

Decision 3048/2022. (II. 4.) AB

on rejecting a constitutional complaint

The plenary session of the Constitutional Court, in the subject-matter of a constitutional complaint – with concurring reasonings by Justices *dr. Ildikó Hörcherné dr. Marosi*, *dr. Zoltán Márki* and *dr. László Salamon*, and dissenting opinions by Justices *dr. Ágnes Czine* and *dr. Balázs Schanda* – adopted the following

decision:

The Constitutional Court rejects the constitutional complaint aimed at establishing a conflict with the Fundamental Law and annulling the ruling No. 12.Szk.14.366/2020/4 of the Pest Central District Court.

Reasoning

I

[1] 1 Through a legal representative (dr. Tivadar Hüttl attorney-at-law), a private individual submitted a constitutional complaint to the Constitutional Court on the basis of section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), requesting the establishment of the lack of conformity with the Fundamental Law and the annulment of the ruling No. 12.Szk.14.366/2020/4 of the Pest Central District Court. According to the petitioner, the contested judicial decision is contrary to Articles VIII (1) (freedom of assembly) and IX (1) (freedom of expression) of the Fundamental Law.

[2] 2 On 11 May 2020, the petitioner joined the “We will not be silent!” gathering with the vehicle he was driving: he drove into the roundabout at Clark Ádám Square in the 1st district of Budapest, where he drove several laps while using the horn of the vehicle. In his petition, the petitioner stated that he had placed a banner on his vehicle with the following inscription: “We need solidarity, humane crisis management”.

[3] The police officers on the scene took the petitioner to court for an offence for making an unjustified sound signal, even though there was no risk of an accident. On the basis of the complaint, the Budapest Police Headquarters I. District Police Department, as the infringement authority, issued a decision No 01801/521-7/2020.szabs. on 19 August 2020, in which it found the petitioner guilty of an infringement and imposed a fine of HUF 150 000. According to the administrative

authority, the petitioner's conduct amounted to a "minor traffic offence" and a "breach of the rules of conduct in a state of danger".

[4] The petitioner raised an objection against the decision of the infringement authority. In the contested decision, the Pest Central District Court terminated the proceedings for the breach of the rules of conduct specified for the state of danger, and otherwise changed the decision of the administrative authority by issuing a warning to the petitioner instead of a fine.

[5] In its decision, the court took into account that opinions cannot be expressed by verbal means alone, but that it is essential that the motivation of the drivers giving the audible warning is intelligible to outside observers. The court concluded that, in the circumstances, the sound signal was unintelligible to outsiders; in the absence of inscriptions, banners, or speeches, only the people concerned knew the reason for the gathering. The court held that the act was unlawful as it was contrary to a restrictive provision of the traffic rules.

[6] 3 The petitioner lodged a constitutional complaint with the Constitutional Court against the court's decision, requesting a declaration that the court's decision violates his rights under Articles VIII (1) and IX (1) of the Fundamental Law.

[7] According to the petitioner, he exercised his fundamental right to peaceful assembly at the event (irrespective of whether an assembly could take place under the rules applicable in a state of danger) and his exercising of that right was restricted by the court's decision. The petitioner considered that the fact that he could not exercise his right to express his opinion in protest against the government measure by honking his horn was a restriction of his fundamental right to freedom of expression under Article IX (1) of the Fundamental Law. In his view, his communication on crisis management was an opinion expressed on a social issue and was therefore subject to enhanced protection of the freedom of expression. The chosen means (honking) is an objectively suitable means of communicating ideas. He also referred to the presence of the police, whose obligation to secure the meeting meant that the petitioner could expect that his act would not be considered a traffic violation, but a free expression of opinion.

[8] Lastly, the petitioner pointed out that the state of danger at the time of the event had inherently restricted the expression of political opinion: for epidemiological reasons, the law-maker had considerably restricted the scope of the meetings which could be held for the purpose of expressing opinions. In such a situation, the public authorities are obliged to provide a broader range of means, which are not harmful to society or the health of others, for citizens who wish to express their views in a responsible manner, taking into account the risks of the epidemic, even during the epidemic.

II

[9] The provisions of the Fundamental Law referred to in the petition:

"Article VIII (1) Everyone shall have the right to peaceful assembly."

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

III

[10] Pursuant to section 31 (6) of the Constitutional Court's Rules of Procedure, instead of the decision on admitting the complaint, the judge rapporteur submitted to the panel a draft containing the decision on the merits of the complaint.

[11] 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.

[12] 1 "(1) According to section 27 (1) of the ACC, based on Article 24 (2) (d) of the Fundamental Law, 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".

[13] 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. Section 52 (1) of the ACC lays down that the petition should contain an explicit request, the substantial elements of which are regulated in paragraphs (1a) and (1b).

[14] The petitioner acted in his own case, indicating in the petition his entitlement to file a petition 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 Articles VIII (1) and IX (1) of the Fundamental Law as the violated provisions of the Fundamental Law [section 52 (1b) (d) of the ACC]. The petitioner provided a detailed justification for the submission of the petition, by explaining the violation of his 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)].

[15] The challenged ruling of the court was received by the petitioner on 15 February 2021, and he filed the constitutional complaint against it on 15 April 2021, within the deadline. It has also been established that there was no further legal remedy available against the ruling of the Pest Central District Court.

[16] 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]}.

[17] The petitioner himself admitted that due to the state of danger at the time of the incident he was unable to exercise his fundamental right to assembly as defined in Article VIII (1) of the Fundamental Law. The court did not consider the petitioner's presence at the place of assembly, his joining the assembly as an offence, and did not sentence the petitioner for it, therefore, no question of fundamental constitutional significance arose in connection with the fundamental right to assembly as laid down in Article VIII (1) of the Fundamental Law, which could be the subject-matter of the present constitutional court proceedings. In the context of the fundamental right to assembly enshrined in Article VIII (1) of the Fundamental Law, it was also not possible to establish, in the light of the above, that the ruling of the court under appeal raised concerns of an infringement of the Fundamental Law that would have materially affected the judicial decision.

[18] In the case under examination, the Constitutional Court considered it a question of fundamental constitutional importance whether honking as a verbal expression of opinion is a conduct protected by Article IX of the Fundamental Law and, if so, whether the court decided to restrict it in accordance with the Fundamental Law. In view of this, the Constitutional Court examined the merits of the petition with regard to the fundamental right enshrined in Article IX (1) of the Fundamental Law.

IV

[19] The constitutional complaint is unfounded.

[20] 1 The Constitutional Court has already addressed the content of Articles IX and VIII of the Fundamental Law on several occasions.

[21] In the context of freedom of expression, it has repeatedly stated that this fundamental right protects the expression of an idea and its sharing with others, regardless of the form in which it is expressed. Consequently, it is not only speech in

the ordinary sense that is constitutionally protected, but also any conduct (use of a symbol, gesture, etc.) that has informative content. "Article IX (1) of the Fundamental Law is considered to protect communication – typically the transfer of one's political opinion to others – irrespectively to the form it is manifested in." {Decision 14/2019. (IV. 17.) AB, Reasoning [33]}

[22] The Decision 3132/2018 (IV.19.) AB confirmed the previous case-law according to which, "therefore, in general, the freedom of expression includes the freedom of all kinds of communication independently from the way or the value, moral quality and, in most cases, the content of truth of the communication concerned" (Reasoning [28]). If the central element of the activity in question is the display and transmission of a message, this act enjoys the protection of Article IX of the Fundamental Law, regardless of the form in which it is presented. In the case in point, the Constitutional Court held that the inscription of a message on a poster or the painting of an inscription on the poster had an informative content which could be perceived and appreciated by society and that such conduct was therefore eligible for protection under Article IX of the Fundamental Law. The decision specifically underlined: "it cannot be said that an external form of expression of freedom of expression could be constitutionally restricted on the sole ground that another form of expression was available to a person exercising his freedom of expression" (Reasoning [40]). The multiplicity of means available for sharing a communication with others does not in itself mean that any one form of communication is conceptually outside the scope of protection of Article IX of the Fundamental Law. The freedom of the exercise of the fundamental right extends to the choice of the channel of communication {Decision 3322/2019. (XI.26.) AB, Reasoning [18]}; on the other hand, some forms of expression of the same communication may be constitutionally restricted while others may not.

[23] From the above, the following can be concluded: information is the central element, the most constitutionally protected part of the freedom of expression as a fundamental right of communication, it is the message that the exerciser of the fundamental right wishes to share with others. The next "layer" of the fundamental right is the form in which the information is shared, the way in which the holder of the fundamental right communicates the message to the recipients. This layer includes the manner of formulation, which may include not only verbal communication, but also the expression of an opinion by action. In the context of the manner of expression, the Decision 3329/2017 (XII.8.) AB and the Decision 3236/2018 (VII.9.) AB went into detail on the formulations that may cross the boundaries of protected expression. In the context of non-verbal expression of opinion, the Constitutional Court required that it should be capable of conveying ideas in an objective manner {Decision 1/2019 (II.13.) AB, Reasoning [36]}, i.e. the communication message of non-verbal expression should be understandable to the outside world.

[24] 2 In this case, the Constitutional Court had to rule on two questions: (1) whether Article IX (1) of the Fundamental Law protects the petitioner's opinion that he disagrees with the government's handling of the epidemic, and (2) whether the same fundamental right ensures, in the circumstances of the case under examination, that the petitioner can express this opinion by honking.

[25] 2.1 In a constitutional democracy, the free formation, expression and sharing of opinions is guaranteed. 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]) The same decision holds that "with regard to the expression of opinions in the scope of debating public affairs and the assessment of the applicable protection, the primary issue at focus is not the status of the affected persons, but the fact that the expressing party uttered his views concerning a social, political issue. Thus, on the one hand, the constitutional aspects applicable to expressing opinions in public life may have to be followed in a scope wider than the realm of opinions affecting the persons exercising public authority or those who act in public on a professional basis, but on the other hand one should not claim that any communication – including the ones not related at all to public affairs – affecting public figures should be assessed on the basis of these criteria." (Reasoning [47])

[26] With regard to opinions on government measures, Article IX (1) of the Fundamental Law is content-neutral: both their support and their criticism can be freely expressed, and both should enjoy equal constitutional protection. In the present case, the petitioner intended to express his opinion on a social issue (crisis management) which, in accordance with the constant case-law of the Constitutional Court, falls within the scope of the enhanced protection of freedom of expression.

[27] 2.2 Subsequently, the Constitutional Court had to answer the question whether in the case at hand, the decision of the court which considered the petitioner's expression of his opinion by honking as an offence (i.e. an act breaching the law) was in line with the fundamental right to freedom of expression enshrined in Article IX (1) of the Fundamental Law.

[28] In relation to the above question, the Constitutional Court emphasises that in the case under examination it was not required to rule on the abstract constitutional question whether honking, in so far as it expresses an opinion which is recognisable to

anyone, can be considered a non-verbal expression of opinion carrying a communication message and thus be covered by the constitutional protection of Article IX (1) of the Fundamental Law. The Constitutional Court was required, in accordance with its established case-law, to examine, in the light of the facts and evidence established by the court in the challenged ruling, whether, in the specific case, it was possible to establish, by carefully weighing all the circumstances of the case, that the conduct of the applicant (honking) was a constitutionally protected non-verbal expression of opinion.

[29] According to the facts established by the court in the ruling challenged in the complaint, the petitioner engaged in the conduct in question (honking) at an assembly covered by the Act LV of 2018 on the Right of Assembly (hereinafter: ARA), at the time of which a general ban on assembly was in force under the government decree on the state of danger. As the court pointed out in its ruling, the petitioner's conduct

was in breach of section 4 (1) of Government Decree No. 46/2020 (III.16.) on measures to be taken in the event of a state of danger ordered to prevent a human epidemics causing mass diseases that threaten the safety of life and property, and the prevention of their consequences, and the protection of the health and life of Hungarian citizens (hereinafter: SDD) (staying at the place of assembly in a state of danger, during the period of a general ban on assembly). Although, under the legislation in force at the time of committing the offence, the petitioner's conduct did not constitute an infringement of the rules of conduct laid down for a state of danger, it was undoubtedly contrary to the above prohibition under the law. According to the facts as established by the court in the contested ruling, the petitioner, in addition to being present at the place of an assembly covered by the ARA despite an express prohibition by law, was present, as a participant, at the place of an assembly called "We will not be silent", which had been announced in advance on the Facebook social networking site. The Constitutional Court also found, on the basis of the content of the contested ruling and the information available to it, that in the case under examination the petitioner had joined a meeting covered by the ARA, the organisers of which had not notified the competent police authority in advance within the time limit laid down in the ARA, which led to the organisers being convicted by the court for the abuse of the right of assembly.

[30] In the case under review, the Constitutional Court concluded on the basis of the above, that the petitioner's conduct at the time of the general ban on assembly was expressed as a participant joining an assembly, staying at the venue of an assembly held in a manner contrary to the ARA, and therefore, in the case under examination, it did not enjoy the protection of the fundamental right to the freedom of expression under Article IX (1) of the Fundamental Law, and did not constitute a non-verbal

expression of opinion that could have been placed, in the case concerned, under the scope of constitutional protection of the relevant fundamental right. The Constitutional Court notes that although the petitioner's conduct (honking) in the case under examination did not constitute a constitutionally protected non-verbal expression of opinion, it is not excluded that honking, as a possible form of expression of a non-verbal expression of opinion, which carries a communication message that is recognizable to anyone, may – on the basis of other facts and in a different legal context – be included, based on a careful assessment of the specific circumstances of the case, in the scope of protection under Article IX (1) of the Fundamental Law. However, in the present case under review, the Constitutional Court could not grant fundamental rights protection, within the framework of the freedom of expression guaranteed in Article IX (1) of the Fundamental Law, regarding a conduct (honking the horn), which constituted a minor offence against traffic law, committed in a state of danger, during a general ban on assembly imposed by law, at an assembly organised without prior notice, in violation of the ARA, the organisers of which committed an offence of misuse of the right of assembly.

[31] 3 In view of the above, the Constitutional Court, after considering all the circumstances of the case, found that in the case under examination the petitioner's conduct did not constitute a constitutionally protected non-verbal expression of opinion under Article IX (1) of the Fundamental Law, and therefore the ruling No. 12.Szk.14 .366/2020/4 of the Pest Central District Court, which classified the petitioner's conduct as an offence for a minor violation of road traffic rules, did not violate Article IX (1) of the Fundamental Law and did not infringe the petitioner's fundamental right to the freedom of expression. Considering the above, the Constitutional Court rejected the constitutional complaint.

Budapest, 25 January 2022.

Dr. Tamás Sulyok,

President of the Constitutional Court
rapporteur Justice of the Constitutional Court

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Ágnes Czine* unable to sign

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Egon Dienes-Oehm* unable to
sign

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Tünde Handó* unable to sign

Dr. Tamás Sulyok, President of the
Constitutional Court on behalf of
Justice *dr. Attila Horváth* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Ildikó Hörcherné dr. Marosi* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Imre Juhász* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Miklós Juhász* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Zoltán Márki* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Béla Pokol* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. László Salamon* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Balázs Schanda* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Marcel Szabó* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Péter Szalay* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Mária Szívós* unable to sign