Decision 26/1999 (IX. 8.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of the petition seeking an *ex post facto* review of the unconstitutionality of a legal rule, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that the text "would commit a criminal offence again" in Section 92 para. (1) item c) of Act I of 1973 on Criminal Procedure is unconstitutional and, therefore, annuls it as of 31 March 2000.

The text of Section 92 para. (1) item c) of Act I of 1973 remaining in force after the annulment is as follows: /In the case of a criminal offence punishable with imprisonment, the defendant may be subjected to pretrial detention if/ "c) during the procedure he or she has committed another criminal offence punishable with imprisonment, or there is ground to presume that he or she would accomplish the attempted or prepared offence if he or she was not taken into custody."

2. The Constitutional Court rejects the petitions seeking to establish the unconstitutionality of, and to annul, the introductory provision, items a) and b), and the other provisions of item c) of para. (1), furthermore, para. (2) of Section 92 as well as Sections 93-97 of Act I of 1973 on Criminal Procedure.

3. The Constitutional Court rejects the parts of the petitions aimed at establishing the unconstitutionality of judicial practice, with particular regard to the guidance contained in a Board Resolution of the Supreme Court, and the judicial practice related to pretrial detention before the pressing of charges.

4. The Constitutional Court terminates the procedure aimed at establishing the unconstitutionality of Section 2 item c) of Minister of Interior Decree 11/1990 (II. 18.) BM on Implementing Custody and Pretrial Detention in the Detention-room of the Police.

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

Reasoning

I

1. Act I of 1973 on Criminal Procedure (hereinafter: the CCP) contains provisions in various parts of the Act on the causes of ordering and terminating pretrial detention as the most severe coercion measure applicable in criminal procedure, on the rules of procedure of adopting the related decision, on the responsibilities of the competent authorities, furthermore, on the legal status of the person subject to pretrial detention.

The petitions reviewed in the present Decision concern the rules of pretrial detention specified in Sections 92-97 of the CCP and included in the coercion measures (Chapter V Title II of the CCP) within the general rules of criminal procedure. These are the following:

„Section 92 (1) In the case of a criminal offence punishable with imprisonment, the defendant may be subjected to pretrial detention if
a) he or she has escaped or hidden from the authorities or — due to the gravity of the crime or for any other reason — it may be presumed that he or she may escape or hide;
b) there is ground to presume that he or she would frustrate, hinder, or endanger the procedure if he or she was not taken into custody;
c) during the procedure he or she has committed another criminal offence punishable with imprisonment, or there is ground to presume that he or she would accomplish the attempted or prepared offence or would commit a criminal offence again if he or she was not taken into custody.

(2) Pretrial detention shall not be ordered before the submission of a private complaint provided that the criminal procedure is dependent upon the submission of a private complaint.

Section 93 (1) The court shall decide on ordering pretrial detention in the form of a court ruling.

(2) The relative named by the defendant – or, in the lack of the former, any other person named by the defendant – shall be notified without delay on the order of pretrial detention by the investigation authority until the end of the investigation, by the public prosecutor until the pressing of charges, and by the court after the pressing of charges.

(3) On the order, extension or termination of the pretrial detention of a soldier, the commander of the soldier shall be notified as well.

Section 94 Upon questioning the person under pretrial detention, the investigation authority until the end of the investigation, the public prosecutor until the pressing of charges or the court after the pressing of charges shall
a) hand over any unsupervised minor child of the person under pretrial detention to the child's relative or any other person or institution capable of taking care of the child, and shall notify the court of guardianship thereon, or it shall notify the notary on any other person taken care of by the person under pretrial detention;
b) see to the security of the unsupervised property and place of residence of the person under pretrial detention.

Section 95 (1) The pretrial detention ordered before the pressing of charges shall last until the resolution adopted by the court of first instance in the preparation of the trial, but for a maximum period of one month. The local court may prolong the detention on one occasion for a maximum of two months. After three months, the local court acting as a single judge may prolong the detention on two occasions for a maximum of one year from the date of ordering the pretrial detention. After the above period, the pretrial detention may be prolonged by the Supreme Court.

(2) The pretrial detention ordered or maintained after the pressing of charges by the court of first instance shall last until the promulgation of the decision of the court of first instance, while the pretrial detention ordered or maintained after that shall last until the criminal procedure is finally finished, but at most for the duration of imprisonment imposed by the court of first instance.

(3) If the period of the pretrial detention ordered or maintained after the pressing of charges exceeds

a) six months, and the court of first instance has not delivered a decision yet, then the court of first instance, or
b) one year, then the Supreme Court
is in charge of reviewing the justification of the pretrial detention.

Section 96 (1) The authorities shall try to ensure that the pretrial detention be as short as possible. If the defendant is under pretrial detention, the procedure shall be conducted with priority.

(2) The pretrial detention shall be immediately terminated if the cause for its ordering ceases to prevail or if its duration expires without prolongation. Until charges are pressed, the pretrial detention may also be terminated by the prosecutor.

Section 97 (1) The person under pretrial detention may only be subjected to restricting measures as becoming necessary by the implementation of the purpose of the criminal procedure or by the orderly operation of the institution executing the pretrial detention concerned. The person subject to pretrial detention may not be restricted in exercising his or her procedural rights, and in particular, the right to prepare for the defence.

(2) The person under pretrial detention
a)
b) may contact his or her relative or another person either orally or in writing under control."

2. Several petitions were submitted to review the constitutionality of the above rules on pretrial detention. The Constitutional Court consolidated the petitions and judged them in a single procedure.

2.1. Originally, the petitioner had asked for reviewing the constitutionality of Section 284 para. (1) of the CCP on the basis of the fact that in case of judicial decisions on pretrial detention, there is no possibility for extraordinary judicial remedy. According to the petitioner, excluding judicial review is contrary to the provision of Article 55 of the Constitution proclaiming that in the Republic of Hungary, everyone has the right to freedom and personal security, and no one shall be deprived of his freedom except on the grounds and in accordance with the procedures specified by law. As part of the reasoning, the petitioner

raised objections – without specifying the concrete provisions of the CCP – to the statutory rules applicable to ordering and extending pretrial detention before the pressing of charges, furthermore, to the too general nature of the statutory provisions allowing the ordering of, and the judicial practice of ordering and maintaining pretrial detention.

As reviewing the constitutionality of Section 284 para. (1) of the CCP on specifying the scope of decisions open for review had already been under way, the Constitutional Court separated the specific part of the petition related to the above provision and assessed it on the merits together with other petitions (Decision 23/1995 (IV. 5.) AB, ABH 1995, 115, 117, 120). At the same time, the Constitutional Court requested the petitioner to exactly specify the statutory regulations on pretrial detention the constitutionality of which were to be reviewed. The petitioner specified Sections 92-97 of the CCP and attached two decisions to the representation to illustrate the unconstitutional nature of the respective judicial practice.

2.2. Another petitioner claimed that Section 92 para. (1) items a), b) and c) were contrary to Article 55 para. (1) of the Constitution. In the petitioner's opinion, the rules pertaining to the causes of pretrial detention, and in particular, the provisions referring to the risk of escaping, hiding, and repeating the criminal act allow an arbitrary application of this coercion measure. In the petition and in other documents submitted, the petitioner criticised the practice of the police, the prosecutors, and the courts concerning pretrial detention, based partly on his own experience and partly on various publications and statistical data on applying the coercion measure in question.

2.3. Some petitioners claimed that the causes of pretrial detention specified in certain parts of Section 92 para. (1) item c) of the CCP violated the presumption of innocence, a fundamental right provided for in Article 57 para. (2) of the Constitution.

According to one of the petitioners, this constitutional right is violated by allowing the defendant's pretrial detention if "in addition to the procedure in question, he/she is the subject of another criminal procedure on the grounds of committing, attempting, or preparing for a criminal offence to be punished with imprisonment, even if the defendant is not declared guilty with final force in the procedure mentioned". Therefore, the petitioner proposed to have Section 92 para. (1) item c) partly annulled, leaving the challenged statutory regulation in

force with the following text: “c) it is presumed on due grounds that after letting him at large, he would commit a criminal offence again.”

However, another petitioner asked for the annulment of the last part of Section 92 para. (1) item c) on the basis of its violating the provision contained in Article 57 para. (2) of the Constitution. In the petitioner’s opinion, the reference to committing “a criminal offence again” “foresees” the defendant’s guiltiness, i.e. that he/she did commit a crime, although the defendant is still under criminal procedure and his/her guiltiness has not been proved yet.

2.4. The petitioner – personally affected by the application of pretrial detention – submitting the petition aimed at the posterior examination of a statutory provision, asked for establishing the unconstitutionality of Section 92 of the CCP and Board Resolution 234 of the Supreme Court on the basis of their being contrary to certain provisions of the Constitution.

The petitioner claimed that Section 92 of the CPC was contrary to the principle of the presumption of innocence specified in Article 57 para. (2) of the Constitution and in Section 3 para. (1) of the CCP. The petitioner did not go into details regarding the above issue, although later on it was suggested that the statutory regulation covering the specific causes of pretrial detention (Section 92 para. (1) items a), b) and c)) were unconstitutional for the following reason: "It is unlawful to establish criminal liability on the basis of a well founded suspicion, since it may only be established with a decision of final force of the court after a trial”, furthermore, “the presumption of repeating the crime is contrary to the presumption of innocence”.

In the petitioner’s opinion, Section 92 para. (1) items a), b) and c) violate Article 55 para. (1) (“the right to freedom”) and Article 55 para. (2) of the Constitution. According to the petitioner, the regulation on the specific causes of pretrial detention results in a list of the cases of arbitrary deprivation of personal freedom, as “a) one is obliged to call in upon a warrant to appear and if one fails to do so, he may be forced to appear or his place of residence may be designated, although one shall not be obliged to make a statement and, therefore, b) it is arbitrary to assume an attempt to encumber the procedure, and the suspect should be allowed to use all legal means of defence without being restricted in doing so.”

In the petitioner's opinion, restricting personal freedom on the basis of Section 92 para. (1) items a), b) and c) results in the violation of equality (Article 57 para. (1) of the Constitution), too, as in assessing "the statutory cause of depriving liberty", the suspect's equality is restricted while the prosecution is favoured in the procedure to the detriment of the defence. Although the petitioner had referred to Board Resolution 234 of the Supreme Court, there is no criminal board resolution under this number. However, it may be deducted from the contents of the petition that, as a matter of fact, it had raised objections to the provisions of Board Resolution 122 BK of the Supreme Court related to Sections 379/A and 379/B of the CCP on the court procedure concerning pretrial detention before the pressing of charges, and in particular, the weighting of evidences by the court.

The petitioner also challenged – as an unconstitutional restriction of the right to legal remedy specified in Article 57 para (5) of the Constitution – the lack of judicial review of the final court decision ordering pretrial detention. The Constitutional Court has already rejected the above request in its Decision 23/1995 (II. 5.) AB (ABH 1995. 115, 120).

In addition, the same petitioner asked for establishing the unconstitutionality of Section 2 item c) of Minister of Interior Decree 11/1990. (II. 18.) BM on Implementing Custody and Pretrial Detention in the Detention-room of the Police as, in the petitioner's opinion, it had limited – in a manner violating equality in law and legal certainty – the possibility of contacts in writing between the person subject to pretrial detention and persons other than relatives as regulated in Section 97 para. (1) item b) of the CCP.

2.5. Based on his own case, one of the petitioners asked for establishing – in the form of a posterior review – the unconstitutionality of, and for annulling Section 92 paras (1) and (2) of the CCP together with Section 73 paras (1) and (2) of the CCP on the obligation to participate in the expert's procedure, Section 74 para. (1) of the CCP on allowing referral to a mental hospital in order to have one's mental state monitored, and Section 206 para. (4) of the CCP on regulating legal remedy against rejecting a motion to obtain evidences. The petitioner termed all the above provisions as the "challenged statutes", claiming that they violate several provisions of the Constitution, i.e. Article 2 para. (1) (democratic state under the rule of law), Article 57 para. (1) (the right to court), Article 57 para. (2) (the presumption of innocence), Article 59 para. (1) (the right to the good standing of one's reputation), Article 61 para. (1) (the freedom of expression and the right to have information on data of public interest),

Article 70/G para. (1) (the freedom of scientific and artistic life as well as the freedom of learning and teaching), Article 54 para. (1) (the right to life and human dignity) and Article 54 para. (2) (the prohibition of torture and cruel, inhuman, or degrading treatment and punishment, and the prohibition of medical or scientific experiments without the prior consent of the person subject to them).

The Constitutional Court separated the review of the "challenged statutes" – taking into account their different subjects – and decided in the present procedure only on the parts of the petition related to Section 92 paras (1) and (2) of the CCP. It can be deducted from the reasoning of the petition that the petitioner claimed the unconstitutionality of the provisions on ordering pretrial detention in respect of Article 2 para. (1) of the Constitution (in an action for libel, the judge of the court of first instance may put the defendant under pretrial detention before obtaining evidence during the trial) and Article 57 para. (2) of the Constitution (the court takes measures based on presuming the private prosecutor's stating the truth, i.e. presuming that the defendant commited a crime).

II

Most of the petitions are in part well-founded.

1. In the opinion of the Constitutional Court, pretrial detention as a coercion measure in criminal procedure is not contrary to the presumption of innocence as a fundamental right specified in Article 57 para. (2) of the Constitution, and it does not violate the principle of the rule of law defined in Article 2 para. (1) of the Constitution.

1.1. According to Article 57 para. (2) of the Constitution, in the Republic of Hungary, no one shall be considered guilty until a court has rendered a final legal judgment determining criminal culpability. The presumption of innocence is provided for in the CCP among the principles of criminal procedure; however, it adds to it a basic rule resulting from the essence of the presumption of innocence: the burden of proving guiltiness lies with the authorities in charge of the respective criminal procedure; the defendant shall not be obliged to prove his/her own innocence (Section 3 of the CCP). There is a partial rule related to the burden of proof that follows from the presumption of innocence whereby facts not proved beyond any doubt may not be evaluated to the defendant's detriment (Section 61 para. (4) of the CPC).

In the opinion of the Constitutional Court, the presumption of innocence is one of the principles of the state under the rule of law (Decision 63/1997 (XII. 11.) AB, ABH 1997, 361, 372), and it is a fundamental institution of constitutional criminal law that "may not be restricted on the basis of another constitutional right, furthermore, from a conceptual point of view, it is impossible not to enforce it as a whole" (Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 83). In the interpretation of the CCP, the presumption of innocence is a constitutional fundamental right related to the process of determining criminal liability, as an obligation of all authorities acting in the respective criminal procedure (investigation authority, public prosecution, and courts) not to treat the defendant as guilty until condemned by the court with final force. The defendant must be allowed to adequately exercise all of his/her procedural rights, and the procedural coercion measures applied shall be necessary and proportional. Regardless of whether the facts verifying the defendant's criminal liability have already been revealed by the authorities and whether their opinion on the defendant's guiltiness has already been recorded in procedural acts (closing of investigation, pressing of charges, decision of first instance establishing guiltiness), the legal consequences resulting from the establishment of guiltiness shall not influence the defendant's procedural position until the judgement is final. It is the responsibility of the State agencies acting in the respective criminal procedure to prove the defendant's guiltiness beyond any doubt, i.e. to refute the presumption of innocence, and the risk of failure of the criminal procedure shall be borne by the State. (Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 70)

However, the Constitutional Court pointed out in several decisions that the State and its agencies shall have the right and the obligation, deductible from the provisions of the Constitution, to exercise the punitive power of the State, and to enforce the demand to punish criminal acts. As held in this respect by the Constitutional Court in the Decision 5/1999 (III. 31.) AB, it is justified for the agencies exercising the punitive power of the State to have effective tools for the enforcement of this task (ABK March 1999, 69, 73). At the same time, in the statutorily specified order of enforcing criminal liability in criminal procedure, this necessitates allowing the application of procedural acts, and in particular, coercion measures which are essentially of a seriously restricting nature as far as the rights, including the fundamental constitutional rights, of the person subject to criminal procedure are concerned (for details see Decision 42/1993 (VI. 30.) AB, ABH 1993, 300, 302, 304-305).

The judicial decision depriving – before the judgement of final force – of their freedom a person subject to a well-founded suspicion of having committed a criminal offence but who may otherwise not be considered guilty is the most severe coercion measure restricting personal freedom. However, from a conceptual point of view, pretrial detention is not considered a punishment but a measure aimed at securing the effective enforcement of the demand to have criminal acts punished as well as the success of criminal procedure, allowing the enforceability of future punishment, and thus it is not contrary to the presumption of innocence.

Comparing the provisions of the Constitution leads to this result, too. It is the Constitution itself that provides for the way of restricting the freedom of persons suspected of having committed a criminal offence. According to Article 55 para. (2) of the Constitution, any individual suspected of having committed a criminal offence and held in detention shall be either released or brought before a judge within the shortest possible period of time. The judge is required to grant the detained individual a hearing and shall immediately prepare a written ruling with a justification for either releasing the detainee or having the individual placed under arrest.

Comparing two international treaties applied as standards of constitutionality in the practice of the Constitutional Court, namely Article 9 and Article 14 paragraph 2 of the International Covenant on Civil and Political Rights promulgated in Law-Decree 8/1976 (hereinafter: Covenant on Civil and Political Rights), furthermore, Article 5 and Article 6 paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms promulgated in Act XXXI of 1993 (hereinafter: European Convention on Human Rights) leads to the same conclusion. The above provisions deal, on the one hand, with the potential causes and guarantee rules of depriving a person of their freedom and, on the other hand, with the presumption of innocence to be applied to person suspected or accused of having committed a criminal offence. The requirements resulting from the presumption of innocence regarding the statutory regulation and the practical application of pretrial detention are dealt with in the documents of the Council of Europe, and in particular, Recommendation 1245/1994 of the Parliamentary Assembly of the Council of Europe. In assessing the constitutionality of Section 92 para. (1) of the CCP, the above document was used by the Constitutional Court as one of the references of evaluation.

As marginally mentioned by the Constitutional Court in its former decisions, the institution of pretrial detention is not against the presumption of innocence. (Decision 1406/B/1991, ABH 1992, 497, 502; Decision 3/1998. (II. 11.) AB, ABH 1998, 61, 67).

1.2. Taking into account the content of the presumption of innocence as detailed above and the fact that pretrial detention is not a penal sanction but a coercion measure of a partially preventive nature, serving the purpose of securing the success of criminal procedure, there is no constitutionally assessable relationship between the specific conditions of pretrial detention defined in the three indents of Section 92 para. (1) item c) of the CCP and the fundamental right to the presumption of innocence; the wording of the statutory provisions concerned does not result in the presumption of guiltiness.

2. In the opinion of the Constitutional Court, the general condition of pretrial detention specified in the introductory provision of Section 92 para. (1) and the special conditions defined in Section 92 para. (1) items a), b) and c) – with the exception of the last part of item c) – of the CCP are not violating the requirements deductible from Article 55 para. (1) of the Constitution interpreted together with Article 8 paras (1)-(2) of the Constitution concerning the restriction of the constitutional fundamental right to personal freedom. At the same time, the Constitutional Court holds that the special condition in the third part of Section 92 para. (1) item c) (“there is ground to presume that the suspect would commit a criminal offence again if he or she was not taken into custody”) restricts the right to freedom in an unnecessary and disproportionate way.

2.1. The Constitutional Court has formed its opinion – taking into account the provisions of Article 7 para. (1) of the Constitution as well – with due regard to the provisions of the Covenant on Civil and Political Rights as well as to the documents related to the relevant provisions of the European Convention on Human Rights, defined by the organisations of the Council of Europe as requirements for their Member States in the field of pretrial detention. In the opinion of the Constitutional Court, the provisions of the CCP are generally in line with the requirements of constitutionality resulting from the international obligations on the level of the legislature.

According to Article 9 paragraph 1 of the Covenant on Civil and Political Rights, “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or

detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The second sentence of paragraph 3 of the Covenant contains the following provision: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

Article 5 of the European Convention on Human Rights deals with the right to liberty and security of person. According to Article 5 paragraph 1(c), deprivation of liberty may be based on "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so." As stipulated in Article 5 paragraph 3, „Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." The importance of the two latter provisions lies in the fact that they form the basis of the case law established in the judicial practice of the institutions of Strasbourg that makes the material conditions of detention more severe, and they have corrected the absence of specified causes of detention in the Convention as well as the lack of restricting the application of the coercion measure to offences of a certain weight.

Article 5 is one of the most often reviewed provisions of the Convention. Still, in the present issue, the documents containing recommendations for the Member States in the field of pretrial detention can be regarded as more reliable abstract standards than the positions taken in concrete cases by the European Commission of Human Rights and the European Court of Human Rights, i.e. Resolution 11 (1965) of the Ministerial Committee of the Council of Europe, Recommendation R (80) 11 of the Ministerial Committee on custody pending trial, and Recommendation 1245 (1994) of the Parliamentary Assembly of the Council of Europe on the detention of persons pending trial.

According to the Resolution of 1965, it is a principle to be followed by the legislation that pretrial detention shall not be automatically applied, with the courts having to make their decisions on the basis of the facts and the circumstances of the case. Pretrial detention shall be

an exceptional tool to be ordered and maintained if absolutely necessary. It may never serve as a tool of punishment.

Recommendation R (80) 11 of the Ministerial Committee of the Council of Europe concerning custody pending trial (*Human Rights Booklets, Annex to the Court Reports 1997/2*) establishes in its introduction that for humanitarian and social reasons, it is desirable to cut the custody pending trial to the minimum level allowed by the interests of jurisdiction.

It is a general principle approved by the above document that any person accused of having committed a criminal offence and presumed innocent until proved guilty may only be taken to pretrial detention pending trial if the circumstances make it absolutely necessary. Pretrial detention is an exceptional measure which shall not be made obligatory or applied for punitive purposes. As far as the conditions of ordering detention are concerned, the document establishes among the principles applicable to decisions ordering pretrial detention that custody pending trial may only be ordered if it can be reasonably suspected that the person concerned has committed the alleged offence and if there are substantial reasons for believing that one or more of the following grounds exist: danger of escape; danger of interference with the course of justice, danger of committing a serious criminal offence (point II/3). Custody pending trial shall not be ordered if deprivation of liberty would be disproportionate in relation to the nature of the alleged criminal offence and the penalty which the criminal offence carries (point II/7).

On the basis of a report prepared on the comparative analysis of the European Convention of Human Rights and the national legislations of the Member States, the Parliamentary Assembly of the Council of Europe adopted its *Recommendation 1245 (1994) on the detention of persons pending trial (Human Rights Booklets, Annex to the Court Reports 1997/2)*. It is held in the introductory part that although pretrial detention is a "compelling and damaging" institution, custody pending trial is in some cases indispensable or even inevitable for the carriage of justice (paragraphs 1, 2, and 6). As far as the present review is concerned, the relevant requirement is specified in the principle that custody pending trial shall always be optional and exceptional, and it may only be ordered when the minimum sentence in question is substantial (point I/a).

2.2. According to Article 55 para. (1) of the Constitution, in the Republic of Hungary everyone has the right to freedom and personal security; no one shall be deprived of his freedom except on the grounds and in accordance with the procedures specified by law. It is provided for in Article 8 of the Constitution that the Republic of Hungary recognises inviolable and inalienable fundamental human rights, and the respect and protection of these rights is a primary obligation of the State. The rules pertaining to fundamental rights and duties are determined by Acts of Parliament; such law may, however, not restrict the basic substance of fundamental rights. The statutory regulations pertaining to the causes and procedures of depriving one's personal freedom may not be suspended or limited even in case of emergency, exigency or danger.

The authorisation given in Article 55 para. (1) to restrict the fundamental right to personal freedom was not examined by the Constitutional Court in itself but together with, and in correlation to, the provisions contained in Article 8 of the Constitution. This has been based on the position consistently held by the Constitutional Court that Article 8 of the Constitution is the basic rule governing the exercise of the punitive power of the State, protecting – in addition to the general normative content of the principle of the rule of law – the individual from the arbitrary application by the State of the tools of criminal law. All the principles and guarantee provisions of the regulative system of criminal law not specified in other provisions of the Constitution shall be in compliance with the above constitutional rule (Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 85; Decision 42/1993. (VI. 30.) AB, ABH 1993, 300, 304; Decision 6/1998. (III. 11.) AB, ABH 1998, 91, 99; Decision 49/1998. (XI. 27.) AB, ABH 1998, 372, 377).

The Constitutional Court summarised in its Decision 5/1999 (III. 31.) AB the decisions – including their essence – of the Constitutional Court related to the content of Article 55 of the Constitution: regulating the causes and the procedure of deprivation of personal freedom is only allowed by the Constitution if such regulation does not restrict the right to personal freedom in an unnecessary or disproportionate way (ABK, March 1999, 69, 74; Decision 19/1999 (VI. 25.) AB, ABK June-July 1999, 225, 228).

In order to enforce the State's demand to punish criminal acts, it is constitutionally justified and necessary for protecting the society and for the sake of public interest to allow the State to temporarily deprive those persons of their liberty who are suspected on reasonable grounds of

having committed a criminal offence so as to prevent the frustration of the procedure of enforcing criminal accountability. The constitutional possibility of restricting personal freedom as mentioned above is indirectly reflected in Article 55 para. (2) of the Constitution, too, by defining the guarantees for the judicial decision on pretrial detention.

However, the deprivation of personal freedom pending trial, i.e. pretrial detention may only be applied if its purposes – securing the presence of the detainee and the success of the procedure in order to enforce the punitive power of the State – cannot be achieved by other means. It follows from the consistent practice of the Constitutional Court that it is not enough for the constitutionality of restricting a fundamental right to serve a constitutionally accepted purpose, but it must be necessary and proportionate as well: the importance of the purpose to be attained by the restriction must be proportionate to the damage thus inflicted to the fundamental right.

In the case of pretrial detention being the subject of the present review, proportionality is of an abstract nature and it can be achieved on the level of statutory regulation, on the one hand, by defining the general and special conditions of pretrial detention and, on the other hand, by the guarantee rules related to the decision-making process.

Evaluating the regulations in force on the basis of the above aspects, it is not unconstitutional in the opinion of the Constitutional Court that pretrial detention may, in principle, be effected against any defendant suspected with reasonable grounds of having committed a criminal offence punishable with imprisonment, i.e. the applicability of the coercion measure concerned is not linked by the legislation to a specific length of imprisonment or to any other criteria related to the weight of the criminal offence concerned, e.g. to a distinction between felony and misdemeanour.

Evaluating the abstract weight of criminal offences and mutually comparing the gravity of conducts punishable in a given period of time is the responsibility of the legislature. Such evaluation is basically reflected in the Criminal Code (hereinafter: the CC) by a distinction between felony and misdemeanour and by applying to criminal offences a system of relatively determined penal sanctions. In the sanctioning system of the CC, the least severe category of the punishment of imprisonment is from two months to one year.

In the opinion of the Constitutional Court, the requirement of proportionality is fulfilled if the proportionality of pretrial detention as a coercion measure restricting personal freedom is to be secured by the legislature by way of restricting its applicability to criminal offences punishable with imprisonment. This qualification is not affected by the scope of criminal offences punishable with imprisonment under the criminal law in force in a given period of time. The actual proportionality between the criminal offence serving as the basis of the criminal procedure and the pretrial detention of the defendant concerned, as well as the necessity of pretrial detention shall be assessed by the public prosecutor putting forward the motion and the court in charge of deciding about ordering, maintaining or extending the coercion measure. The State agencies empowered to review, in the guarantee system of criminal procedure and in the public law system of supervision, the operation of the authorities acting in criminal matters are responsible for securing the constitutionality of the judicial practice.

It results from the purpose of successfully enforcing the demand for punishment as the aim of the coercion measure examined that it may not be considered either unnecessary or disproportionate or, consequently, unconstitutional to define the special conditions for pretrial detention by allowing the deprivation of freedom not only after an event already taken place and threatening the success of the procedure (the defendant has escaped or hidden from the authorities) but also for the purpose of preventing a non-desirable event the effectuation of which is presumed on the basis of facts (due to the gravity of the crime or for any other reason, it may be presumed that the defendant may escape or hide; there is ground to presume that the defendant would frustrate, hinder or threaten the procedure if he or she was not taken into custody).

The Constitutional court holds that based on the punitive power of the State, the protection of constitutional order as well as the protection of citizens and their rights is a public-law obligation of the State. Therefore, pretrial detention may also be constitutionally acceptable if aimed at preventing the person subject to criminal procedure based on a well-founded suspicion in the accomplishment of a prepared or attempted criminal offence or any other offence punishable with imprisonment. Consequently, the first and the second parts of Section 92 para. (1) item c) (during the criminal procedure the defendant has committed another criminal offence punishable with imprisonment, or there is ground to presume that he or she

would accomplish the attempted or prepared offence or would commit a criminal offence again if he or she was not taken into custody) are not unconstitutional.

However, the third part of the provision concerned allows the deprivation of freedom for the prevention of not only criminal offences punishable with imprisonment, but also of any subsequent criminal offence, which is considered a disproportionate tool and which is, therefore, unconstitutional. As a matter of fact, the Constitutional Court has not been influenced in this respect, either, by the actual scope of criminal offences not punishable with imprisonment according to the law.

2.3. In evaluating the constitutionality of the causes of pretrial detention specified in Section 92 para. (1) of the CCP, the Constitutional Court had to deal with a special situation. It had to assess the constitutionality of the law in force regardless of the fact that the legislature had already re-regulated the system of conditions for pretrial detention in Act XIX of 1998 on Criminal Procedure promulgated but not put into force as yet (hereinafter: the new CCP), taking into account the international obligations and experience, and evaluating the judicial practice in the field of pretrial detention, considered in the reasoning of the bill to be mechanical in respect of certain causes. The Constitutional Court reviewed the provisions of the new CCP on pretrial detention and on the institutions that can contribute to substituting for the most severe procedural coercion measure, such as the new rules for the prohibition of leaving the place of residence (Chapter VIII, Title III of the new CCP), the court order on withdrawing passport (Chapter VIII, Title V of the new CCP), and the institution of bail (Chapter VIII, Title VI of the new CCP). On comparing the regulations of the CCP in force with the new one, and taking into account the reasoning of the bill reflecting the intentions of the legislature, the Constitutional Court holds that the conditions for pretrial detention have become partly limited and more accurately elaborated; the new CCP forces the public prosecutor who puts forward the motion to order, extend or maintain pretrial detention as well as the court deciding about the exceptional coercion measure to assess the facts more cautiously and extensively and to give a more justifiable reasoning to the motion or the decision, respectively. There are remarkable new rules on the periodical review, conducted ex officio, of the justification of pretrial detention and on defining its “almost absolute” deadline (Section 132 of the new CCP).

However, in the opinion of the Constitutional Court, the new regulation alone, although it meets the requirement for more guarantees, could not influence the constitutional review of the law in force, as the review had to be implemented solely by the standards of the Constitution rather than by the provisions of the Act of Parliament re-regulating the subject in question.

2.4. According to Act XXXII of 1989 on the Constitutional Court (hereinafter: the CCA), in case unconstitutionality is established, the principal rule is the annulment of the provision under review, and the annulled provision ceases to have effect on the day the decision is published (Section 42 para. (1) and Section 43 para. (1) of the CCA). The Constitutional Court may determine another date for annulment if it is justified by legal certainty (Section 43 para. (4) of the CCA).

When making its decision, the Constitutional Court took into consideration, on the one hand, the fact that if the third part of Section 92 para. (1) item c) of the CCP were annulled with immediate effect, it would be impossible to order pretrial detention even if it became necessary to apply such a coercion measure to exercise the State's obligation to prevent criminal acts. On the other hand, the Constitutional Court took note of the fact that the legislature may terminate the unconstitutionality in several ways. The Constitutional Court wishes to offer adequate time for the Parliament to implement the necessary changes of law.

On the basis of Section 605 para. (1) of Act XIX of 1998, the new CCP shall enter into force on 1 January 2000. At the same time, the Constitutional Court took into account Parliamentary Resolution 80/1998. (XII. 16.) OGY on the tasks related to the establishment of courts of appeal and district prosecutor's offices of appeal. The Parliament requested the Government in the above Resolution to submit a bill until 30 June 1999 based on a review including reconsideration of the system of legal remedies in criminal procedure as well. The drafting work under way may result in the legislature postponing the date of the CCP's entering into force. Taking into account all circumstances mentioned above, the Constitutional Court set the date of annulment at 31 March 2000.

3. The Constitutional Court rejected as totally unfounded the allegation that the provisions contained in Section 92 para. (2), Sections 93-94 and Sections 96-97 of the CCP are contrary to Article 55 (1) of the Constitution.

Section 95 of the CCP deals with the length of pretrial detention as well as with the dates and the relevant court levels of extending and reviewing it *ex officio*. The Constitutional Court holds that the decision-making order established in the system of criminal procedure law in force is not contrary to constitutional requirements stipulated in relation to Article 55 para. (1) of the Constitution. According to the CCP, in the case of both a pretrial detention ordered before the pressing of charges and one ordered or maintained after the pressing of charges, the review of the justification of pretrial detention shall, upon the expiry of one year, fall into the competence of the Supreme Court. The decision-making level of the court is raised in short periods before the pressing of charges, and the obligation of an *ex officio* review within one year is secured in the court procedure as well. Consequently, the Constitutional Court rejected the otherwise unjustified petition to establish unconstitutionality in respect of Section 95 of the CCP, too.

4. In the lack of its competence, the Constitutional Court rejected without examination on the merits the parts of the petitions aimed at reviewing the constitutionality of the procedures of the investigation authorities, the public prosecutor's office and the courts, the judicial practice of proposing, ordering, and extending pretrial detention, and the relevant guidelines of the Supreme Court.

5. The Constitutional Court did not handle separately, for the purpose of examination on the merits, the petition aimed at establishing the unconstitutionality of Section 2 item c) of Minister of Interior Decree 11/1990 (II. 18.) BM on Implementing Custody and Pretrial Detention in the Detention-room of the Police on the basis of its alleged violation of Section 97 item b) of the CCP. The challenged regulation was repealed as of 1 January 1996 by Section 38 para. (1) of Minister of Interior Decree 19/1995 (XII. 13.) BM on the Order of the Detention-rooms of the Police.

According to the established practice of the Constitutional Court (Ruling 647/E/1997 AB, ABK May 1999, 206), the unconstitutionality of a repealed statute may only be reviewed by the Constitutional Court in case of a court initiative based on Section 38 or a constitutional complaint based on Section 48 of the CCA. In the lack of these preconditions in the present case, the Constitutional Court terminated the procedure.

6. Ordering the publication of this Decision is based on Section 41 of the CCA.

Budapest, 7 September 1999

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