

Decision 14/2016 (VII. 18.) AB

In the matter of constitutional complaints, with concurring reasoning by Justice *dr. László Salamon*, and dissenting opinions by Justices *dr. Ágnes Czine*, *dr. Imre Juhász*, *dr. István Stumpf*, *dr. Mária Szívós* and *dr. András Varga Zs.*, the plenary session of the Constitutional Court delivered the following

decision:

1. The Constitutional Court holds that Order No. 20.Kpk.45041/2014/3 of Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) and that of Administrative decision No. 01000/2033-2/2014.ált. of Budapest Police Headquarters are in conflict with the Fundamental Law, therefore, the Court hereby annuls the court Order and the Administrative decision.

2. The Constitutional Court hereby dismisses the constitutional complaint lodged against Order No. 5.Kpk.45.401/2015/5 of Budapest Administrative and Labour Court.

3. The Constitutional Court, acting of its own motion, finds unconstitutionality by omission manifested by non-conformity with the Fundamental Law in breach of Article I (1), Article I (3) and Article VIII (1) of the Fundamental Law due to the legislator's failure to regulate in Act III of 1989 on the Right of Assembly the guarantee rules that adequately ensure the peaceful nature of assemblies and the creation of legal provisions to resolve any conflict of fundamental rights that ensure the simultaneous enforcement of conflicting fundamental rights with the least possible restriction.

Therefore, the Constitutional Court hereby invites the National Assembly to meet its duty of legislation by 31 December 2016.

4. As to the remainder, the Constitutional Court hereby dismisses the petition.

The Constitutional shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1.1. The petitioner (hereinafter referred to as the "First Petitioner") lodged a constitutional complaint before the Constitutional Court pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 20.Kpk.45041/2014/3 of Budapest Administrative and Labour Court. The petitioner contends that the impugned Order violates the right to peaceful assembly guaranteed in Article VIII (1) of the Fundamental Law. The petitioner requested the Constitutional Court to find unconstitutionality by non-conformity with the Fundamental Law and annul Administrative decision No. 01000/2033-2/2014.ált. of Budapest Police Headquarters as reviewed by the contested Order

[2] The organisation represented by the petitioner, Magyar Hajnal Mozgalom Párt (Hungarian Dawn Movement Party), wanted to hold a commemoration with the participation of about 300 people on 8 February 2014 from 11 am to 2 pm in the 1st District of Budapest, Vérmező, which event had been notified to the police on 7 January 2014. The purpose of the event was "to commemorate the anti-Bolshevik defence forces that broke out of Buda Castle on 11 February 1945, and to inform about the 2014 elections." Budapest Police Chief banned the holding of the event in the impugned administrative decision on the basis of Section 2 (3) of Act III of 1989 on the Right of Assembly (hereinafter referred to as the "Right of Assembly Act") on the grounds that "there is a danger that the event will harm the human dignity of others, thereby breaking the balance of the system of personality rights." In support of this, the petitioner referred to Article 2 (1) to (2) of Act XVIII of 1947 promulgating the Paris Peace Treaty and, interpreting the right of assembly as a communication right, invoked Article IX (4) of the Fundamental Law, pursuant to which right to freedom of expression may not be exercised with the aim of violating the human dignity of others. The decision explained that various international legal documents as well as the Fundamental Law and the decisions of the Constitutional Court, such as Decision 75/2008 (V. 28.) AB (hereinafter referred to as the "2008 Court Decision") and Decision 30/1992 (V. 26.) AB (hereinafter referred to as the "1990 Court Decision"), there are fundamental rights that may conflict with the right of assembly and therefore restrict it. The petitioner further referred to two court judgements which, in his view, extended the prohibition grounds regulated in the Right of Assembly Act.

[3] In the impugned order, the court rejected the petitioner's request for review. The court found that it had to take a position on the question of law whether the holding of an event could be prohibited for reasons other than the prohibitions listed in Section 8 (1) of the Right of Assembly Act. The court agreed with the police finding

that the 'Day of Honour' event was a form of expression of opinion and therefore considered Article IX of the Fundamental Law applicable in the case. The court considered that the event was one of the biggest annual events of the far right in Hungary, at which there was a danger of spreading far-right or Nazi ideas. In this respect, the court examined the organiser's website, the goals of the Hungarian Dawn Movement Party indicated on the website, and the classified documents provided by the Constitution Protection Office. The court maintained that the title of the event is "suitable for disturbing public peace", and "statements may be made at the event which may offend the dignity of others, thereby violating the fundamental constitutional right to human dignity" (there is a danger of spreading far-right ideas, in violation of the human dignity of the victims of the Second World War and their relatives living today); and in view of the above, the court rejected the request for a review.

[4] 1.2. In his constitutional complaint, the petitioner complained that the administrative authority and the court did not refer in their decision to the grounds for prohibition of holding the event contained in Section 8 (1) of the Right of Assembly Act, but to Section 2 (3) of the Right of Assembly Act, which "governs the holding of the event" and which "lays down the conditions for the disbandment of the event". He further complained that the court had made its decision not on the basis of Article VIII (1) of the Fundamental Law, but on the basis of the freedom of opinion provided for in Article IX of the Fundamental Law. In addition, the petitioner "notes" that the secret file of the Constitution Protection Office raises a violation of Article XXVIII (1) of the Fundamental Law, but has not submitted a substantive justification in this regard.

[5] The petitioner contends that the organisation he represents wished to hold a commemorative and peaceful event that looked at history from a specific perspective. It refers in that regard to Decision 3/2013 (II. 14.) AB (hereinafter referred to as the "2013 Court Decision"), which rightly stated that "[e]vents held under the right of assembly are suitable for displaying historical narratives that live side by side but are partially or significantly different from each other." The petitioner stressed that the finding of the judicial Order regarding the danger of spreading far-right or Nazi ideas did not correspond to reality. However, the petitioner referred to the requirement of substantive neutrality in the 2008 Court Decision, from which it follows that "no considerations about the content of the communication expected at the assembly can be taken into account" regarding prior prohibition. In his view, a broad interpretation of the prior prohibition was unconstitutional by conflict with the Fundamental Law, and what is more, the police exercised censorship, thereby vacating the essence of freedom of assembly. In line with the substance of the 2013 Court Decision, the petitioner also

referred to the fact that “freedom of assembly includes the right to assemble at a particular place”, and the venue of the petitioner’s event has a communicative function and therefore, in his view, “enjoys particularly strong constitutional protection”. Finally, the petitioner argued that although he no longer had the opportunity to hold the event and that the annulment of the court's decision would not change his situation, a finding of unconstitutionality by conflict with the Fundamental Law would be moral satisfaction for him.

[6] For all the above reasons, the petitioner considers that the contested order and the police decision infringe upon the right to peaceful assembly guaranteed by Article VIII (1) of the Fundamental Law.

[7] 2.1. Another petitioner (hereinafter referred to as the “Second Petitioner”) also lodged a constitutional complaint before the Constitutional Court pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 5.Kpk.45.401/2015/5 of Budapest Administrative and Labour Court.

[8] On 7 February 2015, the petitioner notified a funerary tribute event as an act of reverence to be held on 14 February 2015 in Kapisztrán Square with around 500 participants. The notifying party stated that the purpose of the event was “to express our solidarity with Russia and its leader, Vladimir Putin.” The notifying party mentioned that “[t]raffic will not be obstructed during the assembly”. He also proved to be very cooperative. In his notification, he wrote, “[t]he text of the speakers’ speeches before the event will be discussed with lawyers and, upon request, with Budapest Police Headquarters officials, in order to prevent the texts from violating anyone’s human dignity or disturb public peace. We will also check the clothes, flags and banners of the people in attendance to the event to ensure that they comply with the legislation in force.”

[9] Budapest Police Headquarters prohibited the holding of the event on the basis of Article 2 (1) of Act XVIII of 1947 promulgating the Paris Peace Treaty and Article 2 (3) of the Right of Assembly Act. During the review procedure, the court granted judgement in favour of the respondent (the police) and upheld the prohibition. The court ruled in its order that, subject to the rules in force and the provisions of international treaties, “the right of assembly may, in justified cases, be adequately limited to what is necessary.” According to the findings of the 2008 Court Decision, the restriction was “based on a test formulated in order to protect freedom of expression” and referred in its reasoning to Article IX (4) and (5) of the Fundamental Law. The court questioned whether the applicant really wanted to hold an event “expressing solidarity

with Putin" because "contradicting himself, he admitted that the real purpose of the event was commemoration," which makes it likely that an event related to "Day of Honour" would be notified.

[10] The court took note of the "information contained in the police report containing classified information from the partner authority" and found that the decision of the respondent (the police) was well-founded, since "the manner in which the right to assembly at the event notified by the applicant would be exercised would infringe Article 2 (3) of the Right of Assembly Act and Article 2 (1) of the Paris Peace Treaty." In this context, the court referred to the finding of the police that persons identifying with the ideals of Magyar Nemzeti Arcvonal (Hungarian National FaceFront) would presumably take part in the event, where "there may be grossly anti-community behaviour or a realistic possibility of disseminating ideas that would violate the fundamental rights of relatives of victims of those ideas." The court found that the applicant (complainant) had not provided any evidence that the "manifestations likely to occur in the police decision were unlikely, nor could said applicant substantively rebut the finding to the contrary"; however, "under Section 164 (1) of the Hungarian Code of Civil Procedure, the facts necessary to adjudicate a lawsuit must normally be proved by the party in whose interest it is for the court to accept them as true." Moreover, in the present case, the distancing of the notifying party from the Day of Honour suggests that the notifying party "intended to exercise his freedom of assembly in a deceptive manner, in bad faith, thus abusively". The court found that it wished to comply with the 2013 Court Decision. It stated that "the court has no legal means to uncover and establish the facts and pass an appropriate administrative decision in lieu of an administrative body [...] In such circumstances, a judicial review cannot be directed at whether the police have correctly applied the relevant legislation while fully clarifying the facts. In the course of review, the court can only compare a fundamental right with a fundamental right and the enforcement of a fundamental right only with the prevailing public interest." On the basis of the foregoing, the court concluded that in the present case, on the one hand, the right to assembly and, on the other hand, the protection of public order, as well as the personal rights and human dignity of others competed. The latter "collectively justify that the demonstration notified by the applicant should be prohibited." Finally, the court order concludes that "[t]he court therefore considered that peaceful demonstration (as it had been advanced so) could be prohibited in the present case (the measure in question is necessary and proportionate), as less restrictive means do not enforce the rights and interests of others."

[11] 2.2. The petitioner complained that the police did not base his decision on the grounds for prohibition contained in Section 8 (1) of the Right of Assembly Act; however, a gathering may not be prohibited in advance on a ground outside the scope of Section 8 (1) of the Right of Assembly Act. With regard to the international convention, the petitioner explained that they were primarily addressed to the State. Thus, even if it allows for a certain restriction of fundamental rights, it must be laid down at the legislative level under Article I (3) of the Fundamental right, while respecting the essential content of the fundamental right. The petitioner pointed out that Decision 55/2001 (XI. 29.) AB had already established that the Right of Assembly Act complied with the international obligations undertaken by Hungary, when the legislator codified two cases among the prohibitory grounds allowed by the international conventions in Section 8 (1) of the Right of Assembly Act. In this context, the 2008 Court Decision stated: "primarily, it is the obligation of the legislator to assess to what extent is it necessary to amend or supplement the provisions of the Right of Assembly Act for the purpose of preventing misuses and decreasing the difficulties in applying the law." Even if the situation is subject to Section 2 (3) of the Right of Assembly Act, the police shall give prior notice to the notifying party pursuant to Section 6 (2) of Decree 15/1990 (V. 14.) BM of the Minister of the Interior, as Section 2 (3) of the Right of Assembly Act governs the holding of the event and shall lay down the conditions for the distribution of the event. In the petitioner's view, the procedure gives rise to concern that while the police may only request data according to Section 7 of the Right of Assembly Act and check whether the notifying party meets the conditions provided for in Section 5 of the Right of Assembly Act, "in an administrative proceeding concerning the exercise of a human right, the client is vetted by the secret service". The petitioner contends that "it is unacceptable that the court, while disregarding the applicant's reasonable need for a fair and impartial remedy, should not investigate the lawfulness of confidential data collection."

[12] With regard to freedom of expression and the violation of human dignity, the petitioner, referring also to the rulings of the European Court of Human Rights (hereinafter referred to as the "Human Rights Court") and the Constitutional Court, stated that the opinion was still constitutionally protected as long as it is incapable of inciting violence and cannot be denied on the grounds that it violates someone's sensitivity. "It is clear that any connection between a given regulation and human dignity cannot in itself justify a restriction on freedom of expression", as it is "unrestricted only as a legal determinant of human status" [Decision 7/2014 (III. 7.) AB]. He pointed out that the personality rights specifically mentioned in the Civil Code (Act V of 2013 on the Civil Code) can be enforced only in person and after the violation

has occurred. By analogy with the provisions of Decision 20/1997 (III. 19.) AB, the petitioner explained: "[I]f the public prosecutor may not restrict freedom of the press and opinion as an unsolicited advocate in order to protect rights that can only be enforced in person or by a member of that community, then, in my view, the police may not apply such prior censorship, either. All the more so as the police do not have any legal authority to do so, as they cannot investigate and comment on the content of the notified event." On the basis of all this, the petitioner considered that "a peaceful demonstration is not necessarily an emotional or anger-free assembly." He explained that in keeping with the Organisation for Security and Cooperation in Europe's guidelines on the right of assembly, "opinions expressed at an assembly may be directed against others, including with an anger that disturbs those concerned or others. [...] [The] expression of anger must remain at the level of verballity, but, of course, that verballity may not constitute incitement to commit a crime (Report OBH 4435/2006)." The petitioner also referred to the fact that "at the commemorations of Honour Day held since 2003, with which [the police] sought to link my notification", there was never a statement sanctionable by the Criminal Code, nor that which would have constituted a violation of, or incitement to such violation of, human rights specifically mentioned by the Civil Code. However, he did refer to Report OBH 4435/2006, which analyse the relationship between the peaceful nature of the assembly and possible individual but containable violations.

[13] Based on the above, the petitioner considers that the contested order violates the right to peaceful assembly guaranteed in Article VIII (1) of the Fundamental Law, the fundamental right to freedom of expression guaranteed in Article IX (1), the prohibition of discrimination enshrined in Article XV, the right to a fair trial under Article XXIV, the requirement of legal certainty under Article B (1) and Article I (1), prescribing the obligation of the State to protect fundamental rights.

II

[14] 1. The relevant provisions of the Fundamental Law are as follows:

"Article B) (1) Hungary shall be an independent, democratic rule-of-law State."

"Article Q) (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law."

"Article I (1) The inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights."

"Article VIII (1) Everyone shall have the right to peaceful assembly."

"Article IX (1) Everyone shall have the right to freedom of expression.

[...]

(4) The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.

(5) The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[15] 2. The relevant provisions of the Right of Assembly Act are as follows:

"Section 2 (3) The exercise of the right of assembly shall not constitute a criminal offence or an incitement to commit a criminal offence, nor shall it infringe upon the rights and freedoms of others."

"Section 7 The written notification shall contain:

(a) the expected date, venue and route of the start and end of the planned event;

(b) the purpose as well as the schedule of the event;

(c) the expected number of participants in the event, the number of directors ensuring the smooth running of the event; and

(d) the name and address of the body or persons organising the event and of the person authorised to represent the organisers.”

“Section 8 (1) If holding an event subject to notification were to seriously jeopardise the smooth functioning of representative bodies of the people or that of courts, or if traffic cannot be secured on another route, the police may prohibit the event from being held at the venue or time indicated in the notification within 48 hours of receiving the notification.”

“Section 9 (1) No appeal may be lodged against the police decision; within three days of the communication of the decision, the organiser may request a judicial review of the state administrative decision. The request must be accompanied by the police decision.

(2) The court shall decide within three days from the receipt of the request, in a non-litigious procedure, with the assistance of lay judges, and, if necessary, after hearing the parties. If the court upholds the request, it will set aside the police decision, otherwise it will reject said request. There is no appeal against the court's decision.”

“Section 14 (1) If the exercise of the right of assembly conflicts with the provisions of Section 2 (3), or the participants appear at the event by force of deadly weapons or otherwise armed, and if the event subject to notification is held despite a decision prohibiting such event, the police shall disband said event.”

[16] 3. Relevant provisions of Act XVIII of 1947 promulgating the Paris Peace Treaty are as follows:

“Article 2

1. Hungary shall take all measures necessary to secure to all persons under Hungarian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.

2. Hungary further undertakes that the laws in force in Hungary shall not, either in their content or in their application, discriminate or entail any discrimination between persons of Hungarian nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter.”

III

[17] 1. First of all, the Constitutional Court reviewed whether the conditions for the admissibility of the petition set out in the Constitutional Court Act were met.

[18] Pursuant to Section 27 of the Constitutional Court Act, 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 violates their rights laid down in the Fundamental Law, and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her.

[19] 1.1. The First Petitioner received the court order by fax on 16 January 2014, by post on 21 January 2014, while he sent his constitutional complaint by post on 17 March 2014 to the court hearing the review, thus, the constitutional complaint was submitted within the statutory period. The petition complies with the formal requirements provided for in Section 52 (1b) of the Constitutional Court Act. The petitioner indicated the competence of the Constitutional Court according to Section 27, marked the court order requested for review, indicated Article VIII (1) of the Fundamental Law, which, in his view, had been infringed, and sought a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment thereof.

[20] The petitioner "noted" that the non-disclosure of the secret file of the Constitution Protection Office raises a violation of Article XXVIII (1) of the Fundamental Law, but failed to submit a substantive justification in this regard; therefore, the Constitutional Court dismissed the petition with regard to the right to a fair trial on the basis of Section 64 (d) of the Constitutional Court Act.

[21] 1.2. In the case of the Second Petitioner, the trial court adopted its order on 13 February 2014, while the petitioner lodged his constitutional complaint directly with the Constitutional Court on 13 March 2014, thus, the constitutional complaint was lodged within the statutory period. It can be further concluded that the petition complies with the formal requirements provided for in Section 52 (1b) of the Constitutional Court Act. The petitioner indicated the competence of the Constitutional Court according to Section 27, marked the court order requested for review, and sought a finding of unconstitutionality by non-conformity with the Fundamental Law

and annulment thereof. The petitioner marked Article VIII (1), Article IX (1), Article XV, Article XXIV (1) and Article B (1) and Article I (1) of the Fundamental Law as a violation of his right guaranteed in the Fundamental Law. Of these, with regard to Article VIII (1) [and related Article I (1)], the petition also contains a detailed justification.

[22] On this basis, pursuant to Section 64 d) of the Constitutional Court Act, the Constitutional Court rejected the constitutional complaint lodged by the Second Petitioner for lack of adequate statement of reasons in relation to Article B (1), Article IX (1), Article XV and Article XXIV (1) of the Fundamental Law.

[23] 2. In assessing the substantive conditions for the admissibility of a constitutional complaint, the Constitutional Court established the following.

[24] Pursuant to Section 56 (1) and (2) of the Constitutional Court Act, the Constitutional Court determines in its discretionary power whether the petitioner has fulfilled the statutory conditions for the admissibility of a constitutional complaint, in particular the concernment under Sections 26 and 27 of the Constitutional Court Act, the exhaustion of the legal remedy and the conditions under Sections 29 to 31 of the Constitutional Court Act.

[25] Pursuant to Section 27 of the Constitutional Court Act, a constitutional complaint may be submitted by a person or organisation involved in an individual case if a decision made on the merits of the case has infringed his or her right guaranteed in the Fundamental Law. In these proceedings, both petitioners are directly affected as they were involved as applicants in the judicial review proceedings involved in the constitutional complaint.

[26] Pursuant to Section 27 of the Constitutional Court Act, a constitutional complaint against a judicial decision may be filed the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her. In the present case, the petitioners filed constitutional complaints against the orders made in the review procedure provided for in Section 9 (1) of the Right of Assembly Act in respect of an administrative decision, against which there is no further legal remedy. The constitutional complaint thus meets the conditions set out in Section 27 of the Constitutional Court Act.

[27] As defined in Section 29 of the Constitutional Court Act, a further condition for the admissibility of a constitutional complaint is that a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance. These two conditions are of an alternative nature, so that the exhaustion of either of them in itself establishes the substantive proceedings of the

Constitutional Court. The Constitutional Court found that the present cases raise fundamental constitutional issues (such as the relationship of freedom of expression as a maternal right to the right of assembly, the scope of the grounds for prohibition, the need for substantive neutrality, the petitioner's personal attachments and world view), which also raise doubts about the unconstitutionality by conflict with the Fundamental Law that substantially influences the judicial decision; therefore, the admission of the cases was justified by both conditions.

[28] As both petitions met the conditions of Section 29 of the Constitutional Court Act, the Constitutional Court admitted the constitutional complaint filed under number IV/609/2014 at its plenary session on 23 September 2014 and the constitutional complaint filed under number IV/801/2015 at its plenary session of 24 May 2015.

[29] On 5 June 2015, the Justice rapporteur delivering the opinion of the Court ordered the joinder of the cases pursuant to Section 58 (2) of the Constitutional Court Act and Section 34 (1) of the Rules of Procedure, taking into account their interrelated subject matter.

IV

[30] The petitions are partly well-founded.

[31] 1. The Constitutional Court stated in its 2013 Court Decision that it considers the findings on freedom of assembly contained in its previous decisions to be relevant. {2013 Court Decision, Reasoning [38]; reaffirmed in Decision 30/2015 (X. 15.) AB, Reasoning [24], hereinafter referred to as the "2015 Court Decision"}

[32] In accordance with the provisions of the 1992 Court Decision, the Constitutional Court considers the right to assembly to be a highly protected fundamental right, but this priority, in accordance with the provisions of Decision 30/1992 (V. 26.) AB [ABH 1992, 167, 171.], and Article I (3) of the Fundamental Law based on it, does not mean that the right to assembly is an unrestricted fundamental right. In this context, the Constitutional Court held in Decision 3/2015 (II. 2.) AB that "[a] fundamental right may be restricted in accordance with Article I (3) of the Fundamental Law in order to enforce other fundamental rights or to protect a constitutional value, to the extent strictly necessary, in a manner proportionate to the objective pursued, while respecting the essential content of the fundamental right. This test of the restriction of fundamental rights is above all binding on the legislator, but at the same time, in line with their

competences, it also formulates a constitutional requirement for law enforcers and the courts. This requirement, also having regard to Article 28 of the Fundamental Law, imposes an obligation on courts that, where legislation which restricts the exercise of a fundamental right is interpreted, the restriction of the fundamental right in question must be limited to the level of the necessary and proportionate intervention, within the limits of the margin of interpretation allowed by the legislation." (Reasoning [21])

[33] 2. In its 2015 Court Decision, the Constitutional Court, referring to its previous rulings, emphasised the prominent communication function of the right of assembly in the discussion of public affairs, which can be interpreted as a form of direct democracy in addition to the special fundamental right to freedom of expression. In assessing the present cases, the Constitutional Court considered it particularly important to review the function of the right of assembly as a fundamental right of communication in democratic states governed by the rule of law.

[34] In this context, the Constitutional Court considers its finding that "[f]ree expression of free persons is an essential element and meaning of the constitutional order based on the Fundamental Law. On the other hand, freedom of expression is the foundation of a democratic, pluralistic society and public opinion. Without the freedom and diversity of social and political debates, there is neither democratic public opinion, nor any democratic rule-of-law State. Democratic public opinion requires that all citizens of society be able to express their thoughts freely and thus become those that form public opinion. The widespread provision of freedom of opinion leads to the intellectual enrichment of the community, as the elimination of erroneous, rejected views is only possible in open public debate. Thus, in addition to guaranteeing the subjective right to freedom of expression, the state must also guard over pluralism in order to form and maintain a democratic public opinion." {Decision 7/2014 (III. 7.) AB, Reasoning [39]}

[35] With reference to gatherings, in the initial period of its operation, the Constitutional Court, in reviewing the criminal law statutory provision of incitement against the community, held as a matter of principle that "[t]he term 'public at large', apart from meetings, practically means exposure to the press. With the freedom of the press having become a reality, no-one speaking out publicly may invoke external compulsion, and with every line penned he gives himself and risks his entire moral credibility. Only through self-cleansing can a political culture and a soundly reacting public opinion emerge. Thus one who uses abusive language brands oneself as such and in the eyes of the public one will become known as a "mudslinger." Such abusive

language must be answered by criticism." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 180.]

[36] In this context, the Constitutional Court also formulated a test known as the value neutrality test: "The right to free expression protects opinion irrespective of the value or veracity of its content." However, "[f]reedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, regardless of its content." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 179.; Decision 14/2000 (V. 12.) AB, ABH 2000, 83, 108.] The requirement of substantive neutrality with regard to the expression of opinions at assemblies was also reaffirmed in the 2008 Court Decision: "[I]n addition to the provision in Section 8 (1) of the Right of Assembly Act, no considerations about the content of the communication expected at the assembly can be taken into account." [2008 Court Decision, ABH 2008, 651, 667.]

[37] In other words, it imposes the requirement that "[a] constitutional democracy [...] shall not stifle extremist voices merely because of their content. In a democratic society, such a generalist racist speech cannot change the fact that, from the point of view of the State, every citizen is equally valuable and a person with equal rights." [Decision 95/2008 (VII. 3.) AB, ABH 2008, 782, 789.]

[38] 3. However, the differences between extreme utterances can be astronomical. Accordingly, as early as 1992, the Constitutional Court pointed out that public speeches have several external limitations: such as incitement to hatred against certain groups of people, protection of constitutional values, and fulfilment of Hungary's international obligations. [*Cf.* Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176.]

[39] The first specifically mentioned limitation is defined in Article IX (5) of the Fundamental Law as the "dignity of communities": The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act. Accordingly, an individual may claim compensation under the Civil Code within thirty days from the occurrence of the violation for indignant allegations, if the rights of the national, ethnic, racial or religious community to which he or she belongs has been impaired in front of a large public gathering in a way that was seriously infringing or unreasonably prejudicial in its expression. [Section 2:53 (5) of the Civil Code]

[40] The protection of constitutional values is also enshrined as an external constraint in Article 17 of the European Convention on Human Rights (hereinafter referred to as the "Convention"). In this context, the Constitutional Court has already held that "[p]ursuant to Article 17 of the Convention, nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." [Decision 57/2001 (XII. 5.) AB, ABH 2001, 484, 489.] Referring also to freedom of assembly as a special fundamental right of communication, the cited decision stated: "not only Article 10 (2) of the Convention, as referred to above, but also Article 17 thereof applies to the restriction of freedom of expression. The Commission decided on the basis of Article 17 of the Convention that persons aiming to introduce dictatorship and to annul the rights guaranteed in the Convention shall not be entitled to refer to the rights specified under Articles 9, 10 and 11 of the Convention. Another reference to Article 17 was made by the Commission in assessing a complaint in the case of which it established racial discrimination and incitement, and therefore established the well-founded nature of restricting freedom of expression (decision no. 250/57 in *KPD v. Germany*, and decision no. 8348/78 *Glimmerveen and Hagenbeek v. The Netherlands*, see *J.A.Frowein, W.Peukert, EMRK-Kommentar, Kehl-Straßburg-Arlington, 2. Aufl.* 1996. p. 492). The Court adopted a similar view when establishing that the protection guaranteed in Article 10 of the Convention was not applicable to the expression of racist opinions (decision of 23 September 1994 in *Jersild v. Denmark*, Series A no. 298, para. 35, *Bírószági Határozatok* (Court Reports) 1996/6, pp. 473-477), and that pro-Nazi policy may not be protected under Article 10 as it constitutes a statement against the fundamental values of the Convention (decision of 23 September 1998 in *Lehideux and Isorni v. France*, *Bírószági Határozatok Emberi Jogi Füzetek* (Court Reports - Human Rights Booklets) 1999/2 pp. 61-63)" [Decision 57/2001 (XII. 5.) AB, ABH 2001, 484, 491.]

[41] 4. In accordance with the above, the constitutionality of the restrictions related to the right of assembly in the regulatory system of the Right of Assembly Act can be interpreted. In connection with the two cases of prohibitory grounds specifically mentioned in an exhaustive manner in the Right of Assembly Act, the Constitutional Court found in relation to the Fundamental Law that "[u]nderlying these two constraints, in accordance with Article I (3) of the Fundamental Law, as a serious threat to the smooth functioning of the representative body of the people and that of the courts, there is Article B (1) of the Fundamental Law and, in the case of traffic that cannot be secured on another route, the public interest in the order of traffic.

[Decision 75/2008 (V. 29.) AB, ABH 2008, 651, 658.]” {Decision 24/2015 (VII. 7.) AB, Reasoning [30]} In connection with the grounds for prohibition, the Constitutional Court formulated the additional requirement imposes a responsibility on those implementing the law that “the grounds for prohibition contained in Section 8 (1) of the Right of Assembly Act, if they arise, cannot be applied automatically.” (2015 Court Decision, Reasoning [33]) In connection with the grounds for prohibition concerning the key institutions of the “democratic rule-of-law State” [Article B (1) of the Fundamental Law], the Constitutional Court also found that Section 8 (1) of the Right of Assembly Act sets a special standard by stating that in the event of a conflict with the constitutional core value of the smooth functioning of the courts and that of the representative body of the people, the right of assembly may only be restricted, but in that case if it is to be prohibited in an *ultima ratio* manner, if the planned event would seriously jeopardise the smooth functioning of the above institutions. The proportionality of the restriction can therefore be assessed by applying a standard known as the “standard of seriousness”.

[42] Another *ultima ratio* restriction, albeit milder in degree, on gatherings is the disbandment of events. Under Section 14 (1) of the Right of Assembly Act, if the exercise of the right of assembly conflicts with the provisions of Section 2 (3), or the participants appear at the event by force of deadly weapons or otherwise armed, and if the event subject to notification is held despite a decision prohibiting such event, the police shall disband said event. Section 2 (3) has two components: The exercise of the right of assembly shall not constitute a criminal offence or an incitement to commit a criminal offence, nor shall it infringe upon the rights and freedoms of others.

[43] The “exercise of assembly” in Section 2 (3) of the Right of Assembly Act also applies to assemblies already begun on the basis of either a grammatical interpretation or a systematic interpretation in connection with disbandment.

[44] Whether an assembly that has begun encounters an external barrier can be determined on a case-by-case basis. An assembly that incites hatred against certain groups of people is certainly an infringement of the rights and freedoms of others and can be disbanded. A flagrant case of an assembly constituting a criminal offence or an incitement to commit a criminal offence entailing the possibility of disbandment is when the event is directed against the fundamental values of the democratic rule-of-law State, that is, the existing constitutional order and State organisation.

[45] However, this also means that the event that needs to be disbanded does not fall within the definition of “peaceful gatherings, public marches and protest” in Section 2 (1) of the Right of Assembly Act. That is, even if the event was of a peaceful

nature at the beginning of the assembly, it later fell outside the material scope of the Right of Assembly Act, which is no longer protected by the fundamental right to peaceful assembly. Under Section 2 (1) of the Right of Assembly Act, only events of a peaceful nature may be held, which corresponds to the wording of the Fundamental Law, pursuant to which everyone has the right to peaceful assembly.

[46] The case law of the Constitutional Court has already stated that peaceful nature is an immanent element of gatherings, adding that “a peaceful gathering is not necessarily an event without emotion or anger, on the contrary, it is a conceptual element that it causes temporary discomfort, as it is able to draw attention to the message to be communicated. The Organisation on Security and Cooperation in Europe's directives on the right of assembly explicitly state that an opinion expressed at an assembly may be directed against others, including with an anger that disturbs those concerned or others. All this is included in the concept of peaceful assembly. The constitutional limitation of this is that the expression of emotion and temperament must remain at the level of verballity, with the notion that communication may not constitute a crime or incitement to commit a crime.” (2015 Court Decision, Reasoning [25])

[47] 5. In connection with the First Petitioner's complaint, the Constitutional Court found that distant, hypothetical connections were not sufficient to establish the peaceful nature of the planned assembly, and, in particular, it is not acceptable for those implementing the law to deprive citizens of their fundamental rights merely by referring to their website, where appropriate only on the basis of their “programme available on the world wide web”, which has a remote connection to the event. In this particular case, the organiser's willingness to compromise (he intended to present the speeches in advance) and the fact that he had always held a commemoration without violations of the law for the previous ten years suggest that the organiser intended to hold a peaceful meeting.

[48] The Constitutional Court has ruled that remote, hypothetical references to possible sources of danger and violations of the rights of others that may arise during the assembly cannot provide a basis for the law enforcer to prohibit the assembly in advance. The police have a constitutional obligation to secure the assembly and, in this context, to maintain public order [Article 46 (1) of the Fundamental Law], under which the police may take measures during the assembly both to exercise the assembly and to enforce other fundamental rights and constitutional values guaranteed by the Fundamental Law. In the context of the present case, the Constitutional Court underscores the fundamental principles set out in the context of the function of the

fundamental right to assembly in a democratic state governed by the rule of law: “The right to peaceful assembly (together with freedom of expression and association) has closely linked essential content, which is a precondition for democratic social practice. On the basis of their right to express their collective opinion, citizens can also express their views on issues of general public interest between the dates of national and municipal elections. Such an issue related to public matters is, for example, how we relate to history, what event we consider worthy of celebration and in what way. Events held under the right of assembly are suitable for displaying historical narratives that live side by side but are partially or significantly different from each other.” (2013 Court Decision, Reasoning [40])

[49] In view of the above, the Constitutional Court found that both the police and the court had erred in referring to Section 2 (3) of the Right of Assembly Act when interpreting it as a general prohibition. A prohibition cannot be imposed on its own because law enforcers consider that a hypothetical violation of the rights of the individual in the case before them is recognised, since, as the court states: “Statements that may offend the dignity of others may be made at the event.” Any damage to public peace is merely a presumption which cannot in itself satisfactorily justify a restriction on the right to peaceful assembly as a fundamental right essential to the functioning of a democratic state governed by the rule of law.

[50] Based on the above, the Constitutional Court ruled that the prior prohibition of the event announced by the First Petitioner based on Article 2 (3) of the Right of Assembly Act—or the Paris Peace Treaty which cannot be assessed constitutionally—constitutes an unjustified and unnecessary restriction on the right to peaceful assembly. Therefore, the Constitutional Court annulled Order No. 20Kpk.45041/2014/3 of Budapest Administrative and Labour Court, pursuant to Section 43 (4) of the Constitutional Court Act, by referring *contra legem* to other court orders compared to Section 8 (1) of the Right of Assembly Act, with effect to Administrative Decision No. 01000/2033-2/2014 of the Budapest Police Headquarters.

[51] Pursuant to Section 43 (3) of the Constitutional Court Act, as a result of the annulment of a judicial decision by the Constitutional Court, the court proceedings to be conducted as necessary shall be conducted regarding the constitutional issue in accordance with the decision of the Constitutional Court. In this context, the Constitutional Court found that in the present case, by annulling the court order and the police decision, the petitioner's infringement could no longer be redressed due to the lapse of time. Nevertheless, “the annulment of” the decision and order “according to the Constitutional Court in the present case constitutes moral satisfaction to the

aggrieved parties in the present case, and the aspects described in the Constitutional Court decision serve as guidelines for future assembly disputes.” (2008 Court Decision, Reasoning [71], 2013 Court Decision, Reasoning [57], 2015 Court Decision, Reasoning [29])

[52] However, the Constitutional Court recalls its earlier position that “the effect of expressing an opinion against certain groups of the population on those belonging to the offended community also depends on the state of public life. It is the duty of those exercising of public authority under Article 8 (1) of the Constitution to carry out their activities while respecting and protecting equal human dignity. This obligation applies not only to the exercise of certain powers, but also to all public statements. If the actors forming political life are committed to the core values of the Constitution and consistently speak out against exclusionary views, they will express that those belonging to vulnerable groups will receive adequate support and protection from the political community. In such an environment, voices of hatred, contempt and resentment become isolated, insignificant and incapable of causing any infringement of rights.” [Decision 95/2008 (VII. 3.) AB, ABH 2008, 782, 792–793.]

[53] 6. In connection with the complaint submitted by the Second Petitioner, the Constitutional Court is of the opinion that the applicant cannot mislead the law enforcement body (*ab abusu ad usum non valet consequentia*), as it would be contrary to the function of the notification if the body intended to secure the event receives incorrect information, and, as a result, would misjudge the resources needed to secure the event. “The very essence of the notification requirement is for the police to assess the parameters of the event, the risks involved, what preparations they need to make to ensure the exercise of a fundamental right [See Decision 55/2001 (XI. 29.) AB, ABH 2001, 442, 458–459., reaffirmed in Decision 75/2008 (V. 29.) AB, ABH 2008, 651, 660 and Decision 3/2013 (II. 14.) AB, Reasoning [44]; the summary position of the Venice Commission on freedom of assembly: *Compilation of Venice Commission Opinions concerning Freedom of Assembly, Strasbourg, 04 October 2012, CDL(2012)014rev2, 26–27.*” [Decision 24/2015 (VII. 7.) AB, Reasoning[26]]

[54] If the police had not banned the fake-purpose event, the event for the purpose hidden from the authority would still be considered as a non-notified event, since the police would not be aware of one of its statutory requirements, its specific purpose and the related authentic schedule of the event [Section 7 (b) of the Right of Assembly Act]. Consequently, although the prohibition decision based on Section 2 (3) of the Right of Assembly Act in the case of the Second Petitioner is unlawful, it did not result in the violation of the Second Petitioner’s fundamental rights. Given that the Second

Petitioner's notification was misleading and contained a false element, it cannot therefore be considered as an exercise of the notifying party's right of assembly as intended. As the Second Petitioner did not exercise his right of assembly as intended in the absence of a notification to that effect, despite the unlawful nature of the decisions, they did not infringe the Second Petitioner's right of assembly. In view of the above, the Second Petitioner's constitutional complaint was rejected by the Constitutional Court.

[55] The Constitutional Court notes, however, that there is an important message for the functioning of the rule-of-law State if subjects of law conceal the true purpose of planned assemblies. The false indication of the specific purpose of the assembly can also be regarded as an indication of distrust of the law enforcement institutions. However, the organisers of gatherings must see in the police a partner that can be expected to maintain a fair balance between maintaining public order and the exercise of the fundamental rights of participants. This can be facilitated by the consistent practice of those applying the law, bearing in mind the purpose of the practical enforcement of a fundamental right and taking due account of the specific circumstances of the case.

[56] 7. Section 46 (1) of the Constitutional Court Act authorizes the Constitutional Court that if in its proceedings conducted in the exercise of its competences, declares an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that. Pursuant to Subsection (2) (c) of the Act, it shall be considered as omission of the law-maker's tasks if the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete.

[57] The Constitutional Court found in the 2015 Court Decision that the Right of Assembly Act "was adopted in 1989 and is of public legal historical significance as an emblematic legislative achievement of the regime change." (Reasoning [31]). However, it can be concluded from the cases brought before the Constitutional Court related to the right of assembly that the culture of protest has changed compared to the period of regime change, advanced means of communication promoting the exercise of fundamental rights have become widespread and a common European constitutional culture has crystallized the essential elements of which can be found in the decisions of the Constitutional Court, in the summaries of the Venice Commission and the OSCE, and in the decisions of the European Court of Human Rights. As a common point, the right of assembly has been identified as a fundamental right that is one of the cornerstones of constitutional democracies.

[58] When exercising the right of assembly on public ground, it is inevitable that the constitutional rights of others who do not exercise the right of assembly will be violated to a greater or lesser extent. That is why the regulation of the right of assembly always requires a serious balance of interests; therefore, the task of the legislator is particularly difficult. Recognition of the inevitability of a conflict of fundamental rights does not necessarily imply a restriction of the right of assembly, but it does in any case require a comparison of conflicting rights competing in one place at a time and a decision as to the restriction of which fundamental rights are justified and in favour of one or another fundamental right. This decision is primarily taken by the legislature, but it is precisely in the case of the right of assembly that those implementing the law must also have a wide margin of discretion in order to strike the right balance between the right of assembly and the protection of the fundamental rights of others. All this requires particularly prudent and multifaceted consideration and explanation.

[59] In this context, the Constitutional Court stated in its Decision 3/2015 (II. 2.) AB that “[t]he test of [...] the restriction of fundamental rights is above all binding on the legislator, but at the same time formulating a constitutional requirement for law enforcers in accordance with their competence. This requirement, also having regard to Article 28 of the Fundamental Law, imposes an obligation on courts that if they interpret legislation which restricts the exercise of a fundamental right, the restriction of the fundamental right concerned shall be limited, within the limits of the margin of interpretation permitted by law, to the level of intervention which is absolutely necessary and proportionate.”

[60] In reviewing the regulation of the Right of Assembly Act in connection with the above, the Constitutional Court came to the following conclusions.

[61] 7.1. In the context of Article VIII (1) of the Fundamental Law, the State has the primary obligation under Article I (1) of the Fundamental Law to protect the person exercising a fundamental right by appropriate means in order to be able to exercise his right to peaceful assembly. The loss of the peaceful nature of the event must be clear and imminent. This aspect of review can be related to the standard of *clear and present danger* in the United States [*Dennis v. U.S.*, 341 U.S. 494 (1951)], an improved version of which, the *lawless imminent action* test, takes into account not only the likelihood of danger of unrest but also the intent to cause an infringement of a right. [*Brandenburg v. Ohio*, 395 U.S. 444 (1969)] The standard of *clear and present danger* has already been invoked by the Constitutional Court in the context of the maternal right of the right to peaceful assembly: freedom of expression. [Cf. Decision 30/1992 (V. 26.) AB, ABH 1992

167, 179.; Decision 18/2000 (VI. 6.) AB, ABH 2000 117, 127–8.; and Decision 18/2004 (V. 25.) AB, ABH 303, 309.]

[62] The peaceful nature is linked to the Right of Assembly Act's rule prohibiting appearance by force of deadly weapons or otherwise armed [Section 12 (2) of the Right of Assembly Act], which constitutes a ground for disbandment under Section 14 (1) of the Right of Assembly Act. Section 15 (b) of the Right of Assembly Act interprets the above two concepts, according to which a person who appears at an event by force of deadly weapons carries a firearm or explosive, and a person who appears at the event otherwise armed carries a device capable of extinguishing life or causing bodily harm in order to use violence or carry out a threat.

[63] The Constitutional Court maintains that the current regulatory environment does not provide sufficient guarantees that the participants in the assembly can be adequately protected. The guarantee provisions that facilitate or ensure the exercise of the right to peaceful assembly are incomplete.

[64] In the opinion of the Constitutional Court, in order to secure the peaceful nature in advance and to protect the participants in the assembly, the rules of the Right of Assembly Act need to be supplemented. The current provisions do not cover the full range of instruments that jeopardize peaceful assembly and the right to life, such as stabbing and cutting devices that can cause harm to people or property, various gases or imitation weapons that can cause serious alarm and panic in the peaceful crowd participating in the event. A similar shortcoming of the Right of Assembly Act is that it does not provide for face masking, which should, as a general rule, be prohibited with adequate ways of exemption (e.g. if it is a means of non-verbal communication).

[65] 7.2. In conjunction with Article VIII (1) of the Fundamental Law, the State has an obligation under Article I (1) of the Fundamental Law that adequate protection to the fundamental rights must be afforded to everyone else (third parties) other than the participants in the assembly. In this context, the Constitutional Court observed that the nature of the right of assembly would require law enforcers to enforce the requirement of proportionality on a case-by-case basis, in which they find a balance between the right of assembly and other competing fundamental rights. However, in the opinion of the Constitutional Court, the current regulatory system lacks legal norms enabling the joint exercise of the rights guaranteed in the Fundamental Law. That is why the Constitutional Court, in Decision 13/2016 (VII. 18.) AB, established unconstitutionality by omission manifested by non-conformity with the Fundamental Law in the case of a conflict between the right to privacy and the right to peaceful assembly.

[66] The Constitutional Court considers that it is primarily the responsibility of the legislature to ensure that the restriction remains within proportionate bounds. The legislator must also ensure that police action takes place within a sufficiently differentiated framework. In order to assess the necessity and proportionality of restricting the right of assembly, the legislation should therefore clearly define the considerations through which the police may act and the non-prohibitive technical restrictions that the police may impose. The legislator should define the process of conciliation between the notifying party and the police by an Act, as well as the statutory aspects also provided for by an Act that need to be considered in order that, by enforcing the requirement of proportionality, while maintaining a fair balance of conflicting fundamental rights (*fair balance, schonender Ausgleich*), lighter restrictions or conditions than the prohibition of the event may be applied.

[67] In compensating for the omission, the legislator shall pay particular attention to the enforcement of the constitutional provisions contained in Article I (1) and Article I (3) of the Fundamental Law, that is, during the revision of the Right of Assembly Act, the obligation of protection arising from the Fundamental Law shall be complied with, which shall not result in an unnecessary and disproportionate restriction of fundamental rights.

[68] Based on the above, the Constitutional Court, acting of its own motion, finds unconstitutionality by omission manifested by non-conformity with the Fundamental Law in breach of Article I (1), Article I (3) and Article VIII (1) of the Fundamental Law due to the legislator's failure to regulate in Act III of 1989 on the Right of Assembly the guarantee rules that adequately ensure the peaceful nature of assemblies and the creation of legal provisions to resolve any conflict of fundamental rights that ensure the simultaneous enforcement of conflicting fundamental rights with the least possible restriction.

[69] Therefore, the Constitutional Court hereby invites the National Assembly to meet its duty of legislation by 31 December 2016.

[70] 8. The Constitutional Court ordered the publication of this decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act.

Dr. Tamás Sulyok sgd.,

Deputy Chief Justice of the Constitutional Court

Justice delivering the opinion of the Court

Dr. István Balsai sgd.,

Justice

Dr. Egon Dienes-Oehm sgd.,

Justice

Dr. Béla Pokol sgd.,

Justice

Dr. István Stumpf sgd.,

Justice

Dr. Mária Szívós sgd.,

Justice

Dr. Ágnes Czine sgd.,

Justice

Dr. Imre Juhász sgd.,

Justice

Dr. László Salamon sgd.,

Justice

Dr. Péter Szalay sgd.,

Justice

Dr. András Varga Zs. sgd.,

Justice

Concurring reasoning *dr. László Salamon*:

[71] In the case of the First Petitioner, in my view, the court order and the police decision should have been annulled by the Constitutional Court on the grounds that the contested decisions prohibited the event on grounds other than those mentioned in Section 8 (1) of the Right of Assembly Act, consequently, the Act did not allow the application of the prohibition. The decisions are therefore unlawful and at the same time violate the First Petitioner's right to assembly.

[72] Section 8 (1) of the Right of Assembly Act provides exhaustively for cases in which the holding of a given event may be prohibited in advance. It is not possible for those implementing the law to extend such cases. Thus, neither remote or hypothetical references to potential dangers related to the event or violation of the rights of others, nor other reasons included in or derived from the Right of Assembly Act, but not indicated in Section 8 (1) of the Right of Assembly Act, can substantiate any prior prohibition applied by those applying the law.

[73] Determining what other grounds, in addition to Section 8 (1) of the Right of Assembly Act, may justify a prior ban on events in the protection of the fundamental

rights and constitutional values of others, is a legislative task, which is explicitly and separately made topical by the determination of the unconstitutionality by omission manifested by non-conformity with the Fundamental Law.

Budapest, 12 July 2016

Dr. László Salamon sgd.,

Justice

Dissenting opinion by *Dr. Ágnes Czine*:

[74] I do not agree with point 1 of the operative part for the reasons set out below.

[75] 1. The right of assembly is an important guarantee of participation in democratic will formation. The right to assemble is therefore of paramount importance in the practice of the Constitutional Court and the Human Rights Court.

[76] 1.1. In the practice of the Constitutional Court, it emphasises the prominent role of the right of assembly in view of the fact that it also provides public expression of opinion to those who do not have access to its other possibilities. Through the right of assembly, the “tensions inherent in society” [Decision 4/2007 (II. 13.) AB, ABH 2007, 911, 914] become more widespread, enabling them to be dealt with more effectively. As held by the Constitutional Court, “[t]he freedom of peaceful assembly is a precondition and a fundamental value of a democratic society.” (ABH 2007, 911, 914.)

[77] 1.2. The aspects referred to by the Constitutional Court also appear in the practice of the Human Rights Court. Under Article 11 of the European Convention of Human Rights, “[e]veryone has the right to freedom of peaceful assembly [...]”. “No restrictions shall be placed” on the exercise of this right “other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. [...]”

In the context of freedom of assembly, the Human Rights Court pointed out that “one of the purposes of freedom of assembly is to provide a space for public debate and public expression of protest” {*Ezelin v. France* (11800/85), 26 April 1991, paragraph 37}. It follows that “[t]he protection of freedom of opinion and expression is one of the purposes of the freedom [...] of assembly protected under Article 11”. {Freedom and

Democracy Party (ÖZDEP) v. Turkey [GC] (23885/94), 8 December 1999, paragraph 37} The right of assembly includes the right to choose the date, place and manner of the assembly in accordance with the purpose of the assembly {Sáska v. Hungary (58050/08), 27 November 2012, paragraph 21}

In the context of the restriction of the right of assembly, the Human Rights Court has emphasized, subject to Article 11, point 2, of the Convention, that it can only have a place for reasons "necessary in a democratic society". This presupposes that "the intervention meets an »overriding social need« and, in particular, that it is proportionate to the objective pursued" {Patyi and Others v. Hungary (5529/05), 7 October 2008, paragraph 38}.

In its practice, the Human Rights Court has also assessed when a statutory obligation preliminary notification is compatible with freedom of assembly. In that context, the Human Rights Court pointed out that "prescribing an obligation of notification does not, in general, infringe the essence of the right of assembly" and is therefore not contrary to the spirit of Article 11 of the Convention in itself, if states, for reasons of public policy or national security, require that the holding of events be subject to a permit. {Nurettin Aldmer and Others v. Turkey (32124/02, 21126/02, 21129/02, 32132/02, 32133/02, 32137/02, 32138/02), 18 December 2007, paragraph 42}

In the context of the purpose of the notification, the Human Rights Court pointed out that this was partly due to the need to reconcile the right of assembly with the legitimate interests of others. It follows that, in order to balance those conflicting interests adopted during the notification procedure, the institution of the preliminary administrative procedure. According to the Human Rights Court, "such requirements are not in themselves contrary to the principles embodied in Article 11 of the Convention as long as they do not constitute a disguised impediment to the freedom of peaceful assembly protected by the Convention" {Balcik and Others v. Turkey (25/02), 29 November 2007, paragraph 49}.

The Human Rights Court also pointed out that the restriction of the right of assembly could only take place on the basis of a "statutory" prohibition. In the absence of this, it is not possible to assess either the legitimate aim or the necessity in a democratic society. The lack of a legal basis for the prohibition in itself justifies a violation of Article 11 of the Convention {Szerdahelyi v. Hungary (30385/07), 17 January 2012}.

[83] 2. However, the right of assembly is not unrestricted, despite its paramount importance. In line with the case law of the Constitutional Court, the "State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect

another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In adopting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a compelling reason is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171.]. The Constitutional Court also pointed out that "this test of the restriction of fundamental rights is above all binding on the legislator, but at the same time, in line with their competences, it also formulates a constitutional requirement for law enforcers and the courts." However, the authorities applying the law is bound only by the test of restriction of fundamental rights within the scope of interpretation allowed by law {Decision 3/2015 (II. 2.) AB, Reasoning [21]}.

[84] In the case under review, in the light of the above considerations, the Constitutional Court had to assess whether the police had taken into account the constitutional requirements by deciding to prohibit the event and whether the court had taken into consideration such requirements within the margin of interpretation allowed by the underlying legislation by dismissing the request for review submitted against the police decision.

[85] 2.1. In the grounds of the decision of the court seized, it stressed that "[t]he name of the demonstration and the date on which it will be held on 11 February, the Day of Honour, was considered by the authority to be a form of expression with which the court agreed". Therefore, the court considered Article IX of the Fundamental Law applicable in the case. The court expressly referred to the reasoning attached to the proposed normative text of the relevant provision of the Fundamental Law. Under it, "human dignity may be an external restriction on freedom of expression, and on the other hand it seeks to establish the constitutional basis for sanctioning certain cases of hate speech by means of civil law in case of violation of the dignity of communities. The constitutional limits on freedom of expression must be defined in such a way as to take into account not only the individual right of the person expressing the opinion but also the essential interest of the development or free formation of public opinion for democracy."

[86] On the basis of the above, the court concluded that there was a risk that far-right ideas would be disseminated at the event, which, in violation of the memory of the

affected victims of the Second World War, would violate the personal rights and human dignity of the relatives still living to such an extent that “goes beyond the statutory framework of the right of assembly, thereby upsetting the balance of the system of personal rights, which is accompanied by a significant attack on public order and public peace, against which international treaties allow the state to be impose restrictions or prohibitions”.

[87] The court's decision also took into account the content of the document No. AH/3368/2014/2 of the Constitution Protection Office concerning the organisation involved in the organisation of the event.

[88] 2.2. On the basis of the reasoning cited by the court, it can be concluded that it recognised the relevance of the case in fundamental rights, and revealed the constitutional content of the fundamental rights concerned on the basis of the decisions of the Constitutional Court referred to in its reasoning. It can also be stated that the court interpreted the relevant provisions of the Right of Assembly Act in the light of Article 28 of the Fundamental Law and came to the conclusion on this basis that there is a risk of infringement of the fundamental rights of others in the exercise of the right of assembly in the given case. In view of this, the court also stated, referring to the obligations undertaken in international treaties, that the event was subject to a ban.

[89] In my view, the court acted in accordance with the above-mentioned Decision 3/2015 (II. 2.) AB and could conclude, within the margin of interpretation allowed by Article 28 of the Fundamental Law, that, where appropriate, the prohibition of the event does not constitute an unnecessary and disproportionate restriction on the right of assembly. In this context, I underscore that in my opinion, if the court recognises the fundamental rights relevance of the case pending before it and makes its decision within the margin of interpretation provided for in Article 28 of the Fundamental right, the Constitutional Court may not overrule the judicial decision. This “review by overruling” goes beyond the power of review of the Constitutional Court. According to the consistent practice of the Constitutional Court, “[t]he laws are interpreted by the courts, the Constitutional Court can only designate the constitutional framework of the domain of interpretation. However, this power should not create a basis for intervening in the activities of the courts in all cases where an (alleged) breach of law has taken place which can no longer be remedied by other means of redress. “Neither the abstract principle of the rule of law nor the fundamental right to a fair trial [...] can provide a basis for the Constitutional Court to act as a »super-

court« over the judiciary and to act as a traditional forum for redress.” {Order 3325/2012 (XI. 12.) AB, Reasoning [14] and [15]}.

[90] Consequently, in the case under review the Constitutional Court could not have ordered the annulment of the judicial decision because the constitutional content arising from the fundamental legal relevance of Section 2 (3) and Section 8 (1) of the Right of Assembly Act [Article VIII (1) of the Fundamental Law], having regard to the considerations assessed by the court in the context of Article IX of the Fundamental Law, implies the interpretation of the law contained in the judicial decision. This interpretation of the law is, in my view, consistent with Article 11 of the Convention and the judicial practice based upon it. Pursuant to that provision, national authorities may restrict freedom of assembly on grounds of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. In my view, without recognising the interpretation contained in the impugned judicial decision, the authorities would be ineffective in preventing the event from being held on account of the above-mentioned grounds.

[91] 3. However, it is a fact that the predictability and unity of the application of the law would be more effectively ensured if the legislator clearly regulated the above-mentioned provisions in the provisions of the Right of Assembly Act. In view of this, I support point 3 of the operative part of this Decision. In my opinion, in addition to the substance of the Reasoning for this Decision, when amending the Right of Assembly Act, the legislator should establish regulations in accordance with the aspects also emphasised in the practice of the Human Rights Court.

Budapest, 12 July 2016

Dr. Ágnes Czine sgd.,

Justice

Dissenting opinion by *dr. Imre Juhász:*

[92] I agree with points 1 and 3 of the operative part of the majority decision and the reasoning attached to them, but I cannot identify with point 2 of the operative part and its reasoning for the following reasons.

[93] 1. In my view, there is a contradiction between the reasoning delivered for points 1 and 2 of the majority decision. The reasoning of the majority decision appended to point 1 of the operative part in connection with Section 2 (3) of the Right of Assembly Act states that law enforcers may not prohibit the holding of an event based on the right of assembly on the basis of “remote or hypothetical references to potential dangers related to the event or violation of the rights of others”. However, I consider that the reasoning for point 2 of the operative part is based precisely on such an assumption. Based on the personal contacts of the Second Petitioner (notifying party), the police assumed that the planned event would feature people who are members or sympathizers of far-right radical organisations, and on their part there, contrary to the purpose stated in the announcement, would deliver speeches spreading extreme ideas that may violate the human dignity of others. In the opinion of the court reviewing the police prohibition decision, based on the available data—the event took place on the “Day of Honour”, persons who are expected to have extreme ideas would be in attendance—it can be concluded that the police did not base their decision on uncertain assumptions.

[94] I do not wish to challenge the facts established by the police and the court, not least because the Constitutional Court is not a trier of fact, so it consistently refrains from reviewing the established facts; however, during the review of a judicial decision pursuant to Section 27 of the Constitutional Court Act, the reasonableness of the established facts and the conclusion drawn from them may also be the subject of a constitutional review. Based on the above, it is my firm opinion that both the police and the court based their decision on assumptions. The court, while seeking to substantiate the opposite, itself stated that the police had banned the event on the basis of—not uncertain—assumptions. The court held that the covert purpose of the event carried the risk that the fundamental rights of others could be violated due to blatantly anti-communal manifestations.

[95] In connection with the above, I would like to highlight two problems, one is the applicability of Section 2 (3) of the Right of Assembly Act to prohibit assembly, and the other is the manifestation of conduct prohibited by the same legislation.

[96] 2. In my opinion, pursuant to Section 14 (1) of the Right of Assembly Act and the instances of conduct included in Section 2 (3) of the same Act are only grounds for disbandment, but cannot serve as any ground for a prior ban on the event. I cannot accept the argument that the suspicion of conduct under Section 2 (3) of the Right of Assembly Act (committing or inciting a criminal offence; or violating the rights and

freedoms of others) may give rise to a prior prohibition of the event. Section 14 (1) of the Right of Assembly Act makes it clear that in the event of the above conduct, the police shall disband the event. Three conclusions can be drawn from all this, firstly, one of the prohibited instances of conduct must occur, secondly, it must occur during the event, and thirdly, it follows logically from the above that this can only be a reason for disbandment.

[97] I would also like to note that, in my view, there is no link between Article 2 (3) of the Right of Assembly Act and Article 2 (1) of the Peace Treaty of 10 February 1947 in Paris [promulgated by Act XVIII of 1947], invoked in the police decision and the court judgement, which would have justified the application of the latter. Under this provision, Hungary has made an international obligation to ensure freedom of public assembly. Section 2 (3) of the Right of Assembly Act provides for the cases in which an initially peaceful assembly becomes illegal, that is, when the assembly falls outside the scope of the fundamental right to assembly.

[98] 3. In addition, I find it unacceptable for the police to restrict the right to assembly on the basis of potential dangers, based on assumptions and a logical chain from them. In the current legal environment, the police investigation may be limited to the facts, the police decision cannot be based on the intentions of the notifying party (based on assumptions).

[99] Based on the above, I am of the opinion that the Constitutional Court should have annulled the order No. 5.Kpk.45.401/2015/5 of Budapest Administrative and Labour Court with effect including the prohibition decision of the police, since it violates the fundamental right to assembly guaranteed by Article VIII (1) of the Fundamental Law.

Budapest, 12 July 2016

Dr. Imre Juhász sgd,

Justice

Dissenting opinion by *dr. László Salamon:*

[100] I can only partially support point 3 of the operative part, because although I agree with the finding of a situation of unconstitutionality by omission manifested by non-

conformity with the Fundamental Law, I consider it to be justified in part and for other reasons.

[101] 1. Article I (3) of the Fundamental Law provides for the manner of regulating and restricting fundamental rights, that is, it provides for the legislative level at which the rules on fundamental rights must be defined and the conditions under which these rights may be restricted. In my opinion, a finding of failure to comply with this provision of the Fundamental Law could not, at most, in the case of a restriction that does not meet the conditions, lead to the annulment of the regulation. I am convinced that the situation of unconstitutionality by omission manifested by non-conformity with the Fundamental Law should be established pursuant to Article I (1) of the Fundamental Law, which provides that fundamental rights must be respected and their protection is the primary obligation of the State. A regulation which does not take sufficient account of the fact that other fundamental rights may be infringed and should be protected in the exercise of the right of assembly, nor does it settle which fundamental right in the event of a conflict between different fundamental rights and to what extent it is necessary to restrict it, does not comply with the state's obligation to protect fundamental rights. The omission, in my view, can be established as a result of the above.

[102] 2. In my opinion, the current regulations, those of the Right of Assembly Act and other laws, adequately ensure the peaceful nature of the gatherings and its maintenance [see, for example, the provisions of Section 12 2) of the Right of Assembly Act and related Section 14 (1) of the same, as well as the exact definition of the terms "by force of deadly weapons" and "or otherwise armed" in other laws]; therefore, I do not consider the existence of an unconstitutional situation manifested in the omission to be established in this respect (and in particular not to the extent that it is detailed, as set out in point 7.1 of the Reasoning hereof).

[103] 3. In the present case, I also underline my position, expressed in my concurring reasoning to Decision 30/2015 (X. 15.) AB and reaffirmed in Decision 13/2016 (VII. 22.) AB, that ensuring necessity and proportionality in the event of a restriction of fundamental rights is a purely legislative task that cannot be delegated to those implementing the law.

[104] 4. I certainly consider the obligation to consult in point 7.2 of the Reasoning on the necessity and proportionality of restrictions on the right of assembly to be useful and desirable, and its regulation in an Act; however, I do not consider it to be a regulatory element, the absence of which would in itself constitute a situation contrary

to the Fundamental Law. (However, the enforcement of the required consultation obligation may already be a constitutional issue.)

[105] In conclusion, in my opinion, the existence of a situation of unconstitutionality by omission manifested by non-conformity with the Fundamental Law should have been established by the Constitutional Court because the National Assembly failed to fulfil its legislative duty under Article I (1) of the Fundamental Law by failing to fully adopt rules to protect the fundamental rights of others in the course of exercising the right of assembly.

Budapest, 12 July 2016

Dr. László Salamon sgd.,

Justice

Dissenting opinion by *dr. István Stumpf.*

[106] I do not agree with points 2 and 3 of the operative part of the majority decision.

[107] 1. The Constitutional Court, in connection with the judicial order reviewed in point 2 of the operative part, should have found that the unjust prohibition of the notified event violated the right to peaceful assembly and should therefore have annulled it. I find it contrary to the Fundamental Law that the police and then the court have added a broad legal interpretation to the exhaustive legal grounds for the prior prohibition of gatherings. A prior ban on the event, extending the grounds for the ban, was a violation of the right to peaceful assembly.

[108] According to the facts revealed by the majority decision, Budapest Police Headquarters prohibited the holding of the event notified by the petitioner on the basis of Article 2 (1) of Act XVIII of 1947 promulgating the Paris Peace Treaty and Article 2 (3) of the Right of Assembly Act. During the review procedure, Budapest Administrative and Labour Court rejected the petitioner's request for review and thus upheld the prohibition ordered in the police decision.

[109] In his constitutional complaint lodged with the Constitutional Court, the petitioner expressly complained that the police had not based his decision on the prohibition grounds set out in Section 8 (1) of the Right of Assembly Act, even though

the assembly could not have been prohibited in advance for reasons outside Section 8 (1) of the Act.

[110] In contrast to the annulment under point 1 of the operative part, the majority decision already disregards, in connection with point 2 of the operative part, the fact that the Right of Assembly Act consistently distinguishes between the prior prohibition grounds on assembly, which are set out in Section 8 (1) of the Act, and the grounds for disbandment of the event that has already started, which can be found in Section 2 (3) of the Act. Although the majority decision in point 1 of the operative part annuls the other decision of Budapest Administrative and Labour Court precisely because of the use of the grounds for disbandment contained in the Act as a ground for prohibition, in point 2 of the operative part, the same error of law application no longer led to the annulment of the judicial decision.

[111] The itemized grounds for prohibition are set out in Section 8 (1) of the Right of Assembly Act, and the grounds for disbandment set out in Section 2 (3) of the Act may not serve as a basis for a prior ban on events; in this regard, I agree with Justices dr. Imre Juhász and dr. László Salamon with their positions in connection with the present case. On account of the phrase "exercise of assembly" in Section 2 (3) of the Right of Assembly Act, this provision can only apply to assemblies that have begun. In the context of prohibition and disbandment as the *ultima ratio* limits of the right of assembly, the Constitutional Court has already pointed out in the 2013 Court Decision that "a reasonably reactive dissolution for violations of law during the event cannot be automatically converted to a preliminary ground for prohibition." (2015 Court Decision, Reasoning [30]) This interpretation is supported by the Reasoning for Decision 55/2001 (XI. 29.) AB (ABH 2001. 442, 460-461) and the Report of the Commissioner for Fundamental Rights No. OBH 4435/2006 (see p. 5).

[112] The majority decision nevertheless rejects the constitutional complaint, despite the use of disbandment grounds as a ground for prohibition. The Constitutional Court states that "although the prohibition decision based on Section 2 (3) of the Right of Assembly Act in the case of the Second Petitioner is unlawful, it did not result in the violation of the Second Petitioner's fundamental rights." (Reasoning [54]) As Section 8 (1) of the Right of Assembly Act provides exhaustively for cases in which the holding of a given event may be prohibited in advance, I consider the extension of its application to be contrary to the right to peaceful assembly.

[113] Nor do I agree that the majority decision includes a new aspect which is not a ground for prohibition in the main proceedings and therefore takes a position on the compatibility with the Fundamental Law of a judicial decision upholding a ban on

holding an event. The majority decision argues: "Given that the Second Petitioner's notification was misleading and contained a false element, it cannot therefore be considered as an exercise of the notifying party's right of assembly as intended. As the Second Petitioner did not exercise his right of assembly as intended in the absence of a notification to that effect, despite the unlawful nature of the decisions, they did not infringe the Second Petitioner's right of assembly" (Reasoning [54]).

[114] I do not agree that regarding the constitutionality of the impugned judicial decision, the Constitutional Court does not review that which was the basis for the specific judicial decision, but takes a position on the compatibility of the judicial decision with the Fundamental Law in line with disingenuous aspects. Contrary to the above reasoning, the Constitutional Court does not have to take a position on a hypothetical event intended by the notifying party, or on a hypothetical law enforcement decision prohibiting holding the event on presumed grounds. The Constitutional Court must assess compliance of a specific decision prohibiting the holding of the announced event with the Fundamental Law and take a position on that.

[115] The finding of unconstitutionality by conflict with the Fundamental Law or the rejection of a petition cannot be subject to assumptions of the Constitutional Court. It is not possible to classify the prohibition of the notified event as constitutional on the basis of the "misleading" intention of the notifying party, presumed by the Constitutional Court, not does any false indication of the purpose of the event constitute a ground for prohibition pursuant to Section 8 (1) of the Right of Assembly Act. Not least because an event is for peaceful purposes, it is legal even if the event (more or less) deviates from the purpose notified in advance. I consider the banning of an event to be unfounded on such grounds, contrary to the right to peaceful assembly.

[116] 2. Nor do I agree with the finding of a legislative omission under point 3 of the operative part.

[117] In its decision, "the Constitutional Court, acting of its own motion, finds unconstitutionality by omission manifested by non-conformity with the Fundamental Law in breach of Article I (1), Article I (3) and Article VIII (1) of the Fundamental Law due to the legislator's failure to regulate in Act III of 1989 on the Right of Assembly the guarantee rules that adequately ensure the peaceful nature of assemblies and the creation of legal provisions to resolve any conflict of fundamental rights that ensure the simultaneous enforcement of conflicting fundamental rights with the least possible restriction" (operative part, point 3)

[118] 2.1. In line with to the operative part, it is inherently uncertain what exactly the legislative task applies to: what rules the legislator must replace in order to eliminate the omission.

[119] The content of the omission is somewhat more specific on the basis of the Reasoning, but it also carries serious contradictions. On the one hand, the operative part identifies only Article VIII (1) as a specific fundamental right infringed, but the Reasoning also refers to the need for unspecified rules to ensure the protection of "fundamental rights in conflict". If other fundamental rights in conflict with the right of assembly are also violated due to the lack of regulation, and the Constitutional Court also calls upon the legislator to create rules protecting them, then the violated fundamental rights should have been itemized in the operative part, as the Constitutional Court did so in Decision 13/2016 (VII. 18.) AB in the case of the right to privacy. On the other hand, the majority reasoning also considers it an omission that "the current regulatory environment does not provide sufficient guarantees that the participants in the assembly can be adequately protected". Irrespective of the merits of the finding, it must be stated that no such practical problem could arise in the present case, since in both cases covered by the decision the event was prohibited in advance, the assembly was not held and there were no participants whose protection could be affected. The Constitutional Court has the possibility to establish an omission ex officio during its proceedings, but in my opinion it must be closely aligned with the problem revealed in the case under review. Were this otherwise, there is a danger that the Constitutional Court, detached from specific cases, will discretionarily impose various legislative tasks on the legislature, which can best be classified as "constitutional court governance" and as such should be avoided by far.

[120] If the legislator, following an invitation made by the Constitutional Court in this decision in a rather general way, were to enact further rules restricting the right to peaceful assembly at the statutory level of an Act, it should be stressed that such rules must individually and as a whole comply with the requirements of Article I (3) of the Fundamental Law. The omission established in the operative part of this Decision cannot be interpreted as meaning that the Constitutional Court has authorised the legislator to restrict with reference to other fundamental rights the right to peaceful assembly in its discretionary competence. This would constitute a violation of fundamental rights, a legislative obligation to establish limits that go beyond what is necessary and proportionate, that is, constitutionally permissible, which is clearly beyond the scope of competence of the Constitutional Court and could not have been intended.

[121] 2.2. In addition to my concerns about the specific wording of the omission set out in the operative part and the reasons for it, I am not convinced that in the present case it was necessary to establish the omission in any way or in any form.

[122] In my view, ensuring the exercise of freedom of assembly and that of fundamental rights that conflict with it is not only the fundamental-law obligation of the legislator but also that of the bodies that implement the law, arising from the protection of fundamental rights under Article I (3) of the Fundamental Law. They fulfil such obligation by specifically considering the necessity and proportionality of the restriction of fundamental rights. Contrary to the majority decision, based on previous decisions of the Constitutional Court, as explained below, I do not see enough justification as to why this requires additional statutory provisions “that ensure the simultaneous enforcement of conflicting fundamental rights with the least possible restriction”. If the constitutional aspects expressed in the decisions of the Constitutional Court are not, or not consistently, enforced by the law enforcement (judicial and official) practice, then it is not primarily subject to a finding of a legislative omission, but subject to the establishment of constitutional requirements for those applying the law and the annulment of decisions of judicial and official application of the law that violate fundamental rights.

Budapest, 12 July 2016

Dr. István Stumpf sgd.,

Justice

Dissenting opinion by *dr. Mária Szívós*:

[123] Pursuant to my powers under Section 66 (2) of Act CLI of 2011 on the Constitutional Court, I attach the following dissenting opinion to the decision of the Constitutional Court.

[124] I do not agree with points 1 and 3 of the operative part of the majority decision and the reasons given for them, for the following reasons.

[125] First of all, I would like to point out that by the fact that the Constitutional Court simultaneously considered the present case with the case closed by

Decision 13/2016 (VII. 18.) AB, which also affected the right of assembly, the judicial panel would have been in a position to provide a coherent answer to constitutionally relevant issues in these two cases. In my view, the majority position of the Constitutional Court in the present case and in the case indicated has led to a contradictory result.

[126] 1. I do not agree with the annulment of Order No. 20.Kpk.45041/2014/3 of Budapest Administrative and Labour Court. As held by the majority opinion, the order is contrary to the Fundamental Law because its reasoning contains only remote, hypothetical references to possible sources of danger and violation of the rights of others, which are based in particular on information obtained on the petitioner's website.

[127] On the other hand, the reasoning for the order make it clear that the court's position took into account other evidence, in particular the relevant classified file of the Constitutional Protection Office, which supplied indicative evidence of a risk to national security. In the reasoning for the order, the court drew a legal conclusion on the basis of the assessment of all the evidence obtained, on the basis of which it rejected the application for review against the administrative decision. I consider it important to underscore that the court has also identified an involvement of a fundamental rights issue in the case, and its order contains a detailed statement of reasons for how competing fundamental rights were weighed up against one another. In doing so, the court emphasised that holding an event, in addition to seriously disturbing public order and public peace, would violate the individual fundamental rights of individuals, in particular the right to human dignity, to such an extent as to warrant restriction of the right to assembly.

[128] In my view, the Constitutional Court did not act appropriately in annulling the decision on the grounds set out above, as it did nothing more than reconsider the court's evidence assessment activity. This Court acted accordingly despite the fact that it could not have reassessed the facts established from the evidence in question, as it did not have the opportunity to do so on the basis of established constitutional court practice. It is no accident that the Constitutional Court correctly stated in the above-mentioned Decision 13/2016 (VII. 18.) AB that: "[t]he Constitutional Court emphasises, however, that in the context of a constitutional complaint procedure there is no possibility to reconsider the evidence: whether the circumstances of the case justify [the existence of a ground for prohibition], must be judged on a case-by-case basis by the police or the court during the review and, accordingly, there is an increased duty to state reasons for the application of the ground for prohibition." (Reasoning [33])

[129] In view of the above, in my view, the petition should have been rejected.

[130] 2. I do not agree with the finding of a situation of unconstitutionality by omission manifested by non-conformity with the Fundamental Law in point 3 of the operative part of the Decision because, in view of my position set out in point 1 of my dissenting opinion, its content is not closely linked to the constitutional problem raised in the present case.

Budapest, 12 July 2016

Dr. Mária Szívós sgd.,

Justice

[131] I hereby second Point 1 of the above dissenting opinion.

Budapest, 12 July 2016

Dr. András Varga Zs. sgd.,

Justice

dissenting opinion by *dr. András Varga Zs.:*

[132] I did not support point 1 of the operative part of the decision, the annulment of the court order and the decision by Budapest Police Headquarters. The reasons for this are as follows:

[133] 1. The police and the court applied the Right of Assembly Act, other legislation, including Act XXXIV of 1994 on the Police and Act XVIII of 1947 on the Enactment of the Peace Treaty of 10 February 1947 in Paris, and, through the Right of Assembly Act, applied the provisions of the Fundamental Law. There is no doubt that the Right of Assembly Act succinctly regulates the rules governing the exercise of the right of assembly, the organisers of the event, the police and the court. However, it only follows that the court must make a particularly thorough interpretation of the law when interpreting the Act and applying it to a specific situation.

[134] In the case under review, the court (in addition to the police) fulfilled only its constitutional obligation. The court interpreted the rules of the Right of Assembly Act. It was taken into account that Section 2 of the Right of Assembly Act contains general rules, which must therefore prevail together with other rules of the Act. It follows from this, which is reflected in the established judicial practice, that due to the general nature of Section 2 (3) of the Right of Assembly Act, the grounds for prohibition under Section 8 are also grounds for disbandment and the grounds for disbandment under Section 12 are also grounds for prohibition.

[135] As a result of the interpretation, the court did not extend, but interpreted the applicable legal act in accordance with the Fundamental Law, as provided in Article 28 of the Fundamental Law. In doing so, it had to take into account, and the decision reflects, the fact that Article IX (4) to (5) of the Fundamental Law explicitly mentions the substantive limits of the right to assembly. Although the right to assembly is a right of communication, it is not the same as freedom of expression. Therefore, in view of what is provided for in Section 2 of the Right of Assembly Act, it may be restricted to a greater extent in the event of a conflict with other fundamental rights. In doing so, the court had to take into account, and also took into account, that the Right of Assembly Act should be read in conjunction with the Act on the Police and the Act promulgating the Peace Treaty.

[136] 2. The court's order, as already described, was in line with the long-standing practice based on case-by-case decisions, which practice is not contrary to the Fundamental Law. By annulling the order, the Constitutional Court is placing the judges of the courts of general jurisdiction in an impossible position. The decision objects to the fulfilment of their duty to interpret the law, according to which the concise rules of the Right of Assembly Act were applied to a specific case. The court cannot do anything else neither in this nor any other case. The judge must decide the legal dispute, and due to the regulation of the Right of Assembly Act, which might have been considered to be incomplete, the judge could not petition the Constitutional Court, since the judge may only propose the annulment of legislation, the prohibition of its application, and not the finding of omission.

[137] 3. The constitutional complaint challenged the court's order under section 27 of the Constitutional Court Act; therefore, the conflict with the Fundamental Law did not have to be examined in the light of the abstract infringement of a fundamental right. This would be the purpose of the procedure in the case of a complaint pursuant to Section 26 (1) of the Constitutional Court Act, which, of course, does not preclude the Constitutional Court from doing so by applying Section 28 of the same Act. In the

specific complaint this Court had to assess whether the petitioner's fundamental right had been infringed by the specific decision.

[138] In my view, the court's order did not infringe the petitioner's fundamental rights. The court interpreted the applicable legal act in accordance with the Fundamental Law, as set out in Article 28 of the Fundamental Law. The facts established by the court, which, under the established practice of the Constitutional Court, shall be left uncontested, clearly indicate that the purpose of the event is not to commemorate the heroism of the soldiers who defended their country during the siege of Budapest and, as part of it, during the breaking out attempt, as an act of reverence, but a manifestation contrary to the National Avowal, which provides one of the interpretative frameworks for the Fundamental Law, especially the rejection of the suspension of our historical constitution due to foreign occupation, the rejection of the National Socialist sins manifested in the non-applicability of statutory limitations to such sins, and the loss of self-determination. The Fundamental Law does not provide for the right to hold such an event.

[139] The decision of the police and the court in point 1 of the operative part could only be annulled by the Constitutional Court by disregarding the lack of a fundamental right to hold a specific event, consequently, disregarding the Fundamental Law [and, as part thereof, the National Avowal, Article R (3) and Article 28], as well as the facts established by the court in the absence of jurisdiction; moreover, this Court overruled the above without proof; and relied on the formal legal interpretation of obsolete Constitutional Court decisions prior to the enactment of the Fundamental Law. I could not agree with all that.

Budapest, 12 July 2016

Dr. András Varga Zs. sgd.,

Justice

[140] I second the above dissenting opinion.

Budapest, 12 July 2016

Dr. Mária Szívós sgd.,

Justice