DECISION 11 OF 1992: 5 MARCH 1992

ON THE RETROACTIVE PROSECUTION

OF SERIOUS CRIMINAL OFFENCES

The President of the Republic, having declined to promulgate Act IV of 1991 on the Right to Prosecute Serious Criminal Offences not previously prosecuted for Political Reasons, petitioned for a review of its constitutionality.

He sought to know whether s.1 of the Act violated the principle of the state under the rule of law ("constitutional state") under the Constitution, Arts. 2(1) and 57(4). In particular, he petitioned, *inter alia*, as to whether (a) the recommencement of the limitation period conflicted with the principle of the constitutional state, an essential component of which was legal certainty; (b) s.1 of the Act amounted to an unconstitutional retroactive criminal law which violated the doctrine of *nullem crimen sine lege* especially since the limitation period for acts criminalised by the section might have already expired according to the Criminal Code in force at the time the acts were committed; (c) the recommencement of the limitation period, which had already expired, violated legal certainty; (d) moreover overly general provisions and vague concepts violated the principle of legal certainty, *e.g.* "the State's failure to prosecute its claim was based on political reasons"; and (e) the distinction drawn by the law among perpetrators of the same offence on the basis of the State's reason for prosecuting such offences violated the prohibition of arbitrariness under Art. 54(1) and equal protection of citizens under Art. 70/A(1).

Held, granting the petition:

(1) The ambiguity and vagueness of the Act offended the principle of legal certainty and was accordingly unconstitutional. Since the change of system had proceeded on the principle of legality as imposed by the constitutional state, the old law had thereby retained its validity and thus, irrespective of the date of enactment, every law had to comply with the present Constitution. It was possible, however, to give special treatment to the previous law where legal relationships created by the old (now unconstitutional) law could be harmonised with the new Constitution; or where, in judging the constitutionality of new laws intended to replace old, unconstitutional ones, whether the unique historical circumstances surrounding the change of system should be taken into consideration. Such matters were to be resolved in conformity with the fundamental rule of law, a principle of which was legal certainty that required, *inter alia*, the protection of rights previously conferred, the non-interference with the creation or termination of legal relations, and the limitation of the ability to modify existing legal relations to constitutionally-mandated provisions. As a consequence of legal certainty, established legal relations could not be altered constitutionally either by enactment or by invalidation of existing law. Retroactive modification of the law and legal relations were permitted within very narrow limits. Exceptions to legal certainty were permissible only if the constitutional principle competing against it rendered this outcome unavoidable provided that in fulfilling its objectives it did not impose a disproportionate harm. Accordingly, reference to historical situations and the constitutional state's requirement of justice could not be used to set aside legal certainty as a basic guarantee of the rule of law (page 00, line 00 - page 00, line 00).

(2) As a result, the Act on the recommencement of the limitation period overstepped the limits of the State's criminal power. These were guaranteed rights the restriction of which Art. 8(4) did not permit even if other fundamental rights could constitutionally be suspended or restricted. The constitutional guarantees of criminal law could neither be relativized nor be balanced against some other constitutional right or duty since they already contained the result of a balancing act, *i.e.* the risk of unsuccessful prosecution was borne by the State. The presumption of innocence could not therefore be restricted or denied full effect because of another constitutional right: as a result of the State's inaction, once the time limit for prosecution expired the non-indictability thereby acquired was complete. Considerations of historical circumstances and justice could not therefore be used to gain exemption from the guarantees of criminal law since any such exemption would completely disregard those guarantees, a result precluded by the rule of law (page 00, line 00 - page 00, line 00).

(3) The Act was also contrary to the principle of the legality of criminal law. Article 8(1) and (2) required offences and their punishment be regulated only by statute and that the declaration of criminality of an act and imposition of punishment had to be necessary, proportional and as a last resort. Conviction could only be made by a court of law establishing the defendant's guilt (Art. 57(2)) and such conviction and resultant punishment could only proceed according to the law in force at the time of commission of the crime (Art. 57(4)). The court was therefore required to judge the offence and punishment in accordance with the law in force when the crime was committed unless a new law was passed subsequent to the offence which prescribed a more lenient punishment or decriminalised the act. This was the necessary result of the prohibition on retroactivity embodied in the principle of legal certainty

(foreseeability and predictability) which, in turn, stemmed from the rule of law (page 00, line 00 - page 00, line 00).

(4) The reimposition of criminal punishability for a crime the limitation period for the prosecution of which had already expired was contrary to Arts. 2(1) and 57(4). With the expiry, the criminal responsibility of the offender was irrevocably extinguished and he acquired the legal right not to be punished since the State was unable to punish him during the period prescribed for the exercise of its punitive powers. It did not matter which method was used to reimpose criminal punishability (whether the limitation period recommenced or *ex post facto* legislation was imposed to toll the statute) since their constitutionality had to be viewed in the same way as a law retroactively imposing punishment on conduct which, at the time of its commission, did not constitute a criminal offence (page 00, line 00 - page 00, line 00).

(5) The statutory extension of a limitation period which had not yet expired was also unconstitutional. According to law, the prosecuting authorities could suspend and recommence its running with regard to the offender without informing him with the result that the duration of the suspension extended the limitation period: this latter would then represent the minimum rather than the actual time required for termination of the offender's responsibility. Although the limitation period did not guarantee that punishability would be extinguished within the initially prescribed time frame, it did ensure the methods of calculating the time expired did not change in a manner detrimental to the offender: the State's punitive powers therefore had to be the same at the time of punishment as at the time of the offence. Consequently the extension of the as yet unexpired limitation period was unconstitutional since it would always impose a more onerous

burden on the offender. Moreover determination of whether or not the period had expired could not be decided retroactively by the legislature: no law could therefore retroactively declare that the period was "tolled" for reasons which the law in force at the time of the offence and during the running of the limitation period did not acknowledge as applicable to that criminal offence. The legal facts determining the commencement and duration of the limitation period had to exist during the running of the period and what did not constitute a legal fact warranting the tolling of the period could not be declared so retroactively (page 00, line 00 - page 00, line 00).

(6) The incorporation of the condition "if the State's failure to prosecute its claim to punish was based on political reasons" into the Act was unconstitutional. Legal certainty required the predictability of the behaviour of other legal subjects as well as of the authorities themselves and the condition failed to satisfy this requirement since it did not allow for a meaning which could be determined with sufficient certainty. Further the differentiation contained in the law allowed the recommencing of the limitation period only for three of many non-prosecuted crimes and then only for non-prosecution of those three crimes based on political reasons: such differences could only be justified if Parliament sought to apply positive discrimination in favour of those offenders whose actions, while not covered, could have fallen within the scope of the Act. As the Act revealed no reason which could satisfy the constitutional requirement for positive discrimination, it was accordingly contrary to Art. 70/A(1) (page 00, line 00 - page 00, line 00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

Pursuant to the petition submitted by the President of the Republic seeking a constitutional review of the Act passed by Parliament but not yet promulgated, the Constitutional Court has made the following

DECISION.

The Constitutional Court holds that the Act passed during the 4 November 1991 parliamentary session concerning the Right to Prosecute Serious Criminal Offences Committed between 21 December 1944 and 2 May 1990 that had not been Prosecuted for Political Reasons (hereinafter the "Act") is unconstitutional.

The Act violates the rule of law by reason of vagueness and uncertainty in definition.

The Act violates the requirement of constitutional criminal law that the limitation period - including the interruption and tolling of the limitation period - must be governed by the law in effect at the time of the commission of the offence except that if, during the running of the limitation period, laws more favourable to the defendant are introduced.

Concerning the question of the constitutionality of the specific provisions of the Act, the Constitutional Court's opinion is the following:

1. Reimposition of criminal punishability for offences whose limitation periods had expired is unconstitutional.

2. Extension of the limitation period for criminal offences whose limitation period has not yet expired is unconstitutional.

3. Enactment of a law to recommence the running of the limitation periods for criminal offences whose limitation period has not yet expired is unconstitutional.

4. Tolling of the limitation period by a retroactive law is unconstitutional.

5. With respect to the running of the limitation period, there is no constitutional basis for differentiating between the State's failure to prosecute for political or for other reasons.

6. The vagueness of the statutory definition stating that the "State's failure to prosecute for criminal offences was based on political reasons" is repugnant to the principle of legal certainty, and as a result, the tolling of the limitation period on such a basis is unconstitutional.

7. It is unconstitutional for the Act to incorporate the crime of treason within its scope without consideration of the fact that the legally-protected subject matter has undergone numerous changes under different political systems.

8. Restrictions upon the right of clemency by way of permitting a partial or total mitigation of the lawfully prescribed punishment is unconstitutional.

This Decision of the Constitutional Court is hereby published in the *Hungarian Official Gazette*.

REASONING

I

1. The Act adopted at the 4 November 1991 session provides as follows:

> *Section 1*.(1) On 2 May 1990, the limitation period shall recommence for the prosecution for criminal offences committed between 21 December 1944 and 2 May 1990 which constituted criminal offences under the law in force at the time of the commission of the said offences and are otherwise defined in Act IV of 1978 as treason (s. 144(2)), voluntary manslaughter (s. 166(1) and (2)), and infliction of bodily harm resulting in death (s. 170(5)), provided that the State's failure to prosecute the said offences was based on political reasons.
> (2) The punishment prescribed under paragraph (1) can be mitigated without any restriction.

Section 2. This Act shall have effect on the day of its promulgation.

2. The President of the Republic did not promulgate the Act and on 16 November 1991 petitioned for the review of its constitutionality. The petition set forth the following:

> The substance of the (constitutional) concern is whether s. 1 of the Act violates the principle of the constitutional state contained in Art. 2(1) of the Constitution and whether it is in violation of Art. 57(4) of the Constitution.
>
> Specifically:
>
> Is not the provision to recommence the period of limitation in conflict with the fundamental constitutional principle stated in Art. 2(1) of the Constitution, according to which the Hungarian Republic is a constitutional state? Legal certainty is an indispensable component of the rule of law, without which there can be no constitutional state.
>
> Does not the language of s. 1 constitute an unconstitutional enactment of a retroactive criminal law and does it not violate the historically developed legal doctrine of "*nullum crimen sine lege*," which is internationally recognized as protecting a human right, especially in light of the fact that the limitation period for acts made criminal by s. 1 may have already expired according to the Criminal Code which was in force at the time of their commission?
>
> Does the "recommencement" of the limitation period, which had fully run its course, violate the principles of the constitutional state? Does not the aforenoted provision contradict the requirement of the constitutional state according to which the running of the limitation period promises immunity from prosecution to everyone, and does not the revocation of that promise offend the basic constitutional principle that every citizen can have faith in the trustworthiness of the law and the State?
>
> Is the constitutional principle of legal certainty violated by the overly general provisions and vague concepts contained in the Act such as, *inter alia*, that "the State's failure to prosecute its claim was based on political reasons"; that the Act refers to treason and grievous bodily harm without providing for their basic definition; further, that it declares the possibility of unrestricted mitigation of punishment for "every case"? Finally, can the tolling of the limitation period be constitutionally applied to the Criminal Code by way of analogy in view of the fact that the Code's substantive provisions do not permit the use of the doctrine of analogy?
>
> Does not the Act make an arbitrary and unreasonable distinction among perpetrators of the same criminal offence on the basis of the State's reason for the prosecution for such offences? Does not this provision violate the prohibition of arbitrariness contained in Art.

54(1) of the Constitution, and the rule of the equal protection of citizens contained in Art. 70/A(1)?

II

The Constitutional Court holds that the provisions of the Act are not ambiguous.

1. The vagueness of the statutory text allows the following conclusions:

- that the limitation period shall recommence for crimes the limitation periods of which have already expired;

- that, as of 2 May 1990, the limitation periods for crimes whose time limits have not yet expired are uniformly extended - irrespective of the time which has already elapsed; and

- that with respect to some criminal offences, the limitation period has been tolled and their running is to continue on the basis of the Act.

2. The Act defines the criminal offences falling within its scope pursuant to Act IV of 1978, thus ignoring the fact that the legal definition of these offences has changed on a number of occasions and in a variety of ways not only between 1944 and 1978 but also since 1978.

The overall ambiguity and vagueness of the Act offends the principle of legal certainty and hence is unconstitutional.

III

The Act under review illustrates with unusual sharpness the relationship between the law of the preceding political systems and the new Constitution based on the principles of the

constitutional state. For this reason, a separate summary of the Constitutional Court's viewpoint on this matter is warranted.

1. The enactment of the constitutional amendment of 23 October 1989, in effect, gave rise to a new Constitution which, with its declaration that "the Hungarian Republic is an independent and democratic state under the rule of law," conferred on the State, its law and the political system a new quality, fundamentally different from that of the previous regime. In the context of constitutional law, this is the substance of the political category of the change of system. Accordingly, an evaluation of the state actions necessitated by the change of system cannot be understood separately from the requirements of the constitutional state, as crystallized by the history of constitutional democracies and also posited by the 1989 Hungarian constitutional revision. The Constitution provides for the basic institutions for the organization of the constitutional state and their most important operative laws and delineates human and civil rights together with their basic guarantees.

That Hungary is a constitutional state is both a statement of fact and a statement of policy. The constitutional state becomes a reality when the Constitution is truly and unconditionally given effect. For the legal system the change of system means, and a change of legal systems can be possible only in that sense, that the Constitution of the constitutional state must be brought into harmony - and so maintained, given new legislative activity - with the whole system of laws. Not only the regulations and the operation of the state organs must comply strictly with the Constitution but the Constitution's values and its "conceptual culture" must imbue the whole of society. This is the rule of law and this is how the Constitution becomes a reality. The realization of the constitutional state is a continuous process. For the organs of the State, participation in this process is a constitutional duty.

2. The Constitution created the Constitutional Court in order to review the constitutionality of laws and to invalidate unconstitutional laws. The Constitutional Court was the first new organ of the constitutional state to commence operation. Already in its first Decision (*Dec. 1 of 1990 (II.12) AB* (MK 1990/12) - concerning the effect of the 26 November 1989 referendum on the possibility of constitutional amendment) and with respect to other matters of political significance prior to the [???? missing] Republic and matters pertaining to voting rights), the Constitutional Court made it clear that political endeavours of any kind must be realized within the constitutional framework and that everyday political considerations are precluded from the adjudication of the constitutionality of the laws. From the beginning, the Constitutional Court has not differentiated in its constitutional review between pre- and post-constitutionally enacted laws. [alternatively: between laws enacted before or after the constitutional amendments.]

3. The change of system proceeded on the basis of legality. The principle of legality imposes on the constitutional state the requirement that the regulations governing the legal system be given full effect. The politically revolutionary changes adopted by the Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the old legal system's regulations of the power to legislate, thereby gaining their binding force. The old law retained its validity. With respect to its validity, there is no distinction between "pre-Constitution" and "post-Constitution" law. The legitimacy of the different (political) systems during the past half century is irrelevant from this perspective; that is, from the viewpoint of the constitutionality of laws, it does not comprise a meaningful category. Irrespective of its date of enactment, each and every valid law must conform with the new Constitution. Likewise, constitutional review does not admit two different standards for the review of laws. The date of

enactment can be important insofar as previous laws may have become unconstitutional when the renewed Constitution entered into force.

Special treatment accorded to the law of the preceding systems - even when legality and legal continuity are recognized - can arise in two contexts. The first question is: what could be done with the legal relationships created by the old and now proven unconstitutional, laws - could they be harmonized with the Constitution? The second question is whether in judging the constitutionality of new laws that are intended to replace the unconstitutional provisions of the previous systems, one should consider the unique historical circumstances constituting the change of systems. These questions, too, must be answered in a manner which conforms with the requirements of the constitutional state.

4. A fundamental principle of the constitutional state is the certainty and predictability of the law. Legal certainty demands, among other things, the protection of rights previously conferred, non-interference with the creation or termination of legal relations and limiting the ability to modify existing legal relations to constitutionally-mandated provisions. As the Constitutional Court held in *Dec. 10 of 1992 (II.25) AB* (MK 1992/19), the consequences of the unconstitutionality of a law must be evaluated primarily with reference to the impact on the certainty of the law. This is the guiding principle for determining the date of invalidation for an unconstitutional law, and especially for the invalidation of the legal relations arising therefrom. This is so, because the individual legal relations and legal facts become independent of the statutory sources from which they emerge and do not automatically share their fate. Were this otherwise, a change in the law would necessitate in every instance a review of the whole body of legal relations. Thus, from the principle of legal certainty, it follows that established legal

relations cannot be constitutionally altered either by enactments or by invalidation of existing law, neither by the legislature nor by the Constitutional Court.

An exception to this principle is permissible only if a constitutional principle competing with legal certainty renders this outcome unavoidable, and provided that in light of its objectives it does not impose a disproportionate harm. The acquittal of a defendant based on the review of lawfully completed crimimal proceedings, subsequently struck down as unconstitutional, is an example of such an exception. A constitutional criminal justice system demands this exception. However, the unjust outcome of legal relations does not constitute an argument against the principle of legal certainty. As the Constitutional Court's Decision (*Dec. 9 of 1992 (I.30) AB* (MK 1992/11)) stated, in part, "the demand of the constitutional state for social justice may be effected subject to remaining within the institutional safeguards for legal certainty;" and further, "the attainment of social justice ... is not guaranteed by the Constitution...."

As far as the protection afforded to established legal relations is concerned, no distinction can be made according to the timing and reasons for striking down a law as unconstitutional. With respect to every legal relation, the legislature is constrained by the restrictions imposed on retroactive legislation; the Constitutional Court is even further constrained as it cannot even establish the unconstitutionality of the substance of the norms which existed before the Constitution took effect.

Retroactive modification of the law and legal relations is permitted only within very narrow confines. The problems created by declaring existing laws unconstitutional can be constitutionally rectified by the enactment of new, prospective laws.

5. One question is the extent to which the unique historical circumstances of the change of systems should be considered in reviewing the constitutionality of new laws pertaining to the unconstitutional regulations of the now-defunct (political) systems.

Within the framework of the constitutional state, and in order to further its development, the given historical situation can be taken into consideration. However, the basic guarantees of the constitutional state cannot be set aside by reference to historical situations and the requirement for justice of the constitutional state. A state under the rule of law cannot be created by undermining the rule of law. Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice. In its precedent decisions, the Constitutional Court has already given effect to this principle.

The Constitutional Court cannot ignore history since it, too, has a historical purpose. The Constitutional Court is the repository of the paradox of the "revolution of the rule of law": in the process of achieving the rule of law, beginning with the Constitution and manifesting itself in the peaceful change of system, the Constitutional Court, within its powers, must unconditionally guarantee the conformity of the legislative power with the Constitution.

In its deliberations, the Constitutional Court has always considered the material historical circumstances of specific cases. It is aware that its decisions are historically constrained [by history]: even in those cases where the Constitutional Court declares absolute values, their meaning is construed by the era which is being addressed. In the abortion case (*Dec. 64 of 1991 (XII.17) AB* (MK 1991/139)), the Constitutional Court's Decision that the legislature must expressly decide the legal status of the fetus was based on the recognition that the historical expansion of the legal status of human beings and the traditional conceptualization of the fetus were changing in two diametrically opposite directions. Several decisions concerning the

constitutionality of laws interfering with the freedom of contract or property, review the regulations on the basis of whether, in light of the existing situation, the development of the market economy (as a constitutional objective) is necessary. The constitutional review of nationalization and restitution laws was expressly related to the "change of property systems." However, the Constitutional Court never regarded these situations as comprising exceptions to the Constitution, that is, the suspension of the constitutional requirements was never contemplated. The question asked by the Constitutional Court was, "How could the unique and specific historical requirements of the change of systems be effected on the basis of legal continuity in a manner which conforms with constitutional requirements" (*Dec. 28 of 1991 (VI.3) AB* (MK 1991/59)).

In contrast to the restitution law, in the present case the legislature has less constitutional discretion for manoeuvre. Regulating property relations is prospective. The restitution law confers rights, and where it restricts rights, it is linked to the acquisition of future rights.

The possibility of the reimposition of state duties is also prospective, though this is not necessarily and unconditionally constitutional; not even in extraordinary circumstances can the State arbitrarily modify the basis, conditions or scope of its duties.

In contrast, the law providing for the recommencement of the limitation period oversteps the limits of the State's criminal powers; these are guaranteed rights, which restriction Art. 8(4) of the Constitution does not permit, even when other basic rights can be constitutionally suspended or restricted. In contrast to the restriction on property rights, the basic institutions of constitutional criminal law cannot even be theoretically relativized, nor is it possible to balance them against some other constitutional right or duty. This is so because the guarantees of the criminal law already contain the result of a balancing act, namely that the risk of unsuccessful criminal

prosecution is borne by the State (*cf. Dec. 9 of 1992 (I.30) AB*: MK 1992/11). Hence, the presumption of innocence cannot be restricted on account of some other constitutional right, nor is it conceptually possible not to give it full effect; pursuant to the State's inaction, once the limitation periods runs out, the non-indictability acquired at the moment the limitation period expires is complete, amenable neither to subsequent "reduction" nor resuscitation; nor can the condition of "*nullum crimen sine lege*" be substituted by, for instance, the pursuit of some other constitutional goals seeking the protection of the rights of others. Simply put, historical situations, justice *etc.* are of no consideration in this matter. Exemptions from the guarantees of the criminal law are only possible with their overt disregard, an outcome precluded by the principle of the rule of law.

IV

The Constitutional Court's review of the statute was predicated on the declaration that "the Republic of Hungary is an independent, democratic state under the rule of law" (Art. 2(1) of the Constitution). The Constitutional Court's precedents have consistently reaffirmed the basic principle that the Republic of Hungary is a constitutional state and that the legal system's adherence to the constitutional norms, including the norms relating to the legal system, is the basic criterion of the rule of law. From the constitutionality of the legal system, it follows that the exercise of the State's punitive powers must also conform with constitutional principles. In a constitutional state the exclusive basis for the exercise of punitive powers is the constitutionally-mandated criminal law. The statute under review manifests the will of the parliamentary majority,

the embodiment of popular sovereignty which is a principle espoused by the Constitution itself (Art. 19(1), (2) and (3)).

Nonetheless, Art. 32/A(1) of the Constitution confers upon the Constitutional Court the duty to review the constitutionality of laws, including this statute. Accordingly, in the Republic of Hungary - as a constitutional state - only law which conforms with the Constitution is valid. Criminal legislation must meet this constitutional requirement.

In the Constitutional Court's opinion, in a constitutional state the violation of rights can only be remedied by upholding the rule of the law. The legal system of a constitutional state cannot deprive anyone of legal guarantees. These guarantees are basic rights belonging to all. Wherever the value of the rule of law is entrenched, not even a just demand can justify the disregard of the constitutional state's legal guarantees. Justice and moral argument may, of course, motivate penal sanction but its legal foundation must be constitutional.

1. *Deision 9 of 1992 (I.30) AB* (MK 1992/11) pointed out that the Constitution declared the "constitutional state" to be the fundamental value of the Republic. The provisions of the Constitution describe in detail the fundamental value of the constutional state but they do not fully account for its content. Accordingly, interpretation of the concept of the constitutional state is one of the Constitutional Court's important duties. In reviewing laws, the principles which constitute the basic values of the constitutional state are evaluated by the Constitutional Court on the basis of their conformity with specific constitutional provisions. But the principle of the constitutional state, in comparison with these specific constitutional provisions is not a mere auxiliary rule, nor a mere declaration, but an independent constitutional value, the violation of which is itself a ground for declaring a law unconstitutional. In the Constitutional Court's

precedent cases, legal certainty is closely intertwined with the constitutional law doctrine of the constitutional state.

According to the Constitutional Court's interpretation, legal certainty requires of the State, and primarily the legislature, that the whole of the law, its specific parts and provisions including the Criminal Code, be clear, unambiguous, their impact predictable and their consequences foreseeable by those to whom the laws are addressed. From the principle of predictability and foreseeability, the criminal law's prohibition of the use of retroactive legislation directly follows, especially *ex post facto* legislation and reasoning by analogy.

Procedural guarantees follow on from the principles of the constitutional state and legal certainty. These are of fundamental importance from the perspectives of predictability and foreseeability of the operation of the judicial process. Only by following the formalized legal procedure can there be valid law, only by adherence to the procedural norms can the administration of justice operate constitutionally. The limitation period in the criminal law guarantees lawful accountability for criminal liability by imposing a temporal restriction on the exercise of the State's punitive powers. Failure to apprehend or the dereliction of duties by the authorities which exercise the punitive powers of the State is a risk borne by the State. If the limitation period has expired, immunity from criminal punishment is conferred upon the person as a matter of right.

2. In a constitutional state, the State does not and cannot have unlimited punitive powers. This is especially so because the sovereign power itself is not limitless. Given constitutional fundamental rights and constitutionally protected liberties, the sovereign power can interfere with individuals' rights and freedoms only on the basis of constitutional authorization and constitutional reasons.

Article 8(1) and (2) of the Constitution is also applicable to the constitutional requirements imposed on the criminal law. Accordingly, the Republic of Hungary recognizes the inviolable and inalienable fundamental rights of human beings, their respect and protection being the State's primary duty. The Constitution's important prescription is that "regulation of fundamental rights and duties is to be determined by law, but the substantial content of fundamental rights cannot be restricted." According to the Constitutional Court's Decisions, restrictions on fundamental rights and the content of freedom can be restricted by law only when unavoidably called for in order to protect some other fundamental right or constitutional value, and only in a manner which is strictly necessary and proportional to the objective. The criminal law's prescriptions and prohibitions, and especially its penalties, touch upon every fundamental right or constitutionally-protected right and value. Lawful restrictions where unavoidable, necessary and proportional form the basis and constitutional meaning of the justification of criminal punishment (as intervention) which is perceived as the final instrument of legal recourse.

The Constitutional Court indicates emphatically that the Act under review is unconstitutional not simply because it violates the constitutional prohibition on retroactive punishment (Criminal Code, art. 2), thus contradicting the principle of legal certainty (its predictability and foreseeability) as contained in Art. 2(1) of the Constitution, but also as the Act does not conform with the constitutional requirements of unavoidability, necessity and proportionality for the intervention of criminal punishment. Not even in an extraordinary situation, state of emergency, or grave danger does the Constitution permit the restriction or suspension of the criminal law's constitutional fundamental principles (Arts. 54-56, 57(2)-(4)).

3. The criminal legal system of a liberal, democratic state construes the principles of "*nullum crimen*" and "*nulla poena sine lege*" (prohibition of retroactivity) - pillars of classical

criminal law - as a (constitutional) duty imposed on the State: the conditions of the exercise of its punitive powers must be fixed prospectively by law. In the process of exercising these punitive powers, this principle has taken on an ever-growing importance. This trend is exemplified by the expansion of the requirements of criminal liability going beyond the prescriptions contained in the provisions of the Criminal Code which lay down the specific criminal offences.

The Constitutional Court interprets the principle of "*nullum crimen et nulla poena sine lege*" on the basis of the constitutional principle of the legality of criminal law. In connection with this task the Court has undertaken a comparative review of the constitutions of other constitutional democracies. The Court has concluded that these constitutions do not merely state that criminal offences must be prohibited by law, and the threat of punishment must likewise be declared by law, but they demand in general that accountability for criminal liability, sentencing and punishment must all be lawful and prescribed by the law. That is, they all do what Art. 57(4) of our Constitution prescribes. This, in turn, declares that the right of the individual to lawful sentencing and punishment is a fundamental right. The Constitution states this "no one can be declared guilty and inflicted with punishment...." Thus, the issue is not simply that the State prescribes by law the criminal offences and their punishment, but that the individual has the right to be subjected exclusively to lawful judgment ("declared guilty") and that his/her punishment be prescribed by law ("infliction of punishment").

In a constitutional state the criminal law is not merely an instrument but it protects and embodies values: the principles and guarantees of the constitutional criminal law. Criminal law is the legal basis for the exercise of punitive powers as well as a guarantee of freedom for the protection of individual rights. Though criminal law protects values, as a guarantee of freedom it

cannot become an instrument for moral purges in the process of protecting moral values.

"*Nullum crimen sine lege*" and "*nulla poena sine lege*" are fundamental constitutional principles whose legal content is determined by a number of criminal law provisions. Such a regulation is the Criminal Code's definitions of the elements of a criminal offence, the legal concepts of the penal system and punishment. The concept of a criminal offence, akin to the concept of punishment, is crucial from the perspective of determining individual criminal liability and accountability. The individual's constitutional human rights and freedoms are affected not only by the select provisions and specific punitive sections of the criminal law, but also by the interconnected and closed system of regulation of criminal liability, culpability and sentencing guidelines. Modification of every regulation of criminal liability fundamentally and directly affects the individual's freedom and constitutional position. Modification of the statutes of limitation can thus proceed if it remains in conformity with the basic constitutional requirement of criminal liability.

4. Summing up: the principles of "*nullum crimen sine lege*" and "*nulla poena sine lege*" are part of the constitutional principle of the legality of the criminal law [legality] but do not comprise the only criteria for a constitutional review of criminal liability. In the Constitutional Court's view, the constitutional principle of legality incorporates the following:

- Article 8(1) and (2) of the Constitution requires that punishable offences ("punishability") and their punishment ("threat of punishment") be regulated by statute and not by regulation of a lower order. (Articles 1 and 10 of the Criminal Code are to the same effect.)

- Declaration of the criminality of an act and the imposition of the threat of punishment must be based on constitutional reasoning: they must be necessary, proportional and be used only

as a last resort (Art. 8(l) and (2) of the Constitution, and the corresponding provision, art. 10, of the Criminal Code).

- Declaration of guilt (conviction) can only be undertaken by a court of law through establishing the defendant's criminal liability. This follows from Art. 57(2) of the Constitution declaring the presumption of innocence.

- Conviction (declaration of guilt) and punishment can only proceed according to the law that was in effect at the time of the commission of the offence. This requirement is imposed by Art. 57(4) of the Constitution, echoed by the Criminal Code's prohibition of retroactivity (art. 2). The court must judge (determine criminal liability, convict and pass sentence for) the offence in accordance with the law that was in effect at the time of its commission, and the punishment is also so determined unless a new law passed subsequently prescribes a more lenient punishment or no longer designates the offence as criminal, thus making the action unpunishable by criminal law. This is the necessary outcome of the prohibition of retroactivity embodied in the principle of legal certainty (foreseeability and predictability) which, in turn, stems from the prinicple of the constitutional state whose logical precondition is the public availability of the law at the time of the commission of an act (Criminal Code, art. 2). In addition to the express prohibition of retroactivity, the requirement of the application of the more lenient treatment also springs from the constitutional requirement of the constitutional state: the Constitution cannot permit the application of norms which are alien to its basic principles (such as the imposition of the death penalty), even when at the time of the commission of the offence that penalty was the applicable rule.

On the basis of the foregoing, the Constitutional Court holds that the Act under review is unconstitutional because it is repuguant to the constitutional principles of the legitimacy of the criminal law.

V

The constitutional problems presented by the Act under review were examined separately and without consideration of the possibility that adoption of a viewpoint regarding one issue may render the resolution of another superfluous or outright impossible. The Constitutional Court desires to address every conceivable interpretation of the Act under review and examine some of its conceptual components in light of the fact that the Act will necessarily be re-introduced in Parliament.

From the conclusion reached in Part IV of this Decision concerning the legality of criminal law as a constitutional requirement, it follows that the limitation period must also be determined in accordance with the law that was in effect at the time of the commission of the offence. The Constitutional Court concluded that those constitutional requirements imposed on the criminal law which relate to the rule of law and especially to legal certainty cannot be confined to select provisions and specific punitive sections. The same constitutional requirements are imposed on every aspect of criminal liability - from the conditions governing criminal punishability to the regulation of sentencing.

There is no constitutional basis for the selective application of the prohibition of retroactivity, or the retroactive imposition of a harsher sentence, to specific elements of the criminal process. For this reason, the Constitutional Court examined the problem of the limitation

periods on the basis of the legality of the criminal law, without consideration of the theoretical disputes concerning the procedural or substantive nature of the limitation period.

The fundamental constitutionality of criminal laws must be scrutinized not merely by reference to the criminal law guarantees expressly detailed in the Constitution. The criminal law of itself implies many other fundamental principles and rights. Thus, there is no specific provision in the Constitution prohibiting the imposition of strict liability in criminal cases, and yet the right to human dignity dictates that "*mens rea*" be a constitutional requirement for holding a person criminally liable. Another constitutional principle giving content to the constitutional state is that the lawfully imposed conditions and restrictions on the State's punitive powers cannot be modified to the detriment of the individual whose act is being judged. No additional burden can be imposed on the perpetrator on account of a change in public policy relating to criminal punishment, or due to a mistake or dereliction of duty by the authorities. From this principle ensues the unconstitutionality of any retroactive measure imposing a harsher sentence; and the absolute nature of this principle has already been affirmed by the Constitutional Court in *Dec. 9 of 1992 (I.30) AB* (MK 1992/11) which invalidated the law permitting the imposition of greater burdens on a defendant.

The running of the period of limitation is a matter of fact but the period itself is a matter of legal determination. Only a court can determine lawfully, that is in a manner that is dispositive of the case and binding on all, whether the limitation period for a specific criminal offence has run its course. With respect to the determination of the length of the requisite time and the period remaining, the law in effect at the time of the commission of the offence governs unless, at the time of sentencing, a law more favourable to the defendant is in effect. The legislature's constitutionally permitted discretion to interfere with the limitation period is to enact a more

lenient standard. In contrast, legislation seeking the opposite goal is unconstitutional for a variety of reasons, discussed below, depending on whether or not the limitation periods had already expired.

1. The re-imposition of criminal punishability for a crime whose limitation period had already expired violates the Constitution.

With the expiry of the limitation period, the criminal liability of the offender is irrevocably extinguished. The primary reason for the State's termination of criminal punishability is the restriction on its own punitive powers. These reasons are not related to the determination of criminal liability and guilt, as are, for instance, reasons which justify a certain conduct thereby precluding culpability; these reasons do not alter the nature of the act since the criminal offence remains criminal. The reasons for the termination of criminal punishability are independent of the offender's volition whose impact is, in any case, uncertain. The perpetrator of a crime may hope for clemency, a change in the evaluation of the threat to society posed by his/her actions or that the limitation period has already run its course but s/he cannot expect to benefit from these events. (There is one exception: death is a certainty). The perpetrator of an offence acquires the right to be free of accountability only if the conditions for extinguishing punishability materialize.

Hence, if the limitation period were to run its course, the offender would acquire the legal right not to be punished. This legal right commences when the State's claim for punishment ceases to exist due to its inability to apprehend and punish the offender during the time prescribed for the exercise of its punitive powers. Faith in the law unconditionally demands that once a requirement for extinguishing punishability is met there may be no new law making the same offence punishable once again. The legal technicality employed to reimpose criminal punishability - whether the limitation periods recommences or *ex post facto* legislation is imposed

to toll the statute - is a matter of indifference; their constitutionality must be viewed in the same light as a law retroactively imposing punishment on conduct which, at the time, did not constitute a criminal offence. From the perspective of punishability, an offence whose limitation period has run its course must be treated - given that the State's claim for punishment has been extinguished - as never having been punishable.

The limitation period cannot be recommenced for an offence whose statute had already run its course. This conforms with the Constitution's express criminal law provisions which limit the State's punitive powers and never permit the shifting of the burden upon the perpetrator due to the State's failure to prosecute lawfully. Just as the presumption of innocence protects persons other than the innocent, the limitation period also extinguishes punishability irrespective of the reasons for not prosecuting the offender; the offender cannot be burdened by the State's dereliction of its duty. (The guarantee - as always - prevails irrespective whether the reasons for the enactment of the limitation period are appropriate in a specific instance. That a person is evidently guilty matters not, and s/he remains innocent, if the guilt cannot be legally established; it does not matter that all the evidence is available and society demands punishment - and the limitation period continues to run - if the State does not prosecute.)

Hence, the Act making offences punishable whose limitation periods have already expired is contrary to Art. 2(1) of the Constitution because it offends against legal certainty, it violates the principle of placing checks and balances on the State's punitive powers and, further, it is also contrary to Art. 57(4) by retroactively imposing criminal liability.

2. and 3. The statutory extension of the limitation periods which have not yet expired [run their course] presents different constitutional problems than those posed by the reimposition of criminal liability for offences whose limitation periods have already expired.

With the expiry of the limitation period the State's claim for punishment is extinguished and the offender acquires the right not to be prosecuted. But while the statute is running it serves as a reminder to the prosecuting authorities who control the process: according to the Act, the authorities can suspend and recommence the running of the period anew without the offender having to receive notice of this change. Under the Act, whenever the authorities suspend criminal proceedings, the limitation period is extended by the duration of the suspension. (A handful of statutory exceptions apart, the limitation period is "tolled" during the suspension of the proceedings). Thus, the "normal" limitation period applies only if no criminal proceedings are instituted against the offender. This is an exceptional case, however, an operational failure of the legal system. Hence the offender does not possess a legal right to have his/her culpability extinguished within the "normal" duration of the limitation period and he/she cannot expect as a matter of right that no criminal action will be brought against him/her. S/he only has the right not to be prosecuted and punished once the legally-mandated limitation period has expired. Thus, the limitation period represents the minimum rather than the actual time required for the termination of the offender's liability.

Although the limitation period does not guarantee that punishability will be extinguished within the initially prescribed time-frame, it does ensure that the methods of calculating the time elapsed do not change in a manner that is detrimental to the offender. This follows from the principle that the checks and balances imposed on the State's punitive powers must be the same at the time of the punishment as at the time the [commission of the] offence was committed. Hence the unconstitutionality of a law extending the limitation period for offences whose period has not yet expired depends on whether such an extension imposes a more onerous burden than would be the case if the statute were tolled - even if unbeknown to the offender - due to the State's initiation

of criminal proceedings. The question is whether the offender could be theoretically worse off with an extension of the statute currently running than would be the case if the statute were tolled pursuant to the Criminal Code.

The period of limitation is generally applicable to all perpetrators of a specific offence. In contrast, the recommencement or tolling of a limitation period pertains only to the individual involved in a case; the only action prompting such an outcome would be one seeking to press on with the criminal proceedings. Mere administrative activity cannot achieve this purpose, especially if only seeking to toll the limitation period. Were this otherwise, the constitutional principle whence the limitation period emerges - restraining the State's punitive powers and imposing on it the burden of risk for unsuccessful prosecutions - would be violated.

Because of this difference, the statutory extension of a currently-running limitation period would always impose greater burdens. Statutory extension of the time-frame for criminal punishability does not merely replace the tolled limitation period, but has a wider impact.

On the one hand it affects every offender, irrespective of whether criminal proceedings are contemplated against that person, while, on the other hand, the tolling of the period by initiating criminal proceedings could further extend the time-frame of this limitation period, extended in whatever way beyond what would have been applicable at the time when the offence was committed. Hence the extension of the "normal" limitation period places a more onerous burden on offenders than was imposed by the limitation period at the time of their commission of the offence.

Likewise, in each individual case a heavier burden is imposed if the tolling of the limitation period pursuant to the initiation of some action by the authorities is substituted by a new law. Suspension of the period of limitation by law contradicts the constitutional guarantees

just as an individual administrative act seeking exclusively to prevent its expiry would violate it [be violative]. The contradiction is exacerbated given that the Act also applies to those instances where no criminal proceedings have been initiated. The reasons enunciated in opposing the extension of the limitation period are also valid in this instance. As far as legal guarantees are concerned, it makes no difference whether the limitation period with respect to certain offences is extended by increasing the requisite time or by ordering its recommencement.

4. The constitutional concern presented by retroactive legislation for the extension of the limitation period cannot be side-stepped by the explanation that the period has been "tolled." For if the period had indeed been tolled by the law in effect at the time of the commission of the offence, then a new law prescribing the tolling is unnecessary. Determination of whether or not the period had expired - by application of the law pertaining to the specific offence - is left exclusively to the prosecutor and, in the last instance, to the courts. The legislature cannot retroactively decide this question. According to the limitation period in effect at the time of the offence committed, or those subsequent regulations prescribing a more lenient standard, no law can retroactively declare that the period was tolled for reasons which the law in effect at the time of the commission of the offence and during its running did not acknowledge as applicable to that criminal offence. The expiry of the period of the limitation period is a matter of legal fact, that is the natural fact - the passing of time - must be transformed by the application of the law into a legal fact. The legal facts determining the commencement and duration of the limitation period must exist during the running of the period. These facts either exist or not. What did not then constitute a legal fact warranting the tolling of the period cannot be so declared retroactively. For that would constitute an extension of the limitation period which, on the basis of the foregoing discussion, is unconstitutional.

5. and 6. The limitation period for the criminal offences set forth in the Act under review recommences "if the State's failure prosecute its claim to punish was based on political reasons." This condition is unconstitutional *per se*.

Legal certainty demands the clear and unambiguous formulation of legal rules in order that everyone affected by them can understand their own legal situation, adjust accordingly their decisions and behaviour and can predict the legal ramifications of their actions. Pertinent to this requirement is the predictability of the behaviour of other legal subjects, as well as that of the authorities themselves. The incorporation of the condition that "if the State's failure to prosecute its claim to punish was based on political reasons" into the criminal law does not meet the aforementioned requirement. Not even with the knowledge of the special purpose of this Act can the meaning of "failure to prosecute its claim to punish" be determined with sufficient certainty. Failure to initiate proceedings, and suspension of criminal proceedings in the absence of legal justifications fall within the ambit of this concept but so does, for instance, the conclusion of proceedings with an unlawfully lenient punishment, such as a warning. Likewise, what constitutes "political reasons" and what criteria are to be applied cannot be determined unequivocally - especially in light of the many political changes which have taken place during the long period of time covered by this Act.

The Act under review recommences the limitation period only for three of the numerous non-prosecuted criminal offences; on the other hand, among the offenders of these three very serious classes of criminal offence, the Act singles out for extension of punishability only those who were not prosecuted for political reasons. Hence there is a double differentiation among the offenders; however, there is absolutely no connection between the two criteria and they cannot even affect one another. For even if there were constitutional justifications for recommencing the

limitation period, either for the aforenoted classes of serious offence, or for those who were not prosecuted for political reasons, these would extend to such crimes which the other criteria would preclude. Differentiation among offenders subject to the same category of punishment is not a violation of Art. 70/A of the Constitution if, and only if, the legislature sought to apply positive discrimination in favour of those offenders whose actions, while not covered, could have fallen within the scope of the Act under review. But neither the statutory text nor the documents examined by the Constitutional Court pursuant to its review uncovered any argument or reason which could satisfy the constitutional requirement for positive discrimination.

The choice of politically motivated failure to prosecute as the criterion for extending the duration of criminal punishability also violates the fundamental principle of constitutional criminal law expounded herein - as well as in *Dec. 9 of 1992 (I.30) AB* (MK 1992/11). According to this principle, an offender cannot be burdened by the criminal justice system's inability, brought about by the State's failure to prosecute, to achieve its designated purpose of delivering a just sentence. From the perspective of this constitutionally permissible burden, it makes no difference whether the State exercised its prosecutorial powers improperly or simply failed to exercise them all together. Similarly, the reasons for acting one way or another are of no importance. Whether the prosecutorial authorities are poorly equipped, or their investigators are negligent, corrupt or wilful accessories after the fact, the burden is equally borne by the State in every case. A regime's policy of criminal sanctions can be retroactively classified as unconstitutional; but then, it is not possible to maintain that the exercise of punitive powers putatively in violation of the principles of the rule of law did not extend to select provisions of the criminal law, and to conclude on the basis of this retroactive assessment of the non-existence of

such activities that the limitation periods could not even have begun to run for those offences covered by these select provisions.

With regard to the Act under review, the limitation period for the criminal offences committed between 21 December 1941 and 2 May 1990 could have run only on the basis of reasons which were recognized by the law in effect at the time the offences were committed. That "the State's failure to prosecute its claim to punish was based on political reasons" did not exist as a justification for tolling the running of the period. Although s. 9 of Act VII of 1945 on the people's tribunal retroactively tolled the limitation period for all criminal offences committed in 1919 and thereafter, "whose prosecution was prevented by the ruling regime", and decreed its date of commencement as of 21 December 1944, the periods covered under the that law and the Act under review are different.

Subsequent to 21 December 1944, there were legal regulations - by the Attorney-General and the Minister of Interior, which carried out the resolutions of the [Communist] Party's central organs, such as Directives 6/1955, 1/1961, 2/1966, 1/1985 of the Attorney-General and Directives 8/1966 and 22/1985 of the Minister of Interior - according to which, with respect to a certain (changing) group of people and criminal offences, criminal proceedings could only be initiated with the approval of the relevant Party organs. These legal regulations were fashioned after the right of immunity conferred on Members of Parliament. The task of the judiciary was to judge in each set of proceedings the effect the resolutions based on these directives may have had on the limitation period. But the Act under review has no influence on this matter.

7. Treason is a crime against the State. The subject matter protected by this category alters with the changes in political systems and thus take on formal and textual similarities, different meanings notwithstanding, treason is treated differently in different political systems. Failure to

prosecute an act of treason for "political reasons" is typically an *ex post facto* classification, constituting a retroactive determination of the legal fact. Certain aspects of what constitutes treason today were not so considered at the time of their commission and were not prosecuted accordingly. The Act under review does not consider this change. Deciding what constitutes treason in one era, by applying the value judgments of a subsequent political period, conflicts [clashes] with Art. 57(4) of the Constitution: the criminal offence defined by the new order is retroactively applied to the previous regime and is punished accordingly, even though at the time of its perpetration it did not constitute a crime.

What has been said about the limitation period is also applicable in principle to treason. However, the constitutional law issue raised by the change of system concerning this offence is not related to the limitation period.

8. Section 1(2) of the Act under review permits the unlimited mitigation of punishment "prescribed by law." This provision cannot be reconciled with the criminal justice system currently in force. The Criminal Code stipulates the possibility of unlimited mitigation of punishment (art. 87(g)(4) of the Criminal Code), but this can only be effected by the judiciary in sentencing. The text of the Act under review does not address itself to the sentencing process, but rather it provides for a statutory regulation of clemency. The Act does not unambiguously resolve whether this power of clemency is to be exercised by the courts or - pursuant to the constitutional requirement (Art. 30/A(1)(k)) concerning the exclusive right to grant individual clemency and pardon - is to be vested in the President of the Republic. Given that the Act is not a law of general clemency, it cannot be applied by the courts. Moreover, the constitutionally guaranteed right of individual clemency by the President of the Republic cannot be restricted. The right of

clemency which the Act under review seeks to restrict is made in a manner so as to permit a partial pardon for the punishment, and for that reason it is unconstitutional.

In light of the important prinicples adopted herein, the Decision of the Constitutional Court is published in the *Hungarian Official Gazette*.