*Protesters against Polish law supporting abortion ban vs members of the Catholic religious community*

Decision number: 6/2021 (II. 19.)

Date: February 19, 2021

Decision-making body (final): Constitutional Court

**1. Summary and Outcome**

A demonstration against the Polish Catholic Church’s stance in favour of a total ban on abortion was held in front of the Polish Embassy in Budapest. At the event, some of the participants imitated a Catholic religious ceremony to express their opinions against the Church’s position. Two private individual plaintiffs, claiming themselves to be members of the Catholic religious community, held that the scene presented at the event violated their human dignity and their right to the free exercise of religion through their membership of the Catholic religious community, being an essential feature of their identity, and so they brought an action before the civil court.

The statement of claim of the plaintiffs was dismissed by the Metropolitan Court of Budapest, which decision was overturned by the Budapest Court of Appeal, finding that the plaintiffs’ personality rights had been violated. The Curia in its judgment passed in the review procedure reversed the latter judgment and dismissed the plaintiffs’ action, just like the court of first instance had done. The Constitutional Court, which ruled in the final instance in the case, declared the judgments of the Curia and the Metropolitan Court of Budapest to be contrary to the Fundamental Law and annulled them. The panel stated that the views of religious communities on public issues can be challenged even through the use of mockery. At the same time, a distinction must be made between criticising the religious community and mocking the religion itself. Expressions that fall within the latter category (which is mocking religion itself) may be restricted in order to protect the dignity of the religious community or its members.

The Constitutional Court found that the judgments under appeal established a broad duty of tolerance for members of the religious community, similarly as for public figures, with regard to offensive communications, while at the same time acknowledging the existence of harm caused to the petitioners through their religious community. At the same time, the court decisions accepted the challenged expression as constitutionally protected expression without assessing the content of the opinion and its contribution to the discussion of a public issue. As a consequence, they did not (could not) even consider with sufficient care whether the contested communication was intended to harm the community concerned. In view of these shortcomings, the panel considered that the protection of the dignity of the petitioners’ religious community had been undermined, without any justification for doing so in terms of the exercise of freedom of expression.

**2. Facts**

In 2016, during a protest in front of the Polish embassy in Budapest against the Polish Catholic Church’s position in support of a total ban on abortion in Poland, one participant imitated the rite of receiving Holy Communion by placing a white pill from a bag marked “abortion pills” on the tongues of two other participants, accompanied by the words “the body of Christ”. Following the events at the demonstration, two individuals brought an action before the civil court, asking the court to declare that the defendants had violated the dignity of the plaintiffs and their right to the free exercise of their religion, through their membership of the Catholic religious community being an essential feature of their identity.

The Metropolitan Court of Budapest, acting at first instance, dismissed the claim of the plaintiffs. The judgment found that the defendants had engaged in the challenged activities at an event organised in the context of a public debate on a public issue – the adoption of an abortion law in Poland. The defendants’ performance should be interpreted as a criticism of the Catholic Church’s views on abortion. In the court’s view, the opinion conveyed by the defendants was not aimed at defaming the Catholic faith, but could be interpreted as a sharp, sarcastic criticism of the position of the Catholic Church and the community of believers on the abortion debate, hence there was no violation of the provision of Section 2:54 (5) of the Civil Code, according to which: “any member of the community may enforce his or her personality rights for a legal injury that is seriously offensive to the community or that is unduly insulting in its manner of expression, committed with great publicity, in relation to his or her membership of the Hungarian nation or of a national, ethnic, racial or religious community, which constitutes an essential characteristic of his or her personality”.

The Budapest Court of Appeal, as the court of second instance, reversed the judgment of the court of first instance and found that the infringement had occurred. This court challenged the assessment of the defendants’ conduct as an opinion on the abortion issue, and considered their performance – in particular their imitation of the communion ceremony – to be defamatory, insulting and humiliating. In the statement of reasons attached to the judgment, the court stated that the contested performance clearly constituted a defamation of religion and that the act of mocking did not demonstrate the defendants’ position on the abortion issue, as it could not be interpreted as a criticism of the Church’s position on the abortion debate. The receiving of the Holy Communion with the abortion pill was specifically considered to be a defamation of the religion of the plaintiffs, capable of causing serious offence to the Catholic community in a highly publicised manner.

The Curia, acting on a petition for review of the final judgment, repealed the judgment of the Budapest Court of Appeal and upheld the judgment of the court of first instance. According to the Curia, the defendants expressed their position against the Catholic Church in the social and public debate surrounding the authorisation or prohibition of abortion in a mocking and ironic way. The Curia based its decision on the relevant findings of Constitutional Court decision 8/2018 (VII. 5.) and the judgment of the European Court of Human Rights in Otto-Preminger-Institut v. Austria. According to these judgments, church office holders are also more obliged to tolerate criticism on social and political issues that affect the religious community and are also part of public debates; at the same time, however, persons speaking out on such issues must avoid, as far as possible, expressions that are unnecessarily offensive and do not contribute to the free discussion of public affairs. The Curia held that the manner and form of the defendants’ expression was justified for the purpose of expressing their views, and was not gratuitous or self-serving. The Curia acknowledged that the use of certain liturgical elements in the performance may have been offensive to members of the given religious community, but the basis for establishing an infringement is not individual sensitivity, but only the expression of an opinion that is seriously offensive or unjustifiably offensive in its manner of expression according to popular opinion, which was not the case in this instance, and thus the fulfilment of the requirements of Section 2:54 (5) of the Civil Code could not be established.

In their constitutional complaint, the petitioners requested the Constitutional Court to declare that the judgment of the Curia No. Pfv.IV.21.163/2/4 and the judgment of the Metropolitan Court of Budapest No. 70.P.22.286/2016/13 were unconstitutional and to annul them, invoking a violation of Article II and Article IX (4)-(5) of the Fundamental Law.

**3. Decision Overview**

In its decision, the Constitutional Court first of all laid down with regard to the scope of freedom of expression that “it also includes acts other than oral or written communication”; “the person expressing their opinion may communicate their ideas not only in words but also, for example, by using images, symbols or wearing clothes – symbolic speech, as manifested in the use of symbols, may be one of the classic issues of freedom of expression” {Constitutional Court decision 3089/2019 (IV. 26.), Statement of Reasons [25]}. As a consequence, the scope of expression of opinions towards certain religious communities is wider than verbal or written communications, and in some cases may also protect other communicative acts beyond actual speech. In this context, the court underlines that “it is a necessary, but by no means a sufficient condition for treating an act as an expression of opinion that the perpetrator acts with the purpose of expressing his or her opinion – even though, from the point of view of freedom of opinion, the primary consideration for the law enforcement authorities in assessing an act is the purpose or motive of the perpetrator in taking the action. In order to apply freedom of opinion, it is also necessary that the form of communication chosen should be an objectively suitable means, a medium for the communication of ideas” {Constitutional Court decision 1/2019 (II. 13.) Statement of Reasons [36]}.

After establishing the principles concerning the scope of freedom of expression, the Constitutional Court stated that “a person who uses seriously offensive or insulting expressions in order to humiliate the human dignity of another person is not exercising their freedom of expression in matters of public affairs. Accordingly, human dignity, which is the direct embodiment of our humanity, marks the boundary of freedom of public debate. Speech on public affairs must yield to this inalienable essence of human dignity that determines human status” {Constitutional Court decision 13/2014 (IV. 18.), Statement of Reasons [29]; Constitutional Court decision 3348/2018 (XI. 12.), Statement of Reasons [26]}.

According to the jurisprudence of the Constitutional Court, freedom of opinion opens the door to the possibility of expression itself, and may involve a certain degree of exaggeration and provocation in order to control public power or those exercising public power and to inform and draw the attention of public opinion. It does not, however, protect against self-serving communications outside the scope of public debate, such as those relating to private or family life, which are intended to humiliate or insult, or to use abusive or offensive language or to cause other legal harm. Nor will it defend an opinion expressed in a public debate if the views expressed therein violate the inalienable core of human dignity, and thus amount to a manifest and serious denigration of human status {see Constitutional Court decision 3145/2018 (V. 7.), Statement of Reasons, paras. [59] and [65]}. The limit to freedom of expression, however, is not the insult to someone, but an insult to human dignity. Expressions that are subjectively offensive to the personality but do not violate human dignity are protected by freedom of expression {Constitutional Court decision 3048/2020 (III. 2.) Statement of Reasons, para. [31]}.

Based on the above practice of the Constitutional Court, it can be concluded that the limit to freedom of expression is not the violation of the community itself or of its individual members, but the violation of the dignity of the community. Based on Section 2:54 (5) of the Civil Code, a communication can be classified as “seriously offensive” or “unduly insulting in its manner of expression” if it “violates the inalienable core of the human dignity of the members of the community, or if it is otherwise self-servingly directed at violating the dignity of the community or its members” (Statement of Reasons, para. [25]).

The decision then went on to identify opinions that are closely related to the discussion of public affairs but which are “unduly insulting in their manner of expression”, and the Constitutional Court outlined two approaches. According to the first one, “the opinion can be considered as unduly insulting in its manner of expression if the person expressing the opinion could have sought a form of expression that was neutral or non-offensive from the point of view of the community concerned”. However, this approach was not considered defensible by the panel in several respects. According to the other approach, which the Constitutional Court considered to be the correct one, “when discussing a public matter, in particular when the purpose is to control public power or those exercising public power and to inform and draw the attention of the public, the form and style of expression chosen must not be inconsistently or excessively offensive, but criticism, irony, a certain degree of provocation, and, where appropriate, mildly offensive or insulting communications remain protected by the freedom of expression” (Statement of Reasons, paras. [26]-[27]).

In the light of the constitutional principles summarised above, the Court held, with regard to the judgments of the courts challenged by the constitutional complaint, that the defendants' expression could be considered as expressions of opinion on a public issue, and that the purpose and form of the communication must be given decisive importance. While the use of insulting or offensive communications about the beliefs and rituals of religious communities in a self-serving manner, not as part of the debate on public affairs, is not protected by freedom of expression, at the same time, the use of symbols of religious communities in the context of criticising the discussion of public affairs, in particular when expressing an opinion through visual or communicative acts, is not inherently self-serving and unlawful (Statement of Reasons, para. [34]).

The difference between the arguments of the Court of Appeal, the Metropolitan Court of Budapest and the Curia was that while the final judgment challenged the assessment of the defendants’ performance as a criticism of the Catholic Church's position on the abortion issue, the judgments dismissing the action (and upholding the dismissal) assessed the performance presented by the defendants as a discussion of a public issue; however, according to the Constitutional Court, the opinion content of the contested conduct was not specifically examined. Moreover, based on this finding, “[a]lthough the context of a disputed communication may provide a point of reference in judging it, the use of an otherwise offensive or insulting term does not render it lawful to use it in the context of a social debate if it does not convey a valuable opinion or if it does not consistently fit into the debate. In such cases, in the absence of any other identifiable purpose, there is also the possibility that the communication may in fact be intended to offend the dignity of the community concerned, which is expressly prohibited by the Fundamental Law; however, even in the absence of such an intention, it may be considered to be unduly offensive” (Statement of Reasons, para. [35]).

Taking also into account the ECtHR's judgment in Otto-Preminger-Institut, the Constitutional Court found that the judgments dismissing the action were deficient in, that the defendants’ performance was accepted as a constitutionally protected expression of opinion without “examining its opinion content and its contribution to the discussion of a public matter” and, consequently, without “examining with sufficient care [...] whether the contested communication was intended to offend the community concerned”. In view of the failure to take these assessment criteria into account, the “protection of the dignity of the petitioners’ religious community was undermined, without any justification in terms of the exercise of freedom of expression” (Statement of Reasons, para. [36]).

In its decision, the Constitutional Court underlined that “if an institutionalised religious community expresses its opinion on a public issue, the opinion of the religious community is also open to debate, and even if the criticism takes the form of mockery, it is constitutionally protected. At the same time, a distinction must be made between criticising the religious community and mocking the religion itself. Expressions of opinion that mock a religious belief, symbol, act or ritual may be restricted in order to protect the dignity of the religious community or its members (Statement of Reasons, para. [39]).

The Constitutional Court found that the judgments of the Curia (Pfv.IV.21.163/2018/4) and the Metropolitan Court of Budapest (70.P.22.286/2016/13) are contrary to the Fundamental Law and therefore annulled them.

**4. Decision Direction**

Not only can the opinion of a religious community expressed on a public issue be challenged, but it is also constitutionally protected to express that criticism in the form of mockery. At the same time, a distinction must be made between criticising the religious community and mocking the religion itself. Expressions of opinion that mock a religious belief, symbol, act or ritual may be restricted in order to protect the dignity of the religious community or its members.

**5. Global Perspective**

**Related International and/or regional laws**

* [Otto-Preminger-Institut v. Austria, no. 13470/87](https://hudoc.echr.coe.int/#{%22fulltext%22:[%22otto-perminger%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57897%22]}), judgment of 20 September 1994

**National standards, law or jurisprudence**

* [Fundamental Law of Hungary](https://njt.hu/jogszabaly/2011-4301-02-00) Article II and Article IX (4)-(5)
* [Act V of 2013 on the Civil Code](https://njt.hu/jogszabaly/2013-5-00-00) Section 2:54 (5)
* [Constitutional Court decision 3048/2020 (III. 2.)](https://hunconcourt.hu/datasheet/?id=9F900C0BCA12DE49C1258435005B9545)
* [Constitutional Court decision 3089/2019 (IV. 26.)](https://hunconcourt.hu/datasheet/?id=0CADCD9BEFAE7C00C1258288005969A9)
* [Constitutional Court decision 1/2019 (II. 13.)](https://public.mkab.hu/dev/dontesek.nsf/0/dcb12c4ca8736f72c12581a00058e8c5/%24FILE/1_2019_EN_final.pdf)
* [Constitutional Court decision 3348/2018 (XI. 12.)](https://hunconcourt.hu/datasheet/?id=18BEBDC42A70F0B7C125804F00589192)
* [Constitutional Court decision 8/2018 (VII. 5.)](https://public.mkab.hu/dev/dontesek.nsf/0/1034659eaeb577fec125813f00591268/%24FILE/8_2018_EN_final.pdf)
* [Constitutional Court decision 3145/2018 (V. 7.)](https://hunconcourt.hu/datasheet/?id=99C984B5B36D2380C125804F0058956D)
* [Constitutional Court decision 13/2014 (IV. 18.)](https://alkotmanybirosag.hu/ugyadatlap/?id=64E8BB597FE98F9CC1257C770021B949)
* [Constitutional Court decision 7/2014 (III. 7.)](https://alkotmanybirosag.hu/ugyadatlap/?id=DCAE82809F3037D2C1257BBF001BABA1)
* [Constitutional Court decision 4/2013 (II. 21.)](https://alkotmanybirosag.hu/ugyadatlap/?id=E1E95AF7B7C1A24EC1257ADA00524F2E)
* [Constitutional Court decision 30/1992 (V. 26.)](https://public.mkab.hu/dev/dontesek.nsf/0/d4cc956c6c04b7e2c1258382003c442a/%24FILE/en_0030_1992.pdf)

**6. Case Significance**

The decision establishes a binding or persuasive precedent within its jurisdiction.

**7. Official Case Documents**

Decision:

[https://public.mkab.hu/dev/dontesek.nsf/0/2eb4293fcc9ca5ccc125857b005c5e20/$FILE/6\_2021\_en\_l.pdf](https://public.mkab.hu/dev/dontesek.nsf/0/2eb4293fcc9ca5ccc125857b005c5e20/%24FILE/6_2021_en_l.pdf)