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Expression of opinion through Acts.

A brief analysis of the Hungarian Constitutional Courts practice

Summary: The aim of the article is to present how one can exercise their freedom of expression through acts. I focus on the decisions of the Hungarian Constitutional Court, the European Court of Human Rights and the U. S. Supreme court. I analyze these decisions, and compare the fundamental rights that can collide, such as freedom of expression versus the right to property, which one should prevail when they come into collision. I also study how one can decide, whether the act should fall within the protected circle of the freedom of expression, or it should be penalized as a crime, or misdemeanor.

Keywords: freedom of speech, freedom of expression, expression of opinion through act, physical expression of opinion

1. Introduction

As most of today's great debate topics, freedom of expression as a topic has been around since the ancient Greeks' time. It's a topic which sparked enormous debate amongst legal philosophers, supreme court justices, politicians and common people as well. However, when one thinks about freedom of expression, the most common thought that comes into most people's minds is freedom of speech. Freedom of expression does not only focus on one's ability to say what one wants. There are many other forms of communication that fall within the protected field of freedom of expression. Article 19 1. of the International Covenant on Civil and Political Rights (called hereinafter ICCPR) states that everyone shall have the right to freedom of expression, " ... either orally, in writing or in print, in the form of art, or through any other media of his choice." This phrase implies that one can express their opinion not only in speech, but in almost any form that respects the rights or reputation of others, or does not infringe national security, public order, health or morals.

The other reason why I chose this topic is the fact that society is becoming more and more insensitive and irresponsible to traditional ways of expressing opinion. This means the following: when one wants to express a radical opinion, or wants to draw attention to their point of view concerning an everyday topic, they get better results when doing so by using an irregular

method. Such an irregular method can be e. g. painting a statue, graffiti, throwing eggs on a billboard, and countless other ways. The reason of this senselessness is the fact that the internet and social media platforms give us access to unlimited content which, for the major part, is uncensored. The danger, however, of this unfiltered content is that radical opinions spread as fast as everyday content does. Getting access to such radical content causes people to develop a sort of "personal filter" that helps them separate content which they want to consume from content they do not. However, this filter does not apply when consuming online content. People nowadays are not as well influenced by traditional ways of deliverance as they are by the upper mentioned irregular, more unusual and extreme ways. When one wanted to share their political opinion a few decades ago, one could organise a rally, a protest or could simply print out some pamphlets or billboard ads. Yet in today's society people rarely give a glimpse to billboards, let alone pamphlets or flyers. This is why some people choose to express their opinion in ways that make others look twice or can even scare them...

Allow me to express that these are my own ideas which I found important to share before starting the further analysis of the topic. Also that it is not my task to start a discourse on how free media and free social platforms influence thinking. The previous flow of thoughts is just a basic reasoning on why expression of opinion through acts (or physical expression of opinion) have become a relevant issue in today's legal debate, and why the regulation is still in its early days.

2. Freedom of Expression – in general

Freedom of speech, conscience and expression of belief have been on the minds of philosophers and thinkers for centuries. After the ancient Greek democracy the question of freedom of expression came forth in the middle ages, when freedom of religion became a crucial topic. Following the "Dark Ages", the age of Renaissance and then the Enlightenment brought a new era of thinking and a fresh point of view for freedom of expression. The spread of modern democracies brought the crucial need to protect fundamental human rights; hence freedom of speech and expression were renewed following the Second World War.¹

The protection of free speech and freedom of expression has two very important aspects that we shall see as we analyse the cases. The force of this protection decides whether a spoken opinion or communicative act has to be judged by the rules of freedom of speech or expression. The protection itself helps us to decide whether the insurance granted in the Fundamental Law

¹ A. Koltay, *A szólásszabadság alapvonalai magyar, angol, amerikai és európai összehasonlításban*. Budapest, Századvég Kiadó, 2009.

(the present Hungarian Constitution) protects the spoken opinion or communicative act from state limitations and regulations.²

3. Instrumental Approach – Serving Democracy

According to Plato, in democracy "... people are free, the State is full of freedom and freedom of expression, and everyone can do as they wish". Without the freedom of expression, citizens cannot fully participate in public debates. Democratic governance needs its citizens to be able to debate freely, and with no limitations almost. With said freedom, people are able to participate in public affairs, their opinions can collide and can be argued out to a conclusion. This justification sees the freedom of expression in a utilitarian way. It is seen as a tool, which helps people decide on public manners. Freedom of speech or expression is seen here not as a private right, but as something that exists for the benefit of the whole society, something that helps citizens to move together towards a better way of self-governance. John Stuart Mill's and Jeremy Bentham's opinion is that good governance can only be achieved through freedom of speech.

Alexander Meiklejohn was the first philosopher to justify the democratic approach to freedom of expression. He argued that the main purpose is for the people to take part in public discussion and decision making. Briefly said: the purpose of this right is to create the possibility of democratic self-government.

Meiklejohn further stated that expressions and saying as such can be divided in two groups. The first group of sayings/utterances contains those that carry political opinions. These enjoy a lower level of protection, for, according to this justification, they have a role in forming democratic opinions. The second group of saying contains those that are not needed in deciding over political matters and have no or neglectable impact on political decision making and self-government. These can be limited in a stricter way.

All in all, democratic justification sees sayings as tools that help achieving a greater purpose. The beforementioned greater purpose is not a certain mighty idea, but the democratic and uninterrupted operation of society.

Historically, the first justification of freedom of expression stated that truth can only be established when all opinions are allowed to collide freely. The first author to use this approach when arguing for freedom of speech and expression was John Milton. In his book, *Areopagitica*, published in 1644, he argued that free speech is needed, as restricting that limits God's love and

² B. Török, *A szólásszabadság magyar doktrínája az amerikai jogirodalom tükrében*. Doktori (PhD) értekezés. Szeged, 2018.

will from spreading. Furthermore, putting restraints on exercising free speech restricts scientific minds from flourishing. As we can see, Milton approached justification for freedom of expression from a theological point of view.

In his book entitled *On Liberty*, John Stuart Mill stated, that discovering and finding truth is a premise that is needed for society to progress. It is a fundamental value that all must respect in order to live in peace and for people to progress towards a better community. It cannot be allowed that limitations come into force concerning free speech, for no man is infallible, no one can be unquestionably sure of what one says or of what one thinks the truth is. By restricting some opinions, the possibility rises that an opinion that could not be heard was the one bearing the truth. He also wrote about how tolerance is required for free speech to fulfill its real purpose. When an idea becomes so widely accepted that it no longer is the subject of discussion and argument, it becomes a dead doctrine. People start accepting it because other people do so; when it is no longer acceptable in the actual time or place, due to the time passed, for example. This is the reason why legislators have to be extremely careful about limitations of freedom of expression.

Critics of Mill's theory argued that the author put too much emphasis on the importance of public discussion. Even when living in complete freedom, only a small part of citizens take part in said discussion. The larger part do not care; or, even if they do, they do not care enough to take action or to speak up. The other argument states that open public discussion does not necessarily lead to finding the truth.

The other justification of freedom of speech or expression focuses on the individual. The most important part of this approach is that right to free speech is part of the autonomous person's own self; it is necessary for people to develop their personalities. Here we see freedom of expression as both an individual value and a tool.

It is an individual value that exists only to achieve a greater goal. People are granted freedom of expression or speech because, when people live in freedom, they tend to have a better chance to create a better life for themselves. Free speech is part of the freedom as defined above. Ronald Dworkin argues that people have this right because the State has to see every single individual as a responsible, ethical being.³

³ R. Dworkin, *Freedom's law. The moral reading of the American constitution*. Oxford University Press, 1996. 199-202. and Ronald Dworkin: *Taking rights seriously*. Cambridge, Massachusetts, Harvard University Press, 1977. 366-278., 364-368.

It is also a tool that helps people in the development of their personalities. It is through free speech that one can gain access to all opinions, one can decide which to follow, which to reject and one can also enter into arguments with others.

Democracy working efficiently or truth-finding are not individual values either; they are both tools that help people achieve their goals by and to accomplish their self.

The purpose of this brief summary was to give an overall understanding of the most common ways to perceive freedom of expression and speech. I have read several articles and book chapters in the topic, still I have not done a complete, thorough investigation. I have not done so because this article focuses primarily on expression of opinion through acts (or physical expression of opinion). The aforementioned justifications for freedom of expression give us sufficient background to start analysing the practice of the Hungarian Constitutional Court.

In the following chapters I shall examine three cases by briefly presenting the case facts, analyse the reasoning of the Court and additional opinions and summarize my findings.

4. Decision 1/2019 (Ii. 13.) Ab of the Constitutional Court

The court of first instance laid down the facts of the case in the ruling as it follows. The applicants threw balloons filled with orange paint at the Soviet military memorial located on Szabadság Square, in the 5th district of Budapest. This action left spots of paint on the surface of the memorial, but they did not leave a permanent mark, as the water-based paint could easily be removed when washed with water.

The petitioners were detained for the minor offence of public nuisance; in their testimony they held that even though they had committed the act described in the police report, it did not qualify as a minor offence; they were exercising their right to freedom of expression. They did not intend to cause any permanent damage to the memorial and they did not do so. Their intention was to raise public attention by expressing their political opinion.

The court of first instance found them guilty of the minor offence of public nuisance stated in Section 170 of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System (hereinafter: AO). The court argued that the act was anti-social, broke the norms of living together in a society and could cause indignation and fright. Thus the petitioners were sentenced to pay a fine of 30.000 HUF.

The Court of Appeal maintained the ruling in force. The Court held that there is a possibility for expressing opinion through acts, but in this case it was not obvious that the act was meant to exercise their fundamental right to freedom of expression. Even though one of the two

perpetrators told the passerby what was happening, the Court stated that explaining the act is not sufficient.

Following the Appeal Court's decision, the petitioners submitted a constitutional complaint aimed at establishing the lack of conformity with the Fundamental Law and annulling the Court's decision. In said complaint the applicants argued that the verdict is in contradiction with the Fundamental Law, and thus violates their right to freedom of expression. They argued that the Court misinterpreted the fundamental right to freedom of expression and the conceptual elements of public nuisance. The goal of their action was to express their political opinion in a form that is more efficient. They chose physical expression of opinion because they believed that traditional ways are not able to attract enough attention. They also added that public nuisance has two conceptual elements: one being a conduct that is anti-social. The other one is the potential of the act to frighten or indignate others. The act did not fall within the scope of the first element, since an opinion itself cannot be anti-social, and criticising the government is an inherent part of democracy. Concerning the second element, someone being frightened or scared by an act is a state of mind that depends on the tolerance of the person; thus it cannot be judged objectively. Public order is an abstract value, the applicants stated, and is less important in democracy than expressing one's political opinion.

The constitutional complaint is not well-founded. The Constitutional Court stated that it does not have authority to analyse the facts of the case; that is a task for the Court of First Instance. The Constitutional Court did not qualify this act as physical expression of opinion. It should have been unambiguously interpreted as an act of expression of opinion for any third person present.

The Supreme Court of the United States has published a similar approach to expressing opinion through acts in the case *Spence v. Washington*⁴. The applicant displayed a flag of the United States with a peace symbol taped to it upside down. The Supreme Court stated that free speech can be applied when the perpetrators' purpose is to transfer a message and this message can be interpreted unequivocally by those that encounter it. As we see, the Constitutional Court has a similar requirement.

The other case that the Court brings up is the case *Murat Vural v. Turkey*⁵ of the European Court of Human Rights (hereinafter: ECHR). Here the petitioner poured paint on statues of Kemal Atatürk, a former politician and freedom fighter in Turkey. The ECHR has named two

⁴ United States Supreme Court, *Spence v. Washington*, 418. U. S. 405. No. 72-1690, Argued January 9, 1974 – Decided June 25, 1974.

⁵ European Court of Human Rights, *Murat Vural v. Turkey*, Application No. 9540/07 – October 25, 2014.

criteria that need to be met for an act to be regarded as physical expression of opinion. The first requirement is to examine the motives and intentions of the perpetrator, and the second one is for the act to be judged objectively.

Expression of opinion has two interpretations. The first is the approach of constitutional law. The Hungarian Fundamental Law states in Article IX that everyone has the right to freedom of expression. This passage does not embody every possible way of expressing an opinion. It does, however, contain reference to the fact that it is not only possible to transmit an opinion in speech or through written word, but also by other means. The other interpretation is an everyday, common understanding. This contains every other ways possible; from basic ways, such as speech or writing, to more unusual ones, like clothes, hairstyles, symbols, or even actions. The reason why the second understanding is crucial is because citizens take part in public discussion in more than one way possible. The constitutional elements of freedom of expression are needed to validate other ways of communication that happen in the course of public discussion.

The most important question is that one must be aware when expressing one's opinion physically regarding the right to freedom of expression and other fundamental rights especially the right to property, right to artistic freedom and the integrity of democratic or public discussion. The Hungarian Fundamental Law allows a fundamental human right to be limited if and only if it is (firstly) necessary for an other right to be exercised properly, and (secondly) the limitation is proportional in regard of exercising the other right.

Article XIII of the Hungarian Fundamental Law states that everyone has the right to property. Physical expression of opinion inevitably infringes someone's right to property. For when an opinion is spoken or published in writing, it does not damage anyone's property. Right to freedom of expression and to property collide when the act of expressing opinion in physical form causes actual damage to someone else's property. The question in this case was what to do when the act does in fact affect someone else's property but does not cause any permanent damage. In this case the statue was nothing else but a tool that the petitioners used to express their opinion by, but they had no right to use it in that particular way as it was not their property and they did not get the approval of the owner.

Examining the uppermentioned aspects, the Court annuled the ruling of the Court of Appeal. In the following paragraphs I will analyse opinions: concurring and dissenting Justices.

According to the concurring opinion of Justice László Salamon, it is not acceptable that an act that would normally be categorized as a criminal or a minor offence shall be free of the consequences of criminal procedure only because it is protected by freedom of expression. He argues that it is the duty of the Court of First instance to establish whether an act is dangerous

to society or not and if it is, application of the Criminal Codes and the legal consequences thereof cannot be skipped. This procedure, he stated, would be in contradiction with the principles of constitutionality. If the Criminal Code does not pay sufficient attention to its relationship with the Fundamental Law and with freedom of expression, then the Constitutional Court has to examine the constitutionality of the Criminal Code itself.

Justice István Stumpf analysed the problems surrounding the statue. In his opinion, the memorial in question was a problematic one, because it commemorates a widely divisive period of Hungarian history. He further argued that, in this case, it is not necessary to examine the collision with the right to property, given that the protected legal subject of public nuisance is not property but public peace and order. In Justice Stumpf's opinion, statues and memorials transmit a message in physical form, so spilling paint on them can be an act of expression of opinion. He also stated that the Court does not have to choose between applying the rules of the Fundamental Law or the Criminal code or the AO. It has to be decided within the concept of danger to society whether the act is expression of opinion or not, and if yes, protect it by the provisions of the Fundamental Law. Justice Marcel Szabó examined the problem from a similar approach. He stated that when an act qualifies as a crime stated in the Criminal Code or the AO, the Court has to approach the facts by establishing a contradictable presumption that the action was a crime or a minor offence. It is only possible for an act to fall within the protected scope of freedom of expression by disproving this presumption, which only happens in rare occasions. In brief, the Court of First Instance does not have to examine whether the action was an act of expression and is thus free of criminal liability, but whether there is any particular condition that makes it an expression of opinion. Such condition can be e. g. a symbolic act, that the damage or conflict of interest that occurs is minimal or that there is only a small, insignificant collision of fundamental rights.

Justice András Varga Zs. adds some thoughts to the reasoning concerning the collision of opinions. He says that if the expression of opinion is allowed in physical form, then the debate would also have to be allowed, thus authorizing physical debates, i.e. fights.

Justice Ágnes Czine does not agree with the the reasoning. She analyses the case along the lines of criminal liability. She states that one cannot be acquitted of criminal liability just because of exercising their right to freedom of expression. In her opinion, the Constitutional Court can give guidelines on what specific conceptual element of a certain criminal or minor offence to examine when deciding whether it is an act of expression of opinion or not. She does not agree with the reasoning of the Constitutional Court stating that "... 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 danger to the society is per se excluded". The mere fact that an action is regarded as expression of opinion does not mean that the perpetrator can be excused of criminal liability. The danger to society can be determined by comparing the fundamental rights (e. g. freedom of expression) and the constitutional values (e. g. public order) that collide. Justice Béla Pokol does not agree with rejecting the constitutional complaint. He builds his reasoning on the fact that the memorial is dedicated to Soviet soldiers. Soldiers, whose presence in the country caused millions of people distress and pain, thus traumatizing part of an entire generation. He states that, due to these reasons, it should be acceptable to express opinions against it in physical form.

Justice Mária Szívós raises two questions concerning the case. The first one asks whether the action examined in the procedure falls under the protection of freedom of expression. Justice Szívós answers this question by saying that the legal definition of public nuisance does not require the action to be violent, thus excluding the possibility of damage. The protected legal subject is public peace, hence the collision of freedom of expression and right to property does not have to be examined. Secondly, she examined by what constitutional guidelines can the legal definition of public nuisance restrict right to free expression. She simply states that, if someone commits a criminal or minor offence and there are no obstacles for the perpetrator to be held accountable, the persons' chance to exercise their right to freedom of expression vanishes.

5. Decision 14/2019 (Iv.17.) Ab of the Constitutional Court

According to the facts of the case as laid down in the ruling of the minor offence authority, the petitioners painted certain cracked parts of the pavement and the sidewalk with color paint in order to call the attention of the competent authority to the defects of the pavement and to warn the passerby to be cautious.

The applicants argued before the minor offence authority that they did not commit an offence as their act was not dangerous to society. They did not pollute the surface because the paint was easily removable and the intent of their action was to raise the awareness of the public to the omission of the authorities. According to law, damage of the pavement have to be corrected within one week, but the sidewalk in question has been cracked and damaged for twenty years. They also had reasons to presume that their action would not have legal consequences because on an other part of the same sidewalk a firm painted an advertisement that has been there for a long time.

The minor offence authority imposed a warning on the petitioners for committing the minor offence of polluting public cleanliness. The authority argued that exercising freedom of expression does not allow anyone to commit a minor offence and found the reference to the advertisement irrelevant. As we see, this argument goes along similar line as the one from the previous case.

The Court of Appeal examined the danger to society of the act and the volume of the pollution. The protected legal subject in this case is the order and cleanliness of public spaces. They stated that the act was indeed dangerous to society because the perpetrators used the property of someone else without the consent of the owner. The Court referred to the saying "The end sacrifices the means.". In this case the Court of Appeal argued that not even a good purpose can ratify an action that commits a minor offence.

The petitioners submitted a constitutional complaint for the ruling of the Court of Appeal to be annulled. They argued that the judicial decision violated their right to free expression granted in Article IX (1) and their right to freedom of artistic creation provided in Article X (1) of the Fundamental Law. They argued that painting the pavement with easily removable paint was an action qualified as street art, thus it has artistic value and it also bears a message that falls within the scope of public discussion. They also pointed out that they had a similar case in the 8th district of Budapest where the body of representatives of the Local Government decided that their creation was classified as a cultural value worth preserving temporarily until the renovation of the relevant pavement section. They also argued that the Court did not examine the facts of the case in depth in regard to fundamental rights. As described before, the protected legal subject, , is public cleanliness, which can serve as legal grounds for the limitation of a fundamental right, however it is an abstract value which would have required a more moderate limitation. According to the petitioners, the Court did not deal with the question of proportionality when limiting the exercise in freedom of expression. The ruling in question assessed the liability of the perpetrators, even though it did in fact establish that the action was used to express opinion. Their fundamental rights were violated because the Court assessed their liability on a wrong ground, and it did not examine proportionality in the limitation of fundamental rights.

The constitutional complaint is well-founded. When judging whether one committed an action penalized by the Criminal Code or the AO, the Court or the minor offence authority has to examine if the action violates the constitutionality of the country. When the action is considered to be expression of opinion or a different exercise of fundamental rights, the danger to society is excluded. The court stated in its reasoning that the collision with the right to

property has to be examined when the act of expressing the opinion causes significant damage to the property of others, thus triggering amortisation.

When restricting the exercise of expressing the opinion, the most crucial question the court must answer is whether the physical expression of opinion was necessary. If the opinion could not be expressed with the same efficiency by other means of communication, then the physical expression is necessary, therefore it is not allowed. Also, the court needs to examine if the act to express opinion restricts or limits the owner's right to property; if this was perpetrated in a way to damage property to an extent that exceeds the frames of expression of opinion; if it becomes an autotelic limitation causing impairment of gravity involving reparation or restitution at high cost.

According to the measures applied in case 1/2019 (III.17.) of the Constitutional Court, this act is considered an acceptable way to express opinion through acts. The damaged sidewalk itself transmitted the message. Said sidewalk was also the subject of the message, since it was the horrible physical condition to spark the petitioners' action. The message was objectively interpretable, and the pavement was an eligible way to transmit it. Furthermore, this method of expressing opinion sooner causes joy and humorous reaction to passers-by than fright. The minor offence authority qualified the act as a minor offence because it did pollute the pavement. But, according to this reasoning, the Constitutional Court argued that those should also be prosecuted who step on the pavement with muddy shoes.

The Constitutional Court explained the collision with the right to property as it follows. The protection of right to property can be a limitation regarding freedom of expression. When examining the proportionality of the limitation, it has to be taken into account that the petitioners used water-based, easily removable paint. The most important fact is, though, that painting the pavement is a method that is able to raise awareness for a long time. It is a method that can reach the goal that other ways of communication cannot. This is the reason why the limitation of freedom of expression was not proportionate in relation to right to property. This action falls within the scope of actions accepted by the owner of public spaces implicitly, when they do not oppose it. The consent of the owner rules out the unlawfulness of an act.

In conclusion, the minor offence authority did not examine the action profoundly enough in relation to freedom of expression and property right to. Neither did the authority ascertain that an action is not dangerous to society when it falls under the scope of freedom of expression. An act that bears a communicative message and damages the private property of others with the consent of the owner or does not damage it at all and does neither damage public property, falls within the protected scope of freedom of expression.

Justice István Stumpf stresses that the District Court found the collision between the fundamental rights but did not examine it well enough, thus limiting the right to freedom of expression in an unnecessarily strict way. Danger to society was ascertained by examining its relation to fundamental rights, and the liability was founded on the fact that the petitioners used someone else's property, without the owners' consent. But this interpretation would mean that the limitation of right to property would be an infringement in any case; however, as Justice Stumpf points out, when fundamental rights collide, one of them can be limited if it is proportional and necessary for the other right to prevail. This case when physical expression of opinion is an exceptional one, though, the circumstances that applied here cannot be thought of as a universal authorisation. He also disagrees with the argument that damage to the property itself is the only limit of expression of opinion.

Justice András Varga Zs. argues that the pavement is property of the Local Government and suffers damage and contamination every day. This is the reason why the petitioners had due ground to conclude that their act would not be opposed by the owner in the form of implied conduct. When deciding on the question of danger to society, the Court should have applied the constitutional rule of interpretation in accordance with the common sense and should have ruled that the action is not dangerous to society. This is an exceptional case when expression of opinion through acts is allowed and cannot be interpreted as a general empowerment.

Justice Attila Horváth does not agree with the reasoning of the court. He argues that the complaint should have been rejected by the Constitutional Court. Justice Horváth disagrees with the part of the reasoning stating that other means of communication would not have achieved the same result. He states that the Constitutional Court should not judge negatively the procedure of an authority with insufficient knowledge of the facts of the case. Justice Horváth further explained his point of view concerning the damage done to someone else's property, which states that it was not proven beyond reasonable doubt that the paint did not cause irreversible damage to the pavement or its surroundings. He adds that, even if there is no irreversible damage, persistent expression of opinion in a physical form could, in fact, cause serious damage, and a surplus of work for the authorities. When it comes to the implied acceptance of the action, the petitioners could have known that their action is illegal as there have been numerous procedures against them in other towns for similar activities. And last but not least, Justice Horváth argues that humor is not a factor that can be hauled up on the authorities.

Justice Béla Pokol argued that in case 1/2019 (III.17.) it should have been acceptable for those petitioners to express their opinion through acts: their action was, firstly, against a memorial

that stands for a politically divisive period of time. Secondly, it was a memorial placed on public property; thirdly, it did not reach the levels of vandalism; and lastly, it was a symbolic act due to the fact that the paint could be removed with water. In this case, none of the above-mentioned criteria were met. It could have been acceptable if the subject of the act had been something widely debated or divisive, and there had been irreversible damage.

Justice Mária Szívós examined two questions in her dissenting opinion. The first one stated that it is correct to ascertain whether the act falls under the scope of free speech or freedom of expression. If the answer is yes, the next issue is whether the criteria for its constitutional restrictions are met. The problem is, though, that the Constitutional Court did not establish a consistent and clear constitutional system of criteria that helps to examine the problem of danger to society; they merely give examples.

It is not justified to examine the relation of the act to right to property because the protected legal subject of the minor offence in question is public cleanliness. Also, the liability in this offence can be ascertained even when the owner of the property agrees to the action committed by the perpetrator. Furthermore, Justice Szívós does not agree with the statement of the Court pertinent to an act falling within the protected scope of freedom of expression. She holds that it cannot be dangerous to society. If one commits a crime or an offence pursuant to the Criminal Code or the AO as part of exercising one's right to freedom of expression, the sole fact that one exercises one's fundamental right does not mean that the act is not dangerous to society, only if freedom of expression is a priority. It can be decided whether a communicative act falls under the scope of freedom of expression by comparing it to the fundamental right or constitutional value in the scope of which the protected legal subject of the crime or offence falls.

6. Decision 3089/2019 (Iv. 26.) Ab of the Constitutional Court

The Court of First instance stated the facts of the case as it follows. The petitioners left packed wooden blocks wrapped in pinkish paper in the client areas of six financial institutions with the inscription "Enough of sacking! Turn it around!" on the one side and a quote of the poem *The Sea Has Revolted* by Sándor Petőfi. They placed the blocks in a manner that the text only became visible when it was turned over, until then the packages looked as if containing explosives. In their ruling, the Court found both petitioners guilty of criminal offence of threatening with public endangerment and sentenced them to three hundred hours of public work. The Court argued that the packages looked as if containing explosives and threatened the safety of others; the goal of the perpetrators was to have an investigation started by which their action would get more publicity.

The petitioners appealed against the ruling, stating that they were exercising their right to freedom of expression and that their goal was to raise attention. The appeal court acquitted them, holding that the appellants' goal was for the workers to find their message the next day, recite the poem and join their movement. The Court argued that the packages did not look as if they contained explosives. Nor could it be proven that their intent was to threaten with endangerment and that the criminal offence they were found guilty of can only be committed deliberately.

The prosecutor appealed against the decision of the appeal court. Budapest-Capital Regional Court of Appeal found both defendants guilty. According to the legal definition of threatening with public endangerment, it is sufficient for the packages to appear as if capable to cause damage. The intention of the petitioners was to raise awareness, but they did not do so in a manner that is protected by the freedom of expression.

In their constitutional complaint they argued that their intention was only to express their opinion thus the ruling of the Court infringes their right to freedom of expression. They argued that the reasoning of the Court sets out a too narrow scope for freedom of expression that makes it impossible to use any tool to express an opinion. The Court should have taken the wooden blocks into account as tools for expression of opinion and by not granting them the chance to use these tools, the Court disproportionate restricted their fundamental right.

The Constitutional Court has to examine what tools can be used when expressing opinion and where the border of accepted methods is. As I pointed out in the beginning, the Hungarian Fundamental Law does not set forth every possible way of expressing opinion. It has to be analysed whether the lower Courts took into account the relation to freedom of expression when determining the danger to society. The Constitutional Court cannot examine whether the wooden block was able to strike fear in those that found those; it can examine only whether there was a communicative content to it; to which the Court stated that even though there was, it was not objectively perceivable, because it collided with other fundamental rights. The message was not perceivable by those that encountered it because its appearance threatened them and they would not read the message because they would rather flee from the danger. Thus, the protection of freedom of expression does not apply here, the danger to society can be established and the criminal liability can be assessed.

Justice Béla Pokol adds to the reasoning of the Court that, if an act presumably endangers life safety of and property, then that act threatens constitutional values, the safety of which can be a reason to restrict the exercise of free expression.

Justice István Stumpf further explained that the message could not be perceived by anyone because people fled, fearing an explosion before being able to read it.

Justice András Varga Zs. stated that when deciding if the act was a criminal offence or not, it needs no examination whether the danger exists or not, for the crime is finished when the act disturbed public peace. Justice Varga Zs. adds that when the legal definition of a criminal offence is open, every act that fulfils the result shall be penalized. Following this argument, the Court cannot consider the reason why the criminal offence was committed, and in these cases exercising of freedom of expression cannot rule out danger to society. The legal definition of threatening with public endangering lifts the conducts, the mode of perpetration from the protected scope of freedom of expression; thus the Court of First Instance did not have to examine the act in relation with fundamental rights.

7. Summary

Three cases lead to the conclusion that physical freedom of expression is an exceptional way of expressing one's opinion. The Constitutional Court laid down two elements that an act needs to fulfil in order to be regarded as expression of opinion. The first element is that the act has to be able to transmit the message. In the "memorial" case and the "wooden block" case the acts were not sufficient to meet this criterion, for the message could not be understood because the actions stroke fear in those who witnessed those, causing them to flee. In the "pavement" case, the sidewalk itself was the way the message was transmitted by as well as the subject of the message. It was, therefore, objectively able to transmit the message, and people could understand what it meant to say. The second element is that the act has to be objectively interpretable by third persons. This requirement was met in the "pavement" case, but not in the other two, as stated above.

The Constitutional Court also examined the relation of right to freedom of expression and the right to property. As we see in the "memorial" and the "pavement" cases, it has to be examined to what degree did the act have damaged someone else's property. If the damage is not irreversible and the intention of the perpetrator is not to infringe someone's property but to express their opinion, then the act can be one of physical expression of opinion. The Court also has to examine what the protected legal subject of the criminal or minor offence committed by the perpetrator is, and with what fundamental right is said protected subject in relation.

All in all, this brief essay has been meant to give an insight on where the Hungarian Constitutional Court stands vis a vis expression of opinion through act. The frame of this

research was the practice of the Constitutional Court and a possible approach to summarising and categorising the reasonings thereof.

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