

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior review of the unconstitutionality of a statute, the Constitutional Court has – with dissenting opinions *by dr. András Bragyova, dr. András Holló, dr. László Kiss and dr. István Kukorelli*, Judges of the Constitutional Court – adopted the following

decision:

I

1. The Constitutional Court establishes that the Constitution regulates the right of the President of the Republic to confer titles, orders, awards and decorations and authorize the use thereof in Article 30/A para. (1) item *j*) of the Constitution. Within this framework and based on the effective regulations, the President of the Republic has actual discretionary powers in conferring orders, awards and decorations during the relevant procedure. However, the discretionary powers of the President have limits.

The phrase “specified by law” in Article 30/A para. (1) item *j*) of the Constitution refers to the fact that the legislator regulates in an Act the establishment, definition and conferring procedure of awards (titles, orders and decorations), and Article 30/A para. (1) item *j*) of the Constitution regulates the conferring of these awards by the President of the Republic. In light of the above, the Constitutional Court has taken the effective statutory regulations into consideration in its decision. Based on the regulatory background, the powers of the President of the Republic are limited in the decision-making process concerning awards since, on the one hand, the persons receiving the award are recommended by another person (the Prime Minister or a minister) and, on the other hand, a countersignature is required for exercising the President's powers to confer awards under Article 30/A para. (2) of the Constitution. Since based on the effective statutory regulations and the constitutional practice, the President of the Republic has no rights to recommend anyone for receiving an award, he/she has no power to confer awards to any person that is not specified in the recommendation. This may be prevented by the recommending person refusing to countersign the decision of the President of the Republic on conferring the award. From a procedural point of view, all these circumstances limit the powers of the President of the Republic to confer orders, awards and decorations.

2. The Acts on the conditions of conferring awards and other statutes establishing awards specify the values that are recognized by the legislator as grounds for granting awards. These values are integral parts of the constitutional values of the Republic of Hungary. Certain values that are recognized as grounds for granting awards are specified in the Constitution or may be deduced from constitutional values. When evaluating the worthiness of a person to receive an award, the main standard is the constitutional scale of values recognized in the Republic of Hungary. The constitutional values are those specified in the Constitution, as a legal norm, and also any further values that may be deduced from the Constitution. These values must be asserted unconditionally in the awards procedure.

Any recommendation for an award or the conferring of an award that violates the constitutional values of the Republic of Hungary or that reflects a different scale of values is unconstitutional as it contravenes constitutional values. It is the right and duty of both the recommending persons and the President of the Republic to respect the constitutional values of the Republic of Hungary and to ensure that these values are reflected in the awards procedure. These obligations and powers of the President of the Republic obviously include the case when in the awards procedure the President exercises his/her right granted under Article 30/A para. (1) item *j*) and confers titles, awards, orders and decorations specified by law and authorizes the use of foreign state awards.

3. The powers of the President of the Republic to confer awards as specified in the Constitution includes a substantial discretionary power which is expressed by asserting the constitutional values of the Republic of Hungary as well as by rejecting the recommendations that contravene the same scale of values. In case of a recommendation for an award that violates the constitutional values of the Republic of Hungary, it is the right of the President of the Republic not to sign the recommendation, refusing to confer the award (with the disclosure of his/her reasons). Therefore, the refusal to confer an award or the denial of granting the right to use an award protects in this case the constitutional values of the Republic of Hungary.

4. The Constitutional Court, acting *ex officio*, hereby establishes that the Parliament has failed to meet its legislative duty under Article 30/A para. (1) item *j*) to regulate the awards procedure in accordance with the requirements of legal certainty and the rule of law specified in Article 2 para. (1) of the Constitution. As a result, neither the deadline for sending the recommendation to the President of the Republic, nor the deadline for the President of the Republic to raise his/her concerns about the worthiness of the candidate based on the violation of constitutional values (including the reasons

thereof) has been specified. The Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 December 2007.

## II

The Constitutional Court establishes that the right of the President of the Republic to grant individual pardons is regulated by the Constitution in Article 30/A para. (1) item *k*) on the powers of the President of the Republic. Under this provision, the President of the Republic has actual discretionary powers to decide in the relevant procedure whether he/she wishes to grant pardon. The President of the Republic is not bound by the recommendations made in the preparatory procedure for granting or refusing to grant pardon. His/her discretionary powers are, however, not unlimited as a countersignature is required for the validity of the decision on granting pardon. The person authorized to countersign has actual discretionary powers by choosing to countersign or by refusing to countersign the decision.

The Constitutional Court publishes this Decision in the Official Gazette.

## Reasoning

### I

Under Section 1 item *g*) and Section 21 para. (6) item *b*) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), the President of the Republic has filed a petition seeking interpretation of the Constitution.

1. Having regard to his powers under Article 30/A para. (1) item *j*) of the Constitution, the President of the Republic has asked for the interpretation of the aspects he may take into consideration in evaluating the recommendations when exercising his rights to confer awards. In the petition, the President of the Republic has quoted former decisions passed by the Constitutional Court about the position of the President of the Republic, confirming the President's right of refusing to comply with appointment requests for substantial reasons when performing his/her task to protect the democratic operation of the State. The President is entitled to refuse such requests despite the fact that the President's power of appointment requires countersignature, in the absence of which the decision is invalid.

The power to confer awards (the interpretation of which has been requested by the President of the Republic) requires countersignature under Article 30/A para. (2) of the Constitution. As held by the President of the Republic, the fact that such decisions require countersignature does not mean that the President is obliged to automatically accept award recommendations. This, he believes, means that regarding such recommendations the President has the right to examine the recommendation substantially in addition to checking the legality of the recommendation from formal aspects — with the latter right being granted to the President of the Republic when exercising any of his powers.

The President of the Republic has also mentioned in the petition that the right to confer awards and the right to make appointments are of different natures although both require countersignature for validity. While the powers of appointment have an effect on the democratic functioning of the State, the right to confer awards has namely no such actual and direct influence. As opposed to the power of appointment, neither compliance with the recommendation, nor a refusal to accept it will lead to a grave disruption in the democratic functioning of the State.

In the President's opinion, it is doubtful whether the constitutionality criteria specified by the Constitutional Court regarding the denial of appointments under the power of the President specified in Article 30/A para. (1) item *i*) are also applicable in connection with the refusal to confer awards.

2. As explained by the President of the Republic in his petition, the conferring of an award by the President represents that the nation as a whole recognizes the honoured person for his/her career or achievements.

Consequently, the starting point for an interpretation of the power to confer awards may be the provision in Article 29 para. (1) of the Constitution establishing that “the President manifests the unity of the nation and safeguards the democratic functioning of the system of governance”. As held by the President of the Republic, when evaluating a constitutional power that is not closely related to the (democratic) functioning of the system of governance, the constitutional provision referred to above may be applied to judging the constitutionality of the decision.

When making a decision, the President of the Republic must examine whether a disruption (in a broad sense) may arise in the democratic functioning of the system of governance in case he/she accepts the recommendation for appointment, and also whether in such case the substantially democratic functioning of the system or the basic values of the Constitution are violated.

The President of the Republic is of the opinion that the moral integrity of the Head of State may be jeopardized if he is not given true discretionary powers in making a decision under his powers following, for instance, from Article 30/A para. (1) item *j*) of the Constitution.

The President of the Republic is convinced that examining the statutory conditions for conferring awards is inseparable from value judgment; his decision on recommendation for an award is a purely moral issue and represents a value judgment based on a specific scale of values.

Bearing in mind the moral nature of the decision, it must be also guaranteed in the opinion of the President of the Republic that when making his decision, the President may assert the constitutional values in accordance with his own moral values (integrity).

Based on the above, the President of the Republic has requested the Constitutional Court to establish the criteria (standards) that would enable him to make award recommendations subject to substantial examination, furthermore, to define the conditions under which he may refuse to confer an award.

Having regard to the decision to be passed by the Head of State on conferring an award, the President of the Republic has posed the question whether he may consider an aspect of refusal other than a grave disruption in the democratic functioning of the governance system. The President of the Republic has also asked the Constitutional Court to establish a deadline for exercising his powers to accept or refuse the recommendation for an award.

3. In his petition, the President of the Republic has argued that the President's right to grant individual pardons under Article 30/A para. (1) item *k*) of the Constitution is, in fact, "by nature similar to" the power of conferring awards under Article 30/A para. (1) item *j*) of the Constitution. Having regard to this circumstance, the President has asked the Constitutional Court to interpret Article 30/A para. (1) item *k*) of the Constitution for the same reasons as specified regarding the interpretation of conferring awards.

## II

The provisions of the Constitution relevant to the petition and hereby examined are as follows:

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

Article 29 para. (1) Hungary's Head of State is the President of the Republic, who represents the unity of the nation and monitors the democratic operation of the State.

"Article 30/A para. (1) The President of the Republic shall -

(...)

- j)* confer titles, orders, awards and decorations specified by law and authorize the use thereof;
- k)* exercise the right to grant individual pardons; (...)

(2) The countersignature of the Prime Minister or responsible Minister is required for all of the measures and actions of the President of the Republic listed in Paragraph (1), with the exception of the items specified in Points *a), d), e), f)* and *g)*.

“Article 77 para. (1) The Constitution is the supreme law of the Republic of Hungary.

(2) This Constitution and laws and statutes established in accordance with this Constitution are equally binding for everybody of the country.”

### III

1. Prior to evaluating the contents of the petition, the Constitutional Court examined whether the petition met the requirements for a procedure aimed at interpreting the Constitution in its scope of competence as specified in Section 1 item *g)*, and Section 51 paras (1) and (2) of the ACC.

In Decision 31/1990 (XII. 18.) AB (ABH 1990, 136), as one of its first decisions, the Constitutional Court has already summarized the requirements a petition for interpreting the Constitution must meet.

As established in the reasoning of that decision, constitutional interpretation may only be provided if the petition

- originates from one of the persons and entities specified in Section 21 para. (6) of the ACC;
- initiates an interpretation of a specific provision of the Constitution not in a general way but from the aspect of some concrete problem of constitutional law (under this power of the Court, there is no possibility to interpret some constitutional provision in an abstract way unrelated to any concrete problem, and there is no possibility for unbound interpretation),
- the given problem in constitutional law may be directly derived (without interposition of another legal rule) from the Constitution.

The Constitutional Court has established that the petition is in line with the requirements under Section 21 para. (6) item *b)* of the ACC concerning petitions for the interpretation of the Constitution forwarded by a person entitled to do so, and it also meets the criteria detailed above, and therefore the Constitutional Court has examined the petition in its merits.

2. The President of the Republic has requested an interpretation of Article 30/A para. (1) item *j*) of the Constitution also with regard to the duties of the President specified in Article 29 para. (1) of the Constitution.

First, the Constitutional Court has examined whether the constitutional law issue specified in the President's petition (the "scope" of the President's decision and the constitutional conditions/criteria of rejecting a proposal for conferring an award) may be connected with the decisions of the Constitutional Court passed earlier examining those of the President's powers that require countersignature. The Court has reviewed whether the holdings in the abovementioned decisions regarding the exercise of the powers examined and the constitutional criteria established therein may be applied when interpreting the President's power related to the conferring of awards.

The President of the Republic is of the opinion that "safeguarding" the democratic functioning of the governance system and representing the unity of the nation serve as the constitutional basis (standard) for the key role the President plays in the awards procedure as well as for his actual discretionary powers to decide whether the proposal meets the formal (legal) and the substantial (worthiness) criteria.

The Constitutional Court has been required to examine based on the petition whether the function of "safeguarding" and that of "representing the unity of the nation" may be applied as constitutionality criteria for the President's decision in conferring the award (signing or rejecting the proposal) based on the findings of earlier decisions passed by the Constitutional Court on the President's powers requiring countersignature which are listed in Article 30/A para. (1) of the Constitution.

The Constitutional Court has already addressed and interpreted in earlier decisions some of the President's powers specified in Article 30/A para. (1) of the Constitution with regard to the political responsibility, the power of decision-making and the discretionary power of the President concerning the proposals for appointment and dismissal. [Decision 48/1991 (IX. 26.) AB, ABH 1991, 217 (hereinafter: CCDec1), Decision 8/1992 (I. 30.) AB, ABH 1992, 51; Decision 36/1992 (VI. 10.) AB, ABH 1992, 207 (hereinafter: CCDec2)].

As explained by the Constitutional Court in CCDec1, the President of the Republic has no political responsibility regarding appointments [Article 30/A para. (1) item *i*) of the Constitution]; "the political responsibility is assumed by the Government before the Parliament through countersignature by the Prime Minister or the competent minister". (ABH 1991, 233)

As further explained by the Constitutional Court in CCDec1, under the Constitution, the Head of State may be granted by the Constitution rights in exceptional cases to make such decisions that are final and may not be overruled and for which neither the President of the Republic, nor any other entity (person) takes political liability before the Parliament (independent political decision).

The President may only make an independent political decision (based on a constitutional authorization) when such grave disruptions arise in the democratic functioning of the governance system that may require an intervention by the Head of State to eliminate them.

In such cases, by an exceptional measure, the President may move the system of governance out of the deadlock and thus he/she may enable it to restart normal functioning.

With such intervention, the President fulfils the duties laid down in Article 29 para. (1), namely, he/she “safeguards the democratic functioning of the governance system.” In the Court's interpretation, there are similar independent political decisions when the President exercises his powers of appointment or confirmation by rejecting it on the grounds of merit.

Such a decision is decisive, final and non-revisable. No one bears political responsibility for it; and therefore it meets the criteria set out for independent political decisions. (CCDec1, ABH 1991, 233)

The President may only reject the appointment on the grounds of merit if he/she has appropriate reasons to conclude that the appointment might seriously endanger the democratic functioning of the State. (CCDec1, ABH 1991, 235)

When interpreting in CCDec2 the President's power to make independent political decisions on appointments under Article 30/A para. (1) of the Constitution, the Constitutional Court established strict substantial criteria (“safeguards the democratic functioning of the governance system”) of constitutionality:

“In this Decision, in light of the differences between the power to appoint and the enumerated power of independent political decision-making, and especially due to the nature of the balancing role, the Constitutional Court specifies the criterion of a grave disruption to the democratic functioning of the governance system as a situation in which compliance with the recommendation of a person gives rise to a grave incapacitation of the basic functions of an implicated organ of such a nature with respect to which the Constitution confers on the President of the Republic the power to make a political decision independent of the Parliament. Thus, what is at issue is not that the functioning of an organ (or its results) would fail to satisfy a certain political requirement but that the organ cannot fulfil its basic functions.

The democratic functioning of the system of governance embodies that the State, through the activities of its organs, fulfils its constitutional duty of honouring and protecting fundamental rights (Article 8 para. (1) of the Constitution). (...) Thus, the violation of a fundamental right cannot be separated from the functioning of the organ. (...) (...) It must be taken into consideration that the Constitution confers on the President the power of safeguarding the democratic functioning of the system of governance. The further an organ implicated by an appointment is located from those organs



of constitutional importance, or even from mere administrative agencies, and the less instrumental the position subject to the appointment is for the basic functions of the organ, the less likely it is that a grave disruption to the democratic operation of the system of governance may reasonably be inferred. Those positions that are appointed by the Head of State to make the appointment more respectable must be treated separately.

From the perspective of the President's legal status and the typical rights and privileges at his/her disposal for the President's supervisory function over the democratic functioning of the system of governance, the independent political decision is an irregular and exceptional instrument of final resort. (...) The President may exercise the power to refuse an appointment if the danger posed by the appointment is grave and imminent and if it may not be averted by the exercise of other powers. It is especially significant that the danger must originate from the person nominated for the appointment.” (CCDec2, ABH 1992, 207, 215, 216)

Based on the decisions of the Constitutional Court it is apparent that the President of the Republic may only make a decision that nobody is politically responsible for if without this decision, such a grave disruption arose that was impossible to be averted by the exercise of other powers.

The appointed persons operate a part of the governance system and they are decision-makers in that position. They manage certain organs and may dispose of government funds. The danger related to the person to be appointed is required to be so grave that it must threaten the performance of the basic functions by that particular organ.

The constitutionality criteria defined in the quoted decisions refer to the appointment and other recommendations regarding the functioning of the governance system. None of the earlier Constitutional Court decisions regarding the President's powers under Article 30/A para. (1) of the Constitution (and the interpretations in these decisions) have discussed the power of the President to confer awards under Article 30/A para. (1) item *j*).

Based on the findings above, the Constitutional Court is required to resolve the issue whether in case of awards a similar danger directly affecting the democratic functioning of the governance system may arise and whether the safeguarding of the democratic functioning in the system of governance specified in Article 29 para. (1) of the Constitution may be applied as a constitutional basis for the President's decision in the merits of the case.

The Constitutional Court is of the opinion that conferring the award (that is, signing the proposal by the Head of State) or rejecting the proposal does not have a direct effect on the democratic functioning of the governance system as the award — regardless of whether the person receiving it holds a public position — does not provide additional rights or operative powers to the person concerned.

The President's power to grant appointments and to confer awards are, therefore, so dissimilar based on the above that the Constitutional Court decisions regarding the power of appointment may not be applied as “analogous” decisions (that is, precedents) to the constitutional issue raised by the President of the Republic in his petition.

As there is no direct connection between the democratic operation of the governance system and the conferring of awards, it may not be derived from the constitutional provision in Article 29 para. (1) of the Constitution (the President “safeguards the democratic functioning of the system of governance”) that the President may make a decision on the conferring of awards the political responsibility for which is not taken by somebody else.

The Constitutional Court wishes to stress that the holding above does not affect the findings of the Constitutional Court in earlier decisions regarding the President's power of appointment granted by Article 30/A para. (1) item *i*) of the Constitution, including the interpretation of the constitutional provision in Article 29 para. (1) of the Constitution in connection with the President's power of appointment.

In accordance with the first phrase in Article 29 para (1) of the Constitution, the President manifests the unity of the nation. The Constitutional Court interprets this provision as a symbolic statement concerning the status of the Head of State under public law. According to the judgement of the Constitutional Court, conferring an award by the President does not mean that the award represents a positive and uniform value judgement of the entire nation, that is, of each and every citizen.

The conferring of state titles, orders, awards and decorations reflect the historical values and traditions of the particular country. The awards of the highest honour are traditionally conferred by the Head of State. The person presenting the award, the circumstances of presenting the award (the symbols and the customs) underline the exceptional nature of the event and increase the honour of the recognition.

Consequently, in the procedure of conferring awards, the constitutional (public law) status of the Head of State (the traditional power of the Head of State to confer awards) is evident, and the conferring of the award by the President symbolizes the recognition of the State (and the nation) and shows respect of the person receiving the award.

The participation of the President in the awards procedure and the customary order of the awards ceremony represents and symbolizes the recognition of the nation by way of the constitutional status of the President.

Based on these findings, the Constitutional Court has established that the constitutional provisions quoted above and analyzed in its earlier decisions (“safeguarding” and “manifesting the unity of the

nation”) in connection with the interpretation of Article 30/A para. (1) item *j*) are only indirectly related to the constitutionality issues (especially the President's power to confer awards) raised by the President in the petition under review.

3. Under Article 30/A para. (1) item *j*) of the Constitution, the interpretation of which has been requested by the President, the President of the Republic

- confers
- titles, orders, awards and decorations specified by law,
- and authorizes the use thereof.

The provision of the Constitution to be explained here offers no further guidance for interpreting the term “confer” or the phrase “specified by law”.

3.1. The phrase “specified by law” in the Constitution refers to the fact that the legislator regulates in an Act of Parliament the awards, titles, orders and decorations, whereas Article 30/A para. (1) item *j*) of the Constitution regulates the conferring of these awards by the President of the Republic. [The awards and commemorative medals founded by the President of the Republic and thus conferred by the President himself/herself are a different case.]

On the other hand, the abovementioned provision of the Constitution refers to the currently effective legal regulations on the conferring of awards and the regulations concerning the different phases of the awards procedure at different levels of legislation.

The conferring of state awards under Article 30/A para. (1) item *j*) of the Constitution (that is, the awards procedure) consists of several phases in accordance with the effective regulations:

- 1) call for proposals for persons worthy to receive an award,
- 2) professional decision on the persons to receive an award and forwarding the names to the person entitled to make a proposal,
- 3) decision on selecting those who are actually proposed for an award and forwarding of these names to the President,
- 4) signing the proposal and returning it to the person making the proposal,
- 5) countersignature of the decision made by the President
- 6) presentation of the award in accordance with the relevant customary rules.

3.2. In accordance with the holdings, the Constitutional Court interprets the term "confer" in Article 30/A para. (1) item *j*) of the Constitution by establishing that the signature by the President of the proposal for a state award is a validating instrument for conferring such an award.

By the Constitution, the Head of State has the general obligation to examine the legality of the award proposals he/she receives, and therefore he/she is entitled to examine the proposal from a formal (legality) aspect and notify the recommending person on any objections he/she may have.

According to the interpretation of the Constitutional Court, the President of the Republic is granted by the effective regulations actual discretionary powers during the awards procedure but these discretionary powers have certain limits.

One of the limits concerning the power of the President of the Republic during the awards procedure is the fact that the persons receiving the award are recommended by another person (the Prime Minister or a minister).

Another limit is set by the Constitution itself when making the power of the President of the Republic to confer awards subject to countersignature under Article 30/A para. (2) of the Constitution.

Based on the statutory regulations quoted in Article 30/A para. (1) item *j*) of the Constitution as well as on the established practice of the awards procedure, the President of the Republic has no right to recommend anyone for receiving an award and he/she has no power to confer awards to any person that is not specified in the recommendation.

The countersignature of the person authorized to countersign restricts in a procedural sense the right of the President to confer awards, and it is secured this way that by refusing the countersignature the President may not confer an award to a person that is not specified in the recommendation.

4. On the basis of the petition the Constitutional Court has been required to decide whether the President is entitled to examine the contents of the recommendation for an award in addition to examining whether the recommendation complies with formal regulations and, if the President is entitled to examine the contents, what constitutional criteria he must apply.

In this context, the Constitutional Court has established that the Acts of Parliament on the conditions of conferring awards and other statutes establishing awards specify the values that are recognized by the legislator as grounds for granting awards.

These values specified by the legislator in statutes are integral parts of the constitutional values of the Republic of Hungary specified in the Constitution and derived from the values enumerated in the Constitution. The worthiness of a person to receive an award is part of the substantial examination of the recommendation, and the main standard of appraisal is the constitutional scale of values recognized

in the Republic of Hungary. The values enumerated in the Constitution and reflected in the statutes establishing awards must be asserted unconditionally in the awards procedure.

The Constitutional Court is of the opinion that any recommendation for an award or the conferring of an award that violates the constitutional values of the Republic of Hungary or that reflects a different scale of values is unconstitutional (as it contravenes constitutional values). It is the constitutional right and duty of both the recommending persons and the President of the Republic to respect the constitutional values of the Republic of Hungary and to ensure that these values are reflected and asserted in the awards procedure.

In conclusion, the Constitutional Court has established that the power of the President of the Republic to confer awards as specified in the Constitution [Article 30/A para. (1) item *j*)] includes a substantial discretionary power which is expressed by asserting the constitutional scale of values recognized in the Republic of Hungary and preventing any recommendations that contravene these values.

In case of a recommendation for an award that violates the constitutional values of the Republic of Hungary, it is the right and also the obligation of the President of the Republic to refuse to sign the recommendation and to confer the award. Therefore, the refusal to confer an award or the denial of granting the right to use an award protects in this case the constitutional values of the Republic of Hungary.

5. The President of the Republic, based on his/her constitutional status, may only make an independent decision (that is, a decision for which the political responsibility is not assumed by the Prime Minister or a minister) in exceptional cases.

Based on the Constitution, the President of the Republic is entitled to make decisions independently if the functioning of the governance system is overbalanced and the President needs to play a balancing role (see, for example, the right to declare a state of war or a state of emergency if the Parliament is incapacitated, the dissolution of the Parliament etc).

In its resolutions concerning the appointment powers of the President, the Constitutional Court has interpreted the Constitution to find that in cases when a grave disruption is likely to arise in the democratic functioning of the governance system, the President may make independent decisions even when exercising his/her powers that would otherwise require countersignature.

This is because independent decisions include the President's decision when he/she refuses to sign a recommendation since it is the President's responsibility that the contents of the recommendation are not implemented as the person entitled to countersign the decision does not assume the relevant responsibility.

The Constitutional Court wishes to reiterate in the present Decision that the President's powers to make independent decisions are exceptional and limited (to protect the constitutional institution of the presidency) and these are set by the Constitution or may be derived from a constitutional obligation directly.

When the President exercises his/her powers to confer awards as specified in Article 30/A para. (1) item *j*) of the Constitution, his/her role to implement the constitutional values is a sufficient constitutional justification for authorizing the Head of State to make an independent decision in the merits of the case by refusing to sign the recommendation for an award.

By refusing to sign a recommendation for an award that violates the constitutional values, the Head of State makes a decision in the merits of the case and he/she takes (political) responsibility for the decision as there is no one to assume this responsibility by way of countersignature.

The constitutional basis of this individual responsibility in decision-making is the obligation of the President of the Republic in the process of conferring awards and in the substantial examination of the recommendations to ensure that the Acts of Parliament (and other statutes) related to the conferring of awards are complied with and the scale of values (derived by the legislator from the Constitution) laid down in these statutes are asserted, whereby the constitutional values themselves are also protected.

Therefore, in accordance with the interpretation of the Constitutional Court, under the effective regulations the President of the Republic exercising his/her powers to confer awards as specified in Article 30/A para. (1) item *j*) of the Constitution may only refuse to sign a recommendation for an award and thus make a decision he/she is politically responsible for if the recommendation violates the constitutional values of the Republic of Hungary.

In this case it is not the provisions of the Constitution under Article 29 para. (1) (including "safeguarding" and "manifesting the unity of the nation") that are the constitutional basis for the independent decision of the President of the Republic (which the President is responsible for) but it is the need for implementing and asserting the constitutional scale of values recognized in the Republic of Hungary.

When conducting substantial examination of the recommendation and examining the worthiness of the recommended person to receive an award, the only constitutional standard to be applied by the Head of State is the constitutional scale of values recognized in the Republic of Hungary.

6. Under Article 30 para. (1) item *j*) of the Constitution, not only does the President of the Republic confer titles, orders, awards and decorations specified by law but he/she also authorizes the use thereof.

Traditionally, it is also the right of the President to allow the use of foreign state awards, orders, titles and decorations and through this right the President may prevent the use of a foreign order, title, award or decoration that would violate the constitutional values.

Under Section 2 of Act XXXII of 1991 on the medals, orders and decorations of the Republic of Hungary (hereinafter: the AOMD) it is not required to request the President of the Republic to authorize the use of foreign awards granted by sports, scientific or art organizations (that are not state awards).

For example, if the scale of values in the State where the Head of State is requested to authorize such use were violated by the activities of the person that have resulted in conferring a foreign award, by refusing to grant authorization the Head of State expresses the priority of, and asserts the scale of values of his/her own country. (Under Section 2 of the AOMD, the minister responsible for foreign affairs will present to the President of the Republic recommendations for authorizing the use of foreign state awards).

The President's power to "authorize the use" of foreign state awards under Article 30 para. (1) item *j*) of the Constitution is an actual discretionary power, and the constitutional criteria of this decision are — similarly to state awards — the constitutional scale of values recognized in the Republic of Hungary.

Thus, in this case the President is not bound by the recommendation for authorizing the use of an award. However, the President's discretionary powers are limited by the countersignature specified in Article 30/A para. (2) of the Constitution.

7. When judging the petition in merits, the Constitutional Court has also examined the definition of awards and decorations given in different statutes at various levels of legislation as well as the procedure of conferring awards.

7.1. Neither the Constitution nor other statutes provide a generally applicable definition for the term awards and decorations.

Bearing in mind the significant aspects of the awards and decorations defined in different statutes with different contents, it can be established that awards and decorations are state recognitions based on a value judgement and worthiness criteria of values (performance) that change in every historical period; currently, their conferring is the result of a procedure involving several decision-makers.

The worthiness criteria are specified by various Acts of Parliament and other statutes governing the different types of awards, which are all based on a specific scale of values.

The AMOD defines the worthiness criteria and, as a result, the scale of values recognized by the legislator as follows:

“The Republic of Hungary truly appreciates exemplary and standout accomplishments for the benefit of the nation, in contribution to its development, in supporting the interests of the country and in the enrichment of the universal values of humanity. In order to recognize these accomplishments, the Parliament establishes the Order of Merit and the Cross of Merit for the Republic of Hungary.” (Section 1 of the AMOD)

“The Order of Merit and the Cross of Merit may be conferred to Hungarian and foreign citizens who promote the interests of the Republic of Hungary as an independent and democratic nation or who deserve credit for supporting Hungary. They both have military and civil versions.” [Appendix 1 of the AMOD, Part 1 Section 1 para. (1)]

“In case of a Hungarian citizen, the Prime Minister makes the recommendation for the rank of the award based on the merits of the person and by taking into consideration the person's activities in public life and possible awards conferred earlier.” [Section 7 para. (1) of the AMOD]

It is apparent based on the provisions of the Constitution that it is not only the President who can confer awards, and also awards may be established by statutes other than Acts of Parliament.

Section 7 para. (1) of the AMOD enumerates what (professional, or in case of local governments, local) titles, awards, certificates of merit and plaquettes can be conferred by what persons and entities.

As provided for in the AMOD, the Order of Merit of the Republic of Hungary, the Cross of Merit of the Republic of Hungary and the Imre Nagy Order of Merit are conferred by the President of the Republic on recommendation by the Prime Minister or a minister.

Also, Act XII of 1990 on the Kossuth Award and the Széchenyi Award (hereinafter: the AKSzA) provides that these awards are conferred and presented by the President of the Republic. The Government is entitled to make recommendations for these awards to the Head of State based on a decision made by a committee established for this purpose.

The President of the Republic therefore

confers the five awards specified in Acts of Parliament on the one hand,

and may establish an award on the other hand.

The Constitution includes two provisions related to the conferring of awards. Under Article 30/A para. (1) item *j*) of the Constitution (the interpretation of which has been requested by the President), awards

– are established by the Parliament by Acts of Parliament in which the Parliament specifies the names of, and the criteria for conferring these awards,



- the ministers and the Prime Minister may make recommendations on who should receive awards (however, this provision is laid down in the AMOD rather than in the Constitution),
- awards are conferred by the President of the Republic.

In accordance with Article 44/A para. (1) item *f*) of the Constitution, the “local representative body may develop symbols and emblems of government, and establish local honours and titles”. It is apparent based on the latter provision that there are various awards of different levels, and also awards may be established by statutes other than Acts of Parliament.

Section 7 para. (1) of the AMOD provides that the President of the Republic may establish titles, awards etc. and confer these. However, the awards specified in the Constitution and in the AMOD are quite dissimilar.

It is a case different from the scope regulated in Article 30/A para. (1) item *j*) of the Constitution if the President of the Republic establishes and confers orders under the AMOD. In this case, his/her decision-making powers are not restricted as it is the President who decides on the establishment and the worthiness criteria of the award, the President collects the recommendations and selects who should receive the award, and finally it is the President who confers and presents it.

Thus, in this case the President’s power to confer awards is full (unrestricted), and the President’s power is not limited by either a recommendation or a countersignature.

Consequently, in case of an award established by the President, there is no doubt that it is the President who establishes the rules of conferring awards and the conditions thereof, and therefore the President is never forced to confer awards to a person he/she finds unworthy (a conflict of worthiness and values).

7.2. Based on the petition, the Constitutional Court has examined how the procedure of conferring and presenting awards by the President of the Republic is governed by Acts of Parliament.

The AMOD and the AKSzA very briefly describe who may receive awards and regulate the awards procedure very generally. Government resolutions include more specific regulations, but several procedural questions are unanswered by these as well.

The state awards conferred by the President of the Republic are the awards of the Republic of Hungary and they reflect the constitutional values of the ‘Hungarian State’ and also the value judgment and recognition of the ‘Hungarian State’. Even the Constitution itself specifies three persons or entities that participate in the awards procedure: the President of the Republic confers the awards specified by law (that is, Acts passed by the Parliament) and a countersignature is required for the decision of the President (therefore no person may receive an award without the approval of the Government).

8. The Constitutional Court has examined what the contents of the constitutional values recognized in the Republic of Hungary are as these values are the constitutional standards for the President of the Republic to exercise his/her rights of conferring awards under Article 31 para. (1) item *j*) of the Constitution.

The constitutional values recognized in the Republic of Hungary consist of the primary (fundamental) values specified as norms in the Constitution as well as of the constitutional principles and values (derivative values) that may be established by interpretation based on the norms of the Constitution. Also, the constitutional values include the additional values reflected in the codes of particular fields of law (Acts of Parliament and other statutes) that reflect the primary and derivative values of the Constitution (these include the values reflected in the Acts and other statutes governing the conferring of state awards). These values are reflected in the interpretations (decisions) of the Constitutional Court and eventually in the constitutional culture as a whole.

The primary and derivative values under the Constitution are hierarchical, and according to the relevant practice of the Constitutional Court, several different derivative constitutional values may be deduced from the normative primary values.

The top of the hierarchy in the constitutional value system is the fundamental right to human life and dignity as specified in Article 54 para. (1) of the Constitution. This is the source of several other fundamental and constitutional rights, and it is one of the “mother rights” of fundamental constitutional rights. The right to life is absolute (unrestrictable), and this nature of the right is the basis of the constitutional prohibition for capital punishment. [Decision 23/1990 (X. 31.) AB, ABH 1990, 88]

The right to self-determination that is derived from the right to human life and dignity in Article 54 para. (1) of the Constitution may be connected to several additional fundamental constitutional rights (values) defined in Chapter XII of the Constitution. These include (but are not limited to) the freedom of expression [Article 61 para. (1) of the Constitution], the freedoms of thought, conscience and religion [Article 60 para. (1) of the Constitution] and the rights to the good standing of reputation, the privacy of the home and the protection of secrecy in private affairs and personal data [Article 59 para. (1) of the Constitution].

In case of the abovementioned fundamental rights (values), the Constitution itself defines the “end values”, and usually Acts of Parliament adopted by a qualified majority include the “means values” related to the end values defined by the Constitution (the means values realize and provide contents to the end values).

The means values associated with the end values (the freedom of association and assembly) reflected in the right of assembly and association in Article 63 para. (1) and Article 62 para. (1) of the Constitution are determined by the Acts of Parliament realizing the contents of the end values.

Act II of 1989 on the Freedom of Association defines statutory regulations on the establishment and the operation of association, providing this way concrete content to the end value included in the Constitution.

The Constitution defines the right to social security (Article 70/E para. (1) of the Constitution) as an end value which provides through the objective obligation of the State to maintain institutions (social insurance and social institutions) benefits to the citizens necessary to sustain themselves when they are old, sick, have a disability, in case of widowhood, orphanage or if they become unemployed as a result of causes beyond their control.

The means values allocated to end values (that is, the conditions for establishing and operating institutions as well as the conditions of applying for certain benefits) are regulated by the provisions of the Acts of Parliament and other statutes governing the institutions.

The normative provisions of the Constitution include several fundamental constitutional values (end values) such as the form of government being a republic (Article 1 of the Constitution) or the independence and the democratic State under the rule of law [Article 2 para. (1) of the Constitution].

Under Article 77 para. (1) of the Constitution, the Constitution is the supreme law in the Republic of Hungary.

The Constitution is one of the most complex Acts of Parliament content-wise.

In addition to regulating the social order, the Constitution includes organizational and competence regulations for the individual constitutional entities and the Constitution also regulates the procedural norms governing the relationship between the constitution entities.

The Constitution has a separate chapter for the norms that define the fundamental rights and obligations of the citizens (Chapter XII of the Constitution).

Another type of norms included in the Constitution is the group of norms that regulate constitutional objectives and principles.

Under Article 77 para. (2) of the Constitution, the Constitution and the constitutional statutes are equally binding for everybody.

As a result, the normative provisions of the Constitution and the constitutional values reflected in such provisions and as a result the constitutional scale of values apply to all (including the President of the Republic).

Due to his/her constitutional status [with regard to the general obligation under Article 77 para. (2) of the Constitution], the President is obliged to provide for the implementation of the constitutional values, and, naturally, this obligation equally applies to examining the contents of award proposals.

Article 30 para. (1) item *j*) of the Constitution reflects the discretionary powers of the President of the Republic by declaring that the President confers titles, orders, awards and decorations that are specified by law.

The conferring of awards specified by law is a power of the President granted by the Constitution, and in this respect the President has actual discretionary powers.

The President is required to decide whether to sign or refuse to sign award proposals based on the constitutional standard of constitutional values.

This power of the President granted by the Constitution means that the President has actual powers of discretion despite the fact that his/her decision requires a proposal and a countersignature.

The Constitutional Court wishes to point out that the constitutional scale of values is determined by geography and age and they are always defined by the current social, economic and political system (establishment). The fundamental values of these systems are incorporated in the Constitution by the Parliament-

Consequently, the constitutional scale of values is different in each historical period. The constitutional scale of values in different historical periods and social systems (for example, the values prior to the transformation of the regime under dictatorship and the constitutional values after the transformation of the regime under the rule of law) are incompatible.

For instance, before the amendment of the Constitution in 1989, personal property was limited and the personal ownership of assets for production was prohibited. Also, several freedoms (especially the freedom of speech and expression) were restricted because of the political system. It was a one-party system, with the power of this party being absolute etc. All these are fundamentally in conflict with the constitutional values of the period after 1989 (see, for example, the regulations in the Constitution protecting private property, securing and protecting freedoms, the constitutional guarantees of a multi-party system etc). Although numerically it is the same statute, the amendment of the Constitution dated 23 October 1989 represents an absolute denial by the Republic of Hungary of the scale of values recognized in the People's Republic of Hungary. In the process of conferring awards, all participants are obliged to provide that the constitutional values recognized in the Republic of Hungary (including the primary and the derivative secondary and any additional values deduced from the latter) are implemented and protected, and the scale of values of the Republic are respected when awards are conferred.

It is the duty of the President to assert the constitutional scale of values recognized in the Republic of Hungary, and the President is responsible for asserting these values.

When conferring awards, the concrete duty of the President is to make sure the award does not violate the constitutional scale of values recognized in the Republic of Hungary.

As a result, if the activity, conduct or performance the person making the proposal finds worthy to be recognized by an award actually violates the constitutional scale of values or if conferring the award contradicts these values, the President of the Republic is entitled and also obliged to refuse to sign the proposal.

9. The Constitutional Court, acting *ex officio*, has established in accordance with point I/4 of the holdings that the Parliament has failed to meet its legislative duty under Article 30/A para. (1) item *j*) of the Constitution to regulate the awards procedure in accordance with the requirements of legal certainty and the rule of law specified in Article 2 para. (1) of the Constitution.

With regard to this, the Constitutional Court wishes to emphasize the fact that the legislator has significant discretion in deciding on the regulations governing the awards procedure under Article 30/A para. (1) item *j*) of the Constitution, and within this framework, the legislator may decide to create regulations departing from the regulations of Acts of Parliament and other statutes currently in force.

However, the Constitutional Court wishes to stress that the regulations governing the awards procedure must meet the requirements of legal certainty under the rule of law specified in Article 2 para. (1) of the Constitution. The legal institution of conferring awards must meet the constitutional requirement for foreseeable, calculable and secure operation of legal institutions.

The deficiencies of the current regulations (including but not limited to the lack of formal provisions on making award proposals, the fact that the scope of powers of the recommending person as well as of the person conferring the award are unclear, the uncertain deadline for the recommending person to forward the recommendation to the President, and the uncertain deadline for the President to make a decision on conferring or refusing to confer the award) make the operation of the legal institution unreliable, and therefore render it impossible for the participants of the awards procedure (i.e. the recommending person and the President of the Republic) to exercise their rights.

In addition to the lack of procedural rules, the legislator has to review and secure the compatibility of the award regulations (Acts of Parliament and other statutes) with the Constitution and with each other, including that these issues are regulated at appropriate levels of legislation in line with Act XI of 1987 on Legislation.

The particular award regulations currently in force do not meet the requirements of the hierarchy of law, with several minor procedural rules being regulated at the level of resolutions, although they should have been governed by decrees.

Under Section 6/B item *b*) of the AMOD, the Prime Minister “regulates the general rules of initiating and conferring awards and decorations established by the Government or the Prime Minister in the form of a decree”. This issue is at present regulated by Government Resolution 1130/2002 (VII. 24.) Korm. on the Award Committee and the procedure of conferring state awards, but not in complete detail and not at a satisfactory level.

Under Section 8 para. (3) of the AKSzA, “the regulations governing the recommendations made for the award and on conferring or withdrawing the award not regulated by the present Act of Parliament shall be regulated by the recommendation of the Government and approved by the President of the Republic.” The regulations quoted in the Act of Parliament are currently included in Government Resolution 1101/1196 (X. 2.) Korm. on the conferring procedure of Kossuth and Széchenyi awards. As a result, the few existing rules are regulated at the level of government resolutions.

Based on the above, the Constitutional Court has decided as contained in the holdings of the Decision and it has set a deadline for the legislator to terminate the unconstitutional omission.

#### IV

The Constitutional Court has also examined the President's petition to interpret the right to grant pardons as specified by the Constitution and has established the following:

The Constitution authorizes the President of the Republic to grant individual pardons under Article 30/A para. (1) item *k*) of the Constitution, providing that the President “exercises the right to grant individual pardons”.

However, under Article 30/A para. (2) of the Constitution, these decisions are only valid if they are countersigned by the Prime Minister or the competent minister. The Constitution includes no other provisions regarding the right of the President to grant pardons.

The Constitutional Court has reviewed how the procedure for granting individual pardons by the President of the Republic is realized in practice based on the applicable statutes.

Section 598 para. (5) of Act XIX of 1998 on Criminal Procedure (hereinafter: the ACP) indirectly provides that the person countersigning the decision under Article 30/A para. (1) item *k*) as specified by Article 30/A para. (2) of the Constitution is the minister responsible for justice affairs, and this power is vested in the minister by Section 8 para. (5) of Government Decree 164/2006 (VII. 28.) Korm. on the

tasks and competences of the Minister for Justice and Law Enforcement. Under this provision, the decisions of the President regarding pardons are prepared and countersigned by the Minister for Justice and Law Enforcement (under his/her competence as a minister responsible for justice affairs).

Act IV of 1978 on the Criminal Code specifies pardons as a ground for terminating punishability [Section 32 item *c*], a ground for excluding the enforcement of a punishment [Section 66 item *c*] and a method of rehabilitation [Section 101 item *c*) and Section 106].

Sections 597 and 598 in Chapter XXX Title III of the ACP regulate the procedure for granting pardons, that is, the procedure regarding the President's right to grant pardons. Under this provision, the "proposals for granting pardons" are submitted *ex officio* or by request for the termination of the criminal procedure by the Prosecutor General until the indictment is filed, and after its filing, the minister responsible for justice affairs may submit proposals for the termination of the criminal procedure or for waiving or mitigating punishments that are not yet enforced and also for rehabilitation (for cancelling the negative consequences of a criminal record) to the President of the Republic.

A "request for granting pardon" (serving as the basis of the pardoning procedure initiated by request) may be submitted by the defendant, the defence counsel and a relative of the defendant. A request for granting pardon in an ongoing criminal procedure must be submitted before the proceeding prosecutor or court, while requests for waiving or mitigating punishments that are not yet enforced and also for rehabilitation must be submitted at the court of first instance. In the pardoning procedure, the prosecutor and the court will obtain and handle the personal data of the defendant necessary for the decision. [Section 597 paras (4) and (5) of the ACP]

Under Section 105 para. (2) of Minister of Justice Decree 9/2002 (IV. 9.) IM on the tasks of the courts and other entities in the enforcement of criminal decisions, the scope of the data necessary to be obtained by the court includes the environment study, the parole officer's opinion, the employer's opinion, the certificate of criminal record, the opinion of the corrections institution, the available health certificates and the copies of earlier sentences. The documents of the criminal procedure necessary for the decision on the pardon must also be attached to the request.

The documents and the proposal for pardoning are forwarded by the prosecutor's office or the court (that prepare the documents of the request for pardoning) to the Prosecutor General and the minister responsible for justice affairs, respectively. [Section 598 para. (1) of the ACP]

The Prosecutor General and the minister responsible for justice affairs are both obliged to submit the "request" to the President of the Republic even if they do not propose granting pardon. [Section 598 para. (3) of the ACP] In each case, the pardoning procedure is concluded by a decision on the

pardoning and it shall only be valid if the minister responsible for justice affairs countersigns it. [Section 598 paras (4) and (5) of the ACP]

Having studied the relevant provisions of the Constitution and the practice based on the effective regulations, the Constitutional Court has established that the President of the Republic has actual discretionary powers when the President exercises the right to grant individual pardons under Article 30/A para. (1) item *k*) of the Constitution because the President may decide to grant or refuse to grant pardon to the person specified in the request regardless of whether the pardoning procedure has been initiated *ex officio* or by request. The President may substantiate his/her decision by quoting equitable or humanitarian reasons or moral reasons based on his/her own scale of values.

The sole limitation of the President's discretion is the right of the minister responsible for justice affairs to countersign the decision, and therefore the validating instrument of the President's decision is a countersignature by the minister. Therefore, the President is not bound by whether the Prosecutor General or the minister responsible for justice affairs makes a recommendation for granting pardon. Even if they do not propose granting pardon, the President may grant individual pardon and even if they propose granting individual pardon, the President may refuse to grant it.

The minister (responsible for justice affairs) countersigning the decision has actual discretionary powers since he/she may decide if he/she wishes to countersign the decision of the President on granting the pardon.

The President of the Republic cannot be bound by the proposal for pardon (regardless of whether or not the person recommends granting the pardon). The President therefore has discretionary powers in granting or refusing to grant pardon and is not bound by the recommendation.

This unrestricted nature of the President's discretionary rights in granting individual pardons has already been established by the Constitutional Court in Decision 31/1997 (V. 6.) AB, where the Constitutional Court has established that in case an individual pardon is granted, the State waives its punishment rights. (ABH 1997, 154, 155, 157)

However, the minister responsible for justice affairs is not obliged to countersign the decision of the President automatically. The minister therefore may decide to countersign or refuse to countersign the decision made by the President.

The publication of this Decision in the Official Gazette (*Magyar Közlöny*) is based on Section 51 para. (2) of the ACC.



Budapest, 3 July 2007

*Dr. Mihály Bihari*

President of the Constitutional Court

Reporting Judge of the Constitutional Court

*Dr. Elemér Balogh*

Judge of the Constitutional Court

*Dr. András Bragyova*

Judge of the Constitutional Court

*Dr. András Holló*

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*Dr. László Kiss*

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*Dr. Péter Kovács*

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*Dr. Miklós Lévay*

Judge of the Constitutional Court

*Dr. Péter Paczolay*

Judge of the Constitutional Court

*Dr. László Trócsányi*

Judge of the Constitutional Court

Dissenting opinion by Dr. László Kiss, Judge of the Constitutional Court

1. I agree with the finding presented in part II of the holdings in the Decision regarding the right of the President of the Republic to grant individual pardons. Accordingly, I would like to stress that the President of the Republic has actual discretionary powers in the relevant pardoning procedure to decide whether he/she wishes to grant pardon in the particular case.

2. However, I do not agree with the findings in points 1, 2 and 3 of the Decision since I believe that the problem that has arisen may only be constitutionally solved under the Hungarian law by regulating the issue in an Act of Parliament. To put it more precisely, all attempts to accurately establish the grounds that can legally empower the President to reject a nomination for an award fall under legislation rather than under interpreting the Constitution and they are, therefore, outside of the Constitutional Court's competence.

The theoretical ground of my position is the same as the arguments dr. Géza Kilényi, dr. Péter Schmidt and dr. Imre Vörös expressed in their dissenting opinion to Decision 48/1991 (IX. 26.) AB. The opinion of the abovementioned judges of the Constitutional Court is also relevant to conferring awards by the President of the Republic:

“If the relevant regulations in different countries are compared, we may come to the conclusion that the constitutions of other nations also do not include provisions governing this issue. This is because in the countries specified above, the Prime Minister and the President usually share the same political platform and, as a result, the risk of a conflict related to granting awards is smaller. Also, the advanced political culture and the public law customs that have evolved in these countries over decades (or, in some cases, centuries) help overcome these differences of opinions.” (ABH 1991, 240)

Unfortunately, in the seventeen years since the transformation of the political system, the Government and the President of the Republic have not developed a practical method of cooperation under the principle of the rule of law in the field of conferring awards.

This State under the rule of law is based on the principle of the division of power. The division of power is only efficient if the parties to such division establish institutionalized cooperation regarding the different tasks and competencies that are divided.

“It may be derived from the principle of the State under the rule of law [Article 2 para. (1) of the Constitution] that the state organs regulated by the Constitution are obliged to exercise their constitutional mandate and discharge their duties in a mutually beneficial manner.” [Decision 8/1992 (I. 30.) AB, ABH 1992, 54]

The principal issue of this interpretation of the Constitution is also whether the question unregulated by the present Constitution can be resolved through interpreting the Constitution or whether it requires legislation by an Act of Parliament.

In my view, this issue may only be constitutionally resolved if the regulations provided by an Act of Parliament are made more accurate.

3. I have already pointed it out that the problems arising with regard to conferring awards may only be eliminated if the organs regulated by the Constitution (the Government and the President of the Republic) mutually cooperate. Unfortunately, if there is no such advisable cooperation, a more detailed and straightforward legal regulation (in an Act of Parliament) is required. Although the President in his petition expects the Constitutional Court to interpret the Constitution, the maximum the Constitutional Court can do (could have done) is to establish an unconstitutional omission. This is because the legislator has not specified in the AMOD all the procedural rules (on consulting and delivering

opinions in advance) that would implement the provision in Article 30/A item *j*) of the Constitution [The President of the Republic (...) “*j*) confers titles, awards, orders and decorations specified by law and authorizes the use thereof”].

Therefore, the conferring of awards (titles, medals and decorations) by the President of the Republic as specified by the Constitution is obstructed by the fact that the AMOD fails to regulate the preparatory phase of the conferring process in sufficient detail. “In accordance with the practice of the Court, the Constitutional Court establishes an unconstitutional omission of legislative duty when the issue is regulated but a statutory provision required by the Constitution is missing [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113] and also when the content of the statute specified by the legislator is insufficient and results in an unconstitutional situation.” [Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138-139; Decision 25/2003 (V. 21.) AB, ABH 2003, 328, 343]

Budapest, 3 July 2007

*Dr. László Kiss*

Judge of the Constitutional Court

*Dissenting opinion by Dr. István Kukorelli, Judge of the Constitutional Court*

I do not agree with part I points 2 and 3 and part II of the holdings with regard to the arguments of earlier Constitutional Court decisions interpreting the powers and the legal status of the President of the Republic.

1. In his petition the President of the Republic holds that when interpreting the power to confer awards, a starting point may be the two phrases in Article 29 para. (1) of the Constitution whereby “the President manifests the unity of the nation” and “safeguards the democratic functioning of the system of governance”. The discretionary powers of the President of the Republic in the awards procedure may be established with their correlated interpretation.

As established in the Decision, Article 29 para. (1) may not be “used as a constitutionality criterion” for signing or rejecting a proposal for an award because exercising the right to confer awards by the

President of the Republic does not have a direct effect on the democratic functioning of the system of governance.

In my opinion, Article 29 para. (1) of the Constitution may not be entirely excluded from the interpretation of the President's power to confer awards. Although the provision in Article 29 para. (1) of the Constitution prescribing that "the President manifests the unity of the nation" does not grant discretionary powers for the President when he/she exercises the right to confer awards, the definition of duty of the President of the Republic ("safeguards the democratic functioning of the system of governance") must be taken into consideration as the basis for interpreting the competence of the President.

So far it has been the practice of the Constitutional Court to apply Article 29 para. (1) of the Constitution as a starting point in interpreting the individual powers of the President. As declared in Decision 48/1991 (IX. 29.) AB, Article 29. para. (1) of the Constitution "must be used as a basis of interpretation for each power of the President". (ABH 1991, 217, 228) This is because Article 29 para. (1) defines the constitutional status of the President and also his/her position in the system of governance. Therefore, the framework and the limitations of the President's powers may only be established with regard to Article 29 para. (1) of the Constitution. The statement that the President of the Republic "safeguards the democratic functioning of the system of governance" defines the legal status of the President, and therefore this provision is a special element of protecting the constitutional order in line with the constitutional status of the President. It is also a guideline for the President when he/she exercises the powers of the President.

As each event the President exercises his/her powers is one decision in a chain of decisions, the President participates in maintaining the democratic system of governance through exercising each of his/her powers. As established in Decision 8/1992 (I. 30.) AB, the "safeguarding role" is not limited to crises in the system of governance but rather it is part of the ordinary course of state affairs, which also includes the President's exercise of his/her own rights." (ABH 1992, 51, 54) The President's safeguarding role is apparent in his/her symbolic powers, in other presidential powers that are elements of the everyday administration of tasks, also, in the President's powers to correct the decisions and functioning of other institutions and in the President's powers to restore the regular functioning of the governance system.

2. In my interpretation, it is impossible to come to the conclusion that the President's right to confer awards is a "substantial discretionary power" based on Article 30/A para. (1) item *j*) of the Constitution only, ignoring other provisions of the Constitution.

When the President's power to confer awards is interpreted, it is not possible to overlook that his/her decision is one item in a chain of decisions, and therefore the President of the Republic is not the "person in charge" of the awards procedure. The President participates in the decision-making process in accordance with the legal status of the President, and the Constitution does not allow the President to confer awards based on the President's sole discretion. The main consequence of this is that the President of the Republic has no discretionary power under the Constitution to force the person countersigning his/her decision to accept the President's choice. However, the role of countersigning is not simply a "procedural restriction" of the decision made by the President of the Republic. Regarding the powers that require countersignature, the countersignature is a significant element of the President's legal status and a validating instrument of the President's decision. When the President exercises these powers, the role of the countersignature is to provide that the President has no political responsibility. This principle is established by Article 31/A para. (1) of the Constitution. By countersigning the President's decisions, the person countersigning the decisions takes the political responsibility for them before the Parliament.

The President's immunity from political responsibility specified in Article 31/A para. (1) of the Constitution does not only apply to his/her powers that require countersignature. The President's immunity from political responsibility is an indispensable element of the President's legal status and it is applicable to all his/her decisions. Therefore, the President takes no political responsibility for any of his/her decisions, including any independent political decision the President may make.

3. The Constitution does *not* regulate the President's power to deny conferring an award (similarly to the power of the President to deny appointments). Therefore, in order to establish that the President has such rights, the legal status of the President must be taken into consideration and due constitutional reasons are required.

The decision concludes that the President of the Republic is entitled to deny conferring awards based on the worthiness criteria as "constitutional values" and under Article 30/A para. (1) item *j*) of the Constitution.

It may be concluded according to the Decision that the President's decision that denies conferring an award is a final decision in the merits of the case and that the President of the Republic may make such decisions without a countersignature required. Since the independent political decisions are also final decisions in the merits of the case and no countersignature is required for their validity, the refusal to confer an award is of the same nature as independent political decisions.

In accordance with the interpretations of the Constitutional Court made earlier, the President may only make independent political decisions in exceptional cases, namely when there is a grave disruption in the functioning of the governance system or there is a danger of such disruption. The reason why the Constitutional Court has established in its earlier decisions that the President may only make independent political decisions under the exceptional circumstances specified in Article 29 para. (1) of the Constitution is that in such cases the President of the Republic makes decisions in the merits of the cases without a countersignature required, and *nobody* takes political responsibility for these decisions. The Decision suggests that the condition for denying an award is not a grave disruption in the democratic functioning of the governance system but, instead, the violation of the “values” specified in the statutes governing awards.

The majority Decision has established that the precondition for denying awards, that is, the “protection of constitutional values” is not based on Article 29 para. (1) of the Constitution, and therefore it cannot be connected with a specific provision of the Constitution. As I see it, this way the President is granted actual political decision-making powers without due constitutional barriers.

In my opinion, such approach to any of the President's powers contravenes the legal status of the President defined in Article 29 para. (1) of the Constitution, the essence of which is that although the President of the Republic is not bound by the proposal in all aspects, he/she has very limited rights to object to such proposals. This is due to the fact that if the President refuses to make a particular decision, no person or entity takes political responsibility for this action.

Let me stress that the lack of political responsibility in a constitutional system of governance is always exceptional and it may only occur and it is only justified in extraordinary circumstances. Therefore, the President of the Republic may only exercise the powers that affect the merits of the case, that require no countersignature and that are final (and thus for which nobody bears political liability) only due to exceptional circumstances, that is, when there is a grave disruption in the democratic functioning of the governance system. In any other case, granting such decision-making powers to the President has no constitutional grounds (and contradicts the legal status of the President specified in Article 29 para. (1) of the Constitution and also in a broader sense the rule of law, the division of power and the parliamentary form of government).

4. As I see it, it is impossible to come to the conclusion solely based on Article 30/A para. (1) item *j*) regulating the right of the President to confer awards that it is the President's duty to “protect the constitutional values” regardless of the President's legal status defined in Article 29 para. (1) of the Constitution.

It is doubtless that there is a constitutional scale of values, and I also believe that it is one of the most important obligations to protect these values. Nevertheless, I am convinced that the earlier practice of the Constitutional Court is correct; in accordance with this practice, the President of the Republic safeguards constitutionality and legality in general while maintaining the democratic functioning of the governance system. It is not the exclusive duty of the President of the Republic to protect the abstract constitutional values, but it is the task of all institutions defined by the Constitution to protect the rule of law and constitutionality. In case of the President of the Republic, this obligation is specified under Article 29 para. (1) of the Constitution.

Therefore, the protection of constitutionality by the President is an integral part of the President's legal status and not a task independent from the status of the Head of State, nor does it derive from the individual powers of the President.

The Decision concludes that the constitutional values are to be protected by the President of the Republic due to "the values defined by the legislator in statutes" and establishes that the worthiness criteria identified by the statutes governing awards are such values "that are part of the constitutional scale of values recognized in the Republic of Hungary". By this finding, all worthiness criteria defined in any statute governing awards are raised to the level of constitutional values. However, the Constitutional Court has established that the power of the President of the Republic to deny conferring awards as well as the criteria of exercising this right is based on the worthiness criteria included in Acts on awards rather than on the Constitution, and the Constitutional Court has declared that it is President's duty to protect these values.

In accordance with the provision in Article 30 para. (1) item *j*) of the Constitution the President has requested the interpretation of, the President of the Republic confers titles, orders, awards and decorations that are *specified by law*. In my view, the safeguarding obligation of the President grants a right to the President to deny proposals that violate the statutes governing awards, and therefore the President may only deny conferring awards the proposal of which violate the law. With regard to the worthiness criteria, this means that the President of the Republic is entitled *and* obliged to refuse to confer awards that obviously fail to meet the criteria set by the legislator.

5. Based on the reasoning, the consequences of a decision that denies an award are not obvious. If the President namely refuses to confer an award to a person on the ground that such an award would violate the constitutional scale of values, it is unclear whether the person may be recommended again for an award, and, if yes, when and under what circumstances. It is presumable that if a person's award violates "constitutional values", it is a ground for exclusion that cannot be remedied.

In my opinion, the President of the Republic should only be entitled to refuse to confer an award if the statutes governing awards are violated. Therefore, such errors of the proposal can be remedied. As a result, if the President of the Republic refuses to confer an award, a new proposal may be forwarded even for the same person, provided that the statutory requirements are met concerning the particular person.

6. Finally, I find it important to emphasize that since the decision on conferring awards is the result of joint decisions made by several entities, and all entities participating in the process must make sure that the refusal (by either the President or the person countersigning the decision) of conferring the award is avoided if possible. The President of the Republic as the Head of State has constitutional tools available that are not expressly enumerated in the Constitution. The main purpose of these is to help the President in exercising his/her impartial safeguarding role in a more efficient manner prior to exercising his/her right to refuse to make a decision as a last resort. The main purpose of the cooperation obligation of the government entities is to prevent decisions that may result in decisions similar to refusing to grant awards,

7. With regard to the right of the Head of State to grant individual pardons, let me reiterate that according to the practice of the Constitutional Court “the constitutional interpretation of the scope of authority of the President must commence with his constitutional law position”. [Decision 36/1992 (VI. 10.) AB, ABH 1992, 207, 211] Therefore, the content of the President’s power to grant individual pardon is, in my opinion, established by Article 29 para. (1) of the Constitution and not by the effective statutes or the practice that has evolved in applying the law. Therefore, this provision of the Constitution must be taken into consideration also when interpreting Article 30/A para. (1) item *k*) of the Constitution.

Budapest, 3 July 2007

*Dr. István Kukorelli*

Judge of the Constitutional Court

I concur with the dissenting opinion:

*Dr. András Bragyova*

Judge of the Constitutional Court



I concur with the dissenting opinion and hereby add the following comments:

1. Article 30 para. (1) item *j*) of the Constitution defines the discretionary powers of the President. As a result of the statutory regulations under the authorization of the Constitution, the powers of the President to confer awards is exercised through examining the substantial and formal conditions established by law within the statutory framework.

2. The general discretion (examining the conditions of worthiness defined by law) does not mean exclusivity. The general definition of duty in the second part of Article 29 para. (1) of the Constitution, that is, the “safeguarding” obligation of the President should include safeguarding the constitutional scale of values.

As Article 29 para. (1) ”should be the basis for interpreting” the President’s powers [Decision 48/1991 (IX. 26.) AB, ABH 1991, 217, 228], including, naturally, the interpretation of the power to confer awards, and since the “safeguarding” obligation refers to more than solving crises and “is part of the ordinary course of state affairs, which also includes the President's exercise of his own rights” [Decision 8/1992 (I. 30.) AB, ABH 1992, 51, 54], it is possible that at the level of norms the worthiness criteria are in line with the Constitution, but considering the persons recommended for awards, the criteria are in obvious conflict with the fundamental principles and values of the Constitution. In such exceptional cases the President may reject compliance with the recommendation.

3. Although it is doubtless that the President has a safeguarding role regarding the constitutional scale of values, I must add that this does not redefine the President’s position in the system of constitutional organs. The protection of the constitutional values is primarily guaranteed by the authentic interpretation of the Constitution through the powers exercised by the Constitutional Court.

Budapest, 3 July 2007

*Dr. András Holló*

Judge of the Constitutional Court

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