DECISION 6/1998 (III. 11.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a judicial initiative seeking a posterior examination of the unconstitutionality of a statute, the Constitutional Court has adopted the following

decision.

1. The Constitutional Court holds that Section 4 items a) and c) of Minister of Justice and Minister of Interior Joint Decree 4/1991 (III. 14.) IM-BM on the Issue of Copies of Documents made during a Criminal Procedure (hereinafter: the "Decree") and the second sentence of Section 114 para. (4) of Act I/1973 on the Code of Criminal Procedure (hereinafter: the CCP) in respect of the defendant, the defence counsel, the legal representative entitled to exercise the rights of a defence counsel, and the guardian ad hoc replacing the legal representative are unconstitutional, and therefore, annuls these provisions as of the 31st day of December 1998.

The Constitutional Court rejects the initiative in respect of Section 4 items b), d) and e) of the Decree.

2. The Constitutional Court establishes that Section 4 items a) and c) of the Decree may not be applied in respect of the defendants and the defence counsels in the case KB.III.002/1997 pending before the Military Council of the Metropolitan Court.

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

REASONING

I.

Acting in the case KB.III.002/1997, the Military Council of the Metropolitan Court, in addition to suspending the proceedings in course, initiated a procedure by the Constitutional Court on the basis of Section 38 para. (1) of Act XXXII/1989 on the Constitutional Court. In its ruling the Military Council of the Metropolitan Court requested establishment of the unconstitutionality of the provision laid down in Section 4 of Ministry of Justice and Ministry of Interior Joint Decree 4/1991 (III. 14.) IM-BM.

According to Section 1 para. (1) of the Decree, the authority where the criminal procedure is under way shall, on request by the defendant, the defence counsel, the legal representative, the injured party, the private prosecutor, the private party, any other affected person, the injured party who is a private party to the procedure, and the other affected person's representative, issue unauthentic or - if explicitly requested – authentic copies of the documents made during the criminal procedure, including the ones obtained by the authority in charge as well as those submitted by the persons involved. In comparison, Section 4 of the Decree makes the following exceptions: "It is not allowed to issue copies of (a) documents containing state secrets or official secrets, (b) the draft of a decision made by the authority in charge, (c) the minutes of a hearing or a part of a hearing which was closed to the public, (d) the minutes of a council meeting, (e) the written opinion of the judge representing a minority opinion."

In the petitioner's opinion, application of Section 4 of the Decree would violate the constitutional principle of the right to defence in a criminal procedure, and consequently, it would violate Article 2 para. (1) and Article 57 para. (3) of the Constitution and Section 6 paras (1) and (2) of the CCP. In this respect, the petitioner referred to the Report, dated 1 October 1997, of the Ombudsman for Civil Rights that had established constitutional concerns regarding the conflict between Section 4 of the Decree and the right to defence.

In the course of its procedure, the Constitutional Court established that the contents of the legal norms covered by the initiative were closely related to Section 114 para. (4) of the CCP. According to Section 114 para. (4) of the CCP, "Documents that contain a state secret or an official secret may only be served at the authority. The addressee may not take the document away; he must be given an extract that does not contain any classified information. A similar extract must be used when served by way of an announcement." For this reason, the Constitutional Court completed the constitutional review regarding Section 114 para. (4) of

the CCP as well.

II

1. The initiative claims that the whole of Section 4 of the Decree is unconstitutional by being against the right to defence. The Constitutional Court established that by its substance, the initiative was related exclusively to Section 4 items a) and c), as the right to defence was only affected by Section 4 items a) and c), providing that it is not allowed to issue copies of documents that contain state secrets or official secrets, and of the minutes of a hearing or a part of a hearing which was closed to the public. Items b), d) and e) are irrelevant in respect of the constitutional review initiated. Therefore, the Constitutional Court rejected the petition in respect of these points.

Likewise, the Constitutional Court established that among those entitled to request a copy of a document, the violation of the right to defence may only be examined in this procedure in respect of the defendant, the defence counsel, and the legal representative entitled to exercise the rights of a defence counsel in a criminal procedure against a juvenile delinquent. The right of the defence counsel to inspect the documents is governed by the respective rights of the defendant (Section 52 para. (3) and Section 44 para. (4) of the CCP), and the rights of the legal representative in a criminal procedure against a juvenile delinquent and of the guardian ad hoc replacing the legal representative follow the same rule (Sections 299 and 300 of the CCP). In respect of Section 114 paras (4) and (5) of the CCP, too, it is only the defendant, the defence counsel and the legal representative (guardian ad hoc) in a criminal procedure against a juvenile delinquent whose constitutional rights to defence might be violated.

Consequently, the Constitutional Court shall decide whether Section 4 items a) and c) of the Decree and Section 114 paras (4) and (5) of the CCP violate the rights to defence of the defendant, the defence counsel, and the legal representative (guardian ad hoc) in a criminal procedure against a juvenile delinquent.

2. First of all, the Constitutional Court points out that the right to defence provided by Article 57 para. (3) of the Constitution is embodied in the rights of the defendant and of the defence counsel. The defendant is entitled to defend himself and to use the services of a defence

counsel freely chosen by him (the costs of which shall in specific cases be covered by the state). A consideration from constitutional aspects of the right to defence may only be based on the joint perspective of the rights of the defendant and the defence counsel. This approach is in line with the practice of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "European Convention on Human Rights"). (Cf. X. v. Austria, Appl. No 6185/73, DR 2, 68; Ensslin and others v. FRG, Appl. Nos 7572/76, 7586/76, 7587/76, DR 14, 64)

On the other hand, the defence counsel is an independent person in the criminal procedure, and his rights are not delegated but independent procedural rights that serve the objective interest of the person subject to criminal proceedings. (Dec. 1320/B/1993 AB, ABH 1995, 683, 685.) The Constitutional Court has already pointed out that the attorneys' profession is embedded in the systems of administration of justice and procedural rules, emphasising at the same time the public law concerns related to regulating the attorney's profession (Dec. 22/1994 (IV. 16.) AB, ABH 1994, 127, 130). It results, among other things, from the above special and independent status of the right to defence that in a specific scope of affairs, defence is obligatory and the rights of the defence counsel may, in certain cases, exceed those of the defendant.

3. The Constitutional Court has already dealt with the right to defence, including the legality of its restriction, in military court procedures, furthermore, in the interest of protecting state secrets and official secrets in Dec. 25/1991 (V. 18.) AB, establishing the unconstitutionality of, and annulling some provisions of the then prevailing orders of the Ministry of Justice on both formal and substantial grounds (ABH 1991, 414). The statements of that Decision (hereinafter: the „Decision of the Constitutional Court") are applicable in this case, too.

In its Decision, the Constitutional Court went beyond the requirement of formally securing the right to defence by demanding the effective enforcement thereof and explicitly extending that right to the preparation of the defendant and the defence counsel for exercising their rights. Accordingly, the Constitutional Court stated that in respect of the charges, it was not enough to "secure access to the charges" but raised objections to the "significant encumbrance of preparing for the defence" despite the access secured. The Decision stated that in contrast to the mere right of inspection, physical "'possession' of the charges" is of fundamental

importance for the defendant and the defence counsel in order to allow them to get prepared for the hearing". (ABH 1991, 415, 416).

There were other cases, too, where the Constitutional Court acknowledged the importance of the effectiveness of the right to defence. Dec. 1320/B/1993 AB referred to above also established that it was constitutional to restrict the right of disposal of the defendant in order to allow the defence counsel to practise his/her rights necessary for performing the tasks of the defence.

The Constitutional Court examines the constitutionality of restricting the right to defence in the extended perspective of its effective operation. In this context, the Constitutional Court acknowledged in its Decision that in criminal procedures it may be necessary to appropriately protect state secrets and official secrets. The Constitutional Court also stated that in respect of the right to defence only unavoidably necessary and proportional restrictions not affecting the essential contents thereof may be considered constitutional. (ABH 1991, 418-419)

The requirements derived this way from Article 57 para. (3) of the Constitution fully comply with our international obligations related to the right to defence based *a priori* on this broad interpretation of the right to defence. Both the International Covenant on Civil and Political Rights [Article 14 para. (3) item b)] and the European Convention of Human Rights [Article 6 para. (3) item b)] have the same wording (in contrast to their official Hungarian translations) to describe among the “minimum” rights to be secured for any person accused with a crime to have “at least” “adequate time and facilities for the preparation of his defence”, and “to have adequate time and instruments for the preparation of his defence” (in the wording of the conventions: "to have adequate time and facilities for the preparation of his defence", and "a disposer du temps et des facilités nécessaires a la préparation de sa défense"). These instruments or facilities cover all “elements” that may serve the purpose of being exempted from criminal liability or the diminishing of punishment and that have been, or may be, collected by the authorities in charge. (Cf. Report of the Commission of 14 December 1981, Jespers Case, DR 27 (1982), p. 61, 72.)

4. Undoubtedly, these “instruments” and “elements” include the right to have access to the contents of the documents. This requirement follows not only from the practice of the

conventions referred to above, but in general, from the criminal procedure codes – such as the Hungarian Criminal Procedure Code – as well. For efficiency reasons, and taking into account the requirement of securing preparation for the defence, the Constitutional Court interpreted as early as in 1991 the right of having access to the documents as including their "possession" in addition to merely inspecting them.

This Decision of the Constitutional Court resulted in annulling the restriction of the right to have access to the documents. The Decision of the Constitutional Court annulled some specific restrictions of the right to defence in respect of exercising the right to have access to the documents, the charges, and the "possession" of the defence counsel's notes on the hearing of a "classified case". However, the principles that resulted in establishing the unconstitutionality of the above restrictions on the basis of the interpretation of the right to defence are relevant to the restrictions on making copies as provided by the Decree. For the sake of effective defence in respect of the charges and any document at the disposal of the prosecutor and the court, it is necessary – in order to secure preparation for the defence – to allow the defendant and the defence counsel to examine such documents according to the distinctions specified below not only at the court, by using the copies at the disposal of the authorities, but by receiving and being free to take away a copy thereof to be used exclusively by them.

5. The statement of the Constitutional Court establishing that the "possession" of the data necessary for the defence includes the making of copies and taking them away, i.e. using them out of court, is based not only on the interpretation of the right to defence (Article 57 para. (3) of the Constitution) as detailed above, but on the right to a fair trial as well (Article 57 para. (1) of the Constitution).

According to Article 57 para. (1) of the Constitution, everyone has the right to have the accusations brought against them, as well as their rights and duties in legal proceedings judged in a just and public trial by an independent and impartial court established by law. The requirement of a "fair trial" is not simply one of the requirements set out here for the court and the procedure (e.g. as a "just trial"), but, in addition to the requirements specified in the Constitution as referred to above, particularly in respect of criminal law and criminal procedure, it encompasses the fulfilment of the other guarantees of Article 57. Moreover,

according to the generally accepted interpretation of the articles of the Covenant and the European Convention on Human Rights that contain procedural guarantees, forming the basis of the content and structure of Article 57 of the Constitution, “fair trial” is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, a procedure may be “inequitable”, “unjust” or “unfair” even despite lacking certain details or complying with all the detailed rules. Certainly, evaluating the fairness of a procedure by the international committees or courts that judge the particular case is different from the possibilities of the Hungarian Constitutional Court making an abstract review. In our case it is only possible to establish the general criteria of fair trial.

Although not specified in the texts of conventions and constitutions, the principle of “equal arms” securing in a criminal procedure equal chances and potentials for the prosecution and the defence to form and express their opinions on factual and legal questions is a generally accepted and uncontested element of fair trial. The principle of equal arms does not entail in each case the rights of the prosecution and the defence to be completely the same; however, it requires that the rights of the defence should be of comparable weight in relation to those of the prosecution. One of the conditions of equal arms (elaborated in the most detailed form in the case law of international organisations as well) is the personal presence of all the parties during the acts of the proceedings, and upholding the neutral position of certain actors in the procedure (e.g. experts). Another precondition is securing equal chances for the prosecution, the defendant and the defence counsel to have access to the relevant data of the case in the same completeness and depth. This is where the principle of fair trial is linked to the requirements of the effectiveness of the right to defence and the need to allow adequate time and facilities for the preparation of the defence. In the previous point, the Constitutional Court referred to the interpretation of the European Commission of Human Rights on the broad scale of instruments that serve the right to defence. The Constitutional Court also established that full access to and possession – subject to due security measures – of the data and documents of the proceedings is one of the rights that need to be secured “by all means”. However, access to the documents; free “possession” of the notes made therefrom; and free “possession" of the documents during the hearing or at other times, but only in the building of the court, do not satisfy the requirement of the right to defence if at the same time the principle of equal arms is not enforced. The position of the prosecution and the defence cannot be considered equal if the prosecutor is free to possess and use the documents that contain state secrets during the proceedings even outside the court building (see Section 114

para. (5) of the CCP), while the defendant and the defence counsel are restricted to do so.

The Constitutional Court notes that according to the practice of the conventions referred to above, the limit of the right to inspect the documents has been set by allowing it to include free possession of the documents. It was only in respect of ex officio service that both the Commission of Human Rights in the case of the Covenant and the European Court of Human Rights in the case of the European Convention of Human Rights rejected the requests that claimed ex officio service for the defence of the documents used by the prosecution in addition to the charges (O.F. vs. Norway, B 158/1983, § 5.5, and Kremzow case, 21 September 1993, Séries A 268-B), therefore the issue of documents if so requested has remained within the scope protected by the conventions.

Consequently, it follows from the principle of equal arms that restricting the rights of the defendant and the defence counsel to freely possess and use copies of the documents is unconstitutional subject to the distinctions detailed below if the prosecution is free to possess and use the same documents. (Certainly, the requirements related to the protection of secrets are equally applicable to both parties.)

6. a) The right to defence, and in particular the right to inspect the documents, to possess them, and in general, the right to have adequate "time and facilities" as becoming necessary to prepare for the defence may all be restricted. State security interests, and in particular the protection of state secrets may be a traditional and internationally accepted cause to restrict this right – to the extent necessary in a democratic society. It is stated in the Decision as well that in criminal procedures it may become necessary to appropriately protect state secrets and official secrets. (ABH 1991, 417.) Nevertheless, a constitutionally "adequate" balance between the right to defence and the protection of state secrets may be established only in a highly differentiated way. Distinction may be made, for example, on the basis of whether it should be allowed by any means to have access to the state secret, or some parts of the secret may be withheld from the defence; the way of access to the information is another factor of differentiation: having been informed by the authority, inspecting the document personally, possessing the document in the course of the hearing, or a wider scope of access in the premises of the court, the possibility of making notes and taking them away; having a photocopy exclusively for personal use without the right to take it away from the court; and

finally, free possession and use of the complete document or its copy. The “adequacy” of protecting secrets may be differentiated on the basis of the persons exercising the right to defence: in some aspects, the defence counsel may have more rights than the defendant etc.

The Decision of the Constitutional Court annulled the discretionary power of the council president to decide which documents may be inspected by the defendant and the defence counsel after the investigation is completed. Since then, there has been no legal norm restricting access to state secrets involved in a criminal matter, and thus the right to inspect the documents as provided by the CCP has been effectively enforced. Therefore, the Decree reviewed at present and the rules in the CCP on service do not restrict access to state secrets involved in a criminal matter but, within the scope of free access, they provide for the physical protection of documents containing state secrets – and it may be reasonably supposed that these rules relate only to persons other than the defendant and the defence counsel. As the right of access empowers the defendant and the defence counsel to “obtain” state secrets and “use” them for defence purposes, the above restrictions are clearly aimed at preventing “access” to state secrets “by unauthorised persons”. Preventing the defendant or the defence counsel from disclosing a state secret to an unauthorised person could be effectively achieved by restricting or banning inspection rather than by prohibiting these persons to take the document away from the court. Nevertheless, it is clear that the right to defence may not be constitutionally restricted on the basis of such an assumption. The question is whether it is constitutional to restrict the right to defence and to fair trial with reference to protecting state secrets from access by third parties by legally prohibiting for them to possess outside the official premises documents that contain state secrets and to make copies thereof.

Although the Decision of the Constitutional Court annulled the orders by which in “secret cases”, the defendant and the defence counsel were allowed to examine the charges containing state secrets only in the court building without the right to take the relevant document away, together with the orders by which classified data were to be omitted from the decisions, Section 114 paras (4) and (5) of the CCP introduced in 1994 re-enacted these unconstitutional provisions, reasoning that "it is not allowed to take away from the authority a document that contains a state or official secret, as the adequate protection of the secret can only be secured there. The addressee may examine such documents at the authority and obtains an extract thereof without the classified information, therefore the rules in question do

not restrict his fundamental rights."

The amendment to the CCP took account of the Decision of the Constitutional Court concerning the formal unconstitutionality of the annulled orders only, and enacted provisions of similar content. However, the Decision of the Constitutional Court not only established, in the case of each rule reviewed, substantive unconstitutionality by violating the right to defence, but contained a warning in respect future legislation on the protection of secrets, i.e. that the right to defence may be only restricted in a constitutional way to the extent absolutely necessary, subject to the requirement of proportionality (ABH 1991, 418). Therefore, from the viewpoint of constitutionality, the question is whether it is a necessary and proportional restriction of the right to defence that allows adequate preparation for effective defence to prohibit the defendant and/or the defence counsel from obtaining a copy of the documents that contain state secrets and to ban the taking away of such documents from the premises of the authority in charge of the criminal procedure in order to prevent access to the documents by unauthorised persons.

b) Fundamental rights may only be restricted beyond the limits of the essential content of such rights: according to Article 8 para. (2) of the Constitution, the essential content of a fundamental right shall not be limited even by law. Under the established practice of the Constitutional Court, any limitation violates the essential content of a fundamental right if it is not unavoidably necessary for the exercise of another fundamental right or for another constitutional purpose, or if it is necessary, but the *injuria* caused is disproportionate in relation to the desired goal.

However, in addition to the above constitutional standard applicable as the general rule, the Constitution itself contains further criteria in respect of certain fundamental rights, which, on the one hand, make the general standard more concrete in line with the substance of the fundamental right in question, and, on the other hand, by being concrete, define the essential content of the particular fundamental right on the basis of more stable and inherent features instead of the relative approach of the general rule. The latter general standard applicable to every fundamental right is necessarily an abstract methodological rule that prescribes relativity to the particular limitations; therefore, the latter is the concrete element here, and the protected content of the individual fundamental rights is different case by case. In contrast, the individual standards used for the individual fundamental rights actually link the essential

content to the features of the endangered fundamental right, and therefore, they do not necessarily evaluate the cause and the weight of the restriction; the same limits are applied to any restriction. In certain cases, this method sets absolute limits to restrictions, while in other cases it allows the constitutionality of restriction to be decided on the basis of specific features, even by allowing consideration of necessity/proportionality only within the scope of concrete and narrower requirements as defined in the Constitution. Thus, the essential content of such fundamental rights may be defined more clearly and constantly than that of the rights to which the general rule applies.

For example, the Constitution contains such a specific standard in respect of the right to life and human dignity [where the Constitutional Court interpreted the prohibition of an "arbitrary" deprivation of life as an absolute prohibition: depriving someone of life and human dignity is an arbitrary notion as the full scope of these rights is considered to represent essential content (ABH 1990, 92, 106)]; the Constitutional Court applies a similar substantial – not relative – standard in respect of the rule of law and the state goals, with particular regard to market economy, social rights and environmental protection. However, such strict limitations of restriction are most often provided by the Constitution itself in respect of the guarantees related to criminal law. Accordingly, the Constitutional Court established, for example, the absolute nature of the presumption of innocence, the principle of nullum crimen sine lege, and in particular the prohibition of retroactive criminal legislation. "In most cases, the basic institutions of constitutional criminal law cannot be relativised even theoretically, nor is it possible to balance them against some other constitutional right or duty. This is so because the guarantees of criminal law already contain the result of a balancing act." (11/1991. (III. 5.) AB, ABH 1992, 77, 83). (The Constitutional Court applies the test of necessity/proportionality in assessing the constitutionality of the specific statutory definitions of criminal offences, where it is to be decided whether it is necessary and proportionate to apply a punishment in order to protect another right; here it is the weight of the other right – e.g. the freedom of expression – which determines the result of the assessment.)

The guarantees specified in Article 57 para. (1), i. e. that everyone has the right to have the accusations brought against them, as well as their rights and duties in legal proceedings judged in a just and public trial by an independent and impartial court established by the law, contain many concrete conditions concerning the "right to the court", which are not absolute

in the same sense as, for example, the presumption of innocence, but which are still absolute limitations of assessment according to the general rule. There is no necessity that would justify even a proportionate limitation of the “fair” nature of a trial; it is within the notion of fair trial that a set of characteristics is to be established in order to define its content, and the necessity/proportionality of certain limitations must be assessed within such scope. (In a similar way, there is a specific dogmatic definition of the terms "court", as well as "legal”, "independent” and “impartial” boards in charge etc.)

c) As in the present decision, the Constitutional Court examines the right to defence in relation to the right to fair trial, it assesses the interest related to the protection of documents containing state secrets from access by unauthorised persons in respect of the substantial features of these two rights as explained in Points 4 and 5 above, and therefore, it gives a more concrete form to the requirement concerning future limitations as provided in the Decision of the Constitutional Court.

The right to effective defence allowing adequate preparation for the defence, in correlation with the requirement of fair trial as manifested in the principle of equal arms as well, requires that the defendant and his defence counsel receive and may freely possess, with their full original text, the charges and all the documents that must be served under the CCP, even if they contain state secrets or official secrets. Therefore, the second sentence of Section 114 para. (4) of the CCP is unconstitutional in respect of such persons. As explained in the Decision of the Constitutional Court, these documents are, namely, of such a fundamental importance for the defence as well as for preparing it, and their unlimited possession and use by the prosecution alone would violate the principle of equal arms to such an extent that the protection from third persons of documents containing state secrets cannot be invoked as a proportionate limitation.

The crime of violation of state secrets and the offence of its negligent form, together with the offence of violation of official secrets (Sections 221 and 222 of the Criminal Code) as well as the minor offence of violation of secret protection serve the purpose of protecting state secrets. Certainly, the defendant and the defence counsel who possess a document containing a state secret do exercise their rights of possession under their criminal liability. However, the risk of negligent violation of a state secret may be so serious for an entitled person – first of

all, the defendant – not necessarily able to secure adequate physical protection of the document that it is necessary to offer a chance for the defendant or the defence counsel to examine the document in the protected premises of the authority in order to prevent such a negligent act. However, in such cases, it is a constitutional requirement to issue a copy for exclusive use and to secure full-time access thereto in the official hours of the institution.

Nevertheless, the right to defence and the principle of equal arms are applicable to the possession and free use of all documents available in such a manner for the prosecution as well. In the interest of protecting state secrets, the law may, however, provide preconditions for taking away from the court building documents other than the charges and the other documents to be officially served. As such conditions relate to the physical protection of documents, the relevant limitations must be proportionate primarily thereto: for example, it is not unconstitutional to require a representation from the future possessor of such documents stating that he can secure the physical protection of secrets. Taking into account the opinion delivered by the Constitutional Court regarding the status of attorneys and their position in the system of administration of justice, and the requirement that in respect of the right to defence and the principle of equal arms, the rights of the defendant and the defence counsel must be assessed together, it is possible to consider a solution allowing the defence counsel easier access to such documents or to the copies thereof as compared to the conditions of access by the defendant, who may be subject to sterner examination regarding his ability to secure the physical protection of secrets. However, when applying such rules, it would be a constitutional requirement to prescribe obligatory defence by a defence counsel even if not provided so by the CCP.

7. The Decree is unconstitutional on formal grounds as well. According to its interpretation by the Constitutional Court, Article 8 para. (2) of the Constitution provides that fundamental rights may be restricted directly and to a significant extent by a statutory norm only (64/1991 (XII. 17.) AB, ABH 1991, 300). Prohibiting the issue of document copies according to items a) and c) of the Decree restricts directly and to a significant extent the right to defence in respect of the defendant, the defence counsel and the legal representative entitled to exercise the rights of a defence counsel. For this reason, regulation on the level of a decree violates Article 8 para. (2) of the Constitution.

Budapest, 9 March 1998.

Dr. László Sólyom
President of the Constitutional Court
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