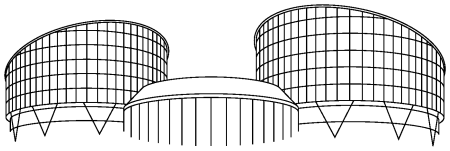

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KIRÁLY AND DÖMÖTÖR v. HUNGARY

(Application no. 10851/13)

JUDGMENT

STRASBOURG

17 January 2017

FINAL

17/04/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Király and Dömötör v. Hungary,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Vincent A. De Gaetano, *President,*
András Sajó,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 29 November 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 10851/13) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Hungarian nationals, Mr Alfréd Király and Mr Norbert Dömötör ("the applicants"), on 5 February 2013.

2. The applicants were represented by Mr A. Kádár, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The applicants alleged that the authorities had failed in their obligations to protect them from racist threats during an anti-Roma demonstration and to conduct an effective investigation into the incident, in breach of Article 8 of the Convention.

4. On 16 November 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1971 and lives in Devecser. The second applicant was born in 1979 and lives in Ajka. The applicants are of Roma origin.

6. Mr G.F., a Member of Parliament from the right-wing Movement for a Better Hungary Party (*Jobbik Magyarországért Mozgalom Párt*,

hereinafter referred to as *Jobbik*), announced that a demonstration would take place on 5 August 2012 in Devecser under the slogan "Live and let live". The reason for the demonstration was that riots had broken out between Roma and non-Roma families of the municipality on 25 July 2012. Following that incident, seventeen people were questioned by the police, and an enhanced police presence was ordered in the municipality, with the constant surveillance of streets inhabited by the Roma community.

7. In the applicants' submission, the police were aware that the presence of a hostile crowd in the municipality could lead to violent acts. The police had been informed through official sources that in addition to the members of *Jobbik*, nine far-right groups, known for their militant behaviour and anti-Roma and racist stance, would also be present at the demonstration. They had also been informed that the demonstrators would seek conflict with the police and the minority community. According to the far-right organisations' websites, the demonstration was aimed "against Roma criminality", "against the Roma of Devecser beating up Hungarians" and "against the Roma criminals unable to respect the rules of living together".

8. Devecser was classified as special zone of risk, (*kiemelten veszélyeztetett*) and eight police patrol units were dispatched to the municipality to ensure an increased presence and carry out checks as of 1 August 2012. About 200 police officers were deployed in Devecser to secure the demonstration, including members of the Operational Squad. On the day of the demonstration checks were increased throughout the county, including traffic check points. The Veszprém county police department also asked members of the Ethnic Roma Self-Government of Veszprém county to inform the Roma population about the upcoming demonstration.

9. About 400 to 500 people were present at the demonstration. Mr G.F. announced that the demonstration was about the justified self-protection of Hungarians. Invoking the crimes committed by members of the Roma community, he demanded the reintroduction of the death penalty and threatened the Roma community that if the criminality continued, *Jobbik* would return to Devecser. He also announced that the Roma were not "normal".

10. In his speech, Mr L.T., leader of the Sixty-four Counties Youth Movement (*Hatvannégy Vármegye Ifjúsági Mozgalom*), mentioned that Roma criminality was omnipresent in the country and wherever this ethnic group appeared, only destruction, devastation and fear came. In his opinion the Roma population wanted to exterminate Hungarians, which left the latter with the choice of becoming victims or fighting back. Mr A.L., leader of the Civil Guard Association for a Better Future (*Szebb Jövőért Polgárőr Egyesület*) stated that hundreds of Hungarians were killed yearly by the Roma with the approval of the State. In his view there was a destruction of civilians going on in Hungary. He called on the demonstrators to sweep out the "rubbish" from the country, to revolt and to chase out the treasonous

criminal group supressing Hungarians. He closed his speech by saying that the Hungarians were entitled to use all means to achieve those goals. Mr Zs.Ty., leader of the Outlaws' Army (*Betyársereg*), spoke about the characteristics of a racial war and an ethnic-based conflict. He said that before such conflict escalated, a message should be sent. He mentioned that the Roma minority was genetically encoded to behave in a criminal way and declared that the only way to deal with the Roma was by applying force to "stamp out this phenomenon that needs to be purged". Mr I.M., the leader of the New Guard (*Új Gárda*), called on the Government to end Roma criminality and warned that if Hungarians ran out of patience, there would be trouble. Finally, Mr I.O., the vice-president of *Jobbik* in Veszprém county, told participants that there would be no mercy and that every criminal act and every prank would be revenged; if the State authorities did not live up to their obligations to protect civilians from Roma criminality, this would be done by the population itself.

11. Following the speeches, the demonstrators marched down Vásárhelyi Street, the neighbourhood of Devecser inhabited by the Roma community, chanting "Roma criminality", "Roma, you will die", and "We will burn your house down and you will die inside", "We will come back when the police are gone", and obscene insults. They also called on the police not to protect the Roma residents from the demonstrators and to let them out from their houses. Sporadically, quasi-military demonstrations of force occurred, involving military-style uniforms, formations, commands and salutes.

12. Certain demonstrators covered their faces, dismantled the cordon and were equipped with sticks and whips. Those leading the demonstration threw pieces of concrete, stones and plastic bottles into the gardens, encouraged by the crowd following them.

13. The Government and the applicants disagreed as to other aspects of the demonstration.

14. During the march through the Roma neighbourhood, which lasted approximately thirty minutes, both applicants stayed in the gardens of houses in Vásárhelyi Street. The first applicant submitted that he had overheard the police stating on their radio that the demonstrators were armed with sticks, stones, whips and metal pipes. Furthermore, one of his acquaintances had been injured by a stone thrown into his garden, but the police officer to whom the applicant had reported the incident had not taken any steps. In the second applicant's submission, two of the demonstrators leading the march had had a list and had pointed out to the crowd the houses that were inhabited by Roma people.

15. According to the applicants, the police were present during the demonstration but remained passive and did not disperse the demonstration; nor did they take any steps to establish the criminal responsibility of the demonstrators. The report of the police's contact officer noted that the

organiser of the demonstrations, Mr G.F. had not been able to keep the events under control and had been unwilling to confront the participants.

16. According to the Government, the commander of the security forces immediately took action when the participants started to act violently, managed the crowd appropriately and separated hostile demonstrators from others.

17. On 21 September 2012 the Minister of the Interior, reacting to a letter from civil society organisations, informed the public that the conduct of the police had been adequate and that forty people, including five demonstrators, had been questioned by the police. Following a statement from two injured persons, the police opened criminal proceedings against unknown perpetrators on charges of "disorderly conduct" (*garázdaság*), which was subsequently amended to "violence against a member of a group" (*közösség tagja elleni erőszak).* It appears from the case file that a further criminal investigation was opened into charges of "violence against a member of a group" several months after the incident.

18. In November 2012 the Office of the Commissioner for Fundamental Rights published a report on the events. The report concluded that the police had failed to assess whether the event had infringed the rights and freedoms of others. Such assessment would have led to the conclusion that the people living in the neighbourhood were forced as a "captive audience" to listen to the injurious statements that had been made. According to the report, the demonstration had been used to incite ethnic tensions on the basis of the collective guilt of the ethnic group. It went on to state that by not enforcing the limits of freedom of assembly, the police had caused anomalies in respect of the right to peaceful assembly and the Roma population's right to dignity and private life. It also pointed out that certain speeches had been capable of inciting hatred, evidenced by the fact that stones had been thrown at Roma houses following the speeches. The Commissioner found it regretful that the police had failed to identify the perpetrators on the spot, which was inconsistent with their task of preventing and investigating crimes and with the right to dignity, non-discrimination and physical integrity.

19. Both applicants complained to the Veszprém county police department about the failure of the police to take measures against the demonstrators, thereby endangering their life and limb and their human dignity.

20. On 22 November 2012 the police department dismissed the applicants' complaint, finding that the conditions for dispersal of the demonstration had not been met, since any illegal or disorderly conduct on the part of the demonstrators had ceased within ten minutes. The police department held that the demonstration had remained peaceful, since, apart from the throwing of stones, no actual conflict had broken out between the police, the demonstrators and members of the Roma minority. It also found

that only a small group of demonstrators had been armed with sticks and whips. As regards the failure of the police to carry out identity checks on demonstrators and to hold suspects for questioning (*előállítás*), the police department found that such measures would only have aggravated the situation and strengthened the demonstrators' hostility towards the police.

21. On appeal, the National Police Service upheld the first-instance administrative decision. Following a request for judicial review lodged by the applicants, it nonetheless overruled the first-instance decision and remitted the case to the county police department.

22. By its decisions of 29 October 2013 and 25 June 2014 the Veszprém county police department dismissed both applicants' complaints again on identical grounds. The police department found that the demonstration had remained essentially peaceful, because the majority of the participants had not aligned themselves with those committing violent acts. The police department observed that there had been grounds to disperse the demonstration, since some participants had been armed and there had been a reasonable suspicion that some of them had committed the criminal offence of violence against a member of a group. Nonetheless, it concluded that dispersing the demonstration would have carried a high risk since, based on previous experience, those participants intent on violence would probably have turned against the police.

23. The National Police Service upheld those decisions on appeal on 19 December 2013 and 5 August 2014, respectively, stating that although under section 14 of Act no. III of 1989 ("the Freedom of Assembly Act") the police had been under an obligation to disperse the demonstration, they could refrain from such action if it carried a higher risk than allowing the demonstration to continue. Furthermore, the commander of the operation had been right not to apply measures against certain individuals, since that would have led to a clash between the demonstrators and the police, endangering not only the police themselves, but the local residents too. The second-instance authority acknowledged that the unlawful acts of certain demonstrators had infringed the fundamental rights of the applicants, but concluded that seeking to protect those rights would have caused more harm than good.

24. The applicants sought judicial review of those decisions, arguing that under section 14 of the Freedom of Assembly Act the police were under an obligation to disperse non-peaceful demonstrations irrespective of the proportionality of such a measure.

25. In its judgments delivered on 3 December 2014 and 19 March 2015 the Veszprém Administrative and Labour Court dismissed the applicants' claims. It found that although the non-peaceful character of a demonstration could serve as grounds for its dispersal, this was only so if the demonstration as a whole had ceased to be peaceful. Sporadic acts of violence, as in the present case, could not serve as legitimate grounds for

dispersal. The court also considered that the police had a margin of discretion when deciding on the dispersal of a demonstration. As regards the applicants' claim that the police should have taken law-enforcement measures against certain individuals, the court pointed out that such actions would have led to clashes between the demonstrators and the police. The court therefore concluded that even if there had been grounds to terminate the demonstration or to apply law-enforcement measures against certain individuals, the police had been justified in not having done so. It added that, in any event, the potential infringement of the applicants' fundamental rights had been caused not by the alleged inactivity of the police, but by the conduct of the demonstrators.

26. The applicants lodged a petition for review with the *Kúria*. In its judgments of 23 September 2015 and 6 January 2016 the *Kúria* reiterated that under the Freedom of Assembly Act no. III of 1989 the dispersal of demonstrations was a possibility rather than an obligation for the police and restrictions on the fundamental rights of others did not in themselves justify the restriction of the right of assembly. Furthermore, dispersal could only be used as a last resort, if the demonstration was likely to entail serious consequences. Relying on the report by the Commissioner for Fundamental Rights, the *Kúria* considered that despite certain violent actions, the demonstration had on the whole remained peaceful. The court went on to find that the police had been under an obligation to respect the principle of proportionality and had been right to conclude that dispersing the march could have caused more serious prejudice to the Roma community than allowing the demonstration to continue in a controlled manner.

As regards the lack of individual measures, the *Kúria* found that an operational unit of the police (*csapaterő*) had been deployed to maintain order, and that such a measure had not allowed for police officers to single out and act against individual demonstrators.

The *Kúria* also rejected the applicants' argument that the police had done nothing to protect them and other members of the Roma minority. It found it established that the police had used a cordon to contain the demonstrators and had ensured the subsequent prosecution of perpetrators by logging events, and taking video footage and photographs.

27. The applicants, together with the Hungarian Helsinki Committee, lodged a criminal complaint concerning the speeches delivered at the demonstration and the attacks to which the Roma community had been subjected. The case was subsequently joined to a criminal complaint lodged by third persons concerning the same issue. On 22 November 2012 the Veszprém county police department opened an investigation into charges of violence against members of a group under Article 174/B of the Criminal Code. The police department opened a separate investigation, under Article 269 point (b) of the Criminal Code (incitement against a group), into the issue of the speeches delivered during the demonstration.

28. The investigation into incitement against a group was discontinued by the police department on 24 September 2013. The police department considered that although the content of the speeches had been injurious to the Roma minority and was morally reprehensible, it could not be classified as a crime. In particular, the speeches had not been meant to trigger unconsidered, instinctive, harmful and hostile reactions. By the same decision, the police department informed the applicants that it had asked the prosecutor's office to press charges against an individual for violence against member of a group.

29. Following a complaint lodged by the applicants, the Veszprém County Prosecution Office upheld the decision to discontinue the investigation. It held that the legally protected interest in the criminalisation of incitement against a group was public morale. Thus the applicants were not victims of the alleged criminal act and had no standing to lodge a complaint against the decision to discontinue the investigation. However, the county prosecution office re-examined the decision on its own motion. It held that the speeches delivered in Devecser contained abusive, demeaning statements concerning the Roma minority and might have contained statements that evoked hatred, but that they had not provoked active hatred and had not called on the audience to take violent action against the local Roma.

30. As regards the investigation into the offence of violence against a member of a group, the police established that four persons had taken part in violent acts, in particular the throwing of stones. Three of the alleged perpetrators could not be identified, while the Veszprém County Prosecutor's Office pressed charges against the fourth person, Mr T.K. He was found guilty as charged on 2 June 2015 by the Ajka District Court and sentenced to ten months' imprisonment, suspended for two years. On appeal the Veszprém High Court upheld Mr T.K.'s conviction but amended his sentence to one year and three months' imprisonment, suspended for three years.

31. The applicants, together with a third person, also lodged a criminal complaint against unknown perpetrators for breach of discipline in the line of duty, under Article 438 of the Criminal Code. Those proceedings were discontinued on 17 October 2012 by a decision of the Central Investigation Office of the Public Prosecutor, which held that the criminal offence could only be committed by soldiers in military service, but not by police officers.

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. The Fundamental Law of Hungary provides as follows:

Article VI

"(1) Everyone has the right to respect for his or her private and family life, home, communications and good reputation."

33. Act no. CLI of 2011 on the Constitutional Court ("the Constitutional Court Act") provides as follows:

Section 26

"(1) In accordance with Article 24 (2) c) of the Fundamental Law, person or organisation affected by a concrete case may submit a constitutional complaint to the Constitutional Court if, due to the application of a legal regulation contrary to the Fundamental Law in their judicial proceedings

a) their rights enshrined in the Fundamental Law were violated, and

b) the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available.

(2) By way of derogation from paragraph (1), Constitutional Court proceedings may also be initiated by exception if

a) due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and

b) there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy.

..."

Section 27

"Any individual or organisation involved in a case may lodge a constitutional complaint with the Constitutional Court against a court decision which is contrary to the Fundamental Law within the meaning of Article 24 (2) d) of the Fundamental Law, if the ruling on the merits or another decision terminating the court proceedings

a) violates the complainant's right enshrined in the Fundamental Law, and

b) the complainant has already exhausted the available legal remedies or no legal remedy is available."

Section 55

"...

(3) If the motion does not meet the requirements on the format and content of such a motion specified in this Act, the Secretary General shall call upon the petitioner to submit a duly completed petition, which the petitioner shall be obliged to do within 30 days. If the petitioner fails to submit a duly completed petition within the time-limit or submits it unduly again, the petition shall not be examined on the merits.

(4) Besides the case specified in paragraph (3), the petition shall not be adjudicated on the merits if

a) the petitioner fails to observe the time-limit of the submission of a petition specified by an Act or, despite the call-up to him or her, fails to justify the omission,

b) the entity was manifestly unauthorised to submit such a petition,

c) the adjudication of the petition manifestly does not fall within the competence of the Constitutional Court,

d) the document submitted does not qualify as a petition, or

e) the petition is manifestly unfounded.

(5) The decision of the Constitutional Court to reject a petition without examining its merits shall be taken – at the proposal of the Secretary General – by a single judge of the Constitutional Court."

34. The Criminal Code, as in force at the material time, provided, in so far as relevant, as follows:

Violence against a member of a national, ethnic, racial or religious group

Article 174/B

"(1) Whosoever uses violence against another because that other person belongs to a national, ethnic, racial or religious group, or forces that person by violence or threats to do or not to do something or to tolerate any conduct is guilty of committing an offence punishable by a term of imprisonment of up to three years ."

Incitement against a group

Article 269

"Any person who, before the public at large, incites hatred against:

a) the Hungarian nation;

b) any national, ethnic, racial or other group of the population

is guilty of committing an offence punishable by a term of imprisonment not exceeding three years."

35. Constitutional Court judgment no. 75/2008 (V.29) AB of 27 May 2008 reads, in so far as relevant, as follows:

"6. The Constitutional Court has reviewed separately section 14(1) of ARA [Freedom of Assembly Act] on the disbanding of assemblies. Under the relevant provision, the police must disband an assembly if the exercise of the right of assembly constitutes a criminal offence or a call to commit such offence, if it violates the rights and freedoms of others, if the participants of the assembly appear to be armed or in possession of weapons, if an assembly under the obligation of prior notification is being held without notification, if an assembly is being held at a time or location, or with a purpose or agenda different from the data in the notification, or if an assembly under the obligation of prior notification is being held despite a decision prohibiting it.

6.1. As held by the Constitutional Court, the first and the second provisos of the list found under section 14(1) (criminal offence or a call to commit such offence, violation of the rights and freedoms of others, and participants appearing in an armed manner or with weapons) do not restrict 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.

...

7.... It is part of the police's role of applying the law to interpret ARA in concrete cases and to weigh fundamental rights against aspects of public interest. Each assembly held in a public area requires a concrete decision on the issues of interpreting the law. It is impossible to preclude debates about interpreting and applying the norms. The police have to consider whether the assembly falls under the scope of ARA and of the prior 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 have to assess whether the disbanding of the event and the application of coercive measures are 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 reduces the danger of legal uncertainty. When adopting the decision, the Constitutional Court took into consideration the risk of abusing the right of assembly. ARA offers some legal remedies against abuse of the application of the law by the authorities, and the Constitutional Court has already assessed them in CCDec. Similarly, there exists another risk 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 grounds that some people might abuse it. ARA and PA offer an adequate framework for acting against illegal assemblies that violate or directly endanger the rights of others. According to section 14(1) of ARA – held to be constitutional – non-peaceful assemblies are to be disbanded. PA provides for the application of coercive measures against those who resist the measures applied by the police, and on the basis of section 59 of PA, if the crowd shows illegal conduct, the police may use tools designed to disperse it."

36. The Supreme Court's Guiding Resolution no. 2215/2010 contains the following relevant passages:

"Criminal law – by criminalising incitement against a group – provides means for those situations where a racist statement, because of the circumstances in which it was made, poses an immediate and clear threat of violence and of the infringement of others' rights. Inciting [hate] speech and violence cannot go unpunished.

The interpretation, according to which incitement to hatred, based on the above, is the emotional preparation for violence, is clearly established in case-law... Accordingly ... the judicial practice qualifies as capable of inciting violence only conduct which – even if committed with conditional intent – inevitably involves recognition that the incited hatred might turn into extreme activities (intolerant, prejudicial, injurious conduct and, ultimately, violent actions)."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicants complained that the failure of the domestic authorities adequately to protect them from the demonstrators and properly

to investigate the incident amounted to a violation of their rights under Article 8 of the Convention. This provision reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Compatibility of the complaints with the Convention

(a) The parties' submissions

38. The Government submitted that Article 8 of the Convention was not applicable to the applicants' case and they were not victims of a violation of the Convention right they relied upon. In this connection, they contended that since the applicants had been staying at the scene of the demonstration as visitors, they could not invoke under Article 8 their right to respect for their home. Furthermore, since the applicants had not suffered any physical injury, they could not rely on Article 8 and the State's obligation to protect their physical integrity against attacks by third persons. The Government also maintained that the applicants' complaint concerning interference with their psychological integrity was to be considered under Article 3 rather than under Article 8 of the Convention, as in the cases of *Karaahmed v. Bulgaria* (no. 30587/13, 24 February 2015) and *P.F. and E.F. v. the United Kingdom* ((dec.), no. 28326/09, 23 November 2010). In this respect the Government also submitted that the impugned treatment had not reached the minimum threshold of severity required for Article 3 to come into play.

39. The applicants submitted that contrary to the Government's assertion, in order for Article 8 of the Convention to apply, it was irrelevant that they had not suffered actual injuries, since their physical integrity had been exposed to a clear and imminent danger. The first applicant, Mr Király, was a resident of Devecser and although he had not stayed in his own house during the demonstration but had been at his brother's house, his ties to the place and to the persons living there were close enough that it could be considered his "home" for the purposes of Article 8. They further argued that even threats that had not actually materialised into concrete acts or physical violence could affect a person's psychological integrity as protected under Article 8. This was particularly the case if the threat of violence was made with reference to a person's Roma origin. In their view, the threats uttered against the Roma community in an openly racist rally and accompanied by acts of violence had caused such a degree of fear and

distress, as well as a feeling of menace and inferiority, that they had affected their psychological integrity, rendering Article 8 applicable in the present case. This was particularly the case, since the applicants had been subjected to intentional harassment as members of a captive audience, unable to avoid the message conveyed by the speakers and demonstrators.

40. The applicants also referred to the general context of the demonstration and the widespread discrimination suffered by the Roma minority, including repeated instances of hate speech and a series of hate-motivated killings. Lastly, they relied on the judgment of *Bensaid v. the United Kingdom* to point out that the Court's case-law did not exclude that treatment which did not reach the severity required to bring it within the ambit of Article 3 might nonetheless breach Article 8 in its private-life aspect where there were sufficiently adverse effects on physical and moral integrity (*Bensaid v. the United Kingdom*, no. 44599/98, § 46, ECHR 2001-I).

(b) The Court's assessment

41. The notion of "private life" within the meaning of Article 8 of the Convention is a broad term that is not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can therefore embrace multiple aspects of a person's physical and social identity. The Court has accepted in the past that an individual's ethnic identity must be regarded as another such element (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008-V, and *Ciubotaru v. Moldova*, no. 27138/04, § 49, 27 April 2010). In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 200, ECHR 2015 (extracts). On this basis, the Court found in *Aksu* that proceedings in which a person of Roma origin who had felt offended by passages in a book and dictionary entries about Roma in Turkey had sought redress had engaged Article 8 (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 60, ECHR 2012).

42. The Court's case-law does not rule out that treatment which does not reach a level of severity sufficient to bring it within the ambit of Article 3 may nonetheless breach the private-life aspect of Article 8, if the effects on the applicant's physical and moral integrity are sufficiently adverse (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C and *R.B. v. Hungary*, no. 64602/12, § 79, 12 April 2016).

43. Turning to the circumstances of the present case, the Court observes that the threats uttered against the Roma minority, which constitute the basis

of the applicants' complaint under Article 8 of the Convention, did not actually materialise into concrete acts of physical violence against the applicants themselves. Nonetheless, it considers that the fact that certain acts of violence were carried out by at least some of the demonstrators, and that following the speeches the demonstrators marched down Vásárhelyi Street in the Roma neighbourhood (see paragraph 11 above) where the police requested the inhabitants not to leave their houses and the demonstrators shouted that they would come back later, any threats made during the demonstration would have aroused in the applicants a well-founded fear of violence and humiliation. Furthermore, the demonstration of an openly anti-Roma stance took place in a municipality where there had already been tension between Roma and non-Roma inhabitants (see paragraph 6 above). Lastly, the threats were directed against the inhabitants of Devecser on account of their belonging to an ethnic minority, necessarily affecting the feelings of self-worth and self-confidence of members of the group, including the applicants. More generally, as the Court has held before in the context of Article 11, the reliance of an association on paramilitary demonstrations which express racial division and implicitly call for race-based action must have an intimidating effect on members of an ethnic minority, especially when they are in their homes and as such constitute a captive audience (see *Vona v. Hungary*, no. 35943/10, § 66, ECHR 2013). These elements, in the Court's estimation, would be enough to affect the applicants' psychological integrity and ethnic identity, within the meaning of Article 8 of the Convention.

44. The application is therefore not incompatible *ratione materiae* with the provisions of the Convention. The Court accordingly dismisses the Government's first objection to the admissibility of the complaint.

2. Alleged failure to exhaust domestic remedies

(a) The parties' submissions

45. The Government contended that the applicants had not exhausted available domestic remedies. They could have brought a constitutional complaint seeking the quashing of the judgment of the *Kúria* of 23 September 2015. In such proceedings they could have argued that the *Kúria's* judgment had infringed their rights enshrined in the Fundamental Law, either because the *Kúria* had applied a law which was unconstitutional or because it had interpreted or applied a law in an unconstitutional manner.

46. The applicants contested the Government's objection. They emphasised that a Government claiming non-exhaustion bore the burden of proving to the Court that an effective remedy had been available in theory and in practice at the relevant time. They argued that the Government had failed to demonstrate that a constitutional complaint would have been an effective remedy in their situation. In any case, in their view, the

constitutional complaint could only have resulted in "several remittals" to the lower-level courts and finally to the police. The proceedings before the police, however, did not constitute an effective remedy on account of their lengthy nature and the general political context. They further submitted that the police complaints procedure whereby a complaint passed to a higher-level authority within the police could not lead to an independent examination of the case, since there was a hierarchical and institutional connection between the lower-level police instances responsible for the alleged omissions and those carrying out the inquiries into the events. In this context, they also referred to the Court's judgment in *Szerdahelyi v. Hungary* (no. 30385/07, § 31, 17 January 2012), where the Court had stated that it had not been "convinced" that the police complaints procedure could be considered an effective remedy.

(b) The Court's assessment

47. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be used are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV and *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 58, ECHR 2013 (extracts)).

48. In the present case, the applicants' complaint concerns the domestic authorities' failure to fulfill their positive obligation to protect their right to private life. The Government have not referred to any decisions or judgments of the Constitutional Court which, like this Court's case-law, inferred from the right to private life (protected by the Fundamental Law under Article VI (1)) the protection of an individual's ethnic identity (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008) and the positive obligation to adopt measures designed to secure respect for private life even in the sphere of individuals' relationships with each other (see *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013).

49. The Court notes that under sections 27 and 55 of the Constitutional Court Act, the absence of a constitutional right renders a complaint inadmissible for examination on the merits. The Government have failed to prove that there is a constitutional right or a domestic judicial practice allowing an individual to seek, with any prospect of success, the intervention of the police for the protection of private life (see, *mutatis mutandis*, *Apostol v. Georgia*, no. 40765/02, § 39, ECHR 2006-XIV). It follows that the application cannot be dismissed for failure to exhaust domestic remedies.

3. Conclusion as to admissibility

50. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

51. The applicants emphasised that the police had been clearly aware that the demonstration constituted a danger to the Roma minority, following previous experience of the behaviour of extreme right-wing groups during rallies and the fact that the demonstration had explicitly been planned in the Roma neighbourhood. This had clearly been indicated by the extensive preparations carried out by the police prior to the events. Furthermore, there had been reported incidents of violence and aggressive behaviour throughout the demonstrations. Notwithstanding, the police had failed to discharge their obligations under Article 8 to protect the applicants from violent attacks by individuals.

52. First, the demonstration fell to be regulated by the authorities. In this regard, the applicants emphasised that the legislative framework provided insufficient protection against racist rallies, in that there were no legal grounds for the police to ban a demonstration, even if it had been knowingly targeting the Roma minority its participants were prone to violence. The police could have used their powers to divert the demonstration to another place or to deny the demonstrators access to the Roma neighbourhood. Moreover, they should have intervened by calling the demonstrators to cease their unlawful conduct.

53. Secondly, the police had not even considered using their powers under section 14 of the Freedom of Assembly Act to disperse the demonstration on the grounds that it constituted a criminal offence, its

character was no longer peaceful, it infringed the rights and freedoms of others, and its participants were armed. In their view, the police had failed to understand that not only the sporadic acts of violence, but also any threatening behaviour constituted a criminal offence, in particular violence against members of a group. They also submitted that none of the authorities had properly assessed that an anti-Roma demonstration of that kind, by its very nature, infringed the rights and freedoms of others. Furthermore, the applicants found it contradictory that the domestic authorities had insisted on the generally peaceful nature of the demonstration, whereas the police had admitted having decided not to take individual measures against certain demonstrators for fear of violence. The applicants also emphasised that although a small number of the demonstrators had engaged in acts of violence, they had been largely supported by the crowd.

As regards the domestic authorities' obligation to balance the applicants' rights under Article 8 of Convention with that of the demonstrators, the applicants maintained that the perpetrators of vehement verbal attacks on ethnic minorities, aimed at inciting hatred, could not rely on the protection of their Convention rights.

54. Thirdly, the police had failed to take the necessary measures to single out and identify individual perpetrators in order to restore the peaceful nature of the demonstration but also for the purposes of subsequent criminal investigations.

55. Lastly, the applicants submitted that the investigations into the incident had been defective. Despite several of the participants being involved in intimidating the Roma community out of racial hatred by chanting anti-Roma slogans, conduct punishable under Article 174/B of the Criminal Code, the investigating authorities had limited the scope of their enquiries to those who had committed acts of violence. Furthermore, in the applicants' submission, the domestic authorities had erred in discontinuing the investigation against certain speakers on account of hate speech, since their utterances inciting people to start an ethnic war could clearly have triggered violence among the audience, given the threatening nature of the event.

(b) The Government

56. The Government submitted that even if the Court found Article 8 applicable in this case, the domestic authorities had complied with their positive obligations under that Article by properly policing the demonstration. Contrary to the applicants' allegations, this was not a case in which the police had stood by and done nothing: they had taken a wide range of preventive measures prior to the demonstration, including vehicle checks, identity checks and consultations with the representatives of the Roma minority. They had also considered that the most effective method to

secure the demonstration had been for the force to act as a team and not to take measures against certain individuals. This operational decision fell within the ambit of legitimate police discretion, as confirmed by the domestic courts' decisions.

57. The Government also submitted that the case concerned on the one hand, the right of a political group to freedom of expression and assembly, guaranteed by Articles 10 and 11 of the Convention and, on the other, the right of the local residents to their private life, guaranteed by Article 8. The alleged failure of the police to ban or disperse the demonstration had corresponded to their obligation to strike a fair balance between those two competing interests. In the Government's opinion, the interference with the applicants' right to private life had been negligible, since, contrary to their submissions, they had not been members of a captive audience, but had been visiting Devecser to confront the demonstrators. On the other hand, the domestic authorities had a very narrow margin of discretion in restricting the exercise of the freedoms protected under Articles 10 and 11.

58. The Government further emphasised that the demonstration, a one-off event, had lasted only two hours and the sporadic acts of violence only a couple of minutes. Thus the event could not be characterised as violent, justifying possible dispersal.

59. Finally, the criminal investigation undertaken after the demonstration had complied with the State's positive obligations under Article 8. In particular, as regards the punishment of the alleged hate speech, the Government submitted that domestic authorities, having a better knowledge of a particular society, were better placed to decide where the limits of free speech and hate speech should be set, and an open debate would allow for mitigating racist tensions within the society.

2. The Court's assessment

(a) General principles

60. The Court reiterates that while the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations between individuals (see *Söderman,* cited above, § 78). To that end, States are required to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see *Sandra Janković v. Croatia*, no. 38478/05, § 45, 5 March 2009, and *A v. Croatia*, no. 55164/08, § 60, 14 October 2010).

61. The State's positive obligation under Article 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation (see *Osman v. the United*

Kingdom, 28 October 1998, § 128, *Reports* 1998-VIII, and *C.A.S. and C.S. v. Romania*, no. 26692/05, § 72, 20 March 2012) and to the possibility of obtaining reparation and redress (see, *mutatis mutandis*, *A, B and C v. Latvia*, no. 30808/11, § 149, 31 March 2016), although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see, for example, *Brecknell v. the United Kingdom*, no. 32457/04, § 64, 27 November 2007). More generally, however, in respect of less serious acts between individuals which may violate psychological integrity, the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection (see *Söderman*, cited above, § 85).

62. The Court also reiterates that its task is not to substitute itself for the competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. The Court will therefore examine whether Hungary, in handling the applicants' case, has been in breach of its positive obligation under Article 8 of the Convention (see *mutatis mutandis*, *Sandra Janković*, cited above, § 46).

(b) Application of the above principles in the instant case

63. The Court notes that the applicants' complaints concern the alleged inadequacy of the Hungarian authorities' response to the intimidating anti-Roma demonstration that had taken place in their neighbourhood. In particular, they pointed out the failure of the police to take preventive measures and react promptly, either by dispersing the demonstration or by applying measures against certain individuals, as well as the shortcomings in the subsequent criminal prosecutions.

64. As regards the decision of the police, subsequently reviewed by the Administrative and Labour Court and the *Kúria*, not to disperse the demonstration, this Court has previously accepted that in certain situations the domestic authorities might be required to proceed with the dispersal of a violent and blatantly intolerant demonstration in order to protect an individual's private life under Article 8 (see *R.B. v. Hungary*, cited above, § 99). Examining the domestic approach to dispersal of demonstrations, it appears that the police have a similar obligation to disband an assembly if the exercise of the right of assembly constitutes a criminal offence or a call to commit such an offence, or if it violates the rights and freedoms of others, as demonstrated by the judgment of the Constitutional Court (see paragraph 35 above).

65. When assessing whether such an obligation had arisen in the present case, the domestic courts gave consideration to the applicants' arguments concerning the unlawful nature of the demonstration. They nonetheless concluded that in the light of previous case-law, there had been no legal basis to disperse the demonstration, since it had maintained its generally peaceful nature, despite some unruly incidents. The *Kúria* also attached weight to respect for the principle of proportionality when having recourse to force, and the risk of violence to the Roma community the measure could have had implied.

66. The Court notes in this respect that in cases where the applicants were able to raise their arguments before the domestic courts, which gave them careful consideration, it is not for this Court to substitute its own assessment for that of the national courts; indeed, it cannot question that assessment, unless it is manifestly unreasonable or there is clear evidence of arbitrariness (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 89, ECHR 2007-I). In the present circumstances, the Court is satisfied that there was no appearance of arbitrariness or a manifest lack of judgment on the part of the authorities as regards the decision of the police not to disperse the demonstration.

67. In a similar vein, the absence of individual measures (for example, identity checks and questioning) was fully considered, first by the investigating authorities and, secondly, by the domestic courts (see paragraphs 25-26 above). In particular, the national courts engaged in an assessment of whether the action taken by the police had been professionally justified and whether they had been sufficient to protect the applicants and the Roma community in general. The courts emphasised that the police had taken a number of preparative steps, had changed the classification of the demonstration and had placed themselves between the protesters and the local residents.

68. In this regard, the Court reiterates its previous finding that the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them (see *P.F. and E.F. v. the United Kingdom* (dec.), no. 28326/09, § 41, 23 November 2010).

69. Consequently, the Court does not consider it appropriate to call into question the findings of the domestic courts concerning the adequacy of the police reaction to the demonstration.

70. Nonetheless, the fact remains that the applicants were unable to avert a demonstration advocating racially motivated policies and intimidating them on account of their belonging to an ethnic group.

71. As regards the ensuing criminal proceedings against the speakers and the participants of the demonstration, the Court notes that the criminal investigation into the crime of incitement against a group was discontinued

because the domestic authorities found that the speakers' statements during the march were not covered by the said offence (see paragraph 29 above). It also notes that an investigation was opened into the criminal offence of violence against a member of a group, in the course of which four demonstrators were found to have thrown stones at a house inhabited by a Roma family. The ensuing criminal proceedings led to the conviction of one of the demonstrators, the other three remaining unidentifiable (see paragraph 30 above).

72. The Court has already dealt with cases of harassment motivated by racism which involved no physical violence, but rather verbal assault and physical threats. It found that the manner in which the criminal-law mechanisms had been implemented was a relevant factor for its assessment of whether the protection of the applicant's rights had been defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention (see *R.B. v. Hungary*, cited above, §§ 84-85).

73. In considering the present case, the Court will draw inspiration from the principles formulated in its previous case-law under Article 10 of the Convention concerning statements alleged to have stirred up violence, hatred and intolerance. The key factors in the Court's assessment were whether the statements had been made against a tense political or social background (see *Zana v. Turkey*, 25 November 1997, §§ 57-60, Reports 1997-VII; *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, §§ 52 and 62, ECHR 1999-IV; *Soulas and Others v. France*, no. 15948/03, § 33, 10 July 2008, and *Féret v. Belgium*, no. 15615/07, §§ 66 and 76, 16 July 2009), whether the statements, fairly construed and seen in their immediate or wider context, could have been seen as a direct or indirect call for violence or as a justification for violence, hatred or intolerance (see, among other authorities, *Özgür Gündem v. Turkey*, no. 23144/93, § 64, ECHR 2000-III and *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58), and the manner in which the statements had been made, and their capacity – direct or indirect – to lead to harmful consequences (see *Karataş v. Turkey* ([GC], no. 23168/94, §§ 51-52, ECHR 1999-IV).

74. In all of those cases, it was the interplay between the various factors, rather than any one of them taken in isolation, that determined the outcome of the case. The Court's approach to that type of case can thus be described as highly context-specific (see *Perinçek*, cited above, § 208).

75. Aware of its subsidiary role, the Court is mindful that it is prevented from substituting its own assessment of the facts for that of the national authorities. Nonetheless, based on the above, it cannot but consider that the domestic authorities should have paid particular attention to the specific context in which the impugned statements were uttered.

76. In particular, the rally in general quite clearly targeted the Roma minority, which was supposedly responsible for "Gypsy criminality", with

the intention of intimidating this vulnerable group. Besides the adherents of a right-wing political party, it was attended by members of nine far-right groups, known for their militant behaviour and acting as a paramilitary group, dressed in uniforms, marching in formation and obeying commands. The speakers called on participants to "fight back" and "sweep out the rubbish from the country". Their statements referred to an ongoing ethnic conflict and the use of all necessary means of self-protection. It was following the speeches that the demonstrators marched down Vásárhelyi Street between the houses inhabited by the Roma, uttered obscenities against the inhabitants and engaged in acts of violence. Throughout the event, the police placed themselves between the demonstrators and the Roma residents to ensure the protection of the latter, while the participants themselves threatened the Roma that they would come back once the police had gone and demanded the police not to protect the Roma minority.

77. Moreover, the event was organised in a period when marches involving large groups and targeting the Roma minority had taken place on a scale that could qualify as "large-scale, coordinated intimidation" (see *Vona*, cited above, § 69).

78. For the Court, these were relevant factors that should have been taken into consideration when assessing the nature of the speeches. This is all the more so that according to the domestic courts' case-law, racist statements together with the context in which they were expressed could constitute a clear and imminent risk of violence and violation of the rights of others (see paragraph 36 above). However, it appears that the investigating authorities paid no heed to those elements when concluding that the statements had been hateful and abusive but that they had not incited violence. Thus, the domestic authorities inexplicably narrowed down the scope of their investigations.

79. As regards the criminal investigations into the offence of violence against a member of a group, the Court recalls that for an "investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means" (see, albeit in the context of Article 3, *Identoba and Others v. Georgia*, no. 73235/12, § 66, 12 May 2015). In the present case, these proceedings lasted almost three years; and their scope was statutorily bound to be limited to the actual acts of violence. The authorities eventually identified one incident liable to prosecution; the perpetrator was prosecuted for, and charged with, violence against a member of a group and convicted of that offence. Although the police had had sufficient time to prepare themselves for the event and should have been able to interrogate numerous persons after the incident (see paragraph 17 above), only five demonstrators were questioned; and three of the alleged perpetrators could not be identified. For the lack of any other elements possibly falling within the

hypothesis of the offence in question, the police were not in a position to extend the scope of the prosecution to any other protagonists. In these circumstances, the Court finds that this course of action in itself was not "capable of leading to the establishment of the facts of the case" and did not constitute a sufficient response to the true and complex nature of the situation complained of.

80. The cumulative effect of those shortcomings in the investigations, especially the lack of a comprehensive law enforcement approach into the events, was that an openly racist demonstration, with sporadic acts of violence (see paragraphs 11-12 and 25-26 above) remained virtually without legal consequences and the applicants were not provided with the required protection of their right to psychological integrity. They could not benefit of the implementation of a legal framework affording effective protection against an openly anti-Roma demonstration, the aim of which was no less than the organised intimidation of the Roma community, including the applicants, by means of a paramilitary parade, verbal threats and speeches advocating a policy of racial segregation. The Court is concerned that the general public might have perceived such practice as legitimisation and/or tolerance of such events by the State.

81. In the light of these findings the Court does not consider it necessary to address separately the applicants' argument that the demonstration should have been banned.

82. Having regard to the above-mentioned considerations, the Court is not satisfied that the domestic laws and practice ensured protection of the applicants' right to respect for their private life. Notwithstanding the respondent State's margin of appreciation in this field, the Court concludes that the State did not comply with its positive obligations under Article 8 of the Convention.

There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

84. The applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

85. The Government contested those claims.

86. The Court considers that the applicants must have suffered non-pecuniary damage on account of the violations found, and awards them, on an equitable basis, EUR 7,500 each in respect of non-pecuniary damage.

B. Costs and expenses

87. Mr Király also claimed EUR 450 in respect of the court fees and legal costs he had had to pay in the domestic proceedings. He also claimed EUR 2,755 plus value-added tax (VAT) for the costs and expenses incurred before the Court. That amount corresponds to EUR 2,560 in legal costs charged by his lawyer for 23.5 hours of legal work at an hourly rate of EUR 102 plus VAT, and EUR 195 in clerical costs. In total Mr Király claimed EUR 3,205 plus VAT.

88. Mr Dömötör claimed EUR 480 in respect of the court fees and legal costs he had had to pay in the domestic proceedings. He also claimed EUR 2,755 plus VAT for the costs and expenses incurred before the Court. That amount corresponds to EUR 2,560 in legal costs charged by his lawyer for 23.5 hours of legal work at an hourly rate of EUR 102, plus VAT, and EUR 195 in clerical costs. In total Mr Dömötör claimed EUR 3,235 plus VAT.

89. The Government contested those claims.

90. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award the sums claimed in their entirety, that is EUR 3,205 plus VAT to Mr Király and EUR 3,235 plus VAT to Mr Dömötör.

C. Default interest

91. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,205 (three thousand two hundred and five euros) to Mr Király and EUR 3,235 (three thousand two hundred and thirty-five euros) to Mr Dömötör, plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 17 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) Concurring opinion of Judge Bošnjak;
(b) Dissenting opinion of Judge Wojtyczek;
(c) Dissenting opinion of Judge Kūris.

V.D.G.
M.T.

CONCURRING OPINION OF JUDGE BOŠNJAK

1. I agree with the majority that there has been a violation of Article 8 of the Convention, but in my opinion the judgment should further analyse and explain the reasons as to why this violation has been found.

2. As stated in the judgment, the State's positive obligation under Article 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation. While there is no absolute right to obtain the prosecution or conviction of any particular person, a violation of the above-mentioned positive obligation may be found where there were culpable failures in seeking to hold perpetrators accountable (see the case-law cited in the judgment, paragraph 61). This should be the test in any given case: in finding the violation, the Court's judgment should clearly and convincingly identify the failure of the authorities of the respondent State and provide an explanation as to why that failure may be qualified as culpable.

3. In the present case the applicants lodged a criminal complaint against (a) speeches delivered at the demonstration and (b) attacks to which the Roma community had been subjected. Regarding the physical attacks, the authorities prosecuted and convicted one participant/perpetrator, while three others remained unidentified. There is no evidence in the file supporting a conclusion that the failure of the authorities to identify, prosecute and possibly convict these three perpetrators was culpable. Regarding the speeches delivered, the police and the prosecutor were of the opinion that the content of the speeches did not constitute a crime under the Hungarian Criminal Code. Consequently, the national authorities did not prosecute the persons who had delivered them. Since a violation was found in this part, it is apparent that, in the Court's assessment, this failure must be considered culpable.

4. In my opinion, the conclusion as to whether the speeches constituted a criminal offence under national law is a matter of interpretation of that law. In principle, the Court should primarily assess whether this interpretation was arbitrary. Additionally, the Court is entitled to scrutinise whether, in applying the law, the authorities of the respondent State adopted a view that was in itself incompatible with the Convention. Finally, a culpable deficiency may also be found in the provisions of the criminal law, providing for the impunity of persons who should be convicted. In such a situation, the Court imposes upon the respondent State a positive obligation of a different kind: to properly criminalise acts that must not remain unpunished. One can fairly expect that the Court should pinpoint the particular reason leading to the conclusion that there has been a violation of the Convention.

5. From the facts of the present case, one can discern that the speakers, among other things, threatened the Roma community, announced that the Roma were not "normal" (see paragraph 9 of the judgment), mentioned that wherever this ethnic group appeared, only destruction, devastation and fear came, and called on the demonstrators to sweep out the "rubbish" from the country (see paragraph 10 of the judgment). This is a clear, almost textbook example of hate speech and incitement to violence against a minority group, which cannot be tolerated in a democratic society. The speeches apparently led to an almost immediate outburst of violence, which luckily did not end with tragic consequences that might have resulted in the present case being analysed as an Article 2 or Article 3 case. The speakers were clearly identified and are referred to by their initials in the Court's judgment. It is clear that their actions constituted an imminent danger to basic legal values and therefore merited a reaction from the criminal justice system, which in the present case failed to occur. Therefore, I voted for finding a violation in the present case.

6. I would, however, prefer to see a clear analysis of the reasons for the failure of the national authorities to prosecute the speakers. It is possible that this failure was due to an arbitrary or otherwise seriously deficient application of the national criminal law. On the other hand, the failure may have been due to deficient provisions in the national criminal law preventing the national authorities from prosecuting and convicting those responsible in cases such as the present one. By giving clear reasons, the Court would send a clearer message to the authorities of the respondent State, which in turn would decrease the chances of such untenable situations recurring.

DISSENTING OPINION OF JUDGE WOJTYCZEK

I respectfully disagree with the approach adopted by the majority in the instant case. In my view the case raises serious issues under Article 3 of the Convention. According to the established case-law, the Court has the power to determine the legal characterisation of the facts. Therefore, the grievances formulated by the applicants should have been examined under Article 3 of the Convention.

At the same time, I am unable to adhere to the majority's interpretation of Article 8 of the Convention, for reasons set out in more detail in my dissenting opinion annexed to the judgment in the case of *R.B. v. Hungary* (no. 64602/12, 12 April 2016). In my view, the lacunae in the Convention system can be remedied only by the masters of the treaty and should not be corrected by an over-extensive interpretation of the Convention which does not sufficiently take into account the applicable rules of treaty interpretation.

In the instant case, the majority formulate the following "implication":

> "The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can **therefore** embrace multiple aspects of a person's physical and social identity." (paragraph 41 of the judgment, emphasis added)

I agree that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. However, the majority do not explain how they infer from this premise the conclusion that the provision in question can embrace multiple aspects of a person's physical and social identity. In my view, *non sequitur*.

DISSENTING OPINION OF JUDGE KŪRIS

1. I voted against declaring the application admissible. Consequently, I could not vote in favour of a finding by the Court that there has been a violation of Article 8 of the Convention. The reasons for my disagreement with the majority as to the admissibility of the application pertain to the ostensible ineffectiveness of a constitutional complaint in the Hungarian legal system and in the applicants' case in particular, as alleged by the applicants and upheld by the majority.

I

2. The applicants initiated a set of proceedings challenging the failure of the police to intervene during what was clearly a hate- and violence-inciting demonstration (on this aspect I cannot but agree with the majority) and to initiate a criminal investigation into the offences of incitement to hatred against members of an ethnic group, the Roma community, and of violence against members of that group. The administrative proceedings against the police were to no avail. The ensuing criminal investigation in respect of the participants in the demonstration was subsequently discontinued as regards the charges of incitement against an ethnic group, and one of the perpetrators was convicted of violence against a member of an ethnic group. The applicants complained that the domestic authorities had not observed their positive obligations under Article 8 to intervene during the demonstration (to disperse the event) and to apply criminal measures against the alleged perpetrators (to pursue criminal proceedings into the racially motivated criminal offences).

3. The Government argued that Article 8 was not applicable to the instant case and that the applicants were not victims of the alleged violation of that Article. As to these objections, I concur with the majority that the situation examined in this case can be deemed as falling under Article 8, as interpreted (however broadly) in the Court's case-law, and that, in the circumstances of the case, the applicants may be held to have been victims of interference in their private life.

4. But I do not agree that yet another objection by the Government, namely that *the applicants had not exhausted all available domestic remedies*, should also be rejected. The Government asserted that the applicants could have lodged a constitutional complaint with the Constitutional Court, in which they could have argued that the *Kúria*'s judgment of 23 September 2015 had to be quashed as infringing their rights enshrined in the Fundamental Law (as Hungary's new Constitution, which came into force on 1 January 2012, is named), either because the *Kúria* had applied a law which was unconstitutional or because it had interpreted and/or applied a law in an unconstitutional manner. The applicants

contested that objection on the ground that the Government had allegedly failed to demonstrate that a constitutional complaint would have been an effective remedy in their situation. They asserted that such a complaint could only have resulted in nothing more than "several remittals" to the lower-level courts and, finally, to the police (see paragraph 46 of the judgment). The majority unreservedly side with this criticism (see paragraph 49 of the judgment, also cited in paragraph 12 below). Although the Government indeed did not refer to any case-law of the Constitutional Court dealing with situations *identical* to that of the applicants, the majority's finding against the Government for having failed to demonstrate the effectiveness of a constitutional complaint in the applicants' situation is not sound.

5. I do not see any reason why the Government's objection as to the non-exhaustion of domestic remedies should not have been upheld. The Government *had* provided pertinent information on the domestic legislative setting. This information, had some of its most meaningful aspects not been gratuitously ignored or distorted, would have been sufficient to hold (contrary to the view of the majority) that the domestic legal system not only guarantees the constitutional right to privacy, but also provides for a constitutional complaint as an effective tool for defending this right. The Government also provided relevant case-law of the Constitutional Court which authoritatively suggests that there were no grounds for holding *a priori* that, had the *Kúria*'s judgment of 23 September 2015 been referred to the Constitutional Court by means of a constitutional complaint, that complaint would have been rejected or the impugned judgment of the *Kúria* would not have been quashed. This information is reproduced to a certain extent in the "Relevant domestic law and practice" section of the judgment (paragraphs 32-36; in the next chapter of this opinion, references to these paragraphs of the judgment are not provided). But *not all* the pertinent information is included.

Let us have a closer look at the domestic legal setting – constitutional, statutory and jurisprudential (doctrinal).

II

6. Article VI of Hungary's Fundamental Law enshrines every person's right to privacy ("the right to respect for his or her private and family life, home, communications and good reputation"). The right to privacy, as worded in the Fundamental Law, does not appear to be narrower, at least manifestly, than its counterpart under Article 8 of the Convention, and this gives rise to an expectation that Article VI of the Fundamental Law is interpreted domestically along the lines of the Court's case-law on Article 8 and includes the element of protection of personal safety. The two rights are related, as emerges from the Court's case-law (referred to in

paragraphs 41-43 of the judgment). It should be noted in this context that the Fundamental Law also explicitly enshrines, in Article IV, every person's right to personal safety. So far, there are no indications whatsoever that the methodology or tendencies regarding the interpretation of the close relationship between the right to privacy and the right to personal safety in the case-law of the Hungarian Constitutional Court or (any other) domestic judicial practice is in any way at variance with the approach professed by the European Court of Human Rights, as embodied in its case-law (again as referred to in the present judgment, *inter alia* in paragraphs 41 and 42).

7. Section 26 of the Constitutional Court Act guarantees "person[s] ... affected by a concrete case" the right to submit a constitutional complaint to the Constitutional Court if, owing to the application of a legal regulation contrary to the Fundamental Law in judicial proceedings concerning them, their rights as enshrined in the Fundamental Law have been violated and the possible legal remedies have already been exhausted or none are available. That is not all. Constitutional Court proceedings may also be initiated, by means of a constitutional complaint, by a "person ... affected by a concrete case", by way of derogation from these (general) conditions if, owing to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, that person's rights have been violated directly, without a judicial decision, and there are no available legal remedies designed to redress the violation of these rights, or the complainant has already exhausted the possible remedies. Also, section 27 of the same Act provides that any individual (as well as any organisation) "involved in a case" may lodge a constitutional complaint with the Constitutional Court against a court decision which is contrary to the Fundamental Law within the meaning of Article 24 (2) d) of the Fundamental Law (which, alas, is *not* reproduced in the "Relevant domestic law and practice" section – an omission to which I shall turn in due course), if the ruling on the merits or another decision terminating the court proceedings violates the complainant's right as enshrined in the Fundamental Law, and the complainant has already exhausted the available legal remedies or no legal remedy is available. On top of this, section 55 of the Constitutional Court Act allows for the rectification of a constitutional complaint if it was submitted without being duly completed.

8. So much, for now, for the right to privacy and the legal possibility of defending it by means of a constitutional complaint under the Hungarian legislation (constitutional and statutory). Let us now turn to the question of criminal responsibility for an infringement of this right through the incitement of hatred and/or violence against a member of an ethnic group, and the statutory duty of the police to disperse hate- and violence-inciting demonstrations.

The Hungarian Criminal Code establishes criminal responsibility (imprisonment for up to three years) for violence against a member of a

national, ethnic, racial or religious group and for the incitement of hatred against, *inter alia*, "any national, ethnic, racial or other group of the population". The Supreme Court (the predecessor of the *Kúria*), in its Guiding Resolution no. 2215/2010, emphasised that inciting hatred and violence could not go unpunished. The Supreme Court also interpreted incitement to hatred as amounting to "emotional preparation" for violence and as pertaining to such conduct which might "inevitably" turn into extreme activities, such as intolerant, prejudicial, injurious conduct and, ultimately, violent actions. According to the Guiding Resolution, Hungarian criminal law and judicial practice provide means for dealing with situations where a racist statement, because of the circumstances in which it was made, constitutes an "immediate and clear threat of violence and of the infringement of others' rights". There can hardly be any doubt that the wording "others' rights" encompasses, *inter alia*, the right to privacy, as well as to personal safety. Yet earlier, the Constitutional Court – acting under the Constitution in force at that time (which also enshrined, albeit using different wording from that of Article VI of the Fundamental Law currently in force, both everyone's right to privacy, including "privacy of ... [the] home" (Article 59), and the "fundamental duty of the police ... to maintain safety and domestic order" (Article 40/A (2)) – held, in a judgment of 27 May 2008, that the right to peaceful assembly, recognised in Article 62 (1) of the then Constitution, "clearly [did] not includ[e] the committing of crimes, the violation of rights or armed rallies". The Constitutional Court held that, although the right of assembly "should not be restricted on the grounds that some people might abuse it", the Freedom of Assembly Act and the Police Act (the relevant provisions of which are still in force) "offer an adequate framework for acting against illegal assemblies that violate or directly endanger the rights of others", so that any non-peaceful assemblies "are to be disbanded"; the police *must disband an assembly* if (in so far as relevant to the instant case) the exercise of the right of assembly constitutes a criminal offence or a call to commit such an offence and/or if it violates the rights and freedoms of others, or if the participants in the assembly appear to be armed or in possession of weapons, and are *empowered to apply coercive measures* against those who resist measures applied by them; if a crowd displays illegal conduct, the police may use tools designed to disperse it. According to the Constitutional Court, these statutory provisos did not restrict the freedom of assembly; they were held to be in compliance with the Constitution as in force at the time when that judgment was adopted.

It is not possible to discern, either in the Hungarian Fundamental Law, or in the statutory legislation, or in the Constitutional Court's case-law formulated under the new Fundamental Law, anything allowing for a non-benevolent (and speculative) inference that the Constitutional Court, when interpreting the privacy- and safety-related provisions of the new

Fundamental Law in a relevant case, would not maintain and, if need be, reaffirm the doctrinal principles in question, which were formulated on the basis of the previous Constitution.

III

9. The constitutional and statutory provisions and jurisprudential (doctrinal) principles cited in paragraphs 6-8 above speak for themselves. Most of them are reproduced in the judgment in some detail or even in full. But two important caveats must be borne in mind.

10. Firstly, the material cited in the "Relevant domestic law and practice" section and referred to in the subsequent paragraphs of the judgment *does not include everything that should have been cited and referred to*. This pertains, first of all, to Article 24 (2) d) of the Fundamental Law, which is referred to in sections 26 and 27 of the Constitutional Court Act (both cited in full in the "Relevant domestic law and practice" section). It is not possible to meaningfully ascertain the content of these two articles without examining, let alone citing, that Article of the Fundamental Law. Moreover, Article 24 (3) b) of the Fundamental Law is also not cited, although it is inextricably related to Article 24 (2) d) in the sense that it directly and explicitly addresses the consequences of the exercise, by the Constitutional Court, of its powers set forth in Article 24 (2) d).

11. Secondly, some of the provisions cited in the "Relevant domestic law and practice" section play no role in the subsequent reasoning on which the conclusion as to the "exhaustion" of domestic remedies is based (as well as the finding of a violation of Article 8, but this is not the essence of my disagreement with the majority); they are not considered or even referred to, or the reference is only formal and therefore superficial (such as, for example, the reference, in paragraph 49 of the judgment, to section 55 of the Constitutional Court Act; see paragraph 12 below). This brings to mind the guidance by Konstantin Stanislavsky: "If you have a rifle hanging on the wall in the first act, it should fire in the last act." In this judgment, the citations of national law do not "fire". The citing is *selective*. As a result, it *misrepresents* the national law.

12. Thus, it is not surprising that, having cited some of the relevant domestic legal provisions but not others which – as will be shown – are no less important, the majority come to conclude (in paragraph 49):

> "The Court notes that under sections 27 and 55 of the Constitutional Court Act, the absence of a constitutional right renders a complaint inadmissible for examination on the merits. The Government have failed to prove that there is a constitutional right or a domestic judicial practice allowing an individual to seek, with any prospect of success, the intervention of the police for the protection of private life (see, *mutatis mutandis*, *Apostol v. Georgia*, no. 40765/02, § 39, ECHR 2006-XIV). It follows that the application cannot be dismissed for failure to exhaust domestic remedies."

13. As a matter of principle, I am not able to agree with *any* superficial, blinkered, arbitrary or far-fetched reading of domestic law. In the present case, there should have been a different reading of the domestic law, even one *diametrically opposed* to the above conclusion. The majority would surely have reached the opposite interpretation had they endeavoured to read and consider *not only* sections 27 and 55 of the Constitutional Court Act (by the way, the provisions of section 55 are only indirectly relevant to the issue under examination), but *also other parts of national law* (doctrinal, statutory and, above all, constitutional) pertaining to the powers of the Constitutional Court to review the conformity with the Fundamental Law of judicial decisions and to annul them. Later in this opinion, I will deal with some of these "other parts" at some length.

14. But before coming to the analysis of procedural (in the broad sense of the word) aspects of the protection of the constitutional right to privacy (and the related right to personal safety) by means of a constitutional complaint, as guaranteed by Hungarian law, I have to express my astonishment that the judgment refers to the "absence of a constitutional right".

It is a mystery what the majority mean by this mechanical and therefore uncritical import from *Apostol v. Georgia* (referred to in paragraph 12 above; I shall compare that case and the instant one in paragraphs 31-35 below). "Absence" of *what* right? Could it be the right to privacy? But the right to privacy is explicitly enshrined in the Constitution (as is the related right to personal safety). It must be defended, by all available means, against any "immediate and clear threat of violence", *inter alia* through the dispersal by the police of hate- and violence-inciting demonstrations and (depending on the gravity of the offences) through the initiation of criminal proceedings against the perpetrators. There are no grounds for believing that these doctrinal tenets do not stand any longer, notwithstanding the fact that the Constitution has been changed. That the right to privacy is explicitly and unequivocally enshrined in Hungarian domestic law (above all, constitutional law) has been mentioned in the "Relevant domestic law and practice" section and explicitly confirmed in paragraph 48 of the judgment by the majority themselves.

Or maybe the majority mean, by the alleged "absence of a constitutional right", not the substantive right to privacy but the procedural right of a person to initiate Constitutional Court proceedings by lodging a constitutional complaint? But no. That this right cannot be the right to lodge a constitutional complaint against a court decision which is contrary to the Fundamental Law or even "without a judicial decision" (*inter alia*, if "there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy") is clear from the domestic law referred to in the judgment, albeit in a non-exhaustive manner, by the majority themselves, namely from section 27 of

the Constitutional Court Act, the relevant provisions of which *are* cited in the "Relevant domestic law and practice" section. But it is even more clear from Article 24 of the Fundamental Law, the relevant provisions of which *are not* cited in the judgment.

What, then, is meant by the alleged "absence of a constitutional right"? Nothing. I regret to have to say this, but it is an incantation, no more than a set of words with no content corresponding to any *legal reality*.

15. The inside-out misreading of the domestic law has become possible in the present case thanks to three resourceful but misleading manoeuvres involving references, or the suppression thereof, to Hungarian law, but also to the Court's case-law. The first manoeuvre lies in the suppression or distortion, in the judgment, of some of the relevant provisions (constitutional and statutory) of domestic law directly pertaining to the powers of the Constitutional Court. The second trick involves not paying heed to the most relevant doctrinal statements by the Supreme Court and the Constitutional Court even while citing them. The third lies in the fact that the majority's conclusion, cited in paragraph 12 above, that "the application cannot be dismissed for failure to exhaust domestic remedies" is based on, *inter alia*, reference to case-law of the Court which is not relevant to the case under examination. All these manoeuvres in combination reveal that the approach underpinning that conclusion and the dismissal of the Government's objection as to the exhaustion of domestic remedies is tainted by prejudice towards (not only?) the Hungarian Constitutional Court as a judicial institution presumably having not enough power to defend human rights effectively at national level.

I shall deal with this hat-trick of manoeuvres consecutively.

IV

16. The *only* constitutional provision cited in the judgment is that of Article VI, which enshrines the right to privacy. Other relevant provisions of the Hungarian Fundamental Law are not mentioned. There is a "proxy" reference to one of them in paragraph 33, where section 27 of the Constitutional Court Act is cited. It refers to Article 24 (2) d) of the Fundamental Law, but (as already briefly mentioned in paragraphs 7 and 10 above) this provision is omitted and is not reproduced anywhere in the judgment, *as if it did not exist at all*. This is a really *fatal* omission. No less ruinous is the omission of Article 24 (3) b) of the Fundamental Law, which also directly refers to Article 24 (2) d) and is inextricably related to the latter.

17. The provisions of Article 24 of the Fundamental Law should have been given the attention which they deserve. This is what this Article provides (in so far as relevant to this case):

"(1) The Constitutional Court shall be the principal organ for the protection of the Fundamental Law.

(2) The Constitutional Court

...

c) shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any legal regulation applied in a particular case;

d) shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any judicial decision;

...

f) shall examine any legal regulation for conflict with any international treaties;

...

(3) The Constitutional Court

...

b) shall, within its powers set out in Paragraph (2) d), annul any judicial decision which conflicts with the Fundamental Law;

...

(4) The Constitutional Court may review and/or annul any provision not requested to be reviewed of a legal regulation only if there is a close substantive connection between that provision and the provision requested to be reviewed of the legal regulation.

..."

18. To have any authority, a judgment of this Court must pay due heed to *all relevant* domestic constitutional and statutory provisions, as well as the doctrinal principles formulated in the case-law of the highest national courts of the State in question. Inattention to some of the provisions concerned, especially when coupled with the emphasis placed on others, may bring about a tremendous distortion of the whole national legal framework and result in the adoption of a judgment that is *not based on law*.

This is what, most regrettably, has happened in this case. The clauses of Article 24 of the Fundamental Law should under no circumstances have been undeservedly left aside, *as if they did not matter at all*. Had they been given due regard and interpreted (as the age-old undisputed canons of legal interpretation require in a case like this) in their interrelationship and in relation to section 27 of the Constitutional Court Act (which was meant to serve their purposes, and not vice versa), but also in the context of Article VI of the Fundamental Law, the answer to the question whether the Constitutional Court could have examined a constitutional complaint by the applicants, had one been lodged, would have been *in the affirmative*. Of course it could. Could the Constitutional Court have annulled the *Kúria*'s judgment of 23 September 2015 (and/or, for that matter, that of 6 January 2016, which is hinted at once in paragraph 26 of the judgment and then not

referred to again)? Yes, it could. A constitutional complaint, as established in Hungarian law, should have been considered an effective remedy for the purposes of Article 35 § 1 in the circumstances of this case.

19. The Hungarian constitutional complaint model is not something which the Strasbourg Court has not already dealt with, either in the context of the old Constitution of Hungary (and the old Constitutional Court Act) or the new Fundamental Law (and the new Constitutional Court Act). True, this instrument is not universal. It may *not always* be an effective remedy for the purposes of Article 35 § 1. But "not always" is not the same as "not". A constitutional complaint, especially given Hungary's strong tradition of constitutional review, may be considered not to be an effective remedy in some circumstances, but *not in all*. This depends on the circumstances of the case under examination and on the type of constitutional complaint.

20. To wit, in the recent case against the same respondent State, *Karácsony and Others v. Hungary* ([GC], nos. 42461/13 and 44357/13, ECHR 2016; by the way, not even hinted at in the present judgment), the Grand Chamber accepted the applicants' submission that the new Constitutional Court Act had introduced *three types of constitutional complaint*: (i) the one under section 26(1); (ii) the one under section 27; and (iii) the one under section 26(2) (ibid., §§ 71 and 77). The Grand Chamber examined each of them from the standpoint of whether they met the requirements of Article 35 § 1 in the particular circumstances of that case. The procedures under sections 26(1) and 27 ("[t]he standard constitutional complaint [to be used] only ... when an unconstitutional provision was applied in court proceedings" and "a complaint against final court decisions", respectively) were held to be "not available to the applicants" *in that case* (ibid., § 77). As to the third type of constitutional complaint, namely the one under section 26(2), the Court held that *in that particular case*, it too could not be considered an effective domestic remedy for the purposes of Article 35 § 1, because it was an "exceptional type of complaint applicable solely in cases where the petitioner's rights have been violated through the application of an unconstitutional provision and in the absence of a judicial decision or a legal remedy to redress the alleged violation" (ibid.), and because "[i]n the event of a successful constitutional complaint lodged under section 26(2), the Constitutional Court will declare a given provision unconstitutional but has no power to invalidate the individual decision based on that unconstitutional provision" (ibid., § 79). *In the circumstances of that case*, the Court concluded that a constitutional complaint under section 26(2) of the Constitutional Court Act was not capable of redressing the alleged violation and thus not an effective remedy for the purposes of Article 35 § 1 (ibid., § 82). Still, the analysis undertaken in *Karácsony and Others*, which only deals in passing with constitutional complaints against court decisions, does not at all exclude the possibility

that such a complaint *may be* an effective domestic remedy *in other circumstances* and that applicants must avail themselves of this remedy before lodging an application with the Court.

The judgment in *Karácsony and Others* rejected the applicability of a constitutional complaint under sections 26(1) and 27 of the Constitutional Court Act, and held that a constitutional complaint under section 26(2) was not an effective remedy for the purposes of Article 35 § 1 for the applicants *in that case*. The instant case, however, differs in essence from *Karácsony and Others*. The violation alleged (and found) in that case resulted not from some Hungarian court's decision, to which Article 24 (2) d) of the Fundamental Law refers, but from decisions of the national parliament, which did not concern "legal regulation[s] applied in a particular case" within the meaning of that Article, but the application of sanctions against MPs. When, as in the present case, a constitutional complaint is *explicitly allowed* to be brought *against a court decision* and, moreover, when the Constitutional Court is explicitly *obliged to annul* that decision if it conflicts with the Fundamental Law (see paragraphs 22 and 23 below), in no way can this remedy be *a priori* considered not effective for the purposes of Article 35 § 1.

21. Cases are different – even cases against Hungary which involve, in one way or another, the issue of a constitutional complaint as an effective (or sometimes not) remedy for the purposes of Article 35 § 1. For instance (to limit ourselves to just a couple of examples from the recent case-law), in *Szabó and Vissy v. Hungary* (no. 37138/14, 12 January 2016), where the applicants complained under Article 8, the Court accepted that a constitutional complaint against a law which was allegedly in conflict with the Fundamental Law was an "effective remedy to [be] exhaust[ed] in the circumstances" (§ 40). In *Miracle Europe Kft v. Hungary* (no. 57774/13, 12 April 2016), where the applicant complained under Article 6 § 1, the Court accepted that "the applicant pursued a constitutional complaint which included ... a question of the constitutional right to a fair hearing" and that "this was an effective remedy in the circumstances" (§ 35). The list of such examples could be extended.

Let it be reiterated once again: whether a constitutional complaint can (or cannot) be considered an effective remedy in the Hungarian system depends on the circumstances of the particular case and on the type of constitutional complaint.

22. In *Karácsony and Others* (cited above) the Court went on to examine each of the three types of constitutional complaint (though two of them were dealt with only in passing because of their manifest inapplicability to the situation of the applicants in that case) from the standpoint of whether they met the standard of Article 35 § 1 in the circumstances of that case.

In the present judgment, however, the majority are satisfied with the "umbrella" assessment that "[t]he Government have failed to prove that there is a constitutional right or a domestic judicial practice allowing an individual to seek, with any prospect of success, the intervention of the police for the protection of private life" (see paragraph 49 of the judgment, cited in paragraph 12 above). In reaching that conclusion, the majority rely on sections 27 and 55 of the Constitutional Court Act (as mentioned in paragraph 13 above, the provisions of the latter section are only indirectly relevant to the issue under examination), but ingeniously remain silent about Article 24 (3) b) of the Fundamental Law, pursuant to which the Constitutional Court "shall, within its powers set out in Paragraph (2) d), annul any judicial decision which conflicts with the Fundamental Law". And the same "Paragraph (2) d)" (that is to say, Article 24 (2) d) of the Fundamental Law), which (as already mentioned more than once) is also not cited anywhere in the present judgment, is the one directly referred to in section 27 of the Constitutional Court Act, which, in the majority's opinion, might have been formally applicable in the applicants' case, but would have provided no "prospect of success" and, therefore, is not an effective remedy for the purposes of Article 35 § 1.

What is meant here by "prospect of success"? Could it be the possibility for the Constitutional Court to quash the *Kúria*'s judgment, had it been challenged by the applicants? Such a possibility exists according to domestic law, no matter what this Court says – or omits to say. Of course, there cannot be any "prospect of success", on the paper on which this judgment is written, if the most pertinent *constitutional* provision which explicitly provides for such quashing ("annul any judicial decision") is buried into oblivion.

23. The invocation of Article 24 (3) b) of the Fundamental Law makes the whole "logic" of the conclusion as to the "exhaustion" of domestic remedies, reached in paragraph 49 of the judgment (cited in paragraph 12 above), fall apart like a house of cards in a simple three-step exercise:

Step one. Section 27 of the Constitutional Court Act allows for the lodging ("may lodge") with the Constitutional Court of a constitutional complaint against a court decision which is contrary to the Fundamental Law within the meaning of Article 24 (2) d) thereof.

Step two. Article 24 (2) d) of the Fundamental Law not only allows but *obliges* ("shall") the Constitutional Court to review, on the basis of such a constitutional complaint, the conformity with the Fundamental Law of the judicial decision complained against.

Step three. Article 24 (3) c) of the Fundamental Law not only allows but *obliges* ("shall") the Constitutional Court, upon having examined that judicial decision within its powers as set out in Article 24 (2) d) of the Fundamental Law, to annul that decision if it is not in conformity with any of the provisions of the Fundamental Law, including Article VI, which

enshrines every person's right to privacy (and/or Article IV, which enshrines the right to personal safety).

Those who have eyes do see – or at least ought to see. It will probably remain a mystery to the readership why and how the majority have declared that a constitutional complaint under section 27 of the Constitutional Court Act has become an ineffective remedy in the applicants' case.

24. An international court such as the European Court of Human Rights should not engage in speculation as to what statutory provisions could have been or had to be challenged by the applicants in this case when lodging a constitutional complaint with the Constitutional Court. But the Court should also not reject – let alone following a simulacrum of consideration – the possibility that there could indeed have been such statutory provisions, as applied by the *Kúria* in the applicants' case, which could or even had to be challenged by means of a constitutional complaint, and that a finding that their interpretation and application were in conflict with the Fundamental Law would have led to the quashing ("annul[ment]") of the *Kúria*'s impugned judgment(s). Most likely, these provisions were not those set forth in the Freedom of Assembly Act or the Police Act, which have been referred to in paragraph 35 of the judgment (especially given that the relevant provisions of those Acts, which pertain to the disbanding of unlawful assemblies, had already been "held" by the Constitutional Court in 2008 "to be constitutional"; see paragraph 7 above). Nevertheless, the *Kúria*, when adopting its judgment of 23 September 2015 (and that of 6 January 2016), applied not only the provisions of these two Acts but also various other legislative provisions, including (because this complexity is inherent in any court procedure) those pertaining to its own competence, the judicial procedure to be followed in the particular case, the rules of interpretation of constitutional and statutory provisions, as well as various provisions pertaining (as in the applicants' case) to the powers of the police and administrative proceedings against the latter, and internal security, and the initiation and/or discontinuation of a criminal investigation into the offences of incitement to hatred against the members of an ethnic group and of violence against them. I imagine that this list may be not exhaustive. However, it is not my task (and I do not intend) to make any suggestions on this account. I am satisfied that Hungarian law, as it stood at the material time, guaranteed (and, in my opinion, guarantees today) that persons in the applicants' situation (and in situations of all other sorts) have an undisputed right to challenge the *Kúria*'s judgment in the Constitutional Court by means of a constitutional complaint – contrary to what the majority have held, in defiance of the domestic constitutional and statutory provisions.

V

25. The doctrinal principles from the case-law of the Supreme Court and the Constitutional Court are cited in the "Relevant domestic law and practice" section. This citation is purely *formal*, because the findings in question are then disregarded in the Court's reasoning. Had they been taken on board, the Court would have concluded that the Constitutional Court not only had the obligation to examine a duly completed constitutional complaint lodged by the applicants against the *Kúria*'s judgment of 23 September 2015 (and/or that of 6 January 2016), but that most likely it *would have found* that that judgment was in conflict with the Fundamental Law and would have quashed it, because (as asserted by the Government; see paragraph 2 above) the *Kúria* had either applied a law which was unconstitutional or had interpreted and/or applied a law in an unconstitutional manner (or, I would add, on both of these grounds). Thus, not only was a constitutional complaint, which the applicants could have lodged under the Hungarian constitutional and statutory law, not a futile tool in that, subject to being duly completed, it *had to be examined* by the Constitutional Court on the merits, it would also not have been a futile tool in that their right under Article 8 *could have been effectively defended*.

26. The doctrinal principles from the case-law of the Supreme Court and the Constitutional Court, cited in the "Relevant domestic law and practice" section, authoritatively suggest that the Constitutional Court could have looked at the matter differently from the *Kúria*. A prima facie inference can be made that the *Kúria* erred in its assessment of the applicants' situation. There clearly was a *contradictio in terminis*, if not something worse, in the *Kúria*'s reasoning that "despite certain violent actions, the demonstration had on the whole remained peaceful" (see paragraph 26 of the judgment). This contradiction is even more obvious in the light of quite unfavourable observations of international human rights monitoring bodies as regards the increase, in Hungary, of racism and intolerance towards the Roma people (see, for example, *Vona v. Hungary*, no. 35943/10, §§ 26-28, ECHR 2013; for the latest assessment see the Opinion of 19 September 2016 of the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities). Had the applicants lodged a constitutional complaint, the Constitutional Court could have looked into whether the *Kúria*'s interpretation of the powers of the police in dispersing the impugned hate- and violence-inciting demonstration was not too lenient in the sense that it may have been understood as *permitting* the police *to disperse* the demonstration (or not), whereas the law (if interpreted systemically, that is to say, statutory provisions being interpreted in the light of the case-law) *required* that the demonstration *be dispersed* (in other words, whether the police had performed their duty to disband a hate- and violence-inciting assembly, which the Constitutional Court had treated, in

its judgment of 27 May 2008, as the police's duty under the Constitution in force at that time and which, as many would suppose, should still be treated as the police's duty under the Fundamental Law currently in force). After all, such chants as "Roma, you will die", and "We will burn your house down and you will die inside", and "We will come back when the police are gone" are not just "certain violent actions" that nevertheless do not change the character of the demonstration so that it "on the whole remain[s] peaceful". Chants like these are no joke and call for the most resolute intervention by the police. They amount to incitement to hatred and violence. Period. Exactly the same applies to the fact that the demonstrators (no matter how many, because, as it appears, these were not limited to isolated instances) were equipped with sticks and whips and threw concrete and stones into the (presumably Roma population-owned) gardens (see paragraphs 11 and 12 of the judgment). The Constitutional Court could – and should – have looked into whether the discontinuation of the administrative proceedings against the police and of the criminal proceedings against the participants in the demonstration had been based on an erroneous – from the standpoint of the Fundamental Law – interpretation and application of statutory provisions. The Constitutional Court could have looked into whether the *Kúria*'s impugned judgment was not arbitrary, and so forth. There could have been many aspects for the Constitutional Court to look into (and again, it is not my task to suggest what they might have been), had the applicants lodged a constitutional complaint with it.

27. What is more, the case-law of the Constitutional Court, in my opinion, allows for a presumption that the Constitutional Court, had a complaint been lodged with it, would have found in favour of the applicants.

This presumption, however, is speculative, because the Constitutional Court *was not given a chance* to be involved and – to use the phrase most often employed in the Court's case-law (see, among many authorities, a recent one – *Avotiņš v. Latvia* [GC], no. 17502/07, § 118, ECHR 2016) – the "opportunity to put matters right through their own [i.e. the Hungarian] legal system" before the supervisory jurisdiction of this Court was invoked.

And now the Strasbourg Court sends a message that the Constitutional Court *ought not to be given such a chance*.

This is not what the principle of subsidiarity calls for.

28. Had the Constitutional Court not quashed the *Kúria*'s judgment after a duly completed constitutional complaint had been lodged with it by the applicants, I would have had no hesitation in joining the majority in finding a violation of Article 8.

VI

29. The conclusion that "the application cannot be dismissed for failure to exhaust domestic remedies" (see paragraph 49 of the judgment) refers to the judgment in *Apostol v. Georgia*, no. 40765/02, § 39, ECHR 2006-XIV). Interestingly enough, this conclusion, on the basis of which the Government's objection as to the exhaustion of domestic remedies has been dismissed, does not refer to any other case of the Court (the references, in paragraph 47, to *Akdivar and Others v. Turkey* (16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV) and *Maktouf and Damjanović v. Bosnia and Herzegovina* ([GC], nos. 2312/08 and 34179/08, § 58, ECHR 2013) and, in paragraph 48, to *S. and Marper v. the United Kingdom* ([GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008) and *Söderman v. Sweden* ([GC], no. 5786/08, § 78, ECHR 2013) pertain to other aspects of the admissibility of the application than the one relating to the constitutional complaint; by the way, the United Kingdom and Sweden, the respondent States in the last two cases, do not have a constitutional complaint system).

30. The paragraph from *Apostol* (cited above) referred to reads:

> "The Court notes that, pursuant to Article 89 § 1 (f) of the Constitution and section 19(1)(e) of the Constitutional Court Act, the absence of a constitutional right renders a complaint incompatible *ratione materiae* with the provisions of the Constitution and, in accordance with section 18(e) of the Constitutional Proceedings Act, inadmissible for examination on the merits. Consequently, in so far as it is not the Court's task to take the place of the Constitutional Court and interpret the Constitution, the Government's failure to discharge the burden of proof by referring to the national judicial practice revealing the existence of a constitutional right to have binding judgments enforced prevents the Court from concluding that the applicant was able to claim such a right successfully before the Constitutional Court."

31. The reference to *Apostol* (cited above) is accompanied by the "*mutatis mutandis*" caveat. However, this caveat should have been worded not as "*mutatis mutandis*" but as "*in toto mutandis*", or something like that, as the judgment (and the paragraph thereof) referred to can hardly be seen as relevant to the instant case. In my opinion, the *Apostol* judgment is irrelevant, or – at least – no longer relevant.

32. *Apostol* (cited above) (i) was a case with a completely different subject matter from that of the instant case: it dealt with the enforcement of a court judgment in a debt-related case and not with hate speech, incitement to violence, assemblies, privacy, safety and so on; (ii) it was examined under a different Article of the Convention (Article 6 § 1) from the instant case (Article 8); (iii) it was brought against another member State (Georgia), which, naturally, had a different legal framework from Hungary; and (iv) by now, it is ten years old.

33. The latter circumstance is of no little importance in this particular case. In fact, it is *very* important. Time matters. The judgment adopted in

Apostol (cited above) deals extensively with comparative law pertaining to constitutional complaints and contains, *inter alia*, a reference to the constitutional complaint model in the Hungarian legal system. It is asserted that such a complaint (which at the material time, in the opinion of the Court, resembled its Georgian counterpart) was not an effective remedy "for the purposes of Article 35", because the Constitutional Court of Hungary "was only entitled to review the constitutionality of laws in general terms and could not quash or modify specific measures taken against an individual by the State" (ibid., § 41). This assertion is based on the much earlier decision of the European Commission of Human Rights adopted back in 1993 in *Vén v. Hungary* (no. 21495/93, 30 June 1993, unreported). Such an assessment might well have been correct in 1993 or even in 2006, when, respectively, *Vén* and *Apostol* were decided. Today (that is to say, at the time of delivery of this judgment), however, is 2017. The Fundamental Law of Hungary, which replaced the former Constitution dealt with in *Vén* and *Apostol*, came into force on 1 January 2012. By any standard, it is a very new constitutional instrument. Of the same young age is the Constitutional Court Act, which is tailored to the new Fundamental Law and serves its purposes. Despite many controversies surrounding the drafting, adoption and content of the new Fundamental Law (including the narrowing, in certain areas not related to the case under examination, of the powers of the Constitutional Court), it contains provisions which do not lend themselves to such careless labelling as the assertion that they do not allow the Constitutional Court to do anything more than "only ... review the constitutionality of laws in general terms and ... not quash or modify specific measures taken against an individual by the State". This has been pointed out in paragraphs 17-23 above.

34. Whatever the state of Hungarian law in 2006, let alone in 1993, the uncritical reliance on how it was assessed by the Court at that time cannot have any bearing on how the *current* Hungarian law has to be assessed by this Court (or any other court) *today*.

35. And – what a reference! What an import!

The paragraph from *Apostol* (cited above), referred to in the conclusion reached in paragraph 49 of the present judgment, *does not* deal with a constitutional complaint in Hungary – it deals with a constitutional complaint in Georgia! And it speaks of the "absence of a constitutional right" in Georgia – not in Hungary! It refers to Article 89 § 1 (f) of the *Georgian* Constitution, section 19(1)(e) of the *Georgian* Constitutional Court Act, and section 18(e) of the Georgian Constitutional Proceedings Act. The present judgment has borrowed, from *Apostol*, the conclusion regarding the "absence of a constitutional right" in *Georgia*, but has – hocus-pocus! – "inferred" it from sections 27 and 55 of the *Hungarian* Constitutional Court Act, that is to say, placed the "ready-made" conclusion on the matrix of the provisions of Hungarian law. But in Hungary, as was

pointed out in paragraph 14 above, any talk of a mystical "absence of a constitutional right" makes no sense.

36. In order to rebut the explicit provision of Article 24 (3) b) of the Fundamental Law to the effect that the Constitutional Court "shall, within its powers set out in Paragraph (2) d), annul any judicial decision which conflicts with the Fundamental Law" and to interpret it *contra legem* (which, in my opinion, would be a totally ineffectual effort), very persuasive arguments would have to be put forward. Instead, one finds in the judgment only the abstract and dubious reference to *Apostol* (cited above), a ten-year-old case which might once have been relevant in a case against Hungary such as the instant one, but no longer is.

37. One might wonder why, in the present case, *Apostol* (cited above) has been "rediscovered", whereas the recent and much more relevant case of *Karácsony and Others* (cited above) has not even been hinted at anywhere in the judgment.

I have no answer.

VII

38. In their conclusion as to the "exhaustion" of domestic legal remedies, the majority assert that the Government have failed to prove that a constitutional complaint was (and is) an effective remedy of which the applicants had to avail themselves.

In the Court's practice, as a rule, where the respondent Government claim that the application has to be rejected for non-exhaustion of domestic remedies, it is for them to prove that such remedies were available and that they have not been exhausted. What proof should the Government have provided in this case? My answer would be: the national legislation (constitutional and statutory), the practice of the criminal courts (the Supreme Court and/or the *Kúria*) and, most importantly, the Constitutional Court's case-law – assuming that any examples of the latter two exist.

Let us see what of all this material the Court had at its disposal.

39. The majority reproach the Government for "hav[ing] failed to prove" that there is a "constitutional right ... to seek, with any prospect of success, the intervention of the police for the protection of private life".

As has been shown, such a right *is* there. The myth of the "absence of a constitutional right" in Hungary (again, *what* right?) comes from the inappropriate reference to *Apostol* (cited above). The relevant legislation is cited in the judgment, albeit with an essential omission. The Chamber has interpreted the domestic law in a manner contrary to what that law says. But this is not the Government's fault. Nevertheless, it may (also) become their problem (see paragraph 41 below).

40. The majority also reproach the Government for "hav[ing] failed to prove that that there is ... a domestic judicial practice allowing an individual to seek [such] intervention".

This is really capricious. Here, I have to repeat myself. The new Fundamental Law came into force on 1 January 2012. The new Constitutional Court Act also became effective on that day. The hate- and violence-inciting demonstration dealt with in the instant case took place on 25 July 2012. The impugned judgment was adopted by the *Kúria* on 23 September 2015 (and a further one on 6 January 2016). It would be a truism and a banality to say that hate- and violence-inciting demonstrations are not a frequent occurrence either in other member States or in Hungary, even bearing in mind the air of intolerance against the Roma population in that country, as referred to in paragraph 26 above. Even assuming that since 2012 there might have been other (not anti-Roma) hate- and violence-inciting demonstrations which had to be dispersed by the police under to the Hungarian law, it is not likely that since 1 January 2012 in Hungary, (i) there have been many (if any) instances when such demonstrations were *not dispersed* by the police; (ii) if they were not dispersed, those affected were *not able to find justice in the Hungarian courts* (other than the Constitutional Court) as regards their right to expect appropriate intervention by the police for the protection of, *inter alia*, their private life; (iii-a) in the event that the court proceedings initiated by them were to no avail, those persons were *not able to refer the matter, by means of a constitutional complaint, to the Constitutional Court*; or (iii-b) the Constitutional Court, having received their constitutional complaints, did *not examine* them; or (iii-c) the Constitutional Court, having examined such constitutional complaints submitted by the respective applicants, *did not decide in their favour*. The requirement for the Government to provide examples of *such* "domestic judicial practice", when there had been no *such* cases (or cases that were more or less "identical"), is whimsical. It does not observe the principle *lex non cogit ad impossibilia*. It also disregards the very clear common-sense statement by the Grand Chamber – which is also a truism, but this is not a reason to disregard it – that "there must come a day when a given legal norm is applied for the first time" (see *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 115, ECHR 2015).

That day – with regard to the powers of the police *vis-à-vis* hate- and violence-inciting demonstrations, as well as to the non-investigation of racially motivated crimes – could have come with the applicants' case, had the latter been referred to the Constitutional Court. This Court could have helped that day to come.

It missed the opportunity.

41. It is disappointing that the majority demand from the Hungarian Government something that most likely is not available. But it is even more disappointing that the majority, at the same time, undermine the availability of such a thing for the future, because of the broader implications which this judgment may entail. What this judgment does is *encourage other potential applicants not to apply to the Constitutional Court* in other hypothetical

similar and dissimilar cases, even if Hungarian law (and the Convention) requires this remedy to be used before an application is lodged with the Strasbourg Court. The message has been sent: *a constitutional complaint, as available in Hungary, is not an effective remedy* for the purposes of Article 35 § 1, because the Court is not persuaded that it is – notwithstanding what the Hungarian Fundamental Law explicitly says. And it says that (let it be reiterated once more) the Constitutional Court has an obligation to review, on the basis of a constitutional complaint lodged with it, the conformity with the Fundamental Law of any judicial decision and to annul the decision in question if it conflicts with the Fundamental Law.

To sum up, *this judgment abruptly rejects the recognition of one important part of the Hungarian constitutional order and thus attempts to effectively invalidate it*.

42. In *Apostol* (cited above, § 39), the Court pledged that "it is not [its] task to take the place of the Constitutional Court and interpret the Constitution". This principled stance has been taken by the Court in many cases. I want to hope that it will continue to be taken in future cases, too. It is the only stance which is compatible with the principle of subsidiarity and with respect for national constitutions.

In the instant case, however, the Court undertook the above-mentioned "task" and interpreted the Hungarian Constitution *contra legem* – against its spirit, but also against its letter, and without even referring to its most relevant provisions. This judgment demonstrates *distrust* of national constitutional instruments (and not only Hungarian ones), both those pertaining to constitutional complaints as a means of settling constitutional disputes, and also those pertaining to the canons of constitutional interpretation.