Decision 30/2015 (X. 15.) AB

on a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 27.Kpk.45.810/2014/2 of Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) and that of Administrative decision No. 01000/27040-4/2014. ált. of Budapest Police Headquarters

In the matter of a constitutional complaint, with concurring reasonings by Justices dr. László Kiss, dr. László Salamon, dr. István Stumpf, dr. Péter Szalay and dr. András Zs. Varga, and dissenting opinions by Justices dr. Ágnes Czine, dr. Egon Dienes-Oehm and dr. Béla Pokol, the plenary session of the Constitutional Court adopted the following

decision:

1. The Constitutional Court holds that Order No. 27.Kpk.45.810/2014/2 of Budapest Administrative and Labour Court and that of Administrative decision No. 01000/27040-4/2014. ált. of Budapest Police Headquarters are in conflict with the Fundamental Law, therefore, the Court hereby annuls said court Order and Administrative decision.

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

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

Reasoning

I

[1] 1. The petitioner lodged a constitutional complaint before the Constitutional Court pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 27.Kpk.45.810/2014/2 of Budapest Administrative and Labour Court. The petitioner requested the Constitutional Court to find unconstitutionality by non-conformity with the Fundamental Law and annul Administrative decision No. 01000/27040-4/2014. ált. of Budapest Police Headquarters as reviewed by the contested Order based on Section 43 (4) of the Constitutional Court Act.

[2] On 16 June 2014, the petitioner notified an assembly for the sidewalk section at 25 Markó Street with the participation of 50 to 200 people. The assembly would have taken place between 9 am and 4 pm, while a uniformity decision on foreign currency loans was being heard in the Curia (the Hungarian Supreme Court) building on the

other side of the road (at 16 Markó Street). The aim of the event, as indicated by the petitioner, was to raise awareness of bank fraud.

[3] Referring to Ombudsman's report OBH 5593/2013, the police approached the Vice-President of the Curia, who stated that the demonstration was of a nature to exert pressure and would therefore severely disrupt the functioning of the court, as well as the judges' sense of security. Subsequently, Budapest Police Headquarters, omitting the conciliation procedure provided for in Section 4 (5) of Decree 15/1990 (V. 14.) of the Minister of the Interior on Police Tasks Related to Ensuring the Order of Events (hereinafter referred to as the "Decree"), based on the position statement of the Vice-President of the Curia, issued a decision prohibiting the event pursuant to Section 8 (1) of Act III of 1989 on the Right of Assembly (hereinafter referred to as the "Right of Assembly Act"), against which the petitioner submitted a request for review to Budapest Administrative and Labour Court. The court dismissed said request, arguing that the police had rightly banned the event on the basis of a resolution by the Vice-President of the Curia, and even interpreted that the police would have acted incorrectly if they had taken other considerations into account, thus, for example, that the purpose of the event was, in the petitioner's view, to be a political expression of opinion on bank fraud and not to influence a specific decision on legal uniformity. Nor did the court find the omission of the conciliation procedure objectionable, since, in its view, its sole purpose was "to draw the organiser's attention to the circumstance giving rise to a possible ban."

[4] 2. In his constitutional complaint, the petitioner explained that in the present case the constitutional value competing with the right of assembly is the smooth functioning of the judiciary. The petitioner claimed as injurious the court's interpretation of the obligation to conciliate, arguing that "the State must do everything in its power to promote the exercise of fundamental rights through positive action." In the petitioner's view, a compromise could have been reached during the conciliation "in order to reconcile the constitutional value and the fundamental freedom." Instead, the police issued a prohibition decision without considering any of the alternatives.

[5] The petitioner referred to Decision 3/2013 (II. 14.) AB, finding that a restriction on a fundamental right shall meet the requirements of necessity and proportionality, and in the petitioner's view such assessment had not been carried out by the court when it rejected the request for review of the decision prohibiting the event. In the petition, the petitioner explained that assemblies that generally put pressure on a particular case and weakened the sense of security of trial judges would certainly exhaust the serious threat to the smooth functioning of the courts, but considered that the notified event did not fall within that category. The fact that the purpose of the event ("raising awareness of bank fraud") "affects" the subject-matter of the legal uniformity decision does not mean that it intended to organise an event for the purpose of exerting any pressure. Adopting such a decision would mean on the absurd assumption that all events of expression of opinion on a matter to be decided by a court would have to be

banned. The petitioner also points out that the uniformity decision was taken in a panel hearing in which the judges discussed a previously prepared draft decision; therefore, an event about twenty-five metres from the entrance to the Curia building would not be susceptible to influence the decision from the outset.

[6] The petitioner explained that all demonstrations were of a disturbing nature to some extent, but expressed strong doubts as to whether the event the petitioner had been planning would reach a level of serious threat to functioning. In the petitioner's view, there are no reasons to support the application of the standard in the Vice-President's resolution, which has also been adopted by the police and the court. In the petitioner's opinion, the two events he had held earlier also proves that a possible intimidating effect on judges was thereby precluded. The petitioner also observed that the Vice-President's resolution is only one circumstance in the case that those applying the law should have considered along with the other circumstances, as the mere opinion of the event recipient cannot be decisive in acknowledging or banning an assembly. As a sign of the failure to conduct a rigorous investigation, the petitioner stated that the police had not sought the opinion of the Central District Court of Pest (hereinafter referred to as the "District Court"), even though the event would have been held outside the District Court. The petitioner considers that his right to a fair trial is infringed by the "failure to state reasons in the decision-making process" in that the competent authorities did not take into account the assemblies he had previously organised with similar characteristics when assessing the notified event.

[7] For all these reasons, the petitioner maintains that the contested order infringes the right to peaceful assembly guaranteed by Article VIII (1) of the Fundamental Law and the right to a fair trial guaranteed by Article XXIV (1) of the Fundamental Law. Nevertheless, the Constitutional Court found that the petitioner had in fact complained of the violation of Article XXIV (1) of the Fundamental Law in connection with the court proceedings, therefore the Constitutional Court assessed it as a violation of the right to a fair trial under Article XXVIII (1) during the Court's deliberations on the substance of the petition.

II

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

"Article I (3) The rules for fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

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

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

[9] 2. The relevant provision of the Right of Assembly Act is as follows:

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

[10] 3. The relevant provision of the Decree is as follows:

"Section 4 (5) Subject to Section 8 of the Act, the public order body shall make enquiries as to whether the planned time and place of the notified event does not seriously jeopardise the smooth functioning of a representative body of the people or that of a court, or involve disproportionate violation of the traffic order. Said body shall draw the organiser's attention to any circumstance which may justify a ban and inform him that this may be remedied by changing the place or time. "

III

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

[12] Pursuant to Section 27 of the Constitutional Court Act, persons or organisations affected by judicial decisions contrary to the Fundamental Law may submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or other decision terminating the judicial proceedings violates their rights laid down in the Fundamental Law, and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her.

[13] The legal representative representing the petitioner received the court order by fax on 16 June 2014 and sent by post on 23 June 2014, while sending his constitutional complaint to the review court on 14 August 2014, that is, to filing a constitutional complaint took place within the statutory period.

[14] The petition complies with the formal requirements provided for in Section 52 (1b) of the Constitutional Court Act. The petitioner indicated the competence of the Constitutional Court according to Section 27, marked the court order requested for review, and sought a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment thereof. With regard to Article VIII (1) and

Article XXIV (1) of the Fundamental Law [substantively Article XXVIII (1)], the petitioner provided detailed reasons for the violation of these rights.

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

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

[17] Pursuant to Section 27 of the Constitutional Court Act, a constitutional complaint may be submitted by a person or organisation involved in an individual case if a decision made on the merits of the case has infringed his or her right guaranteed in the Fundamental Law. In these proceedings, the petitioner is directly affected as he was involved as an applicant in the judicial review proceedings involved in the constitutional complaint.

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

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

[20] As regards the alleged violation of Article XXVIII (1) of the Fundamental Law, the Constitutional Court found that the petitioner's arguments were in fact aimed at reconsidering the court's decision. The Constitutional Court has previously emphasised that "neither the abstract principle of the rule of law nor the fundamental right to a fair trial [...] can provide a basis for the Constitutional Court to act as a super-court over the judiciary and to act as a traditional forum for redress." {Order 3325/2012 (XI. 12.) AB, Reasoning [13] and [14]; see most recently Order 3079/2015 (IV. 23.) AB, Reasoning [29]}. In view of the above, the Constitutional Court rejected the petition on the basis of Section 64 (a) of the Constitutional Court Act with regard to the right to a fair trial in Article XXVIII (1) of the Fundamental Law.

[21] However, the Constitutional Court found that the admission of the present case with regard to the right to assembly was based on both conditions under Section 29 of the Constitutional Court Act. The case raises the interpretation of the legal condition of "serious jeopardy" of the smooth functioning of the courts among the legal provisions prohibiting the holding of notifiable events (assemblies) within the scope of the Right of Assembly Act. In addition, the Constitutional Court considered the assessment of the role of the conciliation procedure included in the Decree to be an issue directly affecting the exercise of a fundamental right and therefore of fundamental constitutional importance.

[22] On the basis of all these criteria, the plenary session of the Constitutional Court admitted the constitutional complaint with its previous decision on the admission assessment.

IV

[23] The constitutional complaint is well-founded.

[24] 1. In its Decision 3/2013 (II. 14.) AB (hereinafter referred to as the "2013 Court Decision") the Constitutional Court ruled on the content of the fundamental right to assembly regulated in the Constitution and the Fundamental Law: "In Article 62 (1) of the Constitution in force until 31 December 2011, the Republic of Hungary recognised the right to peaceful assembly and ensured the free exercise thereof. The Fundamental Law, effective as of 1 January 2012, guarantees everyone the right to "peaceful assembly". Although the wording of Article VIII (1) of the Fundamental Law does not explicitly require the State to ensure the free assembly of people, this obligation follows from Article I (1) of the Fundamental Law, as the latter provision protects all fundamental rights (including the right of assembly) by making it a primary obligation of the State. The legislative and law enforcement institutions of the State are therefore obliged to ensure that those wishing to assemble can exercise their fundamental rights enshrined in Article VIII (1) of the Fundamental Law. The Constitutional Court therefore continues to be guided by the findings on freedom of assembly contained in its previous decisions." (Reasoning [38])

[25] The decision confirmed the previously developed case law of the Constitutional Court, holding that "the right of assembly is part of the wider freedom of expression, which provides for the peaceful expression of a common opinion in public affairs. Constitutional protection therefore applies to events aimed at participating in the public debate on public matters, which help to obtain and share information of public interest with others and to express opinions jointly. [Decision 55/2001 (XI. 29.) AB, ABH 2001, 442, 449., hereinafter referred to as the "2001 Court Decision"; Decision 75/2008 (V. 29.) AB, ABH 2008, 651, 662-663., hereinafter referred to as the "2008 Court Decision".]" (2013 Court Decision, Reasoning [39]) Based on the foregoing, the fundamental right to assembly fits into the system of communication rights, a special and privileged form of the maternal right of freedom of expression in Article IX (1) of

the Fundamental Law. "It is an important element of the right of assembly as a communication right that, in contrast with the press, it has no access barriers and anyone may participate in forming the political will. Pursuant to Article 61 (1) and (2) of the Constitution, everybody has the right to create a press product. It requires considerable financial investment. It does not follow, however, from the Constitution that press products would be obliged to publish anyone's opinion. This is why it is important to have legal institutions securing participation in public affairs allowing access to all on similar conditions. Freedom of assembly on public ground is a traditional institution to grant this right and recently the Internet seems to gain such a function." [2008 Court Decision, ABH 2008, 651, 663.] The privileged communication function of assemblies is thus to enable engagement in the discussion of public affairs in a way that can place a stronger emphasis upon the expressed opinion than any other form. All this also means that a peaceful gathering is not necessarily an event without emotion or anger, on the contrary, it is a conceptual element that it causes temporary discomfort, as it is able to draw attention to the message to be communicated. The Organisation on Security and Cooperation in Europe's directives on the right of assembly explicitly state that an opinion expressed at an assembly may be directed against others, including with an anger that disturbs those concerned or others. All this is included in the concept of peaceful assembly. The constitutional limitation of this is that the expression of emotion and temperament must remain at the level of verbality, with the notion that communication may not constitute a crime or incitement to commit a crime.

[26] The privileged communication function of assemblies not only closely links the fundamental right to freedom of expression with the fundamental right to assembly, but also direct democracy. This is because the purpose of assemblies is typically to express a critical opinion, a dissatisfaction, which is aimed at correcting decisions already made or even planned by an institution of indirect democracy. Thus, the expressed opinion always appears as a means of influence in the communication space. "Events held on the basis of the right of assembly are inextricably linked to the value of democratic publicity, and such events allow citizens to criticise and influence the political process through their protests. Peaceful events are also of value in terms of consolidating political and social order and the legitimacy of representative bodies. Demonstrations and protests also signal tensions in society to representative bodies, government and the public, allowing those in charge to take appropriate action in a timely manner to reduce the causes of tensions. A democratic society cannot choose to silence, unnecessarily and disproportionately restrict protests: Restrictions on political freedoms affect not only those who wish to exercise their rights, but society as a whole, including those to whom the State invokes the means of restricting rights. The purpose of events held under the right of assembly is to enable citizens with the right of assembly to form a common opinion and to share and express their views with others." {Decision 4/2007 (II. 13.) AB, ABH 2007, 911, 914, confirmed by 2013 Court decision, Reasoning [40]}

[27] 2. This does not mean that there are no limits to the right of assembly. The Constitutional Court has already established the privileged role of fundamental communication rights in its Decision 30/1992 (V. 26.) AB; however, these rights are not considered inviolable, either (ABH 1992, 167, 170-172). The constitutional criterion of restriction of fundamental rights rests on a positive legal basis expressed in the Fundamental Law: Article I (3) of the Fundamental Law, with previous case law of the Constitutional Court, primarily on the basis of Decision 30/1992 (V. 26.) AB (ABH 1992, 167, 171), lays down the conditions for the restriction of fundamental rights. Under both Article I (3) of the Fundamental Law and Article 8 (2) of the former Constitution, the rules on fundamental rights and obligations must be laid down by an Act of Parliament. Article I (3) further provides that a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, in proportion to the objective pursued. Content identity can also be established in Article I of the Fundamental Law and in Section 8 (2) of the Constitution regarding the protection of essential content {Decision 11/2014 (IV. 4.) AB, Reasoning [35] to [37]}.

[28] The constraints on assemblies are manifold. The subjective side of the right of assembly is limited by the fact that it can only be organised by a natural person [2001 Court Decision., ABH 2001, 442, 457.], a legal person can only be a "participant" in the event, and Section 5 of the Right of Assembly Act; in addition to its institutional protection function, the notification obligation related to gatherings provided for in Section 6 of the Right of Assembly Act may also be interpreted as a time limit; as an additional time limit, Section 7 of the Right of Assembly Act prescribed that the notification must also indicate the start and end dates of the gathering, from which it can be concluded that the events organised on the basis of the right of assembly are of a temporary nature.

[29] The conceptual element of an event organised under the right of assembly is that, according to its abstract purpose, it aims to discuss public affairs. At the same time, there are restrictions on assembly from a communication point of view, since according to Section 2 (3) of the Right of Assembly Act, the exercise of the right of assembly may not constitute a criminal offence or a summons to commit a criminal offence, and shall not infringe on the rights and freedoms of others, that is, events protected by the right of assembly must be of a peaceful nature. The related limitation of a sanctioning character of the right of assembly is the dissolution of the assembly, which the Right of Assembly Act regulates primarily as an obligation of the organizer [Section 12 (1) of the Right of Assembly Act] and secondarily as an obligation of the police [Section 14 (1) of the Right of Assembly Act].

[30] The most serious of the restrictions is the prior ban on assemblies. In the case of a ban, the opinion intended for expression cannot prevail, as the gatherers cannot hold their event. A prior ban is a restriction of an *ultima ratio* nature which completely prevents the exercise of a fundamental right. In this respect, even the dissolution of the event is considered a milder restriction by degree. Therefore, in the case of a noted

event, a prohibitive ground for holding the event in violation the law may subsequently become a ground for dissolution; however, such relationship cannot be reversed: A reasonably reactive dissolution for violations of law during the event cannot be automatically converted to a preliminary ground for prohibition. This difference in degree was also pointed out by the German Constitutional Court in 1985 (1. BVerGE 69, 315), when it stated in principle in the case of the protest against the construction of the Brokdorf nuclear power station that the application of a prior ban required a direct and high foreseeable threat to public safety. In the court panel's opinion, in view of the fundamental nature of the right of assembly, the prior prohibition must be judged subject to a strict standard, in particular in view of the fact that any erroneous omission of the prohibition can still be rectified subsequently by dissolution.

[31] 3. The Right of Assembly Act was adopted in 1989 and is of public legal historical significance as an emblematic legislative achievement of the regime change. The Constitutional Court has already assessed the prohibition system of the Right of Assembly Act and found that it complies with international conventions. [2001 Court Decision, ABH 2001, 442, 451.] The Right of Assembly Act specifically mentions two cases in the scope of prohibition. On the one hand, if the holding of an event subject to notification were to seriously jeopardise the smooth functioning of representative bodies of the people or that of courts, and on the other hand, if traffic cannot be secured on another route. With regard to the constitutionality of the grounds for prohibition, the Constitutional Court held that "as the possibility cannot be excluded that an assembly would jeopardise, on the basis of the expected number of participants, the causes of or the reasons for organising the assembly, the functioning of a representative body of the people or that 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 upon the right of assembly." (2001 Court Decision, 2001, 442, 459.)

[32] In connection with the entry into force of the Fundamental Law, a matter of principle is that, just as Article 62 (1) of the previous Constitution did not enumerate the typical public policy clauses specifically mentioned by international conventions as a restriction on the right to assembly. In connection with the two prohibition cases named in the Right of Assembly Act, the Constitutional Court found in relation to the Fundamental Law that "[b]ehind these two barriers, in accordance with Article I (3) of the Fundamental Law, as a serious jeopardy to the smooth functioning of the representative body of the people and that of the courts, is Article B (1) of the Fundamental Law, and, in cases where traffic cannot be secured on another route, the public interest in the order of traffic. [Decision 75/2008 (V. 29.) AB, ABH 2008, 651, 658.]. " {Decision 24/2015 (VII. 7.) AB, Reasoning [30], hereinafter referred to as the "2015 Court Decision"}. Based on the legal logical maxim of *enumeratio unius est exclusio alterius*, the grounds for prohibition are linked to the said constitutionally protected (public) interests (values) in an exhaustive manner. It follows from the

regulatory system of the Right of Assembly Act that there is a presumption in favour of holding assemblies, which is only acknowledged by the police, except in the case of certain prohibitive grounds. Consequently, and in accordance with the principle *in dubio pro libertate*, the burden of proof in the exercise of the right of assembly always lies with the authority imposing the restriction.

[33] In this context, the Constitutional Court also points out that, in addition to ensuring and protecting the right of assembly as widely as possible, the rights of others guaranteed by the Fundamental Law may also need to be protected, which may be possible in the context of inquiring into proportionality. Thus, in the context of a serious jeopardy to the smooth functioning of the courts, the law enforcer must bear in mind that the provision of a court judgement free from public and external influence is a requirement of the rule of law. This follows from Article 26 (1) of the Fundamental Law, which states that "[j]udges shall be independent and only subordinated to law" and, from the point of view of individual law, from Article XXVIII (1), according to which "[e]veryone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act of Parliament." In the light of the above, the subject of consideration in a particular case is always whether the combined effect of the relevant factors reaches a level that seriously jeopardises the functioning of the court. However, all this imposes a responsibility on law enforcers that the grounds for prohibition contained in Section 8 (1) of the Right of Assembly Act, if they arise, cannot be applied automatically.

[34] With regard to the application of the grounds for prohibition, in the issue relevant to the present case, Section 8 (1) of the Right of Assembly Act sets a special standard by stating that, in the event of a conflict with the constitutional core value of the smooth functioning of courts, the right of assembly may be restricted only if the assembly would seriously jeopardise the smooth functioning of the court. Therefore, with regard to the assessment of the legal condition of "serious disruption" of the functioning of courts, all facts and circumstances that need to be assessed in order to determine the seriousness of the disruption, in particular the venue characteristics of the planned assembly, must be carefully and impartially assessed.

[35] 4. In its decisions on the right of assembly, the Constitutional Court has always sought to maintain a constitutional dialogue and considered the findings of principle of the European Court of Human Rights to be relevant. In Decision 61/2011 (VII. 13.) AB, the Constitutional Court stated that "in the case of certain fundamental rights, the Constitution defines the essential content of the fundamental right in the same manner as an international treaty (such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights). In such cases, the level of protection of fundamental rights granted by the Constitutional Court may in no case be lower than that of international protection (typically developed by the Strasbourg Court of Human Rights)." (ABH 2011, 290, 321.)

Accordingly, in the field of the right of assembly, the European Court of Human Rights (hereinafter referred to as the "Human Rights Court"), following the case of Bukta and Others v. Hungary [(25691/04, Strasbourg, 17 July 2007)], concluded that spontaneous meetings for peaceful purposes fall within the scope of the right of assembly. The Constitutional Court also referred to the case law of the German Federal Constitutional Court and found that "[t]his conception of the right of assembly is in line with the expectations placed on constitutional democracies." [2008 Court Decision., ABH 2008, 651, 663.] In another Decision, the Constitutional Court also stressed that "the European Court of Human Rights in the Oya Ataman case extended the obligation of tolerance imposed on the authorities during assembly in the Patyi case to the notification procedure [L. ECtHR, Patyi and Others v. Hungary, (5529/05); 7 October 2008, paragraph 43]. This means the wording of the principle *in dubio pro libertate* and the requirement for law enforcers to make a decision on the widest possible protection of the right of assembly when assessing assemblies." (2015 Court Decision., Reasoning [30])

[36] In the present case, the Constitutional Court had to rule on one of the grounds for prohibiting the holding of a notifiable event, which constitutes a legal restriction on the fundamental right to assembly. In this regard, the Constitutional Court attached importance to the fact that in the application of the grounds for prohibition in Patyi v. Hungary the Human Rights Court found the application of the law of the authorities to be in breach of the Convention because, in its opinion, "when the authorities repeatedly banned demonstrations mechanically, for the same reasons, without taking into account the factual explanations put forward by Mr Patyi, they did not strike the right balance between the right of those wishing to exercise their freedom of assembly and those whose freedom of movement is temporarily - possibly - could have been limited." [Human Rights Court, Patyi v. Hungary (35127/08), 17 January 2012, paragraph 42]

[37] In addition, in connection with another ground for prohibition, the "serious threat to the smooth functioning of representative bodies", which is considered in the present case, the Human Rights Court has also condemned Hungary in Sáska v. Hungary. The Human Rights Court emphasised the responsibility of law enforcers and that the reasons given to justify an intervention should be relevant and sufficient and that it was necessary to enquire as to whether the intervention was proportionate to the objective pursued. In the present case, the Human Rights Court found that before the Parliament "the prohibition of the demonstration did not constitute an overriding social need, even taking into account the applicant's reluctance to consider the compromise solution proposed by the police". [Human Rights Court, Sáska v. Hungary (58050/08), 27 November 2012, paragraph 23]

[38] 5. In the 2013 Court Decision, the Constitutional Court found that the police procedure related to the assembly was governed by Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter referred to as the "Public Administrative Proceedings Act"): "Therefore, in accordance with Section 8 (3) of the Right of Assembly Act, after the notification of an event to be held in a public place,

the police shall, on the basis of the Public Administrative Proceedings Act, review, *inter alia*, whether the assembly has been notified to be held on public ground. In doing so, the police must make sure that they have the authority to investigate the notification: the notified location of the event is not private and the designated public ground is accessible to everyone. The police, if they do not have the power to investigate the notification because the event is not intended to be held in an area that is open to everyone without restriction, pursuant to Section 8 (1) and (3) and Section 15 (a) of the Right of Assembly Act, they shall take a decision rejecting the notification in accordance with the relevant provisions of the Public Administrative Proceedings Act. In other cases, the Police take note of the notification or makes a decision prohibiting the holding of the event at the given place and date due to the reason indicated in Section 8 (1) of the Right of Assembly Act. (Reasoning [48] and [49]). The subject of the dispute underlying the case under investigation is the latter case, as the police have issued a prohibition decision.

[39] It follows from the principle of officiality declared by Public Administrative Proceedings Act [Section 3 (1)], the police, as an administrative authority, establishes the facts of its own motion, in clarifying which it must take into account all the circumstances relevant to the case [Section 3 (2) (b)]. Pursuant to the Public Administrative Proceedings Act, the authority clarifies the facts in two ways: on the basis of the available data and through an evidentiary procedure [Section 50 (1)]. With regard to assemblies, the details of the obligation to clarify the facts are regulated by the Decree. The authority judges the event primarily on the basis of the available data, such as the information required and notified in line with Section 7 of the Right of Assembly Act. If the notification is incomplete, the police will call for it to be rectified (Section 3 of the Decree), and if they detect the existence of any grounds for prohibition, they shall communicate such ground to the party notifying the event [Section 4 (5) of the Decree], and in the event of a circumstance giving rise to a valid reason for a violation of law other than any grounds for prohibition, the police shall warn of the legal consequence of the dissolution [Section 6 (1) and (2) of the Decree].

[40] In the event of prohibition, the Decree regulates the conciliation procedure, which follows from the principle of the obligation to cooperate laid down in the Public Administrative Proceedings Act with regard to the obligation to clarify the facts [Section 1 (2)], and, pursuant to the Public Administrative Proceedings Act's conceptual framework, can be considered a special evidentiary procedure. Such procedure is obligatory, the constitutional reason for which being that it is related to the most severe restriction of the right of assembly, the case of prohibition, and as such, in accordance with the principle of *in dubio pro libertate*, requires the careful care of the authorities.

[41] The Constitutional Court found that following a conciliation procedure under the Right of Assembly Act and the Decree, the police must issue a mandatory prohibition decision if the grounds for prohibition exist, if the police inform that the ground for prohibition could not be eliminated by changing the place or venue [Section 4 (5) of the Decree]. As regards the application of the ground for prohibition under review, all

this is objectionable because it relates to the venue for the assembly. However, both the Constitutional Court and the Human Rights Court have already stated that "the right to freedom of assembly includes the right to choose the date, venue and manner of assembly in accordance with Article 11 (2)." [Human Rights Court, Sáska v. Hungary (58050/08), 27 November 2012, paragraph 21] Furthermore, as held in the 2013 Court Decision, "[g]iven that one of the purposes of public grounds has traditionally been to be one of the most obvious, publicly accessible forums for the public, events held on public ground enjoy particularly strong constitutional protection. This is manifested in the fact that if the use of the public ground chosen as the place of assembly is restricted by a measure of public authority, the restriction affecting the fundamental right must meet the requirements of necessity and proportionality. A restriction complies with the Fundamental Law if it is absolutely (that is, inevitably) necessary for the enforcement of a fundamental right or the protection of a constitutional value. In addition, the restriction must be proportionate to the aim to be achieved and must not affect the essential content of the freedom of assembly. [Article I (3) of the Fundamental Law] In considering the constitutionality of a restriction, special consideration shall be given to the fact that a prior prohibition of a gathering on public ground is the most serious restriction on freedom of assembly guaranteed by the Fundamental Law." (Reasoning [45])

[42] With regard to the place of assembly, the Constitutional Court has already held that the reason for the prohibition reviewed in this decision may be necessary due to Article B (1) of the Fundamental Law.

[43] As regards proportionality, in line with the position of the Venice Commission [CDL(2012)014rev2 pp. 20-21, p. 23], the Constitutional Court points out that with regard to the statutory restrictive condition "serious jeopardy to the smooth functioning of the courts", "the standard of seriousness" was included in the regulation of the Right of Assembly Act as a category narrowing the restriction of fundamental rights. Without this, law enforcement practice could lead to the fact that, in general, no assembly could be held in front of courts, as ultimately any assembly could cause some disturbance or inconvenience to the "recipient" of the assembly. In the case under review, the Constitutional Court points out that the "standard of seriousness" is what allows law enforcers to consider case by case in connection with the application of the ground for prohibition under review; therefore, the application of the "standard of seriousness" must be separately justified. This test of discretion is also in line with Human Rights Court practice. (*Cf.* 2013 Court Decision, Reasoning [46])

[44] 6. In the present case, the petitioner wished to exercise his right of assembly near the Curia while a legal uniformity procedure was ongoing in the building of the Curia concerning the assessment of foreign currency loans. Budapest Police Headquarters noticed that the reason for the ban regulated in the Right of Assembly Act arose in the case of the notified assembly, but despite the binding provision of the Decree, they failed to conduct the conciliation procedure. The police approached the Curia to ascertain as to whether the notified assembly would seriously disrupt the functioning

of the court and, based on a positive response, banned the assembly. In the case under review, the police basically relied on the statement of the Vice-President of the Curia in making their decision and concluded that "serious jeopardy to the functioning of the courts could also be realised by a peaceful event".

[45] The Constitutional Court notes that the Ombudsman's guidelines, cited and followed by Budapest Police Headquarters, mentions obtaining the opinion of a Curia representative only as an example of exploring all the circumstances of the case ("preferably [...] after obtaining the opinion of an official" OBH 5593/2008. p. 4.). That guidance also suggests that the existence of a disturbance must be "determined in the light of all the circumstances of the case".

[46] However, it should be noted that the court also considered this evidence and rejected the complainant's request for review. The court reviewing the police's prohibition decision also accused the petitioner of not having attached evidence to refute the statement of the Vice-President of the Curia. In the court's view, the police would have acted unlawfully if they had assessed, in the context of the ground for prohibition, that the specific purpose of the event was a political expression and did not attach importance to the failure to conciliate during the review of the prohibition decision. Under the court's interpretation, the purpose of the missed conciliation procedure is not "to convince the police that a ground for prohibition does not exist against the police's position, [...] [but] that the police draw the organizer's attention to the circumstance justifying a possible ban."

[47] 7. In view of the above and in the context of the case, the Constitutional Court has held the following.

[48] 7.1. The police conducted evidence when they approached the Curia to obtain their opinion, however, the reasons for the result of considering the statement received together with all the other circumstances are missing from the reasoning of the decision. With regard to the assessment of "serious disruption" of the functioning of the courts, the police must carefully and impartially assess the venue characteristics of the planned assembly, and concerning the gravity of the disturbance, without prejudice to the constitutional protection of the fundamental right to assembly it is sufficient to base a prohibition decision solely on the resolution of the recipient of the assembly, if the specific risk of serious disturbance to the functioning of the courts by a given assembly can be established beyond a reasonable doubt from the resolution itself, and the relevant considerations relating to the particular facts are set out in sufficient detail in the statement of reasons for the prohibition decision. All this follows from the principle *in dubio pro libertate*, which "lays down the requirement for law enforcers to make a decision in the assessment of assemblies which will result in the widest possible safeguarding of the right of assembly." (2015 Court Decision, Reasoning [30])

[49] 7.2. The decision to secure the right of assembly as widely as possible also requires law enforcement to make a decision in favour of those who wish to exercise their right

of assembly, while respecting the requirements of proportionality and non-discrimination. [Venice Commission CDL(2012)014rev2 p. 22]

[50] In terms of proportionality, the ultima ratio of the ground for prohibition must be taken into account and the possibility of restrictions less severe than prohibition must be considered. In this respect, the aim is not to completely eliminate the disturbance caused by the assembly, since an assembly necessarily and temporarily causes discomfort. Proportionality requires law enforcers not to apply the ground for prohibition set out in law automatically, without due consideration and justification, and not to seek complete non-interference but to prevent or eliminate serious disturbance according to the content of the restrictive ground set out in the law, to strike a balance between the fundamental right to assembly and the rule of law for the judiciary to function without influence. In addition, law enforcement proceedings should not raise doubts about discrimination. "Law enforcement agencies must follow an application and interpretation of law that is predictable [non-divisive] and does not lead to unnecessary restrictions on fundamental rights." (2015 Court Decision, Reasoning [26])

[51] It must be apparent from the statement of reasons for the decision taken as a result of the deliberations that the law enforcement authorities have considered less restrictive possibilities for assembly. Based on an overview of the elements of the procedure, the Constitutional Court concluded that law enforcers can comply with their obligation to state reasons if they compulsorily carry out the conciliation procedure provided for in the Decree in the event of grounds for prohibition. During the conciliation procedure, the public authority may enter into a dialogue with the organiser of the assembly, and, where appropriate, the possibility of a more differentiated determination of the facts may become possible; it also provides an opportunity for both the organiser and the authority to learn more about the positions and, where appropriate, to develop the power of direct personal persuasion. The application of the conciliation procedure, which is free of formality and results in a meaningful dialogue, is a legal institution that facilitates the exercise of a fundamental right, which can also prevent the possibility of an unjustified restriction of a fundamental right in a given case. The conduct of the organiser of the assembly during the conciliation procedure may also have a useful informative power for the authority in terms of preliminary assessment and evaluation of the events expected during the exercise of the right of assembly. On the basis of the foregoing, it can be concluded that the conduct of the conciliation procedure helps to find a compromise solution between the parties to the assembly and the authority, thus allowing to strike the right balance between the fundamental right to assembly and the rule of law protected by the prohibition. Given the above characteristics, the conciliation procedure is an important procedural guarantee for the exercise of the fundamental right to assembly, the omission or inappropriate application of which violates not only the fundamental right to assembly, but also the constitutional requirement of legal certainty and the predictable functioning of individual legal institutions. The Constitutional Court points out that the conciliation procedure has a guarantee significance for the exercise of the

fundamental right to assembly, as explained in this Decision, which the legislator can express by raising the rules of the conciliation procedure to the legal source level of an Act of Parliament.

[52] The Constitutional Court maintains that during the conciliation procedure with the notifying party, the police should try to find a compromise solution. In the event of a prohibition, the police may make technical suggestions (e.g. regarding the duration or the sound equipment) to the person notifying the meeting in order to hold the meeting, which the notifying person is not obliged to accept, but which may provide the organiser of the assembly with specific guidance on the constitutional framework of the actual enforceability of the fundamental right in the given circumstances. Given that the choice of venue and time is closely related to the purpose of the assembly and the message communicated during the assembly, the police can only propose these features of the event with the utmost care and careful consideration of the possibilities offered by the individual situation. As the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights' Guidelines on Freedom of Peaceful Assembly state, "if a state restricts freedom of assembly, it must do so with the least possible interference. [...] As a general rule, the assembly should still take place within 'sight and sound' of the target audience." [OSCE Office for Democratic Institutions and Human Rights (ODIHR): Guidelines on Freedom of Peaceful Assembly, 2.4 and 3.5, respectively] The tolerance requirement of democratic societies may set a higher threshold for the right of assembly in a given situation in order to be accepted as infringing on the rights and freedoms of others in a given situation. One of the basic reasons for this principled theorem is that freedom of assembly is conceptually limited in time and it restricts the rights of others in one way or another only for a specified period of time. (Paragraph 80) In the light of the foregoing, the temporary nature of the assemblies is of paramount importance in striking the right balance between the fundamental right to assembly and the rule of law protected by the prohibition, and thus enforcing proportionality.

[53] 7.3. In addition, the Constitutional Court also attached importance to the fact that an administrative court belonging to the system of ordinary judicial organisation reviews the decision of the police prohibiting the holding of the announced event. Judicial review as a remedy has a fundamental impact on the fundamental right to assembly (its exercise), and the Constitutional Court therefore emphasizes as a matter of principle that the court seised must pay close attention to the proper fulfilment of the statutory duty to state reasons. In the course of a judicial review of a prohibition decision, the court must examine, *inter alia*, whether conciliation has taken place and assess whether the parties have cooperated adequately in order to remedy the grounds for the prohibition.

[54] 7.4. In its Decision 3/2015 (II. 2.) AB, the Constitutional Court held that "[a] fundamental right may be restricted in accordance with Article I (3) of the Fundamental Law in order to enforce other fundamental rights or to protect a constitutional value, to the extent strictly necessary, in a manner proportionate to the objective pursued,

while respecting the essential content of the fundamental right. This test of the restriction of fundamental rights is above all binding on the legislator, but at the same time, in line with their competences, it also formulates a constitutional requirement for law enforcers and the courts. This requirement, also having regard to Article 28 of the Fundamental Law, imposes an obligation on courts that, where legislation which restricts the exercise of a fundamental right is interpreted, the restriction of the fundamental right in question must be limited to the level of the necessary and proportionate intervention, within the limits of the margin of interpretation allowed by the legislation." Furthermore, "[i]n the exercise of a restriction, law enforcers must always bear in mind that the restriction of fundamental rights may only take place constitutionally in a manner proportionate to the objective pursued. Proportionality requires consideration of the objective pursued and the weight of the restriction on a fundamental right, which also means that the stronger the arguments are in favour of protecting a fundamental right, the more careful it must be when restricting it." (Reasoning [21] and [23]). The Constitutional Court also held that "[a] constitutional complaint enabling the constitutional review of judicial decisions (Section 27 of the Constitutional Court Act) is a legal institution for the enforcement of Article 28 of the Fundamental Law. On the basis of such a complaint, the Constitutional Court examines the compliance of the interpretation of the law contained in the judicial decision with the Fundamental Law, whether the court enforced the constitutional content of the rights guaranteed in the Fundamental Law during the application of the law. If the court has acted regardless of the fundamental rights involved in the case before it, which is relevant to the fundamental right, and the legal interpretation it has formulated is not in accordance with the constitutional content of this right, the judicial decision is in conflict with the Fundamental Law." {Decision 3/2015 (II. 2.) AB, Reasoning [18]} In connection with the right of assembly, the Constitutional Court also pointed out that "in the case of prohibition decisions, a judicial review may be requested pursuant to Section 9 (1) of the Right of Assembly Act, which the court must review on its merits, in which case it may not disregard constitutional considerations." (2015 Court Decision, Reasoning [22])

[55] In the present case, the Constitutional Court found that the court did not attach importance to the failure to conduct a conciliation procedure in reviewing the police prohibition decision and did not review it accordingly, as it did not recognise the guarantee nature of the conciliation procedure affecting the exercise of fundamental rights. The Constitutional Court considers the failure to conduct the conciliation procedure to be a serious violation of the fundamental right to assembly, which was not remedied during the judicial review, as the court misinterpreted the constitutional purpose of the conciliation procedure and failed to take into account its fundamental nature. In view of this circumstance, the Constitutional Court annulled the order of Budapest Administrative and Labour Court as a judicial decision violating the fundamental right to assembly.

[56] 7.5. Pursuant to Section 43 (4) of the Constitutional Court Act, in the event of the annulment of a judicial decision, the Constitutional Court may also annul other judicial

or official decisions reviewed by the decision. As explained above, the police failed to conduct the mandatory conciliation procedure, which is of guarantee significance from the point of view of fundamental rights, therefore the police decision itself violates the fundamental right to assembly, therefore the Constitutional Court annulled the impugned court decision with effect to the contested decision of the police.

[57] 7.6. Pursuant to Section 43 (3) of the Constitutional Court Act, as a result of the annulment of a judicial decision by the Constitutional Court, the court proceedings to be conducted as necessary shall be conducted in accordance with the decision of the Constitutional Court. In this context, the Constitutional Court found that in the present case, by annulling the court order and the police decision, the petitioner's impairment of his rights could no longer be remedied due to the lapse of time. Nevertheless, "the annulment of" the decision and order "according to the Constitutional Court in the present case constitutes moral satisfaction to the aggrieved parties in the present case, and the aspects described in the Constitutional Court decision serve as guidelines for future assembly disputes." (2013 Court Decision, Reasoning [71], 2015 Court Decision, Reasoning [29])

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

Budapest, 12 October 2015

Dr. Barnabás Lenkovics sgd.,
Chief Justice of the Constitutional Court

Dr. István Balsai sgd.,
Justice

Dr. Ágnes Czine sgd.,
Justice

Dr. Egon Dienes-Oehm sgd.,
Justice

Dr. Imre Juhász sgd.,
Justice

Dr. László Kiss sgd.,
Justice

Dr. Miklós Lévay sgd.,
Justice

Dr. Béla Pokol sgd.,
Justice

Dr. László Salamon sgd.,
Justice

Dr. István Stumpf sgd.,
Justice

Dr. Tamás Sulyok sgd.,
Justice delivering the opinion of the Court

Dr. Péter Szalay sgd.,
Justice

Dr. Mária Szívós sgd., Justice

Dr. András Varga Zs. sgd.,
Justice

Concurring reasoning by *dr. László Salamon*:

[59] I agree with the operative part of the Decision, but make the following comments in support of its Reasoning.

[60] I find the line of arguments in the Reasoning convincing in all respects, except as set out in the quotations cited below, which sufficiently supports the decision of the Constitutional Court, but the findings from the 2013 Court Decision (Reasoning [45]) and Decision 3/2015 (II. 2.) AB (Reasoning [21] and [23]) and those cited in points IV.5 (Reasoning [38] to [43]) and 7.4 (Reasoning [54] to [55]) of this Decision concern a matter of principle which definitely need to be clarified before, in my opinion, the wrong approach can be translated into practice.

[61] The question is specifically whether the rule of restriction of fundamental rights in Article I (3) of the Fundamental Law is a legislative or law enforcement requirement. In other words, the question is whether this provision of the Fundamental Law authorises anyone other than the legislator, such as those applying the law, to restrict fundamental rights (corresponding to the necessity and proportionality test).

[62] In my view, contrary to what is stated in those disputed quotations,

– a fundamental right may be restricted only by an Act of Parliament, in accordance with Article I (3) of the Fundamental Law,

– others, such as those applying the law (including courts), cannot restrict fundamental rights; however,

– when applying laws restricting fundamental rights, they assess and consider whether the conditions for the restrictions prescribed or permitted by Acts of Parliament exist in the particular case and, if so, apply such restrictions in individual cases.

[63] It is possible that we are dealing with a purely semantic problem in practice, but this does not make the question weightless either.

[64] I Regulation of the Constitution at the time of the regime change

[65] In the framework of the Constitution of the regime change, two regulations took place in succession. Pursuant to Section 2 of Act XXXI of 1989 on the Amendment of the Constitution, the new Article 8 (2) and (3) of the Constitution provided as follows:

„Article 8 (2) The rules pertaining to fundamental rights and duties may be established only by a constitutional act.

(3) The exercise of a fundamental right may be subject only to such restrictions established by a constitutional act as are necessary for the protection of the security of the State, internal order, public safety, public health, public morality or the fundamental rights and freedoms of others."

[66] This regulation has been supplanted by the new wording of Article 8 (2) of the Constitution established by Section 3 of Act XL of 1990 on the Amendment of the Constitution:

"Article 8 (2) In the Republic of Hungary, rules pertaining to fundamental rights and duties shall be determined by statute, which, however, shall not limit the essential content of any fundamental right."

[67] This provision was in force from 25 June 1990 to 1 January 2012.

[68] Relatively extensive legal literature has emerged on issues related to the restriction of fundamental rights, in line with the practice established by the Constitutional Court.

[69] First of all, we must see that the text of the Constitution is clear in both successive versions of the regulation; it expressly links the restriction of fundamental rights to an Act of Parliament, stating (in the first version) that the restriction can only take place in a constitutional Act, and (in the second version) that the Act establishing the rules of fundamental rights may not restrict the essential content of a fundamental right.

[70] The legal literature is completely uniform in the interpretation of the texts; it deals with the formal and substantive conditions for the restriction of fundamental rights as indispensable requirements of the rule of law. The formal requirement is the level of an Act of Parliament, and the substantive requirement is compliance with the necessity and proportionality test. There is a cumulative relationship between formal and substantive requirements.

[71] The explanatory memorandum to the Constitution in this regard states: "2.2 Article 8 (2) of the Constitution sets out the regulations concerning the regulation and restriction of fundamental rights. Fundamental rights may be regulated and restricted by an Act of Parliament." (Zsolt Balogh – András Holló – István Kukorelli – János Sári : Az Alkotmány magyarázata, KJK-KERSZÖV Budapest 2002, 211.)

[72] The Commentary to the Constitution states the same as follows: "In Article 8 (2) of the Constitution we find the formal and substantive criteria for the restriction of fundamental rights. By formal criteria we mean the rules of procedure, namely that the rules on fundamental rights and obligations are laid down by an Act of Parliament. […] The substantive requirement specified in Article 8 (2) of the Constitution is that the essential content of a fundamental right may not be restricted by an Act of Parliament." [András Jakab (ed.): Az Alkotmány kommentárja, Századvég Kiadó Budapest 2009, 412.]

[73] I cite a single example of the case law of the Constitutional Court from the earliest times, which is also included in the Commentary to the Constitution, Decision 20/1990 (X. 4.) AB, which concerns the constitutionality of norms restricting

fundamental rights in connection with the restriction of fundamental rights. [András Jakab (ed.): Az Alkotmány kommentárja, Századvég Kiadó Budapest 2009, 425.]

[74] Examining the text of the Constitution changing the regime, it can also be stated that the restriction of fundamental rights is mentioned only as an act that can be implemented at the statutory level, that is, subject to legislative activity, there is no reference in the text to a restriction of a fundamental right exercised by the those applying the law separate from the legislator.

[75] It clearly follows from all the foregoing that the Constitution changing the regime allowed the restriction of fundamental rights only within the framework of legislation (that is, the adoption of an Act of Parliament).

[76] The formal requirement, the legislative level of passing an Act of Parliament, is of outstanding importance from the point of view of constitutionality. The institution of restricting fundamental rights is inevitable, it follows from the fact that we do not live alone in the world. The rights and freedoms of others, as well as the protection of other constitutional values of community interest, necessitate the restriction of fundamental rights. However, it is a cardinal issue for the protection of the rule of law that the need for such regulation should not lead to arbitrariness. If the restriction of fundamental rights does not take place at a normative level, namely at the highest level from the point of view of legal sources, then we can no longer speak of a guarantee at the level of the rule of law. The Commentary on the Constitution expounds regarding the foregoing as follows: "Pursuant to Article 8 (2) of the Constitution, fundamental rights can only be regulated by an Act of Parliament. This rule means that in the system of division of power, the legislator, in Hungary only the National Assembly, has the right to decide on the fate of fundamental rights, within the framework dictated by the Constitution. The additional rule is that the decision must be enshrined in an Act in order for the law to be enacted in compliance with the corresponding procedural rules surrounded by guarantees. The National Assembly is therefore not entitled to decide on another norm, on the basis of the system of legal sources in force, using other legal instruments of state administration." [András Jakab (ed.): Az Alkotmány kommentárja, Századvég Kiadó Budapest 2009, 425.]

[77] Gábor Halmai and Attila Gábor Tóth emphasise the historical roots and international involvement of the formal requirement, and in the international perspective he points to the attachment to norms as an indispensable requirement of the restriction of fundamental rights. "The general formal requirement for the restriction of human rights is already set out in Article 4 of the French Declaration: »Restrictions on the exercise of natural rights can only be determined by statute«. The various catalogues of human rights still contain similar formal rules. For example, several articles of the European Convention on Human Rights include a clause stating that the restriction shall be »prescribed by law«, or »in accordance with the law«.

[78] This formal requirement has a double meaning: under the European standard, it expresses that people are only obliged to submit to restrictive measures if they have

been prescribed to them in public, predictable and comprehensible normative provisions. In other words, it is a kind of quality requirement, which can be deduced from the principle of rule of law. "Law" in this approach actually means legislation, and the emphasis is on the accessibility of the norm and the ability of people to adjust their behaviour to the norm. That is why the European Court of Human Rights considers common law norms to be on an equal footing with codified law, as their sources of law are available to everyone from judicial decisions, legal books and other publications. Under the case law developed by common law courts, people can know the limits of lawful action in the same way as under the law adopted as a statute. In the case of legal systems based on codified law, the interpretation of the law adopted by the courts must be used as the basis for determining the content of the standards.

[79] The main requirement, therefore, from this formal point of view, is that the standard should be known and clear to the public and that there should be no discretion for law enforcement authorities, either because of the lack of the standard or because of its secrecy." [Gábor Halmai –Attila Gábor Tóth (Eds.): Emberi jogok, Osiris Kiadó Budapest 2003, pp. 117–118.] (See citations in the original text for references.)

[80] I believe that the examples given, quoted mainly from the legal literature, leave no doubt that in the context of the constitutional restriction of fundamental rights, the restriction of a fundamental right has been interpreted as a normative (typically, also in Hungary, legislative) act.

[81] II Regulation of the Fundamental Law

[82] The restriction of fundamental rights is regulated by Article I (3) of the Fundamental Law as follows: "Article I (3) The rules for fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

[83] This normative text differs from the previous wording in several respects. Regarding the part relevant to our topic, in that the formal requirement (the level of statutory regulation) and the substantive requirements have been placed in separate sentences and the grammatically unambiguous reference to the cumulative relationship of these conditions has been omitted. The question is whether this change has given rise to new rules on the restriction of fundamental rights, whether in the future the restriction of fundamental rights could be provided not only by an Act, but also by individual decisions independently of the Act, possibly by allowing new cases of restriction not included in the Act, also by those applying the law. In other words, did the legislator want to delete the current dogmatics of restricting fundamental rights, or does the division of the regulation into two sentences stem from purely stylistic considerations?

[84] In addition to the knowledge of the participants, the constitutional will can be objectively inferred from the documents of the constitution. It can be stated that neither the concept of the new Constitution finally adopted as a recommendation, nor the explanatory memorandum attached to the Fundamental Law, indicates in this respect the intention to change the previous regulation. No such intention or interpretation arose in the debate on the concept or the Fundamental Law, either during the plenary sitting or at committee level. In the legal literature, or in the debates outside the parliament surrounding the Fundamental Law, but also in the attacks on the Fundamental Law, no accusation has been made of softening or making the formal requirement alternative. Until now, there is a unanimous view in legal circles regarding the relevant regulation that the new Fundamental Law essentially took over the previous regulation in terms of content, explicitly incorporating the interpretation according to the governing practice of the Constitutional Court. The Commentary to the Fundamental Law of Hungary makes the following brief statement in this regard: "The rules and restrictions on fundamental rights shall also be laid down by an Act of Parliament." (Zsuzsanna Árva: Kommentár Magyarország Alaptörvényéhez, CompLex Jogtár)

[85] Based on the foregoing, in my opinion, it can be concluded that the relevant regulations of the Constitution and the Fundamental Law show substantive identity. Consequently, the dogmatics, detailed so far in my concurring reasoning under Part I, can still be considered valid.

[86] The institutionalisation of the redress type known as the 'real constitutional complaint' provided for in Article 24 (2) (b) of the Fundamental Law does not mean any change, either. The fact that, as a result, the constitutionality of judicial decisions has become subject to review by the Constitutional Court does not mean that courts have not so far had, but then would now be in a position to restrict fundamental rights by individual decisions beyond what is permitted by law; that is, the two aspects, namely the regulation of restrictions on fundamental rights and the introduction of a real constitutional complaint, are independent of each other.

[87] III Could it just be a semantic problem?

[88] At the beginning of my concurring reasoning, I referred to the possibility that this question is practically only semantic in nature.

[89] This is because the courts, when applying the law (such as laws restricting fundamental rights), consider whether there are grounds for restriction prescribed in an Act. These have often been worded in such a way that, when comparing these rules with individual cases, the application of restrictions requires discretion at the level of law enforcement, ultimately the judiciary. For example, whether a particular demonstration seriously disrupts the work of the courts can be determined by considering all the circumstances of the case. This consideration is not based on the necessity and proportionality test because it was done by the legislature when it decided to normatively (as defined in the Act) restrict the right of assembly for the

protection of administration of justice (or by the Constitutional Court if this provision of the Act is challenged). The court will apply the Act of Parliament and will decide whether a situation justifying a restriction that can be considered constitutional until the normative and contrary decision of the Constitutional Court (serious disruption of the functioning of the court) can be established in the specific case. This judicial activity is not a *sui generis* restriction of fundamental rights based on the necessity and proportionality test, but an application of the law that enforces the provisions of the Act.

[90] The concept of proportionality is an explicit part of the professional terminology of certain branches of law. However, the concept used in this sense is not, in my view, identical to the concept of the necessity and proportionality test in the constitutional sense in Article I (3) of the Fundamental Law concerning the restriction of fundamental rights. For example, when the legislature identified the criminal offences that it ordered to be punishable by imprisonment, it conducted the necessity and proportionality test in its decision to restrict the fundamental right to liberty. It also established the lower and upper limits of the scales of penalties, allowed the suspension of the penalty, created mitigating possibilities against the lower penalty sentence, and so on. If a criminal offence were to be punishable by a sentence of imprisonment that violates the necessity and proportionality test (as an absurd example, allowing a sentence of imprisonment of more than ten years in the case of a minor bodily injury), the statutory provision would be in conflict with the Fundamental Law. However, if the court imposes an excessive, "disproportionate", severe sentence of imprisonment within the scales of penalties that comply with constitutional requirements, which the appellate court will significantly reduce in proportion to the act committed, it cannot be said of the judgement at first instance that it was in conflict with the Fundamental Law. The concept of proportionality to be established in criminal proceedings by weighing the act and the circumstances is different and, by extension, to carry out the proportionality in this regard, which here means the concept of professional law, criminal law (activity), and the notion of a normative restriction of fundamental rights in the constitutional sense is another matter. In my view, the concept of the necessity and proportionality test can only be linked to the latter.

[91] There is no doubt that by applying a provision of the law restricting a fundamental right to individual cases, the law enforcer restricts the fundamental right in the specific individual case, but this cannot be accompanied by a necessity and proportionality test. It has been done by the legislature, as I have discussed above, and it is neither necessary nor possible for the legislature to repeat it, except for the purpose of reaching a decision on a judicial initiative under Article 24 (2) (b) of the Fundamental Law. Merely for the sake of thought: if the law enforcer were to carry out such a test in order to make a substantive decision and it would lead to the same result as the restrictive provision of the law, then the performance of the test would be superfluous, and in the event of a different result, a substantive decision on it would not be possible due to the fact that those applying the law are subject to the law.

[92] In my view, if the concept of the necessity and proportionality test is maintained as a concept that can be used as a constitutional measure of the normative restriction of fundamental rights, and our use of the term is clear in relation to the court's discretionary, even proportionate, law application function that the latter case is not a constitutional test, we can clarify the theoretical basis of our decisions on restrictions on fundamental rights and rule out any misunderstandings, which does not clearly rule out the possibility of a restriction of fundamental rights incompatible with the rule of law (*praeter* or *contra legem* restriction).

Budapest, 12 October 2015

Dr. László Salamon sgd.,
Justice

Concurring reasoning by *dr. István Stumpf*:

[93] I agree that the Constitutional Court annulled Order No. 27.Kpk.45.810/2014/2 of Budapest Administrative and Labour Court and the Administrative Decision No. 01000/27040-4/2014 of Budapest Police Headquarters. I see the real reason for this, following the decision of the Constitutional Court, in the disproportionate restriction of the right to peaceful assembly. Although the majority decision suggests that this is in fact the case, it does not formally designate it as a ground for annulment.

[94] In the present case, the primary issue was whether the right to peaceful assembly could be violated as a result of the disputed ban on an event planned in front of the Curia building.

[95] This review was carried out by the Constitutional Court on the basis of the standard of restriction of fundamental rights laid down in the Fundamental Law. The Constitutional Court referred to Article I (3) of the Fundamental Law, pursuant to which: "[a] fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

[96] The Constitutional Court took into account Section 8 (1) of the Right of Assembly Act applied in the main proceedings. Under this provision, the police may prohibit the "holding of an event" subject to notification "at the venue or time specified in the notification" if "holding the event would seriously jeopardise the smooth functioning of the courts". In this connection, the Constitutional Court referred to its earlier finding that "in accordance with Article I (3) of the Fundamental Law [...] there is Article B (1) of the Fundamental Law [...] behind this limit. [Decision 75/2008 (V. 29.) AB, ABH 2008, 651, 658.]." {Decision 24/2015 (VII. 7.) AB, Reasoning [30]}. The Constitutional Court thus in fact acknowledged that the ground contained in Section 8 (1) of the Right of

Assembly Act may necessitate a ban on the event and thus a restriction on the right to peaceful assembly. In its present Decision, the Constitutional Court worded it as follows: "With regard to the place of assembly, the Constitutional Court has already held that the reason for the prohibition reviewed in this decision may be necessary due to Article B (1) of the Fundamental Law."

[97] The Constitutional Court then proceeded to review the proportionality of the restriction as follows: "As regards proportionality, in line with the position of the Venice Commission [CDL(2012)014rev2 pp. 20-21, p. 23], the Constitutional Court points out that with regard to the statutory restrictive condition »serious jeopardy to the smooth functioning of the courts«, »the standard of seriousness« was included in the regulation of the Right of Assembly Act as a category narrowing the restriction of fundamental rights." Thus, as held by the Constitutional Court, the application of the standard known as the "standard of seriousness" can be used to judge whether a restriction affecting a fundamental right (prohibition of an event) has taken place in the main proceedings in proportion to the objective pursued. The Constitutional Court therefore required that " the application of the »standard of seriousness« must be separately justified", as without such justification nothing would justify the proportionality of a restriction of fundamental rights, and thus the restriction of fundamental rights should be considered disproportionate in itself.

[98] The Constitutional Court further found, on the basis of the facts established by Budapest Administrative and Labour Court, that "the petitioner wished to exercise his right of assembly near the Curia while a legal uniformity procedure was ongoing in the building of the Curia concerning the assessment of foreign currency loans." "The police approached the Curia to ascertain as to whether the notified assembly would seriously disrupt the functioning of the court and, based on a positive response, banned the assembly. In the case under review, the police basically relied on the statement of the Vice-President of the Curia in making their decision and concluded that »serious jeopardy to the functioning of the courts could also be realised by a peaceful event«. Finally, the Constitutional Court found that the court also only "considered this evidence and rejected the complainant's request for review."

[99] In its Decision, the Constitutional Court stated: "With regard to the assessment of »serious disruption« of the functioning of the courts, the police must carefully and impartially assess the venue characteristics of the planned assembly, and concerning the gravity of the disturbance, without prejudice to the constitutional protection of the fundamental right to assembly it is sufficient to base a prohibition decision solely on the resolution of the recipient of the assembly, if the specific risk of serious disturbance to the functioning of the courts by a given assembly can be established beyond a reasonable doubt from the resolution itself, and the relevant considerations relating to the particular facts are set out in sufficient detail in the statement of reasons for the prohibition decision."

[100] In summary, as found by the Constitutional Court, the proportionality of a restriction of a fundamental right can be assessed by applying the standard known as

the “standard of seriousness”. There is an obligation to state reasons, precisely because the reasons justify the seriousness of the threat to the smooth functioning of the courts and, therefore, the proportionality of the restriction of fundamental rights caused by the prohibition of the event. However, in the Constitutional Court's view, the prohibition decision did not prove that the serious jeopardy to the smooth functioning of the courts by the prohibited assembly could have been established beyond a reasonable doubt.

[101] As a direct consequence of all the foregoing, the Constitutional Court should have held that the prohibition of the event in this manner disproportionately restricted the right to peaceful assembly. However, the Constitutional Court, although it should have done so under Article I (3) of the Fundamental Law, did not find a breach of a fundamental right for this reason, nor did it annul the decisions prohibiting the event for such reason.

[102] Instead, the Constitutional Court switched to the review of Section 4 (5) of Decree 15/1990 (V. 14.) BM of the Minister of the Interior on Police Tasks Related to Ensuring the Order of Events (hereinafter referred to as the “Decree”). The Constitutional Court interpreted this rule of the Decree on the obligation to inform the police that, on the basis of this, the police are obliged to conduct a “conciliation procedure” before the event is banned. Then, starting from the Decree, the Constitutional Court raised this to a “fundamental right-protecting, guarantee-like” requirement, finding a violation of a fundamental right, citing its failure to do so.

[103] I do not dispute that the provision of the Decree invoked is binding on the police, and on this basis the police are obliged to act very carefully before banning an event lest their proceedings be terminated with a decision to unjustifiably ban the notified event. By unjustifiably banning the event, the police would indeed restrict it unconstitutionally in conflict with the Fundamental Law, thus, infringing upon the right to peaceful assembly. However, the unconstitutionality by conflict with the Fundamental Law of the annulled judicial decision cannot be established by reference to the violation of the right to peaceful assembly guaranteed as a fundamental right by the Fundamental Law merely due to the wanton disregard of a requirement deriving from a ministerial decree concerning the manner of conducting police proceedings. Not just because if this requirement derived from the Decree is indeed of guarantee significance for the protection of a fundamental right, then the regulation of this at the given statutory (decree) level, precisely following Article I (3) of the Fundamental Law, would be in breach of fundamental rights from the outset, and therefore could not formally form the basis for establishing unconstitutionality by conflict with the Fundamental Law under this Decision.

[104] I am convinced that an infringement of a fundamental right could have been established under Article I (3) of the Fundamental Law only because of an unnecessary or disproportionate restriction of the fundamental right.

Budapest, 12 October 2015

Dr. István Stumpf sgd.,
Justice

[105] I second the above concurring opinion.

Budapest, 12 October 2015

Dr. László Kiss sgd.,
Justice

Concurring reasoning by *dr. András Varga Zs.*:

[106] I agree with the majority decision, thus, on a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 27.Kpt.45.810/2014/2 of Budapest Administrative and Labour Court and Administrative Decision No. 01000/27040-4/2014. ált. of Budapest Police Headquarters as reviewed by the above court order. The reason for my support is that assembly is a fundamental right guaranteed by the Fundamental Law, the actual exercise of which must be promoted for as long as possible within the framework of the Fundamental Law and the legislation. The police are therefore acting in a right manner by trying to allow the event organiser to change the original plans so that the event can be held. In the present case, this conciliation was not carried out and there is no reasonable reason to assume that the conciliation would certainly have failed, for this reason, but only for this reason, the decisions were indeed unconstitutional by conflict with the Fundamental Law.

[107] In my view, however, the Reasoning to the Decision could have pointed out that the holding of events in the vicinity of the court buildings deserve higher than average, and that the gatherings relating to the functioning of the courts deserve quite exceptional attention.

[108] Section 8 (1) of the Right of Assembly Act allows the event to be prohibited in the event of a serious jeopardy to the smooth functioning of the courts. What is meant by "smooth operation" and "serious jeopardy" needs to be interpreted in detail. In my opinion, the task of the Constitutional Court is primarily to determine the aspects that the authorities should have taken into account or should take into account in the future by interpreting the provisions of the Fundamental Law relating to courts.

[109] In the case under review, both the authority and the court have rightly recognised that the assessment of the existence of a serious jeopardy to the smooth functioning of the courts must take into account, almost exclusively, the opinion of one of the heads of the court concerned. In addition, in the specific case, it had to be taken into account

that the event would disturb not only the Curia, but also Budapest Regional Court of Appeal operating in the same building as well as Central District Court of Pest and the nearby Budapest High Court in the opposite building. The assessment of the circumstances of the specific case can be generalised in two respects.

[110] On the one hand, it cannot be ignored that the purpose of the notified demonstration was to put pressure on the courts, which cannot be accepted from a constitutional point of view under any circumstances. In contrast to institutions of political power, in the case of the courts, independence and impartiality are a requirement originating in the Fundamental Law. The National Assembly, the Government, governmental and local government institutions are key players in the democratic exercise of power. As such, on the one hand, they gain their mandate as a result of the exercise of national sovereignty, and on the other hand, influencing their activities, sometimes through a referendum, sometimes through national consultation, ultimately through criticism, individual or community expression, is a basic constitutional requirement. In the case of the courts, however, pressure is not conceivable within a constitutional framework. This is especially true if an event does not even hide that it intends to influence the decision of a case before a court.

[111] On the other hand, it should be borne in mind that the impartiality and independence of the judiciary is not a privilege of some kind, but in keeping with the wording of Article XXVIII (1) of the Fundamental Law, a fundamental right of the parties before the courts. Keeping assemblies away from the courts is therefore not simply intended to ensure the peace of mind of the institutions or judges as practitioners State powers. On the contrary, it protects the parties who have recourse to the judiciary, to whom it is the only way to ensure the fundamental right to a fair trial. In the courtrooms, not only cases but fates are decided, so the parties can expect their case to be heard in a calm environment.

[112] In my view, therefore, in the context of the courts, a very small, silent assembly can be held during the trial period only under very narrow conditions, and assemblies that do not comply with them should be prohibited. This obviously restricts the exercise of the fundamental right to assembly, but not arbitrarily, but in order to guarantee the fundamental right of the litigants to a fair trial which may not be otherwise secured in any other way.

[113] Budapest, 12 October 2015

Dr. András Varga Zs. sgd.,
Justice

[114] I second the above concurring opinion.

Budapest, 12 October 2015

Dr. Péter Szalay sgd.,
Justice

Dissenting opinion by *dr. Ágnes Czine*:

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

[116] 1. The right to assembly is an important guarantee of participation in democratic will formation. It adds to its importance that it also provides public expression for those who do not have access to its other options. I therefore consider it necessary to underscore that I agree with the decision in so far as it emphasises the distinct role of the right to assembly, which also follows from the case-law of the Constitutional Court and the Human Rights Court.

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

[118] In the present case, in the light of the above considerations, the Constitutional Court therefore had to judge whether the police had taken into account the decision prohibiting the event or the court's rejection of the application for review against the decision, and, within the limits of the room for interpretation allowed by the underlying legislation, whether the above constitutional requirements could have been taken into account.

[119] 2. According to the majority opinion, the position of the court formed in connection with the constitutional purpose of the conciliation procedure is based on a misinterpretation, and in part this justifies the unconstitutionality by conflict with the

Fundamental Law of the decision on the misinterpretation of the law. In addition, the court did not attach any importance to the failure to conduct a conciliation procedure in reviewing the police prohibition decision and, accordingly, did not examine it "because it did not recognise the guarantee nature of the conciliation procedure affecting the exercise of a fundamental right".

[120] I do not agree with these findings in the Reasoning for the Decision. The court's decision in the context of the conciliation procedure is based on the view that neither the Right of Assembly Act nor the Decree contain a "mandatory legal requirement" for the police to conduct a conciliation procedure. In the court's view, it cannot be inferred from Section 4 (5) of the Decree that the conciliation "provides the applicant with an opportunity to explain the reasons for holding the event at the venue, time and manner notified". The court also pointed out that "moreover, the purpose of the conciliation is not, under any circumstances, to convince the applicant that a ground for prohibition does not exist against the position of the police". The provision of the Decree relied on merely states that the public order body "[s]hall draw the organiser's attention to a circumstance which may justify a possible ban and inform it that this can be remedied by changing the venue or date".

[121] In my view, what the court has explained reflects the rules in force. Pursuant to the provision of the Decree referred to, the public policy body must indeed draw the organizer's attention to the circumstances justifying a possible prohibition only if the prohibition can be remedied by changing the venue and date. Behind this is the legislature's intention that the prohibition does not generally restrict the exercise of the right of assembly or the holding of a planned event, but "is expressly intended only to prevent the event from being held there or at that time". However, the event may be held at the venue or time other than what has been specified in the notification. (Justification attached to Section 8 of the Right of Assembly Act)

[122] However, in the present case, the petitioner ruled out the possibility that the event could be held at the venue or time other than what was indicated in the notification. In its order, the court expressly emphasised that the petitioner himself had stated: "Both the venue and the date of the material event are of the utmost importance, »this event would be meaningless in practice if held elsewhere and/or at other times«. In the court's view, the petitioner's reference to the lack of conciliation was therefore incomprehensible, "since the purpose of conciliation under the Decree is precisely to draw the organiser's attention to the circumstance justifying a possible ban and to inform the organiser that by changing venue or date, such prohibition is" preventable.

[123] In view of the above, in my view, it cannot be concluded that the court did not take into account the guarantee nature of the conciliation procedure, which protects fundamental rights. Within the framework of the current legislation, the court, taking into account the submissions of the petitioner, gave a reason why it did not see the possibility to conduct the conciliation procedure.

[124] In the given case, therefore, in my opinion, unconstitutionality by conflict with the Fundamental Law of the decisions of the law enforcement bodies should not have been established, but the constitutionality of the applied legal provisions should have been reviewed (Section 28 of the Constitutional Court Act). In this context, whether the regulation of the Decree on the decision-making power of the public order body adequately ensures the constitutional guarantees of the exercise of the fundamental right to assembly. It should also have been examined whether, on the basis of the regulations in force, the police can judge on the basis of which criteria whether the holding of a given event results in a "serious disruption" of the functioning of the court concerned.

[125] 3. In the opinion of the trial court, the police would have acted in an unlawful manner if, in addition to the provisions of Section 8 (1) of the Right of Assembly Act, other aspects had been assessed. Consequently, it was sufficient for the police to obtain the Curia's resolution and they could not have attached importance to "the event being a political expression of opinion in a case in which a decision, a uniformity decision, is expected which, by its nature, concerns a wide range of citizens".

[126] In my view, this position of the Court necessarily follows from the legislation in force, but at the same time highlights the lack of underlying legislation. Under the current legislation, the possibility of investigation by the police and the court is limited for several reasons.

[127] This is partly due to the fact that the official procedure related to the exercise of the right to assembly requires administration as soon as possible. This is the reason why the law sets an extremely short deadline for the police in case they make a decision prohibiting the holding of an event. In order to review this decision, it provides for a non-litigious court procedure in which the court, with the assistance of lay judges, decides within three days of receiving the request. In addition, there is no appeal against the court's decision, because if this is ensured, both the organiser and the police could appeal against the court's decision, "which could significantly delay the final decision" (Justification to Section 8 of the Right of Assembly Act).

[128] On the other hand, the underlying legislation does not clearly define the exact content of the conditions on which the prohibition is based. It is not clear when it can be established that the event will indeed result in a "serious disruption" of the functioning of the court. It necessarily follows that the police can base their decision only on the decision of the court whose functioning the event seeks to influence. It is difficult for the police to investigate the extent to which an event is aimed at disputing public affairs. In this context, to investigate that the court acts in an individual case or makes a normative decision, and the social impact of these. In order to assess the necessity and proportionality of restricting the right to assembly, the legislation should therefore set out more clearly the criteria by which the police can "review" the position of the requested body. In my view, the application of the law is not effectively aided by the Constitutional Court's guidance that "[w]ith regard to the assessment of »serious disruption« of the functioning of the courts, the police must carefully and impartially

assess the venue characteristics of the planned assembly, and concerning the gravity of the disturbance, without prejudice to the constitutional protection of the fundamental right to assembly it is sufficient to base a prohibition decision solely on the resolution of the recipient of the assembly, if the specific risk of serious disturbance to the functioning of the courts by a given assembly can be established beyond a reasonable doubt from the resolution itself, and the relevant considerations relating to the particular facts are set out in sufficient detail in the statement of reasons for the prohibition decision."

[129] The legislator should determine more specifically which bodies should be contacted by the police in the "information procedure" and the precise criteria to be taken into account when taking their decision. For example, in addition to the facts of the case, it cannot be ignored that the police should assess, in the case of the relevant legislation, also that the Curia did not act in an individual case, but rendered a uniformity decision affecting a large sections of society; therefore, the event was necessarily aimed at discussing public affairs. However, the court has, in my view, pointed out, on a correct interpretation, that, under the current legislation, these are conditions for holding an event which cannot be assessed by either the police or the court, especially if the police have obtained the statement of the court concerned in accordance with the law.

[130] 4. Based on the above, in my opinion, the Constitutional Court, by applying Section 46 (1) of the Constitutional Court Act, should have established *ex officio* a conflict with the Fundamental Law by omission of a legislative duty, and should have called on the legislator to perform its duty. In this context, the legislator should, by means of legislation [Article I (3) of the Fundamental Law], specify the process of the conciliation procedure, the framework of the decision-making power of the public order body, and ensure the possibility of substantive conciliation also in case if the existence of the ground for the prohibition in itself cannot be eliminated by changing the venue or date of the event.

Budapest, 12 October 2015

Dr. Ágnes Czine sgd.,
Justice

[131] I second the above dissenting opinion.

Budapest, 12 October 2015

Dr. Egon Dienes-Oehm sgd.,
Justice

Dissenting opinion by *dr. Béla Pokol*:

[132] I do not support the annulment of the judicial decision challenged in the petition; in my view, the petition should have been dismissed. In my view, the majority decision erred in its assessment of the assembly that arose here as an expression of political will. In fact, the issue in this case was not the question of the right of political assembly, but the pressure of one of the parties to a private lawsuit to obtain a favourable judicial decision from the position of the opposing private parties, the lending banks. Thus, on the basis of this distinction, the former Court Decisions which were formed in connection with the assemblies for the formation of political will fall from the outset here because they take the Constitutional Court's reasoning and situation definition in the wrong direction. In other words, I find the reasoning of the majority decision fundamentally flawed, and in my view, mass demonstrations for a favourable judicial ruling should generally be excluded from the category of political assembly. Thus, all the old Court Decision quotes that apply to them should be ignored here.

[133] However, the specific case also provided an opportunity to analyse the mass actions that were actually a political gathering during court hearings in order to influence the judgements to be handed down in the light of the provisions of the Fundamental Law. In this respect, I also disagree with the analysis and assessment of the majority decision, and in my opinion Article 26 (1) of the Fundamental Law required the Constitutional Court to restrict the holding of mass demonstrations in front of the court buildings during court hearings by requiring independence and non-influence of the judiciary. Since this restriction is left open by the general wording of Section 8 (1) of the Right of Assembly Act, I would have considered it necessary to formulate a constitutional requirement for the demonstration situation raised by the specific case with the following content: "The Constitutional Court finds that it is a constitutional requirement arising from Article 26 (1) of the Fundamental Law in applying Section 8 (1) of the Right of Assembly Act that in order to ensure the smooth functioning of the court, demonstrations in and around the court building are prohibited." This was the constitutional dilemma raised by the case, and in my view we should have responded narrowly to it, as opposed to the explanations of the majority decision, which dealt with the whole right of assembly and even its relationship to freedom of expression. While in fact the present case was not a political gathering at all.

[134] In summary, the contested decision should not have been annulled and, in addition to the dismissal, the above constitutional requirement should have been formulated in response to the question raised by the case in order for judicial judgement to be independent.

Budapest, 12 October 2015

Dr. Béla Pokol sgd.,
Justice