

Decision 3488/2022. (XII. 20.) AB
on rejecting a constitutional complaint

In the subject-matter of a constitutional complaint, the panel of the Constitutional Court has adopted the following

decision:

The Constitutional Court rejects the constitutional petition aimed at establishing a conflict with the Fundamental Law and annulling the judgement No. Pfv.IV.21.047/2021/6 of the Curia.

Reasoning

I

[1] 1 The petitioner company, through its legal representative (Dr. Péter Tóth, attorney-at-law, Tóth Péter Bence Law Office), filed a constitutional complaint pursuant to section 27 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), requesting a declaration that the judgement No. Pfv.IV.21.047/2021/6 of the Curia was contrary to the Fundamental Law and asked for its annulment. According to the petitioner, the contested decision violates the freedom of expression enshrined in Article IX (1) of the Fundamental Law, and does not take into account the case-law of the European Union, and is thus contrary to the fundamental principle enshrined in Article E of the Fundamental Law.

[2] 2 In the 28 April 2020 issue of the political daily newspaper published by the petitioner, a cartoon entitled "Chronic" was published, showing on the left the national chief medical officer standing behind a lectern used at press conferences and on the right Jesus Christ crucified. The caricature presents the national chief medical officer looking at Christ hanging on the cross, with the words "His underlying disease caused addiction" (*the Hungarian word for addiction also means "hanging"*) in a text bubble above her head.

[3] The cartoon prompted a Member of Parliament to initiate legal proceedings, seeking a declaration that the petitioner had violated the dignity of the entire Christian religious community and, by extension, the plaintiff's personality right. According to

the plaintiff, the cartoon published by the petitioner caricatured the death of Jesus on the cross, thereby mocking the very basis of the Christian faith in a humiliating and hateful manner.

[4] The Budapest-Capital Regional Court acting as the court of first instance rejected the action with its judgement No. 22.P.21.457/2020/14. Examining the subject, meaning and message of the cartoon, the court concluded that its subject is not religious but public: it mocks the communication of the Operational Staff, not a religious symbol or event. The depiction of Jesus is standard, the drawing is not offensive, hurtful or degrading and therefore does not constitute an infringement of personality rights. In the view of the court of first instance, the freedom of expression extends to the freedom to choose the visual means by which the petitioner wishes to express its opinion.

[5] The Budapest-Capital Regional Court of Appeal, acting on the plaintiff's appeal, partially altered the judgement of the court of first instance by its judgement No 1.Pf.20.273/2021/4 and held that the defendant had infringed the plaintiff's right to human dignity asserted in connection with his membership of a Christian religious community by publishing the cartoon "Chronic" in the 28 April 2020 issue of the printed daily newspaper published by it. The court of second instance held that the competing fundamental rights in the present case -- freedom of expression, which is a right also the press is entitled to, and the plaintiff's right to human dignity as well as the protection of the fundamental right to dignity, enjoyed by his community -- required the court to interpret them separately and also in conjunction with each other. Therefore, the court of second instance attached fundamental importance to the exploration of the fundamental rights aspects of the case, to the views expressed by the Constitutional Court on the interpretation of Article IX (4) and (5) of the Fundamental Law, introduced by its fourth amendment. The court of second instance recalled the principles repeatedly expressed in the decisions of the Constitutional Court, according to which human dignity is at the heart of the values of the Fundamental Law, and that the freedom of expression is limited not only by the human dignity of the individual but also, among others, by the dignity of religious communities. As a result of a comparison of fundamental rights, the court of second instance found that expressions of opinions that mock religious beliefs, religious symbols, religious acts or rituals may be restricted in order to protect the dignity of the religious community or its members, on the basis of Article IX (5) of the Fundamental Law. Freedom of expression cannot be exercised indefinitely, an opinion can have multiple messages, it may contain multiple ideas, and no infringing communication necessarily enjoys immunity simply because it also includes protected expressions, such as elements that belong to public affairs.

[6] The Court of Appeal held that, examined in its entirety, the cartoon is capable of being perceived as having at least two messages. The figure of the national chief medical officer standing behind the lectern evokes the image of a press conference which became well-known during the period of the coronavirus epidemic; the text attributed to her and the caption under the picture ("Chronic") contain elements which were undoubtedly frequently used at the press conferences. The first meaning of these pictorial and textual elements is a criticism of government communication, highlighting textual elements that have been constantly repeated and are considered one-sided. The critical edge can be found in alleging that no further substantive additional information on specific cases was communicated at the press conferences. This interpretation of the cartoon has a public and political character. However, the communication is accompanied by a further meaning, according to which the national chief medical officer states, in relation to another character in the picture, that his addiction was caused by his own underlying disease. The use of the word "addiction" in the combined interpretation of the textual and pictorial elements creates a link with the meaning specified by the plaintiff as underlying content, which is the identification of addiction with death. The court of second instance considered as an important aspect the fact that the national chief medical officer had provided information exclusively on health data at the press conferences and that Christian denominations had not been present as participants in the public debate on the epidemiological measures.

[7] In the contested decision, the Curia, acting on the petitioner's application for review, upheld the final judgement. The Curia pointed out that, in the assessment of an infringement of personality rights, if a statement is commonly understood to have several meanings and if there is a possible interpretation which is infringing for the person concerned, the other possible alternative interpretation cannot be taken as the only relevant one. The Curia shared the view of the court of second instance that the words accompanying the drawing, appearing in a text bubble, did not facilitate the understanding of the drawing, but on the contrary, its numerous contradictory interpretations gave rise to speculation, so that the average reader could not be expected to recognise its meaning. In that regard, the form of the communication chosen was not objectively suitable for expressing the ideas which the defendant attributed to the meaning of the cartoon. As a matter of principle, the Curia held that the use of a religious symbol in a caricature is arbitrary and self-serving if it contributes by no means to the discussion of public affairs.

[8] 3 To contest the decision of the Curia, the petitioner turned to to the Constitutional Court with a complaint based on section 27 (1) of the ACC. According to the petitioner, the final judgement and the decision of the Curia upholding it reached a wrong conclusion in resolving the conflict between the freedom of expression and the

protection of a religious community. According to the petitioner, the use of a religious symbol as part of the freedom of expression can also be applied to emphasize a communication, especially if it is a statement conveying criticism in a topical political issue.

[9] According to the petitioner, the contested decision confused the subjective harm suffered by the plaintiff with the objective harm suffered by the community; in its view, the relevant communication does not fall within the scope of communication which is beyond the scope of protected expression under Article IX (5) of the Fundamental Law.

[10] According to the petitioner, it is necessary to assess objectively whether the communication infringes the inviolable core of human dignity, and if a cartoon is viewed differently by different communities or forums, that in itself excludes any unanimous objective infringement.

[11] The petitioner also relied on the fact that the trial courts failed to take into account the EU decisions, thus infringing Article E of the Fundamental Law as well.

II

[12] The relevant provisions of the Fundamental Law:

"Article E (2) In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.

The law of the European Union may, within the framework set out in paragraph (2), lay down generally binding rules of conduct."

"Article IX (1) Everyone shall have the right to freedom of expression.

[...]

(5) The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act."

III

[13] On the basis of section 56 (2) of the ACC, the Constitutional Court primarily examined whether the constitutional complaint had complied with the formal and substantial requirements laid down in the ACC.

[14] According to section 27 (1) of the ACC, "persons or organisations affected in an individual case may submit a constitutional complaint to the Constitutional Court against a judicial decision contrary to the Fundamental Law, if the decision adopted in the merits of the case or another decision terminating the judicial proceedings (a) violates the petitioner's right granted in the Fundamental Law or restricts its powers in breach of the Fundamental Law, and (b) the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her".

[15] In accordance with section 30 (1) of the ACC, the constitutional complaint under section 27 of the ACC may be submitted within sixty days from the date of service of the challenged decision. The petitioner received the decision of the Curia on 13 July 2022 and filed the constitutional complaint on 11 August 2022, within the deadline. It has also been established that there was no further legal remedy available against the decision of the Curia.

[16] Section 52 (1) of the ACC lays down that the petition should contain an explicit request regulated in details in paragraphs (1a) and (1b).

[17] The petitioner indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [section 51 (1) of the ACC], the procedure of the Constitutional Court was requested in the competence laid down in section 27 of the ACC. The petitioner also indicated the judicial decision to be reviewed by the Constitutional Court [section 52 (1b) (c) of the ACC], and the violated provisions of the Fundamental Law [section 52 (1b) (d) of the ACC]. The petitioner provided a justification for the submission of the petition, by giving details of the violation of the rights granted in the Fundamental Law [section 52 (1b) (b) of the ACC]. The petitioner submitted an explicit request for the annulment of the challenged judicial decision [section 52 (1b) (f)].

[18] As a precondition for the substantive examination of a constitutional complaint based on section 27 of the ACC is that the petitioner must invoke a violation of a right guaranteed by the Fundamental Law. It does not follow from the integration clause in Article E of the Fundamental Law that possible disregard of the case-law of the Court of Justice of the European Union would result in a violation of a right guaranteed by the Fundamental Law. In this context, the petitioner cannot base a constitutional complaint on Article E of the Fundamental Law and therefore these elements of the petition have not been examined on the merits by the Constitutional Court. However,

the freedom of expression enshrined in Article IX (1) of the Fundamental Law is a genuine fundamental right on which a constitutional complaint may be based.

[19] 2 In accordance with section 29 of the ACC, a further condition of the admissibility of a constitutional complaint is that it has to raise a concern of a conflict with the Fundamental Law substantially influencing the judicial decision or a constitutional issue of fundamental importance. These two conditions are of alternative character, thus the existence of either of them shall form the basis of the Constitutional Court's procedure in the merits of the case {for the first time, see: Decision 3/2013. (II. 14.) AB, Reasoning [30]}.

[20] In this respect, the Constitutional Court considered it a fundamental constitutional question how to resolve the collision between the paragraphs (1) and (5) of Article IX of the Fundamental Law in the case giving rise to the petition.

[21] In the light of the above, the Constitutional Court examined the merits of the constitutional complaint under section 31 (6) of the Rules of Procedure, without ruling on the admissibility of the complaint, in relation to Article VI (3) and Article IX (1) of the Fundamental Law.

IV

[22] The constitutional complaint is unfounded.

[23] 1 According to Article IX (1) of the Fundamental Law, "everyone shall have the right to freedom of expression". Freedom of expression is a communication right. The primary object of protection under the Fundamental Law is information: a democratic society can only be created and sustained if there is the possibility for different (often conflicting) opinions to shape society.

[24] The constitutionally protected expression of one's opinion cannot be merely verbal, just as communication cannot be reduced to speech alone. Freedom of expression can also be exercised by engaging in some conduct, gesture or action. The assessment of these in terms of constitutionality is the same as that of a verbal expression; the same test applies to any restrictions on them, and the prohibition laid down in Article IX (5) of the Fundamental Law applies to such communications in the same way as to verbal communications.

[25] The case-law of the Constitutional Court is consistent in that public communications (where the information shared relates to public affairs) are entitled to greater protection under the Fundamental Law. As pointed out in the Decision 7/2014 (III. 7.) AB: "freedom of expression requires special protection when it relates to public matters, the exercise of public authority, and the activity of persons with public tasks or in public roles. In the case of the protection of persons taking part in the exercise of public authority, a narrower restriction on the freedom of expression corresponds to

the constitutional requirements of a democratic state under the rule of law" (Reasoning [17]).

[26] Freedom of communications related to public affairs of social importance is not absolute either. Article IX (4) and (5) of the Fundamental Law define the limits of protected freedom of expression: the former provision defines the protection of the dignity of individuals, the latter of communities as a value which the exercise of freedom of expression may not be aimed at violating. This does not mean that negative opinions cannot be expressed about individuals or communities; in the context of Article IX (4) of the Fundamental Law, the Constitutional Court has explained that this provision "sets a limit to freedom of expression, but that limit is not an infringement of someone, but an infringement of human dignity. Expressions that are subjectively offensive to the personality, but do not amount to an offence to human dignity, are protected by Article IX of the Fundamental Law" {Decision 3048/2020. (III. 2.) AB, Reasoning [31]}. Expressions that insult communities or their dignity can be judged on the basis of this principle.

[27] 2 According to Article R (4) of the Fundamental Law, "the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State". This provision does not protect the Christian religion and its followers, but the culture of the country. The protection of the identity of individuals, including believers and religious communities, is not derived from this provision of the Fundamental Law, but from the inviolability of human dignity and the objective institutional protection linked to Article VII of the Fundamental Law, which enshrines freedom of conscience and religion. This institutional protection is reflected in Article IX (5) of the Fundamental Law, according to which the exercise of the freedom of expression may not be directed, among others, against the dignity of religious communities.

[28] In two previous cases, the Constitutional Court has examined the extent to which non-verbal communications protected by Article IX of the Fundamental Law may be restricted by the protection of the dignity of religious communities or of persons belonging to religious communities. The Decision 6/2021 (II.19.) AB (hereinafter: "CCDec 1") held that the conduct of putting a white pill from a bag marked "abortion pill" on the tongues of two other persons, accompanied by the statement "the body of Christ", in imitation of a sacrifice, constituted an infringement of the dignity of the religious community and thus fell outside the scope of protection of freedom of expression. By contrast, the Decision 7/2021 (II.19.) AB (hereinafter: "CCDec 2") did not establish the violation of Article IX (5) of the Fundamental Law by the publication of a media product presenting on its front page, under the title "Great Scrounge" (*in Hungarian: "Nagy Harácsony"* – a pun on words as "*Nagy Karácsony*" means "*Great Christmas*"), an altered version of Gerard Von Honthorst's painting The Adoration of

the Shepherds (1622), in which the faces of the original characters were replaced by those of public figures and the image of the child Jesus was replaced by a pile of gold coins.

[29] As pointed out in CCDec 1: "Freedom of expression does not extend as far as protecting arbitrary communications about communities that fall outside the scope of public debate and are intended to incite mere hatred, degrade the human dignity of members of the community, use seriously offensive or abusive language or otherwise cause the injury of rights. Exercise of the freedom of expression may not be directed to such an end. Nor should the expression of an opinion in a public debate involve a violation of the inalienable core of human dignity, and thus a manifest and serious denigration of the human status of the persons belonging to the community. The limit to freedom of expression is not, however, an infringement of a community (or of the individuals belonging to it), but an infringement of the dignity of the community. Offending the dignity of a community is not the same as an offence against the community, much less offending the feelings of individual members of the community. The violation of the human dignity of an individual belonging to a community in the very context of his or her belonging to that community naturally results in the violation of the individual's subjective feelings. However, this is not inevitable the other way round: the violation of the subjective value judgements, emotional orientation or possible sensitivity of a member of the community does not necessarily mean a violation of his or her human dignity or the dignity of the community" (Reasoning [23] to [24]).

[30] CCDec 1 took into account that the conduct complained of in that case could be assessed as expressly defamatory of the religion of the plaintiffs. (Reasoning [31]). As stated in principle by the Constitutional Court, "if an institutionalised religious community expresses its opinion on a public issue, the opinion of the religious community is also open to challenge, and even if the criticism takes the form of mockery, it is constitutionally protected. However, a distinction should be made between criticising the religious community and mocking religion itself. Expressions of opinions that mock religious beliefs, religious symbols, religious acts or rituals may be restricted in order to protect the dignity of the religious community or its members, on the basis of Article IX (5) of the Fundamental Law" (Reasoning [39]).

[31] CCDec 2 also pointed out that the mere fact that the expression of an opinion is directed to the discussion of public affairs does not mean that any use of the symbols of a particular religion in this context is necessarily lawful. It considered that the communication at issue fell within the scope of protected expression on the ground that it was not aimed at insulting Christians nor did it convey a negative value judgement of believers (Reasoning [37]).

[32] It follows from the provisions in principle of the Constitutional Court formulated in CCDec 1 and CCDec 2 that defamatory conduct against religion or religious symbols is prohibited under Article IX (5) of the Fundamental Law, whereas if the communication does not convey a negative value judgement of the practitioners of religion, it is protected by the freedom of expression. It must be evaluated whether, beyond a particular public figure, a wide range of persons other than public figures may find the communication offensive.

[33] 3 In the present case, the Constitutional Court had to rule on whether the courts had assessed the communication in question in accordance with Article IX (1) and (5) of the Fundamental Law.

[34] The Constitutional Court shares the petitioner's view that the communication, unlike in the case examined in CCDec 1, is not intended to mock the Christian religion. The graphic representation of Christ's death on the cross is not in itself covered by the prohibition laid down in Article IX (5) of the Fundamental Law. The manner and time of publication of the communication justify that the object of the mockery is not religious, but the governmental information and communication in relation to the coronavirus. However, the exercise of the freedom of expression also requires an assessment of whether the communication, completely irrespectively to the debate on the public affair in question, contains any negative value judgement of religious practitioners, whether it infringes the object of their religious veneration to an extent that would also infringe on their dignity and, if so, whether this constitutes a proportionate restriction on the freedom of expression.

[35] 3.1 The Constitutional Court shares the position taken in the final judgement -- and upheld by the contested decision -- that the communication in question not only caricatured the government's information on the coronavirus by using the words "addiction" and "underlying disease", but also linked it to the death of Jesus on the cross. The dogmatic teachings of all Christian denominations place the death (and resurrection) of Jesus at the centre of their theology and build their entire ideology around this event. The significance of this, given the separate functioning of the State and religious communities, cannot be assessed by the Constitutional Court. However, it must take account of the convictions of members of religious communities: objective institutional protection would be rendered meaningless if the application of the law were to ignore what it means for members of a religious community to caricature the central element of their faith, even if the communication has no such purpose. Therefore, the fact that some individuals or communities do not consider the communication offensive does not mean that it cannot be subject to the prohibition laid down in Article IX (5) of the Fundamental Law. However, in addition to the social significance of the communication, the visual depiction and the accompanying texts

were also offensive to adherents of the religion in such a way that it exceeded the protected scope of the freedom of expression.

[36] 3.2 A negative value judgement does not necessarily mean that freedom of expression cannot be exercised, even if it affects a religious community or its members (see the case recorded in CCDec 2). In such a case, too, the constitutionality of the restriction of a fundamental right presupposes that it is proportionate to the value protected. It must be assessed on a case-by-case basis whether there is a stronger constitutional interest in the exercise of the freedom of expression or in the restriction of the freedom of expression.

[37] In the present case, the court decisions did not call into question the fact that the petitioner's communication concerned public affairs. However, in addition to the social significance of the communication, the imagery and related texts contained negative value judgements about those who practice religion. The communication did not establish a clear causal link between the two, therefore, in the absence of a logical connection, the communication of the text offending religious sensitivity was self-serving. The Constitutional Court shares the view of the Curia that the use of a religious symbol is an end in itself if it does not contribute to the discussion of public affairs. In such a case, it is not a disproportionate restriction on the freedom of expression if the court grants primacy to the protection of the dignity of the religious community in the dispute.

[38] 4 In view of the above, in the present case, the Constitutional Court did not find it verifiable that the courts had not taken into account the petitioner's right to freedom of expression or that they had not carried out the fundamental rights assessment in accordance with the decisions of the Constitutional Court. On this ground, the Constitutional Court has rejected the petition.

Budapest, 06 December 2022.

Dr. Zoltán Márki head of the panel,
Justice of the Constitutional Court

Dr. Zoltán Márki head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Tünde Handó*
unable to sign

Dr. Zoltán Márki head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Béla Pokol* unable
to sign

Dr. Balázs Schanda Justice of the
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Dr. Zoltán Márki head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Mária Szívós*
unable to sign