DECISION 13/2001 (V. 14.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a motion submitted by the President of the Republic concerning the preliminary constitutional review of certain provisions of an Act of Parliament adopted and not yet promulgated, the Constitutional Court – with concurrent reasoning by dr. István Kukorelli, Judge of the Constitutional Court – has adopted the following

decision:

Having regard to Section 37/B para. (1), Section 118 para. (6), and the reference to Section 37/B in Section 122 para. (3) of Law-Decree 11/1979 on the Execution of Punishments and Criminal Measures as introduced by Section 1 and Section 2, and amended by Section 3 para. (2), respectively, of the Act of Parliament adopted by the Parliament at its session of 5 December 2000, the Constitutional Court establishes the following: it is unconstitutional to restrict – for protecting public safety or the reputation or inherent rights of others, or for preventing crime or the disclosure of an official secret or other confidential data – the right of the convict, the person in pre-trial detention, or the perpetrator in detention to make a statement in the press.

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

Reasoning

I

1. At its session of 5 December 2000, the Parliament adopted an Act on the amendment of Law-Decree 11/1979 on the Execution of Punishments and Criminal Measures (hereinafter: the LDP). The relevant provisions of the Act of Parliament as adopted (hereinafter: the LDPA) amend the LDP by introducing rules on “making a statement in the press” by the convict kept in detention in a penal institution or by a person in pre-trial detention, and the new rules on the convict also apply to perpetrators in detention.

The President of the Republic did not sign the Act because of his concerns about the constitutionality of restricting the freedom of expression and the freedom of the press and – acting within the powers vested on him in Article 26 para. (4) of the Constitution – initiated in his motion of 21 December 2000 the preliminary constitutional review of the relevant provisions of the LDPA on the basis of Section 1 item a), Section 21 para. (1) item b), and Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: ACC).

2. The regulations in force concerning the exercise of the right of free expression of the convict, the person in pre-trial detention, or the perpetrator in detention (hereinafter jointly: the person in detention) are the following:

Chapter IV of the LDP covers the execution of the deprivation of liberty, while Title III thereof covers the convict's rights and obligations. According to the provisions in effect relevant for the freedom of expression:

"Section 19 The aim of executing the deprivation of liberty is to enforce the deprivation of rights specified in the present Act for the purpose of supporting the convict's integration into society after his release, and to prevent him of committing another criminal offence."

"Section 32 During implementation of the deprivation of liberty the convict shall lose his personal liberty; his civil rights and obligations shall be suspended or restricted as ordered in the court's judgement or provided by the law."

"Section 36 para. (1) The convict shall be entitled to

[...]

b) exchange letters with his relatives and other persons chosen by him and approved by the penal institution, without any restriction concerning the size of the letters and the frequency of their sending;

c) receive guests at least once a month; if it is necessary from the aspect of the security of the penal institution, the convict may talk to his visitor through the rails;

[...]

g) put forward a notice of public interest, complaint, request or legal representation in the penal institution and to an organisation independent from the penal system;"

"(5) The civil rights of the convict shall be restricted as follows:

a) his right to have access to data of public interest and to disseminate them shall not endanger the order and the security of the penal institution;

[...]

c) he may express his opinion in a form not disturbing the order and the security of the penal institution; if his opinion intended to be made public violates the order and the security of the penal institution, the document containing such opinion shall be confiscated;

d) his correspondence – with the exception of letters sent to the authorities and to international organisations – shall be subject to control with regard to the security of the penal institution, and the convict shall be informed on the possibility of such control;

e) the convict shall be entitled to use a telephone according to the facilities of the penal institution, telephone conversations may be subject to control, and the convict shall be informed on the possibility of such control;"

Chapter X of the LDP contains the following rules – relevant in the present case – in the scope of executing pre-trial detention:

"Section 118 para. (1) The person in pre-trial detention

[...]

d) may exchange letters with his relatives and – upon the approval of the public prosecutor or the court after the pressing of charges – with other persons, he may receive a visitor at least once a month and may receive a parcel,

[...]

h) may put forward a complaint or a request,

[...]

(2) The right of correspondence and the right of receiving visitors of the person in pre-trial detention may be restricted – with the exception of contacting his defence counsel – […] with the purpose of facilitating the success of the criminal procedure."

Detention applicable for an administrative infraction shall be executed on the basis of the rules specified in Chapter XI of the LDP:

"Section 122 para. (3) Detention shall be executed with the application of the provisions […] under […] Section 36 para. (1) items a)-b) […], and the perpetrator in detention shall enjoy the convict's rights as appropriate."

"Section 124 para. (2) The perpetrator

[...]

b) may exchange letters with his relatives and – upon the approval of the penal institution – with other persons chosen by him,

c) may receive a visitor on one occasion,

[...]

g) may put forward a complaint, a request or may make a legal representation.”

3. The motion submitted by the President of the Republic is related to the following provisions of the LDPA:

“Section 1 The following Sections 37/B and 37/C shall be added to Law-Decree 11/1979 on the Execution of Punishments and Criminal Measures (hereinafter: the LDP):

“Section 37/B para. (1) The convict may be restricted in making a statement in the press on the grounds of protecting national security, public safety, the reputation or inherent rights of others, the prevention of crime, the prevention of disclosing state secrets, official secrets or other confidential data, or for the purposes of securing the order and the safety of the penal institution.

(2) Any document or recording of sound or image containing the statement made by the convict (hereinafter: material to be published) may only be made public upon the approval of the national commander or a person designated by him (hereinafter: the commander). Granting such approval may be refused on the grounds of an alleged violation or endangering of any of the interests specified in paragraph (1). The refusal shall be incorporated in a reasoned written resolution. In this case, the material to be published shall be withheld. The commander shall decide within 3 days on granting or refusing the approval, and the approval shall be deemed granted upon the expiry of the above deadline.

Section 37/C para. (1) The convict or a representative of the press may appeal against the decision on refusing the publication within 3 days of receiving the decision at a local court operating in the seat of the county court that has jurisdiction over the place of service of the commander in charge of the decision.

(2) The court shall decide in a civil non-litigious procedure within 3 days of receiving the request, upon hearing the parties if necessary; the court may sustain the commander’s decision or grant the approval. Such proceedings shall be exempt from charges. There shall be no appeal against the court’s decision.”

Section 2 The following paragraph (6) shall be added to Section 118 of the LDP:

“(6) The provisions of Section 37/B shall be applicable to the right of the person in pre-trial detention to make a statement in the press, with the following derogation: making a statement and publishing the material to be published shall be conditional upon the approval of the public prosecutor or of the court after pressing the charges (Section 116 para. (1)).

Before passing a resolution, the public prosecutor or the court shall obtain the opinion of the penal institution or of the commander in charge of the custody in any question related to the order and security of the police or military detention facility. If the public prosecutor refuses to grant the approval or fails to pass a decision within 3 days, the claimant may appeal to the court. The provisions of Section 37/C shall apply appropriately to the court procedure."

Section 3

(1) [...]

(2) Section 122 para. (3) of the LDP shall be replaced by the following provision:

"(3) The provisions under […] Section 36 para. (1) […] items b), d)-o), […] para. (5) […], Sections 37/B and 37/C […] shall apply to the execution of the detention."

Section 4 para. (1) Section 124 para. (2) item *c)* of the LDP shall be replaced by the following provision:

(The perpetrator)

"c) may receive a visitor at least once a month,"

(2) [...]

Section 5 [...]

Section 6 This Act shall enter into force on the 15th day of the second month after its promulgation. At the same time, Section 36 para. (5) item c) and Section 124 […] para. (2) items f) and g) shall cease to be in force."

4. In his motion the President of the Republic argued that the provisions in Sections 1 and 2 as well as in Section 3 para. (2) of the LDPA "provide for preliminary censorship", and thus they restrict the freedom of expression guaranteed in Article 61 para. (1) and the freedom of the press guaranteed in Article 61 para. (2) of the Constitution. In his opinion, Section 37/B para. (1) of the LDP specified in Section 1 of the LDPA, and Section 118 para. (6) of the LDP specified in Section 2 of the LDPA, as well as the reference to Section 37/B in Section 122 para. (3) of the LDP specified in Section 3 para. (2) of the LDPA are unconstitutional by allowing for the refusal of approving the publication of a statement on grounds other than the order and security of the penal institution or the police or military detention facility.

In the opinion of the President of the Republic, the restriction is unnecessary – and consequently disproportionate – for preventing the publication of "other confidential data", as in such a case there is no protection or enforcement of another fundamental right or other constitutional interest justifying the restriction of the freedom of expression or the freedom of the press. In addition, the term "other confidential data" is a collective concept unknown in the Hungarian legal system, and thus it practically ensures unlimited discretionary powers for the authorities in charge of decision-making.

Although the President of the Republic does not consider the other grounds of restriction listed in the newly introduced Section 37/B para. (1) of the LDP to be unnecessary, he argues that "restricting the freedom of expression and the freedom of the press by way of preliminary censorship on grounds other than the order and security of the penal institution is disproportionate and therefore unconstitutional." As far as persons in detention are concerned, he sees no ground for "the legislature allowing – beyond the general rules – the restriction of the freedom of expression and the freedom of the press merely because the statement of a person in detention is at stake."

Finally, the motion calls one's attention to the fact that the challenged rules are not fully suited to achieve the desired objective, namely the prevention of disclosing certain data. This is because the new provision under Section 37/B para. (1) of the LDP refers to communication "through the press" rather than "in a press product".

5. During the procedure, the Constitutional Court obtained the opinion of the Minister of Justice as well.

II

In respect of the motion submitted by the President of the Republic, the Constitutional Court took note of the following statutory provisions as well:

1. The provisions of the Constitution:

Article 2 para. (1) The Republic of Hungary is a [...] democratic state under the rule of law.

[...]

(3) No activity of any social organisation, State authority or citizen may be directed at the forcible acquisition or exercise of public power, or at the exclusive possession of such

power. Everyone shall have the right and obligation to resist such activities in such ways as permitted by law."

"Article 5 The State of the Republic of Hungary shall defend the freedom and sovereignty of the people, the independence and territorial integrity of the country, and its national borders as established in international treaties."

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

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

"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."

2. The provisions of Act II of 1986 on the Press (hereinafter: the AP):

Preamble: "The Constitution of the Republic of Hungary guarantees the freedom of the press. Everyone has the right to express his views and publish his works in the press, provided that they do not violate the constitutional order of the Republic of Hungary."

"Section 2 para. (1) Everyone in the Republic of Hungary has the right to be informed on the questions related to his close environment, homeland and the world. The task of the press – in harmony with other tools of communication – is to provide authentic, accurate and swift information.

[...]

(3) The press shall be responsible for facilitating the understanding of the interrelations between social phenomena."

"Section 3 para. (1) Exercising the freedom of the press may not constitute a criminal offence or a call for perpetrating such offence, and it may not violate public morals and the inherent rights of others."

[in force up to 31/10/1997] „Section 15 para. (3) On the initiative of the public prosecutor the court shall prohibit the publishing of a press product or a document not qualified as such if it violates Section 3 para. (1) or Section 12 para. (2). The public prosecutor may without delay suspend the publication of such press products or documents.

The public prosecutor's resolution on the suspension of publication shall cease to have force upon the court's decision on the merits gaining final power."

„Section 20 For the purposes of this Act:

a) press: periodical papers, broadcast providers as defined in the Act on Radio and Television, and news agencies;

b) press product: the single volumes of periodical papers, radio and television programmes, books, leaflets, and other publications with text – with the exception of bank notes and securities – publications containing musical works, graphics, drawings or photographs, maps, film tapes, video cassettes, video discs, sound tapes and sound records intended for public use, as well as any other technical tool intended for public use, containing information or a programme;

c) [...]

d) publishing: selling, dispatching, delivering, business-like lending, free distribution, public performance, broadcasting or wired distribution of a press product;

e) 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;

f) periodical paper: a daily paper, periodical journal or other periodical as well as the annex of the foregoing which is published at least once in a calendar year with the same title and subject, having an indication of the year, the volume and the date, publishing – either as the author's original work or as translation – written works in the field of journalism, literature or science (news, reports, articles, interviews, studies, poems, short stories, etc.), photographs, graphics, cartoons or puzzles."

3. Minister of Justice and Minister of Interior Joint Decree 10/1986 (IX.1.) IM-BM on the Provision of Information on Criminal and Justice Matters:

"Section 6 The journalist may only hold a conversation with the defendant in pre-trial detention upon the approval of, and under the supervision specified by, the representative in charge of the provision of information of the investigation authority or of the public prosecutor's office. During the conversation, photos, television, film or sound recordings (hereinafter: recordings) may only be taken upon the approval of the person in charge. Recordings may only be made public upon the approval of the defendant – save in the case specified under Section 80 para. (3) of the Civil Code."

“Section 11 para. (1) At the court hearing, recordings may only be taken upon the approval of the president of the board in charge. The approval may only be granted – save in the case specified under Section 80 para. (3) of the Civil Code – if the persons appearing on the recording and the persons participating in the proceedings approve the publication of the recording.

(2) Taking recordings without the approval of the person affected shall only be allowed in the case specified in Section 80 para. (3) of the Civil Code, upon the approval of the president of the board in charge.”

“Section 12 Holding a conversation with a person under a punishment of imprisonment or detention in a penal institution or with a person in strict custody as well as recording the conversation shall be approved by the national commander of penal institutions in consultation with the head of the Scientific and Information Department of the Ministry of Justice. The provisions of Section 11 paras (1)-(2) shall apply appropriately to the process of approval.”

4. Act IV of 1978 on the Criminal Code (the CC):

“Section 41 para. (1) The imprisonment shall be executed in a penal institution, in the degrees of penitentiary, prison or jail.

(2) The order of executing imprisonment, as well as the obligations and rights of the convict shall be defined in a specific statute.

(3) During the execution of imprisonment, the rights and obligations following from the citizenship of the convict which are contrary to the aim of the punishment, and particularly those which are covered by the prohibition from public affairs, shall be suspended.

„Section 137 For the purposes of this Act [...]

12. broad publicity shall mean, among others, when a crime is committed through publication in the press, another mass media or by reproduction, or by the publication of electronic information in a telecommunications network,”

III

The practices of the Constitutional Court, the European Court of Human Rights and the former European Commission of Human Rights have been emphasized in the reasoning of the Bill of the LDPA, in the parliamentary debate, in the motion submitted by the President of

the Republic, and in the statement of the Minister of Justice. When assessing the constitutionality of the regulations challenged in the motion, the Constitutional Court surveyed its own guiding decisions and the relevant decisions of the bodies in Strasbourg.

1. The Constitutional Court has not yet examined on the merits the constitutionality of any statute expressly related to the freedom of expression of persons in detention. However, many of its decisions have dealt with issues of constitutionality concerning the freedom of publication, and in particular the freedom of the press on the one hand and, on the other hand, with the rights and obligations of the State originating from its punitive power. The essence of the decisions relevant to the present case is summed up in the following:

1.1. So far, the decisions of the Constitutional Court concerned, in relation to establishing criminal offences, the question of the constitutionality of statutes – within the system of criminal liability – that restrict the freedom of expression and the freedom of the press. The Constitutional Court elaborated the constitutional limits upon the criminal law restrictions of the freedom of expression basically in Decision 30/1992 (V. 26.) AB (ABH 1992, 167) and Decision 36/1994 (VI. 24.) AB (ABH 1994, 219). The principles established in the foregoing decisions were applied in further decisions of the same subject in this respect [Decision 12/1999 (V. 21.) AB, ABH 1999, 106; Decision 13/2000 (V. 12.) AB, ABH 2000, 61; Decision 14/2000 (V. 12.) AB, ABH 2000, 83; Decision 18/2000 (VI. 6.) AB, ABH 2000, 117].

According to the position of the Constitutional Court as established in the above decisions, it is an important question concerning every constitutional fundamental right whether they may – and under what conditions – be restricted or limited. In the case of the freedom of expression and the freedom of the press, this issue is of primary importance as such freedoms are among the fundamental values of a democratic society. Although the primary role of the freedom of expression does not result in this right being unrestrictable, the right of free expression may only be overruled by a very limited number of other rights. Since the freedom of expression – as a fundamental constitutional right – represents a high level of values, any injury of interest justifying its restriction must be of an extraordinary weight.

The right to free expression protects opinion irrespective of the value or veracity of its content. The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content. The Constitution guarantees free communication – both as individual behaviour and as a social process. It is the expression of

individual opinion, the manifestation of public opinion formed by its own rules and, in correlation to the aforesaid, the opportunity of forming an individual opinion built upon as broad information as possible that is protected by the Constitution.

In addition to the right of the individual to the freedom of expression, Article 61 of the Constitution imposes the duty on the State to secure the conditions for the creation and maintenance of democratic public opinion. The constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person's individual right to the freedom of expression, the formation and free development of public opinion – indispensable for a democracy – are also considered. [cf.: Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 170, 172, 178].

In the opinion of the Constitutional Court, allowing the public criticism of the activities of organs and persons exercising the duties of the State is a constitutional interest of priority. In a democratic State under the rule of law, the free criticism of the institutions of the State – even if done in the form of defaming value judgements – is a fundamental right of citizens, i.e. the members of society, and an essential element of democracy. [Decision 36/1994 (VI. 24.) AB, ABH 1994, 229]

1.2. Among the Constitutional Court's decisions expressly related to the freedom of the press, the following arguments are worth being referred to in the present case:

The State must guarantee the freedom of the press having regard to the fact that the press is the pre-eminent tool for disseminating and moulding views and for the gathering of information necessary for the formation of opinion. The press has a fundamental role in providing information as a precondition for forming one's opinion. Article 61 para. (1) of the Constitution, too, enumerates next to each other the right of the freedom of expression and the right of access to and dissemination of data of public interest.

The primary guarantee of the freedom of the press is non-intervention by the State with respect to content; the prohibition of censorship is an example. Through this self-restriction, the State makes it possible, in principle, for the whole spectrum of opinions existing in society, as well as for all information of public interest, to appear in the press. The substantive and procedural safeguards of the right to be informed, that is the freedom of information, is primarily developed by the State elsewhere, through regulating access to data with respect to everyone including the press. A democratic public opinion, however, may only come about on the basis of an objective and comprehensive dissemination of information. [cf.: Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 230-231]

In the assessment of the present case, the provisions of Decision 20/1997 (III. 19.) AB are to be followed. In the holdings of that decision, the Constitutional Court established that "Section 15 para. (3) of Act II of 1986 on the Press is in part unconstitutional. It is unconstitutional that the public prosecutor may initiate and thus the court may prohibit the publishing of a press product or a document not qualified as such, and the public prosecutor may without delay suspend the publication of such press product or document on the grounds of its violating the inherent rights of others or with reference to committing a criminal offence punishable upon private complaint, independently of the will of the persons affected." (ABH 1997, 85)

In the opinion of the Constitutional Court, the challenged discretionary powers of the public prosecutor and the court do not cover the mandatory preliminary control, evaluation and assessment under public authority of the contents of the ideas to be published in the press product, with regard to their suitability to be released as a press product. Therefore, the challenged discretionary powers do not qualify as censorship, and thus they do not violate the right to the freedom of the press (ABH 1997, 85, 94).

1.3. The Constitutional Court specified in several decisions – primarily relating to the constitutionality of criminal procedure regulations – the constitutional rights and obligations of the State originating from its punitive power. In a democratic State under the rule of law, punitive power is the – constitutionally limited – public law right of the State to punish those who commit crimes. Criminal acts represent the violation of society's legal order, and the State is entitled to exercise the right of punishment. The exclusive right to punish criminals is at the same time an obligation to meet the demand for punishing criminal acts, and holding perpetrators liable under criminal law is a constitutional obligation of the State. Exercising this punitive power necessarily affects the constitutional fundamental rights of individuals. It follows from the State's obligation deducible from the Constitution that the organs exercising the State's punitive power shall have effective tools for the execution of their duties even if such tools are essentially of a seriously repressive nature. [cf.: Decision 40/1993 (VI. 30.) AB, ABH 1993, 288; Decision 715/D/1994 AB, ABH 1997, 584; Decision 49/1998 (XI. 27.) AB, ABH 1998, 372; Decision 5/1999 (III. 31.) AB, ABH 1999, 75; Decision 19/1999 (VI. 25.) AB, ABH 1999, 150; Decision 26/1999 (IX. 8.) AB, ABH 1999, 265]

In the formation and enforcement of the demand for the State's punitive authority, the wish of the victim of the crime that the perpetrator be punished has only a limited role to play. Among criminal offences, it is in the case of so-called matters subject to private complaint that the State allows the victim to enforce the demand for punishment related to offences that

otherwise violate constitutional fundamental rights (e.g. libel, defamation, illicit possession of private information, illicit possession of information in correspondence) [Decision 40/1993 (VI. 30.) AB, ABH 1993, 288, 289-290].

The Constitutional Court examined the constitutional concerns regarding the execution of punishments in relation to the right to seek remedy against the decisions of a penal judge. It established that it is in this phase of holding the individual liable under criminal law that the execution of punitive power affects him most strongly. Although the legal ground for interfering with the fundamental human rights is undoubtedly based upon the final judgement passed in the criminal procedure, the actual restriction and interference takes place in the phase of execution. Despite the fact that from a legal point of view, the individual's position is changed by the judgement, in practice, it is the act of execution which causes the actual change [Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31].

2. The State of Hungary is obliged to guarantee the freedom of expression by international treaties such as the International Covenant on Civil and Political Rights (hereinafter: the Covenant) promulgated in Law-Decree 8/1976 and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) promulgated in Act XXXI of 1993, which specify the criteria of contents applicable to restricting the freedom of expression.

2.1. According to Article 19 para. (3) of the Covenant, "the exercise of the rights provided for in paragraph 2", as the contents of the freedom of expression, "carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

a) for respect of the rights or reputations of others;

b) for the protection of national security or of public order (*ordre public*), or of public health or morals."

According to Article 10 point 2 of the Convention, "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

There are several decisions of the Constitutional Court examining the guiding essence of the legal practice established in respect of Article 10 of the Convention [for example, most recently: Decision 13/2000 (V. 12.) AB, ABH 2000, 62; Decision 14/2000 (V. 12.) AB, ABH 2000, 83; Decision 18/2000 (VI. 6.) AB, ABH 2000, 117].

Accordingly, it has been repeatedly pointed out in the decisions of the Court that the freedom of expression is one of the important features of democratic societies and it should be applied not only to information and ideas accepted positively, or deemed to be harmless or neutral, but also to ones that attack, shock or annoy people. Exceptions concerning the freedom of expression shall be interpreted in a strict sense and the limitations shall be convincingly well founded.

These principles are especially important in the case of the press. The media are in charge of communicating information, ideas and thoughts on all issues of public interest, and the members of society have the right to have access to them. Protecting the freedom of expression, the Court acknowledged that the freedom of publication – especially in the case of journalists, due to the important role played by the press in a democratic society – may include the application of exaggerations to a certain extent or even that of provocative methods. Although the preliminary restriction of the freedom of expression is not prohibited by the Convention, it necessitates most careful examination by the Court. This is particularly true in the field of the media. News has short-term value ("perishable goods"), and any – even short delay or hindrance in publishing the news implies the risk of it totally losing its value and public interest.

According to the case-law of the Court, national authorities have a relatively wide range of options in defining the measures restricting the freedom of expression. This is so because national authorities are in a better position to assess the necessity of restrictions. At the same time, assessments by the national authorities are supervised by the European bodies. This supervision covers both legal regulations and the concrete application thereof. Finally, the Court is in charge of determining whether or not the restriction is in line with the freedom of expression protected under Article 10.

2.2. The Convention – in contrast with Article 10 of the Covenant – does not expressly provide for the execution of punishments. However, as early as in 1962, the Commission made clear the following: although the applicant was imprisoned on the grounds of violating through a criminal act the most fundamental rights of another person, the convict was not deprived, merely on the basis of the above fact, of the rights and freedoms guaranteed by the Convention.

In the present case, the Constitutional Court looked over the decisions of the Court and the Commission concerning the restrictions upon contacts between the person in detention and the media. First of all, it is to be noted that the Commission forwarded to the Court cases in which the restrictions on communication between the person in detention and the outer world, and in particular the contacts between the person in detention and the press, were examined as violations of Article 8 rather than of Article 10 even if the applicant had alleged the violation of Article 10.

The relevant provisions of Article 8 of the Convention are the following:

„1. Everyone has the right to respect for his […] correspondence.

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

According to the practice of the Court, when one complains about the State intervening into the communication of information or ideas through correspondence, then Article 8 is deemed *lex specialis* as compared to Article 10. The Court concentrates on the right which is the most typical in the case and thus, when establishing a violation of Article 8, it rejects the examination of the alleged violation of Article 10 as unnecessary. Nevertheless, in assessing the violation of Article 8 the Court applies mutatis mutandis the same criteria of evaluation as elaborated for the examination of Article 10 in the so-called Sunday Times Case [Eur. Court H.R. Sunday Times v. United Kingdom judgment of 26 April 1979, Series A no. 30].

Accordingly, the potential causes and ways of intervention into the correspondence of the person in detention shall be specified in a statute complying with the requirements elaborated in the scope of restricting the freedom of expression: they should be defined accurately and in details so as to allow the individual to adapt his conduct to the requirements and to make him able to foresee – with appropriate help when needed – the consequences of his conduct to the extent expectable in the given circumstances. At the same time, the Court acknowledges that certain room should be left for the discretion of the authorities as striving for absolute exactness would lead to inflexible regulations. However, the Court established in several cases the violation of the Convention without examining the further criteria specified in Article 8 para. (2), as it was found that the statute defined too wide discretionary powers for the authorities and did not specify with reasonable accuracy the scope and the way of

exercising the authority's power of discretion regarding censorship over convicts' correspondence [Eur. Court H.R. Calogero Diana v. Italy judgment of 21 October 1996, Reports 1996-V, § 32-33; Eur. Court H.R. Domenichini v. Italy judgment of 21 October 1996, Reports 1996-V, § 32-33; Petra v. Romania judgment of 23 September 1998, Reports 1998-VII, §§ 37-40; Eur. Court H.R. Labita v. Italy judgment of 6 April 2000].

In the opinion of the Court, supervising the convict's correspondence in itself is not incompatible with the Convention; however, in a democratic society the withholding of letters may only be accepted as necessary if the authority's intervention is based upon a pressing social need and it is in proportion to the desired statutory objective [cf. Eur. Court H.R. Silver and Others v. United Kingdom judgment of 25 March 1983, Series A no. 61.]. At the same time, the Court acknowledges that the normal and reasonable demands of imprisonment should also be taken into account. For example, "the prevention of disorder or crime" may justify a wider scope of measures applied in the case of convicts than in the case of free persons [Eur. Court H.R. Golder v. United Kingdom judgment of 21 February 1975, Series A no. 18.]. For the prevention of crime, a higher level of intervention by the authorities may be acceptable in the case of persons in pre-trial detention as well, since there is a higher risk of concerted practices [Eur. Court H.R. Schönberger and Durmaz v. Switzerland judgment of 24 May 1988, Series A no.137., § 25]. Essentially the Court applied the same principles in other similar cases as well [Eur. Court H.R. Campbell and Fell v. United Kingdom judgment of 28 June 1984, Series A no. 80.; Eur. Court H.R. Boyle and Rice v. United Kingdom judgment of 27 April 1988, Series A no.13.; Eur. Court H.R. McCallum v. United Kingdom judgment of 30 August 1990, Series A 183.; Eur. Court H.R. Campbell v. United Kingdom judgment of 25 March 1992, Series A no. 233.].

The interrelations of contacts between the convict and the media and issues of the freedom of expression were assessed similarly in the cases where the Commission rejected the application and did not forward them to the Court.

In the resolution of refusal in the Case Reeve v. Netherlands (No. 14869/89, 8/6/1990), the Commission established that preventing contacts between the convict and the media is a restriction of the convict's freedom of expression. The Commission underlined the following: a balance should be found between the interests of society and the restriction of the convict's right to communicate information. In the specific case, it acknowledged the refusal of approval as a necessary intervention – even in a democratic society – for the purpose of maintaining the order of the prison and for the "prevention of disorder".

In the Case Bamber v. United Kingdom (No. 33742/96, 11/9/1997), the Commission examined the restrictions upon keeping contacts with the media by phone as a specific form of communication. The Commission noted that the freedom of expression does not require the State to guarantee for the individual a general and totally unrestricted right of access to a certain medium or a specific tool of communication. However, it is an interference with the right of free expression when the State prevents the person in contacting the media through a tool which would otherwise be at the individual's disposal. Although the regulation allowed the applicant to communicate through correspondence and also authorised him to give an interview under specified conditions, restricting contacts by phone was considered by the Commission an interference with the rights guaranteed under Article 10.

In assessing the necessity of restriction, the Commission applied the criteria elaborated in the practice of the Court. The State under complaint had prohibited the convicts from maintaining contacts with the media by phone because it considered practically unfeasible to supervise telephone talks effectively, and because direct communication by the convict over the phone could result in excessive pain for the victims and their families. In the opinion of the Commission, the potential pain of the victims and their families would not necessarily justify such restrictions as prohibiting the media appearance of the convict through a telephone talk. The only reason for the negative decision made by the Commission was accepting that it was practically unfeasible for the penal institution to supervise unlimited telephone contacts with the media. As far as the necessity of restrictions is concerned, the Commission referred to the position of the Court elaborated in the Golder case and reinforced in the Silver case: in assessing the restriction, one must take into account the general and reasonable needs of the punishment of imprisonment as well as of the fact that a certain degree of supervision over the contents of communication by the convict is in itself not incompatible with the Convention. The Commission accepted that only a practically effective tool of supervision may be deemed reasonable.

2.3. In the Case „Vereniging Weekblad Bluf!", which is relevant in respect of the present review and was referred to by the President of the Republic as well, the Court rejected the Commission's opinion alleging that Article 10 excluded the confiscation of printed materials and the ban on distribution thereof even before the start-up of the criminal procedure against the person affected. In the opinion of the Court, the national authorities should be allowed to prevent the punishable disclosure of confidential data. The Court acknowledged the necessity of national security services in democratic societies, and accepted the State's right to use such institutions to protect itself from the operation of individuals and

groups that attempt to undermine the fundamental values of a democratic society. Concurring with the Commission in this respect, the Court accepted the argument that the prevention of disclosing information on the operation of national security services enjoys a high degree of protection [Eur. Court H.R. „Vereniging Weekblad Bluf!" v. Netherlands judgment of 25 August 1994, Series A no. 306-A, §32, 35-36., 40.].

IV

The Constitutional Court shares the concerns of the President of the Republic in the following respect:

In the opinion of the Constitutional Court, Section 37/B para. (1) of the LDP introduced by Section 1 of the LDPA, Section 118 para. (6) of the LDP introduced by Section 2 of the LDPA, as well as the reference to Section 37/B in Section 122 para. (3) of the LDP specified in Section 3 para. (2) of the LDPA violate the following:

a) with regard to Section 8 paras (1) and (2), the freedom of expression and the freedom of the press guaranteed in Article 61 paras (1) and (2) of the Constitution, by

– unnecessarily and disproportionately allowing for the communication of statements made by persons in detention being prevented in order to protect public safety or the reputation or inherent rights of others, or to prevent crime or the communication of an official secret,

– unnecessarily and disproportionately allowing for the communication of statements made by persons in pre-trial detention being prevented when this is not justified either by executing the purpose of the criminal procedure or by the order or the security of the penal institution;

b) the requirement of legal certainty as an essential element of the principle of the State under the rule of law the normative content of which is specified under Article 2 para. (1) of the Constitution as

– they concern press statements made by the person in detention and allowing for the restriction thereof,

– the causes of the restriction include the prevention of communicating other confidential data.

The Constitutional Court holds that neither the procedural rules nor the legal remedies introduced by Sections 1 and 2 of the LDPA into the LDP counterweight the above described

violation of the constitutional fundamental rights and of legal certainty and, therefore, they do not make such restriction constitutionally acceptable.

1. In a historical perspective, the constitutional values protecting the individual against the excessive weight and the arbitrariness of the State's punitive power have been formed and incorporated into the constitutions – in different degrees of elaborateness – primarily in the field of criminal law and criminal procedure. Nevertheless, this does not mean that the State's punitive power manifested in the execution of punishments would be unlimited and that persons found guilty and sentenced to punishment would be totally defenceless. The convict is the subject, who has rights and obligations, rather than the object of executing the punishment. A group of the convict's rights comprises the constitutional fundamental rights maintained without restriction or with some modification, while the rest are special rights related to the fact and the conditions of executing the punishment or the criminal measure.

The extreme constitutional limits of executing punishments are delimited, on the one hand, by the right to human dignity and personal security and, on the other hand, by the prohibition of torture, cruel, inhuman and humiliating treatment and punishment. More specifically, the acceptable degree of the State's intervention into one's life and of the State restricting one's fundamental rights and freedom on account of the execution of punishments and measures can be deduced from the principle of the State under the rule of law and the constitutional prohibition on restricting the substantial contents of fundamental rights.

There are constitutional fundamental rights that may not be affected at all by the execution of imprisonment. For example, the rights to life and human dignity are such rights. The execution of imprisonment essentially excludes the enforcement of the rights of personal freedom, free movement, and the right to choose one's place of residence. Between the rights not affected by the execution and the ones necessarily excluded, there are fundamental rights that live on with some modifications in the course of imprisonment. The freedom of expression is one of these rights, which live on with some necessary modifications during imprisonment, too, due to the fact and the conditions of executing the punishment. In the present case, too, the Constitutional Court assesses the constitutionality of restricting fundamental rights as a result of executing imprisonment on the basis of the so-called test of necessity elaborated in the course of its practice.

According to the permanent practice of the Constitutional Court, the State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect any other constitutional

value, if it is justified by some constitutional objective, furthermore, if it is the only way to achieve the desired protection or goal. The constitutionality of restricting a fundamental right also requires that the restriction comply with the criterion of proportionality; the importance of the desired objective must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the contents of a right without a forcing cause or pressing public interest is unconstitutional, just like doing so by using a restriction of a weight disproportionate to the purported objective [see most recently: Decision 18/2000 (VI. 6.) AB, ABH 2000, 117, 123].

Requiring a preliminary approval process for press statements by persons in detention is a twofold restriction: this way, both the communication rights of persons in detention and the freedom of the media – and thus the right of the members of society to have access to information – are limited. Therefore, in both cases, within the freedom of expression, values significant for a democratic society may be affected, which necessitate the Constitutional Court's scrutiny of the necessity and the proportionality of restricting the fundamental rights. Consequently, in addition to the arguments explained in its earlier decisions about the restrictability of the freedom of expression and the freedom of the press, the Constitutional Court took into account further aspects as well.

In assessing the restrictability of the freedom of expression of persons in detention, the Constitutional Court also relied on the minimum standard rules on the treatment of persons in detention elaborated in the framework of the institutions of the United Nations and on the recommendations of the Ministerial Committee of the Council of Europe. The European penal policy formed on the basis of the above documents contains the principle that the conditions of imprisonment should be as close to the conditions of free life as allowed by the security requirements of the penal institution. Although the execution of imprisonment affects several fundamental rights as a result of the nature of punishment, endeavours must be made when restricting such rights to only apply them to the minimum extent absolutely necessary for the protection of society.

Modern penal systems favour social integration rather than isolation from society. Penal institutions are in close contact with their environments, and a wide-scale restriction on contacts between persons in detention and the outer world is considered unnecessary. For several decades the above approach has been reflected in Hungarian regulations in force, last amended in 1993 to make them compliant with international standards [Act XXXII of 993]. In line with the severity of the criminal offence committed, that of the punishment and the

criminal records on the convict, imprisonment shall be executed at levels of different severity as determined by the court (penitentiary, prison, or jail). Although the convict's separation from the outer world is different at the various levels, this is only reflected in different rules on whether the convict has the right to leave – and, if yes, on what terms and with what frequency – the penal institution. Otherwise, the same rules apply to all convicts about their other contacts with the outer world, such as access to information through the media, correspondence, or receiving visitors. These rights may only be restricted in the case of private incarceration, which is the most severe disciplinary punishment, applicable only for a short period of time and with the possibility of supervision by the court. [Sections 41-46 of the Criminal Code; Section 24, Section 25 para. (2), Sections 26-28, and Sections 42-43 of the LDP] The above rules on maintaining contacts are essentially the same in the case of perpetrators in detention [Section 122 para. (3) and Section 124 of the LDP]. However, persons in pre-trial detention may be subject to further restrictions on correspondence and receiving visitors in the interest of the success of the criminal procedure [Section 118 para. (2) of the LDP].

For persons in detention, access to the media and the opportunity to make statements in the media can play an important role in maintaining contacts between the prison and society and in reintegration into the society after serving the sentence. Media contacts may be important in maintaining interest in the outer world, in preserving personality and self-esteem, in reducing the feeling of defencelessness necessarily resulting from the deprivation of liberty, and in some cases in supplementing or rebuilding loosened family ties and other social contacts. It is important that the right to have access to information guaranteed in criminal procedure regulations [Section 36 para. (1) item m) of the LDP] shall not be one-sided, but the convict should be allowed to interact in the communication process. The publicity offered by contacts between the person in detention and the media can be a tool of protecting the rights and remedying the injuries of the person in detention.

The freedom of the media has special importance in relation to the execution of punishments as it reports on a field of the actual exercise of the State's punitive power which is usually hidden from the general public. The system of penal institutions is an armed organ of the State in charge of protecting order. Its operation is managed by the Government through the Minister of Justice [Act CVII of 1995] and the public prosecutor's office is in charge of supervising the lawfulness of its activities [Article 51 para. (2) of the Constitution]. It is the fundamental interest of both society and the person in detention that public control and criticism over the State's organs empowered to deprive one of his personal freedom be

allowed, as well as that information on the operation of such institutions be supplied in order for them to be accepted by society.

At the same time, one should not forget that the system of penal institutions is in charge of executing the State's constitutional responsibility towards society by performing the tasks related to punishments and measures implying the deprivation of liberty (imprisonment, forced medical treatment, forced curing) as well as to coercive measures applied in the course of criminal procedures (pre-trial detention, temporary forced medical treatment), to detention, and to the custody of foreign nationals. The system of penal institutions – not mentioned specifically in the Constitution – has responsibilities and obligations concerning both society and the person in detention. The system of penal institutions is in charge of maintaining the internal order and security of the society of convicts as well as of implementing the specific objectives of punishments and measures.

Upon assessing the above aspects, the Constitutional Court established the following:

1.1. The freedom of expression and the freedom of the press are not violated by the mere fact that contacts between the person in detention and the media are regulated and are under control. The grounds and the essence of punishments justifying custody – imprisonment, detention – and pre-trial detention as a coercive measure in the criminal procedure contain not only the deprivation of one of his personal freedom and freedom of movement but also the necessity to regulate contacts with the outer world and the possibility to control such contacts occasionally or on a continuous basis. It is another issue that in certain cases supervision demands special assessment (e.g. in the case of contacts with the defence counsel).

1.2. Custody in itself may not be the cause or ground of restricting the freedom of expression or the freedom of the press, and therefore neither imprisonment executed on the basis of one's committing a crime, nor detention executed on the basis of an administrative infraction, nor pre-trial detention ordered in a criminal procedure started on the basis of a well founded suspicion of one's committing a crime punishable with imprisonment justify a limitation of the freedom of expression or the possibility of its wide-scale restriction. Holding persons violating the norms of society as defined by the law liable under criminal law or under statutes on administrative infractions does not justify the application of different standards with respect to the freedom of expression. The freedom of communication shall not be diminished merely on the grounds of one's violating statutory prohibitions or rules the violation of which is sanctioned by punishment.

1.3. The modification of the freedom of expression of the person in detention and the particular features of contacts between the person in detention and the media are based on real differences in the actual status of persons in detention and the free members of society, which differences result from unlawful acts or a well founded suspicion thereof in the case of persons in detention. The institutional, operational and security interests resulting from the responsibilities of the organisation executing the detention require and demand a certain degree of control over contacts between the person in detention and the media, in the course of which the staff member of the penal institution may have access to the contents of the information to be published. It follows, however, from the high constitutional esteem of the freedom of expression and the freedom of the press that the communication so controlled shall only be withheld if its public disclosure would lead to serious consequences.

1.4. Within the scope specified in the motion submitted by the President of the Republic, the Constitutional Court acknowledges from among the causes introduced into Section 37/B para. (1) of the LDP by Section 1 of the LDPA the protection of national security and the prevention of disclosing state secrets as constitutionally acceptable restrictions upon the freedom of expression and the freedom of the press. In respect of the order and security of the penal institution, as one of the preconditions for the exercise of the punitive power of the State under the rule of law and of the implementation of other responsibilities vested on the penal system, the Constitutional Court has not completed a separate constitutional analysis, since in this respect no constitutional concerns were put forward by the President of the Republic.

1.4.1. In the opinion of the Constitutional Court, the protection of the interests of national security is a constitutional objective and, at the same time, an obligation of the State. The sovereignty of the country and its constitutional order are indispensable fundamental values for the operation of a democratic State under the rule of law. The enforcement of the sovereignty of the country and the protection of its political, economic and home defence interests, including the finding and averting of activities violating or endangering the sovereignty or the constitutional order of the country are obligations of the State directly deducible form the Constitution [Article 2 para. (2)-(3), Article 5, Article 35 para. (1) item i), Article 40/A, Article 48, and Article 51]. Even on the necessarily abstract level of legislation and constitutional review, one can imagine that the interests of national security might be endangered through communication between the person in detention and the media, and the constitutional fundamental rights are to be restricted in order to protect such interests.

The Constitutional Court does not consider the tools of protection chosen by the legislature to be disproportionate. Preventing the public disclosure of the product resulting from the contact between the person in detention and the press, i.e. the material to be published, is undoubtedly a high degree of restriction of the freedom of expression and the freedom of the press. In view of the weight and importance of the interests in the field of national security, the restriction of fundamental rights is not considered disproportionate. In the assessment of proportionality, the Constitutional Court took into account the existing guarantees in procedural rules, not examined separately in the present case, and the intention of the legislature that the court should decide within a fixed short period of time on the reasonableness, necessity and proportionality of restricting the fundamental right.

The protection of the interests of national security is primarily the task of the State authorities set up for this specific purpose. National security services and their responsibilities are defined in an Act of Parliament adopted with a majority of two-thirds of the Members of Parliament [Act CXXV of 1995]. It may serve as an appropriate ground for the judiciary practice in the future in order to make well-founded decisions on whether or not the public disclosure of the material to be published endangers or violates the interests of national security.

1.4.2. Even in a constitutional State under the rule of law and in a democratic society, the State, the Government, organisations in charge of national security and public administration have secrets in the form of data or facts the public disclosure of which may adversely affect, influence or endanger the external or internal security of the State or the safe operation of its organisations. [Sections 3-4 of Act LXV of 1995] The Constitutional Court acknowledges the protection of state or official secrets as important and constitutional interests of the State; several earlier decisions of the Constitutional Court have dealt with such protection, which may necessitate the restriction of constitutional fundamental rights as well [cf.: Decision 25/1991 (V. 18.) AB, ABH 1991, 414; Decision 32/1992 (V. 9.) AB, ABH 1992, 182; Decision 34/1994 (VI. 24.) AB, ABH 1994, 177; Decision 60/1994 (XII. 26.) AB, ABH 1994, 342; Decision 6/1998 (III. 11.) AB, ABH 1998, 91].

The dangerousness of disclosing secrets varies with the two types of secrets. This is also reflected by the fact that any disclosure of state secrets that may occur in the communication between the person in detention and the media constitutes a criminal offence (Sections 221 and 223 of the Criminal Code), while the possible cases of disclosing official secrets include both criminal offences and administrative infractions (Section 222 of the Criminal Code, Section 25 of Government Decree 218/1999 (XII. 28.)). The Constitutional

Court holds that preventing the public disclosure of statements by the person in the detention on the grounds of protecting an official secret may only be considered a pressing social need if any of the parties of the communication commits the criminal offence of illicitly disclosing official secrets.

1.5. In the opinion of the Constitutional Court, restricting the freedom of expression and the freedom of the press by preventing communication in the interest of protecting the reputation or inherent rights of others is deemed unnecessary and thus unconstitutional. In its Decision 20/1997 (III. 19.) AB, the Constitutional Court held it generally unconstitutional that the public prosecutor may initiate and thus the court may prohibit the publishing of a press product or a document not qualified as such, and that the public prosecutor may suspend the publication of such press product or document on the grounds of the violation of the inherent rights of others, independently from the will of the persons affected (ABH 1997, 85).

In the same decision, the Constitutional Court held that the right of self-determination, which is part of human dignity, was restricted unnecessarily and disproportionately by the fact that the public prosecutor was entitled to make an initiative in relation to inherent rights and to apply suspension in such cases as well as by the possibility that on the public prosecutor's initiative, the court could prohibit the publishing of a press product or a document not qualified as such on the grounds of the violation of the inherent rights of others. The Constitutional Court also established that in the democratic Hungarian society the rights vested on the public prosecutor and the court under Section 15 para. (3) of the AP unnecessarily and disproportionately restrict the freedom of the press (ABH 1997, 85,91-92).

The Constitutional Court considers the above position guiding in the present case, too. As compared to Decision 20/1997 (III. 19.) AB, the regulation under review is different by way of defining the person who makes the statement and by introducing the commander of penal institutions as a new authority in the case of convicts and perpetrators in detention. The Constitutional Court holds that in the present case, neither the essence of the punishment or of the procedural coercive measure, nor the ground or the purpose thereof justifies a differentiated assessment of the constitutionality of preventing communication in the case of persons in detention and under the conditions of free life. Therefore, in the case of persons in detention, the same reasons apply to the unconstitutionality of allowing the commander of penal institutions, the public prosecutor or the court to prevent the public disclosure of the material to be published, independently from the will of the persons affected, on the basis of protecting the reputation or inherent rights of others, as in the case of persons not in detention,

i.e. the authorisation of the public prosecutor to suspend the publication or to initiate the prohibition of the publication, and the authorisation of the court to prohibit the publication.

1.6. In the opinion of the Constitutional Court, the possibility to prevent the publication in the interest of protecting public safety or preventing crime is not in compliance with the constitutional requirements.

1.6.1. The protection of public safety is primarily the task of State organs as an obligation specified in [Article 40/A] or deducible from [Articles 35, 50, and 51] of the Constitution, but in maintaining local public safety local governments also have specific tasks to do [Section 8 of Act LXV of 1990]. Public safety is an indispensable precondition for the institutional system of the State under the rule of law and the operation of a democratic society and, therefore, it is in general a constitutional value and a constitutional objective.

In order to assess the necessity and the proportionality of restricting the fundamental right, the Constitutional Court attempted to apply a conceptual approach to public safety. The notion of public safety, its relation to public order and internal order, as well as the conceptual definition of the latter are subjects of scientific debates. The Constitutional Court shall not take a stand in such debates. Nevertheless, one may conclude upon examining the relevant elements of the legal system that the meaning of the category of public safety is manifold, different interests and values are covered by the term, and there are several, fundamentally different tasks in the background. In the legal system, public safety is an element of public order [e.g. in the field of liability under criminal law or under the rules on administrative infractions, as regulated by the provisions of the Criminal Code, Act LXIX of 1999, and Government Decree 218/1999 (XII. 28.)], but in some cases public order is considered to be an element of public safety [e.g. in Law-Decree 17/1974 at the Security of the State and Public Safety], and in certain cases they are deemed equal categories on the same level [e.g.: Act CX of 1993 on National Defence, Act XXXIV of 1994 on the Police, and Act CVII of 1995 on the Organisation of Penal Institutions].

Public safety is undoubtedly a concept of constitutional value. However, the structure of the notion, of the phenomenon and of the objectives is so complex and diversified that it may lead to a high degree of ambiguity and arbitrariness in interpretation. Therefore, public safety may not be referred to in general as the cause of restricting the freedom of expression of persons in detention and the freedom of the press. In the opinion of the Constitutional Court, the legislature restricted the freedom of expression of persons in detention and the freedom of the press on an unnecessarily wide scale when it allowed for prohibiting the public disclosure of the material to be published on the grounds of protecting public safety.

1.6.2. Criminality is a complex phenomenon of society in sociological and criminological terms, and it may be prevented on several levels. In relation to the execution of punishments and procedural coercive measures, the penal institution itself is directly in charge of responsibilities belonging to various levels of crime prevention. For example, during the execution of the deprivation of liberty and during the implementation of the deprivation of rights the aim of the penal institution is to support the convict's integration into society after his release, and to prevent him from committing another criminal offence (Section 19 of the LDP). Consequently, both maintaining communication channels with society and the actual prevention of allowing for the commitment of another criminal offence through contacts with the media fall within the scope of crime prevention.

Undoubtedly, the Constitutional Court acknowledged in its earlier decision in respect of the prevention of money laundering and bank secrets that the interest of "crime prevention" is a constitutional objective deducible from the principle of the State under the rule of law. However, in the case of the legal provisions reviewed, the restriction of the fundamental right to the protection of personal data on the grounds of crime prevention serves the purpose of preventing the commitment of a well-defined scope of criminal offences [Decision 24/1998 (VI. 9.) AB, ABH 1998, 191, 195]. The preliminary restriction of the freedom of expression and the freedom of the press examined in the present case gives the State authorities a too broad and unclear authorisation for intervention on the "abstract" basis of crime prevention. Indeed, banning statements by persons in detention is not an appropriate tool, even in theory, for crime prevention, and it may only be used for the prevention of preparing, committing or completing concrete criminal offences.

In its Decision 20/1997 (III. 19.) AB, the Constitutional Court established that the prevention of crime or incitement thereto is an important interest of the State, society and individuals. On the above basis, it did not establish the unconstitutionality of the provisions specifying that on the public prosecutor's the motion, the court may prohibit the public disclosure of press products or documents not qualified as such, and that the public prosecutor may suspend the publication in the case of a crime or incitement to crime. Criminal offences punishable upon private complaint are exempted from the above rule (ABH 1997, 85, 92).

The Constitutional Court holds that in the case of persons in detention the authorisation vested on the authorities may cover nothing more than the above scope, namely the prevention of committing a crime or that of publicly disclosing a call for a crime. In such cases, there is no constitutional ground to make any difference between persons in detention and free persons, either. In addition, the prevention of committing a crime is an obligation of

the penal institution, the public prosecutor and the courts in order to protect society, as the authorities empowered and obliged to exercise the punitive power themselves have access to the contents of communication between the person in detention and the media in the course of supervising the contacts.

2. Section 118 para. (6) of the LDP introduced by Section 2 of the LDPA provides that in the case of persons in pre-trial detention not only the publication of the material to be published, but also the making of the statement, i.e. the establishment of contacts between the person in pre-trial detention and the media are allowed to be restricted in order to protect national security, public safety, or the reputation or inherent rights of others, or to prevent crime or the disclosure of state secrets, official secrets and other confidential data.

The LDPA does not affect Section 118 para. (2) of the LDP, which provides for restricting contacts between the person in pre-trial detention and the outer world for the purpose of guaranteeing the successfulness of the criminal procedure. Nor does it affect the general authorisation given in the Code of Criminal Procedure specifying that the person in pre-trial detention may only be subject to restrictions necessitated by the implementation of the tasks of the criminal procedure or the order of the institution where the pre-trial detention is executed, and that such persons may contact persons other than their relatives – either in writing or orally – only upon supervision (Section 97 of the Code of Criminal Procedure). Consequently, the legislature deemed the newly introduced causes as ones that justify the prevention of contacts between the person in detention and the media even in cases in which neither endangering the success of the concrete criminal procedure, nor the potential violation of the order and security of the penal institution may be established.

The Constitutional Court holds that these provisions constitute an unnecessary restriction of the freedom of expression and the freedom of the press, and therefore, are unconstitutional. It may be accepted on the basis of the cause and the objective of pre-trial detention that the public prosecutor or the court would prevent the establishment of contacts between the person in pre-trial detention and the media if such action is justified on the grounds of there being a danger to the success of the criminal procedure or the order or security of the institution in charge of the custody. At the same time, there is no additional cause that would justify the restriction of the fundamental rights in question on a scale wider than in the case of convicts, by way of preventing even the establishment of contacts.

3. It is the consistent position of the Constitutional Court that the principle of the State under the rule of law guaranteed in Article 2 para. (1) of the Constitution is a constitutional value with a normative content, the mere violation of which may render a statute unconstitutional. The State under the rule of law is not a formal – secondary or supplementary – declaration, but a norm in the Constitution.

The Constitutional Court explained in details in many of its successive decisions [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 64-65; Decision 11/1992 (III. 5.) AB (ABH 1992, 77, 80-81, 84], then repeated in several decisions that legal certainty is one of the central and, at the same time, indispensable elements of the principle of the State under the rule of law. As a result, the State – primarily the legislature – is bound to provide for clear and consistent statutes that are foreseeable by their addressees and the effects of which are assessable. At the same time, the legislature may provide the judiciary with a relatively wide scale of discretionary powers. Nevertheless, the criteria of decision-making by the judiciary shall be defined by the legislature in a way to minimise – as much as possible – the possibility of differing or arbitrary interpretations of the law. Legal certainty makes it necessary for the legislature to avoid the use of too broad or too uncertain notions, and the text of the statute should be comprehensible and clear, bearing an adequately interpretable content of norm. Such deficiencies in the text of statutes particularly violate legal certainty when the provisions allow for the restriction of constitutional fundamental rights.

3.1. The Constitutional Court has, first of all, established that the requirements of legal certainty are not complied with the way the LDPA defines the subject of the preliminary restriction of the freedom of expression and the freedom of the press. According to the Constitutional Court, the fact that the regulation covers statements made in the “press” does not reflect the clear intention of the legislature and it does not clearly define the scope of competence of State authorities empowered to control communication between the person in detention and the media and to prevent the person in detention from making a statement.

This may lead to an insecurity of an unacceptable degree concerning the preliminary restriction of the freedom of expression and the freedom of the press. Article 61 para. (2) of the Constitution undoubtedly provides for the protection of the freedom of the “press”. However, the specific sectoral statutes define the concepts with different contents, and the judiciary shall use such concepts in the interpretation related to the newly regulated field. In addition to the definitions in the Act on the Press quoted in point II/2 of this Decision (Section 20 of the AP), one should also bear in mind the provisions of civil law on corrections in the

press or the criminal law provisions on “broad publicity” [Section 79 of the Civil Code, Section 137 item 12 of the Criminal Code].

In the opinion of the Constitutional Court, the violation of legal certainty originating from the ambiguity of the concept of the “press” as detailed above is not eliminated by the fact that Section 37/B para. (2) of the LDP introduced by Section 1 of the LDPA lists the physical bearers of information containing the statement by the person in detention: “document or recording of sound or image (hereinafter: material to be published)”. By defining the publication of “what” may be prevented, the legislature determined only one – although important – element of the communication process. As the Act does not provide for the details of making a statement in the “press” regarding the way of disclosing to the public “the material to be published”, it takes further legal regulations or in some cases an interpretation by the judiciary to find out exactly publishing “where” and “how” (publishing books, release of films or video cassettes, through the Internet) may be prevented, with due regard to the existing sectoral regulations in force.

It follows undoubtedly from the high constitutional value of the freedom of expression and the freedom of the press, as well as from the necessity to evaluate the preliminary restriction of such freedoms stringently that the legislature is bound to define clearly in the statutes not only the causes of the preliminary restrictability of such rights but also the scope of communication covered by the restriction. Interpretation by the judiciary would by no means comply with the requirements of legal certainty. The Constitutional Court holds that the Act of Parliament amending the LDP should contain the exact scope of the restrictability of media statements made by persons in detention. It is within the discretionary powers of the legislature to either give an independent conceptual definition of “press” or refer to the conceptual system contained in any other Act.

3.2. In the opinion of the Constitutional Court, the authorisation contained in the LDPA to restrict the freedom of expression and the freedom of the press on the grounds of protecting state secrets, official secrets, and confidential data termed as “other” violates legal certainty, as the concept is ambiguous, and therefore the authorisation is unconstitutional.

The term “other confidential data” may be interpreted in several ways. In a strict sense, “confidential data” are data to which there is limited access and which are related to international relations as defined in Section 5/G of Act LXV of 1995 on State Secrets and Official Secrets. At the same time, the scope of other confidential data may also be interpreted broadly, as there are many statutes regulating and protecting further data of a confidential nature: e.g. private secrets; business, industrial, bank, securities, insurance, and tax secrets,

and the terms used to describe such secrets often overlap each other. From the field of data protection, personal data and special data etc. may also be included in the group of data under examination.

Such legal uncertainty and such a wide margin of interpretation of the law are not acceptable in the case of the restriction of fundamental constitutional rights. The legislature is in charge of determining as accurately as possible the scope of data the protection of which may allow for the prevention of communication regarding statements made by persons in detention and intended to be published, having due regard also to the various categories of secrets in the legal system. In the course of the above, the legislature is free to rely on the Constitutional Court's positions expressed so far on the protection of secrets that entails restricting various fundamental rights.

4. The Constitutional Court notes that the regulation does not cover all cases of the deprivation of liberty the execution of which is in the competence of penal institutions. Such deprivation of liberty is the criminal law measure of forced medical treatment applicable in the case of persons of unsound mind [Section 74 of the Criminal Code, Sections 83-84 of the LDP, Minister of Justice Decree 9/1979 (VI. 30.) IM], and temporary forced medical treatment as a coercive measure in the criminal procedure [Section 98 of the Code of Criminal Procedure, Minister of Justice Decree 9/1979 (VI. 30.) IM].

5. Having regard to the importance of the position in principle included herein, the Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Budapest, 08 May 2001

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
presenting 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
Judge of the Constitutional Court

In witness whereof:

Concurring reasoning by Dr. István Kukorelli, Judge of the Constitutional Court

I agree with the holdings of the Decision establishing that it is unconstitutional to restrict – on grounds of protecting public safety, the reputation or inherent rights of others, or of preventing crime or the communication of an official secret or other confidential data – the right of the convict, the person in pre-trial detention, or the perpetrator in detention to make a statement in the press. The Decision is primarily involved in examining the potential reasons for preventing the making of a statement and the tools of maintaining contacts with the outer world. In contrast with that, I hold that the primary constitutional question is whether the introduction of the system of approving such statements in advance may be deemed to be in line with the Constitution and with the earlier positions of the Constitutional Court related to the freedom of expression.

1. In its basic decision examining the limits of the freedom of opinion, the Constitutional Court provided extra protection to the freedom of expression as an indispensable means of expressing one's self and freely developing one's personality, and a tool of one's participation in a democratic society. "It is the expression of an individual opinion, the manifestation of public opinion formed by its own rules and, in correlation to the aforesaid, the opportunity of forming an individual opinion built upon as broad information as possible that is protected by the Constitution. The Constitution guarantees free communication – as individual behaviour or a public process – and the fundamental right to freedom of expression does not refer to the contents of the opinion." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 179]

In my opinion, the self-development of a person and the manifestation of one's autonomous thinking are unconstitutionally restricted by a system of approval that prevents the public communication of views and positions on the basis of the contents thereof. No matter what justification we accept for the privileged constitutional protection of the freedom of expression, the introduction of preliminary censorship may not be accepted – save in cases of utmost extremity. The freedom of expression – as the primary way of seeking the truth or

of expressing one's self, or an important tool of debating public matters – means the free articulation of views without any preliminary restriction related to the contents thereof.

In its Decision 20/1997 (III. 19.) AB, the Constitutional Court examined the provisions of Act II of 1986 on the Press (hereinafter: the Act on the Press) that allowed the public prosecutor to request the court to prohibit the publication of a press product or document – or to immediately suspend the publication thereof – if it constituted a criminal offence or called for committing one, or if it violated public morals, the inherent rights of others, or if the periodical paper was distributed before or without registration. The Constitutional Court established the partial unconstitutionality of the above statutory provision with reference to the right of self-determination. In the opinion of the Constitutional Court, the challenged discretionary powers of the public prosecutor and the court do not cover the mandatory preliminary control, evaluation and assessment under public authority of the contents of the ideas to be published in the press product, with regard to their suitability to be released as a press product. Therefore, the challenged discretionary powers do not qualify as censorship, and thus they do not violate the right to the freedom of the press." (ABH 1997, 85, 95)

It is to be noted that in practice, the above challenged provision of the Act on the Press was not suitable for the implementation of preliminary censorship, in contrast with the statutory provisions under the present review that qualify as the classical case of censorship, since, in the latter case, on the basis of the Act on the Press, there being no mandatory preliminary approval system, the public prosecutor had the chance to suspend the distribution of the papers after printing, or could request the court to ban the distribution or the sale of the press products *ex post facto*.

The prohibition of examining in advance the contents of the views to be expressed is an important guarantee of enforcing the freedom of expression. It is an element of the freedom of expression and an indispensable guarantee thereof even without an express constitutional provision. Since censorship constitutes the most severe restriction of the fundamental right to the freedom of expression, preliminary censorship applied to restrict communication may only be accepted as constitutional in extreme cases, with a very limited scope, and in a very well-defined manner. As also referred to by the President of the Republic in his motion, in exceptional cases, with regard to the custody and the special circumstances thereof (the order of the penal institution), a preliminary approval of making statements may be necessary, but even in such cases the restriction of the freedom of expression should be kept within absolutely necessary limits.

2. According to the first sentence of Section 37/B para. (2) of the LDP, objected to on constitutional grounds by the President of the Republic, introduced by Section 1 of the Act amending Law-Decree 11/1997 on the Execution of Punishments and Criminal Measures (hereinafter: the LDPA), any document or recording of sound or image containing the statement made by the convict (hereinafter: material to be published) may only be made public upon the approval of the national commander or a person designated by him (hereinafter: commander). On the basis of the same paragraph, the commander may refuse to grant the approval if the material to be published endangers national security, public safety, damages the reputation or violates the inherent rights of others, or if it is necessary for the prevention of crime or of disclosing state secrets, official secrets or other confidential data.

The Constitutional Court established in this Decision examining the constitutionality of the statutory provision in question that the freedom of communication shall not be diminished merely on the grounds of one's violating the prohibitions or rules the violation of which is sanctioned by punishment.

In my opinion, it follows from the above statement of the Decision that even in the case of persons in detention the freedom of expression may only be restricted on a very limited scale, as it is a fundamental human right equally the due of everyone, and its restrictability does not depend on the situation of life of the person concerned. The freedom of expression may not be restricted more severely merely on the basis of the fact of being in detention or of the restriction of one’s personal freedom. Reference to the punishable nature under criminal law of expressions qualified by the legislature as dangerous to society suffices even in the case of persons in detention. The risk of making a statement violating for example a state secret or the honour of others is the same in the case of both persons in detention and persons not restricted in their personal freedom.

3. The entry into force of Section 1 of the LDPA in the form challenged by the President of the Republic would, in practice, result in allowing the commander to examine in advance the contents of all materials intended by the person in detention to be published, to decide on the basis of the above examination whether or not such communication violates any of the interests listed above, and to deny the approval or allow publication accordingly. This statute gives almost unlimited power to penal institutions in exercising preliminary control over the contents of the views intended to be published, and thus it disproportionately and

therefore unconstitutionally restricts the freedom of expression guaranteed in Article 61 of the Constitution.

In my opinion, an Act may define the exceptional circumstances under which preliminary examination would be allowed, and the legislature may empower the judge in charge of the case of the defendant to consider, with regard to the individual case, the necessity of restricting the right of making a statement of the convict punished by imprisonment to be served. However, no statute may provide in general for the preliminary control of the contents of materials to be published by any person in detention.

The Act adopted by the Parliament but not yet promulgated by the President of the Republic provides for an unjustified preliminary control over the contents of the opinions of convicts, persons in pre-trial detention and perpetrators in detention. In a constitutional democracy, it would be an unnecessary measure to prescribe the preliminary examination of the contents of statements made in the press by any person in detention.

Budapest, 08 May 2001

Dr. István Kukorelli
Judge of the Constitutional Court

In witness whereof:

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