DECISION 20/2005 (V. 26.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions and constitutional complaints seeking examination of the violation of an international treaty by a statute, posterior examination of the unconstitutionality of the statute and annulment thereof, furthermore, establishment of an unconstitutional omission of legislative duty, the Constitutional Court has – with dissenting opinions by dr. Mihály Bihari and dr. András Holló, Judges of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds that Section 360 para. (1) in Act XIX of 1998 on Criminal Procedure is unconstitutional and, therefore, annuls it as of the date of publication of this Decision.

2. The Constitutional Court holds that the text "or suspends the procedure for the cause specified under Section 188 para. (1) item b)" in Section 374 para. (1) and the text "or the appeal related thereto is unfounded" in item a) of the same Section, furthermore, item b) of the same Section in Act XIX of 1998 on Criminal Procedure are unconstitutional and, therefore, annuls them as of the date of publication of this Decision.

The declaration of the provision null and void leaves the following text in Section 374 para. (1) of the ACP in force:
"Section 374 (1) When the court of appeal terminates the procedure on the basis of Section 373 para. (1) item I a), the provisions of the judgment of the court of first instance related to seizure, seizure of property, and to the establishment of a claim under civil law are a) maintained in force when no appeal was filed in respect of the above."
3. The Constitutional Court establishes the following: the Parliament has committed an unconstitutional omission of legislative duty by failing to regulate in Act XIX of 1998 on Criminal Procedure, in accordance with the requirements of legal certainty and fair trial, the scope of cases when the court of appeal shall act at a council session to judge upon the appeal.

Therefore, the Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 October 2005.

4. The Constitutional Court holds that as Section 360 para. (1) in Act XIX of 1998 on Criminal Procedure was unconstitutional, this provision shall not be applicable in the following cases completed with final force: No. Bf. 671/2003 before the County Court of Jász-Nagykun-Szolnok as court of appeal, No. 29. Bf. 8790/2003 before the Metropolitan Court as court of appeal, No. 22. Bf. 9924/2003 before the Metropolitan Court as court of appeal, No. 20. Bf. XI. 8046/2004 before the Metropolitan Court as court of appeal, No. 25. Bf. VIII. 8647/2004 before the Metropolitan Court as court of appeal, No. 3. Bf. 328/2003 before the County Court of Komárom Esztergom as court of appeal, No. Bf. 200/2004 before the County Court of Vas as court of appeal, No. 1. Bf. 996/2004 before the County Court of Borsod-Abaúj-Zemplén as court of appeal, No. 1. Bf. 1905/2004 before the County Court of Borsod-Abaúj-Zemplén as court of appeal, and No. 1. Bf. 184/2004 before the County Court of Békés as court of appeal.

5. The Constitutional Court rejects the constitutional complaint aimed at examining the violation of an international treaty by Section 360 para. (1) in Act XIX of 1998 on Criminal Procedure having regard to Decision No. 1. Bf. 1905/2004 passed with final force by the County Court of Borsod-Abaúj-Zemplén as the court of appeal.

6. The Constitutional Court rejects the petitions seeking establishment of the unconstitutionality and annulment of Section 360 paras (2) and (3) in Act XIX of 1998 on Criminal Procedure.
The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

1. The Constitutional Court has received thirteen petitions on holding a council session for judging upon the appeal submitted in the course of a criminal procedure. The petitioners employ partially different arguments, although most of them use the same aspects in

challenging the provisions of Act XIX of 1998 on Criminal Procedure (hereinafter: the ACP) in respect of the regulations on the institution of council session in the appellate procedure. Some of them ask for establishing the unconstitutionality of, and annulling – in some cases with retroactive force – Section 360 para. (1) of the ACP, while others propose the same in respect of the whole Section, and there are petitions asking for the establishment of unconstitutional omissions – with or without other requests. The petitioners filing constitutional complaints also ask for declaring the prohibition of application in concrete cases.

The Constitutional Court has established that the constitutional complaints are in line with the requirements under Section 48 paras (1) and (2) in Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC).

Having regard to their identical subjects, the Constitutional Court has consolidated the cases, judging them in a single procedure.

2. It is pointed out in the first place by one of the petitioners that by designating a council session to decide upon the appeal, the president of the council of the appellate court prejudices the result of the appeal, thus curtailing the council members' competence. The ACP provides only partial and incomplete rules on selecting the procedural form, granting an "unlimitedly" wide power of discretion for the president of the council entitled to decide whether to refer the case to a council session, to an open session or to a hearing. Subject to further rules of the ACP, selecting the procedural form is a kind of preliminary ruling that determines the scope of review as well as the types and the contents of the decisions to be passed in the appellate procedure. This way, when designating the case the president of the council, acting on his or her authority, makes a preliminary statement – regardless of the judgment to be shaped by the council – on having accepted the facts of the case as established by the court of first instance, excluding the possibility of taking further evidence, holding the enforcement of contradiction useless, and thus projecting the final decision in the appellate procedure. This method leaves no chance for other members of the court to get acquainted with the case, possibly causing the adoption of unfounded decisions.

As further pointed out by the petitioner, although open hearing is the constitutionally granted form of judging upon a criminal case and of examining the charges, its role has become

unjustifiably secondary in the appellate procedure. The accused and his defence lawyer may not even know the fact and the date of holding a council session as the court is not obliged to make a notification thereon, and the council session is – by definition – a meeting where the public is excluded (since only the judges and the court reporter are allowed to be present there). This violates the principle of open hearing enshrined in the Constitution, impairing the accused person's rights. Due to regulatory deficiencies in the ACP, the court may pass at the council session a decision with final force on the guiltiness of the accused as well as on the kind and the level of the punishment to be applied in a procedural regime offering only a narrow scope of action for extraordinary appeal designed to correct mistakes. According to the petitioner, this regulation is unconstitutional. The petitioner holds that based on the minimum requirement of fair trial, the ACP should – similar to Act III of 1952 on Civil Procedure (hereinafter: the CP) – allow the accused and the defence lawyer to initiate the holding of a hearing. Such right, however, does not exist.

It is concluded by the petitioner that with the present regulations the appellate procedure has become a mere formality in the cases dealt with at council sessions. This is in violation of the rights enshrined in Article 57 para. (1) of the Constitution and in Article 14 of the Covenant on Civil and Political Rights (hereinafter: the Covenant). Therefore, the petitioner requests establishment of the unconstitutionality and annulment of the "wording referring to the option of calling for a council session" in Section 360 para. (1) of the ACP.

3. Another petitioner requests establishment – in the framework of posterior constitutional review – of the unconstitutionality and annulment of Section 360 and Section 374 para. (1) of the ACP. In the petitioner's opinion, the provisions challenged violate Article 2 para. (1), Article 50 paras (1) and (3), and Article 57 paras (1) and (3) of the Constitution by contravening the rights to fair trial as well as to independent and impartial court procedure, the right to defence, and the requirement of legal certainty. For the case of the challenged provisions not being annulled, the petitioner makes a motion concerning the establishment of an unconstitutional omission as the legislator has failed to regulate the operation of the institution of council session in line with the provisions of the Constitution referred to by the petitioner.

According to the petitioner's detailed reasoning, by allowing the council session to judge upon the appeal against a decisive resolution – without any obligation to notify the accused person and his defence lawyer – the ACP prevents the participants of the procedure from

obtaining information on the composition of the court. As a consequence, the accused and the defence lawyer cannot exercise their rights of proposing the exclusion of those participating judges who are subject to the causes stipulated by the law. Any decision of final force passed the above way may only be challenged by extraordinary appeal, which would end up in lengthy procedures. It is also added by the petitioner that the decisions passed at council sessions may not even have final force as "the procedural regulations on council session make it impossible to have the decisions promulgated" although, according to Section 588 para. (3) of the ACP, this is a precondition of having final force. At present, the courts arbitrarily determine the fact and the date of having final force, which is by itself a cause of legal uncertainty. Finally, as pointed out by the petitioner applying the same arguments as contained in point 1, council session as a procedural form impairs both the constitutional guarantee of equality before the law and the rights to defence and open trial. The petitioner holds that – with due account to the provisions quoted from the Constitution – the cases can only be judged upon on the merits at open hearings, and council session as a procedural form is unconstitutional by itself.

4. With reference to an individual case, another petitioner requests establishment of the unconstitutionality and retroactive annulment of Section 360 para. (1) of the ACP in the framework of posterior constitutional review. As the basis of the petition, Article 2 para. (1), Article 55 para. (1), and Article 57 para. (1) of the Constitution are mentioned, bearing further reference to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention), to the relevant decisions passed by the European Court of Human Rights (hereinafter: the Court) as well as to Article 14 of the Covenant.

According to the petitioner's reasoning, the rights to fair and open trial, the right to defence, the requirement of legal certainty as well as the right to personal freedom and security – following from the Constitution, the Convention, the Covenant and the Court's decisions – shall be granted to the accused person not only during the trial of first instance. However, the challenged provision excludes all the above constitutionally protected guarantees from the procedure of second instance. The provision in question allows the court to pass – even against the expressed request of the accused or the defence lawyer – a decisive resolution in a completely closed council session without any obligation of subsequent promulgation. Using the same arguments as the former petitions, the petitioner bears reference to the fact that there

are no limitations enforced concerning the nature of the decision of final force: it may either maintain or aggravate or mitigate the judgment of first instance. The petitioner expresses serious concerns about the courts too often "using" the form of council session to make decisions in order to get through the backlog of cases, which is an unacceptable practice as the application of this procedural form in the appellate procedure is clearly unconstitutional with respect to the constitutional right to open trial.

5. The next petitioner has submitted a petition aimed at the establishment of an unconstitutional omission regarding the whole Section 360 of the ACP. The petitioner holds that the legislator has failed to regulate concretely and exclusively the scope of those cases when the appeal may be judged upon at a council session, and it has also failed to define the criteria to be considered in respect of the possible and obligatory shifts by the court from the council session to open session or hearing. In addition, there is no regulation obliging the court to inform the affected persons about the fact and the date of the council session, as well as about the time allowed for making remarks regarding the appeal. All the above violate the principle of legal certainty safeguarded in Article 2 para. (1) of the Constitution.

The petitioner protests against the fact that the regulations on council session are scattered in the Act, wherefore "it is only broadly regulated in what cases a council session may be held". It follows from the wording of Section 360 para. (1) in the ACP that in addition to the cases specifically identified in the Act, council session is a general form equivalent to hearing. The vagueness of the text contained in the statutory regulation leaves ground for arbitrary judicial interpretation.

According to the petitioner, it should also be taken into account that even the appellate procedure affects fundamental rights safeguarded by constitutional guarantees, but most of them (e.g. the right to open trial and the right to defence) are not enforced at a council session. This practice ends up in emptying the right to legal remedy granted in Article 57 para. (5) of the Constitution, as the ACP "deprives the accused of any chance of having a fair appellate procedure by restricting his rights to open trial and to defence".

6. The ten constitutional complaints – mostly containing similar argumentation – initiate establishment of the unconstitutionality and annulment of Section 360 in the ACP by challenging the following decisions: No. 29. Bf. 8790/2003 by the Metropolitan Court as

court of appeal, No. 22. Bf. 9924/2003 by the Metropolitan Court as court of appeal, No. 20. Bf. XI. 8046/2004 by the Metropolitan Court as court of appeal, No. 25. Bf. VIII. 8647/2004 by the Metropolitan Court as court of appeal, No. 1. Bf. 996/2004 by the County Court of Borsod-Abaúj-Zemplén as court of appeal, No. 1. Bf. 1905/2004 by the County Court of Borsod-Abaúj-Zemplén as court of appeal, No. Bf. 671/2003 by the County Court of Jász-Nagykun-Szolnok as court of appeal, No. 3. Bf. 328/2003 by the County Court of Komárom Esztergom as court of appeal, No. Bf. 200/2004 by the County Court of Vas as court of appeal, and No. 1. Bf. 184/2004 of the County Court of Békés as court of appeal. All the petitioners ask the Constitutional Court to order reviewing the cases closed "with final force". Six complainants unanimously protest against the fact that their appeals – aimed at acquittal or at the taking of evidence on account of changes occurred since the hearing at first instance – were judged upon by the appellate court at a council session without any notification thereon despite the petitioners' explicit requests for a hearing, in which they had expressed their concerns about the unconstitutionality of the legal institution of council session. Many of the petitioners have also noted that at a council session, the appellate court may even take evidence in cases of unfoundedness although this should only be done at an open hearing, and consequently the judgments of first instance were reviewed in light of the above without allowing any contradictory action in the cases concerned.

According to the constitutional complaints, the challenged provision violates the requirement of legal certainty enshrined in Article 2 para. (1) of the Constitution as well as the right to fair trial granted in Article 57 para. (1) of the Constitution, furthermore, it contravenes the constitutional duties of the courts defined in Article 50 para. (1) and the requirement of judicial independence guaranteed in Article 50 para. (3) of the Constitution. In addition, it restricts the right to defence enshrined in Article 57 para. (3) and the right to legal remedy granted in paragraph (5). Furthermore, one of the petitioners alleges violation of the presumption of innocence guaranteed in Article 57 para. (2) of the Constitution. To support their argumentation, some of the petitioners also refer to Article 6 para. (1) and Article 3 item c) of the Convention as well as to the case law of the Court.

The petitioners argue that as a result of the council session procedure, the chances of defence "end at the court of first instance, and the appellate procedure becomes a mere formality". The ACP does not even provide for the criteria of considering in what cases the court should hold a council session, an open session or a hearing. The relevant decision is based on nothing else but the "consideration" of the council president of the appellate court, and such consideration

is untraceable and individual, not excluding subjectivity, wherefore it allows "undermining the trust in impartial judiciary", and the face of impartiality dissolves anyway. The petitioners hold that this is the result of – among others – the Act's failure to define the concept of council session, and to specify an obligation of notification on holding a council session and on the composition of the court. Moreover, under Section 255 of the Act, it is not obligatory to take minutes on holding a council session, on the participating persons and on the events taking place at the session. This way, the defence has no chance to even a posterior enforcement of any potential cause of exclusion against the court. What is more, the defence cannot check whether the council session was in fact held with the actual participation of the council composed as described in the resolution. In a given case, this might undermine the foundations of extraordinary appeal.

Most of the persons submitting constitutional complaints – based on the same argumentation as the one under point 1 – also refer to the council president prejudicing the case by selecting the procedural form. It is added by some of the petitioners that in such a procedure the right to defence is only a formality as the "court" has already formed a clear-cut opinion on the case even before reviewing it on the merits. One of the petitioners complains about the discriminative nature of selecting the council session as the decision-making forum. It is "completely incidental" when and what council of which court uses this opportunity, and in some cases this procedural form is, therefore, chosen bearing in mind the identity of the defence lawyer rather than the facts of the case or the accused person. In addition, the petitioners almost unanimously argue that the resolution gaining final force raises several concerns related to legal certainty as detailed in point 2.

One of the persons submitting constitutional complaints argues that council session as a potential form of passing a decision on the merits is not fitted into the legal system and it is incompatible with Article 57 of the Constitution. In the petitioner's opinion, although Section 359 of the ACP contains an itemized list of the potential cases where council session should be held, Section 360 para. (1) offers another way of interpretation (regularly used in the judicial practice), which is, in itself, a violation of legal certainty. The incomplete and incorrect regulations not only empty the right to legal remedy but also impair the presumption of innocence as – due to the lack of notification on the resolution – the accused shall become the subject of a punishment that he could not be aware of. It is not even the judgment but the measures applied by the penal system by which the accused may obtain any information about

the modification (aggravation) of the legal sanctions pertaining to him – as the written resolution shall only be served to him significantly later.
Finally, one of the petitioners asks for establishing the violation of an international treaty by Section 360 para. (1) of the ACP, alleging that the institution of council session contravenes Articles 6 and 13 of the Convention.

7. The Constitutional Court has asked the Minister of Justice to deliver his opinion on the issue hereby concerned.

II

The petitions are examined in the context of the following statutory provisions:

1. The relevant provisions of the Constitution are as follows:

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

“Article 7 (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.”

“Article 50 (1) The courts of the Republic of Hungary shall protect and uphold constitutional order, as well as the rights and lawful interests of natural person, legal persons and unincorporated organizations, and shall determine the punishment for those who commit criminal offences. [...]

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

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

(2) In the Republic of Hungary no one shall be considered guilty until a court has rendered a final legal judgment determining criminal culpability.
(3) Individuals subject to criminal proceedings are entitled to legal defence at all stages of the proceedings. Defence lawyers may not be held accountable for opinions expressed in the course of the defence.
(4) No one shall be declared guilty and subjected to punishment for an offence that was not a criminal offence under Hungarian law at the time such offence was committed.
(5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. A law passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time."

2. The relevant provisions of the ACP are as follows:

"Section 360 (1) The president of the council shall call for a council session, an open session or a hearing to judge upon the appeal, to be held not later than the thirteenth day upon receiving the case. (2) The president of the council may call for an open session or a hearing in a case to be dealt with at the council session, provided that he considers that the appeal can only be judged upon at an open session or a hearing.
(3) The appellate court may pass even at an open session or at a hearing the resolution to be adopted at the council session, provided that the court identified at an open session or at a hearing the cause founding the resolution."

"Section 374 (1) When the court of appeal terminates the procedure on the basis of Section 373 para. (1) item I a), or suspends the procedure for the cause specified under Section 188 para. (1) item b), the provisions of the judgment of the court of first instance related to seizure, seizure of property, and to the establishment of a claim under civil law are a) maintained in force when no appeal was filed in respect of the above, b) changed by the court and the court passes a resolution in line with the law when the court of first instance applied any statute wrongfully in the judgment of first instance. [...]"

III

To support its decision, the Constitutional Court has reviewed its former practice concerning the right to legal remedy and – as the rules of the Convention are referred to by many of the petitioners – the relevant judicial practice of Strasbourg, as well as the historical background, the development and the regulatory contents, as in force, of the challenged legal institution.

1. The Constitutional Court has dealt with the constitutional content of the right to legal remedy in several of its decisions, elaborating from case to case the system of requirements resulting from Article 57 para. (5) of the Constitution.

The argumentation in the decisions relevant to the present examination can be summed up as follows: The essence of the right to legal remedy granted in Article 57 para. (5) of the Constitution is that "[...] the concept and the substance of a legal remedy contains the possibility to remedy the rights injured." It is a fundamental feature of the right to legal remedy that another organisation or a higher decision-making forum within the same organisation shall have the power to make the decision. Informing the affected persons on the contents of the decisions related to their rights and lawful interests is an indispensable precondition of the above [Decision 23/1998 (IV. 9.) AB, ABH 1998, 182, 186; see in details also in: Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 110; Decision 49/1998 (XI. 27.) AB, ABH 1998, 372, 382; Decision 19/1999 (VI. 25.) AB, ABH 1999, 150, 156; Decision 46/2003 (X. 16.) AB, ABH 2003, 488, 502-503]. "The granting of legal remedy serves the purpose of realising the aims and the duties related to the rule of law. That is why the state has to adopt legislation granting the possibility of enforcing subjective rights by providing for procedural guarantees [Decision 602/D/1999 AB, ABH 2004, 1353, 1356].

It has been pointed out by the Constitutional Court as a matter of principle that, in accordance with the Constitution, the various Acts on procedures shall provide for the rules guaranteeing "in respect of the individual legal institutions that an injury of any right by anyone should actually be repairable through legal remedy" [e.g. Decision 47/2003 (X. 27.) AB, ABH 2003, 525, 544]. It is the duty of normative law to elaborate – in accordance with the special characters of the branches of law – the legal remedy forms and the system of resolutions on the merits to be appealed against by seeking legal remedy, meeting the above requirements

and complying with the Constitution [Decision 49/1998 (XI. 27.) AB, ABH 1998, 372, 382; Decision 46/2003 (X. 16.) AB, ABH 2003, 488, 502 – 503].

The system of legal remedies applicable in criminal procedure has been examined in particular in several decisions of the Constitutional Court. Although those decisions are based on petitions challenging the rules of Act I of 1973 on Criminal Procedure (hereinafter: ACP 2), they are relevant here, too, as far as the constitutional standard and the theoretical principles are concerned. Even in its earlier decisions, the Constitutional Court compared the rules of normative law to the set of standards determined by Article 57 para. (5) of the Constitution, and the scope of criminal procedure resolutions to be appealed against by way of legal remedy, the internal order of the legal remedy procedure, and the duties of the appellate court have remained essentially unchanged up to this day despite the changes in detailed rules and the formation of a four-level judicial system.

According to Decision 49/1998 (XI. 27.) AB, summing up the essence of former decisions, "legal remedy is a legal tool helping the prosecution and the defence to challenge the decision and the procedure of the court of first instance, obliging the higher judicial forum to review it and pass a decision on it. Neither the constitutional content of the right to legal remedy, nor the procedural principle guaranteeing the right to legal remedy – enshrined in Section 7 of the ACP – grant a subjective right obliging the court of first instance to establish, in each case, the facts of the case as the basis of criminal liability, or to open a new possibility of legal remedy against the appellate court's decision correcting a mistake in establishing the facts of the case, or to limit the competence of the appellate court in factual questions to a restricted reformatory power or less than that." In addition, it is pointed out in the same decision that not even the most sophisticated regulation of the order of legal remedies can guarantee that the decision passed will be in line with the material justice in each and every case (ABH 1998, 372, 382).

2. In the beginning, the Convention did not contain the right to legal remedy, and the Court judged upon the relevant complaints on the basis of the provisions of Article 6. However, Article 2 of the Seventh Amending Protocol dated on 22 November 1984 in Strasbourg inserted this right into the provisions of the Convention (Article 13). In the practice of the Court reformed (partly) by virtue of the above amendment, a new uniform principle has been elaborated, stating that granting a procedure of legal remedy is not an absolute requirement and the states enjoy a certain degree of discretionary freedom in creating the modes of legal

remedies (e.g. No. 26808/95, Dec. 16. 1. 96., D. R. 84-A p. 164). Nevertheless, as emphasized by the Court, where forums for legal remedies operate, the requirements contained in Article 6 of the Convention are applicable to the legal remedy procedure as well (Delcourt v. Belgium judgment of 17 January 1970, Series A no. 84).

Several decisions of the Court examined Article 6 paragraph 1 in relation to open hearing and the open promulgation of the judgment, connecting the requirement of "public hearing" with the questions of the efficiency of legal remedy, and the rights to fair trial and to defence. The decisions underlined that the publicity required by the provision in each case, on each level and in any procedural order is a primary requirement of fair trial, protecting the participants of the procedure from secret procedures and judgments, and also improving the trust in the judiciary (e.g. Weber v. Switzerland judgment of 22 May 1990, Series A no. 177.). As a general rule, a public "hearing" is to be held, independently of the given case being an appellate procedure or not. The criminal procedure is considered to be a single unit to be closed with the decision of final force – thus the requirements of Article 6 pertain to the whole period of it. There are only a few exceptions regarding the requirement of publicity and they have to be supported by specific reasoning on the level of both the legislation and the judiciary (e.g. No. 13800/88, Dec. 1. 7. 91., D. R., p. 94.; Rolf Gustafson v. Sweden judgment of 1 July 1997, Reports 1997 1997-IV, p. 1149).

In the appellate procedure fulfilling different functions and showing different characteristics in the various states, there are only very limited possibilities to justify an exemption from the requirement of publicity. The only case to verify that is when the "circumstances to be examined" are in particular restricted. For example, the publicity and the public promulgation of the judgment are not necessary when the competence of the court covers nothing more than judging upon the repealing of the decision reviewed and the declaration of the obligation to start a new procedure, or acceptance or the rejection of the appeal (e.g. No. 17265/90, Dec. 21. 10. 93. D. R. 75, p. 76.; 172, pp. 13-14.; Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-B.; Allan Jacobsson v. Sweden No. 2. judgment of 19 February 1998, Reports 1998-I, p. 154). However, the Court has established in several cases as a matter of principle that from the aspect of publicity, the restricted nature of the review procedure cannot be decided upon simply by examining whether the review covers matters of fact or legal issues. Nevertheless, the requirements are more severe when in the appellate procedure the court has a power to decide in matters of fact. But even in that case, the situation may differ

by whether the appellate forum is empowered to adopt a resolution of final force or to order the starting of a new procedure, even if in partial questions only, and by whether the court may take new evidence or this right of the court is restricted (c.p. No. 17265/90, Dec. 21. 10. 93. D. R. 75, p. 76; Ekbatani v. Sweden judgment of 26 May 1998, Series A no. 134).

Being limited to adopting a decision only in a legal question, or the procedure being of tertiary level only justify the exemption from publicity when the court has no wide scale reformatory power (c.p. Josef Prinz v. Austria judgment of 8 February 2000). However, even in those cases the possibility of any "expectable or possible" harm of interests – and not the actual ones – resulting from the by-passing of publicity must be examined. It is a requirement regarding the guarantees contained in Article 6 that the rights are to be enforced actually and practically and not only in theory (c.p. Fejde v. Sweden judgment of 29 October 1991, Series A no. 212-C; Meftah and Others v. France judgment of 26 July 2002, Reports 2002-VII).

As pointed out by the Court, the individual elements of the requirements of fair trial cannot be evaluated independently from each other. The "benefits" resulting from publicity (directness) cannot be replaced – even if the principle of equal arms is guaranteed (that is, for example ,the equal keeping away from the court of both the prosecution and the defence) by the fact that the parties are entitled to make written comments about the judgment of first instance or about each other's statements. And the state cannot excuse itself simply by guaranteeing publicity in the procedure of first instance (e.g. Ekbatani v. Sweden judgment of 26 May 1998, Series A no. 134). Only the parties have the right to waive the holding of a hearing (e.g. Hakansson and Sturesson judgment of 21 February 1990, Series A no. 171). At the same time, the request to hold a hearing imposes a positive obligation on the state and in such cases, there can hardly be any excuse to justify the refusal of holding a hearing. When, in the above case, the appellate court is empowered to review the basic judgment in matters of fact as well, and it fails to guarantee the requirements according to Article 6, it can be regarded as a violation of the Convention, since this alone can cause a serious damage to the appealing party's interests (see in details e.g. No. 17265/90, Dec. 21. 10. 93. D. R. 75, p. 76; JanÅke Andersson v. Sweden judgment of 29 October 1991, Series A no. 212-C.; 570; Ekbatani v. Sweden judgment of 26 May 1998, Series A no. 134).

In addition, it is stressed by the Court that the issue of publicity is closely linked to the whole of Article 6, including the right to defence. The appellate procedure should not be "unduly formalistic" and when appropriate the defence should be allowed to present oral arguments even in the scope of such a procedure (e.g. 10532/83, Dec. 15. 12. 87, D.R. 54, p. 19; No. Van

Geyseghem v. Belgium judgment of 21 January 1999, no. 26103/95). It is an important principle that the accused person should be allowed to participate in the procedure against him, and – in particular when there is a possibility of imposing a severe punishment on him – the accused person shall not be deprived of the benefits of presenting personal argumentation (e.g. Zana v. Turkey judgment of 25 November 1997, Reports 1997-VII, p. 2533).

Finally, it is a notable requirement that the rules on using the judicial way, and in particular the specific forums/levels, should be unambiguous, clear and precise, and the judicial practice built on them must be in line with that. There can be a case of violating the Convention caused simply by harming the requirement of legal certainty (e.g. Geouffre de la Pradelle v. France judgment of 16 December 1992, Series A no. 253-B; Serghides and Christoforou v. Cyprus judgment of 5 May 2002).

3. Act XXXIII of 1896 on Criminal Court Procedure (hereinafter: CCP1) contained provisions on the option of holding a council session in the course of the appellate procedure. However, the relevant rules of ACP1 correspond to the concept and the requirements of open hearing in the Act in force, with decisions not exceeding the competence of cassation. Council session as a procedural form guaranteed publicity for the clients, and the decision "on the merits" regarded only the establishment of the consequences of absolute (formal) procedural irregularities, and – to a limited scale – the review of collateral questions.

In the modern age legislation, the institution of council session to be used in judging upon the merits of an appeal was first introduced in Law-Decree 8 of 1962 on Criminal Procedure (hereinafter: ACP1). Act III of 1951 on Criminal Court Procedure (hereinafter: CCP2), replacing CCP1, and Act V of 1954 amending the former one (hereinafter: CCPA1) ordered that all cases in the appellate procedure had to be dealt with at a hearing [Section 194 para. (2) of CCP2 and Section 76 of CCPA1]. Law-Decree 16 of 1958 on the amendment of CCP2 allowed in some issues not requiring review on the merits (transfer, termination because of procedural obstacles) the holding of a so called closed session, and maintained council session as a procedural form for the preparation of the hearing. Reviewing the merits of the decision of first instance required in each case the holding of a hearing.

In CCP1, there was an itemized listing of cases where – for the purpose of simplifying the procedure – the appeal could be judged upon at a council session. However, the decision could only be a real revision in respect of collateral questions. The council session could only

pass a decision on terminating the procedure (in the cases specified in the law), suspending it, or repealing the judgment on the basis of absolute procedural mistakes (Sections 244 and 246). Nevertheless, the session was open in those cases as well, guaranteeing the participation of the main parties of the procedure and allowing them to exercise their rights in the course of a "simplified hearing" (Section 245).

ACP2 (Act I of 1973 on Criminal Procedure) regulated the scope of the decisions to be adopted by the council session actually the same way as in ACP1, giving an exact list of the issues allowed to be decided in this form. However, the reformatory competence in respect of the judgment of first instance was limited to collateral questions. This was the time when council session was turned into a closed session with the participation of only the council members and the keeper of the minutes.

4. The ACP has maintained the form of closed session but significantly expanded the scope of decisions allowed to be passed there – without providing for a clear-cut and reasonable system on the potential cases of holding a council session. Nor does the law make any link between the form of the procedure and the types of the decisions to be adopted there. However, the most important change lies in opening the possibility for exercising a reformatory competence at the council session even in respect of the main issues of criminal law. But due to the closed character of the session, the decision is not promulgated and the parties receive no prior notification on the fact and the date of the council session, and in the lack of minutes they have no possibility to control what has happened there.

According to the Act in force, the appellate court possesses a wide scale of revising powers in respect of the decision on the merits adopted by the court of first instance: it can review that together with the previous procedures. The appellate court may examine the provisions on the well-foundedness of the decision, the establishment of culpability, the classification of the criminal act, and the application of legal consequences – regardless of whom and on what ground the appeal has been submitted by. In addition, it safeguards compliance with the main requirements related to the orderly processing of the procedure and acts *ex officio* in collateral questions [Section 348 para. (1) of the ACP].

Having regard to the contents and the consequences of the decision of first instance, there are five types decisions that can be passed by the appellate court, i.e. rejecting the appeal, maintaining or changing the judgment, repealing the decision and terminating the procedure,

and ordering the court of first instance to repeat the procedure. Having regard to the form of the decision, Section 370 para. (2) of the ACP only provides that it takes a judgment to review a judgment, and in any other case a ruling is required. Consequently, a reformatory decision shall always be incorporated in the form of a judgment. Choosing the form of the decision is a dogmatic question in itself. However, it becomes a constitutional problem because there is no statutory provision stating that a judgment may only be passed at a hearing, thus opening up the way to the exercise of reformatory power even at a council session.
According to the ACP in force, the framework of judging upon an appeal is connected, on the one hand, to – partly – new forms of court procedure (hearing, open session, and council session) and, on the other hand, to the type of the appellate court's decision. When selecting the procedural form, even if the exercise of reformatory power is needed, the only – but not always decisive – criteria to be considered is the opinion of the council president of the appellate court about the necessity to take evidence affecting the facts of the case. It is required to call for a hearing for the purpose of taking such evidence, and even at an open session, the accused may only be heard concerning the circumstances of imposing the penalty (Section 353 of the ACP).

The ACP contains unified and general rules on the procedural forms in the section pertaining to the phase of the hearing – applicable to the appellate procedure as well. Nevertheless, despite the same terminology, the specific procedural forms fulfil different functions in the various phases of the court's procedure. Nevertheless, this different role is only casually reflected in the normative provisions of the Act, with particular respect to the fact that for adopting certain decisions, the ACP allows or even proposes the application of procedural forms offering "lower level" guarantees. However, apart from some exceptions, the Act makes no difference by their weight and impact on the case among the resolutions to be adopted in the framework of the various procedural forms. Taking into account all the rules concerning the appellate procedure, the specific and special procedures, as well as the extraordinary legal remedies, the "simplified" forms (council session and open session) can be equally used either for closing the procedure with a decisive resolution, even by applying a (new) legal sanction, or for ordering the continuation of the procedure, imposing a procedural sanction, or adopting a decision of procedural nature.

As a consequence, with due respect to the restrictive rules as well, the appellate procedure offers space for the court (i.e. the president of the council) to choose the applicable procedural

form on the basis of Section 360 para. (1) of the ACP. The rules pertaining to the appellate procedure do not exclude handling of the case out of sessions even if it leads to establishing culpability instead of acquittal, based on the same facts of the case, or to changing the qualification of the act, causing the court to change the level of the punishment either on the grounds of the above or for other reasons. Accordingly, no regulatory principles can be deduced from the rules of the ACP regarding the applicability of the various procedural forms to give an accurate guidance for the subjects of law and the judiciary in the question of choosing the right form when in doubt.

The general rules pertaining to the phase of hearing are quite laconic, stating nothing more than that the court shall hold a hearing when it is necessary to take evidence in order to establish the criminal liability of the accused person. In all other cases it is possible to hold a session, a council session, or an open session [Section 234 paras (1) and (2)]. According to the above provision, hearing is the general form for judging upon the merits of the case, with the exception of certain specific procedures, since – as a general rule – the court decides upon the existence or the lack of criminal liability upon the taking of evidence by the court. However, in the appellate procedure (and also in the case of extraordinary appeals), the enforcement of this rule is broken at many points.

The rules pertaining to the appellate procedure limit the possibilities of taking evidence, actually restricting it to certain practical actions related to the establishment of facts. As a general rule, the appellate court is bound to the facts of the case as established by the court of first instance (being bound to the facts of the case). Evidence may only be taken when the facts of the case in the judgment of first instance are unfounded or when some new fact is demonstrated or some new evidence is referred to in the appeal [Section 323 para. (3), Section 345, Section 351 para. (1), and Section 353 para. (1)]. The law gives statutory definitions for the facts of the case being unfounded, specifying what types of such cases can be eliminated by taking evidence [Section 351 para. (2), Section 353 para. (2)]. Further provisions discuss the cases within the above category when a hearing or an open session is to be held [Section 361 para. (1), Section 363 para. (2)].

According to Section 360 para. (1) of the ACP, in addition to some case categories named in connection with the facts of the case being unfounded, it is within the scope of discretion of the council president of the appellate court to decide on holding a council session, an open session or a hearing – determining the framework of reviewing the decision of first instance

(on the merits). The Act does not impose any restriction on the application of a council session even if the appellate court's decision is contrary to the decision of first instance concerning criminal liability, culpability, qualification, punishments or any other measures taken, and in a similar fashion, the law does not provide for any "ranking" by effects of the case categories related to collateral questions. Indeed, it follows from the ranking contained in Section 360. para. (1) and from the minister's reasoning that the council session is the primary form of decision-making. Similarly, the form of the resolutions to be taken in the appellate procedure has no influence on the nature of the decision.

IV

The petitions are, in part, well-founded.

1. The system of guarantees applicable to criminal procedure is diverse. Some of the statutory guarantees stem directly from the Constitution or they are deductible from certain constitutional provisions, and the general provisions of the ACP reinforce many rules. The constitutional guarantees may not be overruled, restricted or suspended by the legislature in the form of Acts, since it would be regarded as restricting the essence of a fundamental right, and thus it would be deemed unconstitutional for violating Article 8 para. (2) of the Constitution [Decision 42/1993 (VI. 30.) AB, ABH 1993, 304; Decision 49/1998 (XI. 27.) AB, ABH 372, 377]. Consequently, the above guarantees shall be directly reflected in the provisions of the ACP pertaining to the specific legal institutions, and they shall be enforced with their constitutional contents. The guarantees mentioned are primarily the right to fair trial and the requirement of independent and impartial court procedure as established by a coherent interpretation of Article 57 para. (1) and Article 2 para. (1) of the Constitution and regulated in Article 6 of the Convention, furthermore, the right to defence as enshrined in Article 57 para. (3) of the Constitution and described in Article 6 para. (3) of the Convention, and the right to legal remedies as contained in Article 57 para. (5) of the Constitution with almost the same content as in Article 13 of the Convention.

According to the consistent approach of the Constitutional Court: "The requirement of a "fair trial" is not simply one of the requirements set out here for the court and the procedure (e.g. as a "just trial"), but, in addition to the requirements specified in the Constitution as referred to above, particularly in respect of criminal law and criminal procedure, it encompasses the fulfilment of the other guarantees under Article 57. Moreover, according to the generally

accepted interpretation of the articles of the Covenant and the European Convention on Human Rights that contain procedural guarantees, forming the basis of the content and the structure of Article 57 of the Constitution, fair trial is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances." Therefore, a procedure may be "inequitable", "unjust" or "unfair" even despite lacking certain details or complying with all the detailed rules [Decision 6/1998 (III. 11.) AB, ABH 1998. 91, 95].

In Decision 14/2004 (V. 7.) AB, summing up its practice related to the right to fair trial, the Constitutional Court established that "the right to fair trial is an absolute right against which no other fundamental right or constitutional objective could be weighed, since the relevant right itself is the result of weighing. In the aspect of the criminal procedure, the above rules are based on the historically accumulated experience of the systems of penal judiciary. Consequently: the most appropriate way of exploring justice is to establish the facts necessary for deciding upon the criminal liability by an independent and impartial court acting at an open hearing with the active participation of the parties having equal rights in respect of taking evidence, as a result of the free consideration of the evidence directly obtained by the court." It was also stressed by the Constitutional Court that when setting up the regulatory system of criminal procedure, the conditions of fair trial – in order to protect the rights of the parties in the procedure – might require guarantees that limit the possibilities of establishing the truth (ABH 2004, 241, 266).

However, the Constitutional Court has acknowledged in several of its decisions the possibility of simplifying the procedure, and emphasised the importance of the requirement of timeliness. As pointed out by the Constitutional Court in each case, the enforcement of the procedural – and in particular the direct constitutional – guarantees shall be secured even in simplified procedures, and the will of the affected parties shall be taken into account [see in details, e.g. Decision 5/1999 (III. 31.) AB, ABH 1999, 75, 88-89; Decision 422/B/1999 AB, ABH 2004, 1316, 1320, 1322]. The starting point shall always be Article 57 para. (1) of the Constitution, stating that everyone has the right to a just and public trial by an independent and impartial court.

2. It was also explained by the Constitutional Court in its decisions on legal certainty – closely related to the requirement of fair trial – that Article 2 para. (1) of the Constitution "requires not only the unambiguity of individual legal norms but also the predictability of the operation

of individual legal institutions." [summarised in: Decision 47/2003 (X. 27.) AB, ABH 2003, 525, 535]. Among the requirements of predictability, the Constitutional Court stresses the predictable and consistent operation of the judiciary, in particular the court procedure, and the unambiguous definition of the procedural rules affecting the decision, by delimiting the criteria of discretion enforced in the practice [e.g. Decision 9/1992 (I. 30.) AB, ABH 1992, 50, 59, 70]. The Constitutional Court pointed out in Decision 47/2003 (X. 27.) AB that "the constitutionally accepted elaboration of systems through interpretation of the law has its own limits, too: it may not violate the requirement of legal certainty. Therefore, the judicial interpretation of the law may only be based on an operable statute which clearly defines the aim of the legal institution concerned, together with the framework, the criteria and the process of its application, the scope of persons affected by its application, their rights and obligations, and the procedure of applicable legal remedies available in connection with the institution" (ABH 2003, 525, 549).

As contained in details in point 4 of Chapter III, Section 360 para. (1) of the ACP and its provisions on processing the appellate procedure do not contain clear regulations on the selectivity of procedural forms. Even by taking into account all rules of the Act delimiting the competence of discretion, there remains a wide scale of cases where the applicable form of the appellate procedure is determined exclusively by the council president's decision. The contents of the criteria determining the decision cannot be deducted – even indirectly – from the Act, and only the sequence of the procedural forms listed refer to the primary role of the council session. The ACP does not contain any – positive or negative – wording referring to any provision regarding the type of the case, the objective weight of the criminal offence, the potential level of the sanction to be imposed or changed, or any other aspect (in excess of certain limitations on taking evidence).

The incomplete regulatory manner detailed above offers ground for different interpretations, and thus it violates directly the requirement of legal certainty following from Article 2 para. (1) of the Constitution and exercises an incalculable effect on the enforcement of the content of the right to legal remedies, as it allows the development of differing judicial practices almost in every court council. All this results in the violation of fundamental rights and causes the impairment of further requirements of fair trial.

3.1 The judiciary activity of the court includes both establishment of the facts of the case and the law to be applied, and determination of the legal consequences. This complex process

covers the objective exploration, summary and evaluation of the legally relevant facts, and the examination of legal questions. These are the factors influencing the judge in making a decision on the basis of his inner conviction – in line with his consciousness – safeguarded by the constitutional principle of judicial independence. Therefore, the Act on Criminal Procedure shall secure the necessary procedural frameworks and methods for all judges.

It follows from the principle of administering justice through councils – as guaranteed in Article 46 para. (1) of the Constitution and considered to be a general rule in the ACP as well – that in the appellate procedure designated to adopt a decision with final force, the members of the council of judges shall jointly exercise their rights of establishing the facts and interpreting the law, and they are obliged to act jointly. This procedure follows unambiguously from the provisions and the wording of the ACP, as the review of the decision of first instance is the duty of the council of three specialised judges.

Administering justice through councils and the independence of judges are constitutional requirements that complement each other, and they are closely linked to the requirement of fair trial. The power of the independence of judges and the enhanced guarantee of fair trial are demonstrated in the fact that the resolution of final force results from the consideration of the council consisting of judges, all empowered to adopt a lawful decision in accordance with their own consciousness, and passing a resolution needs the agreement of at least two judges. However, this requirement is only fulfilled when all members of the council may exercise equal influence on the evaluation of procedural questions forming the framework of the decision, thus having an equal chance to exercise all procedural methods and to use all tools of evidence making them able to gain information necessary for the review of the decision of first instance.

Nonetheless, Section 360 para. (1) of the ACP empowers the council president alone to make a decision on the procedural form to be applied. As a consequence, by violating the constitutional principle of administering justice through councils – in respect of which the rules of the ACP leave no ground for any exception in the appellate procedure – the decision on the applicable procedural form, made by the council president “as a single judge” within his right of discretion without any criteria of consideration, may become a decision having a direct effect on the resolution on the merits and impairing the requirement of judicial independence.

3.2. Since the very beginning of its operation, the Constitutional Court has made a distinction between the external and the internal aspects of judicial independence. In Decision 19/1999 (VI. 25.) AB – summarising the Constitutional Court's practice – the Court established as a principle that "the power of the judiciary – to which the independence of judges is related – is primarily manifested in judgment. The judicial independence pertains to judging upon the case; any further guarantees related to the judicial status and organisation are necessary for securing the independence of passing a judgment. The judge has to be independent from everyone else – including other judges – and his independence must have guarantees against any influence, either in the form of exercising external powers, or originating internally from the judicial organisation. Judicial independence, in the individual aspect, means [...] the guaranteeing of the organisational freedom and the status of the judge for the purpose of securing that the judge make a binding and executable decision in individual cases in order to settle legal debates and to remedy violated rights, without any influence, on the basis of the statutes and the laws in general, and in accordance with his inner conviction." (ABH 1999, 150, 153)
The provision contained in Section 360 para. (1) – without appropriate restrictions – may have adverse effects.

According to Act LXVI of 1997 on the organisation and the administration of courts and Act LXVII of 1997 on the status and the remuneration of judges, the status of the council president is merely an office related to certain administrative duties, the content of which is detailed in the rules of organisation and operation of the individual courts. The powers originating in the administrative status can never become obstacles of judicial independence. This position should not exercise any influence affecting the merits of the case, and it should not create a forced situation preventing the formation of the judge's inner conviction, impairing the independence of the council members.

The creation of the appellate procedure proves that the legislature takes into account the possible mistakes in the procedure and the judgment of first instance. And the fact that, with a limited scope of extraordinary appeals, in the appellate procedure, the administering of justice through councils is the only form accepted – based on the principle of the status of equal "specialised judges" – expresses the enforcement of the requirement that the decisions of final force should reflect the circumspect decisions synthesising the highest level of judicial knowledge and value judgment. Based on the requirement of fair trial, it is incompatible with

any circumstance hindering – in respect of the single judges – the judging activity in the appellate procedure and any regulation suitable to cause the violation of judicial independence would be constitutionally unacceptable.

The preliminary evaluation by the council president seems to only determine the procedural form, but in fact – due to other provisions of the Act – it influences the depths of "remedying", and it means a "withdrawal of competence" within the judicial organisation. In the system of the ACP, selecting the procedural form is a kind of preliminary question regarding the potential application of further normative law provisions when reviewing the decision of first instance, i.e. the scope of review. The "choice" made by the council president is a preliminary ruling as to the correctness of the petitions referring to the lack of well-foundedness, furthermore, whether reformatory powers may be exercised and if so, to what extent, whether the supplementing of data related to the circumstances of imposing the sanction is justified, whether there is any possibility of changing the classification of the criminal act, etc. This way, the council president becomes empowered as a single person to decide in matters related to the essence of the appellate procedure and remedying activity, and although the other members of the council might have different opinions, they can only act as judges in the scope and in the direction predetermined by the president. Accordingly, the status of the council president, bearing rights to make discretionary decisions in procedural questions, finally allows withdrawing from other members of the council their decision-making rights related to questions on the merits, and it may hinder the judges in accessing information on the relevant facts of the case, necessary for creating their judicial conviction. The resulting situation threatens not only judicial independence but also the enforcement of the requirements of fair trial, as it can cause distortions in the appellate process – since the various procedural forms offer different chances even for examining the well-foundedness of the appeal.

It is repeatedly emphasised by the Constitutional Court that judicial independence may only be limited by subordination to the law, excluding any convenient consideration based either on practical reasons within the organisation or on any external pressure [see in details e.g. Decision 53/1991 (X. 31.) AB, ABH 1991, 266, 267; Decision 38/1993 (VI. 11.) AB, ABH 1993, 256, 261; Decision 45/1994 (X. 21.) AB, ABH 1994, 254, 256; Decision 627/B/1993 AB, ABH 1997, 767, 769]. The above requirements make it necessary for the legislature to repsect the provisions of the Constitution when adopting administrative regulations closely related to the judicial activity. Thus, the Act on Criminal Procedure should not create a

situation offering in the judicial process a chance for emptying the principles on decision-making competences and the contents of "competence vesting" rules, thus posing obstacles to the enforcement of constitutional guarantees.

4. The Covenant and the Convention define the publicity of hearings as a fundamental requirement of operation of the judiciary, and it is one of the eminent provisions of all modern criminal procedures, to be restricted only in justified cases and to a limited scale. The principle of hearing, the related publicity, verbal communication, and directness are the primary guarantee requirements of criminal procedure under both the Constitution and the ACP.

As established by the Constitutional Court in Decision 58/1995 (IX. 15.) AB, in criminal procedure, the primary elements of the publicity of the procedure are the openness of the hearing and the public promulgation of the court's judgment. On the one hand, it guarantees control over the judiciary's operation by the society and, on the other hand, "the publicity of enforcing criminal liability is one of the ways of demonstrating to the community members the orders and the prohibitions of criminal law. [...] The Constitution emphasises the guaranteeing side of publicity by safeguarding as a fundamental right the right of any person to have the accusations brought against him judged in a just and public trial [Section 57 para. (1)]." It was also pointed out by the Constitutional Court that the rules of the Covenant and the Convention shall apply to the possibility of restricting publicity. Consequently, restrictions shall be justified by a moral cause, by the interest of protecting public order, state security, state secret or the privacy of the parties, by the parties' special circumstances to be considered case-by-case, or by the interest of protecting other fundamental rights. Still in the above cases, the judgment shall be promulgated in public (ABH 1995, 289, 292-293).

According to the relevant decisions – in line with the international documents and the resolutions of the Court – the court's procedure is a single unit and the enforcement of the requirements about publicity are not limited to the phase of first instance. Any interpretation to the contrary would result in turning the case after the procedure of first instance into a phase of "inquisition" similar to the period of the investigation and, moreover, the exclusion of the affected persons would be wider than in the case of investigation.

The main duty of the appellate procedure is the review of the decision of first instance, although the review covers not only the decision but also the process of making that decision. The parties of the procedure who have the right to appeal formally challenge the decision of first instance, but they usually request final settlement of the case. The appellate court has the right to adopt a new decision *ex officio* in many questions exceeding the limits of the appeal or to substitute provisions in default. There is a wide scale of substantive and procedural questions to be ruled upon: from the main questions of criminal law requiring consideration (guiltiness and punishment) to collateral questions based on the mandatory provisions of the law (e.g. the termination of seizure). The legislature has the freedom of discretion in deciding which of the above issues – and in what cases – do not require the holding of a public hearing, i.e. when it is reasonable to go on without holding a hearing. However, during the above, one should take into account the fact that the procedure by the appellate court shall close the case once and for ever – save in the case of repealing the decision. The appellate court's decision may only be challenged by way of exceptional extraordinary appeals that usually have no effect of staying the execution of the decision even if this is allowed. In any case other than pure cassation resulting in a new procedure, the refusal of the appeal on formal grounds, and the termination of the procedure on the basis of causes terminating punishability (decease, statute of limitation, and mercy) as listed in Act IV of 1978 on the Criminal Code (hereinafter: the CC), to allow any "decision-making with the participants of the procedure being absent" would be contrary to the requirement of public trial granted in Article 57 para. (1) of the Constitution.

As far as the main questions of criminal law and the collateral questions related thereto are concerned, there is no constitutionally acceptable argument for restricting the enforcement of the requirement of limited publicity – allowing at least the participation of the affected persons – in criminal matters where severe legal sanctions are applied. This would cause further violations of fundamental rights, in addition to the impairment of the right to public trial granted in Article 57 para. (1) of the Constitution.

5. According to the consistent practice of the Constitutional Court, under the rule of law, the right to impartial court trial, the enforcement of the right to defence, and the principle of equal arms – closely connected to the question of publicity – are essential elements of the fairness of criminal procedure. In a procedure completely closed to the public, the latter constitutional requirements can either be violated openly or they might be impaired due to the lack of

control over compliance with the procedural rules pertaining to them – which is equally unconstitutional.

5.1. The constitutional rights of the parties in the appellate procedure are restricted due to the fact that they receive no notification during the period of reviewing the appeal about the decision of the council president on holding a council session. Undoubtedly, the Act does not exclude the possibility of the subjects of the procedure making a motion regarding the procedural form. However, the motion shall not bind the court and, on the other hand, there is no rule requiring that the court should decide upon refusing the motion prior to the resolution deciding the case, and that the subjects of the procedure should receive a notification thereon. In addition to that, the prosecutor, the accused party, the defence lawyer and the further affected persons (private party and other interested party) are not in a position to reflect in writing on the written appeals submitted by the others, as well as on further comments related thereto, or on any motion submitted later on. The Act only provides for serving to the accused person the prosecutor's appeal and the prosecutor general's pleading, but it does not order the court of appeal to allow any time for making comments upon serving the above documents. In fact, this "right of being informed" is empty, as it does not guarantee demonstration of the defence's position at the court of appeal prior to decision-making.

This situation alone impairs the accused person's right to defence, and it could also be unreasonably unfavourable for the public prosecutor in charge of enforcing the state's punitive demand, as well as for the supplementary private prosecutor and the private prosecutor. (In respect of private parties and other interested parties, it is not even required to merely notify them on any appeal – made by any side – pertaining to them, and their appeals are not forwarded to the main parties of the procedure either.)

This way, the requirement of equal arms as an essential part of the fairness of the trial as granted in Article 57 para. (1) of the Constitution is not even formally enforced, or it is only enforced "to the extent" that by completely eliminating the possibility of contradiction, the law "equally keeps away" from the appellate procedure all persons empowered to make an appeal. This regulation is against all elements of "fair trial", its content hinders access to the judiciary, and it causes a vacuum in the enforcement of the right to effective legal remedies. Based on a correlated interpretation of procedural and administrative rules concerning procedural deadlines and administration, they impose new limitations on the subjects of the procedure regarding timely information about the documents, and sometimes even regarding

access thereto, thus preventing the actual exercise of their rights. On the other hand, they do not contain any requirement concerning the courts that may compensate for the latter.

5.2. Judging upon the appeal at a council session results in unlawfulness and a failure to control the requirements of impartial judiciary, and it finally prevents the exercise of the right to extraordinary legal remedies by violating the above rights.

According to the provisions of the ACP, the participants of the procedure receive no information about holding a council session and about the composition of the council in charge, and no minutes are taken at the council session – despite the relevant legal consequences. Therefore, in the lack of such information, the composition of the court can only be found out later on, by reading the signatures set onto the resolution. This endangers the enforcement of another aspect of fair trial, i.e. the requirement of impartiality, as the parties of the procedure cannot exercise their procedural rights related to exclusion, including the initiation of certain extraordinary legal remedies.

The Constitutional Court explained in details in Decision 67/1995 (XII. 7.) AB its opinion about the impartiality of the court. The fundamental constitutional right to the impartiality of the court requires the court to be unbiased and neutral towards the accused person. This is, on the one hand, a requirement concerning the judge himself, his conduct and attitude, and, on the other hand, it is an objective requirement related to the regulation of the procedure: any situation which raises a justifiable concern about the impartiality of the judge must be avoided" (ABH 1995, 346, 347). In addition, the Decision pointed out that the issue of impartiality must be examined from both objective and subjective aspects. "Impartiality [...] raises, on the one hand, a requirement of the court's members being free of personal prejudices, and on the other hand – from an objective point of view – there should be an appropriate face of impartiality." [see in details: e.g. Decision 32/2002 (VI. 4.) AB, ABH 2002, 153, 161; Decision 17/2001 (VI. 1.) AB, ABH 2001, 222, 227-228]

Contrary to Article 57 para. (1) of the Constitution, the regulations on council session fail to comply with the requirements in any of the aspects explained in the decisions referred to above.

As detailed in the foregoing (point IV/2), the lack of consideration aspects for holding a council session may suggest that by selecting the procedural form the court of appeal has

already formed an opinion on the whole of the case. This circumstance alone can question the impartiality of the court. Similar concerns are raised by the fact that in the lack of information on the composition of the council, the persons empowered to make an appeal are not able to exercise their rights to put forward a motion on exclusion, and in the lack of minutes on the session, they cannot even enforce subsequent legal consequences based on the above (review).

In every phase of the criminal procedure, minutes are considered to be public deeds authentically attesting that the procedural acts have been performed in line with the statutory provisions, furthermore, who and in what capacity were present there. Minutes taken in accordance with the rules of the ACP rules are the only authentic proof of compliance with the provisions in the case of any procedural act allowed to be held at a court in the absence of the parties of the procedure. Without minutes, the orderly process of the criminal procedure cannot be verified, and therefore the lack of minutes even prevents the enforcement of legal consequences related to absolute procedural irregularities. The lack of this public deed might, finally, question the actual holding of the council session.

The Constitutional Court has stressed in many of its decisions that legal certainty requires orderly legislation and judiciary. It is a part of the enforcement of Article 2 para. (1) of the Constitution that "only by complying with the procedural norms do legal institutions operate in a constitutional manner [...]" [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65]. It is a fundamental condition for controlling and enforcing constitutional operation that compliance with the procedural laws guaranteeing real enforcement of the requirement of fair trial shall be controllable. However, this would be impossible in the lack of minutes, only to be taken when specifically ordered so by the council president case-by-case, and not allowing access thereto for the parties of the procedure.

5.3. The Constitutional Court has already indicated in point III/4 that the rules pertaining to the procedural forms do not reflect the functional differences existing among them in the various phases. And when a certain form with the same name fulfils different roles at the various levels of procedure, a uniform regulation is not suitable in every case – like in the present one – to satisfy the requirements of legal certainty. The different purposes of the procedural forms must be reflected – when needed – in the different contents of the

procedural rules pertaining to them – to the extent of securing legal certainty and the requirement of fair trial including the enforcement of the right to defence as well.

"The constitutional criminal law principle of the right to defence is embodied in numerous detailed rules through the whole procedure, realised in the rights of the accused person and the obligation of the authorities to guarantee that he receives information on the penal demand enforced against him, allowing him to present his position thereon, to argue against the demand, to make comments and motions related to the actions by the authorities, and to use the help of a defence lawyer. The content of the right to defence includes the procedural rights of the defence lawyer and the obligations of the authorities allowing the lawyer to defend the accused person." [Decision 25/1991(V. 18.) AB, ABH 1991, 414, 415]. In Decision 6/1998 (III. 11.) AB, it was also explained by the Constitutional Court that in respect of the right to defence only unavoidably necessary and proportional restrictions not affecting the essential contents thereof can be considered to be constitutional, as "a right to defence operating effectively" (ABH 1998, 91, 94).

Naturally, the right to defence can be exercised most effectively by way of personal participation at the hearing, offering a chance to react directly to the presentations and the motions made by the opposite party. In the contradictory procedural phase, participation at the hearing may only be by-passed in exceptional cases, e.g. when the accused person draws himself out of the procedure, or when it is justified by the protection of the rights of others (e.g. a witness) – i.e. necessitated by the effective enforcement of the State's punitive demand. However, even in those cases, the presence of the accused person and of the defence lawyer may be considered differently, as reflected in many provisions of the ACP.

Further elements of the right to exercise defence are the rights to being informed, to have the time necessary for getting prepared for the defence, to possess the necessary documents, and all the rights related to obtaining information about the case, closely linked to the requirement of fair trial. Strict rules are applicable in respect of the restrictability of the above rights [see in details: Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 94-96]. Having an independently operating and impartial court is a precondition for the enforcement of the above.

The Constitutional Court has examined the restrictability of the right to defence based on the requirements of necessity and proportionality. Restriction is deemed unconstitutional when the desired objective or the manner thereof does not pass the test of necessity and proportionality elaborated on the basis of Article 8 paras (1) and (2) of the Constitution.

According to the consistent practice of the Constitutional Court, the State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. In addition, the mutual relation between the importance of the objective to be achieved through the restriction and the weight of the impairment of the fundamental right is to be examined. "Restricting the contents of a right is unconstitutional without a forcing cause or pressing public interest [...] when it is not unavoidably necessary, [...] using a restriction of a weight disproportionate to the purported objective [Decision 65/2002 (VI. 3.) AB, ABH 2002, 357, 361-362].

Due to the rules on the procedural form of the council session, the right to defence is impaired in many respects, in violation of Article 57 paras (1) and (3) of the Constitution. It is an unnecessary and, therefore, constitutionally unacceptable restriction that the court does not inform the accused person and the defence lawyer on the holding of a council session and the date thereof, similar to not judging upon in due time the motions related to the form of the procedure, or the failure to inform the affected parties thereon. Another unacceptable feature is the fact that – due to the anomalies related to the deadlines and the rules of service – the accused person and the defence lawyer have no adequate time to get prepared for the defence. The same provision is violated by the lack of keeping minutes, and the claims connected to requirement of impartiality are practically impossible to enforce in the case of holding a council session. In addition to the above, in the cases when the procedure is finally closed with the examination of the merits of criminal liability, there is no constitutional cause to justify a deprivation of the right to set up a defence personally.

In that respect, it makes no difference if the final result of the appellate procedure is a reformatory decision or one maintaining the resolution of first instance. In both cases, it is the duty of the court of appeal to examine – partly with respect to the appeal and partly *ex officio* – the questions related to the establishment of culpability, the application of legal consequences, and the collateral questions related thereto, together with the preceding procedure. According to the Act, it is also possible to modify or change the contents or the reasoning of the appeal – submitted by any of the parties – within the original framework, in the period between submitting it and the council to be held by the court of appeal. It is also a part of fair trial that the court must make any concerns visible, even if it has occurred in a question only to be examined *ex officio*. The rules of the ACP on making the matter of taking evidence part of the hearing create an appropriate for framework for that. However, not

allowing the accused party and the defence lawyer to participate in the decisive part of the appellate procedure prevents them from appropriately reacting to the changing arguments and circumstances, depriving even the court of the support granted by directness and verbality in providing a foundation for the court's decisions.

The above restrictions regarding the right to defence do not have any visible constitutional justification or acceptable goal of the State to support it, and therefore they are not considered necessary. Although reducing the court's workload, to facilitate "timeliness", can be an important factor, it is not an aspect serious enough to justify the limitation of fundamental constitutional rights.

The interpretation of the requirement of fair trial in a broad sense includes the requirement of judging upon the case within a reasonable period of time, and it can justify the introduction of simplified forms of procedure, and in a certain scope of cases even out-of-hearing administration can be accepted. Still, the requirement of timeliness is only one of the elements of fair trial, and its enforcement shall not be exaggerated to the extreme: it shall not gain priority over other aspects of fair trial, and it shall never violate another fundamental right. The "time gained" by restricting the right to defence is no value significant enough to justify the limitation of constitutional rights and requirements. Such a consideration would be a merely practical attitude unworthy in respect of the constitutional operation of the judiciary system, contradicting the court's obligation to examine the cases thoroughly, to weigh the evidence with circumspection, to explore all the aggravating and mitigating circumstances, and to adopt a just decision in line with the law – in short: to enforce the punitive demand in the framework of the requirements of fair trial. It would be impossible to grant effective legal remedies on the basis of formalistic regulations without a substantive content, preventing the exercise of the right to defence.

6. The decision passed at the council session raises concerns in respect of the final force of the resolution as well.

According to the consistent practice of the Constitutional Court, the institution of final force is a fundamental element of legal certainty. As established in principle in Decision 9/1992 (I. 30) AB, "the institution of final force, precisely defined as formal and substantive final force, is a constitutional requirement as a part of the rule of law. Respecting the final force obtained with regard to the possibilities for legal remedies secured according to the Constitution serves the security of the whole legal system." (ABH 1992, 59, 65-66)

Based on the paramount importance of final force in respect of the rule of law, it is also of primary importance to be able to establish the conditions of final force and the actual date of a resolution becoming final. However, the provisions in force do not allow fixing the date of final force of resolutions adopted at the council session of the court of appeal. It leads to constitutionally unacceptable consequences in the case of both (reformatory) decisions changing the decisions of first instance and those maintaining their force. According to the rules of the ACP, the decisive resolution of the court of appeal becomes final upon promulgating it. The question of the final force of a judgment adopted at the council session – or of a ruling on maintaining the judgment of first instance, as a decisive resolution of equal effect – can be contested regarding the way of procedure: only the members of the council and the keeper of the minutes are present at the council session, and thus the promulgation of the resolution is conceptually impossible. This, however, may cause a significant impairment of legal certainty, raising concerns about the possible legal effects of the resolutions passed at a council session, since the establishment of final force could only be practically made without taking into account the normative rules of the Act.

Similarly, the council session's decision on repealing the judgment of first instance is not promulgated either. Nevertheless, the latter resolution is not decisive upon the case, and the repetition of the hearing offers adequate guarantees. However, a judgment adopted in the court's reformatory competence contains a new decision compared to the judgment of first instance. Even a decision maintaining the judgment is more than a declarative resolution, and it may also contain new obligations (e.g. on the criminal costs), and the situation is the same in the case of resolutions terminating the procedure due to reasons of substantive law or rejecting the appeal on formal grounds.

Accordingly, it follows from the requirement of the rule of law that the procedural provisions on the establishment of the final force of a decision on the merits – as a pillar of legal certainty – shall not be regarded as provisions "of limited value" and they shall be complied with. The related statutory provisions are substantial requirements, leaving no space for judiciary deviation by weighing practical aspects. However, there is an unconstitutional contradiction between the ACP rules on holding a council session, providing for the nature of the resolutions to be passed there, and the provisions on the final force of resolutions that violates Article 2 para. (1) of the Constitution and goes beyond the possible limits of judicial interpretation.

7. Bearing in mind the arguments detailed in the decision, the Constitutional Court holds that the present regulations on the institution of council session violate – in respect of the challenged provisions – the constitutional requirements concerning fair trial, the right to defence, the independence of judges, and legal certainty. It is unconstitutional to empower the council president to exercise a reformatory competence or to maintain the force of the judgment of first instance at the council session of the appellate court – based on his discretionary power to determine the procedural form, not duly defined and granted in Section 360 para. (1).

There is an unconstitutional omission caused by the failure of the ACP to adequately define the aspects of consideration when choosing from the procedural forms. Another unconstitutional situation results from the ACP not containing any provision that would oblige the court to inform the subjects of the procedure on holding a council session, and thus they are prevented in exercising their fundamental constitutional rights, and in particular certain aspects of the right to defence; furthermore, the guarantees for the impartiality of the court and for an orderly procedure are not enforced, violating by that the requirements of fair trial. All this leads to emptying the content of the right to effective legal remedies. The issue of the final force of the decisive resolution as well as the uncertainty and the ambiguity about the applicability of the effects of final force are also unconstitutional.

In the case under examination, the Constitutional Court has established – by means of the data available, such as the documentation of constitutional complaints, the case law reflecting and at the same time forming the judicial practice, and the commentaries on the case law – that the regulations pertaining to the relevant legal institution are seriously defective, causing an unconstitutional situation in practical application. The primary causes of the above anomalies are the defaults of the legislation concerning constitutional rights (legal certainty, fair trial, independent and impartial court, and legal remedies) as detailed in points 2 to 6 of Chapter IV of the decision. The exercise of these rights shall be guaranteed for the participants of the procedure in an appropriate framework (e.g. by way of notification, allowing access to the motions and the documents, taking minutes at the council session etc.) even if the appeal can otherwise be dealt with at a council session without harming other provisions of the Constitution.

Given this unconstitutional situation, the contents of Section 360 para. (1) of the ACP have become directly unconstitutional in respect of its provision on empowerment, causing a collision with other rules of the Act, too, by allowing the council president as a single person to choose from the forms of procedure without specifying the relevant criteria. Beyond the constitutional omission, this provision violates of the requirements of legal certainty and judicial independence as long as the omission is not remedied.

The provision contained in Section 360 para. (1) – allowing a free choice from the procedural forms and empowering the council session to judge upon main questions of criminal law and to pass resolutions on the merits of the case – violates the right to public hearing as granted in Article 57 para. (1) of the Constitution. This situation is deemed unconstitutional regardless of the elimination of the relevant omissions and the changing of the provisions causing the impairment of judicial independence.

First of all, the legislature has to clarify all the elements – with due account to the requirement of legal certainty – regarding the applicability of the form of council session, as a decision-making forum, lacking several elements of guarantee in the appellate procedure, including publicity. Legislation bears the primary responsibility for establishing a balance between the procedural guarantees reflecting the constitutional principles and the simplified procedural forms supporting the requirement of timeliness. The harmony of the judiciary can only be developed along regulations automatically excluding the possibility of interpreting the law – similar to the current practice – in highly different ways, violating Article 57 paras (1) and (3) of the Constitution.

8. Section 374 para. (1) of the ACP violates the right to effective legal remedies of not only the accused person, but the private party and other interested parties as well, causing legal uncertainty in their situation. In the case of a council session, the Act provides them less right to information than, for example, for the accused person, rendering it impossible for them to make comments or motions related to the parts of the appeal pertaining to them, to present their arguments, or to exercise their rights of disposal. Indeed, the challenged provision renders their position marginal from the very beginning – independently from the right of consideration granted to the council president – by making the council session the general rule in their case.

The Act grants a strong position for the other interested parties (in Section 55 of the ACP), including the right to be present at the hearing, and the enforcement of their proprietary claim under constitutional protection is linked to the decision's final force, which can hardly be interpreted in the case of a council session. The position of a private party, secured by the law to the persons suffering damage due to the criminal offence, is intended to be a beneficial situation allowing compensation within the framework of the criminal procedure for the damage done by the criminal offence. In the adhesive procedure, following from the nature of judging upon a claim for damages, the court shall primarily apply the rules of the ACP, and the provisions of the CP shall only be applied as ancillary rules when – and to the extent – they are not contrary to the provisions of the ACP and the nature of criminal procedure.

Under the CP, the parties shall have the right of disposal in choosing the procedural form. In that framework, under Section 256/A para. (1) items (e) and (f), para. (2), and para. (4) of the CP, the appeal may only be judged upon out-of-hearing when the party requests so. Although the court (and not the council president) may consider handling the case out-of-hearing, according to paragraph (3), an approval by the appealing party shall be obtained for that purpose. However, the regulations of the ACP on council session exclude the exercise of the above rights, actually "leaving" the private party – who is considered a party under the rules of adhesive procedure – without any information after closing the procedure of first instance, to the extent of almost excluding him from the case.

This means that due to the differences between the two procedural types, the private party becomes deprived of exercising a constitutional right, although the purpose of the legislation was to secure the same position by allowing the enforcement of civil law claims in criminal procedure – with due respect to the requirement of timeliness as well. As summarised in Constitutional Court Decision 1167/B/1997 AB, this requirement is part of the equality before the court enshrined in Article 57 para. (1) of the Constitution. The above decision stressed that it was not unconstitutional to provide for different rules of compensation for damages on the basis of the differences between the two regulatory systems, but in the case of legal relations of the same content and subject, "the constitutional right to use the court must be enforced the same way" (ABH 2004, 1179, 1181-1182). It was also established in Decisions 26/1990 (XI. 8.) AB and 1/1994 (I. 7.) AB that an unjustified restriction of the right of disposal was unconstitutional (see in details: ABH 1990, 120, 121; ABH 1994, 29, 35, 37).

Based on the above, the Constitutional Court has established that – by an unjustified restriction of the right of disposal and by making it uncertain to exercise that right – the challenged rule in Section 374 para. (1) of the ACP is unconstitutional because of violating the rights granted in Article 2 para. (1) and Article 57 para. (1) of the Constitution. As pointed out recently by the Constitutional Court in Decision 42/2004 (XI. 9.) AB about legal certainty, in the appellate procedure, the statutory regulations "must empower the party and oblige the forum of appeal" to offer real remedy in the case of an erroneous decision. When a legal institution operates without adequate procedural guarantees – as is the case at a council session – legal certainty becomes impaired (ABH 2004, 551, 574). In the present case, this injury is transferred to the quality of court procedure required under Article 57 para. (1) of the Constitution, raising doubts about the enforcement of the right to effective legal remedies in respect of the persons affected under Section 374 para. (1) of the ACP.

The Constitutional Court has also mentioned that in respect of the victims, the present regulations are also contrary to Council Framework Decision 2001/220/IB of 15 March 2001 on the standing of victims in criminal proceedings. According to the Framework Decision, in the national criminal law system, the needs of the victims of criminal offences "should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions [...]. For this purpose, "each Member State shall ensure that victims have a real and appropriate role in its criminal legal system", being entitled to be heard and to provide evidence, and "as from their first contact with law enforcement agencies" to have access to all information serving the purpose of protecting their interests and to enforce their claim for damages (Articles 2, 3, and 4 in the introduction section). (The deadline for legal harmonisation lapsed on 22 March 2002 in respect of the above Articles.)

9.1. Based on the arguments set out in this decision, the Constitutional Court has annulled Section 360 para. (1), furthermore, item b) and the unconstitutional part of the text in item a) of Section 374 para. (1) of the ACP, and ordered the supplementing of all omissions as needed for the constitutional operation of the legal institution concerned. The Constitutional Court has determined the date of annulment in accordance with Section 42 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC).

As explained by the Constitutional Court in detail in its Decision 64/1997 (XII. 17.) AB, a deviation from annulment with *ex nunc* effect may only be accepted when "justified by the requirement of legal certainty or an especially important interest of the party initiating the procedure." (ABH 1997, 380, 388) It was reinforced in Decision 66/1997 (XII. 29.) AB that

in line with Section 42 para. (1) of the ACC, in the practice of the Constitutional Court, the "general rule is not annulment in the future, but annulment with *ex nunc* effect, i.e. annulment as of the day of publishing the decision of the Constitutional Court […]." (ABH 1997, 397, 407).

Due to the annulment with *ex nunc* effect, in all cases not challenged in the petitions and specified in the law, empowering the court to use a council session, this form of procedure shall remain a lawful option However, no appeal may be judged upon in this framework in any case where it would cause the violation of constitutional rights.

9.2. The Constitutional Court has established during the present examination that there is no constitutional relation among the challenged provisions and the right to court procedure enshrined in Article 50 para. (1), the presumption of innocence guaranteed in Article 57 para. (2), and the prohibition of retroactive force contained in Article 57 para. (4) of the Constitution.

The mere fact that the regulation of the institution of council session is unconstitutional as detailed above does not affect the right to turn to court. As explained before, the unconstitutionality established in the context of final force violates the principle of legal certainty rather than the presumption of innocence.

9.3. The Constitutional Court has established with regard to Section 360 paras (2) and (3) of the ACP – challenged by some of the petitioners – that the contents of those provisions do not diminish the rights of the participants in the procedure as alleged by the petitioners, since the provisions in question are empowering rather restrictive. Accordingly, the court may apply in the handling of the case or in the promulgation of the resolution a procedural form containing additional guarantees compared to the original one, i.e. it may hold an open session instead of a council session, or a hearing instead of an open session. Therefore, the Constitutional Court has rejected the petitions in this respect.

9.4. One of the petitioners also alleged the violation of an international treaty by Section 360 para. (1) of the ACP. However, under Section 21 para. (3) of the ACC, the petitioner submitting a constitutional complaint is not entitled to propose an examination of the violation of an international treaty by a statute. Therefore, the Constitutional Court – acting

subject to Section 29 item c) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof – has rejected without examination on the merits the constitutional complaint aimed at the examination of the violation of an international treaty by Section 360 para. (1) of the ACP.

9.5. In their constitutional complaints submitted in accordance with Section 48 of the ACC, the petitioners requested the Constitutional Court, in line with Section 43 para. (4) of the ACC, to declare the prohibition of applying the unconstitutional provisions in their cases. These requests are well founded as the challenged provision of the ACP has been applied in a way violating several constitutional provisions, severely injuring the interests of the petitioners submitting constitutional complaints, and resulting in the establishment of unconstitutionality. This can be remedied on the basis of paragraph (1) item a) and paragraph (2) in Section 406 of the ACP.

9.6. The provision pertaining to the publication of the Decision is based on Section 41 of the ACC.

Budapest, 23 May, 2005.

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

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

Dissenting opinion by Dr. Mihály Bihari, Judge of the Constitutional Court

1. I do not agree with the annulments contained in points 1 and 2, and with ordering the prohibition of application contained in point 4 of the holdings of the majority decision. However, I do agree with the establishment of the unconstitutional omission as contained in points 3 of the holdings of the majority decision, with the refusal contained in point 5 and the rejection contained in point 6.

2. In point 1 of the majority decision, the Constitutional Court has annulled with *"ex nunc"* effect the statutory provision contained in Section 360 para. (1) of the ACP, related to calling for a council session, an open session or a hearing, empowering the president of the council – within the statutory limits contained in the ACP – to call for a council session, an open session or a hearing to judge upon the appeal, to be held not later than the thirteenth day upon receiving the case.

In my opinion, (the content of) the annulled statutory provision is not unconstitutional in itself, and therefore it should not have been annulled by the Constitutional Court.

I do not agree with the argumentation in the majority decision claiming that given the unconstitutional situation resulting from the defaults by the legislature, the content of Section 360 para. (1) of the ACP has become directly unconstitutional. In my view, the mere fact that the regulation in the ACP applicable to judging upon the appeal at a council session is to be clarified for the purpose of full enforcement of the constitutional rights referred to in the majority decision, and the need to adopt more differentiated statutory regulations containing more procedural guarantees do not make the contents of the challenged statutory provisions directly unconstitutional, and these circumstances may not be used as a ground for the annulment of a statutory provision the contents of which are otherwise not unconstitutional.
I do agree with establishing an unconstitutional omission by the Parliament as contained in point 3 of the holdings of the majority decision: the legislature should have, namely, adopted more differentiated and unambiguous procedural rules to define the scope of cases when the court of appeal may hold a council session for judging upon the appeal, since this is necessary for compliance with the constitutional requirements of legal certainty and fair trial as parts of the rule of law.

At the same time, in my opinion, the Constitutional Court should demonstrate extra circumspection in the constitutional review of – the challenged provisions of – statutes incorporated in the form of codes, and when adopting a decision, the possible safeguarding of norms should be taken into account as well, by foreseeing the effects of the decision on the whole regulation of the code. The Constitutional Court should select an adequate constitutional tool of appropriate weight to remedy the injury of constitutional rights, and annulment – as the most severe tool – should only be used in the case of direct unconstitutionality in the contents of the challenged statutory provision.

According to the majority decision, the primary causes of the unconstitutional situation are the defaults of the legislation concerning constitutional rights (legal certainty, fair trial, independent and impartial court, and legal remedies) as referred to by the Constitutional Court (detailed in points 2 to 6 of Chapter IV in the majority decision). Having regard to the above, I am convinced that it would have been a sufficient tool for eliminating the unconstitutional situation to establish the omission contained in point 3 of the holdings and – incidentally – a constitutional requirement having the function of developing the law.

The annulment of Section 360 para. (1) of the ACP results in making it impossible – in specific cases – to judge upon the appeal at a council session, and consequently this procedural form regulated in the ACP cannot be applied (selected) by the courts of appeal in each case. I hold that by the above ruling, i.e. the annulment of a statutory provision the content of which is not directly unconstitutional, the Constitutional Court actually "overwrites" the regulations of the ACP, limiting the scope of application of a procedural form (decision-making at council session) regulated in the ACP.

In my opinion, the annulled statutory provision should have been examined in the whole system of the ACP, bearing in mind the mutual relations between the annulled provision and the procedural rules – with particular regard to the appellate procedure – of the legal institution in question (council session), by assessing in advance the potential effects of *ex nunc* annulment on the regulation of the code.

Section 360 para. (1) of the ACP clearly defines – not only for council sessions, but for open sessions and hearings as well – who (the president of the council) and when (not later than the thirteenth day upon receiving the case) shall be in charge of calling for one of the above procedural forms for the purpose of judging upon the appeal. Due to the annulment, I hold

that the regulations are incomplete in respect of the above questions, having regard to the latter two procedural forms (open session and hearing) in the framework of preparation for the appeal.
I also hold that due to the annulment, there is no regulation about who and by what deadline may call for a council session in the cases – referred to in the reasoning of the majority decision as well – when judging upon the appeal at a council session does not cause the impairment of constitutional rights.

In addition to the above, in my opinion, the majority decision is not convincing and well-founded concerning the reasons for the annulment of Section 360 para. (1) of the ACP, with particular regard to the part intended to demonstrate that at a council session called for by applying Section 360 para. (1) of the ACP, a decision on the merits different from the judgment of first instance may be adopted on the basis of the appeal in respect of a main question of criminal law, i.e. not only in respect of collateral and other procedural questions.

Moreover, I see a contradiction in the fact that the majority decision attempts to use practically the same reasons for the annulments contained in points 1 and 2 of the holdings as the ones supporting the establishment of unconstitutional omission.
3. In my view, the annulment contained in point 2 of the holdings is also unfounded, and the supporting reasons are not convincing and well-founded either. I hold that the contents of the statutory provisions annulled in point 2 of the holdings of the majority decision are not directly unconstitutional – similarly to the annulled Section 360 para. (1) of the ACP.

The regulatory deficiencies (uncertainties) in the procedural standing of the private party and of other interested parties can be remedied by way of eliminating the unconstitutional legislative omissions established in point 3 of the holdings.

In my opinion, the uncertainties and the problems of interpreting the law in the judicial practice, connected to Section 360 para. (1) of the ACP, are to be dealt with in the procedure of the uniformity of the law, while the regulatory deficiencies (codification errors), the lack of differentiation and incompleteness – causing the violation of the constitutional rights referred to in the majority decision – must be eliminated by the legislation.

Even in the case of constitutional complaints, the Constitutional Court is not in charge of judging upon the constitutionality of judgments adopted in individual cases, nor may the Constitutional Court take over from the legislation the tasks of codification – often implying onerous professional debates.

In the present case, by the establishment of the unconstitutional omission contained in point 3 of the majority decision, and by calling the legislature to remedy the default within the time specified by the Constitutional Court, the Constitutional Court has taken all necessary and adequate measures needed for the elimination of the unconstitutional situation, but – as explained above – it should not have annulled the statutory provisions the contents of which were not directly unconstitutional.

As I do not agree with the annulment ordered in point 1 of the holdings, I do not agree with ordering the prohibition of application contained in point 4 of the holdings either.

Budapest, 23 May, 2005.

Dr. Mihály Bihari
Judge of the Constitutional Court

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

I do not agree with point 1 and the connected point 4 – containing the prohibition of application – of the holdings in the Decision.
Section 360 para. (1) of the ACP is not unconstitutional, and the petition for its annulment should have been rejected. According to the statutory provision in question, the president of the council shall call for a council session, an open session or a hearing to judge upon the appeal, to be held not later than the thirteenth day upon receiving the case. This statutory rule is – in my opinion – a norm of an administrative nature, listing the possible forms to be applied in judging upon the appeal. Thus, the decision by the council president is a decision of an administrative character: he shall choose the appropriate form of judicature in accordance with the law.
With due respect to the above, Section 360 para. (1) of the ACP does not violate the independence of judges declared in Article 50 para. (3) of the Constitution as – according to

the interpretation followed by the Constitutional Court as contained in its earlier decisions – the independence of judges is (or can be) enforced in all three forms of adjudication specified in Section 360 para. (1) of the ACP. In my opinion – contrary to the position taken in the Decision – the list contained in the statutory provision in question is no ranking; selecting the appropriate form shall be based on the rules of the ACP.

If there are problems in the judicial practice related to the application of Section 360 para. (1) of the ACP (as mentioned in the Decision), this must be eliminated on the basis of Chapter III of Act LXVI of 1997 on the Organisation and the Administration of Courts.

According to the practice of the Constitutional Court, a constitutional requirement could have been established, stating that in the application of Section 360 para. (1) of the ACP, the (administrative) decision on selecting the form of adjudication shall be made by the council president exclusively by virtue of the relevant provisions of the ACP.

Budapest, 23 May, 2005.

Dr. András Holló
Judge of the Constitutional Court