Decision 37/2002 (IX. 4.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions, judicial initiatives, and a constitutional complaint seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court has – with concurring reasoning by dr. László Kiss and dr. János Németh, Judges of the Constitutional Court, and dissenting opinions by dr. János Strausz and dr. Éva Tersztyánszky-Vasadi, Judges of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds that Section 199 of Act IV of 1978 on the Criminal Code is unconstitutional and, therefore, annuls it as of the date of publication of this Decision.

The Constitutional Court orders that the final judgments rendered in criminal proceedings conducted on the basis of Section 199 of Act IV of 1978 on the Criminal Code be reviewed if the convicted person has not yet been relieved of the unfavourable consequences of his conviction.

2. The Constitutional Court holds that Section 200 of Act IV of 1978 on the Criminal Code is unconstitutional and, therefore, annuls it as of the date of publication of this Decision.

3. The Constitutional Court rejects the petitions seeking establishment of the unconstitutionality and a declaration of the nullification of Chapter XIV Title II of Act IV of 1978 on the Criminal Code as well as of using the terms “fornication” and “fornicate” in the definitions of the acts constituting the offences determined under Sections 198, 201, and 203 of the Act, and also the establishment of the unconstitutionality and a declaration of the nullification of Section 201 para. (1) and Section 210/A para. (2).

4. The Constitutional Court terminates the procedure aimed at the establishment of the unconstitutionality of the Subtitles in Sections 199 and 200, and Section 209 of Act IV of 1978 on the Criminal Code.

5. The Constitutional Court refuses the petitions seeking a modification of Section 201 para. (1) of Act IV of 1978 on the Criminal Code.

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

Reasoning

I

1. Act IV of 1978 on the Criminal Code (hereinafter: the CC) prohibits in the statutory definitions of "fornication against nature" (Section 199) and "having sex with children" (Section 201) in its Chapter XIV Title II among "Crimes against sexual morals", and also in the form of interpretative provisions [Sections 210 and 210/A para. (2)] even sexual contacts based on consent when established between persons of the same sex or of different sexes at the ages specified in the Act.

Fornication against nature is defined as sexual contact based on consent between a person over the age of 18 and a person of the same sex between the ages of 14 and 18; however, no criminal offence is committed when the person between the ages of 14 and 18 is of the opposite sex. In addition, sexual contact between persons of 14 to 18 years of age, no matter whether they are of the same sex or of different sexes, is not a criminal offence.

The Act prohibits, under the term of having sex with children, sexual intercourse performed by a person over the age of 14 with a person between the ages of 12 and 14. However, persons between the ages of 14 and 18, punishable under criminal law, commit no criminal offence when fornicating with a person, with his or her consent, of the same or the opposite sex, between the ages of 12 and 14.

Fornication is any gravely indecent act, with the exception of sexual intercourse, which serves the stimulation or satisfaction of sexual desire [Section 210/A para. (2) of the CC]. Although the concept of sexual intercourse is not defined in the Act, as far as criminal law is concerned, it is – according to the uniform and constant judicial practice and dogmatic interpretation – a sexual act between persons of different sexes.

With the same acts constituting the offence and the same penal sanctions, the CC punishes forceful fornication in a separate statutory definition. The offence is an "assault against decency" (Section 198) when the perpetrator and the victim are of different sexes, and it is "forceful fornication against nature" (Section 200) when the perpetrator and the victim are of the same sex. The legislature has made a difference between the basic forms of the two offences in as much as an assault against decency can only be punished upon private complaint, i.e. upon the victim's request, while forceful fornication against nature is to be punished independently of the victim's will (Section 209 of the CC).

2. Several petitioners and courts, the latter suspending their procedures under way, turned to the Constitutional Court for the constitutional review of Section 199 of the CC. Some of the petitions, in close relation with the punitive provision, pertained to Section 201 para. (1), Sections 200 and 209 as well as Section 210/A para. (2) of the CC, and there was a petition challenging the constitutionality of the terms used in the CC ("against sexual morals", "against nature " (i.e. homosexual), "fornicate", and "fornication"). In view of their related subjects, the Constitutional Court consolidated the petitions and judged them in a single procedure.

2.1. According to one of the petitions filed jointly by several petitioners, Section 199 of the CC violates the prohibition of discrimination guaranteed under Article 70/A of the Constitution. In their opinion, "criminalising fornication against nature interferes with the right to privacy and the right to private secrets by restricting them in a discriminative way, focusing on a specific group of citizens (sexual minority)". The petitioners raise several arguments to verify that the prohibition under criminal law of sexual affection belonging to the deepest sphere of one's privacy is a form of unnecessary and disproportionate interference by the State, and it is not suited to reach the underlying objectives, i.e. "healthy psychosexual development" and the enforcement of "the right of the young to physical and mental health".

In addition, in connection with the establishment of the unconstitutionality of Section 199 of the CC, the petitioners – in order to prove that they support even the application of tools of criminal law for the protection of children's harmonic development, if such tools are non-discriminative – propose that the Constitutional Court call upon the Parliament to consider raising the age limit of victims (passive subjects) fixed in the statutory definition of having sex with children, i.e. to set a higher but non-discriminative age limit in respect of consent.

2.2.1. The petitioner challenging several provisions of the CC on crimes against sexual morals also alleges a violation of Article 70/A of the Constitution by Section 199 of the CC. In the petitioner's opinion, Section 199 of the CC as well as the provision in Section 201 para. (1) prohibiting sexual intercourse are unconstitutional also because they "criminalise sexual contacts even between persons of a very little age difference, and this statutory objective is arbitrary and constitutionally unjustified". In addition, Section 199 and Section 201 para. (1) of the CC violate "legal certainty as the originally lawful sexual partnership of a couple consisting of a juvenile and a minor under the age of 14 becomes one to be punished or punishable upon the older partner reaching the age of 18, and it remains as such until the younger one reaches the age of 18 or 14 years, as appropriate."

According to the petitioner, "By penalising under Section 199 of the CC the voluntarily chosen sexual partners of juveniles, the State intervenes without a constitutional reason and even later than necessary into the mental, moral and psychosexual development as well as into the private and spiritual lives of juveniles and their sexual partners of full age". Thus Section 199 itself of the CC – regardless of the discrimination of sexual contacts between persons of the same sex – violates Article 8 paras (1)-(2) of the Constitution (respect and protection by the State of fundamental rights and prohibition of restricting the essential contents of fundamental rights), Article 54 para. (1) (right to human dignity), Article 59 para. (1) (protection of secrecy in private affairs), and Article 60 paras (1)-(2) (freedom of conscience and freedom of choosing, exercising, expressing or non-expressing one's beliefs).

2.2.2. The petitioner challenges Section 210/A para. (2) of the CC, claiming it to make an arbitrary distinction between sexual intercourse and fornication, and further arguing that as a result, "Section 201 para. (1) provides for the punishment of a person between the ages of 14 and 18 who engages in sexual intercourse with a person between the ages of 12 and 14 (of the opposite sex), but such person shall not be punished if he/she establishes sexual contact with a person of the same age and the same sex (even though their sexual activities are as intensive as sexual intercourse between persons of different sexes)." This, according to the petitioner, violates Article 70/A para. (1) of the Constitution.

The petitioner holds that the principles of human dignity and the freedom of conscience [Article 8 para. (1), Article 54 para. (1), and Article 60 para. (1) of the Constitution] are violated by the

wording of Title II in Chapter XIV of the CC, using the term "crimes against sexual morals", as this way the Act "seems to declare sexual morals existing only at the level of hypothesis" to be subject to legal protection. It is also offensive to use the stigmatising terms "fornication" and "fornication against nature", as they "try to set up a priority in terms of value between human tastes, emotions, and habits."

2.2.3. In relation to Section 199 of the CC, the petitioner claims that the situation – resulting from Section 209 of the CC – of fornication against nature being punishable on a basis other than private complaint is a violation of the fundamental right to equal human dignity [Article 54 para. (1) and Article 70/A para. (1) of the Constitution], and the right to choose the education of one's child [Article 67 para. (2) of the Constitution]. Similarly, the provision in Section 209 of the CC on forceful sexual criminal offences results in a violation of Article 70/A para. (1) of the Constitution. According to the petitioner, there is an unconstitutional discrimination to the detriment of homosexual perpetrators of forceful sexual criminal offences, with preference given to heterosexual offenders, as in the case of a forceful sexual criminal offence where the victim is of the opposite sex, the perpetrator [Sections 197 para. (1) and 198 para. (1) of the CC] is punishable upon private complaint, while in the case of a forceful sexual criminal offence where the victim is of the same sex, the perpetrator (Section 200 of the CC) is punishable without a private complaint.

2.3. The Court of Budapest Districts II-III initiated the constitutional review of Section 199 of the CC in relation to the criminal case pending under No. 1.B.II.820/1998, started upon charges of having sex with children and fornication against nature. In the opinion of the court, Section 199 of the CC specifying the felony of fornication against nature – in view of Article 8 paras (1) and (2) of the Constitution as well – violates Article 70/A of the Constitution as "it orders the punishment of sexual contacts between persons of the same sex without providing for the same in the case of heterosexual contacts. Since both heterosexual persons and ones showing affection to persons of their own sex are to be treated as persons of equal dignity, the court holds any provision to the contrary to be unconstitutional."

The court also initiated the examination of whether or not maintaining the separate statutory definition under Section 200 of the CC is constitutionally justifiable with regard to Article 70/A of the Constitution. The statutory provisions defining and ordering the punishment of forceful fornication against nature and assault against decency apply the same punishments to

the basic and qualified cases of the same acts constituting the offence, i.e. fornication as defined under Section 210/A para. (2); the only difference is that one of them is committed against a victim of the same sex, while in the case of the other one, the victim is a person of the opposite sex than the perpetrator.

2.4. In pending criminal cases started upon charges of fornication against nature, the Court of Heves County, as the court of second instance, by its orders Bf. 278/2000/3-II and Bf. 401/2000/2, and the Metropolitan Court, as the court of second instance, by its orders 24. Bf. I. 8803/2000/33, 24. Bf. XIX. 5726/2001/2 and 24. Bf. IV. 7215/2002/2, asked for the establishment of the unconstitutionality and for the annulment of Section 199 of the CC on the ground of it violating Article 70/A of the Constitution, suspending at the same time the assessment of the appeals submitted against the judgements by the courts of first instance declaring culpability and imposing punishments. The courts referred to Decision 20/1999 (VI. 25.) AB, in which it was established by the Constitutional Court that discrimination on the basis of sexual orientation was discrimination on "other grounds".

In its order Bf. 278/2000/3-II, the Court of Heves County proposed that together with establishing the unconstitutionality of punishing fornication against nature, the Constitutional Court should consider raising the age limit of victims defined in the statutory definition of having sex with children.

Depending on the Constitutional Court's decision to be formed about Section 199 of the CC, the Metropolitan Court initiated in its orders – without reference to Section 209 of the CC and Article 70/A of the Constitution – the examination of whether it is justified to make a distinction between fornication against nature and having sex with children with regard to the requirement of private complaint for the punishability of the perpetrator. In the opinion of the court, the acts constituting the two offences, respectively, are the same in respect of fornication between persons of the same sex, and the only difference lies in the victims' age. As a result, victims under and over the age of 14 do not enjoy the same criminal law protection as far as the commencement of the proceedings is concerned, and this regulation is not reasonable. On the one hand, it protects younger victims – who should enjoy a higher degree of protection – only on a conditional basis, while the older ones are protected *ex officio*, and, on the other hand, the perpetrator of a less dangerous act is punished regardless of the victim's will, while the other offender responsible for an act representing a graver danger

is punishable only on the basis of the discretion of the victim or the legal representative thereof.

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2.5. The petitioner filed a constitutional complaint against judgement 5.B.592/2000/14 of the Town Court of Pécs and judgement 1.Bf.750/2000/62 of the Court of Baranya County, as the court of second instance. The courts had established the criminal liability of the complaining party on the basis of Section 199 of the CC, punishing him with imprisonment suspended under probation. The essence of the constitutional complaint is as follows: Section 199 of the CC represents discrimination against homosexuals and bisexuals, violating Article 70/A para. (1) of the Constitution. The other petitioner complains about the same, submitting a petition aimed at a posterior constitutional review in relation to the criminal case under way against him.

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

II

1. The statutory provisions relevant for the evaluation of the petitions and the ones referred to by the petitioners are the following:

1.1. The provisions of the Constitution:

“Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law.”

“Article 7 para. (1) The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law.”

“Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.”

“Article 15 The Republic of Hungary shall protect the institutions of marriage and family.”

“Article 16 The Republic of Hungary shall make special efforts to ensure a secure standard of living, instruction and education for the young, and shall protect the interests of the young.”
“Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.”
“Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data.”
“Article 60 para. (1) In the Republic of Hungary everyone has the right to the freedom of thought, freedom of conscience and freedom of religion.
(2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.”
“Article 67 para. (1) In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development.
(2) Parents have the right to choose the form of education given to their children.”
“Article 70/A para. (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.”

1.2. The relevant provisions of the CC are as follows:

“Private complaint:
Section 31 para. (1) In the cases defined in the Act, an act of crime is only punishable on the basis of a private complaint.
(2) The injured party shall be entitled to submit the private complaint.
(3) If the injured party is limited in his disposing capacity, the private complaint may also be submitted by his legal representative, and if he has no disposing capacity, it may be submitted exclusively by his legal representative. In these cases the guardianship authority shall also be entitled to submit the private complaint.
(4) If the injured party entitled to submit the private complaint dies, his relative shall be entitled to submit the private complaint.

(5) The private complaint submitted against any one of the perpetrators shall be effective for all the perpetrators.
(6) A private complaint may not be withdrawn."

"Assault against decency
Section 198 para. (1) A person who by violence or direct menace against life or limb forces another person to engage in fornication or to the endurance thereof, or uses for fornication the incapacity of another person for defence or for manifestation of will, commits a felony and shall be punishable with imprisonment between two to eight years.
(2) The punishment shall be imprisonment from five to ten years, if
a) the victim is under twelve years of age,
b) the victim is under the education, supervision, care or medical treatment of the perpetrator,
c) if several persons fornicate with the victim on the same occasion, knowing about each other's act.
(3) The punishment shall be imprisonment from five to fifteen years if the provisions of paragraph (2) items b) or c) also apply to the sexual assault committed against a victim under twelve years of age."

"Fornication against nature
Section 199 A person over the age of 18 who fornicates with a person younger than 18 of the same sex, commits a felony and shall be punishable with imprisonment of up to three years."

"Forceful fornication against nature
Section 200 para. (1) A person who by violence or direct menace against life or limb forces another person of the same sex to engage in fornication or to endure the same, or uses for fornication the incapacity of another person for defence or for manifestation of will, commits a felony and shall be punishable with imprisonment from two to eight years.
(2) The punishment shall be imprisonment from five to ten years, if
a) the victim is under twelve years of age,
b) the victim is under the education, supervision, care or medical treatment of the perpetrator,
c) if several persons fornicate with the victim on the same occasion, knowing about each other's act.

(3) The punishment shall be imprisonment from five to fifteen years if the provisions of paragraph (2) items b) or c) also apply to the forceful fornication against nature committed against a victim under twelve years of age."

"Having sex with children
Section 201 para. (1) The person who has sexual intercourse with a person who has not yet completed his fourteenth year, as well as the person who has completed his eighteenth year and engages in fornication with a person who has not yet exceeded his fourteenth year of age, commits a felony and shall be punishable with imprisonment from one year to five years."

"Section 209 The offences defined in Section 197 para. (1), Section 198 para. (1), as well as Section 201 paras (1) and (2) may only be punished upon private complaint, except for the case if offences punishable not on private complaint are committed in connection therewith."

"Interpretative provision:
Section 210 For the purposes of Sections 197-198 and Section 200, the person who has not yet completed his twelfth year of age shall be deemed as incapable of defence."
"Section 210/A para. (2) For the purposes of this Title, fornication is any gravely indecent act with the exception of sexual intercourse, which serves the stimulation or satisfaction of sexual desire."

2. In the present case, the Constitutional Court has had to decide about the constitutionality of punishing acts that had traditionally been sanctioned in Europe with the tools of criminal law, but the legal evaluation of which has significantly changed during the last fifty years. Therefore, the Constitutional Court has completed a thorough analysis of legal history and a comparative examination of legal systems, and also surveyed the relevant positions of the European international institutions.

2.1. The states of Europe – especially since the end of the 12th century – had sanctioned with grave punishments the various forms of homosexual acts. Sexual contacts between persons of the same sex, and predominantly between men (qualifying as sodomy), had been generally sanctioned with capital punishment and, indeed, with particularly cruel forms of that. However, the criminal law concepts in the era of the Enlightenment had an effect on the criminal law regulation of homosexuality. In 1764, Beccaria stated in his fundamental work serving as a basis

for modern criminal law that the State should not apply the tools of criminal law to homosexuality. In the 19th century, the scope of criminal liability was generally limited, and punishments became significantly less severe.

In the states of Europe, the criminal law rules punishing heterosexual and homosexual contacts with regard to the partners' age were quite diverse. In most legal systems, the so-called age limit of consent or protected age limit was set higher in the case of sexual contacts between persons of the same sex. As originally only homosexual acts between men were punishable, the protected age limit in such cases was higher than the criminally sanctioned age limit in both heterosexual and lesbian relationships. However, the last decades of the 20th century were marked by the harmonisation of the criminal law provisions sanctioning homosexual and heterosexual acts. The length of that process is well demonstrated by the fact that in the territory of the United Kingdom (England, Scotland, Wales, and Northern Ireland), the Act eliminating the differentiated regulation of homosexual and heterosexual relations and amending former Acts of criminal law was put into force as late as on 8 January 2001 – after a long parliamentary debate. At present, among the Member States of the European Union, Austria is the only one with a criminal law provision (StGB § 209) in force applying differentiation on the basis of sexual orientation, but that rule has already been declared unconstitutional by the Constitutional Court in its decision of 21 June 2002.

2.2. The legislative steps made in the democratic states of Europe – in several cases with a lot of debate – have been closely connected to the requirements specified by international organisations. The documents of the organisations of the European Union relevant in the present case are not international legal obligations for the assessment of constitutionality. Nevertheless, such decisions were based on the evaluation and summary of the processes experienced in the democratic societies of Europe, therefore the Constitutional Court examined them as well when preparing for its Decision.

In 1984 the European Parliament adopted its first resolution calling upon the Member States to eliminate the punishment of consent-based homosexual relations between adults and to define the same age limit of consent to homosexual and heterosexual contacts, respectively. Then, in the yearly reports evaluating the situation of human rights, plus in separate resolutions in 1994 and 1998, it re-established its position about equal rights for homosexuals and lesbians, and repeatedly urged the elimination of criminal law provisions based on sexual

orientation, including the differentiation in setting the age limit of consent. It was reinforced in a separate resolution in 1998 that the Parliament shall not approve the accession of any applicant Member State the legislation or the policy of which violates the human rights of homosexual persons.

2.3. In the present case, the Constitutional Court has paid special attention to the relevant documents of the European institutions protecting human rights: the European Commission of Human Rights (hereinafter: the Commission), the European Court of Human Rights (hereinafter: the Court), and the Parliamentary Assembly of the Council of Europe (hereinafter: the Assembly).

As far as the criminal law regulation of homosexual acts is concerned, the essence of the positions represented in the decisions of the Court [Eur. Court. H.R., Dudgeon v. United Kingdom judgment of 22 October 1981, Series A no. 45; Eur. Court. H.R., Norris v. Ireland judgment of 26 October 1988, Series A no. 142; Eur. Court. H.R., Modinos v. Cyprus judgment of 22 April 1993, Series A, no. 259; Eur. Court. H.R., A.D.T. v. United Kingdom judgment of 31 July 2000] can be summarised as follows:

Punishing homosexual acts based on voluntary consent is a form of interference by the State with the sphere of privacy, interfering in particular with the right to have one's sexual life respected [Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention)]. Such interference by the State affects the most intimate aspect of privacy, the essential manifestation of human personality, and therefore it is restricted to the cases when it is justified by especially firm grounds.

The Court provides for a considerably wide range of discretion for the States to decide on the tools necessary in the society concerned for the protection of morals and for the protection of others' rights and liberty. This applies in particular to the definition of the age under which it is justified to protect, with the tools of criminal law, young people from those sorts of sexual conduct that might result in excluding themselves from the majority of society, and that they themselves might regret later on when they become more mature. In the opinion of the Court, even in democratic societies, tools of criminal law may be necessary for the protection of

persons who – due to their age – are particularly defenceless against sexual abuse and exploitation.

The Court has not taken a stand in the question about the potentially discriminative nature of the criminal law provisions applicable to men and the ones applicable to heterosexual and lesbian relations. In the opinion of the Court, no further examination is needed upon the establishment of a violation of Article 8 of the Convention.

The Commission decided in the so-called Sutherland Case [No. 25186/94, 1/7/1997], relevant to the present review, on the basis of the joint assessment of Articles 8 and 14 of the Convention. As far as the age limit of consent was concerned, the Commission examined the complaint about the – then prevailing – regulation in England and Northern Ireland, and found that it was not objectively and reasonably justifiable to apply a higher age limit of consent in the case of homosexual contacts between men than in the case of heterosexual and lesbian relations. It was established that the relevant provisions of the Act on criminal law and their application constituted discrimination violating the Convention with regard to the right to have one's privacy respected. Finally, the Court did not deliver a position on the merits of the case, as meanwhile the challenged regulation was changed. [Eur. Court H.R., Sutherland v. United Kingdom judgment (striking out) of 27 March 2001].

In relation to the above case, the Commission re-evaluated the earlier case-law in the light of the changes that had occurred in the past 20 years, finding that – contrary to its previous position – there were no reasonable and objective grounds to maintain different age limits for lawful homosexual and heterosexual acts and that defining different age limits was not a proportionate tool for achieving the desired goals. The Commission did not accept the reference to society's supporting the heterosexual way of life and condemning homosexuality as due justification for differentiated treatment under criminal law.

As far as Article 14 was concerned, the Commission noted that the Convention offered protection against discrimination that treated differently – without a due cause – persons being essentially in the same position. Different treatment is particularly objectionable when it serves no lawful purpose or there is no reasonable proportionality between the tools applied and the desired objectives. At the same time, the Commission acknowledged that the States

have a certain degree of discretion in assessing whether the differentiated treatment of similar situations is justified by actual differences and if so, what the scale of such differences is.

In 1981, at the same time when the Court passed its first decision about the prosecution under criminal law of homosexual acts, the Assembly also made a declaration to protect the rights of homosexual persons. In a resolution, the Assembly called upon the World Health Organisation to delete homosexuality from the international list of diseases (it was deleted in 1991), and it adopted a recommendation on the elimination of the various forms of discrimination against homosexual persons, including the application of differentiated age limits of consent. After almost twenty years, on 26 September 2000, the Assembly adopted a recommendation comprehensively evaluating the situation of homosexuals. The Assembly called upon the Committee of Ministers to urge the Member States to provide for the same age limits in the criminal law regulations applicable to homosexual and heterosexual acts.

3. During the evaluation of the petitions, the Constitutional Court has followed its practice formed in respect of interpreting Article 70/A of the Constitution (as summed up most recently in: Decision 1320/B/1996 AB, ABK April 2002, 184, 186), taking into account its position on the interrelations between homosexuality, sexual orientation, and the prohibition of discrimination, contained in some of its earlier decisions.

3.1. In the practice of the Constitutional Court, differently from the strictly interpreted wording of Article 70/A para. (1), the prohibition of discrimination is applied not only to the rights guaranteed in the Constitution but to the whole of the legal system. This approach is based upon the interrelated interpretation and application of two constitutional provisions, namely Article 70/A, providing for ensuring human rights and citizens' rights free of discrimination, and Article 54 para. (1) declaring the inherent and inalienable right to human dignity [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281].

As stated in one of the first decisions of the Constitutional Court – and consistently applied ever since – the prohibition of discrimination does not mean a prohibition of all forms of differentiation. The State has the right – and in a certain scope it is even obliged – to take into account, in the course of legislation, the actual differences between people [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 282]. The prohibition of discrimination applies not to the result but to the procedure, which means that all people must be treated equally (as persons with

equal dignity) by the law, i.e. the criteria for the distribution of rights and benefits must be determined with the same respect and prudence, and with the same degree of consideration of individual interests [Decision 9/1990 (IV. 25.) AB, ABH 1990, 46, 48].

The Constitutional Court pointed out the following: "The issue of whether differentiation remains within the constitutional bounds can only be examined in the objective and subjective contexts of the prevailing regulations […]. Equality must exist with regard to the essential element of a given statutory provision. If, however, a different rule applies to a group within a given regulatory scheme, this will be in conflict with the prohibition of discrimination, unless there is sufficient constitutional justification for the difference." [Decision 21/1990 (X. 4.) AB, ABH 1990, 73, 77-78]

It is explained in Decision 30/1997 (IV. 29.) AB that the Constitutional Court applies different standards to discrimination affecting constitutional fundamental rights (the test of necessity/proportionality) and to cases where the prohibition of discrimination is examined in respect of rights other than the fundamental ones (ABH 1997, 130, 140). The unconstitutionality of discrimination or any other restriction concerning any rights other than the fundamental ones may only be established if the injury is related to any fundamental right, and eventually, to the general personality right to human dignity, and there is no reasonable ground for the distinction or the restriction, i.e. it is arbitrary [Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200]. A distinction made arbitrarily, without a reasonable cause, violates the fundamental right to human dignity "because in such a case, the affected persons are certainly not treated as persons of equal dignity and their viewpoints are not considered with equal care and equity." [Decision 1/1995 (II. 8.) AB, ABH 1995, 31, 47] Even within the same regulatory concept, the prohibition of discrimination does not mean the prohibition of the application of differentiated regulation, provided that such regulation is not arbitrary, and the distinction is based on due grounds and objective criteria [Decision 1406/B/1991 AB, ABH 1992, 497, 500]. In assessing whether or not the cause of making a distinction is reasonable, i.e. not arbitrary, the objective of the Act is to be taken into account as well [Decision 30/1997 (IV. 29.) AB, ABH 1997, 130, 140].

3.2. The Constitutional Court went into details when analysing the questions related to sexual orientation as well as the potential constitutional approaches to it in the framework of the interpretation of the Constitution necessitated by the collision of the freedom of association

and the State's obligation to protect children. The Constitutional Court established in the holdings of Decision 21/1996 (V. 17.) AB the following: the right of the child to protection and care necessary for proper physical, mental and moral development to be provided by the State establishes the constitutional duty of the State to protect the development of the child. Article 67 of the Constitution also means that the State has to protect children – in addition to influences harmful to their development – from taking risks in connection with which, because of their age (presumed to correlate with physical, mental, moral and social maturity), they are not able to get to know and evaluate either the possibilities or the consequences of their choices for their own personality, later lives and social adaptation (ABH 1996, 74).

3.3. The issue of sexual orientation – as the basis of discrimination – has been dealt with by the Constitutional Court in two decisions.

Having examined the constitutionality of acknowledging marriage and domestic partnership between persons of the same sex, the Constitutional Court established in its Decision 14/1995 (III. 13.) AB that defining marriage as a union between man and woman is not an unconstitutional discrimination. At the same time, it also noted that a permanent union between two persons can constitute such values that it should be legally acknowledged on the basis of the equal personal dignity of the persons concerned, irrespective of the sex of those living together. (ABH 1995, 82, 84) The question of the cohabiting partners' sex emerges as a question of negative discrimination. (ABH 1995, 82, 85) The constitutionality of the statutory provision defining domestic partnership cannot be determined on its own but it depends on whether the distribution of rights and duties among those who are in similar situations is done in a manner that respects the right to equal human dignity – that is, realising the equal treatment of persons and evaluating their viewpoints with the same circumspection, attention, impartiality and fairness. (ABH 1995, 82, 86)

In the constitutional review of punishing various acts defined as incest in Section 203 of the CC, the question was whether it was a violation of the prohibition of discrimination provided for in Article 70/A of the Constitution that the law only provided for the punishment of sexual contacts between siblings of the same sex. According to the statutory definition reviewed, fornication between siblings of different sexes was not a criminal offence, i.e. it made a distinction between same-sex and different-sex siblings on the basis of their sexual orientations.

The Constitutional Court established in Decision 20/1999 (VI. 25.) AB that discrimination on the basis of sexual orientation was discrimination on "other grounds" according to Article 70/ A para. (1) of the Constitution. When assessing the above, one must examine if there was an "objectively reasonable ground" for making such distinction. In the case reviewed, the Constitutional Court has found no such grounds. In its view, the different evaluation in criminal law of fornication between siblings of the same sex and that between siblings of different sexes cannot be reasonably justified. The different grades of danger posed by such acts to society cannot be verified either. (ABH 1999, 159, 163)

III

The petitions are well-founded inasmuch as the following:

According to the Constitutional Court, Section 199 of the CC violates Article 70/A para. (1) of the Constitution as the distinction made there cannot be verified on objective grounds, and therefore it is an arbitrary discrimination on the basis of sexual orientation between persons over the age of 18 who establish consent-based sexual contacts with persons who are between the ages of 14 and 18.

For the same reason, i.e. violating Article 70/A para. (1) of the Constitution, Section 200 of the CC is unconstitutional. On the basis of an objective evaluation, there is no reasonable ground for the definition of two separate criminal offences based only on the sexual orientation of the perpetrators of assaults against decency and fornication against nature, and for regulating differently the necessity of a private complaint for punishing the perpetrators of the above two offences.

1. When assessing the constitutionality of Section 199 of the CC, the Constitutional Court – acting in compliance with the main line of arguments in the petitions – did not apply the so-called test of "necessity/proportionality" pertaining to general fundamental rights and regularly used in examining the criminalisation of a given act [for the summary of its essence see: Decision 18/2000 (VI. 6.) AB, ABH 2000, 117, 123-124], but it applied the so-called test of "rationality" also used in the constitutional review of the punishability of fornication between siblings. As a first step, the Constitutional Court established who are deemed to

constitute homogeneous groups for the purpose of the regulation. Then it examined whether the legislature had made a constitutionally acceptable distinction between perpetrators over the age of 18 and victims (in a dogmatic sense: passive subjects) between the ages of 14 and 18 when defining the sanctioned conduct, i.e. whether the legislature had evaluated with equal care and equity the aspects of all those concerned when ordering the punishment of homosexual contacts based on mutual consent but not that of consent-based heterosexual contacts.

1.1. According to the Constitutional Court, in the assessment of the constitutionality of Section 199 of the CC, persons over the age of 18 who establish consented sexual contacts with younger persons over the age of 14 form a group the members of which are comparable with one another. Within that group, distinction on the basis of Section 199 of the CC is based on nothing else but the sexual orientation of the man or woman over the age of 18 as manifested in the specific case.

The legislature defined the legal subject of the criminal offence specified under Section 199 of the CC as the healthy orientation of the sexual development of the young. On the basis of Article 67 para. (1) of the Constitution, all members of this age group are constitutionally entitled to have protection by the State in order to ensure their appropriate physical, mental and moral development, including healthy sexual development. The legal tools aimed at ensuring such protection may include criminal law sanctions as well. The tools of criminal law may be necessary for the State to protect the members of the relevant age group against influences harmful to their personality development, and to prevent them from taking risks in connection with which, because of their age (presumed to correlate with physical, mental, moral and social maturity), they are not able to get to know and evaluate either the possibilities or the consequences of such choices for their own personality, later life and social adaptation [Decision 21/1996 (V. 17.) AB, ABH 1996, 74]. Within the age group of 14 to 18, according to Section 199 of the CC, only the sexual orientation of the young boy or girl concerned, as manifested in the concrete case, is used as the ground for State interference, with the tools of criminal law, with the sexual contact established with an adult person.

1.2. It is necessary for the legislature to make a distinction when specifying what types of conduct are to be sanctioned under criminal law in order to protect the young and children. It is repeatedly emphasised by the Constitutional Court in this Decision that the definition of criminal law measures aimed at securing the healthy sexual development of the young is within the

competence of the legislature, and thus it represents the opinion – and the sentiments – of the democratic majority [Decision 21/1996 (V. 17.) AB, ABH 1996. 74, 82.]. However, the legislature is obliged to take into account the restrictions that result from Article 70/A para. (1) of the Constitution.

Criminal law provisions are also required to impose no unjustified discrimination as far as non-fundamental rights are concerned, i.e. the distinction should not be arbitrary, nor should it violate human dignity as an inherent and inalienable right of everyone. As both heterosexual and homosexual orientations form part of the essence of human dignity, there must be exceptional grounds for making a distinction between them and treating differently the dignity of the persons concerned. Such an exceptional case is, for example, the distinction of homosexual orientation in respect of the right to marriage [Decision 14/1995 (III. 13.) AB, ABH 1995, 82, 84].

Any distinction made in criminal law must be one based upon constitutional reasons of due weight. The Constitutional Court has not established such a reason in the present case. The obligation of the State that follows from Article 67 para. (1) of the Constitution is not a constitutional reason of due weight that would justify criminal law provisions defining different age limits of protection merely on the type of the sexual contact (i.e. one between persons of the same sex or one between persons of different sexes), for the purpose of protecting children's healthy sexual development from influences by adults.

Undoubtedly, the social environment not understanding or even rejecting homosexual contacts strengthens the potential differences in the maturation process of homosexuals and heterosexuals, respectively. [This is analysed in details in Constitutional Court Decision 21/1996 (V. 17.) AB, ABH 1996, 74] There are differences in personality development in the puberty of boys and girls. Historically, such differences have resulted – among others – in a differentiated criminal law treatment of sexual contacts between men and women in most European countries.

However, in the opinion of the Constitutional Court, such differences do not constitute reasonable and objective justification for the State defining the age limit of protection differently. Neither Article 67 para. (1) or Article 15 of the Constitution, nor the international obligations related to children's rights – with consideration to Article 7 para. (1) of the

Constitution – (Act LXIV of 1991 on the promulgation of the Convention on the Rights of the Child adopted in New York on 20 November 1989) make it necessary for the State to interfere in a differentiated way, with the tools of criminal law, which are the most rigorous legal measures necessarily affecting fundamental human rights, with such a complex process – which is of particular importance for the development of human personality – merely on the ground of sexual orientation.

It is certainly up to the legislature to assess whether the regulations of criminal law comply with the State's obligation to protect children, or there are situations of life where – resulting from the hierarchical relation between adolescents and adults – the age group of 14 to 18 years should be protected by means of criminalising further acts in respect of sexual contacts established with persons over the age of 18. The Constitutional Court repeatedly emphasises that it is not empowered to order the legislature to create new statutory definitions or to make certain acts – formerly not subject to punishment – punishable by partially annulling certain statutory definitions in the Special Part of the Criminal Code. However, it is obliged to annul any statute found unconstitutional – in this case, Section 199 of the CC [Decision 20/1999 (VI. 25.) AB, ABH 1999, 159, 163].

According to the practice of the Constitutional Court, when the statute challenged in the petition or part of it is deemed to violate a provision in the Constitution, and it is, therefore, annulled, then the Constitutional Court does not examine regarding the statutory provision already annulled the violation of further constitutional provisions [Decision 29/2000 (X. 11.) AB, ABH 2000, 193, 200]. With the unconstitutionality of Section 199 of the CC established on the basis of Article 70/A of the Constitution, the Constitutional Court has found no reason for continuing the examination in respect of Article 8 paras (1)-(2), Article 59 para. (1), Article 60 paras (1)-(2) and Article 2 para. (1) of the Constitution.

2.1. The statutory definition of forceful fornication against nature specified in Section 200 para. (1) of the CC and punishable according to paras (1) to (3), and the statutory definition of assault against decency specified in Section 198 para. (1) of the CC and punishable according to paras (1) to (3) are exactly the same in respect of the acts constituting the offence and the punishments. It follows from the identity of sanctions and the application of the same qualifying criteria justifying graver sanctions that the legislature considered the same conduct constituting the offence – by violence or direct menace against life or limb, forcing another

person to engage in fornication or to the endurance thereof, or using for fornication the incapacity of another person for defence or for the manifestation of will – to pose an equal threat to society.

According to the original Section 198 of the CC, an assault against decency could only be committed between parties not married to each other. Then, logically, the perpetrator and the victim of an assault against decency could only be persons of different sexes. As, conceptually, forceful fornication against a person of the same sex could not be performed between persons married to each other, it was necessary to define a separate criminal offence to make the conduct punishable. The amendment put into force on 15 September 1997 deleted the reference to the marriage bond. Consequently, the statutory differentiation of the perpetrator's conduct is based merely on his sexual orientation, as the conduct constituting the offence, the qualifying criteria and the sanctions are the same. The Constitutional Court holds that such a distinction has no reasonable and objectively justifiable ground.

2.2. The Constitutional Court considers it a violation of Article 70/A para. (1) of the Constitution that there is a statutory differentiation – resulting from the provision in Section 209 of the CC – between the basic cases of assault against decency and forceful fornication against nature, namely that the perpetrator of an assault against decency may only be punished upon a private complaint by the victim, while the perpetrator of forceful fornication against nature is punishable regardless of the victim's will.

Requiring a private complaint for the punishment of forceful sexual acts serves the purpose of protecting the victim's privacy. It is within the scope of competence of the legislature to decide if it gives priority to punishing unconditionally those who commit sexual crimes over sparing victims the trauma of a trial. It is up to the legislature to select the criminal offences where substantive criminal law provides for exemptions from the criminal law principle of legality, and it has to specify the cases, among sexual crimes, where such exemptions apply – with consideration to sparing the victim – if it deems such exemptions justified.

Therefore, the legislature is to decide on the basis of the mutually relative importance of public interest (the State's obligation to prosecute crime) and private interest (sparing the victim and respecting the victim's private sphere). It may decide that in specific cases of certain criminal offences, private interest shall prevail over public interest, i.e. punishment

shall be conditional upon private complaint, or it may decide that the principle of legality in the classical sense shall have primacy.

The victims of assaults against decency and forceful fornication against nature form a homogeneous group. In the case of forceful heterosexual and homosexual criminal offences, the perpetrator violates the victim's sexual freedom, and thus his human dignity. It is accidental from the victim's point of view whether he/she becomes the "victim" of an offender with heterosexual or homosexual orientation; from the aspect of protecting the victim's privacy, the perpetrator's sexual preference is irrelevant. There is no justification for the legislature's refraining from the principle of sparing the victim in the case of crimes committed by homosexuals, reflecting the enhanced threat posed by that offence, when the level of sanctions in the case of both forceful sexual offences represent that they endanger society to the same degree. This is, indeed, discriminative from the victim's aspect: it marks the threat posed by the crime to society by depriving the victim from the benefit of the right to filing a private complaint – designed to protect privacy – regardless of the victim's own sexual orientation. With a simplified exaggeration: the victim becomes victimised two-times as he/she must not only suffer the forceful sexual act but also tolerate being deprived of the right to be spared otherwise offered by the CC.

Consequently, the legislature is to decide whether the principle of sparing the victim applies to all members of the homogeneous group of victims or to none of them. In the former case, the condition of punishment upon private complaint is to be extended to the basic case of forceful fornication against nature, while in the latter one it is to be cancelled in the case of forceful heterosexual acts as well. There is no way for any intermediary or mixed solution; when victims are not treated in a uniform manner, it is discriminative in an arbitrary manner with regard to certain persons within the homogeneous group of the victims of sexual offences, therefore it is unconstitutional.

The restrictions that result from Article 70/A para. (1) of the Constitution are to be taken into account not only when criminalising a specific act, but also when regulating the conditions of punishability, where no distinction is allowed to be made merely on the basis of sexual orientation.

As far as assault against decency and forceful fornication against nature are concerned, the difference regarding punishability on private complaint is discriminative from the aspect of offenders, too: the potential perpetrators of forceful heterosexual acts "may" hope that the victim might not file a private complaint, while homosexual perpetrators have no ground for such hopes. Certainly, no perpetrator has any constitutional right to be punishable solely upon the victim's private complaint. It is treatment by the State as persons having dignity equal to that of others that perpetrators, including homosexual ones, have a right to.

The provisions of criminal law generally address everyone (without regard to the fact that certain statutory definitions apply to special categories of perpetrators, such as official persons). However, the persons addressed must be aware of the legislature's message, no matter what it is, such as – for example – that in the case of certain offences, punishing the perpetrator may depend on the victim's discretion. When in the case of a specific offence the legislature provides for having a private complaint as a precondition of punishment, the potential perpetrator of the given offence may be aware of this fact in advance, as it is clear from the Criminal Code. There is no ground for making a distinction between the perpetrators of heterosexual and homosexual forceful acts – to be punished with the same sanctions according to the Act – and thus accepting in the former case the acknowledgement of the victim's will as a factor of decreasing risks, but refusing to do so in the latter case.

Therefore, in the opinion of the Constitutional Court, there are no reasonable grounds for a differentiated treatment of the precondition for the perpetrator's criminal law liability and of the victim's general personality right, including his/her rights to privacy and to have private secrets, and therefore, such a differentiated treatment is arbitrary when it is based solely upon the perpetrator's sexual orientation.

Consequently, the Constitutional Court holds that Section 200 of the CC – in relation to Section 198 of the CC – violates Article 70/A para. (1) of the Constitution, therefore it has been annulled by the Constitutional Court. As not the definition itself of the offence but only its separation from Section 198 of the CC has been found unconstitutional by the Constitutional Court, the annulment only affects the statutorily differentiated definition of punishable acts but not the punishability of such acts on the basis of Section 198 of the CC.

IV

1. In other respects the petitions are unfounded or have become objectless, or their further examination is beyond the competence of the Constitutional Court, as appropriate.

1.1.1. In the opinion of the Constitutional Court, Title II of Chapter XIV of the CC, using the words “fornicate” and “fornication”, as well as the distinction made between sexual intercourse and fornication are not related to the freedom of thought and the freedom of conscience and religion guaranteed in Article 60 para. (1) of the Constitution.

The Constitutional Court holds that it does not violate Article 54 para. (1) of the Constitution that the legislature specifies “sexual morals” as the joint legal subject of the statutory definitions protecting sexual freedom and the healthy sexual development of young people. The legislature may impose criminal law sanctions to reinforce certain moral norms regulating sexual behaviour and prohibiting certain sexual acts. It is another question whether the requirements resulting from the constitutional limits to the punitive authority of the State are met.

There is no relevant connection between the statutory interpretation, complying with the former uniform and consistent judicial interpretation, given in Section 210/A para. (2) and introduced by Section 49 of Act XVII of 1993 on the Amendment of Criminal Law Provisions, and Article 70/A para. (1) of the Constitution. The distinction made by the legislature in respect of having separate criminal law definitions for sexual intercourse and fornication is a differentiation between sexual acts constituting the offences and not between the perpetrators thereof. The interpretative provision gives a clear and understandable distinction between the acts constituting the offences to be defined separately. This has fundamental importance in the statutory definitions of having sex with children and incest (Section 203 of the CC) because of the differentiated definition of criminal law liability. The decision of the legislature to use two separate statutory definitions for rape and forceful fornication (Sections 197 and 198 of the CC) – as acts considered to pose equal danger to society – does not raise any constitutional concern in the present case.

The Constitutional Court has not established a violation of the right to human dignity concerning the terms “fornication” and “fornicate”. The terms used in law are based on social and professional conventions, as well as on cultural and legal traditions. In the case of traditionally

punishable acts, there are technical terms living on as residues from old Hungarian everyday or legal language, which have already vanished from current everyday language or are used in a different sense than before. Such terms are, for example, treachery (Section 145 of the CC), pandering (Section 207 of the CC), or prostitution (Section 205 of the CC) as acts constituting offences. The challenged terms also fall into this category.

The terms used by the law can violate constitutional rights if the expressions are inexact and do not provide a clear description of different acts by using linguistic forms, or if they give ground for misinterpretation or prejudice. However, by using the terms fornication and fornicate – and even adding an interpretative provision thereto – the Act provides a clear and unambiguous description of all types of conduct among prohibited sexual acts other than sexual intercourse.

1.1.2. In the opinion of the Constitutional Court, Section 201 para. (1) does not violate Article 70/A para. (1) of the Constitution in respect of the claim that the provision prohibiting sexual intercourse with persons between the ages of 12 and 14 criminalises sexual contacts between persons with a very little age difference. Basically, it is within the discretion of the legislature to set the age limit above which individuals are punishable under criminal law (Section 23 of the CC). Specifying the age limit of childhood as a cause excluding punishability and defining having sex with children as prohibited sexual conduct with persons under the age of 14 years comply with the requirements set by the Constitutional Court regarding the definiteness of criminal law rules [Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 84; Decision 30/1992 (V. 26) AB, ABH 1992, 167, 176], and thus the principle of legal certainty is not violated either.

In view of the above, the Constitutional Court has rejected the petitions seeking the establishment of the unconstitutionality of Title II of Chapter XIV of the CC, the terms “fornication” and “fornicate” in the statutory definitions of the criminal offences specified in Sections 198, 201, and 203 of the CC, as well as Section 210/A para. (2) and Section 201 para. (1) of the CC.

1.2. Due to the annulment of Sections 199 and 200 of the CC, the petitions related to the subtitles in Sections 199 and 200 of the CC and the one related to the unconstitutionality of Section 209 of the CC have lost their objects, and the Constitutional Court has, therefore, closed the relevant procedure.

1.3. On the basis of the fields of competence specified in Section 1 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), the Constitutional Court has no power to either amend an Act or submit a Bill. Therefore, in respect of the petitions aimed at raising the age limit specified in Section 201 para. (1) of the CC related to Section 199 thereof, the Constitutional Court has refused to perform an examination, in line with Section 29 item b) of Decision 3/2001 (XII. 3.) Tü. by the Full Session on the provisional rules of procedure of the Constitutional Court and on the publication thereof.

2. The review of criminal proceedings in which final judgments have been made pursuant to Section 199 of the CC is ordered on the basis of Section 43 para. (3) of the ACC. The Constitutional Court has not ordered the review of the criminal procedures conducted on the basis of Section 200 of the CC, since the annulment only affects the definition of the punishable acts under separate statutory rules, and it does not affect the punishability of the relevant acts in the framework of Section 198 of the CC.

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

Budapest, 3 September 2002

Dr. János Németh
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
presenting Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. János Németh
President of the Constitutional Court
on behalf of
Dr. István Kukorelli
Judge of the Constitutional Court, unable to sign

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Concurring reasoning by Dr. László Kiss, Judge of the Constitutional Court

I agree with the decision in points 2, 3, 4 and 5 of the holdings in the draft Decision. I also agree with the decision specified in point 1 of the holdings, nevertheless, the Constitutional Court should have included further elements in the reasoning for that decision.

1. I acknowledge that the present regulation of fornication against nature as provided in the CC is not suited to reach the desired objective and results. However, this does not mean that with the annulment of Section 199 of the CC the State is liberated from all other obligations. In my opinion, the Decision, focused on examining and evaluating the perpetrator's side and exempting the perpetrator from the criminal law sanctions, does not pay enough attention to assessing the weight and significance of the circumstances on the "victim's" side, and it practically closes the case by stating that Section 199 of the CC violates Article 70/A para. (1) of the Constitution as the distinction made there cannot be verified on objective grounds, and it is, therefore, an arbitrary discrimination on the basis of sexual orientation between persons over the age of 18 who establish consented sexual contacts with persons between the ages of 14 and 18. Although the draft Decision quotes several times Decision 21/1996 (V. 17.) AB, it does not draw the necessary conclusions with regard to the victim's side as well. This decision was right in establishing that the child's right to protection and care necessary for proper physical, mental and moral development to be provided by the State establishes the constitutional duty of the State to protect the child's development. The decision cited in this respect is also well founded when stating that Article 67 of the Constitution means that the State has to protect the child – in addition to influences harmful to his/her development – from taking risks in connection with which, because of his/her age (presumed to correlate with physical, mental, moral and social maturity), he/she is not able get to know and evaluate either the possibilities or the consequences of his/her choices for his/her own personality, later life and social adaptation. (ABH 1996, 74) However, it is questionable whether a person between the ages of 14 and 18 (especially one just over the age of 14) is in fact mature enough in respect of mental and emotional development and ability of evaluation and judgement for us to accept his consent as a valid precondition for engagement in a homosexual contact. To put it in another perspective: I agree that both heterosexual and homosexual orientations belong to the essence of human dignity, and therefore there is no constitutional ground for a differentiated treatment of the dignity of the persons concerned (over the age of 18), however,

I also emphasise that the ability to differentiate between various sexual orientations and to understand the consequences of choosing a certain sexual orientation (giving consent) must be brought into relation with human dignity also in the case of young persons between the ages of 14 and 18. I see a contradiction in the fact that while, regarding the whole of the legal system, the capacity of discretion of persons between the ages of 14 and 18 is treated differently – or at least with more differentiation – than in the case of adults (e.g. the capacity to conclude contracts in the field of civil law; the rules of family law on marriage; the liability rules of the law on administrative infractions, criminal law and public administration law), i.e. the law takes account of the relevant features resulting from their age, in the case of a decision (on consent) determining the whole lives and the very foundations of the future of young people we assume that they are able to decide upon clever, wise and well-founded consideration. I object to the Decision lacking the evaluation of the above aspect and reference to the importance of the State duties resulting therefrom. As a side-remark: the family and society at large play an important role in that decision-making process.

2. Let me emphasise once again: I hold that the present Section 199 of the CC is to be annulled, as in the present case, the criminal law tool applied by the Sate – on the perpetrators' side – leads to negative discrimination between persons over the age of 18 who have different sexual orientations. However, the State's obligation of "care" is not completed with the annulment of the inappropriate criminal law tool, on the contrary: such annulment reinforces the need to have the State perform its obligations – in the chosen form – resulting from Article 16 and Article 67 para. (1) of the Constitution. ("The Republic of Hungary shall make special efforts to ensure a secure standard of living, instruction and education for the young, and shall protect the interests of the young"; "In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development"). In my opinion, the lack of calling one's attention to the above can be seen as if – upon the annulment of Section 199 of the CC – there were no interests and values to be protected by the State. Although in this respect, Section 67 para. (1) of the Constitution puts first the family's obligation of "protection" and "care", I must stress the prominent role of the State as well. Beyond doubt, the State's activities within the school system – in secondary school education –, by organising forums to present objectively the consequences of choosing between different sexual orientations and by allowing the presentation of different opinions about that, can have a significant impact on the weighing, considering and decision-making abilities of

individual families and of society at large, too. In brief: the State's institutions and measures can significantly contribute to the establishment of a social environment free of prejudice. This can eventually lead to young persons between the ages of 14 and 18 being able to assess the consequences of their consent, and deciding wisely when needed. Therefore, the Constitutional Court should have pointed out with great emphasis that the State should not be a passive observer of how the sexual orientations of persons between the ages of 14 and 18 develop. Such a role to be played by the Constitutional Court would not have been in contradiction with its right efforts in respect of not judging upon homosexuality on moral grounds. [Decision 21/1996 (IV. 17.) AB, ABH 1996, 74, 85]

Budapest, 3 September 2002

Dr. László Kiss
Judge of the Constitutional Court

Concurring reasoning by Dr. János Németh, Judge of the Constitutional Court

I agree with the holdings of the Decision. I basically also agree with the reasoning, to which I hold necessary to add the following.

According to point III. 1.2 "Any distinction made in criminal law must be one based upon constitutional reasons of due weight. The Constitutional Court has not established such a reason in the present case."

Due to the nature and importance of the issues reviewed in the present Decision, the above statement should have been elaborated in more details.

The classification in criminal law of types of conduct related to sexual morals depends on many factors. It is a world-wide trend that – on the basis of the latest results of scientific studies and on the (partly) related changes in the value judgements of society – legislatures tend to gradually withdraw formerly punishable acts from the category of criminal offences or to diminish the sanctions applicable thereto. This is especially true of types of conduct formerly criminalised for the purpose of protecting young generations. Thus, the development in the medical, biological, psychical, psychological, sociological, and other fields of

knowledge influences the criminal law assessment related to sexual morals. The Case Sutherland v. United Kingdom, referred to in the Decision, demonstrates the position taken by the European Court of Human Rights, holding that the criminalisation of consented homosexual acts between male adults and young men under a certain age limit (18 years) was not justified as a result of the refutation of the assumptions, based on former scientific studies, about the sexual orientation of young men under the age of 18 still being formed.

With regard to questions the assessment of which demands complex scientific knowledge, often in the field of natural sciences, the Constitutional Court is generally not in charge of establishing whether there are constitutional grounds for the statutory differentiation. As far as the present case is concerned, the Constitutional Court called upon the Minister of Justice to take a position about the lack of constitutional grounds for making such a differentiation – as alleged by the petitioner. The Minister of Justice has, however, not mentioned any cause or justification that could maintain the well-foundedness of the constitutionality of differentiation in the light of the scientific results achieved since the adoption of the criminal law provisions challenged in the petition. Consequently, the statement made in the reasoning of the Decision about the Constitutional Court not finding any ground for the constitutionality of differentiation means – and this is what should have been stressed in the text of the reasoning – that the participants of the procedure have not supplied arguments and information enough for the Constitutional Court to establish the constitutionality of differentiation.

The following is also contained in point III. 1.2. of the Decision: “The Constitutional Court holds that it is certainly up to the legislature to assess whether the regulations of criminal law comply with the State’s obligation to protect children, or there are situations of life where – resulting from the hierarchical relation between adolescents and adults – the age group of 14 to 18 years should be protected by means of criminalising further acts in respect of sexual contacts established with persons over the age of 18.”

This statement needs to be clarified, too. Although the assessment of the circumstances mentioned in the above sentence undoubtedly falls into the competence of the legislature, it must be emphasised that the Constitutional Court may indeed review the constitutionality of the relevant decision made by the legislature. Thus, using the term “up to the legislature” is

slightly misleading, as it makes the relation between the legislature and the Constitutional Court blurred in this respect.

Budapest, 3 September 2002

Dr. János Németh
Judge of the Constitutional Court

Dissenting opinion by Dr. János Strausz, Judge of the Constitutional Court

1. I agree with points 2-5 of the holdings and the reasoning related thereto.

2. I do not agree, however, with the declaration of the unconstitutionality and the annulment of Section 199 of the CC, and, therefore, I hereby present a dissenting opinion with regard to point 1 of the holdings of the Decision.
In my opinion, the petitions and judicial initiatives aimed at the annulment of the statutory provision concerned should have been rejected.

3. The reasons for my dissenting opinion are the following:

Fornication against nature – other than a forceful one – committed by a person over the age of 18 to the detriment of a victim of the same sex between the ages of 14 and 18 is a felony defined under Section 199 of the CC, and it is punishable with imprisonment of up to three years. (The lower age limit (14 years) follows from the provisions of Section 201.)

In contrast, it does not qualify as a criminal offence when an adult person (over the age of 18) establishes consented sexual intercourse or engages in consented heterosexual fornication with a person between the ages of 14 and 18. In that case, the partners in the sexual contact are persons of different sexes.
The so-called “age limit of consent” and the related difference in punishability is related to the fact of homosexuality or heterosexuality.
Therefore, one has to examine whether such a differentiation violates the equality of rights and the prohibition of discrimination declared under Article 70/A para. (1) of the Constitution.

Article 70/A para. (1) of the Constitution – as pointed out in several decisions of the Constitutional Court – does not prohibit all types of differentiation. The constitutional prohibition addresses primarily discrimination made in respect of constitutional fundamental rights. However, if the discrimination concerned is not related to a fundamental right, its unconstitutionality may only be established if it is arbitrary and violates the right to human dignity. [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280-282, Decision 963/B/1993 AB, ABH 1996, 437-445]

The practice of the Constitutional Court is consistent also in the following respect: when a different rule applies to a group within a given regulatory scheme, this will be in conflict with the prohibition of discrimination, unless there is sufficient constitutional justification for the difference. It was a central element of the questions under review to determine the definition of a group with regard to the regulatory concept. [Decision 32/1991 (VI. 6.) AB, ABH 1991, 146, 162, Decision 49/1991 (IX. 27.) AB, ABH 1991, 246, 249]

In the Criminal Code, as far as the criminal offences against sexual morals are concerned, several qualifying criteria are based on the victim's age in order to protect the passive subjects of such criminal offences. Sexual acts committed to the detriment of children under the age of 12 are considered to be committed in a forceful manner and to be qualified cases punishable more severely in the case of certain criminal offences (rape, assault against decency).
Various – either homosexual or heterosexual – contacts established without the use of force with persons between the ages of 12 and 14 are to be punished as having sex with children, on the basis of Section 201 of the CC.
However, in the case of persons between the ages of 14 and 18, only homosexual acts (fornication against nature) are to be punished.

Thus, young persons in the puberty period between the ages of 12 and 14 and the ages of 14 and 18 enjoy enhanced protection under criminal law against negative sexual influences – coming from persons older than they are – that may endanger their physical, mental or moral development, and that may determine their whole future lives.

Such criminal law protection is in line with the provisions of the Constitution, namely the principles and rights declared under Article 16 and Article 67 thereof. These are the following:

“Article 16 The Republic of Hungary shall make special efforts to ensure a secure standard of living, instruction and education for the young, and shall protect the interests of the young.”
“Article 67 para. (1) In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development.”

Minors (in the childhood and the puberty period) enjoy enhanced protection by the State on the basis of their age, in order to prevent older and more mature persons from abusing their inexperience, credulity, or defencelessness.

In line with the quoted constitutional provisions, the rules of other branches of law also contain several provisions concerning the extra protection of minors.
According to Section 15 of the Civil Code, “minors under the age of 14 are considered to be incompetent.”
Section 18 para. (1) states that “a person without disposing capacity may not make legal declarations; his legal representative shall act on his behalf.”
Pursuant to Section 12 para. (1), “minors over the age of 14 who are not incapacitated are considered to have limited disposing capacity.”
The first sentence of Section 14 para. (1) provides that “persons with limited disposing capacity can make valid legal declarations only with the consent or posterior approval of the legal representative, if not provided otherwise by the law.”

Section 70 of Act IV of 1952 on Marriage, Family and Guardianship (hereinafter: the AMFG) provides that “minor children are under parental supervision or guardianship”. As according to the first sentence of Section 12 para. (2) of the Civil Code, persons under the age of 18 are considered to be minors, the comparison of the above statutory provisions reflect the concept of the whole of the legal system: minors – both children and those in the puberty period – enjoy enhanced protection in all respects due to their limited capacity of decision-making, determination and discretion, resulting from their age.

Being a minor is taken into consideration in other aspects of the law as well. They are restricted in marrying, and their criminal law liability is also different from that of adult persons, and the reason for this is the assumption that persons of such age do not have the same capacity for determination and the same degree of punishability as adult persons.

Pursuant to Section 10 para. (2) of the AMFG, “minors may only marry upon the advance approval of the court of guardianship”. In addition, paragraph (3) provides that “the court of guardianship may approve the marriage only in a justified case, provided that the person to be married is over the age of 16.”

It is not only the case that the fact of being a minor is specified in the definition of the passive subjects of certain criminal offences in the Criminal Code, but the General Part of the Act provides for less stringent rules in the case of perpetrators qualifying as “juveniles”, while the criminal liability of children is excluded as follows:
“Section 23 A person who had not completed his fourteenth year when perpetrating the act shall not be punishable.”
Chapter VII of the CC has the title “Provisions relating to juveniles”, and the punishments and measures contained there are less severe or more favourable than the ones applicable to adult offenders.
For the purposes of the Criminal Code, pursuant to Section 107 para. (1), a “juvenile is a person who, when committing the crime, had completed his fourteenth year, but had not completed his eighteenth year.”

The above-mentioned provisions of criminal law, civil law and family law on disposing capacity, punishability, the freedom of marriage, the position of victims, as well as enhanced protection and limited liability under criminal law set – in a mutually harmonised manner – age limits that are in line, in both Hungary and Europe, with certain biological phases of physical, mental and sexual maturity, and correspond to the related phases of intellectual development.

Therefore, the age limits of the victims specified in the statutory definitions of the offences of “having sex with children” and “fornication against nature” have not been set arbitrarily by the legislature, but they have been regulated in line with the intentions of the legislature as demonstrated in other fields of the legal system.

The cardinal difference is that consented fornication with a person between the ages of 14 and 18 and of the same sex as the perpetrator is to be punished, while the same act committed with a person of the opposite sex is not to be punished.

In the case of victims between the ages of 12 and 14, there is no such differentiation, as there all sexual acts committed by an adult person are to be punished without regard to sex or to the manner of committing the offence.

It was not a baseless or arbitrary decision by the legislature to establish that a person over the age of 14 – even though he/she is considered to be a minor in legal terms – is sexually mature enough to decide freely on engaging in a heterosexual contact. Due to biological reasons, this age group needs no enhanced protection in the field of normal heterosexual relations.

However, homosexual relations need to be assessed differently. Engaging in a form of sexual life different from the commonly accepted and biologically reasonable sexual orientation demands serious determination and decision that may also result in the need to accept certain social disadvantages.

Only adult and mature persons of full discretionary capacity and with an independent way of thinking are able to make such a decision. However, the disposing capacity of minors is limited in all respects – even in the case of founding a family.

As demonstrated by the provisions of the various branches of law, persons belonging to this age group enjoy enhanced legal protection, and their liability is limited as compared to that of adult persons.

Young persons in the period of puberty can be exposed to more stimuli and enticement aimed at sexual irregularities, and due to the limited nature of their disposing capacity as well as to their inexperience and pliability, they cannot make a well-founded decision on whether to undertake the risks that result from a homosexual relation. This is why it is justified to protect the right moral development of persons of that age – even with the tools of criminal law. Upon reaching the age of adulthood, they are free to decide to engage in a form of sexual life which is different from the commonly accepted one.
Therefore, the legal provisions challenged in the petitions do not result in unconstitutional discrimination, as the differentiation is not an arbitrary one.

The criminal law liability of the perpetrators of (non-forceful) fornication against nature committed to the detriment of persons in the above-mentioned age group is the reasonable

result of the enhanced criminal law protection given to such passive subjects. This, however, does not constitute negative discrimination and any violation of the Constitution. Article 70/A provides for the prohibition of negative discrimination – in order to guarantee the equality of rights – as far as rights, namely human rights and civil rights, are concerned.
However, engaging in fornication with minors of the same sex cannot be considered a constitutionally protected fundamental human or civil right.

No such fundamental right can be deduced from the Constitution. The violation of perpetrators' human dignity cannot be referred to either. To the contrary: the protection of the human dignity of minor children and young persons enjoys primacy over that of adult perpetrators who exert negative influences on them. Such human dignity is a value protected under Article 54 para. (1) of the Constitution.

The fact that in criminal law different assessments are applied to homosexual and heterosexual acts for a scope of victims belonging to a specific age group cannot be considered an unconstitutional discrimination as in this case there are two different groups, and both of them are homogeneous independently from each other. The differentiation is applied between the groups rather than within any of them. This does not violate the principles of equal rights and equality before the law, similarly to differentiation in criminal law between juveniles and adults, or military personnel and civil offenders, or the distinction applied in civil law and family law between children, minors and adults.
Such differentiation does not qualify as unconstitutionality, as it is neither arbitrary nor unnecessary.

Budapest, 3 September 2002

Dr. János Strausz
Judge of the Constitutional Court

Dissenting opinion by Dr. Éva Tersztyánszky-Vasadi, Judge of the Constitutional Court

I agree with points 3 and 5 of the holdings in the majority Decision and with the related part of the reasoning.

I do not agree with points 1 and 2 of the holdings, i.e. with establishing the unconstitutionality of Sections 199 and 200 of the CC.

1. Section 199 of the CC makes a distinction with regard to the age limit of protection. According to it, an adult person (over the age of 18 – either a man or a woman) is punishable if he or she engages in fornication with a minor over the age of 14 who is of the same sex as he/she is, but such a person is not punishable if the minor partner of fornication is of the opposite sex.

One of the questions arising during the assessment of the petition is whether Hungary is obliged to eliminate the differentiation in respect of the age limit of protection.
As far as legal obligations are concerned, the European Human Rights Convention and the treaties of the European Community are to be taken into account – the latter after Hungary's accession to the EU.

It is the competence of the European Court of Human Rights to give interpretations of the Convention with binding force, in its individual decisions. In contrast, the decisions of the European Commission of Human Rights have no legally binding force.

In the Case Euan Sutherland/United Kingdom, the Commission adopted its decision on 1 July 1997, according to which in this special case, the regulation in British law was incompatible with Articles 8 and 14 of the Convention. In the case concerned, the petitioner had been a homosexual since the age of 12. His first homosexual relationship was established at the age of 16 with a person of the same age. At that time, homosexual acts between men under the age of 21 were punishable, while in the case of women (both in heterosexual and lesbian relations) the age limit of protection was 16 years. In 1994 the age limit of protection was lowered – on the proposal of the medical association and based on public health reasons – to 18 years, as persons concerned were afraid of turning to a physician due to the criminal law sanctions.
(The medical association proposed that the age of 16 be set as the limit.)
The complaining party claimed that setting the age of 18 years as the limit of protection for homosexual men, rather than the age of 16 years (as for women), was a discriminative measure violating the right to privacy.

The Commission based its decision on the fact that according to most scientists, the sexual orientation of men and women develop before the period of puberty, and thus if the protected age limit was lowered, a homosexual contact would not influence the majority of young persons. The Commission referred to the medical report of 1994 and also to the fact that in most of the States Parties to the Convention, the laws acknowledge the equal treatment of the sexes concerning the age limit of protection.
The Commission's resolution was passed with four dissenting opinions.

It is worth noting that – as referred to in the majority Decision – this decision of the Commission was not in line with its former practice. Austrian law contains a statutory definition similar to Section 199 of the Hungarian CC. The only difference is that according to the Austrian CC, a man (the provision is not applicable to women) over the age of 19 is to be punished if he engages in fornication with a minor person of the same sex between the ages of 14 and 18.
(With effect from 28 February 2003, Section 209 has been annulled by the Austrian Constitutional Court, acknowledging that from a constitutional point of view, one cannot question the aim of protection followed by the legislature, i.e. the protection of children and young persons from too early and exploitation-based sexual contacts. As also pointed out by the Court, the present form of Section 209, set in the system of the Austrian Criminal Code and compared to its regulatory environment, violates the principle of equal rights. According to the Austrian Criminal Code, homosexual contacts between persons of the same age may never be punished, and the same is true for partners where the age difference is less than one year, provided that neither of them is younger than 14; the act is also left unpunished when the age difference is between 1 and 5 years on condition that neither of the partners is younger than 14 or older than 19. In such a regulatory environment, as far as homosexual contacts between men are concerned, Section 209 of the CC first leads to the exclusion of punishment, then it has the consequence of punishment, and then again it results in the exclusion of punishment, which is unprecedented in the Act. It is unreasonable that in the case of lawful relations between men where the age difference is more than one but less than five years, the older partner becomes punishable when he reaches the age of 19, and this situation lasts until the younger partner reaches the age of 18.)
The Commission has on several occasions found the age limit of protection applied in Austrian law to be in conformance with the Convention, and it has rejected the complaints as

clearly unfounded ones: H.F./Austria, 22646/93, 26 June 1995; W.Z./Austria, 17297/90, 13 May 1992.

At present, it is an open question whether the Court will accept such an improvement of the interpretation of the Convention as presented in relation to the case concerned.

In the European Community, the Treaty of Amsterdam (June 1997, entry into force: May 2001) introduced a new definition in relation to antidiscrimination, under Article 13. The final text of Article 13 contains the prohibition of discrimination based on sexual orientation. The prohibition specified in Article 13 is primarily applicable to social policy, economy and the world of work. The compromise is reflected in the fact that Article 13 has no direct influence, it is not an independent principle of equality or a positive obligation, and it is merely a principle of law calling upon the Community to issue adequate legal rules if it wishes to do so. Measures based on Article 13 have to be adopted unanimously by the Council. There is a lack of unified political will about the need to take measures and the potential fields to be addressed.

Thus, I agree with the statement made in the majority Decision that there is no binding provision or any international obligation necessitating the changing of Section 199 of the CC.

2. The other question in the present case is whether there is any reasonable justification for the differentiation under Section 199 of the CC in the light of Article 70/A of the Constitution.

I agree that a statute that makes negative discrimination between persons merely on the basis of sexual orientation might violate Article 70/A of the Constitution, depending on the subject of the regulation. However, this question can only be answered case-by-case.

Section 199 of the CC is a peculiar statutory definition. Substantially, it punishes homosexual conduct between an adult person and a person under the age limit of adulthood, but only the older one is to be punished. Juveniles are not offenders but victims. Thus, in the Hungarian legal system, homosexual contacts between adult persons and ones between minors do not constitute criminal offences, either in the case of men or in that of women.

Section 199 of the CC is aimed at protecting juveniles from certain forms of homosexual influence coming from adults. Thus, it is important that Section 199 of the CC does not differentiate merely on the ground of sexual orientation (in such a case, it would also have to punish homosexual acts between persons under the age of 18), but it also takes account of age difference and the situation resulting therefrom.

According to the majority Decision, it is up to the legislature to decide if there are other situations of life beyond the scope of Section 199 of the CC that result from hierarchical relations, where persons in the age group of 14 to 18 are to be protected, by the criminalisation of certain acts, from sexual contacts established with persons over the age of 18. Differently from the majority decision, I hold that the life situation between juveniles and adults defined in Section 199 of the CC typically and usually – with the frequency needed for generalisation in criminal law – involves a degree of dependence and subordination. Also in the concrete cases that serve as the basis of the petitions, such a dependence- and subordination-based situation can be seen between persons of the same sex, and thus such cases do not represent partnerships between equals.

The protection of juveniles from sexual exploitation and from acts even a voluntary consent to which may be regretted in the future can justify additional interference by the State. In this respect, one has to reckon with the aspect that the "realisation", strengthening and demonstration of one's bi- or homosexual orientation is a decision to be made by the young person the consequences of which can reasonably justify the State's obligation to legally ensure complete freedom from external influences and the exclusion of convincing on the basis of authority.

In general, persons who partly or completely show affection to their own sex are considered to be homosexuals. The origins of the emergence of homosexuality are yet undiscovered, and its biological and psychic causes are unknown. Among homosexuals, there are probably many persons born as such. Similarly, many of them are homosexuals for other reasons.

Article 67 of the Constitution obliges the State to be active in order to protect children's rights and the young. The State has to protect children from taking risks in connection with which, because of their age (presumed to correlate with physical, mental, moral and social maturity),

they are not able to get to know and evaluate either the possibilities or the consequences of their choices for their own personality, later lives and social adaptation.

It is a complex question to be answered by professional experts whether there are reasonable and objective grounds for maintaining different age limits for lawful homosexual and heterosexual acts, respectively. Only scientists can decide whether Section 199 of the CC has an effect on the proper physical, mental and moral development of young people, as desired by the legislature.

It is to be noted that – as mentioned in the majority Decision – some of the petitioners themselves hold that in the interest of the harmonic development of children, the age limit of consent should be set in a unified way, but at a higher level; others claim that Section 199 of the CC interferes with the mental, moral and psychosexual development of juveniles.

I agree with the statement made in the reasoning of the majority Decision about the trend experienced in the Member States of the European Community in respect of the unification of the age limit of consent. It does not, however, inevitably follow from the above fact that Section 199 of the CC is unconstitutional. In the European states where the legislature applies the same age limit of consent to both homosexual and heterosexual relations, the age limit is usually higher than the age of 14. One must further note that in certain countries of various traditions, cultures and at different stages of development – other than the Member States of the European Community – (including some Member States of the United States as well), maintaining a differentiated treatment under criminal law of certain forms of homosexual conduct is considered justified even today.

According to the majority Decision, the Constitutional Court has found no constitutional grounds of due weight for the differentiation presented in Section 199 of the CC. However, in the assessment of the present case, no data have been presented to verify with due grounds that the differentiation under review is not justifiable on the basis of objective criteria. In our case, the fact that the parliaments in the Member States of the European Community have completed the unification cannot be considered to be such data. Until natural and social sciences verify that the protection under Section 199 of the CC is unjustified and useless, the uncertainty of science must be weighed in this respect for the benefit and on the side of the young to be protected.

A regulation giving general priority in the specific case to the protection of juveniles cannot be regarded as arbitrary.

3. I do not agree with establishing the unconstitutionality of Section 200 of the CC. Maintaining the separation of the statutory definition under Section 200 para. (1) of the CC is justified by the difference that the relevant offence is to be prosecuted without the need for private complaint.

I agree that the objective of the legal institution of private complaint regulated under Section 109 of the CC is the protection of the victim's privacy [Article 54 para. (1) of the Constitution]. At the same time, according to the CC in force, the prosecution of graver cases does not depend on private complaint.

It does not follow from the fundamental right to privacy in what scope and to what acts the legal institution of private complaint is to be applied. However, the complete lack of it may raise constitutional concerns in certain cases – e.g. in a marriage or domestic partnership relation – of forceful offences against sexual morals.

It is up to the legislature to determine the "graver" cases where the institution of private complaint is not used; such non-use must be constitutional. In the law in force, Section 209 of the CC applies private complaint on a relatively wide scale and not only in cases when the perpetrator and the victim live in matrimony or in a domestic partnership.

It follows from Article 70/A of the Constitution that the CC must treat victims who are in a comparable situation by applying the same provisions on private complaint. However, this does not mean that the rules on private complaint should be extended to all cases currently regulated in Section 200 of the CC, nor is it necessary to delete the rules on private complaint in respect of Section 197 para. (1) and Section 198 para. (1) of the CC.

The mere fact that the legislature applies graver conditions of punishability with regard to the sexual orientation of the perpetrator of a forceful act cannot be considered unconstitutional. There can be certain typical circumstances of committing the offence of forceful fornication against nature – currently not evaluated in the statutory definition – that might result in the non-applicability of private complaint (e.g. committed in a penal institution, or in the army).

The basic cases of the forceful acts under Section 209 of the CC and Section 200 of the CC are not the same in constitutional terms. The basis of differentiation is evaluation by the legislature considering forceful fornication against nature to be of a "graver" nature and, therefore, to be prosecutable *ex officio*. The Constitutional Court may assess this evaluation of the legislature.
However, one can conclude that in respect of Section 200 of the CC, the differentiation is based on reasonable and objective grounds. The reasonable cause of differentiated treatment is the distinguishing factor that, generally, the offence of forceful fornication against nature, according to the statutory definition in force, not only injures the victim's sexual freedom – as, for example, rape – but harms the victim's sexual self-identification as well.

The statutory definitions of the CC have messages primarily for potential perpetrators rather than for victims. The CC contains sanctions for acts to be punished upon certain conditions. One of the aims of the CC is to offer protection against acts deemed to endanger society. The rule under review has the message that the person who commits a forceful act against a person of the same sex shall be prosecuted in all cases by the authorities when informed of the act.

The victim may not be forced to declare his/her sexual orientation, and this question may not be investigated in the criminal procedure. The "meeting" of sexual orientations happens by mere coincidence from the perpetrator's, and even more from the victim's point of view: the victim is selected by the perpetrator. However, the outer appearance of the forceful act may with due ground be interpreted by the external viewer as a graver one when the forceful act is committed against a person of the same sex, since it injures the publicly assumed sexual self-identification of the victim as well. It is irrelevant whether this is, in fact, subjectively true from the point of view of the subject. The victim – who might have the same sexual orientation as the perpetrator of the same sex– cannot be expected to declare in public his/her homosexuality in the criminal procedure.

It follows from the decision in which the Constitutional Court interpreted the Constitution in relation to the membership of children in homosexual associations and the limits of restricting the right of association [Decision 21/1996 (V. 17.) AB] that the views "of the majority" can justify stricter evaluation and enhanced protection as well as interference with privacy and the exercise of "guardianship" by the State, and that the contents of public morals enforced by law are not reviewed by the Constitutional Court.

In view of the above, Section 200 of the CC should not have been declared unconstitutional, and the petition challenging Section 209 of the CC should have been examined on the merits and then rejected.

Budapest, 3 September 2002

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Constitutional Court file number: 1040/B/1993
Published in the Official Gazette (Magyar Közlöny) MK 2002/114