DECISION 55/2001 (XI. 29.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking a posterior examination of the unconstitutionality of a statute and the violation of an international treaty by the statute, as well as the establishment of an unconstitutional omission of legislative duty – with dissenting opinions by dr. Ottó Czúcz, dr. András Holló, dr. László Kiss and dr. István Kukorelli, Judges of the Constitutional Court – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court rejects the petitions seeking an establishment of the unconstitutionality and the annulment of the whole, and of Section 1, Section 2 paras (1) and (3), Section 5, Section 6, Section 7 items b) and d), Section 8 para. (1), Section 9 paras (1) and (2), Section 13 para. (1), and Section 14 paras (1) and (3), as appropriate, of Act III of 1989 on the Right of Assembly.

2. The Constitutional Court rejects the petition seeking the establishment of a violation of an international treaty by the statute and refuses to annul it.

3. The Constitutional Court rejects the petition seeking the establishment of an unconstitutional omission.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I.

Five petitioners requested the Constitutional Court to establish the unconstitutionality of the whole, and of certain provisions of Act III of 1989 on the Right of Assembly (hereinafter: the AA) as well as its violation of an international treaty, and an unconstitutional omission of

legislative duty. The Constitutional Court consolidated the petitions and judged them in a single procedure.

Two petitions were aimed at the complete annulment of the AA. Further petitions were aimed at the annulment of the following provisions of the AA: Section 1, Section 2 paras (1) and (3), Section 5, Section 6, Section 7 items b) and d), Section 8 para. (1), Section 9 paras (1) and (2), Section 13 para. (1), and Section 14 paras (1) and (3).

The Constitutional Court adopted its decision upon the examination of the following statutory provisions and international treaties binding upon Hungary, the majority of which had been referred to by the petitioners as well.

A) The provisions of the Constitution:

“Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law.”

“Article 7 para. (1) The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law.”

“Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.

(...)

(4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental

rights specified in Articles 54 to 56, Article 57 paragraphs (2) to (4), Article 60, Articles 66 to 69, and Article 70/E."

"Article 40/B para. (4) Professional members of the armed forces, the police and other civil national security services may not be members of political parties and may not engage in political activities."

"Article 50 para. (1) The courts of the Republic of Hungary shall protect and uphold constitutional order, as well as the rights and lawful interests of the citizens and shall determine the punishment for those who commit criminal offences."

"Article 57 para. (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.

(...)

(5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions which infringe on his rights or justified interests. A law passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time."

"Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."

"Article 62 para. (1) The Republic of Hungary recognizes the right to peaceful assembly and shall ensure the free exercise thereof."

“Article 70/A para. (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.”

B) The provisions of the AA:

“Section 1 The right of assembly is a fundamental freedom to be enjoyed by everyone, and the Republic of Hungary acknowledges this right and ensures an undisturbed exercise thereof.”

„Section 2 para. (1) In the framework of the right of assembly, peaceful gatherings, marches and demonstrations (hereinafter jointly: assemblies) may be held, where the participants may express their opinions freely.

(...)

(3) The exercise of the right of assembly may not constitute a criminal offence or a call to commit such offence, and it may not violate the rights and freedom of others.”

“Section 3 The following shall be out of the scope of the Act:

a) with the exception of Sections 12 and 13, meetings related to the election of Members of Parliament and members of local governments, as well as meetings where representatives and council members present reports;

b) religious services, events and processions organised in the territories of legally recognised Churches and denominations;

c) cultural and sports events;

d) events related to family occasions.”

“Section 5 The organiser of the assembly shall be a Hungarian citizen or a non-Hungarian citizen with a Hungarian residence permit or permanent residence permit.”

"Section 6 The police headquarters competent at the location of the assembly, in Budapest the Chief Police Headquarters of Budapest (hereinafter: the police) shall be notified of the organisation of an assembly to be held on public ground, three days before the planned date of the assembly. The organiser of the assembly shall be obliged to make the notification."

"Section 7 The written notification shall contain the following:

a) the expected time of commencing and completing the planned assembly, and the location or route of the assembly;

b) the aim and the agenda of the assembly;

c) the expected number of participants at the assembly and the number of organisers in charge of securing the undisturbed holding of the assembly;

d) the names and addresses of the organisation or persons organising the assembly as well as of the person entitled to represent the organisers."

"Section 8 para. (1) If the holding of an assembly under the obligation of notification would seriously endanger the undisturbed operation of the organs of popular representation or of the courts, or would cause disproportionate damage to the order of traffic, the police may, within 48 hours upon receiving the notification, prohibit the holding of the assembly at the location or time requested.

(2) The decision of the police shall be communicated to the organiser within 24 hours.

(3) The general rules on public administration procedures shall apply to the procedure by the police."

"Section 9 para. (1) There shall be no appeal against the decision of the police; within 3 days of communicating the decision, the organiser may ask the court to review the public administration decision. The decision by the police shall be attached to the application.

(2) The court shall decide within 3 days of receiving the application in a non-litigious procedure with the participation of lay assessors, after hearing the parties if necessary. If it finds in favour of the applicant, the decision of the police shall be annulled, while in a case

to the contrary, the application shall be rejected. There shall be no appeal against the court's decision."

"Section 11 para. (1) The organiser shall provide for securing the order of the assembly.

(2) The police and other competent organs shall contribute to securing the order of the assembly upon request by the organiser, and shall take measures to remove persons who disturb the assembly."

"Section 12 para. (1) If the conduct of participants at the assembly endangers the lawfulness of the assembly, and there is no other way to restore order, the organiser shall be obliged to disperse the assembly."

"Section 13 para. (1) The organiser shall bear joint and several liability for any damage caused to any third person by any person participating in the assembly, together with the person causing the damage. The organiser shall be exempted from this liability if he proves that when organising and holding the assembly he acted as generally expectable in the given situation."

"Section 14 para. (1) If the exercise of the right of assembly violates the provisions under Section 2 para. (3), or the participants appear in an armed manner or with weapons, or if an assembly under the obligation of notification is being held without notification, or in a manner different to the specifications in Section 7 items *a)* and *b)*, or despite a prohibiting decision, the police shall disperse the assembly.

(...)

(3) The participant of a dispersed assembly may start a lawsuit within 15 days of the dispersal in order to have the unlawfulness of the dispersal established."

„Section 15 For the purposes of this Act:

a) public ground: area, road, street or square with unlimited access to everyone;"

C) Data protection provisions concerned by the petitions

Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest (hereinafter: Data Protection Act):

"Section 3 para. (1) Personal data may be handled if

a) the data subject has given his consent, or

b) it is ordered in an Act of Parliament or – if authorised by an Act of Parliament and in the scope defined therein – in a local government decree."

„Section 5 para. (1) Personal data may only be handled for a particular purpose, exercise of rights or fulfilment of obligations. Each phase of data handling shall comply with this purpose."

„Section 17 para. (1) In the case of a violation of his rights, the data subject may file for court action against the data handler.

(2) The data handler shall prove that the handling of data complies with the provisions of the statute.

(2) The court having jurisdiction over the area in which the head office of the data handler is located is competent to conduct the lawsuit. Persons who otherwise cannot sue or be sued may also be parties to the lawsuit.

(4) If the court sustains the application, it shall oblige the data handler to provide information, to correct or delete the data, and/or shall oblige the data protection commissioner to provide access to the data protection register.

(5) The court may order the entry of its judgment into the data protection register if required by data protection interests and by the rights of a large number of persons concerned, as protected in this Act."

Act XXXIV of 1994 on the Police (hereinafter: Police Act):

"Section 76 para. (1) In order to perform its tasks of crime prevention and prosecution

(hereinafter together: criminal law enforcement), public administration and security activities, at central, regional and local levels, as determined by law, the Police may handle personal data of suspects, injured parties, and other persons participating in the criminal procedure as well as parties in the administrative procedure and other parties concerned, and other data.

(...)

(4) Data related to tasks of criminal law enforcement and public administration, respectively, shall be handled separately."

"Section 90 para. (1) In order to perform its tasks related to public administration and law enforcement and administrative infraction proceedings, the Police may handle:

(...)

h) the data on assemblies falling in the scope of the right of assembly that are subject to notification as determined by an Act or other statute, for 2 years; the data on the organisers of assemblies not falling in the scope of the right of assembly if they require Police security, for 2 years,"

D) The provisions of Act IV of 1978 on the Criminal Code (hereinafter: the CC):

"Section 228/A para. (1) The person who unlawfully impedes another person in the exercise of his right of association or assembly with violence or menace, commits a felony, and shall be punishable with imprisonment of up to three years."

"Section 271/A para. (1) Any conduct of violent or intimidating resistance against the actions of the organiser of a public assembly aimed at maintaining order at the public assembly, if it does not result in a more serious criminal act, shall be construed as a misdemeanour and shall be punishable with imprisonment of up to two years, work in community service, or a fine.

(2) The punishment shall be imprisonment of up to three years for disorderly conduct committed in groups or with any weapon, which qualifies as a felony.

(3) As additional punishment, an injunction may also be issued.

(4) For the purposes of this Section "public assembly" shall mean an assembly as defined in

the Act on the Right of Assembly as well as cultural and sports events that are open to the public without discrimination."

E) International treaties:

a) International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations at session XXI on 16 December 1966 and promulgated in Hungary in Law-Decree 8/1976 (hereinafter: the Covenant).

Article 4 para. (2) lists the rights that may not be suspended even in the case of war or other state of emergency endangering the existence of the nation. The list does not contain the right of assembly.

"Article 21: The right to peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

b) The Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols, promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention)

"Article 11 The freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not

prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 15 para. (2) lists the rights that may not be suspended even in the case of war or other state of emergency endangering the existence of the nation. The list does not contain the right of assembly.

"Article 16 Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

"Article 18 Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

III

First, the Constitutional Court surveyed the petitions aimed at the complete annulment of the AA.

1. In their petition, the petitioners presented the following grounds for the annulment of the whole of the AA: although the text of the Constitution in force at the date of promulgating the AA on 24 January 1989 had contained a provision on the restriction of rights, namely that the right of peaceful assembly shall not violate the constitutional order of the country [Article 65 para. (2) introduced into the Constitution by Section 10 of Act I of 1989 on the Amendment of the Constitution], a subsequent amendment of the Constitution put into force on 23 October 1989 (Act XXXI of 1989) acknowledged the free exercise of the right to

peaceful assembly and guaranteed its unrestricted enforcement. In spite of the above, the text of the AA still allows for the restriction of the constitutional freedom of assembly and does not contain the guaranteeing provisions that could, on the basis of Article 8 paras (1) and (2) of the Constitution, exclude the possibility of abusing restrictive measures. This is why the petitioners asked for a retroactive annulment – with effect from 23 October 1989 – of the AA provisions which they considered to be the ones that violate the Constitution to the greatest extent, since they considered such provisions to constitute an unconstitutional omission on the basis of the alleged obligation of the legislature to adapt the text of the AA to the amended text of the Constitution upon the amendment of the Constitution on 23 October 1989, and failure to do so resulted in the violation of Article 8 para. (2) of the Constitution.

As far as the unconstitutionality of the whole of the AA is concerned, the other reason mentioned by the petitioners is that the Act contains restrictions not allowed by Article 21 of the Covenant, resulting in breaking up the harmony between the internal law and the international obligations undertaken by Hungary, and therefore the Act is contrary to Article 7 para. (1) of the Constitution.

2. In the first decade of the operation of the Constitutional Court, a relatively small number of petitions or complaints were filed in connection with the right of assembly, in particular as compared to the number of applications related to other freedoms, and primarily to the freedom of expression.

However, certain basic principles may be deduced from the few decisions of the Constitutional Court related to the freedom of assembly. First of all, the freedom of assembly – similarly to the freedoms of thought, consciousness, and religion – is closely related to the freedom of expression [Decision 30/1992 (V. 26.) AB, ABH 1992, 167,171]. Without the right to organise and hold assemblies as well as the right to participate in such assemblies, there would hardly be any chance to gain views and information, to share them with others, and to form opinion jointly.

However, the freedom of assembly may be restricted. On the basis of the differences between the former and the present texts of the Constitution, the petitioners claim that no Act of Parliament may restrict the right of assembly. They argue that, on the one hand, Article 62 para. (1) of the Constitution guarantees the right to free exercise of the freedom of assembly and, on the other hand, that Article 62 of the Constitution on the right of assembly does not allow any restriction of the right of assembly.

The Constitutional Court holds the following: using the adjective "free" shall not be construed as the right of assembly being unrestrictable. In the reasoning attached to the provision concerned of the Constitution, according to which "on the basis of the right of free assembly, everyone has the right to organise and hold marches, assemblies, demonstrations, etc., where the people present may express their opinions jointly. With regard to the general prohibition of violent acts, one of the basic criteria for the lawfulness of such assemblies is peacefulness", using the adjective "free" refers to nothing more than the fact that in the Constitution of democratic Hungary, it is part of human and civil rights that everyone may participate freely in meetings, marches and demonstrations.

It does not refer to the constitutional prohibition of any restriction of the right of assembly either that the text itself of Article 62 merely contains a requirement – which can be interpreted as a restriction – that only the right to peaceful assembly is protected by the law, and the legislature is not expressly empowered by the Constitution to provide for other restrictions. Nor is such general formal empowerment granted by Article 60 of the Constitution on the freedom of thought, conscience and religion, Article 61 declaring the freedom of expression and information, and Article 63 on the right of association, although they are in many respects similar to the right of assembly, still it is clear from numerous decisions of the Constitutional Court adopted in respect of the above rights that all of these constitutional fundamental rights may undoubtedly be restricted by Acts of Parliament. The limits of restricting the rights are set in Article 8 para. (2) of the Constitution, and the Constitutional Court stated in several decisions its position on the constitutional conditions of restricting the rights, requiring for the constitutionality of restricting a fundamental right that the restriction should not affect the untouchable essence of the fundamental right, that the restriction be unavoidable, that is, the result of a forcing cause, and that the restriction

should be proportionate to the desired objective [e.g. Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 71; Decision 7/1991 (II. 28.) AB, ABH 1991, 22, 25; Decision 22/1992 (IV. 10.) AB, ABH 1992, 122,123].

Article 8 para. (4) of the Constitution also supports the above conclusion on the theoretical restrictability of the right of assembly. This provision defines the fundamental rights the exercise of which may not be suspended or restricted even during a state of national crisis, state of emergency or state of danger. The right of assembly is not listed there. Although there is no difference in respect of the value content or the importance of the fundamental rights that may or may not be restricted in extraordinary situations, in the sense that the unrestrictable rights do not enjoy any priority as compared to other rights, still it follows from Article 8 para. (4) of the Constitution that when formulating the Constitution, the right of assembly was not intended to be listed among the absolutely unrestrictable rights – similarly to Article 3 of the Covenant and Article 15 of the Convention.

Therefore, in the opinion of the Constitutional Court, the unconstitutionality of the whole of the AA may not be deduced merely from the fact that Article 62 para. (1) of the Constitution guarantees the free exercise of the right of assembly, and the AA still provides for certain restrictions, and provides a statutory ground for the authorities to pass a resolution on restricting this right.

3. Concerning the petitions alleging the violation of international treaties by the whole of the AA, the Constitutional Court examined, first of all, whether they had been submitted by persons entitled to do so. It established that one of the petitioners was a Member of Parliament, and thus, in accordance with Section 21 para. (3) item a) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), he was entitled to submit a petition for the examination of the alleged violation of an international treaty by a statute. However, the other petitioner is not authorised by the ACC to submit such a petition. Therefore, the Constitutional Court only examined on the merits the petition filed by the petitioner entitled to do so.

a) According to the petitioner, Article 21 of the Covenant does not provide for a possibility to restrict the right of assembly. However, the Constitutional Court established that, on the contrary, the Article in question expressly allows the restriction of the right of peaceful assembly to the extent it may be necessary in a democratic society in the interest of – among others – protecting national security, public safety and public order, as well as for the purpose of protecting the rights and the freedoms of others. According to the internationally generally accepted commentary to the Covenant, exercising the right of assembly – including the holding of protesting marches, demonstrations and gatherings – may, in a given situation, be restricted for the purpose of maintaining public order or the order of traffic, with reference to any of the above interests (Manfred Nowak: CCPR Commentary, Engel Verlag 1993, pp 380-382).

b) Although the petitioner had not invoked the provisions of the Convention to support his arguments, with regard to the similarity of the two international treaties with respect to the right of assembly, the Constitutional Court surveyed the relation between the various restrictions of the right of assembly allowed by the AA and the Convention. It established that Article 11 para. (2) of the Convention allows for the restriction of the right of assembly on the grounds of – among others – protecting national security or public safety, the prevention of disturbance or crime, or for the purpose of protecting the rights and freedoms of others. In addition, Article 11 expressly authorises the States Parties to the Convention to restrict the right of assembly in respect of the members of the armed forces, the police or civil servants. In the judgement passed on 20 May 1999 in the Case Rekvényi v. Hungary, the European Court of Human Rights established about the provision under Article 40/B para. (4) of the Constitution on the restriction of the political activities of professional members of the armed forces, the police and other civil national security services – including their right of assembly – that it does not violate Article 11 of the Convention; the relevance of this judgement in the present case lies in the fact that the Court reinforced with regard to the Hungarian legal system its previous judicial practice, according to which the right of assembly may lawfully be restricted for the purpose of protecting other important fundamental values to the extent absolutely necessary. Article 18 of the Convention guarantees that the States Parties to the Convention shall not apply such restrictions in an abusive manner.

In connection with the petitions regarding specific provisions of the AA, the Constitutional Court shall examine certain further details about the judicial practice of the European Court of Human Rights related to restrictions of the right of assembly and the conditions of the restrictions.

On the basis of the above, the Constitutional Court established that the AA does not violate the international obligations undertaken by Hungary. Therefore it rejected the petition filed by the person entitled to submit such petition, and refused the examination of the one filed by the person not entitled to do so.

4. In the opinion of the Constitutional Court, it does not result in an unconstitutional omission either that the text of the AA was not adapted to the amended text of the Constitution after amending on 23 October 1989 the former provisions of the Constitution on the right of assembly.

The Constitutional Court established the criteria of unconstitutional omissions in several earlier decisions.

An unconstitutional omission occurs when the demand for adopting a legal regulation is the result of the State's statutory intervention into certain situations in life, thus depriving some of the citizens of their potential to enforce their constitutional rights [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]. The AA did not result in such a situation.

The situation when there are no statutory guarantees for enforcing a fundamental right also qualifies as an unconstitutional omission [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 231]. As in their petitions related to Section 8 paras (2) and (3) as well as Section 9 of the AA, the petitioners miss the existence of adequate statutory guarantees in a concrete form in respect of public administration and court procedures following notification of the assembly, the Constitutional Court shall present its position in point IV.8 in connection with the related provisions of the AA.

The Constitutional Court shall establish an unconstitutional omission not only in the case of there being no regulation at all on a given subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205] but even if there is no statutory provision with a content deducible from the Constitution within the regulatory concept concerned [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 129, and Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138]. In the present case, the criteria for establishing an unconstitutional omission are not met.

By applying to the present petition the criteria of unconstitutional omission as elaborated in its earlier decisions and summed up above, the Constitutional Court establishes that the petitioners' request for establishing an unconstitutional omission is unfounded; with regard to the above, there is no significant difference between the former text of Article 65 para. (2) of the Constitution and the text following the amendment that would entail the necessity of the legislature amending the provisions of the AA.

IV

In the following, the Constitutional Court shall examine whether the restrictive provisions of the AA referred to by the petitioners comply with the provisions of Article 8 para. (2) of the Constitution.

1. As far as Section 1 of the AA is concerned, the petitioners complain that the Act – in contrast to the wording of Article 62 para. (1) of the Constitution – provides for the undisturbed exercise of the right of assembly rather than for the free exercise thereof. They claim that the undisturbed exercise of the right of assembly means less than the free exercise thereof, and therefore they consider Section 1 of the AA to be of a restrictive nature as compared to Article 62 para. (1) of the Constitution.

The related position of the Constitutional Court has already been presented in part in point III.2 above. With regard to the present petition, the following is to be added.

Both the petitions claiming the unconstitutionality of the whole of the Act and the petitions claiming the incompatibility of its certain provisions with the Constitution are based on the presumption that only the State or its organs may hinder the exercise of the right of assembly. Accordingly, they compare to the Constitution the terms used by the AA on the basis of the presumption that the terms – different from the ones in the Constitution – used by the AA may serve as a basis for the authorities restricting the right of assembly in a way not allowed by the Constitution.

The Constitutional Court holds that the enforcement of the constitutional fundamental right of assembly should be protected not only against undue interventions by the State but also against others, such as persons who dislike a certain demonstration, or who hold a counter-demonstration, as well as other persons who disturb public order. In other words, the State has got positive obligations, too, in guaranteeing the enforcement of the right of assembly. The judgements of the European Court of Human Rights in cases related to the right of assembly also support the above. In the case Plattform „Ärzte für das Leben" v. Austria, the Court established – and consequently enforced in its subsequent judicial practice – the following: the right of assembly incorporates the right to have the State guarantee that others shall not disturb a meeting or demonstration held lawfully (Judgement of 21 June 1988).

The opinion of the Constitutional Court on the positive obligations of the State in guaranteeing the fundamental rights was formed in the early phase of its judicial practice. For example, in its Decision 64/1991 (XII. 17.) AB, the Constitutional Court established that the State obligation to respect fundamental rights "means more than merely abstaining from violating them; it also includes an obligation to guarantee the conditions necessary for their enforcement" (ABH 1991, 297, 302).

As a consequence, the authorities are allowed to use force if necessary to secure the holding of lawful assemblies, and they shall prevent others from disturbing such assemblies. These

obligations of the State are specified in statutory forms, among others, in Section 11 para. (2) of the AA as well as Sections 228/A and 271/A of the CC. The same principle is represented in Section 1 of the AA providing that the State shall guarantee the undisturbed exercise – not to be disturbed by others – of the right of peaceful assembly. Thus, the term "undisturbed" focuses on an element of the right of assembly different from what is meant by the adjective "free" in Article 62 para. (1) of the Constitution. Therefore, using the word "undisturbed" in Section 1 of the AA is not contrary to the Constitution. Accordingly, the Constitutional Court rejected the petition.

2. The petitioners raise objections to Section 2 para. (1) of the AA, alleging that it contracts without a due ground the various forms of assembly, which are later on handled in the Act in a unified manner, although it is clear that no unified rules may be applied to assemblies to be held in an area used for road traffic and to ones to be held elsewhere. The petitioners claim that introducing the term "peaceful gatherings" into the list of assemblies covered by the AA offers a wide scale of possibilities for the authorities to treat any grouping of people as an assembly. In this respect, they miss the due clarity and unambiguity of the Act, and they consider Section 2 para. (1) of the AA not to be in line with Article 2 para. (1) of the Constitution.

The Constitutional Court holds that the arguments put forward in the petitions do not support the unconstitutionality of Section 2 para. (1) of the AA.

First of all, defining the forms of assembly covered by the Act is essential in order to make it clear in what situations of life the Act is applicable.

Secondly, the petitioners' objection to the term "peaceful gathering" is partly based on an interpretation of the text in the Act regarded by them as correct. The adjective "peaceful" is connected not only to the first word to follow it, i.e. "gatherings", but also to further two words that follow: "marches" and "demonstrations". It is important that the AA points out about all forms of assembly that they should be of a peaceful character in order to fall under the scope of the Act, since non-peaceful assemblies are undoubtedly not covered by the

protection guaranteed by the Constitution and the AA; this logic justifies the dispersal of an originally peaceful assembly if it loses its peaceful character.

Another objection raised by the petitioners in connection with the term "peaceful gathering" is that it may result in allowing the authorities to treat any grouping of people as an assembly. In this respect, the Constitutional Court repeatedly points out that the AA only empowers the authorities to act in respect of assemblies to be held on public ground, and to prohibit the holding of such assemblies. Therefore, if a peaceful gathering is held at a location other than public ground, the authorities are not empowered by the Act to take any measure, including the imposition of any restriction on the right of assembly.

According to the petitioners, extending the scope of the AA to peaceful gatherings may result in letting the authorities abuse their powers related to assemblies, as they may prohibit or disperse groupings formed by the spontaneous gathering of some persons in the street.

This assumption is understandable and explainable up to a point, having regard to the situation before the changing of the political regime. However, the Constitutional Court holds that should the police prohibit or disperse assemblies or groupings without a due cause or in an abusive manner, the provisions under Section 9 para. (1) and Section 14 para. (1) of the AA offer adequate remedies against wrongful acts by the police.

3. In the petitioners' opinion, Section 2 para. (3) of the AA disproportionately restricts the right of assembly by prohibiting in general rather than in a specified way the exercise of the right in the case of the violation of the rights of others. According to the petitioners, exercising the right of assembly necessarily violates the rights of others in all cases, but a lesser damage to such rights may not justify the restriction of the constitutional fundamental right of assembly.

This petition is based on the idea that in order to prevent and exclude the arbitrariness of the authorities or at least an unlawful or wrongful application of the authorities' discretionary

power, it would be preferable to apply the legislative method of listing comprehensively the cases of restricting the right of assembly for the purpose of protecting the rights of others.

In point 2 above, the Constitutional Court already referred to the dangers that result from the application of such a legislative method. In addition, the Constitutional Court establishes the following: there are several provisions in the laws of Hungary the authorities have to comply with when they decide in a concrete situation on restricting the right of assembly for the purpose of protecting the rights of others. First of all, Article 8 para. (2) of the Constitution is a provision like that, together with the Constitutional Court's numerous decisions explaining the contents of this fundamental constitutional provision, and in particular the requirements of necessity and proportionality among the criteria to be taken into account when restricting constitutional fundamental rights. The court judgements made in connection with Sections 9 and 14 of the AA may also serve as appropriate guidance on the cases in which the protection of the rights of others may justify the prohibition of an assembly. And if despite the principles deducible from the above the police unduly prefer the rights of others to those who wish to exercise their right of assembly, the legal remedies introduced by the AA offer adequate means for remedying the injuries.

Based on the above, the Constitutional Court considers the petition to be unfounded and rejects it.

4. The petitioners hold that the provisions of Section 5 of the AA limiting the scope of organisers of assemblies to Hungarian citizens and natural persons who are not Hungarian citizens but possess Hungarian residence permits or permanent residence permits, are contrary to international treaties. In the petitioners' opinion, this provision prevents, without a pressing cause, social organisations, associations and trade unions from organising assemblies the costs of which may exceed the amounts natural persons are able to bear, and prevents international environmental organisations from holding demonstrations. According to the petitioners, excluding legal persons from the potential scope of organisers of assemblies is also harmful to people who suffer damage due to the exercise of the right of assembly, since organisations have bigger financial means to meet their liability for the damage caused as compared to natural persons.

Thus the petition consists of two parts. First, the petition considers it to be a violation of international treaties and thus a violation of Article 7 para. (1) of the Constitution that non-Hungarian citizens and those who have no Hungarian residence permits or permanent residence permits are prevented from being the organisers of assemblies. The second part of the petition challenges the provision on allowing only natural persons to organise assemblies, as a restriction violating Article 8 para. (2) of the Constitution.

a) The Constitutional Court points out that the relevant international treaties contain no provision – nor did the petitioners indicate one – that could be violated by the restriction applied to aliens. Moreover, Article 16 of the Convention expressly allows for a restriction of the right of assembly of aliens if the assembly is of a political character.

Nevertheless, independently from the wrong starting point, the challenged provision undoubtedly results in a certain restriction of rights.

In examining the constitutionality of this restriction, one should start out from the constitutional provision under Article 62 para. (1), which guarantees the right of assembly for everyone, i.e. for both Hungarian citizens and aliens. Accordingly, with the exception of the provisions on the organisers of assemblies, neither Section 5 of the AA, nor other provisions of the Act restrict aliens in exercising their rights of assembly.

In assessing the constitutionality of the restriction imposed on organisers of assemblies as challenged in the petition, one should reckon with the organiser's statutory obligations, as well as the rights and duties vested on the organiser in relation with performing these obligations.

According to Section 6 of the AA, the notification of the assembly is to be made by the organiser. The organiser may file a claim to the court to review the decision of the police on prohibiting the assembly (Section 7 of the AA). It is the organiser's responsibility, too, to

notify the new date of the assembly if the court annuls the prohibiting decision by the police after the originally notified date of the assembly [Section 9 para. (3) of the AA]. The organiser shall see to securing the order of the assembly and he shall ask for help from the police when needed (Section 11 of the AA). Similarly, it is his obligation to disperse the assembly if the participants' conduct endangers the lawfulness of the assembly [Section 12 para. (1) of the AA]. The organiser shall bear joint and several liability together with the person causing the damage for all damage caused to third persons by the participants at the assembly [Section 13 para. (1) of the AA]. Finally, the organiser of a dispersed assembly may start a lawsuit in order to have the unlawfulness of the dispersal established by the court [Section 13 para. (1) of the AA].

Organising and holding assemblies in an orderly manner is the interest of the whole community: both of the participants of the assembly and of everyone else directly or indirectly affected by the assembly, for example persons who live or work at, or travel by, the location of the assembly or in its neighbourhood. In the opinion of the Constitutional Court, the above aspects justify the provision requiring that the organiser of the assembly a person who is familiar with the situation in Hungary, and who is capable of exercising the rights and meeting the obligations vested on the organiser by the AA in respect of preparing and managing an assembly including liability for damages – by virtue of his physical presence in the country. With respect to the above, the restriction of constitutional fundamental rights in respect of the concrete question raised in the petition is considered neither unnecessary nor disproportionate.

b) Having regard to the petitioner's claims on the alleged unconstitutionality of the provision in the AA requiring that the organiser of the assembly be a natural person, the Constitutional Court, first of all, points out that although there is no such express provision in Section 5 of the AA, and in Section 7 item d) even the term "organisation organising the assembly" is used (which could, in a superficial interpretation, be construed as the legislator not intending to, *ab ovo,* exclude legal persons from the scope of organisers of assemblies), it is clear from the wording of the section concerned that the organiser of the assembly may only be a natural person.

The Constitutional Court emphasises that the right of assembly is clearly a human right that individuals are entitled to. The fact that this right can only be exercised in a group shall not change the above conceptual basis; every participant in the group of people formed as a result of exercising the right of assembly may individually decide whether or not to participate in an assembly. At the same time, however, the individual character of the right of assembly shall not impede the organisations referred to by the petitioners in initiating the holding of assemblies. The AA merely provides that if – either a Hungarian or a foreign – legal person plans to hold an assembly in Hungary, it has to find an organiser who meets the criteria specified in Section 5 of the AA. Therefore, such a restriction is considered neither unnecessary nor disproportionate.

Consequently, the Constitutional Court rejected the petition aimed at the annulment of Section 5 of the AA.

5. The petitioners hold that there is no justification for the AA providing in general for all assemblies an obligation of notification in advance, as exercising the right of assembly may be realised in very diverse forms, with different numbers of participants and on public grounds of different characters, and therefore, the endangerment of public order and public safety may be of different scales or may not be realised at all. In the petitioners' opinion, this provision also excludes the possibility of the spontaneous exercise of the right of assembly.

The Constitutional Court repeatedly emphasises in this respect that the obligation of advance notification only applies to assemblies to be held on public ground rather than to all assemblies in general, as mentioned in the petition.

This fact is important from the aspect of the assessment of the necessity and the proportionality of the provisions of the AA restricting the right of assembly.

The Constitutional Court has already established above (in part III) that the legislature has a constitutional opportunity to restrict the right of assembly, and in this respect it has referred to its earlier decisions summing up the constitutional criteria for the restrictions. These references are not repeated here, nevertheless they apply to the assessment of the present

petition as well.

As far as the necessity of restricting the right of assembly is concerned, an independent examination should be made on the restriction realised in the form of the obligation to notify in advance the assemblies planned to be held on public ground of any kind, and on the restriction realised in the form of the right of the authorities to prohibit in certain cases the holding of the assembly.

In the opinion of the Constitutional Court, the necessity of applying the obligation of notification to assemblies to be held on public ground is justified by the fact that, in line with the detailed definition in Section 15 item a) of the AA, public ground is an area, road, street or square with unlimited access for everyone. Here, unlimited access for everyone means that both the participants of the assembly, and everyone else who does not participate therein should have equal access to the public ground. The possibility to use the public ground is a precondition not only for the enforcement of the freedom of assembly but for that of another fundamental right as well: the right of free movement guaranteed in Article 58 of the Constitution. The Constitutional Court has already pointed out in one of its earlier decisions that the right of free movement means the right to free change of place as well [Decision 60/1993 (XI. 29.) AB, ABH 1993, 507, 510]. The right of free movement is typically exercised on a public road or on public ground. As it is the consistent judicial practice of the Constitutional Court that the State's obligation to respect and protect fundamental rights includes both abstaining from violating such rights and guaranteeing the conditions necessary for their enforcement [e.g. Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302, referred to above in point IV.1], with respect to the prevention of a potential conflict between two fundamental rights: the freedom of assembly and the freedom of movement, the authority should be statutorily empowered to ensure the enforcement of both fundamental rights or, if this is impossible, to ensure that any priority enjoyed by one of the rights to the detriment of the other shall only be of a temporary character and to the extent absolutely necessary. This requirement justifies the obligation of notifying the authority in advance of the assembly to be held on public ground, since the authority needs to be informed on such assemblies in time.

The same idea leads to the conclusion that if the authority deems that the holding of the assembly on public ground would result in such a disproportionate damage in respect of the

order of traffic – and thus concerning others' rights to free movement – that could not be counterweighted even with the support of the police, e.g. by the use of police forces to maintain order, then prohibiting the assembly shall not be considered an unnecessary restriction of the fundamental right to the freedom of assembly.

In assessing the necessity of the restriction, the Constitutional Court had to take into account the fact that a differentiation by the law between the various types of public ground in respect of the requirement of notification would be unfeasible. The authority should be aware of the concrete assembly to be held at a concrete location in order to be able to assess whether the planned place of the particular assembly is a location – from the wide scale of public grounds specified under Section 15 item (a) of the AA – significantly or only marginally burdened by the traffic of the general public or of vehicles, and consequently whether or not tolerating the disturbance of public traffic by the planned assembly would be reasonably expectable. This is another reason why the restriction in the AA concerning the requirement of notification of assemblies organised on all types of public ground cannot be considered unnecessary.

Having regard to the requirement of proportionality between the restriction and the desired objective thereof, the Constitutional Court assessed the possibility of there being a less severe measure applicable by the authority for achieving the purported goal – guaranteeing the operation of organs of popular representation and of the courts, or maintaining the normal flow of traffic – than the prohibition of the assembly. The Constitutional Court holds that as the possibility cannot be excluded that an assembly would endanger – on the basis of the expected number of participants, the causes of or the reasons for organising the assembly – the operation of an organ of popular representation or of a court, or the traffic on public ground so seriously that the only means of preventing it would be the prohibition of the assembly, allowing the prevention of such problems shall not be construed as a disproportionate restriction of the right of assembly.

Since the restriction challenged by the petition was proved to be neither unnecessary nor disproportionate, no unconstitutionality was established, and therefore the Constitutional Court rejected the petition.

6. According to the petitioners, items b) and d) of Section 7 of the AA violate personality rights as they allow the authorities to obtain documented data on the political views of citizens and to use such data.

In connection with the challenged provisions requiring that the notification of the assembly contain the aim and the agenda of the assembly, as well as the organiser's name and address, the petitioners object to the alleged restriction of their right to the protection of their personal data and their right of assembly by the violation of Article 59 para. (1) and Article 62 para. (1), respectively, of the Constitution.

In the opinion of the Constitutional Court, the protection of personal data guaranteed by Article 59 para. (1) of the Constitution does not entail that statutes may not require the communication of personal data in a manner the challenged provisions do. It is, however, a precondition for the constitutionality of such an obligation that it shall be enacted in an Act of Parliament, that it shall not restrict the essential contents of any fundamental right, and furthermore, that it shall be absolutely necessary for achieving the objective to be realised by the requirement.

The obligation to notify the aim and the agenda of the assembly as well as the organiser's name and address is provided for by an Act of Parliament, i.e. Section 7 items b) and d) of the AA. This complies with the requirement specified in Section 3 item b) of the Data Protection Act, and also meets the requirement provided for in Section 5 para. (1) thereof, demanding that personal data may only be handled for a particular purpose, in the present case, for guaranteeing an orderly framework for the exercise of the right of peaceful assembly. The adequate handling of the affected persons' data is secured by Section 76 para. (4) of the Police Act providing that the police shall handle separately the data related to tasks of criminal law enforcement and to its public administration duties, as well as by Section 90 para. (1) item h) of the Police Act providing that the data on events falling within the scope of the right of assembly that are to be notified on the basis of an Act of Parliament may only be handled for 2 years. Finally, Section 17 of the Data Protection Act should be mentioned here, which specifies that the affected person may file a claim at the court with reference to the violation of his rights.

The Constitutional Court holds that the notification of the organiser's personal data does not restrict the essential contents of his fundamental right related to the protection of his personal data, as the protection of personal data does not mean that the affected person could never, under any circumstances, be required to notify his name and address.

Concerning the necessity of the obligation to notify the aim and the agenda of the assembly as well as the organiser's name and address, the Constitutional Court points out the following.

The aim and the agenda of the assembly are pieces of information necessary for the authority partly for the assessment of whether the planned assembly is to be prohibited on the grounds of seriously endangering the operation of organs of popular representation or of the courts, or on the basis of causing disproportionate damage to the order of traffic [Section 8 para. (1) of the AA], and partly for judging the probability of any action during the assembly in violation of Section 2 para. (3) of the AA that may necessitate that the police maintain the order of the assembly or – as the last option – that the police disperse the assembly on the basis of Section 14 para. (1) of the AA.

The notification of the organiser's name and address is necessary for the enforcement of the organiser's obligations. For example, claims against the organiser of the assembly on account of damage caused by the participants of the assembly could hardly be enforceable on the basis of Section 13 para. (1) of the AA without knowing the organiser's name and address.

Therefore, the Constitutional Court establishes about the provisions challenged by the petition that, as a whole, they provide for reasonable and necessary measures, and the constitutional fundamental rights guaranteed in Article 59 para. (1) and in Article 61 para. (1) of the Constitution are not violated by these provisions, and consequently, the petition is rejected.

7. According to the petitioners, Section 8 para. (1) of the AA is unconstitutional as it allows for the prohibition of an assembly, without making any distinction, with reference to disproportionate damage caused to the order of traffic.

The Constitutional Court has already pointed out in connection with the petition examined in point IV.3 that for the clarity and transparency of statutes, the legislature is advised to abstain from giving a full list of situations to which a specific provision of a statute is to be applied; the continuous development and changing of situations in life would make the exhaustive listing of such situations impossible. And if the scope of the Act was extended again and again to include new situations originally not listed – or possibly not even imagined – by the legislature, this would result in a series of inevitable amendments to the Act, endangering legal certainty as one of the elements of the rule of law declared in Article 2 para. (1) of the Constitution. Therefore, no constitutional concern may be raised against the mere fact that the legislature applies general concepts such as the disproportionate damage caused to the order of traffic specified in Section 8 para. (1) of the AA, and that it empowers the authorities applying the law to assess the proportionality of the damage done. The potential arbitrariness of the authorities applying the law may be prevented through effective guarantees, and in the opinion of the Constitutional Court, the AA contains such guarantees.

In the present case, the application of the general concept of damage caused to the order of traffic is also justified by the relation between the constitutional fundamental right of free movement and the freedom of assembly. As already pointed out by the Constitutional Court in point IV.5, when enforcing the right to the freedom of assembly, due attention must be paid to the requirement that concerning the two fundamental rights, the authority should also strive for securing that any priority enjoyed by one of the rights to the detriment of the other may only be realised to the extent absolutely necessary, although any assembly held on public ground inevitably results in restricting – to a smaller or greater extent – the right of free movement and the flow of traffic of those who do not participate in the assembly. However, the actual or potential interaction resulting from the exercise of the two rights at the same time cannot be assessed in general and in an abstract manner at the level of legislation; it can only be assessed if the location, size and date of the assembly are known.

Therefore, in the opinion of the Constitutional Court, it is impossible to give a statutory definition of the assemblies that would or would not disproportionately disturb the order of traffic. One of the cases examined by the European Commission of Human Rights well illustrates that the effects of an assembly on traffic cannot be assessed in an abstract way. According to the judgement of the Court, although the planned route as duly notified to the police would, in itself, not have caused disproportionate damage to traffic, the London Police restricted the petitioners' right of assembly not unreasonably when prohibiting a march at the planned time and date with reference to preventing disproportionate damage to the order of traffic, since at the same time, counter-demonstrators planned a march in the vicinity, and thus the police would not have been able to maintain the minimum level of the order of traffic [Christians against Racism and Fascism v. United Kingdom, D & R 21 (1981)].

Therefore, the Constitutional Court rejected the petition as unfounded.

8. According to the petitioners, Section 8 paras (1)-(3) and Section 9 of the AA are unconstitutional not only on the grounds mentioned in the petition examined in point IV.7 above, but also on the basis of the following: firstly, it is impossible to involve an impartial expert to assess the proportionality of the damage to the traffic within the short deadline open for the procedure, and thus the authority may arbitrarily assess the potential damage to the traffic, secondly, the provisions concerned do not contain adequate guarantees for securing the constitutional exercise of the right of assembly, and thirdly, the organiser of the assembly has no practical possibility under the law to present his arguments before the decision on the prohibition of the assembly is adopted, or to submit evidence against the expert opinion serving as a basis for the prohibition; in the court procedure, it is within the discretion of the judge to personally hear or not the organiser seeking legal remedy, and therefore there is no opportunity to present counter-evidence: the organiser is not allowed to learn the details of the facts or the expert opinion serving as a basis for the prohibiting decision, and consequently, he can only contest such opinion if the judge allows him to do so, and finally, the petitioners consider the exclusion of appeal against the court decision in the AA as a violation of Article 57 para. (5) of the Constitution.

This petition emphasises in general the lack of adequate guarantees to protect persons who wish to exercise their rights against the authority arbitrarily and wrongfully assessing the potential damage caused to the order of traffic that may result from the planned assembly.

As to the concern of there being no chance to involve an impartial expert due to the short deadlines, the Constitutional Court points out first of all that the short deadlines provided for in the Act for adopting decisions on prohibiting the assembly and for court appeal against such decisions primarily serve the interests of those who wish to exercise their rights of assembly, as the injuries that might be caused to the right of assembly by the decisions of the authority in default can only be prevented by setting short deadlines, and secondly, the use of impartial experts is possible as explained below.

As far as the objection to the potential one-sided nature of procedures at the police and the court to the detriment of the organiser of the assembly is concerned, the Constitutional Court points out that before the adoption of the decision by the police, the organiser can – in a written notification made on the basis of Section 7 of the AA – explain his point of view about the effect of the assembly on the traffic and attach an expert opinion to that if considered necessary. According to Section 41 of Act IV of 1957 on Public Administration Procedure, persons participating in a public administration procedure may have access to the documents of the case including expert opinions, and the organiser may put forward related motions at the court, and thus, during the court procedure it is possible to present any expert opinion not obtained during the procedure at the police. Section 9 para. (2) of the AA provides that the court shall pass its decision upon hearing the parties if necessary, and thus the organiser of the assembly may request a hearing.

Finally, as far as the petition on the unconstitutionality of excluding appeal against the court decision is concerned, the Constitutional Court deems it unfounded with regard to Article 57 para. (5) of the Constitution. The right of appeal is excluded by virtue of a so-called Act of two-thirds majority, and excluding the right of appeal is justified by the interest of having the debate settled within a reasonable period of time for the purpose of – among others – ensuring the possibility of holding the assembly at the originally designated time point, and not allowing the police to postpone it by appealing against the court judgement adopted in

favour of the organiser and against the decision of the police. In this respect the Constitutional Court refers to its practice, explained among others in Decision 1437/B/1990 AB (ABH 1992, 453, 454-455), stating that the Constitution only guarantees the enforceability at the court of claims based on the violation of fundamental rights, but it does not establish a subjective right to appeal against the court decision adopted in the procedure of reviewing the original decision.

Taking all the above into account, the Constitutional Court rejected the petition as unfounded.

9. According to one of the petitioners, Section 13 para. (1) of the AA is unconstitutional as the practically objective liability of the organiser for damage caused to third persons by any participant of the assembly is a threat that may discourage many people from undertaking such a responsibility. This shall hinder the exercise of the right of assembly.

The petitioner holds that Section 13 of the AA is incompatible with Article 8 para. (2) of the Constitution since it constitutes an unnecessary and disproportionate restriction of the right of assembly.

As assemblies are usually held on public ground, and in such cases, the law requires the designation of an organiser, one may not exclude the possibility that the liability for damages specified in Section 13 para. (1) of the AA may prevent some persons from undertaking the responsibility of organising such an event.
Undoubtedly, in some cases this may cause difficulties in finding and selecting an organiser, which may hinder the exercise of the right of assembly.

The organiser's financial liability is based on the violation of his duties imposed on him by the law. To support his claim, the petitioner only cites the first sentence in Section 13 para. (1) of the AA, not taking into account the second sentence in Section 13 para. (1), thus suggesting that it follows from the Act that the organiser is always automatically liable for any damage caused by the participants. Nevertheless, it is clear from the second sentence in

Section 13 para. (1) that the organiser shall only bear joint and several liability, rather than actual liability as claimed by the petitioner, for damage caused by the organiser not acting the way generally expectable in the given situation.

The organiser's liability is a civil law liability and any legal debate that may arise in this respect is to be settled by the court. Whether or not the organiser acted the way generally expectable in the given situation is also to be established by the court. The scope of acts expectable from the organiser are set by the provisions of the AA on the organiser's duties; his liability may only be established if he failed to meet the expected requirements concerning the duties imposed on him by the definite provisions of the AA, for example by Section 7 item c) or by Section 11 para. (2).

On this ground, the Constitutional Court rejected the petition.

10. In the petitioners' opinion, Section 14 para. (1) of the AA on dispersing assemblies is unconstitutional for several reasons. First of all, the petitioners claim that Section 2 para. (3) as well as Section 7 items a) and b) of the AA, the violation of which is sanctioned under Section 14 para. (1) with dispersal of the assembly, are themselves unconstitutional, just as Section 6 providing for the obligation of notifying the assembly.

The Constitutional Court has already examined and found unjustified in points IV.3, 5 and 6 above the petitions aimed at the establishment of the unconstitutionality of Section 2 para. (3), Section 6 as well as Section 7 items b) and d) of the AA, and therefore, the part of the petition claiming the unconstitutionality of Section 14 para. (1) on the basis of the alleged unconstitutionality of Section 2 para. (3), Section 6, and Section 7 item a) of the AA is hereby rejected.

According to the petitioners, the dispersal of an assembly on the basis of the default of notification is unconstitutional also because of restricting the exercise of the right of assembly with reference to an administrative default, without examining on the merits whether the holding of the assembly actually presents any danger to public order and public

safety. For the same reason, they claim the unconstitutionality of dispersing an assembly on the basis of holding it at a time point, location or route other than that specified in the written notification to be provided in accordance with Section 7 item a) of the AA, since the difference might be of minor importance, and deviation from the originally notified route might indeed serve the purpose of maintaining the order of traffic. Therefore, the petitioners hold that sanctioning the deviation with dispersal of the assembly would qualify as a disproportionate restriction of the right of assembly.

In the opinion of the Constitutional Court, the default of notifying an assembly or holding it in a manner significantly different from that specified in the written notification may not at all be interpreted as an insignificant default of a merely administrative nature. Although departing from these obligations prescribed by the law might be the result of absent-mindedness or negligence, it might also be the first willful step in the direction of unlawfully exercising the right of assembly. Failure to notify an assembly deprives the authority of the chance to assess whether the planned assembly would seriously disturb the operation of the organs of popular representation or the courts, or the order of traffic. Imposing no sanction on holding the assembly at a time point, location, or route other than that notified would make it useless to require a notification, and it would allow for abusing the right of assembly.

However, the right of the police to disperse an assembly different from the one notified does not mean that the police are bound to apply this measure in each case. Necessary modifications in holding the assembly that result from the change of circumstances – for example, the march is to make a by-pass because of road works – may undoubtedly not serve as a ground for dispersing the assembly, as this could qualify in given cases as abusing the rights of the police, to be remedied in the framework of the procedure specified under Section 14 para. (3) of the AA.

Based on the above, the Constitutional Court rejected the petition as unfounded.

11. One of the petitioners claims that Section 14 para. (3) of the AA restricts excessively the rights of persons concerned, since it is only the participants but not the organiser of the assembly who may ask for establishing the unlawfulness of dispersing the assembly, since the subsequent action can only offer a symbolic remedy for an unlawfully dispersed assembly, and finally, since it is only the dispersal of the assembly the unlawfulness of which could be objected to rather than the unlawfulness of the decision of the police or of the court prohibiting the assembly. According to the petitioner, Section 14 para. (3) thus violates Article 62 para. (1) of the Constitution.

The Constitutional Court holds that the petitioner falsely alleges that the organiser is not entitled to ask for establishing the unlawfulness of dispersing the assembly. The AA institutionalised two types of dispersal: dispersal by the organiser [Section 12 para. (1)] and dispersal by the police [Section 14 para. (1)]. Undoubtedly, the fact that the text in Section 14 para. (3) only refers to the participant and not the organiser does not bar the organiser from filing a claim for the establishment of the unlawfulness of dispersal by the police, as according to the true interpretation of the Act, undertaking the duty of organising an assembly does not exclude the possibility of the same person participating in the assembly, rather, being an organiser presumes participation. Since in practice the organiser is surely a participant in the march, demonstration, or meeting, he may file a claim as such, too, if he holds that the police dispersed the assembly unlawfully, therefore the petitioner's claim on the contrary is unfounded.

Nor is the petition well founded in respect of the claim alleging the unconstitutionality of the fact that – as opposed to the dispersal of an assembly – the decision of the police on prohibiting an assembly or the approving decision of the court may not be challenged as unlawful in a lawsuit. Section 9 para. (1) of the AA expressly provides for the judicial review of the decision of the police on prohibiting an assembly, and the organiser's request for review may be based on the alleged unlawfulness of the decision of the police. Regarding the alleged unconstitutionality of the AA with reference to not allowing for a claim for the establishment of the unlawfulness of the court decision on reviewing the decision of the police on prohibiting an assembly, the petitioner refers to Article 62 para. (1) of the Constitution as the basis of his petition but does not specify the alleged connection between

his claim and the concerned provision of the Constitution, therefore the unconstitutionality of Section 14 para. (3) of the AA may not be established on the above grounds.

For the above reasons, the Constitutional Court rejected the petition.

V.

The publication in the Hungarian Official Gazette of this Decision of the Constitutional Court is ordered with due account to the constitutional importance of the issues mentioned in the decision.

Budapest, 26 November 2001

Dr. János Németh
President of the Constitutional Court
presenting Judge of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Dissenting opinion by Dr. István Kukorelli, Judge of the Constitutional Court

I do not agree with point 1 of the holdings of the Decision as I consider the term “gatherings” in Section 2 para. (1) of Act III of 1989 on the Right of Assembly (hereinafter: the Act on Assembly) as well as its Section 5 to be unconstitutional. I have found reasons other than the ones mentioned in the majority opinion for justifying the constitutionality of Section 6, Section 8 para. (1) and Section 14 para. (1) of the Act on Assembly.

Before putting forward the reasons for my dissenting opinion, I wish to emphasise that the Act on Assembly is one of the symbols of the constitutional change of the regime in Hungary. This Act – together with other Acts on fundamental rights, for example Act II of 1989 on the Right of Association – played a very important role in the peaceful political transition, as it secured a statutory framework for the mass demonstrations held at the time of changing the regime.

The Act on Assembly in force is a “revolutionary” Act as a whole, and it is a value of constitutional democracy to be protected since it guarantees – even under European standards – human freedom against unjustified intervention by the State. I agree with the approach of the Constitutional Court, presented in the reasoning of the Decision, of basically examining the Act from the aspect of human rights. In my dissenting opinion, I have tried to apply this human rights approach consistently, with particular regard to the fact that this is the first decision of the Constitutional Court to deal with the freedom of assembly in a comprehensive manner.

It should also be pointed out that exercising the right of assembly is one of the forms of expressing collective opinion, and therefore – in my opinion – the special constitutional protection given to the freedom of expression applies to the freedom of assembly, too. In assessing the constitutionality of the Act on Assembly, the Constitutional Court’s arguments were built upon Decision 30/1992 (V. 26.) AB listing the freedom of assembly among the communicational fundamental rights that enjoy special constitutional protection. As stated in that Decision, it is “the combination of rights guaranteeing the freedom of expression in a broad sense that renders possible the individual's reasoned participation in the social and political life of the community. Historical experience shows that on every occasion when the freedom of expression was restricted, social justice and human creativity suffered and

humankind's innate ability to develop was stymied. The harmful consequences afflicted not only the lives of individuals but also that of society at large, inflicting much suffering while leading to a dead end for human development. Free expression of ideas and beliefs, free manifestation of even unpopular or unusual ideas is the fundamental requirement for the existence of a truly vibrant society capable of development." (ABH 1992, 167, 171)

I. The right of assembly of aliens [Section 5]

1. Article 62 para. (1) of the Constitution provides the following: "The Republic of Hungary recognises the right to peaceful assembly and shall ensure the free exercise thereof." I agree with the holding of the Decision that in the territory of Hungary, the Constitution guarantees the freedom of assembly for both Hungarian citizens and aliens. Except for some rights related to citizenship, everybody possesses the fundamental rights guaranteed in the Constitution, since according to Section 8 para. (1) of the Constitution, the Republic of Hungary recognises the inviolable and inalienable fundamental human rights; ensuring the respect and protection of these shall be a primary obligation of the State. The freedom of assembly is not listed in the Constitution among the rights to be exercised exclusively by Hungarian citizens. It was the amendment of the Constitution promulgated in 1989 together with the Act on Assembly that declared that "everyone has the right to peaceful assembly". In the normative text in force today – determined in the amendment of the Constitution put into force on the day of proclaiming the Republic of Hungary – fundamental rights to be enjoyed by everybody are not qualified as civil rights in the title of the chapter containing the fundamental rights.

2. According to Section 5 of the Act on Assembly: "The organiser of the assembly shall be a Hungarian citizen or a non-Hungarian citizen with a Hungarian residence permit or permanent residence permit." On the basis of Act LXXXVI of 1993 on the Entry, Residing in Hungary and Immigration of Foreigners (hereinafter: the Act on Aliens), non-Hungarian citizens may reside in Hungary if they have a visa, or if they are granted exemption from visa requirements in an international treaty. Aliens who wish to stay in Hungary longer than the period specified in the visa or in the international treaty, shall request from the police authority a provisional residence permit in the case of staying for a period not longer than one year or a long-term residence permit in the case of staying for more than one year. The equivalent in the law in force of the permanent residence permit mentioned in the Act on Assembly is the immigration

permit generally granted to aliens who have been lawfully staying in Hungary without interruption for at least three years.

Consequently, on the basis of the Act on Assembly, aliens who lawfully stay in Hungary with a visa or on the basis of an agreement granting an exemption from visa requirements may not be the organisers of an assembly that falls under the scope of the Act. This restriction primarily applies to those who visit Hungary with the purpose of expressing at a public assembly or at a political demonstration their opinions on a public issue that concerns Hungary, or to those who, during their short visit to Hungary, decide to organise a public assembly on public ground to enforce their interests and to demonstrate their points of view. In such cases, the persons who actually initiate the assembly may only exercise their rights of assembly if they somehow succeed in persuading another person who complies with the criteria set by the Act on Assembly to organise the assembly, or if they apply for a residence permit in the administrative procedure regulated in the Act on Aliens, although otherwise they would not need such a permit.

In addition, other groups of non-Hungarian citizens are also affected by the provision of Section 5 restricting human rights. On the basis of Section 14 of Act CXXXIX of 1997 on the Right of Asylum (hereinafter: Act on Asylum), foreigners seeking recognition as refugees or temporarily protected persons as well as refugees, temporarily protected persons, and persons authorised to stay in the country are entitled to stay in the territory of the Republic of Hungary. As according to Section 17 of the Act on Asylum, the legal status of refugees is – with some exceptions – the same as that of Hungarian citizens, aliens who enjoy refugee status may be the organisers of assemblies under the scope of the right of assembly. At the same time, pursuant to Section 5 of the Act on Assembly, applicants for asylum, as well as temporarily protected persons and persons authorised to stay in Hungary who are under the temporary or transitional protection of the Republic of Hungary may not be the organisers of an assembly under the scope of the right of assembly. This restriction of rights has particular constitutional importance, as in the cases of temporarily protected persons fleeing in large groups, or of persons authorised to stay in Hungary who would face death penalty, torture, inhuman or humiliating treatment in their home countries it is quite probable that they wish to express their opinions at an assembly, for example against the state in which they face persecution.

Based on the above, I hold that Section 5 of the Act on Assembly restricts the right of assembly of the organiser and of the participants in the case of assemblies initiated by foreigners: this provision deprives – merely on the basis of their status – a group of non-Hungarian citizens lawfully staying in Hungary of the right of organising public assemblies freely and under the same conditions as others.

3. As Section 5 of the Act on Assembly constitutes a restriction of the freedom of assembly guaranteed in Article 62 of the Constitution, it has to be examined whether the restriction is constitutional. According to the practice of the Constitutional Court, the State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or enforcement of another fundamental right or to protect another constitutional value. In addition to restricting a fundamental right without a forcing cause, it is also unconstitutional if the level of restriction is disproportionate as compared to the desired objective. [first: Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 71]
According to the reasoning of the Decision, the restriction of the fundamental right in Section 5 of the Act on Assembly is justified by the need for the organiser of the assembly to be a person who is familiar with the situation in Hungary and who can exercise the rights and meet the obligations vested on the organiser by the Act on Assembly in respect of preparing and managing an assembly (e.g. notification, maintaining security, liability for damages) by virtue of his physical presence in the country. In my opinion, aliens who lawfully stay in Hungary can – no matter what their status is – upon inquiries in simple cases or with the help of a legal advisor or representative in more complex cases, manage the "administrative" tasks related to preparing and holding an assembly. Nor does the enforcement of any liability for damages necessitate that the organiser should stay in the country for a longer period, as there are adequate tools in international private law to have the damage caused by foreigners remedied. I hold that neither the arguments put forward in the Decision, nor any other reasons support the restriction of the fundamental right in Section 5 of the Act on Assembly. In an open and democratic society – similarly to business life – the unjustified restriction of the presence of foreigners in the "market of opinions" should not be permitted.

Consequently, the Constitutional Court should have annulled Section 5 of the Act on Assembly, as it unnecessarily restricts without a forcing cause the right of assembly guaranteed in Article 62 of the Constitution in the case of non-Hungarian citizens. (Article 70/A of the Constitution prohibits – among others – any unjustified discrimination of non-

Hungarian citizens who stay in the territory of Hungary as compared to Hungarian citizens. As the petitioners did not refer to the above provision of the Constitution, and the unconstitutionality of Section 5 may be determined on the basis of Article 62 of the Constitution as well, in my opinion, the examination of discrimination is not necessary in the present case.)

Let me note that both the regulations concerning aliens and the asylum right rules shall change as of 1 January 2002. However, these statutory modifications do not result in a change in my opinion on Section 5 of the Act on Assembly; indeed, the position of persons with an immigration permit will be worse, as they shall not be entitled to organise an assembly under the scope of the Act on Assembly.

II Assessment of the freedom of movement [Section 6, Section 8 para. (1)]

1. In the course of its procedure, the Constitutional Court examined Section 6 of the Act on Assembly on the advance notification of assemblies to be held on public ground, as well as Section 8 para. (1) on prohibiting the holding of an assembly. According to the reasoning of the Decision, advance notification is necessary as using public ground affects another fundamental right in addition to the freedom of assembly, namely the right of free movement guaranteed in Article 58 of the Constitution, since assemblies restrict the right of free movement – and thus the right to free traffic – of those who do not participate in them.

In my opinion, exercising the freedom of assembly is not in conflict with the right of free movement – save in very extreme cases. Article 58 para. (1) of the Constitution states that "Everyone legally staying or residing in the territory of the Republic of Hungary – with the exception of the cases established by law – has the right to move freely and to choose his place of residence, including the right to leave his domicile or the country." Based on the above provision, I hold that on the ground of the right to move freely, everyone may choose his place of staying and residence freely, may move freely within the country and may leave the territory of the country. In Decision 30/1993 (XI. 29.) AB – mentioned in the present Decision as well – the Constitutional Court extended the freedom of movement to include "the freedom of traffic by moving around on, with or without a vehicle". (ABH 1993, 510) In my opinion, however, the decision referred to established the scope of protection under Article 58 of the Constitution over the entirety of the right to participate in the traffic on public roads, and it did not extend the protection of the fundamental right to concrete traffic

situations. I hold that the quoted decision of the Constitutional Court may not be interpreted as guaranteeing a constitutionally protected right for people to move freely in the traffic in a particular part of public ground, at a specific time point and location. Although people have the fundamental right to move freely in the territory of the country, the Constitution does not guarantee the right to move freely on a public road section currently used by the participants of a public assembly, rather than on another road section. People who are delayed to some extent or re-routed in reaching their destinations because of a public assembly are in general not subject to a restriction of any fundamental right.

There may be, of course, cases in which exercising the right of assembly leads to a violation of others' fundamental rights. For example, a public assembly may violate the "general personality right" specified in Article 54 para. (1) of the Constitution as well as the "right to the protection of privacy" if the participants express their opinions against other individuals in a situation where the latter have no chance to avoid hearing the utterances expressed to their detriment at the assembly ("captured audience"). Depending on the circumstances, fundamental rights may be violated if an assembly is aimed at preventing individuals from reaching the place where they can exercise their religion, or if an assembly prevents in other ways the undisturbed exercise of a religious act or service (Article 60 of the Constitution). At the same time, the freedom of movement mentioned in Article 58 of the Constitution may be violated by the exercise of the right of assembly only in very extreme cases.

2. Therefore, exercising the right of assembly is in general related to the public interest in the order of traffic rather than the fundamental right "of the freedom of movement with or without a vehicle". The restriction of the right of assembly could be justified by the protection of the above public interest. Making the above distinction is of principal importance as the restricting law to be weighed against the communicational fundamental rights that enjoy special constitutional protection – in the present case, the right of assembly as the collective manifestation of the freedom of expression – is to be assigned a greater weight if it directly serves the realisation or protection of another individual fundamental right, a lesser weight if it protects such rights only indirectly through the mediation of an institution, and the least weight if it merely serves some abstract value as an end in itself. [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 178]

On the other hand, if the Constitutional Court considers the "right to the free flow of traffic" as a fundamental right to be protected in each concrete case, this will lead to unbearable

consequences as this way a violation of fundamental rights will have to be established also in cases where events or acts other than the exercise of the freedom of assembly or any other fundamental right restricts the undisturbed flow of traffic (road works, suspension of the operation of certain public transport lines, etc.). Such an interpretation of the law may eventually lead to the decrease of the importance of the fundamental rights protected by the Constitution.

3. According to Section 8 para. (1) of the Act on Assembly, if the holding of an assembly under the obligation of notification "would cause a disproportionate damage to the order of traffic", the police may prohibit the "holding of the assembly at the location or at the time point indicated in the notification". In my opinion, the above restrictive provision is justified by the public interest in the order of traffic. The legislature chose the least restrictive measures, since the prohibiting decision of the authority shall only apply to the location and the time point requested in the notification, and it may be adopted only in the case of "disproportionate damage" to the order of traffic. The obligation of notification does not mean that the police is empowered to "permit" the holding of an assembly. Exercising the right of assembly as a fundamental freedom does not require advance approval by the State. Notification serves the purpose of making it possible for the police to prepare for securing public order and the order of traffic during the assembly. Section 9 of the Act on Assembly offers adequate legal remedies against a prohibiting decision.

The fact of statutorily restricting the right of assembly not with the purpose of protecting another fundamental right but with that of protecting the public interest in the order of traffic has special importance in the case of concrete notifications on the basis of which the authority applying the law assesses the danger of "disproportionate damage". Participants of traffic have no constitutional right to move in a manner totally undisturbed by the planned assembly. Therefore, the freedom of assembly may only be restricted to a very limited extent with reference to protecting the order of traffic, and those who wish to move on foot or by a vehicle have to tolerate more than they would have to if their fundamental rights were restricted.

III Dispersing the assembly [Section 2 para. (1); Section 14 para (1)]

1. According to Section 2 para. (1) and Section 6 of the Act on Assembly, peaceful

“gatherings”, “marches” and “demonstrations” (jointly: “assemblies”) are to be notified in advance. Section 3 provides that – among others – election rallies, religious, cultural, family and sports events are exempted from the scope of the Act.

According to Section 14 para. (1) the police is bound to disperse an assembly held on public ground if

– the exercise of the right of assembly constitutes a criminal offence or a call to commit such offence, or it violates the rights and freedoms of others;

– the participants of the assembly appear in an armed manner or with weapons;

– an assembly is being held without notification;

– an assembly is being held at a time point, location or route, or with a purpose or agenda different from the data of the notification;

– an assembly is being held despite a prohibiting decision.

2.1. The petitioners challenged among others the fact that on the basis of the above rules, the police may consider any grouping of people a “gathering” and may disperse it. I agree with the statement made in the Decision that the petitioners’ concern about the arbitrary application of the law by the police is understandable and explainable. The term “gatherings” in Section 2 para. (1) of the Act on Assembly indeed allows the authority to regard the meeting on public ground of a few persons engaged in a conversation about public issues as a gathering under the obligation of notification on the basis of Section 6 of the Act, and to disperse it on the basis of Section 14 para. (1).

At the same time, I do not share the view, expressed in the reasoning of the Decision, stating that Section 9 para. (1) and Section 14 para. (1) of the Act on Assembly offer adequate legal remedies for the participants of an assembly against wrongful police action. It is not legal remedies against police measures during the assembly that Section 9 para. (1) provides for but the judicial review of the decision of the police prohibiting the holding of the assembly. The right of appeal in the case of an unlawfully dispersed assembly is guaranteed for the participants of the assembly in Section 14 para. (3). As opposed to the reasoning of the Decision, I hold that in the case under examination the possibility of a legal remedy subsequent by definition does not qualify as an adequate guarantee against the arbitrariness of the authorities applying the law. The constitutional protection against arbitrary actions by the authorities is not to be based on confidence in the authorities who apply the law, instead, adequate statutory and organisational guarantees are needed for the prevention of wrongful acts violating the fundamental rights.

According to the consistent practice of the Constitutional Court, the requirement of legal certainty is an indispensable element of the principle of the State under the rule of law specified in Article 2 para. (1) of the Constitution. "Legal certainty compels the State – and primarily the legislature – 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] "It is a constitutional requirement that the normative text shall have a clear, comprehensible and adequately interpretable content of norm." [Decision 26/1992 (IV. 30.) AB, ABH 1992, 135, 142] "When (…) the statutory definition in a statute is too abstract and too general, then the provision of the statute may be extended or narrowed down in the discretion of the authority applying the law. Such rules allow for subjective decisions in the application of the law, the formation of different practices at different authorities applying the law, and the lack of unity in the law. This diminishes legal certainty." [Decision 1160/B/1992 AB, ABH 1993, 607, 608; summary: Decision 7/2001 (III. 14.) AB, ABK March 2001, 125, 126]
The Constitutional Court connected the arbitrary application of the law with Article 54 para. (1) of the Constitution as well. "[It] also violates the fundamental right to human dignity when the coercive force of an authority is applied against someone without due ground, and thus the State intervenes with no justification into the privacy of individuals. Therefore, any legal regulation which allows for the possibility of this to happen is unconstitutional without regard to the percentage of cases in which such unconstitutional legal consequence actually occurs." [Decision 46/1991 (IX. 10.) AB, ABH 1991, 211, 215]

2.3. The term "gatherings" in Section 2 para. (1) of the Act on Assembly is a concept of vague content, and it allows the authorities applying the law to use coercive force against individuals without due ground. The vagueness of the normative text under examination and the resulting danger of arbitrary action against individuals by the authority applying the norm results in unconstitutionality. In my opinion, the Constitutional Court should have annulled the term "gatherings" as being contrary to Article 2 para. (1) of the Constitution, as referred to in the petition.

3.1. The petitioners also contested the Act on Assembly providing for a disproportionate sanction for the organiser's "administrative default": it orders the dispersal of the assembly even when the assembly does not endanger public order and safety. I cannot agree with the

reasoning of the Decision stating that the failure to notify the event or deviating from the details specified in the notification "may not be considered a default of a merely administrative nature", and "although it might be the result of absent-mindedness or negligence, it might also be the first willful step in the direction of unlawfully exercising the right of assembly". In addition, I hold that dispersing the assembly is not the right but the obligation of the police, and this is exactly what is contested by the petitioner. Nor do I agree with the remark that without dispersing the assembly any failure to notify an assembly would remain unsanctioned.

3.2. In my opinion, from the aspect of constitutional law, different assessment should be applied to cases in which a public assembly under the scope of the Act on Assembly – directly or indirectly – violates or endangers the rights of others or some clearly defined public interest, and cases without such violation or danger.

Holding an assembly is not to be approved of; it is subject to notification (the persons who initiate the assembly are not "applicants"), and therefore the assembly may be held if the police issues no prohibiting order within the specified deadline, and neither dispersal, nor other legal sanctions are applicable against the participants. However, the organisers might think that the planned assembly does not fall under the scope of the obligation of notification, but the police may still consider it an unlawful assembly according to Section 14 para. (1) of the Act on Assembly, and may disperse it. (For example: an event qualified as a cultural one by the organisers, but considered a political assembly by the police.) It might also happen that the organiser requests the judicial review of the prohibiting decision of the police, and holding the assembly is delayed by the default of the court. If an assembly is still held in the above situation (for example because of expressing one's opinion in the given subject would be useless on a later date), then the participants of the assembly shall face dispersal partly because of the State's "administrative default". The reasoning of the Decision also refers to the fact that in some cases the organisers of an assembly are forced by necessity to deviate from the specifications made in the notification. This may be caused by road works as mentioned in the reasoning, but there might be – in connection with either the route or the agenda – less clear-cut situations as well.

It is common in the cases mentioned above that the police is obliged to disperse the assembly if they consider it unlawful. In addition, in a certain scope, the sanction for administrative infraction applicable in cases of abusing the right of assembly as specified in Section 152 of Act LXIX of 1999 on Administrative Infractions shall also apply. In my opinion, when

applying Section 14 para. (1) of the Act on Assembly, i.e. when executing the dispersal, the police should take into account whether or not the particular assembly violates or endangers the rights of others or some clearly defined public interest. When the unlawfulness of an assembly is merely manifested in the fact that the organisers did not regard the assembly as one to be notified, or they deviated from the specifications made in the notification (route, agenda, etc.), but they did not cause any appreciable damage or danger, then the dispersal should primarily be realised in the form of the police stating to the participants the unlawfulness of the assembly. The police shall strive for allowing reasonable time for the organisers to finish the unlawful assembly and for the participants to leave the location of the assembly. Coercive measures may only be applied if the participants do not finish the assembly by the time specified and they contravene the police measures. The application of the above requirements is allowed by Section 68 paras (3) and (4) of Minister of Interior Decree 3/1995 (III. 1.) BM on the Service Regulations of the Police, prescribing that the call for dissolution shall be repeated at least twice and adequate time shall be allowed for the participants to leave the site. According to paragraph (5), coercive measures may only be applied in the case of contravening the police measures, and the requirement of gradual measures – as detailed in the Decree – shall be complied with. Thus the police should not use force as the primary tool to disperse the assembly, but it should take into account the constitutional right for the joint expression of opinion, and the termination or the interruption of an unlawful assembly should be realised on the basis of the circumstances of the assembly.

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Although the right of assembly is not an unrestrictable fundamental right, I am convinced that in interpreting Article 62 of the Constitution that acknowledges the freedom of assembly, and in the application of the Act on Assembly, the approach applied should allow for guaranteeing the freedom of assembly on a scale as wide as possible. This is the approach that is in line with the principles of the "revolution of the State under the rule of law" used as the basis for the first Act on Assembly in the history of Hungarian public law.

Budapest, 26 November 2001

Dr. István Kukorelli
Judge of the Constitutional Court

I concur with the dissenting opinion:

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

I second the above dissenting opinion with the exception of part III thereof:

Dr. András Holló
Judge of the Constitutional Court

Constitutional Court file number: 1139/B/1997

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