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Original text: [https://alkotmanybirosag.hu/uploads/2021/02/sz\\_iv\\_572\\_25.pdf](https://alkotmanybirosag.hu/uploads/2021/02/sz_iv_572_25.pdf)

IV/572/2020.

The Constitutional Court at its sitting as a full court – with parallel arguments by Dr. Ágnes Czine, Dr. Attila Horváth, Dr. Béla Pokol, Dr. László Salamon and Dr. Mária Szívós - ruled as follows:

The Constitutional Court found that the judgement of the Curia (Hungarian Supreme Court) Pfv.IV.21.163/2018/4., and the judgement of the General Court (Fővárosi Törvényszék) 70.P.22-286/2016/13., are unconstitutional, therefore annulled.

The Constitutional Court orders the publication of this ruling in the Hungarian Official Gazette.

Explanation

I.

[1] 1. Based on § 27. of law on the Constitutional Court (2011. CLI. ) the proponent of case IV/572/2020. (Gáspár Frivaldszky dr.), in his constitutional complaint regarding the Supreme Court judgement (Kúria Pfv.IV.21.163/2018/4 ) referring to articles (4) and (5) of the Fundamental Law of Hungary and two private persons proponants of case (IV/706/2020) through their legal representative (Dávid Sobor dr.) in their constitutional complaint regarding the same Supreme Court judgement referring to article II. and paragraphs (4)-(5) of article IX. and paragraph (1) article XXVIII of the Fundamental Law asked for the annulment of the Curia judgement due to unconstitutionality.

[2] The proponants started a case regarding a performance in 2016 that was organized against a position of the Polish Catholic Church in support of the total abortion ban in Poland, in which they asked the Court to state that through being members of the Catholic religious community as essential part of their personality, their right to human dignity and freedom of religion was infringed by the defendants by – a later online published – performance, in which one of them imitating the Holy Communion took out a white pill from a plastic bag with „abortion pill” caption and placed it on the two other defendants' tongue at the same time saying „body of Christ”.

The Court of Budapest (Fővárosi Törvényszék) dismissed the claim. The judgement at first instance was overturned on appeal by the Budapest-Capital Regional Court of Appeal (Fővárosi Ítéltábla) and that judgement states that the defendants infringed the proponents' right to human dignity and freedom of religion. On the appeal of the defendants the Curia (Supreme Court) set aside the judgement of the Budapest-Capital Regional Court of Appeal, and upheld the judgement of the Court of Budapest (first instance). In its reasoning the Curia refers to the strong position of the church and its members in the social debate on abortion, in which members of a religious group similarly to public figures must endure strong criticism to a large extent.

[3] In the proponents' opinion the judgment of the Curia (Supreme Court) infringes their

right to human dignity, the constitutional limit to freedom of expression and right to procedural fairness.

[...]

## II.

[5] 1. Relevant articles of the Fundamental Law:

„Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception

Article IX (4)) The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.

(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.

Article XXVIII. (1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.”

[6] Civil Code of Hungary:

„2:54. § (5) Any member of a community shall be entitled to enforce his personality rights in the event of any false and malicious statement made in public at large for being part of the Hungarian nation or of a national, ethnic, racial or religious group, which is recognized as an essential part of his personality, manifested in a conduct constituting a serious violation in an attempt to damage that community’s reputation, by bringing action within a thirty-day preclusive period. All members of the community shall be entitled to invoke all sanctions for violations of personality rights, with the exception of laying claim to the financial advantage achieved. ”

## III.

[7] [Discretion of the Constitutional Court...]

[8] [The Constitutional Court lays down that the claims satisfy the formal requirements and contain strong positions...].

[9] The proponents support their claim against the judgement(s) as being unconstitutional: first, the courts did not take into consideration that the defendants infringing performance did not express any concrete opinion; second, members of the religious community were obliged to exercise increased tolerance, similar to public figures.

[10] [...]

[11] It is of basic constitutional importance [...] to decide how far members of a religious community are obliged to tolerate offending opinions against their religious community.

(§ 29. Law on the Constitutional Court.

[12] [Case accepted by the Constitutional Court]

## IV.

[13] [...]

[14] [Within the competence of the Constitutional Court...] Accordingly, in the present case the Constitutional Court did not judge whether the performance insulted the Catholic religious community and therefore the proponents' human dignity. Such a judgement would be outside of the Constitutional Court's competence. In the procedure of the constitutional complaint the Constitutional Court investigates the relevant parts of the Civil Code and the Fundamental Law together and see how far the judgement in question falls

into the scope of constitutional interpretation.

[15] [...]

[16] [...]

[17] [...]

[18] [...]

[19] Paragraphs (4) and (5) of article IX of the Fundamental Law of Hungary were introduced by its fourth amendment (March 25, 2013).

The comments of the relevant amendment (T/9929) explain that „[a] The proposal wishes to state on constitutional level that an external limit of freedom of opinion can be human dignity, also wishes to set the constitutional base for legal sanctioning of certain cases of hateful manifestations in case of infringement of the dignity of the community. The relevant practice of the Constitutional Court previously made it clear that on the level of law effective action against hate speech cannot be provided, therefore it must be established by the amendment of the Fundamental law. The proposal sets the constitutional rules of creating the legal tools against the offensive manifestations against the dignity of the communities listed therein. The mostly uniform practice of Hungarian courts find infringement of personality rights only in cases where from the infringement directly or indirectly, the plaintiff can be uniquely determined. This way, if a person considers himself as an addressee of hate speech but his person cannot be uniquely identifiable from the hateful manifestation, he cannot realize civil enforcement set in law. Therefore, the proposal clarifies that practice of freedom of opinion cannot be directed against the dignity of the Hungarian nation, national, ethnic, racial and religious communities. According to the proposal it is possible to go to court with claims about infringement of human dignity where these communities were offended. According to the proposal the offended people can seek remedy due to the infringement of their personality rights within the framework of civil law.

[20] The reasoning of the Fundamental Law amendment uses both the notions „hate speech” and „hateful manifestation”. To this the Constitutional Court points out that in its practice according to paragraph (1) article IX of the Fundamental Law the right to express opinion “includes not only words, but also pictures, symbols, clothes [...]”;

[...]

[21] Until now the Constitutional Court has not applied paragraph (5) article IX on the substance, however it has already interpreted paragraph (4) of the same article. [...] Both paragraphs aim to protect human dignity, and the two paragraphs also explain that „the practice of freedom of expressing opinion cannot be directed at offending human dignity (of others or certain communities)”.

[22] In the interpretive decisions on paragraph (4) article IX. of the Fundamental law the Constitutional Court laid down that „protection of honour and reputation that derives from human dignity [...] means constitutionally verifiable barrier to freedom of opinion and public speech. [...]

Accordingly, human dignity that directly embodies human status indicates the limit of freedom in public debate. Public debate speech must yield to this unlimited essence of human dignity that determines human status.” {13/2014. (IV. 18.) Constitutional Court decision, Explanation [29]; 3348/2018. (XI. 12.) Constitutional Court decision, Explanation [26]} In the legal practice of the Constitutional Court „freedom of opinion opens the way not only to certain understandings or ideas, but also to the possibility to express opinion. [...] In order to inform the public and monitor the people in power this can include exaggeration or provocation to a certain extent. This is what provides the basics of a plural and diverse democratic society. At the same time, the Constitutional Court (according to (4) article IX of the Fundamental law) emphasizes more than before that the limit of

freedom of opinion is the protection of others' honour and reputation that derives from human dignity. That is, freedom of opinion does not give protection to autotelic manifestations that are outside the public debate therefore matters of private or family life, and that aim only at mere humiliation or use of offending, insulting expressions or cause other impairment of rights." {...} 7/2014. (III. 7.) Constitutional Court decision, Explanation [62]}. Moreover, opinion in public debate is not protected if its content offends the unlimited core of human dignity, so embodied in the obvious and grave disparagement of the human status {...} a 7/2014. (III. 1.) Constitutional Court decision, Explanation [60] and [62]}." {13/2014. (IV. 18.) Constitutional Court decision, Explanation [40]; confirms: 3145/2018. (V. 7.) Constitutional Court decision, Explanation [59] and [65]}

The Constitutional Court in its recent decision on paragraph (4) article IX. of the Fundamental law „the provision lays down the limit of freedom of expression, however the violation of this limit is not contempt towards somebody but the violation of human dignity. Article IX. of the Fundamental law protects the expressions that subjectively offend the personality but do not reach the violation of human dignity." {3048/2020. (III. 2.) Constitutional Court decision, Explanation [31]}

[23] {...} Opinion expressed in public debate cannot offend the unassailable core of human dignity, therefore the obvious and grave disparagement of the human status of persons who belong to the community.

[24] The limit of freedom of expression is not the offense against the community (or the people in it), but the offence against the dignity of the community. Violation of the dignity of the community is not equal to the violation of the community, let alone violation of feelings of members of the community. [...] violating a community member's subjective values, emotional attitudes or incidental sensitivity does not necessarily mean violating the person's human dignity or violating the dignity of the community. Expressions that do not reach the offence of human dignity but might offend persons belonging to communities listed in paragraph (5) article IX. of the Fundamental law, are protected in paragraph (1) article IX. of the Fundamental Law.

[25] [... explanation of Civil Code...]

[26] [...Further investigation is needed to see what is considered „unduly offending in its expression“... ]

[27] [Another possible approach, in public debate the style and form of expression cannot be excessively offending...]

[28] [About those who belong to a religious community or minority...]

[29] The Constitutional Court evaluated the complaint in the light of paragraph (5) article IX. of the Fundamental law [...]

[30] [first instance] and [Curia judgement: „The Catholic church has a strong position in the abortion debate therefore people identifying with the Catholic religion must endure similarly strong criticism“ ... „the symbols used in the performance such as the dress, liturgic elements were not autotelic“. The Curia decided that „the defendants' intentions were not the offending of the Catholic faith but the strong and derisive criticism of the Catholic church's and the faithful community's position in the abortion debate.“ [...]

[31] [second instance...] The Court was on the opinion that „the defendants did not dispute that the abortion debate is a public debate on its permission or ban. It is well known that the representatives of the Catholic church are against it. The defendants were not hindered from expressing their opposite opinion in a public debate. However, in this certain case, a performance took place that was clearly offending, defamatory even for those who are not acquainted with Catholic liturgy. The Holy communion is part of the Catholic liturgy and its central element is when the faithful take the body of Christ. The defendants violated the ceremony of Holy communion by changing the bread representing

the body of Christ to the „abortion pill“ and gave it to the participants saying „the body of Christ“. Afterwards they spread the recording of the performance on the internet. These behaviours gravely offended the personality of the members of the Catholic church since for them Jesus is life itself, and the use of abortion pill is sin, meaning the violation of the „Don't kill“ commandment. [...] this behaviour is clearly was defamation of religion. [...] and cannot be interpreted as a criticism of the church position in the abortion debate.“

[32] [According to the decision of the Curia the judgement of the first instance was overruled. [...]]. The Curia decided that the defendants „expressed their position in the social and public debate around the permission and ban on abortion.“ ... „it was obvious from an outsider's point of view that the speech and the performance must be interpreted with irony. They expressed their opinion with the tools of irony.“ ...quoting relevant Constitutional Court decisions where the method of expression can be irony. .../2018. (VII. 5.) Const. Court decision saying „representatives of positions in the Catholic church must endure more criticism if they step out from their private sphere and go into public debate.“ The decision of the Curia also highlighted the importance of the judgement of the European Court of Human Rights in the Otto-Preminger-Institut contra Austria case (13470/87) 20 September 1994. (Otto-Preminger-Institut case) that was also cited by both parties in the case.

[33] In its judgement the Curia lays down that according to the ECHR „freedom of expression is one of the cornerstones of a democratic society that shall be applied not only for those information and ideas that are favourable and harmless, or express only difference in opinion, but also for those that shock, offend or disturb the state or any part of the population. At the same time practicing this right necessarily goes hand in hand with the obligation to avoid those expressions that unnecessarily offensive and do not help the free debate of public affaires.“ In the decision of the Curia the ECHR „connected the protection of freedom of expression to certain criteria [...]“ and pointed out the differences between the Otto-Preminger Institute and the current case, and drew the conclusion that the current case does not need the limitation of freedom of expression by the state.“ The Curia's standpoint was similar to that of the first instance [...]. Regarding the injury, the Curia – among others – considered that „the defendants' behaviour did not cause religious discord, did not instigate antireligious feelings, did not have significant social consequence“. Accordingly the Curia concluded that „the defendants use of liturgic elements to express their opinion might be offending to the given religious community, but since the performance of the religious ceremony was not an objective standard“ - that is, it was not „gravely violent or unduly offending in its expression“ not „from the related person's perspective but from the aspect of „public perception“, injury cannot be determined. (Decision of the Curia, Recital [13]–[29]).

[34] [...] It cannot be justified though, that the dignity of the members of religious communities – just for belonging to that community – shall be protected by the same legal limitations as the personality rights of the public representatives of the religious community. {8/2018. (VII. 5.) Constitutional Court decision, recital [24]}. The Constitutional Court also draws attention to the protection of personality even in case of politicians in public life if the value judgement involves their personality connected to their private or family life. {vö. 7/2014. (III. 7.) Constitutional Court decision, recital [62]}; similarly to this, members of religious communities are not obliged to endure - independently from public debates, in autotelic way – offending and injurious remarks related to the principles of their faith, ceremonies or practice. In the current case there is an agreement with the court judgements regarding the criticism of religious communities in public debates – especially in expressing opinion through communicative and visual actions – using symbols of the religious community is not necessarily autotelic or injurious

(proponents did not question the legality of the criticised performance in general). At the same time, as the Constitutional Court previously laid down, in non-verbal manifestations a condition for the freedom of opinion is that „the selected way of communication must be objectively suitable method or channel of expressing ideas” {3089/2019. (IV. 26.) Constitutional Court decision, recital [26]}.

[35] [The second instance questioned the performers' behaviour as it could be interpreted as their standpoint in the abortion debate, while the first instance and the Curia both considered the performance as a public debate] [...]

[36] Regarding the above mentioned, the Constitutional Court notes: in the Otto-Preminger Institut case – as the Curia quoted – the ECHR required that while practicing freedom of opinion „one must avoid expressions that are unnecessarily offending and do not contribute to the public debate”; however the court judgments failed to investigate this criterium with regards to the complained behaviour. To sum up: the complained judgments acknowledged the existence of the proponents' injury through their religious community, but accepted the offensive manifestations as a constitutionally protected freedom of expression without investigating its content and relation to public debate; consequently they did not (and could not) investigate with due diligence whether the performance aimed at offending the religious community; and in relation to the offending manifestation they found wide extent of endurance for the members of the religious community similar to that of public figures. Consequently, the proponents' protection of dignity of their community – unjustifiably with the practice of freedom of expression – was injured.

[37] [Annulation of Curia judgement]

[38] The Constitutional Court repeatedly points out that due to the limits of its competence it does not take a stand on whether the manifestation gravely violated or unduly offended the Catholic religious community and therefore the human dignity of the proponents. This will be the task of the court according to this decision (in which they have to follow the present decision in constitutional questions).

[39] 4. The constitutional Court points out: if an institutionalized religious community manifests itself in a public issue, than the opinion of the religious community is also debatable, what is more, it is constitutionally protected if the criticism takes the form of irony. However, one must make a difference between the criticism of the religious community and the mockery of the religion. Expressing opinion through mockery of articles of faith, religious symbols, religious actions or ceremonies can be limited in order to protect the dignity of the religious community and that of its members according to paragraph (5) article IX. of the Fundamental law.

[40] The Constitutional Court reminds that freedom of opinion and media, and freedom of religion and conscience are both fundamental values of European civilization and Hungarian constitutional tradition. Applying 2:54. § (5) of the Civil Code the courts, the Curia, and finally the Constitutional Court are responsible for the balance of public speech between equity and moderation that provides democratic public debate and peaceful coexistence of religious communities in the society.

[41] [Publication in the National Gazette]

Budapest, February 2, 2021.

Signatures [...]

## Parallel explanation of Constitutional Court Judge Ágnes Dr. Czine

[42] I agree with the decision, however I wish to emphasize the following.

[43] [Quoting paragraph (5) article IX of the Fundamental Law] The aim of this provision is to sanction certain cases of hate manifestations towards the dignity of communities through civil law. The amendment of the Fundamental law was necessary, as „the related practice of the Constitutional Court made it clear that effective action against hate speech was not provided on the level of law.” (in: explanation to the fourth fundamental law amendment).

[44] The special importance of paragraph (5) article IX of the Fundamental law is that it gives constitutional background to limiting freedom of opinion in cases when they are in the form of hateful manifestations. At the same time however, freedom of expression does not lose its highly protected constitutional nature as a consequence.

[45] In the history of practice of the Constitutional Court the protection of freedom of expressions was always a highly protected constitutional value. [in the democratic rule of law it's a must] {7/2014. (III. 7.) Constitutional Court decision, recital [39]}. [30/1992. (V. 26.) Constitutional Court decision, 1992, 167, 170–171].

[46] [The explanatory aspects of the current case is of high importance]

[47] In connection to paragraph (5) article IX of the Fundamental law the first thing to decide is whether the given manifestation reflects an opinion (position) in the public debate, that it, whether it is related to the free debate of public affairs. To judge this, it is necessary to investigate the form of manifestation, circumstances, subject of the opinion and its social context.

[48] According to these aspects I believe that in the present case the Constitutional Court reasonably reached the conclusion that the criticized judgements are unconstitutional. The Courts failed to evaluate with due regard the social context of the manifestation and did not consider how far the defendants behaviour affected and violated the dignity of the Catholic community. The criticized behaviour of the defendants used the central element of Catholic liturgy to transfer opinion in a public debate. The courts failed to investigate whether [this behaviour] was suitable to transfer their position in the given public debate.

Budapest, 2 February, 2021.

Dr. Sulyok Tamás s. k.,

President of the Constitutional Court on behalf of  
dr. Czine Ágnes

## Parallel explanation of Béla Dr. Pokol Constitutional Court judge

[49] I agree with the annulment of the judgement, but cannot accept part of the explanation in its current form, therefore I give my opinion in a parallel explanation.

[50] I consider the base of the explanation incorrect, that is, if the prohibition of a certain behaviour is given in simple legislation and above that in the constitutional ruling – like in the present case – the constitutional investigation would be excluded from the investigation of the behaviour, and leave it to the sole competence of court. My position to this that the full extent of the investigation of the facts and circumstances related to the behaviour is the task of the court, but if necessary, the Constitutional Court must investigate the frames of facts of constitutional norm and the provided fundamental right from that, and it cannot be prohibited from it. Therefore, I find the first part of the explanation IV/1. (Explanation [14]) totally wrong.

[51] As a result, I would not have determined the unconstitutionality of the court

judgements due to „accepted the offending expression of their opinion as constitutionally protected, without investigating the criticized behaviour's opinion-content and its contribution to public debate; accordingly they could not (and did not) duly investigate whether the criticized manifestation aimed at offending the relevant religious community (IV/3., explanation [29] and next) This implicitly relativize the possibility to offend religious communities if its contribution to the certain public debate is storable. My contradicting position is that the Constitutional Court should have stated by principle that important symbols and liturgic elements of certain religious communities' belief systems can never be object to mockery even in public debate. Knowing that with such a decision the Constitutional Court would declare great differences between religious communities, as there are great differences between religious communities regarding the use of visual symbols and liturgic processes in their religious belief systems.

For example the difference between the Protestant churches and the Catholic church is obvious here [in Hungary], but the high sensitivity of the Islamic religion and the sanctity of their symbols provoke debate on a daily basis in Western European countries. These debates can spread to our country as well, so it must be considered when formulating this decision.

Budapest, 2 February, 2021.

dr. Pokol Béla

[52] I join the parallel explanation.

dr. Horváth Attila

dr. Salamon László

dr. Szívós Mária