Decision 3047/2013. (II. 28.) AB

on rejecting an initiative seeking the establishment of a violation of the Fundamental Law by legislation

On the basis of a petition seeking the ex-post examination of the violation of the Fundamental Law by legislation, the plenary session of the Constitutional Court has adopted the following

decision:

1. The Constitutional Court rejects the petition seeking the declaration of section 34/A of the Act XXXIV of 1994 on the Police being in conflict with the Fundamental Law and its annulment.

2. The Constitutional Court terminates the procedure launched in respect of the petition aimed at the annulment of the text "police" in section 41 (7) (a) of the Act CXC of 2011 on National Public Education.

Reasoning

I

[1] The Commissioner for Fundamental Rights submitted an ex-post review petition to the Constitutional Court, seeking the establishment of the violation of the Fundamental Law by and the annulment of section 34/A (1) to (2) of the Act XXXIV of 1994 on the Police (hereinafter: AP) – which entered into force on 1 January 2013 – (measures against pupils under the age of 14 who are absent or leaving without authorisation from a lesson or a school activity on a school day). In his view, the contested statutory provisions infringe Article B (1) (principle of the rule of law and the requirement of legal certainty deriving therefrom), Article II (right to human dignity) and Article XVI (1) (right of children to protection and care) and (2) (right of parents to choose the upbringing of their children) of the Fundamental Law. Because of the close material connection, the application for annulment also covers the wording "police" in Article 41 (7)(a) of the Act CXC of 2011 on National Public Education (hereinafter: ANPE).

[2] The Commissioner for Fundamental Rights submits, first of all, that the wording of the provision does not meet the requirements of legal certainty and clarity, and that the precise legal framework and limits of the measure are incomplete. On the one hand,

the regulation of the conditions on which the measure is based and the relationship between the individual parts of the sentence are unclear and difficult to interpret grammatically, and to understand even by means of legal interpretation. Furthermore, the period during the school day when the police officer may take action is not specified (the end of the school day may vary from one educational establishment to another, or even from one class to another, or even between different locations, with children moving independently between them). The question is also, the argument continues, how long the consultation with the educational institution can take, i.e. how long the child can be "detained" by the police officer. Finally, there is also concern about the formality of the certificate that the police officer will/may accept and the fact that there may be a number of situations in which it is not possible to obtain a certificate in advance (e.g. a medical certificate) or the child might lose it. This means that there is a constant sense of uncertainty and threat.

[3] In the opinion of the Commissioner for Fundamental Rights, the legislation constitutes a twofold restriction of fundamental rights, affecting both children and parents: the law-maker uses law enforcement measures to restrict the right to human dignity and self-determination of children under 14 years of age, and at the same time the right of parents to upbringing. According to the reasoning, the legislation exposes children to unjustified external control. A police officer could potentially detain them at any time, question them about their destination, detain them for uncertain period and thus restrict their personal freedom. The credibility of the child is called into question if he or she has to prove by means of a certificate that he or she is not "stalking". Furthermore, taking them to school is a "quasi apprehension" which may shame the child in front of their peers. From the parents' point of view, the problem of having a say in the educational model they choose arises, as part of the parent's right to upbringing is how and by what means the parent ensures that the child fulfils their compulsory schooling, the argument goes.

[4] The Commissioner for Fundamental Rights points out that the restriction of fundamental rights implemented by the AP is not necessarily needed to ensure the fulfilment of compulsory school attendance, but rather the attractiveness of educational institutions should be increased by using appropriate pedagogical means, and increasing the effectiveness of the child protection signalling system may also be a more appropriate means of preventing absence from school. Moreover, the restriction is also disproportionate, since the disadvantages it causes (inflexible and unjustified, paternalistic restrictions that intrude into the internal family sphere of the persons concerned – the child-parent relationship) are much greater than the benefits it is hoped to achieve.

[5] With reference to Article 61 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the Commissioner for Fundamental Rights requested that the

Constitutional Court suspend until the petition has been judged upon – as a preliminary measure – the entry into force of the provisions already promulgated and foreseen to enter into force on 1 January 2013.

II

[6] 1 The affected provisions of the Fundamental Law:

"Article B

(1) Hungary shall be an independent and democratic State governed by the rule of law."

"Article II

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

"Article XVI

(1) Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development.

(2) Parents shall have the right to choose the upbringing to be given to their children."

[7] 2 The contested provisions of the AP:

"Section 34/A (1) A police officer may accompany a pupil under the age of 14 who is unaccompanied by an adult and who cannot provide credible evidence that he/she was absent from or left a lesson or compulsory activity organised by the school on a school day with permission, to the head of the educational institution after prior consultation with the educational institution.

(2) For the purposes of this Section, a credible certificate shall be understood to mean a written certificate issued by the educational establishment, the doctor or the parent or legal representative of the pupil under the age of 14."

[8] 3 The relevant provision of the ANPE:

"Section 41 (7) The data of the child or pupil shall include

(a) his/her name, place and date of birth, place of residence, place of stay, the name of his/her parent, legal representative, the place of residence, place of stay and telephone number of his/her parent, legal representative, the start date, the date of interruption, termination date of his/her legal relationship, his/her status as a private pupil, the number of his/her absences from school for the purposes of establishing his/her stay,

the verification of the legality of absence from lessons or compulsory classes organised by the school on a school day and contacting the pupil's parent, legal representative, for the maintenance authority, the court, the police, the public prosecutor's office, the municipal notary, the administrative body, the national security service, [...]"

III

[9] The petition is unfounded.

[10] 1 First of all, the Constitutional Court found that the abstract ex post facto application for review of a norm had been filed by a petitioner entitled to do so under Article 24 (2) (e) of the Fundamental Law and section 24 (2) of the ACC, and thus there were no obstacles to the examination of the merits.

[11] 2 The petitioner raised two different types of constitutional objections in connection with section 34/A (1) to (2) of the AP. On the one hand, he raised concerns relating to legal certainty – the interpretation of the norm – and, on the other hand, he also referred to unnecessary and disproportionate restrictions on the fundamental rights of children and parents (in this respect, he alleged infringement of the human dignity of pupils and their right to protection and care, as well as the right of parents to choose the upbringing of their child).

[12] The Constitutional Court first examined whether the contested legislation satisfied the requirement of legal certainty.

[13] 2.1 The rule of law compels the State – and primarily the law-maker – to ensure that the law in its entirety, in its individual parts and in its specific statutes, is clear and unambiguous and that its operation is ascertainable and predictable by the addressees of the norm." [Decision 9/1992 (I.30.) AB, ABH 1992, 59, 65]. According to the case-law of the Constitutional Court, the clarity of norms is a fundamental element of legal certainty, "it is a constitutional requirement that the normative texts shall have a clear, comprehensible and lucid normative content. The principle of legal certainty – which is an important element of the rule of law declared in Article 2 (1) of the Constitution – demands that the text of a law should bear a reasonable and clear normative content distinguishable in the application of the law [Decision 26/1992 (IV.30.) AB, ABH 1992, 135, 142]. A rule causing legal uncertainty by way of its uninterpretability may be declared unconstitutional as its effects cannot be foreseen and predicted by its addressees [Decision 42/1997 (VII.1.) AB, ABH 1997, 299, 301].

[14] According to the provision of the law challenged in the present case, "a police officer may accompany a pupil under the age of 14 who is unaccompanied by an adult and who cannot provide credible evidence that he/she was absent from or left a lesson or compulsory activity organised by the school on a school day with permission, to the

head of the educational institution after prior consultation with the educational institution".

[15] From a grammatical point of view, the provision is indeed strikingly imprecise: the phrase "unaccompanied by an adult" is not grammatically well matched to the rest of the sentence, and only as a result of a separate interpretative process can the relationship between the individual parts of the sentence be established, and thus the content of the norm: the right of the police officer to take action applies only to pupils under 14 years of age unaccompanied by an adult.

[16] It should be stressed that the law-maker is not only expected to ensure grammatical correctness in formulating sentences to ensure the logical unity and comprehensibility of the norm, but – since this is the basis of its applicability – the clarity of norms is also a constitutional requirement under Article B (1) of the Fundamental Law; the same is also expressly stipulated in section 2 (1) of the Act CXXX of 2010 on Legislation (hereinafter: AL) ("Laws shall have a regulatory content that is clearly understandable to the addressees.").

[17] It may be concluded that the wording of section 34/A (1) of the AP does not, in itself, meet these requirements and therefore raises serious concerns as regards legal certainty, which is an integral part of the rule of law.

[18] According to the case-law of the Constitutional Court so far, however, "a violation of the constitution is only deemed to have occurred if the content of the challenged legislation is so vague or its provisions are so contradictory that the interpretation of the legislation is no longer sufficient to resolve the ambiguity" [Decision 1263/B/1993 AB, ABH 1994, 672, 673-674]. Legal certainty is only infringed by legislation that is not open to interpretation by the law enforcement authorities [Decision 36/1997 (VI.11.) AB, ABH 1997, 222, 232]

[19] The content of section 34/A (1) of the AP is made clear by the immediately preceding subheading "Measures against pupils under the age of 14 who are absent from school or from a school-organised activity on a school day without permission or who leave without permission", which entered into force simultaneously with the relevant provision. The new sub-heading also clearly distinguishes this "measure" from the institution of "apprehension" regulated in section 34. The content of the norm is also clarified by the Order No. 22/2012 (XII. 21.) ORFK of the National Police Captain on the detailed rules of police action that may be carried out against truanting children. [The ORFK order is not a law, but a public law regulatory instrument issued pursuant to section 23 (4) of the AL, which is binding on police officers applying the law].

[20] On the basis of the above, the Constitutional Court considers that the provision of the law examined in the present case, despite the concerns raised as to the clarity of

the norm, cannot be considered to be so vague or contradictory as to be inherently uninterpretable or inapplicable, in violation of Article B (1) of the Fundamental Law: the problem complained of by the petitioner can be resolved by the above interpretation of the law. In this respect, therefore, there is no compelling reason to declare the contested provision unconstitutional and annul it, having regard also to the protection of "living law".

[21] 2.2 According to the petitioner, when drafting the legislation, the law-maker ignored a number of problems of law enforcement (e.g. the end of the school day varies, the education may take place in several locations, the form of the required certification is not clear, as well as the length of time the police may investigate, i.e. how long they may detain the student, etc.), which also causes a breach of legal certainty.

[22] There is no doubt that the legislation is of general nature and does not provide exhaustive answers to all the situations outlined by the Commissioner for Fundamental Rights. However, in other cases, the Constitutional Court has already pointed out that "the infringement of the rule of law and the legal certainty which is part of it, as laid down in Article 2 (1) of the Constitution, shall not be established merely because the text of the provision in question is subject to interpretation in the course of the application of the law: the principle of legal certainty does not impose an obligation on the law-maker to provide each definition separately in each piece of legislation" [Decision 71/2002 (XII.27.) AB, ABH 2002, 417] "Laws are always published in fixed linguistic form. Definitions and expressions of linguistic formulation are always general. Thus, in a given case, there may always be a question as to whether a specific case falls within the scope of the concept described in the legal norm. The application of the law is the connecting of general and abstract legal norms to concrete individual cases." (Decision 1160/B/1992 AB, ABH 1993, 607, 608).

[23] It is not possible to regulate life situations as a complete, closed system, and the diversity of reality cannot always be exhaustively described by legislation focusing on typical life situations.

[24] In the present case, for example, it can be stated that the school days are determined annually by ministerial decree on the basis of the authorisation granted in section 94 (1) (r) of the ANPE [EMMI Decree 3/2012 (VI. 8.) on the organisation of the 2012/2013 school year is the one currently in force], thus that the police officer taking action can always be aware of whether a given day is a school day; however, it is only possible to determine in a specific, concrete situation the time of the day when a specific child has to attend school on a given school day. Obviously, it is precisely these differences in circumstances, which the petitioner refers to, that do not allow the law-maker to regulate, for example, the beginning and end of the school day as part of the

norm at the statutory level. It is also possible for an institution to provide education in several locations (for example, physical education classes in a different building) and for children to move between them independently. In such a case, however, the pupil is obviously not absent from lessons or compulsory activities organised by the school. All these circumstances can only be clarified in the course of carrying out the specific measure.

[25] It should be considered as an elementary requirement that the initiation of the measure may only be taken in the interest of the child and only if the circumstances observed or the information available indicate that the conditions for the measure exist [this is also duly stipulated in Order No. 22/2012 (XII. 21.) ORFK on the detailed rules for police action against truanting children].

[26] Regarding the form of the certificate, it should be noted that this is provided for by the law [section 34/A (2) of the AP: a credible certificate shall be understood to mean a written certificate issued by the educational establishment, the doctor or the parent or legal representative of the pupil under the age of 14]. It is clearly not possible to specify in the law the exact time taken by the measure.

[27] To sum up: in the concrete application of the law, it is the task of the police officer to examine the facts of the case in real life, to establish the relevant circumstances, i.e. to determine whether the statutory conditions for the measure are complied with. Coordination with the educational establishment and verification of the lawfulness of the absence is possible by means of a data query from the Public Education Information System. When taking action, the police officer shall also take into account the provisions of the Order No. 22/2012 (XII. 21.) ORFK on the detailed rules for police action against truanting children (conditions for initiating action, establishing pupil status, etc.).

[28] In some cases, it may be easy to determine the existence of the preconditions for taking action, in other cases it is more complex and requires a greater degree of care. The Constitutional Court considers, however, that the wording of the legislation is not regarded as being so vague or open to divergent interpretations as to render the application of the law inherently impossible or completely uncertain, unpredictable or arbitrary, in a manner incompatible with the rule of law.

[29] At the same time, it is within the remit of the Commissioner for Fundamental Rights to take initiatives to identify and remedy possible constitutional anomalies in the application of the law.

[30] The petition for review based on the violation of legal certainty is therefore also unfounded in this respect, and the Constitutional Court rejected the application for annulment in this respect as well.

[31] 3 In its examination of the petitioner's claim for a fundamental rights violation, the Constitutional Court first examined the background and the system of the challenged legislation.

[32] The regulation pursuant to Article 34/A of the Act on the Law on Law Enforcement was created by the law-maker as one of the means of complying with the obligation to attend school, i.e. as a measure against unjustified and unjustified absenteeism [the regulation was introduced into the Act on the Law on Law Enforcement by Act CXX of 2012 on the activities of persons performing certain law enforcement duties and amending certain acts to ensure action against truancy].

[33] Article XI and Article XVI (3) of the Fundamental Law regulate the right to education (training) and the obligation to attend school in conjunction with each other. In the scope of granting the right to education, the Fundamental Law regulates the extending and generalising of community culture as a duty of the State, by stating that it shall be achieved by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education. Thus the provision itself refers to compulsory education, which is complemented by Article XVI (3), which makes it the duty of parents to provide for the education of their minor children. Participation in education is thus "not only a right but also [...] an obligation on parents to ensure the education of the child" (Cp. Decision 214/B/2003 AB, ABH 2007, 1505, 1510).

[34] Accordingly, section 45 (1) of the ANPE stipulates that in Hungary – as regulated by this Act – all children are obliged to participate in institutional education and to fulfil their compulsory schooling. As a general rule, a child becomes of compulsory school age at the latest in the year following the year in which he or she reaches the age of six by 31 August, and the first day of schooling begins on the first say of the school year [section 45 (2) of the ANPE]. Compulsory education – also according to the general rule – lasts until the pupil reaches the age of sixteen [section 45 (3) of the Education Act], and can be fulfilled in primary school, secondary school, (from 1 September 2013) in the framework of the Public Education Bridge Programme, and in developmental education – by attending school or as a private student.

[35] Section 72 (1) of the ANPE states that parents are responsible for ensuring that their children fulfil their compulsory education requirements. However, the State also performs certain tasks in this area: the district office keeps the register of pupils in compulsory education, orders and supervises ex officio the fulfilment of compulsory education and, in the event of unjustified absence of a pupil in compulsory education, also performs the tasks assigned to it by an Act of Parliament or government decree [section 45 (7) to (8) of the ANPE].

[36] Pursuant to section 51 of Decree No. 20/2012 (VIII. 31.) EMMI on the operation of education institutions and the use of names by public education institutions (hereinafter: "Decree"), if a student is absent from a class or student hostel session, he/she shall justify the cause of his/her absence. The absence is considered justified if the pupil – upon written request of the parent in the case of a minor pupil – has received permission for the absence as specified in the house rules; if the pupil was ill and justifies this as specified in the house rules [pursuant to section 51 (1), a medical certificate including the exact duration of the absence due to illness is required]; or if he/she was unable to fulfil his/her obligation due to an official measure or on other due grounds.

[37] The consequences of unexcused absence in the current regulatory context are as follows:

[38] (a) Complex Indication System

[39] In the case of unexcused absence (see section 51 of the Decree), the parent shall be notified and, if the absence exceeds ten hours in a school year, the guardianship authority, the government office acting as the general authority for the prevention of offences, with the exception of pupils in specialised childcare, the child welfare service in the case of pupils of compulsory school age and the regional child protection service in the case of pupils in specialised childcare shall also be notified. Following the notification, the child welfare service shall draw up an action plan in which it shall determine the tasks to be performed in order to eliminate the situation that endangers the child, pupil and that has caused the unexcused absence, to ensure that the child attends kindergarten, to fulfil the compulsory school attendance requirements and to serve the interests of the child, pupil, taking into account the reason for the absence. Repeated notification is required when the number of unexcused absences reaches 30 or 50 hours.

[40] (b) Academic consequence

[41] The more serious cases of absence listed in section 51 (7) of the Decree may lead to a grade repetition, unless the teaching staff authorises a class examination.

[42] (c) Financial disadvantage

[43] Pursuant to section 6 (1) of the Act LXXXIV of 1998 on Family Support (hereinafter: AFS), the State shall provide monthly education allowance or schooling allowance (hereinafter together: "family allowance") for the costs of raising and educating a child, but according to section 15 (1) (b), 50 hours of unexcused absence shall result in the suspension of the allowance and, pursuant to section 91/G (2) of the Government Decree No. 149/1997 (IX. 10.) on guardianship authorities and child protection and guardianship proceedings, it shall result in the taking into protection of a child under

the age of 16. In this case, the guardianship authority which issued the decision to take the child into protection may decide to grant the family allowance in kind [section 6 (2) of the AFS].

[44] (d) Liability under tort and criminal law

[45] In the case of unexcused absences of up to 30 hours in a school year, the parent may also be held liable for an offence pursuant to section 51 (6) (b) of the Decree and section 247 (c) of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System. In more serious cases, the criminal offence of endangerment of a minor may also be considered, however, the BK Opinion No. 22/2007 emphasises that this is subject to the legal requirement that "the said serious breach of duty must have the consequence of endangering the child's mental development. This consequence, which is obviously rather exceptional, may be established, possibly with the assistance of an expert, on the basis of other evidence adduced at the trial."

[46] Thus, even under the previous regulatory system, compliance with the compulsory school attendance obligation was not exclusively a private matter for the pupil and the parent, and the State sought to exert influence through various channels to ensure that the obligation was properly fulfilled. Under the contested provision, the State also plays a direct role in ensuring compliance with compulsory school attendance: a police officer may accompany a pupil under the age of 14 who is unaccompanied by an adult and who cannot provide credible evidence that he/she was absent from or left a lesson or compulsory activity organised by the school on a school day with permission, to the head of the educational institution after prior consultation with the educational institution. The novelty of this provision, which is new to the existing system outlined above, is that it gives the police, for the first time in public education legislation, the possibility of taking action against children under the age of 14 who do not fulfil their compulsory schooling obligations.

[47] 4 The petitioner sees the introduction of the possibility for police action as a violation of the children's right to human dignity and their right to care and protection, and at the same time he claims that the parents' right to choose their upbringing is also violated.

[48] 4.1 Human dignity is the keystone of the constitutional system, a value and a right at the top of the hierarchy of fundamental rights, which is inviolable under Article II of the Fundamental Law.

[49] The Commissioner considers that the credibility of the child may be called into question by the fact that the police officer can only accept a written certificate pursuant

to section 34/A of the AP and that it may be humiliating for the child to be accompanied to school by a police officer.

[50] However, the Constitutional Court does not share the petitioner's view on the question whether the measure taken against a child of compulsory school age in the case provided for in section 34/A of the AP is manifestly degrading and humiliating the child. In certain situations in life, police measures are also unpleasant for adults, but the protection of human dignity in the constitutional sense does not preclude such – lawful – measures. Dignity can only be violated if the measure is manifestly humiliating and degrading, and thus the "inviolable inner core" of the individual's self-determination and autonomy would be threatened.

[51] A police measure (stop, traffic control, etc.) does not in itself – in the absence of degrading, humiliating circumstances – result in a violation of human dignity, nor does the fact that the police officer may (shall) verify what the person concerned says. Accordingly, no violation of the child's human dignity can be established in the present case.

[52] It should be emphasised that the specific measure, the assessment of the treatment – which may be harassing or degrading – applied in the specific case is a separate issue from all these. If children's right to human dignity is infringed in the course of the application of the law, they may have recourse to legal remedies (complaints) or to the Ombudsman in accordance with section 92 (1) of the AP and the related additional provisions of Chapter IX. However, the present case is concerned only with the examination of the constitutionality of the normative regulation.

[53] 4.2 It should be stressed that the general freedom of action does not enjoy the same unconditional protection as human dignity, and by institutionalising compulsory schooling, the freedom of action of school-age children is supplemented by a specific obligation under the Fundamental Law. This obligation is closely linked to the right of the child to the protection and care necessary for his or her proper physical, mental and moral development, as guaranteed by Article XVI (1) of the Fundamental Law. The importance of education for the overriding interest of children and their spiritual and moral development cannot be denied. The constitutional obligation of parents to educate their child – to ensure the child's physical, mental and spiritual development – serves to protect the child's fundamental constitutional rights as enshrined in Article XVI (1) of the Fundamental Law. (Cp. Decision 214/B/2003 AB, ABH 2007, 1505, 1510). Thus, compulsory education can also be considered as a specific legal institution of child protection: as the Parliamentary Commissioner for Citizens' Rights himself refers to in his Report No. AJB 4149/2010, this "has a justifiable theoretical basis in the fact that the failure to complete basic education results in a serious disadvantage that cannot be remedied later, which in certain cases neither the child nor the parent

foresees. The serious negative effects of not attending education [...] are not immediate, but are experienced in the medium or long term."

[54] The fundamental issue for the assessment of the present case is the role of public action in ensuring compliance with the obligation to attend school and the right of children to protection. This has to be seen in the context of the content and scope of the right of parents to choose upbringing for their child.

[55] The right to care and protection under Article XVI of the Fundamental Law was also guaranteed by the Constitution. The difference between the former and the current provision is that the Constitution expressly provided that the child was to be protected by the family, the State and the society, whereas the Fundamental Law no longer specifies the parties obliged. This change in the wording does not, however, represent a substantive change in the interpretation of the provision: protection and care remain the duty of the family, the State and the society, in that order. This means that the child shall, naturally and primarily, receive the necessary protection from his or her family (parents), both now and in the future [Cp. Article 18 (1) of the Convention on the Rights of the Child, New York, 20 November 1989]. "The obligations to ensure physical development are those of maintenance, care. Enabling intellectual and moral development is achieved by choosing upbringing [Article 67 (2) of the Constitution], by providing education in ideology, religion, culture, art and science, by creating a loving family atmosphere." (Decision 995/B/1990 AB, ABH 1993, 515, 528)

[56] "The State's duty to »respect and protect« fundamental rights is, with respect to subjective fundamental rights, not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the conditions necessary for their realisation." [Decision 64/1991 (XII.17.) AB, ABH 1991, 297, 302] Therefore, State (and social) protection – which is derived from the objective obligation to protect institutions – supplements family protection as an internal legal relationship (and, where appropriate, substitutes it). In the present case, additional protection consists of the State's contribution to ensuring the conditions for the healthy development of the child. The specific content of that protection can always be defined and developed in the context of the legislation under examination. In several decisions, the Constitutional Court has pointed out that the State's obligation to protect institutions is manifested in a wide variety of State obligations, the form, manner and extent of which are not clear from the constitutional provision [Decision 731/B/1995 AB, ABH 1995, 801, 807; Decision 79/1995 (XII.21.) AB, ABH 1995, 399, 405; Decision 429/B/2001 AB, ABH 2005, 987, 991 to 992; Decision 666/B/2004 AB, ABH 2006, 2061, 2063 to 2064; Decision 844/E/2005 AB, ABH 2007, 2544, 2547]. At the same time, as a guideline, it has been pointed out that "while [...] in the case of fundamental rights of citizens as formulated in the Constitution, passivity on the part of the State is the conduct generally expected, in the case of the fundamental constitutional obligations imposed on the family, and more

specifically on the parent, to protect the rights of the child, Article 67 (1) of the Constitution obliges the State to act actively, by laying down explicit obligations for it." (Decision 995/B/1990 AB, ABH 1993, 515, 528) "The role of the State in the protection and care of children is to define the guarantees for the exercise of the fundamental rights of the child, to establish and operate a system of institutions for the protection of children. The Constitution gives the State very broad scope to regulate the child protection system." [Decision 114/2010 (VI.30.) AB, ABH 2010, 579, 582]

[57] In the absence of a family – or in the case of a parent who does not fulfil his/her obligation – the State's obligation to care for children becomes concrete: in such a case the State not only supplements family protection and care, but directly replaces it – it is obliged to do so. "If the child has no parents or parents who do not fulfil their parental duties, the State shall take over their responsibilities. This gives the legislative State the opportunity to intervene in accordance with the law and obliges the State to take direct responsibility (maintenance) in the field of protection and care (punitive measures, taking into State care)". (Decision 995/B/1990 AB, ABH 1993, 515, 528).

[58] To sum up, compulsory schooling is a specific legal institution under the Fundamental Law designed to ensure children's right to healthy development. However, in addition to the family, which plays the primary role, the State also has a role to play in ensuring this right.

[59] 4.3 The parent's right to choose the upbringing [according to Article XVI (2) of the Fundamental Law, parents have the right to choose the upbringing of their children] – in the context of Article VII (1) of the Fundamental Law (freedom of thought, conscience and religion) – means that parents may care for their children in accordance with their own world-view and conscience, so that "primarily parents (guardians) have the right to decide on matters relating to the physical and mental development of their children. Parents can choose their children's health care providers, educational institutions, and the kind of ideological education they wish to provide. Parents also decide on the choice of medical services and between the alternatives available." [Decision 39/2007 (VI.20.) AB, ABH 2007, 464, 481] Thus the essence of this important parents' right is the following: parents themselves decide how they choose the institution, method and means of upbringing and educating their children in accordance with their traditions, family customs, social situation, religious and moral convictions and financial means. No outside authority, no person outside the family, may interfere in this." (Decision 995/B/1990 AB, ABH 1993, 515, 527)

[60] However, the right to upbringing cannot be separated from compulsory schooling, nor from the role of the State in the protection and care of children. The obligation to let the child attend education is on the one hand an inherent limitation under the Fundamental Law of the right to upbringing: parents may choose the type of education

they wish to provide for their minor children of compulsory school age, but they may not choose not to provide education at all, as this would be contrary to the provisions of the Fundamental Law. Furthermore, although it is primarily the parent's right to decide what educational model to follow and, as part of this, what educational principles and means to ensure that the child of compulsory school age attends lessons – and other compulsory activities organised by the school – it is also his/her duty and responsibility to ensure this. In the Constitutional Court's view, this is the limit of a parent's right to upbringing: if, irrespective of any fault on his or her part, he/she is unwilling or unable to ensure that his child fulfils his/her compulsory schooling (attends lessons, etc.), there is also a need for State intervention to protect the child.

[61] Of course, dealing with truancy primarily requires cooperation between parents and school, the application of educational and pedagogical methods. The requirement under section 34/A of the AP, that the child be accompanied to school, is only a "symptomatic" treatment of the problem. In the case of regular truancy, long-term results can only be expected as a result of an appropriate educational process.

[62] However, police action does not constitute a drastic intervention that would exclude the parent from the upbringing and care of the child or change the educational model followed by the parent. Nor can it be considered a sanction either for the parent or for the child, since it has a specific role to play in ensuring the protection of children, in addition to the obligation to attend school: minors are a group in society in need of increased protection, supervision and care; because of their age, they are generally not yet able to assess the dangers they face and to avoid them. Children under the age of 14 who are in public places, public vehicles, shopping centres, etc. during school hours without adult supervision – typically without the knowledge of their parents – are increasingly exposed to more and more serious risks, which the State has an institutional duty to prevent and protect children from.

[63] 4.4 From the above, it is clear that although the child must first and foremost receive the necessary protection and care from his or her family (parents), in the absence of this, the State becomes the duty-bearer. In any event, the possibility of police action cannot be considered to be a harm or a threat to the child's personality, physical, mental or moral development, which would negatively affect his or her future. Even if a parent considers the possibility of police control (action) to be contrary to his or her own educational principles, it cannot be said that it would generally work against the upbringing of children to become free and independent, responsible adults, i.e. that it would obviously have a negative effect on their personal development. The introduction of section 34/A of the AP does not adversely affect the position or rights of either the child or the parent; on the contrary, it educates them to observe the conditions of living in society.

Based on all the above, the Constitutional Court rejected the motion for ex-post norm control aimed at establishing the lack of conformity with the Fundamental Law and annulling the section 34/A of the AP.

[65] 5 The petitioner requested the annulment of the wording "police" in section 41 (7) (a) of the ANPE, without any specific reasoning, merely on the grounds of close connection. In view of the rejection of the petition concerning section 34/A of the AP, the Constitutional Court held that this part of the petition had become irrelevant, and therefore the Constitutional Court applied in this respect the provisions of section 59 of the ACC and section 63 (2) (e) of the Rules of Procedure to terminate the procedure.

[66] The Constitutional Court did not have to rule on the question of the suspension of the entry into force of the legislation in view of the entry into force of the legislation and the delivering of a decision on the merits.

Budapest, 19 February 2013.

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