Decision 1/2007 (I. 18.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior examination of the unconstitutionality of a statute and establishment of an unconstitutional omission of legislative duty, the Constitutional Court has – with concurrent reasoning by Dr. Péter Kovács, Judge of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds it a constitutional requirement resulting from Article 61 para. (2) of the Constitution that when applying Section 49 of Act I of 1996 on Radio and Television Broadcasting, the balanced provision of information shall be examined within the individual programme units and for all the programme units, as appropriate, depending on the character of the programme.

2. The Constitutional Court holds that Section 48 para. (3) of Act I of 1996 on Radio and Television Broadcasting is unconstitutional, and therefore annuls it as of 30 June 2007.

3. The Constitutional Court rejects the petitions aimed at establishing the unconstitutionality of, and at annulling Section 49, Section 50 para. (2), and Section 51 para. (2) of Act I of 1996 on Radio and Television Broadcasting.

4. The Constitutional Court refuses the petition aimed at annulling the whole of Section 50 and Section 51 para. (4) of Act I of 1996 on Radio and Television Broadcasting, as well as the petition aimed at establishing an unconstitutional omission of legislative duty with regard to Section 49 para. (6) of the same Act, together with refusing the petition proposing a review of the practice of the National Radio and Television Board (hereinafter: the NRTB) and the publication of a communication with a specific content.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

The Constitutional Court has received several petitions for the constitutional review of certain provisions in Act I of 1996 on Radio and Television Broadcasting (hereinafter: the Media Act). In the present procedure, the Constitutional Court has assessed the petitions seeking establishment of the unconstitutionality and annulment of Section 48 para (3), Sections 49 and 50, Section 50 para. (2), the second sentence in Section 51 para. (2), and Section 51 para. (4) of the Media Act, with all these provisions being related to the operation of the Complaints Committee.

1. According to one of the petitions, Sections 49 and 50 of the Media Act violate Article 61 of the Constitution, as they do not exclude the possibility of the Complaints Committee examining the enforcement of the requirement for balanced information with regard to a single programme unit. The Complaints Committee does, in fact, often act on the basis of a single programme unit – contrary to the requirements established in Decision 37/1992 (VI. 10) AB (hereinafter: the CCDec).
The same petition requests the Constitutional Court to perform a posterior constitutional review of Section 48 para. (3) of the Media Act, alleged to be in violation of Article 61 of the Constitution, guaranteeing the right to the freedom of expression, and also contrary to the constitutional requirements elaborated by the Constitutional Court in the CCDec.
2. According to another petition, Section 50 para. (2) of the Media Act restricts in an unconstitutional way the freedom of the press granted in Article 61 para. (2) of the Constitution, by providing "too broad authorisation" to the Complaints Committee and to the NRTB in the case of an appeal. The Complaints Committee and the NRTB specify at what time and in what manner the broadcaster is to communicate the opinion by the Complaints Committee and the NRTB or to offer a possibility for the protester to present his opinion.
In addition, the petition claims a violation of Article 57 para. (5), Article 59 para. (1), and Article 61 of the Constitution by the second sentence in Section 51 para. (2) of the Media Act, requiring the broadcaster to perform without delay the NRTB's indicting decision passed in the matter of an appeal submitted against the Complaints Committee's opinion, as the application for judicial review has no staying effect for the implementation of the decision. The petitioner holds this provision to be in violation of the regulations under Chapters XX and XXI of Act III of 1952 on the Act of Civil Procedure (hereinafter: the ACP).

The petitioner claims the unconstitutionality – without specifying the constitutional provision impaired – of publishing in the Education Gazette (since 1999 in the Cultural Gazette) the decision indicting the broadcaster prior to the conclusion with final force of the judicial procedure started on the basis of the application for judicial review [Section 51 para. (4) of the Media Act].

By virtue of the first sentence in Section 49 para. (6) of the Media Act, the Complaints Committee may hold a hearing to hear the broadcaster and the protester. According to the petitioner, in most of the cases, the Complaints Committee practically passes the resolution on account of the documents, without hearing the parties. Thus, also the NRTB passes resolutions without at least once hearing the parties. In the petitioner's opinion, this practice is contrary to Article 61 of the Constitution. In this context, the petitioner requests the Constitutional Court to establish that Section 49 para. (6) of the Media Act "is deficient in respect of granting constitutional protection due to the lack of proper guarantees".

Finally, the petitioner requests the Constitutional Court to declare in its decision the following: "the political parties may in no way interfere with the operation of the media broadcasting public service programmes, and only citizens are entitled to make a complaint at the Complaints Committee for the purpose of protecting their lawful individual interests".

II

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

"Article 8 (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined in Acts of Parliament; such Acts, however, may not restrict the essential contents of fundamental rights."

"Article 57 (5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions which infringe on his rights or justified interests. An Act of Parliament passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time."

"Article 59 (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."

"Article 61 (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest.

(2) The Republic of Hungary recognises and respects the freedom of the press."

2. The provisions of the Media Act taken into account when judging upon the petitions are the following:

„Section 4 (1) The information provided on domestic and foreign events expected to draw considerable public attention and on disputed issues shall be many-sided, factual, up-to-date, objective and balanced.
(2) The totality of the programmes put on the air in the framework of broadcasting, or any group thereof by content or genre, may not serve the interests of any party or political movement and may not solicit the views thereof.
(3) The staff participating on a regular basis in the political information and news providing programmes of the broadcaster as host, news announcer or correspondent may, regardless of their work-related contractual relationship, not add any opinion or evaluating explanation, other than news commentary, to the political news.
(4) Any opinion or evaluating explanation attached to the news shall be published in the broadcast by identifying the capacity and naming the author thereof, distinguishably from the news.
"Section 48 (2) The Rules of Procedure of the Complaints Committee and the Rules of Procedure of the councils proceeding in the individual cases, including the rules relating to the exclusion of a member of the proceeding Complaints Committee on the grounds of bias, shall be established by the Board. In the course of this, attention shall be paid to the enforcement of the principles of the equality of the parties, publicity and impartiality.
(3) The Rules of Procedure of the Complaints Committee shall also contain the order of the settlement of the complaint cases not falling under Section 4. In cases of this nature, the Complaints Committee shall assess the complaint and inform the complainant, the broadcaster concerned, and, if it deems it necessary, the public opinion, of its position."
"Section 49 (1) If the broadcaster provides information on social issues arousing the attention of the population of the reception area in a one-sided manner, in particular, if it only offers the opportunity for presenting or expressing a single or a one-sided opinion on controversial issue, or if it grossly violates the requirement of providing balanced information in any other way, the representative of the opinion not expressed or the prejudiced party (hereinafter "protester") may turn to the broadcaster with his protest.
(2) The protester may request the broadcaster in writing to make known its position under circumstances similar to those of the presentation of the protested position within forty-eight hours of

the broadcasting of the protested communication, or, in the case of multiple broadcasting, of the last repetition; in the case of a person residing (staying, operating) outside the borders of the Republic of Hungary, within eight days. The protester may not exercise his right of protest if another representative of the same position has already been given a chance to present the position not presented earlier, or if the protester has been given this opportunity but has failed to take advantage thereof.

3) The broadcaster shall decide on the acceptance or refusal of the protest within forty-eight hours of the receipt thereof. The protester shall be informed of the decision without delay. The protester may submit a written complaint, identifying precisely the programme protested and the broadcaster, to the Complaints Committee, within forty-eight hours of the communication of the decision, or, in the case of no such communication, within six days of the protested broadcast or broadcast found injurious; in the case of foreigners, within twelve days. A complaint may be submitted to the Complaints Committee also if the broadcaster fails to comply with the contents of the protest in spite of a statement of acceptance. In this case, the complaint shall be submitted to the Complaints Committee within forty-eight hours of the expiry of the deadline set for complying with the protest.

(4) The Complaints Committee shall, within fifteen days of the submission of the complaint, make a statement on the issues presented by the protester.

(5) At the request of the Complaints Committee the broadcaster shall, without delay, make the material recording the disputed programme available for the Complaints Committee, and shall provide the Complaints Committee with the information required in connection with the matter.

(6) The Complaints Committee may hear the broadcaster and the protester. Absence from the hearing shall not be an obstacle to taking a position."

"Section 50 (2) If, based upon the position taken by the Complaints Committee, the broadcaster has violated the requirement of the balanced provision of information, the broadcaster shall, at the date and in the manner defined by the Complaints Committee, in accordance with the contents of the statement of the Complaints Committee, communicate the statement of the Complaints Committee, without any evaluating commentary, or shall enable the protester to present his viewpoint."

"Section 51 (1) Applications for legal redress against the position taken by the Complaints Committee may be submitted to the Board within forty-eight hours of the disclosure of the position. The application of the broadcaster for legal redress shall have a staying effect.

(2) The Board shall decide on the application for legal redress within eight days. The indicting decision of the Board, or if the Board rejects the application of the broadcaster, the position of the Complaints Committee, shall be executed with immediate effect.

(3) A judicial review of the Board's resolution may be requested. The court shall proceed in accordance with the rules of Chapter XX of Act III of 1952 on the Act of Civil Procedure, as amended several times (hereinafter: the ACP). The court may alter the resolution of the Board.
(4) In addition to presenting a protest that proves to be justified in the programme of the broadcaster, the non-appealable decision indicting the broadcaster shall also be published in the Education Gazette (*Művelődési Közlöny*)."

III

The petitions are, in part, well-founded.

Both petitions assessed here raise objections against the Complaints Committee (and the NRTB, acting as the appellate forum when resorted to) sometimes exercising "criticism of a piece of work" in respect of individual programmes, i.e. examining the enforcement of the requirement for balanced information with regard to a single programme unit only. In the petitioners' opinion, this is due to the failure of the relevant Section 49 of the Media Act to explicitly exclude such examination in violation of Article 61 paras (1) and (2) of the Constitution.
Next, the Constitutional Court has examined whether Section 49 of the Media Act regulating the procedure by the Complaints Committee restricts the freedom of expression and the freedom of the press in line with Article 8 para. (2) of the Constitution.

1. According to the practice of the Constitutional Court, the State may only restrict fundamental rights if that is the only way to protect the legitimate objectives which form the basis of the regulation. "The constitutionality of restricting a fundamental right also requires that the restriction comply with the criterion of proportionality; the importance of the desired objective must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose." (Summary: Decision 879/B/1992 AB, ABH 1996, 401)

Under Article 61 para. (1) of the Constitution, everyone shall have the right to the freedom of expression. On the basis of Article 61 para. (2) of the Constitution – guaranteeing special protection for the press – the Republic of Hungary recognises and respects the freedom of the press. The State must guarantee this freedom having regard to the fact that the press is, on the one hand, a pre-eminent

tool for expressing opinions and, on the other hand, of disseminating and moulding opinions. Article 61 para. (2) of the Constitution granting the freedom of the press covers not only the prohibition of censorship and the freedom of establishing a newspaper (CCDec., ABH 1992, 227, 229-230), but the autonomy of editing as well. [Decision 57/2001 (XII. 5.) AB, ABH 2001, 484, 499]

The Complaints Committee has been established by way of the Media Act in order to "facilitate the provision of balanced information". For the broadcaster the establishment of the Complaints Committee, as a body keeping watch over the enforcement of the requirement for balanced information, has been a significant restriction on the freedom of the press. Then, the Constitutional Court has examined the legislative aim for which the editing freedom of the broadcasters is restricted by the procedure of the Complaints Committee monitoring the balanced provision of information.

2. Preventing the development of information monopolies is a constitutional objective. [Article 61 para. (4) of the Constitution] By the dynamic development of broadcasting technologies, the primary threat posed by the information monopolies is the emergence of "opinion monopolies", and therefore the Constitutional Court acknowledges the requirement of ensuring the pluralism of opinions as a legitimate objective. This is the objective for which the editing freedom of the broadcaster is restricted by the requirement of balanced information. As generally accepted, the opinion forming force of radio and television broadcasts and the convincing influence of motion pictures, voices and live coverages is the multiple of the thinking-inductive force of other services in the information society. Therefore, it is justified in the case of the electronic media to provide for special regulations on multi-sided information, in order to allow the members of the political community to develop their views after getting familiarised with the relevant opinions about the issues of public interest.

3. The requirement of providing balanced information was developed in a media model with a limited number of broadcasters and with one-sided information supply. This is reflected in the CCDec. adopted in 1992, where – in addition to the specific conditions related to the freedom of the press – further requirements have been set in respect of the radio and the television for the purpose of enforcing the freedom of expression and the freedom of the press, since the stock of ground-base frequencies was a resource in short supply and the national public service radio and television was in a monopoly situation. (ABH 1992, 227, 230-231)
The Constitutional Court has examined the maintainability, after the emergence of new broadcasting technologies, of the arguments set out in the CCDec. about the scarcity of frequencies and the

monopoly position of the public service radio and television, and how the scope of applicability of the requirement on balanced information is to be amended due to the development of information and communication technologies.

3.1. The short supply in frequencies means that in an analogue environment, there are a limited number of frequencies suitable for the broadcasting of audiovisual contents. There are less and less technical arguments to support the limitation of frequencies, as digital services require much less bandwidth than analogue broadcasting. This means that the same quality of services can be offered with more broadcasters – even more than the market can/could absorb. The proliferation of new broadcasting technologies is another argument supporting the unfoundedness of the reasoning based on the short supply in frequencies. Those technologies, in fact, do not require radio frequencies. Examples include digital cable TV, Internet TV, and DSL-based interactive TV.
However, the reasoning based on the limited number of frequencies may not be held outdated due to the expected development of new technologies requiring bigger bandwidth upon the termination of analogue broadcasting, repeatedly raising the problem of the limited number of ground-base frequencies (3D TV). On the other hand, in addition to broadcasters, other service providers (such as mobile telephone service providers) also aim to obtain good frequencies for utilisation.
Thus, the reasoning based on the limited number of frequencies will – probably – not become completely groundless, but it shall not be decisive enough to justify by itself the existence of special administrative restrictions related to the operation of radio and television (in excess of those pertaining to the printed press), with particular regard to requirement of balanced information.

3.2. According to the CCDec., a comprehensive, balanced and unbiased expression of the opinions prevailing across the society, as well as an unbiased reporting about facts and events of public interest shall be ensured with respect to the "radio and television sector as a whole", i.e. all domestic radio and television channels (external pluralism). [Reinforced in: Decision 22/1999 (VI. 30.) AB, (ABH 1999, 176, 184)] On the other hand, the CCDec. required the legislature to enact, in respect of the national public service radio and television practically enjoying a monopoly status at that time, Acts of Parliament on "substantive, procedural and organisational regulations" guaranteeing "comprehensive, balanced and true information" (internal pluralism).

As established by the Constitutional Court in the present case, the monopoly status of the national public service radio and television has vanished since the decision passed in 1992. In addition to

ground-base frequency broadcasting, there are satellite- and cable-based broadcasts, and the swift development of the communication technology offers new possibilities. Having regard to the full scale of radio and television programmes offered, external pluralism has been achieved by the creation of a multi-actor market. However, the multi-coloured offer of programmes does not make it needless to apply the requirements of balanced information (internal pluralism).
In 1992, when defining the scope of application of the requirement of balancing related to the contents of broadcasting, the CCDec. was based on the presumption that the national public service radios and televisions use the frequencies in short supply, assuming that these means of mass media address the whole of the society.

Today, not only the public service radios and televisions use ground-base frequencies, and there are broadcasters other than the public service ones taking part in forming the democratic public opinion based on comprehensive and objective information.
As the television and radio broadcasters using ground-base frequencies operate under the broadcasting licence granted by the NRTB, it is reasonable to monitor on a continuous basis whether they comply with the conditions specified in the relevant statutory regulations and in their licences. The radio and television channels using frequencies in short supply broadcast programmes receivable by all citizens without any major financial consideration.
In order to maintain the pluralism of opinions, the balanced supply of information is to be examined in the case of public service broadcasters established and operating by means of public funds and in respect of commercial radio and television stations whose opinion forming power has become significant.

4. A special multi-level procedure has been institutionalised by the legislation in order to enforce the requirement of balancing. According to Section 49 of the Media Act, the debate about balancing is to be settled primarily by the broadcaster and the injured party or the person whose opinion has not been presented, and only if the above procedure has failed may the Complaints Committee's procedure be started.
As regulated in Section 49 para. (1) of the Media Act, if the broadcaster provides information on social issues arousing the attention of the population of the reception area in a one-sided manner, and in particular if it only offers the opportunity for presenting or expressing a single or one-sided opinion on a controversial issue, or if it grossly violates the requirement of providing balanced information in any other way, the representative of the opinion not expressed or the prejudiced party may turn to the

broadcaster with his protest. In the protest, the protester may request in writing the broadcaster to present its position under circumstances similar to those of the presentation of the protested position. The broadcaster shall decide on the acceptance or refusal of the protest within forty-eight hours of receipt, against which the protester may file a complaint at the Complaints Committee. As referred to in Section 47 para. (1) of the Media Act, "complaints lodged for any violation of the requirement of providing balanced information (Section 4) shall be heard by the Complaints Committee of the Board".

By adopting Section 49 of the Media Act, the legislation introduced the possibilities of filing a protest and a complaint in addition to the existing tools of protecting rights (rectification in the press, lawsuit for the violation of personality rights, and criminal proceedings for defamation and libel). However, the new institutions introduced do not aim to remedy the violation of personality rights, and their primary aim is not to correct untrue statements of facts – they offer redress for violating the requirement of balanced information. With regard to the same programme unit(s), there can be parallel procedures at the court in a lawsuit for the violation of personality rights, and at the Complaints Committee on the basis of a protest and a subsequent complaint filed because of an alleged impairment of balanced information supply. Rectification in the press may be initiated by anyone to whom reference has been made in a press communication or whose identity may be recognised from the contents of a press communication (PK No 13). On the basis of the relevant request, the court shall examine whether the communicated fact was true or whether the broadcaster distorted any true fact. [Section 79 para. (1) of Act IV of 1959 on the Civil Code] According to Section 7 of Act LXVI of 1997 on the Organisation and the Administration of Courts, court decisions bind everybody, including the case when the court establishes in a particular matter its competence or the lack thereof. Thus, the decision by the court binds the Complaints Committee as well.

However, the procedure by the Complaints Committee does not result in a "pending lawsuit"; the decisions passed by the Complaints Committee and the NRTB, acting as the appellate forum, are not considered "*res iudicata*". Therefore, when the relevant preconditions are met, the complaining party may start a procedure of rectification in the press irrespectively of starting a balanced information procedure as well. In comparison with the procedure of rectification in the press, the procedure of the Complaints Committee may be initiated by a wider scope of persons ("the representative of the opinion not expressed" and the "injured party"), and the requirement of factuality as an element of balancedness allows broader examination than in the case of rectification in the press.

Consequently, in order to ensure the plurality of opinions as a constitutional objective, the freedom of the press is not unnecessarily restricted by establishing an independent State agency designed to examine the multi-sidedness of information supply, and by regulating the procedure of this legal institution specifically under Section 49 of the Media Act.

5. The petitioner's complaint about the violation of the freedom of the press by the Complaints Committee examining the enforcement of the provision on balanced information within a single programme unit has been assessed by the Constitutional Court jointly with the proportionality of restricting the fundamental right.

The Constitutional Court holds that under Section 49 of the Media Act, the broadcaster enjoys a freedom to present the relevant opinions about a topic of public interest in a series of programme units broadcasted on a regular basis. The requirement of balanced information may not be interpreted in a manner expecting the broadcaster to present all individual opinions in every single programme unit. Requiring the broadcaster to present all individual opinions in every single programme unit in order to enforce the requirement of balanced information would impair the freedom of the press – and in particular the freedom of editing – to an extent not justified by the legitimate legislative aim, i.e. ensuring the plurality of opinions. Requiring every single programme unit to be balanced would induce the broadcasters to make less informative programmes and not to touch upon certain highly debated public issues at all, in order to prevent the starting of a procedure by the Complaints Committee. This would result in self-censorship by the broadcasters as against multi-sided information supply, and what is more, it would make the programmes discoloured and act against the debating of public matters.

At present, the qualitative requirements related to the concept of balancedness are laid down in Sections 4 and 23 of the Media Act.
Section 4 para. (1) of the Media Act applicable to the procedure by the Complaints Committee provides for the requirements of multi-sidedness, factuality, up-to-dateness, and objectivity – i.e. internal pluralism – with respect to the "provision of information". Depending on the type of the programme, the provision of information may be realised within a single programme unit (Section 2 item 28 of the Media Act) or within the totality of programmes broadcasted regularly (daily, weekly, every second week or by longer intervals).

Under Section 4 para. (2) of the Media Act, “the totality of the programmes”, or “any group thereof by content or genre”, may not serve the interests of any party or political movement and may not solicit the views thereof. Based on this rule, the examination of substantial influence pertains to the totality of the flow of programmes and to groups of programmes, as appropriate.
Sections 4 paras (3) and (4) require the hosts, news announcers and correspondents of the news programmes not to add any opinion or evaluating explanation (other than news commentary) to the political news [paragraph (3)]; and any opinion or evaluating explanation shall be published in the broadcast distinguishably from the news [paragraph (4)].
The public service broadcaster shall – in line with Section 23 para. (2) of the Media Act, having the same content as Section 4 thereof – provide information on domestic and foreign events which may be of interest for the general public in a comprehensive, impartial, authentic and precise manner. Under Section 23 para. (3), public service broadcasting shall provide for the presentation of the diversity of programs and views and the viewpoints of minorities, and shall secure the variety of programs. Thus, in the case of public service broadcasters, the special provision in the Media Act provides for the diversity and variety of the programmes, i.e. it allows the joint examination of the programmes supplementing each other or following each other at regular intervals.

As regulated under Section 49 of the Media Act, in the case of a serious breach of the above requirements on the provision of balanced information, the “representative of the opinion not expressed” or the “prejudiced party” may turn to the broadcaster and – in the case of an unsuccessful protest – to the Complaints Committee. The damage is deemed to be done when the broadcaster “provides information on social issues arousing the attention of the population of the reception area in a one-sided manner”, and in particular “if it only offers the opportunity for presenting or expressing a single or one-sided opinion on a controversial issue”, or by any other way. In each case, it is up to the authority applying the law to consider whether the impairment of the rights justify starting the procedure. Under Section 49 para. (2) of the Media Act applied as the general rule, the affected person may file a protest within forty-eight hours of broadcasting the protested communication (or, in the case of multiple broadcasting, the last repetition), and Section 49 paras (3) and (5) mention “programme units”. Based on the latter, the protester may turn to the broadcaster and then to the Complaints Committee about the programme unit(s) he/she considers to be imbalanced. The Complaints Committee shall examine the provision of balanced information – depending on the type of the programme – within a single programme unit, within a group of programmes and within the scope of several subsequent programme units broadcasted on a regular basis.

As established by the Constitutional Court, Section 49 of the Media Act does not unconstitutionally restrict Article 61 para. (2) of the Constitution as, based on the above, it allows the examination of the provision of balanced information in more than one programme unit, and it also specifies the limits of filing a protest as well as of exercising the so-called right to complain when the protest fails to be successful. Section 49 para. (2) allows a short time for filing a protest: forty-eight hours of broadcasting the protested communication or, in the case of multiple broadcasting, the last repetition (and in the case of a person residing, staying, or operating abroad, within eight days). In order to prevent the abuse of the right to protest, the protester may only request under Section 49 para. (2) the presentation of its position under circumstances similar to those of the presentation of the protested position. The protester may not file any protest if another representative of the same position has already been given a chance to present the position not presented earlier, or if the protester has been given this opportunity but has failed to take advantage thereof.
Under Section 49 para. (3) of the Media Act applied as the general rule, the time granted for filing a complaint is relatively short: forty-eight hours of communicating the broadcaster's decision about the protest (in the case of a person residing abroad, within twelve days). It is another restriction on exercising the right to complaint as regulated in the Media Act that only the broadcaster has the right to appeal against the decision by the Complaints Committee. According to the reasoning of the Act, "the one-sided possibility of filing an appeal is justified by the interpretation of the right to be heard as a non-subjective right, and only the broadcaster can be the subject of legal sanctions".

Therefore, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality and annulment of Section 49 of the Media Act.
As established in the holdings of Decision 38/1993 (VI. 11.) AB, upon the review of the constitutionality of a statute, the Constitutional Court may adopt a decision on the constitutional requirements applicable in the course of interpreting the norm. As in the present case the Constitutional Court holds that there is an interpretation of Section 49 of the Media Act that complies with Article 61 para. (2) of the Constitution, the holdings of the Decision contain the statutory interpretation of the challenged provision that is in line with the Constitution. Accordingly, it is a constitutional requirement resulting from Article 61 para. (2) of the Constitution that when applying Section 49 of Act I of 1996 on Radio and Television Broadcasting, the balanced provision of information shall be examined within the individual programme units and for all the programme units, as appropriate, depending on the character of the programme.

IV

Next, the Constitutional Court has examined the constitutionality of Section 48 para. (3) of the Media Act. According to this provision, the Rules of Procedure of the Complaints Committee shall also contain the order of settlement of the complaint in cases not falling under Section 4. In such cases, the Complaints Committee shall assess the complaint and inform the complainant, the broadcaster concerned, and – if it deems it necessary – the public opinion, of its position."

1. Under Section 48 para (3) of the Media Act, the rules of procedure of the Complaints Committee shall regulate the procedure applicable to the so-called other complaints. The rules of procedure of the Complaints Committee shall be determined by the NRTB [Section 48 para. (2)]. The Media Act does not specify the breaches in the case of which one may turn to the Complaints Committee, furthermore, it does not regulate the rules of procedure to be followed and does not offer legal remedy for the affected persons, and therefore there are no statutory limits within which the NRTB might regulate the procedure of complaints.

According to point III.1 of the Decision, the establishment and the operation of the Complaints Committee is considered a serious restriction on the freedom of the press. By virtue of Article 8 para. (2) of the Constitution, "fundamental rights may only be restricted directly and to a significant extent by an Act of Parliament". [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 300] Nevertheless, under Section 48 para. (3) of the Media Act, the procedure applicable to "other complaints" is regulated not in an Act of Parliament but in the rules of procedure, which are not even considered a statute.

Section 1 para. (1) of the Rules of Procedure of the Complaints Committee and the Rules of Procedure of the Councils Proceeding in the Individual Cases (hereinafter: the Rules of Procedure of the Complaints Committee) contains the following: "the Complaints Committee shall be in charge of judging upon the complaints based on the violation of Section 4 para. (1) of the Media Act, and other complaints related to the activity of the broadcasters". Presently, under Section 1 para. (3) of the Rules of Procedure of the Complaints Committee, the Complaints Committee judges upon the requests as other complaints that do not fall under Section 4 para. (1) of the Media Act, but object – for example – to the violation of Section 4 paras (2) to (4) of the Media Act or of the fundamental principles [respect for the constitutional order, non-violation of human rights, the prohibition of exclusion and incitement to hatred as contained in Section 3 paras (2) and (3), the protection of religious belief and conviction under Section 5].

In addition to that, under Section 1 para. (3) of the Rules of Procedure of the Complaints Committee, complaints "not specified in the Act" may be filed against "the broadcaster's activity". Thus the Complaints Committee may decide not only questions related to the balanced provision of information, but also complaints regarding consumer protection issues, restrictions on advertising, requests related to personality rights, and even questions of aesthetics and taste [see examples at http:// www.ortt.hu/panaszbiz.php?parent=1)]. In these cases, the Complaints Committee acts without statutorily defined rules of procedure and relevant procedural guarantees.

2. Next, the Constitutional Court has examined whether the freedom of the press regarding the contents of the broadcast is restricted by Section 48 para. (3) of the Media Act in accordance with Article 8 para. (2) of the Constitution . As established in point III.4 of the Decision, the Complaints Committee has been established by the legislature to ensure the plurality of opinions by examining the enforcement of balanced information provision as required under Section 4 of the Media Act.
As laid down in a clear form in Section 47 para. (1) of the Media Act, complaints lodged for violating the requirement to provide balanced information (Section 4) shall be judged upon by the Complaints Committee of the Board. Under Section 112 para. (1) of the Media Act, the NRTB is in charge of imposing sanctions on any broadcaster who "fails to comply with or infringes upon the conditions and regulations prescribed" in the Media Act. While the aim of the procedure by the Complaints Committee is to allow non-heard opinions to be presented in a given programme, the NRTB examines the totality of the flow of programmes, and it may – among others – impose a fine, suspend the exercise of the right to broadcast, or even terminate the broadcasting contract as sanctions against the infringing broadcaster. In addition to the above two procedures – that may also be conducted in a parallel way – there is no constitutional reason to maintain the procedure of other complaints, as referred to in Section 48 para. (3) of the Media Act, granting the Complaints Committee a vague competence to judge upon matters directly related to the broadcasters' freedom of editing.

As the Constitutional Court has established that the first sentence in Section 48 para. (3) of the Media Act unnecessarily restricts the right to the freedom of the press without a constitutionally justified objective, examining the proportionality of the restriction is out of question.

Accordingly, Section 48 para. (3) of the Media Act is contrary – on both formal and substantial grounds – to the requirements on the restriction of fundamental rights as guaranteed under Article 8 para. (2) of the Constitution for the following reasons. On the one hand, without specifying the

conditions for restricting the fundamental right, the Media Act refers the regulation of the order of procedure related to other complaints to the rules of procedure, which is not even considered to be a statute. On the other hand, this provision unnecessarily restricts the freedom of the press granted in Article 61 para. (2) of the Constitution without a constitutionally justified objective. Therefore, the Constitutional Court, acting in accordance with Section 43 para. (4) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), has annulled Section 48 para. (3) of the Media Act as of 30 June 2007 in the interest of legal certainty, with due regard to the cases pending at the Complaints Committee.

V

1. The Constitutional Court has then examined if there is a harmony between Article 61 para. (2) of the Constitution and Section 50 para. (2) of the Media Act, obliging the broadcasters violating the requirement of providing balanced information to broadcast the statement of the Complaints Committee at the date and in the manner defined by the Complaints Committee, in accordance with the contents of the statement of the Complaints Committee, without any evaluating commentary, or to enable the protester to present his viewpoint. According to the petitioner, this provision provides too broad authorisation to the Complaints Committee and to the Board in the case of an appeal. They may specify not only the date but also the way of the broadcast. These opinions contain evaluating statements that interfere with the production of programmes, including editing, dramaturgy, and visual effects.

Under Section 50 para. (2) of the Media Act, violating the requirement of balanced information may result in two types of sanctions to be implemented when and as specified by the Complaints Committee. The broadcaster shall either communicate the Complaints Committee's statement without any evaluating commentary, or enable the protester to present his viewpoint. These two sanctions are not applicable at the same time. (BH 2005, 80)

As stated by the Constitutional Court in the present Decision, the Complaints Committee has been established by way of the Media Act in order to facilitate the provision of balanced information as a legitimate objective. To reach this objective, the Complaints Committee forms an opinion – depending on the character of the programme – upon examining a single programme unit or the totality of the relevant programmes within a given period of time. The mere fact that the Complaints Committee may

specify the date and the manner of broadcasting by the condemned broadcaster, the contents of the statement does not violate the freedom of the press. Should the Complaints Committee specify in a given case a manner violating the freedom of editing or an unreasonably long period of time for the communication of the required statement, the broadcaster would be able to turn to the NRTB and the court by using the legal remedies guaranteed under Section 51 paras (1) and (3) of the Media Act.

Having regard to the above, the Constitutional Court has rejected the petition seeking annulment of Section 50 para. (2) of the Media Act with respect to Article 61 para. (2) of the Constitution.

2.1. Then the Constitutional Court has examined the petition alleging that the regulations under Chapters XX and XXI of the ACP as well as Article 57 para. (5) of the Constitution are violated by Section 51 para. (2) of the Media Act, according to which the indicting decision of the NRTB or – if the NRTB rejects the application of the broadcaster – the position of the Complaints Committee shall be executed with immediate effect.

In the practice of the Constitutional Court, collisions between statutes of the same hierarchical level fall outside the competence of the Constitutional Court and consequently, they shall be interpreted and resolved by ordinary courts. The Constitutional Court only examines a collision between statutes of the same hierarchical level when it violates a constitutional provision as well, but "the exclusion of the collision of norms between statutes of the same hierarchical level does not follow from the principle of the rule of law itself". [Decision 35/1991 (VI. 20.) AB, ABH 1991, 175, 176]

As in addition to the statutory collision the petitioner makes reference to Article 57 para. (5) of the Constitution as well, the Constitutional Court has examined on the merits whether Section 51 para. (2) of the Media Act complies with Article 57 para. (5) of the Constitution guaranteeing legal remedies, in accordance with the provisions of the law, against judicial, administrative or other official decisions that infringe on one's rights or justified interests.
In the practice of the Constitutional Court, the constitutional right to legal remedy requires the legislation to "allow appeal to a superior forum in order to have the decisions on the merits of first instance reviewed, furthermore, the granting of judicial remedies against the authorities' decisions". [Decision 42/2004 (XI. 9.) AB, ABH 2004, 551, 572] In the present case, legal remedies are offered by the procedure before the NRTB as the appellate forum and also by the possibility of judicial remedy against the administrative decision passed by the NRTB. However, legal remedies must be

effective, which means that in general, “legal remedy is to be granted prior to the implementation of the decision”. [Decision 71/2002 (XII. 17.) AB, ABH 2002, 417, 426-427] This requirement is considered to be fulfilled by the provisions under review, since under Section 51 para. (1) of the Media Act, the broadcaster may appeal to the NRTB against the statement by the Complaints Committee, and this appeal has a staying effect. Section 51 para. (2) of the Media Act pertains to the case when the NRTB, acting as the appellate forum, passes a decision indicting the broadcaster or the NRTB rejects the broadcaster’s request, approving the statement passed by the Complaints Committee, which had acted in the first instance. In such cases, the indicting decision by the NRTB or the statement of the Complaints Committee must be executed without delay.

The legal remedy “must consist of at least one appellate level for the purpose of complying with the requirements specified in Article 57 para. (5) of the Constitution” [Decision 953/B/1993 AB, ABH 1996, 432, 434] and the enforcement of the fundamental right “requires, in general, the filing of the appeal to have a staying effect on the executability of the challenged decision”. However, neither Article 57 para. (5), nor Article 50 para. (2) of the Constitution has the consequence of “granting a staying effect merely to the fact of lodging an appeal for judicial review in respect of an administrative decision already reviewed in an appellate procedure”. (ABH 1996, 434-435)
Nevertheless, when the judge acting in the administrative lawsuit holds it justified, he may – at any time upon request – order the staying of the implementation of the challenged administrative decision under Section 332 para. (3) of the ACP. [Law Uniformity Resolution No 2/2006, Public Administrative Law, MK 2006/49]

Consequently, the omission to provide for a staying effect on executability in Section 51 para. (2) of the Media Act is not against Article 57 para. (5) of the Constitution, as this condition is deemed to be fulfilled by granting the legal remedy (with one appellate level) required in the Constitution, and there is a statutory possibility (in the ACP) to have the execution suspended by the judge.

2.2. According to the petitioner, the second sentence in Section 51 para. (2) of the Media Act is unconstitutional as – due to the lack of a staying effect – there is a chance to “have two rivalling statutory communications of conflicting contents – i.e. an administrative decision and a court judgement of final force – subsequently broadcasted to the greatest public”. This is deemed to violate the reputation of the persons involved in preparing the programme.

Under Article 59 para. (1) of the Constitution, in the Republic of Hungary everyone is entitled to the protection of his/her reputation, and to privacy, including privacy of the home, and to the protection of personal secrets and data.
As stated in the challenged provision, the indicting decision of the NRTB or – if the NRTB rejects the petition by the broadcaster – the position of the Complaints Committee shall be executed with immediate effect. The Complaints Committee, the NRTB, as the appellate forum, and the court reviewing the lawfulness of the administrative decision shall judge upon the balanced provision of information within the individual programme units and for the totality of the programme units, as appropriate, depending on the character of the programme. The mere fact of having those decisions broadcasted does not result in the violation of Article 59 para. (1) of the Constitution. When the NRTB acts on the basis of Section 51 of the Media Act, the provisions of the Act on Public Administration Procedure are applicable to its procedure with the derogations contained in the Media Act. If the court reviews the decision passed by the NRTB, the court's decision binds the NRTB (as well as the Complaints Committee). Thus the judicial way serves the purpose of remedying the potential errors in the decisions passed in the first instance and in the appellate procedure in media-related matters.

Therefore, the Constitutional Court has rejected the petition seeking annulment of the second sentence in Section 51 para. (2) of the Media Act with respect to Article 59 para. (1) of the Constitution.

2.3. The petitioner holds the second sentence in Section 51 para. (2) of the Media Act to be in violation of Article 61 of the Constitution, as the subsequent broadcasting to the greatest public of an administrative decision and a court judgement of final force – both dealing with the issue of balanced information – with conflicting contents, as the case may be, violates "the important public interest in the authentic and truthful information of the public, based on a constitutional fundamental right".

As established by the Constitutional Court, the communication of the administrative decision about the question of balanced information and the subsequent court ruling reviewing the lawfulness of the former do not only not restrict but even serve the community members' right to be informed. Without the public disclosure of such decisions, there would be no possibility to follow the judicial practice of the Complaints Committee, the NRTB and the courts in charge of interpreting the requirement on balanced information, or to learn about the reasoning of the individual decisions. Taking into account the above, the Constitutional Court has rejected the petition seeking annulment of the second sentence in Section 51 para. (2) of the Media Act with respect to Article 61 of the Constitution.

VI

1. Under Section 22 para. (2) of the ACC, the petition shall contain the cause forming the ground of the request. It is not enough to refer to the relevant provisions in the Constitution, but the petitioner shall explain why and how the challenged statute violates the constitutional provisions. (Decision 472/B/2000 AB, ABH 2001, 1655) The Constitutional Court has dismissed the petition in the part seeking annulment of the whole of Section 50 in the Media Act as the petitioner has failed to present definite requests with regard to the specific paragraphs of the challenged provision.
2. The Constitutional Court has also refused the petition in the part seeking establishment of the unconstitutionality and annulment of Section 51 para. (4) of the Media Act without specifying exactly the relevant Article(s) of the Constitution.
3. In addition, the Constitutional Court has refused the petitioner's request to establish that Section 49 para. (6) of the Media Act "is deficient in respect of granting constitutional protection due to the lack of proper guarantees". In the absence of a definitive petition, the Constitutional Court – acting in accordance with Section 22 para. (1) of the ACC – has considered the above complaints to be elements not suitable for examination on the merits.
Under Section 29 item b) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof (ABH 2003, 2065, hereinafter: the Rules of Procedure), the Constitutional Court has – due to the lack of competence – refused the petition in the part challenging the practice of the NRTB in connection with Section 49 para. (6) of the Media Act.

4. Finally, pursuant to Section 29 item b) of the Rules of Procedure, the Constitutional Court has – due to the lack of competence – refused the petitioner's request to have the following declared by the Constitutional Court: "the political parties may in no way interfere with the operation of the media broadcasting public service programmes, and only citizens are entitled to make a complaint at the Complaints Committee for the purpose of protecting their lawful individual interests".

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

Budapest, 16 January 2007.

Dr. Mihály Bihari
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court, Rapporteur

Dr. Péter Paczolay
Judge of the Constitutional Court

Concurrent reasoning by *Dr. Péter Kovács*, Judge of the Constitutional Court

Although I agree with the holdings of the Decision, I think it important to point out that the procedure of "other complaints" as regulated in Section 48 para. (3) of the Media Act – to the extent of dealing with complaints on violating the principles of the Media Act (respect for the Constitution, non-violation of human rights, the prohibition of exclusion and incitement to hatred, respecting religious belief and conviction) is a restriction on the freedom of expression that can be substantially compatible with the international law coordinates within which Hungary is bound to guarantee the freedom of expression.

The above natural limitations regarding the freedom of expression are identical with the ones laid down in Article 19 of the International Covenant on Civil and Political Rights, promulgated in Hungary in Law Decree No 8 of 1976, and in Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms, promulgated in Hungary in Act XXXI of 1993, with special regard to their

interpretation by the Commission of Human Rights and – in the case of the latter – by the European Court of Human Rights, in respect of the restrictions and restraints applicable to the necessary extent in a democratic society for the purpose of protecting the public order, the public morals as well as the rights and the reputation of others. Both the Committee of Ministers of the Council of Europe and the European Commission against Racism and Intolerance (ECRI) have adopted several resolutions urging to take steps against incitement to hatred and establishing or expanding the set of domestic laws that could prevent – on the basis of the rule of law – the freedom of expression offering a haven for those who violate the most fundamental human rights. Among the recommendations by the Committee of Ministers, the most important one is Rec(97)20 adopted on 30 October 1997 on "hate speech", containing seven principles – harmonised with the judicial practice of the European Court of Human Rights as well – that list in details the steps to be made as absolutely necessary and potential measures to be implemented when needed, and the media is considered a field of primary importance. In addition, I hold that Recommendation (2004)16 on the right of reply in the new media environment, adopted on 15 December 2004, Recommendation (97)21 on the media and the promotion of a culture of tolerance, adopted on 30 October 1997, and Recommendation (97)19 on the portrayal of violence in the electronic media, adopted the same day are to be followed, with particular regard to point 2 in the former and items *ii.* and *iii.* of principle 3 in the latter. Similarly, in the case of the ECRI, Recommendation N° 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, and Recommendation N° 9 on the fight against anti-Semitism, adopted on 25 June 2004 contain regulations on the media, and on the conditions of providing subsidies by the State as well as on the withdrawal of such subsidies from those who fail to comply with these principles. The importance of the procedure applicable to "other complaints" is also supported by Sections 11, 23 and 24 of the ECRI's Second Report [CRI(2000)5] on Hungary, adopted on 18 June 1999, and acknowledged by the Government of Hungary (with those Sections not been debated by the Government – in contrast to some other Sections – as proven by the annex attached to the report).
Therefore, in my opinion, the annulment necessarily results in a legislative duty in this case.

Budapest, 16 January 2007.

Dr. Péter Kovács

Judge of the Constitutional Court

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