

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court – with a dissenting opinion concerning point 1 of the holdings of the Decision by Dr. Tamás Lábady and Dr. János Strausz, Judges of the Constitutional Court – has made the following

decision:

1. The Constitutional Court holds that the text “or commits a homosexual act” in Section 203 para. (3) of Act IV of 1978 on the Criminal Code (hereinafter: the CC) is unconstitutional and, therefore, annuls it.

Section 203 of the CC shall remain in force as follows:

“(3) The person who performs sexual intercourse with his/her sibling shall be punishable for misdemeanour by imprisonment of up to two years.”

The Constitutional Court orders that the final judgments rendered in criminal proceedings conducted on the basis of the unconstitutional statute be reviewed if the convicted person has not yet been relieved of the unfavourable consequences of his/her conviction.

2. In other respects, the Constitutional Court rejects the petitions seeking a determination of unconstitutionality and a declaration of nullification of Section 203 paras (1)-(2) and (3) of Act IV of 1978 on the CC.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. Two independent petitions were filed in the subject of establishing the unconstitutionality of, and annulling, Section 203 of the CC. Having regard to their related subjects, the Constitutional Court consolidated these petitions and judged them in a single procedure.

1.1. One of the petitioners asked for nullifying the whole of Section 203 of the CC. In the petitioner's opinion, the statute ordering the punishment of incest violates in respect of the persons concerned the prohibition of discrimination declared in Article 70/A para. (1) of the Constitution.

The petitioner acknowledges that sexual intercourse between blood relatives has been banned since ancient times; the long-standing experience that descendants born from relations between blood relatives may show abnormalities has been scientifically proven in genetics as well. It is also true that most human communities and societies still condemn sexual intercourse between close blood relatives. Nevertheless, such relations do not involve any element of danger to society and, therefore, the remedy for such problems should be sought by scientific researchers, physicians and psychologists, out of the scope of criminal law. Furthermore, the law should not be allowed to intrude into the intimate lives and sexual habits of people in a manner whereby it would make unconstitutional distinctions between them.

1.2. The other petition challenges Section 203 para. (3) of the CC. In the petitioner's opinion, it is unconstitutional to punish incest between siblings as a felony. There is a discrimination concerning fornication between siblings of the same sex and siblings of different sexes – to the detriment of the former group of persons. According to the law, heterosexual fornication between siblings is not considered a criminal offence, but “fornication against nature”, i.e. homosexual fornication is ordered to be punished.

II

The petitions are, in part, well-founded.

1.1. Section 203 of the CC contains the following provisions on incest:

“Incest

Section 203 para. (1) The person who performs sexual intercourse or fornicates with his/her lineal relative shall be punishable for felony with imprisonment from one year to five years.

(2) The descendant shall not be punishable if he or she has not yet completed his/her eighteenth year of age on perpetration of the act.

(3) The person who performs sexual intercourse or commits a homosexual act with his/her sibling shall be punishable for misdemeanour with imprisonment of up to two years.”

Section 203 of the Criminal Code specifies two conducts and, therefore, two statutory definitions of incest implying different sanctions. The first form, considered a felony, is judged more severely. The perpetrators of this form of incest are lineal relatives, i.e. each other's ascendant and descendant (e.g. parent and child). Any kind of sexual act is to be punished as a conduct constituting the felony: both sexual intercourse and fornication between persons of different sexes and fornication between persons of the same sex, i.e. a homosexual act or “fornication against nature”. Only minor descendants are exempted from punishment.

The second form, considered a misdemeanour, is less severely condemned and, therefore, its punishment limit is lower, too. The perpetrators are siblings in blood. The conduct constituting the misdemeanour is restricted by the law to a limited scope of acts as compared to the former one: sexual intercourse between siblings and a homosexual act between siblings of the same sex.

Fornication between siblings of different sexes is not to be punished according to the above statutory definition contrary to Section 283 para. (3) of Act V of 1961, i.e. the CC formerly in force, that had ordered the punishment of all sexual contacts between siblings even if less severely than in the case of lineal relatives.

1.2. According to Article 70/A para. (1) of the Constitution:

“(1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.”

The Constitutional Court has already interpreted in many decisions the constitutional contents of the prohibition found in Article 70/A of the Constitution in relation to the right to human dignity (Article 54 para. (1) of the Constitution) as well.

The Constitutional Court established that “all people must be treated equally (as persons with equal dignity) by the law, i.e. the fundamental right to human dignity may not be impaired, and the criteria for the distribution of entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests.” (Decision 9/1990 (IV. 25.) AB, ABH 1990, 46, 48)

It also pointed out that “the unconstitutionality of discrimination between persons or any other restriction concerning their rights other than fundamental ones may only be established if the injury is related to any fundamental right, and finally, to the general personality right to human dignity, and there is no reasonable ground for the distinction or the restriction, i.e. it is arbitrary.” (Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200)

On the basis of the petitions, the question to be examined is whether punishing and sanctioning by criminal law sexual contacts between close kinsmen (lineal relatives and siblings) violate the prohibition of discrimination specified in Article 70/A of the Constitution.

The Constitutional Court explained in the reasoning of its Decision 21/1996 (V. 17.) AB the following: “It is a universal phenomenon that – by recognizing moral plurality – certain parts of sexual morals are withdrawn from legal sanctioning. It is without doubt though that criminal law draws the outer limit in the sphere of sexual morals (too) and society does not tolerate going beyond that. ... There are crimes where not only moral and legal judgements coincide but where culpability may not really be questioned on moral grounds – as in the case of murder. Likewise, from the point of view of sexual morals, punishing incest may not be questioned although theoretical articles have done so, just as they have questioned the punishment of “having sex with minors”, claiming the “sexual rights of children”. These efforts have, however, remained theoretical curiosities without any effect on positive law and adjudication. (ABH 1996, 74, 82)

The Constitution protects the institutions of marriage and family (Article 15) and in Article 16 it provides the following: “The Republic of Hungary shall make special efforts to ensure a secure standard of living, instruction and education for the young, and shall protect the interests of the young.”

The distinction concerning this specific group of society, represented in the penal consequences as well, is reasonably justified by the need to protect marriage and the family ties between close (blood) relatives (i.e. kinsmen), the particular obligation of the State to care for the young, and the genetic protection of descent.

Section 203 para. (1) of the CC ordering the punishment of fornication between lineal relatives is applicable to both homosexual and heterosexual acts. Therefore, there is no distinction on the basis of sexual orientation in the respect of this specific scope of persons.

Taking into account the above, the Constitutional Court rejected the petition alleging that Section 203 paragraphs (1)-(2) and the first sentence of para. (3) violate Article 70/A para. (1) of the Constitution, and asked for the annulment thereof.

1.3. According to Section 203 para. (3) of the CC, “the person who ... commits a homosexual act with his/her sibling shall be punished with ...”.

Section 210/A para. (2) of the CC gives an interpretation of the concept of fornication. It reads as follows: “For the purposes of this Title, fornication is any gravely indecent act, with the exception of sexual intercourse, which serves the stimulation or satisfaction of sexual desire.”

Although the concept of sexual intercourse mentioned as an “exception” in the statutory interpretation is not defined in the normative text, there is a century-old judicial practice (the living law) which defines it in a fairly accurate way. The judicial practice of criminal law has been unchanged in defining sexual intercourse as a sexual act of persons of different sexes, where the contact of genitals has a decisive role.

Fornication means both heterosexual and homosexual forms of the act unless the homosexual element of the act (“fornication against nature”) is underlined by the CC.

The part of the statutory definition under review orders the punishment of homosexual acts (fornication against nature) between siblings of the same sex, performed with their mutual consent without any forceful act. The statutory definition has no regard to the siblings’ age;

for the performance of the criminal offence it is irrelevant whether the siblings are of the same age, or both of them are adults or minors. There is no injured party of the criminal offence, with both siblings considered perpetrators. The form of punishment is imprisonment of up to two years, with no alternative.

Accordingly, the statutory definition reviewed orders the punishment of a specific case of fornication. Such fornication “against nature”, as a homosexual act, can only be committed by siblings of the same sex. The statutory definition reviewed does not order the punishment of fornication between siblings of different sexes. Therefore, there is a distinction in the statutory definition concerning the same conduct between same-sex siblings and different-sex ones.

In the case reviewed, the distinction is based on sexual orientation alone: only homosexual siblings but not the heterosexual ones are threatened with punishment. According to Article 70/A para. (1) of the Constitution, this is a form of distinction on “any other grounds whatsoever”.

According to the practice of the Constitutional Court, in the case of distinction on “any other grounds whatsoever” it shall be examined whether it has any “reasonable justification on the basis of objective evaluation”. (Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200)

There is no such justification in the case reviewed. The different evaluation in criminal law of fornication between siblings of the same sex and those of different sexes cannot be reasonably justified. The different grades of danger posed by such acts to society cannot be verified either.

It is the task of the legislature to declare certain conducts to be criminal acts [or administrative infractions (987/B/1990/3 AB, ABH 1991, 527, 530)] and to assess their dangerousness to society. It is emphasised again by the Constitutional Court that according to its Decision 21/1996 (V. 17) AB, the definition of criminal offences is within the competence of the legislature, and thus it represents the opinion – and the sentiments – of the democratic majority. (ABH 1996, 74, 82)

The Constitutional Court is not empowered to order the legislature to create new statutory definitions or to make certain conducts – formerly unpunished – punishable by partially annulling certain statutory definitions in the Special Part of the Criminal Code. However, it is

obliged to annul any statute found unconstitutional (Section 40 of Act XXXII of 1989 on the Constitutional Court (hereinafter: “Act on the Constitutional Court”).

Based on the above arguments, the Constitutional Court established that the second sentence in Section 203 para. (3) of the CC violated Article 70/A para. (1) of the Constitution, and it adopted the measures provided for in Section 43 para. (3) of the Act on the Constitutional Court.

The publication of the Decision is based on Section 41 of the Constitutional Court Act.

Budapest, 23 June 1999

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Dissenting opinion by Dr. János Strausz, Judge of the Constitutional Court

1. I agree with point 2 of the holdings, and the rejection of the petitions is well-founded. The statutory provision as whole (Section 203 of the CC) ordering the punishment of sexual contacts between lineal relatives and between siblings does not violate the Constitution and, therefore, the statute concerned is not to be annulled.

2. However, I do not agree with the partial annulment ordered in point 1 of the holdings and, therefore, I express my dissenting opinion concerning the decision and the reasoning relevant thereto.

In my opinion, the provisions of Section 203 para. (3) of the CC ordering the punishment of homosexual fornication – as a form of incest – between siblings of the same sex do not violate the Constitution either.

The provisions prohibiting discrimination in Article 70/A para. (1) of the Constitution have, namely, been falsely interpreted by the petitioner. The petitioner challenges the law punishing, with reference to incest, the siblings who have sexual intercourse or engage in homosexual fornication with each other, while not punishing, as a criminal offence, fornication between different-sex siblings.

Consequently, siblings of different sexes may freely do acts which are prohibited in respect of siblings of the same sex. According to the petitioner, making such a legal distinction concerning sexual relations between heterosexual and homosexual siblings to the detriment of the latter is qualified as unconstitutional discrimination.

3. In my opinion, however, the fact that fornication between siblings of different sexes is not punished any more according to the Hungarian Criminal Code in force shall not mean that homosexual fornication between siblings of the same sex is not to be punished either. It is certainly within the powers of the legislature to assess the weight and the dangerousness of certain conducts and to determine, in accordance with constitutional standards, the way of regulating similar acts differently.

It depends merely on the intentions and the will of the legislature – manifested in a particular historical period, in line with the social concepts generally accepted by the public – what conducts should – provisionally or permanently – bear criminal law relevance, and when.

Assessing the current or permanent danger to society of a given conduct, too, is in the competence of the legislature.

Article 70/A para. (1) of the Constitution – as pointed out in several decisions of the Constitutional Court – does not prohibit all types of discrimination. The constitutional prohibition addresses primarily discrimination made in respect of constitutional fundamental rights. If the discrimination concerned is not related to a fundamental right, its unconstitutionality may only be established if it is arbitrary and violates the right to human

dignity. [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280-282, Decision 963/B/1993 AB, ABH 1996, 437-445]

4. Consequently, the distinction challenged by the petitioner does not violate any constitutional fundamental right, having regard also to the fact that establishing a homosexual relationship between siblings may not be considered a fundamental freedom or value protected by the Constitution.

Consequently, there is, in fact, a distinction in the law as the legislature – in line with the public opinion – considers the weight and the danger to society of homosexual incest to be more serious than those of similar heterosexual conducts, necessitating the use of penal sanctions as well.

This way, the distinction is based exclusively on criminal law aspects and, therefore, one may not consider it unconstitutional since the distinction concerned is not arbitrary, nor does it violate human dignity.

Consequently, in my opinion, the petition should have been rejected in the above respect as well, and the present normative text of Section 203 para. (3) of the CC should have been left unchanged.

Budapest, 23 June 1999

Dr. János Strausz
Judge of the Constitutional Court

I second the above dissenting opinion.

Dr. Tamás Lábady
Judge of the Constitutional Court

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