Decision 3065/2022. (II. 25.) AB

on rejecting a constitutional complaint

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

decision:

The Constitutional Court rejects the constitutional complaint aimed at establishing the lack of conformity with the Fundamental Law and annulling section 1 of the Government Decree No. 446/2021 (VII. 26.) on the measures necessary to ensure the safety of air transport during a state of danger and the smooth transport of equipment essential for COVID protection.

Reasoning

I

[1] 1 The petitioners, represented by Dr. Zoltán Rácz, attorney-at-law, filed a constitutional complaint to the Constitutional Court on 11 October 2021, pursuant to section 26 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC).

[2] The petitioners asked the Constitutional Court to declare that section 1 of the Government Decree No. 446/2021 (VII. 26.) on the measures necessary to ensure the safety of air transport during a state of danger and the smooth transport of equipment essential for COVID protection (hereinafter: "Decree") is in conflict with the Fundamental Law and annul it pursuant to section 41 (1) of the ACC. According to the content of the petition, the contested provision infringes Article XVII (2) of the Fundamental Law (the right of workers to take industrial action). The Constitutional Court judged upon the petition according to its content.

[3] In the case giving rise to the petition, the relevant Trade Union had initiated a strike at the Employer. Given that the conciliation between the parties had not led to any result, the Trade Union brought an action for a declaration that the strike was lawful before the Budapest-Capital Regional Court against the Employer. The Labour Chamber of the Budapest-Capital Regional Court, by its ruling No. 13.Mpk.75.206/2021/20, ruled that the indefinite strike announced by the Trade Union

was lawful. The Budapest-Capital Regional Court also determined how the workers were still providing sufficient services during the period of the strike. The decision was upheld by the regional court of appeal and the ruling became final and binding on 20 July 2021 (2.Mpkf.35.080/2021/5).

[4] Subsequently, section 1 of the Decree, which entered into force on 27 July 2021, stated that no strike could be called by the organisation responsible for the provision of the air traffic control service operating a system element designated as a national critical element in the interest of national defence.

[5] The petitioners are employed by the Employer as air traffic controllers. The Employer is the organisation responsible for the provision of the air traffic control service for the operation of a system element designated as a national critical element in the interest of national defence by the sectoral designating authority for defence systems and installations. In other words, the indefinite work stoppage announced cannot be held.

[6] 2 The petitioner submits, in the context of the indication of a question of fundamental constitutional importance, that Article XVII of the Fundamental Law guarantees the workers' right to the stoppage of work, i.e. the right to strike. The right to strike is a fundamental constitutional right and the legislative provision challenged in the present complaint deprives the employees of the organisation responsible for the provision of air traffic control services of the right to strike. The complaint challenges the Decree on the grounds that it violates the right to strike under Article XVII (2) of the Fundamental Law. The conflict with the Fundamental Law by section 1 of the Decree not only materially affects the possibility of exercising the right to strike, but also excludes from the right to strike altogether the employees of the organisation responsible for the provision of the air traffic control service operating the system element designated as a national critical system element in the interests of national defence.

[7] The applicant refers to the Act VII of 1989 on Strikes (hereinafter: "Strike Act"). Section 1 (1) of the Strike Act reads as follows: "Workers shall have the right to strike – under the conditions laid down in this Act – in order to safeguard their economic and social interests." Section 3 (2) of the Strike Act states that "there shall be no right to strike in the judiciary, the Hungarian Defence Forces, law enforcement, policing agencies and civil national security services. The right to strike may be exercised in state administration bodies under specific rules laid down in an agreement between the Government and the trade unions concerned, but employees holding a finance officer's job at the National Tax and Customs Authority are not entitled to exercise the right to strike."

[8] According to the constitutional complaint, the contested regulation supplemented this provision of the law by adding to the scope of persons the body responsible for the provision of air traffic control services.

[9] The petitioner argues that, in the legal literature, in relation to the right to strike, the most widely accepted principle for the classification of fundamental rights is that of classification based on the order in which they arose, according to which we can speak of first-generation, second-generation and third-generation rights. According to the traditional classification, the right to strike is among the second-generation economic, social and cultural rights (some argue that it would be more appropriate to introduce the concept of fundamental rights in the social sphere rather than specifying political, economic and social rights). According to some scholars in the legal literature, the right to strike is in fact constitutionally protected under the right of association and the right of assembly, while others argue that the right to freedom of expression is at least as much a precondition for the right to strike as the right of assembly. The right of association is a fundamental political freedom for all as the right of individuals to form, join or leave organisations with others in order to express their will, opinions and interests and to defend them. The right of association is therefore both individual, as it is enjoyed by all persons with rights, and collective, as it can only be exercised by several persons acting together.

[10] According to the organic theory, the right to strike is a collective right available to trade unions because workers form trade unions in order to counter the dominance of employers and, therefore, strike action is an indispensable means of achieving this objective. According to the individual theory, the right to strike belongs to the individual worker, not to the collective (trade union) Despite the fact that workers are taking collective action, the right to strike is a right of workers as individuals. The development of the right to strike shows that it is increasingly being transformed from a classic right linked to the employer-employee relationship into a right of citizens. According to other views, the right to strike (or more precisely the right to industrial action) can be derived from traditional, first-generation fundamental rights. The recognition and incorporation into legislation of the freedoms of the parties has led to the emergence of institutions that have made labour law a law of peaceful solutions (including the right of association, the right to conclude collective agreements and the possibility of using dispute resolution methods to resolve collective conflicts of interest). This is because, as times change, labour law is evolving more and more in line with the culture of private law, developing its own institutional system, and the conflict resolution method leading to industrial action (strikes) is less suited to it.

[11] At the same time, the complaint stresses that the right to industrial action (strike) was not created by the threat of harm but by the need to assert collective interests. Industrial action is a necessary corollary of the social state under the rule of law, and

we must accept it as well as the damages it causes because it is often the last chance for an autonomous settlement of labour, economic and social conditions at a higher level of society and the law The right to seek industrial action can be derived from general, traditional, first-generation fundamental rights.

[12] 3 The petitioner referred to the violation of Articles B (1) and C (1) of the Fundamental Law. The principle of the rule of law was infringed in that the decree in question deprived the persons concerned of their right to a freedom (the right to strike). In relation to the principle laid down in Article C (1), the petitioner submits that the courts before which the action was brought have ruled with final force on the lawfulness of the strike, whereas the Government, by the decree under appeal, has imposed a ban on strikes on the organisation responsible for the provision of air traffic control services, that is to say, the executive branch has acted in opposition to a final decision of the independent judiciary, in breach of the principle of the separation of powers.

[13] 3 In a submission filed with the Constitutional Court on 2 December 2021, the Ministry of Innovation and Technology, on behalf of and authorised by the Minister, informed the Constitutional Court of its legal position in relation to the petition, in accordance with section 57 (1b) of the ACC, section 116 (18) and Section 132 (1) (b) of the Government Decree 94/2018 (V. 22.) on the Duties and Powers of the Members of the Government. In addition to an overview of the regulatory environment and a detailed description of the Constitutional Court's decisions on the interpretation of the right to strike under the old Constitution and the right to strike under Article XVII of the Fundamental Law, the submission pointed out that the right to strike "is not protected by fundamental rights even in »peaceful times«". The submission, in addition to invoking Article 53 (2) of the Fundamental Law, stated that "the right to strike does not fall within the scope of the fundamental rights listed specifically in Article 54 (1) of the Fundamental Law, the suspension or restriction of which is not permitted in times of special legal order, such as a state of emergency". It also referred to the fact that, according to the findings of the Decision 23/2021 (VII.13.) AB,"in times of special legal order, the law-maker may, pursuant to Article 54 (1) of the Fundamental Law, and apart from the exceptions provided for therein, take exceptional measures which temporarily entail the complete suspension of the exercise of a fundamental right. The expediency of such provisions cannot be challenged by the Constitutional Court, however, it is a question of constitutionality whether the restriction of rights remains within the framework of the Fundamental Law." (Reasoning [25])

[14] According to the application, "the contested provision is intended [...] to ensure the full and uninterrupted operation of the air traffic service in the current emergency situation, in order to contribute to the full implementation of the measures necessary to manage the epidemic and to mitigate and overcome its consequences, through the

continuous and uninterrupted provision of the basic national air transport infrastructure and services. During an emergency situation, as in the case of the specific legislative provision at issue in the proposal, the state of danger introduced because of the Covid19 global epidemic, the operation of critical system elements is a priority, given that they are essential for the performance of vital societal functions. The provision challenged in the present petition stipulated that no strike was to be permitted by the air traffic service provider operating a system element designated by the Minister for Defence as a national critical element in the interests of national defence and national security. This is of particular importance because a possible work stoppage during the emergency could also affect the performance of emergency-related measures (e.g. the air transport of medical equipment and supplies related to the Covid19 epidemic)."

[15] The submission referred to the provisions of section 3 (3) of the Strike Act, according to which the Strike Act itself does not allow the right to strike to be exercised if it would directly and seriously endanger life or health or prevent the fight against damage caused by natural forces. According to the submission, the Decree also facilitates the smooth performance of a number of international obligations. For these reasons, the complaint is unfounded.

II

[16] 1 According to the Fundamental Law:

"Article XVII (2) Employees, employers and their organisations shall have the right, as provided for by an Act, to negotiate with each other and conclude collective agreements, and to take collective action to defend their interests, including the right of workers to discontinue work."

[17] 2 According to the Decree:

"In addition to the organisations defined in section 3 (2) of the Act VII of 1989 on Strikes, in the interests of national defence and national security, no strike could be called the organisation responsible for the provision of the air traffic control service operating a system element designated by the sectoral designating authority as a national critical element in the interest of national defence."

III

[18] 1 According to section 56 (1) of the ACC, the Constitutional Court shall decide on the admission of a constitutional complaint acting in a panel determined in its Rules of Procedure. Pursuant to paragraph (2), the panel shall examine in its discretionary power

the content-related requirements of the admissibility of a constitutional complaint, including its affectedness pursuant to sections 26 to 27, the violation of rights guaranteed by the Fundamental Law and the conditions specified in sections 29 to 31.

[19] According to section 31 (6) of the Rules of Procedure, instead of the decision on admitting the complaint, the judge rapporteur may submit to the panel a draft containing the decision on the merits of the complaint.

[20] Although the petition refers to Article XVII (2), Article B (1) and Article C (1) of the Fundamental Law, the Constitutional Court could not examine the violation of Articles B (1) and C (1) in the present complaint proceedings because, first, these rules do not contain a right guaranteed by the Fundamental Law in the context of the complaint and, second, the violation of Articles B and C contains allegations relating to the exercise of the right to strike. The Constitutional Court therefore went on to examine Article XVII (2).

[21] 2 First of all, on the basis of Section 56 of the ACC, the Constitutional Court had to examine if the constitutional complaint fulfilled certain formal and substantial statutory conditions of admissibility. The complaint fulfils the conditions for a definite request [section 52 (1b) of the ACC], as it contains the statutory provision establishing the competence of the Constitutional Court to rule on the petition and which establishes the petitioner's entitlement [section 52 (1b) (a) of the ACC, section 26 (2) of the ACC]; the grounds for initiating the proceedings [section 52 (1b) (b) of the ACC]; the provision of the law to be examined by the Constitutional Court [section 52 (1b) (c) of the ACC; the provision of the Fundamental Law allegedly infringed [section 52 (1b) (d) of the ACC]; the reasons why the provision of the law complained of is contrary to the provisions of the Fundamental Law [section 52 (1b) (e) of the ACC]; an express request that the Constitutional Court declare that the challenged statutory provision is contrary to the Fundamental Law and annul it [section 52 (1b) (f) of the ACC]. The Constitutional Court was also required to examine whether the conditions for a constitutional complaint under section 26 (2) of the ACC could be met in the present case in relation to the challenged legislation.

[22] 3 [27] According to section 26 (2) of the ACC, the procedure of the Constitutional Court may be initiated exceptionally, if, due to the application of a provision of the law contrary to the Fundamental Law, or when such provision becomes effective, rights have been violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted its legal remedy options. According to the second turn of section 30 (1) of the ACC, the constitutional complaint may be submitted in writing not later than one hundred and eighty days after the decision being in conflict with the Fundamental Law takes effect.

[23] 3.1 The change under the Decree can be regarded as a substantive change in principle, in an abstract way, regarding the legal position of the persons covered by the law. Consequently, the Constitutional Court has held that the time-limit under section 30 (1) of the ACC with regard to the constitutional complaint submitted with regard to section 1 of the Decree has been observed in the present case.

[24] 3.2 The Constitutional Court then examined the existence of the conditions under section 26 (2) of the ACC.

[25] The primary aim of the legal institution of the constitutional complaint under both Article 24 (2) (c) and (d) of the Fundamental Law is […] individual, subjective protection of rights: providing remedy for the injury of rights caused by law or by a judicial decision, which is contrary to the Fundamental Law and which caused an actual violation of rights. [...] Being personally affected is a condition of the admissibility of the complaint, namely that the legal provision deemed by the complainant to be contrary to the Fundamental Law shall provide a rule directly, factually and actually affecting the concrete legal relationship of the complainant in person, resulting in the violation of the complainant's fundamental rights. {Decision 33/2012. (VII.17.) AB, Reasoning [61] to [62], [66]}." {Decision 3367/2012. (XII.15.) AB, Reasoning [13], [15]} Therefore, "in case of an exceptional complaint, as it is aimed directly at the norm, it is in particular important to examine affectedness, as the personal, direct and actual injury of the petitioner's fundamental right is the element that differentiates the exceptional complaint from the former version of posterior norm control, which was open to petitioning by anyone. [Section 20 (2) of the Act XXXII of 1989 on the Constitutional Court (old ACC)]" {Decision 3105/2012. (VII.26.) AB, Reasoning [3]}

[26] According to the Constitutional Court's consistent case law, with regard to the exceptional constitutional complaint, "the affectedness […] should be personal, direct and actual {see: Decision 3110/2013. (VI.4.) AB, Reasoning [27]}" Ruling 3120/2015. (VII.2.) AB, Reasoning [55]}. The affectedness of the petitioner shall not be established when the challenged provision of the law has not been applied against the petitioner or if the petitioner has not been directly affected by the relevant provision becoming effective (i.e. when the injury of rights has not taken place, it is not actual) {Decision 3170/2015. (VII. 24.) AB, Reasoning [11]}. If an implementing act of constitutive effect is needed for the enforcement of the law, the petitioner should first challenge the act of State power directly realising the injury of rights, to be followed by the indirect review of the norm as well. "The requirement of actual affectedness means that the affectedness must be actually existing at the time of submitting the constitutional complaint" {first in Decision 3110/2013. (VI.4.) AB, Reasoning [27] to [31], last reinforced in: Ruling 3123/2015. (VII.9.) AB, Reasoning [12]}. {See the summary of the case-law most recently, for example: Decision 33/2017. (VII.6.) AB, Reasoning [32] to [35]; Decision 33/2019. (XI.27.) AB, Reasoning [18] to [19]}.

[27] The petitioners referred to the fact that the persons employed by the employer covered by the Decree in the jobs affected by the Decree were preparing to exercise their right to take industrial action while observing the statutory conditions. The temporal scope of the R. extends to this planned work stoppage. The personal and direct involvement in the case can be examined. The requirement of actual, i.e. present affectedness means – according to the case-law cited above – that the affectedness of the petitioner must be actually existing at the time of submitting the constitutional complaint. The petitioners have no other legal remedy, no specific legislative action is required for the Decree to take effect, the prohibition is enforceable by operation of law. The Constitutional Court therefore held in the present case that the conditions set out in section 26 (2) of the ACC in relation to section 1 of the Decree, including the occurrence of a violation of rights, are met in the present case. The legislation alleged to be unconstitutional directly and actually affects the petitioners' person, their specific legal relationship, in a current (present) manner.

[28] 4 In the present case, the question under section 29 of the ACC is whether section 1 of the Decree deprives the persons concerned – the employees of the organisation responsible for the provision of air traffic control services – of the right to strike in accordance with Article XVII of the Fundamental Law.

IV

[29] The petition is unfounded.

[30] 1 The Constitutional Court first had to examine whether the contested provision of the Decree complies with the conditions for a restriction of fundamental rights. The first step of this is to determine how the right to strike is regulated in the Fundamental Law. Although in the interpretation of the Fundamental Law the interpretations of the legal literature referred to in the petition may, in general, be taken into account, the mandatory rules on the interpretation of the Fundamental Law can be found in Article R (3) and Article 28.

[31] The rights under Article XVII (2) – the right of workers and employers to bargain collectively, the right to conclude collective agreements, the right to take collective action in defence of their interests, including the right to strike may be exercised “as regulated in an Act of Parliament”. In its examination of the Strike Act, the Constitutional Court, interpreting Article XVII (2) and referring to its Decision 88/B/1999 AB (ABH 2006, 1188), concluded that “the right to strike is a specific fundamental right of a non-subjective nature, which is not protected as a fundamental right and therefore the law-maker is also empowered to restrict it in its regulation. However, as a right enshrined in the Fundamental Law, the regulation is not unlimited: the law-maker is

obliged to ensure the conditions for the exercise of the right to strike, and exclusion from the exercise of the right to strike is only possible in order to protect a right, value or objective formulated in the Fundamental Law and in proportion to it." {Decision 30/2012. (VI. 27.) AB, Reasoning [24]} According to the decision, it is not contrary to the Fundamental Law that the right to strike in public administration bodies can only be exercised under specific rules agreed between the Government and the trade unions concerned.

[32] The Decree does not amend the Strike Act. It is a decree issued for the emergency situation.

[33] It does not deprive the workers concerned of the right to strike in general, but prohibits the exercise of this right during the period of the special legal order. The assessment of the Decree's conflict with the Fundamental Law is therefore not governed by the general rules [Article I (3) of the Fundamental Law], but by those applicable to the special legal order [Article 54 (1)].

[34] 2 Article 54 (1) of the Fundamental Law provides that under a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I (3). Article XVII (2) of the Fundamental Law is not among the exceptions mentioned. In other words, the exercise of rights under Article XVII (2), including the right to take strike, may be suspended or restricted beyond the limits set out in Article I (3).

[35] The interpretation of Article 54 (1) of the Fundamental Law was dealt with in the Decision 23/2021 (VII.13.) AB. According to this, at the time of special legal order, the Fundamental Law allows two types of interference in the exercise of fundamental rights. On the one hand, it provides for the possibility to suspend the exercise of fundamental rights, which is essentially a strong restriction that temporarily completely prevents the exercise of the fundamental right. A less severe restriction is when the law-maker may restrict the exercise of a fundamental right beyond the limits set out in Article I (3). In both cases, the suspension or restriction may last no longer than the conditions for the imposition of the extraordinary legal order are fulfilled and the extraordinary legal order has also been promulgated. In this respect, the guarantee of proportionality is thus realised in the conceptually definite temporality of the measure (Reasoning [24] to [28]).

[36] As pointed out in the Decision 15/2021 (V.13.) AB: "it was not the intention of the constitution-making body to authorise the law-maker during a special legal order either to impose a restriction on a fundamental right that is not linked to the control of the danger, or to restrict certain fundamental rights more than is justified by the exceptional circumstances. Unlimited or unrestricted power is inherently contrary to

the spirit of the Fundamental Law, even during a special legal order." (Reasoning [33]) In the case in question, the Constitutional Court concluded that the "rule restricting a fundamental right in the government decree on the state of danger may be made subject to a substantive constitutional review" (Reasoning [37]). In times of special legal order, the law-maker may, pursuant to Article 54 (1) of the Fundamental Law, and apart from the exceptions provided for therein, take exceptional measures which temporarily entail the complete suspension of the exercise of a fundamental right. The expediency of such provisions cannot be challenged by the Constitutional Court, however, it is a question of constitutionality whether the restriction of rights remains within the framework of the Fundamental Law.

[37] With regard to the necessity of the restriction of the fundamental right, it can be stated that the right to strike, according to the wording of Article XVII (2) of the Fundamental Law, inherently includes the right to strike within the limits of the law, and the exercise of this right is possible within the limits of the law. In general, one type of these limits is related to the service affected by the work stoppage (e.g. essential services that meet a public need), another type may contain restrictive rules regarding the subject matter (e.g. certain public employees, for whom the law regulates certain elements of their legal status, i.e. their legal status is not in general a matter of agreement between employer and employee).

[38] In the case of a work stoppage, a strike is unlawful without the provision of "still sufficient services" under the Strike Act [section 4 (2)]. The "still sufficient service rule" restricts the exercise of the right to strike at the employers whose operation is essential to the basic interests of the society (e.g. public transport, energy services, telecommunications). There are three ways of determining whether a service is still sufficient: legislation, agreement between the parties and, in the absence of such agreement, a finding by the courts, as in the present case.

[39] The fact that "still sufficient service" and the maintenance of the proper functioning of the employer or the uninterrupted performance of a public task are not identical concepts is clear from the legal institution of strike as a means of asserting interests. Strike is an obstacle to the maintenance of the proper functioning of the employer. There may be a public task the uninterrupted performance of which is in general of greater interest than the exercise of the right of the workers concerned to strike. Defending against the coronavirus epidemic may involve restricting or suspending the exercise of a number of fundamental rights. The rules laid down in the Fundamental Law applicable to a special legal order empower the Government during the state of danger to determine the measures necessary to overcome the emergency and restore normal functioning.

[40] It is primarily a question of expediency to assess what measures are necessary to combat the coronavirus epidemic. In the course of the constitutional review, the Constitutional Court may not examine the expediency of the restrictions, but it can examine whether the rule restricting the fundamental right is justified with account to defence against the danger. In the framework of the examination, the Constitutional Court must ascertain whether the challenged regulation is suitable to prevent or mitigate the circumstances giving rise to the introduction of the special legal order. If the appropriateness of the measure is not justified, the suspension or restriction of the fundamental right does not meet the requirements derived from Article 54 (1) and Article I (3) of the Fundamental Law.

[41] 3 The scope of the Decree concerns an essential service fulfilling a public demand – the provision of air traffic control services. As regards the scope of subjects, it applies to persons with a special status, i.e. employees working for an organisation designated as a national critical control element in the interest of national defence, operating an element responsible for the provision of air traffic control services.

[42] In the present case, in the light of the above, it cannot be stated on the basis of the petition that section 1 of the Decree is not suitable to contribute to the combating of the emergency in the time of the special legal order. As also indicated in the submission of the competent minister, the purpose of the Decree is to ensure the full and uninterrupted operation of the air traffic service during the presently existing state of danger, in order to contribute to the full implementation of the measures necessary to manage the epidemic and to mitigate and combat its consequences through the continuous and uninterrupted provision of basic national aviation infrastructure and services. The absence of this, the "provision of still sufficient services" under the Strike Act, may entail a risk which does not make it unnecessary to prohibit the exercise of the right to strike during the state of danger as provided for in the Decree.

[43] 4 Considering the above, the Constitutional Court rejected the constitutional complaint.

Budapest, 08 February 2022.

Dr. Balázs Schanda head of the panel,
Justice of the Constitutional Court

Dr. Balázs Schanda head of the panel, Justice of the Constitutional Court on behalf of rapporteur Justice *dr. Tünde Handó* unable to sign

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

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

Justice of the Constitutional Court on behalf of Justice *dr. Béla Pokol* unable to sign