Decision 14/2002 (III. 20.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

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

decision:

1. The Constitutional Court holds that Section 171 para. (2) and Section 227 of Act I of 1973 on Criminal Procedure are unconstitutional and, therefore, annuls them as of the date of publication of this Decision.

2. The Constitutional Court holds that Section 342 para. (3) of Act XIX of 1998 on Criminal Procedure is unconstitutional and, therefore, annuls it. As a consequence, the provision shall not enter into force.

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

Reasoning

I.

1. A judge of the Town Court of Tapolca – in addition to suspending the criminal procedure – has turned to the Constitutional Court with regard to procedure No. 1. B. 401/2000 commenced on the ground of the felony of theft and other criminal offences. In the opinion of the court, the first sentence of Section 171 para. (2) of Act I of 1973 on Criminal Procedure (hereinafter: the ACP) violates the constitutional right to have one's case judged by an impartial court as granted in Article 57 para. (1) of the Constitution.

In the order of suspension, the court referred to the fact that the tasks of the courts and public prosecutors' offices are laid down in different structural parts of the Constitution (Chapters X and XI). According to Article 50 para. (1) of the Constitution, the courts are in charge of punishing those who perpetrate criminal offences, and Article 51 para. (2) provides

that the public prosecutor's office is responsible for representing the prosecution in court proceedings. In line with that, Section 9 para. (1) of the ACP provides for the principle of sharing responsibilities in the criminal procedure, stating that the sides of prosecution, defence and judgement are separated from one another; paragraph (2), on the other hand, provides for the courts being bound to the charges. Contrary to the above, the "first sentence of Section 171 para. (2) of the ACP, but in the opinion of the court, paragraph (2) as a whole" mixes up the tasks of the authority of prosecution and of the court, and "dislodges the court from its constitutional position guaranteeing that it decides upon the charges as an 'outsider'". As a result of the provision referred to above, the court acts as an accusing party by calling upon the public prosecutor to expand the charges, and then judges upon its own pre-concept. Consequently, the challenged provision violates the above principle provided for in the ACP, furthermore, it violates the right to have one's case judged by an impartial court as granted in the Constitution.

2. During its procedure, the Constitutional Court obtained the opinion of the Minister of Justice.

3. In the procedure, the Constitutional Court has established that the contents of the statutory provision affected by the judicial initiative are closely related to the contents of Section 227 of the ACP. Therefore, acting in accordance with its consistent practice, it has performed a constitutional review in respect of the latter as well. [e.g. Decision 3/1992 (I. 23.) AB, ABH 1992, 329, 330; Decision 6/1992 (I. 30.) AB, ABH 1992, 40, 41; Decision 54/1992 AB, ABH, 1992, 266, 268; Decision 60/1994 (XII. 24.) AB, ABH 1994, 342, 343; Decision 25/1993 (IV. 23.) AB, ABH 1993, 188, 193; Decision 26/1995 (V. 15.) AB, ABH 1995, 123, 124; Decision 31/1995 AB, ABH 1995, 158, 159; Decision 81/1995 (XII. 21.) AB, ABH 1995, 421, 423; Decision 4/1998 (III. 1.) AB, ABH 1998, 71, 72; Decision 16/1998 (V. 8.) AB, ABH 1998, 140, 153; Decision 10/2001 (IV. 12.) AB, ABK April 2001, 171, 184; Decision 31/2001 (VII. 11.) AB, ABK June-July 2001, 329, 335]

In addition, the Constitutional Court has established that Section 342 para. (3) of Act XIX of 1998 on Criminal Procedure to be put into force as of 1 January 2003 (hereinafter: the new ACP) contains the same provision as the one in Section 227 of the Act currently in force. On the basis of the evident connection between the above, the Constitutional Court – acting in accordance with its practice followed in Decisions 5/1999 (III. 31.) AB (ABH 1999, 75, 86)

and 19/1999 (VI. 25.) AB (ABH, 150, 158) – has extended the constitutional review to the above provision as well.

II.

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

"Article 45 para. (1) In the Republic of Hungary justice is administered by the Supreme Court of the Republic of Hungary, the appeals courts, the Municipal Court of Budapest, the county courts and the local and labor courts.

(2) Special courts for specific groups of cases may be established by law."

"Article 50 para. (1) The courts of the Republic of Hungary shall protect and uphold constitutional order, as well as the rights and lawful interests of the citizens and shall determine the punishment for those who commit criminal offences."

"Article 51 para. (2) The Office of the Public Prosecutor shall exercise rights specified by law in connection with investigations, shall represent the prosecution in court proceedings, and shall be responsible for the supervision of the legality of penal measures."

"Article 57 para. (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law."

2. The provisions of the ACP relevant in respect of the petition are as follows:

"Section 9 para. (1) In the criminal procedure the prosecution, the defence and the judgement are separated from one another.

(2) Court proceedings may only be started on the basis of lawful charges. It is only the person against whom charges have been pressed whose criminal law liability the court may decide on, and liability may only be established in the case of acts specified in the charges.

(3) In the court proceedings, during the collection of evidence, the prosecutor, the defendant and the defence counsel enjoy the same rights."

"Section 171 para. (2) In the case of a possibility for the expansion of the charges, the court shall call the attention of the public prosecutor thereto. The court may also call the attention of the public prosecutor to the fact that according to the data available in the case, charges are also to be pressed against another person on the basis of a criminal offence closely related to the conduct subject to the charges. In this case, the court shall forward the documents to the public prosecutor if so requested."

"Section 227 If the criteria for the expansion of the charges are met, and the public prosecutor is not present at the hearing, the court shall notify the public prosecutor and shall adjourn the hearing or separate the procedure."

3. The relevant provision of the new ACP is as follows:

"Section 342 para. (3) If the criteria for the expansion of the charges are met, and the public prosecutor is not present at the hearing, the court shall notify the public prosecutor and shall adjourn the hearing or separate the procedure."

III.

The petition is well-founded.

1. The Constitutional Court has already examined in several decisions the constitutional requirements of the independence of the judiciary branch and the impartiality of the courts, as well as the concept in constitutional law of the administration of justice, and the role played in it by the courts and public prosecutors' offices.

As established by the Constitutional Court in its Decision 53/1991 (X. 31.) AB, "The power of the judiciary, separated from the powers of the legislature and of the executive branch in the Hungarian parliamentary democracy as well, is a manifestation of the power of the State authorised to decide with binding force, through the organisation established for this purpose, on rights injured or debated, in the course of a procedure regulated by the law."

[Decision 53/1991 (X. 31.) AB, ABH 1991, 266, 267; and Decision 627/B/1993 AB, ABH 1997, 767, 768; Decision 52/1996 (XI. 14.) AB, ABH 1996, 159, 161]

The Constitutional Court pointed out the following as well: "The most important feature of the power of the judiciary is […] its permanence and neutrality. This neutrality is formulated in Article 50 para. (3) of the Constitution by stating that judges are independent and answer only to the law." [Decision 17/1994 (III. 29.) AB, ABH 1994, 84, 85]

In its Decision 52/1996 (XI. 14.) AB, the Constitutional Court emphasised that "Participation in the administration of justice is a constitutional obligation of the public prosecutor's office. According to Article 51 para. (1) of the Constitution, the public prosecutor's office ensures the protection of citizens' rights and the prosecution of criminal offences. By way of criminal prosecution and by way of representing the prosecution, the public prosecutor's office is a participant of the administration of justice with independent and specified powers (representation of prosecution and the principle of prosecution). According to Article 51 para. (2) of the Constitution, the public prosecutor's office 'represents the prosecution in court proceedings'. Although the judicial proceedings are in the centre of the criminal procedure, the preparations for the phase of judgement are also part of the administration of justice as an activity of public authority." [Decision 52/1996 (XI. 14.) AB, ABH 1996, 159, 161]

2. The ACP states in Section 9 para. (1) among its basic principles that the procedural tasks of prosecution, defence and judgement are separated from one another during the administration of justice in criminal matters. In the present procedure, the Constitutional Court has examined the contents of the principle of prosecution specified in detail in Section 9 para. (2) of the ACP and the consequences of the enforcement thereof, on the basis of the above principle (the division of functions).

According to the ACP in force, three basic elements form the essence of the principle of prosecution having had varying contents and having been applied within different procedural frameworks in the course of history: the division of functions in litigation, the right of the prosecutor to dispose over the charges, and the court's being bound to the charges at the commencement of the judicial phase of the procedure, during the proceedings, and when passing the judgement.

The abstract theoretical concept of separating the sides of prosecution, defence and judgement becomes a norm in the Act on Criminal Procedure by the Act providing for specific rules attaching concrete rights and obligations to the specific types of procedural responsibilities, and by it defining the rules on competence, jurisdiction, incompatibility and exclusion in connection with the function concerned [Sections 17, 18 para. (4), 20 para. (1) of the ACP].

Further provisions of the ACP set the limits within which the courts and the public prosecutors' offices perform the tasks assigned to them, specifying the tools they may use when performing the concrete procedural rights and obligations.

The public prosecutor shall supervise the lawfulness of the investigation and ensure it with measures in the manner provided for in the specific rules of the ACP [Section 18 paras (1), (2), (3)]. The public prosecutor may decide independently on refusing the investigation, terminating the investigation, terminating the investigation – with or without reprimanding – in order to prevent an unfounded or unnecessary pressing of charges, and on waiving or postponing the pressing of charges [Section 127 paras (2), (3); Section 127/A para. (1); Section 129 para. (1); Section 139 paras (2), (3); Section 140 para. (1); Section 141/C para. (1); Section 147; Section 147/A; Section 303/A of the ACP].

It follows from the system of the ACP that, upon completion of the investigation, only the public prosecutor vested with the function of public prosecution may decide on further continuation of the criminal procedure, on the basis of the evaluation of the data of the investigation. One of the results of the public prosecutor's evaluation activity is the pressing of charges, in the case of which he exercises a right deriving from public authority. This is how the concrete case is put before the court exclusively empowered to pass a decision on the merits.

The existence of lawful charges is a precondition of the court's activity of administering justice. First, the court examines *ex officio* whether the formal and content requirements concerning charges as specified in the Act on Criminal Procedure are met.

According to the formal requirements concerning lawful charges, they are to originate from the public prosecutor empowered by the ACP to represent the prosecution [Section 18 para. (4); Section 295 para. (1); Section 333 para. (1) of the ACP], or from a private prosecutor in specific types of cases [Section 54 para. (1) of the ACP] (legitimacy of the prosecutor). The minimum requirements concerning the content of charges are defined in Section 146 para. (2) of the ACP among the provisions on the necessary elements of the bill of indictment. The representative of public prosecution shall in all cases press comprehensive, well-founded charges to the court with competence and jurisdiction on the basis of an act concretely described, specifying its classification as per the Criminal Code, aimed at the establishment of the criminal liability of an exactly identifiable person, with evidence indicated, and containing the motions of the prosecutor.

In the application of the institution of bringing someone to court regulated in Chapter XVI of the ACP, Section 349 para. (2) of the ACP requires to present the charges orally, but – if there is no provision to the contrary – the oral charges shall contain the same elements as the written ones. In fact, according to the uniform national practice of public prosecutors, in such cases, too, a so-called written "note" is made, which contains the defendant's personal data, the description of the act which is the subject of the charges, and the classification of the act.

According to the ACP, the requirements concerning the contents of private complaints are less stringent than in the case of public prosecution, but private complaints are not relevant with respect to the provision under examination.

Throughout the procedure, the court is bound to the lawful charges, and it may only decide on the liability of the accused person for the act constituting the subject of the charges, however, it must cover the whole of the charges [Section 163 para. (2) of the ACP; Section 250 point III]. It is the set of facts being the subject of the charges that determines the competence and the jurisdiction of the court, the manner of the procedure (felony, misdemeanour), the directions and the extent of the evidence taken by the court, and the framework of passing the judgement.

The provisions allowing the prosecutor to amend the charges ensure the effective exercise of the function of prosecution. If justified by new elements (new evidence or the

modified legal evaluation of the facts) occurring after the original pressing of charges, the charges may be changed (amended or expanded).

In respect of the modification of the charges including the changing of the charges and their expansion regarding their subject, the exclusivity of the public prosecutor's right to represent public prosecution breaks up. According to the ACP, these possibilities are open for the public prosecutor up to the session preceding the adoption of the decision of first instance [Section 209 para. (2) of the ACP], but at the same time, parallel rights and obligations of similar contents connected to the function of prosecution are vested with the court as well. In the preparatory phase preceding the hearing [on the basis of Section 171 para. (2) of the ACP] as well as in the phase of hearing [on the basis of Section 227], the court is obliged to call the public prosecutor's attention to the possibility of expanding the charges regarding their subject. In the preparatory phase, the court is obliged to call attention to the possibility of pressing charges against (an)other person(s) in addition to the defendant(s), while in the phase of hearing it may do so.

Up to the moment when judgement is passed by the court of first instance, the public prosecutor has the chance to significantly amend the charges in respect of any conduct that did not form the basis of the original charges, moreover, he may – in compliance with the procedural rules – press charges against a person originally not accused. This is justified both by the need to enforce the punitive demand of the State and by the need to ensure the economy of litigation. However, the right and obligation prescribed for the courts within a wide scope in respect of "calling attention" also means that the court can gain significant influence over the prosecution that allows the court to widen the scope of prosecution in advance in line with its own "ideas". The partial transfer of the public prosecutor's rights of public prosecution results in a shift from the concept of impartial judges to prosecutor-judges, while the preliminary approximation of the charges to the expectations of the court bears no risk at all for the public prosecutor.

3.1. According to the consistent practice of the Constitutional Court, "[...] the decisions of the Constitutional Court related to the administration of criminal justice are based on the theoretical ground that in a democratic state under the rule of law, punitive power is a constitutionally restricted right of public authority and a constitutional obligation as well. The institutions and the tools for the exercise of punitive power and for the enforcement of the

demand for punishment have direct constitutional relevance; the rules on enforcing criminal liability bear constitutional importance. It follows from the criminal procedure being a manifestation of public authority and from the nature of the task thereof that it affects the constitutional fundamental rights of individuals [see in detail: Decision 42/1993 (VI. 30.) AB, ABH 1993, 300, 304-305].” [Decision 49/1998 (XI. 27.) AB, ABH 1998, 372, 376]

It has also been established by the Constitutional Court that “procedural guarantees follow from the principles of the rule of law and legal certainty, and they are of fundamental importance for the predictability and foreseeability of the operation of legal institutions. The Constitution does not confer a right to the enforcement of substantive justice, and it does not guarantee the exclusion of unlawful judicial decisions. These are the goals and duties of the State under the rule of law for the realisation of which it must establish the appropriate institutions – primarily providing procedural safeguards – and guarantee the rights concerned. Thus the Constitution confers the right to procedures necessary, and appropriate in the majority of cases, for the realisation of substantive justice (ABH 1992, 65).” [Decision 49/1998 (XI. 27.) AB, ABH 1998, 372, 376, 377]

The division between the functions of prosecution and the administration of justice is a basic condition for the requirement of fair trial. The separation of the tasks of the public prosecutor’s office and the court, the detailed rules on the specific types of activities, and the construction comprising the obligations prescribed for the subjects of the procedure and the rights vested on them result in procedural guarantees for the defence.

In the final phase of the criminal procedure, the court’s being bound to the charges not only sets limits upon the contacts between the prosecutor and the court, but it is also significant in relation to the content of the defendant’s right to defend himself. For the defendant, it is necessary for lawful and successful defence to know on the basis of what facts, connections and data, and for what kind of criminal offence the criminal procedure has been started against him in order to establish his criminal liability. It is the exact knowledge of the charges that makes it possible for the defence to reveal – among others – evidence for the lack of culpability or of qualifying circumstances, or for the existence of causal relations justifying privileged treatment of the case, as well as to call attention to motifs or mitigating circumstances significant with regard to the assessment of the act. If the defence is not in possession of such knowledge, it does not have the chance to present its arguments as a party

equal in rank with the prosecution, and to put forward motions, i.e. to exercise the right of defence with the content specified in Section 9 para. (3) of the ACP.

Although – as follows from the regulations in force – lawful and well-founded charges are a central issue in the judicial phase of the procedure, this does not mean that the charges may not be changed in accordance with the results of evidence taken during the adversary procedure. However, the Constitutional Court pointed out in Decision 9/1992 (I. 30.) AB that "the prosecution of crime shall be performed within strict limits and conditions of substantive and procedural law, and that the State shall bear the risks of having no success in the prosecution of crime. This bearing of risks is expressly manifested in the constitutional guarantee of the presumption of innocence presented as a separate rule [Article 57 para. (2)]." [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 70] Thus, it is a fundamental requirement to specify in advance in the Act on Criminal Procedure the framework for the potential changing of charges to ensure foreseeability by the defendant. However, in addition to the technical calculability of rules, the foreseeability by the defendant of the powers of the public prosecutor and of the court must be ensured in terms of content as well, in line with their tasks specified in the Act on procedure. In this respect, the regulation of the right of disposition over the charges, and in particular the regulation of the expansion of the charges is a crucial question.

3.2. In line with the Constitution, the Act on Criminal Procedure confers – without any exceptions – upon the public prosecutor all responsibility for making decisions on pressing charges in respect of criminal offences to be prosecuted by public prosecution. By pressing charges, the prosecutor expresses – on the basis of the documents of the investigation forwarded to him – what facts he has established as proving the defendant's liability, and what his legal position is in respect thereof. The representation of prosecution entails the public prosecutor's obligation to amend the scope of the charges in accordance with the results of taking evidence, in line with the rules related to the public prosecutor's professional responsibility. According to the rules of the ACP, if the charges are expanded by the prosecutor, the defendant shall be allowed to exercise the right to defence in respect of the new accusation brought against him even if such exercise necessitates the adjournment of the hearing [Section 209 para. (3)], with due regard to the fact that the court's judgement shall be based upon the amended charges.

In criminal cases, it is the procedural task of the court in accordance with the Constitution and the ACP to pass an impartial decision on the charges after a fair procedure.

In its Decision 6/1998 (III. 11.) AB, the Constitutional Court laid down the following principle: “The requirement of a ‘fair trial’ is not simply one of the requirements set out here for the court and the procedure (e.g. as a ‘just trial’), but, in addition to the requirements specified in the Constitution as referred to above, particularly in respect of criminal law and criminal procedure, it also encompasses the fulfilment of the other guarantees of Article 57. Moreover, according to the generally accepted interpretation of the articles of the Covenant and the European Convention on Human Rights that contain procedural guarantees, forming the basis of the content and structure of Article 57 of the Constitution, fair trial is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, a procedure may be ‘inequitable’, ‘unjust’ or «unfair» even despite lacking certain details or complying with all the detailed rules.” [Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 95]

Fair trial has numerous unspecified, but acknowledged, and several specifically named components. The requirement of the impartiality of the court is one of the latter, with a prominent role to be played also in relation to the right to defence.

The Constitutional Court pointed out in Decision 67/1995 (XII. 7.) AB, where it examined for the first time the set of constitutional requirements of the court’s impartiality, the following: “The fundamental constitutional right to have one’s case judged by an impartial court requires the court to be unprejudiced and unbiased in respect of the person who is the subject of the proceedings. This is, on the one hand, a requirement concerning the judge himself, his conduct and attitude, and, on the other hand, it is an objective requirement related to the regulation of the procedure: any situation which raises a justifiable concern about the impartiality of the judge must be avoided.” [Decision 67/1995 (XII. 7.) AB, ABH 1995, 346, 347]

In the same decision, the Constitutional Court analysed the so-called double test applied by the European Court of Human Rights when examining the realisation of fair trial guaranteed under Article 6 point 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms promulgated in Hungary in Act XXXI of 1993. In the framework of

the subjective test, the European Court examines the personal conduct of the judge in charge, i.e. whether during the procedure he "showed any sign reflecting the lack of his impartiality." [Decision 67/1995 (XII. 7.) AB, ABH 1995, 346, 347] The objective approach is the "examination of whether the petitioner had any justifiable and objectively verifiable reason to assume a lack of impartiality, independently from the personal conduct of the judge. In this respect, the Court examines in detail what tasks had been performed by the judge concerned in what earlier procedures in line with the rules of the legal system in question, and what the internal structure of the organisation is like within the framework of which the decisions rendering his impartiality questionable had been adopted." [Decision 67/1995 (XII. 7.) AB, ABH 1995, 346, 348]

It is evident from the practice of the European Court of Human Rights regarding the objective test that the examination of the functions performed by the judge during the proceedings is a fundamental question. According to the Court, the accumulation of functions, i.e. when the judge performs functions related to the investigation or the prosecution, in addition to judgement, raises justified doubts about the judge's impartiality. It is a fundamental issue that the judge, who is positioned above the parties, must be detached from the parties. Charges, which are to be attacked by the defence, are a precondition to the criminal procedure, therefore the detachment of the judge can be secured by having the charges formulated by another person and by having that person perform the tasks related to prosecution. Having a single person performing the tasks of prosecution and judgement in the same procedure is a fact in itself questioning the impartiality of the judge, independently from his personal behaviour during the procedure. [Eur. Court H. R., Case of De Cubber v. Belgium, Ser. A-86.; Eur. Court H. R., Case of Piersack v. Belgium, Ser. A-53.]

The European Court of Human Rights and the Commission have examined several times the set of criteria for the calculability of the contents of the procedure before the court. In the course of the above, among others, it has been explained in connection with a case related to Hungary that according to the requirement of fair trial, the notification of the defendant of the charges brought against him is more than a merely formal requisite.

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"Particulars of the criminal offence play a crucial role in the criminal process, in that it is from the moment of their service of that the suspect is formally put on written notice of the factual and legal basis of the charges against him (Eur. Court HR, Kamasinski v. Austria

judgement of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the 'cause' of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed [Eur. Court HR, Pélissier and Sassi v. France (GC), judgement of 25 March 1999, 25444/94, § 51, ECHR 1999-II]. […] The Court further recalls that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence." (Eur. Court H.R., Case of Zoltán Dallos v. Hungary, judgement of 8 February 2001, 29082/95, § 47, ECHR 2001-II; abstract in Hungarian: Bírósági Határozatok (Court Reports), 2001/5, 392, 396)

Consequently, the separation of the tasks of the public prosecutor's office and the court means not only a formal compliance with the rules on pressing charges and representing prosecution, as it has significant weight in respect of the lawfulness of the contents of the charges as well. The detailed procedural rules on the activities of judges and prosecutors, the construction of the obligations prescribed for the participants of the procedure, as well as the rights vested on them have fundamental importance in respect of the requirement of fair trial. Creating a possibility for "permeation" between the procedural functions and prescribing it as an obligation realised throughout the judicial phase of the procedure questions the lawfulness of the contents of prosecution, and thus it violates the requirement of fair trial.

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3.3. The ACP's rules under examination bind the judge to intervene – in concrete cases at the court – into the relation between the parties on the side of the prosecution and against the defendant, moreover, the judge is bound to propose the indictment – without a preliminary procedure – of a person who has not participated in the procedure before. This intervention breaks up the balance resulting from the division of functions, and the court steps over the limits that follow from its scope of responsibilities specified in the Constitution and the ACP. Exercising the rights that fall into the competence of the prosecution, forcing the judge as early as in the preparatory phase to adopt a preliminary position about the case to be judged upon, can, on the one hand, actually result in making the judge biased, and on the other hand, as a consequence, the formal impartiality of the judge becomes questionable. When a judge states the possibility of expanding the charges, this may make one believe that the judge had decided upon the guiltiness of the defendant even before starting the evidentiary

procedure, and that he considers the defendant to be criminally liable beyond the scope specified in the original charges. All the above concerns are reinforced when the prosecutor – after being called upon by the court – presses charges against a person against whom he had not originally intended to use the public authority of prosecution, and in respect of whom an investigation might not have been performed at all.

The fact that the prosecutor is not obliged to expand the charges upon the judge's initiative is not relevant in this respect. Moreover, this manner of regulation builds an unacceptable factor of insecurity into the procedure. Regardless of the declaration made by the representative of the prosecution, the real opinion of the court in charge of the case thus becomes known to the defendant who can then have well-justified concerns about the prejudiced nature of the evidentiary procedure to follow. In this case, the defence could assume with due ground that despite the prosecutor's negative reaction, the court would try to support during the proceedings its own position presented in its motion for the expansion of the charges, or that it would take into account during the imposition of punishment the factors originally serving as the basis of the call for the expansion of the charges. As there is no procedural rule preventing the prosecution from subsequently changing its position on the expansion of the charges, the operation of both the prosecutor and the court becomes incalculable by the defence, also in respect of their procedural functions.

Mixing up the roles of public prosecution and the court, and intervention by the court into the procedure on the side of the prosecution can, as a result of the nature of the regulation, raise doubts about the impartiality of the court. In this respect, the Constitutional Court established the principle in its last Decision 17/2001 (VI. 1.) AB summarising its relevant practice that it is unconstitutional to regulate a procedural institution contrarily to the principle according to which "the judge shall not only be impartial but he shall also give the impression of impartiality." [Decision 17/2001 (VI. 1.) AB, ABK May 2001, 248, 250]

It was also explained in Decision 33/2001 (VII. 11.) AB of the Constitutional Court that the mere existence of a legal institution "violating the principle of equality before the court" harms the consistent enforcement of the principle of impartiality by way of the fact that one of the participants of the procedure, the prosecutor, "is granted extra rights as a result of which the defendant […] suffers a disadvantage." [For details see: Decision 33/2001 (VII. 11.) AB, ABK June-July 2001, 347, 348, 349]

The prosecutor "must act in line with the requirements concerning his professional responsibility when exercising the function of public prosecution." [Decision 34/B/1996 AB, ABK April 2001, 190, 192] The prosecutor's professional obligations related to exercising the right to dispose over the charges are regulated in detail in Chapter III of Act V of 1972 on the Public Prosecutor's Office of the Republic of Hungary (hereinafter: the APP), with special regard to participation in the court procedure. Besides, Section 53 para. (1) item a) of Act LXXX of 1994 on Service at the Public Prosecutor's Office and on Handling Data at the Public Prosecutor's Office provides for the possibility of starting disciplinary action against a prosecutor in the case of a culpable violation of his official duties as regulated – among others – in the APP.

According to the rules of the ACP, the exercise of the tasks resulting from the function of prosecution is inseparable from the prosecutor. As disposal over the charges is fully in the prosecutor's hands, the court has no legal means to enforce the pressing or the amendment of the charges in the case of either an inculpable or culpable default. Providing for such means would result in the merging of functions, which would seriously violate the constitutional right to have one's case judged by an impartial court.

Performing or not the procedural tasks that result from disposal over the charges is the prosecutor's exclusive responsibility. The prosecutor's rights of presence, interrogation, making motions and other rights in court proceedings are fully guaranteed by the ACP. It falls outside the scope of examination by the Constitutional Court, as a question of a merely practical nature, how the prosecutor complies – at the hearing or outside that – with his obligations that result from the above responsibility, and what principles he follows when exercising the right to be present at the hearing. The enforcement of the State's punitive demand is the constitutional obligation of the prosecutor, who shall bear the risks of non-enforcement due to any default related to his professional conduct. The interest in reducing such risks can never be stronger than the enforcement of the right to have a fair trial. However, the latter is conditional upon a clear-cut division between the procedural functions.

3.4. The Constitutional Court has pointed out consistently in its decisions concerning the judicial organisation that it follows from the constitutional principle of the division of power – as one of the constituents of the rule of law specified in Article 2 para. (1) of the

Constitution – that "in the constitutional structure of separating the branches of power, the independence of the judicial branch plays a prominent role". [Decision 17/1994 (III. 29.) AB, ABH 1994, 84, 85] The principle of the division of power results in the court's monopoly in respect of the administration of justice granted in Article 45 para. (1) of the Constitution, which becomes finally manifested in concrete cases, in the exclusivity of the activity of judgement specified in Article 46 para. (1).

The Constitutional Court has explained the constitutional concept of the administration of justice in several closely related decisions. As pointed out in Decision 52/1996 (XI. 14) AB, "The administration of justice is an activity of public authority regulated in the Act on procedure and related to the judicial branch." [Decision 52/1996 (XI. 14.) AB, ABH 1996, 159, 161] At the same time, Decision 1481/B/1992 AB points out that "The constitutional concept of 'administering justice' may not be interpreted as being related only to judgement in concrete cases, as it encompasses a scope necessarily wider than that." (ABH 1993, 756, 757)

In the system of administering justice in criminal cases, examined as a process, there are participating organisations and persons other than the courts. The participating organisations (police, public prosecutor's office, court) have different tasks in the specific phases of the criminal procedure, to be performed by them independently within the limits and according to the principles set by procedural law and the Acts of Parliament regulating their organisation. The Constitution also separates the functions related to the administration of criminal justice, naming – in addition to judgement as mentioned above – in Article 51 para. (2) the prosecutory monopoly of the public prosecutor's office, and in Article 57 para. (3) the right to defence. Thus the principle of the division of functions specified in Section 9 para. (1) of the ACP has got a direct constitutional ground. These constitutional provisions are, at the same time, guarantees for the balance between judgement, prosecution and defence, as the main elements ensuring fair trial, which are to be enforced unconditionally in the Act on procedure.

In the judicial phase of the procedure, it is a requirement resulting from the essence of the adversary and prosecution-based procedure that the competencies, activities and scope of action of both the court – having the monopoly of administering justice, according to the Constitution – and the public prosecutor's office – possessing exclusively the power of public

prosecution – must be transparent and foreseeable. The principle of dividing functions and Articles 45 para. (1) and 51 para. (2) of the Constitution are equally violated by a regulation that offers a chance in the course of the proceedings to take away a competence from any of the participants of the procedure to the detriment of the legal function of that participant. It follows from the above-mentioned provisions of the Constitution that the monopoly of public prosecution vested on the public prosecutor should be just as intact as the independence and impartiality of the judge in respect of judgement.

Undoubtedly, the public prosecutor's monopoly of public prosecution can have some negative consequences (e.g. failure to press charges, unjustified dropping of charges) to the detriment of the interests of the injured party. Such errors and deficiencies can be eliminated and repaired through the system of measures intended to make corrections in respect of the prosecution (e.g. the re-introduction of supplementary private complaint by the new ACP). However, the correcting measures intended to repair the inculpable or culpable defaults or potential professional errors made by the public prosecutor may never result in mixing up the procedural functions of prosecution and judgement.

The Constitutional Court explained in its Decision 9/1992 (I. 30.) AB that legal certainty is a fundamental criterion of the rule of law, and that "legal certainty requires not only the unambiguity of individual legal norms but also the predictability of the operation of individual legal institutions." (ABH 1992, 59, 65) In the relation between the public prosecutor and the court, it is a basic requirement that during the concrete procedures neither the independence and impartiality of judges, nor the inherent essence of the monopoly of public prosecution should be questionable. For realisation of the above, the operation of the authorities participating in the criminal procedure is to be foreseeable in terms of content, and the tasks actually performed by the court and the public prosecutor's office in accordance with the Act on procedure are to be in compliance with the functions of public authority vested on them by the Constitution.

The relevant provisions of the Constitution, i.e. Article 45 para. (1) granting the monopoly of the courts in respect of the administration of justice and the closely related Article 46 para. (1) on the exclusivity of the activity of judgement, Article 51 para. (2) declaring the prosecutory monopoly of the public prosecutor's office, as well as Article 57 para. (3) guaranteeing the right to defence serve the very purpose of having the cases judged

in a fair trial, in an unbiased and impartial manner. Impartiality is one of the preconditions for having just and well-founded judgements in all cases.

In view of the above reasons, the Constitutional Court has established that the provisions reviewed contradict the principle of dividing functions related to the administration of justice in criminal matters, which can be deduced directly from the Constitution and is named specifically in Section 9 of the ACP, and as a consequence, they violate the basic rules guaranteeing the right to have a fair trial. As explained by the Constitutional Court in its Decision 6/1998 (III. 11.) AB, although the core of the right to fair trial consists of the principles laid down in Article 57 of the Constitution, the "fairness of the trial" takes more than that. It was pointed out at the same time that "There is no necessity which could justify any – even proportionate – restriction upon the 'fairness' of the trial." (ABH 1998, 91, 95, 99)

It also follows from the above that the obligation of the court related to the expansion of the charges as provided for in Section 171 para. (2) and Section 227 of the ACP violates the constitutional principle of the right to have one's case judged by an impartial court as granted in Article 57 para. (1) of the Constitution. In addition, the regulation has caused legal uncertainty violating the right to defence as guaranteed in Article 57 para. (3) of the Constitution. Consequently, the Constitutional Court has annulled the provisions under review in accordance with Section 42 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) as of the date of publication of this Decision.

Section 342 para. (3) of the new ACP is unconstitutional for the same reason as Section 227 of the ACP. Therefore, the Constitutional Court has ordered on the basis of Section 42 para. (2) of the ACC that the relevant provision of the Act promulgated but not yet put into force shall not enter into force as of 1 January 2003.

Ordering the publication of this Decision is based on Section 41 of the ACC.

Budapest, 19 March 2002

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