Decision 31/2003 (VI. 4.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking a posterior examination of the unconstitutionality of a statute and the elimination of an unconstitutional omission of legislative duty, the Constitutional Court has – with dissenting opinions by dr. István Kukorelli and dr. János Strausz, Judges of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds that the text "indirectly or" in items 16, 17, and 18 of Section 2 para. (3) of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions and Positions of Public Trust, and Persons Shaping Public Opinion, and on the Historical Archive Office are unconstitutional and are accordingly annulled.

Section 2 para. (3) items 16, 17, and 18 shall remain in force as follows:

"16 Those editors-in-chief, deputy editors-in-chief, editors, and section editors of broadcasting companies as per Section 2 item 31 of Act I of 1996 on Radio and Television who have a direct influence upon shaping political public opinion,
17 Those editors-in-chief, deputy editors-in-chief, editors, reading editors, section editors, and senior contributors of nationwide, regional, county and local newspapers dealing with public affairs who have a direct influence upon shaping political public opinion,
18 Those editors-in-chief, and their deputies or agents authorised to issue news, of Hungarian-resident internet news providers with at least nationwide access, and registered by the competent authorities, who have a direct influence upon shaping political public opinion,"

2. The Constitutional Court rejects the petitions aimed at the establishment of the unconstitutionality and the annulment of other provisions in items 16, 17, and 18 of Section 2 para. (3) of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions and Positions of Public Trust, and Persons Shaping Public Opinion, and on the Historical Archive Office.

3. The Constitutional Court rejects the petitions aimed at the establishment of the unconstitutionality and the annulment of items 15, 19, and 20 of Section 2 para. (3) as well as Section 2 para. (4) item b) of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions, Positions of Public Trust or Persons Engaged in Shaping the Public Opinion, and on the Historical Archive Office.

4. The Constitutional Court rejects the petitions aimed at the elimination of an omission of legislative duty in respect of Section 1 item e), Section 2 para. (3), Section 2 para. (3) items 16 to 18, and Section 18 para. (4) of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions and Positions of Public Trust, and Persons Shaping Public Opinion, and on the Historical Archive Office.

5. The Constitutional Court rejects the petition aimed at the establishment of an omission by the Parliament of its legislative duty by having failed to adopt a statute providing for the national security screening of all judges and public prosecutors, and by not providing for the removal of the "agents of Department III/III" from the courts and public prosecutors' offices.

6. The Constitutional Court refuses the petition challenging the whole of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions and Positions of Public Trust, and Persons Shaping Public Opinion, and on the Historical Archive Office.

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

Reasoning

I

The Constitutional Court has received several petitions for a posterior constitutional review of certain provisions of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions and Positions of Public Trust, and Persons Shaping Public Opinion, and on the Historical Archive Office (hereinafter: the CA).

The Constitutional Court has already reviewed the CA in three decisions. These are the following: Decision 60/1994 (XII. 24.) AB (hereinafter: CCDec 1; ABH 1994, 342), Decision

18/1997 (III. 19.) AB (ABH 1997, 77) and Decision 23/1999 (VI. 30.) AB (hereinafter: CCDec 2; ABH 1999, 213).

When adopting CCDec 1, the scope of persons to be screened was specified in Section 2 items 1 to 25 of the CA, and the screening included, for example, the rectors, deans, and director generals of universities and colleges having a majority ownership by the State; the editors and higher ranking staff members of daily and weekly newspapers with an average circulation of over 30 000 copies per publication; the heads of departments and higher ranking officials of universities and colleges having a majority ownership by the State; the leaders of State-owned organisations performing economic activities, and the ones with a majority ownership by the State; the leaders of banks, specialised financial institutions, and insurance institutions with a majority ownership by the State.

CCDec 1 established the unconstitutionality of the provisions of the CA then in force specifying in detail but constitutionally inconsistently the scope of persons to be screened, as discrimination between persons covered by and exempted from the screening was applied in the provisions of the CA.

The CA had to be amended following CCDec 1. According to Act LXVII of 1996 on the Amendment of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions, the screening covered the persons taking an oath before the Parliament or the President of the Republic, furthermore, the officials elected by the Parliament. The Act limited the scope of persons to be screened to the sphere of the State (public authority), and within that, to a particular scope of persons; the actors of society in the public sphere of politics were not covered by screening. The scope of persons to be screened and the order of screening were specified in Section 2 of the CA.

CCDec 2 reviewed Section 2 para. (1) of the CA, and rejected the petitions claiming the unconstitutionality of the provision concerned.

The CA was amended again as of 30 June 2000. Section 2 of the CA was amended by Section 2 of Act XCIII of 2000 (hereinafter: the Act) on the Amendment of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions, and on the Historical Archive Office; the amendment extended the scope of screening specified in the CA to persons acting in certain

positions of public trust and persons shaping public opinion. According to the reasoning of the Bill, the broader definition of the scope of persons to be screened was based on the above-mentioned decisions of the Constitutional Court.

1. Basically, most of the petitions challenging the amended CA object to the definition of the scope of persons subject to screening, i.e. the relatively wide expansion thereof. They also raise objections to the provision interpreting the definition and the expansion of the personal scope of the Act.

According to the petitioners, the scope of persons to be screened is defined in the CA in a discriminative way, contrary to Article 70/A of the Constitution. Section 2 para. (3) of the CA does not apply a uniform standard to distinguish between personal data and data of public interest, and such a distinction is not specified in an exact form in Section 2 para. (4) either.

According to one of the petitions, Section 2 para. (3) items 15 to 18 violate the freedom of the press (Article 61 of the Constitution).

The petitioners hold that the principles elaborated in CCDec 1 are violated by the CA when it extends the scope of screening not only to persons who exercise direct influence, but also to those whose influence is merely an indirect one; according to the petitioners, the same applies to extending the scope of screening to the staff of press products not directly dealing with politics (item 17) and to internet news providers. The petitioners refer to a violation of Article 2 para. (1), Article 59, and Article 70/A of the Constitution.

1.1. Section 2 para. (3) item 19 of the CA applies unequal treatment within the group of political parties by distinguishing between those who receive and those who do not receive support from the State budget; the petitioners hold that treatment to be unconstitutional within the group of political parties, as all parties are established to pursue political activities and their influence on and shaping of public opinion cannot be reasonably explained on the basis of the above distinguishing criterion. The petitioners claim that leaving out parties receiving no State support is contrary to Articles 59 and 70/A of the Constitution.

1.2. The concept of "exercising influence" mentioned in Section 2 para. (3) items 16 to 18 is a vague and unclear one; the CA does not provide any clear definition thereof, and therefore the scope of persons to be screened is unclear, too.
In relation to the above, the petitioners also claim the unconstitutionality of Section 2 para. (4) item b) of the CA with reference it violating the principle of legal certainty as part of the rule of law [Article 2 para. (1) of the Constitution].

According to the petitioner, the challenged provisions of the CA do not regulate who is responsible for specifying the persons falling under the personal scope of the Act. This is an omission by the legislature resulting in a potential restriction of the freedom of expression and in manipulating the freedom of the press. The head of a broadcasting company may not be required to communicate any personal data, nor may he be obliged to define within his own discretionary powers who shall fall into the personal scope of the Act on screening.

The petitioners also claim that the concept of "internet news providers" (item 18) is non-existent, and thus it is an inapplicable and vague term, which violates legal certainty as part of the principle of the rule of law.

1.3. The petitioners hold that Section 2 para. (3) of the CA defines in an arbitrary manner the scope of persons who do not directly exercise public authority, but who have an influence on shaping public opinion, leaving out prelates as well as the leaders of public bodies and organisations for the representation of interests. This omission violates Articles 70/A and 54 of the Constitution.

1.4. Due to its incompleteness and the legislature's failure to act, Section 18 para. (4) of the CA violates Articles 70/A and 59 of the Constitution as it only allows the persons defined in the CA to request a certificate about their not having been involved in any activity specified under Section 1 of the CA. The omission that others are not allowed to dispose over their personal data is contrary to Article 59 of the Constitution.

2. There is a petition which refers to certain provisions of Article 8 para. (1), Article 54 para. (1), Article 59 para. (1), Article 57, Article 60 para. (2), Article 70/A, Article 50, and Article 48 para. (3), as the petitioner holds that the "unconstitutionality of the statute in question" can be summed up this way.

The petition concerned raises concrete objections to Section 2 para. (3) item 20 of the CA with reference to it violating the independence of the judiciary [Article 50 para. (3) of the Constitution].

3. One of the petitioners asks for the establishment of an "unconstitutional omission by the Parliament … by mentioning in Section 1 item e) of the CA the Arrow-Cross Party only, without referring to the Hungarian Socialist Workers' Party and its predecessors."

According to the petitioner, "Section 1 item e) of the CA is unconstitutional as it is discriminative and fails to treat equally the organisations that should be treated in the same manner."

4. Another petitioner asks the "Constitutional Court to establish that the Parliament has committed an unconstitutional omission by its failure to adopt a statute providing for the national security screening of all judges and public prosecutors and for removing from the courts and the offices of public prosecutors all former and politically too loyal agents of Department III/III. This omission of the Parliament … violates Article 57 para. (1) of the Constitution, as the politically too loyal agents of Department III/III and certain highly loyal former officials of the Hungarian Socialist Workers' Party working at the courts and public prosecutors' offices are not able to disregard their political commitment during their work".

II

The provisions of the Constitution referred to above are the following:

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

Article 3 (1) In the Republic of Hungary political parties may be established and may function freely, provided they respect the Constitution and laws established in accordance with the Constitution.
(2) Political parties shall participate in the development and expression of the popular will.
(3) Political parties may not exercise public power directly. Accordingly, no single party may exercise exclusive control of a government body. In the interest of ensuring the separation of

political parties and public power, the law shall determine those functions and public offices which may not be held by party members or officers. ...

Article 48 ..
(3) Judges may only be removed from office on the grounds and in accordance with the procedures specified by law. ...

Article 50 ..
(3) Judges are independent and answer only to the law. Judges may not be members of political parties and may not engage in political activities. ..

Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights. ...

Article 57 para. (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law. …

Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data.
(2) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the secrecy of personal data. ...

Article 61 para. (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest.
(2) The Republic of Hungary recognizes and respects the freedom of the press. …

Article 70/A para. (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."

The provisions of the CA challenged and affected by the petitions are the following:

"Section 1 It shall be checked whether the persons specified in Section 2 …
e) were members of the Arrow-Cross Party. ...

Section 2 para. (1) The screening specified in Section 1 shall cover – with the exceptions specified in paragraph (2) – the officials who take an oath before the Parliament or the President of the Republic, furthermore, the officials elected by the Parliament, as well as the persons listed under para. (3) items 14 to 22. ...

(3) Screening of the persons specified in paragraph (1) shall take place in the following order:
…

15 The presidents and vice presidents of the Hungarian Radio Company, the Hungarian Television Company, Duna Television Company as well as the presidents and vice presidents or their equivalents at all other broadcasting companies as per Section 2 item 31 of Act I of 1996,
16 Those editors-in-chief, deputy editors-in-chief, editors, and section editors of broadcasting companies as per Section 2 item 31 of Act I of 1996 on Radio and Television who have a direct or indirect influence upon shaping political public opinion,
17 Those editors-in-chief, deputy editors-in-chief, editors, reading editors, section editors, and senior contributors of nationwide, regional, county and local newspapers dealing with public affairs who have a direct or indirect influence upon shaping political public opinion,
18 Those editors-in-chief, and their deputies or agents authorised to issue news, of Hungarian-resident internet news providers with at least nationwide access, and registered by the competent authorities, who have a direct or indirect influence upon shaping political public opinion,
19 Members of the national or county-level presidium or the equivalent officials of the leading bodies of political parties which are eligible for budgetary support from the State,
20 Judges by profession,
21 Public prosecutors, …

(4) For the purposes of this Act ...

b) having an influence: any provision of information as per Section 20 item e) of Act II of 1986 which is directly or indirectly suitable for shaping public opinion. …

Section 18 ..

(4) Any
- attorney-at-law,
- notary public,
- clergyman, or
- staff member of broadcasting companies, newspapers dealing with public affairs, or internet news providers described in items 16 to 18 of Section 2 para. (3) who does not hold any of the positions specified therein;

is entitled to receive, upon his request, a certificate that he did not pursue any of the activities described in Section 1."

III

The petitions are, in part, well-founded.

The present case is the third time the Constitutional Court is dealing with certain constitutional issues related to the essential rules of the CA, and in particular with the definition of the scope of persons to be screened.

In the first case, the Constitutional Court ruled on the general constitutional foundations and principles of the Hungarian model of screening, i.e. the CA of that time, and defined the constitutional framework for screening by providing a mandatory interpretation of the rules contained in the Constitution on public access to data of public interest, on the protection of personal data, and on the prohibition of discrimination.
It is a common feature of the first two cases and of the present one that the petitions have typically dealt with two questions: the determination of the personal scope and the depth of screening, i.e. who and what may be covered by the screening.

In CCDec 1, the Constitutional Court performed a complex and interrelated interpretation of the said rules of the Constitution and the CA; in the present case, the Constitutional Court

holds that there is no ground for changing its position expressed in its earlier decisions. Therefore, where such interpretations are used as grounds, the line of arguments already set out in CCDec 1 shall not be repeated, and only their results applicable in the present case shall be relied upon.

The Constitutional Court first reviewed the essential statements in its earlier decisions about the determination of the scope and the data of the persons to be screened in line with the Constitution.

As established in the holdings of CCDec 1, “in a state under the rule of law, the data and records on individuals holding positions of public authority and those who participate in political life – including those professionally engaged in shaping public opinion – which reveal that these persons used to pursue activities contrary to the principle of the rule of law, or belonged to organs which pursued activities contrary to the same, count as information of public interest as under Article 61 of the Constitution.” (ABH 1994, 342)

It was also declared by the Constitutional Court that the Act reviewed at that time failed to consistently apply the same criterion in order “to distinguish between public and personal data”, leading to an unconstitutional distinction between the individuals subject to screening and those who were not, even though they otherwise met the same criteria. According to CCDec 1, to eliminate discrimination, the legislature must establish and consistently apply a uniform standard within the constitutional framework, based on its own judgement.

As stated in CCDec 1, “activities against the principle of the rule of law” qualify as data of public interest (ABH 1994, 342, 355). It is the task of the legislature to give a definition of the above. Similarly, it was stated in CCDec. 1 that the determination of both the personal scope and the depth of checking is an issue of political decision-making.

According to the reasoning of CCDec 1: “this political decision, namely, the exact definition of the data and the persons to be checked, cannot be deduced from the Constitution but it is required that, on the one hand, data may be neither kept secret, nor completely disclosed and, on the other hand, once the political decision has been adopted, the Parliament shall define in a uniform manner the scope of persons to be checked as well as the data of public interest on the basis of the standard used when setting the interrelated limitations on Articles 61 and 59

of the Constitution, within the constitutional possibilities. ... In this respect, the Constitutional Court may not take over the responsibility from the legislature to adopt a political decision, but it may establish the lack of applying uniform constitutional criteria. Section 2 is, therefore, contrary to Article 70/A of the Constitution. To eliminate discrimination, the legislature must pass a decision to define a uniform standard and it must enforce this standard consistently" (ABH 1994, 342, 357-358).

As reinforced in CCDec 2, determining the depth of screening is a "political issue within the competence of the legislature" (ABH 1999, 213, 225); the Constitutional Court only examines whether the definition of the data and the scope of persons to be screened, and the determination of data of public interest remain within the constitutional limits specified in CCDec 1, and whether the CA applies that standard consistently, in particular in the case of the various clearly distinguishable groups of persons of the same nature.

The Act amending the CA widened the scope of persons to be screened. Section 2 para. (3) items 14 to 22 of the CA in force have extended screening to all persons engaged in shaping public opinion (the presidents and vice presidents of broadcasting companies, the editors-in-chief, deputy editors-in-chief, editors, reading editors, section editors, and senior contributors who have an influence on shaping public opinion, furthermore, the officials of the leading bodies of political parties which are eligible for budgetary support from the State) as well as to professional judges and public prosecutors.

As declared in CCDec 1, certain data pertaining to persons participating in political life – including those who are professionally engaged in shaping political public opinion – qualify as data of public interest within the meaning of Article 61 of the Constitution.
According to CCDec 1, "data pertaining to former political activities are considered to be of public interest in the case of persons who currently influence political public opinion, either by exercising public authority, acting in public in the field of politics, or by operating the intermediaries/media of shaping public opinion, and who are thus able to directly shape political public opinion." (ABH 1994, 342, 364)

1. The Constitutional Court first examined the extension of the screening to a certain scope of persons not exercising public authority, and it reviewed the definition of the new scope of persons in terms of constitutionality.

It can be established in relation to the definition and the extension of the scope of persons that Section 2 para. (3) items 14 to 18 of the CA – with due regard to what is said CCDec 1 – pertain to persons who influence political public opinion by operating the intermediaries and media of forming public opinion.

Reviewing certain detailed rules of Section 2 para. (3) items 14 to 18 of the CA, the Constitutional Court has established the following:

Item 14 and partly item 15 pertain to the top managers of public service media. According to CCDec 1, "there is no constitutional concern about the top managers of public media being part of the scope of persons to be screened" (ABH 1994, 342, 364) Item 15 challenged only on the basis of its alleged violation of the freedom of expression also covers the top managers of other broadcasting companies comparable to public service media with regard to the task of shaping political public opinion. According to the Act, items 16, 17, and 18 only cover those persons acting in the designated positions "who have a direct or indirect influence upon shaping political public opinion" at a newspaper dealing with public affairs or an internet news provider.

By the above definition, the legislature tried to take account of the criteria specified in CCDec 1 as quoted above. In line with CCDec 1, items 17 and 18 take account of the fact that not all editors and programmes deal with politics and form political public opinion, and not all press products have a distinct political nature; thus, the rules in force of the CA establish the public interest nature of certain data not only on the basis of the influence of the individual media or their assumed influence based on their circulation, unlike in the provisions judged upon in CCDec 1. Item 18 only pertains to internet providers that deal with the provision of news.

Item 19 relates to the leading officials of a certain group of political parties. According to CCDec 1, shaping public opinion – "participation in the development of popular will" (ABH 1994, 342, 358) – is a constitutional task of political parties pertaining to concept-making [Article 3 para. (2) of the Constitution]. Professional judges and public prosecutors, as mentioned in items 20 and 21, exercise public authority in accordance with the rules pertaining to them.

The Constitutional Court holds that Article 59 of the Constitution is not violated merely by the fact of extending the scope of persons to be screened to those who exercise no public authority, but hold positions in which they can shape public opinion. It is another issue how the detailed rules challenged in the petitions are in line with certain provisions of the Constitution. According to CCDec 1, when reviewing the CA then in force, the Constitutional Court took it as a basis that certain personal data become of public interest in a constitutional sense by revealing the past activities against the principles of the rule of law of those persons who exercise public authority in the state under the rule of law or hold positions in which they can directly shape political public opinion.

As established in CCDec 1, "this complies with the earlier decisions of the Constitutional Court pertaining to the freedom of expression and public opinion" (ABH 1994, 342, 364) It cannot be established in the present case either that Section 2 para. (3) items 15 to 18 of the CA violate Article 61 of the Constitution.

The petitioners claim that the CA is discriminative in setting the extended scope of persons to be screened. The provisions of Section 2 para. (3) of the CA do not apply a uniform standard to distinguish between personal data and data of public interest, and such a distinction is not specified in an exact form in Section 2 para. (4) either.

CCDec 1 established the partial unconstitutionality of Section 2 of the original CA before its amendment, where it had specified the scope of persons to be checked, due to the application of standards that were not uniform. However, taking into account the arguments of CCDec 1, as the definition of the scope of persons required a political decision, the Parliament could specify this scope in Act LXVII of 1996 on the Amendment of Act XXIII of 1994 on Checking Persons Holding Certain Key Positions on either a broader or a more limited scale in comparison with the former regulation , in terms of both the data and the persons concerned.
According to CCDec 2, it was not objectionable to limit the screening and the disclosure of data to those who were in "important" positions.

Thus, in the present case, the subject of the review has, on the basis of the objections raised in the petitions, been whether the challenged provisions of the CA show the lack of a "uniform standard", i.e. the violation of Article 70/A of the Constitution.

According to CCDec 2, the mere fact that the scope of persons has not been defined using a single standard does not mean the lack of a "uniform standard".

There are at least two groups defined within the scope of persons described in the holdings of CCDec 1, i.e. persons exercising public authority and ones participating in political life, where compliance with a uniform standard can only be raised within the specific groups of persons.

With regard to persons acting in political life, Section 2 para. (3) items 16 to 18 of the CA which provide that within the group of such persons the scope of screening shall only be extended to cover the newspapers and internet news providers that "can shape political public opinion" and persons exercising "influence … on shaping political public opinion", can be accepted, on the basis of "objective consideration" [Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200], as the application of a reasonable and uniform standard in the political decision, as embodied in the amended CA, setting the depth of screening.

According to CCDec 1, "not all editors and programmes deal with politics, or shape political public opinion directly. (For example, musical editors do not qualify as persons to be screened)." The rules of the CA reviewed at that time violated the requirement of equal treatment by not making a distinction between daily and weekly papers, and by not taking into account "whether they were political, dealing with public affairs, or professional, entertaining or other papers not of an express political nature." (ABH 1994, 342, 364)

The rule in force in the CA, i.e. item 17, challenged in respect of press products only pertains to daily and weekly newspapers "dealing with public affairs"; it does not cover professional, entertaining and other press products not of an express political nature. Similarly, item 18 only pertains to internet providers that deal with the provision of news.

Therefore, the screening does not cover non-political, professional, or entertaining press products not dealing with public affairs, or other press products lacking an express political nature, and the staff members of such press products who are not engaged in shaping political public opinion. This is in line with what was established in CCDec 1. Thus, it can be established that with regard to newspapers dealing with politics and public affairs, in Section

2 para. (3) there is no lack of uniform standards that would in itself violate Article 70/A of the Constitution.

However, CCDec 1 makes a distinction among those who are professionally engaged in forming political public opinion with regard to their direct or indirect influence on political public opinion.

CCDec 1 allowed the screening of those "professionally engaged in shaping public opinion" and declared that "certain personal data become of public interest in a constitutional sense by revealing the past activities against the principles of the rule of law of those persons who … in the state under the rule of law or hold positions in which they can directly shape political public opinion. (ABH 1994, 342, 364) According to CCDec 1, the requirement of equal treatment makes it necessary to extend the screening to the editors and senior staff members of non-commercial national or regional radio and TV broadcasts provided that they are directly engaged in activities shaping political public opinion (e.g. they are editors of political programmes).

The Constitutional Court has found that extending in the CA the scope of screening to persons exercising indirect influence, in addition to those who exercise direct influence, is contrary to the constitutional provisions explained in CCDec 1 about the protection of personal data.
Therefore, the Constitutional Court has established the unconstitutionality of the term "indirect or" in Section 2 para. (3) items 16, 17, and 18 of the CA and annulled the above provisions; it has, however, rejected the petition challenging Section 2 para. (3) item 15 of the CA, as well as the petitions challenging the other provisions of items 16 to 18, as provided for in the holdings of the Decision.

1.1. Section 2 para. (3) item 19 makes a distinction within the group of political parties on the basis of whether or not they receive support from the State budget. The petitioners claim that leaving out parties receiving no State support is contrary to Articles 59 and 70/A of the Constitution.

According to Article 3 para. (2) of the Constitution, the political parties shall participate in the development and expression of the popular will.

As established by the Constitutional Court in one of its earlier decisions, the decision by the legislature to support political parties from the State budget is based on the ability of the political parties to comply with their obligation under Article 3 para. (2) of the Constitution, i.e. participation in developing and expressing the popular will. Therefore, according to the decision, it is not an unconstitutional discrimination that the State sets minimum requirements for political parties to be supported, and grants normative support only to those political parties that meet such requirements. (Decision 2179/B/1991 AB, ABH 1994, 518, 521)

Although all political parties are established to pursue political activities, the distinguishing criterion applied reasonably demonstrates their potentials in developing and expressing the popular will, in influencing public opinion, and in shaping political public opinion.

Therefore, it is constitutional to apply eligibility for budgetary support as a criterion distinguishing between sub-groups within the category of political parties.

In the same manner as according to CCDec 1 and CCDec 2, it is not objectionable to screen and publish the data of only those who hold "important" positions, it is not objectionable either to screen certain leaders of only "major" political parties, with the screening not covering minor parties that have not reached the results during the elections as specified in Act XXXIII of 1989 on the Operation and Financial Management of Political Parties.

1.2.

a) Section 2 para. (3) items 15 to 18 of the CA apply several criteria in setting the scope of persons to be screened.

According to one of these – in addition to complying with other conditions – screening shall only cover persons who, directly or indirectly, "have an influence" on shaping political public opinion, as provided for in the Act.

The petitioners claim the unconstitutionality of Section 2 para. (4) item b) of the CA with reference to it violating the principle of legal certainty as part of the rule of law [Article 2 para. (1) of the Constitution] by way of containing the vague, inexact and unclear term of "having influence".

Under Section 2 para. (4) item b) of the CA, having an influence: any provision of information as per Section 20 item e) of Act II of 1986 which is directly or indirectly suitable for shaping public opinion.

Pursuant to Section 20 item e) of that Act: "provision of information: public communication by way of a press product of facts, events, official announcements, speeches, as well as opinions, analyses and evaluations upon the foregoing."

It follows from the above-mentioned rule of the CA that for the purposes of the CA, having influence applies to provision of information that "can shape political public opinion in a direct or indirect manner".

According to the essence of the petitions, this definition is vague and unclear, the CA does not provide a clear definition of having influence, and therefore the scope of persons to be screened is unclear, too.

As stated in Decision 1160/B/1992 AB, the application of general and abstract legal norms to concrete individual cases is a question of applying the law. When applying the law, all statutes need to be interpreted even if the problem-solving and creative nature of the interpretation has faded away, and the act of interpretation has become a routine process based on earlier interpretations of the law. According to the decision, it is up to the legislature to decide in what details it regulates certain relations of life. As stated in the decision, "this is a question separate from the dim or incomprehensible nature of the statute. ... Therefore, the statute must take account of the typical features of relations of life." (ABH 1993, 607, 608)

The criteria set in the challenged rules of the CA and the concepts used in its provisions meet the above requirement, and the concepts are neither dim nor incomprehensible.

Legal certainty is only violated by statutes that are inherently uninterpretable by those who apply the law [cf. Decision 36/1997 (VI. 11.) AB, ABH 1997, 222, 227-228].

The Constitutional Court has established that in the concrete case, legal certainty is not violated by the fact that the legislature has set statutory framework conditions without going into details. The lack of an itemised listing in the statutory definition about the broadcast

providers and newspapers covered by the screening as well as their staff members performing certain activities is not unconstitutional. It is not unconstitutional for the legislature to transfer the concrete definition, in accordance with the standard defined in line with the rules of the Constitution, of the scope of persons to be screened to those who apply the law. Instead of an itemised listing, an appropriately general and abstract statutory definition is also sufficient for the consistent application of the uniform standard of the CA.

The mere fact that a statute needs to be interpreted during its application, and in some cases such interpretation might take the form of problem-solving in a creative manner, does not in itself violate the requirement of legal certainty. The changing of the socio-economic situation may make it necessary to adopt new statutes, and in the case of a new statute, the process of interpretation can rely only to a limited extent on earlier interpretations of statutes – it takes some time to develop routine interpretations.

Applying and interpreting the general and abstract provisions of the CA in the concrete case, including the specification of the contents of the newly introduced concept of "having influence", shall be, on the basis of the above statutes, performed by those who apply the law, i.e. the screening committee and the judicial practice. In respect of the challenged definition, the alleged uncertainty of interpretation, as referred to by the petitioners, is unfounded.
The Constitutional Court is not competent to give a separate and abstract interpretation of a statute independently of any constitutional problem. The text and the interrelations of the challenged provisions described above do not support any well-founded conclusion about the inherent incomprehensibility of the concepts and provisions by those applying the law or about the violation of the principle of legal certainty. Therefore, the Constitutional Court has rejected the relevant petitions.

b) Section 8 of the CA empowers – in line with the statutory conditions – the screening committee to perform investigations, request data and have access to documents.

Pursuant to Section 10 para. (1) of the CA, "in the course of its proceedings the committee shall follow the provisions of Act IV of 1957 on the General Rules of Public Administration Procedure, unless otherwise provided by this Act."

Section 26 para. (1) of Act IV of 1957 on the General Rules of Public Administration Procedure (hereinafter: the APAP) provides that the administrative body shall be obliged to clarify the facts of the case necessary for passing a decision. If there are not enough data available for such clarification, an evidentiary procedure is to be performed *ex officio* or on request.

According to Section 28 para. (1) of the APAP, in order to set the facts of the case, the body of public administration may call upon the client to present a deed or other document, or it may request another body to do so (Section 10).
Section 29 para. (1) of the APAP provides that any fact pertaining to the case may be proved by witnesses. Pursuant to paragraph (2), any person subpoenaed as a witness shall be obliged to appear in order to be heard and to give a testimony.

The Constitutional Court holds that it is not necessary for the CA to specify who shall inform the screening committee about the persons falling into the scope of the Act. The screening committee may use any legal tool of evidence in the course of its procedure, in line with the rules of the CA. The CA defines the tasks of the committee as a special body of public administration, as well as the scope of its competence. The committee checks individuals on the basis of the criteria specified in the CA, and, as a result of the checking, it passes a resolution stating facts. The resolution passed by the committee may be appealed against according to the rules pertaining to the judicial review of public administration decisions. No unconstitutional omission can be established in this respect, and the rules in force adequately ensure the implementation of the procedure, therefore the Constitutional Court has rejected the relevant petition.

c) Regarding the term "internet news providers" [Section 2 para. (3) item 18 of the CA], the Constitutional Court holds that there is no ground for stating its inherent inapplicability or incomprehensibility.

The above general provision in the CA does not result in uncertainty. With regard to the principle of legal certainty as part the rule of law, the required exactness of the CA depends significantly on the contents of the relevant statute, the field to be regulated, as well as the number and the status of those addressed by the statute.

Several statutes (e.g. Act XL of 2001 on Communications) contain the terms “internet service”, “internet” and “internet service provider” There are several other statutes (e.g. Act CXXVII of 1996 on the National News Agency, Act I of 1996 on Radio and Television, Act II of 1986 on the Press) containing rules on the provision of news services, news service providers, and news services. It is generally recognized in copyright law that public broadcasting can be implemented in the form of allowing members of the public to independently choose the location and time of access. In addition, copyright law distinguishes between content providers, and service providers who create the technical conditions of internet services. Therefore, there is no reason to hold that those addressed by the CA would be in doubt, with due ground, about the manner of applying the concept of internet news providers.

The other provisions of Section 2 para. (3) item 18 of the CA offer – in line with the general objective of the CA and the general aspects of defining the scope of persons to be screened – sufficient information for the interpretation and practical application of the concept concerned. According to the Constitutional Court, these provisions do not violate the principle of legal certainty as part of the rule of law.

1.3. According to CCDec 1, data pertaining to former political activities are considered to be of public interest in the case of persons who currently influence political public opinion, either by exercising public authority, acting in public in the field of politics, or by operating the intermediaries/media of shaping public opinion, and who are thus able to directly shape political public opinion. “However, this criterion only applies to those professionally engaged in shaping political opinions.” (ABH 1994, 342, 364)

The fact that prelates as well as the leaders of public bodies and organisations for the representation of interests are not covered by screening does not qualify as a violation of the principle of equal treatment and it does not constitute an unconstitutional omission. One cannot state in general that all such persons are professionally engaged in shaping political opinions; nor can it be established that the Act covers any similar group of persons comparable to them. The leaders of public bodies, partly exercising public authority, could – by the political decision of the legislature – be excluded from the scope of persons to be screened, in line with CCDec 1 and CCDec 2. Consistently enough, no public body at all is covered by the scope of the Act according to Section 2 para. (3) of the CA.

1.4.

a) It is a new element in the Act that attorneys-at-law, notaries public, clergymen, and journalists who are not covered by the screening may voluntarily request to be screened.

According to one of the petitioners, Section 18 para. (4) of the CA has resulted in a discriminative, unconstitutional omission by violating Articles 70/A and 59 of the Constitution, as it only allows a limited scope of persons defined in the CA to request a certificate about not having been involved in any activity specified under Section 1 of the CA.

Section 20 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) provides that the Constitutional Court acts on the basis of a petition by an entitled petitioner. No posterior constitutional review of a statute may be initiated *ex officio* [Section 21 para. (7) of the ACC].

Therefore, in the present case, the Constitutional Court has only examined whether an unconstitutional omission can be established with regard to Section 18 para. (4) of the CA on the basis of the arguments referred to in the petition, i.e. whether the legislature is bound to allow other persons, too, to ask for a certificate, and whether the distinguishing standard applied by the legislature is discriminative in itself.

According to the consistent position of the Constitutional Court, a discrimination between subjects of law is deemed unconstitutional if the legislature has arbitrarily differentiated between the subjects of law within the same regulatory scope without due grounds (Decision 191/B/1992 AB, ABH 1992, 592, 593) Examining the prohibition of discrimination, the Constitutional Court pointed out in its Decision 43/B/1992 AB that discrimination between persons may only be established when individuals or a group of people face discrimination in comparison with persons or groups in the same position (ABH 1994, 744, 745). The unconstitutionality of discrimination or any other restriction between persons concerning any rights other than the fundamental ones may only be established if the injury is related to any fundamental right, and eventually, to the general personality right to human dignity, and there is no reasonable ground for the distinction or the restriction, i.e. it is arbitrary [Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200].

In the concept of the CA, from the very beginning, the legislature only specified the scope of persons to be obligatorily screened. As a result, there was neither an obligation, nor a possibility to screen other persons on the basis of the CA. The Act in force has introduced a new group in addition to the existing two scopes of persons by allowing a limited group of persons to be screened on request.

Any person belonging to this group may request a certificate proving that he did not pursue any of the activities described in Section 1 of the CA.
On the basis of the petition, the Constitutional Court has had to examine whether there is a new group of persons who should be subject to Section 18 para. (4) – based on the uniform standard in Section 18 para. (4) of the CA.

The CA links eligibility to request a certificate to practising certain professions. Practising certain professions and making a distinction between persons practising professions that belong – for the purposes of the regulation – to one category and those who practise other professions usually constitutes a due ground for making a distinction based on objective consideration.

b) According to the Constitutional Court, attorneys-at-law, notaries public, and clergymen have an obligation of confidentiality in line with the rules of their professions. The obligation of confidentiality binds them even after their ceasing to practise the profession concerned. The obligation of confidentiality covers the data pertaining to the principal, the party or the person in contact with the clergyman, and the facts those in the above professions become familiar with while practising their profession.
In addition to the obligation of confidentiality, such persons hold positions of public trust that cannot be compared to the positions of others.

Based on the above similarities, the provisions of the CA do not violate Articles 70/A and 59 of the Constitution by only allowing the above-mentioned persons in positions of public trust to request the issue of a certificate; it is not considered to be an omission or a discrimination that the CA does not allow persons whose professions cannot be compared to the nature of the professions of attorneys-at-law, notaries public, and clergymen to request a certificate.

c) According to Section 18 para. (4), journalists not subject to mandatory screening may also voluntarily ask to be screened. The confidentiality obligation of journalists cannot be compared to that of attorneys-at-law, notaries public, and clergymen.

This rule pertains to persons who practise the same profession as the ones subject to mandatory screening under Section 2 para. (3) items 16 to 18 of the CA but who are not to be screened, i.e. it is related to the implementation of those rules.

As far as the persons who work at the same workplace and in the same position and practice the same profession are concerned, the CA only requires the screening of those who, according to the text of the Act, have a “direct or indirect influence upon shaping political public opinion”.

It is a question of applying the law to select the persons to be screened from the above category. The decision may lead to debates which may cause the extension of the procedures. Although the screening process is confidential, there is a pressing social need to have access to the data of public interest concerned, and this process may reasonably be facilitated by the fact that the Act allows the voluntary screening of those who do not fall under the scope of mandatory screening but work at the same workplace and in the same position and practice the same profession as those subject to obligatory screening.

It can be established that based on the standard applied in Section 18 para. (4) of the CA, there is no group of persons that should be subject to Section 18 para. (4). Therefore the Constitutional Court has rejected the petition aimed at the elimination of an unconstitutional omission with regard to Section 18 para. (4) of the CA.

2. There is a petition which refers to certain provisions of Article 8 para. (1), Article 54 para. (1), Article 59 para. (1), Article 57, Article 60 para. (2), Article 70/A, Article 50, and Article 48 para. (3), as the petitioner holds that the “unconstitutionality of the statute in question” can be summed up this way.
The petition concerned raises concrete objections only to Section 2 para. (3) item 20 of the CA with reference to it violating the independence of the judiciary.

a) Judges exercise public authority, and according to CCDec 1, the data of individuals holding positions of public authority that reveal that these persons used to pursue activities contrary to the principle of the rule of law, or belonged to state organs that pursued activities contrary to the same, count as information of public interest under Article 61 of the Constitution; this is why the Parliament could decide to screen judges.

Here, too, the Constitutional Court has followed the statements made in its earlier decisions.

According to CCDec 1, defining the scope of data of public interest and that of data to remain non-public is a "political question" offering a relatively wide space for the legislature to balance between making some functions completely "transparent", and restricting access to other kinds of data by maintaining the personal nature thereof in order to meet the need for "stability" This political decision, i.e. the exact definition of the data and persons to be screened, cannot be deduced from the Constitution. It is, however, a requirement that the "Parliament shall define in a uniform manner the scope of persons to be checked as well as the data of public interest on the basis of the standard used when setting the interrelated limitations on Articles 61 and 59 of the Constitution, within the constitutional possibilities." (ABH 1994, 342, 357) In the case of judges, it cannot be established that the Parliament has gone beyond the limits of this constitutional possibility.

For this reason, the Constitutional Court has rejected the petition challenging Section 2 para. (3) item 20 of the CA.

b) According to Section 22 para. (2) of the ACC, the petition shall contain a definite request and the cause forming the ground thereof. This means that the petitioner must specify not only the statute, but also the concrete provision of the statute held to violate a concrete provision of the Constitution (Order 440/B/1993 AB, ABH 1993, 910).

The documents submitted by the petitioner do not contain, in other respects, a definite request as required by Section 22 para. (2) of the ACC, and therefore they do not qualify as petitions suitable for the initiation of a procedure on the merits (Order 32/B/1995 AB, ABH 1995, 1075).

The petitioner does not specify either the grounds of holding the challenged provisions of the CA unconstitutional, or the concrete provisions of the Constitution assumed to be violated. Therefore, the Constitutional Court has refused this part of the petition as one containing no definite request, on the basis of Section 21 and Section 29 item d) of Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof.

3. One of the petitioners asks for the elimination of an unconstitutional omission with regard to Section 1 item e) of the CA. According to the petitioner, it is discriminative that the relevant provision of the CA makes a distinction between political parties aimed at despotism, only referring to the Arrow-Cross Party without mentioning the Hungarian Socialist Workers' Party and its predecessors.

According to CCDec 1, defining the scope of data of public interest and the ones to remain classified offers a relatively wide space for the legislature to restrict access to data and to maintain their personal nature. The political decision may provide for narrower or broader limits for public access and depth of screening. The exact definition of the data to be screened cannot be deduced from the Constitution.
However, the legislature is required to apply a uniform standard in defining the data of public interest with respect to Section 1 item e) of the CA, too. Therefore, before deciding upon the issue of discrimination, it has to be verified whether the scopes of persons affected by the distinction can be compared with each other.

Although the text of the prohibition of discrimination under Article 70/A para. (1) of the Constitution is applicable to human and civil rights, the prohibition applies – provided that the discrimination violates the fundamental right to human dignity – to the whole legal system [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281]. The unconstitutionality of discrimination or any other restriction between persons concerning any rights other than the fundamental ones may only be established if the injury is related to any fundamental right, and eventually, to the general personality right to human dignity, and there is no reasonable ground for the distinction or the restriction, i.e. it is arbitrary [Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200]. The State has the right – and in a certain scope it is even obliged – to take into account, in the course of legislation, the actual differences between people [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 282].

According to the consistent position of the Constitutional Court, a discrimination between subjects of law is deemed unconstitutional if the legislature has arbitrarily differentiated between the subjects of law within the same regulatory scope without due grounds. (Decision 191/B/1992 AB, ABH 1992, 592, 593) Examining the prohibition of discrimination, the Constitutional Court pointed out in its Decision 43/B/1992 AB that discrimination between persons may only be established when individuals or a group of people face discrimination in comparison with persons or groups in the same position (ABH 1994, 744, 745).

Section 1 item e) of the CA refers to the Arrow-Cross Party, without mentioning the Hungarian Socialist Workers' Party and its predecessors. According to this provision of the CA, it has to be checked whether or not the specified persons (Section 2 of the CA) were members of the Arrow-Cross Party.

The Constitutional Court has had to establish on the basis of the petition whether the fact of having been a member of the Hungarian Socialist Workers' Party or of its predecessors can be compared to membership in the Arrow-Cross Party with regard to Article 70/A para. (1) of the Constitution.

The Nazi and the Bolshevik despotic systems, their symbols, and the injuries caused by these systems have been treated in the same way in the relevant decisions of the Constitutional Court [Decision 14/2000 (V. 12.) AB, ABH 2000, 83; Decision 28/1991 (VI. 3.) AB, ABH 1991, 88, 102; Decision 22/1996 (VI. 25.) AB, ABH 1996, 89, 101]. However, it does not follow from the equal treatment, based on Article 70/A para. (1) of the Constitution, of the Nazi and the Bolshevik despotic systems, their symbols, and the injuries caused by these systems that membership – i.e. the mere fact of becoming a member – in the Hungarian Socialist Workers' Party or in its predecessors should be evaluated in the same manner as membership in the Arrow-Cross Party.

The role played by the members of the Arrow-Cross Party in the implementation of the totalitarian dictatorship and terror by the Arrow-Cross Party upon seizing power on 15 October 1944, and the demonstration of the positive relation to the terroristic rule of the Arrow-Cross Party by voluntarily joining the Party in that period of history cannot be compared – with regard to Article 70/A of the Constitution – to being a member of other

political parties as mentioned in the petition in other historical situations and in other circumstances, as the members of the said political parties (altogether) do not form an unconditionally homogeneous group.
The special historical situation after 15 October 1944 and the related personal identification with the operation of that political system demonstrated by being a member of the Arrow-Cross Party is to be evaluated differently from constitutional aspects from becoming a member of the Hungarian Socialist Workers' Party organised from November 1956 and dissolved in October 1989 or of its predecessors. Besides, the CA provides for the screening of participation in certain organisations similar to the Arrow-Cross Party concerned (Section 1 items a) and c)).
Maintaining its position explained in the past about the Nazi and Bolshevik despotic systems, their symbols, and the injuries caused by these systems, the Constitutional Court establishes the following: if – according to the petition – the basis of forming a group is the fact of becoming a member in a certain political party, then, in view of what has been said above, the members of the above-mentioned two parties do not count as a single group in constitutional terms. Therefore, the Constitutional Court has rejected the petition aimed at the elimination of an unconstitutional omission with regard to Section 1 item e) of the CA.

4. Another petitioner asks the "Constitutional Court to establish that the Parliament has committed an unconstitutional omission by its failure to adopt a statute providing for the national security screening of all judges and public prosecutors and for removing from the courts and the offices of public prosecutors all former and politically too loyal agents of Department III/III. This omission of the Parliament … violates Article 57 para. (1) of the Constitution, as the politically too loyal agents of Department III/III and certain highly loyal former officials of the Hungarian Socialist Workers' Party working at the courts and public prosecutors' offices are not able to disregard their political commitment during their work".

Sections 67 to 72 of Act CXXV of 1995 on the National Security Services (hereinafter: the ANS) regulate national security screening. Pursuant to Section 68 para. (1), the national security screening to be performed by the national security services is aimed at verifying whether persons designated to important and confidential positions or holding such positions comply with the security preconditions necessary for the lawful operation of the State and the national economy and – where applicable – with the ones that result from obligations under international law.

Article 57 para. (1) of the Constitution regulates the fundamental right to the judicial way. On the basis of the aims and the subject of the ANS, as well as its rules on the scope of affected persons, it can be established that the fundamental right to the judicial way does not entail a constitutional requirement to make all judges and public prosecutors subject to a national security screening.

The part of the petition objecting to the lack of an obligatory statutory provision on removing "agents of Department III/III" from the courts and public prosecutors' offices cannot, in a constitutional sense, be brought into relation with the right to the judicial way.

The petition aimed at the elimination of the unconstitutionality of the omission of legislative duty is, therefore, rejected.

Budapest, 2 June 2003

Dr. János Németh
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
presenting Judge of the Constitutional Court

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

In my opinion, when adopting Act XCIII of 2000 amending Act XXIII of 1994 on Checking Persons Holding Certain Key Positions and on the Historical Archive Office (hereinafter: the Screening Act), the legislature failed to adequately enforce the requirement following from Article 70/A of the Constitution and explained in Decision 60/1994 (XII. 24.) AB of the

Constitutional Court, according to which the legislature must establish and consistently apply a uniform and constitutional standard for the definition of the scope of persons to be screened. In addition, I deem it unconstitutional to reserve the right to ask for a voluntary screening only for attorneys-at-law, notaries public, clergymen and journalists who are not to be screened obligatorily. Finally, in my opinion, in addition to the term "indirectly or" under Section 2 para. (3) items 16, 17, and 18 as well as in Section 2 para. (4) item b) of the Screening Act, it is contrary to the constitutional principle of legal certainty to statutorily provide for the screening of certain staff members of internet news providers "registered by the competent authorities" [Section 2 para. (3) item 18 of the Screening Act].

1. In its Decision 60/1994 (XII. 24.) AB, the Constitutional Court defined the constitutional requirements the legislature must take into account when adopting an Act for the purpose of granting public access to information on activities against the rule of law by those who exercise public authority and by certain participants in political life. Accordingly, the definition of the scope of persons to be screened is a political decision within the discretion of the Parliament that "may provide for narrower or broader limits for the depth of screening. This political decision, namely, the exact definition of the data and the persons to be checked, cannot be deduced from the Constitution but it is required that, on the hand, data may neither be kept secret, nor may they be completely disclosed and, on the other hand, once the political decision has been adopted, the Parliament shall define in a uniform manner the scope of persons to be checked as well as the data of public interest on the basis of the standard used when setting the interrelated limitations on Articles 61 and 59 of the Constitution, within the constitutional possibilities." (ABH 1994, 342, 357)
Act XCIII of 2000 amending the Screening Act and challenged by the petitioners has extended the limits of screening performed by screening judges beyond the scope of persons exercising public authority, to include journalists who "hold positions in which they can shape public opinion" The legislature may decide to restrict screening to persons who exercise public authority, however, if this scope is extended to include persons who form political public opinion, the criterion for forming a homogeneous group should be not the fact of belonging to a specific profession, but the fact of being professionally engaged in shaping political opinion. As established by the Constitutional Court in 1994, the latter criterion applies not only to journalists: ecclesiastical bodies and certain representatives thereof, national public bodies or the leaders of trade unions "certainly play a role in shaping political public opinion" (ABH 1994, 358) Even with the adoption of Act XCIII of 2000, the

legislature has failed to consistently enforce the uniform constitutional standard (shaping political public opinion), as it has arbitrarily defined in violation of Article 70/A para. (1) of the Constitution the scope of persons subject to mandatory screening who do not exercise public authority but participate in shaping political public opinion.

2. I also miss the application of a uniform standard with regard to Section 18 para. (4) of the Screening Act, according to which any attorney-at-law, notary public, clergyman or journalist not subject to mandatory screening may ask for and receive a certificate proving that he was not engaged in any activity against the rule of law specified in Section 1. The petitioners hold that this rule violates Articles 59 and 70/A of the Constitution by only allowing voluntary screening in the case of persons practising certain “professions of public trust” The Decision argues that the application of the exceptional rule is justified by the obligation of confidentiality in the case of attorneys-at-law, notaries public, and clergymen, and by the need to prevent debates about the application of the law in the case of journalists not subject to mandatory screening.
I hold that the Constitutional Court should have taken into account its Decision 15/1991 (IV. 13.) AB, interpreting the right to the protection of personal data as a right of informational self-determination – with consideration to the active side of that right – which “means that everyone has the right to decide about the disclosure and use of his personal data” (ABH 1991, 40, 42) It follows from Decision 60/1994 (XII. 24.) AB that data related to activities against the principle of the rule of law by any person who neither exercises public authority nor participates in political public life by being professionally engaged in shaping political public opinion qualify as personal data.

It follows from the joint interpretation of the right to the protection of personal data granted in Article 59 of the Constitution and the prohibition of discrimination guaranteed under Article 70/A para. (1) of the Constitution that, in order to be constitutional, the limitation of the option of voluntary screening to the scope of persons mentioned above must be absolutely necessary, based on the test of fundamental rights. In my opinion, the obligation of confidentiality and the argument related to the prevention of debates about the application of the law do not qualify as aims that can be implemented by no means other than granting the right to informational self-determination only for a specific group of persons. Accordingly, based on Articles 59 and 70/A of the Constitution, the legislature should have granted the possibility of voluntary screening for any person not exercising public authority and not

participating in political life, and it may only limit the scope of persons entitled to voluntary screening upon proving that this is the only way of reaching an absolutely necessary constitutional aim.

3. I hold that, with due account to the constitutional requirement of legal certainty, the Constitutional Court should have annulled Section 2 para. (4) item b) of the Screening Act. Act XCIII of 2000 amending the Screening Act provides for the screening of those senior staff members of the printed press, radio, television, and internet news providers who have an indirect or direct influence on shaping political public opinion. I agree with the Decision in establishing the unconstitutionality of the mandatory screening of journalists who only have an indirect influence on shaping political public pinion. However, in my opinion, the term "indirectly or" in Section 2 para. (4) item b) of the Screening Act should have been annulled as well, for the same reason. However, there are other concerns, too, about Section 2 para. (4) item b) of the Screening Act. The interpretative provision in item b) violates the constitutional requirement of legal certainty by repeating in the explanation of "having influence" the criterion specified in the text of the Act, i.e. the provision of information suitable for indirectly or directly influencing political public opinion.

Finally, the Constitutional Court should have taken into account the fact that the term "registered by the competent authorities" in Section 2 item 18 of the Screening Act is inapplicable and unenforceable, and therefore it violates the requirement of legal certainty as an essential element of the rule of law granted in Article 2 para. (1) of the Constitution. Pursuant to Section 12 para. (2) of Act II of 1986 on the Press (hereinafter: the Act on the Press), the production and the publication of periodical press products are subject to an obligation of notification. Section 20 item f) of the Act on the Press, defining the term "periodical press product", does not contain provisions on newspapers published on-line, and therefore not all electronic newspapers – being either electronic ones only or the electronic versions of newspapers printed as well – consider themselves to be periodical press products according to the rules of the Act on the Press. Therefore, some of the on-line newspapers published in Hungary at present have registered themselves as periodical press products, while the others operate without such a registration. Since in Hungarian law there are no legal rules on the registration of electronic news portals, the term "registered by the competent authorities" in Section 2 para. (3) item 18 is inapplicable.

Budapest, 2 June 2003

Dr. István Kukorelli
Judge of the Constitutional Court

In witness thereof:

Dissenting opinion by Dr. János Strausz, Judge of the Constitutional Court

In point 4 of the holdings of the Decision the Constitutional Court has rejected – among others – the petition aimed at the elimination of an unconstitutional omission in relation to Section 1 item e) of Act XXIII of 1994.

As I disagree with this decision, I hereby submit a dissenting opinion with regard to the above part of the holdings in the Decision and to the related part of the reasoning.

I hold that the petition is well-founded, and the Constitutional Court should have established the existence of an unconstitutional omission.

According to Section 1 item e), membership in the Arrow-Cross Party is a ground for screening, and it is stated in the reasoning of the Decision that the activities of the members of that political party after 15 October 1944 justify the need for screening, arguing that being a member of communist parties is to be judged completely differently.

However, the scope of persons and activities listed one by one under Section 1 items a) to d) covers the period of 1945 to 1990, i.e. the era of Soviet occupation, and it is of a much narrower scope than item e). Here, the grounds for screening include holding a position or being a member in certain repressive organisations of the political system, in addition to particular leading positions in the State administration and politics.

Checking (screening) covers – among others – the officials and secret agents of the political (State security) police operating after 1945 under various names, and persons acting in the political armed service in the period of 1956 to 1957.

Accordingly, the screening does not cover the members of the Workers' Militia operating between 1957 and 1989, even though this organisation was also an armed force of the communist party, just like the so-called "quilted jacket" armed service.

In addition, in contrast with membership in the Arrow-Cross Party, being a member of the communist party operating under various names (Hungarian Communist Party, Hungarian Workers' Party, Hungarian Socialist Worker's Party) is not considered to be a ground for screening. Thus the members of these parties may hold any State or other public position listed in Section 2 without being screened, despite the fact that in 1990 it was a communist regime and not a fascist one that fell and was replaced by a democratic State under the rule of law.

The scope of persons listed in details in Section 1 of the Act raises several problems.

1. Under Section 1 item a), the legislature has only specified a particular department – internal security – of the political police, leaving out covered intelligence services and counter intelligence, despite the fact that the above organisations formed a single unit as the secret services of the communist regime. For example, in the framework of the State Defence Authority (*ÁVH*) and later within Department III of the Ministry of Interior, the services of intelligence, counter intelligence, and internal security operated as sub-departments, but their staff members could be placed from one to another and they were subjected to a single higher authority.

Therefore, the authorities concerned had no organisational independence.

2. The term "Arrow-Cross Party" in Section 1 item e) reveals an incomplete definition. The political party led by Ferenc Szálasi started its operation not in 1944 but in 1937 – as a party represented in the Parliament. At the time of World War II, it was called "Arrow-Cross Party – Hungarist Movement", seizing power on 15 October 1944 with the support of the foreign armed forces occupying the country, just like the Hungarian Socialist Workers' Party on 4 November 1956.

However, in the puppet government led by Ferenc Szálasi, the "Hungarists" acted in coalition with other extreme right wing organisations, such as the Party of Hungarian Revival, the Hungarian National Socialist Party, the Volksbund, and the Comradeship Association of the Eastern Front.

Why do the members of these organisations escape screening?

3. The above political parties organised armed militia from their members – not covering all members – that acted as terrorist brigades in 1944-45, together with the occupying German forces.
Such armed organisations included the armed national service, the armed party service, the Hungarist Legion, and the National Reckoning Organisation.

4. In addition to the above organisations, at the time of World War II and the German occupation in 1944, the Hungarian State had its own police, political armed forces and secret services just like after 1945.
Most of them had the same functions as the subsequent organisations, and they acted as political police and political armed forces.
Such organisations included the following: the Political Department of the Budapest Police Headquarters, the political investigation departments of the Gendarmerie, the military police, Department 2 of the General Staff Directorate, and the State Security Police, the so-called "Hungarian Gestapo".
However, the legislature has taken no account of those organisations and only used the vague term of membership in the Arrow-Cross Party.

5. Examining the situation before and after 1945, it becomes clear that both totalitarian despotic regimes applied the same methods in establishing and operating police, military and political repressive organisations that acted in the interest of some occupying force and whose social basis was in mass parties with various ideological backgrounds.

Neither moral, nor political aspects justify any constitutional differentiation between the two kinds of regimes. I hold that the group formation and the distinction made is arbitrary, and it can only be explained by a political compromise, which, however, the Constitutional Court should not necessarily respect.

The reasoning of the Decision is right in pointing out that the Constitutional Court has already established in several of its decisions that no reasonable distinction can be made between the Nazi and communist despotic regimes.
This has been the basis of treating equally the despotic symbols of the Nazi and the communist regimes, and of regarding compensation claims for the injuries caused by these regimes as ones that can be judged upon on the basis of the same criteria.

However, in the present case, with regard to the evaluation of the mass parties that used to operate the totalitarian regimes, the decision has failed to draw the right legal conclusion from the correctly presented arguments.

6. To sum up my opinion, I hold that the listing found under Section 1 of the Act is based on an arbitrary grouping without reasonable grounds, and it compares incomparable and inhomogeneous, i.e. heterogeneous groups of persons and activities. This results in a violation of the principle of equal rights and equal treatment on the basis of uniform standards, and thus it violates the prohibition of discrimination contained in Article 70/A para. (1) of the Constitution. At the same time, it gives preferential treatment to the members and officials of the communist party in comparison with those of the Arrow-Cross Party.

7. In view of the incomplete and inconsistent nature of the statutory regulation, I hold that the existence of an unconstitutional omission with regard to items a) to e) of Section 1 should have been established partly on the basis of the petition and partly acting *ex officio*, instead of the annulment of these provisions.

The legislature could have grouped the persons to be screened in two ways, had it applied the criteria for forming homogeneous groups on the basis of a uniform standard:
a) First, it could have stated that members of the Arrow-Cross Party and similar national socialist parties as well as the members of the communist "predecessor parties" may not hold the positions listed in Section 2. In that case, the comparison would have been made between political parties rather than between political parties and repressive organisations.

However, this solution would be unreasonable, as most members of the Arrow-Cross Party have already died, or they are so old that they are not in a position to play a role in public life, and mere membership in the former communist parties has no longer any relevance.

b) In the second case, the legislature should have treated in the same manner the holding of positions in certain the repressive organisations of former totalitarian despotic regimes. Thus, the basis of screening could have included the holding of positions in the fascist and communist secret police, political police, political armed forces and armed party militias – instead of membership in a party – together with acting as informers or agents.

As the legislature has failed to perform the above task, I hold that an unconstitutional omission of legislative duty has taken place.

Budapest, 2 June 2003

Dr. János Strausz
Judge of the Constitutional Court

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