Decision 47/2003 (X. 27.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition and a judicial initiative seeking a posterior declaration of the unconstitutionality and the annulment of a statute, the Constitutional Court has adopted the following

d e c i s i o n:

1. The Constitutional Court holds that Sections 35, 35/A, 35/B, 35/C, 36/A para. (1) item *a)* point *ab),* Section 39 para. (1) item *g),* the text "and crime prevention control" in Section 92 para. (2), and the text "pertaining to ordering crime prevention control, and" in Section 101 para. (1) item *h)* of Act XXXIV of 1994 on the Police are unconstitutional, and, therefore, annuls them as of the date of publication of this Decision.

Section 92 para. (2) and Section 101 para. (1) item *h)* of Act XXXIV of 1994 on the Police shall remain in force as follows:

"Section 92 para. (2) With regard to forced appearance, the Act applicable to the procedure by the authority adopting the resolution shall apply to legal remedy against the ordering of the coercive measure."

Section 101 para. (1) […]

h) the rules pertaining to the authorisation and application of special tools and methods[1[1]],"

2. The Constitutional Court holds that Section 13/A of Law-Decree 11/1979 on the Implementation of Punishments and Measures is unconstitutional, and, therefore, annuls it as of the date of publication of this Decision.

[1[1]] Text as corrected by way of Order …/2003 (…) AB

3. The Constitutional Court holds that Minister of Interior Decree 28/1999 (VIII. 13.) BM on Crime Prevention Control is unconstitutional, and, therefore, annuls it as of the date of publication of this Decision.

4. The Constitutional Court holds that the issue of the Methodological Guidelines of General No. 483/2000 by the Criminal Department of the Criminal Directorate of the National Police Headquarters was unconstitutional, and, therefore, it shall have no legal force.

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

R e a s o n i n g

I

1. The Constitutional Court has received a petition and a judicial initiative (hereinafter: the petition) for the constitutional review of the statutes pertaining to crime prevention control. The Constitutional Court has consolidated the petitions and judged them in a single procedure.

The petitioner and the judge filing the initiative [hereinafter: the petitioner(s)] ask for the establishment of the unconstitutionality, and for the annulment of Sections 35 to 35/C, 36/A para. (1) item a) point *ab),* Section 39 para. (1) item *g),* Section 69, the second part in Section 92 para. (2), and the first part in Section 101 para. (1) item *h)* of Act XXXIV of 1994 on the Police (hereinafter: the AP), furthermore, of Section 13/A of Law-Decree 11/1979 on the Implementation of Punishments and Measures (hereinafter: the LDP), and of Minister of Interior Decree 28/1999 (VIII. 13.) BM on Crime Prevention Control (hereinafter: the D) as a whole.

The petitioners hold that the challenged provisions raise constitutional concerns in several respects. Although the AP gives a formal definition of crime prevention control, this is merely an apparent definition as its contents are relatively uncertain. In addition, the criteria for ordering the measure include many uncertain and vague legal concepts. At the same time, the provisions of the AP empower the police, on the ground of crime prevention control, to apply without due justification all measures regulated in Chapter V of the Act (including

those excluded in principle on the basis of their definitions). In this context, both petitioners raise objections to the Act not defining the rights and obligations of persons subject to crime prevention control. According to one of the petitioners, the resulting situation violates the constitutional requirements of necessity and proportionality.

The petitioner also refers to the situation resulting from legal uncertainty, i.e. that the court (the penal judge) "cannot be able to form an opinion on the applicability of crime prevention control" and "the court may not pass a decision that cannot be enforced with due clarity".

In addition, the same petitioner claims that there is no constitutional ground for crime prevention control, as the legal institution fails to meet the constitutional criminal law requirement of *ultima ratio*. Taking account of the statutory changes occurring meanwhile, the petitioner has supplemented its petition with a reference to the contradiction between the provisions of the AP and Act IV of 1978 on the Criminal Code (hereinafter: the CC). According to the provisions in force as of 1 April 2002 of the CC, upon serving his imprisonment, the convict may no longer be subjected to supportive supervision as an alternative to crime prevention control. The above amendment of the CC, besides causing a collision, results in a constitutionally even more intolerable application of crime prevention control without regard to the principle of *ultima ratio*, as under constitutional criminal law, no further sanction may be applied against a person who has already served his punishment.

In this context, the petitioner also refers to the fact that due to the lack of adequate rules, crime prevention control is absolutely inadequate for the enforcement of the aspects of individualisation as opposed to the legal institution of supportive supervision defined in details, which may be applied in some cases in parallel with crime prevention control. However, in the case of a parallel application of the two types of measure, the "total" nature of crime prevention control questions the realisation of supportive supervision, which is in line with the requirement of constitutional proportionality. This is a contradiction putting the judge in a dilemma about applying the law, when the court is to decide on both measures in the case of convicts who may also be placed on parole.

As added by the other petitioner, crime prevention control is a relatively uncertain measure, since the actual restriction of rights applied against the person concerned during the implementation of the measure cannot be taken into consideration when ordering the measure.

Both petitioners refer to Article 2 para. (1) of the Constitution as the constitutional ground of their petitions. They consonantly refer to the objections mentioned above in stating that the legal institution of crime prevention control is fully unconstitutional as the relevant Acts and the D violate the requirement of legal certainty.

2. During its procedure, the Constitutional Court has obtained the opinion of the Minister of Justice.

II

When judging upon the petition, the Constitutional Court has had to examine the following statutory provisions:

1. The relevant provisions of the Constitution:

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

"Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.
(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights."

"Article 35 […]
(2) Within its sphere of authority, the Government shall issue decrees and pass resolutions, which shall be signed by the Prime Minister. Government decrees and resolutions may not conflict with the law. Government decrees shall be promulgated in the Official Gazette."

“Article 37 […]

(3) In the course of administering their duties, Members of the Government may issue decrees. Such decrees, however, may not stand in conflict with the law or with Government decrees or resolutions. Decrees shall be promulgated in the Official Gazette.”

“Article 50 […]

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

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

[…]”

“Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data.

(2) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the secrecy of personal data.

[…]”

2. The relevant provisions of the AP:

"Section 35 For crime prevention purposes, the Police may check any person released from three years' imprisonment provided that, at the time of judging the criminal act committed by such person, any of the circumstances set out in items *a)* to *h)* of Section 69 para. (3) was established, and it can be reasonably assumed from his behaviour during the imprisonment suggesting continued criminal lifestyle and renewed criminal contacts that he might commit a criminal act again."

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

(2) The request shall contain the following:

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

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

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

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

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

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

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

"Section 36/A para. (1) In addition to the cases specified in other Acts of Parliament, the Police may, or – in the case of missing persons – shall order a search

a) for a person whose whereabouts are unknown in order to reveal his whereabouts,

[…]

ab) who is under crime prevention control;

[…]"

"Section 39 para. (1) The police officer shall not enter a private home, whether normally or by forceful means, without the consent of those inside or an official permit unless in order to

[…]

g) perform a crime prevention check (Section 35) in the home, residence or known place of stay of a person subject to crime prevention control;

[…]"

"Section 69 para. (1) To attain the criminal prosecution objective set out in Section 63 para. (1) and subject to a court permit, the Police shall be entitled in the case of serious criminal acts to

a) secretly search a private home (secret search) and record its findings using technical devices;

b) observe and record the events taking place in a private home using technical devices;

c) have access to and record information contained in letters or other postal consignments, or transmitted through telephone lines or equivalent telecommunications systems;

d) have access to and use data and information generated by e-mail messages exchanged on the Internet or using other computer technology.

(2) Information collected using the devices set out in paragraph (1) items *c)* and *d)* and relating to persons obviously not affected by the procedure on which the secret collection of

information is based shall be promptly destroyed and shall not be processed or used any longer.

(3) The Police shall be entitled to use the devices and techniques of secret information collection (hereinafter: special tools) referred to in paragraph (1) according to the provisions set out therein for the purpose of finding a person wanted under the suspicion of a criminal act, and if a criminal act not mentioned in paragraph (1)

a) can be related to cross-border criminal investigation,

b) is aimed at a child,

c) is perpetrated in series or in an organised manner,

d) is related to drugs or other substances qualifying as such,

e) is related to the counterfeiting of banknotes or securities,

f) is perpetrated with arms,

g) is a terrorist act or an act of a terrorist type,

h) seriously disturbs public security.

(4) Detecting criminal acts against the State (Chapter X of the CC), criminal acts against humanity (Chapter XI of the CC), desertion abroad (Section 343 of the CC), mutiny (Section 352 of the CC), and the endangerment of combat-readiness (Section 363 of the CC) shall be the competence of the national security services until an investigation is ordered.

(5) Detecting terrorist acts (Section 261 of the CC) shall be the competence of the Police if the relevant report is submitted to the Police or if it has become known to the Police.

(6) In the case of the activities in para. (1) item *c),* the telecommunications or postal organisation shall give all assistance falling within its competence.

(7) For the purposes of para. (1) items *a)* and *b),* in addition to the definition in Section 97 para. (1) item *c)* 'private home' shall include all other premises and locations except those open to the public."

"Section 92 para. (1) In respect of the application of police measures listed in Chapters V and VI, and the coercive measures (for the purposes of this Chapter, hereinafter jointly: 'measures') legal remedies shall be available in accordance with the provisions set out in Section 93 – save in the case specified in paragraph (2).

(2) With regard to forced appearance and crime prevention control, the Act applicable to the procedure by the authority adopting the resolution shall apply to legal remedy against the ordering of the coercive measure."

"Section 101 para. (1) The Minister of Interior is hereby authorised to issue a Decree on

[…]

h) the rules pertaining to ordering crime prevention control and to the authorisation and application of special tools and methods,"

3. The relevant text of the D:

"On the basis of the authorisation given in Section 101 para. (1) item *h)* of Act XXXIV of 1994 on the Police (hereinafter: the AP), I order the following:

Initiation of ordering crime prevention control

Section 1 para. (1) Ordering crime prevention control (hereinafter: control) may be initiated (Section 35/A of the AP) by the criminal director of the county chief police headquarters competent at the seat of the penal institution releasing the convict, or the criminal deputy of the Budapest chief commissioner of the Police (hereinafter: the initiator).

(2) The initiation of ordering control may be proposed to the initiator by:

a) the head of the police headquarters competent at the convict's last place of residence or stay before imprisonment, or at the convict's place of residence or stay indicated when releasing the convict,

b) the head of the Border Guard's investigation authority competent at the place of residence or stay of a person convicted for a crime that falls into the competence of the Border Guard's investigation authority, or the place of residence or stay indicated when releasing such a person.

(3) Ordering crime prevention control may also be initiated upon request by an investigation authority not listed in paragraph (2).

Section 2 The initiation of ordering control shall contain the following data in addition to the ones specified in Section 35/A paragraph (2) of the AP:

a) the name and address of the initiator,

b) the file number of the case,

c) the name, rank, position, and signature of the person entitled to initiate the control,

d) when the initiation is based on a proposal in accordance with Section 1 paragraph (2), the name of the authority that has made the proposal,

e) the stamp of the authority initiating the control.

Implementation of crime prevention control

Section 3 para. (1) The implementation of the control shall fall into the competence of the criminal service (hereinafter: the executor) designated by the criminal director of the county chief police headquarters competent at the place of residence – or in the absence of that, the place of stay – of the person under control, or by the criminal deputy of the Budapest chief commissioner of the Police.

(2) The initiator shall inform the executor immediately on ordering or terminating the control by sending him the request and a copy of the ordering or terminating ruling.

(3) When the control is initiated on the basis of a proposal specified in Section 1 paragraph (2), the person who has made the proposal shall be informed of ordering the control, as well as on the results and the termination thereof.

Section 4 para. (1) During the term of the control, if the person under control becomes subject to

a) criminal or public security custody, or custody by the aliens authority,

b) pre-trial detention,

c) temporary forced medical treatment,

d) imprisonment replacing community service or fine due to transformation,

e) detention imposed for an administrative infraction or replacing fine due to transformation

the implementation of control shall be suspended for the term of implementation of the above.

(2) The term of suspension shall be included in the term of control.

(3) The suspension and the cause thereof shall be recorded in the document.

Section 5 para. (1) The executor shall initiate the termination of the control by the penal judge having ordered the control if

a) the causes that justified ordering the control have ceased to exist;

b) the execution of imprisonment of the person under control has been started.

(2) The execution of control shall be terminated upon the expiry of one year after release from imprisonment, and in the cases specified in paragraph (1).

(3) The initiator of ordering control shall be informed immediately of the termination of the execution of control and of the initiation of the termination thereof.

Section 6 This Decree shall enter into force on 1 September 1999."

4. The relevant provisions of the LDP:

"Section 13/A para. (1) The penal judge may order crime prevention control upon the initiative of the chief police headquarters (hereinafter: 'the initiator') competent at the seat of the penal institution releasing the convict.

(2) The penal judge shall issue a ruling on ordering crime prevention control, by the day of releasing the convict.

(3) Crime prevention control shall be terminated

a) upon the expiry of one year after release from imprisonment;

b) on request by the initiator, if the causes that justified ordering the control have ceased to exist."

III

Both petitions are well-founded.

1.1. The institution of crime prevention control was introduced by Act LXXV of 1999 on the Rules on Combatting Organised Crime and Certain Related Phenomena, and on the Related Amendments of Acts (hereinafter: the Amendment of Acts), taking effect on 1 September 1999. The aim of introducing the legal institution was to provide a well-organised framework for the control of potential criminals by the Police – in the interest of an enhanced protection of society.

In the present procedure, the Constitutional Court has examined the whole legal background of the institution as well as the possibilities and consequences of the joint

application of all the relevant statutes, on the basis of the requirements originating from Article 2 para. (1) of the Constitution. It has been established that the regulation of crime prevention control in the statutes listed in point II does not provide for guarantees for a constitutional application of the legal institution concerned. The regulation in force violates the principle of legal certainty as part of the rule of law, the principle of the clarity of norms, that of the predictability of legal consequences, and the requirements related to harmony between statutes, and it is in conflict with several other provisions of the Constitution, too.

1.2. The Constitutional Court has already acknowledged in several of its decisions the interest in the prevention of crimes as a constitutional objective resulting from the rule of law, the securing of which may even justify the restriction of certain fundamental rights. However, it has been stressed in each case that the implementation of this constitutional objective may not result in putting aside the requirements of the rule of law and legal certainty, and the organs of the State may not gain too broad authorisations with vague contents in the interest of the general and abstract purpose of crime prevention [for details see Decision 20/1997 (III. 19.) AB, ABH 1997, 85, 92; Decision 24/1998 (VI. 9.) AB, ABH 1998, 191, 195; and Decision 13/2001 (V. 14.) AB (hereinafter: CCDec 1), ABH 2001, 177, 199-200].

As established by the Constitutional Court in Decision 9/1992 (I. 30.) AB (hereinafter: CCDec 2), Article 2 para. (1) of the Constitution "[…] declares the basic values of the republic: independence, democracy and the rule of law. The principle of the rule of law is expounded in further detail by other provisions of the Constitution, however, these provisions do not comprise the whole content of this fundamental value, and hence the interpretation of the notion of the rule of law is one of the Constitutional Court's important tasks. […] Although during constitutional reviews, the Constitutional Court primarily examines the compatibility of the challenged regulations with specific provisions of the Constitution, this does not mean that the general provisions are seen as formal declarations and that the fundamental principles are assigned a secondary, i.e. merely auxiliary role. The violation of the fundamental value of the rule of law enumerated in the Constitution is in itself a ground for declaring a certain legal rule unconstitutional." (ABH 1992, 59, 64-65)

In addition, as pointed out by the Constitutional Court, the enforcement of the guarantees of the rule of law during the operation of the legal institutions is one of the major pillars of the values of the rule of law. The lack of the above results in violating legal certainty

and diminishing the calculability of the consequences of statutory provisions, and the enforcement of the fundamental rights granted in Article 57 paras (1) to (3) of the Constitution may become uncertain. Therefore, neither practical reasons nor the aspects of equitableness may justify setting aside the guarantees of the rule of law [for details see e.g.: CCDec 2, ABH 1992, 59, 65; Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 84-85; Decision 49/1998 (XI. 27.) AB, ABH 1998, 372, 376-377; and CCDec 1, ABH 2001, 177, 201].

2.1. Section 35 of the AP provides for three conjunctive conditions for the application of crime prevention control.

Of these, there is only one criterion of a – seemingly – objective nature, i.e. persons released from three years' imprisonment may be subjected to crime prevention control. However, reflecting the lack of its harmonisation with the CC, the AP does not contain any provision on how to interpret the concept of three years' imprisonment: is it the period of imprisonment originally imposed by the court that has to reach three years, or is it the period to be served by the convict until placed on parole.

According to the statutory provisions (the CC), the date of placing on parole is differentiated according to the degrees of executing the punishment, and the court may order in its judgement the application of a degree less severe by one grade than prescribed. The mitigating and certain special provisions of the CC [Section 87 and Section 47 para. (3)] allow further deviations with effect on the length and the degree of imprisonment, influencing the date of placing on parole as well. In addition, when executing the punishment, the penal judge is also entitled to re-classify the execution to a less stringent grade. As a result, the provisions of the AP may cause extreme situations with regard to ordering crime prevention control, depending on the calculation of the three years of imprisonment. In some cases, a convict punished for a more severe criminal act, or a convict who is more dangerous to society may not be subjected to crime prevention control, while a perpetrator originally punished – without any mitigation – with the least severe degree of imprisonment, who had committed a criminal act of a lesser weight, may be subjected to control. Consequently, the requirement of three years – as the "period of release" – causes legal uncertainty, and it is not suited to "measure" any important circumstance with respect to the desired objective.

2.2. As pointed out by the Constitutional Court in CCDec 2, "[…] legal certainty requires not merely the unambiguity of individual legal norms but also the predictability of the operation of the individual legal institutions" (ABH 1992, 59, 65). In its decisions related to predictability, the Constitutional Court has always laid great emphasis on the potential existence of a judicial practice supporting the answer to the question under examination and helping those applying the law in adopting decisions – to the degree absolutely necessary for the enforcement of legal certainty.

In the present legal system, there is no other institution comparable to crime prevention control. It is an institution showing the features of police measures, and it cannot be linked to any type of legal consequences applied by the courts in the past (even in the distant past). However, it has become clear even beyond the contents of the petition that the calculation of the period of time poses difficulties for the judicial practice in terms of resolving the contradiction between the provisions of the CC – which is to be followed by the courts in all other cases – and the AP. According to the document dated 27 May 2002, entitled "Kollégiumvezetők álláspontja a Btk.-t módosító novella (a 2001. évi CXXI. törvény.) egyes rendelkezéseinek alkalmazásával kapcsolatos jogértelmezési kérdésekben" (Bírósági Határozatok. 2002. évi 10. szám), i.e. "Opinion of the Heads of Boards on the Questions of Interpreting the Law in Connection with the Application of Certain Provisions of the Amendment of the CC (Act CXXI of 2001)" [(Court Reports, 2002/10); hereinafter: the Opinion of the Heads of Boards], the terminology of the AP is incompatible with the system of substantive criminal law, and it breaks up the clear line of legal interpretation harmonised with the system of the CC. It follows from the contents of the opinion referred to above that resolving the contradiction resulting from the potential synchrony of crime prevention control and placing on parole is beyond the courts' competence of interpretation. This proves, however, that in connection with the legal institution under review, there is no link of legal interpretation between the statute and the practice that could clearly guide the judge when deciding on the basic question of calculating the period of three years.

In view of the above, the Constitutional Court has established that – in the absence of adequate statutory provisions – it cannot be decided whether crime prevention control is only applicable to those released upon serving their punishments, or to those as well who are placed on parole. For both the addressees of the norm and those who apply it, this results in a situation contrary to the constitutional requirement of the predictable operation of legal

institutions, which is a basic element of legal certainty. The lack of a clear rule may lead to an uncertain and contradicting judicial practice, as it is exclusively up to the discretion of the judge acting in the concrete case to interpret the concept of three years' imprisonment as a precondition for ordering control.

3.1.1. The establishment by the court in the case concerned of any of the circumstances specified in Section 69 para. (3) items a) to h) of the AP is a further precondition for ordering crime prevention control. However, the legislature did not define in any interpreting provision the contents of the legal concepts and procedural technical terms related to the crime categories listed in the relevant provision of the AP, and they cannot be identified with the provisions of either the CC or Act XIX of 1998 (hereinafter: the ACP). As a result, the courts have no fixed set of concepts defined (at least) in another statute that would give them clear guidance when examining this particular precondition to ordering control.

Most recently, the Constitutional Court summarised in its Decision 10/2003 (IV. 3.) AB its statements about the requirement of the clarity of norms. According to the essential contents of that Decision as relevant in the present case, the requirement of the clear contents of norms that can be identified and comprehended when applying the law are part of legal certainty. When the normative text is incomprehensible or allows different interpretations, this results in an incalculable situation for those who are addressed by the norm. In addition, too generally worded normative texts create a possibility for subjective and even arbitrary application of the law (ABK, March 2003, 117, 120).

Most of the conditions specified in Section 69 para. (3) items *a)* to *h)* of the AP contain generally undefined concepts, the unified interpretation of which has not been developed in the judicial practice. Nor can the exact meaning of these terms be found in the scientific or academic legal literature, and, in the individual cases, they necessitate the analysis of distant connections. The contents of the majority of the terms "cross-border criminal investigation", "aimed at a child", "perpetrated in an organised manner", "terrorist type", "related to substances qualifying as drugs", "seriously disturbs public security", and "perpetrated with arms" are uncertain and difficult to clarify, and some of them could be the subject of legislative debates. The expressions "related to", "can be related to", and "type" attached to the various "legal concepts and types of criminal offences in the broad sense" as

specified in the relevant provisions of the AP allow an unacceptably broad scale of interpretation that may result in an unpredictable or in some cases even casual construal of the law.

3.1.2. Nor can it be inferred from the rules of the AP how to interpret the "establishment" of the above-mentioned circumstances in the criminal judgement. Part of the terms listed in Section 69 para. (3) items *a)* to *h)* can be found – although with a wording other than the one used in the AP – as part of the name of a criminal offence or as a qualifying circumstance, naturally to be stated by the court in the holdings of the judgement; however, the other part of the terms can be established as aggravating circumstances, while in other cases, they can be established by the court in the reasoning of the judgement as part of the facts of the case.

It follows from what has been argued above (points 3.1.1 and 3.1.2) that the provisions in Section 69 para. (3) items *a)* to *h)* of the AP designed to define the conditions of crime prevention control fail to meet the requirement of the clarity of norms with regard to the applicability of the legal institution, they do not unambiguously and clearly reflect the will of the legislature, and they do not eliminate the possibility of different or arbitrary interpretations of the law. On the basis of the statutes that can be taken into account, the relevant facts and circumstances to be examined by the judge as conditions for ordering control cannot be determined exactly. This, however, leads to uncertain, unpredictable and uncontrollable decisions.

4.1. The next condition for ordering crime prevention control is the negative opinion about the convict's further criminal lifestyle and the renewal of his criminal contacts, formed on the basis of the convict's behaviour during the execution of punishment.

4.1.1. According to the law, the convict's behaviour may only be monitored by the penal institution. Although this is the only organisation that may have any information on violations of the law by the convict while serving his punishment as well as on his contacts, it has no role to play in initiating crime prevention control.

The tasks of penal institutions and the rules of handling and recording data related to convicts are specified in Act CVII of 1995 on the Organisation of Penal Institutions

(hereinafter: the AOPI). According to the AOPI, the tasks of the organisation of penal institutions may only be defined in an Act of Parliament [Section 1 para. (3)]. However, the Act providing for crime prevention control and the subsequent legislation have not provided for any obligation of contribution for penal institutions with regard to the application of the legal institution concerned. In addition, they have not specified any new competence in connection with crime prevention control for the elaboration and forwarding of special data recordings, data selections or new databases, created for evaluation purposes, covering all convicts or particular groups of them.

According to Minister of Justice Decree 6/1996 (VII. 12.) IM about the operation of penal institutions, regulating the execution of imprisonment and pre-trial detention, the penal institution has a general and uniform obligation to give information on all convicts only after release, and only in respect of the fact of release. According to Section 79 para. (1) of the Decree, so-called “evaluating opinions” about convicts may only be prepared in the case of specific convicts, in the cases specified in that statute and on the basis of a request by the authority justified in advance.

Therefore, the database of a penal institution cannot be used when ordering a crime prevention measure without violating the rules on data handling and the connecting of data systems specified in Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (hereinafter: the DPA). The organisation of penal institutions may only record data related to convicts within the limits set in Section 28 para. (2) of the AOPI, for specific purposes, in order to perform its penal tasks, within a specific scope, and not grouped according to the preliminary criteria of a potential measure in the future. In the absence of adequate provisions in the AOPI, the rules on data handling being bound to a specific purpose (Section 5 of the DPA) are violated by creating a general, prior database with the purpose of evaluation, as this qualifies as data handling or data processing under the DPA – taking into account the provisions under Section 2 para. (4) items *a)* and *b).* On the basis of Section 3 para. (1) item *b)* and para. (2) item *c)* of the DPA, the organisation of penal institutions would need a specific statutory authorisation for such data handling, and such authorisation would in every respect extend beyond the framework set in Section 28 para. (2) of the AOPI.

As a consequence, the prohibition resulting from the provisions of the DPA and the collision caused by the incompleteness of the rules in the AOPI question the feasibility of the set of conditions specified under Section 35 of the AP. This is a legal uncertainty that may result in a violation of Article 59 para. (1) of the Constitution granting the protection of personal data.

4.1.2. The AP provides for certain mandatory elements of content for the request to be submitted to the penal judge. In addition to general personal data and data on the sentence, these include the justification of ordering crime prevention control including the presentation of the circumstances related to the execution of punishment that constitute grounds for initiating the ordering of control. Such information includes the convict's conduct during the term of punishment, and last but not least, the special data related to the convict's criminal contacts. However, in accordance with the arguments in point 4.1.1, the existence "in stock" of such an evaluatory database – absolutely necessary for "selecting" the scope of persons to be subjected to crime prevention control – is not allowed by the law.

However, it is clear in view of Section 35/A para. (2) item *c)* of the AP that a well-founded request for ordering control can only be submitted when the police initiating the control has information not only on the convict to be subjected to crime prevention control, but also on his external contacts or contacts within the penal institution reflecting the renewal of his criminal lifestyle, i.e. adequate information related to third persons. However, persons posing a danger in respect of crime prevention among the convict's internal and external contacts can only be identified by screening all of his contacts, which is definitely not among the tasks of the penal institution. Consequently, the initiator can only have access to such data by going beyond the authorisation given in Section 84 item *g)* of the AP, by using the penal institution's database created for a different purpose.

As on the basis of Section 35/B of the AP, the Police is not empowered to use tools of secret information collection before ordering crime prevention control, and the procedure concerned does not qualify as a procedure of investigation either, this "legal gap" was to be bridged and the operability of the system was planned to be secured by the Methodological Guidelines of General No. 483/2000 issued by the Criminal Department of the National Police Headquarters' Criminal Directorate (hereinafter: the Methodological Guidelines). The

Methodological Guidelines are not a statute, they have never been published, and their contents may not be disclosed to persons outside the Police.

Pursuant to Article 59 para. (2) of the Constitution, the legal regulations on the protection of personal data shall be presented in Acts of Parliament. The prohibition of collecting data for a specific purpose and the legal gap concerning the lawfulness of data collection may not be circumvented by using internal orders related to methods that presume actual data collection.

4.1.3. Crime prevention as a constitutional aim requires co-operation by the organs engaged in securing public order and safety. However, this may only be done in compliance with the provisions of the Constitution. Data collection for a specific purpose, with particular regard to the fact that it affects not only the convict, may only be performed on the basis of a statutory regulation in accordance with the fundamental right to data protection granted in Article 59 para. (1) of the Constitution. As pointed out by the Constitutional Court in Decision 24/1998 (VI. 29.) AB, although the right to informational self-determination closely related to data protection is not unrestrictable, the restriction is only constitutional if it complies with the requirements that follow from Article 8 of the Constitution. Forwarding, handling and using personal data, and the generation of new information from such data is in line with Article 59 para. (1) of the Constitution only if there are guarantees for controllability concerning the case where such acts are performed without the affected person's knowledge and consent (ABH 1998, 191, 194).

Decision 15/1991 (IV. 13.) AB emphasised that personal data may only be processed for a specific purpose. As pointed out in that decision, collecting and storing data for general stocking purposes is unconstitutional, and both the data provider and the data requester must have a purpose-specific authorisation for connecting the data systems (ABH 1991, 40, 42-43).

It is also clear from the Methodological Guidelines that during the collection of data without procedural guarantees, extending beyond the scope of data available at the penal institution, the set of data obtained by the initiator about third persons can cover a very broad scale, actually including not only data pertaining to "criminal contacts" relevant to the measure to be ordered. The meaning of such contacts is not defined by the Act, i.e. it is not clear which third persons should be classified, and by what criteria, as "dangerous". It results

from this vague legal concept and the lack of exact rules on the "flow of information" as well as on the procedural conditions that it cannot be determined what provisions of the AP are to be applied to the persons monitored by the Police with regard to data handling (information obligation, storage, deletion of data), and, consequently, compliance with those rules cannot be controlled.

4.1.4. Most recently, the Constitutional Court reviewed in Decision 37/2001 (X. 11.) AB its practice about the other legal tools of state administration, the legal guidelines that fall beyond those, and the documents containing informal interpretations of the law. As pointed out in that decision, the authorities that issue documents under various names which do not even qualify as other legal tools of state administration, may not establish rules different from the ones specified in the relevant Acts of Parliament; it is particularly prohibited to provide for "new" obligations for the members of the authorities or for the citizens. In addition, they may not give any authorisation to the members of the authority affected by the guidelines issued if the respective Act does not provide for such authorisation. Such documents, which are not covered by the guarantees specified in Act XI of 1987 on Legislation (hereinafter: the AL) but claim to serve the purpose of forming a unified legal practice, and which "overwrite" the provisions of the relevant statutes, hindering the enforcement thereof, violate the fundaments of the requirement of the rule of law. The Decision established in principle the following: "[…] it is constitutionally unacceptable and intolerable that legally non-existent, void acts form the practice, as the persons addressed by the void act follow it as a mandatory norm" (ABH 2001, 302, 304-306).

The Methodological Guidelines not only interpret the provisions of the AP, specifying recommendations pertaining to implementation, but they also set new norms as compared to the provisions of the Act. Their provisions on site investigators, the "selection criteria" applicable to convicts, the necessarily related collection and processing of data as well as on the relevant deadlines are, on the one hand, contrary to the provisions of the AP and, on the other hand, they contain elements that extend beyond the provisions of the Act. As the Police is an organisation operating on the basis of a strict hierarchy, no deviation from the provisions of the guidelines is allowed during implementation. As demonstrated above, this is unconstitutional.

5. As demonstrated by the petitions as well, considering the third condition for the legal institution under review causes another problem related to the accumulation of legal sanctions: the collision of the rules on crime prevention control and placing on parole.

5.1.1. As ordering crime prevention control can also affect those placed on parole (see point III/1), it is possible that in the case of the same convict, the same penal judge – with due account to the rules on the deadlines for making a decision – first makes a positive decision on placing the convict on parole, and later on he has to order crime prevention control. The examination criteria of the two legal institutions are fundamentally different, the procedures take place independently, and the Opinion of the Heads of Boards does not exclude, either, the possibility of a parallel application of the two measures. However, this situation raises concerns with regard to the constitutional position of the judge.

It is a basic criterion for deciding on placement on parole whether the convict's behaviour, moral views, and relation to social values have changed positively during the execution of imprisonment as compared to his previous lifestyle. It follows from Section 35 of the AP that crime prevention control may be initiated on the ground of the mere assumption that the convict has not terminated his former contacts "to the extent" necessary for the initiator to be sure that those contacts shall not be renewed.

As pointed out by the Constitutional Court above, the AP does not set any criterion that could help the initiator of the measure in examining the nature and the depth of dangerous contacts. Consequently, with respect to the existence or the lack of the criteria specified in Section 35 of the AP, the penal judge can neither perform re-evaluation nor verify the well-founded nature of the initiative. Thus the judge may make a positive decision at his own discretion with regard to placement on parole, based on other criteria, but later on he shall be bound to rule on ordering crime prevention control against the same convict, without a chance of actual discretion.

As explained by the Constitutional Court in details in its Decision 19/1999 (VI. 25.) AB, in cases requiring discretionary decision-making, having a decision-making competence without pre-defined criteria available to everybody in itself leads to a serious injury of legal certainty. Furthermore, the lack of assessment criteria may result in the judicial procedure

becoming a mere formality, and the actual decision-making power being transferred to an organisation other than the court (ABH 1999, 150, 155).

According to the Constitutional Court, providing for a merely formal judicial decision does not comply with the requirements of constitutionality. The important issue is what the court may actually examine and consider when forming a decision. A judicial procedure closing legal relations with final force cannot be a merely formal review of the decisions or resolutions of other authorities [Decision 39/1997 (VII. 1.) AB, ABH 1997, 263, 272], nor can it be a formal manifestation of decisions made by other authorities.

In the present case, the lack of assessment criteria makes the judicial procedure a formality, as it is, in fact, the initiating Police that determines the outcome of the procedure. The court plays the role of representing a decision instead of adopting a decision on the merits, which is contrary to its constitutional tasks.

The situation that the same judge is to decide upon placing the convict on parole and under crime prevention control results in a situation where the judge may acknowledge the merits of a convict in the form of placing him on parole, but he has to, almost at the same time, make another decision reflecting a negative value judgement about the same convict, which he has to justify even against his own former arguments. This, together with the above role of only “representing” the decision, causes for the judge a conflict with himself of such an extent that may even violate judicial independence protected under Article 50 para. (3) of the Constitution. The subordination of judges to the law may not lead to degrading judges, who are personally and professionally responsible for their decisions, to a role of representing without any criticism a measure based on the decision of another authority. It may not result, either, in obliging the court to adopt any decision without a true chance of discretion, without the tools and legal preconditions guaranteeing well-founded decision-making, or against his earlier opinion formed in the course of a procedure ensuring those preconditions.

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Depriving the court’s procedure of its essence manifested in taking evidence and in the power of discretion is completely suitable for discrediting both decisions presenting clearly contradicting conclusions (i.e. the one on allowing placement on parole and the one allowing the application of crime prevention control) in the eyes of the convict concerned. The fact that according to the statutory provisions on procedural deadlines the granting of placement on

parole precedes the judicial decision on ordering crime prevention control adopted “in line with the decision of the Police” can be seen as the court’s willingness to order a measure against its own former opinion, upon pressure by the Police. This, in addition to violating judicial independence, in itself diminishes respect for judicial decisions and for the legal order.

5.1.2. With regard to the procedure by the penal judge, further constitutional concerns arise since the rules of procedure are not elaborated, and they can only be inferred indirectly from various other Acts of Parliament, and since still many procedural questions are left unresolved by the statutes. As the LDP only provides for a judicial way and it does not contain any further guidance in connection with ordering crime prevention control, the procedure can be carried out, according to the general rules of the Act, only on the basis of the general provisions of the ACP, even though they are not adequate for the institution under review. This incompleteness of the provisions on procedure leads to serious legal uncertainty.

In the procedure concerned, the “subject” of taking evidence is the preconception of another authority (the Police, acting as initiator), based on uncontrollable criteria, on whether or not the convict would commit a specific type of criminal act in the future. However, the initiator of the measure is not entitled to play a role (nor can he be present) at the hearing aimed at ordering the control by the Police of a potential perpetrator of a potential crime, as the LDP does not allow doing so. It can be deduced from the rules that the initiator’s position (possibly) must (or should) be represented by the public prosecutor (whose participation at the hearing is mandatory pursuant to the provisions of the ACP and the LDP). However, there is no statutory provision vesting any competence on the public prosecutor in the procedure related to the measure under review (filing a motion, supervision or direction of the Police etc.), and the Police initiating the measure is not bound to propose any action by the public prosecutor. Therefore, as a result of the regulation leading to the legal gap between the AP and the LDP, on the one hand, as follows from the said document containing the Opinion of the Heads of Boards, the mandatory participation of the public prosecutor in the procedure concerned is not well-founded, and, on the other hand, if the public prosecutor disagrees with the initiative, he must (should) still support it against his own professional conviction.

Several decisions of the Constitutional Court have dealt with the constitutional role and the legal status of the public prosecutor’s office. According to Article 51 of the

Constitution, the constitutional tasks of the public prosecutor's office include the exercise of the State's punitive power, and, in addition to participation in other procedures – in the cases specified by an Act –, ensuring lawfulness and the enforcement of statutes [summed up in: Decision 12/2001 (V. 14.) AB, ABH 2001, 163, 168; Decision 2/2000 (II. 25.) AB, ABH 2000, 25, 30].

Protecting and ensuring lawfulness is one of the constitutional functions of the public prosecutor's office. In performing his duties stemming from this function, the public prosecutor acts on the basis of an authorisation granted in an Act of Parliament, in the cases and in the manner specified in the Act. Neither a legal gap nor an uncertain interpretation of the law may force the public prosecutor to behave contrarily to his constitutional role. Therefore, it is clear that without an authorisation given in an Act of Parliament, the public prosecutor may not take part, to an extent beyond supervision, in a procedure supervised by him with respect to lawfulness only. This way, however, the lawfulness of the hearing is injured as holding a hearing without the participation of a public prosecutor is contrary to the relevant general provisions of the ACP and the LDP.

The incompleteness of the regulations on the participants of the procedure and their rights, and the conflicts between the provisions of the AP and the LDP violate the requirement of legal certainty resulting from Article 2 para. (1) of the Constitution.

5.2.1. As a logical consequence of what has been pointed out above (points 5.1.1 and 5.1.2), the right to legal remedy – on the "initiator's" side – is emptied during the procedure. None of the statutes under examination provides for a right of appeal for the initiator (the Police) against the court's decision on refusing the initiative. According to the general rules of the LDP and the ACP, only the public prosecutor may (would be allowed to) appeal (in addition to the convict and his representative) against the ruling by the penal judge.

However, the public prosecutor may only submit an appeal on a statutory basis and with due account to professional requirements. It follows from the constitutional role of the public prosecutor that no external third authority may oblige or request the public prosecutor to exercise his right of appeal, in particular in a procedure where the statutes grant for the public prosecutor no actual rights concerning his participation therein. Therefore, the Police

may not request the public prosecutor to submit an appeal if the Police disagrees with the penal judge.

It has been established in several decisions of the Constitutional Court that the essence of the right to legal remedy granted in Article 57 para. (5) of the Constitution is the following: "[…] the concept and the substance of legal remedy contain the repairability of the injury of rights" [Decision 23/1998 (VI. 9.) AB, ABH 1998, 182, 186; in details: Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 110]. However, it is the rules on procedure that have to ensure in respect of the individual legal institutions that an injury of any right by anyone should actually be repairable through legal remedy.

5.2.3. It also results in legal uncertainty that the procedural rules applicable to the judgement of the appeal cannot be identified.

According to the text of the LDP, the rules in the ACP on misdemeanour procedure apply to the procedure by the court when judging the appeal [Section 6 para. (4) of the LDP]. However, this rule could only be interpreted within the framework of Act I of 1973 on Criminal Procedure. The present ACP does not make a distinction between misdemeanour and felony procedures. The general rules applicable to the court procedure and the provisions on judging the appeal set the framework for judging the appeal partly in relation to the new forms of court procedure: hearing, open session, council session, and partly in relation to the nature of the decision of second instance [Section 234 paras (1)-(2), Section 345, Section 370 paras (1)-(2)]. The ACP prescribes with mandatory force the scope of application of the individual forms of procedure, and it only allows deviations in the cases specified in the Act [Section 234 para. (2)]. It is impossible to interpret the said provision of the LDP in the above system, and the ACP does not contain any specific provision on judging the appeal against the ruling by the penal judge, either.

5.3. In respect of the third precondition for crime prevention control, serious legal uncertainty is caused by the fact that no statute provides for the mandatory elements of content of the ruling to be adopted by the penal judge. The statutes do not even provide for a clear rule on the term of the measure to be set by the penal judge. There is no rule on whether the longest, one-year term of the measure is to be ordered in each case, or whether it is possible to set a shorter period, and if so, whether the judge should specify it in days or

months. Thus, deciding upon this issue may vary from case to case, depending on the judge in charge.

It is a fundamental requirement concerning the measures applicable against citizens that their essential elements of content should be calculable and known by citizens in advance. The possible maximum and minimum terms of effect of the measure are one of the most important issues of content. These terms are to be set exclusively by the legislation, and they may not be substituted for by interpreting the law in order to create a uniform practice.

5.4.1. There are further contradictions in the regulations on the competences related to initiating the termination of the measure. According to the LDP, the initiator of crime prevention control at the court is entitled to initiate its termination, while according to the D, this is within the competence of the Police implementing the measure.

In general, the rules of procedure define who are entitled to submit certain petitions, and the petitions submitted by those who are not entitled to do so have to be rejected without an examination on the merits.

However, with regard to the challenged legal institution, this leads to a situation where the court has to reject *ex officio* the request for the termination of the measure if it has been submitted by the police department in charge of implementing the measure – in accordance with the provisions of the D – and not by the department having the exclusive competence to initiate the measure according to the provisions of the LDP. In this case, due to the contradiction between the statutes, the person concerned is subjected without due grounds to the measure including serious restrictions of his rights, since the petition for terminating his control is based upon the fact that even the Police considers it unnecessary to continue crime prevention control.

The Constitutional Court holds that a measure by the Police, similar in many respects to a criminal sanction and closely linked to such sanction, also has to be based upon constitutional grounds, furthermore, it has to be necessary and proportionate. It is incompatible with the essence of the rule of law to make the period of a measure of public safety – including restrictions of fundamental rights – longer than absolutely necessary for its

purpose, and it seriously violates legal certainty if the above situation is caused by contradictions between legal regulations.

5.4.2. In respect of terminating the measure, another contradiction is caused by the fact that the D extends beyond the provisions of the AP by providing for a further cause of termination: the execution of imprisonment.

Pursuant to Article 35 para. (2) of the Constitution, Government decrees may not conflict with Acts of Parliament, and according to Article 37 para. (3), decrees issued by Members of the Government may stand in conflict neither with Acts of Parliament nor with Government decrees. According to the consistent practice of the Constitutional Court, a formal violation of the Constitution can be established when the hierarchical order of the sources of law specified in the AL is violated, and the challenged statute may be annulled merely on that basis [summed up in e.g. Decision 2/2002 (I. 25.) AB, ABH 2002, 41, 56]. With regard to the statutes of an implementing nature, the Constitutional Court held that "[…] within the limits of the basic statute, they primarily define detailed rules that facilitate the practical implementation of the basic statute's provisions and interpret the concepts used in the basic statute. Extending beyond the limits of authorisation results in unconstitutionality through the violation of the hierarchy of legislation." [Decision 19/1993 (III. 27.) AB, ABH 1993, 431, 432-433]

The above-mentioned provision of the D, as it prescribes a new rule, certainly goes beyond the limits of an implementing statute, and thus it is unconstitutional on formal grounds, even though the contents of the regulation are reasonable.

5.4.3. The – possible – rules of procedure governing the termination of crime prevention control also result in legal uncertainty. As the rules of the LDP apply to the termination of the measure, termination should, in principle, be decided upon only at a hearing, after hearing the convict. However, none of the statutes concerned contain any provisions on what the former convict should be interrogated about in such a case, what information he may obtain on the control itself, and what data have to be provided by the Police to the penal judge. It cannot be established either what facts and circumstances may form the subject of taking evidence, and what is to be done if the judge rejects the petition for

termination, i.e. whether another petition of a similar content can be submitted later on, and if yes, what the relevant deadline is.

The resulting contradictory regulations and the lack of rules also violate the requirement of legal certainty.

6.1. The seriously restrictive character of crime prevention control is shown by the fact that, resulting from Section 35/B of the AP, by virtue of merely ordering and implementing this measure, all kinds of Police measures specified in Chapter V of the AP as well as tools of secret information collection not requiring a court approval may be applied. It does not follow from the text of the statute that the execution of the available measures would require the existence of their specific preconditions defined in the AP. This situation means an eventual elimination even of the guarantees originally specified as conditions for the applicability of the specific measures.

Section 35/C para. (1) of the AP, which suggests an intention to spare the convict – and the convict only – is clearly aimed at remedying this situation. However, this is not a real guarantee, since the detailed rules on the measure and the manner of its execution are not defined with respect to either the person under control, or the other affected persons, or the Police.

Besides, the application of part of the measures in Chapter V of the AP in relation to crime prevention control is excluded on conceptual grounds or greatly restricted {e.g. measures applied in road traffic [Section 44 para. (1) item *a),* Section 45 of the AP], measures securing the safety of persons and facilities [Section 46 para. (1) items *a)* and *b)* of the AP], measures related to personal protection or a Protection Programme (Section 46/A of the AP)}. Thus the reference to the above is uninterpretable.

6.2. All measures applicable through the authorisation given in Section 35/C of the AP affect fundamental rights granted in the Constitution or deducible therefrom. The wide scale of such rights includes the right to personal freedom, the right to human dignity, and the right to the privacy of one's home and private life. However, crime prevention control and the measures applicable in the course of it are not based on the commission of a criminal act, i.e. on the court's judgement establishing it, but on an uncertain "future possibility" that the

person subject to control would commit a criminal offence if such measures were not applied. It also results from the nature of crime prevention control that it indirectly affects the environment of the person controlled, including those who live in the same flat, share a common household, or work at the same workplace.

However, in connection with crime prevention control, the rights and obligations of neither the person directly affected by the control, nor the ones in contact with him and thus indirectly affected by the measure (hereinafter: "third persons") are regulated in details. In the case of persons subjected to crime prevention control, no standards or rules of behaviour are defined which would ensure the controllability of their conduct during the term of executing the measure, and which would make it possible to verify whether the intervention by the authority has been justified and necessary, and whether it has caused a disproportionate restriction of rights. As far as the third persons "falling under the effect" of the control are concerned, the AP does not even provide for the formal grounds of their inclusion. There is no provision authorising their inclusion in the measure on the ground of their contacts with the person under the effect of crime prevention control. Consequently, no information can be gained on the rights and obligations of such third persons. This legal uncertainty is unconstitutional in itself.

The lack of exact statutory regulations on relevant rights and obligations results in a situation where the right to legal remedy (right of complaint) – in general against the measures specified in Chapters V and VI of the AP – granted in Section 92 para. (1) of the AP is emptied with regard to the person subject to the procedure. Based on the text of Section 93 para. (1) of the AP, there are practically no legal remedies available for third persons, as they are not subjects of the measure.

IV

1.1. The Constitutional Court has established on the basis of the above that the rules of crime prevention control are largely unelaborated, and they offer many possibilities for subjective or even arbitrary interpretations of the law. The operation of the legal institution is unpredictable and uncontrollable due to the fact that – albeit in a lawful framework – the conditions for ordering the measure contain a large number of uninterpretable definitions, there is a lack of detailed rules and procedural guarantees, the right to legal remedy is emptied

out, and the existing rules often collide with the provisions of criminal law, criminal procedure law, and penal law.

Moreover, when examining crime prevention control, the Constitutional Court has established that the legislative errors and deficiencies in the rules of the AP as well as the ACP and the LDP, which cause many legal gaps, cannot – or can only partially – be resolved by way of interpreting the law, and this prevents the development of a uniform legal practice. In other cases, the disharmony between the provisions of the different statutes results in a collision that constitutes a direct violation of constitutional provisions. This is a situation which qualifies as a serious violation of legal certainty protected under Article 2 para. (1) of the Constitution, and which leads to a constitutionally unacceptable restriction of fundamental rights.

In addition, the Constitutional Court has established that the rules on crime prevention control violate Article 37 para. (3) of the Constitution through the violation of the order of legislation, and they violate at all levels and fields of regulation the constitutional principles related to the constitutional tasks and position of the courts and public prosecutor's offices as regulated in Articles 50 and 51 of the Constitution, as well as the constitutional requirements pertaining to the independence of judges protected under Article 57 para. (1) of the Constitution, and also the principle of protecting personal data guaranteed in Article 59 of the Constitution.

Therefore, the Constitutional Court has ordered the complete annulment with *ex nunc* effect of the regulations related to the legal institution concerned, on the basis of Section 40 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC).

1.2. In respect of the provisions of the challenged D, consisting of only six sections, the Constitutional Court has pointed out separately that several of its points are unconstitutional in themselves on substantial or formal grounds (see Decision: points 5.4.1, 5.4.2, 5.4.3). In addition, the Constitutional Court has established the unconstitutionality of all provisions of the AP related to crime prevention control that form the basis of the D as an implementing statute. These unconstitutional provisions are repeated – partly unchanged, and partly with the same contents as in the AP – in the text of the D, and therefore such provisions of the D share the unconstitutionality of the relevant provisions of the AP. Some other

provisions of the D contain technical rules with regard to the unconstitutional provisions of the AP, and, although they do not violate the Constitution in themselves, they are inseparable from the underlying unconstitutional regulation and from the unconstitutional parts of the D.

As summarised in Decision 33/2002 (VII. 4.) AB, the Constitutional Court holds the requirement of legal certainty to be a key issue with regard to its own operation as well. Therefore, in respect of the annulment of the statutes declared unconstitutional, it may not cause a situation which would be contrary to the requirement resulting from Article 2 para. (1) of the Constitution. Thus the Constitutional Court annuls those "parts of the norm" which are uninterpretable by the judicial practice and, therefore, cannot be applied constitutionally, even if they are not unconstitutional in themselves but cannot be applied without the parts declared unconstitutional (ABH 2002, 173, 186-187).

The parts of the D that are not affected by any constitutional objection are "floating norms" not connected in themselves to any other legal institution, and they lose their functions without the provisions of the underlying AP and the unconstitutional rules of the D. In view of this, the Constitutional Court has annulled the whole of the D, taking into account the requirement of legal certainty as the basis of the present Decision.

1.3. The challenged Section 13/A of the LDP only contains rules on the procedure pertaining to crime prevention control. This provision (Section 13/A), on the one hand, loses its interpretive context due to the annulment of the provisions in the AP on crime prevention control, and, on the other hand, its deficiencies referred to above cause legal uncertainty violating the constitutional requirement stemming from Article 2 para. (1) of the Constitution. Therefore, the Constitutional Court has also annulled Section 13/A of the LDP.

1.4. The Constitutional Court has already pointed out in its Decision 10/1992 (II. 25.) AB that "the consequences of the unconstitutionality of a statute, as defined in Section 43 of the ACC, are […] related to the requirement of legal certainty, […]. The consequences of the unconstitutionality of a statute must be settled in a manner that actually results in legal certainty […]" (ABH 1992, 72, 73, 74).

As explained by the Constitutional Court in detail in its Decision 64/1997 (XII. 17.) AB, a deviation from annulment with *ex nunc* effect may only be accepted when "justified by

the requirement of legal certainty or an especially important interest of the party initiating the procedure." (ABH 1997, 380, 388) It was reinforced in Decision 66/1997 (XII. 29.) AB that in line with Section 42 para. (1) of the ACC, in the practice of the Constitutional Court, the "general rule is not annulment in the future, but annulment with *ex nunc* effect, i.e. annulment as of the day of publishing the decision of the Constitutional Court […]." It was also pointed out that the Constitutional Court must in each case weigh carefully "what kind of annulment is required by the interest of legal certainty." (ABH 1997, 397, 407)

In the present case, the Constitutional Court has found that the challenged regulations concerning the legal institution at issue do not comply with the requirements of legal certainty prescribed by Article 2 para. (1) of the Constitution. The provisions on crime prevention control, independently and in relation to each other and to the requirements that result from other statutes, show such serious deficiencies that prevent the practical application of the institution, i.e. the implementation of the relevant procedure in line with the Constitution.

The Constitutional Court has also established that resolving the legal deficiencies revealed extend beyond the realm of judicial interpretation, and there are several collisions which could only be resolved by interpretation in an arbitrary and unpredictable manner varying from case to case. The constitutionally accepted elaboration of systems through interpretation of the law has its own limits, too: it may not violate the requirement of legal certainty. Therefore, the judicial interpretation of the law may only be based on an operable statute which clearly defines the aim of the legal institution concerned, together with the framework, the criteria and the process of its application, the scope of persons affected by its application, their rights and obligations, and the procedure of applicable legal remedies available in connection with the institution. As the regulation of the legal institution under review fails to meet the minimum requirements, it would be unacceptable under the rule of law to temporarily keep in force regulations that violate in many respects several provisions of the Constitution. Therefore, the Constitutional Court has decided to apply annulment with *ex nunc* effect.

The Constitutional Court holds that it is a minimum requirement for *pro futuro* annulment that the predictability of the operation of the legal system should be secured until putting into force the new statute to be adopted as a result of the declaration of unconstitutionality. Its other precondition is that temporarily keeping the unconstitutional

statute in force should pose less threat to the integrity of the legal order than annulment with immediate effect.

However, in the present case, the regulation concerned disturbs the operation of the basic institutions of the State under the rule of law, such as the courts and public prosecutor's offices, as it collides with the regulations and the resulting principles concerning the constitutional division of tasks and the constitutional position of these organisations. Such problems of operation also influence the Police and the penal institutions – also considered to be important institutions of the State under the rule of law – since they can only perform their tasks related to the legal institution by violating further statutes and constitutional principles. All this results in a violation of the fundamental rights granted in the Constitution. Under such circumstances, keeping the present regulations in force even temporarily would not result in legal certainty greater than that caused by the temporary lack of regulations. Therefore, in the present case, the Constitutional Court has declared the unconstitutionality of the statute with immediate effect, in line with the general rule in Section 42 para. (1) of the ACC.

1.5. The Constitutional Court emphasises that the protection of public order and public safety as constitutionally acknowledged aims of the State may justify the application of Police measures and procedures, and the legislature is in charge of deciding on the necessity to do so. However, the regulation of legal institutions established for such a purpose must be in line with all provisions of the Constitution. Legal regulations are required to comply with the principles of legal certainty, clarity of norms and predictability, to take into account the requirement of necessity and proportionality with regard to the restriction of fundamental rights, to provide for procedural guarantees, and to create harmony between the norms related to the given legal institution and the entire legal system in force.

2. Examining the challenged provisions of the AP, the Constitutional Court has taken note of the fact that some of them not only constitute detailed rules on the application of crime prevention control, but – due to the legislative technique of back-reference – they also serve as a basis for the application of other legal institutions not challenged in the petitions. As the Constitutional Court has not examined such other legal institutions, it has decided upon the unconstitutionality of the rules in question only in respect of crime prevention control. As a result, these provisions have not been annulled. In view of the fact that these rules cannot be

applied in respect of crime prevention control, since the provisions on that institution have been completely annulled, it is not necessary to annul these rules separately, either.

3. According to Section 1 item *b)* of the ACC, the competence of the Constitutional Court covers the constitutional examination of statutes and other legal tools of State administration. Even though on the basis of the AL the Methodological Guidelines do not fall into any of the above formal categories, with regard to their contents, they are enforced as a legal norm. Consequently, in line with its consistent practice [see e.g. Decision 60/1992 (XI. 17.) AB, ABH 1992, 275, 278; Decision 31/1995 (V. 25.) AB, ABH 1995, 158, 161; Decision 37/2001 (X. 11.) AB, ABH 2001, 302, 306], the Constitutional Court has established the unconstitutionality of issuing the respective document not qualifying as any other legal tool of State administration, but functioning as a norm, by declaring that its content has no legal force.

4. Ordering the publication of this Decision is based on Section 41 of the ACC.

Budapest, 21 October 2003

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President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
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Constitutional Court file number: 646/B/2002
Published in the Official Gazette (*Magyar Közlöny*) MK 2003/122