Decision 30/2012 (VI. 27.) AB

In a procedure for an *ex post* review of unconstitutionality by non-conformity with the Fundamental Law of a statute and for the determination of the unconstitutionality by omission manifested in non-conformity with the Fundamental Law of a legislative duty, with the concurring reasoning by Dr. Elemér Balogh, Dr. András Holló, Dr. Péter Kovács and Dr. Miklós Lévay, Justices of the Constitutional Court as well as the dissenting opinions of Dr. András Bragyova, Dr. László Kiss, Dr. Péter Paczolay and Dr. István Stumpf, Justices of the Constitutional Court, the Constitutional Court, sitting as the Full Court, has passed the following

decision:

The Constitutional Court hereby dismissed the petition for a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the second sentence of Section 3 (2) of Act VII of 1989 on Strikes and for the establishment of unconstitutionality by omission manifested in non-conformity with the Fundamental Law of a legislative duty.

The Constitutional Court shall publish its decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1.1 The Parliamentary Commissioner for Citizens' Rights initiated before the Constitutional Court to declare the second sentence of Section 3 (2) of Act VII of 1989 on Strikes (hereinafter referred to as the "Act on Strike") unconstitutional and to annul such provision. In the view set out in his petition, the restriction on the right to strike, which left the determination of the rules governing the exercise of the right to strike in relation to State administration bodies to an agreement between the Government and the trade unions concerned, infringed Article 8 (2) of the Constitution. The Parliamentary Commissioner for Citizens' Rights saw a breach of the legal certainty attached to the rule of law declared in Article 2 (1) of the Constitution in the wording of the term "State administration bodies", which, in his view, was unclear as to which categories of civil servants were covered.

[2] The Parliamentary Commissioner for Citizens' Rights requested a finding of unconstitutionality in the form of omission in violation of Article 2 (1), Article 8 (2) and Article 70/C (2) of the Constitution on the grounds that the Act on Strike (a) does not clearly define the scope of those entitled to exercise the right to strike, (b) does not define the concept of a "solidarity strike" and the conditions for its exercise, (c) does not contain any guarantee rules for the conduct of the conciliation procedure, (d) does not define "sufficient service" and (e) does not contain any provision on the "time and manner" at which a strike must be notified.

[3] 1.2 At the request of the Constitutional Court, the successor of the Parliamentary Commissioner for Citizens' Rights, the Commissioner for Fundamental Rights, upheld the petition as follows.

[4] He requested that the Constitutional Court annul the second sentence of Section 3 (2) of the Act on Strike, as amended in the meantime, as it "is contrary to Article B (1) of the Fundamental Law (the principle of the rule of law and the consequent requirement of legal certainty), Article I (3) of the Fundamental Law and Article XVII (2) of the Fundamental Law (the right to strike)". He argues that 'the exercise of the right to strike cannot be the subject of an agreement between the Government and the trade unions concerned, since the essential content of the right to strike can only be limited by law'.

[5] The Commissioner also sought a finding of an infringement of the Fundamental Law by reason of the fact that the Act on Strike (a) does not provide sufficient clarity on the scope of the persons entitled to exercise the right to strike, (b) does not define the notion of what is known as the "solidarity strike", (c) it does not contain the basic guarantee rules for the conduct of the conciliation procedure and (d) there is no provision on the time and manner of notification of the strike before the strike is called. According to the Commissioner, this is in breach of Articles B (1), I (3) and XVII (2) of the Fundamental Law. As grounds for the infringement of the Fundamental Law, he requested that account be taken of the grounds set out in his first petition.

[6] 1.3. In the light of Section 71 (1) and (2) and Section 73 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the Constitutional Court reviewed the merits of the petition of the Commissioner for Fundamental Rights.

II

[7] 1. The relevant provisions of the Fundamental Law read as follows:

"Article B

[8] (1) Hungary shall be an independent, democratic State governed by the rule of law."

"Article I

[9] (3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

"Article XVII

[10] (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."

[11] 2. The relevant provision of the Act on Strike reads as follows:

[12] "Article 3 (2) There shall be no strikes in the judiciary, the Hungarian Defence Forces, law enforcement, law enforcement agencies and civil national security services. The right to strike may be exercised at State administration bodies under specific rules laid down in an agreement between the Government and the trade unions concerned, but professional staff at the National Tax and Customs Administration shall not be entitled to exercise the right to strike."

III

[13] The petition is unfounded.

[14] 1.1 The Constitutional Court has already taken a position on the continued applicability of its decisions taken prior to the entry into force of the Fundamental Law. It has emphasised that, according to the Fundamental Law, "[t]he Constitutional Court's duty lies in the protection of the Fundamental Law. The Constitutional Court may apply in new cases the arguments connected to the issues of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law took effect, provided that it is possible on the basis of the specific provisions, having identical or similar content as that of the previous Constitution, and of the rules of interpretation of the Fundamental Law. Performing its specific competences, the Constitutional Court interprets the constitution, even if it is not an abstract one as in the competence under Section 38 (1) of Constitutional Court Act, and it is related to the review of a statute or a judicial decision. The Constitutional Court's interpretation of certain institutions, principles and provisions can be found in its decisions. The Constitutional Court's findings made on the fundamental values, human rights and freedoms and on the constitutional institutions that have not been altered fundamentally by the Fundamental Law shall retain their validity. The principal findings expressed in the Constitutional Court's decisions based on the previous Constitution shall remain applicable as appropriate also in the decisions interpreting the Fundamental Law. However, the findings made in the decisions based on the previous Constitution cannot be taken over automatically without any assessment, but requires a comparison and careful consideration of the relevant rules of the previous Constitution and the Fundamental Law. If the comparison results in establishing that the constitutional regulation has not been changed or it is substantially similar to the previous one, then the interpretation can be transposed. On the other hand, in the case of the substantive concurrence of certain provisions of the previous Constitution and the Fundamental Law, it is not the adoption of the legal principles appearing in the previous decision of the Constitutional Court that must be justified, but their disregard." [Decision 22/2012 (V. 11.) AB, Hungarian Official Gazette 2012,Issue No 57, 9737, 9737-9740.].

[15] 1.2. The Commissioner for Fundamental Rights based the unconstitutionality of the second sentence of Section 3 (2) of the Act on Strike on the contradiction with Article B (1), Articles I and XVII of the Fundamental Law. The Constitutional Court first reviewed the provisions of Fundamental Law and the constitutional provisions relied on, since the second petition referred back to the first petition.

[16] Article B (1) of the Fundamental Law and Article 2 (1) of the Constitution declare what is known as the rule of law clause.

[17] Article I of the Fundamental Law is identical in wording to Article 8 (2) of the Constitution in that the rules on fundamental rights and obligations must be laid down by law. Article 8 (2) of the Constitution stated that the essential content of a fundamental right could not be restricted by law. The Constitutional Court, however, formulated further requirements for the restriction in the so-called fundamental rights test, the essence of which is that "[t]he State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In adopting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a compelling reason is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171]. The Fundamental Law essentially follows this interpretation when it provides that a fundamental right may be restricted to the extent strictly necessary and proportionate to the objective pursued in order to ensure the exercise of another fundamental right or to protect a constitutional value. There is also a similarity of content between Article I of the Fundamental Law and Article 8 (2) of the Constitution as regards the protection of essential content.

[18] There is no substantive difference in the regulation of the right to strike. Under both the Fundamental Law and the Constitution, the right to strike (or to discontinue work) is regulated by law.

[19] In view of this, the Constitutional Court based its decision on the practice it has followed in the course of the review of the petition.

[20] 2.1. The Constitutional Court has already reviewed the restriction (exclusion) of the right to strike from several aspects on several occasions.

[21] In its Decision 88/B/1999 AB (ABH 2006, 1188.), the Constitutional Court summarised that the right to strike is placed among economic and social rights in the chapter regulating fundamental rights and obligations. As held by the Constitutional Court, "under Article 70/C (2) of the Constitution, the right to strike is a specific constitutional right which, by virtue of the provisions of the Constitution, may be exercised by law, within the limits of the law regulating it". It follows from this way of regulating the Constitution that the legislature has greater

freedom to regulate the right to strike than in the case of other fundamental constitutional rights of a substantive nature. The right to strike is not a fundamental right of a substantive nature and is not protected by the provision of Article 8 (2) of the Constitution; therefore, in regulating the right to strike the legislature also has a broader power to restrict the right to strike. However, this does not mean that this power of the legislature is without constitutional limits. It follows from the fact that the right to strike is a right regulated by the Constitution that the legislature is obliged to ensure the conditions for the exercise of the right to strike, and that exclusion from the exercise of the right to strike is only possible for constitutional reasons, in order to protect a constitutional right, a constitutional value or a constitutional objective." (ABH 2006, 1188, 1195.) In this decision, the Constitutional Court did not find the prohibition of strikes for civil servants and public employees belonging to the staff of these bodies unconstitutional, in view of the specific tasks performed by the defence and law enforcement bodies, which are manifested in the protection of constitutional order and fundamental human rights (ABH 2006, 1188).

[22] The Constitutional Court took a similar position on the exclusion of the right to strike with regard to judicial bodies in its Decision 673/B/1990 AB. The Constitutional Court explained that a strike by members of the judiciary would jeopardise or, in more serious cases, actually prevent the exercise of the fundamental rights of others. The protection of citizens' rights, the effectiveness of that protection and the guarantee of that protection require a far-reaching restriction, in practice the abolition, of the right of members of the judiciary to strike, without which the protection of the fundamental rights of others cannot be guaranteed (ABH 1992, 446, 447-448).

[23] 2.2. Under the provision reviewed in the present case, the right to strike may be exercised in State administration bodies, but only under specific rules laid down in an agreement between the Government and the trade unions concerned. According to the Commissioner for Fundamental Rights, that restriction is unconstitutional because it is not laid down by law.

[24] The Constitutional Court, in the light of the already cited Decision of 88/B/1999 AB (ABH 2006, 1188.), proceeded from the fact that the right to strike is a specific fundamental right of a non-subjective nature, which is not protected by fundamental rights, and therefore the legislator has the power to limit it in the course of its regulation. However, as it is a right enshrined in the Fundamental Law, the regulation is not unlimited: The legislator 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.

[25] In this case, the Constitutional Court found, first of all, that the interest in the smooth and continuous functioning of the State administration bodies performing the functions of the executive is a valid justification for restricting the right to strike. The Constitutional Court did not find that the legal solution which left the determination of the conditions to the agreement of the Government and the trade unions concerned was in itself problematic from the point of view of the Fundamental Law. (This agreement was concluded by the Government with the Federation of Public Service Trade Unions, the Union of Public Employees, the Union of Internal

Affairs Workers, the National Council of Tax and Finance Workers, the Union of Social Insurance Workers and the Public Health Workers' Union in 1994. The National Association of Municipalities, the Association of Hungarian Villages, the Association of Small Towns, the Association of Towns with County Rights, the National Association of County Municipalities, the Association of Hungarian Municipalities and Local Government Representatives and the National Association of Municipalities, all joined the agreement. The Agreement was published in the Hungarian Official Gazette No. 8 of 1994.) The Constitutional Court has held from the outset that "not every connection with fundamental rights requires regulation at the level of an Act of Parliament. The definition of the content of a fundamental right and the establishment of its essential guarantees can only be made by an Act, and an Act is also required for a direct and significant restriction of a fundamental right. However, in the case of an indirect and remote connection, the level of regulation is sufficient. If not, everything would have to be regulated by law" [Decision 64/1991 (XII.17.) AB, ABH 1991, 297, 300]. The contested provision of the Act on Strike does not exclude the right to strike in respect of public administration bodies. The Constitutional Court held that it is not possible to lay down all the detailed rules for the exercise of the right to strike at the level of a statute alone. In particular, the participation of the persons concerned in the definition of the conditions is not objectionable. In the light of the above, the Constitutional Court did not find that there was any infringement of the Constitution in this respect.

[26] 2.3 According to the Commissioner for Fundamental Rights, the wording "State administration bodies" in Section 3 (2) of the Act on Strike is unclear, which violates legal certainty. In the view of the Constitutional Court, legal certainty, which is part of the rule of law, "does not imply an obligation on the part of the legislature to define each concept separately in each piece of legislation. If an element of the legal system already contains a definition of a given concept, it is also valid in the application of other legislation, unless otherwise provided" [Decision 71/2002 (XII. 17.) AB, ABH 2002, 417, 424]. Since the scope of State administration bodies is defined in the legislation in force by several legal acts, such as Section 1 (2) to (4) of Act XLIII of 2010 on Central State Administration Bodies and the Status of Members of the Government and State Secretaries No, Section 2 (8) (c) of Act V of 2012 on the transitional, amending and repealing rules related to the Act on Civil Servants and amending certain related acts, and therefore the Constitutional Court did not find a violation of Article B of the Fundamental Law.

[27] In view of the above, the Constitutional Court dismissed the petition in this part.

[28] 3. The Commissioner for Fundamental Rights has taken the initiative to declare unconstitutionality by omission in several cases. Pursuant to Section 71 (2) of the Constitutional Court Act, all proceedings for the termination of unconstitutionality by omission ceased to exist as of 1 January 2012, unless the petitioner was the Government, a quarter of the Members of Parliament or the Commissioner for Fundamental Rights. The Constitutional Court therefore reviewed the merits of the petition of the Commissioner for Fundamental Rights in the present case.

[29] The Commissioner for Fundamental Rights based the violation of the Fundamental Law on the fact that the legislator did not regulate certain issues in the Act on Strike or did not

regulate them properly. The Act on Strike has been amended by the legislature in the meantime. It is the consistent practice of the Constitutional Court to assess the provisions in force in the context of *ex post* review of legislation (Order 36/J/1990 AB, ABH 1991, 669, 671), and therefore it conducted its examination with regard to the legislation in force at the time of the assessment.

[30] Pursuant to Section 49 (1) of Act XXXII of 1989 on the Constitutional Court, the Constitutional Court has established the unconstitutionality of the omission if the legislative body has failed to perform its legislative duties arising from the legislative mandate and has thus caused unconstitutionality. The Constitutional Court has consistently held that the legislative omission and the unconstitutional situation must coexist [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232]. Failure to perform a legislative function does not necessarily in itself constitute unconstitutionality [Decision 14/1996 (IV. 24.) AB, ABH 1996, 56, 58-59; AB Decision 479/E/1997 AB, ABH 1998, 967, 968-969; Decision 1080/D/1997 AB, ABH 1998, 1045, 1046; Decision 10/2001 (IV. 12.) AB, ABH 2001, 123, 131]. The unconstitutional situation resulting from the omission can always be established as a result of a specific review [Decision 35/2004 (X. 6.) AB, ABH 2004, 504, 508]. One of the cases of unconstitutionality in omission is when the legislator has not regulated the content of the law in an appropriate manner, thereby creating an unconstitutional situation [Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138; Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 63].

[31] The Commissioner for Fundamental Rights found a legislative omission in violation of Article B (1), Article I (3) and Article XVII (2) of the Fundamental Law in that the Act on Strike (a) does not provide sufficient clarity on the scope of those entitled to exercise the right to strike, (b) does not define the so-called "solidarity strike", (c) does not contain basic guarantee rules for the conduct of the conciliation procedure and (d) does not contain any provisions on the time and manner of the notification of the strike before the strike is called. The Constitutional Court reviewed the issues raised by the Commissioner individually in the light of the legislation in force. The Constitutional Court's review was aimed at establishing whether the lack of regulation is indispensable for the proper exercise of the right to strike and, if so, whether the lack of regulation results in a violation of the Fundamental Law, in particular in view of the legislative objective, set out in the explanatory memorandum to the draft Act, that the Act on Strike, in accordance with international practice, "only concerns the most general issues, since detailed regulation would inevitably lead to problems of application of the law". The Constitutional Court further notes that in its Decision 88/B/1999 AB, it was precisely in the course of its review of Section 3 (2) of the Act on Strike that the Constitutional Court found, with general reasoning, that the Act on Strike "regulates the scope of the persons entitled to exercise the right to strike, the purposes for which it is possible to strike, regulates the substantive and procedural conditions of a lawful strike, establishes the enforcement of the right to strike, the guarantee provisions ensuring the protection of the participants in a lawful strike, and determines the cases in which a strike is deemed unlawful" (ABH 2006, 1188, 1195).

[32] 3.1 According to the Fundamental Rights Commissioner, the scope of those entitled to exercise the right to strike, including those entitled to initiate and participate in strikes, is unclear. The Act on Strike uses the term "workers" as the subject entitled to exercise the right

to strike. This is a general term, which the Constitutional Court has found to be clear, and includes all persons working in an employment relationship. And the right to strike covers both the right to initiate a strike and the right to take part in a strike. In its Decision 55/2001 (XI. 29.) AB (ABH 2001, 442), the Constitutional Court pointed out, in connection with the use of general concepts, that "for the clarity and transparency of statutes, the legislature is advised to refrain from providing a full list of situations to which a specific provision of a statute is to be applied; the continuous development and changing of situations in life would make the exhaustive listing of such situations impossible. And if the scope of the Act was extended again and again to include new situations originally not enumerated, or possibly even inconceivable, by the legislature, this would result in a series of inevitable amendments to the Act, endangering legal certainty as one of the elements of the rule of law declared in Article 2 (1) of the Constitution. Therefore, no constitutional concern may be raised against the mere fact that the legislature applies general concepts" (ABH 2001, 442, 461). In the light of the above, the Constitutional Court dismissed the petition as unfounded in this part.

[33] 3.2 In the context of the omission regarding strike in solidarity, the Constitutional Court first of all refers again to the explanatory memorandum to the draft of the Act on Strike, according to which the specific regulation of the solidarity strike was an explicit legislative objective, given that "this type of strike may also cause disadvantages for an employer who has no possibility to remedy the strike claim, a special guarantee regarding the legality of the strike is justified. Therefore, such a strike can only be initiated by the trade union". Although the concept is not defined in the law, its meaning is clear in the public mind, a strike for what is known as a foreign cause is a strike in solidarity or sympathy (*see* for actual case law: ECJ2005. 1253, Official Collection of Supreme Court Decisions 2005/1). According to the Constitutional Court, the mere fact that 'the legal system does not define certain concepts and expressions which have been introduced in both legal and common language does not in itself result in either incomprehensibility or an arbitrary application of the law' (Decision 460/E/2000 AB, ABH 2008, 1726, 1734; *see* also Decision 983/B/2009 AB, ABK November 2011, 1149, 1151; Decision 145/B/2000 AB, ABH 2008, 1655, 1667-1670).

[34] The Constitutional Court therefore did not find that there was any infringement of the Fundamental Law in this respect either.

[35] 3.3. In connection with the regulatory deficiencies of the conciliation procedure, the Constitutional Court notes that the legislator clarified the "confusing" legal reference after the submission of the original petition, which provides for "conciliation held in the collective labour dispute concerning the disputed issue" instead of "conciliation procedure concerning the disputed issue". The rules on collective labour disputes are contained in both the sectoral laws laying down general labour law rules (Sections 194/G to 197 of Act XXII of 1992 on the Labour Code) and the sectoral laws containing specific labour law rules. There was therefore no failure to fulfil the legislative task in this respect.

[36] 3.4 Similarly, the Constitutional Court did not find the petition lacking rules on the time and manner of the announcement of the strike to be well-founded. According to the Constitutional Court, the exercise of the right to strike does not necessarily require a statutory definition of the time and manner of the announcement of the strike following the conciliation

procedure. "It is for the legislature to decide whether and in what detail it regulates a particular situation. From this point of view, a question of constitutionality arises only if the inadequacy of the regulation impedes the exercise of a fundamental right or a constitutional principle declared in the Constitution" (Decision 1621/E/1992 AB, ABH 1993, 765, 766).

[37] On the basis of the above, the Constitutional Court dismissed the petition seeking a finding of unconstitutionality by omission manifested in non-conformity with the Fundamental Law of a legislative duty.

[38] The publication of the Decision in the Hungarian Official Gazette is based on Section 44 (1) of the Constitutional Court Act.

Budapest, 26 June 2012

Dr. Péter Paczolay, sgd.,

Chief Justice of the Constitutional Court

Dr. Elemér Balogh, sgd.,

Justice of the Constitutional Court

Dr. István Balsai, sgd.,

Justice of the Constitutional Court

Dr. András Bragyova, sgd.,

Justice of the Constitutional Court

Dr Dienes-Oehm Egon, sgd.,

Justice of the Constitutional Court

Dr. András Holló, sgd.,

Justice of the Constitutional Court

Dr. László Kiss, sgd.,

Justice of the Constitutional Court

Dr. Péter Kovács, sgd.,

Justice of the Constitutional Court, Justice-Rapporteur

Dr. Barnabás Lenkovics, sgd.,

Justice of the Constitutional Court

Dr. Miklós Lévay, sgd.,

Justice of the Constitutional Court

Dr. Béla Pokol, sgd.,

Justice of the Constitutional Court

Dr. István Stumpf, sgd.,

Justice of the Constitutional Court

Dr. Péter Szalay, sgd.,

Justice of the Constitutional Court

Dr. Mária Szívós, sgd.,

Justice of the Constitutional Court