

DECISION 14/2019 (IV. 17.) AB OF THE CONSTITUTIONAL COURT

on establishing the conflict with the Fundamental Law and on annulling the ruling No. 59.Szk.1163/2017/6/I of the Szombathely District Court

The plenary session of the Constitutional Court in the subject of a constitutional complaint, with concurring reasonings by Justices *dr. István Stumpf* and *dr. András Varga Zs.* and with dissenting opinions by Justices *dr. Egon Dienes-Oehm*, *dr. István Balsai*, *dr. Imre Juhász*, *dr. Attila Horváth*, *dr. Béla Pokol* and *dr. Mária Szívós* adopted the following

decision:

The Constitutional Court states that the ruling No. 59.Szk.1163/2017/6/I of the Szombathely District Court is in conflict with the Fundamental Law, therefore the Constitutional Court annuls it.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I

- [1] 1. The petitioners, acting through a legal representative (*dr. Miklós Hankó-Faragó* attorney-at-law), requested, in their constitutional complaint submitted on the basis of Section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the Constitutional Court to state that the ruling No. 59.Szk.1163/2017/6/I of the Szombathely District Court was contrary to the Fundamental Law, and to annul it on the basis of Section 43 (1) of the ACC. They hold that the judicial decision maintaining in force the decision of the minor offence authority that condemned them because of a minor offence of public cleansing is in breach of their freedom of expression granted in Article IX (1) of the Fundamental Law and their right to the freedom of artistic creation enshrined in Article X (1).
- [2] 1.1. According to the facts of the case laid down in the court's ruling, on 14 April 2017, at 17 o'clock and 35 minutes, in Szombathely, the petitioners painted with colour paint the cracked parts of a pavement section, – according to them – for the

purpose of preventing accidents and for calling the attention of the competent authority and of the general public to the defects of the pavement.

- [3] At the hearing held by the Szombathely District Office of the Vas County Government Office, as the minor offence authority of first instance, the petitioners, charged with committing a public cleansing minor offence, stated that they had not committed a minor offence as their act had not been dangerous to the society. They actually had not contaminated the surface of the pavement as they had used an easily removable paint solvable in water, and their conduct had been nothing else but a free expression of their opinion calling the attention of the general public to an omission by the authorities. They referred to the fact that although, according to the applicable laws, the pavement should have been repaired within one week after the defect, the relevant section of the pavement had been in bad shape for the past 20 years. The petitioners added: they had assumed on due grounds that their act would not imply a legal consequence, as a huge advertisement of a company can be seen on another road section in Szombathely, about which the town management had earlier stated that it had not been unlawful.
- [4] The minor offence authority imposed a warning on the petitioners because of committing a public cleansing minor offence qualified under Section 196 (1) *a*) of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System (hereinafter: AO). According to the reasoning provided by the authority, the persons subject to the procedure implemented the minor offence by their conduct of contaminating the public ground – in the present case, the pavement – with paint. The authority held that the petitioners' defence about painting the cracks of the pavement being a manifestation of the freedom of expression was unfounded, as this right empowers no one to arbitrarily contaminate public ground, even if it is aimed at raising attention. According to the minor offence authority, the reference that had been made to another inscription found in the city was irrelevant.
- [5] The court held that the petitioner's objection aimed at terminating the minor offence procedure was unfounded, and it also amended the reasoning that had been provided by the minor offence authority. With respect to the conceptual elements of the minor offence as laid down in Section 1 (1) of the AO, the court examined whether the painting of the cracked parts of the pavement qualified as "contaminating" according to Section 196 of the AO, and whether this conduct was dangerous to the society. On the one hand, the court established that "contaminating", "smutching" is a collective term used in the right on minor offences and it is possible to commit it by painting the pavement. On the other hand, it explained that in the course of examining the dangerousness to the society of a

public cleansing minor offence that can only be committed on public ground, the protected legal subject matter is the order of public grounds, public cleansing and public health. The appropriate protection of the above subjects requires using public grounds adequately or asking a permission from the owner in the case of any irregular use. Consequently, as interpreted by the court, the assessment had to focus on whether the minor offence authority was right to decide on giving priority to the interest of the owner of the public ground over the freedom of expression.

- [6] The court concluded that the petitioners' conduct of using other person's property for the expression of their opinion without the consent of the owner had been dangerous to the society as it had violated the owner's right of disposal. The fact that the conduct was aimed at raising the attention of the competent party about the defects of the area shall not provide an exemption from the liability under the law applicable to minor offences, as there are no lawful possibilities to do it. Neither the purpose, which was right in itself – raising attention about an unsafe situation –, nor the freedom of self-expression may justify a method or tool classified as a minor offence. Just as the minor offence authority, the court held that making a reference to another case in Szombathely was not relevant.
- [7] 1.2. The petitioners turned to the Constitutional Court against the final ruling of the court. In their constitutional complaint, the petitioners claimed that the judicial decision violated their right to the free expression of opinion granted in Article IX (1) of the Fundamental Law and their right to the freedom of artistic creation enshrined in Article X (1).
- [8] They hold that in the case concerned, painting the cracked pavement with four colours, by using paint soluble in water, is a work of art in the field of *street art*, which, at the same time, conveys an expression in the scope of debating public affairs. (The petitioners referred to the decision of the body of representatives of the Local Government of Józsefváros District VIII of Budapest-Capital adopted in 2017, according to which the painting of cracked pavements with four colours, as a work of art in the field of *street art*, was classified as a cultural value worth preserving temporarily until the renovation of the relevant pavement section.) According to their arguments, the conduct, which was the basis of their liability under the law applicable to minor offences fell in the scope of the enforcement of the fundamental right enshrined in Article IX (1) of the Fundamental Law as well as of the fundamental right granted in Article X (1) of the Fundamental Law, as special manifestation of the foregoing.

[9] As stated in the constitutional complaint, although the challenged judicial decision identified the fundamental rights involved in the case, it failed to fully examine the restriction of the fundamental rights. Indeed, in the statutory definition of public cleansing minor offence, the protected legal subject is not the right to property, but the clean state of the public ground, which may also serve as a basis of the necessity to restrict a fundamental right, but, as an abstract interest, it may only justify a more lenient restriction of the freedom of expression. Actually the court completely failed to examine the issue of the proportionality of the restriction, although, in this context, the criminal nature of the law applicable to minor offences would have raised the requirement of applying a restrictive interpretation. The petitioners claimed that their fundamental rights specified above were injured due to the challenged ruling establishing their liability under the law applicable to minor offences by using a false ground to establish the necessity of restricting their rights in the context of their conduct within the scope of the freedom of expression, and it was also accepted by the court, and the proportionality of the restriction of rights has not been examined at all.

II

[10] The affected provisions of the Fundamental Law:

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

"Article X (1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the freedom of teaching."

III

[11] 1. The Constitutional Court established primarily on the basis of Section 56 (2) of the ACC that the constitutional complaint fulfilled the formal and substantial requirements laid down in the ACC with respect to Section 27 of the ACC.

[12] 1.1. The constitutional complaint was received by the court in due time. The complaint complies with the statutory requirement of containing an explicit request as laid down in Section 52 (1b) of the ACC. The petition indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [Section 51 (1) and Section 52 (1b) a) of the ACC]; the procedure of the Constitutional Court was requested in the competence laid down in Section 27 of the ACC. The complainants 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]. They provided a detailed 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 petitioners formed an explicit request for the annulment of the judicial decisions [Section 52 (1b) *f*) of the ACC].

- [13] 1.2. According to Section 27 of 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 violates the petitioner's right granted in the Fundamental Law and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her.
- [14] In the present case, the constitutional complaint has been submitted by the persons subject to the underlying minor offence procedure against the judicial ruling closing the case on the merits. On the basis of Section 116 (3) of the AO, there was no way to appeal against the ruling.
- [15] 1.3. In accordance with Section 29 of the ACC, a further condition of the admissibility of the constitutional complaint is to raise the doubt 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]}.
- [16] In this respect the Constitutional Court established that the case raises constitutional questions of fundamental importance affecting the effect and the limits of the right to the freedom of expression enshrined in Article IX of the Fundamental Law. During examining the constitutionality of the judicial ruling, it should be assessed whether the act qualified in the minor offence procedure is covered by the freedom of expression. If it is indeed covered, an assessment should be made about the existence of the reasons to constitutionally restrict it. In the course of the above, the Constitutional Court should explore as necessary the constitutional aspects that may influence the interpretation of dangerousness to the society, as a conceptual element of the minor offence.

[17] Considering the above, the Constitutional Court admitted – in its sitting of 27 March 2018 – the constitutional complaint with respect to Article IX (1) of the Fundamental Law.

IV

[18] The constitutional complaint is well-founded.

[19] 1. According to the consistent judicial practice of the Constitutional Court, on the basis of a constitutional complaint it shall "examine the compatibility with the Fundamental Law of the interpretation of law found in the judicial decision, i.e. whether the court enforced the constitutional content of the rights granted in the Fundamental Law. If the court acts without paying due attention to the fundamental rights affected by the relevant case and if the interpretation of the law developed by the court is not compatible with the constitutional content of this right, then the adopted judicial decision is contrary to the Fundamental Law" {Decision 3/2015. (II. 2.) AB, Reasoning [18]}

[20] Nevertheless, the Constitutional Court may not distract the power of the adjudicating courts to comprehensively assess the elements of the facts of the cases before them, it may only review whether the interpretation of the law underlying the weighing was in compliance with the Fundamental Law, and whether the constitutional criteria of weighing were complied with.

[21] First of all, the Constitutional Court holds it important to point out, as it has already been laid down in the Decision 1/2019. (II. 13.) AB that in the course of assessing the punishability of a case, attention should also be paid to the fact that although the Act C of 2012 on the Criminal Code (hereinafter: Criminal Code) and also the AO links (among others) the evaluation of certain conducts' dangerousness to the society to the violation or the endangerment of the constitutional order (of the society, the economy or the of the State in accordance with the Fundamental Law), if a conduct qualifies as exercising a fundamental right protected by the Fundamental Law (for example, it falls into the scope of the freedom of expression), then its dangerousness to the society is *per se* excluded. {see: Decision 1/2019. (II. 13.) AB, Reasoning [44]}.

[22] Accordingly, the Constitutional Court reviewed, on the basis of the constitutional complaint, whether the proceeding court had correctly assessed the relation between the current case and the freedom of expression. The court had to address the question whether, in the framework of the established facts of the case, the challenged act was under the scope of the freedom of expression, i.e. whether the

constitutional standards securing the protection of the freedom of speech were applicable to it.

- [23] 2. In the course of examining the above question, in line with its earlier case law, the Constitutional Court first provided a brief overview of the conditions under which an act may be included in the conceptual scope of the freedom of expression in the context of the scope of interpretation of Article IX (1) of the Fundamental Law.
- [24] 2.1. In this respect, the Constitutional Court reiterated that the effect of the right to the expression of opinion enshrined in Article IX (1) of the Fundamental Law, i.e. the concept of "expressing opinion" is of normative, which may not encompass all manifestations of forming an opinion, but on the other hand it also includes acts beyond oral or written communication. Therefore, its limits are not determined by expressions in the everyday sense, but by the acts that are linked to the constitutional justification of the freedom of opinion. In accordance with the earlier case law of the Constitutional Court, the person expressing an opinion may share his or her ideas not only by saying words, but also by using images, symbols or by wearing items of clothing – the symbolic speech manifested in using symbols is a classic issue of the freedom of opinion [c.p. most recently: Decision 4/2013. (II. 21.) AB].
- [25] In accordance with the interpretation laid down in the Decision 7/2014 (III. 7.) AB and reinforced several times, the justification of the freedom of speech is twofold: the freedom of the citizens to express their thoughts is rooted on the one hand in the democratic operation of the political community, and on the other hand in the need for individual self-expression. In the determination of the effect of the fundamental right to the expression of opinion, the primary aid is provided by the criterion of participation in communication in a democratic society. Accordingly, the communicative acts used by the actors in the public social dialogue are linked to the freedom of expression. However, the citizens participate in many ways in the public social dialogue beyond the traditional written or oral forms, therefore, the scope of the right to the expression of opinion is wider than verbal expressions. Thus the constitutional aspects of the freedom of expression may be relevant also in respect of communicative acts other than "speeches" in the everyday sense, and such aspects may become mandatory elements of the legal assessment {see in this respect: Decision 1/2019. (II. 13.) AB, Reasoning [31]–[32]}.
- [26] 2.2. With account to the above, the Constitutional Court points out that assessing whether or not the relevant communicative act falls under the scope of the freedom of expression shall require the complex evaluation of several factors. As pointed out by the Constitutional Court in its Decision 1/2019. (II. 13.) AB, in order to handle an act as an expression of opinion, it is a necessary but never a sufficient precondition

that the actor acted for the purpose of expressing his or her opinion – although in the course of assessing an act from the point of view of the freedom of opinion, the judiciary should primarily examine the aim or the motivation the actor had when he or she performed the conduct. Indeed, for the applicability of the freedom of opinion it is also necessary that the selected form of the communication should be objectively suitable for conveying the message. {Decision 1/2019. (II. 13.) AB, Reasoning [36]}

- [27] 3. The court warned the petitioners because of committing a public cleansing minor offence. According to the statutory definition of public cleansing minor offence, qualified under Section 196 (1) *a*) of the AO, „anyone who [...] *a*) commits littering on, or contaminates public ground, a building used by the public, or a vehicle of public transportation [...] shall be liable for committing a minor offence.” The protected legal subject matter of the relevant provision of the AO is the order of public grounds and public cleansing. Although the concept of public cleansing is not defined in any law, but in general it means cleansing and keeping clean the municipal area, the community spaces of the settlements. The court concluded in its decision – in agreement with the minor offence authority – that the petitioners had committed the minor offence specified under Section 196 (1) *a*) of the AO, as their conduct had been in line with the statutory definition and it had also posed a danger to the society.
- [28] 3.1. With respect to a particular act, it is not the duty of the Constitutional Court to decide which acts are held by the minor offence authorities and by proceeding courts as ones posing a danger to the society. It is to be examined by the Constitutional Court, however, if the declaration of posing a threat to the society resulted in the unconstitutional restriction of exercising a protected fundamental right.
- [29] In this respect, the Constitutional Court first has to answer whether the act of the petitioners, i.e. painting with colour paint the cracks of the pavement, fell into the constitutionally protected scope of expressing one’s opinion, and if it did, whether the proceeding court took it into account in the course of assessing the act’s dangerousness to the society.
- [30] 3.2. Based on the case law referred to above, the Constitutional Court concluded as follows regarding the relation between the conduct of the petitioners and the freedom of expression. First of all, it is important to note that, in accordance with Section 29 (2) *a*) of the AO, “public ground means any territory serving the purpose of use by the public, irrespectively to the person of the owner and to the form of ownership, that may be used by anyone without restriction or under the same conditions [...]”. Accordingly, a section of the pavement that is available without restriction for anyone to be used qualifies as public ground. However, there are many ways of putting an inscription on such a section of pavement. For example, an

advertisement may be placed on the pavement in a regulated way. There are also other ways of putting an inscription on a pavement on public ground. For example, children may draw on the pavement with an easily removable chalk. Implicitly, the act of the petitioners was a similar conduct when they painted the cracks of the pavement with a washable paint.

- [31] Nevertheless, the relation between this act and the freedom of expression should not be assessed in a uniform manner. A chalk-drawing on asphalt made by children does not typically convey a communication message related to the public affairs, in contrast with, for example, a cracked section of the pavement painted in the interest of raising attention. Inscriptions and colourings applied, by using easily removable paint, to the road or pavement sections classified as public ground may qualify as a form of symbolic speech under the umbrella of the right to the expression of opinion. In the course of assessing the above, the primary concern should be whether the relevant act (e.g. a painted inscription or colouring) is an objectively suitable tool for conveying the communication of thoughts, in addition to the personal intention to express one's opinion. If the answer is yes to the above question, we should consider the relevant act as a conduct within the scope of the expression of opinion.
- [32] 3.3. Naturally, it does not mean that all acts of this kind would automatically be authorised with reference to the freedom of expression. For example – similarly to what has been stated in the Decision 1/2019. (II. 13.) AB –, the impairment of a road or pavement section on public ground to the extent of causing irreparable damage, or a damage only reparable with high costs, to the subject of the property, namely the road or pavement section itself (e.g. a repair that requires re-asphalting) shall fall outside the scope of the freedom of expression.
- [33] Thus, it is the duty of the courts to judge in the particular case, on the basis of the individual facts of the case, whether the relevant act was a conduct to be assessed in the scope of the freedom of expression or an act of vandalism. In this respect, however, it is an important element whether the particular conduct was an act of communication interpretable – at least hypothetically – by the public both according to the subjective intention of the person “expressing the opinion” and according to an objective assessment.
- [34] 3.4. The adjudicating courts, along with the above criteria, should also take into account – in the course of assessing an act to be handled as an expression of opinion – the collision between the freedom of expression and other fundamental rights, in particular its relation to the right to property. Actually, the freedom of expression and the right to property are considered to be in a real collision, if the physical expression

of the opinion causes a physical damage to the subject of the property, decreasing the value of the property. In such a case, the collision should be resolved with due care and it should be noted that any expression of opinion damaging the subject of property can only be constitutionally justified in exceptional cases. {Decision 1/2019. (II. 13.) AB, Reasoning [38]}

- [35] In the course of examining the above, it should be taken into account on the one hand – on the basis of Article I (3) of the Fundamental Law – whether, with regard to the necessity of restricting the right to property, the expression of the actor’s opinion by way of physical conduct was justified (or it could also be expressed by using other tools – e.g. speech, banner, boards etc. –, to cause the same weigh of raising public attention as the one caused by the physical action). On the other hand, it should be assessed whether the restriction of property resulting from the expression of opinion carried out with the action was proportionate with the aim of the opinion-expressing action. In this respect, the court should first examine whether the affected person’s action aimed at expressing his or her opinion restricts others’ right to property to an extent that results in the autotelic damaging of the property, exceeding the limits of communicating the opinion, and which is either irreversible or only reversible at a significant cost.
- [36] 4. Based on the above, in the context of the concrete conduct, it should be established that the conduct of the petitioners qualified as an expression of opinion. However, the facts of the particular case are different from the one examined in the Decision 1/2019. (II. 13.) AB. In the present case, the cracked and painted section of the pavement itself directly conveyed the opinion: the petitioners painted the defective parts of the pavement as a form of demonstration against the neglected state of it, and they intended to raise attention about the need of repairing the relevant section. Thus, the particular act was, according to objective assessment, a communication interpretable by the public. It is also worth noting in this context, that colouring a cracked section of the pavement would rather raise a laugh in the passers-by, therefore, a sober sense of humour is also needed on behalf of the proceeding authorities in the course of assessing the conduct. It should also be underlined that the painting of the relevant pavement section has not caused any permanent damage to the condition of the affected surface and it was objectively appropriate for conveying the message.
- [37] 4.1. It needs to be reiterated with regard to the court ruling challenged by the petitioners, that the minor offence authority and the proceeding court qualified the petitioners’ act as a public cleansing minor offence because, in their opinion, painting the cracks of the pavement resulted in contaminating the pavement surface, therefore, the petitioners performed the elements of the statutory definition of the

relevant minor offence. However, one may also claim on the basis of the above, that the statutory definition of Section 196 (1) a) of the AO has been performed when, for example, someone steps on the surface of the pavement with a muddy shoe or when a chalk-drawing is made on it, still, the authorities are not ready to launch a procedure in these cases. The petitioners' act has the same character as the cases mentioned above. Indeed, the petitioners coloured the cracks with a washable paint, which has not caused any irreparable harm to the pavement surface. The difference between the above cases and the conduct of the petitioners can be found in the fact that it conveyed a clear content, message related to the freedom of speech, i.e. it could be interpreted as a kind of criticism related to public affairs. However, as a clear conclusion of the above, the minor offence authority and the proceeding court only handled the petitioners' act differently from the cases mentioned above, and they only established their liability for a public cleansing minor offence because, their conduct had a clear character related to the expression of their opinion.

[38] 4.2. Together with taking the above into account, the act of the petitioners undoubtedly caused a collision with the right to property. With regard to releasing the collision, one should first note that the right to property, the protection of either public or private property (e.g. preserving its condition) may be a legitimate objective of restricting the freedom of expression. It should also be underlined that the application of the sanction system of minor offences may be a necessary way for safeguarding property and – in the current case – for preserving public sanitation. However, it is an important circumstance in the context of the assessment of the proportionality of the restriction that the petitioners used washable paint to colour the surface of the cracked pavement, which was already in fundamentally bad shape (due to being cracked). Moreover, the painting of the cracks offered a chance for a relatively long-lasting calling of attention that could not have been achieved by applying any other method (e.g. the placement of a banner or table, holding speeches etc.), thus the petitioners could assume on due ground that, for example, writing petitions to the authority, that knows the state of the surface very well, would not produce a similar effect. -With account to the above, it can be stated in the present case that restricting the freedom of expression on the basis of the right to property was disproportionate.

[39] 4.3. As another fact worth noting on the basis of the above in the context of the collision existing between the petitioners' act and the right to property, the conduct of the petitioners examined in the present case fits into the scope of conducts to which the owner of the public ground is deemed to give its implied approval by not acting against them on the basis of the provisions of the AO. Such an approval by the owner made by way of implied conduct shall, in itself, exclude the unlawfulness of the act.

[40] 5. By taking all the above into account, the Constitutional Court held that the court had failed to appropriately evaluate the petitioners' act, as it had failed to thoroughly examine its character related to the freedom of expression, and it also failed to appropriately compare the petitioners' conduct to the right to property on the basis of Article I (3) of the Fundamental Law, and thus it had disproportionately restricted the petitioners' right to express their opinion as declared in Article IX (1) of the Fundamental Law. In addition to the above, one may also note that the minor offence authority and the proceeding court established the petitioners liability for a public cleansing minor offence for the very reason of their act being a conduct within the scope of the freedom of speech. It is also important that in the course of adjudicating the case, the court failed to take into account the fact that the conduct's dangerousness to the society could not be verified, as the act's protection under the freedom of expression excluded it. As emphasized repeatedly by the Constitutional Court in this respect, an act that conveys a communication message and that does not affect any object in private ownership, or that affects it only with the owner's consent, not causing any damage in the condition of a public property, shall be classified to be constitutionally protected as the expression of one's opinion.

[41] Based on the above, the Constitutional Court annulled the ruling No. 59.Szk.1163/2017/6/I of the Szombathely District Court.

[42] Due to the declaration of the conflict with the Fundamental Law and the annulment of the challenged judicial ruling, the Constitutional Court did not review the element of the petition alleging the violation of Article X (1) of the Fundamental Law. According to the established case law of the Constitutional Court, when the law challenged in the petition or a part of it is declared by the Constitutional Court to violate a provision of the Fundamental Law and, therefore, the Constitutional Court annuls it, then the Constitutional Court shall not examine the merits of a potential violation of any further provisions of the Fundamental Law regarding the statutory provision annulled {Decision 18/2016. (X. 20.) AB, Reasoning [21]}. The Constitutional Court also follows this practice in the scope of reviewing the constitutionality of judicial decisions. {most recently: Decision 3219/2018. (VII. 2.) AB, Reasoning [37]}.

[43] 6. The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the ACC.

Budapest, 9 April 2019.

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. István Balsai
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Attila Horváth
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Dr. Imre Juhász
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Dr. Marcel Szabó
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Dr. Péter Szalay
Justice of the Constitutional Court

Dr. Mária Szívós
Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. István Stumpf*

[44] Although the district court noted the existence of a collision of fundamental rights (thus “the assessment had to focus on whether the minor offence authority was right to decide on giving priority to the interest of the owner of the public ground over the freedom of expression” [ruling, page 5]), I agree with the conclusion (point IV.5) of the majority decision stating that “the court had [...] failed to appropriately compare the petitioners’ conduct to the right to property on the basis of Article I (3) of the Fundamental Law, and thus it had disproportionately restricted the petitioners’ right to express their opinion as declared in Article IX (1) of the Fundamental Law” (Reasoning [40]).

- [45] In my view, the court could have had the opportunity – and an obligation under Article 28 of the Fundamental Law – to take the above fundamental rights’ aspects into account primarily in the scope of assessing the acts’ “dangerousness to the society”.
- [46] The district court considered the reviewed conduct to be dangerous to the society, because the “persons subject to the procedure [...] used other person’s property for the expression of their opinion without the consent of the owner”, this way “violating the owner’s right to the property, the right to dispose over the property” (ruling, page 6). Thus, according to the interpretation provided by the district court, restricting the right to dispose over the property is, in itself, to be regarded as a violation of a fundamental right. This, however, is not well-founded, as in the case of the collision of fundamental rights, either of the fundamental rights may naturally be restricted, which, in itself, shall not result in the violation of that fundamental right; the violation shall only be considered to take place, if the restriction is unnecessary or disproportionate. In the case concerned, although the district court did refer to the right to property as one the protection of which might provide (reasonably, in general) a ground for the restriction of the right to express opinion; however it failed to examine whether, in the relevant case, the protection of property actually justified the restriction (sanctioning) of the opinion-expressing conduct, and whether the restriction had been proportionate with the desired objective. Nevertheless, as the consequence of the interpretation provided by the district court, in the case of a collision between the owner’s right of disposal and the freedom of expression, the right to property should enjoy an almost automatic priority, without any further assessment. I hold that the district court’s ruling had to be declared to be in conflict with the Fundamental Law due to this (general) error of interpretation.
- [47] The majority reasoning uses detailed descriptions and plastic examples to argue for the eligibility of the act examined in the basic procedure for a protection under scope of the fundamental rights; it also argues that the restriction of the conduct was disproportionate {the washable character of the paint, the bad shape of the cracked pavement, calling for a sense of humour on the side of the authority, the objective suitability of the conduct for conveying the message, the comparisons of muddy shoes and chalk-drawing, the scope of other conducts it is fitted into etc. (IV.4., 4.1–4.3., Reasoning [36]–[39])}. At the same time, the detailedness of the majority reasoning as mentioned above may also raise concerns about the Constitutional Court testing or indeed trespassing the limits of its own powers and competences. I doubt that the Constitutional Court would be authorised to qualify a particular act and to prescribe for the district court a new decision (in conformity with the Fundamental Law) to be adopted in relation to the relevant facts of the case. In my

opinion, the Constitutional Court should have only performed a more abstract level constitutional review of the court's interpretation of the AO's provisions applied.

[48] The majority reasoning also contains a few other statements the adequacy and the well-foundedness of which I am not convinced of. According to point IV.3.4. (Reasoning [34]–[35]), the law-applying authority should examine the necessity and the proportionality of the right to property. Of course, in principle, it could be an option, but not in the present case (therefore, it disturbs the argumentation). Indeed, the minor offence authority and the court restricted in the case the right to express one's opinion, rather than the right to property, and in the petition submitted, the petitioner referred to its violation. As laid down in the reasoning in point IV.5 at the end of the essence of the arguments, "as emphasized repeatedly by the Constitutional Court [...] an act that conveys a communication message [...] not causing any damage in the condition of a public property, shall be classified to be constitutionally protected as the expression of one's opinion" (Reasoning [40]). I seriously doubt that the physical damage of the property could be the only applicable limitation upon an opinion-expressing act performed on the subject of public property: on this basis, contaminating with graffiti the wall of a national heritage building in public ownership could hardly be prohibited. Moreover, as I see, it is more than a pure repetition of the statements made earlier in the decision: it is the categorical declaration of a new principle (not stated in this form earlier), the problem of which is not appropriately addressed in the decision.

Budapest, 9 April 2019.

Dr. István Stumpf

Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. András Varga Zs.*

[49] I fully agree with the holdings of the majority decision and with its reasoning. However, with regard to the importance of interpreting and delimiting the fundamental rights affected in the case – the freedom of expression and the right to property – I hold that it is worth explaining my point in details.

[50] I maintain that the standard of differentiation that I proposed in the concurring reasoning attached to the Decision 1/2019. (II. 13.) AB is applicable in this case as well: "I hold that granting constitutional protection for the expression of one's opinion in the form of actions (burning, painting, impairment etc.) should only be accepted in very exceptional cases. These acts typically do not convey thoughts, as they are thought-induced and often emotionally driven actions [...] I hold that the

physical »expression of opinion« is only protected by the Fundamental Law as long as it does not restrict the fundamental rights of others. Indeed, as follows from the right to property, it is actually prohibited even to touch a piece of property owned by another person (unless the law allows it, the owner provided consent to it, or the owner's conduct refers to providing consent]. The constitutional protection does not apply to any other case" (Reasoning [68]).

[51] Actually, in the present case, the subject of the decision was the exceptional situation that I hold to be acceptable. The public ground concerned (pavement) is in the ownership of the local government, it is typically open for use by anyone and it may become contaminated during regular use. Thus the owner usually tolerates a certain degree of contamination, therefore the petitioners had due ground to conclude that their act would not be opposed by the owner in the form of implied conduct. Should the local government explicitly prohibit painting on the pavement, the situation would be different.

[52] The proceeding authority had to examine on the basis of Section 1 (2) of the AO whether the activity subject to the procedure, the painting of the pavement, was dangerous to the society as a public cleansing minor offence, i.e. whether it violated or endangered the social, economic or state order according to the Fundamental Law, the personality or the rights of natural persons, legal entities or unincorporated bodies – in the current case, public cleansing and the right to property. In the particular case, with account to the above, according to the constitutional rule (Article 28) on the interpretation in accordance with common sense, "no" could have been the only possible answer. Therefore, in the case concerned, painting the pavement would not have been punishable either in itself or in the context of the freedom of expression.

[53] Thus, in my view, the particular case is one of the explicitly few exceptions. Consequently, the decision cannot be interpreted as a general empowerment to paint a pavement or any other item of property. An explicit prohibition by the owner of the public ground open for use by anyone shall be regarded as a limitation of the above (including the expression of one's opinion is such a form). In the case of an item of property not open for use by anyone, the exceptional application may not even come into the picture.

[54] Of course, the relevant painting of the pavement could have also implemented another minor offence (or even a criminal offence), for example, if the paint applied was a permanent one or it was dangerous to the environment or to health. Nevertheless, this was beyond the scope of review by the Constitutional Court, for,

due to the legal remedy nature of the constitutional complaint, the constitutional review may only be carried out in the particular case in the scope of the facts of the case that had been examined by the authority and the court, as well as with regard to the laws applied.

Budapest, 9 April 2019.

Dr. András Varga Zs.

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Egon Dienes-Oehm*

- [55] I disagree with the decision. My dissenting opinion is based on three factors and their joint effect.
- [56] 1. The decision, both in terms of its reasoning and the application of the legal consequence, is based on the over-dimensioned and in many respect outdated concept of the Decision 7/2014. (III. 7.) AB of the Constitutional Court, with its spirit dragging away the competence of the courts, and granting supremacy over other fundamental rights to the right and the freedom of expression enshrined in Article IX (1) of the Fundamental Law.
- [57] I have expressed in my dissenting opinion, attached to the relevant decision – adopted with the narrowest majority – that, on the one hand, a case-by-case assessment shall be needed in any collision between Article IX (1) and another fundamental right granted in the Fundamental Law. On the other hand – as a consequence of the foregoing –, the courts should have a decisive role in enforcing the constitutional requirements and in elaborating its practice, since they are the decision-making bodies acting in the adversary procedure, establishing the facts of the cases, following the rapid changes of public affairs and circumstances, including the increasing role of misusing the law, and they are capable of applying the Fundamental Law's new principle that requires the consideration of the responsibility, which comes along with exercising the fundamental rights.
- [58] 2. In many cases, when the decisions were related to Article IX (1), I have had to present my approach referred to in the previous point in a concurring reasoning or in a dissenting opinion, as it was appropriate.
- [59] During the adoption of the Decision 1/2019. (II. 13.) of the Constitutional Court applicable to the present case, I could accept the general direction of the decision.

The reason for this was that in the particular case, in the relation between the freedom of expression and the right to property, the decision granted priority to the latter by acknowledging that “any expression of opinion damaging the subject of property can only be constitutionally justified in exceptional cases” (Reasoning [38]). With regard to the above, and as the relevant decision was a precedent in line with my position in terms of the applied legal consequences, too, I held it sufficient to join the concurring reasoning attached by Justice *András Varga Zs.* According to the essential statement made there: “I hold that the physical expression of opinion is only protected by the Fundamental Law as long as it does not restrict the fundamental rights of others. Indeed, as follows from the right to property, it is actually prohibited even to touch a piece of property owned by another person [unless the law allows it, the owner provided consent to it, or the owner’s conduct refers to providing consent]. The constitutional protection does not apply to any other case” (Reasoning [68]).

[60] I hold that the constitutional approach referred to above is bearable and applicable in the present case. However, what I cannot accept is dragging away by the Constitutional Court, with a reference made to the above, the competence of the adjudicating court, and that the Constitutional Court itself established the facts of the case in an attempt to support its own constitutional qualification. A statement like this can be found for example in the reasoning of the present decision by establishing the element of the facts of the case in the form of “an approval by the owner made by way of implied conduct” (Reasoning [39]), although the court decision does not mention such an element.

[61] 3. In the present particular case, however, – on the basis of my constitutional approach explained in the foregoing points – I do not agree with the decision and its reasoning applicable to the individual case, because

- the court applied the constitutional criteria when it examined and weighed its decision, based on establishing the violation of the owner’s right of disposal and the relevant liability under the law on minor offences;
- the assessment of the constitutional criteria is in line with the content of the reasoning of the Decision 1/2019. (II. 13.) AB, in particular its paragraphs [38], and [66]–[68];
- the Constitutional Court may not review the correctness of the decision without changing the established facts of the case (which would be beyond its competence).

Budapest, 9 April 2019.

Dr. Egon Dienes-Oehm,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Imre Juhász*

[62] I do not support the majority decision.

[63] 1. In my view, by declaring certain conducts to be minor offences or criminal offences, the legislator made a general decision about their dangerousness to the society. It is the discretionary right of the law-applying authority to verify the level of dangerousness to the society, and to impose a sanction on the basis of it. Based on the dogmatic rules of the branch of law, in the cases regulated therein, this process may result in establishing the negligible level or the ex-post negligibility of the dangerousness to the society, or, exceptionally, its absence (vanishing). In the case concerned, the court carried out this test and it applied the least severe sanction in line with the level of the act's dangerousness to the society.

[64] According to the standing and consistent case law of the Constitutional Court, it refrains from acting as a so-called supercourt {Ruling 3325/2012. (XI. 12.) AB, Reasoning [14]}. In line with that, it shall not examine whether or not the pieces of evidence and the arguments presented in the reasoning are well-founded, whether the law-applying authority evaluated correctly the pieces of evidence obtained and the arguments presented in the procedure, or whether the facts established in the particular case, as a result of judicial assessment, are well-founded. Actually, establishing the facts of the case as well as evaluating and weighing pieces of evidence is a duty reserved in the rules of procedural law for the law-applying entity {Decision 3237/2012. (IX. 28.) AB, Decision 3309/2012. (XI. 12.) AB, Reasoning [5]}” {Decision 7/2013. (III. 1.) AB, Reasoning [33]}.

[65] It follows – in my view – from the above that the assessment of dangerousness to the society is the duty of the ordinary courts, rather than of the Constitutional Court.

[66] 2. Although I do not support the decision, I hold it important to point out that the reasoning was based on false ground. The petitioner referred to the violation of the right to express opinion, allegedly caused by the judicial interpretation of the statutory definition of the public cleansing minor offence. According to the petitioner, the court restricted the fundamental right of the expression of opinion with reference to public cleansing and public health. Still the decision – *de facto* neglecting the petition – collides the freedom of expression with the right to property, and it states the disproportionality of restricting the fundamental right in this respect. At the same time, Section 51 (1) of the ACC lays down that the Constitutional Court acts on the basis of the petitioner's petition, and also the ACC provides an authorisation to deviate from the petition (see Section 28 of the ACC). In my interpretation, it means

that the Constitutional Court is bound by the content of the petition and it may not deviate from that.

[67] 3. Thus, the Constitutional Court has taken, with majority support, in the same subject (the so-called physical expression of opinion), a fundamentally different position within a short period of time. With regard to the above, it is evidently not by coincidence that the majority decision states that the Decision 1/2019 (II. 4.) AB and the present decision are based on different facts of the cases. Irrespectively to the extent it may be regarded as the Constitutional Court's standing practice and to the extent it may serve legal certainty, I hold that from the point of view of the constitutional problem, the two cases are completely identical. Actually both cases raised the question whether the committing of a minor offence could be eliminated by reference to the primacy of the expression of opinion.

[68] By maintaining my position described in the dissenting opinion to the Decision 1/2019. (II. 13.) AB, I hold in the present case as well that if a conduct fulfils the statutory definition under the law on minor offences or according to criminal law, then it must have relevance under minor offences or criminal law. A person who implemented an act in line with the statutory definition of an offence, should not be exempted from liability merely on the basis of a reference to the right to express one's opinion. The enforcement of the freedom of expression may be assessed on the basis of the exceptional rules of substantive law adopted with regard to the level of the dangerousness to the society and to the potential absence of it.

Budapest, 9 April 2019.

Dr. Imre Juhász

Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Attila Horváth*

[69] I do not agree with the holdings and the reasoning of the decision; in my opinion, the constitutional complaint should have been rejected in the relevant case.

[70] The decision assessed, on the basis of Article I (3) of the Fundamental Law, the restriction of the right to express opinion in the context of the right to property, and it basically established the disproportionate restriction of the petitioners' right to express their opinion, because the painting of the pavement section with washable paint did not cause any permanent damage to the condition of the surface, and the implied consent of the public ground's owner excluded the unlawfulness of the act.

- [71] In accordance with the Decision 1/2019 (II. 13.) AB, in the event of a collision between the “physical” expression of opinion and the right to property, it should be examined whether, in the particular case, any other method of expressing one’s opinion could have resulted in raising attention to the same extent as the one caused by the physical action, and whether the resulting restriction of the right of ownership was proportionate with the aim of the opinion-expressing conduct (Reasoning [38]). In my opinion, in the case concerned, neither of the above conditions have been verified.
- [72] On the one hand, I do not agree with the statement made in the decision that the relevant result “could not have been achieved by applying any other method (e.g. the placement of a banner or table, holding speeches etc.)” and that “the petitioners could assume on due ground that, for example, writing petitions to the authority, that knows the state of the surface very well, would not produce a similar effect.” The petitioners have not verified at all these circumstances, therefore I do not agree with the Constitutional Court’s general negative evaluation about the activity of an authority, without knowing the facts and without requesting the relevant authority.
- [73] On the other hand, I also doubt the statement made in the decision that the absence of a “permanent damage to the condition” would justify the proportionality of restricting the right to property, and that the “owner of the public ground provided an implied” consent to the petitioners’ act. In the case underlying the Decision 1/2019 (II. 13.) AB, it was proven that the paint used was removable with tap water, without scouring (Reasoning [2]). It should be underlined in the present case that – in contrast with the case underlying the Decision 1/2019 (II. 13.) AB – the Constitutional Court was not aware of any evidence verifiably supporting that the paint used by the petitioners have not caused any “permanent damage to the condition”. It was not evident from the press photos published in the case whether the petitioners had used an environmentally friendly, washable paint. For that matter, washable paints qualify as chemical agents that, in many case, can only be removed by solvents also qualifying as chemical agents, thus the dissolved paint shall contaminate the environment. Let me note that for the very same reason, painting the pavement with paint should not be regarded the same way as the children’s chalk-drawings on the asphalt or as stepping on the pavement with muddy shoes, although the decision falsely depicts these act as not being different from the relevant case as far as their “character is concerned”. Additionally, if the petitioners’ “physical” expression of opinion becomes a regular action, removing the traces of the pavement paint may cause significant costs and workload for the owner of the public ground, even if it does not imply any “permanent damage to the condition” of the pavement. For all these reasons, I do not agree with the decision’s narrowing interpretation that limits

the assessment of the proportionality of the restriction of ownership to visible external physical damages. In my opinion, in the course of examining the collision between the "physical" expression of opinion and the right to property, not only the physical damage of the property's condition should be assessed, but other relevant aspects (e.g. environmental points, costs and workload caused to the owner) should also be taken into account. I also disagree with the statement made in the decision about the "implied consent given by the owner of the public ground" to the petitioners' conduct. For that matter, page 6 to 7 of the Szombathely District Court's ruling contained the opposite: based on the relevant facts of the particular case, it laid down that in the case concerned there had been no "ex post consent" referred to by the petitioners, "on the contrary, it is of public knowledge that the act of the persons subject to the procedure – painting the pavement – resulted in measures taken by the authorities in several towns, therefore, the persons subject to the procedure could not have believed that their act was lawful, there could not have been any doubt in that respect."

- [74] I also hold it irrelevant to state that the pavement painting might have raised a laugh in the passers-by, as in the present case the "physical" expression of opinion clearly collided with the owner's fundamental right, rather than with that of the passers-by.
- [75] Furthermore, I disagree with the statement made in the decision about "a sober sense of humour is also needed on behalf of the proceeding authorities in the course of assessing the conduct." I hold that in the case of committing a minor offence, calling the proceeding authorities to account on the basis of their sense of humour, as an aspect beyond the realm of law, would be an interpretation not deductible from Article 28 of the Fundamental Law.
- [76] In my view, with regard to the fact that the petitioners have only been warned by the minor offence authority and by the Szombathely District Court that maintained the effect of the decision, no disproportionate rigour has been applied against them, therefore I also hold on this basis that their constitutional complaint should have been rejected.

Budapest, 9 April 2019.

Dr. Attila Horváth,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Béla Pokol*

[77] I do not support the holdings of the decision on entertaining the petition and annulling the court decision. –I indicated in my dissenting opinion attached to the Decision 1/2019 (II. 13.) AB that I support, as a rare exemption, the protection of the expression of opinion also in its form manifested in a physical action. Therefore, I held that it was a manifestation protected by the constitutional freedom of expression to act with washable paint against the monument that stands, despite of the connected horrific events, as a public memorial of the Soviet occupation, which was one of the greatest traumas for the Hungarian society in the 20th century. For me, these were the preconditions that granted remaining within the framework of protection by the Fundamental Law, and these were the limits for my own position to differentiate between the freedom of expression to be exercised constitutionally and the constitutionally unacceptable conducts that have taken place recently in the public political sphere. This framework underlined in the other case the fact that the physical expression of opinion took place against a public statue (2) of a historical event that divides millions of people in the Hungarian society (1), and that the action did not go as far as to impair the statue (3), since the pouring of removable paint was a symbolic demonstration (4). I also underlined in my dissenting opinion, in addition to the constitutional acceptance based on emphasizing the above, that pouring paint on the walls of public institutions or any physical act against state buildings are beyond the limits of protecting fundamental rights. I hold that in the present case, none of the preconditions of this framework have been fulfilled, and although the colouring of the pavement may be regarded as a childish prank to be accepted with a good sense of humour – and this is how the graffiti paintings on the walls and then almost on all surfaces were handled by many people in the management of the local government of Budapest in the 90's –, but the experiences show its consequences. Based on these arguments, in this case, I could only support rejection.

[78] To amend my arguments, I note that – in contrast with the current position taken in the majority decision – I could have only supported the decision with the statement and the separated underlining of the following decision-making rationale: The Constitutional Court lays down that it can only exceptionally regard the expression of opinion manifested – beyond its oral forms – in a physical act against things, to be protected by the Fundamental Law, if specific preconditions are fulfilled. This way, it can only be accepted, if the thing targeted by the physical act means the symbolic manifestation of an event or a related ideology debated widely by the public, and if the act does not cause any permanent damage to the thing, provided that it does not imply the disproportionate injury of another fundamental right granted in the Fundamental Law.

[79] Since in the present case the expression of opinion manifested in a physical act did not fall in the above category, I could not support – contrary to the majority opinion – putting the act under the protection provided by the Fundamental Law.

Budapest, 9 April 2019.

Dr. Béla Pokol
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Mária Szívós*

[80] I agree neither with the holdings of the majority decision, nor with the reasoning attached to it, for the following reasons.

[81] 1. With regard to the existence of a question of fundamental constitutional importance, the majority decision makes the following statements that I hold to be correct: “during examining the constitutionality of the judicial ruling, it should be assessed whether the act qualified in the minor offence procedure is covered by the freedom of expression. If it is indeed covered, an assessment should be made about the existence of the reasons to constitutionally restrict it. In the course of the above, the Constitutional Court should explore as necessary the constitutional aspects that may influence the interpretation of dangerousness to the society, as a conceptual element of the minor offence” (Reasoning [16]).

[82] However, in the following part, the reasoning of the majority decision fails to define a consistent and clear constitutional system of criteria in principle with regard to the examination of dangerousness to the society – namely the assessment of the collision between the freedom of expression and another fundamental right or constitutional value –, and it draws the right to property into the scope of the evaluation, by often using the tools of examples – similarly to the Decision 1/2019. (II. 13.) AB –, although the protected legal subject of public cleansing minor offence is public cleansing (public health, the order of public grounds), rather than the right to property. Indeed, in case of a minor offence (just as in a criminal case), the particular dangerousness to the society of the act under review should not be examined in general, but with respect to the protected legal subject of the relevant minor offence (or criminal offence). Accordingly, when the Constitutional Court reviews whether, in the assessment of the liability for a public cleansing minor offence (in the course of evaluating dangerousness to the society), the court resolved appropriately the collision of fundamental rights, in the case of painting the pavement in the name of the freedom of expressing one’s opinion, the freedom of expression should be evaluated against the rights, values and interest raised in the context of public

cleansing, rather than of the right to property. Therefore, in my opinion, the statement made in the reasoning of the majority decision about the “owner’s consent in itself” (Reasoning [39]) excluding the dangerousness to society, is unfounded, as this statement might be true about conducts that violate the right to property, but it shall not stand for acts that violate public cleansing, since a consent in itself shall not eliminate the dangerousness of these acts to the society, manifested in the injury of public cleansing. In other words: a public cleansing minor offence should also be declared to exist also in the cases when the owner of the relevant territory provided consents to the acts that breach public cleansing.

[83] 2. I also disagree with the simplifying statement made in the majority decision, according to which, when an act falls in the scope of the freedom of expression, “its dangerousness to the society is per se excluded” (Reasoning [21]). If an act is performed by exercising the freedom of expression and the relevant act is restricting another fundamental right (constitutional value) that the legislator aims to protect by way of one of the statutory definitions laid down in the AO or in the Criminal Code, then the fact itself of exercising the fundamental right concerned shall not exclude its dangerousness to the society, only when, according to the constitutional standard applicable to the relevant fundamental right (constitutional value), the freedom of expression should enjoy priority. To put it in other words: the question whether a communication is under the protection of the freedom of expression can only be answered after making a comparison – in the course of the assessment of dangerousness to the society – between the relevant fundamental right and the protected legal subject of the minor offence (or criminal offence) concerned, to be more precise, the fundamental right, constitutional value in the scope of which the protected legal subject belongs.

[84] The statement made in the reasoning of the majority decision about the conduct performed by the petitioner being an act “to which the owner of the public ground is deemed to give its implied approval by not acting against them on the basis of the provisions of the AO” (Reasoning [39]) is completely unfounded. On the one hand, the majority decision fails to indicate the ground upon which the conclusion that the local government concerned in the particular case does not take action in such cases has been drawn; on the other hand, the potential violation of the right to a fair trial might be considered due to the fact that in some cases the authority takes action against certain conducts – that otherwise qualify as minor offences –, while in other cases it fails to do so, but it could never be interpreted as a consent given to the relevant act.

Budapest, 9 April 2019.

Dr. Mária Szívós
Justice of the Constitutional Court

[85] I second the above dissenting opinion.

Budapest, 9 April 2019.

Dr. István Balsai
Justice of the Constitutional Court

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