

Decision 28/2014 (IX. 29.) AB

On a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Judgement No. Pf.20.656/2012/7 of Budapest Regional Court of Appeal

In the matter of a constitutional complaint, with dissenting opinions by Justices *dr. István Balsai*, *dr. Egon Dienes-Oehm* and *dr. Béla Pokol*, the Plenary Session of the Constitutional Court adopted the following

decision:

The Constitutional Court holds that Judgement No. Pf.20.656/2012/7 of Budapest Regional Court of Appeal is contrary to the Fundamental Law and, therefore, annuls the Judgement.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning:

I

[1] 1. INDEX.HU Zrt. (hereinafter referred to as the "petitioner") lodged a constitutional complaint on the basis of Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"). The petitioner requested the Constitutional Court to establish the unconstitutionality by non-conformity with the Fundamental Law and annulment of Judgement No. Pf.20.656/2012/7 of Budapest Regional Court of Appeal, as it is unconstitutional, violates freedom of expression guaranteed in Article IX (1) and freedom of the press guaranteed in Article IX (2) of the Fundamental Law.

[2] In the lawsuit giving rise to the constitutional complaint, the petitioner contends that the police officers performing the task of securing an event, thus exercising public power, asserted their personality rights against the publisher and editors of an internet news portal reporting on the event. As a news portal reporting on the event, in consonance with the constitutional complaint, the petitioner exercised several fundamental rights, such as freedom of expression and freedom of the press, which the representative of the public authorities is obliged to tolerate. The petitioner considers that taking and disclosing a photograph of an event is a non-verbal way of expressing opinions and informing, which, according to constitutional theory and practice, enjoys the same protection as a verbal form of expression. Freedom of opinion also extends to the fact that its subject is free to choose the way and means of expression; their

expediency or necessity. On this basis, it is free to decide that the complainant will also illustrate the opinion expressed with a photograph in the report on the event. The report on the event, which also affected police officers, was specifically intended to provide information on public affairs and the contestability of public affairs, that is, such report is to be considered political speech. As contended by the petitioner, part of the public scrutiny of the exercise of public power is to be able to use the recognisable facial image of the police officers in its reports, as the acting police officer gives a face to the public authorities. If the police officer has no face, the liability of the public authorities is lost and personal responsibility becomes uncertain. This communication, as a political speech, also enjoys enhanced constitutional protection. Given that the prohibition on the publication of an image of a police officer restricts freedom of expression and of the press, a violation of the human dignity of a police officer must always be justified and the existence of such a violation can only be determined on a case-by-case basis. Based on the constitutional complaint, no such circumstance arises in this case. The court failed to take due account of the above factors in its judgement to provide legal protection for police officers as natural persons. The judgement only took into account the fact that public figures in the public domain have a higher-than-average tolerance obligation to the public, which Act V of 2013 on the Civil Code (hereinafter referred to as the "Civil Code") expresses by not requiring their consent for the disclosure of their image. In the petitioner's view, the fact that the judgement argues that police officers are not public figures does not result in the application of the civil law general rule of image protection, that is, requiring consent. At the same time, with the civil law protection of personality provided for police officers, the court restricted the complainant's indicated fundamental rights without a constitutional reason, thus violating freedom of opinion and of the press.

[3] 2. The constitutional complaint complies with the formal and substantive requirements prescribed in the Constitutional Court Act [Section 56 (2) of the Constitutional Court Act].

[4] It is a constitutional law issue of fundamental importance (Section 29 of the Constitutional Court Act) whether the rule of the Fundamental Law that Hungary recognises and protects freedom and diversity of the press and ensures the conditions for free dissemination of information necessary for the formation of democratic public opinion has prevailed in the specific case, where a press body acting as a news portal was condemned by the court for publishing a photograph of the police officers involved in securing the event in the coverage of the protest.

[5] The relationship between the image rights and the information dissemination function of the press is generally a matter of civil law and is usually a matter for the court to decide which right takes precedence. However, pursuant to Article IX (2) of the Fundamental Law, free dissemination of information necessary for the formation of democratic public opinion is also a constitutional issue.

[6] 3. In keeping with the operative part of Uniformity Decision No. 1/2012 BKMPJE adopted jointly by the Criminal-Public Administrative-Labour-Civil Law Divisions of the Curia issued subsequently to the judgement rendered by the court of first instance in the case giving rise to the petition, a person performing an official duty or performing work in a public place or on public ground is not considered to be a public figure in the performance of such activity, therefore his or her consent is required for the publication of an image or sound recording that individually depicts the person in an identifiable manner.

[7] The operative part of the Uniformity Decision essentially interpreted the notion of "public figure". The judgement of the Regional Court of Appeal does not refer to the Uniformity Decision.

[8] 4. Following the submission of the petition, the Judgement No. Pfv.IV.20.784/2013/5 of the Curia, on the basis of the petitioner's request for review as a defendant, upheld the judgement challenged with the constitutional complaint.

II

[9] Pursuant to the provisions of the Fundamental Law:

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

Hungary shall recognise and protect freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion."

III

[10] The petition is well-founded.

[11] 1. In its Decision 7/2014 (III. 7.) AB, the Constitutional Court has already pointed out that Article 61 (2) and (3) of the Constitution have the same content in terms of substance as Article IX (2) of the Fundamental Law. Both define the protection of freedom and diversity of the press as a State obligation among fundamental rights, and both rules, through the interpretation of the previous Constitution by the Constitutional Court, clearly link freedom and diversity of the press to the formation of "democratic public opinion". Therefore, the interpretation expressed in previous decisions in connection with freedom of the press and the formation of democratic public opinion can be included in the Reasoning in the present case {Decision 7/2014 (III. 7.) AB, Reasoning [20] to [23]}.

[12] Respect for the achievements of our historical constitution and the obligation according to which the provisions of the Fundamental Law must be interpreted in accordance with such achievements of the historical constitution [Article R (3)], also justifies the overriding protection of freedom of the press, free dissemination of information and the role of the press in shaping “democratic public opinion”.

[13] Freedom of the press is undoubtedly one of the achievements of our historical constitution. The very first step and at the same time the main demand of the revolution of 1848 was to free the press and secure freedom of the press, because freedom of the press was the basis for all other freedoms. In the absence of this, burning political and social issues as well as the wishes of the great transformation could not be articulated in public. The very first of the 12 points in the Proclamation published on 15 March stated: “We demand freedom of the press, the abolition of censorship.” Only this was followed by the responsible ministry, equality before the law, equality in the discharge of public burdens, the demand for the emancipation of serfs and all other demands. With the abolition of prior censorship, one of the April Laws, Act XVIII of 1848, known as the Press Act, guaranteed freedom of the press.

[14] Freedom of the press, as an achievement of our historical constitution, has been linked from the outset to free dissemination of information about current events, to the presentation of social issues to the public. Protecting freedom of the press and ensuring the conditions for free dissemination of information is, on the one hand, a State obligation based on Article IX (2) of the Fundamental Law and, on the other hand, a fundamental right of persons that can be restricted under Article I (3) of the Fundamental Law.

[15] 2. In practice, the Constitutional Court regarded freedom of the press as a fundamental right of communication, encompassing the freedom of all media. In its first decision interpreting freedom of the press, the Constitutional Court pointed out that freedom of expression applies in a particular manner to freedom of the press. Freedom of the press must be guaranteed by the state, bearing in mind that the press is a key instrument for obtaining information, expressing and forming opinion. [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 229, hereinafter referred to as the “1992 Court Decision”] The Constitutional Court therefore considered the social significance of the press to be of paramount importance from the outset in connection with freedom of expression and the formation and maintenance of democratic public opinion. The press is not only an instrument for the free expression of opinion, but also for the dissemination of information, in other words, it plays a fundamental role in obtaining information that is a precondition for forming opinion. (1992 Court Decision, ABH 1992, 227, 229.)

[16] The press is an institution of freedom of expression. Thus, the protection of freedom of the press, insofar as it serves the free expression of speech, communication and opinion, is also twofold: in addition to its subjective legal nature, it serves to create and maintain democratic public opinion on the part of the community (1992 Court

Decision, ABH 1992, 227, 229.). Freedom of the press represents a value that is protected along with the values of other fundamental rights, embedded in the protection and maintenance of the entire constitutional order. The Constitutional Court, without distinguishing the structural elements of the media, nuancing the content of freedom of the press, has taken the position that it is at the same time a means of free expression of opinion, dissemination of information and obtaining information. Freedom of the press as an individual fundamental right is an instrument in the sense that it reinforces the impact of individual expression of opinion and supports the provision of information to the democratic public on matters of public interest and the formation of opinion on matters of public interest. By exercising the right to freedom of the press, those entitled under the fundamental right play an active role in shaping democratic public opinion. In this capacity, the press monitors the activities of public figures and institutions, the decision-making process, and informs the political community and the democratic public about it (in the role of the “watchdog”). The basic reason and responsibility for the protection of freedom of the press, the institution of the free press, also enshrined in international conventions and documents, is the disclosure of information essential to individual opinions, the disclosure of complete information of public interest and the avoidance of monopolistic “public perceptions” based on the “officially approved viewpoint”. Keeping the State away from the activities of the press as an institution—to employ the language of the 1992 Court Decision (ABH 1992, 227, 229)—is in principle a guarantee of freedom of the press [Decision 165/2011 (XII. 20.) AB, ABH 478, 503.].

[17] The Constitutional Court reaffirmed its previous principled theorems even after the entry into force of the Fundamental Law: “Freedom of the press, which encompasses the freedom of all media types, is an institution of freedom of speech. The press, along with being engaged in more and more complex and diversified activities, is first and foremost an instrument for expressing opinions, forming opinion and gathering information necessary for developing one’s opinion. The exceptional character of freedom of speech is in this respect applicable to freedom of the press as well, just as the twofold justification of this freedom: the importance of freedom of the press is justified both by being a subjective fundamental right and a constitutional institution of democratic public opinion. Accordingly, Article IX (2) of the Fundamental Law not only acknowledges freedom of the press but it also provides for securing the conditions of free dissemination of information necessary for the formation of democratic public opinion” {Decision 7/2014 (III. 7.) AB, Reasoning [40]}.

[18] Free dissemination of information and the disclosure of social issues may conflict with other rights, in particular the right to privacy and the protection of human dignity.

[19] Article VI (1) of the Fundamental Law enshrines the right to respect for private and family life, home, communications and the good standing of reputation. Article VI replaced Article 59 of the previous Constitution, which included the right to the good standing of reputation, the inviolability of the home, and the protection of personal

secrets and personal data. Article VI is, in essence, a "confidentiality" rule and does not apply to activities of individuals which cannot be considered as part of privacy.

[20] The right to one's own image was not included in the previous Constitution and is not included in the Fundamental Law, although some specifically mentioned personality rights also have constitutional equivalents (e.g. the right to the good standing of reputation or the right to protection of personal data).

[21] The right of personal portrayal (image right) is a special personality right, dating back to the end of the 19th century (the simplification of the fixation of the image portraying a person). The right of personal portrayal is taken against the special case of the good standing of reputation and protection of honour, its unauthorised use for commercial advertising (commercial use).

[22] Image rights have other roots in the Anglo-Saxon countries and different on the continent. Starting in the United States, it is seen as belonging to privacy, the "right to be left alone," a constitutionally protected private sphere whose three essential aspects are secrecy, anonymity, and the right to seek solitude; in Europe, it is derived from the right of self-determination, human dignity, and is considered a special right of the personality. In most European countries, the protection of personal portrayal is part of civil law, and its protection is also shaped by judicial practice.

[23] The right to one's own image is generally considered to be an expression of the general personality right. It means, first and foremost, that each person can basically decide for themselves what image and in what context they will be made public. Appearance is the manifestation of personality to the outside world.

[24] Section 2:42 (2) of the Civil Code clearly links the rights of the individual to human dignity: The rights of personality, including the right of personal portrayal [Section 2:43 (g)], derive from this, in line with the wording of the Civil Code.

[25] The protection of privacy, as opposed to the protection of the right to one's own image, is not specifically directed towards representation, but must be judged according to the subject and place of the communication. In public places, the basic condition for asserting privacy is generally missing: The need for withdrawal. Therefore, the perception of secret and long-distance telephoto photographs is different. In the case of images in which the person is randomly seen as part of the landscape or in another public place, together with the main object of the image, e.g. a person walking in front of a building, or images of gatherings, processions, or other similar events attended by the person in the picture, also comes up differently for the protection of privacy.

[26] The creation and storage or disclosure of an image on public ground is not, in itself, primarily subject to the rule on the right to privacy, good standing of reputation, the inviolability of the home, personal secrets or the protection of personal data. The treatment of photography and sound recording on a principled basis other than the registration and processing of personal data is in line with the case law of the European

Court of Human Rights (hereinafter referred to as the "Human Rights Court"). In Hungary, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, promulgated by Act XXXI of 1993, signed in Rome on 4 November 1950, states the right to respect for private and family life, home and correspondence. The right to respect for private and family life is enshrined in the Fundamental Law in the same way as in Article 8 of the Convention. The Human Rights Court did not infer from that detailed rule the general protection of the personality, but interpreted that rule as a provision on the protection of privacy in the interpretation of Article 8 (Case 59320/00 von Hannover v. Germany, 26 June 2004, paragraphs 59 and 77). It was considered a violation of Article 8 of the Convention for the police to retain data on someone's privacy, to take fingerprints and to take a photograph during an interrogation, but the Human Rights Commission did not find a violation of Article 8 when the photograph was taken of a protester [Friedl v. Austria (15225/89), 19 May 1994, paragraphs 45 to 51]. Although the case law of the Human Right Court is in line with the text of the Convention and therefore differs from the rules to be reviewed under the Constitution, it can be stated that the Human Rights Court treats the taking and registration of photographs and sound recordings as special issues different from other cases [this is being confirmed by the case of P. G. and J. H v. the United Kingdom (44787/98), judgement of 25 September 2001, paragraphs 56 to 59]. However, under Decision 35/2002 (VII. 19.) AB, a recording obtained as a result of visual observation and recorded on a medium is considered personal data (ABH 2002, 199, 208).

[27] 3. In the present case, the Constitutional Court proceeds from the rules of the Fundamental Law on freedom of the press and human dignity and does not seek to settle civil disputes.

[28] 3.1 The provisions of civil law are filled with content by ordinary judicial practice. The concept of image, disclosure, consent to disclosure, cases of unauthorized disclosure, including one of the most important exceptions to the right to dispose of the image, the concept of public performance [Section 80 (1) to (3) of Act IV of 1959 on the Civil Code, hereinafter referred to as the "previous Civil Code"] shall be interpreted by the courts. Even in an unclear legal environment, it is possible to develop a practice that respects freedom of the press through proper application of the law.

[29] Pursuant to Section 80 (1) of the previous Civil Code, any abuse of a person's image or sound recording constitutes a violation of individual rights. Subsection (2) provides that the disclosure of an image or sound recording, other than public performances, requires the consent of the person concerned.

[30] By law, in the case of a public performance, no permission is required to produce and disclose the recording or image. This general statutory wording raises a number of practical issues. According to the position of the legal literature, participation in public events that influence the life of society in general, determine the development of national or local conditions, or are created for such a purpose can be considered a public performance (Compendium of Judicial Decisions, BDT2006. 1298). Typically,

such speeches and public engagements at cultural, social and political events and gatherings are considered as such. Such qualification is not linked to any formal social or legal status. The fact of public performance is based on speeches and engagements in the public interest.

[31] It is questionable, however, whether the exemption from the permit requirement extends to passive participants in addition to those who take an active part in public performances. There are two perceptions of this in the legal literature. In keeping with the first perception, if an event qualifies as a public performance, all participants (whether active or passive) may be recorded without their permission and this may be made public (Compendium of Judicial Decisions, BDT2007. 1663). The second perception makes distinctions also within the group of passive participants. In line with this, there is a difference between participating in the interest of a public task or in favour of a social opinion, and a difference between being present as an interested party and as an observer. Judicial practice has developed the concept of a recording made of a crowd. According to this, the prohibition on disclosing an image does not apply to recordings of images of public events, events, landscape and street details, so that the mode of representation is not individual, when the overall effect of the recording captures events that took place in public. In line with judicial practice, even in the case of a recording made of a crowd, the consent of the person depicted in the recording is required at the time of disclosure, if, taking into account all the circumstances, the uniqueness of the recording and the individual portrait character can be established (Court Reports, BH1985. 17).

[32] 3.2 Section 2:48 of the Civil Code provides similar to the previous Civil Code, but not exactly in an identical manner. Pursuant to this provision, the consent of the person involved shall be required for producing or using his or her image or recorded voice. The consent of the person concerned is not required for producing his or her image or recorded voice, and for the use of such recording if made of a crowd or a public life performance.

[33] The exception is that the Civil Code requires the consent of the person concerned even to the production of the image or recorded voice.

[34] It is a difference that the Civil Code does not use the term public performance, but the term public life performance. A further derogation is that the Civil Code, in contrast to Section 80 (2) of the previous Civil Code, states that the consent of the person concerned is not required for the production of the recording and for the use of the recording so produced in the case of a recording made of a crowd.

[35] 3.3 The task of the Constitutional Court in the present case is to assess whether in the specific case, the restriction of the exercise of freedom of the press is justified by the right to the protection of human dignity, that is, whether the decision complained of strikes a balance between the different aspects of free dissemination of information and protection of image rights which can be traced back to human dignity in a particular case.

[36] In the present case, the Constitutional Court also maintains to be relevant the considerations set out in Decision 7/2014 (III. 7.) AB regarding the conflict of fundamental rights ensuring the free dispute of public affairs and the protection of the personality of public figures, including those exercising public power. In keeping with the holdings of the above decision, in the case of persons exercising public power (and public figure politicians), the restriction of the protection of the personality is considered to be more broadly justified than everyone else in the interests of freedom of speech and of the press. Control over the activities of the institutions under the rule of law is a fundamental right of the press, which constitutes an essential element of democracy. Those applying the law need to take all this into account when, in certain cases, personality protection limits are imposed as a result of the profession of certain public authorities. However, the absolute limit of freedom of expression and of the press can only be expressed in communications that affect the unrestricted aspect of human dignity, that is, the innermost essence of a human being. {Decision 7/2014 (III. 7.) AB, Reasoning [56] to [63]}

[37] 4. In the case giving rise to the petition, the communication challenged by the ordinary court was a demonstration. The right of assembly in the constitutional sense protects not only events held in the public sphere (on public ground) that are directly political, but also other, but not directly political, gatherings that are intended to discuss public affairs in the broadest sense. The Constitutional Court considers that events protected by the right of assembly are not limited to gatherings, meetings, rallies and marches held in the traditional form. When it comes to deciding whether a gathering is an exercise of the right of assembly, it is crucial that the event, in terms of its orientation, is typically a means of expressing opinions, expressing and disseminating views for a common goal, a public life event, or just a form of entertainment. It is considered an expression of opinion if a communication with a specific content is conveyed to the participants and others at the event, regardless of whether or not it is directly political in nature. The right of assembly is also protected by the most diverse and possibly unusual forms of group communication, as long as they serve to form opinions and express opinions.

[38] Reporting on an assembly is a direct realisation of the freedom of the press, free dissemination of information and the role of the press in shaping "democratic public opinion"; therefore, the privileged protection of the content of such a report is justified.

[39] 5. The right of personal portrayal protects the outward expression of the human personality. The image and the sound recording indirectly serve to identify the personality, they convey the essential qualities of the personality. The right of personal portrayal can therefore be restricted differently than other personality rights. Any unauthorised, intrusive behaviour related to the image of another person is infringing.

[40] The petitioner as a news portal published an article entitled "Law Enforcement Representative Body Demonstration". The demonstration in question exercised the right of assembly, in public (on public ground), allowing anyone to participate. An

image gallery was attached to the article by the news portal. Pursuant to the decision affected by the constitutional complaint, images 7 and 16 of the image gallery showed two police officers in a uniquely recognisable way. In order to perform their official duties, the police officers, as an exercise of public authority, took part in a public event, which is subject to the right of assembly. Both images are group images.

[41] The court did not find that the recordings in question conveyed an offensive, humiliating, hurtful, degrading or distorted image or gave a bad impression of the persons depicted.

[42] As long as any information does not constitute an abuse of freedom of the press, a reference to a violation of individual rights in the context of the protection of human dignity rarely justifies a restriction on the exercise of freedom of the press. An image of a person who has come to the attention of the public in connection with a contemporary event may generally be disclosed in connection with the event without their permission.

[43] Photographs of a police action may be disclosed without consent if such disclosure is not self-serving, that is, based on the circumstances of the case, it qualifies as information about the events of the present day or of public interest from the point of view of the exercise of public power, or as pictorial coverage of public affairs.

[44] Police deployment in demonstrations is always considered a contemporary event, even if the police are not real "participants" in the incident. Therefore, a recording of it may be made available to the public without the consent of those in the picture, unless this constitutes an infringement of the human dignity of the police officer, as a protection which must be inherent in the intrinsic nature of the human being; such as showing the suffering of a police officer injured in the exercise of his profession. The interest in presenting the events of the present day, as the constitutional basis for the unauthorised disclosure of a photograph, does not generally apply even when only one person is shown in the image. In such cases, the conflict of interest between the freedom of the press and the right of personal portrayal based on the protection of dignity must be resolved by individual consideration, and it must be examined whether or not the image of the person or its disclosure falls within the scope of information of public interest for the purposes of presenting current events or the exercise of official authority. The rules of the previous and the new Civil Code, which constitute exceptions to the disclosure of an image subject to permission, must in any case be interpreted in such a manner as to be consistent with the exercise of freedom of the press. Although it is primarily a matter for the ordinary court in a civil case to consider what event it deems to be a public performance or a public life performance, what recording it classifies as a recording made of a crowd or a violation of personal rights under the Civil Code, the Fundamental Law must be taken into account in its interpretation. Section 1:2 (1) of the Civil Code states as a principle of interpretation that "the provisions of this Act shall be interpreted in accordance with the constitutional order of Hungary." Non-offensive recordings made in a public place, which objectively depict

the person concerned, may normally be disclosed without permission if they are linked to news coverage of public interest and are linked to the free provision of information on current events.

[45] Reporting of an assembly usually involves the publication of a picture or footage. Such a recording usually also shows police officers involved in securing the event. The compulsion to change these recordings before their release, when the recording does not exceed the content of a faithful illustration of the event, amounts to preliminary control without a due cause of the information intended to be published.

[46] 6. The images affected by the constitutional complaint do not show only one person. The decision complained of is based on the premise that "it is the consistent practice of Budapest Regional Court of Appeal that police officers performing only police tasks do not qualify as public figures and therefore require their separate permission to record and disclose their image".

[47] However, Article 28 of the Fundamental Law also provides that in the course of the application of the law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law, which requires further consideration in the present case.

[48] The decision affected by the complaint failed to take into account the constitutional aspect related to the freedom of the press and the free provision of information on current events when interpreting Section 80 (2) of the previous Civil Code. The decision does not attach decisive importance to the location of the police officers' specific tasks and their photography during their specific activities, the circumstances in which the images were taken and the purpose of their disclosure, the coverage of the gathering as a public performance, a mass event, but the only consideration is whether the police officer in general, in the performance of his or her duties, is generally considered to be a public figure. Footage of an event of public interest is usually taken on public ground, showing a multitude of people, but not as individuals, but with others, without rendering them visibly standing out (such as using telephoto lens). Without a certain degree of free use of images, modern media could not exist, and based on a literal, rigid interpretation of civil law rules, producing the image would already be subject to permission. Section 2:48 (2) of the Civil Code codifies the judicial practice according to which the consent of the person concerned is not required for the use of a recording if made of a crowd or of a public life performance, regardless of whether such person can be recognised in the image: Based on this, the prohibition on disclosing an image does not apply to recordings of public events, events, parts of a landscape or a street, that is, where the mode of representation is not individualised or the overall effect of the recording captures events that took place in public.

[49] In view of all this, the Constitutional Court found Judgement No. Pf.20.656/2012/7 of Budapest Regional Court of Appeal to be contrary to the Fundamental Law and, therefore annulled said Judgement.

Budapest, 23 September 2014

Dr. Péter Paczolay sgd.,
Chief Justice of the Constitutional Court
Justice delivering the opinion of the Court

Dr. Elemér Balogh sgd.,
Justice

Dr. István Balsai sgd.,
Justice

Dr. András Bragyova sgd.,
Justice

Dr. Egon Dienes-Oehm sgd.,
Justice

Dr. Imre Juhász sgd.,
Justice

Dr. László Kiss sgd.,
Justice

Dr. Péter Kovács sgd.,
Justice

Dr. Barnabás Lenkovics sgd.,
Justice

Dr. Miklós Lévy sgd.,
Justice

Dr. Béla Pokol sgd.,
Justice

Dr. István Stumpf sgd.,
Justice

Dr. Péter Szalay sgd.,
Justice

Dr. Mária Szívós sgd.,
Justice

Dissenting opinion by dr. Egon Dienes-Oehm:

[50] I do not agree with the operative part of the Decision and its Reasoning leading to the annulment of Judgement No. Pf.20.656/2012/7 of Budapest Regional Court of Appeal.

[51] 1. In line with the Reasoning of the Decision, I base my position on the premise that "Free dissemination of information and the disclosure of social issues may conflict with other rights, in particular the right to privacy and the protection of human dignity". (Reasoning [18])

[52] However, my position is completely different from that of the Decision as regards the comparison of Article IX (2) and Article VI (2) of the Fundamental Law and the result thereof. In my view, the Reasoning of the Decision in this conflict also performs factual court duties and unjustifiably favours the right to freedom of expression, freedom of the press and freedom of expression over the protection of personal data. The Decision disregards a legal fact relevant to the resolution of a constitutional conflict that the Constitutional Court, in its Decision 35/2002 (VII. 19.) AB, classified the recordings as

personal data in connection with the constitutionality of the recordings made by cameras at sports events and stated that everyone and no-one else has the right to disclose and use their own personal information.

[53] During the assessment of the possibility of a conflict within the Fundamental Law in this context, it should first be emphasised that courts hearing civil disputes concerning the protection of the right to one's own image must not only establish the facts concerning the application of the relevant provision of the Civil Code. In the performance of their legal interpretation tasks arising from the facts established by them, it is inevitable for the courts to take a position in the constitutional conflict mentioned here.

[54] 2. On the basis of the facts established by the courts in the present case, and in agreement with the judgement of Budapest Regional Court of Appeal referred to and under Judgement No. Pfv.IV.20.784/2013/5 of the Curia, in my opinion, the legal interpretation of these courts based on previous judicial practice and then on Uniformity Decision No. 1/2012 BKMPJE adopted jointly by the Criminal-Public Administrative-Labour-Civil Law Divisions of the Curia is correct and also in accordance with the Fundamental Law.

[55] It is clear from these judgements that a recording of their colleagues made of police officers performing their duties in uniform is suitable for unique identification. In view of this fact, Budapest Regional Court of Appeal found it justified that, in view of the applicable provision of the Civil Code and taking into account all the special circumstances of the case, the acting police officers, who fear negative circumstances affecting their privacy, may be requested their consent to the publication of the recordings.

[56] Accepting these facts, I agree with the legal interpretation of the Regional Court of Appeal, as well as with the constitutional law position statement by the Curia that the right to freedom of opinion, of the press and expression is not violated by the requirement of individual consent. As held by the Curia: "The press or other information providers may publish recordings of a police measure in such a way as to make the image of the police officers involved in it unrecognisable. In such circumstances, they would be able to comply with their obligation to provide information without infringing on individual rights. This does not impede the exercise of freedom of opinion, of the press and freedom of expression and is therefore not contrary to the case law of the European Court of Human Rights referred to in the request for review." (*cf.* Penultimate paragraph of the Judgement of the Curia)

[57] In the context of the latter finding, I note that the case law reference intended to support the content of the Decision (Reasoning [15] to [26]) is irrelevant in this respect, and does not in any way contradict my position that in the event of a conflict between Article VI (2) and Article IX (2) of the Fundamental Law, it can only be decided on the basis of an examination of all the circumstances of the case and Article IX (1) of the Fundamental Law, which provision must give priority to the benefit of the other, in the

form of a condition attached to the exercise of the freedom in question and, if necessary, a restriction.

Budapest, 23 September 2014

Dr. Egon Dienes-Oehm sgd.,
Justice

[58] I second the above dissenting opinion:

Dr. István Balsai sgd.,
Justice

Dissenting opinion by *dr. Béla Pokol*:

[59] 1. I cannot support either the part of the Decision on annulment or certain parts of the Reasoning. I cannot substantively support the annulment provision, which violates the right to privacy of police officers taking action by allowing their facial image to be recognised in future media reports. The annulled judicial decision represents the correct position in holding that police officers are simple executors of measures of state and political power and thus cannot be considered public figures. Their identification number is sufficient to hold them accountable for their possible illegality, and therefore the greatest disciplinary offence is to cover it up or eliminate it, but disclosing their facial image in media reports violates their right to privacy already maintained during their police work.

[60] 2. I cannot support the provision of the Decision from a procedural point of view either. The annulled judgement of the Regional Court of Appeal was restated and affirmed at the highest level of the ordinary judicial hierarchy by the Curia in its Judgement No.Pfv.IV.20.784/2013/5, and this remained unaffected by this Decision, on account of being bound by the framework of the petition. Thus, pursuant to the procedural rules regarding the constitutional complaint, the only correct solution would have been, even if such a solution existed, which we do not accept, if, by accepting the unconstitutionality by conflict with the Fundamental Law of the contested judgement, we now refuse to challenge the judgement of the Regional Court of Appeal and indicate in an Order that substantively, this can only be judged together with a confirmatory judgement of the Curia in the course of filing a possible new constitutional complaint, if the deadlines still allow it. By setting aside a lower-level judgement, but leaving a similar judgement at the upper level unaffected, the majority of the Justices who voted for the decision have created a contradiction in the judiciary, and, by my dissent, I would like to distance myself from that.

Budapest, 23 September 2014

Dr. Béla Pokol sgd.,
Justice