DECISION 42/2003 (XI. 14.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a petition seeking the posterior constitutional examination of a statute and a law uniformity resolution, the Constitutional Court – with dissenting opinions by dr. Attila Harmathy and dr. Éva Tersztyánszky-Vasadi, Judges of the Constitutional Court – has adopted the following

decision:

1. The Constitutional Court holds that Criminal Law Uniformity Resolution 3/2004 BJE of the Supreme Court – subjected to a posterior constitutional examination on the basis of Article 32/A para. (1) and Section 1 item b) of Act XXXII of 1989 on the Constitutional Court – is unconstitutional and therefore annuls it as of the day of promulgation of this Decision.

2. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of Section 51 para. (1) and Section 53 para. (1) of Act XIX of 1998 on Criminal Procedure.

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

Reasoning

I

On the basis of Section 1 item b) of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"), the Prosecutor General has initiated the constitutional examination of the provisions of criminal procedure defining the injured party and the possibility of supplementary private prosecution with regard to criminal proceedings initiated on the basis of criminal offences causing damage to State property. Supplementary private prosecution means the right of the injured party of a criminal offence to replace the public prosecutor in

his position of prosecution at court if the public prosecutor refuses to institute criminal proceedings (rejects the reporting of the crime), refuses to press charges in proceedings already instituted (terminates the proceedings or partly refuses to press charges), or decides not to continue representing the prosecution (drops the charges).

1. The petitioner requests the Constitutional Court to establish the unconstitutionality of Section 51 para. (1) of Act XIX of 1998 on Criminal Procedure (hereinafter: "ACP") containing the procedural definition of injured party, and consequently of Section 53 para. (1) granting to the injured party the right to act as supplementary private prosecutor, and to annul these provisions with *pro futuro* effect. The petitioner claims the unconstitutionality of the challenged provisions in the context of Article 51 paras (1) and (2) of the Constitution defining the tasks of the Prosecutor General and the public prosecutor's office, Articles 9-11 on the protection of forms of property and State property, and Article 70/K on the judicial enforcement of claims based on the violation of fundamental rights. The petitioner does not challenge the institution of supplementary private prosecution derived form Article 70/K of the Constitution, "provided that its regulation does not violate constitutional rights, i.e. if it does not impair the public prosecutor's competence and consequently does not diminish the public prosecutor's tasks of protecting the fundamental rights of citizens."

According to the petitioner, "the State, as the direct holder of all of its legally protected interests (entity), becomes a participant in the criminal procedure as a special person. Its personality is of a public authority character rather than a natural or legal one. This also applies when the State directly suffers damage as a subject of property ownership." It follows from the historically developed and constitutionally enshrined punitive monopoly of the State that the enforcement of the State's punitive demand is primarily a public interest, and the public prosecutor is obliged by Article 51 para. (1) of the Constitution to perform this duty. The definition of injured party contained in Section 51 para. (1) of the ACP and the resulting definition of the right to supplementary private prosecution as per Section 53 para. (1) of the ACP violate the constitutional principle of the State's exclusive punitive demand because they do not reflect the idea that the right to supplementary private prosecution may only be a tool of enforcing one's private interest. According to the petitioner, Section 51 para. (1) of the ACP would only be constitutional "if it made clear that the injured party's rights listed under paragraph (2) may only be exercised by natural and legal persons and not by the State as an entity. Therefore, this restriction should be included among the criteria defined in paragraph

(1).” Due to this deficiency, the regulation does not express the constitutional priority of the public prosecutor over the supplementary private prosecutor in the course of enforcing the State’s punitive demand. “The law of criminal procedure is only constitutional if it clarifies from all aspects and beyond doubt that the acts of a supplementary private prosecutor are never considered as the enforcement of public interest, but only as that of the demand enshrined in Article 70/K of the Constitution [...].” “When a criminal offence directly violates or endangers the fundamental interests of the Republic of Hungary, all rights enjoyed by the State as injured party are exercised by the public prosecutor in the criminal proceedings, since in such cases no distinction can be made on the basis of the categories of public and private interests. In such cases, the involvement of a supplementary private prosecutor is theoretically impossible, but this was not realised by the legislator when drafting the ACP.”

2. In addition to the provisions of the ACP, the public prosecutor has initiated the establishment of the unconstitutionality of Criminal Law Uniformity Resolution 3/2004 BJE of the Supreme Court (hereinafter: “CLUR”) and the retroactive annulment thereof with effect from 27 September 2004. As a preliminary issue to the relevant part of the petition, the petitioner argues that, although the posterior examination of a law uniformity resolution is “in general” not within the Constitutional Court’s competence defined in Section 1 item b) of the ACC, the examination of the constitutionality of the law uniformity resolution cannot be avoided due to the principles established in Decision 57/1991 (XI. 8.) AB concerning the constitutional examination of statutes on the basis of their interpreted and applied content.

In the opinion of the petitioner, point I of the holdings of the CLUR is unconstitutional for the same reasons as the ones detailed by him in connection with the provisions of the ACP. The interpretation of the concept of injured party as included in point III of the reasoning of the CLUR is also deemed to be unconstitutional. “Even though the unclear concept of injured party included in Section 51 para. (1) of the ACP could also be interpreted in a constitutional manner, the resolution sets an unconstitutional way for the future development of the living law. This, however, prevents the legislator from expecting the constitutional interpretation of the Act in force from those applying the law.”

With regard to point II of the holdings of the CLUR, the petitioner states that the council on the uniformity of law did not consider the importance of the difference between causing damage – as the result of a criminal offence – to the State directly as an entity, or through its

organs having independent legal personalities. Section 56 para. (3) of the ACP regulating the representation of the injured party does not contain any provision on the possible representation of the State as the injured entity by an employee etc. of any of its organs. The law uniformity resolution tries to bridge this deficiency by obligatorily extending the category of persons entitled to exercise the right of representation, even including the supplementary private prosecutor, which is an outright interference with the competence of the legislator, and therefore it is unconstitutional even for this reason alone. The use of the unclear term "sphere of interest" is also contrary to the constitutional requirement of legal certainty. It is unconstitutional for the CLUR to extend Section 56 para. (3) by requiring the judicial practice to accept the representation of the prosecution – instead of the public prosecutor – by any other organ or authority of the State even if the criminal offence has directly violated or endangered the property-related interests of the State. The implementation of this guideline would dissolve – with regard to the State acting as supplementary private prosecutor – the constitutional constraints restricting the public prosecutor's rights and protecting the defendant's rights, as well as the related responsibility; the guideline concerned offers the competence of the public prosecutor for State organs that are not independent. This could undermine the constitutional grounds of the rule of law.

II

The provisions taken into account by the Constitutional Court during its examination are as follows:

1. The relevant provisions of the Constitution are as follows:
"Article 9 para. (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law."
"Article 10 para. (1) Property of the State of Hungary is considered national wealth.
(2) Fields of ownership and economic activity deemed to be the sole domain of the State shall be defined by law.
Article 11 Enterprises and economic organizations owned by the State shall conduct business in such manner and with such responsibilities as defined by law."
"Article 32/A para. (1) The Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law.

(2) The Constitutional Court shall annul any laws and other statutes that it finds to be unconstitutional."

"Article 35 para. (1) The Government shall

a) defend constitutional order, and defend and ensure the rights of the natural person, legal persons and unincorporated organizations;

b) ensure the implementation of laws;

c) direct and co-ordinate the work of the Ministries and other organs placed under its direct supervision;"

"Article para. (2) The Supreme Court shall assure the uniformity of the administration of justice by the courts and its resolutions concerning uniformity shall be binding for all courts."

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

"Article 51 para. (1) The General Prosecutor and the Office of the Public Prosecutor of the Republic of Hungary ensure the protection of the rights of the natural person, legal persons and unincorporated organizations, maintain constitutional order and shall prosecute to the full extent of the law any act which violates or endangers the security and independence of the country.

(2) The Office of the Public Prosecutor shall exercise rights specified by law in connection with investigations, shall represent the prosecution in court proceedings, and shall be responsible for the supervision of the legality of penal measures.

(3) The Office of the Public Prosecutor shall help to ensure that everybody comply with the law. When the law is violated, the Office of the Public Prosecutor shall act to uphold the law in the cases and manner specified by law."

"Article 70/K Claims arising from infringement on fundamental rights, and objections to the decisions of public authorities regarding the fulfilment of duties may be brought before a court of law."

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

"Section 28 para. (1) The public prosecutor is in charge of public prosecution. It is the duty of the public prosecutor to take into account in all phases of the proceedings the circumstances in favour of and against the defendant, as well as the ones that make his criminal liability more or less serious.

[…]

(7) In the case of the existence of the conditions specified in this Act, the public prosecutor shall press charges and – with the exception of private prosecution and supplementary private prosecution – shall represent the prosecution at court or decide on the postponement of the pressing of charges or on partly refusing to press charges. The public prosecutor may drop or modify the charges. The public prosecutor may inspect the documents of the case during the court proceedings, and he may put forward a motion on any question to be decided by the court in relation to the case."

"Section 51 para. (1) The injured party is the person whose right or lawful interest has been violated or endangered by the criminal offence."

"Section 53 para. (1) The injured party may act as a supplementary private prosecutor in the cases defined in the present Act if

a) the public prosecutor or the investigating authority has rejected the reporting of the crime or terminated the investigation,

b) the public prosecutor has partly refused to press charges,

c) the public prosecutor has dropped the charges."

"Section 54 para. (1) A private party is an injured party enforcing a civil law claim in the criminal proceedings.

(2) A private party may enforce a civil law claim against the defendant if such claim has resulted from the act subject to the charges.

(3) The lack of action by the injured party as a private party shall not exclude the enforcement of the civil law claim in any other lawful way.

(4) The civil law claim – under the conditions specified in the Act on Civil Procedure – may also be enforced by the public prosecutor.

(5) Civil law claims for the compensation of damage caused by criminal offences related to taxes within the competence of the State tax authority or budgetary subsidies shall be enforced by the Tax and Financial Control Authority on behalf of the State."

"Section 56 para. (1) The injured party, the private prosecutor and the other affected party may also exercise their rights through a representative, save if provided otherwise in this Act. Representation may be performed on the basis of a power of attorney by an attorney-at-law or a relative of full age.

[…]

(3) A State organ or an economic organisation may also be represented by an authorised employee, or a member or employee in charge of administration.

(4) The supplementary private prosecutor shall be represented by an attorney-at-law, save if the supplementary private prosecutor is a natural person who has passed the bar examination."
"Section 236 In the court proceedings, the supplementary private prosecutor – save if provided otherwise in this Act – shall exercise the rights of the public prosecutor, including the submission of a motion on ordering a coercive measure resulting in the deprivation of the defendant of his personal freedom or the restriction thereof. The supplementary private prosecutor may not initiate the termination of the defendant's right of parental supervision."
"Section 474 para. (5) Military criminal proceedings may only be instituted upon public prosecution, in the case of a criminal offence to be prosecuted upon private prosecution, action shall be taken by the military prosecutor. No countercharge may be pressed in military criminal proceedings." Supplementary private prosecution is not possible in proceedings for a military criminal offence."

3. The relevant provisions of Act IV of 1959 on the Civil Code (hereinafter: "CC") are as follows:
"Section 28 para. (1) The State, as the subject of property-related legal relations, is a legal person. Unless provided otherwise by a statute, the State shall be represented by the Minister of Finance in civil law relations; he may exercise this right by way of other State organs or transfer it to other State organs.
[…]
(3) In accordance with the relevant statutes, the organisations of the State, local governments, companies, as well as social and other organisations are legal persons."
"Section 31 para. (1) State-owned companies are legal persons.
[…]
(6) State-owned companies shall be represented by the director. The director may, with regard to specific cases or a specific category of issues, transfer this right to an employee of the company."
"Section 35 Unless provided otherwise by the statute, the provisions pertaining to state-owned companies shall also apply to the legal personality of other state-owned economic organisations."
"Section 36 para. (1) Budgetary organs are legal persons.
(2) Budgetary organs shall be represented by their heads, who may, with regard to specific cases or a specific category of issues, transfer this power to one of their employees."

4. The relevant provisions of Criminal Law Uniformity Resolution 3/2004 BJE are as follows: "I. In criminal proceedings instituted on the basis of criminal offences causing damage to State property, supplementary private prosecution may be applied in all cases where the conditions thereof specified in Section 53 para. (1) of Act XIX of 1998 (hereinafter: "ACP") exist. This applies regardless of whether the criminal offence subject to the criminal proceedings is placed among the offences against property (Chapter XVIII of the Criminal Code) or in another chapter of the Special Part of the Criminal Code.

II. The State as injured party shall be represented as supplementary private prosecutor by the State's organ whose sphere of interest has been affected by the act. This organ can be a state-owned company (Section 31 of the CC), other state-owned economic organ (Section 35 of the CC), or a budgetary organ (Section 36 of the CC). Supplementary private prosecution may be performed by the persons authorised to represent such organs [Section 31 para. (6) and Section 36 para. (2) of the CC]."

III

In the present procedure, the Constitutional Court first had to decide – on the basis of the related petition – whether it is within the Constitutional Court's competence to examine the constitutionality of the law uniformity resolution specified in Article 47 para. (2) of the Constitution as a result of the amendment thereof by Act LIX of 1997. First of all, one can conclude that after the introduction of the concept of law uniformity resolution in the Constitution, neither the Constitution, nor Act LXVI of 1997 on the Structure and Supervision of Courts and on the Legal Status and Remuneration of Judges (hereinafter: "ACJ") or the ACC has included any provision on allowing or excluding the constitutional examination of law uniformity resolutions. The possibility to examine the constitutionality of a law uniformity resolution can be determined on the basis of a set of criteria essentially based on the interpretation of Article 32/A of the Constitution, as previously elaborated by the Constitutional Court.

1. Pursuant to Article 32/A para. (1) of the Constitution, "the Constitutional Court shall review the constitutionality of laws and attend to the duties referred by law into its jurisdiction." According to Section 1 item b) of the ACC, the competence of the Constitutional Court covers the posterior constitutional examination of statutes and other legal tools of State administration. The Constitutional Court has interpreted its own competence

related to the constitutional examination of statutes as granted in Article 32/A para. (1) of the Constitution on several occasions. It has established that only one competence of the Constitutional Court follows from the Constitution itself, namely, the posterior constitutional examination of legal norms, however, that is mandatory and comprehensive. [Decision 4/1997 (I. 22.) AB, ABH 1997, 41, 49] It is mandatory because the rules of the ACC pertaining to posterior constitutional examination are based on the provisions of the Constitution, thus the competence of posterior constitutional examination cannot be "reduced" through the simple amendment of the Act. [This does not apply to e.g. prior constitutional examination to be initiated by at least fifty Members of Parliament: Decision 66/1997 (XII. 29.) AB (ABH 1997, 397).] On the other hand, the comprehensive nature of the competence of posterior constitutional examination also follows from the Constitution, consequently this competence applies to all norms. The Constitutional Court has interpreted the comprehensive nature of its competence of posterior constitutional examination in several Decisions and from several aspects.

1.1. As established by the Constitutional Court in Decision 4/1997 (I. 22.) AB, "the Constitutional Court has jurisdiction to review the constitutionality of the law promulgating an international treaty". "The constitutional review includes the examination of unconstitutionality of the international treaty forming part of the promulgating law." (ABH 1997, 41) This Decision also established the legal consequences of unconstitutionality established during the exercise of the competence interpreted: "Following upon such a decision of the Constitutional Court the legislature is required to – if necessary, by amendment of the Constitution – achieve the harmony of domestic law and the obligations assumed under international law. Pending this process, the Constitutional Court may suspend its proceedings concerning the determination of the date of nullification of the unconstitutional legal rule for a reasonable time." (ABH 1997, 41)

1.2. In another case, the comprehensive nature of the Constitutional Court's competence of posterior constitutional examination was raised in the context of establishing that it is within the Constitutional Court's competence to review any act of normative content not qualifying as a statute or other legal tool of State administration. Accordingly, Decision 60/1992 (XI. 17.) AB established that "the issue of ordinances, circulars, guides, directives and resolutions containing legal guidance as well as other informal interpretations of the law by ministries and other central State organs without complying with the guaranteeing rules of Act XI of

1987 on Legislation and the practice of direction through such documents are unconstitutional." (ABH 1992, 275) In this case as well – similarly to the constitutional examination of a statute promulgating an international treaty – the Constitutional Court defined the legal consequence to be applied: "it is unconstitutional to issue any informal interpretation of the law, it has no legal effect and entails no binding force under the law."

1.3. In view of the above, it can be concluded that the Constitutional Court has considered – in line with its constitutional status – its competence of posterior abstract constitutional examination to result from (and to be protected by) the Constitution and to be applicable to all norms (provisions of normative content). The Constitutional Court examines case-by-case whether the provision requested to be examined is of normative content and thus whether the Constitutional Court is competent to examine it. Furthermore, whenever the Constitutional Court defined – during the interpretation of its competence – a new type of exercising its competence of posterior constitutional examination, it also defined the legal consequences of the unconstitutionality declared as a result of exercising the competence interpreted, and such consequences did not necessarily include the (immediate) annulment of the provision concerned: in the case of the unconstitutionality of a statute promulgating an international treaty, the legislator must harmonise domestic law with the obligation assumed under international law (the procedure for annulment is suspended by the Constitutional Court), or – as in the case of informal interpretations of the law – unconstitutionality is established without annulment.

As emphasised by the Constitutional Court in relation to its practice of interpreting competence: "The decisions of the Constitutional Court in which the Court interprets its competence are binding on everyone, just like any other decisions – including those made on the basis of the competence achieved by such an interpretation. In this interpretative work, the Constitutional Court is led by the object of fulfilling its special task; and by the models of other constitutional courts with the adoption of those solutions which were developed in response to the needs of an effective constitutional case-law." [Decision 4/1997 (I. 22.) AB, ABH 1997, 41, 49] These principles are followed by the Constitutional Court in the present Decision as well.

2. According to the judicial practice of the Constitutional Court, when acting within the competence of posterior constitutional examination defined in Article 32/A para. (1) of the

Constitution, it must take into account the content with which the statute under examination has been realised in practice. Both the interpreted and the applied content of the norm must be reviewed.

2.1. Pursuant to Decision 57/1991 (XI. 8.) AB, "the Constitutional Court should not compare the normative text in itself with the content of the provisions of the Constitution, but the norms which prevail, become effective and are realized – namely, the 'living law.'" As provided by the same Decision, the constitutional review must commence from the fact that the meaning and content of the legal rule is what the uniform and permanent legal practice deems it to be. At the same time, following from its constitutional status and on the basis of its other competences defined in the ACC, the Constitutional Court is not competent to review the constitutionality of the judicial practice and the application of the law alone, and neither is it competent to interpret statutes out of the context of a constitutional problem or to adopt an interpretative decision to facilitate the uniform application of the law. (ABH 1991, 272, 277) Therefore, the Constitutional Court must perform the posterior constitutional examination specified in the Constitution in such a manner that the consideration of the applied content of the norm be reconcilable with the limitations of Constitutional Court's competence.

2.2. It can also be concluded from the Constitutional Court's practice that the Constitutional Court has provided protection for the independent interpretation of statutes by the judiciary (as a quasi-regulatory activity). It was pointed out for the first time in Decision 38/1993 (VI. 11.) AB that "the 'law' is finally established by the courts according to their own interpretation. [...] Being subordinated exclusively to the law not only excludes any influence on the judiciary by the two other branches of power, but it also guarantees the independence of judges through the independent, continuous and systematic interpretation and application of the law within the limits and the requirements of the Constitution." (ABH 1993, 256, 262) The Constitutional Court also emphasised the importance of the independent law-interpreting activity of the judicial branch in Decision 42/2004 (XI. 9.) AB, with regard to the division of power. Among others, it was pointed out in that Decision that "in order to ensure the uniformity of law application, there can be several possible solutions within the judicial system. The legislative power and the constitutional competence of the legislative branch are not violated by the mere fact that the judicial power provides for a uniform content of the statutes to be applied. As long as it is exclusively based on the interpretation of statutes (as long as the judicial branch does not fundamentally and directly take over the function of

legislation), "judicial legislation" remains in line with the principle of the division of power. Consequently, the violation of this constitutional principle cannot be established merely on the basis of the fact that the uniformity of law is ensured not only through the ACJ but also through procedural rules, e.g. in the present case through a review. The compliance of law uniformity resolutions with the provisions of the Constitution is another question, which has not been the subject of the present procedure." (ABH 2004, 551, 571)

2.3. Based on the above, there are two tendencies in the Decisions of the Constitutional Court. On one hand, the consideration of the "living law" during the constitutional review (either in the form of uniform judicial practice consolidated as a norm or in that of a formal law uniformity resolution at the constitutional level, binding the courts), and on the other hand, the protection of the independent judicial interpretation (by the Supreme Court) of the law (the independence of the judiciary) by the Constitutional Court. In consideration of the above, the problem of the constitutional review of a law uniformity resolution is connected to the Constitutional Court's competence and its general task of safeguarding the Constitution: the possibility of constitutional control must be ensured in respect of all statutes and norms of the legal system. This is a requirement based on Article 32/A of the Constitution and on the above Decisions of the Constitutional Court interpreting this constitutional provision.

According to Article 47 para. (2) of the Constitution, law uniformity resolutions are binding upon the courts. The binding force provided for by the Constitution also means that if the Constitutional Court wishes to find out the actual and uniformly enforced content of a legal norm under review (the "living law"), it must take into account the uniform mandatory judicial interpretation of the statutory provision(s) and the content of the relevant law uniformity resolution. The living content of the statute (statutory provision) concerned is the law uniformity resolution. Consequently, during a procedure aimed at the constitutional examination of a given statute and based on Article 32/A para. (1) of the Constitution, if there is a law uniformity resolution connected to the statutory provision, it necessarily becomes the subject of the examination, too [even if the Constitutional Court only applies the legal consequences of unconstitutionality to the statute examined]. This is so because the examination of a statute can only be performed through the analysis of its content. In the course of such an examination, the Constitutional Court must decide case by case whether the unconstitutionality is the result of the legal regulation under examination (and the law uniformity resolution merely "interprets" accordingly) or the unconstitutionality basically

originates from the content of the law uniformity resolution rather than from the statute. The Constitutional Court must establish unconstitutionality accordingly. It follows from the theory of "living law" applied in the practice of the Constitutional Court and from the Constitutional Court's practice – stemming from its constitutional status – of including in the scope of posterior constitutional examination the constitutional examination of all norms that the review of a law uniformity resolution is within the Constitutional Court's competence and that the Constitutional Court may establish the unconstitutionality of such a resolution when it is deemed to violate the Constitution as a result of interpreting the law differently than acceptable. The Constitutional Court considers that the legislator should not be obliged to adopt new legislation (or forced to accept the annulment of statutory provisions in force) if the unconstitutionality is found not in the text of the statute itself but in the content thereof as interpreted with mandatory force [using the terms of Decision 42/2004 (XI. 9) AB quoted above, in judicial legislation, i.e. in the law uniformity resolution]. In the opinion of the Constitutional Court, the law uniformity resolution specified in Article 47 para. (2) of the Constitution – through the independent interpretation of the law by the Supreme Court (for which it is constitutionally authorised for the purpose of making the judicial practice uniform) – may extend or narrow down the content of the original statute, or it may fill a legal gap through interpretation. Therefore, it can be decided – without classifying the law uniformity resolution within the hierarchy of statutes – as a result of case-by-case constitutional examination whether the law uniformity resolution has an independent statutory content separating it from the statute interpreted. The law uniformity resolution becomes the subject of a constitutional examination on the basis of Article 32/A para. (1) of the Constitution. Consequently, the Constitutional Court reviews the constitutionality of the law uniformity resolution within its competence of posterior constitutional examination defined in the ACC as well.

The Constitutional Court notes that it exercises its competence related to the posterior constitutional examination of the law uniformity resolution without prejudice to the independence of the judicial branch of power. The Constitutional Court accepts the fact that the content of a statute is the content attributed to it by the relevant law uniformity resolution. In respect of the content of a law uniformity resolution, the Constitutional Court does not give a contrary interpretation (e.g. in the form of a constitutional requirement), as it would violate judicial independence.

At the same time, the present Decision of the Constitutional Court interpreting its competence (allowing the constitutional review of law uniformity resolutions) widens the independence of judges, as the judge in charge may request not only the constitutional review of the statute applied but also that of all norms binding upon him.

IV

1. Supplementary private prosecution is one of the forms of correcting the public prosecutor's monopoly of prosecution characterising the criminal procedure models of modern continental states. Its original purpose was to diminish the potential threats (the lack of public prosecution – due to political reasons, a professional mistake or incorrect assessment – might result in leaving the perpetrators of serious criminal offences unpunished) caused by this monopoly concerning the enforcement of criminal liability in line with justice, and to provide a counterweight to the public prosecutor's excessive power – manifested in his right to refuse to press charges and to drop charges – in relation to the court, whose action depends on the charges.

On the basis of the regulatory experience of other European countries (primarily Austria and Scotland), supplementary private prosecution became a legal institution in codified Hungarian law by way of Act XXXIII of 1896 on the Penal Procedure, as part of the criminal law system prevailing in 19th century legal thought, based on the division of procedural functions and using the system of prosecution. Act V of 1954 amending Act III of 1951 on Criminal Procedure terminated the injured party's right to supplementary private prosecution, which was reintroduced into the ACP after almost half a century.

In the preparatory concept of the new Act on Criminal Procedure, the idea of the reintroduction of supplementary private prosecution was raised not in relation to eliminating the dangers resulting from the monopoly of prosecution, but in relation to widening the injured party's possibilities of enforcing claims and his procedural rights. From the last third of the 20th century, documents adopted by the UN, the Council of Europe and the European Union represented new trends of criminal policy aimed at improving the procedural position and widening the rights of the victim/injured party, a participant of the criminal offence "marginalised" by the State. The reintroduction of supplementary private prosecution was primarily related to such objectives [Government Resolution 2002/1994 (I. 17.) Korm., point

6]. At the same time, the reasoning attached to the ACP also referred to the legitimacy crisis of the judiciary and the public doubts about the unbiased and impartial operation of the judiciary as reasons for the reintroduction of supplementary private prosecution. In point VI of the general reasoning, under the title "The social acknowledgement of criminal procedure, cooperation of citizens with the organs of the judiciary", the preparers of the Bill pointed out that supplementary private prosecution could be the most important tool to correct the inactivity of the authorities and non-objective proceedings. In their opinion, supplementary private prosecution can take place if the decision of the authority has been based on discretion, and the injured party has a real opportunity to enforce a court decision.

2. The Constitutional Court – having to adhere to the petition in line with Section 20 and Section 22 para. (2) of the ACC – has examined the constitutional issues related to the statutory provisions pertaining to supplementary private prosecution in the scope specified by the petitioner.

In this framework, with regard to the posterior constitutional examination of Section 51 para. (1) and Section 53 para. (1) of the ACP, the Constitutional Court examined the normative content thereof as determined by the Supreme Court in Criminal Law Uniformity Resolution 3/2004 BJE. The reasoning of the law uniformity resolution emphasises that the council on the uniformity of law has formed an opinion on the possibility of supplementary private prosecution only in respect of criminal offences injuring or endangering the State's property-related interests. ("The council on the uniformity of law underlines that the present procedure is only aimed at examining and deciding on the question whether supplementary private prosecution may be applied in criminal proceedings instituted on the basis of criminal offences entailing the injury of the State's property-related interests." "The council on the uniformity of law has not examined and has not decided on cases where the criminal offence has entailed an injury of State interests not related to property.") Consequently, the Constitutional Court – in line with the petition – has only examined the constitutionality of the normative content of Section 51 para. (1) and Section 53 para. (1) of the ACP as included in the law uniformity resolution. Thus, in the present procedure, the Constitutional Court has examined whether the undifferentiated authorisation of all potential injured parties – in a procedural sense (budgetary institutions, economic organisations) – of a criminal offence damaging State property for supplementary private prosecution is constitutionally compatible with the provisions of the Constitution pertaining to the division of the branches of power, the

State's punitive power, the constitutional status of the public prosecutor's office and the State as owner.

3. To assess the petition, the Constitutional Court has reviewed its Decisions pertaining to the division of the branches of power, the State's punitive power, the constitutional status of the public prosecutor ('s office) and the State's property relations, as well as the legal regulations on the operation of State property.

3.1. Although the Constitution does not explicitly state the principle of separating the branches of State power, in the practice of the Constitutional Court it is considered to be one of the principal organisational and operational principles of the State's organisation in Hungary. This is indicated by the constitutional provisions on the tasks and the competences of the various State organs (branches of power), the rules on the relations between the State organs (organisational and procedural guarantees), and the rules on incompatibility contained in the Constitution. The principle of the division of power and the separation of the branches of power is regarded by the Constitutional Court as an independent element of the content of the rule of law. [Decision 31/1990 (XII. 18.) AB, ABH 1990, 136; Decision 53/1991 AB, ABH 1991, 266; Decision 38/1993 (VI. 11.) AB, ABH 1993, 256; Decision 41/1993 (VI. 30.) AB, ABH 1993, 292; Decision 17/1994 (III. 29.) AB, ABH 1994, 84; Decision 55/1994 (XI. 10.) AB, ABH 1994, 296; Decision 28/1995 (V. 19.) AB, ABH 1995, 138; Decision 66/1997 (XII. 29.) AB, ABH 1997, 397; Decision 2/2002 (I. 25.) AB, ABH 2002, 41; Decision 50/2003 (XI. 5.) AB, ABH 2003, 566; Decision 62/2003 (XII. 15.) AB, ABH 2003, 627; Decision 750/B/2002 AB, ABH 2004, 1655]

In a democratic state under the rule of law, the separation of the branches of power means the division of the major functions of the State in terms of organisation, competence and operation. The public law relation among the branches of power means, on one hand, that no branch of power may take over the rights of another one, and, on the other hand, that there is no unlimited and unrestrictable power, the individual branches of power form counterweights of power against the other branches, and therefore certain branches of power necessarily restrict the rights of other branches of power. The essential elements of the principle are aimed at preventing the concentration of power and the unlimited and arbitrary exercise of the State's power, as well as at mutually restricting the centres of power, balancing between them and regulating their cooperation.

In the present case, particular attention is to be paid to the Decisions that not only deal with the constitutional problems of dividing the classic branches of power (legislative power, executive-governmental power, judicial power) but also take a stand, on the basis of the principle of the division of power, concerning the public law status of other constitutional organs, such as the Constitutional Court, the President of the Republic, and the public prosecutor's office.

As explained by the Constitutional Court in Decision 62/2003 (XII. 15.) AB: the conditions of the realisation of the democratic State under the rule of law enshrined in Article 2 para. (1) of the Constitution are, among others, the following: 1. the principle of the division of power, 2. the obligation of cooperation between the divided constitutional organs, 3. mutual respect for the procedural and decision-making autonomy and discretion of the divided organs, 4. the existence of and compliance with procedural rules derived from the Constitution. (ABH 2003, 637, 645)

3.2. The Decisions of the Constitutional Court pertaining to the administration of criminal justice [among others: Decision 9/1992 (I. 30.) AB, ABH 1990, 59; Decision 11/1992 (III. 5.) AB ABH 1992, 77; Decision 42/1993 (VI. 30.) AB, ABH 1993, 300; Decision 49/1998 (XI. 27.) AB, ABH 1998, 372; Decision 14/2002 (III. 20.) AB, ABH 2002, 101; Decision 41/2003 (VII. 2.) AB, ABH 2003, 430; Decision 14/2004 (V. 7.) AB, ABH 2004, 241; Decision 20/2005 (V. 26.) AB, ABH May 2005, 269] are based on the principle that in a democratic state under the rule of law punitive power is a constitutionally limited right of public authority exercised by the State for the purpose of punishing the perpetrators of criminal offences.

Criminal offences represent the violation of the legal order of society, and the right of punishment may only be exercised by the State as public authority. The State's monopoly of the administration of criminal justice results in the obligation of enforcing its punitive demand. This is a constitutional duty justifying that the organs exercising the State's punitive power obtain effective tools for performing their tasks.

The enforcement of the punitive demand without delay is a constitutional duty of the State in respect of society: a constitutional requirement derived from the normative content of the rule of law and from the constitutional fundamental right to fair trial. At the same time, the

exercise of punitive power – based on its character of public authority and the nature of its duty – necessarily affects the constitutional fundamental rights of individuals. In a state under the rule of law, the prosecution of crime must take place in the framework of strict limitations and conditions under substantive and procedural law.

The criteria of the rule of law and constitutional criminal law require the State to exercise its punitive power according to such rules that create a balance between the guaranteeing rules protecting individuals against the State – in particular, safeguarding the constitutional rights of persons subjected to criminal proceedings – and the expectations of society regarding the proper operation of the system of administration of criminal justice.

The risk of enforcing the punitive demand, i.e. the risk of the failure of prosecution, is to be borne by the State. This risk-bearing is expressly manifested in the constitutional guarantee of the presumption of innocence presented as a separate rule. The perpetrator cannot be expected to bear the burden of not achieving – due to the default of the State – the ideal purpose of the criminal proceedings, namely the imposition of a just punishment accomplishing its desired objective. Regarding the above constitutional distribution of burdens, it is irrelevant whether the State has enforced its punitive demand deficiently or not at all, for whatever reason.

3.3. In the Republic of Hungary, the public prosecutor's office – in accordance with its position generally accepted in the continental legal systems – is primarily an organisation acting in the function of prosecution; its main duty is the enforcement of the punitive demand at court. This is the content of Article 51 paras (1) and (2) of the Constitution on the constitutional status of the public prosecutor's office, its functions of prosecuting crime and acting as public prosecutor, as well as the other related tasks and competences. According to paragraph (3), the public prosecutor's office has other duties as well. [Decision 1/1994 (I. 7.) AB, ABH 1994, 29, 33] As emphasised by the Constitutional Court in Decision 12/2001 (V. 14.) AB, it follows from the constitutional provisions pertaining to the constitutional status of the public prosecutor's office that the performance of the constitutional tasks of the public prosecutor's office is differentiated in respect of the exercise of the State's punitive power and the other procedures. (ABH 2001, 163, 168)

In Decision 3/2004 (II. 17.) AB (hereinafter: "CCDec1") interpreting the constitutional and public law status of the Prosecutor General and the public prosecutor's office, the

Constitutional Court made statements relevant in the present case as well. The public prosecutor's office – in contrast with the courts – is not an independent branch of power, but it is an independent constitutional organisation. (CCDec1, ABH 2004, 48, 58) The constitutional tasks of the Prosecutor General and the public prosecutor's office include, among others, the prosecution of acts violating or endangering the interests of the Republic of Hungary or democracy, and the securing and protection of lawfulness. The public prosecutor's office represents the prosecution in court proceedings, it is responsible for the supervision of the legality of penal measures, and it exercises specific rights in connection with investigations. It is a constitutional duty of the public prosecutor's office and the Prosecutor General to perform these tasks lawfully. (CCDec1, ABH 2004, 48, 62)

CCDec1 reinforced the statement made in Decision 52/1996 (XI. 14.) AB (ABH 1996, 159, 161), according to which participation in the administration of criminal justice is a constitutional obligation of the public prosecutor's office. Consequently, in the system of administering justice – in the broad sense – the public prosecutor's office has the rights specified in the Constitution, and it has to perform certain duties. It follows from the function of public prosecution that in the case of criminal offences subject to public prosecution – with the exception of the cases of supplementary private prosecution as specified in an Act of Parliament – only the public prosecutor's office has the right to decide on pressing or dropping charges; no other organ may review its decision or force it to change its decision about pressing or dropping charges. (CCDec1, ABH 2004, 48, 57-58)

The public prosecutor's office and the Prosecutor General are independent, their activities and procedures are only subject to the Constitution and other statutes, and there is no other organ exercising any right of supervision, control, direction or instruction in relation to them. It is within the free discretion and professional responsibility of the public prosecutor to evaluate the data, facts etc. available in a given case and to draw conclusions therefrom. (CCDec1, ABH 2004, 48, 62)

The opinion expressed in relation to the comparison of cases of private and public prosecution also applies to the institution of supplementary private prosecution: examining the matter from the point of view of the "prosecutor", the difference between cases of public and private prosecution lies in the fact that the public prosecutor acts in the public interest when pressing charges and representing prosecution, and he must proceed in compliance with the

professional requirements pertaining to public prosecutors when exercising his functions of public prosecution. Naturally, the injured party acting as private prosecutor does not perform obligations resulting from the general tasks of the public prosecutor. With regard to criminal offences subject to public prosecution, the public prosecutor has a filtering role whereby the unnecessary pressing of charges is prevented. However, a private prosecutor may only be required by the law to act on a proper basis [Decision 34/B/1996 AB, ABH 2001, 849, 853]. In the court proceedings, the supplementary private prosecutor exercises the rights of the public prosecutor (Section 236 of the ACP), at the same time, it is reasonable that the supplementary private prosecutor is not expected to comply with the requirement of objectivity of the public prosecutor based on the Constitution and the ACP [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 258].

As established by the Constitutional Court previously, among the guarantee components ensuring the right to fair trial there are important statutory provisions – based on the constitutional role of the public prosecutor's office – obliging the public prosecutor to protect the interests of the defendant also in his function of public prosecution. The following elements of the public prosecutor's legal status guarantee mandatory objectivity: the obligation to take into account, throughout the proceedings, the circumstances in favour of the defendant and reducing his criminal liability [Section 28 para. (1) of the ACP], the right to propose the acquittal of the defendant [Section 315 para. (3) of the ACP], the right to appeal in favour of the defendant (Section 324 of the ACP). [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 258]

3.4. Article 9 para. (1) of the Constitution uses the terms "public property" and "private property", and pursuant to Article 10 para. (1), the property of the State of Hungary is national wealth. The review of the Constitutional Court's practice related to economic constitutionality and the protection of property is justified by the references to the Decisions of the Constitutional Court both in the petition and in the reasoning of the law uniformity resolution.

The petition refers to Decision 1814/B/1991 AB (ABH 1994, 513, 514) and Decision 46/1992 (IX. 26.) AB (ABH 1992, 247, 249), according to which a sharp distinction is to be made between the State's roles as public authority and owner in the competitive sector, and the scope of the State's monopoly (objects and activities) based on Article 10 para. (2) of the

Constitution does not belong to the competitive sector, and thus the freedom of economic competition cannot be fully realised.

The law uniformity resolution refers to Decision 21/1990 (X. 4.) AB (ABH 1990, 73, 81), Decision 7/1991 (II. 28.) AB (ABH 1991, 22, 24-25), Decision 27/1991 (V. 20.) AB (ABH 1991, 73, 76) and Decision 6/1992 (I. 30.) AB (ABH 1992, 40, 42), the relevance of which in the present case is the elaboration of the content of the equality and the equal constitutional protection of public and private property. As established in Decision 6/1992 (I. 30.) AB in relation to the annulment of the statutory definitions under criminal law ensuring the enhanced protection of social property, the Constitutional Court took a position in several of its earlier Decisions concerning the interpretation of Article 9 para. (1) of the Constitution and in the interest of ensuring the equal treatment of public and private property acknowledged by the Constitution. Decision 21/1990 (X. 4.), Decision 7/1991 (II. 28.) and Decision 27/1991 (V. 20.) AB particularly emphasise the equality of the above forms of property, especially with regard to the equal protection following from such equality. Moreover, the Constitutional Court underlined in Decision 27/1991 (V. 20.) AB that "[...] Article 9 para. (1) of the Constitution does not mean the differentiation of property forms, on the contrary: it provides for the protection of property irrespective of its form." According to the Decision of the Constitutional Court mentioned above, this protection is also manifested in Article 13 para. (1) of the Constitution, providing that the Republic of Hungary guarantees the right to property. However, as pointed out by the Constitutional Court in Decision 21/1990 (X. 4.) AB, Article 9 para. (1) of the Constitution does not contain a list of property forms and does not differentiate between them: "[...] on the contrary, it provides for a prohibition of discrimination against any form of ownership." (ABH 1992, 40, 42) At the same time, the Constitutional Court considered it necessary to underline that the prohibition of discrimination cannot be interpreted as forbidding the legislator to apply any differentiation on due constitutional grounds in respect of the protection of property under criminal law. The public use of the object of ownership, its function of public service and its usefulness for the public can be a basis and a constitutionally justifiable reason for applying stricter protection under criminal law. Positive discrimination may also take the form of punishing the negligent commission of the act. (ABH 1992, 40, 43)

V

The petition is, in part, well-founded.

1. The Constitutional Court has established that Section 51 para. (1) and Section 53 para. (1) of the ACP are not unconstitutional. Neither the statutory provision containing the procedural definition of injured party, nor the statutory provision authorising such injured party to act as supplementary private prosecutor violates in itself Article 51 paras (1) and (2) of the Constitution defining the tasks of the Prosecutor General and the public prosecutor's office or Articles 9-11 of the Constitution pertaining to the protection of forms of property and State property. There is no constitutional connection between Article 70/K of the Constitution and supplementary private prosecution.

The Constitutional Court examined at the time of Act I of 1973 on Criminal Procedure being in force whether the injured party had a constitutional fundamental right to have criminal liability judged upon by the court. As explained in Decision 40/1993 (VI. 30.) AB, since criminal offences constitute a violation of the legal order and the right of punishment is exercised by the State, the wish of the injured party of the crime that the perpetrator be punished has only a limited role to play (private complaint, private prosecution) in the enforcement of the punitive demand. As the punitive demand belongs to the State and not to individuals, there is no regulation necessarily resulting from Article 70/K of the Constitution that should grant any unconditional right for the injured party to claim the enforcement of the punitive demand at court. (ABH 1993, 288, 290)

The Constitutional Court pointed out in Decision 42/1993 (VI. 30.) AB that not even Article 57 para. (1) of the Constitution grants any exclusive constitutional right for the court to decide whether the punitive demand exists or not. The relevant position of the Constitutional Court is in accordance with the practice of the European Court of Human Rights, which does not acknowledge the right of the person subject to the proceedings or a third person such as the injured party to force out criminal proceedings, including a court trial. (ABH 1993, 300, 303) As repeated by the Constitutional Court in Decision 13/2001 (V. 14.) AB, in the formation and enforcement of the demand for the State's punitive authority, the wish of the injured party of the crime that the perpetrator be punished has only a limited role to play. (ABH 2001, 177, 187)

At the same time, the Constitutional Court acknowledged in Decision 14/2002 (III. 20.) AB examining the questions of constitutionality related to the division of functions that the public prosecutor's monopoly of public prosecution can have some negative consequences (e.g. failure to press charges, unjustified dropping of charges) to the detriment of the interests of the injured party. Such mistakes can be corrected and deficiencies eliminated through the system of prosecutional correction established by the legislator. (ABH 2002, 101, 113)

The Constitutional Court maintains its opinion explained in its previous Decisions even after the "reintroduction" of the institution of supplementary private prosecution. The commission of a criminal offence results in a demand for the punishment of the perpetrator on the side of the State rather than on that of the injured party. The mere fact that in the ACP the State provides for a statutory basis to make up for missing public prosecution under certain conditions – thus providing an opportunity for injured parties to present at court their position on the well-foundedness of the criminal proceedings or the charges, if such position is different from that of the public prosecutor – has not created a constitutional fundamental right for injured parties to have the punishable acts violating or endangering their rights or lawful interests judged upon by the court. This means that the legislator had no constitutional duty to introduce the institution of supplementary private prosecution, as it is not related to either Article 57 para. (1) or Article 70/K of the Constitution.

It is within the relatively wide scope of discretion of the legislator to decide on the cases of allowing and excluding supplementary private prosecution. However, the regulations are subject to the requirements of the Constitution, and in this case as well, the limits of the freedom of legislation are set by the constitutional restrictions. In the present case, the Constitutional Court has addressed such a question resulting from the constitutional restrictions, however, it has not affected either the general procedural definition of injured party or the statutory provisions granting a general authorisation for supplementary private prosecution.

In view of the above, the Constitutional Court has rejected the petition seeking the establishment of the unconstitutionality and the annulment of Section 51 para. (1) and Section 53 para. (2) of the ACP.

2. It is one of the fundamental questions of the "operation" of supplementary private prosecution how the court of first instance judging the criminal offence decides on the procedural rights of the person who wishes to act as a supplementary private prosecutor. If the court acknowledges the injured party's right to supplementary private prosecution, it accepts the indictment submitted by the injured party via an attorney-at-law, and if the court holds that the indictment has been submitted by an unauthorised person, it rejects the indictment. There is no possibility of appeal against the court's decision on rejection. [Section 230 para. (1), Section 231 paras (1) and (2) item c), Section 233 para. (1) of the ACP]

The Constitutional Court has established that it is a constitutional requirement to be followed in respect of the institution of supplementary private prosecution that the rights of pressing charges and representing prosecution under public authority may not be taken over from the public prosecutor's office by any State organ having public authority. It would be unconstitutional to use supplementary private prosecution – aimed at improving the injured party's procedural status – as a tool for action by organs with public authority purporting to bypass the public prosecutor's office, thus weakening the constitutional status of the public prosecutor's office. The normative content of the holdings of the CLUR does not comply with this constitutional requirement, thus the CLUR has established an unconstitutional duty for the courts.

2.1. The evaluation of the CLUR is based exclusively on grounds of constitutionality, the Constitutional Court has not questioned the dogmatic appropriateness of the interpretation of the law. It is the constitutionality of the interpretation that the Constitutional Court has examined, namely whether, in respect of criminal proceedings instituted on the basis of an offence causing damage to State property, the joint interpretation of Section 51 para. (1) and Section 53 para. (1) of the ACP is compatible with the provisions of the Constitution referred to in the petition.

2.2. According to the CLUR, the ACP provides for the possibility of supplementary private prosecution by the injured party – in a procedural sense – of any criminal offence causing damage to State property – with the exception of military offences [Section 474 para. (1) of the ACP] – regardless of the characteristics of State property/ownership under other branches of law (civil law, company law, public law). By way of this interpretation, the CLUR has

allowed State organs with public authority but not authorised in the Constitution to exercise the power of public prosecution to act as prosecutors.

Following from point I of the law uniformity resolution, the court must accept action by State organs with public authority as supplementary private prosecutors – provided that other statutory conditions are complied with – and it must conduct the criminal proceedings with regard to the persons accused even if they are unfounded or unjustified in the opinion of the public prosecutor. This violates the status of the public prosecutor's office within State administration defined in Article 51 paras (1) and (2) of the Constitution and the requirement of the division of power as an essential element of democracy under the rule of law, and it restricts without a constitutional reason or objective – thus unnecessarily – the constitutional protection to be provided by the public prosecutor's office in relation to the private individuals in the criminal proceedings, in particular the person subject to the criminal proceedings.

The institutions of criminal prosecution and the judicial system aimed at controlling crime as a social phenomenon are the organisations entitled and obliged to exercise the State's punitive power. The constitutions of democratic states under the rule of law are considerably diverse in respect of how deeply and to what extent they contain constitutional rules directly or indirectly determining the institutions of the administration of criminal justice, the criminal procedure, and the penal system. The constitutional provisions pertaining to the organisational order of punitive power can be interpreted on the basis of the Constitution's rules on the legislative right of the Parliament, the duties of the Government as well as the public prosecutor's office and the courts [Decision 42/1993 (VI. 30.) AB, ABH 1993, 300, 302].

In line with the principle of the division of power and the separation of the branches of power, the State's punitive power is exercised in a divided manner, too. The legislative branch has the right and the duty to determine the general legal criteria, foundations and framework of the State's punitive power. The executive-governmental branch and the judicial branch have the right and the duty to exercise the State's punitive power in specific cases, within the above limits. The public prosecutor's office, as an independent constitutional institution not subordinated to any of the classic branches of power, is a central participant in exercising the punitive power. Its basic duty and right is to enforce at court the State's punitive demand in an objective and impartial manner, securing the protection of constitutional fundamental rights.

The entire system of organisations empowered to exercise the punitive power, including the division of competences and duties, can be outlined on the basis of the Acts on organisation and operation/procedure. From among the State organisations involved in criminal prosecution, criminal proceedings and the operation of penal institutions, the Government directly manages the national security services, while it manages the Police and the Border Guard through the Minister of the Interior and penal institutions through the Minister of Justice. The Customs and Financial Guard, exercising investigative competence as well, is under the supervision and direction of the Minister of Finance, while the service of supportive supervision takes part in the exercise of the punitive power under the direction of the Minister of Justice.

From among the organisations in the various branches of power participating in the exercise of punitive power, the Constitution regulates the tasks of the public prosecutor's office in the most detailed way, defining these tasks with regard to the entire process of enforcing criminal liability [Article 51 paras (1) and (2)]. The public prosecutor's office, as an independent and autonomous constitutional professional organ of the State, plays a central and substantial role in the system of criminal prosecution/administration of justice/penal institutions and in the related activities performed under public authority.

It clearly follows from the constitutional requirements and guarantees pertaining to the separation of the branches of power and to the punitive power that the State organisations exercising public authority may only participate in the process of enforcing criminal liability on the basis of an explicit authorisation and task-setting in the Constitution or in Acts on organisation and procedure/execution based on the Constitution. In the present case, it is clear from the principle of separating the branches of power that the public authority of prosecution may not be exercised by any organ with public authority other than the public prosecutor's office. The principles elaborated in the practice of the Constitutional Court on constitutional criminal law exclude the possibility of doubling the public authority of prosecution for the purpose of improving the injured party's status in the criminal proceedings, and that of allowing an organisation with public authority and affected by the property-related rights of the State – in the absence of public prosecution by the public prosecutor – to enter into the criminal proceedings as a supplementary private prosecutor. [Naturally, a State organisation with public authority as injured party may act as a private party in proceedings aimed at the

compensation of property-related damage resulting from a criminal offence.] From the point of view of constitutionality, a State organisation as part of State authority may not be allowed to act as a supplementary private prosecutor in the position of pressing charges and representing prosecution in criminal proceedings, as such an organisation is not restricted by the duties binding the public prosecutor's office – resulting from its status under public law and the law of criminal procedure – with regard to safeguarding the constitutional and procedural guarantee rights of private individuals in criminal proceedings. Doubling the public authority of prosecution also weakens the right of public prosecution granted exclusively to the public prosecutor in Article 51 para. (2) of the Constitution. The case is different when supplementary private prosecution is exercised by natural and legal persons without public authority: here the issue of doubling the public authority of prosecution is excluded in principle.

In respect of the enforcement of the State's punitive demand, the Constitution, the Acts on organisation and the ACP vest the competence of public prosecution with the public prosecutor's office, the operation and operability of which is a responsibility of the State. The risk of any difference of opinion between the public prosecutor's office and organisations of other branches of power – as the injured parties of offences damaging State property – regarding the existence and enforceability of the punitive demand is to be borne by the State. In solving a debate between the public prosecutor's office and another organisation of public authority subject to the violation of the State's property-related rights, criminal proceedings may not be used either in an institutionalised manner or on a case-by-case basis, since the tools of criminal procedure necessarily affect the constitutional fundamental rights of the persons subject to the proceedings and third persons. [See in detail: Decision 42/1993 (VI. 30.) AB, ABH 1993, 300, 305-306]

The supplementary private prosecutor may be a natural person, a legal person or an organisation without legal personality, however, it is a requirement deriving from the Constitution that no organisation of public authority other than the public prosecutor's office be empowered to act in the position of public prosecution as supplementary private prosecutor. This is so because in the court proceedings, the supplementary private prosecutor exercises the rights of the public prosecutor, including the submission of a motion on ordering a coercive measure resulting in the deprivation of the defendant of his personal freedom or the restriction thereof. Allowing a State organisation with public authority, as an injured party, to

"enter" into the criminal proceedings as a supplementary private prosecutor results in the enforcement of the punitive demand in the form of action by the State authority in cases where the public prosecutor's office – authorised by the Constitution – considers such action to be unjustified or unfounded. The lack of restriction poses a risk of the State's power becoming excessive, since the organisations with public authority acting as supplementary private prosecutors are not subject to the constitutional professional responsibility of the public prosecutor's office with regard to the enforcement of the punitive demand in line with the constitutional requirements.

3. The Constitutional Court has established that point II of the holdings of the CLUR is unconstitutional as it extends beyond the limits of interpreting the law and qualifies as the creation of a new norm in terms of content. It is a basic rule of interpreting the law that it may only be aimed at the further specification of the content of a statute, and it may not lead to the creation of a new rule through the amendment of the content of the statute, in the present case through the supplementation of Section 56 para. (3) of the ACP. [Decision 41/1993 (VI. 30.) AB, ABH 1993, 292, 294] That would violate the principle of the division of the branches of power.

4. In view of the above, the Constitutional Court has established that point I of the holdings of the CLUR is unconstitutional as the joint interpretation of the provisions under Section 51 para. (1) and Section 53 para. (1) of the ACP is too broad in respect of the criminal proceedings instituted on the basis of criminal offences causing damage to State property, determining the scope of injured parties authorised for supplementary private prosecution without the restriction absolutely necessary on the basis of the Constitution. Thus the CLUR violates the constitutional status of the Prosecutor General and the public prosecutor's office as defined in Article 51 paras (1)-(2) of the Constitution. Point II of the holdings of the CLUR is unconstitutional, as it constitutes criminal legislation rather than an interpretation of the law.

The Constitutional Court's Decisions interpreting the competence of posterior constitutional examination define the legal consequences to be applied during the exercise thereof.

In the opinion of the Constitutional Court, a law uniformity resolution is to be annulled in accordance with Article 32/A para. (2) of the Constitution if its unconstitutionality is established within the framework of a posterior constitutional examination.

According to the judicial practice of the Constitutional Court, when the Constitutional Court adopts a resolution interpreting (the exercise of) competence, the essential elements of such interpretation are included in the holdings. For example, it was established in the holdings of Decision 38/1993 (VI. 11.) AB (point 2) that the Constitutional Court may specify constitutional requirements upon the examination of a statute (ABH 1993, 256). In the holdings of Decision 4/1997 (I. 22.) AB, it was established that a statute promulgating an international treaty may be examined within the competence of posterior constitutional examination. (ABH 1997, 41) In accordance with the judicial practice of the Constitutional Court, it has established – with consideration to the importance of the matter in principle – that a law uniformity resolution issued by the Supreme Court may be subjected to posterior constitutional examination on the basis of Article 32/A para. (1) of the Constitution.

The publication of this Decision in the Official Gazette (*Magyar Közlöny*) is based on Section 41 of the ACC.

Budapest – Esztergom, 12 November 2005

Dr. András Holló
President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. András Bragyova
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. Péter Kovács
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. Attila Harmathy, Judge of the Constitutional Court

I do not agree with point 1 of the holdings in the Decision and the reasoning thereof. In my opinion, the petition should have been refused. My arguments are the following:

I

The petitioner has requested the Constitutional Court to establish the unconstitutionality of and annul the provisions pertaining to the injured party and the supplementary private prosecutor in Section 51 para. (1) and Section 53 para. (1) of Act XIX of 1998 on Criminal Procedure (hereinafter: "ACP"), as well as Criminal Law Uniformity Resolution 3/2004 BJE. The petitioner refers to Articles 9-11, 47 and 51 of the Constitution. In his opinion, the holdings and the reasoning of the law uniformity resolution give an unconstitutional interpretation of the provisions of the Act concerned, and the resolution was adopted through the enforcement of unconstitutional statutory provisions (as the latter question is not subject to the present procedure, I shall not examine it).

The petitioner does not question the constitutionality of the institution of supplementary private prosecution. However, in his opinion, the two challenged provisions of the ACP are unconstitutional because they "violate the constitutional principle of the State's exclusive punitive demand".

The petitioner explains that the State as an entity becomes a participant in criminal proceedings as a special person. "Its personality is of a public authority character rather than a natural or legal one. This also applies when the State directly suffers damage as a subject of property ownership." Therefore, Section 51 para. (1) of the ACP would only be constitutional if it made clear that "the injured party's rights listed under paragraph (2) may only be exercised by natural and legal persons and not by the State as an entity." The "constitutional concerns" related to Section 53 para. (1) "necessarily result from this deficiency".

The petitioner claims the unconstitutionality of the challenged law uniformity resolution because "it prevents the courts of the Republic of Hungary from exercising their right to the independent interpretation of the law. The law uniformity resolution does not decide on a

debate concerning the interpretation of the law, it rather constitutes a norm which is to be followed by the courts without a possibility of review, and which must be adapted to both by the authorities and citizens on the basis of respect for the constitutional interest in legal certainty."

II

1. The dissenting opinion applies to the part pertaining to the law uniformity resolution. Accordingly, the Constitution's rule on law uniformity resolutions must be examined first.

Pursuant to Article 45 para. (1) of the Constitution, the task of the courts is the administration of justice. Article 47 para. (1) provides that the Supreme Court is the supreme court authority for justice of the Republic of Hungary. The Supreme Court is not only in charge of the tasks of administering justice to be performed by all courts, but it is also responsible – on the basis of Article 47 para. (2) of the Constitution – for securing the uniformity of law application.

According to the rules of the Constitution, courts may not legislate. The text of Article 45-47 was established in Sections 8 and 9 of Act LIX of 1997 on the amendment of the Constitution. That was the time of introducing into the Constitution the institution of law uniformity resolution as a tool ensuring the uniformity of the courts' activity of law application. By establishing the mandatory nature of law uniformity resolutions with regard to the courts, the Constitution has not empowered the Supreme Court to legislate. A law uniformity resolution may not determine the conduct of the subjects of law, it may only define the interpretation considered by the Supreme Court to be the correct one from the several possibilities raised during the application of the law. The designated interpretation is to be followed by the courts because otherwise the uniformity of law application – required by the Constitution – could not be achieved and legal certainty would be endangered.

2. The reasoning attached to the Bill on amending Articles 45-47 of the Constitution emphasises that within the activity of the Supreme Court aimed at ensuring the uniformity of law application, law uniformity resolutions serve the purpose of helping to answer debated questions in principle. The law uniformity resolution is a relatively new legal institution, although it had been previously applied in Hungarian law, and thus the introduction of the rule thereon constitutes a return to the Hungarian traditions of legal development.

The rules pertaining to the law uniformity resolutions adopted by the Curia (Supreme Court) were defined in Act LIV of 1912 putting into force Act I of 1911 on Civil Procedure. According to Section 70 of the Act, the council on the uniformity of law decided on "debated questions in principle in order to protect the uniformity of the administration of justice". Section 75 provided that the courts had to follow law uniformity resolutions. As provided for in Section 13 of Act XXV of 1890 on the Organisation of Royal Appeals Courts and Royal Chief Public Prosecutor's Offices, law uniformity resolutions in criminal matters were adopted at the full session of the Curia when the appeals courts had made contradictory decisions, and the resolution of the Curia was binding upon the appeals courts (this provision was further developed by Section 3 of Act XVIII of 1907 on the Modification and Supplementation of Act XXXIII of 1896 on Criminal Procedure).

Upon examining the statutes adopted before the Second World War, one can conclude that law uniformity resolutions served the purpose of solving problems emerging during the interpretation of statutes and ensuring the uniformity of law application rather than the adoption of new rules.

3. The task of the Constitutional Court is defined in Article 32/A of the Constitution: the Constitutional Court examines the constitutionality of statutes, and it annuls the statutes found unconstitutional.

The competence of the Constitutional Court is specified – on the basis of Article 32/A of the Constitution – in Section 1 of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"). In 1989, the institution of law uniformity resolution was unknown in the law then in force. Therefore, it has no relevance that the ACC does not mention the constitutional examination of law uniformity resolutions as belonging to the Constitutional Court's competence. According to the preamble of the ACC, the Constitutional Court is the supreme organ for the protection of the Constitution, and it refers to the separation of the branches of power and the creation of a balance between them as one of the objectives of adopting the Act.

It is debated whether the scope of the Constitutional Court's constitutional examination must include the application of the law by the courts, and whether it includes that according to the

rules in force. In my opinion, on the basis of Article 32/A para. (1) of the Constitution and the rules of the ACC in force based thereon, the Constitutional Court has no competence to examine the constitutionality of the judicial application of the law [as established in Decision 57/1991 (XI. 8.) AB as well, ABH 1991, 272, 277].

As also pointed out by the Constitutional Court, it is a constitutional interest to interpret statutes in the judicial practice in a uniform manner. The adoption of a law uniformity resolution for the uniform interpretation of statutes remains in line with the principle of the division of power as long as it does not constitute direct legislation [Decision 42/2004 (XI. 9.) AB, ABH 2004, 551, 571].

However, it also applies in this respect that the Constitutional Court considers the separation of the branches of power to be an element of the rule of law declared in Article 2 para. (1) of the Constitution. It is on the basis of this principle that the Constitutional Court examines whether tasks of legislation have been taken over by organs not authorised to legislate or to adopt other legal tools of State administration. On several occasions, the Constitutional Court decided on the basis of the content of ordinances, circulars etc., rather than on the basis of their form of appearance or name. When the Constitutional Court finds that an organ not authorised to legislate has issued a document containing rules of conduct, it adopts a decision establishing the unconstitutionality of issuing the document concerned, and declares that the issuing has no legal force [Decision 60/1992 (XI. 17.) AB, ABH 1992, 275, 276-278]. This is why it is necessary to clarify whether the challenged law uniformity resolution is of an interpretative character or sets a new legal rule.

III

1. Point I of the holdings in the challenged law uniformity resolution provides that in criminal proceedings instituted on the basis of criminal offences causing damage to State property, supplementary private prosecution may take place in cases where the conditions specified in Section 53 para. (1) of the ACP exist. With reference to relevant statutes, point II gives a list of organs that may perform supplementary private prosecution on behalf of the injured party.

The petitioner primarily challenges the provisions of the ACP constituting the basis of the law uniformity resolution, as well as the law uniformity resolution in the context of those

provisions. The essence of the constitutional objection is that the State acts as a public authority also in respect of property relations, and that the exclusive punitive demand of the State must be enforced by the public prosecutor's office.

As the petitioner has not requested the establishment of the unconstitutionality of the institution of supplementary private prosecution, this question has not been addressed by the Constitutional Court.

The Decision has rejected the petitioner's request that the Constitutional Court establish the unconstitutionality of and annul the challenged provisions of the ACP. I agree with this conclusion of the Decision. Unconstitutionality cannot be established, either, with regard to the law uniformity resolution in the context of the challenged provisions of the ACP. The only question to be answered remains whether the law uniformity resolution exceeds the limits of the interpretation of the law.

2. The constitutional concern about the law uniformity resolution is related to the rule on the supplementary private prosecutor. The rule in force on the supplementary private prosecutor in Section 53 para. (1) of the ACP was introduced by Section 36 of Act I of 2002 amending Act XIX of 1998 on Criminal Procedure. According to the Minister's general reasoning attached to the Bill, one of the main aims of amending the ACP was the following:
"The injured party's possibilities to enforce his claims and his procedural rights must be widened in the criminal proceedings. Within appropriate limits, the injured party must be allowed to act as supplementary private prosecutor."
The Minister's reasoning related to Section 36 states, among others, the following:
"It is presumed in the Act that the introduction of supplementary private prosecution is justified by the need to widen the injured party's rights of enforcing claims in cases where a decision made by the authority would otherwise prevent the conduct of court proceedings in respect of the criminal offence perpetrated to the detriment of the injured party. Based on this principle, the Act ensures an opportunity for the injured party to act as supplementary private prosecutor even if the public prosecutor has partly refused to press charges."

According to the rules of ACP, the supplementary private prosecutor does not completely take over the public prosecutor's role, and even where supplementary private prosecution takes place, the injured party may only act in the second place (if the public prosecutor does not

want to enforce the State's punitive demand). This supplementary possibility of action provides help for the injured party in the enforcement of his claims.

3. The law uniformity resolution pertains to the case where the State's property is damaged.

According to Article 9 para. (1) of the Constitution, public and private property shall receive equal consideration and protection under the law. This provision of the Constitutional was interpreted by the Constitutional Court as early as in a Decision of 1991. As explained in the reasoning of the Decision, in a market economy, a sharp distinction is to be made between the State's roles as public authority and owner. In property relations, the State acts as an owner, as one of the subjects of economic life, rather than as an organisation exercising public authority, therefore it has to be qualified accordingly [Decision 59/1991 (XI. 19.) ABH 1991, 293, 294-295]. This principle was not changed by Decision 1320/B/1990/3 AB, explaining that the State's right of ownership (the principles under Article 10 of the Constitution) is not violated by privatisation resulting in the loss of certain property items by the State. In that sense, the State has no fundamental rights protection against its own measures (ABH 1991, 574, 575). However, the State, as owner, is entitled to the same protection under civil law as any other owner. The State, as owner, is the injured party of the criminal offences committed against its items of property, similarly to any other owner.

Section 54 para. (5) of the ACP is related to the above principles, as it states that civil law claims for the compensation of damage caused by criminal offences related to taxes within the competence of the State tax authority or budgetary subsidies shall be enforced by the Tax and Financial Control Authority on behalf of the State.

Therefore, point I of the holdings in the challenged law uniformity resolution does not define a new statute, but it simply interprets the law when establishing that in the case of damaging State property the State is to be regarded as any other owner, and when allowing the application of the rules on supplementary private prosecution in the case of the State.

4. Pursuant to Section 28 para. (1) of Act IV of 1959 on the Civil Code (hereinafter: "CC"), the State, as the subject of property-related legal relations, is a legal person. Unless provided otherwise by a statute, the State is represented in civil law relations by the Minister of Finance; however, the Minister of Finance may transfer this right to another State organ.

State property and the independent legal personality of State organs raise many questions that cause problems in practice. Before the Second World War, the State was embodied by the State Treasury in relations of private law, represented by the Legal Directorate of the Treasury, and the organs of the State were deemed to have independent legal personality if a statute provided so or if they had separate property (Magyar Magánjog /Hungarian Private Law/, ed. Szladits Károly, I. Budapest 1941, 619; Magyary Zoltán, Magyar Közigazgatás /Hungarian Public Administration/, Budapest 1942, 215). The present situation is more complex. In addition to the CC, Act XXXVIII of 1992 on Public Finance (hereinafter: "APF") must also be taken into account in order to acknowledge the independent legal personality of budgetary organs. Accordingly, the Hungarian State Treasury is a central budgetary organ with independent economic management [Section 18 para. (2) of the APF], and the Tax and Financial Control Authority (APEH) is an organ of state administration with an independent legal personality and independent economic management [Section 1 para. (1) of Act LXV of 2002]. The classification of the property under the control of the various legal persons (owned property, entrusted property, managed property) is also unclear.

Consequently, by giving a list of possible legal persons with references to statutes, and by using the expression "whose sphere of interest has been affected by the act", point II of the holdings in the challenged law uniformity resolution has tried to facilitate the interpretation of the law in a situation of legal complexity rather than creating a new rule.

In view of the above, I consider that the petition seeking the establishment of the unconstitutionality and the annulment of Criminal Law Uniformity Resolution 3/2004 BJE should have been refused – for lack of competence – on the basis of Section 28 item b) 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.

Budapest – Esztergom, 12 November 2005

Dr. Attila Harmathy
Judge of the Constitutional Court

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

1. I do not agree with point 1 of the holdings in the majority Decision establishing the unconstitutionality of the law uniformity resolution, and with point 2 thereof rejecting the petition seeking the establishment of the unconstitutionality and the annulment of Section 51 para. (1) and Section 53 para. (1) of the ACP.

The Constitutional Court has a special place in our constitutional system, it is not part of the regular court system, and it is entrusted with special tasks by the Constitution (Decision 1350/ B/1992 AB, ABH 1993, 619).
The tasks of the Constitutional Court are determined by Article 32/A paras (1)-(2) of the Constitution. Accordingly, the Constitutional Court reviews the constitutionality of laws and attends to the duties assigned to its jurisdiction by law; it annuls any laws and other statutes that it finds to be unconstitutional.

The judicial organisation is provided for in Articles 45-50 of the Constitution. These rules provide that judges are independent and answer only to the law, and the Supreme Court assures the uniformity of the administration of justice by the courts [Article 47 para. (2)].

According to an early Decision of the Constitutional Court, the independence of the courts – with regard to the independence of the administration of justice – lies in their independent interpretation of political Acts of Parliament and administrative norms. The judicial practice is independent of political changes, its coherence is facilitated by its continuity, traditions and interactions with theory. Law is finally established by the courts according to their own interpretation [Decision 38/1993 (VI. 11.) AB, ABH 1993, 256].

Although the Constitutional Court always interprets the statutes in its own procedure, the interpretation of a statute does not mean the same in the procedure of the Constitutional Court and in court proceedings. The examination of the interrelations between – and the related interpretation of – the abstract rules of the Constitution and abstract statutes is a competence of the Constitutional Court, while the examination of the interrelations between the facts of specific cases and abstract statutes – and the related (independent) interpretation of statutes – is a competence of the courts [Decision 31/1993 (V. 21.) AB, ABH 1993, 242].

According to Chapter X of the Constitution, the content of legal norms is to be determined and consolidated by the judicial practice. It is in the everyday practice of the courts to refer to the judicial practice as a factor partly justifying and substantiating judicial decisions. The judicial practice has a normative force, a rule-setting function. This does not mean, however, that the individual decisions constituting the judicial practice or the resolutions, opinions and recommendations of the judicial bodies qualify as "statutes" for the purposes of Article 32/A of the Constitution.

2. I also consider that in interpreting its own competence, the Constitutional Court must start out from its constitutional status and function [Decision 25/1999 (VII. 7.) AB, ABH 1999, 251, 256]. The Constitutional Court has the power to interpret the concept of "statute" included in Article 32/A of the Constitution in line with its constitutional status.

However, in the present constitutional environment there is no reason for the independent constitutional examination of the law uniformity resolution as separated from the relevant statute. As regulated in the Constitution, the Supreme Court assures "the uniformity of the administration of justice by the courts", and it is within this competence that it issues law uniformity resolutions and publishes – on the basis of Section 32 para. (5) of the ACJ – court decisions in principle selected by the council on the uniformity of law. A law uniformity resolution is adopted for the purpose of ensuring the uniformity of the application of a certain statute (for the development of the judicial practice or the securing of a uniform judicial practice), and it is as such that it binds the courts as organs applying the law. The resolution's normative content is connected to the statute concerned, it has no independent normative content separated from the statute. It is not a statute, yet it is such a tool of shaping the law that influences the judicial practice in general and with binding force. It is a legal institution – between general legislation and the very complicated and complex law application – that facilitates the uniform enforcement of the law and the elimination of contradictory judgements by the courts. All law uniformity resolutions are connected to statutes, and the Constitutional Court is competent to review statutes.

From the point of view of the Constitutional Court's procedure, any statute under review has an identifiable normative content, and the text and the content of the statute cannot be separated in the Constitutional Court's procedure, especially if a relevant law uniformity resolution has been adopted. In general, all statutes live in practice with an interpreted and

applied – sometimes changing – content, separated from the legislator, and through their application to new sets of facts they may receive new normative content originally not expected or intended by the legislator.

When examining a statute taken into account with the normative content included in a law uniformity resolution, the law uniformity resolution itself may not be the subject of the Constitutional Court's procedure. At the same time, the interpretation of the statute by the Constitutional Court may not be separated from the normative content presented in the law uniformity resolution. The interpretation of the statute by the Constitutional Court has to be based on the normative content established by the Supreme Court in the law uniformity resolution. Although the law uniformity resolution binds the courts, in the course of judging specific cases, the courts apply the interpreted statute with its well-defined content rather than the law uniformity resolution alone, as persons are bound by statutes.

It is the unconstitutionality of the "statute" that the Constitutional Court must examine, i.e. the text of the statute with its recognisable normative content. If the statute is unconstitutional with the content established by the Supreme Court, then it must be annulled. It has no relevance in respect of the Constitutional Court's procedure whether the Supreme Court has exceeded the boundaries of the statute in the course of its interpretation, there is no organ to make a decision thereon, as that would be an independent interpretation of the law. It is not relevant, either, whether a statute whose text theoretically allows more than one possible interpretation "becomes" unconstitutional on the basis of and due to the law uniformity resolution, or was originally unconstitutional in all possible interpretations.

In my opinion, Section 51 para. (1) and Section 53 para. (1) of the ACP should have been annulled on the basis of the arguments found in the majority Decision, and the petition challenging the law uniformity resolution should have been refused.

Budapest-Esztergom, 12 November 2005

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court