Decision 75/2008. (V. 29.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking a posterior examination of the unconstitutionality of a statute and the establishment of an unconstitutional omission of legislative duty, and a judicial initiative seeking the establishment of unconstitutionality of a statute to be applied in a pending case – with dissenting opinions by *dr. Mihály Bihari, dr. András Bragyova, dr. András Holló* and *dr. László Kiss* constitutional judges – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court establishes that the right of assembly recognized in Article 62 para. (1) of the Constitution also covers the holding of events organised in advance including peaceful events where the assembly can only be held shortly after the causing event. In addition, the right of assembly covers assemblies held without prior organisation.

2. The Constitutional Court holds the following: it is a constitutional requirement following from Article 62 para. (1) of the Constitution that in the application of Section 6 of the Act III of 1989, the obligation of notification pertains to organised events to be held on public ground.

It is unconstitutional to prohibit merely on the basis of late notification the holding of peaceful assemblies that cannot be notified three days prior to the date of the planned assembly due to the causing event.

3. The Constitutional Court establishes the unconstitutionality of the term “without notification, or in a manner conflicting with the conditions specified in Section 7 items a) and b), or” in Section 14 para. (1) of the Act III of 1989 on the Right of Assembly, and therefore annuls it as of the date of publication of this Decision.

Section 14 para. (1) of the Act III of 1989 on the Right of Assembly shall remain in force as follows: “If the exercise of the right of assembly violates the provisions under Section 2 para. (3), or the participants appear in an armed manner or with weapons, or if an assembly under the obligation of notification is being held despite a prohibiting decision, the police shall disperse the assembly.”

4. The Constitutional Court rejects the petitions seeking the establishment of the unconstitutionality and the annulment of the whole of the Act III of 1989 on the Right of Assembly and of Section 6 thereof.

5. The Constitutional Court rejects the petition seeking the establishment of the prohibition of application of Section 6 of the Act III of 1989 on the Right of Assembly in the case pending at the Town Court of Pécs under the file number 15.sz.1974/2007.

6. The Constitutional Court rejects the petition aimed at the establishment of the omission of constitutional duty submitted with regard to the Act III of 1989 on the Right of Assembly.

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

REASONING

I

The Constitutional Court received several petitions concerning the notification obligation related to events to be organised on public ground and to the dispersal of unnotified events. Some of the petitions initiated the constitutional review of certain provisions of the Act III of 1989 of the Right of Assembly (hereinafter: ARA), while others contained constitutional concerns in the respect of the whole ARA.

One of the petitioners initiated the establishment of the unconstitutionality and the annulment of the text "if an assembly under the obligation of notification is being held without notification, or in a manner conflicting with the conditions specified in Section 7 items a) and b) (…) the police shall disperse the assembly" in Section 14 para. (1) of ARA. In addition, the petitioner initiated that the Constitutional Court establish the following: Sections 6 and 7 of ARA are not applicable to the so called spontaneous assemblies as those events have no organiser who could notify the assembly. As held by the petitioner, the challenged provision does restrict the essential content of the right of assembly granted in Article 62 para. (1) of the Constitution, and it is also in conflict with Article 7 para. (1) of the Constitution stating that the legal system of the Republic of Hungary accepts the generally recognised principles of international law. Those principles include the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols, promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention), Article 11 of which provides for the freedom of assembly.

Another petitioner also referred to Articles 7 and 62, initiating the posterior constitutional review of Section 14 para. (1) of ARA. According to the petitioner, the unconstitutionality of the challenged regulation lies in the fact of not allowing the police to consider how to act against an unnotified event.

In a petition, initiating the annulment of the text "if an assembly under the obligation of notification is being held without notification" in Section 14 para. (1) of ARA, one of the petitioners referred to Article 61 of the Constitution enshrining the freedom of expression in the context of Article 62 of the Constitution. In addition, the petitioner referred to the judgement of the European Court of Human Rights in the case *Bukta et al v. Hungary* (25691/04; Strasbourg, 17 July 2007) where Hungary was condemned because of the dispersal of a peaceful assembly.

A judge of the Town Court of Pécs also turned to the Constitutional Court, who suspended a procedure of administrative offence and at the same time initiated the Constitutional Court to establish the following: Section 6 of ARA is in conflict with Article 62 of the Constitution, therefore it cannot be applied in the case No. 15.sz.1974/2007. The basis of the procedure at the Town Court of Pécs was a fine imposed by the police headquarters of Pécs against a person who proposed to the people spontaneously assembling at the time of the Prime Minister's visit to Pécs to march over to another site. According to the police, the organisation of an unnotified demonstration qualifies as the administrative offence of abusing the right of assembly sanctioned in Section 152 para. (1) of the Act LXIX of 1999 on Administrative Offences (hereinafter: AAO). The judge of the Town Court of Pécs holds that the obligation of prior notification specified in ARA does not allow a chance for spontaneous peaceful demonstrations. To support his arguments, the judge referred to the judgement of the European Court of Human Rights in the case *Bukta and others v. Hungary*.

Two petitioners challenged the deficient regulation in the whole of ARA. One of them referred to the unconstitutionality of the ARA's failure to provide adequately for the definition of terms, the limits of the right of assembly, the time limits of assemblies, the intersection of events, the securing of traffic ways, the material liability of the organiser and the claims for damages. Therefore, in the first petition, the petitioner asked the Constitutional Court to establish the unconstitutionality of Sections 6, 8, 9, 12 and 13 of ARA. The petitioner subsequently refined and amended his petition several times. Finally, the petitioner reached the conclusion of the ARA being irreparable by way of deleting some of its elements, consequently he asked the Constitutional Court to annul the whole ARA because of the numerous unconstitutional provisions and deficiencies in it and to oblige the Parliament to adopt a new Act of the Right of Assembly.

The other petitioner requested the Constitutional Court to establish the omission of a constitutional duty as the Parliament failed to provide for the statutory conditions necessary for the enforcement of the right to free movement and the right to transport, in order to secure adequate protection against the "extreme forms" of practising the right of assembly. According to the petitioner, the ARA should provide for a possibility to the advance protection of rights against the holding of a notified event, to the temporal restriction of assemblies and for the enforcement of damages caused by events implying the blocking of roads. The petitioner referred to Article 2 para (1), Article 7 para. (2), Article 8 para. (1), Article 58 and Article 78 of the Constitution.

On the basis of Section 28 of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's provisional rules of procedure and on the publication thereof (hereinafter: the CCRP), the Constitutional Court consolidated the petitions and judged them in a single procedure.

II

1. The relevant provisions of the Constitution in the respect of the petitions are as follows:

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

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

(2) Legislative procedures shall be regulated by Act of Parliament, for the passage of which a majority of two-thirds of the votes of the Members of Parliament present is required."

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

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by Act of Parliament; such law, however, shall not restrict the essential contents of fundamental rights."

"Article 58 (1) Everyone legally staying or residing in the territory of the Republic of Hungary – with the exception of the cases established by Act of Parliament – has the right to move freely and to choose his place of residence, including the right to leave his domicile or the country."

"Article 61 (1) In the Republic of Hungary, everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest."

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

(2) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the Act on the right of assembly."

"Article 78. (1) The Constitution of the Republic of Hungary shall enter into effect on the day of its promulgation; the Government shall ensure its implementation.

(2) The Government shall propose the Bills necessary to implement this Constitution to the Paliament."

2. The provisions of ARA affected by the petitions are as follows:

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

Section 7 The written notification shall contain the following:

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

b) the aim and the agenda of the assembly;

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

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

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

(2) There must be a warning prior to dispersing the event.

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

III

The petitions are, in part, well-founded.

First, the Constitutional Court examined the petitions containing constitutional concerns with regard to the whole of ARA.

1.1. One of the petitions initiated the establishment of the unconstitutionality of ARA and the annulment of the whole Act, as – in the opinion of the petitioner – it fails to adequately regulate several questions. Such questions include the definition of terms, the limits of the right of assembly, the time limits of assemblies, the intersection of events, the securing of traffic ways, the material liability of the organiser and the claims for damages.

The Constitutional Court has already assessed the constitutionality of the complete ARA in the Decision 55/2001. (XI. 29.) AB (hereinafter: CCDec). According to CCDec, it is not against the freedom of assembly granted in Article 62 para. (1) of the Constitution, that ARA "provides for certain restrictions, and provides a statutory ground for the authorities to pass a resolution on restricting this right". In addition, it established that the whole of ARA "does not violate the international obligations undertaken by Hungary", first and foremost Article 11 of the Convention. (ABH 2001, 442, 448-451) Therefore, the Constitutional Court rejected the petitions aimed at the establishment of the unconstitutionality and the annulment of the whole of ARA. In addition, as the result of the special examinations undertaken in CCDec, the Constitutional Court rejected the petitions seeking the establishment of the unconstitutionality and the annulment of Section 1, Section 2 paras (1) and (3), Section 5, Section 6, Section 7 items b) and d), Section 8 para. (1), Section 9 paras (1) and (2), Section 13 para. (1), and Section 14 paras (1) and (3) of ARA containing altogether 20 Sections. (ABH 2001, 442)

1.2. According to Section 31 item c) of CCRP, the Constitutional Court terminates the procedure when the petition is aimed at the review of a statute (statutory provision) which is the same as one already reviewed by the Constitutional Court on the merits, and the petitioner refers to the same Article or the same constitutional principle (value) and, – within the above – to the same constitutional tie when requesting the establishment of unconstitutionality ("a matter [already] judged").

In the present case the petitioner initiated the annulment of the whole of ARA on the basis of constitutional ties partially different than the previous ones. Therefore, in this respect, the Constitutional Court holds the request contained in the petition not to be a “matter [already] judged". However, at the same time, – taking also into account the comprehensive constitutional review of ARA performed in CCDec – the Court holds that certain alleged regulatory deficiencies of ARA may not lead to the unconstitutionality of the whole ARA. In CCDec the Constitutional Court regarded the whole of ARA to be a constitutional Act containing the guarantees of fundamental rights and complying with the international standards on human rights. Accordingly, neither in the present case do some alleged individual deficiencies justify the constitutional revision of the whole ARA.

Therefore, the Constitutional Court rejected the petition aimed at the establishment of the unconstitutionality and the annulment of the whole of ARA.

2.1. The Constitutional Court examined the petition, according to which the failure of ARA to secure adequately the protection of the right to free movement and the right to transport against the right of assembly was an unconstitutional omission violating Article 2 para (1), Article 7 para. (2), Article 8 para. (1), Article 58 and Article 78 of the Constitution. The petitioner referred to the deficient regulation concerning the advance protection of rights against the holding of a notified event, the temporal restriction of assemblies and the enforcement of damages caused by events implying the blocking of roads.

2.2. According to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC): “If an unconstitutional omission to legislate is established by the Constitutional Court *ex officio* or on the basis of a petition by any person because the legislature has failed to fulfil its legislative duty mandated by a statute, and this has given rise to an unconstitutional situation, it shall call upon – by setting a deadline – the organ in default to perform its duty.” The Constitutional Court shall establish an unconstitutional omission if the guarantees necessary for the enforcement of a fundamental right are missing, or if the omission of regulation endangers the enforcement of a fundamental right. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232]

The petitioner referred to the right to free movement and the freedom of transport. As stated in Article 58 para. (1) of the Constitution: “Everyone legally staying or residing in the territory of the Republic of Hungary – with the exception of the cases established by Act of Parliament – has the right to move freely and to choose his place of residence, including the right to leave his domicile or the country.” In this respect CCDec contains the following: “The possibility to use the public ground is a precondition not only for the enforcement of the freedom of assembly but for that of another fundamental right as well: the right of free movement guaranteed in Article 58 of the Constitution. The Constitutional Court has already pointed out in one of its earlier decisions that the right of free movement means the right to free change of place as well [Decision 60/1993 (XI. 29.) AB, ABH 1993, 507, 510]. The right of free movement is typically exercised on a public road or on public ground. As it is the consistent judicial practice of the Constitutional Court that the State’s obligation to respect and protect fundamental rights includes both abstaining from violating such rights and guaranteeing the conditions necessary for their enforcement (…), with respect to the prevention of a potential conflict between two fundamental rights: the freedom of assembly and the freedom of movement, the authority should be statutorily empowered to ensure the enforcement of both fundamental rights or, if this is impossible, to ensure that any priority enjoyed by one of the rights to the detriment of the other shall only be of a temporary character and to the extent absolutely necessary. This requirement justifies the obligation of notifying the authority in advance of the assembly to be held on public ground, since the authority needs to be informed on such assemblies in time.” (ABH 2001, 458-459).

As stressed by the Constitutional Court in CCDec, the weights of the aspects of the freedom of assembly and traffic concerns are to be taken into account in the course of applying the law. The „authority should be aware of the concrete assembly to be held at a concrete location in order to be able to assess whether or not tolerating the disturbance of public traffic by the planned assembly would be reasonably expectable." (ABH 2001, 459)

2.3. In the present case, the petitioner referred in general to the freedom of movement and – as concrete deficiencies – he mentioned the lacking regulations concerning the advance protection of rights against the holding of a notified event, the temporal restriction of assemblies and the enforcement of damages caused by events implying the blocking of roads.

The Constitutional Court upholds its opinion explained in CCDec, according to which the ARA contains the framework regulations to be applied in every case and the questions raised in the concrete cases must be addressed in the course of the application of the law by the police and the courts. The House of Lords, too, stressed the importance of discretion exercised by the judiciary: as stated in one of it's decisions, it is always the judge in charge who should assess – with regard to size and the duration of the assembly, and the characteristics of the road section concerned – whether, for example, assemblies held on the highway make the flow of traffic impossible or not. d (*Director of Public Prosecutions v. Jones and Another*; 4 March 1999.)

After the adoption of CCDec, the Parliament amended the regulations of ARA concerning the prohibition by the authority of a notified event. On the basis of Section 147 para. (1) item a) of Act XXIX of 2004 on the amendment of certain Acts of Parliament, the annulment of statutory provisions and the adoption of certain statutory provisions in connection with the accession to the European Union, the text "or would cause disproportionate damage to the order of traffic" was replaced by the text "or there is not other route to be used by the traffic". According to the present regulations, the organiser of an event must file a written notification indicating – among others – the location and/or the route of the planned event [Section 6 item a)]. The police may only prohibit the holding of the event if there is not other route to be used by the traffic [Section 8 para. (1)]. If the assembly has not been prohibited and it is to be held on a public road, the police shall notify the organisation in charge of managing the public road [Section 10]. The organiser shall provide for securing the order of the assembly. However, if requested by the organiser, the police and other bodies in charge shall cooperate in securing the order of the event [Section 11].

As held by the Constitutional Court, exercising the right of assembly is in many cases related to the public interest in the order of traffic rather than the fundamental right "of the freedom of movement with or without a vehicle". The Constitutional Court of Poland adopted a similar position stating that the right to free movement does not refer to the use of roads but essentially signifies the possibility to change the place of stay. (Case 21/05; 18 January 2006) Although the protection of the public interest in the order of traffic may justify the restriction of the freedom of assembly, this should be of less extent than in the cases of restrictions based on the protection of other fundamental rights. [Decision 30/1992.(V. 26.) AB, ABH 1992, 167, 178.; Decision 55/2001. (XI. 29.) AB, ABH 2001, 471-473.]

The violation of the freedoms of movement and of change the place of stay may in particular be caused by events to be held without reasonable limitations, practically without time limits, as in certain cases such events render it impossible for the persons to move around freely on the public ground. Those events are, however, not protected by Article 62 para. (1) of the Constitution, as they cannot be regarded as "assemblies". This term, as used in the Constitution, clearly refers to joint expressions of opinions within fixed time limits. It is an approach followed by ARA, as according to Section 7 item a) of the Act, "the expected time of commencing and completing the planned assembly" is to be notified. Therefore the organiser of the event must notify the timeframe of the event even in the cases when it is impossible to foresee when shall a demonstrative presence on public ground – which might even last for several days – reach its goal or when shall it become purposeless. In such cases, in compliance with

Sections 6 and 7 of ARA, the organiser may file an additional notification in order to have the duration of the event extended. Accordingly, the bodies applying the law must assess whether the notification pertains to a peaceful, joint expression of opinions falling under the scope of ARA, or to a different kind of using the public ground.

2.4. Based on the above, the Constitutional Court holds that the freedom of assembly enshrined in Article 62 para. (1) of the Constitution does not necessarily imply the restriction of the freedom of movement – linked to Article 2 para. (1) of the Constitution as referred to in the petition as well as connected reasonably to Article 8 para. (1) of the Constitution – following from Article 58 para. (1) of the Constitution. The weight of the freedom of assembly and of the interests related to the freedom of transportation have to be taken into account in the course of applying the law in the concrete cases. ARA provides the statutory framework necessary for this assessment. Requiring the police to take into account *ex officio* the aspects of traffic, is a constitutional legislative solution. Consequently, the ARA does contain the guarantees necessary for the enforcement of the freedom of movement, thus there is no ground to establish an unconstitutional omission of legislative duty.

The regulation of the compensation for damages caused by the road-blocking events is a concrete problem raised in the petition not related to the freedom of movement.

According to Article 7 para. (2) of the Constitution, legislative procedures shall be regulated by Act of Parliament, for the adoption of which a majority of two-thirds of the votes of the Members of Parliament present is required. Article 78 regulates the taking of force and the implementation of the Constitution. These provisions are not connected in a constitutionally relevant manner to the regulatory deficiencies mentioned in the petition.

Based on the aforementioned reasoning, the petition seeking a declaratory judgment of unconstitutional omission of the duty to legislate is rejected by the Constitutional Court.

IV

The Constitutional Court examined the petitions challenging the concrete provisions of ARA on the obligation of notification and the dispersal of unnotified events, with reference to Article 62 para. (1) of the Constitution and the related Articles 7 para.(1) and 61 para. (1). The petitioners requested the – complete and partial – annulment of Section 6 and Section 14 para. (1) of ARA respectively.

1. First the Constitutional Court examined whether the petitions refer to a “matter [already] judged”. It has been done because the Constitutional Court has already rejected in CCDec the petitions initiating the establishment of the unconstitutionality and the annulment of Section 6 and Section 14 para. (1) of ARA.

1.1. Section 6 of ARA regulates the obligation of prior notification while Section 14 para. (1) provides for the disbanding of certain events. According to CCDec, Section 6 of ARA is not in conflict with the freedom of assembly as “the obligation of advance notification only applies to assemblies to be held on public ground rather than to all assemblies in general, as mentioned in the petition.” In fact, the notification obligation related to events to be held on public ground is not an unconstitutional restriction of rights as “the possibility cannot be excluded that an assembly would endanger – on the basis of the expected number of participants, the causes of or the reasons for organising the assembly – the operation of an organ of popular representation or of a court, or the traffic on public ground so seriously that the only means of preventing it would be the prohibition of the assembly, allowing the prevention of such problems shall not be construed as a disproportionate restriction of the right of assembly.” (ABH 2001, 458-459).

As pointed out in CCDec in the examination of Section 14 para. (1) of ARA on the dispersal of events, this provision is closely related to Section 6 providing for the the obligation of notification and Section 7 regulating the contents of the written notification. “In the opinion of the Constitutional Court, the default of notifying an assembly or holding it in a manner significantly different from that specified in the written notification may not at all be interpreted as an insignificant default of a merely administrative nature. Although departing from these obligations prescribed by the law might be the result of absent-mindedness or negligence, it might also be the first wilful step in the direction of unlawfully exercising the right of assembly. Failure to notify an assembly deprives the authority of the chance to assess whether the planned assembly would seriously disturb the operation of the organs of popular representation or the courts, or the order of traffic. Imposing no sanction on holding the assembly at a time point, location, or route other than that notified would make it useless to require a notification, and it would allow for abusing the right of assembly.” (ABH 2001, 465)

1.2. In a formal sense, the petitions forming the basis of the present case challenge the same regulations of ARA as the ones already reviewed by the Constitutional Court in CCDec. However, the petitions partly refer to other constitutional relations and other provisions of the Constitution then the ones already assessed by the Constitutional Court.

The question of the so called spontaneous peaceful assemblies, which is in the focus of the present petitions, was dealt in CCDec not in the context of Section 6 and Section 14 para. (1) of ARA, but in connection with Section 2 para. (1) of ARA describing the events falling under the scope of ARA. In the opinion of the Constitutional Court, ARA offers adequate legal remedies, “should the police prohibit or disperse assemblies or groupings without a due cause or in an abusive manner”. (ABH 2001, 455)

CCDec mentioned in the context of the whole of ARA the relation between the freedom of assembly and the freedom of expression [Article 61 para. (1) of the Constitution] and the international obligations undertaken in the Convention [Article 7 para. (1) of the Constitution]. (ABH 2001, 449, 451) Nevertheless, the present petitions – including the judicial initiative – refer to the Convention and the judgement of the European Court of Human Rights adopted after CCDec in the *Bukta et al v. Hungary* case explicitly in the context of Section 6 and Section 14 para. (1) of ARA.

The petitions in the present case mentioned several problems in the judicial practice of the recent years. The case of administrative offence to be administered by the judge initiating the procedure of the Constitutional Court also reflects the difficulties around the interpretation and the application of the regulations on the right of assembly. In this context, the Constitutional Court has taken into account that after the publication of CCDec two expert committees had presented reports addressing the issue. The team of experts set up by the Government Decree 1105/2006. (XI. 6.) Korm. (hereinafter: „Gönczöl Commission”) summarised it’s findings in the *Report of the Special Commission of Experts on the Demonstrations, Street Riots and Police Measures in September–October 2006* (www.gonczolbizottsag.gov.hu). The Civil Commission of Lawyers set up for the investigation of the violent events on 23 October 2006 (hereinafter: “Civil Commission”) published the *Report on the violation of human rights in September-October 2006* (www.oktober23bizottsag.hu). Both documents address the constitutional problem subjected to the present procedure of the Constitutional Court.

1.3. After considering the above arguments, the Constitutional Court holds that the petitions in the present case do not pertain to a "matter [already] judged" as they refer to constitutional relations partly different than the ones contained in CCDec, and they refer to other other provisions of the Constitution. In addition, the petitions are linked to constitutional concerns which have become questionable after the adoption of CCDec. Thus the present case is to be distinguished from the constitutional questions reviewed in CCDec. Consequently, the Constitutional Court holds that the petitions are suitable for examining them on the merits.

2. The Constitutional Court underlines that the freedom of assembly enshrined in Article 62 para. (1) of the Constitution – similarly to the freedoms of thought, consciousness, and religion – is closely related to the freedom of expression [Decision 30/1992 (V. 26.) AB, ABH 1992, 167,171]. Without the right to organise and hold assemblies as well as the right to participate in such assemblies, there would hardly be any chance to gain views and information, to share them with others, and to form opinion jointly. [Summarised in: CCDec, ABH 2001, 449.]

Decision 4/2007. (II. 13.) AB provides for further principles related to the character of the right of assembly: "The freedom of peaceful assembly is the precondition and a fundamental value of a democratic society. The events held on the basis of the right of assembly are linked inseparably to the value of democratic openness as these assemblies offer a chance for the citizens to criticise the political processes and to influence politics by way of protesting. The peaceful events are also valuable in the respect of strengthening the political and social order and the legitimacy of the representative bodies. The demonstrations and protest actions warn the representative bodies, the government and the general public about the tensions in the society, allowing the organisations in charge to take the necessary steps in time in order to tackle the causes of the tensions. In a democratic society, repressing protests, or restricting them in an unnecessary and disproportionate manner is not an option: restricting the political freedoms would act not only against those who wish to practice their rights but also against the whole society, including those with reference to whom the State applies the restrictions. The aim of the events held on the basis the right of assembly is to allow the citizens practicing their right of assembly to form joint opinions, to share their views with others and to express it jointly." (ABK February 2007, 117)

Consequently, in today's constitutional democracies, the primary purpose of assemblies held on public ground is the joint representation and demonstration of the opinions and views already formed. The main connection between the freedom of expression and the freedom of assembly is the joint, public expression of the opinion. It is an important element of the right of assembly as a communication right that – in contrast with the press – it has no access barriers and anyone may participate in forming the political will. According to Article 61 paras (1) and (2) of the Constitution, everybody has the right to establish a press product. It requires considerable material resources. It does not follow, however, from the Constitution that press products would be obliged to publish anyone's opinion. This is why it is important to have legal institutions securing participation in public affairs allowing access to all on similar conditions. The freedom of assembly on public ground is a traditional institution to grant this right and recently the Internet seems to gain such a function.

According to Article 62 para. (1) of the Constitution, the right to assemble peacefully can be exercised freely. The limitations on restricting this right – just as in the case of other fundamental rights – are based on Article 8 para. (2) of the Constitution. According to the practice of the Constitutional Court, the constitutionality of restricting a fundamental right requires the restriction not to affect the untouchable essence of the fundamental right, the restriction to be unavoidable, that is, the result of a forcing cause, and that the restriction should be proportionate to the desired objective [Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 71; Decision 7/1991 (II. 28.) AB, ABH 1991, 22, 25; Decision 22/1992 (IV. 10.) AB, ABH 1992, 122,123, summarised in: CCdec, ABH 2001, 450.].

3.1. There are several types of assemblies on public ground falling in the category of peaceful spontaneous assemblies. The really spontaneous assemblies are not generated in a previously planned and arranged manner as they are the result of the actions of several persons who act, more or less, independently. *Flash mobs* are a little bit different as they are either of artistic or of political nature, where the participants get together for a short time (in general only for some minutes) after a swift exchange of information (via the Internet or through mobile phones) and they draw public attention to themselves because of their peculiar or staggering appearance. Organised assemblies that can only be

held within a very short period of time after the causing event – as holding the assembly later on would be senseless - are to be distinguished from spontaneous assemblies.

The Constitutional Court holds that all these peaceful events of public cause fall under the scope of the right of assembly protected in Article 62 para. (1) of the Constitution. Everybody has the right to joint and public expression of his or her opinion, without regard to the organised nature of the assembly or the character and the time of the event in public life causing the assembly.

This interpretation of the right of assembly is in line with the requirements for constitutional democracies. According to the practice of the German Federal Constitutional Court, spontaneous and swift assemblies (*Eilversammlungen*) are constitutionally protected. Therefore the regulation on the obligation of notification does not apply to spontaneous assemblies. (BVerfGE 69, 344.; BVerfGE 85, 69.). As established by the Constitutional Court of Latvia – partly following the arguments found in the decision of the Constitutional Court of Germany – although the Constitution secures the freedom of holding "peaceful and previously notified" assemblies, in the case of spontaneous assemblies, the legislation may not require an obligation of notification, as it cannot be reasonably expected because of the event giving cause to the a spontaneous assembly. (Decision 2006-03-0106, items 23-24; 23 November 2006)

According to the relevant document issued by the Organisation for Security and Co-operation in Europe, the possibility of spontaneous and instant demonstrations is an essential element of the right of assembly. (*OSCE/ODIHR Guidelines for Drafting Laws Pertaining to the Freedom of Assembly*, chapter 5.3. Warsaw, December 2004.) In the opinion of the European Court of Human Rights, the notification obligation alone does not restrict the essence of the right of assembly (*Rassemblement Jurassien Unité v. Switzerland*, 8191/78. 10 October 1979), but at the same time, the instant dispersal by the police of an unnotified demonstration of peaceful cause and course violates the freedom of assembly granted in Article 11 of the Convention (*Oya Ataman v. Turkey*, 74552/01, 5 December 2006).

3.2. Every substantial decision of the Constitutional Court necessarily interprets the Constitution in an explicit or implicit way. [Decision 36/1992 (VI. 10.) AB, ABH 1992, 207, 210] From the very beginning of it's activities, the Constitutional Court has emphasized the statements in principle made in the course of interpreting the Constitution. According to the practice of the Constitutional Court, the holdings of a decision may contain not only the abstract interpretation of the Constitution in line with Section 1 item g) of ACC, but also the conclusions of the other constitutional interpretations necessarily emerging in other competencies of the Constitutional Court, if it is justified because of the obligations pertaining to the legislation and the jurisdiction. The interpreting statements included in the holding may also contain principal theorems abstracted from the given case [Decision 61/1992. (XI. 20.) AB, ABH 1992, 280.; Decision 4/1993. (II. 12.) AB, ABH 1994, 48.; Decision 28/1994. (V. 20.) AB, ABH 1994, 134.; Decision 60/1994. (XII. 24.) AB, ABH 1994, 342.; Decision 32/1998. (VI. 25.) AB, ABH 1998, 252.]. Moreover, the interpretations of the Constitution may also contain the general framing of the unconstitutionality of the legal institution concerned [first in: Decision 23/1990. (X. 31.) AB, ABH 1990, 88.; Decision 15/1991. (IV. 13.) AB, ABH 1991, 40.].

Consequently, there is no distinction in terms of the abstractness of the phrasing between the abstract interpretation of the Constitution under Section 1 item g) of ACC and the interpretations of the Constitution performed in other competencies of the Constitutional Court. The speciality of the abstract interpretation of the Constitution under Section 1 item g) of ACC can be found in the facts that it can only be initiated by the persons specified in Section 21 para. (6) of ACC, and it can be performed by the Constitutional Court in an abstract manner, without reviewing any norm ranked lower than the Consitution.

Accordingly, the Constitutional Court established in the holdings of the decision that the right of assembly recognized in Article 62 para. (1) of the Constitution also covers the holding of events

organised in advance including peaceful events where the assembly can only be held shortly after the causing event. In addition, the right of assembly covers assemblies held without prior organisation.

4. In the opinion of the petitioners, Section 6 and Section 14 para. (1) of ARA exclude the possibility of holding spontaneous and instant assemblies, therefore it is in violation of Article 62 of the Constitution [and, indirectly, of Article 7 para. (1) and Article 61 para. (1) of the Constitution]. The objections related to the regulation have also been presented in the expert reports analysing the problems of the right of assembly. According to the majority opinion contained in the Gönczöl Commission, the notification deadline should be decreased from three days to six-eight hours. The Civil Commission agreed with the dissenting opinion of the Gönczöl Commission, stating the in the respect of spontaneous assemblies the notification requirement found in ARA was in conflict with the Constitution and the Convention.

In the *Bukta and others v. Hungary* case, the European Court of Human Rights formed an opinion not directly on ARA but on the original case and the decisions of the jurisdiction interpreting and applying the provisions of ARA. “In the Court's view, in special circumstances when an immediate response might be justified, in the form of a demonstration, to a political event, to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.” (Paragarph 36)

Section 1 of ARA states in consonance with Article 62 para. (1) of the Constitution: “The right of assembly is a fundamental freedom to be enjoyed by everyone, and the Republic of Hungary acknowledges this right and ensures an undisturbed exercise thereof.” Section 2 provides the following:

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

(2) The participants of assemblies may inform the interested persons about their jointly formed opinion.

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

As held by the Constitutional Court, the provisions of Chapter I of ARA – in line with Section 62 para. (1) of the Constitution – also include the freedom of holding spontaneous assemblies of peaceful purposes as well as of swift assemblies.

5. From the two challenged provisions, the Constitutional Court first examined Section 5 of ARA on the obligation of notification.

5.1. In the system of ARA, the assemblies not requiring notification include on the one hand the events taken out of the scope of ARA by virtue of Section 3 (events of electional, religious, cultural, sports and of family nature). On the other hand, according to Section 6, it is not necessary to file a notification on the assemblies falling in the scope of ARA but not held on public ground. (ABH 2001, 445)

In addition, Section 6 of ARA does not apply to the spontaneous assemblies held without prior arrangement. The provision concerned requires the notification of "organising an assembly" to be held on public ground, and the obligation concerns the organiser. Section 7, listing the elements of the notification’s content, requires notifying the data and the advance estimates connected to the planned assembly. However, spontaneous assemblies are not planned by the organisers and they have not predefined route, agenda, organisers etc.

Therefore, according the Constitutional Court’s position explained in the present case, interpreting ARA in the context of Article 62 para. (1) of the Constitution leads us to the consequence that on the basis of Section 1 and 2 of ARA, there is a legal way to hold spontaneous (not organised) peaceful

assemblies that cannot be notified in advance under Section 6. According to Section 6, the notification obligation pertains to organised assemblies to be held on public ground.

5.2. Sections 1 and 2 of ARA – in compliance with Article 62 para. (1) of the Constitution – allow the holding organised gatherings, demonstrations and rallies even if they can only be held within a short period of time after the happening of the event causing the assembly. According to Section 6 of ARA, such gatherings are to be notified as they are assemblies held on public ground.

In CCDec, the Constitutional Court established that the notification obligation in ARA was a constitutional restriction of the right of assembly. This statutory provision is justified on the one hand by the need to have the public order secured by the police, with particular attention to the order of traffic as well as the unhindered operation of the representative bodies and the courts. On the other hand, even the organiser and the participants of the assembly have an interest in having the event notified. Without the cooperation of the police, the participants may not use the routes designed for public road motor traffic and they must comply with the traffic code in every respect. Making the notification and having it confirmed by the police guarantee that the police would implement the necessary tasks related to the security of the event – depending on the location, the route etc. of the assembly.

According to Section 6 of ARA, the event must be notified at least "three days before the planned date of the assembly". However, in compliance with Section 8 para. (1) of ARA on banning assemblies, the police may not prohibit the holding of an event solely on the basis of late notification.

The wording of ARA may be interpreted in two ways. In one interpretation, submitting a notification in less than three days prior to the event shall not be considered a notification in the sense of ARA, therefore it is to be rejected without examining it on the merits. According to another interpretation, submitting a notification in less than three days prior to the event shall indeed be considered a notification, and as provided in Section 8, an assembly may not be banned solely on the basis of the date of making its notification, it is to be examined on the merits. Since neither of the above interpretations is to be deducted forcingly from the text of ARA, the Constitutional Court considered the latter to be an interpretation in line with Article 62 para. (1) of the Constitution.

Even the judicial practice under evolution follows this interpretation of Sections 6 and 8 of ARA. As summarised in the report of 11 April 2008 by the Police Headquarters of Budapest, "there were at least 8 events in 2007 and 68 events in 2008 when the police acknowledged the notifications submitted after the statutory deadline. Since in the above cases there was a possibility to proceed with the necessary negotiations, the time was enough for preparing for the assemblies and securing them."

Consequently, even in the case of the so called swift gatherings it is obligatory to make a notification, and the police may only ban the event it either of the two conditions for prohibition specified in Section 8 para. (1) is fulfilled. In the case of notifications within three days, the possibility of securing traffic routes becomes more important. Based on the provisions of ARA, three days should be enough in any case for the police to organise the necessary security arrangements if there is an alternative traffic route. However, in the case of a notification submitted very shortly before the event, it can be questionable whether the conditions of traffic could be secured up to the notified time, depending on the location and the route of the assembly and the expected number of participants. This can be the reason behind prohibiting the holding of an event very shortly after its notification.

As underlined by the Constitutional Court, neutrality regarding the content is to be followed is such cases, too. "The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content." [First: Decision 30/1992 (V. 26.) AB, ABH 1992, 179] Consequently, in addition to the provision in Section 8 para. (1), no considerations about the content of the communication expected at the assembly can be taken into account.

5.3. As explained by the Constitutional Court in the Decision 38/1993. (VI. 11.) AB: "In the course of the constitutional review of a statute, the Constitutional Court is to establish – by way of interpreting the Constitution – what are the constitutional requirements relevant to the subject of the statutory provision in question. The statute is constitutional if it complies with those requirements. However, in order to verify compliance, it is logically indispensable to interpret the statute concerned. The Constitutional Court shall establish either the compliance or the conflict of the Constitution and the reviewed statute interpreted with regard to each other. Establishing the constitutionality of the norm shall, at the same time, delimitate the realm of the constitutional interpretation of the norm: the norm shall be considered constitutional in all of its interpretations that comply with the constitutional requirements established in the given case. It is required by the unity of the legal system as well that a statute should be interpreted not only in itself and with regard to its functions, but also in the respect of it's compliance with the Constitution, without regard to the fact whether the statute was adopted prior to or after the Constitution. (…) [ABH 1993, 256, 267.; reinforced in: Decision 23/1995.(IV. 5.) AB, ABH 1995, 115, 121.; Decision 4/1997. (I. 22.) AB, ABH 1997, 41.; Decision 22/1999. (VI. 30.) AB, ABH 1999, 176, 201.; in the recent practice: Decision 22/2005. (VI. 17.) AB, ABH 2005, 246.; Decision 28/2005. (VII. 14.) AB, ABH 2005, 290.; Decision 1/2007. (I. 18.) ABK 3 January 2007]

Taking all the above into account, the Constitutional Court establishes: it is a constitutional requirement following from Article 62 para. (1) of the Constitution that in the application of Section 6 of ARA, the obligation of notification pertains to organised events to be held on public ground.

It is unconstitutional to prohibit merely on the basis of late notification the holding of peaceful assemblies that cannot be notified three days prior to the date of the planned assembly due to the causing event.

As there is an interpretation of Section 6 of ARA complying with Article 62 para. (1) of the Constitution, the Constitutional Court rejected the petitions aimed at the establishment of the unconstitutionality and the annulment of Section 6 of ARA.

6. The Constitutional Court reviewed separately Section 14 para. (1) of ARA on the disbanding of assemblies. According to the relevant provision, the police must disband the assembly if the exercise of the right of assembly constitutes a criminal offence or a call to commit such offence, it violates the rights and freedoms of others, the participants of the assembly appear in an armed manner or with weapons, an assembly under the obligation of notification is being held without notification, an assembly is being held at a time point, location or route, or with a purpose or agenda different from the data of the notification, or an assembly under the obligation of notification is being held despite a prohibiting decision.

6.1. As held by the Constitutional Court, the first and the second proviso of the list found under Section 14 para. (1) (criminal offence or a call to commit such offence, the violation of the rights and freedoms of others, participants appearing in an armed manner or with weapons) do not restrict the freedom of assembly. Article 62 para. (1) of the Constitution acknowledges the right to peaceful assembly, clearly not including the committing of crimes, the violation of rights or armed rallies. In such cases, Act XXXIV of 1994 on the Police (hereinafter: PA) empowers the police to apply coercive measures.

6.2. According to the last proviso of Section 14 para. (1), if an assembly under the obligation of notification is held despite a prohibiting decision, it must be disbanded. It is a case when the justification (necessity and proportionality in the given case) of restricting the freedom of assembly (it's necessity and proportionality in the given case) has been previously assessed by the police and, in the case of seeking a legal remedy, by the court. Prohibition can only be issued when the planned assembly would seriously endanger the operation of organs of popular representation or of the courts,

or it would hinder traffic disproportionately. Consequently, the disbanding of an assembly requiring prior notification and held despite of a banning ruling is in compliance with the result of the advance assessment of the restrictability of the right.

The Constitutional Court acknowledged the fact Section 9 of ARA offers a possibility for seeking judicial remedy against the prohibiting decision. In addition, the Constitutional Court took not of the fact that the police is obliged to weigh concrete criteria in the course of implementing the disbanding, on the basis of Sections 16-17 and Sections 59-60 of AP and according to Section 74 of Decree of the Ministry of Justice and Policing 62/2007. (XII. 23.) IRM ont he Service Regulations of the Police. Coercive measures may only be applied if the participants do not finish the assembly by the time specified and they contravene the police measures. Thus, on the basis of the circumstances of the event, the police must first try without the application of force to have the illegal assembly ended or interrupted.

6.3. The Constitutional Court applied a different approach in assessing the third and fourth provisos in Section 14 para. (1) of ARA (holding without notification an assembly requiring notification, holding an assembly requiring notification at a time, location, route, or with a purpose or agenda different than the notified one).

Based on the interpretation of ARA in compliance with Article 62 of the Constitution, the notification obligation contained in Section 6 of ARA does not apply to peaceful assemblies without prior arrangements. As Section 14 para. (1) orders the disbanding of the unnotified holding of "assemblies requiring notification", there is no legal ground to disband unorganised peaceful gatherings (spontaneous assemblies, flash mobs) solely on the basis of not having it notified.

According to Section 14 para. (1) of ARA, an assembly requiring notification may be disbanded when held without notification, held differently than notified, or held despite of the police's banning order, but it cannot be disbanded merely on the basis of having it notified too late. That is why, on the basis of ARA, it is not possible to disband – solely on the ground of the notification's time – the peaceful assemblies not notified by the organisers three days prior to the planned date thereof because of the nature of the event causing the assembly, provided that the police has not prohibited the holding of the assembly.

At the same time, the provisions under review call for the obligatory disbanding of the assemblies requiring notification if they are being held without notification or held at a time, location, route, or with a purpose or agenda different than the notified one. The common features of the above cases are their peaceful nature, the fact that they do not imply the violation of rights and that they do not necessarily hinder traffic or the undisturbed operation of the organs of popular representation or of the courts. [The events violating the rights and freedoms of others shall be disbanded on the basis of the first proviso of Section 14 para. (1).] The text "without notification, or in a manner conflicting with the conditions specified in Section 7 items a) and b), or" in Section 14 para. (1) of ARA does not allow the police to consider the necessary criteria and the possibility of gradual intervention. In the case of not orderly held peaceful assemblies, events, the above provision orders disbanding as the only and obligatory option.

The Constitutional Court holds that in the case of a failure to submit the required notification, or in the case of derogation from the notified data, it is necessary for the maintenance of public order and the prevention of the violation of rights that the police should contact the organiser of the event to clarify if there has been a default or derogation from the notification. In certain cases, the cooperation between the organiser of the event and the police is indispensable in the application of Sections 11 and 12 of ARA on securing the order of the assembly. If the organiser fails to co-operate with the police and the assembly loses its peaceful character, resulting in the violation of the rights and freedoms of others, then the disbanding of the assembly – as the final measure – is justified. However, the obligatory disbanding of peaceful assemblies in the cases where the participants do not show law- or peace-

breaking conduct qualifies as a disproportionate restriction of the right of peaceful assembly enshrined in Article 62 para. (1) of the Constitution.

It is stressed by the Constitutional Court that the failure to make the required notification is a violation of the law that may entail legal sanctions. However, a default by the organiser of the event may not imply – without addition criteria – in each case the sanction of disbanding by the police an assembly the participants of which have not broken the law.

Holding an assembly at a different time, on a different location or route or with a different purpose or agenda than notified shall qualify as a breach of the law as well. However, the changes are not always due to any default by the organiser. Changes compared to the notified data may be justified, and are sometimes unavoidable, due to the number of the participants or the nature of the assembly. However, the provisions in ARA require the obligatory disbanding of the assembly without any regard to the above circumstances.

Based on the above, the Constitutional Court established the unconstitutionality and annulled the term "without notification, or in a manner conflicting with the conditions specified in Section 7 items a) and b), or" in Section 14 para. (1) of ARA.

Based on Section 42 para. (1) of ACC, the Constitutional Court annulled the unconstitutional provision as from the day of promulgating the decision. The *pro futuro* annulment according to Section 43 para. (4) of ACC would not be supported in the present case by the protection of legal certainty, as in the case concerned, the text remaining in force in Section 14 para. (1) of ARA is an applicable norm not necessarily requiring any intervention by the legislation. In the opinion of the Constitutional Court, legal certainty would indeed be threatened if the police could consider the practical application of a provision that remained provisionally in force, despite of establishing its unconstitutionality due to the disproportionate restriction of fundamental rights.

7. As underlined by the Constitutional Court, the notification obligation pertains to all assemblies to be held on public ground and falling under the scope of ARA. Spontaneous assemblies are an exception, as it is impossible to require the prior notification of such events. According to Section 152 para. (1) of AAO, anyone "who organises or holds without notification (…) or despite of the banning resolution of the police any gathering, march or demonstration requiring notification shall be punishable with a fine of up to one hundred thousand forints". In addition, any person who uses the motor traffic routes without the assistance of the police or otherwise fail to comply with the traffic regulations shall be punishable because of committing administrative offences against the order of traffic. In such cases the procedure and the measures of the police are governed by the AP. It is a part of the police's activity of applying the law to interpret ARA in the concrete case and to weigh the fundamental rights as well as the aspects of public interest. Each assembly on public ground requires a concrete decision in the issues of interpreting the law. It's impossible to preclude the debates about interpreting and applying the norms. The police is to consider whether the assembly falls under the scope of ARA and under the scope of the notification obligation, whether it is happening in accordance with the provisions of ARA and the notification, and whether it violates or not the fundamental rights and freedoms of others etc. Similarly, the police has to assess whether the disbanding of the event and the application of coercive measures is justified or not. The court is in charge of reviewing the application of the law by the police. The law as applied by the courts is to be followed by the police, too. Unification of the legal practice shall lessen the danger of legal uncertainty.

When adopting the decision, the Constitutional Court took into consideration the threats of abusing the right of assembly. ARA offers some legal remedies against abusing the application of the law by the authorities, and the Constitutional Court has already assessed them in CCDec. Similarly, there exists another threat to be taken into account: the initiators, organisers and participants of some assemblies may abuse the right of assembly, i.e. the rights acknowledged in the Constitution and ARA.

However, in the opinion of the Constitutional Court, the right of assembly is a freedom to be enjoyed by all, and it should not be restricted on the basis of the possibility of some people abusing it.

ARA and AP offers adequate framework for acting against illegal assemblies violating or directly endangering the rights of others. According to Section 14 para. (1) of ARA – held to be constitutional – non-peaceful events, assemblies are to be disbanded. AP allows the application of coercive measures against those who resist the measures applied by the police, and on the basis of Section 59 of AP, if the mass shows illegal conduct, the police may use tools designed to dismiss the mass. The related legal sanctions can be found in Section 13 para. (1) of ARA on the compensation for damages and the cited Section 152 para. (1) of AAO. Of course, sanctions can also be found in the Act IV of 1978 on the Criminal Code, Chapter XVI of which contains the offence of affray among the criminal offences against the public order (Section 271/A).

Accordingly, it is to be noted that the Constitutional Court has now diverged from the statements made in CCDec. The Constitutional Court could judge upon the merits of the petitions because of differentiating the present case from the constitutional question judged upon in CCDec, by referring to different constitutional contexts and the newly emerged problems. The interpretation of the Constitution in the framework of the normative review and the resulting conclusions are partly different from contents of CCDec, as in the present case the Constitutional Court adopted a different position – on the basis of the arguments detailed above – on assessing the conditions of securing and restricting the freedom of assembly.

8. The Constitutional Court rejected the petitions aimed at the establishment of the unconstitutionality and the annulment of Section 6 of ARA. This is why it has rejected the judicial initiative aimed at the Constitutional Court establishing: Section 6 of ARA was not applicable in the case pending at the Town Court of Pécs under the file number 15.sz.1974/2007. The judge in charge of the case may, and has to, decide on the basis of the concrete facts of the case – in compliance with the interpretation of ARA as specified in the present decision, in accordance with Article 62 para. (1) of the Constitution – whether the person subjected to the procedure of administrative offence organised without notification any gathering, march or demonstration requiring notification.

9. The Constitutional Court has adopted this decision on the basis of the presented petitions. According to Section 49 para. (1) of ACC, an unconstitutional omission of legislative duty may be established not only on the basis of a petition but also *ex officio*. In the present case, the issue of an unconstitutional omission of legislative duty may arise from several aspects.

The Constitutional Court affirmed the holdings of CCDec, stating that the alleged specific deficiencies of ARA do not justify the constitutional review of the whole of ARA. The Constitutional Court established that the regulations in ARA provided adequate statutory framework for the organs applying the law to duly consider in assessing the concrete cases the weight of the freedom of assembly and of the interests related to free movement. In this context, the Constitutional Court underlined: using the public ground for an unlimited period time or the events not serving the purpose of expressing joint opinions are not qualified as assemblies. In the above case, the rules of AP are to be followed.

Neither did the Constitutional Court establish an unconstitutional omission of legislative duty in the respect of the so called spontaneous and swift assemblies. According to the practice of the Constitutional Court, an unconstitutional omission of legislative duty is to be established when the statute fails to contain the guarantees necessary for the realisation of the fundamental right (first in: Decision 161/E/1992. AB, ABH 1993, 766, 776.). As held by the Constitutional Court, in the present case, the provisions in force of ARA may be interpreted in compliance with Article 62 para. (1) of the Constitution. For constitutional reasons, it is not absolutely necessary for the legislation to expressly acknowledge the freedom of spontaneous and swift assemblies, as such assemblies can also be held in

the absence of a statutory prohibition or special restriction. Consequently, the statutory guarantees necessary for the realisation of the freedom of assembly are not lacking.

The Constitutional Court emphasizes: primarily, it is the obligation of the legislation to assess to what extent is it necessary to amend or modify the provisions of ARA for the purpose of preventing misuses and decreasing the difficulties in applying the law. According to Article 8 para. (1) of the Constitution, it is the primary obligation of the State to respect and safeguard the fundamental rights. Article 62 para. (2) of the Constitution expressly requires the adoption of the Act on the Right of Assembly. After the adoption of an Act of Parliament the content of which complies with the Constitution, Article 8 para. (1) of the Constitution requires the Parliament and the Government, responsible for the preparation of Bills, to monitor the realisation of the fundamental right in the judicial practice 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 the permanent monitoring of the effects.

In addition, the Constitutional Court notes: the Parliament must provide for the provisions of ARA to be in line with the possibilities of restrictions as regulated in Article 11 para. (2) of the Convention and Article 21 of the International Covenant on Civil and Political Rights. Based on the above conventions and the related case law, the State is on the one hand obliged to secure the conditions for the freedom of assembly. On the other hand, the conventions specify the causes on the basis of which the State may – in the framework of the Constitution – restrict the freedom of assembly.

As stated in the decision of the Constitutional Court, the whole of ARA has not become unconstitutional in the course of the almost two decades passed since its adoption. However, several provisions of can be considered to be in a need of further clarification. In the present case, the Constitutional Court has not been faced with any serious deficiency of ARA restricting the realisation of the freedom of assembly. Therefore, the need for further statutory guarantees for the protection of the freedom has not been raised. On the contrary: the justified statutory amendments would either be presented as barriers to the freedom of assembly, or they would not result in any significant change in terms of the fundamental rights. The Constitutional Court does not call on the Parliament to adopt rules with such content. The legislation may only provide for the restriction of a fundamental right if it is unavoidable for the protection of another fundamental right or for a constitutional objective.

The Constitutional Court has ordered the publication of the present Decision in the Hungarian Official Gazette on the basis of Section 41 of ACC.

Budapest, 27 May, 2008.

*Dr. Mihály Bihari*
President of the Constitutional Court

*Dr. Elemér Balogh*
Judge of the Constitutional Court

*Dr. András Bragyova*
Judge of the Constitutional Court

*Dr. András Holló*
Judge of the Constitutional Court

*Dr. László Kiss*
Judge of the Constitutional Court

*Dr. Péter Kovács*
Judge of the Constitutional Court

*Dr. István Kukorelli*
Judge of the Constitutional Court, Rapporteur

*Dr. Barnabás Lenkovics*
Judge of the Constitutional Court

*Dr. Miklós Lévay*
Judge of the Constitutional Court

*Dr. Péter Paczolay*
Judge of the Constitutional Court, Rapporteur

*Dr. László Trócsányi*
Judge of the Constitutional Court

Dissenting opinion by *Dr. András Bragyova*,
Judge of the Constitutional Court

I agree with the interpretation of the Constitution in points 1 and 2 of the holdings of the Decision. However, with regard to the subsequent points of the holdings, my opinion and my reasoning about the whole of the holdings – in the respect of the concept and the constitutional function of the right of assembly as well as of it's relation to different constitutional rights – is different than that of the majority opinion.

1. The first question to be addressed is the definition of the right of assembly, its extent and its relation to other freedoms.

1.1. In the broadest sense, any gathering with a common purpose is regarded as a conduct safeguarded under the right of assembly. According to this concept, the scope of application of the right of assembly is independent from the purpose of the gathering group, provided that this purpose is a lawful one, including sports, leisure, entertaining or cultural events when organised by private individuals. On the other hand, the broad interpretation can also be a wide one in the respect of including in the scope of the right of assembly not only assemblies held on public ground, but also all public events held in theatres, sports halls or shopping centres.

In my opinion, the right of assembly enshrined in the Constitution is to be interpreted in the broad sense, thus covering all events held in public places and accessible by everyone (i.e. public events, for example: sports events), consequently, it is not limited to open-air assemblies held on public ground. Assembly means the common presence of several (at least 10-15) persons with a common purpose on public ground or at a public place.

The principal function of the right of assembly, determining its relation to the other constitutional rights, is the joint expression of the political-social-cultural opinion of the participants for the ultimate aim of influencing public opinion, which is fundamental importance in a constitutional democracy. The right of assembly is the joint and grouped exercising of the freedom of expression and the freedom of movement. The main aim of exercising the freedom of assembly is not enforcing the *argumentative* side of the freedom of expression (convincing and the exchange of opinions), but typically it is the manifestation of a convinced opinion, therefore it is not *discursive and argumentative*. It may have two sides: the joint manifestation may be addressed to the other participants, but on the other hand, the opinion expressed by way of practising the right of assembly is also addressed to those who do not participate in the assembly and sometimes to the authorities of the State.

The participants of the assemblies typically express their opinion in the questions debated in the political life of constitutional democracies. This is why it is especially important to clarify the relation between those who whish to exercise their right of assembly and the ones who do not assemble, as well as between the State's authorities and the assembling persons.

By defining the concept of the right of assembly I whish to stress that the freedom of assembly is not participation in the State's "manifestation of will" – in other terms, forcing the State's organs to take measures – but it is the manifestation of opinion for the purpose of influencing the public opinion in the society. However, one should underline that influencing shall not mean forcing, it may only be aimed at convincing others (or drawing their attention).

There is a significant difference between the general freedom of expressing one's opinion and the freedom of assembly, as the latter does not necessarily imply restricting the constitutional rights of others (although it may also happen). Nevertheless, the right of assembly has got such an implication,

therefore regulating it requires due consideration and the weighing of many aspects by the legislation and also by the ones who construe the Constitution. The freedom of expression does not contain the right to have others the expressed opinion heard or otherwise noticed at all; indeed, in the case of “captive audience” – when the audience may not evade the expressing of the opinion – the restriction of the freedom of expression can also be justifiable.

1.2. My opinion is also dissenting from the majority opinion with regard to assessing the relation between the right of assembly and the constitutional right to free movement. The holdings of the present decision are partly differing from the position taken in the Decision 55/2001. (XI. 29.) AB (hereinafter: CCDec), according to which, the right of assembly does restrict the freedom of movement. Now the majority decision seems to closer to the minority opinion attached to CCDec, although it acknowledges the possible collision between the two rights.

Acknowledging the unavoidability of the collision does not necessarily imply the restriction of the right of assembly, it merely requires considering the restriction of the colliding rights – i.e. rights that cannot be exercised jointly at the same time and place – to be followed by a decision about which constitutional right is to be justifiably restricted on what conditions to the benefit of the other fundamental right. This is a decision to be taken primarily by the legislation, but in the very case the right of assembly also the public administration (police) authorities enjoy a wide scope of discretion.

The general standard to be used in making a decision about the collision between the constitutional rights – exercising of which right is to enjoy priority and on what terms – is the "value" or weight of the specific constitutional rights in their mutual relation, as well as the extent and the scope of the restriction of rights. Exercising the right of assembly at a place open to the public, especially on public ground, often implies more or less damage caused to the constitutional rights of others – who do not exercise the right of assembly. In general, everybody is required at least to tolerate the exercising of constitutional rights by others – but it is a mutual obligation applicable to everybody and to all constitutional freedoms equally. It is a particularly difficult situation when the exercising of a specific constitutional right excludes – and not only restricts or hardens – the exercising of rights by others. When it is the only feasible way to guarantee the exercising of an important constitutional right, the provisional restriction or the temporal exclusion of exercising other constitutional rights may be acceptable. However, in such cases, special attention must be paid to the proportionality of restricting the freedom or the constitutional right; when the exercising of a constitutional right becomes more difficult or becomes impossible, the legislation is responsible for keeping the restriction between acceptable spatial and temporal limits.

Assemblies held on public ground necessarily imply the violation of others' rights to free movement, as the grounds open for the general public become actually possessed by the assembling persons (according to the law, the organisers may even order others to leave the concerned area, and those who resist to do so may also be punishable for committing a criminal offence: affray, specified in Section 271/A of the Criminal Code). Accordingly, for the time of the assembly, the public ground used ceases to be a place open for everyone, i.e. a public ground, and it becomes subordinated to the rules set by the organiser and the manager of the assembly.

Beyond doubt, the freedom of movement includes the rights both to be on public ground and to move around there – with respect to the general rules. In the case of narrowing down this to the right to freely select one's place of residence, getting to or getting back to the place of residence would not be a constitutional right. However, the freedom to be at any place can mean nothing else but the above, as no one has a constitutional right to reside in a property owned by somebody else – as the right to reside in one’s own flat or property is safeguarded by the right to property and the right to the privacy of one’s home and not by the freedom of movement which is a part of personal freedom.

1.3. It is the essence of all freedoms that both the non-exercising and the exercising of the relevant conduct are allowed equally. Thus all freedoms have a positive content in the respect of exercising it and a negative one in the respect of not exercising it. Both the negative and the positive sides are equal

parts of the freedoms; consequently, both the right of exercising and the right of not exercising a specific freedom can be enjoyed by all: equal constitutional protection is to be provided for the persons who exercise either the positive or the negative freedom.

As the right of assembly is a freedom, it has got positive and negative sides, too: the freedom of assembly is at the same time a freedom of NON assembling [cp: Decision 64/1991. (XII. 17.) AB, ABH 1991, 258, 262-263.; Decision 4/1993. (II. 12.) AB, ABH 48, 50.; Decision 38/1997. (VII 1.) AB, ABH 1997, 249, 255.; Decision 48/1998. (XI. 23.) AB, ABH 1998, 333, 341.]. In my opinion, the majority decision fails to take this aspect into due account and it's arguing fails to take into attention the rights of those who do not assemble or of the ones who specifically whish to remain out of the assembly – although their rights are also constitutional rights, just as the ones of the assembling folks. Due to the conflicting nature of the right of assembly – as discussed above – this problem is to be taken seriously. The group of assembling persons do not express their opinion at a place delimited from others, indeed, they do it at a place where persons having different or neutral opinions have just as much constitutional right to stay as they do.

The bigger the public ground to be used by the assembly and more participants are there, the rights of others are the more restricted; therefore it is constitutionally desirable to have both aspects restricted. Article 8 para. (1) of the Constitution requires the legislation to protect not only the right of assembly, but also to safeguard every other persons' personal freedom and freedom of movement, right to privacy and simply the general freedom of all.

2. I also agree with the decision stating that the right of assembly is also applicable to the so called swift assemblies, to be held within a short period of time, and to the spontaneous (not organised) assemblies as well. However, I cannot agree with the majority in regarding constitutionally equal the above three cases of exercising the right of assembly. In my opinion, the general rule is still the assembly on public ground after submitting prior notice. It has already been established by the Constitutional Court in CCDec and now it is affirmed in the present decision that requiring prior notification is not an unconstitutional restriction. The importance of the obligation of notification lies in the fact of providing information on the expectable event for those who do not take part in the assembly and allow them to adapt to it. Of course, the same is true for the authorities and other affected parties as well, for example public transport. Accordingly, a (swift) assembly held after the expiry of the deadline for notification can only be considered constitutional if in fact it was impossible to have the event organised according to the general rule – nevertheless, the assembly is to be notified in this case, too. Spontaneous assemblies are to be considered exceptional and the law may constitutionally require further conditions not restricting the essence of the right of assembly and the freedom of expression.

Accepting the previous practice of the Constitutional Court, I agree that in the case of assemblies held on public ground, the obligation of notification is a restriction always justified; however, the notification deadline could be decreased proportionally if the assembly is to be held within a justifiable short period of time and keeping the general notification deadline would make the holding of the event senseless. This would be a viable solution both in the case of swift assemblies (both the organised ones and the assemblies held in the form of an actual event) and the spontaneous gatherings lacking any prior event as the direct cause of the assembly. Consequently: in the case of all the above types of assemblies, it is not the notification itself, but only the keeping of the required deadline becomes impossible, therefore it is not justified to disregard the obligation of notification, only the deadline pertaining to notifying these special forms of assemblies should be made shorter. If the participants can organise the spontaneous demonstration by swiftly informing each other, using telecommunication tools – as contained in the holdings of the majority decision – the same tools could also be used for informing the competent authority as well. Consequently, in the case of swift assemblies, it is constitutional to require notification, but the deadline for making the notification might be decreased.

3. The justifiability of establishing the omission

3.1. Exercising and regulating the right of assembly requires in each case the serious assessment of interests – thus the task of the legislation is especially difficult. To make it more burdensome, the proliferation of today's new telecommunication technologies offer a chance for new gathering techniques.

The majority decision fails to establish any unconstitutional omission of legislative duty – neither on the basis of the petitions, nor ex officio – although, in my opinion, the Constitutional Court had all the reasons to have done so, since the preconditions for establishing an omission, in line with the practice of the Constitutional Court, have been fully met – as it is clearly stated in the decision itself.

Because of the decision's annulling and interpreting provisions (points 1, 2 and 3 of the holdings), it should have been necessary to establish an unconstitutional omission, as these provisions of the majority decision cannot fulfil their purpose without an intervention by the legislation, as the system lacks the legal norms allowing the exercising of certain (here: some) constitutional rights. According to the practice of the Constitutional Court, it implies the establishment of an unconstitutional omission (see: Decision 161/E/1992. AB, ABH 1993, 766, 776.). However, the adoption of the constitutional regulations is the duty of the legislation and not of the Constitutional Court.

3.2. Due to the lack of the legal norms containing the following elements, the Constitutional Court should have established an unconstitutional omission of legislative duty, as these norms are necessary for the (adequate) exercising of the constitutional rights.

3.2.1. There are no regulations in ARA on spontaneous and swift assemblies.

In this respect, I consider the arguments of the decision to be too short and defective, stating that spontaneous assemblies are allowed directly on the basis of the Constitution without any specific statutory regulation, on the basis of the general right to freedom. It would only be true if the spontaneous demonstrators complied with all other regulations (e.g. the traffic code), but in that case their act would not be classified in the legal sense as assembly, only the public expression of their opinion. Indeed, if a gathering or grouping qualifies as "assembly" according to the law on assemblies, then the general regulations may (provisionally) be violated. [The same is pointed out by the ECHR in the *Oya Ataman case*. (*Oya Ataman, vs. Turkey Chamber Judgement, 5. 12. 2006. 7. 41.*)]

3.2.2. The limitations of the right of assembly are not regulated in detail, in particular the temporal limitations of assembly are lacking. The right of assembly grants a right to hold meetings and programmes and not to occupy the public ground in a permanent way. Therefore, it is not unconstitutional, indeed, it would be justified to limit the timeframe of the right of assembly, or to require the obligatory determination of the ending or starting time of the assembly.

3.2.3. Another lack is the definition of the areas (e.g. squares, such as Kossuth Square) where the holding of assemblies is absolutely prohibited Places under similar ban could be the sites considered as national symbols or other places to be saved from gatherings for other reasons (e.g. cemeteries). The same way, gathering in the areas in front of courts and other State offices could also be prohibited in order to secure the undisturbed operation of the judiciary. Let me note that the originally adopted text of Section 4 of ARA, which was in force between 24 January and 13 March of 1989, excluded the direct environs of the building of the Parliament from the scope of locations where the right of assembly could be exercised freely.

3.3.4. Similarly to the previous point, the ARA fails to regulate when the exercising of the right of assembly hinders the operation of the State's organs.

3.3.5. Another lack is – especially after the annulling provision in the decision – the regulation of the disbanding of assemblies in a detailed, foreseeable and clear manner, to be followed by the police, too. Assemblies can only be disbanded if the assembling persons – as a whole – have passed beyond the limits of the right of assembly, therefore they are not protected by the constitutional right of assembly any more.

These regulations should include the more detailed specification of the criteria distinguishing between the peaceful and the non-peaceful nature of an assembly, although requiring the assembly to be peaceful cannot be considered as a restriction upon the right of assembly as the Constitution only allows the holding of peaceful assemblies. A non-peaceful mob may not be regarded as a lawfully assembling gathering, therefore its disbanding is merely an issue of policing law.

Finally, a related deficiency is the lack of regulating the prohibited ways of assembling, e.g. the ban on wearing masks or making one's face unrecognizable.

3.3.6. Another deficiency is the lack of regulating the mutual relation between the holding of assemblies and other general statutory regulations on, for example, noise protection, traffic, public health, trade and so on (general rules).

3.3.7. Also the detailed regulation of the necessary police actions in the case of the prohibited forms of expressing opinion (e.g. incitement against the community, incitement to revolt against the mass or against the authorities) is missing.

Let me note here that limits of the right of assembly are much wider than the limits of the freedom of expression. Holding an assembly is a tool for emphasizing, stressing some opinion, which is in conflict with the opinion of others. This is the root of the latent – or sometimes manifest – conflicting nature of the assemblies, and it requires regulation. Of course, in general, in a constitutional democracy it is essential for the State to remain neutral in the fight of the conflicting opinions. The fight between differing opinions is the essence of the political life of constitutional democracies. This is why it is important to regulate the forms of the "fight". It is not by coincidence that the traditional public events – religious or family events – do not fall within the scope of ARA, as they do not show the confrontative character of assemblies.

Budapest, 27 May, 2008.

*Dr. András Bragyova*
Judge of the Constitutional Court

I second to point 3 of the dissenting opinion.

*Dr. András Holló*
Judge of the Constitutional Court

I concur with the dissenting opinion:

*Dr. László Kiss*
Judge of the Constitutional Court

Dissenting opinion by *Dr. András Holló*, Judge of the Constitutional Court

1. I do not agree with the proviso in point 3 of the holdings of the decision establishing the unconstitutionality and annulling not only the text "without notification" but also the text "in a a manner conflicting with the conditions specified in Section 7 items a) and b), or" in Section 14 para. (1) of the Act III of 1989 on the Right of Assembly (hereinafter: ARA).

It is correctly established in point 1 of the holdings that the right of assembly recognized in Article 62 para. (1) of the Constitution also covers the holding of events organised in advance including peaceful events where the organised assembly can only be held shortly after the causing event, as well as to assemblies without prior organisation. As underlined in the constitutional requirement established in the second point of the holdings for the application of Section 6 of ARA, the notification obligation

pertains to organised events to be held on public ground, but the holding of peaceful assemblies that could not be notified due to the causing event may not be prohibited merely on the basis of late notification.

Points 1 and 2 of the holdings of the decision extended the constitutional protection of the right of assembly over the peaceful events not notified or notified late because of the above reasons.

In my opinion too, Section 14 para. (1) of ARA is unconstitutional because of regulating the lack of notification as an unconditional cause for disbanding, and at the same time, it narrows down in an unconstitutional manner the manifesting forms of the peaceful events falling in the scope of the right of assembly in comparison with the constitutional interpretation given in point 1 of the decision. Nevertheless, I do not agree with the establishment of the unconstitutionality and the annulment of the causes of disbanding regulated in Section 7 items a) and b) of ARA.

According to the remaining text of Section 14 para. (1) of ARA, a demonstration violating Section 2 para. (3) is to be disbanded. According to this statutory provision, the exercise of the right of assembly may not constitute a criminal offence or a call to commit such offence, and "it may not violate the rights and freedom of others."

If a demonstration is not held at the place and time where and when it should be held according to the notification, then the demonstration shall be in violation of the rights of others. In my opinion, not the regulations themselves qualify as a constitutionally unjustifiable and therefore disproportionate restriction of the right of assembly, but in the course of applying the law, the given circumstances may make the unconditional application of the cause(s) of disbanding be unjustified, and this may result in a constitutionally non justifiable extent of restricting the fundamental rights. Therefore the constitutional solution is not to eliminate the statutory criteria, but to secure the assessment of the criteria based on the law. Consequently, the unconstitutionality results from the lack of the adequately differentiated regulation of police actions.

I hold that instead of the annulment of the cited statutory provision, points 1 and 2 of the holdings support the establishment of an unconstitutional omission of legislative duty.

2. At the same time, points 1 and 2 of the holdings could have been used as a basis for the ex officio establishment of an unconstitutional omission of legislative duty. The interpretation of Article 62 para. (1) of the Constitution and the constitutional requirement to be followed in the application of Section 6 of ARA do not substitute the statutory regulations, but they form a basis for differentiated statutory regulation to create a balance between the right of assembly and the protection of the fundamental rights of others related to exercising the right of assembly.

In the respect of the justification of establishing an unconstitutional omission, I second to point 3 of the dissenting opinion by Dr. András Bragyova Judge of the Constitutional Court.

Budapest, 27 May, 2008.

*Dr. András Holló*
Judge of the Constitutional Court

I concur with the dissenting opinion:

*Dr. Mihály Bihari*
Judge of the Constitutional Court

I second to point 1 of the dissenting opinion.

*Dr. András Bragyova*
Judge of the Constitutional Court

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