Decision 13/2016 (VII. 18.) AB

On a finding of unconstitutionality by non-conformity with the Fundamental Law by omission in violation of Article VI (1) of the Fundamental Law and dismissal of a constitutional complaint

In the matter of a constitutional complaint, with concurring reasoning by Justice *dr. Ágnes Czine* concurring, and dissenting opinions by Justices *dr. László Salamon and dr. István Stumpf*, the plenary session of the Constitutional Court delivered the following

decision:

1. The Constitutional Court, acting of its own motion, finds unconstitutionality by omission manifested by non-conformity with the Fundamental Law in breach of Article VI (1) of the Fundamental Law due to the legislator's failure to regulate the criteria for resolving the conflict in the event of a conflict between the fundamental right to privacy and the fundamental right to assembly and its procedural framework.

Therefore, the Constitutional Court hereby invites the National Assembly to meet its duty of legislation by 31 December 2016.

2. The Constitutional Court hereby dismisses the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No. 5.Kpk.46.622/2014/2 of Budapest Administrative and Labour Court.

The Constitutional shall order publication of its 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. 5.Kpk.46.622/2014/2 of Budapest Administrative and Labour Court. The petitioner contends that the impugned Order violates the right to peaceful assembly guaranteed in Article VIII (1) of the Fundamental Law. The petitioner requested the Constitutional

Court to establish the unconstitutionality by non-conformity with the Fundamental Law of Administrative Decision No. 01000/54162-4/2014.ált of Budapest Police Headquarters as revised by the impugned order, covering the first instance administrative decision and to annul said Administrative Decision.

[2] The petitioner notified a static gathering for 19 December 2014 at several other venues, such as: Budapest Districts V and VI Nyugati tér overpass, Budapest District XIII in front of Lehel út 70-72, Budapest District VI Oktogon, Budapest District V Erzsébet square, Budapest District II, Fullánk utca 8 - next to Markó utca 25., Laura út 26. and Cinege út 5. with the participation of 30-100 people, or using 20-50 cars, and between the above locations on a route that includes Váci út - Lehel tér - Lehel út - Hősök tere - Teréz körút - Alkotmány utca - Bajcsy-Zsilinszky út - Andrássy út - Margaret bridge - Margit körút - Törökvészi út - Fullánk utca - Széll Kálmán tér - Istenhegyi út - Béla király út - Kútvölgyi út - Cinege út etc., a processional gathering was to be held. Gatherings (static protests in front of the venues and public marches between the venues) would have taken place between 9 a.m. and 8 p.m. The petitioner indicated as the aim of the event to visit the "sites visited" during the year, to revive the means of exerting pressure; draw attention to the protracted nature of the solution to “SeVizahiteles” (a pun for foreign currency loans) looting, to laws that are, in their view, of a “bank rescue” rather than “debtor rescue” nature, as well as bank fraud; moreover, a further goal of the event was “to put pressure on decision-makers to ensure that compliance with the law takes precedence over the interests of the oligarchs”. The police issued a prohibition decision regarding the three locations highlighted above (Markó u. 25. and Laura út 26. and Cinege út 5.). This was preceded by a conciliation meeting with the organisers in accordance with Section 4 (5) of Decree 15/1990 (V. 14.) of the Ministry of the Interior, during which the organisers modified the programme for the day in a way that not three-quarters of an hour or a half-hour stops will be included in front of the above-mentioned venues, but they will only spend ten minutes there, they will walk as far as the venues in question, they will use manual loudspeakers and they also gave up on the purpose of “putting pressure”, by modifying it merely to draw attention.

[3] The police contacted the Curia (the Supreme Court in Hungary), referring to the Ombudsman's report OBH 5593/2013. In line with the position statement of the Vice-President of the Curia, the “case pending before the Curia” would run the risk of seriously disrupting the functioning of the court if the notified event were actually held. Following the conciliation procedure, Budapest Police Headquarters approached the Curia for a second time, and the Vice-President of the Curia maintained his previous statement. The police decision, based on a statement from the Vice-President of the Curia, held that the demonstration was of a nature to exert pressure and would therefore seriously disrupt the functioning of the court. In view of this, Budapest Police Headquarters 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").

[4] With regard to the assembly at Cinege út 5, the police decision based the prohibition on Section 2 (3) of the Right of Assembly Act ("The exercise of the right of assembly [...] shall not infringe on the rights and freedoms of others."). The police put forward several reasons in this regard. Thus, for example, the police argued that the right to family and private life would be violated if a gathering could be held in a suburban residential area, as the gatherers could see into the gardens, the residents could not evade the announcements made at the event, in addition, there is no state body relevant to the exercise of official authority in the area. The police referred to the "disturbance of everyday peace" and the fact that the gathering could induce fear in the children living in the area, the residents of the area should take a detour home from school and work, and also that the Counter Terrorism Centre ordered personal and facility security measures by Decision No. 30100-1325/8/2014. ált. in the area concerned on 30 October 2014. On the basis of the foregoing, the court ruled that "the imminent threat of invasion of privacy, the exercise of the right to free movement and the guarantee of the safety of protected persons combined justify the right of assembly being set aside as opposed to competing fundamental rights."

[5] Against the police prohibition decision, the petitioner lodged a request for review with Budapest Administrative and Labour Court, which dismissed such request. Concerning the protest in front of the Curia building, the court found that the police "subjected the respondent's notification to a thorough investigation" before making a decision prohibiting the holding of the event. The court found that "there is no doubt that the [police] based their decision on the information of the Vice-President of the Curia". The court then emphasised that "the Vice-President of the Curia has made it clear that holding the event could jeopardise the independence of the administration of justice, regardless of the peaceful or non-peaceful nature of the event [...] It should be noted that the applicant did not attach to his request for review any evidence contrary to the statement of the Vice-President of the Curia to refute it. [...] [the] respondent rightly accepted the statement obtained by the Vice-President of the Curia in the specific case as the basis for its decision, and the decision based on it was also considered lawful by the court."

[6] With regard to the protest at Laura út 26 and Cinege út 5, the court stated that "the right of assembly may, in justified cases, be limited to the extent necessary." Decision 75/2008 (V. 28.) AB (hereinafter referred to as the "2008 Court Decision") specifically mentioned the right of assembly as a fundamental right of communication; therefore, the court relied on the test set out in Decision 30/1992 (V. 26.) AB, formulated in defence of freedom of expression, in deciding the case. In selecting the free venue for the assembly, the court referred to the findings in

Decision 3/2013 (II. 14.) AB (hereinafter referred to as the "2013 Court Decision"), pursuant to which there are emblematic events from the point of view of political expression, and then added: "[H]owever, following this logic, it can be concluded that there are public grounds where the exercise of the right of assembly must, due to special circumstances, be relegated. [...] the applicant must also assess whether he has organized his event in a residential area, which is first and foremost a place of private and family life." The court also noted that "residents of the neighbourhood are generally not public figures, they do not have an increased obligation of tolerance." The court attached importance to the fact that this was a "repeated" event, which in its order it also described as "recurring" or "continuous". The court considered that "[t]he protection of privacy, the preservation of everyday peace, the protection of the fundamental rights and individual rights of the residential community may justify the restriction or even prohibition of repeated or continuous demonstrations possibly resulting in habitual residence." The court acknowledged that the inconvenience of exercising rights in itself is not a reason for restricting the right to assembly, "but [the] recurring or continuous exercise of a fundamental right specifically in the living environment, which interferes with the private sphere, is rightly so."

[7] With regard to the intimidating effect on children living or attending school in the area, the court considered that the petitioner should have furnished evidence on "how to protect the rights of non-participants by the police" and why encountering protests would be "part of the healthy moral development of children" and, as held by the court, the petitioner "did not substantiate his claim that teaching at that school would have ended by the time of the demonstration."

[8] The court also referred to the provisions of the 2013 Court Decision, "which requires the court to make an unconditional substantive assessment." In the context of the Counter Terrorism Centre measure, the Order stated that "the respondent had already informed the applicant during the consultation with the organisers, according to which the area affected by the measure" extends from which intersection to which area. In conclusion, the court concluded that "on the basis of Section 2 (3) of the Right of Assembly Act, invoked by the respondent as the legal basis for the prohibition in this respect, a peaceful demonstration (as it had been advanced so) may also be prohibited in the present case (the measure is necessary and proportionate), since less restrictive means do not ensure the enforcement of the rights and interests of others."

[9] 2. In his constitutional complaint, the petitioner referred to the provisions of the 2013 Court Decision, in which it was held that "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." Furthermore, "freedom of assembly includes the choice of venue for the assembly", as confirmed by the judgement of the European

Court of Human Rights (hereinafter referred to as the "Human Rights Court") in Sáska v. Hungary (58050/08, 8 November 2012), in which it was held that "[t]he right to freedom of assembly includes the right to choose [...] the date, venue and manner of assembly". The petitioner contends that the court failed to comply with its discretion in the 2013 Court Decision, which in Patyi v. Hungary (35127/08, 17 January 2012) was also called upon by the Human Rights Court to assess the existence of "relevant and sufficient grounds".

[10] In connection with the protest before the Curia, the petitioner complained that the court had found it lawful that the police had issued a prohibition decision on the basis of the position statement of the recipient of the event as the only circumstance, which he also considered to be a fundamental constitutional issue. The petitioner finds it problematic that, in the opinion of the Vice-President of the Curia, "the holding of the event could jeopardise the independence of the judiciary, regardless of the peaceful or non-peaceful nature of the event." The petitioner professed to be concerned that both the police and the court had accepted this interpretation of the law, which, moreover, was based solely on an abstract jeopardy, "but does not include any likelihood of this possibility occurring." The petitioner maintains that the standard of seriousness and at the same time the right to assembly is completely undermined, "[if] an event may be prohibited which does not disturb the operation of the Curia more than street noise or the noise of a thunderstorm". The petitioner takes the view that neither the police prohibition decision nor the court order is supported by factual grounds, they are based solely on the statement of the Vice-President of the Curia, and they do not assess at all that the petitioner significantly limited the time and manner of the planned event. The petitioner considers that the depletion of the standard of seriousness implies "that any demonstration of expression of opinion on the courts is unconstitutional from the outset." "How short, how soundless and how distant an event would I have to notify so that the Vice-President of the Curia [...] may no longer assess it as jeopardising the independence of the judiciary?" the petitioner asked. The petitioner also complained that the burden of proof had been reversed as read from the court decision. In his view, the burden of proof would have been on the police, since "[t]he exercise of this freedom does not require further proof, its restriction must be duly substantiated." The petitioner quoted Decision 7/2014 (III. 7.) AB and argued that the operation of the courts is a public matter and can therefore be freely disputed. In its view, the court failed to provide a compelling reason that would justify a serious jeopardy to the functioning, making the restriction of fundamental rights unnecessary in the present case. Finally, the petitioner also referred to the fact that the police took note of several other gatherings at this location, but the court ignored these similar cases, saying that "one should always look at the specific circumstances of the particular case", in contrast to Laura út and In the case of the Cinege út assemblies, the court took into account the circumstances of what the court thought were similar events.

[11] With regard to the protest on Laura út and Cinege út, in the petitioner's view, the court adopted a new ground for prohibition *contra legem*. According to the petitioner, the police and the court have swapped the grounds for prohibition and disbandment regulated in the Right of Assembly Act. "Violation of the rights and freedoms of others" is merely an abstract threat until the event begins, "just as the establishment of incitement against the community (Section 332 of the Criminal Code) presupposes, as a minimum, that a manifestation actually takes place". As long as only a "plan" for a notified meeting is available to the authority, it does not have sufficient information "to establish the likelihood of an infringement without prejudice." Even if it can be inferred from the notification that this is likely to occur, it is merely a "forecast the occurrence of which could fail for an unforeseeable variety of reasons", and that is true of the other grounds for disbandment. In the specific case, moreover, the court based the alleged violation of the rights of others on events other than those notified ("continuous" gatherings) or requested the petitioner to provide evidence against the police's unsubstantiated allegations.

[12] The petitioner also disputed that the court compared the event "measured in minutes" he had notified to "continuous", "habitual" events, and also challenged the court's interpretation of the "captive audience": "The »violation of the rights of others« in the Right of Assembly Act does not protect against the inconvenience of confronting a dissenting opinion, but from forcing one to listen to intimidating speech." Referring to other orders made by Budapest Administrative and Labour Court, the petitioner explained in connection with the Counter Terrorism Centre measure that "the area affected by the closure does not lose its public ground character under the Right of Assembly Act", but only its use is limited; therefore, the police shall consider the avenues of actually holding the event and consider the applicability of less restrictive means (e.g. screening bags at admission to the area).

II

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

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

[14] 2. The relevant provisions of the Right of Assembly Act are as follows:

"Section 2 (3) The exercise of the right of assembly shall not constitute a criminal offence or an incitement to commit a criminal offence, nor shall it infringe upon the rights and freedoms of others."

“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.”

"Section 14 (1) If the exercise of the right of assembly conflicts with the provisions of Section 2 (3), or the participants appear at the event by force of deadly weapons or otherwise armed, and if the event subject to notification is held despite a decision prohibiting such event, the police shall disband said event.”

“Section 15 For the purposes of this Act, “public ground" shall mean any area, road, street, square that can be used by everyone without restrictions; [...]”

III

[15] 1. Pursuant to Section 56 (1) of the Constitutional Court Act, the Constitutional Court first decides on the admission of the constitutional complaint.

[16] The legal representative of the petitioner received the court's order on 19 December 2014, while he sent his constitutional complaint to the review court on 16 February 2015, thus, lodging the constitutional complaint took place within the statutory period.

[17] 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 under Section 27 of the Constitutional Court Act as well as the court order requested for review, and sought a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of said court order. With regard to Article VIII (1) of the Fundamental Law, the petitioner provided detailed grounds for the violation of this right.

[18] 2. When deciding on admission, during the substantive review of the petition, the Constitutional Court assesses in particular the involvement under Sections 26 and 27 of the Constitutional Court Act, the exhaustion of the legal remedy, and the conditions under Sections 29 to 31. During the assessment of the substantive conditions of the admissibility of the petition, the Constitutional Court established the following.

[19] 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 violated a right guaranteed in the Fundamental Law. In the present proceedings, the petitioner is directly concerned as

he was involved as an applicant in the judicial review proceedings as contained in the constitutional complaint. The petitioner lodged a constitutional complaint against a court order in a review proceedings, provided for in Section 9 (1) of the Right of Assembly Act, concerning an administrative decision, against which there is no further legal remedy.

[20] Pursuant to Section 29 of the Constitutional Court Act, the Constitutional Court shall admit constitutional complaints if 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 condition in itself establishes the substantive proceedings of the Constitutional Court. In this context, 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.

[21] The organiser's willingness to cooperate, which in the present case has not been assessed by either the police or the court, should be examined as a fundamental constitutional issue affecting the exercise of a fundamental right. In view of the fact that the cases of prohibition of an assembly are listed in Section 8 (1) of the Right of Assembly Act, the case gives rise to whether the police prohibition decision and the order adopted in the review procedure confirming such decision unlawfully extended the preliminary prohibitive grounds on assemblies.

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

IV

[23] The petition is party well-founded.

[24] 1. With regard to the content of the fundamental right to assembly regulated by the Constitution and the Fundamental Law, the Constitutional Court held in the 2013 Court Decision: “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]) {Affirmed in Decision 30/2015 (X. 15.) AB, Reasoning [24], hereinafter referred to as the "2015 Court Decision"}

[25] In the 2015 Court Decision, the Constitutional Court, referring to its previous decisions, emphasised the outstanding communication function of the right of assembly in the discussion of public affairs, which, in addition to the special fundamental right to freedom of expression, can also be interpreted as a form of direct democracy. At the same time, the Constitutional Court underscored that in accordance with the provisions of Decision 30/1992 (V. 26.) AB (ABH 1992, 167, 171) and Article I (3) of the Fundamental Law formulated on the basis thereof, the privileged nature of the right of assembly does not mean that it is an unrestricted fundamental right. Recalling the wording of Decision 30/1992 (V. 26.) AB, it can be stated that the right to peaceful assembly has a prominent role in the system of fundamental rights in a democratic state under the rule of law. Although this does not mean that this right is unrestricted, it does mean that the right to peaceful assembly must in fact be set aside against very few rights, and its restriction is strictly limited by the provisions of the international conventions adopted by Hungary.

[26] In this context, the Constitutional Court ruled in Decision 3/2015 (II. 2.) AB 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]). (Reaffirmed in the 2015 Court Decision, Reasoning [54])

[27] In the 2015 Court Decision, the Constitutional Court found that among the limitations of the right of assembly "the most serious [one] 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." (2015 Court Decision, Reasoning [30])

[28] The Right of Assembly Act mentions two cases of prohibition in an exhaustive manner, on the one hand, if the holding of the event subject to notification would seriously jeopardise the smooth functioning of the representative bodies of the people or that of courts, or on the other hand, if traffic cannot be secured on another route. In connection with the two prohibition cases specifically 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]} In connection with the grounds for prohibition, the Constitutional Court imposed 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. 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." (2015 Court Decision, Reasoning [34])

[29] 2. The Constitutional Court in the 2015 Court Decision, in connection with the announcement of assemblies and the occurrence of grounds for prohibition, concluded that the police could not apply such grounds in a mechanical manner. It is necessary to carry out the conciliation procedure provided for in the Decree and to give separate reasons for the use of the "standard of seriousness" in the Right of Assembly Act in the case of disturbance. The reason for this is that "[d]uring 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." (2015 Court Decision, Reasoning [51]) The Constitutional Court pointed out that "[i]n 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." (2015 Court Decision, Reasoning [52]) All of this places the responsibility on the law enforcer to show in its decision that he has considered the issues raised by the compromise solution and to substantiate it factually if it still sees the applicability of the grounds for prohibition. In addition to trying to find a compromise during the conciliation procedure, the police should also draw the organiser's attention to the fact that the event can still be held at (public ground) venues not affected by the grounds for prohibition.

[30] 3. The Constitutional Court has previously 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]}

[31] In the present case, the petitioner wished to exercise his right of assembly before the Curia building, between 1 p.m. and 1:45 p.m., as set out in the notification. The law enforcement authority contacted the Curia to be informed as to whether the notified

assembly would seriously disrupt the functioning of the court, and the Vice-President of the Curia responded in the affirmative to the police question. The police then conducted a conciliation procedure and signalled the organiser of the assembly that a ground for the ban had arisen, who therefore amended the content of his notification. To keep the event going, the organiser changed the purpose of the event, shortened its duration to ten minutes, changed it to a march, and wanted to use manual sound system for public address.

[32] The police should then have considered the justification for the ban on the notified assembly on the basis of the information provided and the facts established in the context of the case. Instead of considering the justification for the ground for the ban, the police approached the Vice-President of the Curia for the second time, who maintained his previous position, arguing that the assembly was unconstitutional because it violated Article 26 (1) of the Fundamental Law.

[33] The Constitutional Court found in the case under review that the trial court did not take into account that by the above procedure the police essentially vacated their own discretion and decision-making power and rendered the guarantee significance of the conciliation procedure from the point of view of fundamental rights protection a mere formality. In its present decision, the Constitutional Court also recalls that the conciliation procedure is suitable for removing any legal impediment that may arise in connection with the notification, which prevents the holding of the notified event, and, if effective, for paving the way for the exercise of the fundamental right to assembly. The Constitutional Court emphasises, however, that in the context of a constitutional complaint procedure there is no possibility to reconsider the evidence: whether the circumstances of the case justify a "serious jeopardy" to the functioning of the courts, must be judged on a case-by-case basis by the police or the court during the review and, accordingly, there is an increased duty to state reasons for the application of the ground for prohibition.

[34] 4. With regard to the protest in front of 26 Laura út and 5 Cinege út, the Constitutional Court stresses that the exercise of the right of assembly may also affect the rights of others enshrined in the Fundamental Law. In this context, the Constitutional Court points out that in the regulatory system of the Right of Assembly Act "violation of the rights of others" was not included among the preliminary grounds for prohibition of assembly, but in Section 2 (3) of the Right of Assembly Act, which is a ground for dissolution pursuant to Section 14 (1) of the Right of Assembly Act. This taxonomic interpretation is also supported by the grammatical interpretation, since the "exercise of assembly" in Section 2 (3) of the Right of Assembly Act applies to assemblies that have commenced. In the context of prohibition and dissolution as *ultima ratio* restrictions on the right of assembly, the Constitutional Court has already pointed out in the 2015 Court Decision that "a reasonably reactive dissolution for

violations of law during the event cannot be automatically converted to a preliminary ground for prohibition." (2015 Court Decision, Reasoning [30]) This interpretation is supported by the reasoning for Decision 55/2001 (XI. 29.) AB (ABH 2001, 442, 460-461), and also the report of the Commissioner for Fundamental Rights No. OBH 4435/2006 (*see* p. 5).

[35] In the present case, the police clearly indicated Section 2 (3) of the Right of Assembly Act as the legal basis for the prohibition. The court reviewing the legal basis indicated by the police justified its decision on the grounds that "on the basis of what is prescribed in Section 2 (3) of the Right of Assembly Act, a peaceful demonstration (as it had been advanced so) may also be prohibited". However, it is questionable how the rights of others can be violated in the case of a peaceful demonstration as it had been advanced so.

[36] The temporal characteristics of the gatherings are also of great importance. In the present case, however, it must be stated that the court did not take into account the temporal self-limitation of the organiser of the gathering in relation to the temporary nature of the gathering. On the one hand, in its reasoning, the court did not assess the duration of the meeting at all, nor its reduced duration as a result of the conciliation procedure, on the other hand, its reasoning gives the impression that it did not consider the specific circumstances of the particular case: in the context of the notified events, the court's reasoning referred to the problems of "continuous", "habitual" and "recurring" events (such as the "setting up of mobile toilets"), which are irrelevant in the present case.

[37] The Constitutional Court recalls that under Article I (3) of the Fundamental Law, the legislator is entitled to determine the ground for prohibition related to the right to peaceful assembly as a fundamental right in accordance with the criteria of necessity and proportionality, which are the current legal provisions, which are contained in an exhaustive manner in Section 8 (1) of the Right of Assembly Act.

[38] 5. However, the Constitutional Court also found that in the current regulatory environment, law enforcers are left without any means in the event of a violation of fundamental rights or constitutional values that did not fall within the scope of the grounds for prohibition highlighted in Section 8 (1) of the Right of Assembly Act. However, official and judicial application of the law must also result in assessing, comparing and evaluating the relationship and conflict of fundamental rights in a specific situation.

[39] On the basis of the foregoing, the Constitutional Court found that both the police and the court invoked Section 2 (3) of the Right of Assembly Act as a ground for prohibition because the law enforcers recognised a conflict of fundamental rights in the case before them. As this is not an individual case (*cf*. Case IV/609/2015), the

Constitutional Court considered that it was not sufficient in itself to remind the trial court that the grounds for prohibition were regulated in an Act of Parliament by the legislator in Section 8 (1) of the Right of Assembly Act in accordance with the requirements of Article I (3) of the Fundamental Law and Hungary's international obligations. However, given that in the present case the petitioner ultimately had the opportunity to express his views at the other sites of the dynamic procession; therefore, the Constitutional Court has found that, overall, the petitioner's right to peaceful assembly has not been disproportionately violated; therefore, the constitutional complaint filed for a finding of unconstitutionality by conflict with the Fundamental Law of the specific judicial order was accordingly dismissed by the Constitutional Court.

[40] 6.1. Nevertheless, based on the criteria outlined in the Constitutional Court decision, the Constitutional Court sets out the following guidelines for courts dealing with future assembly disputes.

[41] In the present case, the police found that, in view of the characteristics of the public ground, the exercise of the assembly raised the issue of the protection of the fundamental right to privacy.

[42] "In its Decision 32/2013 (XI. 22.) AB, the Constitutional Court interpreted the right to privacy and its relation to the right to human dignity. It found that Article VI (1) of the Fundamental Law, in contrast to Article 59 (1) of the old Constitution, comprehensively protects privacy: the individual's private and family life, home, contacts and the good standing of reputation. With regard to the essence of privacy, this Court still considered the general statement formulated in the previous practice of the Constitutional Court, which is the essence of the concept of private life, to be sustainable, according to which the essential conceptual element of privacy is that, others may not invade upon or gain insight into it against the wishes of the affected person [Decision 36/2005 (X. 5.) AB, ABH 2005, 390, 400]. The Constitutional Court pointed out that the link between the right to privacy guaranteed by Article VI (1) of the Fundamental Law and the right to human dignity guaranteed by Article II of the Fundamental Law is particularly close. Article II of the Fundamental Law establishes the protection of the inviolable area of the transformation of privacy, which is completely excluded from any State intervention, as it is the basis of human dignity. However, according to the Fundamental Law, the protection of privacy is not limited to the internal or intimate sphere, which is also protected by Article II of the Fundamental Law, but also to the wider private sphere (contacts) and the spatial sphere in which private and family life unfolds (in the home). [...] (Reasoning [82] to [84])" {Decision 17/2014 (V. 30.) AB, Reasoning [29]} In Decision 11/2014 (IV. 4.) AB, the Constitutional Court also explained that respect for private and family life includes "the traditional fundamental right to the inviolability of the private home, which is specifically mentioned by this name in the Constitution, as the private home is the

scene of private life." (Reasoning [55]) In view of the above, it can be stated as a constitutional law issues of fundamental importance whether the distant connection of the exercise of the fundamental right to assembly, which does not affect the intimate sphere, with the fundamental right to privacy can serve as a basis for any prior prohibition of assembly.

[43] 6.2. The issue of peace of mind at home is also under special consideration in the United States. The U.S. Supreme Court also addressed the issue in Carey v. Brown [447 U.S. 455 (1980)] and Frisby v. Schultz [487 U.S. 474 (1988)]. In addition to the fact that, similarly to the Hungarian regulations, the U.S. Supreme Court came to the view that public roads and sidewalks are public ground, even in residential areas, and made a distinction between marches and static, venue-based events, especially with regard to the issue of the captive audience manifested in their homes. The U.S. Supreme Court considers that the tranquility of the home ("the last citadel of the tired") is the space where people can retreat from the hustle and bustle of everyday life, and is certainly a value of the highest order. The fact that a captive audience can occur almost anywhere on public ground does not mean that it must be accepted everywhere: while on public ground it is usually possible to avoid unwanted gatherings, the home is a special place in this respect, which the State must provide legal protection for.

[44] However, this should not mean that peaceful and temporary gatherings can be restricted for non-compelling reasons. Accordingly, in the case of Patyi and Others v. Hungary, the Human Rights Court did not accept that events organised in front of the Prime Minister's home were banned by the police on the grounds that "the sidewalk was not wide enough" for twenty demonstrators or "on 1 November, that is, on All Hallows' Day, heavier traffic is to be expected" [ECtHR, Patyi and Others v. Hungary (5529/05); 7 October 2008, paragraph 12]. In the same case, another twenty-minute gathering of twenty people was banned by the police, among other things, on account of a regular bus service in the street and on the grounds that "many people travel to the ski resorts around Budapest via that street" [paragraph 15].

[45] 6.3. The Constitutional Court found that the Right of Assembly Act does not apply differentiated regulation to the method of assembly or the place of assembly, but provides for a uniform "event" and uses the monolithic concept of "public ground".

[46] In connection with the place of assembly, the Constitutional Court has already stated that "[f]or the purposes of the Right of Assembly Act, public ground shall mean any area, road, street, square that can be used by everyone without restriction [Section 15 (a) of the Right of Assembly Act]. As a general rule, therefore, any gathering may be organised in an area open to the public without restriction. In line with Constitutional court precedent, »unlimited access for everyone means that both the participants of the assembly, and everyone else who does not participate therein

should have equal access to the public ground«. [Decision 55/2001 (XI. 29.) AB, ABH 2001, 442, 458.] (2013 Court Decision, Reasoning [48]) "Given 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." (2013 Court Decision, Reasoning [45]) This requirement must also be met by personnel and facilities measures ordered by the police. "This finding formed the basis for the judgement of the European Court of Human Rights in Patyi v. Hungary (35127/08, 17 January 2012) and Szerdahelyi v. Hungary (30385/07, 17 January 2012) in ruling that: Hungary violated the complainants' right of assembly by declaring Kossuth Square an illegal security operation area to make it impossible to hold the demonstration notified by the complainants for March 2007." (2013 Court Decision, Reasoning [51]) In this context, in the 2013 Court Decision, the Constitutional Court also confirmed that "[w]here it is clear that the underlying purpose of regulating the use of public ground in a given way is to restrict the right of assembly and to amend the conditions of use of public ground is merely a means of restricting the right of assembly, it can also make unconstitutional rules that are not in themselves relevant to fundamental rights". [Decision 4/2007 (II. 13.) AB, ABH 2007, 911.] (2013 Court Decision, Reasoning [62])

[47] In summary, the 2013 Court Decision found that "all events held in public areas and in privately owned areas that are freely accessible to the public fall within the scope of the right of assembly, but pursuant to Section 6 of the Right of Assembly Act, only the organisation of an event held in a public area must be reported to the police station competent for the place of the event. Pursuant to Section 8 (1) of the Right of Assembly Act, only in the case of the latter, the »event subject to notification«, does the police have the possibility that if it seriously jeopardised the smooth operation of representative bodies or courts, or if transportation could not be provided on another route, they may prohibit the event from being held at the designated place or date. The obligation to notify in the case of an event to be held on public ground is justified by the need for the authorities to be able to ensure that the gathering be held." (2013 Court Decision, Reasoning [44])

[48] 6.4. Section 46 (1) of the Constitutional Court Act authorises the Constitutional Court, in its proceedings conducted in the exercise of its, to declare an omission on the part of the law-maker that result in violating the Fundamental Law in the course of its proceedings, and to call upon the organ committing the omission to perform its legislative duty by setting a time limit. Pursuant to Subsection (2) (c) of the same

provision, it is considered an omission of a legislative duty if the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete.

[49] Pursuant to Article 8 (1) of the former Constitution, the protection of fundamental rights is the primary obligation of the State under Article I (1) of the Fundamental Law. The Constitutional Court has already pointed out in the 2008 Court Decision that "primarily, it is the obligation of the legislation to assess to what extent it is necessary to amend or modify the provisions of the Right of Assembly Act for the purpose of preventing misuse and mitigation of difficulties in applying the law." In line with the 2008 Court Decision, all this "requires the National Assembly and the Government, responsible for the preparation of draft laws, to monitor the realisation of the fundamental right in the practice of those applying the law and to take the necessary steps for the amendment of the Act. Thus, the State's obligation to safeguard fundamental rights is not ended by the adoption of the individual Acts, but it requires a continuous impact assessment." (2008 Court Decision, ABH 2008, 651, 673.)

[50] However, under Article I (1) of the Fundamental Law, the State is not merely obliged to protect the person exercising a fundamental right from State interference by appropriate means. In the case of the right of assembly in particular, the State must also fulfil its obligation of protection against the intervention of third parties (*see* counter-demonstrations). In these cases, where two entitled parties of the same fundamental right are opposed to each other, with the State acting as a mediator in the conflict between the two.

[51] Similar competing fundamental rights positions are encountered in the exercise of peaceful assembly with respect to persons present at the venue for the assembly (e.g. freedom of movement, right to privacy), in which case the conflict must be resolved by applying appropriate fundamental rights standards.

[52] In this context, the Constitutional Court has found that there is currently no adequate regulation in the legal system defining the criteria and procedural framework (detailed rules for the conciliation procedure) for the police for resolving the conflict in the event of a conflict between the fundamental right to peaceful assembly and other fundamental rights. The Constitutional Court considers that the primary reason for the restrictive application of fundamental rights in the present case is the lack of statutory guarantee regulation, which does not allow for the possibility of applying restrictions or conditions less severe than the prohibition of the event. The Constitutional Court takes the view that a conflict of fundamental rights arising in the exercise of the right of assembly may, in exceptional cases, lead to even the most severe restriction or prohibition of assembly as a result of proper consideration, but the mere fact of conflict does not provide sufficient grounds for prohibition. In the event of a conflict of fundamental rights outside the scope of the prohibitions, it must also be possible for

the police to consult with the organisers of the assemblies in order to find a balance that allows the assembly to be held but also the competing rights enshrined in the Fundamental Law to be enforced. In this regard, the authorities applying the law should be given the opportunity to consider the circumstances of the assembly, but this should not lead to the impossibility of exercising a fundamental right (*see* paragraph 99 of the OSCE Office for Democratic Institutions and Human Rights Guidelines on Freedom of Peaceful Assembly).

[53] In the 2013 Court Decision, the Constitutional Court found that certain public ground venues have an emblematic function (*cf*. Reasoning [67]). In contrast, it can be argued that some such public ground venues are typically residential and recreational locations. In that regard, it is irrelevant whether one of the venues of the planned event, as is clear from the Court's reasoning, is inhabited by a public figure, since they are equally entitled to domestic tranquility. Moreover, the principle of fair balance can be reconciled only in exceptional cases if those wishing to assemble wish to express their views in groups primarily by designating the vicinity of the public figure's private residence as the exclusive venue for the assembly. Nor does the tolerance expected of a democratic society give rise to pressure on the actors of democratic opinion-forming (public figures and their non-public figure roommates, neighbours) with a disproportionate violation of their fundamental right to privacy. This does not mean that such venues lose their public ground character, nor does it generally mean that a demonstration organised on such public ground necessarily affects the intrinsic nature of the fundamental right to privacy of those exposed to the event, on the other hand, however, residents may legitimately claim the protection of the tranquility of the home and the disturbance of that tranquility only of a highly temporary nature and not disproportionately affecting their right to privacy. Depending on the circumstances, a gathering may be held here, but under stricter technical conditions: the purpose, number of participants, duration, frequency, dynamic or static nature of the event and the time of day at which participants take part, the manner of sound system in which they wish to convey their message to the recipient of the assembly. In view of the message, all this continues to be a communication in public, protected by the right to peaceful assembly; however, it may be subject to a technical restriction in order to protect another right guaranteed by the Fundamental Law, such as the right to privacy in Article VI (1).

[54] However, as the choice of venue, time and manner of assembly is closely linked to the purpose of the assembly and the message communicated during the assembly, the police should exercise the utmost care when objecting to these features of the event during the conciliation. In the present case, the venue for the assembly is the relevant of the characteristics listed. The Constitutional Court recalls that "[i]t is the individual's freedom of assembly to organise and participate in assembly. An essential element of

organising a gathering (sometimes part of an expression of opinion in a particular public affair) is choosing for what purpose the event will take place where, when, and under what circumstances. Freedom of assembly also extends to the choice of the place of assembly. [...] This is because the objective one wishes to achieve with the gathering can be closely related to the chosen location." (2013 Court Decision, Reasoning [41]) In this context, the OSCE Office for Democratic Institutions and Human Rights' Guidelines on Freedom of Peaceful Assembly state that if a state restricts freedom of assembly, it should do so with the least possible interference, such as not taking restrictions that would fundamentally affect the nature of the event, such as directing a parade to the outskirts of the city. [OSCE Office for Democratic Institutions and Human Rights (ODIHR): Guidelines on Freedom of Peaceful Assembly, point 2.4.] In addition, "[t]he 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." {OSCE Office for Democratic Institutions and Human Rights (ODIHR): Guidelines on Freedom of Peaceful Assembly, point 80, *cf.* 2015 Court Decision, Reasoning [52]}.

[55] The Constitutional Court maintains that in such competing cases of fundamental rights, it is the responsibility of the legislator to provide adequate prompts for guidance to the authorities applying the law in order to effectively fulfil their obligation of protection under Article I (1) of the Fundamental Law. The definition of protection is therefore the task of the legislator, its concretisation is the task of the authorities applying the law. In fulfilling the obligation of protection, both the legislature and the authorities applying the law must take into account that the essential content of any fundamental right cannot be restricted, on the other hand they must strive to ensure that competing fundamental rights positions are fairly balanced in accordance with the principle of proportionality (fair balance, *schonender Ausgleich*). The Constitutional Court continues to exercise control over such matters.

[56] On the basis of the above, in view of the tranquility of the home, which is part of the right to privacy, and emphasising the presumption of peaceful assembly, the Constitutional Court, acting of its own motion, held that there is an unconstitutionality by omission manifested by non-conformity with the Fundamental Law in breach of Article I (1) and Article VI (1) of the Fundamental Law due to the legislator's failure to regulate the criteria and the procedural framework for resolving the conflict in the event of a conflict between the fundamental right to privacy and the right to assembly. Therefore, the Constitutional Court hereby invites the National Assembly to meet its duty of legislation by 31 December 2016.

[57] 7. 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 July 2016

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

Dr. István Balsai sgd.,
Justice

Dr. Ágnes Czine sgd.,
Justice

Dr. Egon Dienes-Oehm sgd.,
Justice

Dr. Béla Pokol sgd.,
Justice

Dr. László Salamon sgd.,
Justice

Dr. István Stumpf sgd.,
Justice

Dr. Péter Szalay sgd.,
Justice

Dr. Mária Szívós sgd.,
Justice

Dr. András Varga Zs. sgd.,
Justice

Concurring reasoning by *dr. Ágnes Czine*:

[58] I agree with the operative part of the decision and with the main reasons for it, but I would have considered it necessary to emphasise the following in the explanatory memorandum to point 1 of the operative part.

[59] 1. The right of assembly has a key role to play in a democratic society because it also provides public expression for those who do not have access to its other opportunities. Through the right of assembly, the "tensions inherent in society" [Decision 4/2007 (II. 13.) AB, ABH 2007, 911, 914] become more widespread, enabling them to be dealt with more effectively. I therefore agree with the Constitutional Court's earlier finding that "[t]he freedom of peaceful assembly is a precondition and a fundamental value of a democratic society." (ABH 2007, 911, 914.)

[60] The right of assembly is a fundamental right of communication [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171.]. The significance of this lies in the fact that "the consistent practice of the Constitutional Court puts »fundamental rights of communication« above other rights in that »laws restricting freedom of opinion

must be interpreted restrictively«" [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 75.]. The reason for this is that the scope of these freedoms requires special protection, especially when it concerns public affairs or the exercise of official authority, the activities of persons performing public duties or taking part in public life. The Constitutional Court also pointed out that "[o]pen discussion of public affairs is a prerequisite for the very existence and development of a democratic society which presupposes the expression of different political views and opinions and criticism of the operation of public authorities. As the experience of societies with democratic traditions shows, in these debates governments and officials are attacked from time to time by wild, bitter and possibly unjust accusations, and facts are revealed to the public which are capable of offending the honour of public figures." [Decision 36/1994 (III. 7.) AB, ABH 1994, 219, 228.]

[61] However, the right of assembly is far from being unrestricted, despite its paramount importance. However, the set of criteria of the restriction contain several specific criteria in relation to this fundamental right, which, in my opinion, the legislator must also take into account when amending the Right of Assembly Act.

[62] In line with the case law of the Constitutional Court, the State can generally resort to a means 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." [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 competences, it also formulates a constitutional requirement for law enforcers and the courts." However, the authorities applying the law is 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]}. Consequently, when amending the Right of Assembly Act, the legislator must create the framework of the "margin of interpretation" for law enforcers, thus providing an opportunity to have a legal background for restricting the right of assembly and a clear system of criteria for assessing the statutory grounds for prohibition.

[63] In my opinion, the following cannot be disregarded in the course of legislation: according to the above-mentioned case law of the Constitutional Court [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 75.], laws restricting the right of assembly must be interpreted restrictively. In addition, the specific aspect that arises in connection with the restriction of the right of assembly is that it affects not only those

who wish to exercise their right of assembly, but also affects society as a whole. In view of this, the Constitutional Court emphasised that "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." (ABH 2007, 911, 914.)

[64] 2. The aspects referred to above also appear in the practice of the Human Rights Court. Under Article 11 of the European Convention of Human Rights, "[e]veryone has the right to freedom of peaceful assembly […]". "No restrictions shall be placed" on the exercise of this right "other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. […]"

[65] In the context of freedom of assembly, the Human Rights Court pointed out that "one of the purposes of freedom of assembly is to provide a space for public debate and public expression of protest" {Ezelin v. France (11800/85), 26 April 1991, paragraph 37}. It follows that "[t]he protection of freedom of opinion and expression is one of the purposes of the freedom […] of assembly protected under Article 11". {Freedom and Democracy Party (ÖZDEP) v. Turkey [GC] (23885/94), 8 December 1999, paragraph 37} The right of assembly includes the right to choose the date, place and manner of the assembly in accordance with the purpose of the assembly {Sáska v. Hungary (58050/08), 27 November 2012, paragraph 21}

[66] In the context of the restriction of the right of assembly, the Human Rights Court has emphasized, subject to Article 11, point 2, of the Convention, that it can only have a place for reasons "necessary in a democratic society". This presupposes that "the intervention meets an »overriding social need« and, in particular, that it is proportionate to the objective pursued" {Patyi and Others v. Hungary (5529/05), 7 October 2008, paragraph 38}.

[67] In its practice, the Human Rights Court has also assessed when a statutory obligation preliminary notification is compatible with freedom of assembly. In that context, the Human Rights Court pointed out that "prescribing an obligation of notification does not, in general, infringe the essence of the right of assembly" and is therefore not contrary to the spirit of Article 11 of the Convention in itself, if states, for reasons of public policy or national security, require that the holding of events be subject to a permit. {Nurettin Aldmer and Others v. Turkey (32124/02, 21126/02, 21129/02, 32132/02, 32133/02, 32137/02, 32138/02), 18 December 2007, paragraph 42}

[68] In the context of the purpose of the notification, the Human Rights Court pointed out that this was partly due to the need to reconcile the right of assembly with the legitimate interests of others. It follows that, in order to balance those conflicting interests adopted during the notification procedure, the institution of the preliminary administrative procedure. According to the Human Rights Court, "such requirements are not in themselves contrary to the principles embodied in Article 11 of the Convention as long as they do not constitute a disguised impediment to the freedom of peaceful assembly protected by the Convention" {Balcik and Others v. Turkey (25/02), 29 November 2007, paragraph 49}.

[69] The Human Rights Court also pointed out that the restriction of the right of assembly could only take place on the basis of a "statutory" prohibition. In the absence of this, it is not possible to assess either the legitimate aim or the necessity in a democratic society. The lack of a legal basis for the prohibition in itself justifies a violation of Article 11 of the Convention {Szerdahelyi v. Hungary (30385/07), 17 January 2012}.

[70] 3. Based on the above, it can be stated that it became necessary to regulate more clearly when the authority may prohibit the holding of an event falling within the scope of the Right of Assembly Act [Section 2 (1), Section 3]. In this context, the legislator should strive to create a regulation that allows the law enforcers sufficient leeway when considering whether the application of the prohibition grounds specified in the Right of Assembly Act should take place only in specific cases, necessarily involving consideration of specific aspects, in exceptional and truly justified cases.

[71] In drafting the rules, it must, in my view, be borne in mind that the right of assembly, as a fundamental right of communication, enjoys enhanced protection. Consequently, the legislator has a narrower scope for restricting the right of assembly than the general system of criteria contained in Article I (3) of the Fundamental Law would otherwise allow.

[72] In my view, in addition to the above, it is also necessary for the legislator to incorporate into the legislation a clear set of criteria for the conduct of the conciliation procedure. In connection with this issue, I maintain the substance of my dissenting opinion appended to Decision 30/2015 (X. 15.) AB.

Budapest, 12 July 2016

Dr. Ágnes Czine sgd.,
Justice

Dissenting opinion by *dr. László Salamon*:

[73] I consider the unconstitutionality by omission manifested by non-conformity with the Fundamental Law to be traceable in a different approach and much more broadly. I dissent against point 2 of the operative part.

[74] 1. I take the view that the regulation of the Right of Assembly Act is extremely incomplete, and therefore in most cases it is not suitable for providing the authorities applying the law with a legal basis regarding the relationship between the fundamental rights competing with the right of assembly and the right of assembly. As can be seen in the present case, and can be seen in other cases, in the vast majority of cases, in the vast majority of cases, the police authority acting on received notifications and then the court reviewing the procedure of the police authority, obviously of their best convictions and conscience, seek to interpret this relationship by comparing competing fundamental rights as authorities applying the law, taking on the necessity and proportionality test instead of the law, for specific cases, and pass their decisions accordingly. This then leads to the police authority and the court applying the instrument of prohibition even when the ground for prohibition contained in Section 8 (1) of the Right of Assembly Act does not exist. This extends the possibility of prohibition to cases other than Section 8 (1) of the Right of Assembly Act.

[75] 1.1. A cardinal issue for addressing the problem in principle is the correct interpretation of Article I (3) of the Fundamental Law, which prescribes that fundamental rights be regulated by an Act of Parliament, which is tantamount to the requirement that restrictions on fundamental rights can only take place by such Act of Parliament. The arguments supported by this in the legal literature were described in detail in my concurring reasoning attached to Decision 30/2015 (X. 15.) AB. These arguments are unanimously contained in the constitutional (Fundamental Law-related) explanations and publications dealing with the restriction of fundamental rights with regard to the relevant provisions of both the Constitution changing the regime and the Fundamental Law [that is, Article 8 (2) of the Constitution and Article I (3) of the Fundamental Law]. The legal literature is completely uniform in the interpretation of these texts; the publications deal 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 the Act of Parliament, and the substantive requirement is essentially compliance with the necessity and proportionality test. There is a cumulative relationship between formal and substantive requirements.

[76] Article 8 (2) of the Constitution provided as follows: "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."

[77] The explanatory memorandum to the Constitution in relation to this provision 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.)

[78] 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.]

[79]] 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.]

[80] 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.

[81] 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).

[82] 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.]

[83] 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«.

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.

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.)

[84] Concerning the regulation of the Constitution, 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.

[85] 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?

[87] 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)

[88] 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 developed so far in connection with the Constitution can still be considered valid.

[89] 1.2. It follows from the foregoing that, in my view, it is not acceptable for those applying the law to decide on the substantive aspects of the restriction of fundamental rights instead of the law. This is true even if the intention of the arbitrary procedure could not be established in the cases reviewed by the Constitutional Court. Nevertheless, it is also of the utmost interest of the authorities applying the law that a specific decision implementing the restriction of fundamental rights, namely, the right of assembly here, be based on specific statutory provisions, that is, it should not create a right, concealed in interpretation, but should apply specific restrictive rules contained in an Act of Parliament to an individual case when considering the notification of assemblies, and thus be protected from the outset against any unworthy political insinuation.

[90] 1.3. Article I (1) of the Fundamental Law provides that "[t]he inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights." Although the latter provision contains a State objective, that State objective is of a special nature. The protection of fundamental rights is inseparable from the elimination, as far as possible, of all factors which impede the exercise of certain fundamental rights. This can be achieved relatively in the case of competing fundamental rights, by reciprocal restriction of fundamental rights, through the necessity and proportionality test provided for in Article I (3) of the Fundamental Law. Since it is a legislative task to ensure this, Article I (1) of the Fundamental Law necessarily entrusts the State with a legislative task in order to settle the mutual restriction of fundamental rights.

[91] 1.4. In my view, the State has performed this task very incompletely in the case of competition between the right of assembly and other fundamental rights.

[92] The fact that Section 2 (3) of the Right of Assembly Act declares that "[t]he 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" does not make up for this shortcoming. Nor does Section 14 of the Right of Assembly Act provide the necessary protection, as the Right of Assembly Act does not contain any specific legal basis as to what constitutes an infringement of the rights of others. (For example, this provision does not allow a night-time demonstration to disrupt residents' peace of mind or take action to protect children's rights.) In addition, Section 14 of the Right of Assembly Act provides for the dissolution of an ongoing demonstration that has already begun, that is, this rule does not apply in the case where it is already clear from the announcement of the event that the planned demonstration will obviously violate some other fundamental right (e.g., a demonstration announced in advance for a period of time near homes that could lead to a violation of the fundamental rights of

others by making rest impossible). In connection with this problem, it is important to emphasise that under current regulation, the demonstration does not need to be allowed, and only the two clauses included in Section 8 (1) of the Right of Assembly Act are prohibited.

[93] Let it be noted here that the lack of legislation not only leaves fundamental rights in conflict with the right of assembly unprotected, but also vice versa, as the rule of restricting the right of assembly by law would provide a guarantee to those living with the right of assembly that they can no longer be prevented from exercising their right of assembly within legal limits. This means inversely restricting other fundamental rights in favour of the right of assembly. (This also confirms that reciprocity is a feature of restrictions on fundamental rights.)

[94] 1.5. Point 1 of the operative part of the decision restricts the omission to the "fundamental right to privacy", while fundamental rights other than those enshrined in Article VI of the Fundamental Law need to be protected (e.g. the right to health, which can be damaged by the permanent impossibility of rest, or children's rights, a very important element of which is set out in Article XII of the Fundamental Law). The Right of Assembly Act itself does not restrict the principle of legal protection in Section 2 (3) of the Right of Assembly Act to a given fundamental right, moreover, it is not simply a violation of fundamental rights, but of the rights forming a broader concept, the rights and freedoms of others.

[95] It follows from the foregoing that, in my view, the failure of the National Assembly can be inferred from Article I (1) of the Fundamental Law that it did not fully establish rules for the protection of the fundamental rights of others when exercising the right of assembly.

[96] 2. I do not agree with the argument in the Reasoning to point 2 of the operative part of the decision that if the right of assembly is exercised in more than one place, it is also acceptable if that right is not exercised in certain places. In my opinion, the constitutional complaint must be reviewed in its elements, by venue, and if the violation of law can be established in respect of even one venue, we can no longer speak of the lawful exercise of the right of assembly.

[97] 2.1. In my opinion, the limited form of the event notified in front of Markó utca 25 (Budapest, District V) during the consultation with the police authority no longer justified the prohibition of the event as, in my judgement, this form would not have seriously endangered the smooth functioning of the courts. With regard to this place, moreover, Section 8 (1) of the Right of Assembly Act contains a clear provision restricting the right of assembly, namely, this is not a legislative omission detailed in point 1 of my dissenting opinion, but an assessment of the application of this provision to the individual case, that is, whether there is indeed a "serious jeopardy" in the

particular case. Nor do I agree that judicial review of the right of assembly cannot be overturned by the Constitutional Court. Disputes related to the violation of the right of assembly are directly fundamental and constitutional protection issues; to circumvent these is tantamount to abandoning the function of protecting fundamental rights.

[98] In my view, in the light of the above, there are sufficient grounds for annulling the contested acts in respect of this venue.

[99] 2.2. As a result, the assessment concerning the rest of the venues in the court order that become relevant to the order as a whole becomes virtually irrelevant; the assessment of a single order in the case is in itself determined by the ground for annulment set out above.

[100] In any event, with regard to the additional venues, I allude to my position on the legislative competence of the necessity and proportionality test detailed above. However, where the police or court decision is based on TEK measure No. 30100-1324/8/2014, there is a statutory provision in Section 46 of Act XXXIV of 1994 on the Police on the application of a permissible restriction of fundamental rights to an individual case, which may, of course, legitimately impede the exercise of fundamental rights (such as the right to assembly) in the area concerned, although the application of the concept of "prohibition" in this regard is not in accordance with the Right of Assembly Act.

Budapest, 12 July 2016

Dr. László Salamon sgd.,
Justice

Dissenting opinion by *dr. István Stumpf*:

[101] I do not agree with the majority decision.

[102] The Constitutional Court should have annulled the revised court order. It should have found that the unjustified ban on the notified event infringed the right to peaceful assembly. It is contrary to the Fundamental Law that the police and then the court added a broad legal interpretation to the itemised legal grounds for the prior prohibition of gatherings: The holding of events notified in advance to specific venues was prohibited by referring to subsequent grounds for dissolution. A prior ban on events planned for specific venues, extending the grounds for the ban, constituted a serious breach of the right to peaceful assembly.

[103] And if, in the main proceedings, the right of assembly has been infringed, not the right to privacy, since it was with reference to the latter that the holding of events in several venues was prohibited, then, as a result of the mandate of the Constitutional Court to protect fundamental rights, it should, in my view, have acted primarily to protect the right of assembly. I am therefore particularly concerned that the Constitutional Court has just found an omission in breach of Article VI (1) of the Fundamental Law (on the right to privacy).

[104] 1. The majority decision states that the petitioner notified the police of a marching event involving several venues in Budapest for 19 December 2014. The multi-venue event was to be held from 9 a.m. to 8 p.m. on the day indicated, namely, by visiting the venues concerned one after the other and spending ten minutes each at each venue. Based on the notification, the police issued a decision prohibiting the holding of the event in respect of three venues (Budapest District V, Markó u. 25 and Budapest District XII, Laura út 26 and Cinege út 5). This police prohibition decision is the basis for the procedure prior to constitutional court review.

[105] The police decision in question prohibited the holding of the event at the latter two venues pursuant to Section 2 (3) of the Right of Assembly Act, arguing that "the exercise of the right of assembly would infringe the rights and freedoms of others". In the first venue, in front of the Curia building, pursuant to Section 8 (1) of the Right of Assembly Act, the police issued said prohibition decision claiming that according to the previously requested statement of the Vice-President of the Curia, "the smooth functioning of the court would be seriously jeopardised".

[106] Against the police prohibition decision, the petitioner filed an application for review with Budapest Administrative and Labour Court, which dismissed the application in the contested order. Concerning the two venues in Buda, the court ruled that the police could "prohibit the peaceful demonstration (as it had been advanced so) on the basis of the provisions of Section 2 (3) of the Right of Assembly Act, which was invoked by the police as the legal basis for the prohibition". Concerning the event before the Mansion, the court found that the police "rightly accepted the statement obtained by the Vice-President of the Curia in the specific case as the basis for its decision, and the decision based on it was also considered lawful by the court."

[107] 2. On the basis of the petition, the Constitutional Court had to assess whether the court order complied with the Fundamental Law.

[108] 2.1. In connection with the ban on holding the two events planned for the Buda venues, the majority decision consistently distinguishes between the preliminary prohibition grounds of the gathering and the grounds for dissolution of the already started event. The Constitutional Court states that "in the regulatory system of the Right of Assembly Act," "violation of the rights of others" has not been included in the

preliminary grounds for prohibition of assembly, but in Section 2 (3) of the Right of Assembly Act, which is a ground for dissolution under Section 14 (1) of the Right of Assembly Act. This taxonomic interpretation is also supported by the grammatical interpretation, since the "exercise of assembly" in Section 2 (3) of the Right of Assembly Act applies to assemblies that have begun. In the context of prohibition and dissolution as the *ultima ratio* limits of the right of assembly, the Constitutional Court has already pointed out in the 2015 Court Decision that »a reasonably reactive dissolution for violations of law during the event cannot be automatically converted to a preliminary ground for prohibition.« (2015 Court Decision, Reasoning [30]) This interpretation is supported by the Reasoning for Decision 55/2001 (XI. 29.) AB (ABH 2001, 442, 460–461) and the Report of the Commissioner for Fundamental Rights OBH No. 4435/2006. (*see* p. 5)."

[109] In connection with the above, the majority decision states that in its decision prohibiting the holding of the notified event, "the police clearly indicated Section 2 (3) of the Right of Assembly Act as the legal basis for the ban. The court order reviewing the legal basis indicated by the police justified its decision on the grounds that »on the basis of what is written in Section 2 (3) of the Right of Assembly Act, a peaceful demonstration (as it had been advanced so) may also be prohibited«." In this context, the majority decision questions whether the peaceful demonstration, as it had been advanced so, may have infringed the rights of others at all, that is, an infringement that would have made it necessary to restrict the holding of the notified event in any way. Especially since the banned event in the affected venues was planned to be held for only a very short time ,as a matter of fact for span of ten minutes. (Incidentally, the majority decision also attaches great importance to the "temporal characteristics" of the gatherings, and it is missing that the court "did not assess the duration of the assembly at all", the time limitation of the organiser of the assembly.)

[110] 2.2. Concerning the ban on holding the planned event in front of the Curia building, the majority decision states that, in banning the event, the police, relying solely on the statement of the Vice-President of the Curia, "essentially emptied their own discretion" and this was not taken into account by the court reviewing the police decision; that is, in fact, it applied Section 8 (1) of the Right of Assembly Act unjustifiably without any ground.

[111] 2.3. The majority decision assessed the case as a matter of fundamental constitutional importance in the decision to admit the petition "whether the police prohibition decision and the order adopted in the review procedure confirming such decision unlawfully extended the preliminary prohibitive grounds on assemblies".

[112] Despite the fact that the ban on holding the planned event at the two Buda venues, as well as in front of the Curia building, was considered unfounded by the

majority decision, as described above; however, the decision does not draw the necessary conclusion: despite the unjustified or disproportionate restriction of the fundamental right, it does not establish a conflict with the Fundamental Law of the reviewed judicial decision.

[113] Following the reasoning set out, the majority decision does not take a position on an issue which, in my view, is decisive, whether the judicial interpretation of the prohibition on holding the event planned for the three venues in question, and consequently the judicial decision, was in accordance with the Fundamental Law, but also includes an additional aspect of assessment in the review. In line of the majority decision, "in the present case the petitioner ultimately had the opportunity to express his views at the other sites of the dynamic procession; therefore, the Constitutional Court has found that, overall, the petitioner's right to peaceful assembly has not been disproportionately violated; therefore, the constitutional complaint filed for a finding of unconstitutionality by conflict with the Fundamental Law of the specific judicial order was accordingly dismissed by the Constitutional Court."

[114] Similarly to Justice Dr. László Salamon, I do not agree with the above explanation of the majority decision to reject the constitutional complaint. The scope of freedom of assembly cannot be reduced in such manner. The right to peaceful assembly, which entitles to assemble at a venue elected by the subjects of law, is not limited, nor can the exercise of this right be restricted to (any) other venue. Whether the fundamental right to peaceful assembly can actually be exercised or violated must therefore be assessed separately for each venue of the planned assembly. With regard to the planned exercise of the right to peaceful assembly in more than one venue, it cannot be considered acceptable that the exercise of a fundamental right may not take place at some venues simply because it has already taken place at other venues. That is to say, an event held at another venue cannot constitute a blanket authorisation to prohibit the holding of the event at another, additional venue and thus restrict the exercise of a fundamental right. Not least because a judicial and enforcement decision can never provide legal justification for an(other) infringing law enforcement decision. Previous judicial and enforcement decisions, if anything, could provide a basis for similarly lawful decisions.

[115] In the event of a thorough investigation, neither the Constitutional Court nor the court making the revised decision could have escaped the attention of one of the locations affected by the prohibition, Budapest District XII, Cinege út 5, where, in line with judicial practice, it was not forbidden to hold an event. See, for example, Order No. 17.Kpk.45.743/2013/2 of Budapest Administrative and Labour Court of 11 July 2013 and Order No. 27.Kpk.45.920/2013/2 of 29 August 2013. In the former order, the court explicitly concludes that the police (Counter Terrorism Centre) "can do nothing but let

the participants enter the venue indicated in the notification [Budapest District XII, Cinege út 5.], while, of course, taking care no disruption should occur".

[116] 3. Nor do I agree with the finding of unconstitutionality by omission manifested by non-conformity with the Fundamental Law under point 1 of the operative part.

[117] In its decision, the Constitutional Court, acting of its own motion, finds that there has been a legislative omission in breach of Article VI (1) of the Fundamental Law due to the "legislator's failure to regulate the criteria for resolving the conflict in the event of a conflict between the fundamental right to privacy and the fundamental right to assembly and its procedural framework" (Point 1 of the operative part).

[118] 3.1. In my opinion, in addition to the legislator, those that implement the law also have a fundamental constitutional obligation under Article I (3) of the Fundamental Law to ensure freedom of assembly and the enforcement of fundamental rights that conflict with it, arising from the protection of fundamental rights. They fulfil this obligation by specifically considering the necessity and proportionality of the restriction of fundamental rights. Contrary to the majority decision, based on previous decisions of the Constitutional Court, as explained below, I do not see as sufficiently substantiated why additional statutory "criteria" would have required the restriction of fundamental rights ("resolving the conflict" between fundamental rights). If the constitutional aspects expressed in the decisions of the Constitutional Court are not or inconsistently enforced by in the practice of those implementing the law, then there is no need to establish a legislative omission, but a need to establish constitutional requirements for the application of the law and to annul the decisions of those applying the law (courts and authorities) that violate fundamental rights.

[119] The omission set out in the operative part of this decision cannot be interpreted as meaning that the Constitutional Court would have authorised the legislature to restrict the right to peaceful assembly at its discretion by invoking the protection of the right to privacy. This would constitute a legislative obligation to set limits that go beyond what is necessary and proportionate, that is, constitutionally permissible.

[120] 3.2. In the view of the majority decision, a further task of the legislator is to define the "procedural framework for [...] resolving the conflict" between fundamental rights. Nor, in my view, can such an omitted legislative task be inferred from the Fundamental Law.

[121] The Constitutional Court has already described in the 2015 Court Decision the procedure to be followed by the police in connection with the exercise of the right to peaceful assembly and, if justified, its restriction, a procedure during which the police, relying, *inter alia*, on the governing provisions 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"), seek to ensure the simultaneous enforcement of conflicting rights, not infrequently deriving from fundamental rights.

[122] In the 2015 Court Decision, the Constitutional Court pointed out in connection with Section 4 (5) of the Decree that the police are obliged to draw the organizer's attention to the "circumstance justifying a possible ban". 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". (2015 Court Decision, Reasoning [51]) Pursuant to Section 6 (1) of the Decree, the police shall also warn the organiser if the notification or holding of the planned event violates the provisions of the Right of Assembly Act, but may not be prohibited in advance. In such cases, "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." (2015 Court Decision, Reasoning [52]) It must be clear from the decision of the police that they have consulted with the organizers [Section 5 (1) of the Decree] or made an attempt to reach a compromise solution. Accordingly, in accordance with Section 4 (5) of the Decree, the police shall inform the organiser that, by changing the venue or the date, the ground for prohibition under Section 8 (1) of the Right of Assembly Act for holding the event or violation of other provisions of the Right of Assembly Act can be avoided. Thus, in the event of a conflict of fundamental rights (outside the scope of the grounds for prohibition), a balance must be found primarily through conciliation, which also allows for the holding of the assembly, but also ensures the enforcement of competing rights as enshrined in the Fundamental Law. In this connection, the Constitutional Court refers to its settled case-law, which was first laid down in Decision 5/2001 (XI. 29.) AB, and reaffirmed in the 2008 Court Decision: "the State's obligation to respect and protect fundamental rights includes both refraining from violating such rights and guaranteeing the conditions necessary for their enforcement [...], with respect to the prevention of a potential conflict between two fundamental rights: freedom of assembly and freedom of movement, the authority should be statutorily empowered to ensure the enforcement of both fundamental rights or, if this is impossible, to ensure that any priority enjoyed by one of the rights to the detriment of the other shall only be of a temporary character and to the extent absolutely necessary." [...] (ABH 2001, 458–459.)" (ABH 2008, 651, 657.)

[123] In the 2013 Court Decision, the Constitutional Court found that certain venues have an emblematic function (*cf*. Reasoning [67]); in contrast, some venues, such as residential areas, are typical locations for private housing and privacy. This does not

mean that such venues lose their public ground character, nor does it generally mean that a demonstration organised on such public ground would affect the intrinsic essence of the privacy of the persons exposed to the event; on the other hand, however, residents may legitimately claim the protection of domestic tranquility and the disturbance of that tranquility only on a temporary basis. Based on all the foregoing, an assembly can be held here, but under stricter conditions. Thus, in particular, the number of gatherers, the duration of the event, its dynamic or static nature, and the time of day and the way in which they wish to convey their message to the recipient of the gathering must be taken into account. In view of the message, all this continues to be public communication, protected by the right to peaceful assembly (subject to freedom of expression as well). In such a case, if the exercise of the right of assembly as a fundamental right competes with other fundamental rights (the right to privacy, the right to move freely) or the public interest (and the holding of the planned event cannot be prohibited in advance), then the conflict of fundamental rights can be resolved by applying the requirements of Article I (3) of the Fundamental Law.

[124] It is important to see that the exercise of freedom of assembly is always accompanied by a restriction on the rights of others. In principle, therefore, the "procedural framework for [...] resolving the conflict" should not be laid down for the police in the procedure for notifying events. The police basically acknowledge the notification of the planned assembly, which is their only task in advance in order to enforce freedom of assembly. There is no need to further formalise this 48-hour police procedure. During the event, however, it is the task of the police to ensure that freedom of assembly is exercised in such a way that other fundamental rights (or the rights that can be traced back to them) are restricted only in a absolutely necessary and proportionate manner. If it is necessary to establish a legislative duty, it is possible to create a reasonable guarantee of other fundamental rights in connection with assemblies, at most through the powers of the police.

[125] Let it be noted here that the majority decision itself does not contain any convincing argument as to why a "procedural framework for [...] resolving the conflict" of fundamental rights should be regulated. This Decision considers it necessary merely on the grounds that the practice of those applying the law is dysfunctional: those implementing the law usually resolve the conflict of fundamental rights that arises in the exercise of the right of assembly by the most severe restriction, by vacating the right of assembly, that is, the prohibition of events organised on public ground (although a milder restriction would suffice). In my view, the incorrect practice restricting the exercise of a fundamental right cannot be a valid reason for the Constitutional Court to oblige the legislator to restrict a fundamental right (the right to peaceful assembly). The Constitutional Court would have been able, or entitled, to correct a legal practice that unjustifiably restricts the enforcement of a fundamental

right, if the unjustified restriction arose from the erroneous application of the law, not by establishing unconstitutionality by omission manifested by non-conformity with the Fundamental Law, but by formulating a constitutional requirement pursuant to Section 46 (3) of the Constitutional Court Act. Therefore, I support the latter of the operative part defining a legislative duty for the regulation of the "procedural framework for [...] resolving the conflict" between fundamental rights and the related Reasoning, which in its content imposes a requirement on those implementing the law.

Budapest, 12 July 2016

Dr. István Stumpf sgd.,
Justice