

# Limitations of the Physical Expression of Opinion

## Decision No. 14/2019. (IV. 17.) AB of the Constitutional Court of Hungary

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### Abstract

*The present case note tries to answer the question whether Article IX of the Fundamental Law of Hungary protects the physical expression of opinion, by analyzing the jurisprudence of the Constitutional Court. The protection of freedom of expression has been a priority for the Constitutional Court from the outset. In the 21st century, however, as far as freedom of expression is concerned, it is not enough for the Constitutional Court to rely solely on doctrines. Increasingly, courts are faced with cases where those expressing their opinion do not express their message in words, but in a physical way. And these acts (e.g. dousing a statue with paint or just painting a crack in a sidewalk in four colors) are very often in conflict with other fundamental rights (e.g. with the right to property), raising the question of the illegality of the action expressing the opinion. In 2019, the Constitutional Court dealt with three such cases. This case note analyzes the Decision No. 14/2019. (IV. 17.) AB of the Constitutional Court. In essence, the Constitutional Court had to answer three questions: (i) What are the criteria for deciding whether an act can be included in the constitutionally protected scope of freedom of expression (and how are the actions of the petitioners to be judged)? (ii) If an act can be included within the constitutionally protected scope of expression, how to balance it with other fundamental rights, in particular to the right to property? (iii) Where are the boundaries between constitutionally protected expressions and criminal acts? The aim of the present case note is to raise some new aspects to allow for further reflection on the topic.*

**Keywords:** freedom of expression, expression of opinion, Constitutional Court of Hungary, political freedom, conflict between fundamental rights.

### 1. The Facts of the Case

The petitioners in the case were activists of a Hungarian party, who had been warned by the Szombathely District Court for committing an offense of public

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sanitation. According to the facts of the case laid down in the court's ruling, the petitioners painted the cracked parts of a pavement section in bright colors. According to them, their purpose was to prevent accidents and to call the attention of the competent authority and of the general public to the deteriorated pavement. In the proceedings, the petitioners claimed that they did not commit an offense because their act was not dangerous to society. They added that they had not contaminated the surface of the pavement since they used a water-based paint that is easy to remove. Finally, their conduct had been nothing more than an expression of their opinion calling the attention of the general public to an omission of the authorities.

The police gave the petitioners a warning for misdemeanor under Section 196(1)(a) of the Act II of 2012 on Minor Offences, Offence Procedures and the Registration System of Offence (Offences Act). According to the reasoning of the authority, the persons subject to the procedure committed the misdemeanor by contaminating public grounds – in the present case, the pavement – with paint. The authority held that the petitioners' defence, namely that painting the cracks of the pavement was a manifestation of the freedom of expression was unfounded. It stated that this right does not entitle anyone to arbitrarily contaminate public grounds, even if this act is a call for attention.<sup>1</sup>

The petitioners objected to the decision of the police, which was rejected by the trial court. In its decision, the court examined whether painting the cracked parts of the pavement qualified as 'contaminating' according to Section 196 of the Offences Act, and whether this conduct was dangerous to society. The court established, that in the course of examining the dangerousness to the society of a misdemeanor that can only be committed on public grounds, the protected legal interest to be taken into account is the order of public grounds, public sanitation and public health. Protection of the above interests requires that public grounds be used appropriately or that permission of the owner be requested for extraordinary usage. The court concluded that the petitioners' conduct of using another person's property for the expression of their opinion without prior consent of the owner was dangerous to the society since it violated the owner's right of disposal. The fact that the conduct aimed at drawing the attention of the competent party to the defects of the area does not exempt from the liability under the law on misdemeanors, since there are no lawful exceptions to the prohibition. Neither the purpose of the expression, namely, drawing attention to an unsafe situation, nor the freedom of self-expression may justify an act or instrument classified as a misdemeanor.<sup>2</sup>

The petitioners turned to the Constitutional Court against the final ruling of the court. In their constitutional complaint, the petitioners claimed that the ruling violated their right to free expression of opinion granted under Article IX(1) of the Fundamental Law and their right to artistic freedom enshrined in Article X(1). They held that in the case concerned, painting the cracked pavement with four colors, by using water base paint, is a work of street art, which, at the

1 Decision No. 14/2019. (IV. 17.) AB, Reasoning [4].

2 Id. Reasoning [4]-[5].

same time, conveys an expression falling under the scope of debating public affairs. In their view, the conduct, for which they were held liability under the law on minor offences fell within the scope *ratione materiae* of the fundamental rights enshrined in both Article IX(1) and Article X(1) of the Fundamental Law (the latter being as specific manifestation of the foregoing). As stated in the constitutional complaint, although the contested ruling identified the fundamental rights involved in the case, it failed to fully examine the restriction of the fundamental rights. Indeed, according to the statutory definition of minor offence related to public sanitation, the protected legal interest is not the right to property, but the cleanliness of the public grounds, which may also serve as a basis for the restriction of a fundamental right, but it being an abstract interest, it may only justify a more lenient restriction of the freedom of expression. In fact, the court completely omitted to examine the issue of the proportionality of the restriction, notwithstanding the fact that the penal nature of the law applicable to minor offences would have called for a restrictive interpretation.<sup>3</sup>

On the basis of the above facts, the Constitutional Court found that the case raises constitutional questions of fundamental importance affecting the scope and the limits of the right to the freedom of expression enshrined in Article IX of the Fundamental Law. Thus, according to the Constitutional Court, it was bound to examine: (i) whether the offense classified under the misdemeanor procedure came under the scope of the freedom of expression and, if so, whether there were grounds for constitutional restriction, furthermore (ii) what constitutional considerations may influence the interpretation of ‘danger to the society’, an inseparable element of the offense.

## 2. The Decision of the Constitutional Court

First, the Constitutional Court emphasized in its decision, that it is not the duty of the Constitutional Court to decide whether a particular act should be considered by authorities and proceeding courts as misdemeanors posing a danger to the society. It is however the responsibility of the Constitutional Court, to examine whether finding that the act posed a threat to society resulted in the unconstitutional restriction of the exercise of a protected fundamental right. In this respect, the Constitutional Court first has to answer (i) whether the act of the petitioners, *i.e.* painting the cracks of the pavement with colorful paint, fell under the constitutionally protected scope of expressing one’s opinion, (ii) and in case it did, whether the proceeding court took this into account in the course of assessing the act’s dangerousness to the society.

In its ruling on the merits, the Constitutional Court first addressed the issue of freedom of expression in general. In this context it emphasized, that although freedom of expression does not include all manifestations of expressions of opinion, but at the same time, protected speech also extends beyond oral or

3 Id. Reasoning [8]-[9].

written communication.<sup>4</sup> In accordance with earlier case-law of the Constitutional Court, the person expressing an opinion may share his or her ideas not only by through words, but also by using images, symbols or by wearing items of clothing: symbolic speech manifested in using symbols is a classic case of freedom of opinion.<sup>5</sup> Thus, the scope of the right to expression of opinion is broader than verbal expressions and may cover communicative acts other than ‘speeches’ in the literal sense. These aspects may be mandatory elements of the legal assessment.<sup>6</sup> With respect to the above, the Constitutional Court points out that determining whether or not the relevant communicative act falls under the scope of the freedom of expression requires a complex evaluation of several factors.<sup>7</sup> To consider the act an expression of opinion, it is a necessary but never a sufficient that the person acted for the purpose of expressing his or her opinion. Indeed, in order for the freedom of opinion to apply it is also necessary that the selected form of communication should be objectively suitable for conveying the message.<sup>8</sup> Based on these criteria, the Constitutional Court established, that a section of the pavement that is accessible without restriction to everyone qualifies as public grounds.<sup>9</sup> There are many ways of putting an inscription on such a section of pavement, thus, the relationship between these acts and the freedom of expression cannot be assessed in the same way. For example, a chalk-drawing on asphalt made by children does not typically convey a communicative message related to public affairs, in contrast with *e.g.* a cracked section of the pavement painted in the interest of drawing attention. Inscriptions and colorings applied, with using easily removable paint, to the road or pavement sections classified as public grounds may qualify as a form of symbolic speech coming under the scope of the right to the expression of opinion.<sup>10</sup> In the course of assessing the above, the primary concern should be whether the relevant act (*e.g.* a painted inscription or coloring) is an objectively suitable tool for conveying thoughts, in addition to the personal intention to express one’s opinion.<sup>11</sup> If the answer is yes to the above question, we should consider the relevant act as a conduct coming within the scope of expression of opinion. Naturally, this does not mean that all acts of this kind would automatically benefit from the protection of the freedom of expression. *E.g.* similarly to what has been stated in *Decision No. 1/2019. (II. 13.) AB*, the vandalizing of a road or pavement section on public grounds to the extent that it causes irreparable damage, or damage that can only be repaired at a high cost (*e.g.* re-asphalting) shall fall outside the scope of freedom of expression.<sup>12</sup> In this respect, however, it is an important element whether the particular conduct was an act of communication that may be

4 Id. Reasoning [24].

5 Decision No. 4/2013. (II. 21.) AB.

6 See in this regard: Decision No. 1/2019. (II. 13.) AB, Reasoning [31]-[32].

7 Decision No. 14/2019. (IV. 17.) AB, Reasoning [26].

8 Decision No. 1/2019. (II. 13.) AB, Reasoning [36].

9 Decision No. 14/2019. (IV. 17.) AB, Reasoning [30].

10 Id. Reasoning [31].

11 Id.

12 Id. Reasoning [32].

interpreted, at least hypothetically, by the public, both according to the subjective intention of the person 'expressing the opinion' and according to an objective assessment.<sup>13</sup> Based on the above, in the context of the concrete conduct, it must be established whether the conduct of the petitioners qualify as an expression of opinion. In the present case, the cracked and painted section of the pavement directly conveyed the opinion: the petitioners painted the deteriorated parts of the pavement as a form of demonstration against such neglect, and they intended to call attention to the fact that the relevant section of the pavement was in need of repair.<sup>14</sup> It is also worth noting, that the painted section of the pavement would induce passers-by to laugh, therefore, a sense of humor is also necessary on the part of the proceeding authorities in the course of assessing the conduct.<sup>15</sup>

According to the Constitutional Court, the adjudicating courts should, besides the above criteria, also take into account the conflict between the freedom of expression and other fundamental rights, in particular to the right to property, in case the expression of opinion causes physical damage to the property, decreasing its value.<sup>16</sup> If this is the case, the conflict should be resolved with due care, with the caveat that any expression of opinion involving damage to property can only be constitutionally justified in exceptional cases.<sup>17</sup> In this respect, the court should first examine whether the person's action aimed at expressing his or her opinion restricts others' right to property to such an extent that it results in a self-serving damage to property, exceeding the limits of communicating the opinion, which damage is either irreversible or only reversible at a significant cost.<sup>18</sup> Taking the above into account, the act of the petitioners undoubtedly conflicted with the right to property. When resolving the conflict, one should first note that enforcing the right to property, the protection of either public or private property (*e.g.* preserving its condition) may be a legitimate reason for restricting the freedom of expression. It was also established by the Constitutional Court, that the application of the misdemeanor sanction system may be a necessary way for safeguarding property and – in the current case – for protecting public sanitation. However, it is an important circumstance in the context of the assessment of the proportionality of the restriction that the petitioners used removable water based paint to color the surface of the cracked pavement, which was already in dire shape (cracked).<sup>19</sup> Moreover, the painting of the cracks offered a chance to call attention to the message in a relatively long-lasting way that could not have been achieved by applying any other method (*e.g.* the placement of a banner or table, holding speeches, *etc.*). The petitioners could reasonably assume that, for example, writing petitions to the authority, who knows the state of the pavement very well, would not produce a similar effect. With due consideration to the above, it can be stated in the present case that

13 Id.

14 Id. Reasoning [36].

15 Id.

16 Id. Reasoning [34].

17 Decision No. 1/2019. (II. 13.) AB, Reasoning [38].

18 Decision No. 14/2019. (IV. 17.) AB, Reasoning [35].

19 Id. Reasoning [38].

restricting the freedom of expression on the basis of the right to property was disproportionate.<sup>20</sup>

In its ruling on the matter, the Constitutional Court repeatedly referred to *Decision No. 1/2019. (II. 13.) AB*, which also dealt with the issue of physical expression. On this basis, the Constitutional Court confirmed, as it has already been laid down in *Decision No. 1/2019. (II. 13.) AB* that in the course of assessing the punishability of a case, attention should also be paid to the fact that although Act C of 2012 on the Criminal Code and also the Offences Act connects (among others) the evaluation of certain conducts' dangerousness to the violation or the endangerment of the constitutional order, if a conduct qualifies as exercising a fundamental right protected by the Fundamental Law, then its dangerousness to the society is *per se* excluded.<sup>21</sup> It must be reiterated with regard to the court ruling challenged by the petitioners, that the police and the proceeding court qualified the petitioners' act as a public sanitation misdemeanor, because in their opinion, painting the cracks of the pavement resulted in the contamination of the pavement surface.<sup>22</sup> However, on the basis of the above, one may also claim that the statutory definition under Section 196(1)(a) of the Offences Act has been fulfilled when *e.g.* someone steps on the surface of the pavement with a muddy shoe or when a chalk-drawing is made on it, still, the authorities are not ready to launch a procedure in these cases.<sup>23</sup> The petitioners' act has the same character as the cases mentioned above. Indeed, the petitioners colored the cracks with removable paint, which has not caused irreparable damage to the pavement surface. The difference between the above cases and the conduct of the petitioners can be found in the fact that it conveyed a clear content, a message coming under the scope of the freedom of speech, *i.e.* it could be interpreted as a kind of criticism related to public affairs.<sup>24</sup> Meanwhile, the police and the proceeding court only handled the petitioners' act differently from the other cases mentioned above, establishing their liability for a public sanitation offence, because their conduct had the clear character of an expression of opinion.<sup>25</sup>

### 3. Critical Remarks

"The petitioners [...] tossed the Soviet Heroic Monument with orange paint",<sup>26</sup> expressing their protest against the Russian-friendly policy of the Government;

"in the client areas of six financial institutions, the petitioners placed wooden blocks wrapped into pink colored paper with the inscription on one side:

20 Id.

21 Decision No. 1/2019. (II. 13.) AB, Reasoning [44].

22 Decision No. 14/2019. (IV. 17.) AB, Reasoning [37].

23 Id. Reasoning [38].

24 Id.

25 Id.

26 Decision No. 1/2019. (II. 13.) AB.

“Enough of sacking! Turn it around!”, with a quote from the poem “Upheaval of the sea” by Sándor Petőfi, on the other side”,<sup>27</sup>

which challenged the banks’ practice of foreign currency lending; “the petitioner painted an inscription ‘STO’ on the pavement”,<sup>28</sup> with the intention of raising their voice against the spread of Nazism. These snippets could be newspaper headlines, but in fact – similarly to the case analyzed – they are excerpts from the Constitutional Court’s freedom of opinion-related cases, in which the Constitutional Court had to rule on ‘new’, physical forms expressions of opinion. Of course, this issue is not new, since it was not 2019 that a physical expression of opinion first emerged, but this was the year that the Constitutional Court first expressed an opinion on them (in several cases). The case analyzed in this case note is both a continuation [*Decision No. 1/2019. (II. 13.) AB* ‘continuation’] and prelude,<sup>29</sup> likely to be followed by more cases. It can therefore be considered a baseline decision in defining the limits of physical expression.

We have already talked about the dual nature of the freedom of expression (as an opportunity for individual self-expression, and as a political freedom<sup>30</sup> that guarantees participation in democratic decision-making), and its role typically becomes meaningful when the thoughts, information, and principles shared are surprising or possibly offensive.<sup>31</sup> In these cases, freedom of expression typically comes into conflict with other fundamental rights<sup>32</sup> (as in the present case, with the right to property), or the unlawfulness of what is said or spoken during the speech is considered. Therefore, in the current case, the Constitutional Court had to answer essentially three questions: (i) What are the criteria for deciding whether an act can be included in the constitutionally protected scope of freedom of expression (and how can the petitioners’ action be qualified in this respect)? (ii) If an act can be included under the constitutionally protected scope of

27 Decision No. 3089/2019. (IV. 26.) AB.

28 Decision No. 3269/2019. (X. 30.) AB.

29 Decision No. 3089/2019. (IV. 26.) AB.

30 Political opinions receive stronger protection in legal system than other opinions. Therefore, these can be considered the best protected inner core of the freedom of expression. The ECtHR has also ruled in *Handyside (Handyside v. the United Kingdom, No. 5493/72, 7 December 1976)*, that freedom of opinion primarily protects political opinions. In *Sunday Times No. 1. [Sunday Times v. the United Kingdom (No. 1), No. 6538/74, 26 April 1979]* the ECtHR added, that the margin of appreciation available to States Parties does not cover the protection of political opinions, whereas a uniformly high level of protection should be laid down for them. Some legal systems only consider opinions specifically related to the functioning of parliament to fall within this scope, however, most give a much broader interpretation to the category. András Koltay, ‘A véleménynyilvánítás szabadsága. Fogalmi tisztázás az Alkotmány 61. §-hoz’, *Századvég*, 2008/2, p. 79.

31 Éva Simon, ‘Véleménynyilvánítás szabadsága’, in Vanda Lamm (ed.), *Emberi jogi enciklopédia*, HVG ORAC, Budapest, 2018, p. 726.

32 It is worth noting that, according to some authors, one of the central arguments explaining of the outstanding constitutional significance of the freedom of expression is that its exercise is less likely to conflict with other freedoms than other actions. Michael D. Bayles, ‘Mid-Level Principles and Justification’, in J. Roland Pennock & John W. Chapman (eds.), *Justification*, New York University Press, 1986, p. 54.

expression, how can the conflict with other fundamental rights, in particular to the right of property be resolved? (iii) Where does the boundary lie between acts that come within the constitutionally protected scope of expression, and those exceeding the threshold of legality, which are ultimately dangerous to society?

(i) As far as the first question is concerned, the Constitutional Court has already set up a test in *Decision No. 1/2019. (II. 13.) AB*<sup>33</sup> which was essentially confirmed by the decision analyzed in this case note (notwithstanding the fact that the Constitutional Court, on the basis of the test, reached arrived at an opposite conclusion in the two cases). According to this test, an action is considered to be an expression of opinion if it has a clear communicative message and the message can be objectively identified and recognized by anyone during the action. The significance of both cases was that the Constitutional Court pointed out that the manifestations of physical forms of expression necessitated the establishment of a test. András Koltay also emphasizes that ‘speech’ and categories of physical action are inseparable. An action can express a certain opinion without the need for it to include either verbal or written text. Certain signs and symbols can in themselves qualify as ‘speech’. However, drawing boundaries is important because almost any act can be said to express something.<sup>34</sup> The need for such boundaries was already recognized in 1974 by the US Supreme Court, which stated in the case *Spence v. Washington*, that the First Amendment should cover all matters, in which “the intent of conveying a particular message is present and the message is likely to be understandable to those who are watching it in the circumstances”, that freedom of expression should apply whenever the person expressing himself is being driven by a specific message, and it is likely that the message can be understood by anyone who is faced with it.<sup>35</sup> At the same time, Robert C. Post points out that not all expressions of opinion, even under the above conditions, will be considered constitutionally protected. In his example, if I throw in my neighbor’s window with a brick to bring the message to light, that I do not like his religion and that he leave his home immediately, even if there is a high probability that my neighbor understands this message, I would not be able to invoke the constitutionally protected nature of freedom of expression in the proceedings launched against me for my action of vandalism.<sup>36</sup> In this context, it is also worth recalling the *Murat Vural v. Turkey* case from the case-law of the ECtHR. In its judgment, the ECtHR broadly recognized the possibility of treating certain physical acts as expressions of opinion. When evaluating the nature of a particular act, the ECtHR basically highlighted two factors: on one hand, the

33 It is important to emphasize that at this point I have examined the test established by the Constitutional Court in general, and not in relation to the result that specifically follows from the two decisions concerned.

34 András Koltay, ‘A véleménynyilvánítás szabadsága’, in András Jakab & Balázs Fekete (eds.), *Internetes Jogtudományi Enciklopédia*, at <http://ijoten.hu/szocikk/a-velemenynyilvanitas-szabadsaga> (2018), para. 8.

35 418 U.S. 405 (1974) 410-411.

36 Robert C. Post, ‘Democratic Legitimacy and the First Constitutional Amendment’, *In Medias Res*, 2017/1, p. 73.



opinion expressing character of the act must be examined from an objective point of view, on the other hand, the intention or purpose of the person carrying out the act must be evaluated.<sup>37</sup> Based on all this, it can be concluded, that the Constitutional Court has in *Decision No. 1/2019. (II. 13.) AB* as well as in the present case, created a test on the freedom of expression of individual actions, taking into account international practice and social changes, which, in my view, is also a suitable tool for applying the law to the first step of the examination.

(ii) One of the most important questions in the system of fundamental rights is how to resolve conflicts between individual fundamental rights. As far as the physical expression of opinion is concerned, this raises questions primarily in relation to property rights: an opinion expressed through action necessarily raises the issue of protecting the property of others. In this context, the decision analyzed in this case note sought to respond to the question along the lines of the necessity-proportionality test, however, the solution outlined above only provides a satisfactory solution to the present case, while leaving several questions unanswered. There is no doubt that the solution to the case analyzed can be a good starting point for determining (i) whether it was necessary to express the opinion in this form, and (ii) whether the damage caused is commensurate with the gravity of the opinion expressed and whether it has caused serious, irreparable harm or damage that can only be repaired at significant cost). Yet the test can certainly not answer all such cases. As Robert C. Post pointed out, that even if an action qualifies as an expression of opinion, this does not mean that it will automatically come under the scope of protection.<sup>38</sup> So we can say that when the expression of an opinion through action conflicts with the right to property, it is not certain that the former will enjoy constitutional protection under the test of the decision analyzed above. Koltay underlines that while freedom of opinion is particularly protected by the legal system, it does not automatically enjoy priority in conflicts with other fundamental rights. Its level of protection is not commensurate with the harm caused by expressing the opinion, that is, in some cases, freedom of opinion takes precedence even in the event of damage.<sup>39</sup> However, it must also be emphasized that exceptions in any case should be duly justified and sufficiently narrow: in addition to the formal requirements, restrictions must also meet the strict substantive requirements of the individual systems.<sup>40</sup>

The question of the general applicability of the above test has also been raised in other cases, e.g. in *Decision No. 3269/2019. (X. 30.) AB*. Although the Constitutional Court has not made a decision on the merits, the facts of the case

37 *Murat Vural v. Turkey*, No. 9540/07, 21 October 2014, paras. 54-55 and 65-68. Considering the circumstances of the case, the ECtHR regarded the scandalous activity of vandalizing a sculpture to be an expression of freedom of expression. It should also be noted that the ECtHR found that there had been a breach of the right to a fair hearing, in view of the disproportionate nature of the sanction applied and the purpose for which the offender was prosecuted.

38 Post 2017, pp. 73-74.

39 Koltay 2018.

40 *Id.* para. 28.

deserve further analysis.<sup>41</sup> The test outlined in the analyzed example the issue of necessity, namely, whether the person committing the act had any other opportunity to convey the message with a similar effect or whether it could be communicated solely through action. This raises the following question: when there is a conflict between two fundamental rights, do we consider whether one fundamental right could have been exercised in another way without violating the other fundamental right, or much rather whether it was necessary to restrict the exercise of a fundamental right in a particular case in order to protect another right? Could it be grounds for restricting one of the fundamental rights exercised? The question is difficult to answer. While it is clear on the basis of fundamental rights doctrine, that in the course of examining a restriction of a fundamental right, it cannot be a consideration that, if the person exercising the fundamental right had exercised his right otherwise, there would have been no conflict, this aspect cannot however, be overlooked in the context of the physical expression of an opinion. As for the decision analyzed in the present case note, an important consideration was that the pavement section concerned had not been repaired for years, so simply filing a request or posting a bill could not have had the same effect as painting it. By contrast, in *Decision No. 3269/2019. (X. 30.) AB*, the Constitutional Court found that there was a real alternative to effectively expressing protest by the person concerned other than on the pavement. A test of the proportionality of the restriction, as opposed to the necessity, in my view, provides the appropriate answer to resolving the conflict. Namely, when it comes to necessity, we cannot establish a clear system of criteria for examining it based on the decision underlying this case note. Thus, the Constitutional Court can only resolve such fundamental rights conflicts on a case-by-case basis.

(iii) One of the most common issues that arise in the context of freedom of expression (see hate speech) is where the boundary of free speech lies. To what extent can you freely express your opinion (in terms of content and manner of expression)? This is particularly important when the content of the opinion, or the way in which it is expressed, crosses the line of illegality, and words used or actions committed amount to an offense or possibly a crime.<sup>42</sup> In this context, it is important to emphasize that the above dilemma can only be considered relevant, in case the action complies with the criteria of the test outlined above.<sup>43</sup> If this is not the case, the action must be considered in itself, according to which it may still be legal or illegal (and sanctioned). In the latter case, the considerations described in this section will not be relevant either.

Bernát Török also believes (and many other authors agree) that there is a need for legal regulation in cases where our words (or even our expressive

41 According to the facts of the case, the petitioner painted a 'STO' sign on a public pavement section to draw attention to what he believed to be Nazi propaganda.

42 The answer to that question is also relevant in the present case, because in the decision under consideration, the petitioners were penalized for their act of expressing an opinion.

43 According to Martin H. Redish, one crucial aspect of the dividing line between expressions of opinion and physical actions is that the former is less likely to cause direct or immediate detriment. Martin H. Redish, *Freedom of Expression. A Critical Analysis*, Charlottesville, The Michie Company, 1984, p. 19.

actions) can incite others to dangerous, violent acts,<sup>44</sup> or if the person expressing the opinion engages in unlawful conduct. Most of this regulation has extensive and elaborate case-law in the field of hate speech. In the US legal system, for example, proceedings are launched against the person manifesting their opinion in cases of clear and present danger, even in less clear-cut situations.<sup>45</sup> However, in this area too, there are still many unanswered questions related to the physical expression of opinion. The decision examined in this case note expressly declares, in accordance with *Decision No. 1/2019. (II. 13.) AB*, that where a fundamental right protected by the Fundamental Law (e.g. it falls into the scope of the freedom of expression), then its dangerousness to the society is per se excluded. The question, however, is where the boundary between the exercising a protected fundamental right lies, which excludes the possibility of establishing illegality? In the analyzed decision, the Constitutional Court expressly concluded that the petitioners were punished for expressing their opinion, thus, their action clearly fell under the protected scope. In contrast, in *Decision No. 3089/2019. (IV. 26.) AB*, the Constitutional Court found that the actions of the petitioners were capable of giving the appearance of jeopardizing personal safety and the security of property, posing the risk of a violation of a constitutionally protected value (public security) which justified the restriction of freedom of expression in the given case.<sup>46</sup> It is apparent from these two decisions that the demarcation of the boundary is clearly influenced by the gravity of the illegality committed by the expressive act and the danger to society it poses. However, if an act expressing an opinion is not subjected to constitutional scrutiny, merely because it amounts to a crime or offense, excluding it from the scope of permissible infringements in order to attain the constitutionally protected objective, shall mean a violation of the freedom of expression. If in the course of the examination it is found that the expressive act is in conflict with a fundamental right or public policy, then it is up to the Constitutional Court to decide, in the particular case, whether it is the exercise of the freedom of expression or its restriction that is constitutional. This conflict must be recognized by the trial courts and subjected to a specific constitutional examination. It is therefore important that, without conducting a constitutional examination, the exclusion of such acts from the scope of permissible acts would mean a deprivation of the freedom of expression.

#### 4. Closing Remarks

*Decision No. 14/2019. (IV. 17.) AB* responded to dilemmas that had not been worked out in Hungarian practice before (in particular, the inclusion of an act within the constitutionally protected sphere of expression). In my view, therefore, despite the fact that this decision has not provided a satisfactory and complete answer to all the questions, it can be considered as a key decision in the

44 Bernát Török, *Szabadon szólni, demokráciában. A szólásszabadság magyar doktrínája az amerikai jogirodalom tükrében*, HVG ORAC, Budapest, 2018, pp. 95-97.

45 Koltay 2018, para. 55.

46 *Decision No. 3089/2019. (IV. 26.) AB*, Reasoning [34].

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field of expression of opinion, since it will serve as a good basis for answering the remaining questions at a later stage.