DECISION 21 OF 1996: 17 MAY 1996 Hiba! A könyvjelző nem létezik.

ON THE MINIMUM AGE FOR MEMBERSHIP

OF HOMOSEXUAL-ORIENTED ASSOCIATIONS

The President of the Supreme Court sought the abstract constitutional interpretation of certain fundamental rights.

The petitioner submitted that there was a concrete constitutional problem in that the rights of the child guaranteed by Art. 67 conflicted with his/her right of association under Art. 63(1) where it concerned the child's membership in an association which presented itself as one protecting the rights of homosexuals as a social group.

Held, ruling accordingly:

(1) The membership of minors in associations related to homosexuality could be excluded or restricted by law or in court decisions. In the conflict between the rights guaranteed under Arts. 63(1) and 67, the different criteria restricting them also had to be harmonised: this meant not only to which protective measures a child had a right under Art. 67, *i.e.* whether the restriction on the child's membership in such an association formed a part of the constitutionally-required minimum protection provided by the State, but also whether this level of protection was a necessary and proportionate restriction on the exercise of the right of association under Art. 63(1). The right of the child to protection and care at the same time established the constitutional duty of the State for the institutional protection of the child's personality development which protective duty (based on the Constitution) could result in the restriction of the child's fundamental rights by the legislature or

courts. Further the specific qualities of the child's fundamental right legal status would have to be clarified which were different from the general precisely because of his/her age (page 00, lines 00-00, page 00, lines 00-00, page 00, lines 00-00).

(2) Consequently, there were several criteria to be considered in determining whether and to what extent the right of the child to protection for his\her development could restrict his\her right of association. These were age, the nature of the association to be joined, the child's ability to understand and evaluate his/her choices with respect to homosexuality and the consequences thereof for their own personality, later adult life and social adaptation particularly the consequences of membership of a homosexual-related association and the public view of homosexuality therein. Taking these into account and without forming a moral judgement on homosexuality on the basis of the Constitution, it remained harmful for the development of all the child's personality (physical, mental and moral) and would decisively affect his/her future were he/she to come onto a compelled route due to the lack of maturity necessary to decide these vital questions. The State, in avoiding the child's exposure to such risk, could set a higher age limit for coming out publicly (if legally possible, *e.g.* in regulating membership of associations) because a different level of maturity was necessary for evaluating the social consequences thereof. Thus setting an age limit for membership of a homosexual-related association primarily protected the responsible and mature decision of those who would bear its consequences for the whole of their life. As a result, on the basis of Art. 67, children's membership of such associations could be restricted (page 00, lines 00-00, page 00, lines 00-00, page 00, lines 00-00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

In the matter of the petition by the President of the Supreme Court seeking the interpretation of constitutional provisions, the Constitutional Court has made the following

DECISION.

1. The right of the child to protection and care necessary for proper physical, mental and moral development to be provided by the State (Art. 67(1) of the Constitution) establishes the constitutional duty of the state to protect the development of the child. This duty of the State serves as a constitutional basis for the legislature or the courts to restrict -- primarily in the public sphere -- the child in exercising his/her fundamental rights, including the right of association guaranteed in Art. 63 of the Constitution.

Article 67 of the Constitution also means that the state has to protect the child -- beside influences harmful to his/her development -- from taking risks in connection with which, because of his/her age (presumed to correlate with physical, mental, moral and social maturity), he/she is not able get to know and evaluate either the possibilities or the consequences of his/her choices for his/her own personality, later life and social adaptation.

2. On the basis of the above, the child's membership in associations "related to homosexuality" can be excluded or restricted in laws or in court decisions. The actual restriction on the child's exercise of his/her right of association has to adjust to the concrete risk endangering the development of the child. In the course of considering whether the right of the child to

protection for his/her development may lead to the restriction on his/her right of association, the age of the child and the nature of the association has to be evaluated together and from the point of view of whether the child is able to know and evaluate the choices in connection with his/her relationship to homosexuality and the consequences of his/her choice for his/her own personality, later life and social adaptation, including those consequences which might ensue from membership in the association in question and the public assumption of the concept of homosexuality prevalent there.

The Constitutional Court published its Decision in the *Hungarian Official Gazette*.

REASONING

I

1. The President of the Supreme Court petitioned that the Constitutional Court, in the framework of abstract constitutional interpretation, delimit the fundamental rights expressed in Art. 67 and Art. 63(1) of the Constitution. The petitioner found it to be a "concrete constitutional problem" that "the right of the child to protection and care necessary for proper physical, mental and moral development to be provided by the state [Art. 67 of the Constitution], conflicts with his/her right of association [Art. 63(1) of the Constitution] if the question arises about the child's membership in an association which presents itself as the association protecting the rights of homosexual persons as a social group."

2. The petition complies with the conditions set forth by the Constitutional Court in *Dec. 31 of 1990 (XII.18) AB* (MK 1990/128 at 2503-2504). The Constitutional Court has always tried to keep abstract constitutional interpretation away from two extremes: on the hand from "the

purely abstract and indeed unbounded interpretation that is disconnected from any concrete problem;" and on the other hand from deciding concrete cases or merely interpreting regulations by abstract interpretation. By the latter condition the Constitutional Court wanted to keep away from the tasks of other branches of power. The condition of "concrete constitutional problem" expresses the relative generality of the interpretation and the Court decided from case to case whether "a properly abstract answer to be compulsorily applied in all cases in the future" (*Dec. 36 of 1992 (VI. 10) AB*, MK 1992/59 at 2027) could be given, one which went beyond the particular problem that concerned the petitioner.

II

In the present case a classical political liberty, the right of association, conflicts with the right of the child to protection and care necessary for proper physical, mental and moral development to be provided by his/her family, the state and society.

1. The conflict between two fundamental rights cannot possibly be judged completely in an abstract manner. There is a question about whether there is any hierarchical relationship between the two or any difference in their nature which could give a general framework for the judgment.

(a) The permanent practice of the Constitutional Court places "communication rights" above others in the sense that "laws restricting the freedom of expression have to be interpreted restrictively": (*Dec. 30 of 1992 (V.26.) AB*: MK 1992/53 at 1913). The right of freedom of expression is the "mother right" to fundamental rights of communication according to the Constitutional Court. The priority of freedom of expression against other rights does not,

however, comprise all communication fundamental rights. For if it were the case, almost all classical political liberties would enjoy this special protection which on the one hand would decrease the real significance of the freedom of expression and on the other hand it would make the difference between political and socio-cultural rights more distinctive than it actually is by their nature. The prior practice of the Constitutional Court required an especially strong connection with the "mother right" for extending the priority of the freedom of expression over other rights (*cf.* in connection with the freedom of religion, *Dec. 4 of 1993 (II. 12)AB*: MK 1993?15 at 704).

Thus the right of association does not have the priority of freedom of expression in relation to other constitutional rights.

(b) Classical liberties do not necessarily enjoy priority against social rights or other obligations of the State that do not derive from classical rights. But when rights of the two different types conflict with one another, their peculiarities cannot be disregarded.

2. In the conflict between the right of the child to protection and care necessary for proper development and the right of association, the different criteria restricting the two different rights also have to be brought to harmony.

(a) Thus in the case to be decided not only the following has to be answered in the course of interpretation — as to what protective measures does the child have a right, taking into consideration *only* Art. 67 of the Constitution, that is, whether the restriction on the child's membership in an association related to homosexuality forms a part of the constitutionally required minimum protection — but also the Constitutional Court has to define the constitutionally required level of protection with regard to whether this level of protection is at

the same time a necessary and proportionate restriction on a classical liberty, that of the exercise of the right of association.

The extent to which a fundamental right can be restricted in the interest of protecting the exercise of another, can be determined only in connection with a concrete legal regulation or a concrete case. In the course of abstract constitutional interpretation about the conflict of two fundamental rights, the test of minimal state measures (in connection with the protection of the child, Art. 67) and the test of proportionality (for the restriction on the right of association, Art. 63) can be applied, with one significant proviso, if the "concrete constitutional problem" is considered as an abstract case defined as a case in a law. In fact, the Constitutional Court has to create a constitutionally perfect statutory case, to which legislation can adjust, or on the basis of which courts can judge constitutionally.

(b) The conflict of the right of the child to protection and the freedom of association can arise in several cases even in the case defined in the petition -- "if the question arises about [the child's] membership in an association presenting itself as the association protecting the rights of homosexual persons as a social group" -- and these require differing judgements. The constitutional questions are different on the one hand according to whether we talk about generally prohibiting or setting conditions for the child's membership, or individually enforcing the right of association; on the other hand whether the restriction is given by a legal rule or court decision or it is enforced by the parent. Restricting the right of association by statutory regulation is, by its nature, general; the courts can generally exclude the membership of children in associations which permit the membership of children, by denying registration and can decide in individual membership cases; while the parent can prohibit the membership of his/her own child.

Nevertheless, the Constitutional Court mentions at the outset that a separate examination of these restrictions will follow depending on what amount of restriction on the right of association the Constitutional Court regards as constitutionally justified in the interest of protecting the development of the child. For, if the Court finds that it is the duty of the State generally to protect the child from risks related to membership in such an association, then courts naturally cannot diverge from this in individual membership cases, and the duty of protection will not lie with the parent -- in the form of approval of membership in the association.

3. In order to clarify the relationship between the right of the child to protection and the right of association, we have to take into consideration two specific qualities of the right given in Art. 67 of the Constitution. One is that the right of the child to protection and care at the same time establishes the duty of the State for the institutional protection of the child's personality development. This protective duty of the State can result in the restriction of the fundamental rights of the child. The decisive question in the Decision of the Constitutional Court will precisely be about where to draw the line between the child's independent exercise of fundamental rights and the State's or the parent's fundamental right of guardianship. On the other hand it will be necessary to clarify those specific qualities of the child’s legal status as a fundamental right, which are different from the general, precisely because of his/her child’s age. [See below III.1.]

From the point of view the right of association guaranteed in Art. 63 of the Constitution, we need to indicate that the question in our case is not about the constitutionality of an aim of association (see s. 2(3) of Act II of 1989 on Associations, hereinafter the "Act on Associations") but about the restriction on the right of association in the interest of the child (Art. 67 of the Constitution). That is, the present case does not involve the matter of constitutionally qualifying

associations related to homosexuality. The constitutional conditions for restricting the exercise of the right of association by legislation follow from the Constitution and its interpretation by the Constitutional Court. The judge refuses to register the social association if the founders do not comply with conditions set forth in the Act on Associations. According to s. 2(2) of the Act on Associations, exercising the right of association cannot violate Art. 2(3) of the Constitution [cannot aim at the violent seizure and exclusive exercise of power], cannot amount to committing a crime or encouraging to do so, and cannot result in the violation of the rights and liberties of others. This latter condition is included in art. 15 of the New York Treaty on the Rights of the Child -- promulgated in Act LXIV of 1991 -- which declares that the signatory states recognize the child's right of association.

Restricting the right of association in the interest of protecting it from the infringement of "others' rights and liberties" is constitutional if this restriction is made necessary by the other right and the extent of restriction is proportionate to the desired aim. This other right has to be a constitutional right or may be deduced from such a right. The right of the child to protection and care necessary for development excludes the child's membership in certain associations. If in such an association, according to its statutes, children too can be members, then the association does not comply with s. 2(2) of the Act on Associations since this violates the right of children guaranteed in Art. 67 of the Constitution. The task of the Constitutional Court in the present Decision is to determine those features in connection with associations related to homosexuality, on the basis of which it can be determined in which cases the child's right to protection and care necessary for development make the restriction on the exercise of the right of association necessary and proportionate. This abstract constitutional interpretation at the same time determines the constitutional requirements of applying the quoted provision of the Act on

Associations -- the exercise of the right of association cannot result in the violation of the rights and liberties of others -- for the case defined in the petition.

III

1. According to the Constitution human rights are applicable to "everybody," civic rights apply naturally to Hungarian citizens and for certain rights the Constitution itself defines the circle of eligible (refugees' rights, the right to vote). The Constitution is not consistent in differentiating between fundamental right legal capacity and the right to exercise fundamental rights. (The limits of the right to vote which theoretically belong to the latter, Art. 70 of the Constitution defines as exclusion, that is as the lack of legal capacity.) The conditions for exercising fundamental rights can be defined in laws for certain groups of persons.

The child is entitled to fundamental rights. The Constitution excludes them explicitly only from the right to vote. The child -- like everybody else -- can exercise fundamental rights under the conditions set forth by the individual spheres of the law. But these restrictions can be the subject of constitutional review.

Where laws do not regulate minors' exercise of rights, it has to be determined from case to case which fundamental rights and in what respect the child can exercise on his/her own, or who should exercise them on his/her behalf and in his/her interest, and whether with regard to his/her child age and Art. 67 of the Constitution, the child can completely be excluded from exercising certain spheres of a fundamental right. The possibility of the child's exercise of fundamental rights -- including the right personally to exercise them -- gradually widens by age and by the development of an ability of decision considering the consequences of exercising a right.

The Constitutional Court has treated this question in two connections. On the one hand the Court declared it unconstitutional that the child could be completely deprived of his/her right to ascertain his/her origin by blood because of the unconditional authorization of the officially assigned guardian to initiate legal proceedings (*Dec. 57 of 1991 (XI.8) AB*: MK 1991/123); on the other hand the Court said that the right of parents to provide the kind of schooling for their children which suits, but at least does not conflict with their conscience, applies to the child as well "within the boundaries of parental guardianship" (*Dec. 4 of 1993 (II.12) AB*: MK 1993/15 at 706). This reinforces the fact that the personal exercise of rights or one which is conducted in the interest of the child by others depends on the fundamental right in question. For example, exercising the right of association usually applies to the child too. But the question of whether the parent or the child can decide about it and when the right of association can be restricted or excluded depends on the one hand on age and on the other hand on the aim of the association and the effects of membership on the child's physical, mental and moral development -- under the protection of the Constitution.

2. Whether restricting the exercise of the fundamental right of the child is justified depends on the mutual consideration of two factors: is the child generally mature enough for independent decision; and as for the subject of decision: what is maturity need for in the given case? The "maturity" of participants is usually required in order to preserve the operability [?] of the social institutions involved, that is it is required by the public interest. But protecting the child against him/herself -- that is against the consequences of his/her decision -- may be a sufficient argument for restriction. Restricting rights for public interest or for the interest of a person overlaps in most cases.

The civil law institutions of legal incapacity and limited liability above all protect for instance the security of transactions; but also protect the minor (his/her property) from careless losses and generally from risks. From this latter point of view, protection is preventive: it restricts the rights of the child during childhood in the interest of the child's future. Setting age limits for the right to vote or to holding certain offices also serves the interest of the optimal operation of certain institutions. The age (or permission) requirement for marriage protects the seriousness and the durability of the institution and at the same time protects the child from the consequences of carelessly changing his/her status. In the listed cases restriction under the age limits applies to positive activities of some sort. Nevertheless, from the point of view of restricting the child's exercise of rights, this is not the decisive quality of the prohibited activity.

Restricting fundamental rights does not involve a value judgement about what the child is prohibited or prevented from doing. It is the weight of the decision that justifies the restriction on the exercise of right by the child until he/she is capable of responsible decision. The decision can be made weighty by the consequences and risks that the child assumes by the decision.

Article 67 of the Constitution which compels the State to provide protection and care necessary for the personality development of the child, requires on the one hand the prevention of unambiguously harmful effects and on the other hand also requires averting the assumption of weighty risks that can determine the child’s personality and thus the whole of his/her future life.

Everybody can harm him- or herself and can assume risks if he/she is capable of a free, informed and responsible decision. The law gives a wide range of possibilities for this by its non-interference, and the rights to self-definition and activity (Art. 54 of the Constitution) following from the general personality right, guarantee this possibility. The restrictive guardianship of the state is a matter of constitutional debates only in boundary cases (from the punishment of drug

usage to euthanasia). But in the case of children, the Constitution itself and international treaties also compel the State to protect the development of the child from dangers and risks, exactly in order that the child can prepare for responsible and informed decisions once his/her maturity (supposed to correlate with age) renders him/her capable thereof.

3. The duties of the State following from Art. 67 of the Constitution for the protection of the child's development, but its constitutional possibilities too, are present primarily in the public sphere; the child's public activity can be regulated and also institutional protection can be provided by general regulations. In the private sphere the right and the duty of protection and care are due primarily to the parent. Thus for instance a law can prohibit -- with a general preventive aim -- the selling of alcohol to children in public places, the selling of pornographic printed matter or the opening of sex shops in close proximity to schools. Laws can prohibit children form entering such places. It is duty of the parent, however, to decide whether the child can have access to alcohol or pornography at home. The State intervenes only if the development of the child is seriously and concretely violated or endangered -- for instance by suspending parental supervision.

4. The State has to protect the child from taking risks in connection with which, because of his/her age (presumed to correlate with physical, mental, moral and social maturity), he/she is not able come to know and evaluate either the possibilities or the consequences of his/her choices for his/her own personality, later life and social adaptation. The State is thus bound, as part of its duty to avert risks, to prohibit the child at least in the public sphere from pursuing activities or taking a stand in matters in connection with which the child is not mature enough in the above sense to develop a responsible position, although taking up a public position can prove to be decisive for the child's physical, mental and moral development and his/her later life. The risks

involved are particularly increased if taking up a public position in relation to a question which society judges as controversial in the sense that it is widely judged to be negative.

In restricting the child's exercise of rights on the basis of Art. 67 of the Constitution, the following have to be taken into consideration:

No freedom can be restricted generally but only in those respects of exercising them that are made necessary for the protection of the child or others' rights.

An abstract endangerment of the physical, mental and moral development is not sufficient for the restriction on a liberty even in the interest of protecting the child. It has to be proven that a certain activity is restricted or prohibited by the law because such an activity carries concrete dangers for the affected age group; the proportionality of right restriction depends on the extent of this concrete danger.

When state intervention avoids assuming grave risks, in qualifying the extent of the risk, the positive, educational effect on the personality also has to be considered which might be realized by participation in debate since expressing and debating opinions forms part of democracy. Thus it depends on the concrete circumstances, as to what extent the child's freedom of inquiry and of expression can be restricted in "debated" questions. The child too has to face that there are disagreeable, provocative, controversial phenomena which might potentially exert harmful influences, he/she has to learn to form a position, have an opinion, debate and hold his/her opinion even against a majority, *etc*. Accessibility can depend for instance on whether there is a possibility to put these effects in a context, to compare them with other opinions -- for example in the framework of education.

At the same time, qualifying risks cannot exclusively depend on the evaluation of a branch of science that is confined to its own specialization, but it has to ponder what effects these risks

can have on the development and future of the affected group of children in the given social context. An art critique can give an unambiguously positive aesthetical evaluation of a work of art, and this will not exclude the restriction on access, since the child might not be capable of (exclusively) aesthetic evaluation and the actual effect of the work can be dangerous.

5. A general restriction on the child's right of association could not be justified constitutionally. The question can only be about making stipulations or prohibiting the establishing or joining of certain types of association.

There is no need, in the present decision, to examine whether the civil law rules of ability to act, especially the approval of the parent (or guardian) of the child's legal statement originating his/her membership, apply to exercising the fundamental right of association. For if membership in a certain association constitutes such a weighty risk for the child that a law or the courts can in general exclude it on the basis of the interpretation of the Constitutional Court in the present Decision, then approval is off the agenda.

Thus it is only possible to decide separately, for certain types of risk, the constitutional question of up to what age of the child the parent can exercise the right of association on the child's behalf, and when the child is mature enough to decide about exercising this fundamental right; and, further, in which cases is parental approval required because of the extent of risks involved in membership, and when the law evaluates this risk so extensive completely to deprive the child and the parent of the decision.

IV

1. The international comparison of (constitutional) court decisions on homosexual discrimination suggests that the "moral judgement of public opinion" plays an increasingly less important role in them. Earlier on "public morals" and "majority views" had been driven from the decisive arguments by which the courts recognized a different self-determination in the private sphere (setting out from the cases on contraception and abortion); later by enforcing the prohibition on discrimination, this protection was expanded to homosexuals too. But the situation, in fact, is much more complicated than that since public morals still remain arguments in many important decisions. Parallel with liberalization, there is another line of decisions present which -- in accordance with public morals -- provides protection against the aggressive "self-assertiveness" of others, the provocative propagating of their own moral norms (see for instance the restriction on offensive pornography). The subject of these cases is usually the presence of activity in the public sphere that is considered to be immoral by the "majority view" (which is publicly upheld by those who do also not comply with it, that is the moral convention).

A further important difference that can be deduced from the decisions made abroad is that discrimination "according to sex" can usually be successfully contested while discrimination "according to sexual orientation" is rarely contested successfully.

2. It is a universal phenomenon that a certain part of sexual morals -- by recognizing moral plurality -- are withdrawn from legal sanction. It is without doubt though that criminal law draws the outer limit in the sphere of sexual morals (too) and society does not tolerate going beyond that. Although the definition of crimes is the competency of legislation and thus the sphere where democratic majority opinion -- and sentiments -- is realized, in exceptional cases constitutional control can be applicable.

There are crimes in the case of which the moral and legal judgement not only coincides but punishability cannot really be questioned morally -- as in the case of murder. Likewise, from the point of view of sexual morals, punishing incest cannot be questioned although theoretical articles have questioned it, just like they questioned -- demanding the "sexual rights of children" -- punishment for "seduction." These efforts remained theoretical curiosities without any effect on positive law and on adjudication. But if there are several kinds of moral judgements of significant strength in the public opinion -- even if artificially reinforced -- "public morals" or the "public view" as constitutional arguments lose their strengths and are pushed to the background.

A sphere of previously criminalized behaviour, the crimes against sexual morals -- prostitution, "crime against nature" between consenting adults -- are no longer punished in most European countries. But public morals are still there, although they usually disguise themselves as legally more unambiguously protectable values or interests. For instance prostitution is not a crime. But in case of regulation -- *e.g.*, confinement to a place -- the morally motivated objection of the neighbourhood is usually taken into consideration, even if not explicitly. In these cases it is acknowledged that the "neighbourhood deteriorates," but it is not stated why -- only the *fact* is noted that the value of flats decreases.

3. The Constitution has broken with the "official" ideology which was made the foundation of the State and also with that rights had to be interpreted in harmony with it. By Act XL of 1990 amending the Constitution, the last reference to ideologies and values formulated separately -- independently of fundamental rights -- was dismissed. Constitutional interpretation has to start out from the interpretable notion of rights, as a neutral category, the boundaries of which are consensually fixed but as for its content, there are several concepts with different value contents. The essence of a pluralistic society includes the fact that rights can be realized with

different value contents, while the whole constitutional system of rights remains coherent and operative. The Constitutional Court has to intervene in borderline cases when incompatible concepts clash and has to draw the line beyond which a certain substantial interpretation cannot be harmonized with the system of constitutional rights. The Constitutional Court in the course of this interpretation does not start out from the presumed general value structure of the Constitution but expounds the value contents explicable from individual fundamental rights. For interpreting individual fundamental rights, there is comprehensive, comparative international case-law and theoretical opinions at hand so that there is no need to turn to directly ideological or political arguments. Constitutional interpretation of such methodology is protected from the direct enforcement of ideologies by emphasizing formal guarantees, and the explication [?] of the value content of individual rights provides protection against the abuse of positivism.

The Constitutional Court does not review the content of public morals enforced in law. As the Court basically made it over to legislation to define "public interest" (*Dec. 64 of 1993 (XII.22) AB*: MK 1993/184 at 11079), enforcing public order as well as morals is the right of representatives -- before, for other reasons, they come up against the boundaries of the Constitution. These boundaries have to be defined according to the above method so that an independent evaluation of public morals preferably does not occur.

The relationship between persons of the same sex -- in its durable and publicly assumed form and confined to certain aspects of life -- was recognized by the Constitutional Court itself, but *not because* the relationship was homosexual, but because the relationship is such that similar cases are elsewhere recognized by the law and the differentiation had no basis. In the course of the so far single judgment on homosexuality, the Constitutional Court remained on a neutral path, disregarding the evaluation of public morals. This neutrality is possible in the course of

interpretation carried out for the present case -- in spite of the fact that the Constitution explicitly gives a right to protect the proper physical, mental and moral development of the child. There is no reason in the present case for the Constitutional Court to confine itself to certain questions of sexual morals instead of the protection of the child's personality development as a whole. What is more, in the present case the Constitutional Court does not even consider the problem of homosexuality to be a question of sexual morals -- although it is generally regarded as such in the public opinion.

4. The causes, the development and what is more the notion of homosexuality are ambiguous or controversial; even in terms of self-definition there are several and contradictory views. One extreme view is that homosexuality is an innate an unchangeable bent, as a "third sex," and according to the other extreme homosexuality is a "social construction," it does not differ from heterosexual behaviour and thus this trend rejects as "stigmatization" all forms of differentiation/discrimination, and actually even the problematization of homosexuality. An in-between view is the (outdated) illness theory, according to which one can recover from homosexuality but obviously it cannot be punished. The "neutral" approach which takes all differentiation/ discrimination according to sexual orientation unfounded, is not extreme either. There are also differences among the views according to whether homosexuality is merely a sexual preference or the basis of self-identity, and furthermore, in connection with this, whether it is a life style, a peculiar culture. (It is in the latter sense that certain groups in Hungary reject the term "homosexual" for its overemphasis on sexuality, while they are -- as they call themselves -- *melegek* [„gay”]as regards their whole personality.) Different claims accompany the different theories -- *e.g.*, the recognition merely of different and undisturbed sexual behaviour and on the other extreme, overthrowing the power conditions of the bipolar heterosexual world.

The boundaries of heterosexuality are blurred. A gradual transition is presumed today between "clear" heterosexuality and homosexuality. Several forms of interest in and affection for the other or the same sex can pertain to the same person with different intensities and it depends on innumerable individual and social factors which of these one expresses. From fantasies to hidden affection and bisexuality, and the different types of homosexual behaviour, the scale of behaviour is gradual and not necessarily finite. It is of significance for the Constitutional Court that individual decision plays an important role in homosexual behaviour. Also it depends on a decision how one relates to his/her homosexuality, *e.g.*, how great a publicity one gives to it, whether one wants to remain hidden, living undisturbed with his/her affections in his/her private life, or wants militantly to go public.

The different interpretations of homosexuality pose different legal requirements. The human rights approach goes best together with the "neutral otherness" theory: without evaluating homosexuality it can be determined that in many respects discrimination is unjustified on the basis of constitutional tests. The usual (constitutional) court cases are: denying jobs (especially in schools) for homosexuals; discrimination in flat renting. It is more difficult to avoid the evaluation of homosexuality in the case of restricting the parental rights of the homosexual parent and in examining restrictive adoption cases. The most difficult is criminal law.

That is: discrimination according to sex (sexual role) is indeed impermissible where sexual role is indifferent to the essence of the relation in question, or at least it does not have a constitutionally justifiable weight. But in the case where exactly this gives the essence of the relation in question, it is very difficult to avoid taking a position on homosexuality by some other kind of argumentation. The dream of certain homosexual trends to achieve the entirety of their rights while there is not a word about what they are, is not realizable in these cases. The

recognition of the rights of homosexuals (where it is necessary as such) will always reinforce their separateness.

V

1. The Constitutional Court does not qualify homosexuality from a moral point of view. In the present case, however, it cannot disregard either the peculiarities of homosexuality or the current social situation of homosexuals.

The peculiarities of homosexuality cannot be evaded in the present case since in the relations in question the sexual role is not necessarily irrelevant. From among the above listed characteristics of homosexuality for the purposes of constitutional interpretation the following are decisive: the ambiguous boundaries of homosexuality, the many kinds of homosexual roles (both in terms of self-definition and in terms of social representation) and the personal decision about assuming this role.

Publicly assuming homosexuality, of any kind, is an existentially decisive decision also because of the current social reception of homosexuality by society; there is much to be assumed and later any change is difficult. The Constitutional Court does not qualify the problems of homosexuals in terms of social adaptation, acceptance and discrimination -- which the homosexuals themselves feel and experience to be more weighty than the objectively measurable social judgement -- but takes them into consideration as *facts* to the weight of the decision of the child.

The Constitution protects primarily not that decision of the child of becoming or not becoming a homosexual, but that he/she can decide with full knowledge of the possibilities and

the consequences about how to relate to his/her discovered affections and which role to chose from among the many kind of possibilities. This is the interpretation in harmony with the value content of Art. 67 of the Constitution.

The Constitutional Court thus does not interpret the Constitution to say that the possibility of becoming homosexual would endanger the "moral development" of the child (Art. 67) because the Court cannot form a moral judgement about homosexuality on the basis of the Constitution. But it is harmful for the development of the whole personality (physical, mental, moral) and decisively effects the future of the child if he/she comes onto a compelled track (?) because of the lack of maturity necessary for decision in such vital questions. The State cannot expose the child to the risk of immature decision because of two reasons. Neither of these reasons is related to homosexuality solely.

Psychosexual development is a long process in which premature effects might be seriously harmful; those effects also belong here to which the child cannot adequately relate because of the lack of necessary maturity. Thus the law protects this development even the private sphere by criminal law sanctions (see abuse), and can assist it in the public sphere with further limits. (For instance the protection of the child from pornography.)

Certain decisions have such consequences for social status that the law sets an age limit. In some of these decisions one assumes a legal status (marriage, change of sex) and the effect of others constitute the assumption of a certain status (becoming sterile, publicly assuming homosexuality). These roles and/or legal statuses require above all the maturity necessary to bear the consequences and thus the age limits are always higher than the role's sexual maturity age. The development of homosexual identity and coming out with it, as a path of psychosexual development, itself receives protection (counselling, protection against violence, keeping

alternatives open). But the law can set a higher age limit here too for coming out publicly with the role (where the law has a possibility for this -- *e.g.*, in regulating membership in associations), because a different kind of maturity is necessary for evaluating the social consequences of the many kinds of homosexual roles.

There is a difference between heterosexual development and homosexual coming out. Homosexual affections (in our society) have to be realized separately and accepted by the person and it depends on him/her as to what extent he/she wants to come out with it. The development of heterosexuals "works on its own" (that is "naturally"), self-reflection during puberty has to handle the problems within the male or female roles, and are not about the roles themselves as optional identities. If somebody has problems in terms of the latter, he/she might become homosexual.

2. On the basis of the above the membership of children can in principle be restricted in homosexual associations on the basis of Art. 67 of the Constitution. But the actual restriction on the right of association has to adjust to the concrete risk endangering the child's development. Legislation or the court deciding on the membership of the child, has to consider the age and the nature of the association together and mutually.

First, that age has to be determined by the court at which sexual orientation is usually fixed. The age limit necessary for publicly assuming a role -- depending on the nature of the association -- can be set higher.

It might prove helpful for a minor under 18 years of age struggling with homosexuality if he/she can find company in a regular framework where there are people with similar problems and where he/she can receive psychological, medical or legal counselling if need be.

But an association of adult, practising homosexuals, one which is a part of the homosexual subculture is different. In this context -- completely excluding the criminal law

aspect -- there is an increased possibility that a minor whose homosexuality has not yet been fixed and who has not chosen a role, excludes his/her possibilities by a premature decision.

And finally, an association that is active to the outside, fights for the rights of homosexuals, demonstrates their presence, represents separateness, the pressure of decision and the kind of homosexuality that is to be assumed by the whole of the personality. Not only among minors in their puberty but even among adults homosexual affections are not unambiguous and exclusive. A "campaigning" association does not allow the possibility that a person does not differ completely with the whole of his/her personality from the world of two sexes, that a person chooses to remain hidden or lives a "double" life as a bisexual. Membership of children in such associations is the most problematic since this constitutes the most public commitment and thus there is hardly any way back from there or any possibility for different roles.

3. The petition raises the constitutionality of restricting the child's *membership* in associations related to homosexuality. The argumentation of the Constitutional Court rests on the effected person's own relation to his/her homosexuality, the choice of roles, and the weight of the decision's consequences. It is a question whether on the basis of these arguments one can make a difference between homosexual or potentially homosexual minors, and between children for whom the question of choosing to be a homosexual does not even come up and who would join an association aimed at the protection of homosexual rights out of a pure human rights' motivation.

The second argument expounded above for restricting the public activity of the child in a homosexual association -- the immaturity of the child to evaluate the social consequences of publicly taking a position on questions of homosexuality and responsibly to decide -- is valid irrespective of the direction of the minor's psychosexual development. This component of the risk

is the same since the public will not differentiate among members. Such a differentiation actually would be impossible technically and also because of transitions. The participation of children in public social discourse could be restricted in other cases -- not only in questions of sexual roles or sexual morals -- and also because of the lack of being personally affected.

The first argument of restriction -- the protection of mature decision about how to relate to his/her own homosexuality -- does not, of course, apply to the minor motivated solely by rights protection. The necessity of restricting the right of association which was founded by the interest of homosexual or potentially homosexual minors, also extends to them. They have to go along with the age limit exactly in the interest of minors of the same age group which is to be protected. For setting an age limit for membership primarily protects the responsible and mature decision of those who will bear the consequences of their decision for their whole life.