

DECISION 16/2016. (X. 20.) OF THE CONSTITUTIONAL COURT

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with dissenting opinions by Justices *dr. Egon Dienes-Oehm* and *dr. Béla Pokol* – adopted the following

d e c i s i o n:

The Constitutional Court states that the judgement No. 56.Pf.632.194/2015/3 of the Budapest-Capital Regional Court is in conflict with the Fundamental Law, therefore the Constitutional Court annuls it.

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

R e a s o n i n g

I

[1] 1 The petitioner press organ – by way of its legal representative – submitted a constitutional complaint to the Constitutional Court on the basis of Section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), requesting the establishment of the lack of conformity with the Fundamental Law and the annulment of the judgement No. 56.Pf.632.194/2015/3 of the Budapest-Capital Regional Court.

[2] The Budapest-Capital Regional Court as the court of second instance approved, in its final judgement, the judgement of the Central District Court of Pest that had proceeded as the court of first instance. On 15 June 2012, the plaintiff, as the member of the Intervention Police secured an enforcement act carried out by a bailiff, and an amateur video footage of the event was recorded. The defendant petitioner disclosed this footage on its website without asking for the plaintiff's consent to it. This circumstance has not been questioned at all subsequently during the litigation. On 18 April 2013, upon the plaintiff's notice, the defendant removed and deleted the footage from the website. As claimed by the plaintiff, the disclosure of the footage had caused him social disadvantage, with regard to which, he claimed from the defendant compensation for non-material damage in the amount of HUF 300000. The Central District Court of Pest reviewed, in the knowledge of the subsequent Decision 28/2014. (IX. 29.) AB of the Constitutional Court (hereinafter: "CCDec"), whether the plaintiff was a public figure in the relevant appearance, and it established that he was not, therefore, the unauthorised recording of his image and its recognizable disclosure without his consent had been unlawful.

[3] Although the primary argument of the court was that the criminal-administrative-labour-civil law uniformity decision No. 1/2012 of the Curia (hereinafter: CALCUD) was applicable to its procedure, and the CCDec does not bind the court – as it had not affected the uniformity decision and it had annulled a particular decision –, still it assessed the principles laid down in the CCDec. The court quoted the content of paragraph [43] of the Reasoning of the CCDec as follows: “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 challenging the public interest in terms of exercising public authority – a video coverage affecting public affairs.” As stated by the court, “the manner of exercising public authority shall challenge the public interest, if the rules of procedure are clearly violated during the above”. [Judgement No. 36.P.90.562/2014/6 of the Central District Court of Pest, p. 3, paragraph 5] In addition to the above, the court also holds that the participation in mass events without individual focus is a situation where arbitrary disclosure as a prohibited conduct is excluded. The court found, however, that the footage discussed in the lawsuit does not belong to any of the exceptional scope of cases, therefore, the recognizable disclosure is unlawful and it shall serve as the basis for the compensation of non-material damage.

[4] The defendant petitioner lodged an appeal against the judgement, arguing that the footage covered an event of the present challenging the public interest, where the police officers can be seen without individual focus, together with others. It also referred to the fact that the decision 1/2015 CALCUD, which had annulled the decision 1/2012 CALCUD, is also applicable in the pending cases. According to the court that delivered the final judgement, the decision 1/2015 CALCUD is not applicable in the pending cases, it shall exclusively be applicable with regard to the events that take place after the decision. Similarly, in the opinion of the Budapest-Capital Regional Court, the CCDec is not applicable, because it did not exist when the events subject to the litigation took place. Based on the above arguments, the judgement was well-founded both on the basis of its legal basis and – due to the correct evaluation of the evidence – the adjudicated amount, therefore, the Court approved the judgement.

[5] 2 The petitioner has not filed an application for review, however, it submitted a constitutional complaint and it asked for the annulment of the challenged judgement. In its application, clarified upon the call made by the secretary general of the Constitutional Court, the petitioner requested, on the basis of Section 27 of the ACC, the declaration of the conflict with the Fundamental Law and the annulment of the judgement No. 56.Pf.632.194/2015/3 of the Budapest-Capital Regional Court, due to

the violation of the freedom of expression granted in Article IX (1) of the Fundamental Law and the freedom of the press guaranteed in Article IX (2).

[6] 2.1 The petitioner's constitutional complaint referred to Article IX (1) and (2) of the Fundamental Law and to the statements made in the CCDec, as arguments on the merits of the case, holding that the judgement should have compared the petitioner's right to the freedom of expression and to the freedom of the press to the plaintiff's right to privacy. As argued by the petitioner, evictions – where the plaintiff participated as an official party on behalf of the police authority securing the action – are beyond doubt events of the present challenging public interest, justified by the connected legislation, the list of laws related to supporting the persons indebted because of foreign currency-based loans. The petitioner also argued that it would be a misinterpretation of the CCDec to interpret the law in a way to hold that only the events taking place on public ground or the contributors on behalf of the police recorded without special focus are lawful on the basis of the CCDec. Based on the above, the petitioner claimed that the courts' interpretation of the law declaring, in the particular case, the arbitrariness of the disclosure of the footage was directly contrary to the Fundamental Law.

[7] The petitioner also attached, as an illustration, a judgement delivered by another panel of the Budapest-Capital Regional Court in an appeal procedure, rejecting the plaintiff's action – indeed, by reference to the CCDec – under essentially the same facts of the case, against the same defendant (petitioner).

[8] The petitioner goes into details by quoting the case law of the Constitutional Court on the prominent protection of the freedom of the press, reiterated in the Decision 7/2014. (III. 7.) AB, and claims the injury of its fundamental rights on the basis of the arguments found in that decision.

II

[9] 1 The provisions of the Fundamental Law affected by the petition:

"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

[10] The petition is well-founded due to the following reasons.

[11] 1 On the basis of Section 31 (6) of the Rules of Procedure, the Constitutional Court decided about admitting the complaint upon putting forward the decision on the merits of the case and it admitted the complaint, as the complaint fully complied with the formal and substantive conditions laid down in the ACC.

[12] The affectedness of the petitioner was beyond doubt, as he had participated in the litigation as defendant. The petitioner exhausted the legal remedies available and neither of the parties submitted an appeal for review. The petitioner had received the final judgement on 7 July 2015 and it mailed, as a registered letter, the constitutional complaint on 7 September 2015, the last day of the deadline, therefore, it is considered to be submitted in due time.

[13] The petitioner filed, on the basis of Section 27 of the ACC, an explicit request to annul the judgement and it provided a reasoning to support the injury of its fundamental rights. With regard to assessing the potential conflict with the Fundamental Law influencing the merits of the judicial decision, and taking into account the question of fundamental constitutional importance, one should examine whether or not the decision of the Constitutional Court, CCDec, has been duly taken into account in other cases connected, from a significant aspect, to the facts and to the constitutional concepts of the case concerned, and also affecting a relevant constitutional question. As on the basis of Section 39 (1) of the ACC, the decision of the Constitutional Court shall be evidently binding upon everyone – including the courts proceeding with the present case – the Constitutional Court shall, upon petition, check, examine, and remedy as necessary by annulling the judgement, the appropriate enforcement by the courts of the universally binding constitutional content of the Constitutional Court's decision.

[14] 2 At the time of delivering the judgement of first instance, the Central District Court of Pest had been in the knowledge of the CCDec, and when the final judgement was passed, the decision 1/2015 CALCUD, annulling the decision 1/2012 CALCUD of the Curia, also existed. The importance of this circumstance can be found in the fact that the decision 1/2012 CALCUD declared, with respect to persons performing a service obligation or working at a public place or on public ground, that they do not qualify as public figures in the course of performing their duty, therefore, their consent shall be needed for the disclosure of a recognizable, individualised image or voice recording. Due to the annulment of this uniformity decision, the courts could again decide in the individual cases with the direct application of the laws, by appropriately taking into account the statements made in the CCDec.

[15] 2.1 Subsequently, the law-maker adopted the Act XI of 2015 on the amendment of the Act III of 1952 on the Civil Procedure, which added a new Chapter XXI/A to the

Act III of 1952 on the Civil Procedure (hereinafter: ACP). In this new chapter, the rules of a new type of action, the action brought for the enforcement of the right for image and sound recording, can be found. These rules – similar in totality to the structure of the procedure for the rectification in press – offer swift and effective legal protection for the persons whose right to image and sound recording has been injured. The aim of the swift and extraordinary procedure is to offer an opportunity for bringing a limited action to stop the injury, to provide appropriate compensation, to disclose this in public, to put an end to the injurious situation, to restore the state existing before the injury, to destroy the thing created by way of the injury or to deprive such thing of its injurious character. The action may be brought within a limited period of time, but the failure to do so shall not result in forfeiture: it shall only result in losing the right to use this special tool of action and the injured party who fails to bring such an action may still bring a general action for personality protection. (Sections 346/A–346/F of the ACP)

[16] 3 “The Constitutional Court may review the judgements of the courts [...] if they violate the boundaries of interpretation set by the Fundamental Law, thus rendering the judicial decision to be in conflict with the Fundamental Law.” {Ruling 3119/2015. (VII. 2.) AB, Reasoning [22], Ruling 3031/2016. (II. 23.) AB, Reasoning [19]}. Consequently, in the present case, the Constitutional Court has not examined whether the judgement of the Central District Court of Pest and the final judgement of the Budapest-Capital Regional Court of Appeal reviewing it were right to state that the debated video footage had the quality of an individualised recording; it has not examined whether or not the court assessed the pieces of evidence correctly. The scope of the review by the Constitutional Court covered – in line with the content of principle found in the CCDec – the question whether or not the judgement provided for the freedom of expression, comparing it appropriately with the right to human dignity of the plaintiff depicted in the photograph. The fundamental constitutional question of this case is the following: has the court complied with the call made by the Constitutional Court to resolve “by way of individual assessment the collision of interests between the freedom of the press and the right to one’s image, based on the protection of dignity” (CCDec, Reasoning [44]). The annulment by the Curia of 1/2012 CALCUD by the time of delivering the judgement of first instance could have been a useful aid for the judge proceeding with the case, however, it is evident from Section 39 (1) of the ACC that the decision of the Constitutional Court shall be binding on everyone, including the parties of the litigation as well as the court delivering the judgement. The decision of the Constitutional Court shall become effective from the moment of its publication or any other date contained therein, and it shall be binding upon everyone.

[17] As underlined by the Constitutional Court, by passing the decision No. 1/2015 CALCUD – i.e. the annulment of the decision No. 1/2012 CALCUD – the Curia intended to eliminate the obstacle (assumed to exist according to the above) from the way of the enforcement of the Constitutional Court’s decision, but the court – also neglecting the intentions of the Curia – interpreted the CCDec in the narrow sense as follows.

[18] Both the court of first instance and of the second instance knew and took account of the decision of the Constitutional Court that also affected the assessment of the current case, nevertheless, they interpreted it in a restrictive way, contrary to its essential content of principle. The decision of first instance correctly quoted paragraph [43] of the CCDec’s Reasoning, stating, by applying Article IX of the Fundamental Law to the particular case, that the photograph taken of the measure by the police may be disclosed, provided that it is not arbitrary. 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. (CCDec, Reasoning [43])

[19] The court held that the footage made on the act of enforcement was not an event of the present time, as the application of force during enforcement is as old as the state structure itself. As pointed out by the Constitutional Court, accepting this argument would imply that, for example, exercising the right of assembly and an objective report about it would not qualify as an event of the present time, since assembling is a customary social activity that also enjoys constitutional protection. The preamble of the Act I of 1946 – considered to be an achievement of our historical constitution – also granted the right of assembly, together with other rights, as a natural and inalienable right. The mere fact that a certain activity did also exist in the past should not prevent from taking it into account as an event of the present time. The circumstance that enforcement has taken place for centuries with the aid of the State shall not wash away the present interest about the acts of enforcement carried out in the present, and neither can Article IX of the Fundamental Law be interpreted, on the basis of the CCDec, in such a restrictive manner.

[20] With regard to the information challenging the public interest in terms of exercising public authority, the court argued that it shall only “challenge the public interest, if the rules of procedure are clearly violated during the above”. This standpoint does not follow in any way from Article IX of the Fundamental Law as interpreted by the Constitutional Court in the CCDec.

[21] The “watchdog” role of the press is clearly an important democratic value (c.p. CCDec, Reasoning [16]), during which the democratic role of the press shall include – in line with its function and within the limits of the law – the unveiling and the

disclosure of the breaches of law. Nevertheless, on the one hand, the freedom of the press shall not be limited to this role: the press may also cover the events of the present challenging the 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.

[22] In a decision about questions of media law, the Constitutional Court analysed the function of the press in a democratic social system. “In the practice of the Constitutional Court, the freedom of speech enshrined in Article 61 (1) of the Constitution has double foundations: the freedom of speech serves the purposes of both the full development of individual autonomy and, from the side of the community, the possibility of creating and maintaining a democratic public opinion. [...] Press is an institution of the freedom of speech. Therefore, the protection of the freedom of the press – since it serves the purpose of the free expression of speech, communication and opinions – is also justified in a twofold way: in addition to being a subjective right, it serves the community aim of creating and maintaining a democratic public opinion. [...] By exercising the right to the freedom of the press, the person who exercises this right becomes an active former of the democratic public opinion. In this role, the press controls the activities of public figures and institutions, as well as the process of decision making, and it informs the political community and the democratic public («watchdog» role)” [Decision 165/2011 (XII. 20.) AB, ABH 2011, 478, 503]. The Constitutional Court stated in the Decision 7/2014. (III. 7.) AB that with regard to the verification of the fundamental right, its position laid down in this decision published before the entry into force of the Fundamental Law shall continue to be applicable {Decision No. 7/2014. (III. 7.) AB, Reasoning [20]–[23]}. In another decision, the Constitutional Court analysed the relevant practice of the European Court of Human Rights, and it pointed out that by performing the «watchdog mission», the freedom of the press shall safeguard the democratic public life through guaranteeing the public debating of public affairs. Indeed, this role shall necessarily include the publication of exaggerating, provocative or, as the case may be, vulgar opinions. [ECHR, *Prager and Oberschlik v. Austria* (15974/90), 26 April 1995, paragraph 38; ECHR, *Bergens Tidende v. Norway* (26132/95), 2 May 2000, paragraphs 48–50]. The ECHR holds this to be not only a possibility, but also an obligation of the press in the democratic countries {ECHR, *Goodvin v. United Kingdom* [GC] (17488/90), 27 March 1996, paragraph 32}.” {Decision 13/2014. (IV. 18.) AB, Reasoning [35]}.

[23] Consequently, an interpretation by the court considering the recording and its recognizable disclosure to be lawful, exclusively if the “clear violation of the rules of procedure” applicable to the measure has been documented, would be incompatible with Article IX of the Fundamental Law. Considering the totality of acts of the police that breach the law, in many cases, the “clear violation of the rules of procedure” is

only applicable with regard to certain partial acts, however, according to the interpretation of the law by the court, an image of a lawful act could only be recorded and subsequently disclosed – even for the purpose of monitoring it, in the interest of maintaining its lawfulness, as a kind of pressure – with the prior explicit consent of the police officer (other public figure) whose image was recorded. In the CCDec, the Constitutional Court interpreted, in the protection of the freedom of the press and the freedom of expression enshrined in Article IX of the Fundamental Law, the legal situation related to the disclosure of a video recording 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” (CCDec, Reasoning [42]). The realm of constitutional interpretation specified by the Constitutional Court indicates several exceptions that qualify as misuses of the freedom of the press (such as arbitrary disclosure), or when the freedom of the press gives way, for another reason, to the protection of human dignity (such as, for example, the footage on the sufferings of the wounded police officer, in the scope of the recordings of events that otherwise challenge public interest).

[24] The Constitutional Court lays down in the CCDec the general rule, the criteria of the assessments to be carried out by the courts: “the Fundamental Law should also be taken into account in the course of the interpretation of what events are regarded as public appearance, appearance in public life, which footages are considered as mass recordings or ones that infringe personality rights on the basis of the Civil Code. “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, Reasoning [44]). In line with its constitutional position, the Constitutional Court shall not carry out instead of the courts this interpretation of the law, which is of constitutional importance, but which falls into the general courts’ scope of competence. In the Decision 3/2015. (II. 2.) AB, the Constitutional Court explained with respect to the review of a court judgement that “on the basis of Article 28 of the Fundamental Law, it is the constitutional obligation of the courts to decide in the present case 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 them, and to review the administrative decision of the Central Bank on the basis of an interpretation of the prohibition of market manipulation that does not violate the constitutional content of the freedom of the press. It’s not about an obligation of the court to build its decision directly on these provisions of the Fundamental Law, however, the court should take

into account the relevant aspects of constitutionality in the course of interpreting the Tpt. [Act n. CXX of 2001 on the Capital Market] and applying it in the particular case” {Decision 3/2015. (II. 2.) AB, Reasoning [20], similarly c.p. also: Reasoning [53]}.

[25] If, in the final judgement, the court fails to respect the authentic interpretation of the Fundamental Law, then it is the duty of the Constitutional Court – in accordance with its constitutional standing, when a relevant petition has been lodged – to review the judgement in the framework of a constitutional complaint, and to annul it as necessary. Indeed, it is beyond the court’s scope of discretion to decide whether or not to enforce the provision under Article 24 (1) of the Fundamental Law: “the Constitutional Court is the principal organ for the protection of the Fundamental Law”. As pointed out by the Constitutional Court, this Article of the Fundamental Law binds the Constitutional Court to annul, without any scope of discretion, the judicial decision, which is contrary to the Fundamental Law, thus enforcing the role of the Fundamental Law fulfilled in the hierarchy of norms. Section 39 (1) of the ACC, as a cardinal Act, unfolds this prominent role fulfilled in the constitutional order by laying down that the decision of the Constitutional Court is binding upon everyone. The selective, narrow application of the decision of the Constitutional Court either by the law-maker or – just like in the present case – by the judiciary, or the failure, in any other way, to enforce it would question the above rule.

[26] As in the present case the final judgement to be reviewed – that essentially maintained, in the questions of constitutional importance, the arguments of the court of first instance as detailed above – does not comply with the requirements concerning the interpretation of Article IX of the Fundamental Law, as laid down in the CCDec, the Constitutional Court stated that the judgement No. 56.Pf.632.194/2015/3 of the Budapest-Capital Regional Court was contrary to the Fundamental Law, and annulled it.

[27] 4 The publication of the decision in the Hungarian Official Gazette is based upon the second sentence of Section 44 (1) of the ACC.

Dr. Tamás Sulyok

Vice-President of the Constitutional Court

Dr. István Balsai

Justice of the Constitutional Court

Dr. Egon Dienes-Oehm

Justice of the Constitutional Court

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Dr. Péter Szalay
Justice of the Constitutional Court

Dr. Mária Szívós
Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court

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

[28] I disagree with the decision. I hold that the fundamental problem is the fact that decision based the declaration of the conflict with the Fundamental Law and the annulment of the judgement No. 56.Pf.632.194/2015/3 of the Budapest-Capital Regional Court solely on the CCDec, rather than on examining the constitutionally relevant circumstances of the given individual case. According to the majority opinion, the final judgement concerned "does not comply with the requirements concerning the interpretation of Article IX of the Fundamental Law, as laid down in the CCDec" (Reasoning [26]).

[29] The summarising argument quoted above and the connected reasoning are questionable from a number of aspects and they raise questions in which my opinion is – in some cases radically – different from the statement of position reflected in the majority decision.

[30] 1 First of all, I wish to underline that requirements of interpretation handled by the decision as a binding constitutional interpretation, i.e. as the "law of the Constitutional Court", had been laid down in an individual case incomparable with the present case in a number of important aspects, where the Constitutional Court – acting also as a court of facts – unfoundedly and one-sidedly favoured the exercising of the freedom of the press against the protection of other freedoms. As I have pointed out in my dissenting opinion attached to the CCDec, the decision had neglected the legal fact, decisive from the point of view of the constitutional conflict – reiterated earlier in the case law of the Constitutional Court –, that a camera recording is a piece of personal data and everyone shall dispose over disclosing and using it. Consequently, the unauthorised disclosure of the recorded image, within the given circumstances, may violate not only human dignity, but also the rights attached to the protection of personal data.

[31] I have presented my position in principle in my dissenting opinion – which I hold to be a guiding one in the present case as well – namely that "when Article VI (2) of

the Fundamental Law and Article IX (2) of the Fundamental Law are in collision, the examination 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.”

[32] I consider it necessary to add the following, in the present dissenting opinion, to this statement of principle, which I maintain in unchanged form. The courts are entitled and bound to resolve the constitutional collision on the basis of the explored facts of the case, but the Constitutional Court may only review the collision of fundamental rights and it may not qualify the facts of the case differently from the court that proceeded in the adversary procedure. All the above shall significantly restrict the usability of the criteria of interpretation, specified in the CCDec regarding Article IX and considered in the present decision as determining ones, in the individual cases of similar subject matter, but of different circumstances, and handling it as “the law of the Constitutional Court” may be excluded.

[33] 2 In the individual case forming the subject matter of the present decision, in its judgement No. 36.P.90.562/2014/6, the Central District Court of Pest (hereinafter: CDCP) had explored the facts of the case, and on the basis of it, the court established the misuse of the freedom of the press, the arbitrary disclosure by the defendant that had also damaged the privacy of the plaintiff. It is important to note that the reasoning of the judgement made an explicit reference to the compliance with the range of interpretation of the CCDec, although at the time of committing the act, the disclosure infringing the personality rights, the CCDec had not even existed.

[34] Thus, it bears no importance that the judgement of the CDCP, to support its decision, also made a reference to the civil uniformity decision No. 1/2012 CALCUD of the Curia that had been still in force and binding the court at that time, and which was not annulled by the CCDec. The final court judgement approved in its every important element the facts of the case as it had been determined by the CDCP. (I also note in this respect that the relation of the present decision to the court decision of first instance delivered in the case is unclear.) Therefore, the annulment of the judgement of the Budapest-Capital Regional Court based on and approving the correct interpretation of the law by the court of first instance is unfounded.

Budapest, 18 October 2016.

Dr. Egon Dienes-Oehm

Justice of the Constitutional Court

[35] I do not support the annulling provision in the holdings of the decision as, in my view, it violates the right to privacy of the police officers in charge by maintaining the recognizability of their portrait in future media coverages. Police officers are simple implementers of the state-political measures, therefore, they are not to be regarded as public figures. Their identification number is a sufficient guarantee of their accountability for any unlawful act – this is why the covering or the removal of this number is a major disciplinary offence –, but the disclosure of their portrait in the media reports is a violation of their privacy to which they are entitled to also during their work as a police officer. My dissenting opinion attached to the CCDec contained this standpoint of mine as well, and in my present dissenting opinion I intend to underline that I maintain my position. Additionally, I wish to put forward another argument to support my standpoint.

[36] From the 1990's, the majority of the Constitutional Court at that time has addressed the dilemma, mainly occurring with regard to events of assembly, caused by the media appearance of the images of police officers, and thus their private personality beyond their identity as police officers, by applying – in the absence of a better solution – the right to human dignity. At that time, only the right to the protection of one's private home has become the subject matter of constitutional protection, in the context of the protection of privacy, in Article 59 of the Constitution in force that time. Thus, in those years, the Constitutional Court could only take action for protecting the images of police officers on the basis of the protection of dignity, provided that the relevant image was depicted for the public in a manner violating human dignity. In contrast with the foregoing, the Fundamental Law of 2012 extended the protection of privacy and thus the protection under Article VI (1) of the Fundamental Law covers the totality of privacy. It opened up the way for the Constitutional Court to address this question from the side of the particular protection of the privacy of the police officer, rather than on a comprehensive basis (as a normatively emptier formula). Despite of the fourth amendment of the Fundamental Law that had provided for the explicit annulment of the old decisions of the Constitutional Court, and although the subsequent declaration in the Decision 13/2013. (VI. 17.) AB by the majority of the Constitutional Court at that time stated that it would only follow the old decisions of the Constitutional Court if there had been no change between the provisions of the old Constitution and the relevant rules of the new Fundamental Law, the actual situation was as follows. In fact, in most cases, even after fierce debates within the body, there has usually been a majority in favour of the interpretations found in the old decisions of the Constitutional Court. For a number of years after 2012, in the majority of the Constitutional Court's

decisions, this attitude naturally resulted – with some superficial argumentation – in the instant reactivation of the old decisions of the Constitutional Court. This is why in many cases we failed to elaborate new arguments aligned with the amended rules of the Fundamental Law, and even today the cases are often decided mechanically, in line with the old ways of reasoning that originate in the old rules.

[37] In my view, the same happened in the reasoning of the CCDec laying down the case law of the Constitutional Court in the context of the present case: it remained limited to the arguments based on the protection of human dignity, and it failed to include the protection of the police officers' right to privacy on the basis of the provision of the new Fundamental Law. Since the adoption of the CCDec, it has been applied as the standpoint taken by the majority of the Constitutional Court. In fact, this decision offers a much broader scope for the public disclosure of the images of police officers, as if it had changed for an assessment in accordance with the Fundamental Law, rather than applying the old case law of the Constitutional Court. It only allows the prohibition of disclosing the image, if it implied the injury of the police officer's dignity. I cannot share this view, and I wish to underline that police officers are not public figures, they are only implementing tools of the application of force by the State. Beyond this role, the whole personality of a police officer is mandatorily pushed into the background in line with the detailed regulations on applying coercive measures, and it means, on the other side, that during playing this role, the whole personality of the police officer shall remain a part of his or her privacy. Consequently, disclosing this privacy by presenting his or her image shall violate the right to privacy not only in the case of presenting the image in a manner injuring human dignity, but also in any other case when the disclosure is made without his or her consent.

[38] To sum up my position, I hold, in contrast with the majority opinion, that the present decision repeated the mistake that had been made by the CCDec by failing to examine the difference between the old constitutional regulations and the present Fundamental Law, and it reviews the challenged court decisions by remaining within the narrowed scope of arguments focusing on the protection of dignity. In the case of making a shift to the line of argumentation that I propose, by involving the actually relevant provision of the new Fundamental Law – Article VI in the protection of privacy –, the Constitutional Court should have dispensed with the annulment of the judicial decision.

Budapest, 18 October 2016.

Dr. Béla Pokol

Justice of the Constitutional Court