Decision 30/2017 (XI. 14.) AB

on the conflict with the Fundamental Law and the annulment of section 1 paragraphs (4a) (b), (4b), (4f) and (4g) of the Act CVI of 2011 on Public Employment and Amending Acts Connected to Public Employment and other Acts

In the matter of a judicial initiative seeking the establishment of a conflict with the Fundamental Law by a law, the plenary session of the Constitutional Court has – with concurring reasoning by Justice *dr. Ágnes Czine* and dissenting opinions by Justices *dr. Egon Dienes-Oehm, dr. Béla Pokol, dr. László Salamon, dr. Mária Szívós* and *dr. András Varga Zs.* – adopted the following

decision:

1. The Constitutional Court found that section 1 paragraphs (4a) (b), (4b), (4f) and (4g) of the Act CVI of 2011 on Public Employment and Amending Acts Connected to Public Employment and other Acts are contrary to the Fundamental Law and therefore annulled them.

2. The Constitutional Court rejects the petition aimed at establishing that section 1 paragraphs (4c) to (4e) and section 2 (5) (g) of the Act CVI of 2011 on Public Employment and Amending Acts Connected to Public Employment and other Acts are contrary to the Fundamental Law and their annulment

3. In other respects the petition is dismissed by the Constitutional Court.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

Reasoning

I

[1] The Commissioner for Fundamental Rights submitted a petition pursuant to section 24 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) for establishing a conflict with the Fundamental law by and the annulment of section 33 (7), section 38 (9) and section 132 (4) (a) and (e) of the Act III of 1993 on Social Administration and Social Benefits (hereinafter: Social Benefits Act) as well as section 1 (4a) (a) (aa), section 1 (4a) to (4g) and section 2 (5) (g) of the Act CVI of 2011 on Public Employment and Amending Acts Connected to Public Employment and other Acts (hereinafter: Public Employment Act).

[2] As background information, the Commissioner for Fundamental Rights referred to his constitutional concerns found in his reports (AJB-4162/2012 and AJB-3025/2012) based on the investigations carried out in connection with section 33 (7) of the Social Benefits Act, which have not been remedied in the absence of amendments to the legislation. In the petitioner's view, section 38 (9) of the Social Benefits Act is also unconstitutional from the point of view of the requirements of the rule of law and the right to privacy, based on an initiative of an NGO. Therefore, the petitioner initiated proceedings before the Constitutional Court under section 34 of the Act CXI of 2011 on the Commissioner for Fundamental Rights.

[3] 1 The petitioner explained that pursuant to section 33 (7) of the Social Benefits Act in force at the time of the submission of the petition, the municipal government may stipulate in its decree as an additional condition for entitlement to benefits for the persons of active age, that the applicant or the beneficiary of the benefits must fulfil the conditions laid down in the decree for ensuring the tidiness of his/her living environment. The obligation to ensure the tidiness of the living environment may include the obligation to keep the dwelling or house occupied by the applicant or the beneficiary and its yard, garden, the area outside the fence, the pavement clean, and to secure proper condition of the property as well as its fitness for its intended use and its hygiene. By virtue of the statutory authorisation, the municipal notary shall require the applicant or the beneficiary to comply with the conditions laid down in the decree, by setting a reasonable time limit, which must be at least five days, and specifying the activities to be carried out.

[4] Section 38 (9) of the Social Benefits Act provides for an authorisation with the same content in relation to normative housing maintenance support, according to which the local government may stipulate in its decree, as an additional condition for entitlement to normative housing maintenance support, that the applicant or the

beneficiary must fulfil the conditions laid down in its decree for ensuring the tidiness of his/her living environment. The obligation to ensure the tidiness of the living environment may include the obligation to keep the dwelling or house occupied by the applicant or the beneficiary and its yard, garden, the area outside the fence, the pavement clean, and to secure proper condition of the property as well as its fitness for its intended use and its hygiene. The municipal notary shall require the applicant or the beneficiary to comply with the conditions laid down in the decree, by setting a reasonable time limit, which must be at least five days, and specifying the activities to be carried out. If the applicant or the beneficiary fails to comply, the application shall be rejected or the aid granted shall be cancelled. In accordance with the above, section 132 (4) (a) and (e) of the Social Benefits Act empowers the municipalities to adopt the detailed rules for ensuring the tidiness of the living environment by means of a local government decree.

[5] In the context of the interpretation of Article B (1) of the Fundamental Law, the petitioner referred to several decisions of the Constitutional Court [Decision 6/1999 (IV. 21.) AB, Decision 38/2012 (XI. 14.) AB], which pointed out that, based on the requirement of legal certainty, if a law grants legislative power to an administrative body to restrict a constitutional or statutory right, in this case the law must define the scope of the legislative power and its limits.

[6] According to the opinion of the Commissioner for Fundamental Rights, section 33 (7) and section 38 (9) of the Social Benefits Act violate the principle of the rule of law and the requirement of legal certainty deriving from it. In his view, the general, overly broad and vague wording of the provisions in question, which confer the power to issue a decree, and certain elements of that power (such as “hygiene”) have created a system of requirements which is vague. These authorisations allow the resulting local government decrees to specify in an excessively broad manner the duties of the persons in need to keep their living environment tidy. In his view, the combined effect of the two provisions make the adoption of local government decrees subjective to such an extent that the requirement of legal certainty is infringed.

[7] In his reasoning, the Commissioner for Fundamental Rights pointed out that the provision of benefits for persons of active age is part of the State's duty related to social security. At the same time, the requirement to keep the living environment in good order, which is a specific condition for the provision of benefits, reflects legislative obligations relating to health protection and environmental protection. The latter

objectives are also regulated by other sectoral legislation, and failure to comply with the obligations contained therein is sanctioned in a number of cases.

[8] 2 In the petitioner's view, the authorisation under section 33 (7) and section 132 (4) (a) of the Social Benefits Act – in addition to the above – unnecessarily and disproportionately restricts the right to social security without sufficient justification. The Commissioner for Fundamental Rights, after the detailed analysis of the content of the right to social security [with reference to the arguments found in the Decision 32/1998 (VI. 25.) AB, Decision 37/2011 (V. 10.) AB, Decision 1169/B/2009 AB and Decision 40/2012 (XII. 6.) AB], explained that, according to relevant case-law, making the establishment and payment of social transfers – such as benefits for the persons of active age and housing maintenance allowances – subject to conditions which are feasible and are in accordance with system of social criteria does not, in itself, raise constitutional concerns. In the view of the Commissioner for Fundamental Rights, Article XIX (3) of the Fundamental Law – in line with the content of the right to human dignity enshrined in Article II of the Fundamental Law and the right to equal treatment enshrined in Article XV(2) of the Fundamental Law – can be interpreted as imposing a "duty of reciprocal solidarity" on those in need who benefit from social measures, in return for social solidarity, in the framework of which they shall carry out activities that are useful to the community. However, in his view, this specific obligation of reciprocity cannot be interpreted in a broad sense and impose any arbitrary condition in this context. Furthermore, no condition may be imposed which restricts another fundamental rights of the person concerned or infringes equal dignity. Therefore, an approach that builds the granting of social assistance to the persons in need on individual "merit" beyond the above cannot be constitutionally accepted. In the light of the above, the Commissioner for Fundamental Rights is of the opinion that in the context of the provision of benefits to the persons of active age, the requirement under section 33 (7) of the Social Benefits Act to keep the living environment tidy does not constitute a condition which may be imposed under Article XIX (3) of the Fundamental Law.

[9] The petitioner referred to the decision 5/2013 (II. 22.) OVB of the National Election Committee (which stated that the right to social security as laid down in the Fundamental Law would be violated if the eligible person would be deprived of support due to circumstances independent of the system of social criteria); it also explained that circumstances falling under the system of social criteria may include, for example,

compliance with the obligation to cooperate with the municipality, the labour authority, and the acceptance of the offered job opportunity may be a constitutional condition due to the function of social law. However, the requirement and control of the "tidiness" of the living environment in the broad sense does not qualify as a condition linked to the system of social criteria, i.e. the state of being in need.

[10] The Commissioner for Fundamental Rights described the main characteristics of the provision of benefits to the persons of active age and stated that the provision of benefits to the persons of active age is an essential element of support to the persons in need, and the function specified in the Decision 37/2011. (V. 10.) AB cannot be replaced by any other benefit if it is made subject to unjustified additional conditions. In his view, the power to impose the condition laid down in section 33 (7) of the Social Benefits Act unnecessarily and disproportionately restricts, without sufficient reason, the right to social security and the right to a minimum subsistence level deriving from the right to human dignity. In his opinion, the proportionality of the restriction of rights is not guaranteed by the fact that the withdrawal of benefits shall be preceded by a notice issued by a municipality notary, since he considers it disproportionate that it is done at short notice and that the person in need must fulfil an obligation not connected to the disbursement of social assistance. He also stressed that people in need cannot be expected to "tidy up" their living environment in a manner not specified to sufficient detail, as they could not do it or could only with disproportionate difficulty because of their financial circumstances.

[11] 3 The petitioner also alleged a violation of the right to private life (respect for private and family life, home) enshrined in Article VI (1) of the Fundamental Law by section 33 (7), section 38 (9) and section 132 (4) (e) of the Social Benefits Act. According to the petitioner, the contested provisions unnecessarily and disproportionately restrict the right to privacy and private life of the persons in need who are entitled to social assistance, without sufficient constitutional ground. They create the possibility for the local governments to monitor the lifestyle and the way of life of the claimants of benefits in their (internal) private sphere and to collect sensitive data irrelevant to the right to social assistance, which, in the view of the Commissioner for Fundamental Rights, results in a serious breach of the right to dignity of the claimants of benefits and the persons entitled to benefits.

[12] 4 The Commissioner for Fundamental Rights also considered section 1 (4a) to (4g) and section 5 (g) of the Public Employment Act to be in breach of several

provisions of the Fundamental Law. The provisions of section 1 (4a) to (4g) of the Public Employment Act lay down the substantive and procedural rules of the law for exclusion from public employment. According to the content of section 1 (4a) in force at the time the application was lodged, a public employee shall be excluded from public employment for a period of three months if he or she is the subject of administrative infraction proceedings because of the school absence of his or her child of compulsory school age, or has been convicted of this administrative infraction within three months, or has not fulfilled the obligation to keep their living environment (garden, yard, etc.) tidy, as provided for by a decree of the local government. The provisions of section 1(4b) to (4g) lay down further details of the administrative procedure in this respect. On the basis of these rules, the said administrative procedure starts *ex officio*; the rules on exclusion from public employment under section 1 (4d) (if the conditions mentioned exist) shall apply not only to the jobseeker but also to the person in a legal relationship of public employment.

[13] Pursuant to section 2 (5) (g) of the Public Employment Act, section 64 (1) of the Act I of 2012 (hereinafter: Labour Code) on the termination of employment shall apply to public employment relationship, with the derogation that the public employer shall notify the competent labour centre of the termination of the public employment relationship; and the public employer shall terminate the public employment relationship with immediate effect if the public employee has been excluded from public employment by a final decision of an authority. (The minister's reasoning of the amendment justifies the generally expected moral and conduct standards as a condition applicable to public employees by public employment being a value-added work related to the public tasks of municipalities and other State bodies.)

[14] After a detailed analysis of the nature of the public employment relationship, the Commissioner for Fundamental Rights explained that – in accordance with the provisions of Article XII (2) of the Fundamental Law – granting participation in public employment by the State is related to the employment policy tasks of the State as an aim of the State; although it is related to the social security system, it is not a measure in the scope of social security under Article XIX of the Fundamental Law. As an instrument of employment policy, it may be suitable for helping workers in disadvantaged situation to re-enter the primary labour market; however, in the view of the Commissioner for Fundamental Rights, the mere fact that the law-maker treats public employment as a special legal relationship with social elements does not in itself

justify the application of rules that are generally less favourable than those that apply to labour relationship.

[15] In his view, the requirement of the rule of law (in particular legal certainty) is violated by the fact that section 2 (5) (g) of the Public Employment Act results in a fundamental conceptual change to the detriment of the public employee, which is alien to the system of the Labour Code and is incompatible with it. It further submits that the relationship between the Labour Code and the Public Employment Act is unclear, since the rules to be applied are not clarified. Furthermore, it argues that in the context of checking the tidiness of the living environment there is a conflict between the condition for exclusion from public employment as laid down in section 1 (4a) (b) of the Social Employment Act and the empowering provision under section 33 (7) of the Social Benefits Act: in the case of the condition for exclusion from public employment, the tidiness of the "external' environment" is checked by the municipality, whereas the tidiness of the entire living environment, that is to say, the "internal" living environment is checked by the municipality, as a condition for the granting of benefits to active-age persons. In his view, the challenged automatic decision-making procedure [section 1 (4b) to (4e)], where neither the court nor the public employer may exercise discretion but is obliged to take the decision and the public employer shall terminate the public employment relationship with immediate effect on the basis of that decision, disproportionately restrict the right of public employees to a fair procedure and render the right to legal remedy formal and void. In his view, the provisions of section 1 (4a) to (4g) and section 2 (5) (g) of the Public Employment Act are contrary to the requirement of equal treatment as laid down in Article XV (2) of the Fundamental Law, since they discriminate against public employees in comparison with other persons in labour relationship or with persons in a public service relationship without a reasonable, constitutionally justifiable purpose.

[16] The petitioner also considered section 1 (4a) (a) (aa) of the Public Employment Act also to be contrary to the principle of the presumption of innocence enshrined in Article XXVIII (2) of the Fundamental Law, arguing that the contested provision bases exclusion from public employment on a pending infringement procedure. He considered that the law-maker had infringed the Fundamental Law by imposing a sanction at the very outset of the proceedings, while at that stage of the proceedings it could not even be established whether the parent was liable for the unexcused absence. He further argued that the provision infringed the right to a fair procedure

enshrined in Article XXIV (1) of the Fundamental Law, since the law-maker attached a sanction to proceedings which had not been finally concluded.

[17] 5 In connection with the petition, on the basis of Article 24 (7) of the Fundamental Law and the section 57 (1) of the ACC, the Constitutional Court has requested the minister of the interior and the minister in charge of human capacities to express their views.

II

[18] 1 The provisions of the Fundamental Law affected by the petition:

“Article B (1) Hungary shall be an independent and democratic State governed by the rule of law.”

"Article I (3) The rules relating to fundamental rights and obligations shall be laid down in an act of Parliament. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right."

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

"Article VI (1) Everyone shall have the right to respect for his or her private and family life, home, communications and reputation."

“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 XIX (1) Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the event of maternity, illness, invalidity, disability, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.

(2) Hungary shall implement social security for those persons referred to in paragraph (1)
and for others in need through a system of social institutions and measures.

(3) The nature and extent of social measures may be determined in an Act in accordance
with the usefulness to the community of the beneficiary's activity."

"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 (2) No one shall be considered guilty until his or her criminal liability has been established by the final and binding decision of a court.

[...]

(7)Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

[19] 2 The relevant provisions of the Social Benefits Act in force at the time of examining the petition:

"Section 33 (7) The application of the summary procedure shall not be used in determining entitlement to benefits for persons of active age."

"Section 38 (9)"

"Section 132 (4) The municipal local government is authorised to regulate by decree

(a)

[...]

(e)

[...]

(g) the conditions of eligibility for benefits under the municipal support, and the rules for the establishment, payment, granting and control of the use of the benefits."

[20] 3 The relevant provisions of the Public Employment Act in force at the time of examining the petition:

"Section 1 (4a) A jobseeker shall be excluded from public employment for a period of three months if

(a) for the absence of his or her child of compulsory school age

(aa)

(ab) has been convicted because of this infraction by a final judgement within three months, or

(b) fails to comply with the obligation to keep the living environment (garden, courtyard, public areas connected to the property as defined by law) tidy, as provided for by a local government decree, or

(c) fails to accept a suitable job offered to him or her under the provisions for jobseekers pursuant to the Employment Act,

(d) fails to accept the job offered to him/her in the framework of simplified employment, or

(e) his or her employment relationship other than public employment has been terminated by the employee's notice of termination of employment or by immediate dismissal by the employer, excluding immediate dismissal during the probationary period, within three months preceding the establishment of the public employment relationship,

(f) his or her public employment relationship is terminated by the immediate termination of the public employment contract by the public employee,

(g) does not accept the training opportunity offered to him/her under the provisions for jobseekers pursuant to the Employment Act.

(4b) For the administrative procedure conducted *ex officio*, the municipality notary competent for the place of residence of the jobseeker shall, upon request, provide data to the district (Budapest-Capital district) office acting as the State employment agency (hereinafter: "district office") within 3 days in the case referred to in paragraph (4a) (b).

(4c) In order to verify the existence of the ground for exclusion specified in paragraph (4a) (a) (ab), the district office may directly obtain data from the register of infractions before posting the person to public employment.

(4d) In the matter of exclusion, the district office shall decide in the first instance, and the Budapest-Capital or county government office acting as the State employment agency (hereinafter: "county government office") in the second instance, by an official decision.

(4e) If the district office is informed of a reason for excluding public employment after the establishment of the public employment relationship, it shall notify the public employee of its decision on the exclusion. The public employer shall terminate the public employment relationship with immediate effect on the basis of the final decision.

(4f) In the case referred to in paragraph (4a) (b), a request is not necessary if the public employment is carried out by the local government of the place of residence of the public employee, by an institution of the local government or by an economic

organisation established by the local government, or if the local government does not have a decree in force pursuant to paragraph (4a) (b).

(4g) A public employer subject to paragraph (4f) may refuse to establish a public employment relationship if it is aware of the existence of a reason for exclusion of the public employee pursuant to paragraph (4a) (b).

(4h) In the event of a reason for exclusion under paragraph (4a) (d), the district office shall verify the data available to it, in particular the data provided by the State Tax Authority in accordance with the rules of the Act on Simplified Employment, before taking its decision.

(4i) The district office shall verify the existence of the condition set out in paragraph (4a) (e) on the basis of the certificate form issued by the employer pursuant to section 36/A of the Employment Act."

"Section 2 (1) The rules of the Labour Code shall apply to the public employment relationship, with the exceptions specified in paragraphs (2) to (5).

[...]

(5) In the case of a public employment relationship:

[...]

(g) section 64 (1) of the Labour Code shall apply with the derogations that the public employer shall terminate the public employment relationship with immediate effect if a final decision of a public authority has excluded the public employee from public employment or if the application for recognition of a person within the meaning of section 1 (4) (c) has been finally rejected, unless the person is subject to section 1 (4) (d) by decision of the aliens policing authority."

III

[21] The Constitutional Court found that the motion submitted by the Commissioner for Fundamental Rights complied with the formal requirements of the ACC: the motion was submitted on the basis of the powers provided for in Article 24 (2) (a) of the Fundamental Law and section 24 (2) of the ACC, and the motion for abstract ex post review originates from an eligible person and contains a definite request. The content of the motion also complies with section 24 (2) and section 52 (1) of the ACC, and the Constitutional Court therefore examined it on the merits.

IV

[22] The petition is, in part, well-founded.

[23] The Constitutional Court briefly reviewed the regulatory background of the provisions of the Social Benefits Act challenged by the motion.

[24] 1 On the one hand, the petitioner considered the provisions of the Social Benefits Act on the benefits for the persons of active age and on housing maintenance support, which were regulated by the Social Benefits Act under the Title III of the Act on cash benefits depending on social need [section 33, section 38], to be contrary to the Fundamental Law. The Constitutional Court observed in this context that the Act XCIX of 2014 on the Foundations of the Central Budget of Hungary for the Year 2014 significantly restructured the system of social benefits as of 1 March 2015, and the provisions under review were repealed and subsequently, section 14 (4) of Act CLXXXVI of 2015 introduced in section 33 (7) of the Social Benefits Act a different content.

[25] The reform has separated the benefits provided under State regulation from the tasks of local governments in providing assistance. The Social Benefits Act only contains rules on compulsory benefits, while local governments are responsible for the provision of additional social assistance to those in need, which is also laid down in the Act CLXXXIX of 2001 on Local Governments in Hungary [section 13 (1) (8a)].

[26] The compulsory benefits regulated by the Social Benefits Act include the old-age allowance, employment substitution allowance, health detriment and childcare allowance, nursing care allowance [section 25 (3), cash benefits], and statutory and normative public health care and the entitlement to health care services [section 47 (1), social benefits in kind]. The district offices are in charge of determining the entitlement to these benefits from 1 March 2015. By contrast, the types of other benefits provided by local governments and the conditions of eligibility are determined by the local governments and are uniformly called municipal benefits.

[27] The Constitutional Court contacted the competent minister, who explained in his reply that, according to the results of the survey conducted by the Ministry of Human Capacities in spring 2012, 1,684 municipalities – with a response rate of 94.6% – had adopted regulations imposing a requirement of tidiness of the living environment in connection with the forms of social benefits concerned.

[28] In view of the prevalence of the regulation, the Constitutional Court notes with the intention of providing guidance: the questions raised in connection with social

benefits can be interpreted on the basis of Article XIX (1) of the Fundamental Law, according to which "Hungary shall strive to provide social security to all of its citizens." As laid down in Article XIX (2), "Hungary shall implement social security for those persons referred to in paragraph (1) and for others in need through a system of social institutions and measures." Article IXI (3) of the Fundamental Law provides that "the nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity." On this basis, the Constitutional Court must decide, in the context of the examination of the restriction, whether Article XIX (3) of the Fundamental Law and the "usefulness to the community of the beneficiary's activity" which it allows apply to the requirements laid down as conditions for social benefits. In this context, the Constitutional Court points out that the Fundamental Law, unlike the previous Constitution, also contains provisions on the relationship between the individual and the society. Indeed, Article XIX (1) and (2) are closely linked to the part of the National Avowal stating that "we hold that we have a general duty to help the vulnerable and the poor". The Fundamental Law thus manifestly expresses community solidarity. Moreover, Article XIX (3) of the Fundamental Law, which allows for the imposition of conditions, should be read in close connection with Article O of the Fundamental Law, which, on the one hand, requires individuals to take care of themselves: "everyone shall be responsible for him- or herself"; on the other hand, it states the expectation that everyone "shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities". Article O of the Fundamental Law thus lays down, in a general way, the responsibility of the individual for him- or herself and for the community. From this provision, the Constitutional Court has interpreted the individual's link to society as an element of the Fundamental Law's conception of man: "the man's image in the Fundamental Law is not that of an isolated individual, but of a responsible personality living in the society." {Decision 3132/2013. (VII. 2.) AB, Reasoning [95]} At the same time, the Constitutional Court has already referred to the ultimate limit of the obligations arising from social coexistence, the inviolability of human dignity, as delimited by the Fundamental Law: "the Fundamental Law defines the relation between the individual and the community by focusing on the individual being tied to the community, without, however, affecting his or her individual value. This follows from in particular from Article O and Article II of the Fundamental Law." {Decision 32/2013. (XI. 22.) AB, Reasoning [88]}

[29] On the basis of the above, the Constitutional Court emphasises that Article XIX (3) of the Fundamental Law does not allow for any conditions to be imposed, since the wide legislative leeway in the field of social measures should remain within the limits of the Fundamental Law. In that regard, the minimum limit is that Article XIX (3) of the Fundamental Law does not allow the imposition of conditions which, by reference to an alleged or real public interest, would nullify the freedom of the individual or the obligation of the State to provide social security by imposing impossible conditions. In particular, conditions may not be imposed which restrict fundamental rights in a manner contrary to the Fundamental Law. In this context, the Constitutional Court points out that the examination of the internal scene of private and family life, i.e. the intimate sphere, as a means of ensuring the tidiness of the living environment, cannot be interpreted as a requirement of "activity useful to the community" permitted by Article XIX (3) of the Fundamental Law. This constitutes a restriction of the right to privacy which has no constitutionally assessable connection whatsoever with social benefits and does not contribute to the realisation of the principle of "everyone shall be responsible for him- or herself" as declared in Article O of the Fundamental Law. On the basis of the above, the Constitutional Court calls upon the local governments to pay special attention to the provisions of the Decision 32/2013 (XI. 22.) AB {Reasoning [82] to [84], reinforced by the Decision 17/2014 (V. 30.) AB, Reasoning [29]}, and the Decision 11/2014. (IV. 4.) AB (Reasoning [55]).

[30] 2 As regards the benefits provided under the municipality support scheme introduced on 1 March 2015, the Constitutional Court observed that the Social Benefits Act contains an authorising provision [section 132 (4) (g)] for adopting a decree with a content similar to the one in the context of the benefits previously requested by the petition to be examined. The Constitutional Court therefore asked the Commissioner for Fundamental Rights to state whether he wished to extend his motion to the authorising provision concerning the regulation of municipality benefits, however the petitioner did not consider it justified.

[31] In view of the above, since the amendment of the Social Benefits Act by the Act XCIX of 2014, all the statutory provisions requested by the petitioner to be examined and those directly related to them [such as section 36 (2) (d) and section 37/B (1a) of the Social Benefits Act] have been repealed or their content has been substantially changed [section 33 (7)], the Constitutional Court therefore rejected the motion aimed at establishing the conflict with the Fundamental Law by section 33 (7), section 38 (9)

and section 132 (4) (a) and (e) of the Social Benefits Act on the basis of section 64 (e) of the ACC.

V

[32] Subsequently, the Constitutional Court reviewed the regulatory background of public employment in order to examine the constitutionality of the challenged provisions of the Public Employment Act.

[33] 1 Public employment means the temporary employment of registered unemployed persons for a limited period of time within the framework of state-subsidised public work programmes, in order to promote the employment of job seekers and to overcome disadvantages in taking up employment. The aim of the legal relationship of public employment is laid down in section 1 (2) (a) to (e) of the Public Employment Act, according to which it may be established for the performance of a task specified therein – typically a task prescribed by law or for the fulfilment of community needs – or for developing the conditions for the performance of a task, except for work which is exclusively performed in the capacity under civil employment, civil service, government service or state service.

[34] The subjects of public employment relationship are, on the one hand, the public employers, mainly state, municipal or public benefit employers, and on the other hand, the employees.

[35] In the case of public employees, two conditions must be fulfilled at the same time [section 1 (4) of the Public Employment Act]. A public employee may be a natural person who is eligible to enter into an employment relationship under the Labour Code, except for persons under the age of 16. In addition, he/she must meet one of the following three requirements: he/she must be a jobseeker under the Act IV of 1991 on the Promotion of Employment and Unemployment Benefits (hereinafter: Employment Act) or a person in receipt of rehabilitation benefits under section 4 of the Act CXCI of 2011 on the Benefits of Persons with Disabled Work Ability and Amendment of Certain Acts; pending the final decision on his/her application, a person who has applied for recognition as a refugee, a beneficiary of subsidiary protection status or a person enjoying temporary protection, with the exception of a person in asylum detention; or a third-country national who has been ordered by the aliens

policing authority to stay in a place designated pursuant to section 62 (1) (a), (c), (d), (f) of the Act II of 2007 on the Entry and Stay of Third-Country Nationals.

[36] The content of the public employment relationship is regulated by section 2 of the Public Employment Act. According to this, the provisions of the Labour Code applicable to employment relationships are applicable, except for the provisions set out in section 2 (2) to (5) of the Public Employment Act. [Section 2 (1) of the Public Employment Act]. A rule different from the Labour Code is that the public employment relationship may only be established for a limited period. The Act links the duration of employment to the duration provided for in the official contract on the subsidy to be granted under the Government Decree No. 375/2010 (XII. 31.) on subsidies for public employment (hereinafter: "Decree on Subsidies for Public Employment"). No probationary period may be laid down. The duration of the normal working time in the public employment relationship may be the working time provided for in the official contract for the subsidy granted under the law on subsidies for public employment. The normal working hours are 4 or 6 to 8 hours respectively [section 3 (1) (b) and section 4 (1) of the Public Employment Act]. The amount of leave to which the public employee is entitled is 20 working days per calendar year [Section 2 (4) (4a) of the Public Employment Act]. In addition, public employees are entitled to wages, the amount of which shall be specified in the official contract [section 2 (2) (2c) and section 2 (4) of the Public Employment Act]. By contrast, the social security, tax and labour safety rules applicable to labour relationship shall also apply to public employment [Section 4 of the Public Employment Act].

[37] 2 The petitioner claimed that the provisions of the Public Employment Act concerning the exclusion of job seekers laid down in section 1 (4a) to (4g) of the Public Employment Act were contrary to the Fundamental Law. According to the wording of the Public Employment Act in force at the time of the examining the motion, a jobseeker shall be excluded from public employment for three months if his or her child of compulsory school age has been absent and (the jobseeker) has been convicted of that administrative infraction within three months [section 1 (4a) (a) (ab)], or if he or she fails to comply with the obligation to ensure the tidiness of the living environment (such as the garden, yard, public area connected to the property as defined by law) as provided for in the local government's decree [section 1 (4a) (b)]. Since the lodging of the petition, several other grounds for exclusion have been introduced into the legislation, which the petitioner did not request to be examined,

therefore the Constitutional Court did not examine their constitutionality. The procedural rules for exclusion are set out in section 1 (4b) to (4i). Accordingly, the exclusion procedure based on the disorderliness of the living environment is an *ex officio* administrative procedure, during which the municipality notary of the place of residence of the jobseeker shall provide information to the district (Budapest-Capital district) office of the public employment agency within 3 days [section 1 (4b)]. Pursuant to section 1 (4f), no request is required if the local government does not have a decree in force pursuant to section 1 (4a) (b), or if public employment is carried out by the local government of the place of residence of the public employee, its institution or a business entity established by the local government. However, in the latter case, the municipal public employer may refuse to establish the public employment relationship if it is aware of the existence of a reason for exclusion of the public employee pursuant to paragraph 4a (b) [section 1 (4g)].

[38] In the matter of exclusion, the district office shall issue an official decision in the first instance, and the county or Budapest-Capital government office acting as the public employment agency shall issue an official decision in the second instance [section 1 (4d)].

[39] If the district office is informed of the reason for exclusion after the establishment of the public employment relationship, it shall notify the public employee of its official decision, who shall terminate the public employment relationship with immediate effect on the basis of the final decision [section 1 (4e)].

[40] With regard to the termination of the public employment relationship, the provisions of the Labour Code on the termination of employment [section 64 (1)] shall apply with the derogation that in the event of the exclusion of a public employee from public employment by a final official decision, the public employer shall terminate the public employment relationship with immediate effect [section 2 (5) g) of the Public Employment Act].

[41] 3 The petitioner claimed that the provisions of the Public Employment Act concerning the exclusion of job seekers were contrary to the Fundamental Law. Pursuant to the provision of section 1 (4a) (a) (aa) of the Public Employment Act in force at the time of the submission of the petition, a jobseeker was to be excluded from public employment for three months if the jobseeker was subject to proceedings pending for an administrative infraction due to the absence of his or her child of compulsory school age. The relevant provision was repealed on 29 November 2013 by

section 18 (3) of the Act CXCII of 2013 amending certain Acts in connection with increasing the effectiveness of disaster prevention.

[42] Pursuant to section 1 (4a) (a) (ab), a jobseeker shall also be excluded from public employment for three months if his/her child of compulsory school age has been absent and the jobseeker has been convicted of committing this administrative infraction within three months. However, the motion contained no reasoning in the context of section 1 (4a) (a) (ab).

[43] On the basis of all the above, the Constitutional Court rejected the motion aimed at establishing a conflict with the Fundamental Law by section 1 (4a) (a) (aa) and (ab) of the Public Employment Act on the basis of section 64 (d) and (e) of the ACC.

[44] 4 The petitioner claimed to have discovered a conflict of norms between section 1 (4a) (b) of the Public Employment Act and section 33 (7) of the Social Benefits Act. In his view, the principle of legal certainty is violated by the fact that the rules on the exclusion of active age persons from the benefits contained in section 33 (7) of the Social Benefits Act and the rules on the exclusion from public employment contained in section 1 (4a) (b) of the Public Employment Act contain different rules with regard to the requirement of the tidiness of the living environment. Whereas in the first case the Act also requires the "internal" environment to be tidy, in the case of exclusion from public employment the municipality may only examine the "external" environment.

[45] The Constitutional Court found that the reviewability of the collision of norms referred to by the petitioner no longer exists, in view of the fact that the content of section 33 (7) of the Social Benefits Act has changed. On the basis of the above, the Constitutional Court dismissed the motion for review of section 1 (4a) (b) of the Public Employment Act on the basis of section 64 (e) of the ACC.

[46] 5 The petitioner also considers to be contrary to the Fundamental Law the provisions of the Public Employment Act, which establish exclusion rules for jobseekers and public employees on the grounds of failure to comply with the obligation to keep the living environment (garden, yard, etc.) tidy, as provided for in a local government decree. In its view, the provisions of section 1 (4a) to (4g) of the Public Employment Act and section 2 (5) (g) of the Public Employment Act infringe Article XV (2) of the Fundamental Law, on the one hand, by prohibiting jobseekers (for about three months) from entering public employment, and on the other hand, imposing on public employees an immediate termination of employment and a three-month ban on returning to public employment. In so doing, as argued by the petitioner, they

discriminate against public employees in comparison with other persons in employment and with persons in a public service relationship, without any constitutionally justifiable purpose. The discrimination consists, according to the petitioner, in the law-maker's defining a special external condition for public employees as a cause for extraordinary termination of employment, which is not at all connected with the employment relationship in terms of its content. In the petitioner's view, that is indirect discrimination based on social origin and wealth, since there are more disadvantaged persons living in poverty among public employees than among persons in other employment relationships. They are therefore more likely to be penalised by having their employment relationship terminated if they do not meet the additional conditions imposed on them as a "moral code of conduct".

[47] In its motion, with regard to the contested provisions of the Public Employment Act, the petitioner alleged a violation of Article XV (2) of the Fundamental Law, which contains the equality of fundamental rights and the prohibition of discrimination. This provision is in line with the rule of Article 70/A (1) of the Constitution [See Decision 42/2012 (XII. 20.) AB, ABH 2012, 279, 286]. In its Decision 13/2013 (VI. 17.) AB, the Constitutional Court stated the following in connection with the use of the provisions of its decisions rendered before the entry into force of the Fundamental Law: "The road of Hungarian and European constitutional development that has been completed so far and the rules of constitutional law have a necessary impact on the interpretation of the Fundamental Law as well. In the course of reviewing the constitutional questions to be examined in the new cases, the Constitutional Court may use the arguments, legal principles and constitutional relationships elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant section of the Fundamental Law and of the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed." (Reasoning [32])

[48] In this context, the Constitutional Court pointed out in the Decision 42/2012. (XII. 20.) AB: "the content of Article XV (2) of the Fundamental Law is identical to that of Article 70/A (1) of the Constitution; the Fundamental Law also contains Article II, which is identical to Article 54 (1) of the Constitution with regard to human dignity. It is still acceptable to link the two, insofar as the requirement of general equality follows

from the dignity to which every human being is entitled; however, this is not always necessary, because the Fundamental Law lays down equality before the law in a separate rule. Having said that, the essential content of equality before the law remains – in line with the previous case law of the Constitutional Court – the equal dignity of human beings. The human dignity clause of the Fundamental Law precludes any different interpretation of equality before the law, while at the same time it continues to define its content. Thus, the link between human dignity (Article II of the Fundamental Law) and equality (Article XV of the Fundamental Law) has been maintained under the Fundamental Law, despite the fact that the general rule of equality of rights, which was absent from the Constitution and which was developed in the cited case-law of the Constitutional Court, is now explicitly included in Article XV (1) of the Fundamental Law. The general rule of equality of rights can thus be based on Article XV (1) of the Fundamental Law. This is a dogmatic simplification, while – according to the above – the necessary link between equal dignity (Articles I and II) and substantive equality before the law remains unchanged, because the ultimate basis of equality is equal dignity. Therefore, as stated above, no change is justified in the doctrine of the application of the general rule of equality – e.g. in the examination of the formation of groups – and the case-law of the Constitutional Court remains applicable" {Reasoning [23] to [26], reiterated in the Decision 3086/2013. (III. 27.) AB, Reasoning [31]}.

[49] From the above findings it also follows that the rule of general equality of rights can also be derived from Article XV (2) of the Fundamental Law, and consequently the Constitutional Court finds that the petitioners may rely on the general rule of equality of rights with regard to both Article XV (1) and XV (2). The Constitutional Court shall decide about the petition on the basis of Article XV (2) in the case of affecting fundamental rights and the alleged violation of the individual's protected characteristics and on the basis of Article XV (1) if other rights are affected. The Constitutional Court took a similar position in its Decision 32/2015 (XI.19.) AB, in which it stated that "the private individual petitioners based their application on Article XV (2) of the Fundamental Law [...] However, the differentiation created by the definition of the scope of the Act cannot be linked to any of the characteristics referred to in Article XV (2) of the Fundamental Law. Consequently, the constitutionality of the challenged provision of the law should be decided on the basis of Article XV (1), rather than paragraph (2), of the Fundamental Law" {Decision 32/2015. (XI. 19.) AB, Reasoning [79]}.

[50] 6 The Constitutional Court summarised its case-law in relation to Article XV (1) and (2) of the Fundamental Law in the Decision 3206/2014 (VII.21.) AB. According to the case-law of the Constitutional Court elaborated in the course of interpreting the general rule of equality enshrined in Article XV (1) of the Fundamental Law, equal treatment is guaranteed in respect of all rules of the legal order because the ultimate source of equality is equal human dignity. The equal rights clause imposes a constitutional command on those exercising public power to treat all persons as having equal dignity and to weigh their considerations with equal standards and fairness. This requirement extends to the entire legal system, since those exercising public authority are obliged to guarantee equal treatment for all persons within their jurisdiction. It follows from this that a given regulation is considered to be incompatible with the constitutional standard of Article XV (1) of the Fundamental Law if it ultimately violates the right to human dignity. In other words, the principle of equal rights does not prohibit any differentiations, it only prohibits discriminations that violate human dignity. The discrimination shall be held as being contrary to the Fundamental Law, i.e. to violate human dignity, if the differentiation is an arbitrary one. According to the general standard, a differentiation resulting in a disadvantage shall be regarded an arbitrary one if it has no reasonable constitutional justification of due weight. In order to verify this, it is primarily necessary to examine the legitimate aim of the measure. In addition, it is necessary to assess, first, whether the measure is suitable for achieving the legitimate aim and, second, whether the scope of persons targeted by the legitimate aim pursued coincide with the persons affected by the measure. All of these criteria provide an opportunity to determine whether a distinction can be considered arbitrary and without reasonable justification {see: Decision 42/2012. (XII. 20.) AB, Reasoning [22], [24] to [27], [28], [34]; reinforced in: Decision 23/2013. (IX. 25.) AB, Reasoning [87]; and Decision 3206/2014. (VII. 21.) AB, Reasoning [23]; Decision 3073/2015. (IV. 23.) AB, Reasoning [43]}.

[51] In contrast with the above, no discrimination shall be established when the law provides for different rules concerning the scope of subjects having different characteristics as an unconstitutional discrimination is only possible with regard to a comparable scope of persons who belong to the same group. “Discrimination shall be deemed to exists if the assessment of the subjects, the determination of their rights and obligations is different with respect to an essential element of the regulation. However, no discrimination shall be established when the law provides for different

rules regarding a different scope of subjects." [Decision 8/2000 (III. 31.) AB, ABH 2000, 56, 59] (Reasoning [28])

[52] Article XV (2) of the Fundamental Law contains the equality of fundamental rights and the prohibition of discrimination. In addition to the itemized list of the characteristics, the wording "discrimination on other grounds" provides a guarantee that the persons who live in unforeseeable situations, which are remarkably similar to the listed characteristics, shall not suffer from a negative discrimination. This open-ended list cannot be extended without limits as it shall not offer protection for those persons who are currently negatively affected by a certain rule, but who are not subject of a discrimination. Actually, the prohibition of discrimination granted in Article XV (2) of the Fundamental Law only covers the situations of life where people face a prejudice or social exclusion due to their essential characteristics that determine their identity. Consequently, the constitutional clause of the prohibition of discrimination primarily serves the purpose of protecting the groups of the society differentiated according to their personal characteristics that cannot be changed by one's free discretion. The Constitutional Court has consistently held that the prohibition of discrimination under Article XV (2) of the Fundamental Law may be extended not only to the legislation protecting fundamental rights, but also to the entire legal system. This follows from the fact that the prohibition of discrimination in fact prohibits discrimination on the basis of the characteristics of the self-identity and identity of people, i.e. discrimination, as specified in the rule of the Fundamental Law. From this it also follows that the validity and justifiability of such a distinction must be examined by the Constitutional Court with particular rigour, both with regard to fundamental rights and non-fundamental rights {Decision 3206/2014. (VII. 21.) AB, Reasoning [27] to [28]}.

[53] 7 The Constitutional Court first had to examine the nature of the public employment relationship and to carry out a constitutional assessment of it.

[54] According to the Constitutional Court, the institution of public employment can be distinguished from other employment relationships on the labour market, and can be characterised as an intermediate area between social benefits and the open labour market. In fact, by way of public employment the law-maker intended to develop a mechanism driving persons towards the labour market, offering a remuneration higher than the social benefits but less than the wages that can be earned on the open labour market. This built-in incentive system is referred to in the general explanatory memorandum of the Public Employment Act, which states that the maximum amount

of cash benefits that can be received under the social assistance system is set by law in order to ensure that "the amount of benefits that can be received does not act as an incentive against work". Moreover, the reasoning attached to sections 62 to 92 of the Act XCIX of 2014 on the Foundation of the Central Budget of Hungary for the Year 2015 amending the Social Benefits Act states that the legislative objective is to "ensure that as many people as possible live of work instead of benefits." According to the reasoning, the law-maker, through the public employment scheme, "provides public employment opportunities for more and more people every year, which allows those who want to work to earn a higher income than they did previously from benefits."

[55] This intermediate, hybrid situation is also reinforced by the amendment of the Public Employment Act in force since 1 January 2015, which added a subsection (c) to the examined Section 1 (4a). In the light of this, a jobseeker shall also be excluded from public employment for three months if he or she does not accept a suitable job offered to him or her under the Employment Act in accordance with the provisions applicable to jobseekers.

[56] Nevertheless, it can also be stated that the law-maker itself regards public employment as a special employment relationship, to which, as a rule, the Labour Code applies, and this character is also highlighted by the fact that the Central Statistical Office also includes public employees in the employment index.

[57] The fact that the time spent in public employment is considered as pension-earning time [cf. Section 5 (a) of the Act LXXX of 1997 on Social Insurance Benefits and Private Pension Beneficiaries and on the Coverage of These Services], and the payment of employment substitution allowance is suspended during the period of public employment [section 36 (1) (b) of the Social Benefits Act], also indicates that the nature of public employment is close to labour relationship.

[58] Nevertheless, it can also be stated that although the application of the Labour Code as a background regulation underlines the private law character of public employment, at the same time, work as a replacement of welfare allowance stresses the public law character of public employment. Public employment – according to the reasoning of the Act – provides temporary employment for persons of active age and capable of working who have been dropped out of the labour market, with the aim of facilitating the return of such persons to the labour market. However, public employment also differs from typical labour relations in respect of the subjects and the objects of the legal relation as well as regarding the wages that are lower than the

amount of the minimum wage. Public employment is a form of employment that can only be organised for a public duty, established between the employer and the employee for work, for a fixed term without probation [section 1 (2) of the Public Employment Act] by concluding an employment contract under the Labour Code. Although the specific provisions of the Labour Code apply to the public employment relationship (such as the provisions of the Labour Code prescribing the obligations of employers and employees), section 2 (2) to (5) of the Public Employment Act, by setting out a derogation from the rules of the Labour Code, establish its special nature as distinct from the labour relationship. Accordingly, the legislation lays down specific additional requirements for both employees (personal scope, section 1 (4) of the Public Employment Act) and employers (e.g. free transport, section 3 (1) of the Public Employment Act). The selection of public employees is carried out by means of posting, thus the public employee has no choice about which public employer to work for, therefore the contractual position of a public employee is less advantageous than that of an employee under a contract of private law.

[59] However, public employment is also to be distinguished from other types of jobs in the public sector, as the State creates an unlimited labour market supply side in public employment in order to "enable to work anyone who wants to work" [Article XII (2) of the Fundamental Law]. This finding is also supported by the minister's reply to the Constitutional Court's request, according to which "participation in public employment is open to all." Accordingly, the legal relationship of public employment can be interpreted as a social benefit extended in time and linked to a condition, work performance. In this sense, traditional social benefits and public employment replace each other, as is also indicated by the fact that the various social benefits are suspended during the period of public employment [see section 36 (1) (b) of the Social Benefits Act].

[60] Based on all the above the Constitutional Court established that, according to its content, the legal relationship of public employment is a particular atypical form of employment with a function linked to the social system, i.e. the employment form under examination can be found in the intersection of social policy and employment policy. In terms of constitutional law, this can be interpreted in relation to two state objectives, which are set out in Article XII (2) ("Hungary shall strive to create the conditions that ensure that everyone who is able and willing to work has the

opportunity to do so") and Article XIX (1) ("Hungary shall strive to provide social security to all of its citizens") of the Fundamental Law.

[61] The purpose of the State, as set out in Article XII (2) of the Fundamental Law, is complemented by Article XII (1), the second sentence of which states that "everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential." Article XIX (1) is supplemented by Article XIX (3), which allows that "the nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity." On the basis of these considerations, the rules of the institution under scrutiny, which is balancing between two objectives of the State and seeks to promote their attainment, must be examined on a case-by-case basis to determine which aspect of the legal relationship is relevant and when.

[62] 8 According to the petitioner, the provisions of the Public Employment Act partly violate Article XV (2) of the Fundamental Law because they prevent jobseekers (for about three months) from being able to enter public employment. In line with this, the minister's reply to the Constitutional Court also points out that the Public Employment Act does not merely require "compliance with the moral and behavioural rules that are generally expected" for the maintenance of a public employment relationship, but also for the establishment of such a relationship. Consequently, the Constitutional Court had to examine whether, within a homogeneous group of jobseekers, the fact that the legislation also lays down conditions other than employment-related ones for the persons who intend to establish a relationship of public employment entails discrimination.

[63] Jobseekers are not yet in employment, they just want to get into some form of employment. In this context, a jobseeker, when it is not yet known whether he or she will find a "market-based job" or become a public employee, belongs to a homogeneous group of jobseekers. At this point in time, the conditions for entering the employment relationship will be different, as the law-maker imposes conditions on public employees which are not linked to their employment but to their private life. Although such conditions may be formulated in order to protect constitutional values, having regard to the special nature of public employment and Article XIX (3) of the Fundamental Law, the conditions laid down may not lead to disproportionate infringement of the rights guaranteed by the Fundamental Law. The permissibility of this would lead to a situation in which certain provisions of the Fundamental Law could

empty out each other. However, a coherent interpretation of the Fundamental Law {see the Decision 12/2013 (V.24.) AB, Reasoning [48]} requires that a condition which may be imposed under Article XIX (3) cannot, on the one hand, override Article XV (2) of the Fundamental Law (8.1), which is the rule guaranteeing the equality of fundamental rights, and, on the other hand, a restriction of a fundamental right may only be imposed, even in the course of providing for a condition under Article XIX (3), in accordance with the provisions of Article I (3) (8.2).

[64] 8.1 According to the Constitutional Court's case-law, the clause contained in Article XV (2) of the Fundamental Law also provides protection against hidden or indirect discrimination. In the case-law of the Constitutional Court, it is a violation of the prohibition of indirect discrimination if an apparently general and neutral provision of the law or rule ultimately results in the disqualification, exclusion or deprivation of an opportunity of persons in "other situations", who are often subject to adverse discrimination in society and are listed in the Fundamental Law or have a decisive similarity with them. As interpreted by the Constitutional Court, the prohibition of discrimination guaranteed under Article XV (2) of the Fundamental Law shall also be extended to all measures of public authority that seem to contain general and neutral provisions equally applicable to everybody, but their results or effects in fact impose further disadvantages on the group of the society having the characteristics listed in the Fundamental Law's rule. In other words, they ultimately result in the exclusion of members of a group that bears one of the traits of one of these characteristics {Decision 3206/2014. (VII. 21.) AB, Reasoning [29]}. Similarly, according to the European Court of Human Rights (hereinafter: ECtHR), the rule prohibiting discrimination in Article 14 of the European Convention on Human Rights defines the persons in certain social situations by using an open list, similar to Article XV (2) of the Fundamental Law. However, this list – according to the case-law of the ECtHR – cannot be extended at will, and it can only include so-called vulnerable groups of society, distinguished according to their inherent personal characteristics {Cf. Decision 3206/2014. (VII. 21.) AB, Reasoning [31]}.

[65] On the basis of the above, discrimination within a homogeneous group of jobseekers can be established when the law-maker discriminates against a well-defined group of the society. The Constitutional Court recalls that it has already found implicit discrimination in the Decision 176/2011 (XII. 29.) AB on scavenging, in which it found that the regulation rendered indirect discrimination against homeless people (it was an

infraction to scavenge from a waste collection container placed in a public place), since the legislation was clearly directed against a group of the society existing in a particular life-situation. According to the reasoning of the decision, "it is indirect discrimination contrary to Article 70/A (1) of the Constitution if a series of apparently neutral provisions leads to the exclusion or deprivation of an opportunity of persons in »other situations«, listed in Article 70/A (1) of the Constitution or in a situation which is decisively similar to it, who are often discriminated against by law and social custom. Decision 63/2008 (IV.30.) AB similarly states that »an enacted law shall not only contain provisions, which are neutral in appearance. It must also ensure that the legal norm, which applies equally to all, does not in the end result in *de facto* discrimination without constitutional justification against a clearly defined group of persons.« (ABH 2008, 559, 570-571.) This principle is expressed in section 9 of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, according to which indirect discrimination is a provision that does not constitute direct discrimination and that appears to meet the requirement of equal treatment, placing certain persons or groups of persons with the characteristics defined in section 8 (1) in a significantly more disadvantaged position than that in which another person or group in a comparable position was, is or would be placed" (ABH 2011, 622, 632).

[66] Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities was enacted as a result of the accession to the European Union and the related harmonisation obligation. Section 65 of the Act lists all the Council Directives that the Act serves to transpose. Section 65 (g) sets out Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which states in recital 15 of its preamble that "the appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence."

[67] In the context of the present case, it can be stated that the aim is to transfer public employees to the primary labour market, and the legislative concept itself ultimately presupposes a group in need. Thus the persons in public employment are thus typically ones in difficult financial circumstances, who are among the most vulnerable in the society, as is shown by the fact that the amount they can earn in public employment is lower than the minimum wage. The employment of

disadvantaged persons is also highlighted in the reasoning of the Public Employment Act: “it is of major importance for social inclusion in public employment to give priority to the employment of the disadvantaged and the most disadvantaged persons in terms of employment.” This is also confirmed by the 2013 report of the State Audit Office on the audit of the efficiency and effectiveness of the support system for public employment and related training programmes. According to the document, “the public employment support scheme has been effective in contributing to the objectives of preventing the exclusion of unskilled workers from the labour market and improving the employment of people with low educational attainment. Between 43% and 62% of those introduced in public employment during the period had a low level of education, exceeding the share of low-educated people among registered jobseekers in each year.”

[68] The Constitutional Court had to examine whether there was any reasonable justification for the above discrimination within the group of jobseekers. According to the law-maker's reasoning, “the fact that public employees are engaged in value-creating work which is intrinsically linked to the public tasks of local governments and other public bodies makes it a condition for those engaged in public employment that they observe the generally accepted rules of morality and conduct”. In the present case, however, it can be established that it is not only public employees who carry out work linked to the public tasks of public bodies. Consequently, there is no reasonable justification whatsoever for the law-maker to prescribe special rules of conduct merely for this specific group of the jobseekers. In the case under examination, the Constitutional Court concluded that it was a case of hidden discrimination based on one's “wealth status” as, in fact, the provision of the law only applied to those who live in a disadvantageous and vulnerable material situation, requiring to fulfil conditions unrelated to work (in the context of one’s living environment). For this reason, the Constitutional Court held that the law-maker’s ordering the application of the rules of exclusion as a precondition for access to public employment also constituted an infringement of Article XV (2) of the Fundamental Law.

[69] 8.2 In connection with the restriction of fundamental rights due to the imposition of a condition under Article XIX (3), the petitioner also referred to the infringing nature of the challenged provision of the law in respect of the right to privacy. In that regard, the Constitutional Court finds that condition that unnecessarily or disproportionately

restricts Article VI (1) of the Fundamental Law may be imposed neither as a condition for access to public employment nor as a case of exclusion from it.

[70] This is also indicated by the Labour Code, applicable as a background rule, according to which “the employee's right to privacy may be restricted if the restriction is absolutely necessary for reasons directly related to the purpose of the labour relationship and proportionate to the achievement of the objective" [section 9 (2) of the Labour Code], and which provides that “the employer may control the employee only in the context of his conduct in the labour relationship. The employer's control and the means and methods used in the course of such control shall not involve any violation of human dignity. The employee's private life shall not be subject to control” [section 11 (1) of the Labour Code].

[71] The provisions of the Labour Code protecting the private sphere can be interpreted on the basis of Article I (1) of the Fundamental Law, according to which "the inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.” Under Article I (1) of the Fundamental Law, the State is not only under an obligation to protect the exercise of a fundamental right by appropriate means against State interference, but also has a duty to protect against interference by third parties {Cf. Decision 13/2016. (VII. 18.) AB, Reasoning [50]}. All this applies even in labour relationships of a private law nature, and is therefore particularly relevant in atypical public employment relationships, which have elements of public law.

In the Decision 32/2013. (XI. 22.) AB the Constitutional Court interpreted the right to privacy and its relation to the right to human dignity. It established that Article VI (1) of the Fundamental Law – in contrast with Article 59 (1) of the old Constitution – provides comprehensive protection for privacy: the individual's private and family life, home, contacts and reputation. In terms of the essence of privacy, however, it maintained the general statement, developed in the former case-law of the Constitutional Court, specifying as the essential conceptual element of privacy that others should not have the possibility to intrude or even look into it despite of the will of the affected person [Decision 36/2005 (X. 5.) AB, ABH 2005, 390, 400]. The Constitutional Court pointed out that there was a particularly close link between the right to privacy enshrined in Article VI (1) of the Fundamental Law and the right to human dignity granted in Article II of the Fundamental Law. Article II of the Fundamental Law lays down the foundations for the protection of an untouchable

realm of developing one's privacy, which is closed against any intrusion by the State as it is the basis of human dignity. However, according to the Fundamental Law, the protection of privacy is not limited to the inner or intimate sphere also protected by Article II of the Fundamental Law, but is also extended to privacy in the broad sense (keeping contacts) and also to the spatial sphere where one's private and family life evolves (home). [...] (Reasoning [82] to [84]).” {Decision 17/2014. (V. 30.) AB, Reasoning [29], reinforced in: Decision 13/2016. (VII. 18.) AB, Reasoning [42]}

[72] The Constitutional Court has also interpreted Article VI (1) of the Fundamental Law in its Decision 19/2013 (VII. 19.) AB in the context of the operation of the national security services: “under Article VI (1) of the Fundamental Law, everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. The Fundamental Law significantly extends the right to undisturbed privacy as compared to the rules of the previous Constitution. The term “private secret” is not used in the Fundamental Law, protecting instead the private and family life, home and communications” (Reasoning [23]).

[73] The Constitutional Court also explained in its Decision 11/2014 (IV. 4.) AB that “the freedom of private life is closely related to personal freedom, since freedom of private life is impossible without personal freedom. Respect for private and family life, which is a fundamental right under Article VI of the Fundamental Law, requires that the State should not interfere in the intimate sphere of the individual. Article 59 of the Constitution recognised this right as a right to reputation, the inviolability of the private home and the protection of private secret (or similar rights). Respect for private and family life means, in addition to the prohibition of State interference, that information about private life should not be disclosed or come to the knowledge of the State without the consent of the person concerned (or by virtue of the law). It also includes the traditional fundamental right to the inviolability of the private home, specifically referred to by that name in the Constitution, since private home is the scene of private life – but it is not relevant in this case.” (Reasoning [55])

[74] As laid down by the Constitutional Court in the Decision 13/2016. (VII. 18.) AB: “according to the Supreme Court of the US, the peace of home ("the last citadel of the tired") is a space where people can recede from the everyday rush and it is a value of primary importance. The fact that one may become a captive audience anywhere on public ground does not mean that it is to accepted everywhere: while it is usually possible to evade listening to any non-desired assembly encountered on public

ground, one's home is a special place in this respect to be legally protected by the State." (Reasoning [43])

[75] The scope of protection of the right to privacy is therefore not limited to the internal or intimate sphere, but extends to the wider private sphere (communications) and the spatial sphere in which private and family life unfolds.

[76] The Constitutional Court shall decide about the petition on the basis of Article XV (2) in the case of affecting fundamental rights and the alleged violation of the individual's protected characteristics. The protection of the right to privacy is a right of both those seeking to enter public employment and those in public employment, and therefore Article XV (2) of the Fundamental Law is infringed if the granting of the fundamental right is not implemented under non-discriminatory conditions.

[77] The test for the restriction of the fundamental right to privacy is found in Article I (3) of the Fundamental Law. According to this, "the rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right." The right to privacy may therefore be restricted in order to enforce another fundamental right or to protect a constitutional value also in the context of the Public Employment Act as an Act of Parliament. In assessing the necessity of a restriction, it is necessary to take into account whether the law-maker pursued a constitutional objective and whether the restriction applied is suitable to achieve the constitutional objective.

[78] "In its previous practice, the Constitutional Court did not consider legal entities subject to different Acts regulating employment relationships as falling within the same regulatory scope. [...] This different classification is also supported by Decision 1/2016 (I. 29.) AB, which points out that there are significant differences between the employment relationships in the competitive sector and the public sector, despite the fact that they all share the common characteristic of being employment-oriented {Decision 1/2016. (I. 29.) AB, Reasoning [43] to [45]; {Decision 3172/2017. (VII. 14.) AB, Reasoning [27] to [28]} However, the Constitutional Court was mindful of the fact that in its early case-law it had already examined restrictions on the right to privacy in relation to public servants. In its Decision 20/1990 (X. 4.) AB, the Constitutional Court held that the protection of the purity of public life or the exercise of a public function may entail a restriction of the right to privacy. However, in its Decision 56/1994 (XI.10.)

AB, it also held that only a minority of public servants perform a public function and that the threat of disciplinary action for the private conduct of public servants is only exceptionally necessary or proportionate. The restriction can only be accepted as constitutional if the unworthy conduct has a substantial, real and direct impact on the job or position, but in the absence of this, the restriction of the fundamental right constitutes an unnecessary and disproportionate interference in the private sphere of the public servant (ABH 1994, 312, 314.).

[79] According to the above-quoted reasoning of the challenged provisions of the Public Employment Act, "the fact that public employees are engaged in value-creating work which is intrinsically linked to the public tasks of local governments and other public bodies makes it a condition for those engaged in public employment that they observe the generally accepted rules of morality and conduct". This justification alone, as a constitutional objective, is not sufficient to limit a fundamental right. It cannot be accepted as a legitimate aim that the law-maker may, without differentiation and by general reference to the public task, impose specific standards of conduct which restrict the right to privacy and which cannot be linked to the content of the work actually carried out. It follows from the protection of the general freedom of action that the State shall respect the freedom of the individual and shall justify any restriction of freedom on the basis of rational arguments and may not interfere with it in an arbitrary manner. In contrast, the Constitutional Court considers that it is unreasonable and, as such, constitutes an arbitrary legislative decision to impose on a special employment relationship with social aspects, namely public employment, conditions that are outside the logic of the regulation and are not part of the system.

[80] In the context of Article XV (2) of the Fundamental Law, all this is aggravated by the fact that the power to issue regulations restricting the private sphere granted to local governments allows the formulation of special life-style standards for only one group of jobseekers or employed persons that can be clearly defined according to their financial situation or labour market position, while the quality of the living environment aimed to be achieved by the regulatory objective is ensured by other instruments of the legal system without discrimination [see, for example, section 5:23 of the Act V of 2013 on the Civil Code, the Government Decree 17/2015 (II. 16.) on the procedure for the protection of possession under the competence of the municipality notary or section 17 of the Act LXIII of 1999 on the Supervision of Public Areas]. Consequently, the challenged provision of the Public Employment Act unnecessarily restricts in a

discriminatory manner the right to privacy. In view of the above, in the present case, the Constitutional Court finds that section 1 (4a) (b) of the Public Employment Act is contrary to the Fundamental Law and therefore annuls it.

[81] Article 24 (4) of the Fundamental Law allows the Constitutional Court to examine the provision of the law that are not requested to be reviewed and to annul it if necessary, provided that its content is closely connected to the provision of the law requested to be reviewed. In the present case, in relation to the annulled section of the Public Employment Act, section 1 (4b) of the Public Employment Act provides that "for the administrative procedure conducted ex officio, the municipality notary competent for the place of residence of the jobseeker shall, upon request, provide data to the district (Budapest-Capital district) office acting as the State employment agency (hereinafter: "district office") within 3 days in the case referred to in paragraph (4a) (b)"; according to section 1 (4f) of the Public Employment Act, "in the case referred to in paragraph (4a) (b), a request is not necessary if the public employment is carried out by the local government of the place of residence of the public employee, by an institution of the local government or by an economic organisation established by the local government, or if the local government does not have a decree in force pursuant to paragraph (4a) (b)"; furthermore, under section 1 (4g) of the Public Employment Act, "a public employer subject to paragraph (4f) may refuse to establish a public employment relationship if it is aware of the existence of a reason for exclusion of the public employee pursuant to paragraph (4a) (b)."

[82] Since all three provisions are rendered void by the annulment of section 1 (4a) (b) of the Public Employment Act, the Constitutional Court, in view of Article 24 (4) of the Fundamental Law, annulled also section 1 (4b), (4f) and (4g) of the Public Employment Act due to their close connection.

[83] 9 According to the petitioner, the exclusion rules under section 1 (4c) to (4e) of the Public Employment Act are in fact an automatic decision-making procedure, which violate the right to a fair procedure of the public employees under Article XXIV (1) of the Fundamental Law and the right to legal remedy under Article XXVIII (7). According to the motion, the contested rules deprive the right to judicial remedy of its effectiveness.

[84] The petitioner failed to put forward any independent argumentation in connection with Article XXIV (1) of the Fundamental Law; the petitioner claimed the violation of the right to a fair official procedure through the violation of the

fundamental right to legal remedy, therefore the Constitutional Court rejected the petitioner's request for the substantive examination of the compliance of section 1 (4c) to (4e) of the Public Employment Act with Article XXIV (1) of the Fundamental Law on the basis of section 64 (d) of the ACC.

[85] 10 With regard to Article XXVIII (7) of the Fundamental Law, the Constitutional Court has repeatedly emphasised that it considers the subordination of public administration to the rule of law as a requirement of the rule of law, which must be guaranteed by the courts through the control of the legality of administrative decisions {see: Decision 24/2015. (VII. 7.) AB, Reasoning [19], [20]}. "According to the consistent case-law of the Constitutional Court, the subordination of public administration to the law is considered as an element of the rule of law laid down in Article 2 (1) of the Constitution [...] In the view of the Constitutional Court, the rule of law does not only impose the requirement of legality on official acts of public administration, but the requirement of subordination of public administration to the law extends to all acts of public administration in which public administration takes decisions affecting the fundamental rights of the addressed persons". [Decision 8/2001 (II. 18.) AB, ABH 2011, 49, 79] This also follows directly from Article 25 (2) (b) of the Fundamental Law, which defines the review of the legality of administrative decisions as a task of the court

[86] The right to legal remedy guaranteed in Article XXVIII (7) of the Fundamental Law grants everyone the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests. In accordance with the established case-law of the Constitutional Court, the right to legal remedy would require that a possibility to turn to another organ or to a higher forum of the same organ should be offered for the purpose of reviewing all decisions that substantially influence the right or the lawful interest of the affected person. The effectiveness of legal protection afforded by the right of appeal requires that it be effective and capable of redressing the harm caused by the decision. The effective enforcement of the right of appeal may be influenced by a number of factors, including the extent of the possibility of review, the time limit for the exercise of the right of appeal, or the rules for the service of the decision complained of and the effective possibility of having access to it {Decision 22/2013. (VII. 19.) AB, Reasoning [26]; reinforced by the Decision 12/2015. (V. 14.) AB, Reasoning [25]}. The Constitutional Court pointed out in its decision 2/2013. (I. 23.) AB that the enforcement of the right to legal remedy has two elements: on the one hand, access to the system of fora for

legal remedy should not be blocked by provisions of the law, and on the other hand the extend, i.e. the completeness or the restricted nature of the legal remedy {Reasoning [35], [37]}.

[87] 11 The Constitutional Court has already described the detailed procedural rules of exclusion from public employment in the grounds of the present decision. In addition, the minister's reply to the request of the Constitutional Court explained that "the decisions taken in the procedure leading to exclusion may be challenged by the public employee in three separate fora." Firstly, "the public employee may appeal against a decision taken in the infraction or administrative proceedings underlying the exclusion." Then "the public employee may also appeal against the administrative decision of exclusion taken by the district employment agency [district office]." Lastly, "if the decision of the district employment agency [district office] becomes final and the public employee is excluded from public employment, the public employee shall terminate the employment relationship without discretion on the basis of the decision. [...] The public employee may challenge the termination with immediate effect before the labour court."

[88] Based on the above, the Constitutional Court is of the opinion that this procedure is not automatic, and that the contested provisions of the Public Employment Act allow for the review of the grounds for exclusion [Section 1 (4c) of the Public Employment Act]. Exercise of the fundamental right to legal remedy is granted in the matter of exclusion: the decision of the district office is considered in the second instance by the county and Budapest-Capital government office acting as the public employment agency [Section 1 (4d) of the Public Employment Act]. Following the final decision on exclusion, the public employment relationship is terminated with immediate notice [section 1 (4e) of the Public Employment Act], against which the person excluded from public employment may turn to court: he or she may initiate a labour dispute under section 2 (5) (g) of the Public Employment Act.

[89] In view of the above, the Constitutional Court rejected the petition in so far as it alleged a violation of the fundamental right to legal remedy under section 1 (4c) to (4e) of the Public Employment Act and section 2 (5) (g) of the Public Employment Act.

[90] 12 According to the petitioner, in addition to certain exclusion provisions of the Public Employment Act, section 2 (5) (g) of the Public Employment Act is also contrary to the Fundamental Law. In his view, section 2 (5) (g) of the Public Employment Act, which excludes the application of the Labour Code, violates Article XV (2) of the

Fundamental Law. According to the challenged provision, "section 64 (1) of the Labour Code shall apply with the derogations that the public employer shall terminate the public employment relationship with immediate effect if a final decision of a public authority has excluded the public employee from public employment or if the application for recognition of a person within the meaning of section 1 (4) (c) has been finally rejected, unless the person is subject to section 1 (4) (d) by decision of the aliens policing authority."

[91] The Constitutional Court notes that the normative content of the second part 2 (5) (g) of the Public Employment Act is empty, since section 1 of the Public Employment Act contains neither point (c) nor point (d).

[92] The Constitutional Court held that the case of immediate termination based on exclusion did not constitute discrimination. As explained in point 7 of Part V of the Reasoning, the Constitutional Court found that the group of public employees identified by the petitioner cannot be compared with other groups of employees on the labour market as regards the grounds for termination of their public employment relationship (mandatory immediate dismissal) and exclusion from employment. Indeed, all employees outside the public employment sector have a legal relationship on the labour market, therefore even the extraordinary termination of the legal relationship, whether in the public or private sector, takes place on a market basis and under market conditions.

[93] Given the fact that the social characteristics of public employment as an atypical employment relationship are determinative, public employees do not form a homogeneous group with other employees (workers) employed on a market basis in terms of the grounds for extraordinary dismissal. Belonging to a homogeneous group is, however, a fundamental and decisive criterion in the examination of the prohibition of discrimination. According to the case-law of the Constitutional Court, a distinction is only contrary to the Fundamental Law if the law-maker distinguishes between comparable subjects of the law belonging to the same group in terms of the regulation. In the absence of a group identity, that is to say, in the absence of a comparable situation, the legislation challenged by the Commissioner for Fundamental Rights does not infringe the constitutional prohibition laid down in Article XV (2) of the Fundamental Law.

[94] In view of this, the Constitutional Court rejected the petition, which alleged that section 2 (5) (g) of the Public Employment Act was in conflict with Article XV (2) of the Fundamental Law.

VI

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Budapest, 6 November 2017.

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