Decision 37/2005 (X. 5.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking prior review of an Act passed by the Parliament but not yet promulgated, the Constitutional Court has adopted the following

decision:

The Constitutional Court establishes the unconstitutionality of Section 2 para. (1) and Section 8 of the Act on the Amendment of Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security, adopted at the session of the Parliament on 30 May 2005.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

1. At its session of 30 May 2005, the Parliament adopted with 194 votes in favour, 6 votes against and 129 abstentions Bill No. T/14230 (hereinafter: the Act) on the amendment of Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security (hereinafter: the AHA).
On 31 May 2005, the Speaker of the Parliament sent the Act to the President of the Republic for promulgation.
The President of the Republic did not sign the Act because of his concerns about the constitutionality thereof and – exercising the power vested in him by Article 26 para. (4) of the Constitution – initiated in his petition of 14 June 2005 prior constitutional review of the Act

under Section 1 item a), Section 21 para. (1) item b), and Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC).

In the opinion of the President of the Republic, Section 2 para. (1) – in the part establishing Section 5 para. (4) item c) of the AHA – and Section 8 – regarding the scope of persons defined in Section 5 para. (4) item c) of the AHA – of the Act sent to him for promulgation are unconstitutional.

2. As pointed out in the petition, it is an essential element of the Act sent for promulgation that the personal data necessary for identifying, and getting to know the operation of, operative contact persons, collaborators and professional employees whose personal files are managed by the Archives are removed from the scope of data subject to anonymization [the new Section 5 para. (4) item c) of the AHA under Section 2 para. (1) of the Act].
These data may be made public by anyone [Section 5 para. (5) as in force of the AHA]. According to Section 10/A of the AHA, as established in Section 8 of the Act, the Archives shall make accessible by anyone on its website all documents from which the data not subject to anonymization can be familiarized with.
Thus, the amendment would result in terminating the rights of operative contact persons, collaborators and professional employees whose personal files are handled by the Archives to the anonymized protection of their personal data and the data related to their operation, found in their personal files handled by the Archives and necessary for their identification. Those data can be familiarized with by anyone without restriction.

Both the regulations in force under the AHA – i.e. that a person under observation may get to know the data necessary for the identification of an operative contact person, a collaborator and a professional employee who can be brought into connection with him [Section 3 para. (2)] – and the intention of the Bill to make those data accessible to anyone in the future do restrict those persons' right to the protection of their personal data [Article 59 para. (1) of the Constitution].

Similarly, the same right is restricted by the provision in the AHA under which anyone may get to know and may make known the data which are necessary for the identification of the publicly

acting professional employee, the publicly acting operative contact person and the publicly acting collaborator [Section 5 para. (4) item c)].

One of the constitutional questions put forward in the present case is whether the constitutional requirements for restricting fundamental rights are met by those provisions of the Act that allow access by anyone to the personal and operative data of those operative contact persons, collaborators and professional employees whose personal files are handled by the Archives, regardless of whether or not those persons act publicly (Section 2 para. (1) and Section 8 of the Act regarding Section 5 para. (4) new item c) of the AHA).

According to the President of the Republic, Section 2 para. (1) and Section 8 would make the relevant data accessible to anyone without a constitutional reason, and therefore they are deemed to violate the right to the protection of personal data granted in Article 59 para. (1) of the Constitution.

In the opinion of the President of the Republic, it follows from Decision 60/1994 (XII. 24.) AB (ABH 1994, 342) that the data related to the activity of operative contact persons, collaborators and professional employees are personal data, and such data may only be disclosed as data of public interest when the persons concerned are acting in public. In all other cases, the personal data of the persons concerned are under protection by Article 59 para. (1) of the Constitution.

The President of the Republic holds that when adopting the Act, the legislature failed to define a constitutional objective the achievement of which would justify and make necessary the restriction of fundamental rights resulting from full disclosure. As under Section 3 para. (2) of the AHA in force, the persons under observation may get to know the data necessary for the identification of operative contact persons, collaborators and professional employees who can be brought into connection with them, and the full disclosure of such personal data is not necessary for the enforcement of the right to informational self-determination (and “informational compensation”).

However, it is constitutionally unacceptable to justify the restriction of a fundamental right with the legislature's intention to prevent a casual unlawful disclosure of personal and other data related to the agents' activities by allowing the public disclosure of all personal data of that kind.

As mentioned by the President of the Republic, the uniform handling of the persons listed under the new Section 5 para. (4) item c) of the Act may, in respect of the disclosure of their data, raise constitutional concerns as professional employees (hiring agents and contact officials) and collaborators (hired agents) played significantly different roles in the operation and the activities of the secret services. For this reason, the President of the Republic has asked the Constitutional Court to complete separate constitutional reviews concerning the individual scopes of persons listed under the new Section 5 para. (4) item c) of the Act.

3. The President of the Republic holds that Section 2 para. (1) – in the part establishing Section 5 para. (4) item c) of the AHA – and Section 8 – in the part establishing Section 10/A of the AHA referring to the scope of persons defined in Section 5 para. (4) item c) of the AHA – of the Act are also in violation of the right to legal remedies granted in Article 57 para. (5) of the Constitution.

Under Article 57 para. (5) of the Constitution, in the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions which infringe on his rights or justified interests. The above provision requires opening the way for legal remedies against "other official decisions" as well, and the President of the Republic holds this rule to be applicable regardless of whether or not the State agency concerned is a public administration organ. Consequently, if a State agency is authorized under a statutory regulation to pass an individual decision of public law character, affecting the subjects of private law, Article 57 para. (5) of the Constitution requires the securing of legal remedies. This rule is to be followed in particular when the individual decision pertains to a condition of life bearing an importance in respect of any fundamental right, and the violation of the interests caused by the decision may be a significant one.
As established by the Constitutional Court in its aforementioned Decision in the above sense, the Act of Parliament under review can only be considered constitutional when "the disclosure of the

data of public interest is preceded by a procedure that guarantees the reliability of the data. Accordingly, the application of the rules of public administration procedure to the committee and the judicial way are preconditions for the constitutionality of the Act of Parliament." As also pointed out in the Constitutional Court Decision, the question of the completeness and the reliability of the data handled by the various security services can raise serious constitutional concerns provided that the Parliament decides to disclose the full set of data, including the identity of all collaborators. However, in the case of an incomplete disclosure, the reliability of the data is of great importance with primary respect to the fact that they might contain manipulated data and names, especially ones subsequently inserted, and the procedure determined in the Act should provide for adequate guarantees against the disclosure of such data and names.

Section 2 para. (1) and Section 8 of the Act are practically aimed at complete disclosure, at least in respect of the data necessary for the identification of the persons – including their related activities – listed in the new Section 5 para. (4) item c) of the AHA. Not only the protection of personal data, but also the reputation of the persons concerned [Article 59 para. (1) of the Constitution] are directly affected by this provision. Therefore, it is constitutionally required to have a procedure guaranteeing the reliability of the data performed prior to the public disclosure of the data. Accordingly, the public administration procedure and the judicial way are preconditions for the disclosure. The Act and the AHA do not contain such rules on guaranteeing legal remedies.

In many cases, the use of posterior legal remedies, although it can be an important tool, would not allow effective reparation of the fundamental right impaired. Indeed, in line with the practice of the Constitutional Court, the legal remedy must affect the merits of the case and it should be effective.

Excluding the effective way of prior legal remedy can be considered neither unavoidable, nor proportionate. In view of the above – so the President of the Republic holds – Section 2 para. (1) and Section 8 of the AHA violate Article 57 para. (5) of the Constitution, due to their failure to grant preventive and effective legal remedies for the persons concerned.

II

1. Pursuant to the provisions of the Constitution:

"Section 57 (5) (...) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. An Act of Parliament passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time. (...)

Article 59 (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. The rules the Act challenged by the petition of the President of the Republic provide for the following:

"Section 2 (1) The following provision shall replace Section 5 para. (4) item c) of the AHA, the following new item d) shall be added to the same paragraph, and at the same time the marking of the present item d) shall be changed to item e):

"(No anonymization shall be required for)

(c) the family name and the first name or names, the date and the place of birth, the place of work, the job, the date of hiring or entering employment, the name, rank and qualification of the hiring person, the basis of hiring or employment, the line of employment, the cover name or number, and – in the case of women – the maiden family name and the first name or names of the operative contact person, the collaborator and the professional employee whose personal files are handled by the Archives,

d) the family name and the first name or names and the position of the persons acting in his/her scope of competence during a judicial, public administration or other official procedure, or as the official of the Hungarian Workers' Party or the Hungarian Socialist Workers' Party;"(...)

Section 8 The following Section 10/A shall be added to the AHA:

"Section 10/A (1) The following documents shall be made accessible to anyone on the website of the Archives – without restriction in the respect of the documents handled by the Archives:
(a) the digitalized copies of the register books of the organs specified in Section 1 and the operative officers' own operative diaries,
(a) the digitalized copies of the so-called files No. 6 from the collaborative registries of the organs specified in Section 1, in the case when the so-called hiring dossier (Dossier 'B') of the person concerned or his/her so-called operative dossier (Dossier 'M') can be found in any of the register books handled by the Archives,
(c) the orders on appointing 'T' officers and 'SZT' officers from the file registry of the Human Resources Department of the Ministry of Interior.

(2) The digitalized copy of any document copied by the Archives for the purpose of providing information under Section 5 of the present Act shall be made accessible to anyone on the website of the Archives.

(3) The digitalized copy of the documents handled by the Archives shall be made accessible without restriction to anyone on the website of the Archives. The timing of the disclosure shall be determined by the Body – upon the performance of disclosure under paragraph (1).

(4) Personal data pertaining to persons under observation and third parties may only be made accessible by anyone upon obtaining the explicit approval of the person under observation or the third parties concerned.

(5) The provisions of Section 5 shall be applicable in the case of making the copies specified in the present Section."

III

1. From the aspect of constitutionality, precedents of the present case can be found in the Constitutional Court decisions on the posterior constitutional review of certain provisions of (the amended) Act XXIII of 1994 on Checking Persons Holding Certain Key Positions (hereinafter: the CA).
Several decisions of the Constitutional Court are related to the examination of the CA, such as Decision 60/1994 (XII. 24.) AB (CCDec.1) and Decision 23/1999 (IV. 30.) AB (CCDec.2).

The original basic concept of the MA was to order the obligatory monitoring of certain state officials and persons holding other key positions if they were, before the formation of the state under the rule of law, engaged in state security operations (to fight “internal reaction”), if they received data from state security organs for their own decision-making, and if they had been members of paramilitary forces or the Arrow Cross Party. If in the course of such check-ups, any of above facts was revealed about someone, the relevant results had to be disclosed save for the case the checked person had already resigned from the position concerned. Accordingly, certain data of the checked person were classified by the CA as ones of public interest in a function of his/her participation in public politics and involvement in forming public opinion.

According to CCDec.1, the most important issue surrounding the constitutional review of the CA may be approached in two ways, depending on whether the starting point is the freedom of information or the disclosure of personal records in public interest. The records kept by the oft-cited Department III/III of the Interior Ministry's state security apparatus and in part the records of the other secret services, by their very nature, contradict in view of their aims, contents, and secrecy not only every principle of a state under the rule of law but also the Constitution in its particulars as well. So what can justify maintaining their secrecy in a State under the rule of law, and how can such records be disclosed in such a way that the individual rights of those who enjoy the constitutional defence of these rights are not violated? As these questions bear upon the position of all the secret service records established and maintained contrary to the Constitution,

the Constitutional Court extended its review to the constitutionality of the subsequent situation of those records.

However, according to CCDec.1, both approaches lead to the same decisive question. What information kept on record in public interest may nonetheless be treated as private, and what personal information may be classified as "being of public interest."? As established in the decision, the termination of the secrecy of the records affected by the CA does not entail that the data contained in the records should be made accessible by anyone, i.e. the data do not automatically become data of public interest. The mere fact of terminating secrecy has the consequence that all persons concerned may enforce their rights to informational self-determination [Article 59 para. (1) of the Constitution], i.e. they may get to know and dispose over their own personal data. However, as established by CCDec.1 in all other respects, it is the State or public function fulfilled by the persons to be screened that makes their data being of public interest within the meaning of Article 61 para. (1) of the Constitution. Consequently, in its decision, the Constitutional Court used the term "data of public interest" with reference to Article 61 para. (1) of the Constitution, and not in the sense defined in Section 2 item 3 of Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (hereinafter: the DPA) and regulated in Section 19 para. (3) of the DPA. As explained in CCDec.1, public interest alone does not justify the restriction of a fundamental right – save when expressly allowed by the Constitution itself, such as in the case of expropriation. [c.p. Decision 64/1993 (XII. 22.) AB, ABH 1993, 373, 381] There was an explicit intention in the decision on the personal identification number to prevent the derogation of data protection merely on the basis of public interest [Decision 15/1991 (IV. 13.) AB, ABH 1991, 40, 42]. This constitutional requirement is applicable to any Act of Parliament – such as the CA – ordering the disclosure of personal data independently from the DPA. As established in CCDec.1, the evaluation of the case therefore depends on the identification of the fundamental right or the constitutional principle necessitating the disclosure of personal data, as well as on the examination of proportionality concerning the objectives and the mutual restriction of the fundamental rights to the freedom of information and data protection.

Although CCDec.1 established in many respects the unconstitutionality of the statute in question, it did, in fact, reject the petitions as for their main concern. In addition, it extended the basic

concept of the CA, as detailed above, by raising the issue of the need to generally settle the legal situation of unconstitutional registries and the data contained therein, and – establishing the existence of an omission causing an unconstitutional situation – it called upon the legislature to secure the right to informational self-determination for both the persons under observation and the agents.

Act LXVII of 1996 subsequently amending the CA tried to comply with the above decision of the Constitutional Court. Its provisions focused – in addition to refining some procedural and technical rules – on defining the scope of persons to be checked and securing the exercise of the right to informational self-determination. For the latter purpose, the CA established a new institution called the Historical Archive Office (HAO) as a special archive.

The Historical Archives of the Hungarian State Security (hereinafter: the Archives) was established by the AHA, taking effect on 22 January 2003, as the legal successor of the Historical Archive Office. According to the AHA, the Archives is a public archives operating as a specialized archives of the State. The competence of the Archives includes the documents specified in the Act. The special rules on the operation of, and the duties to be fulfilled by, the Archives are laid down in the AHA.

Under Section 1 para. (1) of the AHA:

"The effect of the Act shall cover the documents and data which were produced at and belonged to the archival materials of, in connection with the operation of the Hungarian State organs performing state security activities between 21 December 1944 and 14 February 1990,

a) the Office Division III of the Ministry of the Interior, its territorial and local organs, as well as their predecessors (the Political Security Departments of the police headquarters in Budapest and the countryside of the Hungarian State Police and the operative groups of the Economic Security Departments, the State Security Department of the Hungarian State Police, the State Security Authority of the Ministry of the Interior, the State Security Authority, the organizational units of the Ministry of the Interior having performed state security tasks between 1953 and 1956, the Political Investigation Division of the Ministry of the Interior), the Reconnaissance Department of the Border Guards of the Ministry of the Interior, as well as the Military Political Department of the Ministry of Defence, the Military Political Office Group of the Ministry of Defence, the Military Intelligence Office Division of the Ministry of Defence, the Office Division IV of the Ministry of Defence, the Office Division 2 of the General Staff of the Hungarian People's Army,

the Foreign Affairs Department of the Ministry of the Interior, the Department for International Relations of the Ministry of the Interior, the Internal Security Department of the Ministry of the Interior, the State Security Operative Registration Department of the Ministry of the Interior or
b) the Personnel Division of the Ministry of the Interior in connection with the employees of the Office Division III of the Ministry of the Interior, as well as with its "secret" and "strictly secret" staff members,
c) and the committee controlling certain persons performing important, public confidence and public opinion forming positions."

2. As pointed out in the reasoning attached to the draft of Act LXVI of 1995 on Public Records, Public Archives, and the Protection of Public Archives, the archives financed from the taxpayers' money in the various countries have the general duty to primary safeguard those documents belonging to the archives of the organs performing public authority or exercising public duties (collectively referred to as "public documents"), and to disclose such documents to the researchers which are not necessary any more for the operation of the organ that established the archives, although the data contained in the document may serve as a primary source for historical science, or which are indispensable for maintaining the continuity of the State or securing the protection of the citizens.
Most of the Western European States adopted new laws on the archives in accordance with their laws on the freedom of information and the protection of personal data. Typically, all of those laws determine – among others – the scope of the archives under the obligation of archiving as well as the archives being competent to take over the documents to be preserved for the purpose of protecting the public documents and securing their usability, and they also provide a definition for what a document is in the above context, including all data and information recorded on any medium; and they regulate the use of public documents preserved in the archives under the principle that the publicity of public documents may only be restricted – for a definite period of time – on the ground of protecting the interests of the citizens and the State.

In the above way of regulation, there are different provisions on the research of, and access to, the documents by scientific researchers, and on access by anyone; another difference can be observed in respect of archival materials that do or do not contain personal data. As the main rule,

the time limit for research is thirty years, as generally applied in the European legal practice, too: anyone can perform research in archival materials after thirty years upon the date of the document concerned. As a special deadline for research, in general, the archival materials containing personal data shall open for research by anyone upon the expiry of 30 years after the decease of the person concerned.

In the present case, it is unnecessary to examine the constitutional requirements related to scientific research in public archives, as the challenged regulations of the Act – with regard to their essential contents – are about getting to know and making public by "anyone".

3. Under Section 5 para. (1) as in force of the AHA, anybody may get to know and may make known in an anonymized form the data controlled in the Archives. However, no anonymization shall be required – among others – for data which are necessary for the identification of the publicly acting professional employee, the publicly acting operative contact person and the publicly acting collaborator [Section 5 para. (4) item c)].
In addition to the above, a person under observation, a third party, a professional employee, an operative contact person, and a collaborator may get to know and may make known the personal data included in a document managed in the Archives which can be brought into connection exclusively with him [Section 3 para. (1)].
Moreover, a person under observation may get to know the data necessary for the identification of a professional employee, an operative contact person, and a collaborator who can be brought into connection with him [Section 3 para. (2)].
Finally, under Section 3 para. (3), a person under observation and a third party may get to know – and with the consent of the third party or the person under observation – he may make known the data recording or describing the personal contacts established between the person under observation and the third party (e.g. data gathered during personal meetings or conversations).
The aims of the above provisions in force are to grant the right to informational self-determination of the persons concerned, to enforce the constitutional right to have access to data of public interest, and to create an adequate balance between the freedom of information and the protection of personal data.

This structure of document disclosure, based on gradation, is transformed by the Act. It is an essential element of the amendment that the personal data necessary for identifying, and getting to know the operation of, operative contact persons, collaborators and professional employees whose personal files are handled by the Archives are removed from the scope of data subject to anonymization [the new Section 5 para. (4) item c) of the AHA under Section 2 para. (1) of the Act].
Anyone may disclose the above data [Section 5 para. (5) as in force of the AHA]; and according to Section 10/A of the AHA, as established in Section 8 of the Act, the Archives shall make accessible by anyone on its website all documents from which the data not subject to anonymization can be familiarized with.

The amendment would result in terminating the rights of operative contact persons, collaborators and professional employees whose personal files are handled by the Archives to the anonymized protection of their personal data and the data related to their operation, found in their personal files handled by the Archives and necessary for their identification, regardless of when the documents were produced, whether the person concerned is alive or not, or how much time has passed since his/her decease.
The Act contains no balancing at all between the freedom of information and the protection of personal data. It grants one-sided, unconditional and unrestricted priority to the enforcement of the constitutional right of access to the data.

The restriction of the right to the protection of personal data may be justified by the observed persons' right to informational self-determination (and "informational compensation"), as well as by the requirement specified in CCDec.1, stating that the publicly acting persons' data which reveal that these persons at one time pursued activities contrary to the principles of the rule of law, or belonged to state organs which at one time pursued activities contrary to the same principles, count as information of public interest under Article 61 of the Constitution.

However, it follows from CCDec.1 that the data related to the activity of operative contact persons, collaborators and professional employees are personal data and such data may only be disclosed as data of public interest when the persons concerned are acting in public. In all other

cases, the personal data of the persons concerned are under the protection of Article 59 para. (1) of the Constitution.

The Constitutional Court has – since the beginning of its operation – interpreted the right to the protection of personal data, having regard to its active aspect as well, as a right to informational self-determination rather than as a traditional protective right [Decision 20/1990 (X. 4.) AB, ABH 1990, 69, for the first time explicitly in: Decision 15/1991 (IV. 13.) AB, ABH 1991, 40, 41]

There is no constitutional objective the achievement of which would justify and make necessary the restriction of fundamental rights resulting from full disclosure. As under Section 3 para. (2) of the AHA in force, the persons under observation may get to know the data necessary for the identification of operative contact persons, collaborators and professional employees who can be brought into connection with them, the full disclosure of such personal data is not necessary for the enforcement of the right to informational self-determination (and "informational compensation").

The mere informational interest is, in itself, not sufficient for restricting the right to the protection of personal data as provided for in the challenged provisions of the Act.
It is unacceptable to justify the restriction of a fundamental right with the legislature's intention to prevent the casual unlawful disclosure of personal and other data related to the agents' activities by allowing the public disclosure of all personal data of that kind. As established in CCDec.1, public interest in itself, or legal policy aims such as "familiarization with the activities of the state security services of the past regime" (preamble of the AHA) are not sufficient for disclosing personal data. Indeed, the public identification of professional employees, collaborators (agents) etc., and the disclosure of the materials documenting their activities are not sufficient for "familiarization with the activities of the state security services of the past regime". Despite the importance of the state security organs in the party-state, their documents and data may only be used as a basic source of "exploring the past" upon sound professional criticism of the sources and by comparing them to further data found elsewhere, and the constitutionality of the restriction on personality rights is conditional upon having such data quality.

Based on the above, it is established that Section 2 para. (1) and Section 8 – regarding the scope of persons defined in Section 5 para. (4) item c) of the AHA – of the Act violate Article 59 para. (1) of the Constitution. On establishing a violation of the right to the protection of personal data, there was no need for further examination about the constitutionality of the uniform treatment of the persons listed under the new Section 5 para. (4) item c) in the Act.

4. According to Article 57 para. (5) of the Constitution, legal remedies are needed "against judicial, public administration and other decisions by the authorities".

The subject of the fundamental right to legal remedies covers decisions by the authorities. This right is not applicable in the case of decisions made not by the State but, for instance, by the employer (Decision 1129/B/1992 AB, ABH 1993, 604, 605), or the owner (Decision 1534/B/1990 AB, ABH 1991, 602, 603), or in the case of State decisions made outside the scope of authorities, such as decisions by military superiors [Decision 485/B/1992 AB, ABH 1992, 611, 613; Decision 578/B/1992 AB, ABH 1993, 590, 591; Decision 57/1993 (X. 25.) AB, ABH 1993, 349, 351] The question of whether or not a decision by a State body or a non-governmental organ qualifies as a public authority decision for the purposes of Article 57 para. (5) of the Constitution can only be judged upon with due respect to the actual regulatory environment.

As established in CCDec.1, one of the general questions about the constitutionality of the CA was whether the incompleteness and the unreliability of the data specified in the CA and the implementation of the law based on the above could lead to an unconstitutional discrimination; and according to CCDec.1, the other aspect of the same constitutional problem is that the CA was only considered constitutional when "the disclosure of the data of public interest is preceded by a procedure that guarantees the reliability of the data. Accordingly, the application of the rules of public administration procedure to the [screening] committee and the judicial way are preconditions for the constitutionality of the CA."

According to the petition of the President of the Republic, "Section 8 of the Act – regarding the scope of persons defined in Section 5 para. (4) item c) of the AHA – is unconstitutional."

Section 8 of the Act introduces a new Section 10/A into the Act on the Archives. These provisions contain obligations for the Archives. One of the rules provide that "the digitalized copy of any document copied by the Archives for the purpose of providing information under Section 5 of the present Act shall be made accessible by anyone on the website of the Archives."

The Act provides for the duty and the competence of the Archives, which are to be performed by the Archives.
By adopting a decision on granting access, the Archives performs a public authority activity under the Act when deciding – on the basis of predefined criteria – upon the mandatory disclosure of data related to natural persons.
The above part of the activity of the Archives is a public authority activity: on the basis of the new Section 10/A of the Act, the Archives applies the law with a decision-making power. Procedure and decision-making by the Archive under the new Section 10/A of the Act are considered public administration activities.

Accordingly, granting access as specified in Section 8 of the Act is only considered constitutional in light of Article 57 para. (5) of the Constitution if granting access to personal data on the website of the Archives is preceded by a procedure securing – with adequate procedural guarantees – their reliability.

5. Section 2 para. (1) of the Act – in the part establishing Section 5 para. (4) item c) of the AHA – allows familiarization with certain personal data by anyone on request.

Section 2 para. (1) of the Act does not provide for an obligation of disclosure by the Archives; it allows research in, and gathering data from, the archival materials for the purpose of scientific research or for another objective. In the above cases, the Archives grants continuous access to the documents open for research or allowed to be accessed by anyone – without a need to make a decision about the personal data contained in the material concerned.

This part of the Act allows an unrestricted research of the documents in the Archives – not only in the framework of scientific research. This challenged provision of the Act merely allows that

others may use those documents in the Archives which are handled by the Archives. Such use is independent from the fact whether the document or the data contained therein are fake or forged, or whether the content is true or false. Neither the decisions made by the Archives in the scope of its services, nor the decisions made by the person performing research qualify as public authority decisions for the purposes of Article 57 para. (5) of the Constitution.

As the right to legal remedies only pertains to public authority decisions, the statutory provisions on performing research in the archival materials are not related to the fundamental right to legal remedies. Not the right to legal remedies but the right to the protection of personal data is deemed to be violated by a law which allows research in the materials containing personal data as well, without an adequate protection of personal data – e.g. an adequate period of protection, statement of consent, anonymizing, or other guarantee – regardless of whether the data are true or false, and whether or not they are disclosed by the person performing research or by any other party.

Section 2 para. (1) of the Act does not violate Article 57 para. (5) of the Constitution.

6. The Constitutional Court has published this Decision in the Official Gazette (*Magyar Közlöny*) in view of the establishment of unconstitutionality.

Budapest, 4 October 2005.

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court, Rapporteur

Constitutional Court file number: 563/A/2005
Published in the Official Gazette (*Magyar Közlöny*) MK 2005/132