DECISION 9/2004 (III. 30.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking a posterior review of the unconstitutionality of a statute – with dissenting opinions by dr. András Holló, dr. István Kukorelli and dr. Éva Tersztyánszky-Vasadi – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that Section 54 item h) of Act XXXIV of 1994 on the Police is unconstitutional and, therefore, annuls it.

2. The Constitutional Court holds that the two instances of the text "or other dangerous tool" in Section 54 item i) of Act XXXIV of 1994 on the Police are unconstitutional and, therefore, annuls them.

After the annulment, Section 54 item i) shall remain in force as follows:
"Section 54 The police officer may use a firearm
[…]
i) against any person who does not comply with the instruction of the police to put down the weapon he or she is holding, and whose conduct suggests an intention to directly use the weapon against another person;"

3. The Constitutional Court holds that Section 54 item j) of Act XXXIV of 1994 on the Police is unconstitutional and, therefore, annuls it.

4. The Constitutional Court rejects the petitions seeking the establishment of the unconstitutionality and the annulment of the text "shall protect public safety and domestic order even at the risk of his or her life, if necessary" in Section 11 para. (1) of Act XXXIV of 1994 on the Police, the text "if possible" in Section 17 para. (2), the second sentence of Section 19 para. (1), Section 33 para. (2) item b), Section 38 para. (1), the text "his or her

hiding can be reasonably expected" in Section 38 para. (2), Section 54 item g), Section 57 para. (2) and Section 67 para. (1).

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

Reasoning

The Constitutional Court has received several petitions concerning certain provisions of Act XXXIV of 1994 on the Police (hereinafter: the AP). The petitions related to the right to life and to human dignity, respectively, were separated by the Constitutional Court and judged jointly in a single procedure. During its procedure, the Constitutional Court has obtained the opinion of the Minister of the Interior and that of the Minister of Justice.

I

1. According to the petitioner, the text "shall protect public safety and domestic order even at the risk of his or her life, if necessary" in Section 11 para. (1) of the AP violates Article 8 para. (2) and Article 54 para. (1) of the Constitution, as such a general requirement of risking does not only restrict the essential content of the police officer's right to life, but it also allows the entire and irreparable elimination of life and the right thereto.

2. Pursuant to Section 17 para. (2) of the AP, if means of coercion are applied in the course of a police action, causing an injury or taking human life should be avoided if possible. The petitioner emphasises in this respect that human life is an absolute value. However, using the term "if possible" allows killing someone with at least a possible intention, which is in conflict with the prohibition in Article 8 para. (2) of the Constitution, and at the same time violates the provisions of Article 54 para. (1) as well.

3. One of the petitioners requests the establishment of the unconstitutionality and the annulment of the second sentence in Section 19 para. (1) of the AP, with reference to it violating Article 54 of the Constitution. According to the challenged provision, the lawfulness of a police action may not be questioned in the course of the action, save if the unlawfulness

of the action can be established beyond doubt without deliberation. In the petitioner's opinion, this provision is in conflict with one's natural sense of justice.

4. One of the petitioners requests the annulment of Section 33 para. (2) item b) of the AP with reference to it being in conflict with Article 54 para. (1) of the Constitution. The challenged provisions provide that a police officer may bring before the competent organ a person who can be suspected of having committed a criminal offence. The petitioner also refers to Decision 46/1991 (IX. 10.) AB of the Constitutional Court establishing that it is contrary to the fundamental right to human dignity for an authority to apply force against someone without due grounds.

5. According to the petitioner, Section 38 para. (1) and the text "or there is a strong likelihood of his or her hiding" in para. (2) are in conflict with Article 54 para. (1) of the Constitution. The petitioner objects to empowering the police to restrict the enforcement of a fundamental right for an excessively long time, namely for 24 hours, merely for the purpose of establishing one's personal identity. The petitioner claims that human dignity is also violated by the provision allowing detention for 72 hours merely on the basis of a presumption of the likelihood of the supervised person's hiding. According to the petitioner, this provision qualifies as coercion by the authority without due grounds, empowering the State to unjustified interference with one's privacy.

6. Two petitioners challenge the provisions in Section 54 of the AP related to the police officer's use of firearms, in particular items g), h) and j) as well as the text "or other dangerous tool" in item i), as ones in conflict with the provisions of Article 8 para. (2) and Article 54 para. (1) of the Constitution. The petitioners argue that using firearms on the basis of the AP may result in the entire and irreparable elimination of life and the right to life, therefore – in their opinion – the legal regulation is unconstitutional – except for cases of justifiable defence and extreme necessity – regardless of the percentage of cases where such an unconstitutional legal consequence actually occurs. It is a common element in the cases challenged by the petitioners that the police officer may kill a person not because of a direct threat or attack against life, but for the purpose of crime prevention or criminal prosecution. Although it is an important constitutional interest to ensure the successful operation of the judicial system and the protection of public safety, but that interest – as stated by the petitioners – cannot in itself justify the taking of human life. One of the petitioners

specifically argues that the reference to dangerous tools in the challenged provision is an unconstitutional extension of the use of firearms. Finally, both petitioners consider that the normative text challenged in their petitions is hazy; they point out that there are overlaps and repetitions in the listing.

7. Another petitioner alleges the violation of Article 54 para. (1) of the Constitution by Section 57 para. (2) of the AP, according to which the use of firearms may not be deemed unlawful in the case of hitting a person who has not left the scene despite being instructed by the police to do so. The petitioner argues that in the course of applying the challenged provision the police is not required to verify whether the persons being at the scene have really left the scene upon being instructed to do so.

8. One of the petitioners requests the establishment of the unconstitutionality and the annulment of Section 67 of the AP. In his opinion, as there is no reference in the Act to the timeframe of information supply to the police by the perpetrator of a criminal offence for the purpose of gaining an advantage, there is a danger of the police keeping the affected person under pressure for a long time in order to obtain further information. According to the petitioner, in the absence of statutory guarantees, the police may interfere with relations that belong to one's privacy without due grounds, thus violating the right to human dignity.

II

The following statutory provisions were taken into account during the constitutional review:

1. The relevant provisions of the Constitution:
"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law."
"Article 8 para. (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 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights."

2. The relevant provisions of the AP:

“Section 11 para. (1) The police officer shall perform the tasks specified in his or her service assignment in accordance with the statutory regulations, he or she shall comply with the instructions of his or her superior – taking into account the provisions of the present Act – and he or she shall protect public safety and domestic order even at the risk of his or her life, if necessary.”

“Section 17 para. (2) If means of coercion are applied in the course of a police action, causing an injury or taking human life should be avoided if possible. Assistance shall be given to the person injured during a police action as soon as possible, the police officer shall arrange for aid by a physician if necessary, and if the injured person is taken to hospital, the police officer shall ensure that a relative or other person in contact with the injured person is notified thereof.”

“Section 19 para. (1) Everyone shall submit to a police action and obey the instructions of the police officer if the action is aimed at the enforcement of provisions set forth in statutes, unless otherwise provided by an Act of Parliament or an international treaty. The lawfulness of a police action may not be questioned in the course of the action, save if the unlawfulness of the action can be established beyond doubt without deliberation.”

“Section 33 para. (2) In the interest of public safety, the police officer may bring before the authority or the competent organ the person

a) …

b) who can be suspected of having committed a criminal offence;

c)-g) …”

“Section 38 para. (1) The police may take a person brought before the authority into public security detention for 24 hours if detention is necessary for establishing personal identity or if the interest of the person concerned (being in a self-dangerous condition or representing a danger to others due to drunkenness or for other reasons) requires so. The period of bringing before the authority shall form part of the timeframe of detention.

(2) The police may detain for 72 hours a person on parole or temporarily released from a reformatory institute who is under supportive supervision, if that person has hidden from the authority or there is a strong likelihood of his or her hiding.” The text of Section 38 para. (1) in force at the time of judging the petition:

“Section 38 para. (1) The police may take a person brought before the authority into public security detention for 24 hours if detention is necessary for establishing personal identity. The period of bringing before the authority shall form part of the timeframe of detention.”

“Section 54 The police officer may use a firearm

[…]

g) to capture or to prevent the escape of a perpetrator who has intentionally killed someone;

h) to capture or to prevent the escape of the perpetrator of a criminal offence against the State (Chapter X of the Criminal Code) or against humanity (Chapter XI of the Criminal Code);

i) against any person who does not comply with the instruction of the police to put down the weapon or other dangerous tool he or she is holding, and whose conduct suggests an intention to directly use the weapon or other dangerous tool against another person;

j) to prevent from escaping, from being forcibly freed or to capture a person previously captured, detained because of the perpetration of a criminal offence or kept in captivity under a judicial decision, save if the person in captivity is a juvenile delinquent;

k) to avert an attack against the police officer's own life, physical integrity or personal freedom."

"Section 57 para. (2) The use of firearms may not be deemed unlawful in the case of hitting – using a firearm in the regular manner – a person who has not left the scene despite being instructed by the police to do so."

The text of Section 67 para. (1) in force at the time of submitting the petition:

"Section 67 para. (1) With the consent of the public prosecutor, the police, promising the refusal or termination of the investigation, may enter into an agreement with the perpetrator of a criminal offence on the supply of information, if the interest in criminal prosecution to be served by the agreement is superior to the interest in the enforcement of the State's demand for punishing perpetrators under criminal law."

The text of Section 67 para. (1) in force at the time of judging the petition:

"Section 67 para. (1) With the consent of the public prosecutor, the police, promising the refusal or termination of the investigation, may enter into an agreement with the perpetrator of a criminal offence on the supply of information, if the interest in criminal prosecution to be served by the agreement is more important than the interest in the enforcement of the State's demand for punishing perpetrators under criminal law."

III

1. The Constitutional Court expressed its position on the right to life and human dignity in its earlier decisions primarily in connection with capital punishment, the protection of the foetus, and euthanasia.

In Decision 23/1990 (X. 31.) AB, establishing the unconstitutionality of capital punishment, the Constitutional Court pointed out – upon examining the relation between the provisions in Article 8 paras (1)-(2) and (4) and Article 54 para. (1) of the Constitution – that capital punishment violates the prohibition of restricting the essential content of the rights to life and human dignity. Deprivation of life by capital punishment not only imposes a limitation upon the essential content of the fundamental right to life and human dignity, but also allows the entire and irreparable elimination thereof. It was established by the Decision that human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the precondition for several other fundamental rights. The right to human life and dignity as an absolute value create a limitation upon the punitive power of the State. Thus, the unrestrictable nature of the right to life was established by the Constitutional Court by declaring the unconstitutionality of capital punishment, in connection with the exercise of the State's punitive power. [Decision 23/1990 (X. 31.) AB, ABH 1990, 88, 92-93]

In Decision 64/1991 (XII. 17.) AB, examining the constitutionality of abortion, the Constitutional Court pointed out that the State's allowing the taking of human life can only be constitutional in such situations where the law tolerates a choice between lives and accordingly does not punish the killing of a human being. (ABH 1991, 297, 315-316)

It was in the so-called first decision on abortion mentioned above that the Constitutional Court explained the State's general duty of protection originating from the right to life. As established in that Decision, Article 54 para. (1) of the Constitution states that the right to life is guaranteed to every human being on the one hand, and – in harmony with Article 8 para. (1) – that the respect and protection of human life shall be the primary obligation of the State on the other. The State duty to respect and protect fundamental rights is, with respect to subjective fundamental rights, not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the conditions necessary for their realisation. To perform the State's tasks guaranteeing the above, in addition to securing the individual subjective fundamental rights, the related actual values and situations of life as such must be protected by the State – not only in connection with individual claims – by handling them in the context of the other fundamental rights. For the State, the protection of fundamental rights is merely a part of maintaining and operating the entire constitutional order. Consequently, the State shall

guarantee the statutory and institutional conditions needed for the realisation of fundamental rights by taking into account its duties related to other fundamental rights and its other constitutional duties; it shall ensure the most favourable enforcement of the specific rights with regard to the whole order, thus facilitating harmony among the fundamental rights as well. Due to the entitlement to fundamental rights on the one hand, and the State's various considerations and duties on the other, the individual's subjective right, as one aspect of the fundamental right, is not necessarily of the same extent as its objective aspects. On the basis of its general and objective considerations the State may exceed the province protected by the subjective right while determining the objective, institutional boundaries of the very same fundamental right.

The duty of the State goes beyond its obligation not to violate the individual's right to life and to employ its legislative and administrative measures to protect this right. This obligation is not limited to the protection of the life of individuals, but it also includes the protection of human life in general and the conditions of its existence. This latter duty is qualitatively different from aggregating the right to life of individuals, it is "human life" in general, consequently human life as a value, that is the subject of protection. Hence, the State's objective and individual duty to protect human life extends to those lives which are in their formation, no less than it has a duty to secure the conditions of life for the future generations. This duty, in contrast with the right to life, is not absolute. Accordingly, it is possible that this duty is restricted by other rights. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302-303]

In Decision 22/2003 (IV. 28.) AB on the right to self-determination of terminally ill patients, the Constitutional Court reviewed its earlier decisions concerning the relation between the right to life and the right to human dignity. (ABK April 2003, 219) In assessing the so-called "euthanasia" problem as well, the Constitutional Court followed as a theoretical basis the doctrine of unity – on the determination of human status – expressed in the Decisions on capital punishment and later on abortion. It pointed out that "the principles elaborated by the Constitutional Court in the course of its practice are suitable for serving as a basis for taking a stand in the questions raised by the petitions." (ABK April 2003, 219-232) With regard to the "untouchable essence" provided for under Article 8 para. (2) of the Constitution, applicable to the restriction of fundamental rights, the Constitutional Court established the following: "A legal system based on ideologically neutral constitutional foundations may not reflect either a supporting or a condemning view about one's decision to end one's life; this is a sphere

where, as a general rule, the State has to refrain from interference. The role to be played by the State in this respect is limited to the absolutely necessary measures resulting from its obligation of institutional protection concerning the right to life." (ABK April 2003, 219) In the so-called "Euthanasia Decision", the Constitutional Court's arguments were not based on the conflict between the rights to life and to human dignity, it rather compared the right to self-determination deduced from the right to human dignity (and thus open for restriction in accordance with the test of necessity/proportionality) and the State's duty of institutional protection (the protection of life) stemming from the objective side of the right to life (ABK April 2003, 219, 236-237). Thus, the Constitutional Court applied an extended test as the method of the examination, not affecting the absolute nature of the rights to life and to dignity as rights determining the legal status of humans: it weighed and compared the constitutionally restrictable right to self-determination and the obligation of protecting life that is not absolute either.

2. It is a common element in the challenged provisions of the AP – with regard to the constitutional protection of fundamental rights – that they are not related to the State's taking human life as a certainly occurring act, but rather to the potential taking of human life by (an)other person(s), the risking of life, and allowing the possible violation of the right to life. Therefore, in the present procedure, the Constitutional Court is to examine the right to life – with due account to other provisions of the Constitution as well – in the complex relation with the State's duty to protect life. Accordingly, the constitutional review has covered the possibility of allowing the risking of life, the arbitrariness of taking life, the State's duty of protecting life, i.e. whether it is indispensable to allow the risking of life and whether the importance of the desired objective and the fundamental right restriction applied for that purpose are justified. When reviewing the constitutionality of various provisions of the AP, the Constitutional Court has taken into account its positions elaborated in the Decision on capital punishment, the one on abortion, and the so-called "Euthanasia Decision".

Article 8 para. (2) of the Constitution sets a limit to restricting fundamental rights, as it provides that their essential content may not be restricted by the legislator. Undoubtedly, the State's allowing the arbitrary taking of life would violate this constitutional prohibition. At the same time, in certain cases the law allows the taking of life as it accepts the lawfulness of killing in a situation of justifiable defence or extreme necessity. The provisions of the AP challenged by the petitions – primarily the cases of using firearms – do not belong to the

above regulatory scope. The different evaluation of these provisions is based, on the one hand, on the fact that they do not allow the taking of life but only the risking thereof, and, on the other hand, on the fact that the police officer acts not as a private individual but as a person performing the State's duty of protecting life.

The constitutional provision providing for the protection of public safety and domestic order as the fundamental duty of the police [Article 40/A para. (2) of the Constitution] is a constitutional objective the attainment and maintenance of which serves the protection of life as well.

In order to ensure the protection of public safety and domestic order, the State must empower the police with adequate rights and means. The lack of such empowerments would result in the impossibility of performing the task of the police defined in the Constitution. In comparison with everyday people – due to the nature of their chosen profession – police officers more often face conflicts where their lives, those of their colleagues or those of other people are threatened. The result of this situation is the special circumstance that the police officer, while performing his or her function of protecting life in the course of protecting public safety and domestic order, performs an activity that puts life at risk by the application of the means provided for him or her. Thus, the review by the Constitutional Court had to consider the above circumstance in order to decide whether it is necessary to apply the means provided for the constitutional objective of protecting life but risking life at the same time, together with other statutory provisions, and, if yes, whether such means and provisions are in proportion with the desired objective.

The Constitution does not specify what rights and means may be vested with the police in order to achieve the desired objectives. The two-thirds majority required by the Constitution for adopting an Act of Parliament on the police shows that a broad consensus of the legislative body is necessary for defining or amending the relevant rules, including ones on police officers' rights. This not only demonstrates the significance of the police as an armed organisation, but it also reflects the paramount importance of the protection of life and the right to life; at the same time – indirectly – it is one of the constitutional guarantees thereof.

The AP specifies the rights vested with the police together with the means related to the exercise of those rights. However, with regard to the constitutional relations described above,

the review cannot be limited to merely examining the adequacy and proportionality of the individual means and rules. The regulatory environment of the AP must also be taken into account. Among the general principles and rules of the operation of the police, the AP defines the requirement of proportionality:
"Section 15 para. (1) A police action shall not cause any disadvantage that is obviously out of proportion with the lawful objective of the action.
(2) Of several possible and suitable options for police action or means of coercion, the one being effective and causing the least restriction, injury or damage to the affected person shall be chosen."

The arbitrary use of means of coercion is also prohibited by the AP: "Section 16 para. (1) The police officer shall only apply means of coercion under the conditions defined by an Act of Parliament. The application of means of coercion shall not be continued if resistance breaks and the effectiveness of the police action can be ensured without it."

Thus, there are guaranteeing rules in the AP that are absolutely necessary for the statutory definition and application of means affecting human life. In addition to the evaluation of the existence and adequacy of guaranteeing rules, the assessment of the constitutionality of the provisions challenged by the petitioners is primarily determined by the fact whether the legislator took into account the limits of the restrictability of the fundamental rights enshrined in the Constitution when it provided for the various means and rules.

Considering the subjective side, the content of the regulation under review is twofold: on the one hand, it concerns the life of the police officer in action, acting on behalf of the State, and on the other hand, the life of those who are targeted by the action. In respect of the right to life, the Constitutional Court has not formed two separate groups, however, it has used different focal points within a single set of criteria. The reason for this is that the identity of life values does not automatically result in a requirement of there being equal levels of protection and risking. The equality of the fundamental right protection is the combined result of the legal and actual situation of the person in a dangerous situation and the level of life protection required in respect of that person. The same applies to the differences in the positions of persons affected by police actions.

IV

The petitions are, in part, well-founded.

1. The Constitutional Court first examined the constitutionality of the provisions of the AP on the use of firearms.

Section 53 para. (1) of the AP defines the term of "using a firearm": "only intentional shooting aimed at a person shall be regarded as use of a firearm." Within the meaning of this definition, any shooting aimed at a person qualifies as use of a firearm even if no injury has been caused. According to Minister of the Interior Decree 3/1995 (III. 1.) BM on the Service Regulations of the Police (hereinafter: "Service Regulations"), shooting should be aimed at the foot, if possible, or – if the attacker has a tool in hand that can be used from a distance – at the hand. However, the police officer's right to use a firearm may cause the termination of human life, therefore it constitutes an important and direct risk factor in connection with the right to life.

The Constitutional Court examined earlier the constitutionality of certain provisions related to the keeping, sale and use of firearms, but the previous reviews did not address the concept of using firearms as defined above. However, several decisions of the Constitutional Court have dealt with the relations between the regulation on firearms, the right to life, and the State's duty to protect life.

"A technical failure or health impairment influencing the use of a firearm may endanger human life. The protection of the fundamental right to life and health is an important constitutional interest undoubtedly justifying severe regulation for the purpose of preventing fatal mistakes in using firearms." [Decision 14/1992 (III. 30.) AB, ABH 1992, 338, 341]

"In the opinion of the Constitutional Court, it follows from the State's duty to protect life and health that it sets administrative limitations in fields where the enforcement of the right to life and health is highly threatened (see e.g. keeping of firearms)." (Decision 677/B/1995 AB, ABH 2000, 590, 597)

"The protection of public order is one of the most important duties of the police on the basis of the Council of Ministers Decree. Article 40/A para. (2) of the Constitution contains a

similar provision: ‘The fundamental duty of the police is to maintain public safety and domestic order.’ As the use of firearms might seriously endanger public order, the restriction or prohibition of the sale and use of firearms on a smaller or wider scale – and the Minister’s implementing decree authorising such restriction or prohibition – indeed support the protection of the constitutional order.” [Decision 22/1991 (IV. 26.) AB, ABH 1991, 408, 410]

“There is reasonable justification for the statutory limitation of the number of small firearms lawfully kept in circulation: for the purpose of protecting public safety, it is the clear constitutional duty of the public authority in power to apply restrictions to the objects of property threatening the enforcement of certain fundamental rights, for the protection of such rights. The Constitutional Court stated in Decision 58/1994 (XII. 14.) AB that in the field of criminal, civil and administrative law such statutes must be adopted and implemented that serve the active protection of human life by the State, and that ‘safeguard human life from other persons’ activities or the results thereof.’ (ABH 1994, 337)” (Decision 720/B/1997 AB, ABH 1998, 1005, 1007)

“Chapter XII of the Constitution lists the fundamental human rights item-by-item. However, the liberty of keeping a firearm is not named there, and it cannot be deduced from the fundamental rights to life and human dignity [Article 54 para. (1) of the Constitution] or the fundamental rights to freedom and personal security [Article 55 para. (1) of the Constitution], either. On the contrary: allowing the unrestricted purchase of firearms would entail – as demonstrated by foreign statistical data – an increase in the number of arbitrary deprivations of the human right to life, since firearms can be used not only for self-defence but for unlawful attacks as well. Pursuant to Article 40/A para. (2) of the Constitution, the protection of public safety – including human life and dignity – is the ‘fundamental duty of the police’.” (Decision 201/B/1995 AB, ABH 1995, 774, 775)

Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter: “European Convention on Human Rights”) and promulgated in Hungary in Act XXXI of 1993 contains provisions on the right to life.
They are as follows:
“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
a) in defence of any person from unlawful violence;
b) in order to effect a lawful arrest or to prevent the escape of a person lawfully kept in captivity;
c) in action lawfully taken for the purpose of quelling a riot or insurrection."
Although item 1 allows capital punishment, Article 1 of the sixth additional protocol to the European Convention on Human Rights provides for the abolition of capital punishment.

Upon comparing the requirements of Article 2 with the provisions of the AP on the use of firearms, the Constitutional Court has established that the challenged provisions are within the limits set in Article 2 item 2 sub-items a)-c). However, in the present procedure the Constitutional Court could not disregard the interpretation of the expression "force which is no more than absolutely necessary" as a fundamental conceptual condition.

Although the reasoning of the AP in relation to the regulation of using firearms does not refer to the content of the European Convention on Human Rights, it mentions another international document: "The Bill regulates the police officers' right to use firearms with due consideration to the resolution adopted at the 8th UN Congress on Crime Prevention: it is an ultimate means of coercion that may be used for self-defence, to prevent a serious criminal offence endangering the life of others, to capture a person causing such danger, or to prevent the escape of such a person." The regulation currently in force extends beyond the above category of cases, as it allows the use of firearms not only for capturing or preventing the escape of the perpetrator of a serious criminal offence threatening the life of others.

Prior to the specific examination of the challenged provisions, the Constitutional Court reviewed the regulations in force on the use of firearms, in particular in the operation of the Police, the penal institutions, the national security services, the Border Guard and the Customs and Financial Guard.

Comparing the regulations on the use of firearms pertaining to the above organisations, it can be concluded that the scope of the regulations varies from Act to Act; the sets of criteria and the terminology of the specific cases are partly the same and partly different. In this respect, the Constitutional Court points out that there is no requirement, contained or deducible from

the Constitution, obliging the legislator to adopt uniform regulations on using firearms. On the contrary: the legislator must consider the differences in the tasks and competencies of the organisations that may be empowered to use firearms, and the regulations on the right under review must be tailored to the organisation concerned. However, certain interrelations within the regulations may not be ignored in respect of the examination of the enforcement of the fundamental right to life.

The first such interrelation is the definition of the extent of the right to use firearms. Undoubtedly, if the legislator provides for an authorisation to use firearms in any case not justified by the tasks and competencies of the organ concerned, this in itself results in an unconstitutional situation. Upon examining the specific cases of authorisation, one can conclude that the legislator authorised all organs concerned (i.e. persons acting on behalf of such organs) to use firearms when it serves the purpose of averting a direct threat or attack against life or a direct attack seriously endangering physical integrity.

In the next category of cases – in line with the tasks and competencies of the specific organs – the use of firearms is justified by the prevention or interruption of the commission of serious criminal offences threatening life, as listed in detail (acts; attacks against objects, facilities). In this respect, police officers and border guards have the broadest authorisation, while financial guards have the narrowest one.

In line with the above, the risking of the life of the person affected by the use of firearms – i.e. the authorisation to use firearms – is, in all cases, justified by the need to avert a threat to one's life. Among the provisions under review, only a specific element in Section 54 item j) (the forcible freeing of a person in captivity) of the AP involves attacking, i.e. endangering conduct; all the others do not belong to the above categories of cases. This means that a majority of the regulations challenged by the petitions allow the use of firearms even if the threat to life is not manifest.

No other Act of Parliament provides for an authorisation to use firearms to the same extent as Section 54 items g) and h) of the AP. Thus it is an exclusive right of the police to use firearms against a person who has committed a criminal offence but who has not yet been prosecuted for that offence. The provision in Section 54 item i) of the AP has almost exactly the same wording as Section 58 para. (1) item g) of Act XXXII of 1997 on Border Surveillance and the

Border Guard, and it is partly identical to Section 22 para. (3) item j) of Act CVII of 1995 on the Organisation of Penal Institutions (hereinafter: the API). Finally, the provision under Section 54 item j) of the AP can be found in Section 22 para. (3) items g), h) and i) of the API – with a partly different set of criteria.

Although the legislator provided separately for the various cases of using firearms, in practice such cases may also occur in sequence within a single situation, depending on the conduct of the persons affected by the use of firearms. For example, a person showing attacking conduct may run away upon abandoning the attack, or vice versa: a person on the run might attempt an attack.

Prior to examining certain cases of using firearms challenged by the petitions, the Constitutional Court reviewed some provisions of the AP having an effect on the regulatory content of this right.

On that basis, it has established that in the AP the legislator provided for the police officer's obligation to take action [Section 13 para. (1) of the AP], and it required everyone to submit to a police action and to obey the instructions of the police officer [Section 19 para. (1) of the AP]. In the case of resistance to the lawful action taken by the police officer, the actions and means of coercion defined in the AP may be applied [Section 19 para. (2) of the AP].

The legislator defined the cases where no firearm may be used (Section 55), and it also provided for the preconditions of applying such a tool [Section 56 para. (1)]. However, the legislator itself specified exceptions to both preconditions, i.e. it partially eased the strictness of the rules ensuring the exclusion or prevention of endangerment. Such an extension of allowing the risking of human life generally necessitates – with consideration to the requirements of fundamental rights protection – the enhancement of the constitutional protection of life in the specific cases of using firearms.

At the same time, the Constitutional Court points out that there are differences between the specific cases with regard to the preconditions of the exercise of the right to use firearms. The most differences can be found in the enforceability of the preconditions (preventive actions). In the so-called cases of endangerment, the person affected by the use of a firearm shows attacking conduct, therefore the police officer's coercive action serves the purpose of averting

it. It follows from the attacking nature, swift course and approaching direction of the conduct that in general there is little time available for performing the actions (calling, warning, warning shot) specified in Section 56 para. (1) of the AP. Consequently, these are the cases where Section 56 para. (2) of the AP, i.e. the complete or partial setting aside of the actions preceding the use of a firearm, is more often applied. In contrast, in the case of most of the challenged provisions, the person affected by the use of a firearm is on the run or escaping, clearly moving away, therefore the police officer chasing him or her usually has an opportunity to take preventive action.

Section 54 item h) of the AP allows the use of a firearm to capture or to prevent the escape of the perpetrator of a criminal offence against the State or against humanity.

First of all, the Constitutional Court points out with regard to the provision under review that this authorisation to use firearms does not belong to the category of cases of endangerment. The person affected by using a firearm has already committed the criminal offence, but he or she attacks neither the police officer nor other persons, he or she is actually fleeing or hiding away. Consequently, in this case, the examination is directed at establishing whether the use of firearms is permissible in cases where no other life is being threatened at the same time.

In the opinion of the Constitutional Court, the constitutionality of using firearms is justified by the fact that the person affected by the use of firearms previously violated the right to life by taking the life of another person.

Chapter X of Act IV of 1978 on the Criminal Code (hereinafter: the CC) defines crimes against the State. (Section 139 violent changing of the constitutional order; Section 139/A conspiracy against the constitutional order; Section 140 riot; Section 142 sabotage; Section 144 high treason; Section 145 treachery; Section 146 assisting the enemy; Section 147 espionage; Section 148 espionage against allied armed forces; Section 150 omission of reporting.)

The taking of one’s life, as an element of the statutory definition, cannot be found in any of the statutory definitions of the listed criminal offences.

Chapter XI of the CC defines crimes against humanity. (Section 153 incitement for war; Section 154 prohibited recruitment; Section 155 genocide; Section 157 apartheid; Section 158 violence against the civilian population, Section 159 war-time looting; Section 160 criminal warfare; Section 160/A use of weapons prohibited by an international treaty; Section 161 battlefield looting; Section 162 infringement of armistice; Section 163 violence against a war emissary; Section 164 misuse of the red cross; Section 165 other war crimes.)

Among the statutory definitions of the criminal offences listed above, only genocide, apartheid, criminal warfare and other war crimes include – not unconditionally, but in addition to other criminal acts – the taking of one's life.

Based on the above, the Constitutional Court has established that the regulatory content of Section 54 item h) of the AP – namely the authorisation to use, without exceptions, firearms against perpetrators of the criminal offences listed in Chapters X and XI of the CC – violates the right to life enshrined in Article 54 para. (1) of the Constitution. However, perpetrators of crimes against humanity who have killed someone are subject to the provisions in Section 54 item g) of the AP in respect of the possibility to use firearms against them.

Consequently, the Constitutional Court has annulled Section 54 item h) of the AP.

2. Section 54 item i) of the AP also allows the use of firearms against a person whose conduct suggests an intention to directly use the weapon or other dangerous tool he or she is holding against another person. In the petitioner's opinion, the text "or other dangerous tool" is unconstitutional.

In the case under examination, the legislator provided for a double condition for using firearms, in addition to the preventive actions defined in Section 56 para. (1) of the AP. The first condition is that the police officer must first instruct the person concerned to put down the weapon or other dangerous tool he or she is holding. The other condition is the given person's non-compliance with the above instruction.
The Constitutional Court points out that Section 54 item i) of the AP cannot be classified into any of the case categories of using firearms as detailed earlier. Section 54 items a)-f) and k), and, to some extent, item j) of the AP authorise the use of firearms against an attacker whose attack has been realised and directly or indirectly threatens life. In the case of Section 54

items g) and h), and – to some extent – item j) of the AP, the legislator connected the authorisation to use firearms to a criminal offence committed in the past.

Section 54 item i) of the AP does not contain any of the above conditions. In this case, the person affected by the use of firearms does not show any attacking conduct or any other conduct actually threatening life. One can only conclude from the circumstances that the person concerned is preparing to use the object he or she is holding in a manner suitable for endangering human life. In other words: once the instruction of the person to put down the object has proved to be unsuccessful, the police officer assumes with due grounds that the object is going to be used in an attack targeting the police officer or some other person. Thus, in the case as per the provision under review, both a realised attack and a criminal offence committed previously by the person affected by the use of firearms are missing.

It follows from the regulatory content of Section 54 item i) of the AP and especially from the comparison with other cases of using firearms that the object (weapon or other dangerous tool) is of special importance. Therefore, the Constitutional Court has primarily examined in relation to the right to life whether the dangerousness of the objects specified in the provision reaches a level that justifies the use of firearms, i.e. the possibility of risking life.

Although the AP does not provide a definition of weapons, as a general term and in the sense of criminal law, a weapon is an object or tool suitable for endangering or taking one's life. Accordingly, pursuant to Section 137 item 4 a) of the CC, a crime shall be classified as having been committed in an armed manner if it has been committed by using a firearm or explosive. The AP does not provide a definition of other dangerous tools, either. While tools endangering life are regarded as weapons, other dangerous tools do not necessarily qualify as such.

According to the annex to Government Decree 175/2003 (X. 28.) Korm. on the Tools Particularly Dangerous to Public Safety, such tools include, among many others – e.g. cold steel – tools suitable for spraying out a substance causing a state of inability to attack by irritating the eyes, mucous membranes or skin (gas spray), which are, however, not suitable for taking one's life.

According to the provision under review, firearms may also be used when the conduct of the person affected by the use of firearms suggests an intention to use the object – not suitable for killing anyone but regarded by the acting police officer as belonging to the category of other dangerous tools – held by the person directly against another person. Therefore, the term "other dangerous tool" allows a too broad interpretation that might justify the use of firearms even in cases where it is unnecessary. Thus, the legislator authorised the exercise of a police right on the basis of a legal concept without due differentiation, consequently, the lack of an exact statutory definition – in the context of the right to life – has resulted in an unconstitutional situation.
Therefore, in the opinion of the Constitutional Court, the provision on other dangerous tools – as worded at present – may lead to legal uncertainty. As a result, the use of firearms can only be constitutional in the case of a weapon or other tool suitable for taking one's life.

Accordingly, the Constitutional Court has established that the two instances of the text "or other dangerous tool" in Section 54 item i) of the AP not only cause legal uncertainty due to the undefined nature of the concept pertaining to the objects concerned, but also constitute an unjustified risk in relation to the right to life. The risking and protection of life can only be balanced, i.e. the equal protection of the fundamental rights can only be ensured, if the category of objects defined in the provision under review is narrowed down to those tools which are suitable for killing someone, or, at least, might directly endanger life.

On the basis of the above, the Constitutional Court has established that the two instances of the text "or other dangerous tool" in Section 54 item i) of the AP violate the requirement of legal certainty resulting from Article 2 para. (1) of the Constitution, and also violate the provisions of Article 8 para. (2) and Article 54 para. (1) of the Constitution, therefore it has annulled the unconstitutional texts and established the normative text remaining in force.

3. According to Section 54 item j) of the AP, the police officer may use a firearm to prevent from escaping, from being forcibly freed or to capture a person previously captured, detained because of the perpetration of a criminal offence or kept in captivity under a judicial decision, save if the person in captivity is a juvenile delinquent. Thus, according to this provision of the AP, firearms may be used for the above purposes against any adult person in captivity, regardless of the weight or nature of the offence for the commission of which the person was detained by the police.

One of the petitioners claims the unconstitutionality of the entire provision, while the other one that of the texts “from escaping” and “or to capture”.

The provision under review is twofold regarding the person affected by the use of firearms: it applies to the person in captivity as well as to the person participating in the forcible freeing of the person in captivity. Persons affected by the use of firearms because they are on the run or to be captured – subject to item j) – show no attacking conduct, and they clearly do not act against the life or physical integrity of other persons. If the person performs such an act, the use of firearms becomes possible on the basis of some other reason defined in Section 54 of the AP [items a), b), i) or k)]. However, a person participating in forcible freeing necessarily shows attacking conduct.

The differences between the types of conduct have resulted in different directions in the examination by the Constitutional Court. In the case of persons on the run and ones to be captured after escape, there is no threat to the police officer or a third person, therefore the Constitutional Court has again had to form an opinion on the constitutional acceptability of risking life (using firearms) when it does not serve the purpose of averting a threat to life.

In Decision 9/1992 (I. 30.) AB, the Constitutional Court stated the following: “The failure of proving is a risk to be taken by the State, similarly to mistakes made during the proceedings, together with any circumstance – save if otherwise provided in an Act – hindering the proceedings and preventing the achievement of the ideal purpose of the criminal proceedings, namely the imposition of a just punishment fulfilling its desired objective.” (ABH 1992, 59, 70)

The Constitutional Court also pointed out in several decisions that the State and its organs have the right and the obligation, deducible from the provisions of the Constitution, to exercise the punitive power of the State, and to enforce the demand to punish criminal acts. In this respect, it stated in Decision 5/1999 (III. 31.) AB that it is justified for the organs exercising the punitive power of the State to have effective tools for the performance of this task. (ABH 1999, 75, 83) This necessitates allowing the application of such acts in the criminal proceedings, including coercive actions, that are essentially of a seriously restrictive

nature as far as the constitutional rights of the person subjected to criminal proceedings are concerned. [Decision 26/1999 (IX. 8.) AB, ABH 1999, 265, 271]

The quoted statements also reinforce the obligation of the State to use the available constitutional tools effectively. In the context of the provision reviewed, this means that the police must ensure the safe guarding of the person in captivity, thus preventing his or her escape.

Pursuant to Section 14 para. (1) of Minister of the Interior Decree 19/1995 (XII. 13.) BM on the Rules on the Detention Rooms of the Police (hereinafter: the DDP), a detention room is a building or part of a building suitable for permanent human residence, serving the purpose of the placement and safe guarding of persons in captivity. The DDP regulates the means of coercion applicable against the person in captivity: "Section 30 para. (1) The means of coercion defined in Sections 47-50 and Section 52 of the AP may be applied against persons in captivity in compliance with the provisions on means of coercion contained in Minister of the Interior Decree 3/1995 (III. 1.) BM on the Service Regulations of the Police (hereinafter: the SRP)" Section 32 para. (2) of the DDP also provides for the regular control of persons in captivity: "The guards of the detention room shall monitor the conduct of the persons in captivity therein through the inspection hole once in every 20 minutes. Persons in captivity who have committed an extraordinary act or who – on the basis of their conduct – can be reasonably expected to commit an extraordinary act – shall be monitored more frequently or on a continuous basis, if necessary." According to Section 34 para. (3) of the DDP: "A person in captivity shall be shackled without delay if he or she has attempted an attack or escape. After the execution of the procedural act, prior to leading the person in captivity back to the detention room, he or she shall be shackled and his or her clothes shall be checked."

Based on the above provisions, it can be concluded that the legislator has provided for the conditions and means of safe guarding by the police. If, in the course of guarding, any negligence occurs that renders possible the escape of a person in captivity prior to the establishment of his or her legal liability, this may not be corrected by using a tool suitable for taking one's life (firearm). This means that besides the State's duty to protect life, it is also obliged to take responsibility for the guarding of persons in captivity, and these two obligations render the use of firearms disproportionate in relation to the right to life. The Constitutional Court has also taken into account the fact that the State is not left without any

tool under criminal law to sanction the escape of a person in captivity, as according to Section 245 para. (1) of the CC, such conduct qualifies as a criminal offence of "escape of prisoner", which results in the criminal liability of the person concerned.

Section 64 para. (2) of the SRP significantly narrows down the right to use firearms as defined in the provision under review: "Firearms may only be used on the basis of Section 54 item j) of the AP when the capture, detention or captivity is based on a criminal offence specified in Section 54 items g) and h) of the AP." According to the present regulations, this means that firearms may only be used against such persons in captivity who had been detained (or captured or who are kept in captivity) for killing someone or committing a criminal offence against the State or humanity. On the basis of the Constitutional Court's decision concerning Section 54 item h), this would otherwise only apply to such persons in captivity who had killed someone.

However, the Constitutional Court has established – on the basis of the above – that the texts "from escaping" and "or to capture" in Section 54 item j) of the AP violate Article 8 para. (2) and Article 54 para. (1) of the Constitution. It is particularly emphasised by the Constitutional Court that the State bears enhanced responsibility for guarding and safe detention in the case of a person in captivity who has committed an act of killing.

At the same time, the Constitutional Court has not established the unconstitutionality of the further provision in Section 54 item j) of the AP, as the use of firearms is justified in the case of preventing the forcible freeing of a person in captivity. In that case, justification for using firearms is provided by the fact that forcible freeing necessarily bears a risk with regard to the life or physical integrity of other persons. It belongs to the competence of the legislator to provide for further conditions for the use of firearms, as it has been done in the provision [Section 64 para. (2)] of the SRP referred to above.

When reviewing Section 54 item j) of the AP in line with the above, the Constitutional Court also detected a problem concerning the clarity of the norms, as referred to in general by the petitioners. The Constitutional Court has already pointed out in its reasoning that the provision under review is twofold regarding the person affected by the use of firearms: it applies to the person in captivity as well as to the person participating in the forcible freeing of the person in captivity. However, the closing part of the provision excludes the use of

firearms in all cases where the person in captivity is a juvenile delinquent. Presumably, the legislator only intended to exclude the use of firearms in the case of juvenile delinquents in captivity, but due to the technical implementation of codification, this exclusion also applies to the other group of persons concerned, i.e. to those who take part in an act of forcible freeing. Consequently, in the case of an attack aimed at the freeing of a juvenile delinquent in captivity, the police officer may not at all exercise his or her right to use firearms vested with him or her on the basis of Section 54 item j) of the AP.

The Constitutional Court has established the unconstitutionality of using firearms against a person in captivity, but at the same time it points out that it is not unconstitutional to use firearms against those who participate in a forcible action aimed at freeing a person in captivity.

According to the standing practice of the Constitutional Court, when a norm is found to be partly unconstitutional, it usually only annuls the part at issue, and at the same time it establishes the text of the provision remaining in force. Although in the present case this solution would be possible in the technical sense, it cannot be applied because the interpretation of the text remaining in force would become impossible, leading to a so-called lack of the clarity of the norm, which would maintain the unconstitutional situation.

That is why the Constitutional Court has decided to annul the entire provision. This way, the legislator can separately regulate the use of firearms against persons participating in the forcible freeing of a person in captivity, constituting the constitutional part of Section 54 item j) of the AP up to now.

4. The Constitutional Court gives the following reasons for rejecting the petitions related to further provisions of the AP:

4.1. According to Section 54 item g) of the AP, the police officer may use a firearm to capture or to prevent the escape of a perpetrator who has intentionally killed someone.

First of all, the Constitutional Court had to decide whether it is constitutionally acceptable to risk human life when the purpose thereof is other than averting a threat to life. The mere fact that a person killed someone in the past does not necessarily mean that he or she is preparing

to commit another homicide or an act threatening life. Another important circumstance to be taken into account is the question whether it was the person affected by the police officer's use of firearms who in fact committed the homicide. The identity of the person who committed the homicide can be presumed in the case of catching in action by the police, but verbal information (statement by a witness) may make identification uncertain. It is also important to point out that the guiltiness of the person affected by the use of firearms has not yet been established by the court. According to the provision, any form of intentional homicide justifies the use of firearms, not only those forms where the perpetrator uses a firearm, or where the brutality or viciousness of the perpetrator is otherwise demonstrated, thus justifying an increased social demand for the protection of life (posing a high threat to public safety in relation to the right to life). It is not a condition that the perpetrator be armed or in preparation to use the weapon directly against someone.

One of the risk factors of life is man himself, partly because anybody can kill in the abstract sense of the term. If someone actually kills another person, he or she has to face the State's administration of justice which makes a decision on his or her guiltiness and on imposing a punishment. However, in the present procedure, the Constitutional Court has to evaluate the legal situation where the use of firearms is allowed against a person who has intentionally committed homicide, but whose criminal liability has not yet been established.

The protection of life as the most important value among the fundamental rights demands a diversified, well-founded and clear approach that is always in line with the circumstances of the given case. In the present case, a possible approach would be an evaluation based on the comparison of similar life values. This assumes a twofold relation where one side is represented by the life of the person affected by the use of firearms, having committed homicide, and the other side is represented by the life value – in an abstract form – potentially endangered by the person having previously killed another person by the possibility of trying to take one's life again. In line with the above, this endangerment is too general and it cannot be concretely specified, therefore it does not form any justification for the acceptability of risking life in respect of Section 54 item g) of the AP.

However, in connection with the right to life, the Constitutional Court has not followed the above approach with regard to the provision under review. A person who is in a state of endangerment as defined in Section 54 item g) of the AP is in a special legal situation. In

comparison with all other persons in the same situation, the speciality lies in the fact of having committed homicide in the past. It basically follows from the right to life that a decision has to be made on the legal liability of a person who has killed someone. However, this requires his or her presence, which might only be possible to ensure by capturing him or her.

A person who violates the right to life by taking another person's life is and may not be placed outside the realm of law, but takes the risk of his or her life becoming endangered in the form of being subjected to the lawful use of firearms applicable against him or her under the conditions specified in the relevant Act of Parliament. This situation is the result of a continuous and closed chain of intentional acts specified by the Act. The first such intentional act is homicide. The second one is the unwillingness of the affected person to be subjected to legal proceedings: he or she fails to voluntarily appear at the authority or avoids being captured. The third act is the failure to obey the actual police action by running away. The fourth one is that the affected person's intention to escape the proceedings is maintained despite being warned about the use of firearms and the warning shot. Thus, the affected person is in a situation of choice, as he or she has sufficient time to prevent the emergence of a situation risking his or her life. Although according to Section 56 para. (2) of the AP the preventive actions may be partly or completely set aside, but this only applies if otherwise the life of the police officer or another person would be endangered. However, from the point of view of the evaluation of constitutionality, the latter situation falls within another category of using firearms, based on the actual endangerment of life [Section 54 items a), b) or k) of the AP].

Examining the actual situation of the person affected by the use of firearms, it is indeed possible to be mistaken concerning the identity of the person having committed the homicide. This means that the police officer might use firearms against a person who did not commit homicide – although the police officer thinks that he or she did so. Still, the statutory authorisation is clear-cut, as, pursuant to Section 52 para. (1) of the AP, the police officer only has a right to use firearms in compliance with the provisions of the AP. Consequently, in the individual cases, the use of firearms is only lawful if the police officer knows beyond doubt – as it follows from the circumstances of the case – that the person he or she is going to shoot at previously killed someone. If the above condition is not fulfilled, the police officer shall be liable under criminal law – with due consideration to the rules on making mistakes – if the use of the means of coercion has resulted in injuring or killing the person concerned.

Taking one's life can also happen in a situation of justifiable defence or extreme necessity (Sections 29 and 30 of the CC), regarded by the authority in the course of the criminal proceedings as a circumstance excluding punishability. However, in general – in a given situation – the actual examination of the lack of unlawfulness cannot be expected from the police officer in action.

The legal and actual situation of the person endangered by the use of firearms has been evaluated by the Constitutional Court with consideration to the provisions under Article 8 paras (1)-(2) and Article 54 para. (1) of the Constitution. In the opinion of the Constitutional Court, the use of firearms is justified when it ensures or renders possible the capture of the perpetrator of an intentional homicide. The justification is based neither on the need to enhance the effectiveness of criminal prosecution, nor merely on the authorisation to conduct criminal proceedings, but on a requirement that follows from the right to life: any person taking another human's life must face legal proceedings.

In view of the above, the Constitutional Court has established that Section 54 item g) of the AP does not violate Article 8 para. (2) and Article 54 para. (1) of the Constitution, therefore it has rejected the relevant petition.

4.2. With regard to risking the life of the police officer under Section 11 para. (1) of the AP, the Constitutional Court points out that it has already examined the provisions on requiring the sacrifice of life contained in Act CX of 1993 on National Defence (hereinafter: the AND). As explained in Decision 46/1994 (X. 21.) AB, "When, in the framework of the obligation to protect the country, the State requires the soldier engaged in armed service to sacrifice his or her life, as an ultimate possibility, this is not a certainly occurring case of deprivation of human life and human dignity by the State. In the text of the oath, the soldier undertakes the risk of sacrificing his or her life. When using the army constitutionally, this may only happen in the case of an armed attack by a foreign power (Section 2 of the AND), or in the case of participation in averting violent acts committed in an armed manner or with weapons, as defined in Article 40/B para. (2) of the Constitution. These are situations where the life of the soldier is necessarily at risk, and where the law allows the soldier to take the life of the aggressors.

A soldier risking his or her life in an armed conflict is in a situation of performing his or her constitutional duty (Article 70/H of the Constitution). However, for those whose conscience cannot tolerate participation in an extraordinary situation suspending the inviolability of human life, the Constitution offers a possibility not to perform armed military service. They may not take the oath objected to, either. Consequently, the text of the soldiers' oath does not violate Article 54 para. (1) of the Constitution." (ABH 1994, 260, 262-263)

Under Section 11 para. (1) of the AP, the risking of life is not related to the performance of a constitutional duty, but to the exercise of a voluntarily chosen profession (occupation). The person concerned (the police officer) knows, or at least is expected to know, his or her duties resulting from engagement in the service of the police. It is his or her personal decision, not forced by the State, to become and to remain a police officer. The person undertaking to serve in the police is aware of the complex tasks of professional police officers – including the risking of life – when he or she decides on joining the service or withdrawing therefrom, basically exercising his or her right to self-determination. The potential endangerment of one's life is related to the service of police officers.

It is one of the professional requirements of the service that the police officer is obliged to protect public safety and domestic order even by risking his or her life, if necessary. In this respect, the State must establish the conditions ensuring the professionality of the police officer's performance of his or her duty, thus minimising the risk of the police officer losing his or her life. Such conditions include in particular the elaboration of service regulations, requiring police officers to be aware of the provisions of such service regulations, and ensuring proper training and technical background. On the side of the police officer this means that he or she has the right to acquire the knowledge and skills necessary for protecting his or her own life. In respect of the State's compliance with the above conditions, the competence of the Constitutional Court extends to examining whether the legislator has met its relevant obligation to regulate. In this regard, the Constitutional Court has established the following:

The Minister of the Interior elaborated the Service Regulations and the Parliament adopted Act XLIII of 1996 on the Service of the Professional Members of the Armed Organisations, where – among others – it provided that the superior shall provide the police officer with the conditions necessary for performing the service in a healthy and safe manner; organise the

performance of service duties by making it possible for the professional member of an armed organisation to exercise his or her rights and meet his or her obligations resulting from the service relationship; give all information and guidance necessary for performing the tasks, and ensure the acquisition of all the knowledge necessary for performing the service.

According to Section 30 para. (4) of the CC, the case of extreme necessity shall not be applicable to the benefit of persons whose profession involves the assumption of risk. Police officers also belong to the above category of persons. This provision also supports the claim that the acceptance of dangerous situations forms part of the police officer's profession, and he or she has no right to refer to a situation of extreme necessity in order to protect his or her own life.

Consequently, the Constitutional Court has established that the text "shall protect public safety and domestic order even at the risk of his or her life, if necessary" in Section 11 para. (1) of the AP does not violate Article 8 para. (2) and Article 54 para. (1) of the Constitution, therefore it has rejected the relevant petition.

4.3. The legislator declared among the general principles and rules of the operation of the police – more specifically among the principles of applying means of coercion – that the taking of human lives should be avoided if possible. The expression "should be avoided" does not mean a prohibition, as – undoubtedly – it has an aspect of permission in addition to the restrictive, negative orientation.

The application of means of coercion is absolutely necessary for performing the State's obligation to protect life. Physical force, shackles or firearms are all means of coercion the application of which may result in injuries. The provision of the AP under review focuses on the principal rule that the application of the means of coercion may not cause injury or the loss of human life. Thus the legislator has complied with the requirement resulting from the obligation to protect life. However, according to the correct grammatical interpretation, the expression "if possible" does not provide a broader right to use firearms, and it does not weaken the restrictive force of the expression "should be avoided". The above words may not be arbitrarily separated, consequently the expression "should be avoided if possible" is to be interpreted as a single entity, as a recommendation on the manner of the application of the law, and it is in line with the provisions of the AP related to the proportionality and order of

means of coercion, as well as to the acts preceding the use of firearms. The expression "if possible" in itself, separated from its context, has no relevance in constitutional law.

Consequently, the Constitutional Court has established that the text "if possible" in Section 17 para. (2) of the AP does not violate Article 8 para. (2) and Article 54 para. (1) of the Constitution, therefore it has rejected the relevant petition.

4.4. The Constitutional Court explained for the first time in Decision 8/1990 (IV. 23.) AB that the right to human dignity is one of the designations of the so-called "general personality right". In the practice of the Constitutional Court, the general personality right was defined through its various aspects, namely the right to free personal development, the right to the freedom of self-determination, the general freedom of action or the right to privacy. In the same Decision, it was also pointed out by the Constitutional Court that the general personality right is a "mother right", i.e., a subsidiary fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete, named fundamental rights are applicable to a particular set of facts (ABH 1990, 42, 44-45).

In the opinion of the petitioner, the provision of Section 19 para. (1) of the AP violates Article 54 of the Constitution by providing for a statutory presumption according to which the lawfulness of a police action may not be questioned in the course of the action. In the light of constitutional law, the above claim of the petitioner can be interpreted as a reference to the violation of the general freedom of action, the right to privacy and the right to self-identification (personal integrity) by the challenged statutory provision.

As stated by the Constitutional Court in Decision 65/2003 (XII. 18.) AB when analysing the conditions of successful police actions, effective means must be provided to the organisation in charge of protecting domestic order and public safety in order to ensure the successful protection of domestic order and public safety in the country. It is the above requirement serving the interests of the community that justifies the provision under Section 19 para. (1) of the AP, according to which everyone shall submit to a police action and obey the instructions of the police officer if the action is aimed at the enforcement of provisions set forth in statutes, unless otherwise provided by an Act of Parliament or an international treaty. This requirement and statutory provision is closely related to the second sentence in Section 19

para. (1) of the AP, challenged by the petitioner, providing that the lawfulness of a police action may not be questioned at the scene of the action, save if the unlawfulness of the action can be established beyond doubt without deliberation. The same decision of the Constitutional Court points out that the presumption of the lawfulness of the police action is a statutory presumption, which, however, may be subsequently confuted by counter-evidence, thus it is possible to seek legal remedy. (ABK December 2003, 900, 907)

The possibility of legal remedy is offered by the AP under Section 92 para. (1), and it is concretised in Section 93 by declaring that a complaint may be submitted by the person against whom the police action was performed. According to the statutory provisions, the complaint may be submitted within 8 days after the action to the police organ having performed the action, the complaint shall be judged within 15 days in a resolution with reasoning by the head of the police organ concerned, and an appeal may be filed against that resolution to the superior police organ. The judicial review of the challenged police action is also possible: the complaint against the resolution by the superior police organ may be submitted by the person who is entitled to submit a complaint. In the opinion of the Constitutional Court, under the statutory guarantees, the challenged statutory provision does not violate the general freedom of action, the right to privacy, or the right to personal integrity, as fundamental rights specified as personality rights.

In view of the above, the Constitutional Court has rejected the petition seeking the establishment of the unconstitutionality and the annulment of the second sentence in Section 19 para. (1) of the AP.

4.5. According to the petitioners, Section 33 para. (2) item b) of the AP, authorising, in the interest of public safety, the police officer to bring before the authority or competent organ the person who can be suspected of having committed a criminal offence, and Section 38 paras (1) and (2) of the AP, according to which the police may take a person into public security detention, violate not only the right to personal freedom but the right to human dignity as well. The petitioner claims that the condition “his or her hiding can be reasonably expected” in Section 38 para. (2) is unconstitutional.

The Constitutional Court has already examined the challenged provisions in connection with the restriction of the right to personal freedom, and it established in Decision 65/2003 (XII.

18.) AB that the provisions on the rules of procedure pertaining to bringing before the authority and detention are in line with the constitutional requirements on the temporary limitation of personal freedom. (ABK December 2003, 900, 910)

In respect of the violation of the right to human dignity, it was established by the Constitutional Court in Decision 64/1991 (XII. 17.) AB that the right to human dignity is only absolute and unrestrictable in its unity with the right to life. (ABH 1991, 297, 308, 312) However, the component rights deduced from this right, such as the right to self-determination, the right to self-identification or the right to the freedom of action may be restricted in accordance with Article 8 para. (2) of the Constitution just like any other fundamental right. (Decision 879/B/1992 AB, ABH 1996, 397, 401) According to the standing practice of the Constitutional Court, the restriction of a fundamental right is only constitutional if it does not affect the untouchable essence of the fundamental right, if it is unavoidable, and if the weight of the restriction is not disproportionate to the desired objective. [e.g. Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 71; Decision 7/1991 (II. 28.) AB, ABH 1991, 22, 25]

It was also stated by the Constitutional Court in Decision 46/1991 (IX. 10.) AB that it violates the fundamental right to human dignity when coercion is applied by an authority against someone without due grounds, and thus the State interferes, without any justification, with the privacy of individuals. (ABH 1991, 211, 215)

In the opinion of the Constitutional Court, the act of bringing before the authority performed on the basis of Section 33 para. (2) item b) of the AP and the act of taking into public security detention as defined in Section 38 paras (1) and (2) of the AP are actions applied by the authority with due grounds. The above statutory actions are justified by the public interest in the protection of public order and safety, and they are necessary when the persons concerned are not willing to cooperate with the authority. The above actions applied by the authority with due grounds do not disproportionately restrict – in comparison to the desired objective – the enforcement of the right to human dignity of persons brought before the authority on the basis of Section 33 para. (2) item b) of the AP, or that of persons taken into public security detention on the basis of Section 38 of the AP. In the view of the Constitutional Court, the coercive actions applied on the basis of the challenged statutory provisions do not violate the provisions under Article 54 para. (1) of the Constitution.

Consequently, the Constitutional Court has rejected the petitions seeking the establishment of the unconstitutionality and the annulment of Section 33 para. (2) item b) of the AP, Section 38 para. (1) of the AP, and the text "his or her hiding can be reasonably expected" in para. (2) thereof.

4.6. Among the rules pertaining to the use of firearms against a person in a crowd, Section 57 para. (2) of the AP excludes the establishment of unlawfulness if the person hit did not leave the site despite being instructed by the police to do so.

As the challenged provision is not about a shot intentionally aimed at a certain person, it may not be regarded as belonging to the category of using firearms defined in Section 53 para. (1) of the AP. Accordingly, the Constitutional Court had to examine whether it is permissible to risk the life of a person against whom there is no reason to use firearms but who is hit by accident when using firearms against another person.

The petitioner assumes that after being instructed by the police to do so, some people might not leave the site but hide away, and this way they might accidentally receive even a lethal shot. Therefore, according to the petitioner, the exclusion of unlawfulness could only be accepted if the Act obliged the police to check, prior to using firearms, whether the instruction to leave the site has been complied with.

Resistance to the instruction by the police results from the person's free will, and as it causes a threat to life undertaken knowingly in the scope of self-determination, the person concerned must bear the consequences that might result from it. When someone is unable to leave the site for objective reasons beyond his or her free will, he or she can inform the police about the situation in some way. If the police – without considering the above circumstance – fail to ensure the affected person's access to a safe place, and at the same time the police officer exercises his or her right to use firearms against another person and the affected person is accidentally hit by a bullet, then the exclusion of unlawfulness may not be established to the benefit of the police officer.

Thus, it is within the State's objective obligation of institutional protection to ensure a possibility to leave the site where one's life is endangered, but the State's obligation to protect

life may not be enforced in respect of a person who willingly remains at a site where human life is endangered. Accordingly, the content of the challenged provision is not considered to violate the right to life as a constitutional fundamental right.
Consequently, the Constitutional Court has established that Section 57 para. (2) of the AP does not violate Article 8 para. (2) and Article 54 para. (1) of the Constitution, therefore it has rejected the relevant petition.

4.7. In connection with the statutory provision regulating the promising of the refusal or termination of the investigation [Section 67 para. (1) of the AP], the petitioner claims the violation of the right to human dignity by the fact that the AP does not define the period available for the perpetrator of a criminal offence to inform the police, and – in the opinion of the petitioner – this may result in a situation where the police can exercise pressure for a long time on the person subject to the proceedings, in order to obtain information related to the commission of the criminal offence and considered important by the authority.

Pursuant to Section 170 para. (1) of Act XIX of 1998 on Criminal Procedure (hereinafter: the ACP), the public prosecutor or the investigating authority shall start the procedure of investigation on the basis of the information that has become known to them, or the investigation may be commenced upon reporting an offence. The statutory rules on the deadlines of investigation are defined in Section 176 of the ACP. Paragraph (1) of the above section provides that the investigation is to be completed as soon as possible, and it shall be closed within two months after its ordering or commencement. When it is justified by the complexity of the case or by an unavoidable obstacle, the public prosecutor may extend the deadline for closing the investigation by two months, and upon the expiry of such extension, the Chief County Prosecutor may extend the deadline by a maximum of 1 year reckoned from the date of commencing the criminal proceedings. According to Section 176 para. (2) of the ACP, only the Prosecutor General may extend the deadline for completing the investigation beyond 1 year, if the investigation is being performed against a specific person, and the extension shall not be longer than 2 years from the interrogation of the suspect.

On the basis of the above statutory provisions, it can be concluded that the ACP, by setting a reasonable deadline for completing the investigation, provides adequate guarantees ensuring that the police do not perform a lengthy investigation without due professional grounds. Consequently, under the public prosecutor’s supervision of the investigation, the police may

not misuse the statutory possibility to reach an agreement on supplying information in consideration for promising the refusal or termination of the investigation. The agreement on supplying information may not keep under "pressure" the person suspected of having committed a criminal offence for an indefinite period. If the statutory provisions are complied with, the police have no possibility to blackmail the suspect by forcing him or her, through unlawful influence, to supply additional information, thus violating his or her human dignity by an unlawful interference with his or her privacy, as a result of keeping him or her under duress. Supplying information is not only in the interest of the investigating authority, but it is equally in the interest of the person suspected of having committed a criminal offence. Both the investigating authority and the suspect have to weigh the arguments for and against making an agreement. The person suspected of having committed a criminal offence has personal interests motivating the conclusion of the agreement, while the police are motivated by the interest in criminal prosecution that can be enforced through the agreement. The police may only conclude an agreement if the latter interest is more important than the interest in punishing the person suspected of having committed a criminal offence. However, this is an issue belonging to the realm of legal practice rather than to that of legislation.

In the opinion of the Constitutional Court, the suspect of a criminal offence may, in fact, decide freely – exercising his or her right to self-determination – on concluding an agreement on information supply to the authority, therefore requiring information after concluding the agreement cannot violate his or her right to human dignity. As regards the lack of deadline mentioned by the petitioner, it does not cause an unconstitutional situation, as the ACP established adequate statutory guarantees for the completion of investigations, and thus there can be no further "forced information supply". The investigation deadlines defined in the ACP also determine the timeframe of information supply.

In view of the above, the Constitutional Court has established that Section 67 of the AP does not violate the fundamental right enshrined in Article 54 para. (1) of the Constitution, therefore it has rejected the relevant petition.

The Constitutional Court has ordered the publication of the present Decision in the Hungarian Official Gazette on the basis of Section 41 of Act XXXII of 1989 on the Constitutional Court.

Budapest, 29 March 2004

Dr. András Holló
President of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court, Rapporteur

Dr. Attila Harmathy
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, Rapporteur

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Dissenting opinion by Dr. András Holló, Judge of the Constitutional Court

1. I agree with the Decision in respect of examining the compliance of Act XXXIV of 1994 on the Police (hereinafter: the AP) with Article 51 para. (1) of the Constitution on the basis of Decision 23/1990 (X. 31.) AB (hereinafter: CCD1), interpreting the right to life and the right to human dignity in unity, Decision 64/1991 (XII. 17.) AB (hereinafter: CCD2) and Decision 22/2003 (IV. 28.) AB (hereinafter: CCD3) of the Constitutional Court. Consequently, I agree with the Decision declaring in its points 1-3 the unconstitutionality of Section 54 items h) and j) in whole, and the quoted part of item i).
However, I do not agree with point 4 of the Decision, rejecting the establishment of the unconstitutionality of the text "if possible" in the first sentence of Section 17 para. (2) of the AP, and of Section 54 item g) of the AP. On the basis of CCD1 and CCD2, both statutory provisions should have been declared unconstitutional, similarly to the other provisions of the AP declared unconstitutional.

2. In CCD1, the Constitutional Court excluded, on the basis of Article 8 para. (2) of the Constitution, the constitutionality of statutorily accepting capital punishment, and at the same time it excluded the non-arbitrary restrictability of the right to life enshrined in Article 54 para. (1) of the Constitution. Accordingly, the constitutional protection of the essential content of life encompasses the non-arbitrary deprivation of life as well. In CCD1, the Constitutional Court stated the constitutional restriction in relation to the State's punitive power, but at the

same time it also established the indivisible and unrestrictable nature of the right to life in unity with human dignity in general, in relation to the State's legislative power. CCD2 refers to the same by arguing that if the legislature decided that the foetus is legally a person, that is a legal subject entitled to the right to life and dignity, then abortion (taking human life) would be permissible where the law "tolerates" a choice being made between lives and accordingly does not punish the extinction of human life. (ABH 1991, 297, 315-316) According to the above decisions, the State may not constitutionally dispose over taking human life.

The concurring reasoning attached to CCD1 was the first to deal with the law tolerating a choice between human lives, examining the unified concept of the rights to life and human dignity in the light of the problem of justifiable defence: "Due to the absolute approach to the right to life, the range of justifiable defence will narrow. Life can only be proportional to life… When the person assaulted kills his/her assailant, the law does not recognize the legality of the deprivation of life by the non-punishability, insured by "justifiable defence", but it recognises that the situation in which the attack and its repelling occurred is beyond the reach of law. The situation of justifiable defence is present only if there is a choice between lives… because the life of the person assaulted may be saved if the assailant's life is lost." (Concurring reasoning by László Sólyom, ABH 1990, 107-108)

The same interpretation occurred in CCD2, and it was subsequently confirmed in another decision of the Constitutional Court: as the State may not dispose over taking human life, only those cases can be deemed constitutional "…where the law tolerates a choice being made between lives and accordingly does not punish the extinction of human life." [Decision 46/1994 (X. 21.) AB, ABH 1994, 260, 262]

3. CCD3 interpreted Article 54 para. (1) of the Constitution not in the relation between the State and the individual, but in another context, answering the question on the constitutional limits of an individual's freedom to dispose over his or her own life.
According to CCD3, the dogmatic difference manifests itself the fact that the unrestrictable nature of the right to human dignity in unity with the right to life "… only applies to cases where life and human dignity inseparable therefrom would be restricted by others." (ABK April 2003, 233 – where "others" means the State or another person.) However, the Constitutional Court did not abandon the so-called "doctrine of unity" explained in CCD1 and CCD2. In the argumentation of the Constitutional Court, the right to self-determination

deduced from human dignity (accordingly open for restriction in compliance with the test of necessity-proportionality) was compared with the obligation of institutional protection – the State's duty to protect life – originating from the objective aspect of the right to life. (ABK April 2003, 236) As referred to in the Decision, the Constitutional Court applied an "extended test": it weighed and compared the constitutionally restrictable right to self-determination and the obligation to protect life, neither considered to be absolute.

The requirement specified in Section 11 para. (1) of the AP, according to which the police officer shall "… protect public safety and domestic order even at the risk of his or her life, if necessary" is constitutionally justifiable – as established in the Decision – on the basis of the test described in CCD3. The person concerned is aware of the complex tasks of professional police officers – including the risking of life – when he or she makes a decision, exercising his or her right to self-determination. In the case of a police officer undertaking police service, the abstract risk to life – potentially resulting from the activities of the police officer – as a potential endangerment of life is not part of the "essential content" of the right to life. The possible endangerment of one's life is related to the service of police officers. At the same time, the State's objective duty to protect life appears in the context of police service – based on the right to self-determination – in order to minimise the possibility of risking life. This can be achieved through adequate training, the provision of technical means of protection, as well as the use of firearms.

4. However, the constitutional standard for the AP's provisions on using firearms is defined in CCD1 and CCD2. As the State may not constitutionally dispose over taking one's life, it may not authorise anyone by way of legislation to take human life, either, and the use of firearms is only justified in the case of an attack against life or lives (threat to life). The police officer may only use firearms when his or her own life or another person's life is in actual danger. Although it is constitutionally unacceptable to directly endanger life or to take one's life by using arms, the law has to tolerate (it is not unconstitutional in this respect) a choice between lives and leave the taking of life unpunished. By doing so, the law "protects the quality of non-arbitrariness of the defence against arbitrariness."
(Concurring opinion by Tamás Lábady and Ödön Tersztyánszky, ABH 1990, 96)

On the basis of the above, it is not constitutionally justified to allow the use of firearms merely on account of the weight of the criminal offence committed (intentional homicide), for

the purpose of capturing or preventing the escape of the perpetrator, therefore the Constitutional Court should have annulled Section 54 item g) of the AP as well.

The first sentence in Section 17 para. (2) of the AP – including the expression "if possible" – simply contains a recommending rule (provision), and at the same time it handles equally the risk of physical injury and the taking of human life as potential consequences of applying means of coercion. As the above text in the AP violates the content of the right to life as detailed in CCD1 and CCD2, the Constitutional Court should have annulled that provision as well.

To sum up: both provisions are unconstitutional as they qualify as statutory rules rendering possible the arbitrary deprivation of human life.

Budapest, 29 March 2004

Dr. András Holló
Judge of the Constitutional Court

I second the above dissenting opinion.

Budapest, 29 March 2004

Dr. István Kukorelli
Judge of the Constitutional Court

Dissenting opinion by Dr. Éva Tersztyánszky-Vasadi, Judge of the Constitutional Court

1. I do not agree with points 1, 2 and 3 in the holdings of the Decision. The petitions challenging Section 54 items h), i) and j) should have been rejected.

In my opinion, it is not unconstitutional that the police officer may use firearms

- to capture or to prevent the escape of the perpetrator of a criminal offence against the State or against humanity;
- against any person who does not comply with the instruction of the police to put down the dangerous tool he or she is holding, and whose conduct suggests an intention to directly use the dangerous tool against another person;
- to prevent from escaping, from being forcibly freed or to capture a person previously captured, detained because of the perpetration of a criminal offence or kept in captivity

under a judicial decision (save if the person in captivity is a juvenile delinquent, according to the Act).

2. I do not agree with part of point 4 in the holdings of the Decision, either. In my view, Section 57 para. (2) of the AP should have been declared unconstitutional. I claim the unconstitutionality of the rule on the use of firearms against a person in a crowd, according to which the use of firearms may not be deemed unlawful in the case of hitting – using a firearm in the regular manner – a person who has not left the scene despite being instructed by the police to do so.

3. I cannot accept the argument aimed at forming theoretical grounds for the reasoning, stating – regarding the use of firearms in order to capture or to prevent the escape of a person who committed a crime against the State or against humanity – that the "examination is directed at establishing whether the use of firearms is permissible in cases where no other life is being threatened at the same time". Neither do I agree with the reasoning of the Decision in respect of the statement that "the constitutionality of using firearms is justified by the fact that the person affected by the use of firearms previously violated the right to life by taking the life of another person."
Furthermore, I do not agree with the following statement: "if, in the course of guarding, any negligence occurs that renders possible the escape of a person in captivity prior to the establishment of his or her legal liability, this may not be corrected by using a tool suitable for taking one's life (firearm)." I cannot accept the statement that "besides the State's duty to protect life, it is also obliged to take responsibility for the guarding of persons in captivity, and these two obligations render the use of firearms disproportionate in relation to the right to life."

In relation to the right to life, the Constitution states that no one may be arbitrarily deprived thereof. The violation of the right to life is manifested differently in the case of using firearms as compared to capital punishment or euthanasia. In the latter cases, the statute would explicitly and knowingly authorise an act expressly aimed at taking one's life, but this is not the case when using firearms. When a statute allows to use this form of violence as an ultimate means, it merely tolerates the situation where the violence applied as an ultimate means results in death as one of the effects of the act, despite the intentions and will of the police officer using the firearm. Therefore, the constitutional question is not in what cases the

State may take one's life. In the present case, the constitutional question is whose life and in what cases may be risked in the interest of protecting the common good, public order and the safety of persons, and in what cases the risking of human life by using firearms is not permissible.

The rule authorising the use of firearms against humans must prohibit the use of firearms with the intention of taking life. The AP complies with the above requirement resulting from the right to life. Section 17 para. (2) of the AP provides that if means of coercion are applied in the course of a police action, causing an injury should be avoided if possible, and taking human life should be avoided when using firearms; shooting should be aimed at the foot, if possible, or – if the attacker has a tool in hand that can be used from a distance – at the hand [Section 62 para. (1) of Minister of the Interior Decree 3/1995 (III. 1.) BM on the Service Regulations of the Police (hereinafter: the SRP)]. When the use of firearms is lawful, it cannot be regarded as a deprivation of the right to life, or as a restriction thereof. The lawfulness of using firearms may be examined by the competent authority. In the constitutional review of the statutorily defined cases of using firearms, the question is whether the statutorily defined cases originate from the performance of the police's constitutional tasks, and whether the Act only authorises the use of firearms – as violence applied by the authority – as an ultimate means in situations where it is absolutely necessary.

Pursuant to Article 40/A para. (2) of the Constitution, the fundamental duty of the police is to maintain public safety and domestic order. The tasks of the police are defined in Sections 1 and 2 of the AP. According to the Act, the police provides protection against acts directly threatening or violating life, physical integrity or the safety of property. The police actions and means of coercion defined in the AP serve the purpose of performing police tasks.

In the background of performing duties by the State, in most cases, there is a possibility of applying sanctions as negative consequences of unlawful acts. Coercion (the possibility thereof) is related to sanctioning. Coercion by the State is ultimately based on physical coercion, which is – if it remains within the statutory limits – always lawful. Coercion by the armed forces is one of the types of coercion by the State, and it has different degrees.

The regulation authorising the use of arms should be examined in this context. The use of arms in the broadest sense is the mere presence of a police officer visibly bearing arms, i.e.

the decision of the police officer to appear in arms. In a narrower sense, the use of arms is a shot aimed at an object or a person. The AP further narrows the use of arms to an intentional shot aimed at a person. The AP does not provide for any case when the use of arms – in the narrowest sense described above – is obligatory. Within the meaning of Section 52 para. (2) of the AP, firearms may be used on the basis of the police officer's own determination or upon order.

There are strict rules and conditions pertaining to the possible use of firearms, and compliance with these rules and conditions can be controlled [Section 66 of the SRP]. According to the AP, the use of arms is the ultimate means among the means of coercion; it may only be applied if all other actions have failed, or if such failure can be foreseen [Section 15 para. (2) of the AP, Section 52 para. (1) of the SRP]. The AP provides for a predefined order of police actions leading to an intentional shot aimed at a person [Section 56 para. (1)], and, as a general rule, these elements follow each other subsequently (calling upon the person concerned to submit to the police action; application of other means of coercion; warning about the use of firearms; warning shot). The shooting, as a consequence, does not only follow from the conduct of the police officer, it is also caused by the affected person, whose conduct is considered by the police officer to justify the application of a police action and who resists the police action. In general, in the case of using arms, the person against whom the weapon is being or going to be used can realise this in advance, but – despite being aware of this fact – he or she behaves in a manner leading to the use of arms.

I agree with the general statement made in the Decision about the need to apply the principle of proportionality in the case of the use of firearms by the police. Fundamental rights may only be restricted as defined in an Act of Parliament, provided that the restriction is necessary, it has a constitutional objective, and the restriction is in line and in proportion with the constitutional objective. This requirement is also a standard for evaluating the constitutionality of measures applied by the State on the basis of an Act of Parliament. However, I do not agree with examining the AP's rules on the use of firearms only in relation to the right to life. In line with the above, the rules on the use of firearms do not authorise the police officer to intentionally take one's life, they rather reckon with the possibility of the lawful use of firearms causing death as a potential but unintended consequence of the conduct of both the police officer and the other person affected.

4. The use of firearms has a nature characteristic of public administration law in the sense that it is a means of direct coercion that may be applied in order to ensure that the State's administration can perform its duties. In the present case, the Constitutional Court should have examined the comparable practices of other states concerning the permissibility of using firearms. By comparing the rules on the use of firearms in Britain, Northern Ireland and Germany, one can conclude that they typically accept five objectives in respect of the use of firearms by the police:

a) averting a direct threat to physical integrity or life,

b) preventing the commission of an imminent criminal offence,

c) restraining a person suspected with due grounds of having committed a criminal offence, if such person attempts to escape from capture or identity check,

d) preventing escape, if the person concerned is detained by the authority on the basis of a judicial decision or a well-founded suspicion,

e) preventing the forcible freeing of a person detained by the authority.

It follows from the majority decision that, in the opinion of the Constitutional Court, the use of firearms is only permissible in a scope narrower than the above list. According to the Constitutional Court, the use of firearms is limited to two categories of cases in relation to the provisions of the AP declared unconstitutional by the majority decision. In the first case, the person subject to the use of firearms is making an attack or holding a weapon; in the second case, the person concerned is one who committed a well-defined criminal offence, i.e. he or she took someone's life (suspected of having done so), and he or she is on the run or has escaped from the custody of the authority.

In my opinion, in view of the constitutional duty of the police, firearms can be used – in addition to averting a direct or threatening attack – as an ultimate means, to capture or keep in detention persons believed to have committed other serious acts (not only ones who took someone else's life), or to prevent such acts.

5. I do not agree with the statement made in relation to the regulation on dangerous tools, according to which "the use of firearms can only be constitutional in the case of a weapon or other tool suitable for taking one's life"; and neither do I agree with the statement that "the equal protection of the fundamental rights can only be ensured, if the category of objects

defined in the provision under review is narrowed down to those tools which are suitable for killing someone, or, at least, might directly endanger life."

No uncertainty can be established with regard to the provision of the AP referring to other dangerous tools. Legal certainty is only violated by statutes that are inherently uninterpretable by those who apply the law [cf. Decision 36/1997 (VI. 11.) AB, ABH 1997, 222, 227-228]. The terms used in and the regulatory environment of the rule declared unconstitutional in the majority decision does not give grounds for concluding that the challenged rule of the AP is uninterpretable as such. According to the AP, the tool must be "dangerous" and suitable for being used against humans. Dangerous tools suitable for being used against humans are dangerous for humans.

In my view, in connection with a dangerous tool suitable for being used against humans, it is constitutionally acceptable to use firearms as an ultimate means, provided that the affected person does not comply with the instruction of the police to put down the dangerous tool he or she is holding and his or her conduct suggests an intention to directly use the dangerous tool against another person.

6. I do not agree with the statement that Section 57 para. (2) of the AP cannot be related to the use of firearms as defined under Section 53 para. (1) of the AP. According to the title and content of Section 57 para. (2), it regulates the use of firearms against a person in a crowd.

Section 55 of the AP provides that no firearm may be used – with the exception of an attack committed in an armed manner or with weapons, fight against armed resistance, and the use of arms against a person in a crowd (Section 57) – when a) it would endanger the life or physical integrity of a person in respect of whom the conditions for using firearms are not met; b) the aim of the police action can also be reached by shooting at an object or animal.

Furthermore, the AP prohibits the use of firearms for the purpose of dispersing a crowd [Section 59 para. (4)]. However, firearms may be used against a person in a crowd – if, in respect of the affected person, the general conditions for using firearms are met [Section 57 para. (1)]. The use of firearms against a person in a crowd means that the AP permits the endangerment of the life or physical integrity of an external person in respect of whom the conditions for using firearms are not met; it also allows the use of firearms endangering

external persons even if the aim of the police action could also be reached by shooting at an object or animal. According to the AP, the use of firearms against a person in a crowd is not unlawful in the case of hitting – using a firearm in the regular manner – another person who has not left the scene despite being instructed by the police to do so.

The above rules entail that the death of an external person may be caused by violence the application of which – with due account to the general rules on using firearms – is not necessarily needed in all cases for protecting others from unlawful violence. It is unacceptable to risk the life or physical integrity of an external person giving no grounds for police action merely on the basis of the affected person's non-compliance with the relevant instruction of the police. Therefore, I consider that Section 57 para. (2) of the AP should have been declared unconstitutional as a provision violating the right to life.

Budapest, 29 March 2004

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court