

**DECISION 9 OF 1992: 30 JANUARY 1992**

**ON THE PROTEST OF ILLEGALITY**

**ON APPEALS**

The petitioner sought a determination of the unconstitutionality of the legal rules governing the protest of illegality.

The protest of illegality permitted the President of the Supreme Court or the Chief Public Prosecutor to lodge a protest against any final judgment of a court, whether civil or criminal, if they deemed such judgment to be groundless or a violation of the law. Such protest, for which there was no limitation period in lodging, was decided upon by a panel of three Supreme Court judges or, if the protest were against a Supreme Court judgment, by the Presidential Council of that Court. Their decision could either reject the protest or hold that the challenged judgment was groundless or violated the law. Such decision bound the parties to the action subject to certain qualifications *viz.* that (i) in a criminal case a heavier punishment could not be imposed through a protest after a year of the coming into force of the challenged final judgment; (ii) in a civil case only a protest lodged within a year of the final judgment could give rise to a decision binding the parties; and (iii) in respect of a civil procedural matter, the challenged final judgment might be annulled, partially or totally, only if the decision extended to the parties and the violated procedural rule had no impact on the judgment of the merits.

The petitioners submitted, *inter alia*, that (a) the protest violated the principle of the rule of law under Art. 2(1): in particular it was discretionary in nature thereby rendering it possible for illegal judgments to remain in force; further such a protest could be decided by the President

of the Supreme Court or the Chief Public Prosecutor without reasons; and (b) art. 270(1) of the Code on Civil Procedure permitted these two named persons to lodge a protest against any final judgment in a civil action. Such provision violated Arts. 35(1)(a) and (b), and 51(1) and (3) since parties to the action were not forced to lodge a protest even if a violation of the law had occurred.

**Held,** granting the petitions:

(1) The protest of illegality was unconstitutional. Although in principle applicable only in extraordinary cases to obtain a ruling on legal uniformity, the protest of illegality had through judicial practice also to come to fulfill a legal remedy function. On the one hand, in respect of its latter function, the protest would have been constitutional if it had conferred on the parties affected a defined and qualified subject right of standing so that the Supreme Court would have been able to judge the alleged legal violation and so render a decision on the merits which bound the parties. In fact the parties had no rights at all to have the Chief Public Prosecutor or the President of the Supreme Court lodge a protest on their behalf who alone had the standing, guided by their discretion, to decide in which cases to lodge and to initiate a protest. On the other hand, legal uniformity decisions which offered appropriate guidelines on legal principles, required a right to choose between cases; such a function could not be fulfilled through a review mandatory upon a party's request. A legal uniformity decision neither invalidated nor arbitrarily modified one judgment among the many because a decision had to be made; further its aim was not to provide a legal remedy in the individual case neither could it consider the constitutional dimensions thereof. Consequently the introduction of constitutional requirements necessary to protect one function of the protest necessarily precluded the other (page 00, lines 00-00; page 00, lines 00-00).

(2) The protest of illegality was also contrary to the principle of the rule of law, and in particular legal certainty under Art. 2(1) which formed a part thereof. The whole of the legal proceedings were clouded by uncertainty since the two entitled persons might change the final judgment independently of the wishes of the parties, based on deliberations lacking any objective restrictions. Following a final judgment (itself perhaps the result of an appeal) proceedings might be recommenced; indeed on the basis of repeated protests of illegality, such proceedings could in practice be recommenced several times. Since legal certainty embodied predictability in the application of the laws and in legal proceedings, the protest rendered it fundamentally uncertain (page 00, lines 00-00; page 00, lines 00-00).

(3) Moreover the protest was contrary to the institutions of the finality of judgments and legal validity. A necessary requirement for the overturning of a final judgment is that the criteria for so doing are predictable and determined by law. The protest failed to satisfy this criteria: the violation of the law and the groundlessness of the challenged judgment were themselves vague concepts and subject to broad interpretation. But what above all rendered it vague was that the Chief Public Prosecutor and the President of the Supreme Court had a discretion to refuse to lodge the protest even if by their own interpretation there had been such a violation or the decision was groundless. It was not certain therefore in which case a protest would be lodged and since the parties to the proceedings had themselves no right to lodge a protest, there was no need to give a reason for its rejection. There was also a possibility that a very serious violation of criminal law, revealed in judging the protest, would result merely in a declaration that such a

violation had occurred; alternatively, the final judgment might be modified to impose a harsher punishment on the convict (page 00, lines 00-00; page 00, lines 00-00).

(4) The forfeiture of the parties' right to decide with regard to the lodging of a protest violated not only the right to self-determination under Art. 54(1) but also within the right of a party to civil dispute to litigate the matter under Art. 57(1), the freedom not to exercise that right. In civil proceedings the protest thus violated the parties' right to decide since it could be lodged in any case without regard to the particulars thereof and could result in a modification of the final judgment with binding force on the affected parties, independent of or even contrary to their wishes. This violation of basic principles of civil procedure consequently amounted to a violation of the right to self-determination (page 00, lines 00-00; page 00, lines 00-00).

(5) The legal regulation of the protest also violated the principle of judicial independence under Arts. 50(3) and 57(1). The lodging of the protest gravely interfered with judicial decision-making because the discretionary determination by the authorised persons disturbed an already-decided case. The Chief Public Prosecutor could suspend or stay the execution of the challenged judgment and order the necessary urgent relief. A protest lodged by the President of the Supreme Court was determined by a committee under his leadership: thus a protest against a Supreme Court decision would be adjudicated upon by the Presidential Council of the Supreme Court the head of which was the President himself. Such procedures were necessarily incompatible with the independence of the judiciary (page 00, line 00 - page 00, line 00).

(6) The protest of illegality lodged against a convicted person or because of the prosecutor's dismissal of a case violated legal certainty and the rules of a constitutional state according to which a criminal prosecution had to proceed within strict substantive and procedural limits, with the risk of failure or commission of errors resting on the State. With the lodging of the protest against him, the burden was arbitrarily shifted onto the already-convicted person. The risk of failure to prosecute or of errors was therefore also shifted onto the accused and opened up the possibility that a harsher sentence would be imposed on him (page 00, lines 00 - page 00, line 00).

#### IN THE NAME OF THE REPUBLIC OF HUNGARY!

In the matter of the petitions seeking an *ex post facto* review of the unconstitutionality of legal rules, the Constitutional Court has made the following

#### DECISION.

The Constitutional Court holds that the legal institution of the discretionary *ex officio* and *ex parte* challenge of a final judgment (hereinafter referred to as "the protest of illegality") is unconstitutional. For this reason the Constitutional Court nullifies the legal rules pertaining to the lodging of such a protest, effective from 31 December 1992. But those rules of criminal procedure according to which a protest of illegality may impose a more disadvantageous

treatment on a convicted person than was imposed by the final judgment are struck down by the Constitutional Court effective from the date of publication of this Decision.

Accordingly, with the date of publication of this Decision the following provisions of Act I of 1973 on the Code of Criminal Procedure (hereinafter referred to as the "Code on Criminal Procedure") shall no longer have any effect:

- The second and third sentences of art. 285;
- The clause of art. 287(3) which states that "after the passing of one year from the entry into force of the challenged judgment";
- The first sentence of art. 288(6) and part of the second sentence, stating that "if subpoenaed, in any event, and if notified" and part of the third sentence stating that "or the protest of illegality was lodged against the convicted person";
- The clause of art. 288(8) which states that "the subpoenaed accused in custody or";
- The clause of art. 290(4) which states that "if the accused is at large the requisite emergency measures may be ordered";
- The first sentence of art. 290(5) and part of the clause stating "in other cases" from the second sentence therein;

These rules remain in effect until 31 December 1992, with the following text:

*Article 285.* A protest of illegality has no [automatic] effect to stay [the proceedings]; however, the President of the Supreme Court or the Chief Public Prosecutor may stay or suspend the execution of a challenged judgment pending the adjudication of the protest.

*Article 287(3).* No graver punishment may be imposed on a convicted person pursuant to a protest of illegality than was determined by the challenged final judgment, and only the existence of an illegality may be determined; this limitation is also controlling for a procedure initiated anew because of a prior vacating of a final judgment pursuant to a successful protest of illegality.

*Article 288(6).* A person in custody must be arraigned upon his or his defence lawyer's request. The defence lawyer must attend the arraignment hearing if the right to a lawyer attaches.

*Article 288(8).* The hearing may not take place in the absence of the Chief Public Prosecutor or his representative and the notified defence lawyer.

*Article 290(4).* If the Supreme Court invalidates the final judgment and the convicted person is in custody, the Supreme Court must make a decision on the matter of bail.

*Article 290(5).* The cost of the criminal procedure is borne by the State.

With the publication of this Decision, arts. 284(2), 288(2)(b) and 290(2)(d) of the Code on Criminal Procedure are likewise nullified.

Effective from 31 December 1992 the following shall no longer have any effect:

- Article 270 of Act III of 1952 on the Code of Civil Procedure;
- Section 10(2) of Act IV of 1972 on the Judiciary, and that part of s. 33(2) thereof which states that "a protest of illegality may be brought against the final judgment of any court".
- Section 33(2)(a) remains in force with the following text: "(2) The President of the Supreme Court (a) may request the files of any court during any stage of its proceedings; he may order the second-level review to be conducted by the Supreme Court";
- Section 5(2)(f),(g) of Act V of 1972 on Prosecution;
- Article 284(1) of Act I of 1973 on the Code of Criminal Procedure.

The Constitutional Court orders the review of all those criminal proceedings in which the convicted person received a harsher punishment pursuant to a petition of illegality than was originally imposed by the final judgment, provided that the convicted person has not already been relieved of that harsher treatment.

The Constitutional Court rejects the petition seeking the vacating of the final judgments.

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

## REASONING

### I

The petitioner sought a determination of unconstitutionality of the regulations pertaining to the protest of illegality on the grounds that these regulations violate the principle of the rule of law expounded in Art. 2(1) of the Constitution. The petitioner finds two aspects of the protest of illegality especially unconstitutional, those being its discretionary nature, thus making it possible for illegal judgments to remain in force, and that such a protest may be decided by the President of the Supreme Court or the Chief Public Prosecutor without an explanation. This petition challenges the institution of the protest of illegality as well as the legal rules pertaining to it.

The Constitutional Court consolidated this petition with two other ones. According to one petitioner, the application of the protest of illegality to parties involved in an incorporation procedure violates Art. 9 of the Constitution because it is incompatible with a market economy and the right of free enterprise and the freedom of competition. Accordingly, this petitioner also requested the nullification of s. 25(2) of Law Decree 23 of 1989 on Incorporation and art. 273(1) of Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as "the Code on Civil Procedure"). The other petitioner requested an examination of the constitutionality of art. 270(1) of the Code on Civil Procedure, according to which the Chief Public Prosecutor or the President of the Supreme Court may lodge a protest of illegality against any final judgment in a civil suit. According to the petitioner, this regulation conflicts with Arts. 35(1)(a), 35(1)(b), 50(1) and 51(1)

and (3) of the Constitution; the alleged unconstitutionality is that the parties to the suit are not compelled to lodge a protest even if a violation of the law has occurred.

In light of their interrelated nature, the Constitutional Court consolidated these three cases and conducted its enquiry into the unconstitutionality of the protest of illegality as a whole.

## II

The essence of the current regulation of the protest of illegality is that the President of the Supreme Court or the Chief Public Prosecutor may lodge a protest against any final judgment of a court if that judgment is deemed to be groundless or in violation of the law. The protest is judged by a panel of three sitting judges of the Supreme Court, or by the Presidential Council of the Supreme Court if the protest is lodged against a judgment of the Supreme Court. In the judgment made pursuant to such a protest of illegality, the Supreme Court either rejects the protest as being without merit or holds that the challenged judgment violates the law or is groundless. There is no limitation period for lodging such a protest of illegality. The judgment made pursuant to a protest of illegality binds the parties to the suit with the following qualifications. In a criminal matter, after one year of the entry into effect of the challenged final judgment, no punishment more burdensome to the convicted person may be imposed by a judgment made pursuant to a protest of illegality. In a civil matter, only protests of illegality lodged within one year of the final judgment may result in decisions binding on the parties. In a civil procedure, the challenged judgment may only be partially or fully vacated if the judgment extends to the parties, and even then only to the extent that such a procedural rule was violated which had no material impact on the judgment on the merits of the case.

### III

The Constitutional Court undertook a comparative legal and legal historical enquiry in order to arrive at a reasoned evaluation of the validity of the regulation of the protest of illegality.

A review of the final judgments of the courts was first introduced by the French revolutionary legislation. The theoretical justification of the institution was a stricter separation of powers and the prevention of judicial excesses, and it was applied in practice to ensure that the new legal order was properly applied by the courts. The 1808 French code of criminal procedure contained two forms of the institution: one made possible the vacating of an unlawful final judgment without affecting the parties, while the other served to remedy the judiciary's overstepping its jurisdictional competence, which remedy also affected the parties in exceptional cases. Following France's example other countries (Belgium, Austria and Italy) also introduced similar legal institutions during the 19th century.

This legal institution was introduced into Hungary by Act XXXII of 1896 on Criminal Procedure (arts. 441-442) under the name of trial remedy to ensure legal uniformity. This trial remedy could be utilized by the chief prosecutor and the lawyer of the crown in the Curia (Supreme Court), against the unlawful verdicts of the criminal courts which could not be appealed against in any other way. No such remedy was available against the Royal Curia's substantive decisions. If finding that the remedy was justified, the Curia declared that the challenged judgment or decree was a violation of the law. In general, the decision declaring a violation of the law had no impact on the parties, but if the defendant was charged with a violation of that law, he was acquitted by the Curia or the punishment was reduced. The aim of

this legal institution was not to provide legal remedy for the parties but to bring about legal uniformity, in particular the uniformity and consistency of judicial practice. The 1911 Act giving birth to civil procedure broadened the scope of this trial remedy. From this moment onward, the trial remedy seeking legal uniformity was adjudicated upon by the Curia's special, so-called legal uniformity council.

The decisive modification of the legal institution -- with the copying of the Soviet procedure -- took place in 1949. By Act XI of 1949 on the People's Participation in the Criminal Justice System and Simplification of Appeal, the legal institution's new name became "trial remedy in the interest of legality". This Act expounded that the main aim of the remedy was not legal uniformity but the guarantee of legality, with the maintenance of legal uniformity secured by case-law development. This Act rendered possible for the first time the imposition of a more severe punishment subsequent to the rendering of a final judgment. Council of Ministers' Decree 210/1950 (VIII.20) MT also introduced this institution of the trial remedy in the interest of legality into civil suits with binding effect on the parties to the suit.

The extraordinary trial remedy institutionalized by both the criminal procedure (Act III of 1951) and civil procedure (Act III of 1952) was renamed the protest of illegality pursuant to the 1954 reform of the organization of the judiciary and criminal and civil procedures, and the President of the Supreme Court was also given the right to initiate it. With this measure, the regulation of the legal institution substantially achieved its present-day form.

This protest of illegality, in principle applicable only in extraordinary cases, has in fact become a third level "safety-valve" of the theoretically one-level system of trial remedy, or the unacknowledged substitute for the second-level appeal. Individual legal protection, originally purely supplementary and infrequently applied, has become in practice the first-order priority. This is demonstrated by the number of protests of illegality lodged, the absolute number of protests certified, their numbers relative to the cases in which final judgments have been entered, as well as by the fact that the number of protests of illegality lodged in the interest of legal uniformity one year or more after the entry of final judgment are negligible, comprising less than one per cent, while the so-called "principle-oriented" protest -- those lodged within a year but without a binding effect on the merits -- exists only in theory. In reality, the protest of illegality as it manifests itself is a form of legal remedy.

The Constitutional Court -- consistent with its position expounded in its reasoning of *Dec. 57 of 1991 (XI.8) AB* (MK 1991/123) -- does not examine the text of the norm itself, not even in a case of a protest of illegality, but takes judicial notice of the content of that norm as consistently and uniformly construed by judicial practice and it is this "living" norm content which it then compares with the Constitution. Accordingly, in the examination of the protest of illegality, the Constitutional Court gave appropriate weight to the fact that in judicial practice this institution invariably fulfills a legal remedy function as well.

## V

1. In the case of the institution of the protest of illegality, the legal remedial and legal uniformity functions mix in a manner whereby neither one meets the constitutional requirements

and, indeed, the achievement of the constitutional requirements necessary for one task is not made possible by the other. For the protest of illegality to fulfill its legal remedial function in a constitutional manner, it would have to confer on the affected parties a defined and qualified subject right of standing, so that the Supreme Court would be able to adjudicate upon the alleged legal violation in a manner that would permit a decision on the merits to be reached with binding force on the parties. In contrast, the parties have no rights whatsoever to have the Chief Public Prosecutor or the President of the Supreme Court lodge a protest of illegality on their behalf. It is these latter parties with standing, guided by their discretion, who choose the cases in which a protest of illegality is lodged, although the majority of cases they choose are ones in which the parties have sought a review of the final judgment and a modification of the judgment's binding force upon them. But the decision brought pursuant to the protest of illegality may have binding force on the parties only if it were lodged within one year of the final judgment coming into force, and the timing of the initiation of the protest of illegality is likewise determined by the judgment of the parties with standing to lodge the protest. But the introduction of the safeguards conceptually required for the legal remedy is precluded by the legal uniformity function of the protest of illegality. Legal uniformity decisions -- offering guidelines on legal principles when deemed appropriate -- require a right to choose among the cases. Such a function could not be fulfilled, even in principle, by a review which is mandatory upon a party's request. By its nature, a legal uniformity decision does not invalidate and it may not arbitrarily modify one judgment among the many simply because the necessity of rendering a decision has been determined. In general, the moulding of legal uniformity has nothing to do with a protest of groundlessness. Indeed, the remedy of unlawful judgments may also be unrelated to the problem of legal uniformity. The aim of a legal uniformity decision is not the provision of a legal remedy in the

individual case, neither can it consider the constitutional dimensions of the latter. And even if the protest serves neither legal uniformity nor individual legal remedy but another distinctly conceived goal -- "the guarantee of legality" -- the functions of the institutions sketched above may still not be reduced to a common denominator, and rather than supplying the missing requirements this third goal impedes in a further way the creation of the requirements necessary for either objective. It is a self-contradictory institution which makes the redress of legal violations, and its binding force on the parties, dependent on two discretionary rights whose exercise is not obligatory even in the event of a self-evident violation of a law, even where a criminal conviction arose therefrom.

The institution of the protest of illegality is also contrary to the principle of rule of law, the requirement of legal certainty contained in Art. 2(1) of the Constitution, the institution of finality of judgments and the parties' right of decision in a civil suit.

2. Article 2(1) of the Constitution states that the "Republic of Hungary is an independent, democratic state under the rule of law." This general provision of the Constitution declares the basic values of the republic: independence, democracy and the rule of law. The principle of the rule of law is expounded in further detail by other provisions of the Constitution, although these provisions do not comprise the whole content of the fundamental value, and hence the interpretation of the rule of law is one of the Constitutional Court's important tasks. The principles comprising the fundamental value of the rule of law are expounded by the Constitutional Court on a gradual, case-by-case basis. Although in the process of a constitutional review of a legal rule the Constitutional Court primarily examines the compatibility of the challenged regulations with specific provisions of the Constitution, this does not mean that the general provisions are seen as formal declarations and that the fundamental principles are

consigned to a secondary, mere auxiliary role. The violation of the fundamental value of the rule of law enumerated in the Constitution is in itself a ground for declaring a certain legal rule unconstitutional.

3. Legal certainty is an indispensable component of the rule of law. Legal certainty compels the State -- and primarily the legislature -- to ensure that the law on the whole, in its individual parts and in its specific legal rules, are clear and unambiguous and that their addressees find their operation ascertainable and predictable. Thus, legal certainty requires not merely the unambiguity of individual legal norms but also the predictability of the operation of individual legal institutions. It is for these reasons that procedural guarantees are fundamental for legal certainty. Only by following the formal rules of procedure may a valid legal rule be created, only by complying with the procedural norms do the legal institutions operate in a constitutional manner.

4. Notwithstanding this, the principle of legal certainty leaves ample room for balancing and decision-making opportunities for the legislature since the rule of law also demands the realization of other principles, some of which may conflict with the requirement of legal certainty. For instance, the doctrine of equity enabling the making of a just decision in an individual case is contrary to legal certainty in principle. Yet legal certainty is not breached because the scope and conditions for the realization of specific exceptions are clarified in advance by the law. This applies both to specific applications of the doctrine of equity (for instance, equitable compensation as contained in art. 347(2) of the Civil Code) and to all those concepts which provide a great latitude for judges' balancing and decision making (The predictability of the latter is ensured in a constitutional state by a variety of institutions, including those of legal uniformity). The rule of law's requirement of substantive justice may be attained while remaining

within the constraints and guarantees ensuring legal certainty. The Constitution may no more confer a subject right for the "realization of substantive justice" than a right to ensure that no judicial decision be unlawful. These are the goals and duties of the constitutional state for the realization of which it must bring about institutions -- primarily those providing procedural safeguards -- and guarantee the implicated subject rights. The Constitution therefore confers the right for procedures necessary and appropriate in the majority of cases for the realization of substantive justice. Article 57 of the Constitution confers a subject right to judicial adjudication but does not guarantee that its outcome shall be correct in every instance. But the Constitution contains further procedural safeguards to ensure a just and lawful judicial outcome: the constitutional right to a legal remedy. If a legal institution aimed at the realization of substantive justice or the rectification of legal mistakes operates without precise procedural safeguards comparable with those of ordinary and extraordinary legal remedy mechanisms, then legal certainty is violated.

The requirements of substantive justice and legal certainty are brought into harmony by the institution of legal validity -- once more on the basis of the priority of legal certainty. The institution of legal validity, in its precise formal and substantive determination, is a constitutional requirement being part of the rule of law. Respecting the legal validity of decisions secured by a legal remedy mechanism in accordance with the Constitution safeguards the security of the legal system on the whole. A fundamental constitutional interest is served by the binding and irrevocable nature of final judgments. An essential element of the rule of law is that the law must determine unequivocally when a judicial decision may be challenged by an ordinary appeal, on what grounds may there be an opportunity to challenge a final judgment, and at what point does a final judgment become no longer subject to a challenge by any means of legal remedy. Legal

certainty demands that the final judgment -- within the scope of its subject matter and *in personam* jurisdiction -- be binding both for the parties involved in the dispute as well as for subsequent courts or other authorities. If the requirements for the finality of a judgment have been met, it becomes binding irrespective of the correctness of its content.

5. The protest of illegality violates the requirement of legal certainty because the whole of the judicial proceeding is clouded by uncertainty since the Chief Public Prosecutor or the President of the Supreme Court may change the final judgment independently of the wishes of the parties, based on deliberations lacking any objective restrictions. Following a final judgment -- itself perhaps the result of an appeal -- a suit may be initiated anew and, indeed, on the basis of repeated protests of illegality, or "super-appeals," it may be reinitiated several times in practice. Giving effect to the predictability of the law also embodies the predictability of the application of the laws and the predictability of legal proceedings as well, the latter of which is rendered fundamentally uncertain by the protest of illegality.

The protest of illegality is especially contrary to the institution of the validity of law. A necessary but not sufficient constitutional requirement for the vacating of a final judgment is that the criteria for doing so be precisely determined by law and that they be predictable. The institution of retrial meets this criterion where it is known in advance, in which cases and within what time frame there may be a new trial once the final judgment is entered in a civil dispute or a criminal matter. With respect to the protest of illegality there is no comparable predictability and certainty: the violation of the law and the groundlessness of the challenged judgment are themselves anyhow subject to broad interpretation and are, in fact, vague concepts (which may not be compared with the objective requirements of the discovery of new evidence, for example). But above all, what makes the institution of the protest of illegality fundamentally vague is that

the parties entitled to lodge such a protest are not required to do so even if there has been a violation of the law or a groundless decision by their own interpretation. It is totally uncertain in which case a protest would finally be lodged. Since the parties to the suit do not have a subject right to lodge the protest, there is no need to give a reason for its rejection. But this circumstance, logical in itself, highlights the great extent to which the practical operation of the protest of illegality is inconsistent even with the minimum requirement of legal certainty. The discretionary right to lodge the protest -- given that it is used for individual legal protection -- also violates equality before the law whenever one of the two authorized persons lodges a protest in one case while in another comparable situation fails to do so; or when he lodges a protest on behalf of one party while ignoring the other party's request without an explanation.

The Chief Public Prosecutor or the President of the Supreme Court is not obliged to lodge a protest even in the event of discerning a blatant violation of the law. The regulation of the protest procedure also permits the selection among all the cases on any basis whatsoever, extending to those cases in which the judgment violated a fundamental procedural principle or the constitutional rights of the defendant. It is also possible a most serious violation of the criminal substantive law, uncovered in the process of adjudication of the protest of legality, results merely in a declatory decision stating that a violation has occurred; on the other hand, it may be that the final judgment is modified in a manner which imposes a more burdensome punishment on a convicted person.

6. In civil suits the institution of the protest of illegality violates the parties' right of decision, because a protest may be lodged in any case without regard to the particulars of the case and the protest may result in a modification of the final judgment with binding force on the parties to the dispute, independently or even contrary to their wishes. This violation of the

fundamental principle of civil procedure is also a violation of the constitutional right to self-determination. The right to self-determination has always been held by constitutional court precedent to be an aspect of the right to human dignity, and hence the protest of illegality is contrary to Art. 54(1) of the Constitution. The forfeiture of the parties' right of decision also violates Art. 57(1) of the Constitution. The constitutional right of a party to a civil dispute to have the dispute adjudicated upon by a court entails -- similarly to other freedoms -- the freedom not to exercise that right. A rule which in every case makes possible the continuation of a procedure and the modification of a final judgment binding on all parties irrespective of the wishes of the litigants cannot in principle be subjected to a necessary or proportional limitation.

The root of the unconstitutionality of the protest of illegality is the discretionary competence conferred on those with standing to lodge the protest. But this characteristic feature may not be altered within the framework of the institution because the legal uniformity function which confers its legitimacy on the other hand is incompatible with a compulsory, fixed criteria-based protest procedure, and especially with a litigant's subject right of standing to lodge such a protest.

7. In conclusion it can be summed up that the legal institution of the protest of illegality is contrary to legal certainty comprising the rule of law and the validity of laws serving that end. Although in practice it is used for legal remedial purposes, the protest lacks the constitutional guarantees of the right of legal remedy. The violation of these rights may not be justified by the fact that such a restriction may be unavoidably necessary in the interest of the realization of other constitutional rights and that the magnitude of the violation would be proportional. On the contrary: discretionary licence can never be a necessary means of realizing either substantial

justice or legality at the expense of the stabilizing fundamental values of the rule of law. The realization of legality or substantive justice through an arbitrary act is not constitutional.

8. The legal regulation of the protest of illegality also violates the principle of the independence of the judges and the judiciary [Arts. 50(3) and 57(1) of the Constitution]. Although the adjudication of the protest of illegality takes place in the courts, the very fact of the lodging of the protest is a grave interference with judicial decision making because the discretionary determination by the authorized person disturbs an already adjudicated and closed matter. The Chief Public Prosecutor may not simply order the remand and initiation anew of a completed procedure, as he deems appropriate, but he may make other decisions with more serious legal consequences: he may suspend or stay the execution of the challenged judgment and may order the required emergency measures [Article 285 of the Code on Criminal Procedure; s. 5(2)(g) of Act V of 1972 on Prosecuting Counsel].

The authorization by the President of the Supreme Court to lodge a protest of illegality gives rise to other constitutional concerns. It is incompatible with the principle of the independence of the judiciary that the protest lodged by the President of the Supreme Court is judged by a committee under his leadership. It is especially of concern that a protest of illegality lodged against the judgment of the Supreme Court is adjudicated upon by the Presidential Council of the Supreme Court whose President is the President of the Supreme Court.

The Constitutional Court did not find such a compelling state interest which could have been weighed in favour of the constitutionality of this solution. The oft-cited explanations -- concerning the quality of the lower courts' judgments, the need for speedy rectification of sentencing errors and the benefits of centralized guidelines for judicial practice -- are all practical considerations, not constitutional principles. The Constitutional Court took notice of these

considerations in determining the date of invalidation of the regulations governing the protest of illegality.

9. The Constitutional Court also took notice of the consequences of the invalidation of the regulations pertaining to the protest of illegality, cognizant of the fact that its decision materially affects judicial procedure and the court system. The codification of a new legal procedure and the creation of a more suitable system of legal remedy embodied within it requires legislative action. The remedy of groundless or unlawful judgments may be addressed by the existing system of appeal and retrial. According to Art. 57(5) of the Constitution, the requirement of the right to legal remedy is satisfied by a first order appellate review as well, although the legislature may provide a more expansive means of legal remedy.

The disruption of the system of trial procedure always entails great risks; but the protest of illegality is not a basic element of this system and, at most, it was the hidden mistakes of the system which led to the systematic application of the protest of illegality for the reduction and rectification of these inadequacies.

The Constitutional Court also calls attention to the fact that the termination of the protest of illegality leaves ample opportunities for the Supreme Court to further legal uniformity in its judicial practice: concerning any case with appeal pending it may exercise its subject-matter adjudicatory authority to certify the case and issue a decision of general, binding nature.

10. In judging the constitutionality of the protest of illegality as an institution the Constitutional Court examined all the legal rules in effect pertaining to such a protest but invalidated only those regulations, effective from 31 December 1992, pursuant to s. 43(4) of Act XXXII of 1989 on the Constitutional Court (hereinafter referred to as "the Constitutional Court Act") which made possible the submission of the protest. The Constitutional Court acted in this

manner cognizant that the reasons which gave rise to the use of the protest of illegality as an instrument of individual legal protection and a quasi third-level appellate review continue to remain in existence even after the declaration of the unconstitutionality of the institution. The legislature has ample time till the end of the year to provide constitutional solutions to these problems through the enactment of the rules of procedure and court system organization, whose drafting is already in progress. The termination of the protest of illegality makes it especially urgent that the legislature rectify the situation arising from the presently single-tier system of legal remedy and two-tiered procedural rules which -- especially in criminal procedure -- do not make possible the redress of certain violations of the law. In this matter the Constitutional Court calls the legislature's attention to the fact that Hungary, having become a signatory to the International Covenant on Civil and Political Rights accepted the obligation to ensure that it "develop[s] the possibilities of judicial remedy," art. 2(3)(b).

The Constitutional Court saw no reason to render impossible, by its invalidation of the procedures governing the protest of illegality, the completion of those cases which have already been initiated pursuant to such a protest of illegality -- provided that they do not disadvantage the convicted person. Accordingly, it only struck down the regulations pertaining to the submission of the protest; the invalidation of the other regulations is the task of the legislature or the authorities promulgating them, once all of the procedures initiated under the protest have been completed. With the invalidation of the regulations pertaining to the protest the possibility of lodging such protests in the areas of real property, trademarks and patents is naturally extinguished as well. The invalidation of the regulations pertaining to these specific areas of the law will also be in order upon the completion of the pending cases.

A temporary maintenance of the protest of illegality is not required for the purposes of individual legal protection in those criminal cases where a protest was submitted against a convicted person. Accordingly, the Constitutional Court strikes down all regulations pertaining to the protest of illegality lodged against convicted persons, effective from the day of publication of this decision, pursuant to the basic rule contained in s. 42(1) of the Constitutional Court Act.

Protests of illegality lodged against a convicted person -- and protests lodged because of the prosecution's dismissal of a case -- are especially grave violations of the constitutional principle of legal certainty and that principle characterizing the power of sanction of a constitutional state according to which a criminal prosecution must proceed within strict substantive and procedural limits, with the risk of the failure of prosecution being borne by the State. The constitutional guarantee of the presumption of innocence specifically provides for such an allocation of burden [Art. 57(2)]. A court's final judgment makes that portion of the proceedings binding and unassailable for both parties which were secured by the prosecution in rebutting the presumption of innocence while complying with all the procedural guarantees. The failure to meet the burden of proof is a risk borne by the State, just as it carries the risk that -- unless the law compels otherwise -- mistakes made during the trial or any circumstance impeding the completion of the trial would not render possible the achievement of the ideal goal of the criminal procedure -- the handing down of a just sentence. Thus the accused is not to be penalized for a final judgment which violates the law in his favour or is otherwise unjustly lenient, especially because the avenues of remedial appeals equipped with constitutional guarantees and available to the authorities for the correction of their mistakes, with which application the accused had to reckon, have already been exhausted. According to this Decision of the Constitutional Court, the protest of illegality does not belong in principle to the arsenal of constitutional legal

remedies. It violates legal certainty and the principle of the allocation of the burden of proof in a criminal prosecution under the rule of law in an especially grave manner by arbitrarily shifting that burden onto the accused pursuant to a protest of illegality lodged against the accused. The risk of the failure of the prosecution or the commission of errors is shifted onto the accused pursuant to such a protest of illegality and opens up the possibility that a harsher sentence would be imposed on the convicted person. These reasons are especially compelling to justify the immediate striking down of the regulations pertaining to a protest of illegality lodged against a convicted person.

11. According to s. 43(3) of the Constitutional Court Act, the Constitutional Court had to order a review of the criminal procedures which imposed a harsher punishment on convicted persons pursuant to the submission of a protest of illegality, unless the convicted person had already been relieved of that more onerous burden. Section 5(2)(f) of Act V of 1972 on Prosecuting Counsel makes it the duty of the Chief Public Prosecutor to lodge a protest of illegality on behalf of a person convicted by a final judgment in a criminal procedure reviewed and deemed unconstitutional by the Constitutional Court. Pursuant to this Decision, a protest of illegality under art. 43(3) of the Penal Code may not be lodged after 31 December 1992. It is the legislature's task to regulate the review of criminal procedures ordered by the Constitutional Court on the basis of art. 43(3) of the Penal Code.

## VI

The third petitioner sought the vacating of two final judgments in addition to an examination of the unconstitutionality of the legal rule. As a result of its enquiry into a petition of

unconstitutionality submitted as a constitutional complaint or pursuant to a case pending before a judge, the Constitutional Court also holds that the unconstitutional legal rule cannot be applied in this specific case -- namely in the dispute giving rise to the suit. In the present case the petitions do not comply with the statutory requirements of a constitutional complaint (s. 48, Constitutional Court Act). This is so since the judgments already became final in 1988 and 1989, while the petition was received by the Constitutional Court on 1 March 1991. For this reason the Constitutional Court rejected the petitions.