DECISION 1/1999. (II. 24.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of the petition submitted by the President of the Republic concerning the preliminary normative control of certain provisions of an act passed by the Parliament but not yet promulgated, the Constitutional Court, with dissenting opinions by Judges of the Constitutional Court dr. István Bagi, dr. Tamás Lábady and dr. Ödön Tersztyánszky, has made the following

decision:

1. It is established by the Constitutional Court that the requirement to have a qualified majority in the adoption of any Act of Parliament defined by the Constitution is not simply a formal requirement of the legislative process but a constitutional guarantee with the essential content of securing wide-scale concordance among the Members of Parliament. The requirement to have a qualified majority applies not only to the adoption of the Act of Parliament as the direct implementation of the constitutional provision concerned but to its modification (i.e. amendment or completion) and repealing as well. No Act of Parliament passed constitutionally by a qualified majority may be amended or repealed by an Act of Parliament passed by a simple majority.

2. The Constitutional Court establishes that Sections 12-24, 36-37, Section 40 para. (7) item c), Sections 46-50 and 54 of the Act on the "rules of the combat against organised crime and the related phenomena and the amendment of related Acts of Parliament", adopted by the Parliament in its session of 22 December 1998 (hereinafter: the "Act on Organised Crime") are unconstitutional.

3. The Constitutional Court establishes that the parts referring to the Prevention Service in Sections 25 and 38, and Section 39 para. (1), furthermore, the parts referring to Section 64

para. (8) of Act XXXIV of 1994 on the Police in Section 39 paras (2), (3) and (6) of the Act on Organised Crime are unconstitutional.

4. The Constitutional Court establishes that further provisions of the Act on Organised Crime affected by the petition, i.e. Section 2 para. (2), Section 40 paras (2), (3), (4), (8) and (9), and Section 51 paras (2) and (3) are not unconstitutional in the context of the petition.

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

Reasoning

I

1. During its session of 22 December 1998, the Parliament adopted an Act on the "rules of the combat against organised crime and the related phenomena and the related amendments of Acts of Parliament".

The new Act of Parliament – in addition to introducing new provisions and amending many other Acts of Parliament – amends Act XXXIV of 1994 on the Police (hereinafter: the "Act on the Police"), Act LXXXVI of 1993 on the Entry, Residing in Hungary and Immigration of Foreigners (hereinafter: the "Act on Aliens"), Act CXXXIX of 1997 on the Asylum (hereinafter: the "Act on Asylum"), Act XXXII of 1997 on Border Surveillance and the Border Guards (hereinafter: the "Act on the Border Guards") and Act XII of 1998 on Travelling Abroad (hereinafter: the "Act on Travelling Abroad"). According to Article 40/A paras (1) and (2), Article 58 para. (3) and Article 65 para. (2) of the Constitution, the supportive votes of two thirds of the Members of Parliament present at the session were required for adopting the above Acts of Parliament.

Taking into account the debate conducted in the Parliament about the amendment of Acts of Parliament demanding a qualified majority, the Prime Minister asked the President of the Republic in his letter dated 29 December 1998 and received on 4 January 1999 to initiate the preliminary normative control of the Act in order to verify whether the "provisions of the adopted Act of Parliament amending the Act on the Police and the Act on Aliens were in

harmony with the constitutional provisions on qualified majority (Article 40/A para. (2) and Article 58 para. (3) of the Constitution)".

2. The President of the Republic himself, too, considered it necessary "on the grounds of legal certainty and in order to secure the democratic operation of State administration" to obtain the opinion of the Constitutional Court. Therefore, in his petition dated 5 January 1999, he initiated – by virtue of his powers specified in Article 26 para. (4) of the Constitution – the preliminary constitutional normative control of certain provisions of the Act based on Section 1 item a), Section 21 para. (1) item b) and Section 35 of Act XXXII of 1989 on the Constitutional Court.

The President of the Republic initiated the review of Sections 12-24, 36-37, Section 40 para. (7) item c), Sections 46-49, 50 and 54 of the Act on Organised Crime in respect of whether "they have been adopted in a constitutional procedural way, with the required proportion of votes", taking into account Article 40/A paras (1) and (2), Article 58 para. (3) and Article 65 para. (2) of the Constitution. In the reasoning of the petition, he quotes some statements made by the Constitutional Court in Decision 4/1993 (II. 12.) AB on qualified majority acts.

The President of the Republic initiated the constitutional review of Section 2 para. (2), Section 13 para. (1), Sections 16, 24, 25, 38, Section 39 paras (1), (2), (3) and (6), Section 40 paras (2), (3), (4), (8) and (9), and Section 51 paras (2) and (3) of the Act on Organised Crime in respect of legal certainty as an important element of the rule of law declared in Article 2 para. (1) of the Constitution. In his opinion, after comparing the normative text submitted to voting and the text sent to him for signing, the latter does not correspond in every respect to the text adopted by the Parliament. The reasons for this were, on the one hand, the amendment necessitated by the rejection of some provisions. In the opinion of the President of the Republic – with reference to the constant practice of the Constitutional Court, and in particular to Decision 12/1990 (V. 23.) AB – the transcription in any way of the provisions adopted by the Parliament may only take place based on the procedure laid down in Section 107 para. (1) of Parliamentary Resolution 46/1994 (IX. 30.) on the Standing Orders of Parliament, i.e. by means of appropriate voting. On the other hand, the omission of the necessary amendment of the text based on the result of the voting caused the Act to refer to non-existing provisions and non-existing legal institutions.

3. As the first step, the Constitutional Court performed a formal constitutional review – without any review of the contents – of the provisions adopted by a simple majority on the amendment of acts adopted by a qualified majority. Then, in compliance with the petition of the President of the Republic, the Constitutional Court examined the deviations between the normative text of the Act on Organised Crime submitted to final voting and the one sent to the President of the Republic for signing.

In the reasoning of the decision, the Constitutional Court shall include the whole text of the provisions of the adopted Act affected by the petition as the precisely defined subject of constitutional review. This is justified by the particular feature of preliminary normative control that the Act adopted by the Parliament has not been promulgated in this form, and therefore, in the absence of promulgation, its text can be learnt from the Constitutional Court decision only.

II

1. The provisions reviewed in relation to the requirement of qualified majority are the following:

1. 1. The Constitution provides for the following in respect of the armed forces and the police:
"Article 40/A para. (1) The fundamental duty of the armed forces (the Hungarian Army and the Border Guards) is the military defence of the country. As part of its security activities, the Border Guard shall guard the borders of the country, monitor and control border traffic, and maintain order on the borders. A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law establishing the duties and detailed regulations of the armed forces.
(2) The fundamental duty of the police is to maintain public safety and domestic order. A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the police and the detailed regulations pertaining to issues of national security."

The Acts of Parliament relevant in the present review as having been passed in the direct implementation of the above constitutional provisions are the Act on the Police and the Act on the Border Guards. The Act on Organised Crime amends the Act on the Police and the Act on the Border Guards the following way:

‘Chapter IV

Crime prevention control

Section 12 The following Sections 35/A-35/C shall be added to Act XXXIV of 1994 on the Police (hereinafter: the “Act on the Police”):

/Crime prevention control/

“Section 35/A para. (1) Crime prevention control shall be initiated one month before freeing the convict by the police headquarters competent at the seat of the penal institution setting free the convict at the penal judge operating in the county (metropolitan) court competent at the seat of the penal institution.

(2) The request shall contain the following:

(a) the name, address (place of residence or stay) and natural identification data of the person to be controlled with a crime prevention purpose;

(b) the qualification of the criminal act on which the conviction has been based, the punishment ordered by the court, and the qualification of habitual criminality;

(c) the data justifying the order of crime prevention control, and in particular, information relating to the convict’s behaviour during the execution of punishment, as well as to the continuance of criminal behaviour and the renewal of contacts to criminals.

(3) Crime prevention control is ordered by the penal judge in a procedure in line with the provisions of Law Decree 11 of 1979 on the Implementation of Punishments and Measures.

Section 35/B In addition to the measures taken by the Police as specified in the present chapter, the person under crime prevention control may be the subject of covert information gathering which does not need any authorisation by a judge as specified in Section 64 para. (1) of this Act.

Article 35/C para. (1) Crime prevention control must be implemented in a way not hindering the social reintegration of the person affected and, as far as feasible, the social environment of the controlled person should not become informed on the control.

(2) The Police shall stop implementing the crime prevention control and, at the same time, shall initiate its termination if the causes that justified the order of the control cease to exist.”’

‘/Chapter VI

Rules pertaining to the management of personal data/

Section 23 para. (1) Section 63 para. (2) of the Act on the Police shall be replaced by the following provision:
"(2) Data gained in the course of covert information gathering – until used as evidence in the criminal procedure – as well as the identity of the person co-operating with the Police and that of the covert investigator, the existence of information gathering and the technical details thereof shall be classified as state secrets."

(2) Section 63 para. (5) of the Act on the Police shall be replaced by the following provision:
"(5) In the course of covert information gathering, the authorised organ of the Police and, as far as the information gained and the existence of information gathering is concerned, the prosecutor and the judge may be informed on the content of the protected state secret without any specific authorisation. Data and information specified in paragraph 2 may be forwarded to international and foreign investigating and judiciary authorities on the basis of an international convention, agreement or treaty or, in the lack of the above, on the basis of reciprocity, if forwarding is justified by the elimination of a grave and direct danger or the prevention of a serious crime, provided that the foreign data management authority complies with the conditions for managing personal data in respect of all data."

Section 24 The following paragraph 2 shall be added to Section 68 of the Act on the Police and, at the same time, the present text of Section 68 shall be renumbered to paragraph 1:
"Section 68 para. (2) In order to enforce security requirements, the rules of procedure pertaining to data reporting in the field of social security, health-care, taxation, budgetary finance, financing and statistics, as well as the control done by the public archive for the protection of a document to be archived, and the using of foreign currency as part of special operational costs may be agreed on by the Police and the respective competent authorities within the limits of statutory regulations."'

'/Interim, Miscellaneous and Closing Provisions

Chapter VIII

Provisions on putting into force and interim provisions

Section 40 para. (7) Upon putting into force the present Act, the following shall be repealed:/
(c) The text "- on the basis of the prosecutor's approval -" in Section 79 para. (2) item b) of the Act on the Police;"'

'/Amended legal norms/

Section 46 Section 5 para. (1) item c) of the Act on the Police shall be replaced by the following provision:

/The Minister of the Interior in his/her power of direction/

"(c) controls the budgetary management of the Police, approves the development plans of the Police on the proposal of the national chief commissioner of the Police, and he/she controls the reasonability and the efficiency of the Police's financial management."

Section 47 Section 33 para. (4) of the Act on the Police shall be replaced by the following provision:

"(4) The arrested person must be informed orally or in writing on the cause of his/her arrest and a certificate is to be issued on the duration thereof."

Section 48 Section 101 para. (1) item h) of the Act on the Police shall be replaced by the following provision:

/The Minister of the Interior is authorised to specify in a decree/

"(h) the rules pertaining to the order of crime prevention control as well as to the authorisation and application of special tools and methods."

Section 49 The following paragraph 2 shall be added to Section 102 of the Act on the Police and, at the same time, the present text shall be renumbered to paragraph 1:

"(2) The detailed rules on the application of the tools and methods of covert information gathering (Act on the Police, Chapter VII) shall be specified by the Minister of the Interior."'

Section 50 Section 25 para. (1) item j) of the Act on the Border Guards shall be replaced by the following provision:

/The Minister of the Interior in controlling the operation of the Border Guards/

"(j) controls the budgetary management of the Border Guards, approves the development plans of the Border Guards on the proposal of the national commander, and he/she controls the reasonability and the efficiency of the Border Guards' financial management."

(2) The following new paragraph 2 shall be added to Section 59 of the Act on the Border Guards and the present text under paragraph 2 shall be renumbered to paragraph 3:

“(2) The utilisation of the Border Guards’ special operational budget may be controlled by an external state organ on the grounds of legality only. In this scope, no control of reasonability and efficiency may be performed, with the exception of that of under Section 25 para. (1) item j).”

(3) Section 69 para. (1) of the Act on the Border Guards shall be replaced by the following provision:
“(1) The following data pertaining to a controlled foreign person with the obligation to obtain a visa shall be kept by the Border Guards for 90 days from the date of data entry in the registry system serving the purpose of controlling border traffic, at the time of applying the IT system supporting the control: the place, date and method of entering the territory of the Republic of Hungary, the name (family name and first name), place and date of birth, gender, citizenship, travelling document number of the person entering the country, and the registry plate number of the car in case of entering the country by car.”

(4) The following item d) shall be added to Section 83 para. (1) of the Act on the Border Guards:
/The Government is authorised to specify in a decree/
“(d) the rules pertaining to the protection of witnesses and other persons who participate in the criminal procedure, the persons who conduct the criminal procedure, the persons who co-operate with the investigation authorities of the Border Guards in the framework of the covert information gathering as well as those who are in a close relation with the above-mentioned persons.”

(5) The following new paragraph 2 shall be added to Section 83 of the Act on the Border Guards and the present text under paragraph 2 shall be renumbered to paragraph 3:
“(2) The Government shall be authorised to specify the detailed rules of the procedure related to establishing and maintaining by the Border Guards a cover institution.”

(6) The following item e) shall be added to the present Section 83 para. (3) of the Act on the Border Guards and it shall be renumbered to paragraph 4:
/The Minister of the Interior is authorised to specify in a decree/
“(e) the rules pertaining to the authorisation and application of special tools and methods.”

(7) The following paragraph 5 shall be added to Section 83 of the Act on the Border Guards:
"(5) The detailed rules on the application of the tools and methods of covert information gathering (Act on the Police, Chapter VII) shall be specified by the Minister of the Interior."'

1. 2. The rights to move freely and to choose one's place of residence are specified in the Constitution as fundamental rights.
Article 58 (1) Everyone legally staying or residing in the territory of the Republic of Hungary – with the exception of the cases established by law – has the right to move freely and to choose his place of residence, including the right to leave his domicile or the country.
(2) Foreigners legally residing in the territory of the Republic of Hungary may only be deported on the basis of a resolution reached in accordance with the law.
(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the freedom of movement and residence. "

The Acts relevant in the present review as having been passed in the direct implementation of the above constitutional provisions are the Act on Aliens and the Act on Travelling Abroad. The Act on Organised Crime amends the Act on Aliens and the Act on Travelling Abroad the following way:

'Chapter V

Regulations on aliens and on asylum

Section 13 para. (1) Section 9 of Act LXXXVI of 1993 on the Entry, Residing in Hungary and Immigration of Foreigners (hereinafter: the "Act on Aliens") shall be replaced by the following provisions:
"Section 9 para. (1) Visa is – upon compliance with the conditions specified in the present Act – a promise related to the entry to and transit through the territory of the Republic of Hungary, and a licence to stay upon entry in the country, with the purpose and in the duration specified in the visa, as well as a licence to leave the country.
(2) Visa may be issued to a foreigner who supplies indicative evidence or proof in his/her request that during his/her entry into, transit through or stay in the territory of Hungary, he/she shall comply with the requirements specified in this Act and the statutes adopted for the implementation thereof.

(3) In the case specified in paragraph 3 item a), the visa may be issued if the applicant supplied the missing data or annexes within the deadline specified in the order of the authority.

(2) Section 11 para. (1) of the Act on Aliens shall be replaced by the following provision:
"Section 11 para. (1) The following are empowered to issue a visa:
(a) a foreign representation office authorised to issue a visa;
(b) the Ministry of Foreign Affairs;
(c) the police headquarters;
(d) the directorate of the Border Guards and the border traffic representation office thereof;
(e) the designated organ of the Ministry of the Interior (hereinafter: the "Ministry of the Interior")
as visa-issuing authorities (hereinafter: "visa-issuing authorities")."

Section 14 Section 15 para. (3) of the Act on Aliens shall be replaced by the following provision:
"(3) The Police shall decide in the matters specified in paragraph 1 within 15 days from the date of receiving the request."

Section 15 The following new paragraph 2 shall be added to Section 34 of the Act on Aliens and, at the same time, the present paragraph 2 shall be renumbered to paragraph 3:
"(2) The duration of the prohibition to enter into and stay in the country ordered on the basis of expulsion shall be counted from the day of implementing the expulsion."

Section 16 Section 35 para. (1) of the Act on Aliens shall be replaced by the following provision:
"(1) Appeal against the decision ordering an expulsion of aliens may be filed within three days from the communication of the decision."

Section 17 The following subtitle and Section 35/A shall be added to the Act on Aliens:

"Implementation of the expulsion ordered by the court or the authority dealing with minor administrative infractions

Section 35/A (1) If expulsion was ordered by the court or the authority dealing with minor offences, the implementation of the expulsion shall fall in the competence of the aliens authority.
(2) The court and the authority dealing with minor administrative infractions shall notify the aliens authority by sending a copy of the final judgement or the final decision respectively.
(3) The aliens authority shall advance the costs of implementing the expulsion if such costs may not be secured by other means."

Section 18 Section 37 para. (1) of the Act on Aliens shall be replaced by the following provision:
"(1) The custody of aliens shall be implemented in the detention-room of the Police or in a penal institution as specified by the authority ordering thereof."

Section 19 para. (1) Section 47 para. (1) of the Act on Aliens shall be replaced by the following provision:
"(1) For the purposes of this Act, aliens authority shall mean the Ministry of the Interior, the Police, the Border Guards, the Public Administration Office, the Board of Customs and Excise and the visa-issuing authorities, empowered in the present Act with official and acting powers."

(2) Section 48 para. (2) of the Act on Aliens shall be replaced by the following provision:
"(2) The Ministry of the Interior, the Police and the Border Guards may act in any aliens matter within their competence on the grounds of public order and security. If the Police headquarters or the directorate of the Border Guards acted at first instance, the appeal against their decision shall be judged by the Ministry of the Interior, and if the ministry acted at first instance, the minister shall be in charge of ruling on the appeal."

Section 20 Section 49 of the Act on Aliens shall be replaced by the following provision:
"Section 49 para. (1) In aliens matters, the decisions adopted in administrative and judicial procedures must be communicated orally in the presence of the foreign person in his/her mother tongue or any other foreign language he/she understands.
(2) If a foreign language is used, and the representative of the authority in charge does not speak the language in question, an interpreter must be used. The fee and the expenses of the interpreter shall be paid by the state.

(3) If the place of stay of the foreign person is unknown, the decision shall be communicated by way of public exhibition. Only the holdings of the decision may be put on public exhibition.”

Section 21 para. (1) The following paragraphs 3 and 4 shall be added to Section 60 of the Act on Aliens:
“(3) If the return may not be implemented without delay, the costs of the foreigner’s stay until return shall be borne by the operator of the aircraft (hereinafter: the “operator”).
(4) On the basis of the provisions of paragraph 1, the aliens authority may impose on the operator of the aircraft a fine of public order protection up to the amount of one million forints per flight to be paid to the account specified in the decision of the aliens authority." "

(2) Section 64 para. (1) item f) of the Act on Aliens shall be replaced by the following provision:
/The Government shall be authorised to regulate in a decree/
“(f) the order of procedure to designate the mandatory place of stay, the requirements on establishing a community accommodation and the in-house regulations of the community accommodation.”

‘/Chapter VI

Rules pertaining to the management of personal data/

Section 37 para. (1) Section 54 para. (1) of the Act on Aliens shall be replaced by the following provision:
“(1) The data file management authority can provide data from the registry for the authorities listed in Section 53 para. (2) and the judicial and law enforcement agencies, national security agencies, the authority in charge of asylum matters and the public administration office (hereinafter: the “authorities entitled to request data”) as well as on the basis of an international treaty, in the data-scope and for the authorities specified therein.”

(2) Section 56 para. (1) item f) of the Act on Aliens shall be replaced by the following provision:
“(f) Rejection of the request to issue the licence or to extend the validity thereof as well as the withdrawal of the licence and the reasoning thereof.”’

'/Miscellaneous Rules/

Section 54 Section 18 para. (1) of Act XII of 1998 on Travelling Abroad shall be amended as follows:

"(1) On the request of a citizen under the effect of the restriction specified in Section 16 para. (1), the passport authority may authorise travelling abroad for a determined period of time if it is justified on the grounds of special appreciation. The travelling may only be authorised with the approval of the prosecutor or the court until the submission of the charges or afterwards respectively in the cases specified in Section 16 para. (1) items a) and c), with the approval of the court in the case specified in Section 16 para. (1) item c), and with the approval of the authority specified in Section 16 para. (3) in the case specified in item e)."'

1.3. The right to asylum is listed in the Constitution among the fundamental rights.

Article 65 para. (1) In accordance with the conditions established by law, the Republic of Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum to foreign citizens who, in their native country or the country of their usual place of residence, are subject to persecution on the basis of race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded.

(2) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to asylum. "

The act adopted as the direct implementation of the above constitutional provision is the Act on Asylum. The Act on Organised Crime amends the Act on Asylum in respect of the following two points:

'/Chapter V

Regulations on aliens and on asylum/

Section 22 Section 32 para. (1) of the Act CXXXIX of 1997 on Asylum (hereinafter: the "Act on Asylum") shall be replaced by the following provision:

"(1) At the time of filing the request, the asylum authority shall inform the applicant on his/her procedural rights and obligations, the legal consequences of non-compliance with the obligations as well as designated place of accommodation."'

'/Chapter VI

Rules pertaining to the management of personal data/

Section 36 Section 55 para. (4) of the Act on Asylum shall be replaced by the following provision:
"(4) Data specified in Section 51 para. (1) item e) may only be forwarded to the investigation authority and the Office of the Public Prosecutor as well as to the national security services according to the statutory provisions and to the court reviewing a decision passed in a matter related to asylum."'

2. In the parliamentary debate about the Act on Organised Crime the central issue was the possibility to amend Acts of Parliament that demand a vote of qualified majority according to the Constitution and to repeal certain provisions thereof. As regards the qualification of the provisions of "unified proposal" submitted for final vote, both the party submitting the Act, the Parliamentary Committee on Constitutional and Justice Matters, and the Members of Parliament in opposition referred to the provisions of Constitutional Court Decision 4/1993 (II. 12.) AB (ABH 1993, 48) on the content of the freedom of religion and the so-called two-thirds acts. The petition of the President of the Republic was also based on the differing interpretation of the above decision.

Taking into account the above, one of the starting points of examining the constitutionality of the Act on Organised Crime was the survey of the Constitutional Court's established practice, and in particular, the statements of principle found in Decision 4/1993 (II. 12.) AB (hereinafter: the "Decision of the Constitutional Court").

As soon as the Constitutional Court had started its operation, it faced a task of interpreting the Constitution with regard to a peculiarity of the Hungarian public law – which is, however, not unique on international scale – resulting from the three-level system of "the Constitution – Acts of Parliament that need a qualified majority vote (originally: acts of constitutional power) – simple Acts of Parliament" (Decision 4/1990 (III. 3.) AB, ABH 1990, 28; Decision 5/1990 (IV. 9.) AB, ABH 1990, 32). The system of norms created in the Constitution at the time of the constitution-making process in 1989 was modified by Act XL of 1990 transforming that from an essentially and formally clear value hierarchy into a condition of validity of the legislative process. According to the general reasoning of Act XL of 1990, the category of the acts of constitutional power caused many interpretation difficulties, too, and therefore, it is significant in the modification that instead of using a general definition, the

Constitution defines in each concrete case what proportion of, and how many votes in favour are needed.

The present system, which is different in principle from the earlier one, necessitates the Constitutional Court to act in its role of interpretation, too. As referred to in the Decision of the Constitutional Court: "Parliamentary groups have already asked the Constitutional Court in a number of petitions to interpret the Constitution related to whether each legal regulation on the fundamental right in question or only the act „pertaining to it" requires a two-thirds majority; in addition several petitions have asserted that some of the acts are unconstitutional since the act in question should have been passed with a qualified majority". (ABH 1993, 48, 62).

Before adopting the Decision of the Constitutional Court, the Constitutional Court established among others the following: its follows from Article 44/C of the Constitution that although the express modification of Act LXV of 1990 on Local Governments (hereinafter: the "Act on Local Governments") may only be implemented by a qualified majority, it is possible to adopt the detailed provisions relating to an institution (Commissioner of the Republic) regulated by the Act on Local Governments in an Act of Parliament passed by a simple majority (Decision 1586/B/1990/5 AB, ABH 1991, 608, 609). According to Decision 26/1992 (IV. 30.) AB, an act containing the organisation and operational principles of an authority of the State – the State Audit Office – does not equal the statutory regulation setting the powers of the respective authority (ABH 1992, 135, 143).

Following and summarizing the evaluation of the contents of its former decisions, it was established in the Decision of the Constitutional Court that "Since the current Constitution required a two-thirds majority for acts to be enacted on particular fundamental rights, several different orders of importance may be established among the fundamental constitutional rights which do not overlap each other" (ABH 1993, 48, 59). "The present rule on the two-thirds majority does not establish a theoretically-based hierarchy among fundamental rights; it only reveals their political importance for the political factors in agreeing to amend the Constitution." (ABH 1993, 48, 60).

Point B1 of the holdings of the Decision of the Constitutional Court contains two statements not separated structurally:

– where the Constitution ordains the votes of two-thirds of the Members of Parliament present, the obligation for a qualified-majority act does not concern any legal regulation of the fundamental right in question but only the act passed as the direct implementation of the given constitutional provision; this act defines the direction of enforcing and protecting the fundamental right concerned;
– the requirement of a qualified majority to pass an act on fundamental rights does not exclude that detailed rules necessary to implement the given fundamental right be determined by a simple majority (ABH 1993, 48, 49). In the reasoning, the Constitutional Court repeated the above wording, with the following added: "An act passed constitutionally by a qualified majority may not be amended by an act passed by a simple majority" (ABH 1993, 48, 64).

In addition, it was pointed out in the Decision of the Constitutional Court that "The Constitution currently in force expresses the aim that the regulation of certain basic institutions and certain – mainly political – fundamental rights should be realised with a broad consensus. This aim is achieved if – in conformity with the text of the Constitution – the act on the basic institution or fundamental right is passed with a two-thirds majority. However, an interpretation that would exclude the simple majority from the possibility of regulating matters relating to the fundamental rights in question – outside the scope of conceptual questions falling under two-thirds acts – in accordance with its political concepts, i.e. from the possibility of regulating their implementation, building further guarantees, and adjusting their realisation to the given conditions according to its own concepts would be contrary to the substance of parliamentarianism. The protection and realization of fundamental rights in the system of the Constitution, based on parliamentary principles, would suffer an unjustifiable restriction if every change and improvement, or partial guarantee which does not determine the regulatory concept, would require a two-thirds majority. Even the specific way of extending the guarantees may, namely, be contrary to the political interest of the minority and its views concerning the right in question" (ABH 1993, 48, 61, 62).

Subsequent decisions follow the principles laid down in the Decision of the Constitutional Court and they quote its statements in their reasoning, such as in the case of Decision 27/1993 (IV. 29.) AB, (ABH 1993, 444, 445), Decision 53/1995 (IX. 15.) AB (ABH 1995, 238, 242), and Decision 735/B/1996 AB (ABH 1997, 654, 661).

In interpreting Article 44/C of the Constitution, the Constitutional Court established that this rule, even on the basis of a simple grammatical construction, is only applicable in the adoption of a single fundamental act, the Act on Local Governments, and not in the adoption of any statutory provision concerning local governments (Decision 1671/B/1991 AB, ABH 1997, 557, 558). In interpreting the question of qualified majority necessary for the restriction of the fundamental rights of local governments, the Constitutional Court also established that 'it was not bound by any qualification raised, or not raised, at the parliamentary session, and it might, on a case-by-case basis, determine the nature of the provision of concern, as well as whether there were "yes" votes actually cast to have the relevant provision of the draft adopted. At the same time, both for the operation of the Parliament and as far as legal certainty is concerned, it is important that that Members of Parliament should be aware of which decisions demand a qualified majority vote, and the promulgation of the decision passed should correspond to that. The lack of such awareness could, however, raise the risk of adopting an act that, as a whole, demands a simple majority only, with some provisions in it that need a qualified majority, and due to the lack of an appropriate focus on such provisions, it can happen that only a constitutional review would point out that the Parliament has not, in fact, adopted the provisions in question, as the number of "yes" votes cast satisfied only the requirements of a simple majority. As a consequence, the provisions concerned must be annulled.' (Decision 3/1997 (I. 22.) AB, ABH 1997, 33, 39).

3. In the present procedure, just as in adopting the Decision of the Constitutional Court, the Constitutional Court recalls that in its practice the Court have considered decisive the functioning ability of the parliamentary system, and within this, the maintenance of the decision-making ability of the Parliament as well as stable and effective government (ABH 1993, 48, 62). As the Constitutional Court was set up to protect the Constitution, it must secure the stability of the constitutional system even in the course of sharp debates concerning public law and in political debates related to such questions.

In the present case, this means protecting the acts that demand a qualified majority. In the opinion of the Constitutional Court, the fact that the determination of the present constitutional scope of fundamental rights and institutions demanding a qualified majority vote was influenced by political concerns as well would not diminish the obligatory power of such constitutional provisions; they bind the Constitutional Court just as any other constitutional rule.

No petition has so far been submitted to the Constitutional Court for review demanding an explicit statement by the Constitutional Court on whether an act adopted by qualified majority according to the provisions of the Constitution could be amended or repealed by an Act adopted by a simple majority. In the Decision of the Constitutional Court, the board had to decide on the relation between a certain provision of a given act that can be adopted by a simple majority (Settlement of the Ownership of Real Estate Formerly Owned by Churches) and the respective fundamental right (freedom of religion); whether it defined the direction of enforcing and protecting the fundamental right, or, to the contrary, it set up detailed rules necessary for the enforcement of the fundamental right in question. The Act reviewed by the Constitutional Court did not contain any provision amending the two-thirds regulation applicable to the fundamental right concerned, namely Act IV of 1990 on the Freedom of Conscience and Religion and on the Churches. However, in the reasoning of the Decision of the Constitutional Court, it was established that "An act passed constitutionally by a qualified majority may not be amended by a statute passed by a simple majority" (ABH 1993, 48, 64).

Nevertheless, the Act on Organised Crime as affected by the petition does not embody a supplementary regulation related and connected to a given fundamental right but – in addition to other provisions not reviewed – it amends and repeals thematically certain provisions of several individual acts that demand a two-thirds majority. Consequently, the target of the constitutional review is changed: it should not focus on whether a qualified or simple majority is needed for adopting a regulation related to a certain new subject, but on the possibilities of the legislature in the modification of a two-thirds act to set aside constitutionally the guarantee of the procedural rule of legislation specified for the adoption of that act.

As a result, in examining the petition, the Constitutional Court had to establish whether the forced consensus of the legislature resulting from the norms of the Constitution regarding the adoption (amendment or repeal) of acts demanding a qualified majority – as a precondition of validity for the legislative process – could be set aside in part or as a whole, or, to the contrary, it must be applied.

The review resulted in the Constitutional Court establishing that in the legislative process, the constitutional requirement of a qualified majority must be applied even in case of modifying some parts of the regulation or if the legislation is aimed at using more effective tools for the

enforcement of the fundamental right or institution concerned. The intention to enforce such or any similar initiative – as a tool of implementing effective governance – may not violate a constitutional norm. Undoubtedly, this rule sets a constitutional restriction on the formal validity of the law-making process even in the face of reasonable intentions by those representing the simple majority.

The Constitutional Court has pointed out in several former decisions that observing all formal rules of the legislative process is an important constitutional requirement (Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 85; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122; Decision 66/1997 (XII. 29.) AB, ABH 1997, 397, 401). In the opinion of the Constitutional Court, although the Constitution does not contain any essentially founded hierarchy of the fundamental rights and fundamental institutions, the procedural rules of the law-making process related to them, and in particular the conditions of validity, create a special status for the qualified majority acts. If the Parliament violated the procedural rules of legislation, this would lead to formal unconstitutionality with sanctions of constitutional law, taking into account the nullification powers of the Constitutional Court.

The Constitutional Court points out that the Parliament has the competence to decide to what details it regulates the given legislative subject by way of a so-called two-thirds act. However, the Constitutional Court maintains its related statements made in the Decision of the Constitutional Court, according to which it does not follow from the text and the structure of the Constitution that only so-called 'two-thirds acts' could regulate all aspects of the fundamental rights for the act on which the Constitution ordains a qualified majority (ABH 1993, 48, 61). "The Constitution distinguishes two-thirds acts from other acts concerning fundamental rights only from a procedural point of view, by the qualified majority necessary for their enactment; in the hierarchy of norms, the qualified act is not superior to the other acts. The specific procedure is, however, a constitutional requirement also in case of the amendment of these acts" (ABH 1993, 48, 63).

At the time of adopting the Acts on the Police, on the Border Guards, on Aliens, on Asylum, and on Travelling Abroad, the Members of Parliament agreed on regulation of a specific scope and elaborateness. In this context, the guarantee of qualified majority means that if, after adoption, there is a need for amending the whole or a part of the content or the method of regulation, it is necessary to win a wide-scale support for the modification concerned.

Consequently, at the time of amending an act demanding a qualified majority, there is no constitutional ground to make a distinction on the basis of the direction, nature and significance of the amending and the amended provisions.

Taking into account the above, the Constitutional Court established that the provisions of the adopted but not promulgated Act on the "rules of the combat against organised crime and the related phenomena and the related amendments of Acts of Parliament" that amend the Act on the Police, the Act on the Border Guards, the Act on Aliens, the Act on Asylum and the Act on Travelling Abroad violate the provisions of Article 40/A paras (1) and (2), Article 58 para. (3) and Article 65 para. (2) of the Constitution, and therefore, they are unconstitutional.

In the context of establishing the unconstitutionality, the Constitutional Court emphasises that there is no constitutional way of using an act adopted by a simple majority for any amendment or repeal of an act demanding a qualified majority. Only and exclusively by changing the constitutional rules that provide for qualified majority would it be possible for the Parliament to widen the possibilities of the regular legislation process (subject to a simple majority) and, at the same time, to shrink the scope of legislation subject to a qualified majority.

4. However, the present decision of the Constitutional Court maintains the possibility for the Parliament to adopt any regulation by a simple majority that does not affect the normative content of a so-called two-thirds act if it is needed for the enforcement of the fundamental right concerned or for a more effective operation of a particular organisation or institution. The legislature may do this constitutionally if, on the one hand, it keeps the procedural order of the law-making process by observing in particular the procedural requirement of not amending by a simple majority an act, or a provision thereof, once adopted by a two-thirds majority, and, on the other hand, it observes the requirement related to the content of the regulation, namely that the act may only provide for detailed rules – not demanding a qualified majority – on the fundamental right, organisation or institution concerned.

In the opinion of the Constitutional Court, the direct (itemised) modification of two-thirds acts cannot be circumvented constitutionally by amending another independent simple-majority act which covers a subject close to the regulatory field of the two-thirds act or which covers a certain part thereof, or by passing a new act. All that would lead to a situation where, with the

formal power of two-thirds acts left intact, the act regulating the fundamental right or institution would lose its constitutionally definitive power as compared to the amended or newly enacted acts formally demanding a simple majority. Whether amending or adopting a particular act does, in fact, have such an effect can only be established after reviewing its content.

The Constitutional Court has already interpreted in its former decision the question of which regulations pertaining to fundamental rights and duties require an act in accordance with Article 8 para. (2) of the Constitution (*Decision 64/1991 (XII. 17.) AB*, ABH 1991, 306). According to the Constitutional Court, there is a necessity and a possibility for a similar interpretation to separate the regulations to be defined by qualified majority acts and those passed by a simple majority (ABH 1993, 48, 62).

The Constitutional Court has not examined in the present procedure the constitutionality of the provisions of the Act on Organised Crime not affected by the petition. However, the Constitutional Court stated in Decision 3/1997 (I. 22.) AB that – in line with its powers specified in the Constitution, if requested in a petition – it shall examine the content of the statutory regulation concerned in order to take a position on the required majority level needed for its constitutional adoption (ABH 1997, 33, 39). As far as the essential criteria of the need for a qualified majority are concerned, in the field of fundamental rights, the Constitutional Court refers to the importance of – among other factors – the direction of their enforcement and protection, the guarantees of their operation and enforcement, the questions related to restricting the citizens' fundamental rights and obligations, and the essential elements of the procedural rules to be followed in the case concerned. In the scope of regulating the organisations and institutions affected by the requirement of qualified majority, the system of criteria primarily, but not exclusively, includes the relevant regulatory elements of competence, organisational structure and rules of operation.

III

1. In compliance with the petition of the President of the Republic the Constitutional Court performed the constitutional review of the deviations between the normative text of the Act

on Organised Crime submitted to final voting and the one sent to the President of the Republic for signing. The review was, however, limited to the parts of the text not affected by point 2 of the holdings. For this reason, the provisions in Section 13 para. (1) and Sections 16 and 24 were excluded from the review.

Consequently, the provisions reviewed in relation to the requirement of legal certainty were the following:

"Section 2 para. (2) The public order protection fine imposed on the basis of this Act (Section 4 para (3) and Section 11) and the public order protection fine imposed against the operator of an aircraft on the basis of a separate Act (Section 21 para. (1)) must be used for a purpose defined in a government decree."

'/Section The following Sections 160/A-160/F shall be added to Act C of 1995 on Customs Law, Customs Procedure and Customs Administration (hereinafter: the "Act on Customs"):/
„Section 160/E para. (1) Only members of the customs authority and the Prevention Service controlling the operation of the customs authority (Section 75 of the Act on the Police), the person designated by the Minister of Finance, the Ombudsman of Data Protection and the representative of another body authorised by an act can observe, inquire about, and request some notification or data from the criminal data file management systems of the customs authority."'

Section 38 Section 6 para. (1) item q) of Act LXV of 1995 on State Secrets and Official Secrets (hereinafter: the "Act on Secrets") shall be replaced by the following provision:
/Within his scope of power and competence, qualification can be made by/
"q) the Border Guards and the head of the central organ of the Police authority or of the Prevention Service (Section 75 of the Act on the Police)." "

Section 39 para. (1) The following title and Section 30/A shall be added to the Act on Secrets:

"Prevention Service

Section 30/A In the scope of operation of the Prevention Service the following shall be classified as state secrets:
a) The rules of procedure for applying the tools as well as the powers and methods of covert information gathering.

The longest period of state secret classification is 30 years.

b) All concrete data, until used in the criminal procedure, obtained in and in relation to the covert information gathering activity of the Prevention Service concerning a particular person or matter as well as their registries in any form and type of media.

The longest period of state secret classification is 90 years.

c) Submissions, proposals and reports related to the co-operating suspect obtained in the course of an investigation rejected or terminated with the proposal of the prosecutor on the basis of Section 127 para. (3) and Section 139 para. (3) of the Code of Criminal Procedure.

The longest period of state secret classification is 90 years.

d) Information outside the scope of the criminal procedure, gained in the course of revealing the criminal acts.

The longest period of state secret classification is 90 years.

e) Data gained in the co-operation of the state security services and the Prevention Service if they refer to the activity of the state security services.

The longest period of state secret classification is 90 years.

f) Data related to the nature and the financial sources of cover institutions established according to Section 65 of Act XXXIV of 1994 on the Police.

The longest period of state secret classification is 90 years.

g) The identity of a person co-operating with the Prevention Service and of a covert investigator as well as the entering of cover data in the registries specified in Section 64 para. (8) of Act XXXIV of 1994 on the Police together with any document or other data medium containing an order to enter such data in the registries.

The longest period of state secret classification is 90 years.

h) Training materials on the covert information gathering activities of the Prevention Service.

The longest period of state secret classification is 30 years.”

(2) The following Section 33/A shall be added to the Annex of the Act on Secrets:

“33/A The identity of a person co-operating with the Border Guards and of a covert investigator as well as the entering of cover data in the registries specified in Section 64 para. (8) of Act XXXIV of 1994 on the Police together with any document or other data medium containing an order to enter such data in the registries.

The longest period of state secret classification is 90 years.”

(3) The following Section 46/A shall be added to the Annex of the Act on Secrets:

“46/A The identity of a person co-operating with the Police and of a covert investigator as well as the entering of cover data in the registries specified in Section 64 para. (8) of Act XXXIV of 1994 on the Police together with any document or other data medium containing an order to enter such data in the registries.
The longest period of state secret classification is 90 years.”

(6) The following Section 137/G shall be added to the Annex of the Act on Secrets:
“137/G The identity of a person co-operating with the Board of Customs and Excise and of a covert investigator as well as the entering of cover data in the registries specified in Section 64 para. (8) of Act XXXIV of 1994 on the Police together with any document or other data medium containing an order to enter such data in the registries.
The longest period of state secret classification is 90 years.”

Section 40 “(2) Section 13 para. (2) and Section 19 shall enter into force on 1 May 1999, and the provisions must be applied in pending cases as well. The provisions in Section 17 on the authority dealing with administrative infractions and the expulsion ordered by the authority dealing with administrative infractions shall be put into force by a separate act.
(3) The provisions of Section 42 shall enter into force on the 8th day after their promulgation.
(4) Section 605 paras (8)-(12) of Act XIX of 1998 on the Criminal Procedure (hereinafter: the “CCP”) shall enter into force together with the entering into force of the present Act.

(8) From 1 March 1999, the text in force of Section 1 of the present Act shall be as follows:
Section 1 The present Act is aimed at offering – by means of criminal law and administrative law – a more effective protection against the criminal offences, and certain related acts violating the law, committed in the framework of a criminal organisation according to the provisions of Act IV of 1978 on the Criminal Code (hereinafter: the CC) (Section 137 para. (8) of the CC) or committed with the purpose of establishing a criminal organisation (Section 263/C of the CC).
(9) From 1 March 1999, the text in force of Section 3 item s) of the present Act shall be as follows:

s) s) a criminal act is connected to organised crime if it is committed by a member of a criminal organisation (Section 137 para. (8) of the CC) and the establishment of a criminal organisation (Section 263/C).”’

‘Section 51 para. (2) Section 174 paras (2) and (3) of the Act on Customs shall be replaced by the following provision and the new paragraphs 4 and 5 shall be added to it, and at the same time, the present paragraphs 4 and 5 shall be renumbered to paragraphs 5 and 6:

“(2) The investigation authorities of the Board of Customs and Excise designated by the national commander perform covert information gathering according to the provisions specified in Chapter VII of Act XXXIV of 1994 on the Police (hereinafter: the “Act on the Police”) in order to prevent, reveal and interrupt criminal offences that fall into the investigation powers of the customs authorities on the basis of the Act on Criminal Procedure, as well as to identify and arrest the offender, search for the wanted person, identify his place of stay, and to gain evidences. For the purposes of Section 68/D para. (1) of the Act on the Police, the provisions under Section 173 para. (1) shall be deemed an exception.

(3) For the protection of the informant, the confidential person, other persons cooperating with the customs authority covertly, the covert investigator and the cover document or the cover institution, the customs authority may enter cover data into the public administration registries, and in particular the registries of personal data and residence address, the registry of identification cards, the birth certificate records, the registry of travelling documents, the records of driving licences and vehicles, the real estate registry and the company registry. The entering of cover data and the document or any other data medium containing the order to enter the cover data are deemed state secrets. Cover data must be deleted as soon as the criminal persecution interest justifying their application has ceased to exist.

(4) The damage caused to third persons during the covert information gathering by the informant, the confidential person and other persons cooperating with the customs authority covertly shall be compensated by applying appropriately the provisions specified in Section 67 para. (2) of the Act on the Police.”

(5) The Government shall be authorised to

a) lay down detailed rules on the procedure of the Board of Customs and Excise for establishing and maintaining a cover institution;

b) lay down in a decree the rules pertaining to the protection of witnesses and other persons who participate in the criminal procedure, the persons who conduct the criminal procedure, the persons who co-operate with the investigation authorities of the Board of Customs and Excise in the framework of covert information gathering as well as those who are in a close relation with the above-mentioned persons.”

(3) The following paragraph 7 shall be added to Section 174 of the Act on Customs:

"(7) The detailed rules on the application of the tools and methods of covert information gathering (Act on the Police, Chapter VII) shall be specified by the Minister of Finance."'

2. The Constitutional Court established on the basis of the authentic minutes of the Parliament's session of 22 December 1998 that, after the parliamentary debate and the modifications accepted, the final text of the draft submitted under No T/272, the so-called "unified proposal" was voted for by the Parliament in two parts, in accordance with Section 107 para. (5) of Parliamentary Resolution 46/1994 (IX. 30.) on the Standing Orders of Parliament (hereinafter: the "Standing Orders"). In its recommendation No T/272/94, the Parliamentary Committee on Constitutional and Justice Matters established which provisions of the "unified proposal" demand, in its opinion, the "yes" votes of two-thirds of the Members of Parliament present. This proposal was accepted by the Parliament by a simple majority, with 203 votes in favour, 127 votes against and 1 abstention (Parl. Minutes Column 5662). The provisions of the "unified proposal" which were declared to demand a qualified majority were not accepted by the Parliament, with 208 votes in favour, 136 votes against and 3 abstentions (Parl. Minutes Column 5722). Then the Parliament decided on the provisions declared to demand a simple majority, adopting the Act with 213 votes in favour, 26 votes against and 108 abstentions (Parl. Minutes Column 5734).

Therefore, as the provisions of the Act on Organised Crime that, based on a recommendation by the Committee on Constitutional and Justice Matters and the position of the Parliament, demand the "yes" votes of two-thirds of the Members of Parliament present at the session had not been adopted by the necessary majority, the normative text of the adopted Act was limited to the provisions that demand a simple majority.

3. The Constitutional Court established contradictions in the contents of the adopted text of the Act on Organised Crime, caused by omitting the provisions not adopted on the grounds of demanding a two-thirds majority as classified by the Parliament as well as by a failure to redraft with due care the remaining normative text.

Lacking a two-thirds majority, the Parliament has not adopted the amendment to Section 75 of the Act on the Police about the establishment of the Prevention Service. Nonetheless, Section

25 of the Act on Organised Crime establishing Section 160/E of the Act on Customs refers to the above organisation not established. Similarly, Section 6 para. (1) item q) of the Act on Secrets established by Section 38 of the Act on Organised Crime mentions the Prevention Service, moreover, Section 39 para. (1) of the Act on Organised Crime provides for adding a new point 30/A to the Annex of the Act on Secrets, with the title "Prevention Service".

Similarly, due to the lack of a two-thirds majority, the provision establishing the new paragraph 8 of Section 64 of the Act on the Police was not adopted; however, Section 39 paras (2), (3) and (6) of the Act on Organised Crime still refer to that.

The Constitutional Court has pointed out in several cases that it is a constitutional requirement that the normative texts must have a clear, comprehensible and lucid normative content. The principle of legal certainty – which is an important element of the rule of law declared in Article 2 para. (1) of the Constitution – demands that the text of a statute should bear a reasonable and clear normative content distinguishable in the application of the law (Decision 26/1992 (IV. 30.) AB, ABH 1992, 135, 142).

Minor inconsistencies identified in the text when applying the law after putting the Act into force may be eliminated through interpretation in the application process. There are several examples for this, although the only effective way of eliminating such defaults would be the amendment of the acts concerned in order to prevent casual interpretations. Nevertheless, when the "inconsistency" cannot be resolved by everyday interpretation because it represents missing parts in the normative text the elimination of which could only be implemented by the introduction of an institute or principle not regulated in the act or by the omission of an existing provision, it can only be eliminated by amending the act to create its inner coherence.

Based on the above, the Constitutional Court established that the provisions of the Act on Organised Crime listed in point 3 of the holdings violate the requirement of legal certainty resulting from the principle of the rule of law regulated in the normative content under Article 2 para. (1) of the Constitution, and therefore, they are unconstitutional.

4. The results of the voting, as mentioned before, made it necessary to redraft the normative text; numberings of sections and paragraphs were changed. In addition to the renumbering needed, there was a numbering error in Section 51 paras (2) and (3) of the Act on Organised Crime.

As mentioned by the President of the Republic in his petition, the Standing Orders offer an adequate procedure in the course of voting to secure the consistency of the statutory provisions. The Constitutional Court established that the provisions of the Standing Orders (Section 107 paras (1) and (5) and Section 56) merely offer a possibility for, but do not prescribe the submission of an amendment proposal, neither do they prescribe obligatory voting concerning the edited version of the text.

The petition referred to Constitutional Court Decision 12/1990 (V. 23.) AB establishing that "Errors in the codification cannot be considered as manuscript errors, they can only be remedied by amending the statute. Any practice to the contrary would violate the principle of legal certainty and the fundamental rules of legislation. In connection with the case concerned, the Constitutional Court points out in general that it has become a widespread practice to correct codification errors as manuscript errors. In this field, one may experience that such corrections are usually implemented with an unreasonable delay after the promulgation of the statute. All this violates the principle of legal certainty and the rules of legislation, discrediting at the same time the codification activities." "In the opinion of the Constitutional Court, statutes can only be corrected in case of discovering a misprint, within a short period after promulgation" (ABH 1990, 160, 168-169).

The statement quoted in the petition cannot be applied in the present case for two reasons. On the one hand, the former opinion of the Constitutional Court was expressly based on a promulgated statute published in the Official Gazette, and on the other hand, in the case on which the decision referred to had been founded, there were essential modifications (which could not be qualified as numbering or other technical errors) to the normative text implemented as codification errors.

There were merely technical, such as editing modifications in Section 2 para. (2) and Section 40 paras (2), (3), (4), (8) and (9) of the Act on Organised Crime, while in Section 51 paras (2) and (3), there were evident numbering errors. Therefore, as far as the above provisions are concerned, the Constitutional Court has not established a violation of the Constitution by violating legal certainty on the basis of the review criterion raised in the petition.

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

Budapest, 23 February 1999

Dr. János Németh
President of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Árpád Erdei
presenting Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. János Németh
Judge of the Constitutional Court
on behalf of
Dr. László Kiss
Judge of the Constitutional Court incapacitated to sign

Dr. Tamás Lábady
Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Ödön Tersztyánszky
Judge of the Constitutional Court

Dr. Imre Vörös
Judge of the Constitutional Court

Dissenting opinion by Dr. Tamás Lábady, Judge of the Constitutional Court

1. I agree with the statements found in points 3 and 4 of the holdings, however, I do not share the majority opinion in that the requirement to have a wide-scale concordance between the Members of Parliament is the only essential content of the qualified majority demanded for the adoption of certain Acts of Parliament defined in the Constitution. The requirement of qualified majority demanded by the Constitution is an essential criterion and not only a formal one regulating the legislative process and the essential elements thereof can only be specified on the basis of the Constitution. This can, in the last instance, be determined by the Constitutional Court.

Consequently, in my opinion, the Constitutional Court would have had to implement an independent constitutional review of the contents of each of the concrete provisions of the qualified majority Acts amended by the Act on Organised Crime in the respect of whether they would have had to be adopted by a qualified majority on the basis of the Constitution.

The Constitutional Court could have been in a position to decide on the constitutionality of the statutory provisions defined in point 2 of the holdings after such reviews only.

2. Taken from the reasoning of Constitutional Court Decision 4/1993 (II. 12.) AB (hereinafter: the "Decision of the Constitutional Court") it is inserted as a statement in principle into the holdings of the decision of the majority that "An act passed constitutionally by a qualified majority cannot be amended or repealed by an act passed by a simple majority." (ABH 1993, 64). However, even this theoretical statement includes that only the qualified majority acts classified as such by and on the basis of a constitutional provision may not be amended by a simple majority act. This question must, nevertheless, be decided neither on the basis of the title of the act, nor on the grounds of a parliamentary agreement, namely a wide-scale concordance between the Members of Parliament or any other bargain, but only on the grounds of the contents of the provision concerned and its relation to the Constitution.

The scope of application of constitutional provisions may only and exclusively be defined on the basis of the Constitution. Therefore, when deciding on whether a certain relation or regulatory subject falls in the scope of application of a constitutional rule – in the given case, the requirement of qualified majority – the Constitutional Court can rely on nothing else but the Constitution. If this was not the case, it would be in the sole discretion of the legislature to apply the constitutional guarantees and the Constitution would not be placed above the legislation, and therefore, it would not be possible to decide in constitutional issues in this field. Consequently, in my opinion, the legislature alone cannot determine with a binding force whether or not a given act is to be adopted by a qualified majority but – when in doubt – the Constitutional Court is in charge to establish on the basis of the Constitution the substantial criteria that set the legislation subjects demanding a qualified majority vote.

3. In fact, this is what the Decision of the Constitutional Court regulated when setting the substantial criteria of the need for a qualified majority, but it did so only in respect of the fundamental rights as at that time the issue of qualified majority had only been raised at the Constitutional Court in connection with fundamental rights. However, this shall not mean that – as mentioned in the majority decision – the same set of substantial requirements should not be defined by the Constitutional Court in respect of the institutions and organisations falling in the scope of subjects that demand a qualified majority according to the Constitution. What is more, this has even been done in the reasoning of the majority decision by highlighting

certain constitutional criteria, which has, in my opinion, resulted in a contradiction with the provision of the decision stating that the wide-scale concordance between the Members of Parliament is the only essential content of the constitutional guarantee. If, according to the Constitution, in addition to the wide-scale concordance between the Members of Parliament, there are essential criteria related to the qualified majority subjects of the legislation, the Constitutional Court must take a position on the issue of constitutionally required majority level – upon a relevant petition – in respect of both the particular provisions of an act adopted by a qualified majority and the particular provisions of an act adopted by a simple majority if, according to the Constitution, it falls into the category of qualified majority norms. Although the above conclusion is reached in the majority decision, it is one-sided: it concerns only the case of adopting an independent act by a simple majority in the given field of subject, in addition to the qualified majority act. According to the decision, the constitutionality of such an act may only be assessed on the basis of examining its contents. I do not see any constitutional, reasonable or logical ground to exclude that the same examination of content be performed by the Constitutional Court in the case of qualified majority acts already passed if asked to decide on the constitutionality of simple majority acts amending them. This process would result in creating a twofold standard for controlling constitutionality. On the one hand, it empowers solely the Parliament to define the content and the extent of the constitutional requirements on the level of qualified majority acts, and on the other hand, it calls upon the Constitutional Court to review their contents. In my opinion, there can be only one standard for constitutionality: the Constitution itself.

In many cases, acts adopted by a qualified majority have many provisions adopted so by the legislature not on the basis of the Constitution, but merely on the grounds of drafting the legislation, of codification technology or on political grounds, without any public law foundation. There is also a statement in principle in the Decision of the Constitutional Court. It reads: “However, an interpretation that would exclude the simple majority from the possibility of regulating matters relating to the fundamental rights in question – outside the scope of conceptual questions falling under two-thirds acts – in accordance with its political concepts, i.e. from the possibility of regulating their implementation, building further guarantees, and adjusting their realisation to the given conditions according to its own concepts would be contrary to the substance of parliamentarianism. The protection and realization of fundamental rights in the system of the Constitution, based on parliamentary principles, would suffer an unjustifiable restriction if every change and improvement, or

partial guarantee which does not determine the regulatory concept, would require a two-thirds majority." (ABH 1993, 62) Accordingly, the level of qualified majority is only required by the Constitution as far as conceptual issues are concerned, and the amendment or development of certain provisions of qualified majority acts can be implemented constitutionally by way of simple majority acts. I do not see any constitutional or reasonable cause for the Constitutional Court to deviate – without a due constitutional reason – from this position in principle formed as early as in 1993. Such an unreasonable deviation would act against the predictability and calculability of the law as well as the constitutional requirement of legal certainty resulting in insecurity in the law-making process, too.

Let me refer to only one example from the many. According to the majority decision, the following provision concerning administrative and judicial decisions passed in aliens administration matters should have been adopted by a qualified majority: "If the place of stay of the foreign person is unknown, the decision shall be communicated by way of public exhibition. Only the holdings of the decision may be put on public exhibition." This provision was, namely, inserted by the act into Act LXXXVI of 1993 on the Entry, Residing in Hungary and Immigration of Foreigners adopted by a qualified majority. Just as in the case of many other procedural provisions specified in the petition, I do not see the constitutional requirement of a qualified majority as being justified by the Constitution here either.

4. I agree with the majority decision stating that "the Parliament can decide to what details it regulates the given legislative subject by way of a so-called two-thirds act". However, it is in the competence of the Constitutional Court to decide – upon a relevant petition – which of those statutory norms are to be adopted by a qualified majority on the basis of the Constitution. Statutory provisions outside that scope may constitutionally be amended by a simple majority. In such cases, the Parliament is not bound by the level of majority reached at the time of adoption, similarly to the possibility of amending by a simple majority a simple majority act even if adopted unanimously. In the constitutional review of the provisions of the Act on Organised Crime as affected by the petition, the Constitutional Court should have decided not simply in the question of allowing the amendment of qualified majority acts (statutory provisions) but also in the question of allowing the amendment of provisions that demand a qualified majority on the basis of the Constitution. t would have necessarily taken a review on the content. If indeed, there was no relationship between the content of the constitutional requirement of the qualified level and the particular provisions of the act

adopted by a specific (two-thirds majority) procedure, the regulation in question has not become a qualified rule despite being adopted according to the relevant procedure. Consequently, a provision so adopted may be amended by a simple majority act as well.

The reason for this is that qualified acts, too, are acts, that is to say, there is no hierarchical relationship between the various acts – as there is in the case of the Constitution. In contrast, the majority opinion on interpreting the majority requirement gives these acts a quasi independent status, a separate level of norms in the hierarchy of norms between simple acts and the Constitution.

5. The majority opinion takes note of only formal explanation in the assessment of the petition, namely, whether or not the whole of the act was originally passed by a qualified majority. However, this criterion binds the scope of a constitutional guarantee to a casual agreement reached in the legislature, in some cases on technical or purely political grounds. It takes no account of the fact that the given act contains several framework provisions of authorisation down to the level of ministerial decrees. These authorisations as well as those referring to separate "simple" acts practically dissolve the boundaries of the act.

On the basis of the above, it may be established that it is the task of the Constitutional Court to decide - taking into account the concerns raised in the petition - if there is a relationship of content between the act reviewed and the relevant constitutional provision, and if such a relationship is close enough.

The Decision of the Constitutional Court has set up a test by regarding as the criterion of qualified majority the determination of the direction of enforcement and protection of the fundamental right concerned. The present petition concerns not only fundamental rights, but the regulation of institutions as well. In my opinion, the Constitutional Court should have defined – as contained in the exemplary listing of the majority decision – the essential features of the institution as a subject demanding qualified majority. It would cover nothing else but the fundamental powers and the fundamental organisational structure of the institution as well as the rules pertaining to its position in the constitutional system. The unconstitutionality of the statutory regulations affected by the petition could have been established in those cases only where the amending provisions of the Act on Organised Crime modify the regulations of qualified majority acts that fall into this category.

Budapest, 23 February 1999

Dr. Tamás Lábady
Judge of the Constitutional Court

I second the above dissenting opinion:

Dr. István Bagi
Judge of the Constitutional Court

Dr. Ödön Tersztyánszky
Judge of the Constitutional Court

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