

Decision 25/2013 (X. 4.) AB of the Constitutional Court of Hungary

On establishing the constitutional requirement relating to Section 416 (1) (c) and Section 21 (1) (e) of Act XIX of 1998 on Criminal Procedure and the dismissal of a constitutional complaint

In the matter of a constitutional complaint seeking a finding of unconstitutionality by non-compliance with the Fundamental Law and annulment of a judicial decision, with the concurring reasoning of Dr. Béla Pokol, Justice of Constitutional Court, the Constitutional Court, sitting as the Full Court, adopted the following

decision:

1. The Constitutional Court finds that it shall be a constitutional requirement under Article XXVIII (1) of the Fundamental Law that the review proceedings provided for in Section 416 (1) (c) of Act XIX of 1998 on Criminal Procedure may be based on a motion for review brought on the grounds of bias under Section 21 (1) (e) of the Act.
2. The Constitutional Court dismisses in its entirety the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the orders of the Curia Nos Bfv.I.1412/2012/4 and Bfv.III.153/2013/2.

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

Reasoning

I

[1] The petitioner filed a constitutional complaint with the Constitutional Court, in which he alleged that the orders of the Curia Nos Bfv.I.1412/2012/4. and Bfv.III.153/2013/2. were contrary to the Fundamental Law.

[2] 1. On the authority of the facts of the criminal case on which the constitutional complaint is based, between September 2007 and December 2008 the petitioner sold technical equipment and machinery of which he was either not the owner or no longer the owner at the time of the conclusion of the sales contracts. Baranya County Court (later changing its name to the 'Regional Court of Pécs') seised of the matter at first instance found the petitioner guilty of the offence of fraud contrary to Section 318 (1) and classified under paragraph 6(a) thereof, and other offences of Act IV of 1978 on the Criminal Code (hereinafter referred to as the 'the Criminal Code'), which was previously in force . In its final judgement of 4 May 2012, Pécs Regional Court of Appeal, acting on the basis of appeals by the prosecution and the defence

seeking opposing outcomes, reversed the judgement of the court of first instance with regard to the legal qualification, leaving the established facts intact, and increased the cumulative penalty imposed by the court of first instance.

[3] The petitioner challenged the final judgement of Pécs Regional Court of Appeal before the Curia by means of a motion for review on the grounds set out in points (a) and (c) of Subsection (1) of Section 416 of Act XIX of 1998 on Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure"). The petitioner based his motion for review in part on the ground set out in Section 416 (1) (a) of the Criminal Code, because, in his view, his guilt had been established in breach of the rules of substantive criminal law. In part, the motion for review was based on Section 416 (1) (c) of the Code of Criminal Procedure, as the petitioner claimed that the first instance proceedings were adjudicated by a judge who was disqualified by law, because the deputy president of the Regional Court of Pécs is the petitioner's cousin. Consequently, according to the petitioner's argument, the judge of the Regional Court of Pécs who had acted at first instance could not be expected to judge the case impartially. [Section 21 (1) (e) of the Code of Criminal Procedure]

[4] The Prosecutor General stated in his statement No. BF. 2864/2012/1 that "[i]n accordance with the consistent practice of the Curia (Bfv.II.856/2009/20.) only the invocation of the what is known as an absolute ground for disqualification is a ground for review, not the ground for review under Section 21 (e) of the Code of Criminal Procedure cited in the motion."

[5] In its Order No Bfv.I.1412/2012/4 of 4 December 2012 (hereinafter referred to as the: the "First Order"), the Curia dismissed the defence's motion for review and upheld the judgements challenged in the motion for review. The Curia ruled that the motion for review, in so far as it was based on Section 416 (1) (c) of the Code of Criminal Procedure, was precluded by law. According to the reasoning of the First Order, the statutory grounds for review are exhaustively listed in Section 416 (1) of the Code of Criminal Procedure. Section 416 (1) (c) of the Code of Criminal Procedure refers back to the procedural infringements set out in Section 373 (1) (I) (b) or (c) or in one of the provisions of points II to IV of the Code of Criminal Procedure. The petitioner based his motion for review on Section 373 (1) (II) (b) of the Code of Criminal Procedure, in which he complained that the judgement was delivered by a judge who was disqualified by law. This rule points back to Section 21 (1) of the Code of Criminal Procedure, which lists the grounds for disqualification of judges (judicial recusal). Section 21 (1) (e) of the Code of Criminal Procedure sets out a relative ground for disqualification, that is, where a judge cannot act in a case because he cannot be expected to give an impartial judgement. The First Order adopted the statement of the Prosecutor General, according to which "the Curia agreed with the transcript of the Office of the Prosecutor General". However, the First Order stated that "[i]n the pending criminal case, however, no such circumstance - which would cast doubt on the objectivity of the proceedings - can be established either from the motion for review or from the file, nor is it likely." [On this, see page 4 of the First Order.]

[6] The petitioner then filed a renewed motion for review of the grounds of the First Order as to the disqualification of the trial judge. That motion for review was dismissed by the Curia in its Order No Bfv.III.153/2013/2 of 11 February 2013 (hereinafter referred to as the 'the Second Order'). In the Second Order, the Curia explained that "[the] relative grounds of the

disqualification - unlike the objective grounds for disqualification - cannot be asserted *ex post facto* and thus not in review proceedings pursuant to Section 283 (1) (b) and Section 23 (2) to (3) of the Code of Criminal Procedure. A ground for disqualification under Section 21 (1) (e) of the Code of Criminal Procedure may constitute a ground for review if the judge (or lay judge) has been disqualified for such a ground and has nevertheless continued to sit."

[7] 2. The petitioner filed a constitutional complaint with the Constitutional Court against the Curia's orders pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), in which he sought a finding that the orders were contrary to the Fundamental Law and also sought annulment of the orders. The petitioner's primary argument in the constitutional complaint was that the criminal proceedings in the case did not comply with the requirements of the Fundamental Law on fair trial. In the petitioner's view, the right to an impartial judicial procedure under Article XXVIII (1) of the Fundamental Law was infringed by the fact that his case was decided by a court whose deputy president is also the petitioner's cousin. The petitioner also supported this belief by the fact that in the other criminal proceedings pending against him, the judges of Pécs Regional Court had themselves initiated their disqualification on the basis of Section 21 (1) (e) of the Code of Criminal Procedure. The petitioner also claimed that the Curia had violated its duty to interpret the law, as provided for in Article 28 of the Fundamental Law, by applying the rules of review of criminal proceedings in a manner inconsistent with the requirements of Article XXVIII (1) of the Fundamental Law. The petitioner concludes that the interpretation of the law by the Curia, which is contrary to the Fundamental Law, also infringes the right to personal liberty recognised by Article IV (1) and (2) of the Fundamental Law, the general rule of equality enshrined in Article XV (1) of the Fundamental Law and the right to fair administration guaranteed by Article XXIV (1) of the Fundamental Law. The petitioner also invoked the right of defence under Article XXVIII (3) of the Fundamental Law, arguing that the failure to send the transcript of the Prosecutor General's report to the defence counsel had resulted in a breach of the right of defence guaranteed by the Fundamental Law.

[8] According to the petitioner, therefore, the criminal proceedings challenged in the complaint did not comply with the constitutional requirement of impartiality, and the petitioner therefore sought a finding that the curia's orders were in violation of the Fundamental Law and sought annulment of the same.

II

[9] The legal provisions governing the consideration of the constitutional complaint read as follows.

[10] 1. The provisions of the Fundamental Law invoked in the constitutional complaint read as follows:

"Article IV

(1) Everyone shall have the right to liberty and security of the person.

(2) No one shall be deprived of his liberty except for reasons specified in an Act and in accordance with procedures laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.."

"Article XV

(1) Everyone shall be equal before the law. Every human being shall have legal capacity."

"Article XXIV

(1) Everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

"Article XXVIII

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

"Article XXVIII

(3) A person subject to criminal proceedings shall have the right of defence at all stages of the procedure. [...]"

"Article 28

In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good."

[11] 2. The relevant provisions of the Code of Criminal Procedure:

"Section 21 (1) No one may act as a judge,

(a) who acted in the case as a public prosecutor or member of the investigating authority, or who is a relative of the public prosecutor or a member of the investigating authority having acted or acting in the case,

(b) who is or has been involved in the case as a defendant or a counsel for the defence, victim, private prosecuting party, substitute private prosecuting party, private party, person reporting the crime, or the representatives thereof, further, the relatives of the above,

(c) who is or has been involved in the case as a witness, expert or advisor,

(d) who has made a decision, under the relevant legal regulation²⁵ on gathering secret intelligence in the case, regardless of whether the information thus collected has been actually used in the course of the criminal proceedings,

(e) who cannot be expected to form an unbiased opinion of the case for other reasons.

(2) The provisions set forth in Subsection (1) above shall also apply to the investigating judge.

(3) In addition to the cases regulated in Subsection (1) above

(a) the person having acted as a investigating judge in the case shall be disqualified from subsequent court procedures,

(b) the judge who heard the case at first instance shall be disqualified from the proceedings at second instance, and the judge who participated in the first or second instance proceedings shall be disqualified from the proceedings at third instance,

(c) the judge who participated in the decision to set aside or in the decision set aside on the ground that it is unfounded shall also be excluded from the proceedings to be resumed following the setting aside,

(d) a judge who participated in the decision ordering a retrial or in the decision challenged by the retrial shall also be disqualified from the retrial at first instance or at second instance,

(e) a judge who participated in the decision challenged by the extraordinary remedy is excluded from the extraordinary remedy procedure."

"Section 24 (1) If the ground for disqualification is notified by the judge himself or the presiding judge of the panel in respect of the judge, from the time of the notification the judge concerned shall not be involved in the case.

(2) Apart from the cases specified in Subsection (1) the judge may remain involved in the case until the notification is given effect; however, the judge may not participate in the adoption of the conclusive decision.

(3) The restriction under Subsection (2) shall not apply if the ground for disqualification is based on Subsection (1) (e) of Section 21.

(4) The judge may act without the limitation provided for in Subsection (2) if the person making the notification, after the refusal to disqualify him, makes a new announcement for the judge's disqualification based on the same point of Section 21 (1) and (3).

(5) A repeatedly filed notification for unfounded disqualification based on the same Subsections (1) and (3) of Section 21 against the same judge may be dismissed without a statement of reasons.

(6) The President of the Court shall arrange for the designation of another judge if the judge has himself or herself or, in relation to him or her, the President of the Panel declared the ground for disqualification or the judge has consented to his or her disqualification. In that case, no special decision on disqualification shall be required.

(7) If the notification of disqualification cannot be made in the manner provided for in Subsection (6), and

(a) it has been reported against a single judge of the court, such notification shall be decided by a panel of another judges and two lay judges,

(b) is directed against a judicial panel of the court, the notification shall be decided against another judicial panel of the court."

"Section 373 (1) The court of second instance shall

[...]

II. set aside the judgement of the court of first instance and order the court of first instance to reopen the proceedings if

(b) the judgement was handed down by a judge disqualified by law"

"Section 416 (1) A review against a final decision of a court on a case shall be admissible if

[...]

(c) the court's decision was rendered with a procedural violation as defined in Section 373 (1) (I) b) or (c) or in one of the points II to IV."

III

[12] The Constitutional Court decided on the basis of Article 56 (1) of the Constitutional Court Act first of all on the question of whether the constitutional complaint filed against the Curia's orders is admissible, that is, whether it fulfils the conditions for admissibility of constitutional complaints set out in the Constitutional Court Act. .

[13] 1. In determining the formal conditions of admissibility, the Constitutional Court found the following:

[14] 1.1 The petitioner fulfilled the condition set out in Section 51 (2) of the Constitutional Court Act, because the petitioner was represented by a lawyer registered with the Baranya County Bar Association, and the petitioner also attached the power of attorney that was duly issued

[15] 1.2 Pursuant to Section 30 (1) of the Constitutional Court Act and Section 27 (b) of the Constitutional Court Act, a constitutional complaint may be filed in writing within sixty days of the service of the challenged judicial decision. The petitioner received the First Order on 25 January 2013 and the Second Order on 13 March 2013. The petitioner accordingly lodged the constitutional complaint on 19 March 2013, in compliance with the statutory time limit.

[16] 1.3 The petition also fulfils the conditions laid down in Section 52 (1) of the Constitutional Court Act. The constitutional complaint contains a reasoned reference to the competence of the Constitutional Court under Article 24 (2) (d) of the Fundamental Law and Section 27 of the Constitutional Court Act. The petitioner expressly states, *inter alia*, the right to a fair trial recognised by Article XXVIII (1) of the Fundamental Law and also sets out the grounds for the infringement of the right guaranteed by the Fundamental Law.

[17] Pursuant to Section 52 (1) (f) of the Constitutional Court Act, a petition is deemed to be explicit if, *inter alia*, it contains an express request for the annulment of a statute, a statutory

provision or a judicial decision. The constitutional complaint contains an explicit request, because the complainant seeks a finding that the decisions of the Curia in the criminal case are contrary to the Fundamental Law and also seeks their annulment.

[18] 2. Pursuant to Section 56 (2) of the Constitution Court Act, the judicial panel with the power to decide on admissibility shall, in its discretion, consider the statutory substantive requirements for the admissibility of a constitutional complaint, in particular the relevance of the complaint under Section 27 of the Constitution Court Act, the exhaustion of the legal remedy, and the substantive requirements under Sections 29 to 31 of the Constitution Court Act. In determining these conditions, the Constitutional Court has reached the following conclusions:

[19] 2.1 The petitioner can be considered to be a person entitled under Section 27 of the Constitutional Court Act and Section 51 (1) of the Constitutional Court Act, and in view of the fact that the petitioner is a defendant in the criminal case underlying the present constitutional court proceedings, his concernment in the individual case can be established beyond doubt.

[20] 2.2 In accordance with Section 27 of the Constitutional Court Act, a constitutional complaint may be lodged against a court decision on the merits of the case or against any other decision terminating the court proceedings, provided that the petitioner has exhausted his / her legal remedies or has not been granted any legal remedies. In the present case, the petitioner challenged in his constitutional complaint the orders of the Curia in the review proceedings. There is no legal remedy against these decisions; therefore, the constitutional complaint also meets the requirement of Section 27 of the Constitutional Court Act. [as well as Section 32 (2) (a) of the Rules of Procedure of the Constitutional Court]

[21] 2.3 Pursuant to Section 29 of the Constitutional Court Act, the Constitutional Court shall admit constitutional complaints in the case of an infringement of the Fundamental Law or a constitutional law issue of fundamental importance that has a substantial impact on the judicial decision. The two admissibility requirements are of an alternative nature, and the Constitutional Court considered the exhaustion of these conditions separately.

[22] The Constitutional Court first considered whether the issue raised in the constitutional complaint could be considered to be a constitutional law issue of fundamental importance. In the context of this complaint, the Constitutional Court noted that the restrictive interpretation of the enforceability of the grounds for disqualification is in line with the established practice of the Curia, which is linked to Opinion No 86 BK of the Criminal Special Panel of the Supreme Court of 8 February 2010. Point 2 of that Special Panel Opinion provides that the grounds for setting aside of a court decision in review proceedings are those where the panel, after the finality of the decision disposing of the case, the exclusion of the judge by the panel under Section 24 (7) of the Code of Criminal Procedure considers the motion for disqualification, notified before the finality of the decision, to be well founded.. Subsequently, the Supreme Court, in its case decision Bfv.II.856/2009/20 of 29 April 2010, also referred to in the transcript of the Prosecutor General, concluded that "bias may not be invoked after the decision of the court of final instance has become final in order to proceed with extraordinary legal remedies, even if the reason for the bias becomes known to the defendant subsequently." Here, the

Constitutional Court recalls its Decision 8/2013 (III. 1.) AB, in accordance with which the nationwide multiplicity recurrent nature of a constitutional law issue establishes its fundamental importance (Reasoning [21]). Accordingly, in the present proceedings, the Constitutional Court extended its consideration beyond the individual criminal case concerned by the constitutional complaint to the uniform Curia practice interpreting Section 416 (1) (c) of the Code of Criminal Procedure, in the course of which it subjected the judicial practice related to the procedural normative text to constitutional assessment. For these reasons, the Constitutional Court considers of fundamental importance the constitutional law issue of whether a practice of the Curia which interprets Section 416 (1) (c) of the Code of Criminal Procedure restrictively and excludes the possibility of invoking bias from the grounds for review even if the reason for the bias becomes known to the accused after the final decision has been taken is compatible with the enforceability of the right to an impartial judicial procedure inherent in a fair trial.

[23] Taking into account that the fundamental importance of the constitutional law issue in itself justifies the Constitutional Court's substantive proceedings, the Constitutional Court did not take a position on whether the challenged orders could have been substantially affected by the violation of the Fundamental Law alleged by the complainant.

[24] Based on all these aspects, the Constitutional Court's Panel No 1 of 17 June 2013 admitted the constitutional complaint and ordered the consideration of the merits of the case by the Constitutional Court.

IV

[25] In Part IV of the statement of reasons of the decision, the Constitutional Court considered the petitioner's objection alleging a violation of the constitutional right to an impartial judicial procedure under Article XXVIII (1) of the Fundamental Law. In the light of the obligation to interpret the Fundamental Law, as provided for in Article R (3) of the Fundamental Law, the Constitutional Court first briefly describes the interpretation of the principle of impartiality in criminal proceedings (1). The Constitutional Court then outlines its understanding of the requirement of judicial impartiality as developed in the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter referred to as the 'the Convention') and in other mechanisms of international law for the protection of rights (2). The Constitutional Court then determines, in the light of Article R (3) of the Fundamental Law, what the fundamental rights benchmark thus identified requires of both the legislative environment and the interpretation and application of the law, in order to ensure that the principle of impartiality is effectively and efficiently applied (3). On this basis, the Constitutional Court answers the question of the constitutional relationship between the requirement of impartiality and the enforceability of the objection of bias in a review proceedings (4).

[26] 1. Article XXVIII (1) of the Fundamental Law guarantees everyone the right to have any charge against him or any proceedings against him, or his rights and obligations in any proceedings, tried by an independent and impartial tribunal established by law, in a fair and public hearing within a reasonable time. The independence and impartiality of a court or tribunal can only be understood in relation to each other. The constitutional rule of judicial independence is laid down in Article 26 (1) of the Fundamental Law, in accordance with which judges are independent and subject only to the law, and may not be instructed in their judicial activity. Judicial independence, which is one of the achievements of our historical Constitution, is a constitutional guarantee that operates to ensure the fulfilment of the court's function as laid down in the Fundamental Law and to preserve the independence of the judiciary. Judicial power is embodied in the judiciary. It is therefore an essential element of judicial independence that the judge who is to sit in judgement must make his or her decision free from influence from outside or inside the judiciary, in accordance with the law and in accordance with his or her own convictions. The independence of the judiciary must be safeguarded by personal, status-related and organisational guarantees. {On this, see in detail, Decision 33/2012 (VII. 17.) AB, Reasoning [72] to [81]} In comparison, the requirement of impartiality is intended to facilitate the adjudicating judge's assessment of the case and his decision without any bias or prejudice against the parties to the case. The requirement of impartiality is, on the one hand, an expectation of the conduct and attitude of the judge. On the other hand, it also sets a benchmark for the legal environment. In accordance with this benchmark, procedural rules must seek to avoid any situation which might give rise to legitimate doubts as to the impartiality of the judge. It follows that in a given case, the judge must not only judge objectively, but must also preserve the appearance of impartiality. [A similar conclusion was reached in Decision 67/1995 (XII. 1.) AB, ABH 1995, 346, 347; Decision 17/2001 (VI. 1.) AB, ABH 2001, 222.]

[27] 2. The Constitutional Court recalls here that it accepts the level of legal protection provided by international legal protection mechanisms as a minimum standard for the exercise of fundamental rights. {See Decision 32/2012 (VII. 4.) AB, Reasoning [41]; last reaffirmed in Decision 22/2013 AB, Reasoning [16]}. Hungary has submitted itself to the jurisdiction of the European Court of Human Rights (hereinafter referred to as the "ECtHR") sitting in Strasbourg, and the Constitutional Court outlines the meaning that the ECtHR ascribes to the requirement of impartiality in its case law. The point of departure for the ECtHR's assessment of the present question is that impartiality is an essential element of the public trust which the judiciary has a fundamental duty to uphold in democratic societies. [See, first, ECtHR in *Piersack v. Belgium*, (8692/79), 1 October 1982, para. 30; most recently confirmed by the ECtHR in *Romenskiy v. Russia*, (22875/02), 13 June 2013, para. 26.] In the ECtHR's reading, the preservation of impartiality is of paramount importance because the absence of the principle or its enforceability entails a risk of arbitrary decision-making, which is not in accordance with the requirements of the right to a fair trial under Article 6 (1) of the Convention. [ECtHR, *H v. Belgium*, (8950/80), 30 November 1987, paragraph 53] The ECtHR recognises two aspects of impartiality: impartiality in the subjective sense (subjective approach) and impartiality in the objective sense (objective approach). The subjective aspect of impartiality requires that no member of the tribunal in a given case should be prejudiced or biased. In comparison, the

objective aspect of impartiality means whether there can be legitimate doubt as to the impartiality of a judge beyond the conduct of the judge in a given case. This legitimate doubt is relevant if it can be objectively justified. [See, first, ECtHR in *Piersack v. Belgium*, (8692/79), 1 October 1982, paragraphs 26 and 30; ECtHR in *De Cubber v. Belgium*, (9186/80), 26 October 1984, paragraphs 24 to 26.] The ECtHR's reasoning is also in line with the position of the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (hereinafter referred to as the "Covenant"). In reviewing the application of the fair trial rule of Article 14 (1) of the Covenant, the Human Rights Committee, while not drawing a sharp line between the objective and subjective aspects, always considers whether both the subjective and objective elements of the requirement of impartiality have been met in a given case (see *Karttunen v Finland*, 387/1989; 23 October 1992; para 7.2).

[28] In determining whether the principle of impartiality is effectively upheld, the ECtHR considers the grounds for disqualification ['grounds for withdrawal' in the terminology of the ECtHR] under national law to be a relevant factor. [ECtHR, *Mežnarić v Croatia*, (71615/01), 15 July 2005, para 27] In line with this, the ECtHR has, in its case law, not accepted arguments which limit the applicability of the requirement of impartiality by reference to the initiation of the proceedings or to the fact that the defendant had prior knowledge of the circumstances giving rise to the bias. [ECtHR in *Pescador v. Spain*, (62435/00), 24 September 2003, paragraphs 24 to 26; most recently confirmed in ECtHR, *Huseyn and Others v. Azerbaijan*, (35485/05), (45553/05), (35680/05) and (36085/05), 26 July 2011, paragraph 164.]

[29] 3. The effective implementation of the constitutional principle of impartiality is facilitated by several rules of procedural law that can be considered as guarantees. Among these, the rules of disqualification are of decisive importance, while at the same time the secrecy of the deliberations and voting in the decision-making process also ensures the impartial assessment of the case [Section 256 (6) and (7) of the Code of Criminal Procedure]. Certain grounds for disqualification of a judge are set out in Sections 21 and 22 of the Code of Criminal Procedure. The legal literature divides these grounds for disqualification into absolute and relative grounds for disqualification. [On this, see György Berkes (ed.), *Büntetőeljárási kommentár*, 2009, Budapest, HVG-ORAC, pp. 101 and 102.] The absolute disqualification rules are exhaustively listed grounds for disqualification, the existence of which alone, without the need to determine actual bias, justifies the disqualification of the judge [Section 21 (1) (a) to (d) of the Code of Criminal Procedure, Section 21 (3) and (4) of the Code of Criminal Procedure and Section 22 of the Code of Criminal Procedure] Relative grounds for disqualification, as opposed to absolute grounds for disqualification, are any circumstances which cannot be determined in advance and which may reasonably be presumed to prevent the presiding judge or a member of the panel of judges from making an impartial assessment of the particular case.

[30] 3.1 The enforcement of both absolute and relative grounds for disqualification is regulated by Section 23 to 25 of the Code of Criminal Procedure. In accordance with these procedural rules, if a judge or a member of the judicial panel is notified of a ground for disqualification by the President of the Panel to the President of the Court, he or she may not participate in further proceedings from the moment of such notification. In such cases, the President of the Court will take steps to designate another judge without taking a separate decision. [Section 24 (1)

and (6) of the Code of Criminal Procedure] The public prosecutor and other persons involved in the criminal proceedings may also allege the grounds for disqualification. In such a case, the judge may proceed with the case pending the ruling on the motion for disqualification, but may no longer take part in the decision on the case. The motion for disqualification, whether it is for a single judge or a panel of judges, is considered by a panel of two judges and two lay judges or by another panel of the court. After obtaining the declaration of the judge concerned, a formal decision is taken on the merits of the motion for disqualification. [Section 23 (2) of the Code of Criminal Procedure, Section 24 (2) and (7) of the Code of Criminal Procedure and Section 24/A (2) and (3) of the Code of Criminal Procedure] With regard to the notification of the grounds for disqualification, the Code of Criminal Procedure lays down limits. Thus, in the case of a motion based on the same ground for disqualification, the judge concerned may also participate in conclusively deciding the case. [Section 24 (4) and (5) of the Code of Criminal Procedure.] If the participants in the criminal proceedings repeatedly file an unfounded motion for disqualification against the same judge, a fine may be imposed in the decision refusing disqualification (Section 25 of the Code of Criminal Procedure, and from judicial practice, Supreme Court case decision Bk.I.733/1998.)

[31] 3.2 The Code of Criminal Procedure allows the use of a relative ground for disqualification, that is, based on bias, subject to further strict limits. In accordance with these limits, a relative ground for disqualification may only be asserted after the commencement of the hearing if the petitioner proves that he became aware of the ground for disqualification after the commencement of the hearing and that there was no delay in asserting it, that is, he immediately discloses the grounds of bias of which he becomes aware. [Section 23 (3) of the Code of Criminal Procedure] Moreover, a motion to disqualify a judge based on bias does not prevent the judge or member of the panel concerned from taking part in the rendering the conclusive decision. [Section 24 (2) of the Code of Criminal Procedure, from the judicial practice, see Supreme Court decision Bfv.I.395/2009.] In addition to the above, the Constitutional Court has also observed that judicial practice imposes additional substantive requirements on motions of bias. Thus, the objection of bias can only be successful if a specific and well-founded reason is given (Supreme Court decision B.V.785/1993). Another requirement is that the bias must always be related to the case at hand and be based on precise facts (Supreme Court decision Bkk.III.843/2011).

[32] The framework of the enforceability of the relative ground of disqualification is able to prevent the abusive exercise of bias objections, which in fact are no longer aimed at facilitating an impartial judicial process, but at delaying criminal proceedings. Therefore, in accordance with Article XXVIII (1) of the Fundamental Law, the interest in the timely completion of criminal proceedings may justify that motions for disqualification may not be exercised without limitation, but only in the strict order prescribed by the procedural law. {See also, Decision 8/2013 (III. 1.) AB, Reasoning [29] and [30]} It can thus be concluded that the standard of interpretation required by Article R (3) of the Fundamental Law, in accordance with which the provisions of the Fundamental Law must be interpreted in accordance with their purpose, is satisfied by the concept of a fair trial enshrined in Article XXVIII (1) of the Fundamental Law, which is capable of effectively promoting and guaranteeing that criminal cases can be heard impartially. Consequently, legislation which, through the rules on disqualification, effectively

promotes the impartial conduct of criminal trials and, at the same time, is capable of preventing the abuse of the institution of disqualification, is consistent with the constitutional requirement of impartiality. In the following, the Constitutional Court has considered and assessed the relationship between the standard of impartiality and the enforceability of the objection of bias in review proceedings on the basis of these aspects.

[33] 4. In criminal proceedings, the review proceedings is a type of extraordinary remedy which may be used against a final, conclusive decision of the court, if the conditions exhaustively listed in the Code of Criminal Procedure are fulfilled. The review proceedings can be initiated mainly on the grounds of substantive or procedural irregularities committed by lower courts. [Section 416 (1) (a) to (d) of the Code of Criminal Procedure] However, this extraordinary remedy procedure also provides protection if the Constitutional Court has ordered a review of criminal proceedings that have been terminated by a final decision or if the court has established criminal liability or imposed a sentence on the basis of a law that the Constitutional Court has found to be contrary to the Fundamental Law. In addition, review proceedings may also be invoked if the human rights body established by an international treaty has found that the proceedings or final decision of a domestic court have violated an international treaty obligation. [Section 416 (1) (e) to (g) of the Code of Criminal Procedure] Accordingly, one of the grounds for a review proceedings is if the lower court in the criminal case subject to review committed a procedural violation as defined in Section 373 (1) (I) (b) or (c) or in one of the provisions of Section 373 (1) (II) to (IV) of the Code of Criminal Procedure when it rendered its decision. [Section 416 (1) (c) of the Code of Criminal Procedure] By applying the rule in Section 373 (1) II (b) of the Code of Criminal Procedure, the law allows for review proceedings if the judgement was rendered by a judge who was disqualified by law. The rules of procedure for disqualification described above impose a restriction on the filing of a objection of bias based on Section 21 (1) (e) of the Code of Criminal Procedure, in that such an objection may be raised only after the commencement of the hearing if the circumstances on which it is based have come to light after the commencement of the hearing and are immediately asserted. Taking this into account, two separate cases of objection of bias in review proceedings can in theory be distinguished. In the first case, the judgement was delivered by a judge whose disqualification on the basis of an earlier motion for a declaration of bias was established only after the judgement had become final by a panel of judges acting under the powers provided for in Section 24 (7) of the Code of Criminal Procedure. In the second case, the judgement was delivered by a judge against whom an objection of bias was raised, for whatever reason, after the judgement had become final.

[34] Concerning the first case, the Constitutional Court notes that the rule contained in Section 24 (8) of the Code of Criminal Procedure, in accordance with which the decision dismissing the motion for disqualification and denying the disqualification cannot be challenged independently, but only by means of a remedy against the decision deciding the case. It follows from a combined reading of the two rules that such a decision may be challenged not only by ordinary remedy but also by extraordinary appeal, and thus also by a motion for review, and that the application for bias may be asserted in the review proceedings. This is the conclusion reached by the Supreme Court in point 2 of its Opinion No BK 86 of 8 February 2010, in accordance with which the fact that the judicial panel, acting under Section 24 (7) of the Code

of Criminal Procedure, finds that the motion for disqualification is well-founded after the decision on the merits has become final, leads to setting aside the judicial decision from the outset.

[35] In the context of the second case, the Constitutional Court noticed in the course of its proceedings that the Curia follows the practice in accordance with which it is no longer possible to raise an objection of disqualification based on bias, nor to assert it in the review proceedings. In its decision of 29 April 2010, No Bfv. II. 856/2009/20 of 29 April 2009 and in the orders challenged in this constitutional complaint, the Curia held that, after the decision of the court of first instance has become final, it is not possible to invoke bias in order to bring an extraordinary remedy even if the reason for the bias becomes known to the defendant at a later date. It can be seen from the above that the Curia gives a restrictive interpretation to the ground for review set out in Section 416 (1) (c) of the Code of Criminal Procedure when it allows the absolute grounds for disqualification listed in Section 21 (1) (a) to (d) of the Code of Criminal Procedure to be valid, while it considers a motion for review based on the relative ground for disqualification set out in Section 21 (1) (e) of the Code of Criminal Procedure to be excluded by law. The Constitutional Court extended its proceedings on the basis of the constitutional complaint filed in the individual case to the consideration of the established practice of the Curia interpreting Section 416Section 416 (1) (c) of the Code of Criminal Procedure and thus compared the uniform practice and interpretation of the law by the judiciary in relation to the statutory condition with the constitutional standard of impartiality. {Similarly, see the doctrine of what is termed "living law" from the earlier practice of the Constitutional Court; Decision 57/1991 (XI. 8.) AB, ABH 1991, 272, 277; Decision 38/1993 (VI. 11.) AB, ABH 1993, 256, 267; and cf. this Decision, Reasoning [21] to [24]}

[36] 4.1 The exceptional remedies provided for in procedural law are the exceptional cases of piercing the legal force of finality. In general, the enforcement of substantive justice in itself, that is, a just decision which complies in all respects with substantive and procedural law, is not sufficient constitutional justification for piercing the legal force of finality of a judicial decision. The guarantee of extraordinary remedies and the conduct of proceedings are justified in particular in cases where the final decision may be vitiated by errors of law or fact which make it absolutely necessary to protect the rights or legitimate interests of the person concerned; therefore, the interest in eliminating them outweighs the interest in respecting the finality of the decision and thus the interest in legal certainty, which is essential to the stability of the rule of law. In other words, in such exceptional cases, it is more important to uphold and strengthen public confidence in judicial decisions by removing the finality of the decision rather than by respecting the finality of a decision which is vitiated by a legal error or mistake. Notwithstanding all the procedural guarantees and counterbalances, even if the court's work is accurate in its fact-finding and law-applying, it is not possible to rule out serious errors of procedure which can only be redressed by extraordinary remedies. The question as to the precise cases in which substantive justice may be preferred, that is, in which cases extraordinary remedies are justified, may depend on a number of circumstances, including the type of proceedings, the importance of the case, the seriousness of the error or the extent of the error.

[37] The Constitutional Court considers that in this respect criminal procedure occupies a distinctive place that sets it aside from the other procedural laws. Criminal procedure is a procedural system for the enforcement of the right on the part of the State to prosecute and its sanctions system, which, by its nature of public authority and its legal consequences, necessarily restricts the fundamental constitutional rights of individuals. It is for this reason that, in criminal cases, the rules on extraordinary remedies to correct errors in the judicial process and the interpretation and enforcement of those rules are of particular importance. This view is also reinforced by the provisions of criminal procedure which do not impose a time limit on the exercise of extraordinary remedies in favour of the defendant, and which do not even prevent the conduct of a retrial or review proceedings, under the terms of the law, even if the defendant has ceased to be a criminal offender. [Section 408 (5) of the Code of Criminal Procedure, Section 418 (2) and Section 432 of the Code of Criminal Procedure]. Because of the retributive nature of the system of criminal sanctions, which severely restricts the fundamental constitutional rights of the defendant, the Constitutional Court has come to the conclusion that respect for the finality of judicial decisions cannot in any case prevail over the enforcement of substantive justice in cases where the courts adjudicating criminal cases make errors in the application of the law or in the reconstruction of the relevant facts to the detriment of the defendant.

[38] 4.2 The Constitutional Court, recalling the above, notes that the principle of impartiality is a guarantee of constitutional criminal procedure which is protected by Article XXVIII (1) of the Fundamental Law and Article 6 (1) of the Convention. Accordingly, the lack of impartiality in the conduct of criminal proceedings and the breach of the rules of disqualification may constitute a serious breach of a guarantee of constitutional criminal procedure which may not only have a decisive impact on the outcome of a particular case but may also undermine public confidence in the administration of justice and the authority of the court's decisions. The Constitutional Court also stresses in this context that the effective application of the disqualification rules is of the utmost importance because, in the vast majority of cases, it is not necessarily in the interest of the parties to reveal a lack of impartiality. In other words, following a biased assessment of a case in the light of a concealed circumstance, it is in the interest of the judge to ensure that the circumstances giving rise to the bias remain secret and are not revealed. It is therefore necessary, both in the legislative context and in the specific cases, to apply a strict standard whereby, in addition to the impartial assessment of cases, the court hearing the case cannot lose even the semblance of impartiality. [In line with this, see ECtHR in *Piersack v. Belgium*, (8692/79), 1 October 1982, paragraph 30.]

V

[39] The Constitutional Court then assessed whether the restrictive interpretation of the Curia's interpretation of Section 416 (1) (c) of the Code of Criminal Procedure is in accordance with the constitutional principle of impartiality contained in Article XXVIII (1) of the Fundamental Law (1), in the context of the specific case on which the constitutional complaint was based, relying on the outlined system of requirements (2).

[40] 1. The petitioner filed a motion for review against the final decision of the Pécs Court of Appeal, *inter alia*, because, in his opinion, a judge excluded by law participated in the first

instance judgement. In accordance with his argument, his cousin is the deputy president of the Regional Court of Pécs; therefore, the judge of the Regional Court of Pécs who was acting in the case could not be expected to judge objectively.

[41] With regard to this part of the motion for review, the First Order of the Curia accepted the arguments of the Prosecutor General in his transcript, in accordance with which only what is known as absolute grounds for disqualification regulated in points (a) to (d) of Section 21 (1) of the Code of Criminal Procedure may serve as grounds for disqualification in the review proceedings. On the basis of the repeated motion for review, the Second Order confirmed that the grounds for disqualification provided for in Section 21 (1) (e) of the Code of Criminal Procedure cannot be asserted in the review proceedings even if the defendant becomes aware of the grounds for disqualification after the final decision has been made, and thus the motion for review is excluded by law in the part based on this ground.

[42] 1.1 The Constitutional Court is of the opinion that the reasoning of the Curia and the established practice of the Curia on which it is based are not in accordance with the effective enforcement of the principle of impartiality contained in Article XXVIII (1) of the Fundamental Law. In the Constitutional Court's view, Article XXVIII (1) of the Fundamental Law recognises the right of the defendant to have the charges against him decided by an independent and impartial court established by law, which also implies the requirement of the enforceability of a fundamental constitutional right, that is to say, that the effective exercise of that right is guaranteed by adequate means of control. For the reasons set out below, the restrictive interpretation and exclusion of the possibility of review to verify the impartiality of the judgement infringes the right of the defendant to an impartial judicial process under Article XXVIII (1) of the Fundamental Law.

[43] 1.2 The Constitutional Court started from the function of an impartial judicial procedure when assessing the question. The objective adjudication of cases is guaranteed if the judges are able to determine and assess only the facts of the case, the evidence on which the facts are based and the law necessary to assess the facts in isolation. Any circumstance outside these limits, which is both connected with the parties and with the case itself, jeopardises the objective assessment of the case in question because it is capable of influencing the judge's discretion. It is for that reason that the infringement of the guarantee of impartiality affects the conduct of the case and its outcome to the detriment of one or other of the parties. On the other hand, a biased and partial assessment of cases may erode the authority of the judiciary and public confidence in the judgements of the court, and thus ultimately the rule of law. The guarantee of impartiality therefore extends to the remedies available to enforce it and to challenge it. These remedies play a particularly important and guarantee role in cases where impartiality is due to a concealed circumstance. Without the effective functioning of the available redress procedures, such grounds of impartiality will remain undetected. On the basis of these considerations, the Constitutional Court has come to the conclusion that the absence of adequate rules of disqualification, as well as the limits on their enforceability, are contrary to the requirement of impartiality.

[44] In the context of the case at hand, Section 416 (1) (c) of the Code of Criminal Procedure allows review proceedings in cases where a judge disqualified by law participated in the

judgement. In line with the Second Order, the practice of the Curia narrows down this ground for review to cases where the motion for review specifies what is known as an absolute ground for disqualification and, at the same time, in all cases, considers a motion for review based on a relative ground for disqualification and based on bias to be disqualified by law. Consequently, the Curia denies the possibility to initiate a review to all those who become aware of a ground for disqualification under Section 21 (1) (e) of the Code of Criminal Procedure that could be opposed to the presiding judge or a member of the judicial panel after the final judicial decision has been rendered.

[45] 1.2.1 Recalling the means by which the exclusion rules prevent the abuse of the abuse of biased motions, the Constitutional Court also considered whether the restrictive interpretation of the law by the Curia could be justified by the prevention of the abuse of the exercise of rights. In this context, the Constitutional Court notes, first of all, that the mere need to curb the improper exercise of rights cannot justify the authorisation of a breach of the constitutional principle of impartiality in certain cases. Even if only a minimal part of the reported objections of bias prove to be well-founded. In accordance with the Constitutional Court's benchmark, a single case in which a convicted person in a criminal case is deprived of the chance to assert a circumstance which may vitiate the impartiality of the criminal proceedings, the conviction and the sentence imposed on him is considered to be one too many.

[46] The Code of Criminal Procedure does not set a final time limit for the submission of objections of bias. However, Section 23 (3) of the Code of Criminal Procedure serves to prevent the abuse of rights, in accordance with which such an objection may only be raised after the commencement of the trial if the person making the objection proves that he or she became aware of the circumstances giving rise to the objection after the commencement of the trial and did not delay in reporting them. A further restriction is provided for in Section 24 (5) of the Code of Criminal Procedure, in accordance with which a repeated and unfounded motion for disqualification on the same point may be dismissed without stating the reasons for such a decision. Section 25 of the Code of Criminal Procedure provides for the possibility of imposing a fine if a ground for disqualification is repeatedly and unfoundedly raised against the same judge. In addition to the above, Section 418 (3) of the Code of Criminal Procedure contains a further restriction on the rules of review, in accordance with which each right-holder may only submit a motion for review once. Motions for disqualification which fail to meet these conditions may be dismissed without consideration. In addition, there is the judicial practice outlined above, which provides as a further restriction of a substantive nature that a motion for disqualification based on bias may only be successful if it states a specific and well-founded reason for the case (cf. the this Decision, Reasoning [31] and [32]). It follows that the restrictive judicial interpretation of Section 418 (1) (c) of the Code of Criminal Procedure, which forms the subject of these proceedings before the Constitutional Court, in fact deprives only those who, for the first time, seek to assert a specific circumstance of which they can prove that they became aware after the final judgement was delivered of the possibility of asserting an objection of bias. In the Constitutional Court's view, therefore, a judicial interpretation of the law which restricts the possibility of review cannot serve the purpose of curbing the abuse of rights. On the contrary, given that the persons concerned have an interest in the secrecy of the circumstances giving rise to the bias, the Constitutional Court considers that the established

judicial practice may inadvertently contribute to the fact that the circumstances which may give rise to the bias of the court may remain secret, despite having been disclosed.

[47] The Constitutional Court has also noted that the Criminal Procedure Code considers as a ground for retrial the breach of duty by a member of the court, the prosecution or the investigating authority in a manner contrary to the Code of Criminal Procedure, provided that the criminal offence was established by a final judgement or that such a judgement was not precluded by lack of evidence and that the criminal offence influenced the decision of the court. [Section 408 (1) 2 (d) and Section 408 (2) (a) and (b) of the Code of Criminal Procedure] In this context, the Constitutional Court has held that this ground for retrial undoubtedly also constitutes a breach of impartiality, but that the lack of impartiality cannot in any event be limited to this case. The Constitutional Court thus concluded that that ground for retrial could not serve as an alternative to the ground for review provided for in Section 416 (1) (c) of the Code of Criminal Procedure.

[48] 1.2.2 The effective preservation of the impartiality of judicial proceedings in individual cases is guaranteed by certain provisions of the Code of Procedure and the consistent enforcement of these provisions by the courts. (cf.: this Decision, Reasoning [26] to [29]) It follows that the fundamental constitutional right to impartiality also requires the courts to facilitate effectively the exercise of the means by which the impartiality of the court or tribunal may be effectively checked or the consequences of the lack of impartiality may be enforced. The need to enforce impartiality is more acute in criminal cases, where a final conviction involves a rebuttal of the presumption of innocence and the retributive sanctioning regime of criminal law severely restricts the fundamental rights of the convicted person. The Constitutional Court, precisely because of the interest in concealing the reason for the bias, does not consider it unrealistic that such a reason should only come to the attention of the defendant after the final conviction. It is therefore incompatible with the right to an impartial judicial procedure deriving from Article XXVIII (1) of the Fundamental Law if the practice of the Curia excludes from the possibility of asserting certain grounds of impartiality in the review proceedings the objection of bias raised for a well-founded reason and in due time, that is to say, refuses to consider the merits of a motion for review based on such a ground.

[49] 1.3 In proceedings based on a constitutional complaint, the Constitutional Court primarily has a role of legal protection, because in accordance with the provisions of Sections 26 and 27 of the Constitutional Court Act, its task is to enforce the fundamental constitutional rights guaranteed by the Fundamental Law. In its Decision 8/2013 (III. 1.) AB, the Constitutional Court stated that the Constitutional Court's task includes defining the constitutional requirements of criminal proceedings and the constitutional guarantees and counterbalances which the authorities acting in criminal matters must unconditionally respect both during the investigation and the judicial proceedings. (Reasoning [45], [54] and [55]) By Section 46 (3) of the Constitutional Court Act, the Constitutional Court has been empowered, in the exercise of its competences, to determine the constitutional requirements arising from the provisions of the Fundamental Law and giving effect to the provisions of the Fundamental Law, the fulfilment and implementation of which may not be disregarded by the law enforcement authorities in the application of the law. Consequently, the Constitutional Court is ultimately empowered to

answer the question of which interpretation of a given piece of legislation by the legislature meets certain requirements inherent in the rights guaranteed by the Fundamental Law.

[50] The Constitutional Court has now made use of its statutory mandate and found that the application of the condition of the review proceedings under Section 416 (1) (c) of the Code of Criminal Procedure is in accordance with the impartial judicial procedure of Article XXVIII (1) of the Constitution if it allows the consideration of the motion for review based on bias even if the ground for disqualification arose after the final decision was made. The Constitutional Court concludes that, in interpreting the rule laid down in Section 416 (1) (c) of the Code of Criminal Procedure, it is a constitutional requirement under Article XXVIII (1) of the Fundamental Law that a motion for review based on the grounds of bias under Section 21 (1) (e) of the Code of Criminal Procedure and in accordance with the other rules of law may be considered, assessed and determined on the merits.

[51] 2. The Constitutional Court then considered whether the violation of the constitutional law alleged in the constitutional complaint could cause the unconstitutionality of the Curia's orders challenged in the constitutional complaint. In this respect, the Constitutional Court found that the First and Second Orders challenged in the constitutional complaint both adopted the judicial practice called for in the transcript of the Prosecutor General, in accordance with which only the absolute grounds for disqualification provided for in Section 21 (1) (a) to (d) of the Code of Criminal Procedure may be considered on the merits in review proceedings. However, the First Order nevertheless assessed the merits and found the declared grounds of bias to be unfounded, while the Second Order declared the motion for review to be excluded by law. Therefore, a finding that the contested Curia orders are contrary to the fundamental Law in the specific case would not result in the redress of the grievance raised in the constitutional complaint. Accordingly, in the Constitutional Court's view, the infringement of the right to an impartial judicial procedure and thus the violation of the fundamental Law by the Curia's orders cannot be established in the present case.

[52] 2.1 The Constitutional Court then considered the violation of the other constitutional rules invoked in the constitutional complaint. The petitioner invoked the right to personal liberty recognised by Article IV (1) and (2) of the Fundamental Law, the rule of equality recognised by Article XV (1) of the Fundamental Law and the right to impartial administration of public affairs recognised by Article XXIV (1) of the Fundamental Law in connection with the refusal to grant review. However, the Constitutional Court did not see any substantive connection between any of the constitutional rules invoked and the refusal to review the infringement alleged. The petitioner also invoked a violation of the right of defence under Article XXVIII (3) of the Fundamental Law, since, in his view, the service of the transcript of the Prosecutor General on the defence counsel had not been effected. In that context, the Constitutional Court held that, although the failure to serve the document could be regarded as a procedural irregularity, it did not constitute, in the present case, an irreparable breach of the rights of the defence recognised by Article XXVIII (3) of the Fundamental Law.

[53] 2.2 For these reasons, the Constitutional Court dismissed the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and

Annulment of the Curia's orders in all its parts, in addition to establishing the constitutional requirement.

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

Budapest, 30 September 2013

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

Dr. Elemér Balogh, sgd.,
Justice of the Constitutional Court

Dr. István Balsai, sgd.,
Justice of the Constitutional Court, Justice-
Rapporteur

Dr. András Bragyova, sgd.,
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, sgd.,
Justice of the Constitutional Court

Dr. Imre Juhász, sgd.,
Justice of the Constitutional Court

Dr. László László Kiss, sgd.,
Justice of the Constitutional Court

Dr. Péter Kovács, sgd.,
Justice of the Constitutional Court

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

Dr. Miklós Lévy, sgd.,
Justice of the Constitutional Court

Dr. Béla Pokol, sgd.,
Justice of the Constitutional Court

Dr. László Salamon, sgd.,
Justice of the Constitutional Court

Dr. István Stumpf, sgd.,
Justice of the Constitutional Court

Dr. Péter Szalay, sgd.,
Justice of the Constitutional Court

Dr. Mária Szívós, sgd.,
Justice of the Constitutional Court

Concurring reasoning by *Dr. Béla Pokol*, Justice of the Constitutional Court

[55] I accept the operative part of the Decision, but I see a problem in a certain part of the Reasoning and would like to submit a parallel statement of reasons.

[56] In Marginal No [27] of the Reasoning, the decision makes a statement which gives an excessive primacy to the fundamental individual rights which guarantee the autonomy of individuals vis-à-vis communities. In so doing, it classifies the scope of fundamental rights once established in this field as unlimited and irreducible, and it considers the scope of fundamental rights as set out in decisions of the international court of human rights to be only increasable, not reducible, and only as a minimum level. This repetition of the statement laid down in previous Constitutional Court decisions - in the present case in relation to the Human Rights Convention and the case law of the European Court of Human Rights (ECtHR) - must be challenged. This thesis was put forward by the previous majority of constitutional justices

against the background of an extremely individualistic conception of society, the essence of which is that the standard of protection of fundamental rights of individuals, once set, cannot be changed in the future, nor can it be lowered in the interests of the survival of the social community. This can be argued from the standpoint of an individualist worldview as the highest achievement, but that does not change the fact that it is based on a thoroughly one-sided worldview. The individual can only exist in a social community, and his fundamental rights can only ever be exercised to the extent of the existence of the community, its harmony and the moral order which it ensures. The 'never-reducible level of individual fundamental rights' as a principle stands in contrast to this, and in the light of the Fundamental Law's emphasis on community goals and functions, which is more central than in the previous Constitution, this earlier individualist thesis is no longer tenable. In my view, the contested part of the Reasoning has not thought through the requirements of the new Fundamental Law in this respect and has therefore wrongly adopted this thesis.

Budapest, 30 September 2013

Dr. Béla Pokol, sgd.,
Justice of the Constitutional Court