

DECISION 23/2019. (VII. 19.) OF THE CONSTITUTIONAL COURT

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with concurring reasonings by *dr. Ágnes Czine and dr. Imre Juhász* Justices of the Constitutional Court, and with dissenting opinions by *dr. Egon Dienes-Oehm, dr. Béla Pokol, dr. László Salamon and dr. István Stumpf* Justices of the Constitutional Court – adopted the following

d e c i s i o n:

The Constitutional Court states that the judgement No. 2.Pf.20.009/2018/4/II of the Budapest-Capital Regional Court of Appeal is in conflict with the Fundamental Law, therefore the Constitutional Court annuls it.

The Constitutional Court orders the publication of this decision in the Hungarian Official Gazette.

R e a s o n i n g

I.

[1] 1 The petitioner television channel, acting through a legal representative (dr. Zsolt Stubenvoll, Stubenvoll Law Office, 4 Váci út, 4 floor / 3.), requested, in its constitutional complaint submitted on the basis of Section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the Constitutional Court to state that the judgement No.2.Pf.20.009/2018/4/II of the Budapest-Capital Regional Court of Appeal was contrary to the Fundamental Law, and to annul it on the basis of Section 43 (1) of the ACC. The petitioner holds that the judgement of the court is in conflict with Article IX (1) and (2) of the Fundamental Law.

[2] 2 In the underlying case of the petition, the Budapest-Capital Regional Court (hereinafter: "regional court"), in its judgement No. 65.P.22.706/2017/4, condemned the petitioner and ordered to pay compensation for immaterial damage because of the following. The petitioner television channel aired a coverage of a hearing proceeding before the Curia, and in the report the face of the accused person was blurred, but the face of the accompanying penitentiary staff was not. The employee of the penal institution turned to the court because of the violation of his right to the protection of his image. The regional court established that the plaintiff had not provided consent to the public disclosure of the image. The court also pointed out that "presence in the courtroom does not qualify as a public life event and the individual presentation of the plaintiff does not qualify as a recording of a crowd". The judgement also referred to the fact that neither police officers nor employees of penal institutions are, in the course of performing their duties, in a situation to raise

an objection against recording their image; the arbitrary presentation of their image is unlawful.

[3] After an appeal had been lodged by the petitioner, the Budapest-Capital Regional Court of Appeal (hereinafter: "regional court of appeal") approved the decision of first instance in its decision challenged in the present procedure. As argued in the reasoning provided by the regional court of appeal, the petitioner "could have also completed its obligation of providing information by not presenting the plaintiff in a recognizable way. The defendant had not covered any event focusing especially on the plaintiff, therefore, in the particular case, the protection of the right to one's image justified the restriction of the freedom of the press."

[4] 3 The petitioner turned to the Constitutional Court with a constitutional complaint against the judgement of the regional court of appeal.

[5] According to the constitutional complaint, the courts that proceeded in the case failed to take into account the Decision No. 28/2014. (IX. 29.) AB of the Constitutional Court (hereinafter: "CCDec 1"), which had laid down that "an image recorded during a measure carried out by the police may also be disclosed without obtaining consent, provided that the disclosure is not arbitrary, i.e. it qualifies, on the basis of the circumstances of the case, as information about the events of the present time or a report about an event of public interest in terms of exercising public authority – a video coverage affecting public affairs" (Reasoning [43]). According to the petitioner, the concerned video recording provided information about the events of the present time and it was a report about an event of public interest in terms of exercising public authority, therefore no consent by the affected person was necessary for making the recording and airing it. Several media service providers covered the hearing, it was clearly subject to the interest of the national public, and the media content broadcasted by the petitioner contained no other element but the presentation of the event.

[6] The petitioner holds that the regional court of appeal made a mistake by establishing that the plaintiff's activity at the event had been of ancillary nature and therefore the conduct of the petitioner had been against the law.

[7] As a conclusion, according to the petitioner, the challenged decision of the regional court of appeal violates the freedom of expression laid down in Article IX (1) of the Fundamental Law as well as the freedom of the press enshrined in paragraph (2) of the same article.

II

[8] 1 The affected provisions of the Fundamental Law:

"Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

"Article VI (1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others."

"Article IX (1) Everyone shall have the right to freedom of expression. Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion."

III

[9] On the basis of Section 56 (2) of the ACC, the Constitutional Court primarily examined whether the constitutional complaint had complied with the formal and substantial requirements laid down in the ACC.

[10] 1 According to Section 27 of the ACC, "persons or organisations affected by judicial decisions contrary to the Fundamental Law may submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or other decision terminating the judicial proceedings

- a) violates the petitioner's right laid down in the Fundamental Law, and
- b) the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her".

[11] In accordance with Section 30 (1) of the ACC, the constitutional complaint under Section 27 of the ACC may be submitted within sixty days from the date of delivery of the challenged decision. Section 52 (1) of the ACC lays down that the petition should contain an explicit request regulated in details in paragraphs (1a) and (1b).

[12] The petitioner indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [Section 51 (1) and Section 52 (1b) a) of the ACC]; the procedure of the Constitutional Court was requested in the competence laid down in Section 27 of the ACC. The petitioner also indicated the judicial decision to be reviewed by the Constitutional Court [Section 52 (1b) c) of the ACC], and the violated provisions of the Fundamental Law [Section 52 (1b) d) of the ACC]. The petitioner provided a detailed justification for the submission of the petition, by giving details of the violation of the rights granted in the Fundamental Law [Section 52 (1b) b) of the ACC]. The petitioner formed an explicit request for the annulment of the judicial decision [Section 52 (1b) f) of the ACC].

[13] The petitioner had received the challenged decision on 20 April 2018 and the constitutional complaint submission arrived to the Budapest-Capital Regional Court on 19 June 2018. Consequently, the petitioner submitted the constitutional complaint within the deadline laid down in Section 30 (1) of the ACC. It has also been established that there was no further legal remedy available against the decision of the regional court of appeal.

[14] 2 In accordance with Section 29 of the ACC, a further condition of the admissibility of the constitutional complaint is to raise the doubt of a conflict with the Fundamental Law substantially influencing the judicial decision or a constitutional issue of fundamental importance. These two conditions are of alternative character, thus the existence of either of them shall form the basis of the Constitutional Court's procedure in the merits of the case {for the first time, see: Decision 3/2013. (II. 14.) AB, Reasoning [30]}.

[15] In this respect, the Constitutional Court stated that the case raises a collision of constitutional importance between the freedom of the press granted in Article IX of the Fundamental Law, human dignity enshrined in Article II of the Fundamental Law and privacy laid down in Article VI. In the context of examining the constitutionality of the judicial decision, one should assess the conditions under which the exercising of the freedom of the press may justify the public disclosure of recordings made of individuals who exercise public authority.

IV

[16] The constitutional complaint is well-founded.

[17] In the present case, the Constitutional Court had to take a position about whether, within the circumstances of the case subject to the constitutional complaint, the image of a person exercising public authority at a court trial could be disclosed freely with reference to the freedom of the press, i.e. whether a media content showing an identifiable person attending a court trial and exercising public authority could be made accessible.

[18] 1 According to Article IX (2) of the Fundamental Law, Hungary shall recognise and protect the freedom and diversity of the press. In the Decision 7/2014. (III. 7.) AB, the Constitutional Court summarised and reinforced its practice stating that "the freedom of speech and the freedom of the press have a twofold justification, i.e. they are equally important with regard to both the individual self-expression and the democratic operation of the political community. Reinforcing this twofold justification in the Fundamental Law means that the former interpretation about the special place of the freedom of speech among the fundamental rights shall remain valid"

(Reasoning [23]). This decision also pointed out that “the freedom of the press – encompassing the freedom of all media types – is an institution of the freedom of expression. Indeed, press – despite of its activity being more and more complex and diverse – is first of all a tool for expressing opinion, shaping opinion and obtaining information indispensable for forming opinion. The exceptional character of the freedom of speech is in this respect applicable to the freedom of the press as well, just as the twofold justification of this freedom: the importance of the freedom of the press is justified both by being a subjective fundamental right and a constitutional institution of the democratic public opinion. Accordingly, Article IX para. (2) of the Fundamental Law not only acknowledges the freedom of the press but it also provides for securing the conditions of free information necessary for the development of democratic public opinion” (Reasoning [40]).

[19] Thus the media service provider shall exercise its constitutional right when it covers events of public interest. This freedom shall also include deciding about which events to cover in what depth and with what content. If exercising the freedom of the press violates another’s fundamental right or a constitutional objective, the Constitutional Court should decide in the particular case whether to grant more space to exercising the freedom of the press or to the objective restricting it.

[20] The CCDec 1 has already examined the conditions under which the media disclosure of the image of a person exercising public authority is constitutionally allowed.

[21] Paragraphs [11] to [17] of the reasoning of CCDec 1 lay down the content of the freedom of the press as specified in the Constitutional Court’s practice, while paragraph [18] points out that “the freedom of information, the public disclosure of social questions may get into conflict with other rights, in particular with the right to the protection of privacy and human dignity”. Paragraphs [19] to [26] of the reasoning then unwind the content of the right to one’s image, human dignity and privacy.

[22] According to CCDec 1, it was the explicit role of the CCDec 1 to examine: “if, in the particular case, the right to the protection of human dignity justified the restriction of the enforcement of the freedom of the press, i.e. whether, in the particular case, the decision affected by the complaint created a balance between the different aspects of the freedom of information and the protection of one’s image deductible from human dignity” (Reasoning [35]). The decision then evaluated the circumstances of the individual case: whether the communication was of political nature [37], whether the picture was taken at a public event [37], whether individuals exercising public authority attended the event [40] and whether the image has violated the human dignity of the depicted persons.

[23] The CCDec 1 also laid down that “as long as a communication is not a misuse of exercising the freedom of the press, a reference to the violation of personality rights in the context of the protection of human dignity rarely justifies the restriction of exercising the freedom of the press. The image taken of a person in the public attention in connection with any event of the present may, in general, be disclosed to the public in the context of the event without their consent” (Reasoning [42]). Based on the above factors, the CCDec 1 concluded that “an image recorded during a measure carried out by the police may also be disclosed without obtaining consent, provided that the disclosure is not arbitrary, i.e. it qualifies, on the basis of the circumstances of the case, as information about the events of the present time or a report about an event of public interest in terms of exercising public authority – a video coverage affecting public affairs” (Reasoning [43]).

[24] After the CCDec1, the Decision 16/2016 (X. 20.) AB (hereinafter: CCDec 2) referred to paragraph [43] of the CCDec 1, as its *ratio decidendi* (Reasoning [18]). At the same time, CCDec 2 continued the reasoning behind CCDec 1 and concluded that “the press may also cover the events of the present of public interest, if they do not contain any unlawful element. On the other hand, the »watchdog« role could not be fulfilled, if the press was prevented from freely covering otherwise lawful actions and events.” (Reasoning [21]).

[25] As also added by CCDec 2, “an interpretation by the court that considers the recording and its recognizable disclosure to be lawful exclusively, if it documented the »clear violation of the rules of procedure« applicable to the measure, would be incompatible with Article IX of the Fundamental Law” (Reasoning [23]). Based on similar arguments, the Decision 17/2016 (X. 20.) AB reached the same conclusion.

[26] To sum up the practice of the Constitutional Court, in the case of disclosing in the press the image of a person exercising public authority, the Constitutional Court – shall examine whether the disclosure of the image is related to the affected person’s human dignity or privacy;

- if this is the case, then the question should be assessed by examining Article II, Article VI and Article IX of the Fundamental Law (Reasoning [18]);
- should assess case-by-case whether the challenged “decision created a balance in the particular case between the different aspects of the freedom of information and the protection of one’s image deductible from human dignity” (Reasoning [35]); and
- it should be examined during the assessment whether the disclosure of the image was arbitrary (Reasoning [43]).

[27] 2 It follows from the practice of the Constitutional Court that if a person exercising public authority becomes identifiable in this quality in a certain media content, the protection of the image, in itself, shall not justify the restriction of the freedom of the press. “A non-offensive recording taken in a public place and

depicting the affected public figure objectively may, in general, be disclosed without consent, provided that it is connected to a report on a publicly challenging coverage, linked to freely covering the events of the present” (CCDec 1, Reasoning [44]). Formulating the same from the side of the press, it means that, as a general rule, with reference to Article IX of the Fundamental Law, they may freely disclose the image of a person exercising public authority during the exercising of public authority.

[28] Based on the above test, “image protection” can only be a real restriction upon the freedom of the press, if the disclosure of the image causes the violation of a fundamental right or another constitutional value – in addition to being recognizable – (in particular, the violation of human dignity or the right to privacy). In such cases, on the basis of the particular circumstances, a balance should be found between the different aspects of the freedom of the press and the protection of one’s image. In the absence of a specific fundamental right, the persons exercising public authority should tolerate the disclosure of their image during their official activities. In such cases, the condition to be justified from a constitutional point of view is why the photograph of the affected person could not have been disclosed, rather than why it could be done: the presumption of constitutionality shall support the exercisability of the freedom of the press in contrast with the protection of one’s image.

[29] The presented case law of the Constitutional Court applied to the cases when the person exercising public authority attended open events of public life, held at a place accessible by anyone. The peculiarity of the present case can be found in the different character of the location; although, as a general rule, court hearings are public [Article XXVIII (1) of the Fundamental Law], the constitutional assessment of attending a court trial is different from that of attending an event held on public ground.

[30] Therefore, in the present case, the Constitutional Court had to make a decision in a constitutional question not addressed before: whether the image of a person exercising public authority and attending a court trial can be freely disclosed to the public.

[31] 3 With respect to image and video recordings, the standards of exercising the freedom of expression and the freedom of the press are different with regard to the contexts of courtrooms and the trial held there on the one hand, or on the other hand on other locations (typically open public grounds) and the events of public life taking place there. The openness of the hearing, as a guarantee principle also specified in Article XXVIII (1) of the Fundamental Law, shall primarily mean public access to the courtroom, the availability to follow the court proceedings and the decision. The fundamental justification of openness is not the general information value of the public debate, but the protection of the persons affected in the proceeding by requiring the court to decide about their rights under the public eye. Indeed, the courtroom in itself is not a forum for debating public affairs: it is a place

where justice is delivered regarding the charges in a criminal case or about the rights of the litigant parties. In the context of the general interests of the judicial system and the special interests and rights of the litigant parties, the press publicity of the courtroom should be evaluated differently than with regard to the customary coverings of public affairs, events of the present, and therefore, the restriction of the freedom of the press could be justified to a wider extent in the case concerned {Decision 3021/2018. (I. 26.) AB, Reasoning [26]}.

[32] The openness of the hearing does not make it an event of press publicity. It does not follow from Article XXVIII (1) of the Fundamental Law that media content can be shared about the totality of the hearing, including all of its elements and all participants. The independence of the judiciary and the order of the hearing are constitutional values the enforcement of which may require the restriction of press activity, including the disclosure of the image of certain persons. Logically, the independence of the judiciary and the order of the hearing can only be enforced in the court hearing, this is why the assessment of exercising the freedom of the press is different in the contexts of the courtroom and of any other place open for the public (even in the corridor of the court).

[33] As noted by the Constitutional Court, Section 74/B of the Act XIX of 1998 on the Criminal Procedure – in force at the time of commencing the legal debate – (hereinafter: “old ACP”) had provided an explicit list of persons attending a court hearing whose image may be recorded without his or her consent (with the consent of the panel president, in the interest of informing the public) as a part of a coverage of the court trial; they are the following: members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer. Recording the image of any other attending person, including – as also explicitly reinforced in the connected commentary – the employee of the penal institution engaged in bringing the accused person before the authority, required an explicit consent to be given by the person concerned, provided that his or her person was recognizable on the recording. In this regard, the fact whether bringing before the court was carried out by a police officer or by the employee of the penal institution is irrelevant; on the one hand, both of them represent the state authority, and on the other hand, the constitutional assessment is based on the activity, rather than the status of the person.

[34] 4 Although the order of the trial and the independence of the judicial system are constitutional values that, in general, justify the restriction of the freedom of the press, it does not mean that the activity of the press could be totally restricted – through normative or individual acts – at a court trial. The courts, and finally the Constitutional Court, should form a position on a case-by-case basis whether the stronger constitutional interest is attached to granting or restricting the possibility to provide a press coverage with images in the protected scope under Article IX (2) of the Fundamental Law.

[35] According to the general rule, the freedom of the press shall also be applicable to coverages of public court trial events. By acknowledging the above, Section 74/A (2) of the old ACP laid down that “the press may cover public court hearings”. The Act XC of 2017 on the Criminal Procedure (hereinafter: ACP) currently in force provides a different definition: according to Section 108 (1), “everyone shall have the right to be informed through the media about the court hearing.” Paragraph (2) lays down – similarly to Section 74/B of the old ACP – that “a recording of image, sound or image and sound of the court hearing, for the purpose specified in paragraph (1), may be made with the consent of the single judge or the president of the panel; the recording of a person present at the hearing – with the exception of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer – shall require the consent of the affected person.” It means that the logic of the regulation has not been changed with respect to the fact that an image or sound may be freely recorded of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer, but recording anyone else shall require their consent.

[36] However, the freedom of covering court trials may be restricted by the order of the trial, the impartiality and independence of the court as aims and values laid down in the Fundamental Law. Deciding in a legal debate is the duty of the court originating from the Fundamental Law [Article 25 (2)]. In the course of deciding in the particular cases, the court shall guarantee the enforcement of Article XXVIII (1) of the Fundamental Law, namely that the legal debates are judged impartially and free from influences. The judge shall be in charge of leading the hearing. Consequently, primarily the judge shall be in a position to assess at a particular hearing the extent to which the exercising of the freedom of the press might disturb the order of justice or the independence of the judge. If, according to the judge leading the hearing, such a disturbing circumstance exists, the freedom of the press shall not be excluded automatically, but a weighing should be carried out between the constitutional interests of exercising or restricting the freedom of the press. Only the persons having a constitutionally acknowledged interest may take action with reference to protecting the order of the justice (e.g. judge, accused person, parties, their representatives, public prosecutor). If the persons directly affected by the lawsuit do not raise an objection against reporting by the media (including taking pictures), then other persons may not challenge the exercising of Article IX (2) of the Fundamental Law by referring to the order of justice.

[37] In the present case, the judge did not exclude publicity (and the press) from the hearing and the subject of the lawsuit was of the public interest, therefore, with reference to Article IX of the Fundamental Law, the press may freely disclose the image of the persons exercising public authority. However, in such a case, too, the disclosure should be conditional upon not violating human dignity.

[38] 5 With respect to that, finally, the Constitutional Court had to examine whether or not the disclosure of the image violated the petitioner's rights laid down in Articles II and VI of the Fundamental Law.

[39] Establishing the facts of the case as well as evaluating and weighing pieces of evidence is a duty reserved in the rules of procedural law for the law-applying entity (first see in: Ruling 3237/2012. (IX. 28.) AB, Reasoning [12]); with respect to the facts, the Constitutional Court shall rely on the facts established by the ordinary court.

[40] The underlying court decisions only examined the violation of the petitioner's personality rights, i.e. the disclosure of his image against his will. The court decision did not contain any element in any form referring to the violation of the petitioner's human dignity. The court did not establish any circumstance according to which the recording of the petitioner's image could be degrading, offensive or otherwise in breach of the human dignity.

[12] The challenged court decision examined allowing the disclosure of the image only in terms of the personality rights, and it assessed the collision between Article IX of the Fundamental Law and Articles II and VI of the Fundamental Law. However, as pointed out by the Constitutional Court: presenting the image of the activity carried out by a person engaged in exercising public authority, acting in this quality, shall only be prevented, if there is a specific constitutional reason justifying it. The order of the justice and the independence of the court may justify restricting the freedom of the press in the courtroom, but the mere fact of being recognizable shall not be a cause of restriction. In line with the consequences drawn on the basis of CCDec 1, even at a court hearing, a person exercising public authority may not argue with the protection of human dignity because of becoming recognizable in a specific media content.

[42] With respect to the above, the Constitutional Court stated that the judgement No. 2.Pf.20.009/2018/4/II of the Budapest-Capital Regional Court of Appeal had violated the petitioner's right granted in Article IX (2) of the Fundamental Law and, therefore, annulled it.

[43] 6 The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the ACC, with account to the importance of the constitutional question.

Budapest, 9 July 2019.

Dr. Tamás Sulyok

President of the Constitutional Court

Dr. István Balsai

Justice of the Constitutional Court

Dr. Egon Dienes-Oehm

Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi

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Dr. Béla Pokol

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Dr. Balázs Schanda

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Dr. Marcel Szabó

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Dr. Mária Szívós

Justice of the Constitutional Court

Dr. Ágnes Czine

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Dr. Attila Horváth

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Dr. Imre Juhász

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Dr. István Stumpf

Justice of the Constitutional Court

Dr. Péter Szalay

Justice of the Constitutional Court

Dr. András Varga Zs.

Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Ágnes Czine*

[44] I agree with the decision laid down in the holdings, but at the same time I also hold it important to emphasize the following.

[45] 1 According to the consistent case law of the Constitutional Court, Article 28 of the Constitutional Court lays down as a constitutional requirement for the courts in the course of the application of law to interpret the laws primarily in accordance with the Fundamental Law. Based on this obligation, the courts should identify the fundamental rights' aspects of the relevant case within the limits of interpretation provided by the laws, and it should interpret the laws applied in the judicial decisions with due account to the constitutional content of the affected fundamental right {Decision 7/2013. (III. 1.) AB, Reasoning [33]; Decision 28/2013. (X. 9.) AB, Reasoning [29]; Decision 3/2015. (II. 2.) AB, Reasoning [17]}.

[46] At the same time, it is beyond doubt that the mere fact of having fundamental rights' relevance in a particular case should not result in allowing the proceeding

courts to neglect the assessment of the case from the aspects of its special legal field. The courts should make efforts to take into account, within the limits of the scope of action provided by the applicable substantive and procedural norms, the fundamental rights' relevance of the case they proceed, and to enforce in their decision – in accordance with the applicable norms – the constitutional content of the affected fundamental right. When the applicable norm does not offer such a potential interpretation, the norm is considered to be contrary to the Fundamental Law.

[47] 2 I hold that in the present case the primary aspect to be pointed out is that the proceeding courts had to deliver a decision in a debate of personality rights.

[48] In the underlying court procedure, the plaintiff's action was aimed at establishing the violation of his right to the protection of his image. His action was based on being presented – as the employee of a penal institution – in a recognizable manner in a press coverage made by the petitioner of a criminal procedure challenging public attention, despite of the fact that he had not provided consent to the disclosure of his image.

[49] Accordingly, the plaintiff had based his action on Sections 2:42 to 43 and 2:48 of the Act V of 2013 on the Civil Code (hereinafter: "Civil Code"). Thus the civil courts had to deliver their decisions primarily on the basis of these provisions. Section 2:48 (1) to (2) of the Civil Code – as pointed out by the proceeding courts – contain clear provisions: the consent of the affected person shall be required both for taking and for using the image recording, unless it is a mass recording or the recording is made during one's open appearance in public affairs.

[50] The rules of personality rights in the Civil Code in force prescribe, in addition to the above, that the exercise of fundamental rights ensuring a free discussion of public affairs may limit the personality rights of public figures to an extent that is necessary and proportionate and is without prejudice to human dignity" (Section 2:44 of the Civil Code). As underlined in the reasoning attached to the proposed normative text of the Civil Code, "an omission of several decades is remedied by the Act by raising to the level of an Act the rule on the lower protection of the personality rights of public figures, in the interest of the enforcement of the fundamental rights that guarantee the free debating of public affairs."

[51] This way the law-maker made it clear in the scope of the legal regulation of personality rights that the courts should enforce the constitutional content of the fundamental rights guaranteeing the free debating of public affairs.

[52] 3 The Constitutional Court clarified in many decisions that "as long as a communication is not a misuse of exercising the freedom of the press, a reference to the violation of personality rights in the context of the protection of human dignity

rarely justifies the restriction of exercising the freedom of the press. The image taken of a person in the public attention in connection with any event of the present may, in general, be disclosed to the public in the context of the event without their consent. {Decision 28/2014. (XI. 29.) AB, Reasoning [42]; Decision 3/2017. (II. 21.) AB, Reasoning [16]}. With regard to the above, “a non-offensive recording taken in a public place and depicting the affected public figure objectively may, in general, be disclosed without consent, provided that it is connected to a report on a publicly challenging coverage, linked to freely covering the events of the present” {Decision 28/2014. (IX. 29.) AB, Reasoning [44]}.

[53] The Constitutional Court also underlined in a summarising way in CCDec 2 that an interpretation by the court only considering the recording and its recognizable disclosure to be lawful, if they were connected to the measures taken by the affected person, would be incompatible with Article IX of the Fundamental Law (Reasoning

[23]). Thus, contrary to the interpretation provided by the courts that proceeded in the present case, the important factor is whether or not the disclosure was arbitrary, rather than if it was related to the measures taken by the person affected by the coverage. Disclosure shall not be regarded arbitrary, if it covers information about the events of the present time or a report about an event challenging the public interest in terms of exercising public authority, a video coverage affecting public affairs, provided that it does not violate the human dignity of the person affected by the coverage {CCDec 1, Reasoning [43]; CCDec 2, Reasoning [23]; Decision 3/2017. (II. 25.) AB, Reasoning [26]}.

[54] Accordingly, in the above cases, the Constitutional Court has defined for the courts the constitutional criteria to be assessed. In the Decision 3/2015. (II. 2.) AB, the Constitutional Court also clarified that, on the basis of Article 28 of the Fundamental Law, it is the constitutional obligation of the court to judge upon the cases with a relevance of Article IX of the Fundamental Law by taking into account the constitutional criteria applicable to the restriction of the freedom of the press as well as the decisions of the Constitutional Court that unfold these criteria.

[55] 4 In the present case, special aspects, not examined before, have also been raised in the context of the video report covering the hearing of a criminal case challenging public attention. There is an insecurity of interpretation as the old ACP regulated in the scope of the openness of the hearing that “a recording of image or sound of the court hearing, for the purpose of informing the public, may be made with the consent of the president of the panel; the recording of a person who is present at the hearing – with the exception of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer – shall require the consent of the affected person.” [Section 74/B (1), first sentence of the old ACP].

[56] Although in the present case the courts did not have to apply the provision of the ACP referred to above, I hold it important to point out the following as well.

[57] Several decisions of the Constitutional Court deal with the collision of norms in the case of laws of the same level. As laid down in the Decision 35/1991. (VI. 20.) AB, “the colliding content – depending on the interpretation – of statutory provisions shall not, in itself, result in establishing unconstitutionality, in the absence of substantive unconstitutionality” (ABH 1991, 175, 176). Therefore, according to the case law of the Constitutional Court, a difficulty of interpretation resulting from a potential collision of two statutory provisions shall not, in itself, be a sufficient condition for the establishment of unconstitutionality [Decision 1/2001 (I. 17.) AB, ABH 2001, 31, 34].

[58] In my view, in the case concerned, the potential collision between the relevant statutory provisions may be resolved by way of interpreting the law. In this context, also with account to Article 28 of the Fundamental Law, one should also note that the law-maker actually introduced Section 74/B of the old ACP because “the society has an interest in fulfilling the need of informing the general public about pending or closed criminal cases. This need can primarily be fulfilled by the press – with account to its duties” (reasoning attached to the Act II of 2003). By taking Article IX (1) to (2) of the Fundamental Law into account, the ACP links the regulation to the right of information of the public. (Reasoning attached to the ACP)

[59] Thus, the regulations of both the old ACP and of the ACP in force guarantee the enforcement of the constitutional provisions that grant the freedom of expression and the freedom of the press. It is the duty of the panel president to decide whether the exceptional criteria of restricting press publicity exist in the particular case, resulting in reinforcing the interest of the justice (e.g. the hearing of a witness after excluding the presence of the press) [Section 74/B (2) of the old ACP, Section 109 (1) of the ACP].

[60] I support the decision adopted by the Constitutional Court on the basis of the reasons detailed above.

Budapest, 9 July 2019.

Dr. Ágnes Czine
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Imre Juhász*

[61] I agree in principle with the holdings of the decision and with the majority of the statements made in the reasoning to support the merits of the decision. However, I do not share certain statements of the reasoning as follows.

[62] The majority opinion presented an interpretation, which is – in my opinion – false, stating that the Constitutional Court could annul the court decision in the case concerned without examining Section 74/B of the old ACP, and it allowed the adoption of the decision of the Constitutional Court. I do not agree with that, as the old ACP had a binding provision the judge could not differ from.

[63] In my opinion, the Constitutional Court should have also carried out the examination under Section 26 (1) of the ACC, as the courts could not disregard the law in force. Actually, both the old ACP applicable at the time of adopting the decision challenged by the constitutional complaint and the ACP require a consent for the disclosure of the image, and the employee of the penal institution is not listed among the exceptions.

[64] As laid down in point IV.4 of the decision's reasoning: "according to the general rule, the freedom of the press shall also be applicable to coverages of public court trial events. By acknowledging the above, Section 74/A (2) of the old ACP laid down that »the press may cover public court hearings«. The effective Act XC of 2017 on the Criminal Procedure (hereinafter: ACP) provides a different definition: according to Section 108 (1), »everyone shall have the right to be informed through the media about the court hearing«. Paragraph (2) lays down – similarly to Section 74/B of the old ACP – that »a recording of image, sound or image and sound of the court hearing, for the purpose specified in paragraph (1), may be made with the consent of the single judge or the president of the panel; the recording of a person present at the hearing – with the exception of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer – shall require the consent of the affected person.« It means that the logic of the regulation has not been changed with respect to the fact that an image or sound may be freely recorded of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer, but recording anyone else shall require their consent" (Reasoning [35]).

[65] The reasoning of the decision also concludes at the same place that a "weighing should be carried out" by the judge "between the constitutional interests of exercising or restricting the freedom of the press. Only the persons having a constitutionally acknowledged interest may take action with reference to protecting the order of the justice (e.g. judge, accused person, parties, their representatives, public prosecutor). If the persons directly affected by the lawsuit do not raise an objection against reporting by the media (including taking pictures), then other persons may not challenge the exercising of Article IX (2) of the Fundamental Law by

referring to the order of justice. In the present case, the judge did not exclude publicity (and the press) from the hearing and the subject of the lawsuit was one challenging the public interest, therefore, with reference to Article IX of the Fundamental Law, the press may freely disclose the image of the persons exercising public authority. However, in such a case, too, the disclosure should be conditional upon not violating human dignity" (Reasoning [36] to [37]).

[66] Nevertheless, the decision fails to draw the appropriate consequence deductible from the above arguments.

[67] I firmly hold that the Constitutional Court should have examined ex officio the potential violation of the Fundamental Law by Section 74/B of the old ACP. I am convinced that, on the basis of the arguments put forward in the reasoning of the decision, this provision of the law, in its present form, is contrary to the Fundamental Law, and I hold that a necessary mosaic-like annulment could have been adopted on the basis of an examination from the aspects of fundamental rights. I would like to point out that I held it necessary to extend the examination to the ACP's provisions of similar content.

[69] Consequently, many of the conclusions found in the reasoning of the decision are false, as it fails to annul the relevant provision of the law: In case of annulling the relevant rule of the old ACP, the review should have also been extended to the applicable rules of other codes of procedure. I would like to point out that here the applicable source of law is not the Civil Code, as there is a special rule. The courts did not have free discretion in this respect.

[69] I agree with the position taken by the Constitutional Court – based on the Fundamental Law, in line with the earlier decisions of the Constitutional Court and also supported in the reasoning of the present decision – that the images of employees of penal institutions should be handled the same way as that of police officers, taking into account the fact that they may use coercive measures, including a firearm, under similar conditions. This, however, would have justified, with regard to the affected provision of the ACP, the – potentially mosaic-like – annulment of the relevant provision of the law by the Constitutional Court.

[70] As I agreed with the holdings, the direction and with the majority of the reasoning of the decision, I held that it was not necessary to vote against the draft decision in the case concerned.

[71] To sum up: the Constitutional Court should not place the proceeding courts in a situation where the adoption of a decision contrary to a law in force is required, while the Constitutional Court had the option, on the basis of the authorisation provided

under Section 28 (1) of the ACC, to declare the – assumed – incompatibility of the statutory provision with the Fundamental Law, and to annul it.

Budapest, 9 July 2019.

Dr. Imre Juhász
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Egon Dienes-Oehm*

[72] I disagree with the decision.

[73] I have presented my position in many of my dissenting opinions in principle – which determines my opinion about the present case as well – namely that when Article VI of the Fundamental Law and Article IX of the Fundamental Law is in collision, the examination and the assessment of all circumstances of the case shall be required in order to decide which provision should enjoy priority over the other one in the form of providing for justified conditions or restrictions on exercising the respective freedom. I cannot accept the universal applicability of the requirement of interpretation originating from the Decision 7/2014. (III. 7.) AB, subsequently handled in the case law as a quasi “law of the Constitutional Court”, namely that exercising the freedom of the press would enjoy, in a particular case, undeserved one-sided primacy over the protection and the freedom of privacy laid down in the Fundamental Law.

[74] According to the given situation in the present case, the court had the option of resolving the collision between the relevant fundamental rights by way of individual balancing, and indeed, the Regional Court of Appeal stated that the image of the employee of the penal institution did not challenge the public interest and its disclosure was arbitrary. Furthermore, in the course of the court trial, the order of the hearing and the independence of justice provides a ground for restricting the disclosure of arbitrary media content.

[75] Thus one should not state that the judgement of the Regional Court of Appeal balanced between the criteria of constitutionality without taking into account the content and the aim of the fundamental rights. Consequently – in line with my position of principle – the Constitutional Court should have rejected the constitutional complaint.

Budapest, 9 July 2019.

Dr. Egon Dienes-Oehm,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Béla Pokol*

[76] I do not support the points of annulment in the majority decision and neither do I support its reasoning; I could have only supported rejection. As I have already explained in my dissenting opinions attached to the decisions on the so called image-cases, in my opinion, those who must and who do act in a completely regulated way, within the limits of instructions, as persons executing orders in the service of the State (minor police officer, employee of the penal institution etc.), should not be regarded as a person independently exercising public authority, and therefore he or she shall not be considered a public figure. Consequently, the public disclosure of photographs or video recordings depicting him or her shall mean the violation of privacy, therefore, it is contrary to the Fundamental Law. Accordingly, I cannot accept the present majority decision annulling the judicial decision that protected this fundamental right of an employee of the penal institution.

Budapest, 9 July 2019.

Dr. Béla Pokol,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. László Salamon*

[77] I do not agree with the annulment of the Budapest-Capital Regional Court of Appeal's judgement, as in my view the Constitutional Court should have rejected the petition on the following grounds.

[78] As it has been explicitly referred to in the decision, Section 74/B (1) of the old ACP [just as Section 108 (2) of the ACP], the sound or image recording of a person present at the hearing – with the exception of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer – shall require the consent of the affected person. The relevant commentary of the ACP explicitly regulates that a recording of the guard of the penal institution engaged in bringing the accused person before the authority shall always require his or her consent, provided that the person is recognizable in the recording.

[79] This statutory prohibition (i.e. requiring the consent of the affected person) – which, at the same time, differentiates between the relevant persons subject to a press coverage of a court trial and the police officers on duty at demonstrations – is an explicit condition laid down in an Act, the non-performance of which shall, in itself, make the recording and the disclosure of the image unlawful; this shall exclude the

petitioner making a well-founded reference to the violation of his right under Article IX (2) of the Fundamental Law. Indeed, the relevant provisions of the ACP are also statutory limitations of the freedom of the press; in the present case, the collision is not only between the affected person's right to his or her image and the freedom of the press: the ACP provides for an explicit prohibition related to recording images without consent.

[80] Whether the relevant provisions of the ACP are in line with Article IX (2) of the Fundamental Law, and whether they restrict it in accordance with Article I (3) of the Fundamental Law: it could have been decided during a review carried out on the basis of Section 26 (1) of the ACC; however, the Constitutional Court failed to carry out this review.

[81] As long as the Constitutional Court fails to declare that the relevant provisions of the ACP are contrary to the Fundamental Law, the proceeding court shall not be held accountable because of a decision that can only be adopted on the basis of a *contra legem* interpretation of the law contrary to the above provision of the ACP. (Namely – taking into account the fact that it has to apply the laws in force – the court cannot rule on not establishing the unlawfulness of disclosing the image, despite of the explicit provision of the ACP, if the image could not have been lawfully recorded at all.)

Budapest, 9 July 2019.

Dr. László Salamon
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. István Stumpf*

[82] It is easy to collect many "likes" by granting privileges to the freedom of the press and the freedom of expression. However, to simply stand where the majority stands is not a judicial decision. The court has to assess the colliding rights by placing them on the scale of Lady Justice and it has to reach a balance between them. In the present case, the protection of the freedom of the press and the freedom of expression is one side of the scale. However, the court of first instance and the court of second instance that proceeded in the basic case took appropriate account of the other side as well, and they delivered well-balanced decisions. This is why I do not agree with the annulment of the judgement of final force.

[83] The annulled judgement closed with final force the civil lawsuit that had been started against the petitioner television channel. The plaintiff asked for the declaration of the violation of his personality rights because of the disclosure of a

court trial recording of him. The recording recognizably depicted the plaintiff employee of the penal institution in the courtroom at the hearing of a criminal case beside the accused person brought before the court by him. This courtroom recording was recorded and disclosed by the defendant without the plaintiff's consent. The final judgement delivered in the civil lawsuit stated that the petitioner television company had violated the plaintiff's right to his image. This judgement has been annulled by the Constitutional Court by granting privilege to the freedom of the press against the plaintiff's right to personality protection. Nevertheless, the Constitutional Court failed to take due note in its decision the fact that the court had appropriately justified the restriction of making and disclosing the courtroom recording, i.e. restricting the freedom of the press.

[84] The courts often hear cases that challenge public attention, and the press understandably feels inclined to cover these hearings. And although "the freedom of expression has a special position among constitutional fundamental rights" [Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 170 to 171], the freedom of expression and the freedom of the press shall, under the given circumstances, necessarily compete with the rights of those who attend the hearing. First of all, they shall compete with the right to human dignity and the right to personality protection, as well as with the right to fair trial, on the basis of which both the right to an impartial judge and, last but not least, the protection of the court's authority (*fairness*) could also be referred to.

[85] As pointed out by Károly Bárd in his study on dogmatics: "The freedom of expression can be restricted not only by [...] the right to an impartial judge, but also by the requirement of *fairness* as well as by the substantive rights entitling both the accused persons and the other participants of the procedure. In the latter case, the specified legitimate cause of the restriction is »safeguarding the court's authority«. Although cases related to the sphere of politics often form the subject of court procedures, and the operation of justice, in itself, is a public affair, still the freedom of expression could be restricted to a significant extent, since in such cases it happens in the interest of the protection of »another subjective fundamental right«. Indeed, the rights to an impartial judge and to fair procedure are strong rights of absolute force. This is why they can restrict the freedom of expression even in the cases when the press covers or comments procedures launched against public figures in the context of their official actions." (See in: Károly Bárd: Human Rights and Penal Justice in Europe. The fair trial in criminal cases – a study on the dogmatics of human rights. Budapest, Hungarian Official Gazette Press, 2007. p 170)

[86] Accordingly, when the freedom of expression or the freedom of the press is restricted in the courtroom, in particular at the hearing of a criminal case, this is essentially done primarily in the interest of the fundamental rights that grant the operation of justice, and these rights are ones of absolute force. As it is explicitly

specified in Article 10 paragraph (2) of the European Convention on Human Rights, “maintaining the authority and impartiality of the judiciary” may render the restriction of the freedom of expression necessary. First of all because it is the fair trial by virtue of which the court becomes an institution the community can trust in, as one capable of stating rights and obligations, deciding in legal debates, and delivering unbiased judicial decisions. Thus, in the interest of securing fair trial, the recording of sound or image in the courtroom may be prohibited.

[87] Taking all the above into account, I hold that granting fair trial in general, in itself, is a due justification of the statutory provision laid down in the Act on criminal procedure, which had been applicable in the basic case, namely that a recording of image or sound of a person present at the court hearing, for the purpose of informing the public, may only be made – with the exception of the members of the court, the keeper of the minutes, the public prosecutor and the defence lawyer – with the consent of the affected person. [See Section 74/B (1) of the old ACP. There are several countries where taking and using sound and image recordings made in the courtroom are more severely prohibited, for example at the Supreme Court of the USA; in Germany: § 169 *Satz 2 des Gerichtsverfassungsgesetzes*; in France: *Code de procédure pénal*, Article 308 etc.] Actually, when the law-maker restricts with general force the recording of sound or image in the courtroom for the protection of fair procedure, I doubt that the Constitutional Court could completely disregard this provision (and its constitutional justification). Therefore, I do not agree with the Constitutional Court allowing, on the basis of the freedom of expression and the freedom of the press, the taking and the disclosure of a courtroom image recording, despite of the existence of an explicit statutory prohibition with constitutional foundations. The palladium of the rule of law should not turn against its own *credo* [Decision 11/1992. (III. 5.) AB, ABH 1992, 77, 82], and it should not hold that the rule of law may be enforced even in conflict with the rule of law.

Budapest, 9 July 2019.

Dr. István Stumpf
Justice of the Constitutional Court