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DECISION 54/2004 (XII. 13.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking a posterior examination of the unconstitutionality of a statute and the violation of an international treaty by the statute, as well as the establishment of an unconstitutional omission of legislative duty and the omission of a legislative duty resulting from an international treaty, as well as acting *ex officio* – with dissenting opinions by Dr. Mihály Bihari and Dr. István Kukorelli, Judges of the Constitutional Court – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that the text "without the licence of an authority" in Section 282 para. (1), Section 282/A para. (1), Section 282/B para. (1), Section 282/C paras (1) and (2), and Section 283/A para. (1) of Act IV of 1978 on the Criminal Code, and the text "to a person without the licence of an authority" in Section 283/A para. (1) are unconstitutional, therefore it annuls them as of the date of publication of this Decision.

The listed provisions shall remain in force as follows:

"Section 282 para. (1) Any person who cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country narcotic drugs commits a felony and shall be punished by imprisonment of up to five years."

"Section 282/A para. (1) Any person who offers, hands over, distributes or trafficks in narcotic drugs commits a felony and shall be punished by imprisonment of two to eight years."

"Section 282/B para. (1) Any person over the age of eighteen who, by using a person under the age of eighteen, cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country narcotic drugs commits a felony and shall be punished by imprisonment of two to eight years."

“Section 282/C para. (1) Any person addicted to narcotic drugs who cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country narcotic drugs commits a misdemeanour and shall be punished by imprisonment of up to two years.
(2) Any person addicted to narcotic drugs who offers, hands over, distributes or trafficks in narcotic drugs commits a felony and shall be punished by imprisonment of up to three years.”
“283/A para. (1) Any person who produces, obtains, keeps, uses, distributes, trafficks in, takes into or out of the country, or transports through the territory of the country a substance classified in a statute issued for the implementation of an international treaty as a chemical substance used for the prohibited production of a narcotic drug, similarly, who hands over such a substance by violating a statutory provision commits a felony and shall be punished by imprisonment of up to five years.”

2. The Constitutional Court holds that Section 283 para. (1) items b), c), d) and point 2 under item e), as well as Section 283 para. (2) of Act IV of 1978 on the Criminal Code are unconstitutional and, therefore, annuls them as of the date of publication of this Decision.

Section 283 will remain in force as follows:
“Section 283 para. (1) No punishment shall be imposed on the ground of misuse of narcotic drugs on a person
a) who cultivates, produces, obtains or keeps a small quantity of narcotic drugs for own use [Section 282 para. (5) item a)],
[…]
e) addicted to narcotic drugs who
1. for own use, cultivates, produces, obtains, keeps, takes into or out of the country or transports through the territory of the country narcotic drugs not of substantial quantity [Section 282/C para. (1) and para. (5) item a)],
[…]
f) addicted to narcotic drugs who commits another criminal offence – punishable with not more than two years of imprisonment – in connection with the criminal offence defined in point 1 under item e),
provided that the person concerned produces an official document before the adoption of the judgement of first instance to verify that he or she has been treated for drug addiction,

received other assistance relating to drug use or participated in a preventive-consulting service for at least six consecutive months."

3. The Constitutional Court holds that Section 286/A para. (2) of Act IV of 1978 on the Criminal Code is unconstitutional and, therefore, annuls it as of 31 May 2005.

4. The Constitutional Court holds that an unconstitutional situation violating international treaties has resulted from the failure of the Parliament to adopt regulations in Act IV of 1978 on the Criminal Code in relation to certain cases of misusing narcotic drugs in order to enforce the provisions of the Convention on the Rights of the Child adopted in New York on 20 November 1989, guaranteeing the enhanced protection of minors, promulgated in Hungary in Act LXIV of 1991, and of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 20 December 1988, promulgated in Hungary in Act L of 1998.

Therefore the Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 May 2005.

5. Acting *ex officio*, the Constitutional Court holds that the Parliament has committed an unconstitutional omission of legislative duty by failing to promulgate in Acts of Parliament the original and effective (amended) text of Schedules I-IV of the Single Convention on Narcotic Drugs adopted in New York on 30 March 1961 and promulgated in Hungary in Law-Decree 4 of 1965, and of Schedules I-IV of the Convention on Psychotropic Substances signed in Vienna on 21 February 1971 and promulgated in Hungary in Law-Decree 25 of 1979.

Therefore the Constitutional Court calls upon the Parliament to comply with its legislative duty concerning the promulgation of the text of the above Schedules by 31 May 2005.

6. Acting *ex officio*, the Constitutional Court holds that an unconstitutional situation has resulted from the failure of the Parliament to adopt provisions on the basis of which the object of the criminal offence can be determined in compliance with the requirement of legal certainty when applying Sections 282-283/A of Act IV of 1978 on the Criminal Code.

Therefore the Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 May 2005.

7. Acting *ex officio*, the Constitutional Court holds that an unconstitutional situation has resulted from the failure of the Parliament to adopt rules, in connection with the provisions of Act IV of 1978 on the Criminal Code, on the matters related to the criminal liability of those who participate in the implementation of programmes aimed at supporting drug users and preventing or curing drug addiction.

Therefore the Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 May 2005.

8. Acting *ex officio*, the Constitutional Court holds that an unconstitutional situation has resulted from the failure of the legislator to harmonise the statutory definitions of the offences under Sections 282-283/A of Act IV of 1978 on the Criminal Code with the statutes defining activities that may be performed under licence.

Therefore the Constitutional Court calls upon the legislator to comply with its duty by 31 May 2005.

9. The Constitutional Court rejects the petition, seeking the establishment of the violation of an international treaty, according to which the jurisdiction of the national courts is violated – in a manner violating Article 3 para. 5 subparas f) and g) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on 20 December 1988, promulgated in Act L of 1998 – by the provisions of Section 283 of Act IV of 1978 on the Criminal Code granting exemption from criminal sanctions to non-addicted users of narcotic drugs.

10. Beyond the scope covered by points 1, 2 and 4 of the holdings of the Decision, the Constitutional Court rejects the petitions seeking the establishment of the violation of an international treaty by, and the unconstitutionality of, as well as the annulment of Section 282, Section 282/A, Section 282/B, Section 282/C, Section 283 para. (1) item a), item e) point 1 and item f), as well as of Section 283/A and 286/A para. (3) of Act IV of 1978 on the Criminal Code.

11. The Constitutional Court rejects the petition seeking the establishment of the Parliament's unconstitutional omission, according to which the right to self-determination of subjects of law enshrined in the Constitution is violated by the provisions of Act IV of 1978 on the Criminal Code providing for the punishment of the production and the cultivation of a small amount of narcotic drugs for own consumption.

12. The Constitutional Court rejects the petition seeking the review of final judgements rendered in criminal proceedings for the misdemeanour and felony of misusing narcotic drugs.

13. The Constitutional Court terminates the procedure aimed at the establishment of the unconstitutionality and the annulment of the text "consumes narcotic drugs" in Section 282 para. (9) item a), and of item b) of the same Section and paragraph in Act IV of 1978, which were in force between 1 March 1999 and 1 March 2003.

14. The Constitutional Court refuses the petition seeking the establishment of the Parliament's unconstitutional omission, according to which the children's interests enshrined in Article 16 of the Constitution are violated by Act IV of 1978 on the Criminal Code not providing for rules that are sufficiently strict in respect of the misuse of narcotic drugs.

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

Reasoning

I

Five petitions were submitted to the Constitutional Court in connection with the statutory definitions of misusing narcotic drugs in Act IV of 1978 on the Criminal Code (hereinafter: the CC). The petitions challenge the present regulations in almost all respects and from both sides. On more than one occasions, the petitioners refer to the same constitutional provision to support their – sometimes opposed – positions, presenting contrasting arguments and drawing contradictory conclusions. Consequently, the Constitutional Court has consolidated the petitions and judged them in a single procedure.

A

1. Regarding the acts constituting the offence of misusing narcotic drugs, one of the petitioners requests the establishment of the unconstitutionality and the annulment of the words “obtains” and “keeps” in Section 282 para. (1) and Section 282/B para.(1), as well as of the definition elements sanctioning the conduct of consuming narcotic drugs as provided for in Section 282 para. (9) item a) and Section 282/B para. (5) item a) of the CC in force between 1 March 1999 and 1 March 2003. In addition, the petitioner requests the ordering of the review of the final judgements rendered in criminal proceedings based on the challenged statutory provisions. (At the time of submitting the petition, the CC had no Section 282/B. The provisions challenged by the petitioner under the above designation – according to the reasoning of the petition – were contained in the Section 282/A in force at that time.) After the entry into force of Act II of 2003 on the Amendment of Criminal Statutes and Certain Related Acts (hereinafter: “CC Amendment 1”) on 1 March 2003, the contents of the challenged provisions can be found under Section 282 para. (1), para. (5) item a), and Section 282/C paras (1) and (5).

Furthermore, the petitioner also requests the establishment of an unconstitutional omission as “the Parliament […] fails to ensure the exercise of the right to self-determination when it orders the punishment of the production and cultivation of a small amount of narcotic drugs for own consumption.” The petitioner argues that the right to human dignity guaranteed under Article 54 para. (1) of the Constitution includes the right to self-determination. Consequently, the State’s interference with privacy should also be prohibited in cases where citizens use consciousness-altering substances that are harmful to their health. According to the petitioner, the individual’s self-damaging conduct only harms the individual himself and does not endanger the rights of others, therefore the fundamental right enshrined in Article 54 para. (1) of the Constitution has to enjoy primacy over the State’s obligation – resulting from Article 70/D of the Constitution – to guarantee a right to the highest level of physical and mental health for those living on its territory. This restricts the State in applying measures of criminal law to interfere with the privacy of persons using narcotic drugs by violating the principle of proportionality.

The petitioner adds that the challenged provisions also violate Article 70/A para. (1) of the Constitution with regard to the right to personal freedom guaranteed in Article 55 para. (1) of

the Constitution. In his opinion, it is an arbitrary decision by the State to make a selection from consciousness-altering substances without reasonable grounds, and to prohibit under criminal law the use of certain substances while tolerating others, regardless of their harmful effects to health.

After the entry into force of CC Amendment 1 on 1 March 2003, the petitioner made no statement upon the call of the Constitutional Court. However, the provisions challenged by the petitioner can still be found in the provisions of the CC in force.

2. Another petitioner asks for the establishment of the unconstitutionality and the annulment of the text "consumes narcotic drugs" in item a) of Section 282 para. (9) and the whole of item b) thereof, as well as Section 282/A paras (1) and (5) (consumes, obtains, keeps) of the CC in force between 1 March 1999 and 1 March 2003. After CC Amendment 1, the challenged provisions – except for the propagation of the consumption of narcotic drugs before a large public gathering, contained in Section 282 para. (9) item b) – have remained in the CC under Section 282 para. (5) item a) and Section 282/C paras (1) and (5).

According to the petitioner, the challenged provisions are contrary to the right to human dignity enshrined in Article 54 para. (1) of the Constitution, they violate the provisions under para. (2) prohibiting torture and cruel, inhuman or humiliating treatment and punishment as well as medical or scientific experiments, and they are incompatible with the right to the highest level of physical and mental health enshrined in Article 70/D para. (1) of the Constitution. Moreover, during legislation the State fails to meet its obligations specified in para. (2) for the enforcement of the latter provision.

In the opinion of the petitioner, "the right to regression is a constitutional fundamental right, any subject of law is entitled to destroy himself or herself. […] the individual is the owner of his or her body, accordingly […] he or she has a primary right to dispose over his or her 'unhealthy' state. […] Toxicomania is lawful and constitutional conduct […] it is the result of the operation and serves the purpose of the satisfaction of the thanatos /death instinct/." Furthermore, the regulation is also considered unconstitutional on account of the legislator not making a distinction between those narcotic drugs that cause addiction and the ones that do not.

Later on, the petitioner supplemented his petition with the claim that in the case of the categories “obtains” and “keeps”, the regulation does not differentiate according to whether the conduct of the perpetrator is aimed at own consumption or trafficking. According to the petitioner, sanctions under criminal law should only be imposed in the latter case. In this regard, the petitioner initiated the establishment of the unconstitutionality and the annulment of Section 282 para. (8) and Section 283/A paras (1)-(3) of the CC, claiming that these statutory provisions do not differentiate between acts of a consuming type and acts of a trafficking type. After the amendment of the CC, these challenged provisions can be found – in a dogmatically modified system – under Section 282 para. (5) item a) and Section 282/A para. (6) item a) and partially in Section 283/A para. (1).

After CC Amendment 1, the petitioner maintained the petition in respect of the new regulations, too.

B

The other petitioners challenge – party from the same aspect – the statutory definitions of the CC on misusing narcotic drugs as contained in CC Amendment 1.

1. On the basis of Section 21 para. (3) item a) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), two Members of Parliament initiated the examination of the alleged violation of an international treaty by the regulation, with consideration to the provisions under Article 7 para. (1) of the Constitution. As a secondary petition, they initiated that if the Constitutional Court does not find due grounds to establish the violation of an international treaty, it should oblige the legislator – on the basis of Section 47 para. (1) of the ACC – to remedy the omission caused by its failure to perform its tasks resulting from international treaties.

In their detailed reasoning, the petitioners claim that the provisions on exemption from criminal liability contained in Section 283 para. (1) item b), Section 283 para. (1) item c) and Section 283 para. (1) item d) violate the regulatory systems of two international treaties. They violate on one hand Article 3 para. 5 subparas f) and g) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 20 December 1988, promulgated in Hungary in Act L of 1998 (hereinafter: “UN

Convention”), and on the other hand Article 36 para. 1 subpara. a) of the Single Convention on Narcotic Drugs adopted in New-York on 30 March 1961, promulgated in Hungary in Law-Decree 4 of 1965 (hereinafter: “Single Convention on Narcotic Drugs”).

According to the UN Convention, the misuse of narcotic drugs is deemed particularly serious when the victim is a minor, or a minor is used for the perpetration of the offence, and when the offence is committed in or in the vicinity of an institution requiring enhanced protection [educational institution, penal institution, social service facility, or other places to which school children and students resort for their activities (hereinafter: “classified institutions”)]. In addition, the UN Convention provides that the Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account such factual circumstances when passing a decision. The Single Convention on Narcotic Drugs obliges the contracting parties to declare the unlawfulness of all forms of conduct related to the misuse of narcotic drugs – as listed in the Convention – that violate the Convention on any legal basis. The contracting parties have to ensure that in the case of such intentional acts their national laws should allow the application of appropriate sanctions commensurate with the category of “serious breach of law”, namely the imposition of deprivation of liberty.

The petitioners refer to the provisions under Article 36 para. 1 subpara. b) and Article 38 para. 1 of the Single Convention on Narcotic Drugs, according to which, in the case of acts committed in connection with misusing narcotic drugs, apart from punishment under criminal law, regulations pertaining to treatment, education and after-care may only be adopted and applied in the case of persons who have already become addicted. The institution of “conditional exemption” may not be applied in general to all perpetrators acting as consumers, and especially not to those who make it possible for others to use narcotic drugs. Therefore, the provisions of the Hungarian regulation violate the content of the Single Convention on Narcotic Drugs as they expand the cases of no criminal liability to the categories of “offering”, “handing over”, “cultivating” and “producing” without even declaring the unlawfulness of such acts outside the scope of the Criminal Code. Thus the legislator has committed an unconstitutional omission.

2. Another Member of Parliament also initiated – partly for other reasons – the establishment of the – multiple – violation of international treaties by the provisions of criminal law in force on the misuse of narcotic drugs, and as a consequence requested the annulment of the entire

Section 283 of the CC with consideration to Article 7 para. (1) of the Constitution (taking into account the interrelatedness in terms of subject). Furthermore, the petitioner requested the Constitutional Court to establish the legislator's unconstitutional omission of a legislative duty resulting from an international treaty.

According to the petitioner, Section 283 para. (1) item c) and item d) point 1 of the CC violate Article 3 para. 5 subpara. f) of the UN Convention, and Section 283 para. (1) item d) point 2 violates Article 3 para. 5 subpara. g) of the UN Convention. Furthermore, Section 283 para. (1) item c) and item d) point 1 of the CC violate Articles 1 and 33 of the Convention on the Rights of the Child adopted in New York on 20 November 1989, promulgated in Hungary in Act LXIV of 1991 (hereinafter: "Child Convention"). At the same time, the legislator has failed to perform its duties resulting from Article 33 of the Child Convention and Article 3 para. 5 subparas f) and g) of the UN Convention.

With regard to the UN Convention, the petitioner points out that the statutory regulations in force withdraw the right of those applying the law, granted in the Convention, to assess with due weight the fact of using minors in acts related to misusing narcotic drugs. The international treaty provision referred to above is violated by the provisions that grant exemption from criminal liability and are applicable to perpetrators over the age of 18 even when the conduct of committing the offence qualifies as "obtaining", "keeping", "offering" or "handing over". The same applies to all cases where in classified institutions or in their neighbourhood a person under the age of 21 can offer or hand over narcotic drugs to a person of any age for free or for consideration, with a possibility of being exempted.

The petitioner also adds that according to the above-mentioned provisions of the Child Convention the State is obliged to keep persons under the age of 18 away from narcotic drugs and psychotropic substances even through legislative means. The obligation of protection covers the prevention of the consumption of drugs by such persons, and the prevention of using such persons in acts related to drugs. The challenged provision violates this rule by offering a possibility of conditional exemption to persons of full age in cases where a minor was affected by or participated in the act concerned.

The petitioner points out in connection with the petition seeking the establishment of an omission that the Articles of the Child Convention referred to by the petition, together with

Article 3 para. 5 subpara. f) of the UN Convention, are also violated by the Parliament's failure to perform the legislative duties – concerning the protection of minors – specified in the above treaties when it regulated the criminal offences of misusing narcotic drugs.
3. The latter Member of the Parliament, together with two other private individuals, jointly initiated the establishment of the unconstitutionality and the annulment of Sections 282, 282/A, 282/B, 282/C, 283 and 283/A of the CC, too. Although they challenge the specific expressions, conditions, and acts of committing the offence in the designated statutory provisions on different constitutional grounds, they claim that, in view of the requirement of legal certainty, only the complete annulment of the provisions is possible due to their interrelations.

3.1. In their opinion, Sections 282, 282/A, 282/B, 282/C and 283/A, the text "for own use" in Section 283 para. (1) items a), c) and item e) point 1, as well as items b) and d), furthermore the text "on the occasion of consuming narcotic drugs jointly" in item e) point 2 violate the requirement of legal certainty as defined in Article 2 para. (1) of the Constitution. The expressions "without the licence of an authority", "for own use" and "on the occasion of consuming narcotic drugs jointly" are considered to be unclear elements of the statutory definitions, therefore they may lead to a multitude of various legal interpretations by those applying the law.

The petitioners argue that the definition of "the licence of an authority" cannot be found in the Act, similarly to the earlier statue – also challenged by the Constitutional Court in another context – which failed to define the legal content of "regulations of an authority." One cannot identify the organ competent to issue the licence, the content of the licence and the manner in which citizens can familiarise themselves therewith. Furthermore, according to Section 1 para. (1) of Act XI of 1987 on Legislation (hereinafter: the AL), a licence is not a statute, therefore it cannot be considered as binding on citizens.

The expressions "for own use" and "on the occasion of consuming narcotic drugs jointly" are, on the one hand, too general concepts that can be used at the discretion of those applying the law in a broader or narrower sense, and, on the other hand, they can only be interpreted by citizens if they have deep knowledge depending on circumstances not defined in the Act. The reference to the notion of "own" can be neither verified nor contested in the course of the particular proceedings, i.e. the acceptance of this criterion solely depends on the discretion of

the authority. Therefore, the "ad hominem" formation of the statutory text makes the application of the law unpredictable and subjective. In the opinion of the petitioners, one cannot exactly interpret the term "use", as the relevant provisions of the Act do not define such conduct as one constituting the offence. Thus, the term "use" may be a synonym for consumption or a concept encompassing all acts of committing the offence concerned.

The examination of the "extent" of use also causes problems. In this respect it is a crucial issue – not addressed by the Act – how, in the case of "use", the various acts constituting the offence relate to one another, i.e. whether the quantities affecting the evaluation of the case are to be added up or not. Finally, it is another problem that in respect of the "joint" conduct and the "occasion of consumption", the CC does not define the limits in space and time, and it does not clarify the acts constituting the offence, either.

According to the petitioners, it is of special importance from a constitutional point of view that the expressions "for own use" and "on the occasion of consuming narcotic drugs jointly" were introduced among the rules granting exemption from criminal liability. The possibility of a subjective application of the law resulting from legal uncertainty poses the danger of applying different standards in the case of individual perpetrators. This is a violation of the requirement of constitutional criminal law according to which the same standards of criminal liability and the same causes excluding and terminating such liability must be applied in the case of all perpetrators.

3.2. As the basis of the unconstitutionality of Section 283 para. (1) item b) and item e) point 2, the petitioners refer to the "the State's duty to actively protect life" deducible from Article 8 and Article 54 para. (1) of the Constitution.

In their opinion, the challenged provisions offering a wide scale of "escape" from criminal liability are one-sided rules by which the State gives up the protection of public health. In addition, the legislator accepted the application of conditional exemption in the case of a small amount of any narcotic drug, even though the personal risk of consuming narcotic drugs is diverse in general. Besides, the regulation does not take into account the constitutional duty related to the protection of the life and health of the other person who receives the narcotic drug. Instead, "the State implicitly acknowledged the acceptability of the phenomenon of consuming narcotic drugs."

3.3. Finally, the petitioners challenge Section 283 para. (1) item c) and item d) points 1 and 2 on the basis of the constitutional rights to the protection of the interests of the young, guaranteed in Article 16 of the Constitution, and to the satisfactory development of the child, enshrined in Article 67 para. (1) of the Constitution. The petitioners argue that "by showing arbitrary, unreasonably one-sided […] extreme tolerance towards the accessibility of narcotic drugs" the legislator completely disregards the requirements of the protection of children and the young as set by the Constitution. The State's passivity – referred to in the above point – in the field of protecting life and health may not extend to allowing the use of minors by adults in the course of acts related to narcotic drugs.

The child's right to satisfactory development is a constitutional right which may not compete with the "right to be narcotised" not deducible from the Constitution. The "freedom of using a substance or device […]" does not result from the right to self-determination. Moreover, concerning the use of narcotic drugs, minors cannot be regarded as "voting citizens", and it is the duty of the adult society to ensure their protection. It is an obligation of the State to organise such protection.

4. Another petitioner claims that Sections 17-23 of CC Amendment 1, providing for the regulations in force, violates the fundamental right to the protection of the interests of the young granted under Article 16 of the Constitution, the right to healthy environment guaranteed under Article 18, the right to the highest level of physical and mental health protected under Article 70 para. (1), the right to human dignity guaranteed in Article 54 para. (1), and the right to personal security enshrined in Article 55 para. (1). Accordingly, the petitioner requests the establishment of the unconstitutionality and the annulment of the amending provisions.

The petitioner reasons that the regulation providing for light sanctions and exemption from criminal liability serves the purpose of neither special nor general prevention, and it does not ensure the protection of the interests and the education of the young. In addition, it is contrary to the right to health and the right to human dignity, as in the end the consumer of narcotic drugs loses his or her human dignity as well.

C

1. In the course of its procedure, the Constitutional Court obtained the opinion of the Minister of Justice and – on certain issues – that of the Minister of Health, Social and Family Affairs.
2. During the procedure of the Constitutional Court, Act XL of 2004 on the Amendment of Statutes of Criminal Law (hereinafter: "CC Amendment 2") – in force as of 19 May 2004 – again modified Section 286/A para. (2) item b) containing interpretative provisions with regard to the statutory definitions on misusing narcotic drugs. Therefore, in the examination of the petitions, the Constitutional Court considered the amended content of the Act and the amended implementing decrees providing the amended content of the interpretative provisions, as in force at the time of the examination.

II

When judging the petition, the Constitutional Court examined the following statutory provisions:

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

"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 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 18 The Republic of Hungary recognizes and shall implement the individual’s right to a healthy environment.”

“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.
(2) No one shall be subject to torture or to cruel, inhuman or humiliating treatment or punishment. Under no circumstances shall anyone be subjected to medical or scientific experiments without his prior consent.”

“Article 55 para. (1) In the Republic of Hungary everyone has the right to freedom and personal security; no one shall be deprived of his freedom except on the grounds and in accordance with the procedures specified by law.”

“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.”

“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.”

“Article 70/D para. (1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. (2) The Republic of Hungary shall implement this right through institutions of labour safety and health care, through the organisation of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment.”

2. The relevant provisions of the UN Convention are as follows:

“Article 3
Offences and Sanctions

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

a) i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;

iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above;

b) i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

c) Subject to its constitutional principles and the basic concepts of its legal system:

i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such offence or offences;

ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances,

iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.
3. Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.
[…]
5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph l of this article particularly serious, such as:
[…]
f) The victimization or use of minors;
g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;
[…]
6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.
7. The Parties shall, ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph l of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences."

3. The relevant provisions of the Single Convention on Narcotic Drugs are as follows:

"Article 36

Penal Provisions

1. a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.
b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38. […]"

"Article 38

Measures against the Abuse of Drugs

1. The Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.
[…]"

4. The relevant provisions of the Convention on Psychotropic Substances signed in Vienna on 21 February 1971 and promulgated in Hungary in Law-Decree 25 of 1979 (hereinafter: "Psychotropic Convention") are as follows:

"Article 5

Limitation of Use to Medical and Scientific Purposes

1. Each Party shall limit the use of substances in Schedule I as provided in article 7.
2. Each Party shall, except as provided in article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.
3. It is desirable that the Parties do not permit the possession of substances in Schedules II, III and IV except under legal authority."

"Article 7

Special Provisions regarding Substances in Schedule I

In respect of substances in Schedule I, the Parties shall:
a) Prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;
[…]"
"Article 20

Measures against the Abuse of Psychotropic Substances

1. The Parties shall take all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved, and shall co-ordinate their efforts to these ends.
2. The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of abusers of psychotropic substances.
3. The Parties shall assist persons whose work so requires to gain an understanding of the problems of abuse of psychotropic substances and of its prevention, and shall also promote such understanding among the general public if there is a risk that abuse of such substances will become widespread."

"Article 22

Penal Provisions

1. a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

b) Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 20.

[…]"

5. The relevant provisions of the Child Convention are as follows:

"Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

"Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances."

6.1. The relevant provisions of the CC in force are as follows:

"Section 282 para. (1) Any person who, without the licence of an authority, cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of

the country narcotic drugs commits a felony and shall be punished by imprisonment of up to five years.

(2) The punishment shall be

a) imprisonment of two to eight years if the criminal offence is committed as a business operation or in a criminal conspiracy or by using a person addicted to drugs,

b) imprisonment of five to ten years if the criminal offence is committed in respect of a substantial quantity of narcotic drugs.

(3) Any person who

a) engages in preparations for the commission of a criminal offence defined in paragraph (1),

b) produces, hands over, distributes, trafficks in, imports into, exports from or transports through the country materials, equipment or accessories necessary for the production of narcotic drugs, if no criminal offence of greater gravity is committed,

commits a felony and shall be punished by imprisonment of up to three years.

(4) Any person who provides funding for a criminal offence defined in paragraphs (1)-(3) shall be punished as set forth therein.

(5) If the criminal offence is committed in respect of a small quantity of narcotic drugs, the punishment shall be

a) imprisonment of up to two years for misdemeanour in the case of paragraph (1),

b) imprisonment of up to three years for felony in the case of item a) of paragraph (2)."

"Section 282/A para. (1) Any person who, without the licence of an authority, offers, hands over, distributes or trafficks in narcotic drugs commits a felony and shall be punished by imprisonment of two to eight years.

(2) The punishment shall be imprisonment of five to ten years, if the criminal offence is committed

a) in a criminal conspiracy or by using a person addicted to drugs,

b) by a public official or a person performing public duties who is acting in such capacity,

c) in a facility of the armed forces or law enforcement agencies, or in a penal facility.

(3) The punishment shall be imprisonment of five to fifteen years or life imprisonment if the criminal offence is committed in respect of a substantial quantity of narcotic drugs.

(4) Any person who

a) engages in preparations for the commission of a criminal offence defined in paragraph (1) or (2) shall be punished for felony by imprisonment of up to three years,

b) engages in preparations for the commission of a criminal offence defined in paragraph (3) shall be punished for felony by imprisonment of up to five years.
(5) Any person who provides funding for a criminal offence defined in paragraphs (1)-(4) shall be punished as set forth therein.
(6) If the criminal offence is committed in respect of a small quantity of narcotic drugs, the punishment shall be
a) imprisonment of up to two years for misdemeanour in the case of paragraph (1),
b) imprisonment of up to five years for felony in the case of paragraph (2).”

“Section 282/B para. (1) Any person over the age of eighteen who, by using a person under the age of eighteen, without the licence of an authority, cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country narcotic drugs commits a felony and shall be punished by imprisonment of two to eight years.
(2) The punishment shall be imprisonment of five to ten years
a) if a person over the age of eighteen offers or hands over narcotic drugs to a person under the age of eighteen or distributes or trafficks in narcotic drugs by using a person under the age of eighteen,
b) if the perpetrator offers, hands over, distributes or trafficks in narcotic drugs inside or in the immediate vicinity of a building serving the purpose of public education, child welfare, child protection or cultural activities,
c) if a criminal offence defined in paragraph (1) is committed in a criminal conspiracy.
(3) The punishment shall be imprisonment of five to fifteen years or life imprisonment if the criminal offence
a) is committed in respect of a substantial quantity of narcotic drugs,
b) defined in item a) or b) of paragraph (2) is committed in a criminal conspiracy or by a public official or a person performing public duties who is acting in such capacity.
(4) Any person who engages in preparations for the commission of a criminal offence defined in paragraph (1) or (2) shall be punished for felony by imprisonment of up to three years.
(5) Any person over the age of eighteen who offers assistance to a person under the age of eighteen in the abnormal use of a substance or preparation having a narcotic effect but not classified as a narcotic drug or tries to persuade such a person to engage in such abnormal use shall be punished for felony by imprisonment of up to three years.
(6) Any person who provides funding for a criminal offence defined in paragraphs (1)-(5) shall be punished as set forth therein.

(7) If the criminal offence is committed in respect of a small quantity of narcotic drugs, the punishment shall be
a) imprisonment of up to two years for misdemeanour in the case of paragraph (1),
b) imprisonment of up to five years for felony in the case of paragraph (2) and item b) of paragraph (3)."

"Section 282/C para. (1) Any person addicted to narcotic drugs who, without the licence of an authority, cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country narcotic drugs commits a misdemeanour and shall be punished by imprisonment of up to two years.
(2) Any person addicted to narcotic drugs who, without the licence of an authority, offers, hands over, distributes or trafficks in narcotic drugs commits a felony and shall be punished by imprisonment of up to three years.
(3) The punishment shall be imprisonment of up to three years for felony in the case of paragraph (1) and imprisonment of up to five years for felony in the case of paragraph (2) if the criminal offence is committed as a business operation or in a criminal conspiracy.
(4) The punishment shall be imprisonment of up to five years for felony in the case of paragraph (1) and imprisonment of two to eight years for felony in the case of paragraph (2) if the criminal offence is committed in respect of a substantial quantity of narcotic drugs.
(5) If the criminal offence is committed by the person addicted to drugs in respect of a small quantity of narcotic drugs, the punishment shall be
a) imprisonment of up to one year, community service or a fine for misdemeanour in the case of paragraph (1) or paragraph (2),
b) imprisonment of up to two years, community service or a fine for misdemeanour in the case of paragraph (3)."

"Section 283 para. (1) No punishment shall be imposed on the ground of misuse of narcotic drugs on a person
a) who cultivates, produces, obtains or keeps a small quantity of narcotic drugs for own use [Section 282 para. (5) item a)],
b) who offers or hands over a small quantity of narcotic drugs on the occasion of consuming narcotic drugs jointly [Section 282/A para. (6) item a)],

c) over the age of eighteen who cultivates, produces, obtains or keeps a small quantity of narcotic drugs for own use by using a person under the age of eighteen [Section 282/B para. (7) item a)],

d)

1. between the ages of eighteen and twenty-one who offers or hands over to a person under the age of eighteen a small quantity of narcotic drugs on the occasion of consuming narcotic drugs jointly, or

2. below the age of twenty-one who offers or hands over a small quantity of narcotic drugs on the occasion of consuming narcotic drugs jointly inside or in the immediate vicinity of a building serving the purpose of public education, child welfare, child protection or cultural activities [first part of Section 282/B para. (7) item b) if the criminal offence violates item a) or item b) of paragraph (2)],

e) addicted to narcotic drugs who

1. for own use, cultivates, produces, obtains, keeps, takes into or out of the country or transports through the territory of the country narcotic drugs not of substantial quantity [Section 282/C para. (1) and para. (5) item a)], or

2. who offers or hands over a small quantity of narcotic drugs on the occasion of consuming narcotic drugs jointly [Section 282/C para. (2) and para. (5) item a)],

f) addicted to narcotic drugs who commits another criminal offence – punishable with not more than two years of imprisonment – in connection with the criminal offence defined in point 1 under item e),

provided that the person concerned produces an official document before the adoption of the judgement of first instance to verify that he or she has been treated for drug addiction, received other assistance relating to drug use or participated in a preventive-consulting service for at least six consecutive months.

(2) Items b), d) and point 2 under item e) of paragraph (1) may not be applied if the criminal liability of the perpetrator was established on at least one occasion in criminal proceedings instituted on account of the perpetrator's misuse of narcotic drugs or the indictment against the perpetrator was suspended within the two years preceding the commission of the act."

"283/A para. (1) Any person who, without the licence of an authority, produces, obtains, keeps, uses, distributes, trafficks in, takes into or out of the country, or transports through the territory of the country a substance classified in a statute issued for the implementation of an international treaty as a chemical substance used for the prohibited production of a narcotic

drug, similarly, who hands over such a substance to a person without the licence of an authority by violating a statutory provision commits a felony and shall be punished by imprisonment of up to five years.
(2) Any person who has provided assistance for the production of narcotic drugs shall be exempted from punishment if he or she confesses the act to the authority before it becomes aware of it, hands over to the authority the objects produced, obtained, kept or imported, and cooperates with the authorities in finding other persons facilitating the production of narcotic drugs in respect of material handed over, used, distributed, trafficked, and transported through or exported from the territory of the country."

"Section 286/A
[…]
(2) For the purposes of Sections 282 and 283 'narcotic drugs' shall mean
a) the substances defined in the statute issued for the implementation of the Single Convention on Narcotic Drugs signed in New York on 30 March 1961 and promulgated in Hungary in Law-Decree 4 of 1965, and of the Protocol on the amendment and supplementation of the Single Convention on Narcotic Drugs signed in Geneva on 25 March 1972 and promulgated in Hungary in Law-Decree 17 of 1988, and
b) the substances defined in the statute issued for the implementation of the Convention on Psychotropic Substances signed in Vienna on 21 February 1971 and promulgated in Hungary in Law-Decree 25 of 1979, which are dangerous from the point of view of misuse.
(3) For the purposes of Section 283/A 'chemical substances used for the illicit production of narcotic drugs' shall mean the substances defined in the statute regulating certain activities involving chemical substances also used for the illicit production and manufacture of narcotic drugs and psychotropic substances, issued for the implementation of Article 12 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 20 December 1988 and promulgated in Hungary in Act L of 1998."

6.2. The provisions of the CC in force at the time of submitting the petitions detailed under point I/A:

"Section 282 para. (1) Any person who, in violation of the regulations of an authority, cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the

territory of the country narcotic drugs commits a felony and shall be punished by imprisonment of up to five years.

(2) Any person who, in violation of the regulations of an authority, offers, hands over, distributes or trafficks in narcotic drugs commits a felony and shall be punished by imprisonment of two to eight years.

(3) The punishment shall be imprisonment of two to eight years in the case of paragraph (1) and imprisonment of five to ten years in the case of paragraph (2) if the criminal offence is committed

a) as a business operation,

b) in an armed manner,

c) by a public official or a person performing public duties,

d) by a person over the age of eighteen by using a person under the age of eighteen, or the latter receives narcotic drugs as a result of committing the offence,

e) by a person not addicted to narcotic drugs by using a person addicted to narcotic drugs.

(4) In the case of paragraph (2), the punishment shall be imprisonment of five to ten years if the criminal offence is committed inside or in the vicinity of a building serving the purpose of public education, child welfare, child protection or cultural activities, in a facility of the armed forces, or in a penal facility.

(5) The punishment shall be imprisonment of five to fifteen years in the case of paragraph (1) and imprisonment of ten to fifteen years or life imprisonment in the case of paragraph (2) if the criminal offence is committed

a) in respect of a substantial quantity of narcotic drugs,

b) as a member of or commissioned by a criminal organisation.

(6) Any person who provides funding for the criminal offence of misusing drugs shall also be punished in accordance with paragraphs (1)-(5).

(7) Anyone who volunteers, undertakes or calls on others to commit the misuse of narcotic drugs, or agrees on the joint commitment of misusing narcotic drugs shall be punished for felony by imprisonment of up to three years.

(8) If the misuse of narcotic drugs is committed in respect of a small quantity of narcotic drugs, the punishment shall be imprisonment of up to two years, community service or a fine for misdemeanour in the case of paragraph (1), and imprisonment of up to two years for misdemeanour in the case of committing the offence by offering or handing over as specified in paragraph (2).

(9) Any person who

a) consumes narcotic drugs in violation of the regulations of an authority,

b) calls, in front of a large public, for consuming narcotic drugs,

commits a misdemeanour – if no criminal offence of greater gravity is committed – and shall be punished by imprisonment of up to two years.”

“Section 282/A para. (1) Any person addicted to narcotic drugs who, in violation of the regulations of an authority, cultivates, produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country narcotic drugs commits a misdemeanour and shall be punished by imprisonment of up to two years.

(2) Any person addicted to narcotic drugs who, in violation of the regulations of an authority, offers, hands over, distributes or trafficks in narcotic drugs commits a felony and shall be punished by imprisonment of up to three years.

(3) The punishment shall be imprisonment of up to three years for felony in the case of paragraph (1) and imprisonment of up to five years for felony in the case of paragraph (2) if the criminal offence is committed as a business operation.

(4) The punishment shall be imprisonment of two to eight years for felony in the case of paragraph (1) and imprisonment of five to ten years for felony in the case of paragraph (2) if the criminal offence is committed in respect of a substantial quantity of narcotic drugs.

(5) Any person addicted to narcotic drugs who, in violation of the regulations of an authority,

a) consumes narcotic drugs or keeps narcotic drugs for own consumption,

b) produces, cultivates or obtains narcotic drugs of small quantity for own consumption,

c) offers or hands over narcotic drugs of small quantity to a person over the age of eighteen for consumption

commits a misdemeanour and shall be punished by imprisonment of up to one year, community service or a fine.

(6) A person addicted to narcotic drugs may not be punished

a) in the case of items a)-b) of paragraph (5), or

b) if he or she has committed another criminal offence – to be punished by not more than two years of imprisonment – in connection with the consumption of narcotic drugs,

provided that the person concerned produces an official document before the adoption of the judgement of first instance to verify that he or she has been treated for drug addiction for at least six consecutive months.”

“Section 283 Any person over the age of eighteen who offers assistance to a person under the age of eighteen in the abnormal use of a substance or preparation having a narcotic effect or tries to persuade such a person to engage in such abnormal use commits a felony and shall be punished by imprisonment of up to three years.”

“Section 283/A para. (1) Anyone who provides the conditions necessary for the cultivation or production of narcotic drugs in violation of the regulations of an authority, or ones facilitating the cultivation or production of such drugs, or who
a) prepares or has another person prepare substances, products, equipment or accessories necessary for the cultivation or production of narcotic drugs,
b) hands over, distributes or trafficks in such articles,
commits a felony – if no criminal offence of greater gravity is committed – and shall be punished by imprisonment of up to three years.
(2) Anyone who provides the cultivator or producer of narcotic drugs with any business, technical or organisational knowledge of proprietary value necessary for or facilitating the cultivation or production of narcotic drugs in violation of the regulations of an authority shall be punished as provided for in paragraph (1).
(3) Any person who, in the case of paragraph (1) item a), has provided assistance for the production of narcotic drugs shall be exempted from punishment if he or she confesses such act the authority before it becomes aware of the preparation of the given substance, product, equipment or accessory necessary for the cultivation or production of narcotic drugs, hands over the objects prepared to the authority, and cooperates with the authority in finding other persons engaged in the production of narcotic drugs.”

“Section 286/A
[…]
(2) For the purposes of Sections 282, 282/A and 283/A, narcotic drugs shall also mean psychotropic substances deemed dangerous from the point of view of misuse.”

7.1. The provisions in force of Law-Decree 5 of 1979 on the Entry into Force and Implementation of Act IV of 1978 on the Criminal Code (hereinafter: the CCInt) are as follows:

“Section 23 para. (1) In respect of the acts constituting the offence ‘produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country’ and ‘offers, hands over, distributes or trafficks in’ as specified in Sections 282-283 of the CC, narcotic drugs shall be regarded as being of small quantity when

a) the clear active substance content thereof, expressed in base form, does not exceed

0.001 gram in the case of LSD,

0.6 gram in the case of heroin,

0.5 gram in the case of amphetamine and methamphetamine,

1 gram in the case of MDA, MDMA, N-ethyl-MDA (MDE), MBDB, 1-PEA and N-methyl-1-PEA,

1 gram in the case of methadone,

0.9 gram in the case of morphine,

2 grams in the case of cocaine,

1 gram in the case of ketamine,

1 gram in the case of codeine,

0.8 gram in the case of dihydrocodeine,

1 gram in the case of pethidine,

b) in the case of tetrahydrocannabinol (THC), the clear active substance content does not exceed 1 gram.

(2) In respect of the acts constituting the offence ‘cultivates, obtains, keeps, takes into or out of the country, or transports through the territory of the country’ and ‘offers, hands over, distributes or trafficks in’ as specified in Sections 282-283 of the CC, narcotic drugs shall be regarded as being of small quantity when in the case of cannabis plants the number of plants is not more than five.

(3) During the application of Sections 282-283 of the CC, any narcotic drug specified under paragraphs (1)-(2) shall be regarded as being of substantial quantity when it exceeds by twenty times the upper threshold of small amount specified therefor.

(4) In the case of a narcotic drug not specified in paragraphs (1)-(2), the narcotic drug shall be regarded as being of small quantity when the physiological effect of its clear active substance content equals the physiological effect of 0.9 gram of morphine base at the most.

(5) In the case of a narcotic drug not specified in paragraphs (1)-(2), the narcotic drug shall be regarded as being of substantial quantity when the physiological effect of its clear active substance content equals the physiological effect of over 18 grams of morphine base.”

7.2. The provisions of the CCInt in force at the time of submitting the petitions detailed under point I/A are as follows:

"Section 23 para. (1) In respect of the acts constituting the offence 'produces, obtains, keeps, takes into or out of the country, or transports through the territory of the country' and 'offers, hands over, distributes or trafficks in' as specified in Sections 282 and 282/A of the CC, narcotic drugs shall be regarded as being of small quantity when
a) the clear active substance content thereof, expressed in base form, does not exceed
0.001 gram in the case of LSD,
0.6 gram in the case of heroin,
0.5 gram in the case of amphetamine and methamphetamine,
1 gram in the case of MDA, MDMA, N-ethyl-MDA (MDE), MBDB, 1-PEA and N-methyl-1-PEA,
1 gram in the case of methadone,
0.9 gram in the case of morphine,
2 grams in the case of cocaine,
1 gram in the case of ketamine,
1 gram in the case of codeine,
0.8 gram in the case of dihydrocodeine,
1 gram in the case of pethidine,
b) in the case of tetrahydrocannabinol (THC), the clear active substance content does not exceed 1 gram.
(2) In respect of the acts constituting the offence 'cultivates, obtains, keeps, takes into or out of the country, or transports through the territory of the country' and 'offers, hands over, distributes or trafficks in' as specified in Sections 282 and 282/A of the CC, narcotic drugs shall be regarded as being of small quantity when in the case of cannabis plants the number of plants is not more than five.
(3) During the application of Sections 282 and 282/A of the CC, any narcotic drug specified under paragraphs (1)-(2) shall be regarded as being of substantial quantity when it exceeds by twenty times the upper threshold of small amount specified therefor.
(4) In the case of a narcotic drug not specified in paragraphs (1)-(2), the narcotic drug shall be regarded as being of small quantity when the physiological effect of its clear active substance content equals the physiological effect of 0.9 gram of morphine base at the most.

(5) In the case of a narcotic drug not specified in paragraphs (1)-(2), the narcotic drug shall be regarded as being of substantial quantity when the physiological effect of its clear active substance content equals the physiological effect of over 18 grams of morphine base."

8. The provisions of Law-Decree 27 of 1982 on the Procedure Related to International Treaties (hereinafter: the LDIT) are as follows:

"Section 1 For the purposes of this Law-Decree:
[…]
g) 'promulgation of an international treaty' shall mean the inclusion of an international treaty into a statute;
[…]"

"Section 9 International treaties may be concluded – depending on the provisions of this Law-Decree, the resolution of the Presidential Council of the People's Republic of Hungary or the Council of Ministers, the provisions of the treaty, or the relevant separate agreement between the contracting parties – in the form of
a) ratification by the Parliament or by the Presidential Council of the People's Republic of Hungary […]."

"Section 13 para. (1) International treaties ratified by the Parliament shall be promulgated in Acts of Parliament."

"Section 14 para. (1) The promulgating statute shall contain
a) the declaration of promulgating the treaty;
b) the authentic Hungarian text of the treaty, or the official Hungarian translation of the treaty;
[…]"

III

A

1. The misuse of narcotic drugs has been combated for a long time in the framework of cooperation between states manifested in a legal form as well. As the Republic of Hungary is one of such states, the relevant international treaties are to be complied with by domestic law.

Criminal law regulations are directly based upon the Single Convention on Narcotic Drugs, the UN Convention, the Convention on Psychotropic Substances signed in Vienna on 21 February 1971 and promulgated in Hungary in Law-Decree 25 of 1979 (hereinafter: "Psychotropic Convention"), and all legal antecedents thereof ratified by Hungary as well, and the provisions of the legal acts issued by the institutions of the European Union. Therefore, the Constitutional Court considered it necessary to overview the international law regulations within the scope covered by the petitions, and it took such regulations into account when examining the challenged provisions.

1.1. The Single Convention on Narcotic Drugs is deemed to constitute the basis of the regulations, synthesising the content of former international treaties, and applying a unified regulatory approach. Its provisions prohibit in general the cultivation, production, trade and use of narcotic drugs "for non-medical and non-scientific purposes". The substances controlled by the Convention have been defined in the attached lists, which indicate the dangerousness of the substances as well. The wording of the Convention makes it clear that the prohibition under international law is limited to such substances. However, the Convention empowers the States Parties to extend the scope of supervisory regulations to substances not included in the Convention but suitable for the illegal production of narcotic drugs (Article 2 paragraph 9), and to re-classify – at the national level – the substances within the lists in order to apply stricter rules thereon (Article 39).

The reason for the adoption of the Psychotropic Convention was the fact that several substances not covered by the Single Convention on Narcotic Drugs [e.g. synthetic compounds (of amphetamine type)] could be misused similarly to certain narcotic drugs. The states agreed not to "loosen" the drug control system by expanding control to the extremely wide spectrum of synthetic substances and the very high number of producers, exporters and importers thereof, but rather to create a separate group of such drugs – on a schedule attached to the Convention – under the name "psychotropic substances". It was a novelty in the Convention that it provided for the States Parties' duty related to the early detection of misuse, the treatment of drug addicts, education, after-care, and social rehabilitation. The rules adopted in the above field were incorporated into the Single Convention on Narcotic Drugs in the form of the "Protocol adopted in Geneva on 25 March 1972."

However, the new Convention did not contain, either, any rule on controlling the precursors of psychotropic substances. This need justified the adoption of the UN Convention, which also concentrates on the most important substances necessary for the production of materials suitable for misuse. In addition, it provides for the new principles applicable to police and criminal law cooperation and the methods thereof related to the misuse of narcotic drugs as a phenomenon.

International legislation and cooperation has continued even after the adoption of comprehensive conventions. A significant milestone thereof was the setting up of the European Monitoring Centre for Drug and Drug Addiction (hereinafter: the EMCDDA) by the European Union and the commissioning of this organisation to collect data and elaborate proposals necessary for codification at the level of the Union. [In Hungary, Government Resolution 1091/2003 (IX. 9.) Korm. defined the necessary legislative tasks at the national level and the duties of certain government organs in the field of cooperation with the EMCDDA.] One must also take into account the secondary sources of law – Council Regulations of direct applicability and Directives to be incorporated into domestic law – within the European Union serving the purpose of legal harmonisation in respect of the misuse of narcotic drugs, psychotropic substances and precursors.

1.2. In spite of the intense and long international cooperation, the conventions do not contain definitions of narcotic drugs and psychotropic substances. According to the conventions, narcotic drugs and psychotropic substances mean the drugs included in the texts of the conventions and the schedules attached thereto, open for amendment in line with well-defined rules of procedure. Furthermore, the conventions provide for mandatory definitions concerning substances used under different names or with different meanings in the various countries (e.g. coca leaf, cannabis, poppy straw).

The separation of narcotic drugs and psychotropic substances, as well as the legal method of regulating on a case-by-case basis through the schedules attached to the conventions have historical roots. At the beginning of the international cooperation there were only a limited number of substances – suitable for causing a narcotic effect – known and refused by all states, therefore case-by-case regulation was a feasible solution for the cooperating parties. However, later on, the expansion of international trafficking in narcotic drugs induced the "invention" of new substances, and the development of organic chemistry resulted in the

widening of the range of available narcotic substances. By now, this has become an obstacle to formulating uniform definitions. Today, it is impossible to provide scientifically well-founded medical, let alone legal, categories or definitions that form a consistent system and include all natural, semi-synthetic and synthetic substances already known or emerging on the market. Therefore, it has become accepted at the international level to extend the scope of the legislation in force to newly emerging substances individually in the form of amending the regulations on a case-by-case basis.

1.3. The lack of uniform and autonomous definitions for narcotic drugs and psychotropic substances and the use of the lists attached to the conventions as a basis for codification demand a very high level of circumspection in legislation and the application of the law in terms of criminal law and policing.

Today, the numbered lists attached to the Single Convention on Narcotic Drugs, the Psychotropic Convention and the UN Convention merely theoretically contain the classification of substances according to weight, from the most to the least dangerous one. These three documents set up ranking lists from the point of view of general control by taking into account the combination of risk factors (e.g. cultivation, production, trafficking, export, import, use), rather than by considering aspects under criminal law, although the above ranking is used as a basis for differentiation in criminal assessment in the legislation of certain countries (e.g. United Kingdom, Italy). At the same time, the texts of the Conventions do not provide any guidelines on the necessity to differentiate between the listed substances in respect of criminal law, but they do not provide for the contrary, either. They only forbid the States Parties to disregard the narcotic drugs, psychotropic substances and precursors included in the schedules of the international documents during their national legislation. It follows from the above fact in itself that, when adopting criminal law regulations at the national level, the starting point has to be the clear statutory regulation of all narcotic drugs, psychotropic substances and precursors subject to the international conventions.

2. The international treaties are aimed at the prevention of the misuse of the substances included in the lists contained therein, but not exclusively through means of criminal law. As a result, it is the duty of national legislation to make a clear distinction between the use and misuse of narcotic drugs, as sanctions under criminal law may only be applied in the case of the latter. In addition to defining the dangerous substances in respect of misuse, the

definitions of acts (e.g. distribution, trafficking etc.) contained in the conventions may not be disregarded, circumvented or applied with a different content in the course of legislation.

B

With regard to the statutory definitions under criminal law on consuming narcotic drugs, the Constitutional Court had to take a position on issues that have been debated world-wide for a long time. Therefore it has examined in details the international treaties and the relevant regulations adopted by other states, as well as the relevant positions taken by international institutions, together with the system of underlying principles and opinions.

1.1. Criminal law became a primary tool of handling problems resulting from the consumption of narcotic drugs in the second half of the 20th century. For a long time, acts of distributing drugs and various forms of transiting drugs as part of the drug consumer's (according to recent terminology: consumer-procurer's) conduct have equally been regarded as acts to be condemned and sanctioned under criminal law in all democratic societies. However, from time to time, debates are raised about – the very heterogeneous – acts of a consumption type, albeit mainly concerning the use of cannabis. There is a consensus that the misuse of narcotic drugs should be avoided, but there are diverse opinions on whether to apply sanctions of criminal law, and what types of such sanctions can be applied in the combat against this undesired phenomenon.

The general and unrestricted legalisation of the consumption of narcotic drugs without the application of any sanctions has never been raised as a serious alternative. In general, drug policies focusing on the suppression of the misuse of drugs mainly use the tools of prohibition and harm reduction, with shifts of emphasis. The use of drugs for the purpose of consumption is prohibited by the states either through possession or as an independent act constituting the offence, partly through the norms of criminal law, and partly through sanctions under administrative, policing and healthcare norms. All types of narcotic drugs are more or less "prohibited", although in certain cases special rules are applicable to cannabis.

1.2. Users of narcotic drugs have officially declared world-wide that although at present the consumption of drugs is undoubtedly a habit exercised by a minority of society, it does not violate the interests of others or cause damage to anyone (only to the user at the most), therefore the majority society should show tolerance towards this phenomenon. As the common opinion of a minority is part of public opinion, and in a democratic society minority

opinions are as important as the majority opinion, the State has no duty to use the tools of criminal law for the protection of the majority opinion, and it is not necessary, either, to protect the individual from himself or herself.

However, even those in favour of the legalisation of consuming drugs do not consider that the use of drugs should be unconditionally legalised. They themselves acknowledge that the use of drugs involves risks, they do not agree on the scope of “harmless substances”, and in general they use the “standard” of a “mature and responsible adult” as a person to whom such substances can be made accessible.

Those against the consumption of drugs argue that drug users can only justify their conduct by pure hedonism, which cannot be accepted as a basis for choosing between values. On the one hand, hedonism does not define any reasonable and acceptable main objective, and on the other hand, accepting hedonism would result in losing reasonable grounds for arguing against certain acts causing serious harm (such as paedophilia or violent sexual harassment). There could be – and indeed there are – incomparable forms of pleasure (in addition to intensity and duration, which are also incomparable), and there are no parameters for doing justice between them when they collide. In addition, the uncontrolled consumption of drugs for pure pleasure makes the consumer addicted to the narcotic drug sooner or later, depending on his or her sensitivity. Very soon, the user reaches a level of addiction where he or she can only concentrate on obtaining the drug. He or she gives up his or her job, his or her contacts become empty, his or her existence deteriorates, and he or she rapidly drifts towards criminality in order to get the money needed for obtaining the drug. Consequently, such conduct poses a danger not only to the user but to others as well. In general, national legislatures are reluctant to legalise the consumption of drugs, but there are various parts of society seeking the easing of prohibitions on different scales. There are various tendencies in the national legislations for the handling of this situation, and there are significant differences between the regulations of even the states apparently following the same criminal law policy.

1.3. In this respect, the European states do not follow a unified regulation, either. In some countries, imprisonment or alternative sanctions are applied for the consumption of narcotic drugs irrespectively of the type but taking into account the quantity of the drug concerned, but such sanctions are less severe than in the case of any other conduct related to the misuse of drugs (e.g. in France, Sweden, or Malta). There is a group of countries where narcotic drugs

are classified into “classes” or at least “groups”, and sanctions mainly depend on such classification (e.g. England, Ireland). It is also commonly accepted to use separate “directives” (e.g. in Finland) or decisions by the Supreme Court (e.g. in Norway) for weighing criminal law sanctions, and to differentiate accordingly between addicted and non-addicted consumers through the availability of therapeutic programmes. In other countries (e.g. Greece) the Act itself provides for such distinction.

There is a group of states heterogeneous with regard to sanctions where the regulations are “more lenient” in respect of the consumption of drugs. In some cases administrative sanctions are applied, sometimes even making a distinction between cannabis and other drugs (e.g. in Portugal), or relating only to the consumption of drugs in a public area (e.g. in Spain or Italy). In some countries (e.g. in Denmark) the consumption of drugs is only sanctioned by a fine, or – with a special differentiation with regard to cannabis – only consumption in a group may be sanctioned by imprisonment (e.g. in Belgium). According to the regulations in certain countries, acts of consuming drugs are only distinguished in the case of cannabis (Austria, Germany, the Netherlands). However, there are remarkable differences between the sanctions applied within the latter category. There is only one state (the Netherlands) where the moderate consumption of cannabis by adults in public is allowed and unsanctioned, but even there the communities have the right to veto the process of licensing (“through the triangle committee”).

The problem of consuming narcotic drugs has been present in the American Continent for centuries. Today in the United States of America the so-called “zero tolerance” is applied in the “war against drugs” even at the level of legislation; drug-related problems are handled with the tools of criminal law. The same approach is reflected in the decisions of the Supreme Court (e.g. the decision on the medical use of marijuana, the prohibition of applying the 4th Amendment to the Constitution in cases related to drugs). However, in the case of marijuana, in matters outside the competence of the federal courts, the regulations of the individual states show a tendency of easing or tolerance.

In Canada, the use of marijuana for medical purposes is permitted under certain conditions, while the cultivation or possession thereof for own use entails primarily administrative sanctions.

In the states of Latin-America the consumption of marijuana is allowed either in a regulated manner (e.g. in Peru) or without regulation (e.g. in Bolivia), the consumption of cocaine is allowed within certain limits (e.g. in Columbia), or both are "tolerated" (e.g. in Mexico).

In Australia, permissive rules only apply to marijuana, and part of the acts related to consumption only entail administrative sanctions in most cases.

In the countries of Asia, the regulations are quite heterogeneous. Sanctions range from capital punishment even for possessing a very small quantity of drugs (e.g. Singapore, Pakistan) through the application of severe imprisonment (e.g. in Japan and China) to the diversification of sanctions based on the type and/or quantity of the drug (from administrative sanctions to imprisonment, e.g. in Thailand and India).

In Africa, only the consumption of marijuana (hashish) for cultic purposes is part of the cultural heritage. Thus, "non-conscious consumption" results in sanctions of criminal law.

1.4. Independently of the prohibition of the consumption of narcotic drugs under criminal law, many states apply harm reduction measures. Today, almost all countries – with the exception of the ones lacking relevant regulations or tolerating the cultic use of drugs – apply a network of various forms of institutionalised care. The individual countries apply various frameworks for education, disaccustoming, medical treatment and the social reintegration of drug consumers. The states acknowledge the "eradication of drugs" as a social value, and in order to be efficient, they have combined the applied methods with criminal law. This is how the legally regulated system of "conditional exemption" has emerged as an alternative to punishment.

The tools are quite diverse. They range from the most widely used treatment with medicines aimed at disaccustoming (e.g. methadone programme) through the provision of rooms for exchanging needles and shooting – sometimes with medical supervision – (e.g. in Zürich, Frankfurt, Liverpool, Sydney) to mobile laboratories measuring contamination levels (e.g. in Switzerland, Portugal). Programmes for disaccustoming are offered not only by state-run addictology centres but also by religious and charitable organisations.

1.5. It is apparent from the above that all states in the world have to face the challenge of handling the consumption of narcotic drugs and related problems. Accordingly, international organisations continuously encourage concerted actions by the states.

In addition to attempts to harmonise the drug policies of its Member States, the European Union regularly initiates cooperation with states outside the continent (e.g. continuous talks of the Commission with Morocco on the expansion of the control system). Commissioned by the European Parliament and the Council, several committees have examined the issue of drugs, the possibilities of prevention and the handling of consumption (e.g. Stewart-Clark Committee, Pompidou Group, Cooney Committee). Nevertheless, Recommendation No. 1085 adopted in 1988 by the Parliamentary Assembly of the Council of Europe could only declare the fact that the states had no common strategy on the problem of narcotic drugs, and that government reactions ranged from total unconcern to tyrannic severity. For the purpose of facilitating harmonisation, a special committee called the European Committee to Combat Drugs (CELAD) was set up, which was subsequently replaced by the EMCDDA.

Despite the institutionalisation of cooperation, the EMCDDA report of 2002 established that various combinations of three lines of action can be found in the national criminal law policies, namely the reduction of drug supply, the reduction of demand for drugs and harm reduction. Practically the same is documented – at a global level – in the "summary report" (Global Illicit Drug Trends) presenting the results of five years of research, published in 2003 by an office of the United Nations Organisation [Office on Drugs and Crime (before 1 October 2002: Office for Drug Control and Crime)].

IV

1. Similarly to earlier decisions of the Constitutional Court on similar issues causing social debates as well [e.g. Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 261], the Court's starting point in evaluating the petitions was the idea that an ideologically neutral legal system (and, therefore the Constitutional Court of such a system) has no responsibility to formulate an approving or tolerating attitude towards the hedonism related to the use of narcotic drugs or the rejection thereof. However, it has to examine whether the State's duty of institutional protection has a role in respect of evaluating the consumption of drugs from the point of view of criminal law. In order to formulate an opinion on this issue in line with its duty to protect

the Constitution, it can compare the individual rights resulting from the provisions of the Constitution and the related duties of the State with the proven consequences of using drugs as an issue manifested at an individual and social level and of the use of certain drugs and their effect on the human body. This can be the objective basis for comparing the right to self-determination with the constitutional duties of institutional protection related to the young and public health.

2.1. Narcotic drugs and psychotropic substances have a direct effect on nerve cells and cause chemical reactions in the brain. There are many substances capable of having such an effect, and the consequences of using them depend on their type, consumed quantity, active substance content and level of purity: all substances have a different "misuse potential". In addition, consumers have different reactions according to their individual sensitivity to the various substances. Therefore, the individual substances cause different levels and types of damage (destruction) in the brain, and they induce different consequences during various periods of time. Consequently, the level of individual risks is unpredictable and incalculable even in the case of narcotic substances of the same type and active substance content.

Furthermore, addiction does not mean that the person consuming the drug experiences all possible effects at the same time, as addiction also has its own stages. According to proven experience, addiction is the necessary consequence of the "conditioning" and "reinforcing" effects, resulting in the deterioration of the person's mental, physical and social state, and devaluating all needs other than the desire for the drug. Paradoxically to the reference to the legality of "free choice" stemming from the freedom of self-determination, the individual becomes increasingly subordinated to the use of drugs, i.e. the level of addiction is inversely proportional to the level of the freedom of action. From that point on, the consumption of drugs having generally indefinable but high health risks – even involving the loss of one's life in certain cases – is no longer a matter of conscious decision-making, thus the individual has no real freedom of choice.

2.2. Undoubtedly, the health and social consequences at the level of both individuals and society resulting from the consumption of narcotic drugs are serious not only in respect of addicted consumers. Those distributing illicit drugs pose a threat to the health and welfare of the entire society, as well as to public safety and public peace indispensable for the freedom of action.

Illegal trafficking, handing over and distribution must remain prohibited even in the case of "liberalising" the side of consumers. However, according to the strict dogmatic interpretation of criminal law, consumers/buyers assist in committing the crime of illegal trafficking when they buy their own dose, thus contributing to maintaining the market of illicit drugs and influencing the rate of related criminal offences. It must be taken into account in this regard that (beyond the obligations resulting from international treaties) a general legalisation would reshape the market of narcotic drugs not only at the national level. The increase of the harmful effects of the international trade in narcotic drugs in Hungary is also a significant risk factor. All the above are a constitutional issue affecting the status, security and peaceful course of life of the whole population as well as the freedom of action through the dramatic deterioration of public safety and public peace in the country.

Furthermore, drug consumers themselves claim that the narcotic effect causes an altered state of consciousness characterised – as perceived externally – by the affected person's inability to control his or her own behaviour. Thus there is a real danger that he or she re-evaluates or disregards the restraints preventing persons of full capacity for judgement from endangering others.

Therefore, the petitions are unfounded in respect of claiming that acts of a consumption type only affect the individual concerned. Consumption takes place in a social environment, which includes not only the minority characterised by the subculture. On the contrary: the consumer's conduct directly restricts the sense of security and freedom of action of those not using drugs through having a negative effect on the life of the community (e.g. crime related to obtaining drugs, consuming drugs in the presence of minors, endangering the environment as a result of uncontrolled behaviour).

For the purpose of protecting everyone's personal dignity, the State is obliged to avert the dangers threatening its citizens, and to provide at least symptomatic or "palliative" care for those members of society who cannot do so or who can do so only to a limited extent, even if such incapability is the result of their own choice. In Decision 28/1994 (V. 20.) AB, the Constitutional Court emphasised that despite the fact that no subjective rights directly originate from social rights, the State has duties in the field of care and the establishment and protection of institutions "closely and extensively related" to subjective rights, as the persons

entitled to benefit from the desired objective of the State can be specified in the relevant framework (ABH 1994, 134, 138). Thus it is the duty of the State to avert "damage" on the side of the consumer in order to protect society, and it is also a State obligation in the field of healthcare and social affairs to take care of the individual affected by the consumption of drugs when he or she is no longer able to do so alone. According to the consistent practice of the Constitutional Court, it follows from the interpretation of Article 70/A of the Constitution – with consideration to Article 8 para. (1) and Article 54 para. (1) thereof – that the prohibition of discrimination is to be applied not only to the rights specifically named in the Constitution but to the entire legal system [e.g. Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281; Decision 37/2002 (IX. 4.) AB, ABH 2002, 230, 241; Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 264-266]. The requirement of treating persons as ones of equal dignity also means that even persons whose situation has become unbearable or critical through their own fault should not be left without help.

Maintaining its position explained in Decision 32/1998 (VI. 25.) AB (ABH 1998, 251, 254), the Constitutional Court stated in Decision 42/2000 (XI. 8.) AB that on the side of the State, the right to social security – even without the specification of concrete obligations of providing support – is manifested in the active fulfilment of minimum requirements indispensable for the realisation of human dignity (ABH 2000, 329, 333, 336). Otherwise certain groups of the population – due to their life situation – would be left without basic social care [Decision 37/1999 (XII. 7.) AB, ABH 1999, 431, 434].
However, as pointed out by the Constitutional Court in Decision 48/1998 (XI. 23.) AB, in the case of managing a "situation of crisis", interests must be compared even in the framework of the objective duty of institutional protection. "The right to life […] [protecting individual lives rather than a statistical population] is the common root of the system of subjective rights and the State's obligations and goals that serve the purpose of protecting life." (ABH 1998, 333, 341). However, it can be confronted by third persons' rights to life and self-determination. Apart from extreme situations, the harmonisation of the above two interests is a State duty manifested on the level of statutes as well, and it means, among others, an obligation of the State to take specific care of those in a situation of crisis (ABH 1998, 333, 341, 343, 345, 353, 359). However, it is obvious that in respect of misusing narcotic drugs, the price of such care has to be paid by citizens who do not "enjoy" drugs but are otherwise negatively affected by the above dangers threatening the community.

There is no reason to expect the State to support the development or maintenance of the "death instinct" mentioned in one of the petitions, but it bears responsibility in respect of all citizens for establishing safe living conditions in terms of healthcare, welfare and legal security. As part of the above, the State must create for the members of the community, to the greatest extent possible, living conditions ensuring a real, value-building freedom of action and preventing and averting the consequences of criminality. As the entire society is expected to bear the consequences of realising the above objective, the State must – for the benefit of the community – strive to ensure the reasonable "redistribution" of goods, and in this respect it must act by taking into account everyone's interest at the same time. Consequently, the State provides reasonable protection for the community when it applies legal tools against and for the prevention of harmful habits. The weight of dangers and the level of damage justify the application of the tools of criminal law as well.

3. Several petitions challenge the criminalisation of consuming drugs in the context of the right to self-determination.

The right to self-determination has been interpreted by the Constitutional Court in many decisions and from several points of view. During these examinations, the Constitutional Court dealt with certain aspects of this fundamental right and specified the main aspects of fundamental right protection.

As stated by the Constitutional Court in its Decision 8/1990 (IV. 23.) AB, the right to human dignity is considered to be one of the designations of the so-called general personality right, which includes – among others – the right to the free development of one's personality, the right to self-identification, the freedom of self-determination, as well as the general freedom of action. The general personality right is a subsidiary fundamental right for the protection of the individual's autonomy (ABH 1990, 42, 44-45). However, in the practice of the Constitutional Court, the right to human dignity is considered to be absolute and unrestrictable only as a determinant of human status and in its unity with the right to life. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308, 312] Therefore unrestrictability "only applies to cases where life and human dignity inseparable therefrom would be restricted by others." [Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 262] Its component rights, such as the right to self-determination, may be restricted in accordance with Article 8 para. (2) of the

Constitution just like any other fundamental right. [Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383]

3.1. The general personality right – similarly to the protection of life – limits the State's punitive power. "[However], in a state under the rule of law the criminal law is not merely an instrument but it protects and embodies values […]. Criminal law is the legal basis for the exercise of punitive powers as well as a guarantee of freedom for the protection of individual rights." [Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 86] Consequently, the tools of criminal law may be used for the protection of other fundamental rights and constitutional values, and they may also restrict – within the limits of necessity and proportionality – the right to self-determination related to human dignity. When examining restrictions by criminal law, the Constitutional Court must take into account that even the component rights derived from the right to self-determination and the further results thereof are enforced in an interrelated manner rather than independently from one another, and they are to be equally enjoyed by everybody.

As pointed out by the Constitutional Court in Decision 9/2004 (III. 30.) AB, "To perform the State's tasks guaranteeing the above, in addition to securing the individual subjective fundamental rights, the related actual values and situations of life as such must be protected by the State – not only in connection with individual claims – by handling them in the context of the other fundamental rights. For the State, the protection of fundamental rights is merely a part of maintaining and operating the entire constitutional order. Consequently, the State shall guarantee the statutory and institutional conditions needed for the realisation of fundamental rights by taking into account its duties related to other fundamental rights and its other constitutional duties […]." (ABK March 2004, 212, 215) In view of all the above, in evaluating the consumption of narcotic drugs – similarly to the Decisions on abortion and the right to self-determination of terminally ill patients – the Constitutional Court has applied the extended test of necessity-proportionality. It has examined whether the right to self-determination stemming from the right to human dignity may be constitutionally restricted on the basis of the State's duty of institutional protection emerging on the objective side of the right to life, and if yes, where the limits of such restriction can be found.

As detailed above, the condition resulting from the consumption of narcotic drugs in fact takes away part of the consumer's human dignity, through limiting his or her autonomy by

subjecting his or her discretionary capacity to an external factor. However, this is a situation where the State's obligation of institutional protection appears in connection with the enforcement of the right to health and the protection of personal integrity, as provided under Article 70/D para. (1) of the Constitution. With regard to the consumer of drugs, this means that his or her positive right to self-determination is by limited his or her own rights to physical and mental health and the preservation of the freedom of action, rather than by any other person's right. Permitting the consumption of narcotic drugs would in fact eliminate the affected person's right to self-determination, as it would represent unconcern towards the limitation of the discretionary capacity of the person under the effect of and addicted to a narcotic substance. The importance of the action taken by the State lies in the fact that it safeguards the central core of the consumer's right to human dignity "beyond the reach of all others, whereby … the human being remains a subject, not amenable to transformation into an instrument or object." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308] Consequently, the right to human dignity can only be fully enforced if the decision-making related to the right to self-determination is not disturbed by artificial and uncontrolled influences.

3.2. The State's duty of protection is a general one. Therefore, it must guarantee the rights to the protection of life, freedom of action, self-expression, self-development and healthy life not only of the consumer of narcotic drugs (hereinafter: "consumer"), but of others as well. It is a constitutional duty to ensure the above, and the conduct of consumers – as detailed above – is closely related to the interests of the entire society.

The freedom of action, to be enjoyed by everybody, creating and protecting values concerning society, economy and social welfare, embodying the positive realm of the right to self-determination enshrined in the Constitution, can only be exercised in a safe and fearless environment. However, the individual's right to self-determination may only be exercised within the constitutional limits, and the use of narcotic drugs – i.e. self-narcotisation – is beyond those limits, especially due to the high risk of its various so-called shifting effects, and its consequences related to social and public security.

Criminal law – enforcing the State's punitive power – is not only aimed at "delivering" the punishment representing the value judgement of the majority, but it also serves the purpose of prevention through threatening with sanctions regarding acts dangerous to the community. The provisions of the CC on the misuse of drugs are aimed at protecting the whole population

from the negative effects of drugs, even if such protection involves the restriction of the individual's freedom of action or the potential application of criminal sanctions. To reach this goal, and to ensure public order acknowledged as a constitutional value, the CC not only sanctions those forms of conduct which pose a direct threat to the individual and the community, but it also provides for regulations supporting the reasonable prevention of acts threatening everybody. Such regulations are designed to shape social cohabitation in a manner ensuring that society is free from the harmful effects of narcotic drugs.

3.3. The Constitutional Court must accept the fact, confirmed in the international treaties, that the harmful effects of narcotic drugs result in the deterioration of the individual's quality of life and loss of livelihood, and pose a constant threat to the community. According to multiple studies performed by the international organisations world-wide, at present prohibition without sanctions is not effective in itself for prevention even in the case of consumption. Consequently, criminal law is the only effective tool available to the legislator for handling the problem and appropriately controlling drug-related crime for the purpose of protecting the right to life and the right to human dignity declared as fundamental rights and for safeguarding public order, public safety and public health acknowledged as constitutional values. As pointed out by the Constitutional Court in several of its Decisions, the use of criminal law is indispensable for the protection of constitutional rights, values and objectives when in general or in the given historical situation other legal means are incapable of effective prevention [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176; Decision 13/2000 (V. 12.) AB, ABH 2000, 61, 67, 70; Decision 14/2000 (V. 12.) AB, ABH 2000, 83, 93-94].

When prohibiting consumption and defining the related sanctions under criminal law, the legislator's action is justified by the need to eliminate both the abstract and concrete dangers for the purpose of safeguarding public interests. This is a constitutionally acknowledged task of criminal law, and it cannot be reasonably disputed – especially not on the basis of the provisions of the Constitution – as general prevention is performed in order to protect constitutional rights and values. In the scope of special prevention, however, the restriction of the right to self-determination through means of criminal law cannot be regarded as either unnecessary or disproportionate, taking into account the high level of risks resulting from the "uncertainty of the freedom of consumption". As a result, the Constitutional Court has rejected the petitions seeking the annulment of Section 282 paras (1) and (5), Section 282/A para. (6), Section 283/A para. (1) and Section 282/C paras (1) and (5) of the CC, and the

establishment of an omission regarding the legalisation of the consumption of narcotic drugs on the basis of the right to self-determination.

4.1. It follows from the right to physical and mental health that the State's constitutional duty not only consists in simply refraining from the violation of this right, but it demands proper action as well. In this respect, it is one of the elements of the obligation of institutional protection that all members of society – including children and inexperienced young adults not informed adequately, as well as all other citizens receptive to the harmful conduct – are to be safeguarded from irreversible health risks. This duty is fulfilled if the State enforces measures against all phenomena endangering the above objective. Therefore it may not remain a passive observer of the spread of the consumption of narcotic drugs.

As pointed out by the Constitutional Court in Decision 21/1996 (V. 17.) AB, "Everyone can harm him- or herself and can assume risks if he/she is capable of a free, informed and responsible decision. The law gives a wide range of possibilities for this by its non-interference, and the rights to self-definition and activity [Article 54 para. (1) of the Constitution] following from the general right of personality, guarantee this possibility. The restrictive paternalism of the State is a matter of constitutional debates only in borderline cases (from the punishment of drug usage to euthanasia)." (ABH 1996, 74, 80)

Thus the question is whether in the case of misusing drugs in the form of personal consumption the affected person's decision is in fact a free, informed and responsible one, which could limit the State's interference despite the above State objective and the requirements resulting from other provisions of the Constitution (protecting life, the young, and health, etc.).

According to the present state of scientific knowledge, one can only state for certain that these various substances modify the individual's state of consciousness through their physiological and biological effects causing operational disorders in the brain. Due to the damaging or elimination of chemical barriers, the affected person cannot control – or cannot fully control – his or her thoughts, behaviour, conduct and value judgements for a limited period. As a result of the damage to the brain and the disruption of homeostasis, the individual increasingly loses control of his or her actions even after the end of the direct effect of the drug. Due to addiction, the personality and the mental sphere become gradually suppressed by the narcotic

substances. As in the beginning the users of such substances have only a minimum amount of information on the above consequences, addicted persons cannot make uninfluenced and responsible decisions.

According to the Constitutional Court, being informed is a further condition to making a well-founded decision "entitling the person to free harm". As there are no traditions of using narcotic drugs in Hungary, one cannot take it for granted that there is a high level of individual experiences and knowledge in society about the consequences, effects and risks of the particular substances. According to studies and observations from various aspects, the actual knowledge about risks is of a critically low level even in the states where narcotic drugs have "traditionally" caused serious social problems. In addition, the supply of drugs is rapidly growing, and the actual risks of newly created substances – made under "secret" conditions – are only known by a statistically immeasurable minority (the "professionals" participating in the development thereof).

Under such external circumstances excluding the possibility of informed choice, one cannot claim with due ground that the State's obligation of institutional protection does not cover consumers in respect of the right to a healthy life. The Constitutional Court has already pointed out in an earlier Decision that under no circumstances may a human be made an instrument or object of a will "superior to him or her." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308; Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 266] It applies to the use of narcotic drugs as well that human dignity may only be deemed to be respected when persons of full discretionary capacity make informed decisions on their own life, and as long as – according an the objective standard – this condition cannot be fulfilled, the State must act against the helplessness of the individual. For the above purpose, it is not unconstitutional to adopt regulations restricting the consumers' right to self-expression in order to protect them and the entire community.

Although the "right to be preoccupied with oneself" is part of the right to self-determination, it is not an absolute value. The right to "stupor" without restrictions does not follow even indirectly from Article 54 para. (1) of the Constitution, and it is not part of the right to have the highest possible level of physical and mental health, since self-narcotisation does not belong to the constitutionally guaranteed freedom of the individual's development of personality. In fact, at the present state of scientific knowledge, it can be verified that narcotic

substances and drugs attack the physical and mental integrity of humans. There is a real danger of violating human dignity when a narcotised individual endangers his or her own or others' health or physical integrity. Consequently, the limitations on the right to free personal development are to be enforced in the case of narcotic drugs as well.

The Federal Constitutional Court of Germany reached a similar conclusion in the so-called cannabis decision of 9 March 1994 (Cannabis-Urteil; Entscheidung Nr. 10 in: BVErfGE 90, p 145), referring to the constitutional value content of the restrictions necessary for the peace of the individual as part of society and that of the community as well. The provisions of the international treaties referred to in the present Decision setting out the regulatory objective call attention to the "immeasurable suffering and pain" resulting from the use of drugs and psychotropic substances and equally damaging the individual and the community, and they point out that it is human dignity that is hurt instantly. Both the German approach and the Conventions support the position deducible from the Hungarian Constitution as well: the human dignity of the individual cannot be protected in relation to risking his or her life or "in details", just like no one's human dignity is superior to others'.

"The Constitutional Court's practice is also consistent concerning the interpretation of Article 70/D of the Constitution. Accordingly, the constitutional requirement about the right to the highest possible level of physical and mental health means the State's constitutional duty to create an economic and legal environment, in line with the capacity of the national economy as well as the possibilities of the State and society, that secures the most favourable conditions for the citizens' healthy lifestyle and way of life. […] Thus, the right to the highest possible level of physical and mental health cannot be interpreted in itself as a subjective right, it is formulated as a State duty under Article 70/D para. (2) of the Constitution, including the obligation of the legislator to define subjective rights in certain fields of physical and mental health. {Decision 56/1995 (IX. 15.) AB, ABH 1995, 260, 270; […] }" [Decision 37/2000 (X. 31.) AB, ABH 2000, 293, 297] To guarantee the enforcement of rights, in some cases it is necessary to set up rules limiting the "possibility of action" resulting from other persons' rights not directly deducible from the Constitution.

The Constitution protects the various fundamental rights, constitutional values and objectives not in themselves or on the basis of individual needs, but as part of fully enforcing one's human dignity enshrined in Article 54 para. (1). Guaranteeing the fundamental rights serves

the purpose of preserving human dignity as a positive value (self-realisation, self-esteem, free and uninfluenced decision-making), and it may not act against the realisation and full enforcement of human dignity. Therefore, the State may not take any legal steps, with reference to either Article 54 para. (1) or Article 70/D of the Constitution, that injure the essential content of fundamental rights (in this case the right to human dignity).

One must also take into account the fact that the use of narcotic drugs may cause immediate death. However, it has already been stated by the Constitutional Court in Decision 75/1995 (XII. 21.) AB that the right to human dignity "includes […] the fundamental right to one's physical integrity" (ABH, 1995, 376, 381). It has also been clarified in Decision 22/2003 (IV. 28.) AB that it is a constitutional duty to ensure the protection of life in the exceptional cases where there is a conflict between the right to life and the right to self-determination derived from the right to human dignity. No situation may be created where the legislator gives priority to the right to self-determination – with regard to individual needs not protected in the Constitution – over the protection of life (ABH 2003, 235, 264-270). This reinforces the requirement that the right to physical and mental integrity and the fundamental right to human dignity may not – even conceptually – collide. The State's objective obligation of institutional protection related to the protection of life and deducible from the Constitution is also manifested in the fact that the State elaborates a standard in the form of normative regulations previously available to and binding on everyone, in order to ensure the prevention of situations that might cause such conflicts as referred to above.

4.2. The international treaties also confirm the obligation to act and the objectives that follow from the Constitution. All these treaties prescribe legislative and law application obligations for the States Parties with regard to types of conduct not accepted by them in relation to narcotic drugs and substances.

According to Article 36 para. 1 subpara. a) of the Single Convention on Narcotic Drugs entitled "Penal Provisions", each Party shall adopt such measures as will ensure that – apart from the two aims acknowledged by the Convention – the cultivation, production, manufacture, extraction, preparation, possession, distribution of, and all forms of trade in drugs shall be punishable offences when committed intentionally. The States Parties shall provide for the possibility of State interference in all cases – not specified in detail – where "any act" by subjects of law is contrary to the provisions of the Convention. This "obligation

of criminalisation" binds the States Parties – without exceptions – in respect of cultivation, production, preparation, distribution and possession for own use as well. The above is clear from the rules of the Convention as well, since in the relevant subparagraph the Convention itself differentiates between minor and serious offences by requiring that imprisonment be applicable to perpetrators of serious criminal offences.

The same is provided for in the introductory provisions of the Psychotropic Convention and in the provisions thereof on distribution and medical licensing (Article 2 para. 7 subparas a)i), a)ii), b)i), c)i); Article 5). Obligatory interference by the State is required under Article 20, while the duty of adopting criminal provisions is defined under Article 22.

In the UN Convention the Parties expressly agreed on criminalising the possession, purchase and cultivation of narcotic drugs and psychotropic substances for own consumption, too (Article 3 para. 2).

In view of the above, the petition seeking to justify the primacy of Article 54 para. (1) of the Constitution over Article 70/D of the Constitution with reference to the violation of the requirement of proportionality and accordingly seeking the complete legalisation of consuming narcotic drugs is unfounded. There is no "constitutional fundamental right to be narcotised", therefore it cannot compete with either the right to human dignity or the right to the highest possible level of physical and mental health. Therefore, the Constitutional Court has rejected the relevant petition.

5.1. Criminal law is one of the many tools of intervention available for the protection of constitutional rights and for the performance of the active duties resulting from international treaties. The States Parties to the international conventions undertook an obligation to apply sanctions of criminal law to all forms of misusing narcotic drugs. However, the states have the freedom to decide – in accordance with their constitutional principles and rules – on the level and form of sanctions as well as on the possibility of exemption from sanctions. Thus, the State may adapt the relevant statutes to the aims of the national drug policy and criminal policy within the framework of the above undertaking and the provisions of the Constitution.

It has already been pointed out by the Constitutional Court in its earlier Decisions that "criminal law is the *ultima ratio* in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of

criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance. […] A strict standard is to be applied in assessing the necessity of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law necessarily restricting human rights and liberties may only be used if such use is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, society and the economy that can be traced back to the Constitution.” [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176; in detail: Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 87; Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 233; Decision 12/1999 (V. 21.) AB, ABH 1999, 106, 113] The Constitutional Court also pointed out that it is an important standard of the constitutionality of a criminal statute “whether the specific provision of the CC is restrained and provides an appropriate response to the phenomenon deemed undesired and dangerous, that is, whether, in accordance with the authoritative requirement in restricting a constitutional fundamental right, it confines itself to the narrowest possible scope to achieve its objective.” [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176]

In line with this Decision of the Constitutional Court, in general, the legal system refrains from applying criminal law sanctions for acts of a “self-destructive” nature. However, such restraint does not mean that suicide, addiction to gambling, alcoholism or sexual aberrations are completely out of the scope of the CC. It punishes all persons who act by supporting or encouraging the instable mental-intellectual state, distortions of personality or momentary weakness of the individual, or who abuse another person’s situation (assistance in suicide, organising prohibited gambling, organising prohibited animal fight, sexual abuse of minors). For example, the CC deals with alcoholism in both the special part (driving under the influence of alcohol) and the general part thereof (rules on liability concerning the state of being under the influence of alcohol through one’s own fault, forced medical treatment of alcoholics). These rules of criminal law “draw the outer limit going beyond which is not tolerated by society” in all respects regarding the sphere of self-destructive acts, too, just like in the case of sexual morals examined in Decision 21/1996 (V. 17.) AB. However, reviewing the public morals and public order manifested in the above norms of criminal law is beyond the Constitutional Court’s scope of authority (ABH 1996, 74, 82, 83). This is at the same time a “sphere for realising the opinion – and sentiments – of the democratic majority” [Decision 20/1999 (VI. 25.) AB, ABH 1999, 159, 163].

5.2. The provisions on the misuse of narcotic drugs are contained under Title IV on criminal offences against public health, in Chapter XVI of the CC on criminal offences against public order. The protected legal subject related to the offence: the social interest in the physical integrity and health of the community, i.e. of the entire society. As shown by the place of inclusion of the offence in the structure of the CC, the legislator considered that all criminalised acts in the field of narcotic drugs posed a potential threat to public order.

Public order – similarly to public peace according to an earlier Decision of the Constitutional Court [18/2000 (VI. 6.) AB] – is considered to be a constitutional value on the basis of the principle of the rule of law specified under Article 2 para. (1) of the Constitution, as it serves the purpose of guaranteeing well-arranged social relations of co-existence. It is undoubtedly covered by the State's duty of protection, and the use of criminal law for ensuring it cannot be regarded as disproportionate in general. This is so because the ultimate aim of criminal law and the application of sanctions under criminal law is the protection of society and prevention (special and general prevention). The interest in the prevention of crime, as one of the functions of criminal law norms, was acknowledged by the Constitutional Court in one of its earlier Decisions as a constitutional objective deducible from the principle of the rule of law [Decision 24/1998 (VI. 9.) AB, ABH 1998, 191, 195]. Furthermore, the Constitutional Court pointed out in Decision 21/1996 (V. 17.) AB that the definition and the sanctioning of criminal offences are in fact within the powers of the legislature, over which control is exercised by the Constitutional Court in exceptional cases only (ABH 1996, 74, 82).

The special criminal law rules adopted for the protection of public health are elements of performing the State's duties of organisation, management and orientation based on Article 70/D para. (1) of the Constitution. [see: Decision 28/1994 (V. 20.) AB, ABH 1994, 134, 139; Decision 56/1995 (IX. 15.) AB, ABH 1995, 260, 270; Decision 54/1996 (XI. 30.) AB, ABH 1996, 173, 186, 198; Decision 1316/B/1995 AB, ABH 1996, 735, 737; Decision 261/B/1997 AB, ABH 1998, 689, 692] Public health is a constitutional value the protection of which under criminal law is not necessarily unconstitutional, therefore the test of necessity-proportionality is to be applied to examine the limits of interference through criminal law [cf.: Decision 58/1997 (XI. 5.) AB, ABH 1997, 348, 354].

In selecting the legal subjects to be protected, the value system of society, the rules of international law and the prevailing criminal policy of the State are always important factors.

However, in the above respect, the legislator – although it is obliged by Article 7 para. (1) of the Constitution not to disregard its obligations prescribed by international treaties, including in the present case the protection of the values of human life and dignity, health, the rights and interests of minors, and compliance with the requirements contained in the legal documents – has a wide scale of discretionary power.

It has been pointed out several times by the Constitutional Court in relation to criminal sanctions that “It is beyond the competence of the Constitutional Court to pass a decision on the appropriateness of and reasons for the needs, requirements and objectives specified by the criminal policy, and in particular on the expediency or efficiency thereof. The Constitutional Court may only decide on the constitutionality or unconstitutionality of a political decision manifested in a norm. However, this is done by the Constitutional Court in the framework of a constitutional review taking into account not only the text of the Constitution but also the normative and institutional contexts thereof, as well as the coherence of the provisions and institutions of the CC. The Constitutional Court is therefore empowered to define the constitutional limits of the criminal policy, but not to decide on the content thereof, and it must take particular account of the constitutional guarantees of criminal law for protecting fundamental rights.” [Decision 1214/B/1990 AB, ABH 1995, 571, 573, 574; Decision 13/2002 (III. 20.) AB, ABH 2002, 85, 90-91]

6. One of the petitioners claims that in the challenged provisions the legislator made an arbitrary selection regarding the criminalisation of consciousness-altering substances. However, in line with the above, it is beyond the competence of the Constitutional Court to examine the assessment made by the legislator when elaborating the State’s criminal policy regarding the reason for not applying (or applying only in certain cases) the most severe tools of criminal law as well as the other rules applied instead and the reasons therefor.

6.1. Since the commencement of its operation, the Constitutional Court has applied the test of necessity and proportionality when evaluating the legal tools of criminal law, which necessarily restrict rights. The State may only use the tool of restricting a fundamental right under criminal law if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. [Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 83, 85] In assessing the importance of the desired objective, the Constitutional Court has taken into account, in each case, its limited competence to review the

legislator's wide scale of discretion regarding the evaluation and forecasting of social dangers threatening the individual or the community. According to the requirement of proportionality in the narrow sense applied as the method of examination, it is prohibited to apply a suitable and necessary tool for the protection of the legal subject when the resulting restrictions of the affected persons' fundamental rights would be significantly greater than the advantages resulting from the protection of the legal interest concerned.

6.2. Differentiation between the various acts of misuse, when made on reasonable and scientific grounds, is not unconstitutional, and it is not against the Constitution, either, when the legislator evaluates acts of different weight and entailing various consequences differently from one another. Article 70/A of the Constitution, referred to by the petitioner, prohibits negative discrimination between persons of equal human dignity, and not discrimination between various substances suitable for abnormal use. The fact that the rules of the CC only apply limited consequences to the use of certain substances undoubtedly having harmful effects (e.g. alcohol) does not justify any claim for the liberalisation of using other substances suitable for abnormal use. On the contrary: it is the responsibility of the legislator to apply distinct and differentiated solutions for cases where substances different in terms of manner of use and consequences are used, since this is the only way to comply with the constitutional requirement on the necessity and proportionality of provisions of criminal law.

The legal systems apply different legal consequences for using various drugs and substances influencing one's state of health. Clearly, the rigour or flexibility of State interference is based on different ideas in the various historical periods and cultures. European culture has "learnt" to live together with alcohol, nicotine and coffee, as they have been used for centuries. They cannot be treated in the same manner as narcotic drugs, since, according to what we know about these substances, their use has significantly different consequences – in terms of both acute and long-term effects – in comparison with narcotic drugs. Smoking and caffeine cause absolutely no narcotisation, i.e. an altered state of consciousness, thus they have no effect on the individual's intellectual and physical capacity. The risks of consuming alcohol are significantly lower than those of using narcotic drugs due to the great differences in terms of the quantity and period necessary for addiction, and the immediate effects of consumption are less risky, too.

Therefore, the "selection" raises no constitutional concerns. In line with the dogmatic principles of criminal law, the provisions of the CC apply differentiated sanctions to the consumption of narcotic drugs, relate legal consequences to alcohol consumption, and dispense with evaluating the use of other stimulants. Consequently, with regard to persons of equal human dignity, the provisions are not considered discriminative in respect of the right to personal freedom guaranteed in Article 55 para. (1) of the Constitution. Therefore, the Constitutional Court has rejected the petition in this respect.

7. Another petition is unfounded for similar reasons, namely the one challenging the provisions on sanctions in general, considering CC Amendment 1, and in particular with regard to consumption, claiming that the sanctions lack "due severity".

As summarised in Decision 13/2002 (III. 20.) AB, the Constitutional Court considers that in the punitive system of the CC in force, the right to determine sanctions is divided between the legislator and those applying the law. It pointed out concerning the constitutional requirement of necessity and proportionality: "The content of the principle of proportional punishment can be filled with several different value concepts, therefore the legislator has a wide scale of constitutional discretion in shaping the system of criminal institutions related to the imposition of punishment. It is beyond the competence of the Constitutional Court to review the expediency of the legislator's concept or to form an opinion on the value content of various concepts, as these are subject to the legislator's liability in the field of politics and legal policy. Based on the principle of neutrality, the Constitutional Court may only examine whether the legislator has violated any provision of the Constitution when 'exercising its discretionary power related to the definition of the rules pertaining to the imposition of punishments.' {in detail: e.g. Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281; […]}" (ABH 2002, 85, 93-94)

Accordingly, when defining the level of sanctions related to specific criminal offences and to specific acts constituting the offence or qualifying circumstances, the legislator may make a distinction between light and heavy sanctions, as the "act" itself can be a minor or more serious one.

However, making a distinction also involves harmonisation. The aims of special and general prevention related to the act must be taken into account, and the sanctions for the criminal

offences endangering or violating various legal subjects have to be made proportionate to one another. In this respect, it is beyond the Constitutional Court's competence to review the criteria of assessment applied by the legislator, and it may not interfere with the system of sanctions as long as no constitutionally unacceptable disproportionality – disrupting the coherence of the system of sanctions – is detected.

Therefore, it is only in extreme cases that the Constitutional Court may establish the unconstitutionality of the fact that in respect of certain provisions on the misuse of narcotic drugs the legislator applies an "unreasonably one-sided", "highly tolerant" or rigorous framework of sanctions serving as the basis of decision-making during law application. In the present case, the Constitutional Court has not identified any major disproportionality contrary to the aim of punishment explained above in terms of constitutionality, or in violation of any fundamental right.

In the challenged provisions of the CC the legislator ordered the punishment of the intentional misuse of narcotic drugs, making a distinction between the acts on the basis of the weight of misuse, differentiating between consuming and distributing drugs, and personal use and trafficking. In the provisions in force – differently from the former ones – consumption is not specifically mentioned, however, it is sanctioned under the acts of obtaining, keeping, cultivating and producing narcotic drugs. However, as consumption is only possible through one of the above acts, the amendment of the provisions has not excluded it from the scope of sanctionable acts.

All acts mentioned in the CC only constitute preliminary protection in respect of consumption. This manner of regulation is in accordance with both the international treaties and international trends. The punishments and measures imposable for the offences under examination are comparable to the sanctions of other acts prohibited under criminal law and regulated in the relevant chapter of the CC, they differentiate between the acts constituting the offence and provide due power of discretion to those applying the law as well.

In view of the above, the Constitutional Court has rejected this petition, too.

8.1. The Constitutional Court has found no constitutional relation between the above provisions of the CC, the criminalisation of consuming narcotic drugs and the prohibition of

torture and inhuman or humiliating treatment contained in Article 54 para. (2) of the Constitution. Therefore, the Constitutional Court has also rejected the petition in this respect.

8.2. Similarly, no constitutional relation has been found between the reviewed provisions of the CC and the right to a healthy environment enshrined in Article 18 of the Constitution. Therefore, the Constitutional Court has also rejected the petition in this respect.

9. The petition claiming that the acts of misusing narcotic drugs are undifferentiated due to the lack of distinction between "trafficking and own use" is unfounded, too.

Both the statutory provisions currently in force and the ones that were in force at the time of submitting the petition consistently differentiate between the consumers' and distributors' sides of misusing narcotic drugs. With regard to the target of the act, there were and are significant differences of weight among the applicable sanctions. This was the primary tool of the legislator to differentiate between personal use and use for trafficking purposes. Furthermore, by applying a further differentiation influencing the level of sanctions on the basis of quantitative limits (small amount, substantial amount, basic unit), it also obliged those applying the law to examine the "purpose" even beyond the above scope.

Examining the purpose of obtaining and keeping drugs is a general duty of those applying the law also on the basis of the provisions of Act XIX of 1998 on Criminal Procedure (hereinafter: the ACP), as according to the ACP, the authorities have to investigate the circumstances relevant in respect of establishing and evaluating the criminal offence. In the case of misusing narcotic drugs, the establishment of the perpetrator's intention through examining the quantity and net active substance content of the narcotic drug possessed, sold or produced by the perpetrator is part of taking evidence. Accordingly, the Constitutional Court has found the petition unfounded in respect of Sections 282-282/C of the CC for the above reason as well, and has rejected it.

10. However, the petition based on claiming the violation of legal certainty by the concepts of "own use" and "joint consumption" is partly well-founded.

10.1. The statutory definitions of the CC regulating the misuse of narcotic drugs define acts constituting the offence and apply sanctions related to such acts and to the related qualifying

circumstances. On the basis of the rules specified in the previous point, the judicial practice has developed the concept of "own use", mainly for the purpose of distinction from acts of trafficking. Section 283 para. (1) items a) and c), as well as item e) point 1 of the CC specify – reflecting the uniform approach developed earlier – the acts covered by the term "own use" (cultivation, production, obtaining, etc.) in their challenged provisions. Therefore, the claim that there is an uncertainty about the interpretation of "own use" in respect of whether it only means consumption or all the other acts as well is unfounded.

10.2. The petitioners' allegation that the term "own" in the concept of "own use" makes in itself the application of the law unpredictable as a reference thereto "can be neither verified nor contested" is also unfounded.

As expressed in points 5 and 9 of this chapter, the orientation of use is a question of evidence. It is an element of the statutory definition with regard to which the court has to perform a thorough examination, during which the statement of the defendant is clearly not the only piece of evidence. The court has to examine the defendant's way of life, his or her condition, whether he or she is a consumer or not, whether he or she has already become addicted or not, it has to take into account the amount of the narcotic drugs seized, and finally it has to evaluate the evidence on the basis of scientific and professional knowledge as well as judicial practice. Consequently, the criteria for determining the scope of facts to be verified can be identified without difficulty, and the evaluation of the evidence is not more difficult than in any other case. Thus, the "verification" or "contesting" of the reference is not impossible.

Based on the above, the Constitutional Court has rejected the petition seeking the establishment of the unconstitutionality of the challenged provisions in this respect as well.

10.3.1. However, the objection raised by the petitioners about the term "joint consumption" being an uncertain legal concept is well-founded.

In the system of the CC, "joint" perpetrators are classified as co-offenders, contributors, or persons committing the offence in a group, in a criminal conspiracy or in a criminal organisation. Furthermore, the concept of indirect perpetration is also used in the dogmatic system. However, it is not clear from the term "joint consumption" what level of joint perpetration – posing various degrees of threat to society – is meant by the joint consumption

of narcotic drugs. It is not clear, either, how many persons can participate in an act in relation to which the Act offers a possibility of conditional exemption.

It is typical of the offence of misusing narcotic drugs that several acts constituting the offence, defined under various statutory provisions, are accumulated in the case of the same perpetrator. However – together with several factors of uncertainty found in the scope of exemptions also containing conditions that depend on the will of the perpetrator – this situation may cause dogmatic problems influencing the extent of punishment as well, since the evaluation of the "perpetrating" quality of "joint consumers" (committing the offence in a group, in a criminal conspiracy, etc.) has been transposed into the realm of "free interpretation".

The Constitutional Court has already declared in its Decision 11/1992 (III. 5.) AB that the conditions of the exercise of the State's punitive power must be determined in advance, in an Act of Parliament. However, the legality of exercising punitive power means more than the mere enforcement of the classic principles of *nullum crimen sine lege* and *nulla poena sine lege*. Constitutional criminal law includes the realm of legitimacy of shaping the punitive system belonging to the requirement of the legality of holding perpetrators accountable under criminal law. "The individual's constitutional rights and freedoms are affected not only by the elements of an offence and the sanctions of the criminal law, but also by the interconnected and closed system of regulation of criminal liability, punishability and determination of penalty." (ABH 1992, 77, 86) The provisions in the general part of the CC pertaining to the concept of joint forms of committing crime and the consequences thereof have a fundamental effect on evaluating the conduct of the perpetrator and on the level of related sanctions. As a result, the individual may not be kept in the uncertain legal situation caused by evaluation varying from case to case. According to the above Decision, this would, at the same time, violate the prohibition of the arbitrary modification of "the conditions and restrictions on the State's punitive powers determined by law", contrary to Article 2 para. (1) of the Constitution.

10.3.2. The petition is also well-founded in respect of claiming that the concept of "occasion of use" is not clear-cut. One cannot determine on the basis of the provisions of the CC whether this circumstance applies to a single occasion of consumption, or to regular use at the same place or different places or with the same partner(s) or different partner(s), although such circumstances reflect different levels of danger. It is not clear whether the active

substance contents of the narcotic drugs handed over on more than one occasion are to be added up or not, or how the different occasions of handing over are to be evaluated on the basis of the rules of cumulation contained in the general part of the CC. The uncertainty resulting from the above may turn the original aim and content of the provision concerned to their contraries, and may cause a discrimination between subjects of law.

As this term is not used in any other provision of the CC, there is no relevant judicial practice to rely on. In the given context, its content cannot be identified on the basis of the scientifically acknowledged methods of interpretation, either. This may result in the arbitrary interpretation of the law, depending on the prosecutor or judge concerned, and thus the same conduct may result in conviction or the ordering of medical treatment in the case of certain perpetrators, while others could be exempted from criminal liability.

According to the consistent practice of the Constitutional Court, the clarity of norms is a fundamental element of legal certainty. As detailed in several Decisions, this criterion applies not only to the description of the prohibited conduct, but to the application of sanctions and the possibilities of exemption therefrom as well. According to the summary made in Decision 10/2003 (IV. 3.) AB, relevant in the present case as well, the requirement of the clear contents of norms that can be identified and comprehended is part of legal certainty. When the normative text is incomprehensible or allows different interpretations, this results in an incalculable situation for those who are addressed by the norm. In addition, too generally worded normative texts create a possibility for subjective and even arbitrary application of the law (ABH 2003, 130, 135).

As it is part of the punitive system to specify when and under what circumstances the State refrains from enforcing the demand for punishment, this, too, may only be realised in a constitutional manner. For the very purpose of protecting constitutional rights, the criteria of the above must be defined precisely in compliance with the requirements under Article 2 para. (1) of the Constitution, as legal certainty requires not only the unambiguity of the specific norms but also the predictability of their application. [in detail, most recently: Decision 47/2003 (X. 27.) AB, ABH 2003, 525, 535]

As the statutory provisions under review [Section 283 para (1) items b), c), item d) point 1, item e) point 1 of the CC] fail to meet the required criteria, they violate Article 2 para (1) of

the Constitution. Consequently, the Constitutional Court has decided to annul them, with due account to the further circumstances explained in Chapter VI of the Decision.

V

The petition claiming the unconstitutionality of the term "licence of an authority" in the statutory definitions of the misuse of narcotic drugs included in the CC with reference to the violation of Article 2 para. (1) of the Constitution is well-founded.

Undoubtedly, the requirement of having a licence or the lack of a licence is also found in other statutory definitions in the CC, and in theory a statutory definition in the special part may use it as a precondition for punishability. However, this may only be done without causing a lack of clarity of norms or legal uncertainty. In such cases, the regulations have to clarify that the activities prohibited in the statutory definition at issue can be practiced lawfully under a licence, and the statutes have to clearly set out the criteria of licensing and to specify the licensor. Thus the condition of punishability in question may not turn the applicability of the statutory definition to its contrary.

However, it follows from the wording of the challenged provisions of the CC that the acts constituting the offence of misusing narcotic drugs only constitute criminal offences when performed without the "licence of an authority". The presence of the expression "licence of an authority" in the text of the Act suggests as if it were possible to obtain the licence of an authority for all acts (constituting the offence) defined in the challenged provisions, and as if these acts were only condemned under criminal law in the case of the lack of the "condition".

The acts constituting the offence as specified in the provisions under review are prohibited in general, therefore they are unlawful. However, when, on the basis of statutory provisions of an appropriate level, certain persons obtain the licence of an authority to perform one or more of these generally prohibited acts, such acts are not unlawful and not punishable despite meeting the formal criteria of the statutory definition of a criminal offence. Nevertheless, the legislator may only allow the issuing of a licence if the use of the narcotic drug or psychotropic substance concerned is needed in a sphere acknowledged as "legitimate".

The set of rules in the CC and in the CCInt make no reference at all to the norms concerning the licensing process, the range of activities subject to licensing and the content requirements of the licence. In this respect, according to the interpretative provisions of the CC, the statutes issued for the implementation of the international conventions constitute background legislation. Such statutes are the following: Government Decree 142/2004 (IV. 29.) Korm. on Lawful Activities Pursued with Narcotic Drugs and Psychotropic Substances (hereinafter: "GovDec1"), Government Decree 162/2003 (X. 16.) Korm. on the Cultivation, Distribution and Use of Plants Suitable for the Production of Narcotic Drugs (hereinafter: "GovDec2"), and Government Decree 272/2001 (XII. 21.) Korm. on the Regulation of Certain Activities Involving Chemical Substances also Used for the Illicit Production and Manufacture of Narcotic Drugs and Psychotropic Substances (hereinafter: "GovDec3").

1. According to Section 20 of the ACC, the Constitutional Court acts on the basis of a petition. No specific constitutional complaint has been received with regard to the above government decrees, which – partly – form the background of the concept of "licence of an authority". However, the fact that the interpretative provisions of the CC include the content of these decrees in the system of the CC has made it necessary to review them in the course of examining the constitutionality of the challenged provisions.

During the review, the Constitutional Court has established that the nature and extent of activities subject to licensing and the list of potential contributors are defined in the various statutes on an almost incomprehensibly broad scale, in different conceptual systems, and including numerous authorities, organisations and offices. The exact meaning of the terms "use", "certificate", etc. used in different contexts in connection with licensing cannot be established in each case, or the meaning may vary among the different decrees. However, the deficiencies of regulation may cause a collision of the procedures. Due to the differences in the technical terms used in the various statutes and the legal concepts unclear in themselves – including the definition of authority – the licensing procedure is incomprehensible even to professional and experienced persons. Consequently, in the course of criminal proceedings, the examination of the legality of the content framework of the licences on the basis of uniform criteria is rendered almost impossible, and it may be the basis of extreme statements even in the best possible case. Accordingly, holding the perpetrator accountable becomes uncertain, too.

2. The Constitutional Court has established that the conceptual system used in the government decrees containing the provisions pertaining to procedures of licensing by authorities is incompatible with the provisions of the CC defining the acts constituting the offence, as the list of known and regulated activities to be licensed, supervised or otherwise controlled by the authorities contained therein is not consistent – with the exception of a narrow range – with the provisions of the Criminal Code. Furthermore, it is important that the element of adherence to a specific purpose is not included in the statutory definitions of the CC, even though it can be found in the relevant decrees and in the international conventions serving as their basis. According to the decrees and conventions, as a general rule, narcotic drugs and psychotropic substances may only be used for scientific and medical purposes.

The texts of the government decrees handle the issues related to criminal law as matters of secondary importance. As it is clear from the titles and preambles of the decrees, they are aimed at regulating – primarily in accordance with the relevant requirements under international law – certain activity types of an essentially economic nature, for the purpose of facilitating international control and the enforcement of the prohibitions related to the use of narcotic drugs, psychotropic substances and precursors. Besides, they pay particular attention to the utilisation of medicines and pharmaceutical products due to their dangerousness. Therefore, the framework and content of the licensing procedure are subordinated to the above objectives, despite the fact that the field of the lawful use of psychotropic substances and precursors is much wider than the one covered by these objectives.

At the same time, it is obvious that no licence and no other act of an authority can be requested in respect of the activities defined in the CC as ones constituting the offence and not mentioned in the government decrees. As explained above, several acts constituting the offence qualify as such, therefore providing for the licence of an authority as an element of the statutory definition excludes punishability in these cases. Thus the asynchronicity of the background legislation with the Criminal Code impairs the enforceability of the latter. This is clearly contrary to both the objectives of the legislator and the content of the binding international treaties, and in a dogmatic sense it results in an unacceptable situation of discrimination between subjects of law and legal uncertainty.

As a result, on the one hand, even the acts posing the most serious threat to society may be exempted from criminal sanctions (e.g. trafficking in narcotic drugs), and on the other hand,

activities subject to licensing – on the basis of statutes of lower rank – may only be evaluated on the basis of the CC if the provisions of the background statute correspond to the acts constituting the offence as listed in the CC. The above also result in the absurd situation that in fact proceedings may only be instituted for acts defined in the CC against those perpetrators who are obliged to request a licence according to the government decrees and who fail to do so, while others are exempted from criminal liability despite having committed acts of the same type.

It must also be taken into consideration that, according to the international treaties, the legitimate use of certain types of narcotic drugs – specified in the CCInt as well – for any purpose, including medical applications, is excluded in principle [with the exception of scientific research, e.g. heroin and cocaine]. Accordingly, the government decrees (or other statutes) do not contain any rules on the activities that may be performed with such drugs. However, this results in a contradiction between the provisions of the Criminal Code on the acts constituting the offence and the ones on the objects of committing the offence, and the CC collides with the international treaties referred to by the CC itself.

Requiring the licence of an authority as an element of the statutory definition empties the content of the provisions of the CC on the protection of children and classified institutions, and the rules on exemption also lose their function. Obviously, Section 282/B of the CC – in its present form – is aimed at preventing minors form obtaining any narcotic or psychotropic substance in an illegal manner. With the exception of medical treatment – regulated by the norms on healthcare – no situation can be envisaged where minors can possess narcotic drugs let alone be used in the distribution thereof. Requiring the licence of an authority for such activities is a theoretical absurdity.

3. The meaning of the term "authority" cannot be identified, either. Although the government decrees list several organs, it is questionable whether all of them have official competence embodying public power.

It was established by the Constitutional Court in Decision 30/1992 (V. 26.) AB and reinforced among others in Decision 47/2000 (XII. 14.) on the constitutional review of an issue similar to the present one, namely the criminal offence of misusing a performance-enhancing substances or methods, that "Constitutional criminal law requires the disposition describing

the conduct prohibited by threatening with a sanction in criminal law to be straightforward, well-defined and clear. It is a constitutional requirement to clearly express the intentions of the legislature concerning the protected legal subject and the conduct constituting the offence. It must contain a definite message on when the individual is considered to commit a breach of the law sanctioned under criminal law. At the same time, it must not give way to arbitrary interpretation of the law by those applying the law. Therefore, it must be examined whether or not the statutory definition delimits the scope of punishable conducts too broadly and whether it is definitive enough. (ABH 1992, 167, 176)" According to the latter Decision, in the system of the CC, it is unacceptable to use unclear terms establishing criminal liability with reference to an excessively broad scale of statutes to be taken into account when interpreting the concepts. This is incompatible with the requirement of the rule of law. The term "authority" – without a more specific description – is an uncertain legal concept, and the authorities taken into consideration by the legislator for the purposes of the Act should be specified by the CC itself (ABH 2000, 377, 380-381).

Similarly, according to Decision 7/2001 (III. 14.) AB examining matters related to the competence of the Parliamentary Ombudsman for Civil Rights, unconstitutionality results from the fact that, while the Constitution does not provide any definition of authority, the relevant statutes and their reasonings use this term inconsistently. "Uncertainty caused by the use of words [in itself] violates the constitutional interest in the predictability of the operation of constitutional organs and in the prevention of collisions in the fields of tasks and competence." (ABH 2001, 114, 118)

In view of the above, it is to be concluded in the present case that, with regard to the CC and the statutes filling in the framework, the situation in respect of the lack of the licence of an authority as a condition of punishability violates the requirements of constitutional criminal law detailed above. The Constitutional Court also emphasises on this occasion that it is the minimum constitutional requirement of legal certainty that the legal system should clearly reflect the causes and conditions of institutional interference under criminal law. No such situation may emerge in which subjects of law have unequal possibilities to act reasonably and consciously due to the varying and uncertain interpretation, as well as the conceptual problems and inaccuracy of the rules of substantive criminal law, which necessarily entails a potentially strong interference with the realm of freedoms. This results in a direct violation of the guarantees of the rule of law.

In view of the above, the term "licence of an authority" used in the challenged rules of the CC is unconstitutional because it violates Article 2 para. (1) of the Constitution through causing legal uncertainty. Consequently, the Constitutional Court has annulled with immediate effect those parts of the challenged provisions of the CC that contain the above words.

4. Furthermore, acting *ex officio*, the Constitutional Court has established that the lack of harmony between the statutes pertaining to licences of authorities and the provisions of Sections 282-283/A of the CC on the acts constituting the offence has resulted in a situation of unconstitutional omission of legislative duty violating Article 2 para. (1) of the Constitution in itself.

An unconstitutional omission of legislative duty may be established by the Constitutional Court on the basis of any petition or acting *ex officio* [Section 49 para. (1) of the ACC; in detail: e.g. Decision 32/2004 (IX. 14.) AB, ABK August-September 2004, 638, 640].

The Constitutional Court establishes an unconstitutional omission of legislative duty when there is no statute at all regarding a certain subject, and when there is regulation but a statutory provision the necessity of which follows from the Constitution is missing, thus resulting in an unconstitutional situation [e.g. Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 54/2001 (XI. 24.) AB, ABH 2001, 421, 436; Decision 49/2001 (XI. 22.) AB, ABH 2001, 351, 355]. "The legislature shall be obliged to legislate even in the absence of a concrete mandate given by a statute if it recognises that there is an issue requiring statutory determination within its scope of competence and responsibility, provided that the enforcement or the securing of a constitutional right forms a pressing need for regulation [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]. As pointed out by the Constitutional Court in Decision 37/1992 (VI. 10.) AB (ABH 1992, 227, 231), the legislative duty of the State may follow from the Constitution even without an express provision thereon if it is absolutely necessary for ensuring a constitutional fundamental right (Decision 1395/E/1996 AB, ABH 1998, 667, 669)" [Decision 12/2004 (IV. 7.) AB, ABK April 2004, 291, 295]

As summarised in Decision 59/2003 (XI. 26.) AB, "The Constitutional Court 'establishes an unconstitutional omission of legislative duty not only if there is no regulation at all regarding a certain subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204] but also if any statutory

provision with a content deducible from the Constitution is missing from the regulatory concept concerned. [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128; Decision 15/1998 (V. 8.) AB, ABK May 1998, 222, 225] Even when an unconstitutional omission is established due to the incompleteness of the content of the regulation concerned, the omission itself is based on the non-performance of a legislative duty deriving either from an explicit statutory authorisation or – if there is no such authorisation – from the absolute necessity to have a statutory regulation.' [Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 56-57] "Thus, according to the practice of the Constitutional Court, an unconstitutional omission of legislative duty may also be established when the legislator has performed its legislative duty resulting from a statutory authorisation, but with such regulatory deficiencies that have resulted in an unconstitutional situation." (ABH 2003, 607, 614)

As explained previously, the definitions of activities that may be performed lawfully with a licence on the basis of the government decrees – clearly not focusing on aspects of criminal law – and the concepts contained in the Criminal Code do not match. In the course of applying criminal law, the uncertainty resulting from the government decrees provides an opportunity for the arbitrary interpretation of the law. Therefore the Constitutional Court has called upon the legislator to remedy the omission in this respect as well.

The Constitutional Court underlines that during the regulation of narcotic drugs and psychotropic substances, it is necessary, even in the new situation resulting from the present Decision, to develop – with due account to the provisions of the international treaties and the mandatory rules of the EU – a licensing procedure taking into account the requirements and the objectives specified in the international conventions. Both the international trade of narcotic drugs and substances with narcotising effect and the domestic use thereof for scientific and medical purposes are subject to mandatory (international) control. In this context, the Constitutional Court refers to the new tasks of national legislation specified in the EU's Council Framework Decision 2004/757/JHA, promulgated on 11 November 2004, laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. (The deadline for implementing the tasks resulting from the framework decision is 12 May 2006.)
However, the rules of the licensing procedure must be elaborated and harmonised with the provisions of the CC on the misuse of narcotic drugs in a manner allowing the direct

deduction of the range of acts prohibited by criminal law from the statute of substantive law. The requirement of the clarity of norms applies to framework provisions under criminal law, too. The existence of rules filling in the framework may only serve as a legal technique, and it may not cause disorders in the operation of criminal law or result in a situation which is unpredictable and confusing for the subjects of law.

VI

In the following, the Constitutional Court examines the challenged provisions with regard to the alleged violation of international treaties.

1. According to the Preambles of the Single Convention on Narcotic Drugs and the Psychotropic Convention, the States Parties are concerned with the future and the welfare of mankind by protecting the health and the social status of people in the form of joining efforts to combat the misuse of substances, products and preparations covered by the Conventions. As referred to in the Preamble of the UN Convention, children are the most threatened by the danger of becoming consumers of narcotic drugs, as they are more often used in the perpetration of illicit acts than other groups of society. According to the UN Convention, the misuse of narcotic drugs is deemed particularly serious when the victim is a minor, or a minor is used for the perpetration of the offence, and when the offence is committed in so-called classified institutions (e.g. educational institutions, social service facilities for children, etc.) (Article 3 para. 5 subparas f) and g)). Furthermore, it underlines that the States Parties are obliged to maximise the effectiveness of law enforcement measures in respect of these offences with due regard to the need to deter the commission of such offences, and that such circumstances have to be assessed with due weight when "considering the eventuality of early release or parole of persons convicted of such offences" (Article 3 paras 6-7).

In line with the provisions of the UN Convention referred to above, as well as with Article 3 para. 4 subpara. a) thereof, the Single Convention on Narcotic Drugs and the Psychotropic Convention provides that each Party shall ensure that serious offences when committed intentionally shall be liable to adequate punishment, "particularly by imprisonment or other penalty of deprivation of liberty" (Article 36 para. 1 subpara. a) of the Single Convention on Narcotic Drugs, Article 22 para. 1 subpara. a) of the Psychotropic Convention).

According to the Preamble of the Child Convention, "childhood is entitled to special care and assistance" as well as to protection. It does not relate in general to securing an atmosphere necessary "for the harmonious development of the child's personality", but to acknowledging that the minor "should be fully prepared to live an individual life in society with human dignity". To this end, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection […]." To concretise the group of persons protected by its provisions, the Convention specifies that persons below the age of 18 shall be considered as children (Article 1). Pursuant to Article 4, it is the duty of the States Parties' legislatures to take action for the enforcement of all rights granted in the Convention in the case of all children under the age of 18. In relation to the misuse of drugs, Article 33 provides that the States Parties shall take all appropriate measures – including legislative ones, among others – to protect children "from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances." In Article 24 para. 3 of the Child Convention the States Parties have undertaken to take all "effective and appropriate" measures with a view to abolishing "practices prejudicial to the health of children".

Upon comparing the provisions of the four international treaties, one may conclude that the misuse of narcotic drugs to the detriment of or by using persons under the age of 18 is to be considered as a serious offence, and in such cases the States Parties have to ensure the applicability of deprivation of liberty against perpetrators. The relevant provisions of the Conventions define such obligations for the States that necessitate active legislation.

Undoubtedly, the Single Convention on Narcotic Drugs and the Psychotropic Convention empower the States to apply the measures of medical treatment specified in the Conventions against misusers of drugs, alternatively or in addition to punishment. However, Article 3 para. 4 subpara. c) of the UN Convention narrows down this discretionary power by allowing the exercise thereof only in the case of perpetrators of minor offences. The potential application of alternative measures against the perpetrators of the offences is significantly limited by the fact that, pursuant to para. 5, acts committed by victimising or using children and acts committed in classified institutions are to be considered as serious. However, this does not constitute a contradiction between the international treaties, as the Preamble of the UN Convention emphasises that – acknowledging the principles of the Single Convention on

Narcotic Drugs and the Psychotropic Convention – the States Parties wish to “deepen” the measures to be taken against illicit trafficking and the serious consequences thereof.

Thus, by determining the scope of serious criminal offences and narrowing down the scope of application of less severe legal sanctions, the UN Convention set for the States Parties not only a regulatory objective but a method as well. It follows from the wording of Article 3 para. 5 that the treaty does not merely provide for a list of options concerning the consequences of qualified cases, but it defines a set of requirements for the domestic legislation of the States. In line with the above, Article 33 of the Child Convention calls upon the States Parties – specifying the acts constituting the offence – to adopt legislation for the protection of children from misusers of narcotic drugs.

2. The Constitutional Court has already interpreted – in another context – the relations between the Child Convention and the Constitution, pointing out the principles to be followed by criminal legislation as well. It was emphasised in Decision 995/B/1990 AB that children are entitled to the fundamental constitutional rights, but “to make the child able to fully exercise such rights, all conditions necessary for becoming an adult must be secured for him or her in line with his or her age.” The State of Hungary as a signatory party to the Child Convention has an obligation – directly deducible from the Constitution – to create, in every field of law, legislation that takes into account the interests of the child, which have primacy over everything else. “Protecting and taking care of children is a constitutional obligation not only of the family but of the State and society as well.” For full compliance with this obligation, all necessary means of criminal law must be applied (ABH 1993, 515, 524, 526, 527, 528).

Similarly, the legislator’s international obligations requiring action make it obvious that the tools of criminal law may be applied for the protection of children, for the elimination of threats to children related to the misuse of narcotic drugs, and for preventing children from having access to substances altering consciousness and harming health. In the case of an abstract danger to children and juveniles, the resulting criminal law regulations must fully comply with the requirements of institutional protection by the State stemming from Article 16 of the Constitution.

The CC contains rules acknowledging the aim of the enhanced protection of minors concerning the misuse of narcotic drugs. However, due to factors of legal uncertainty and gaps in "conformity with the Conventions", the result of the regulation, i.e. the level of protection, is not harmonised in all respects with the aims and requirements of the international treaties, thus violating Article 7 para. (1) of the Constitution. This is primarily caused by the strong relativisation – from the aspect of constitutionality – of the differentiation between acts of consumption and distribution – justifiable on the basis of penal dogmatics – with regard to the endangerment of minors. This approach only partly ensures the comprehensive institutional protection that is required by the UN Convention and the Child Convention, and that is in accordance with the Constitution as well.

2.1. The CC defines independent and quantity-related forms of offences to be sanctioned more seriously – with regard to the acts of both distributors and consumers – when the victim of the act is a person under the age of 18 or such a person is used for committing it, or when the place of committing the offence is a classified institution. However, in respect of rendering access to narcotic drugs or equivalent psychotropic substances possible as well as of the scope of affected persons and the enhanced protection of classified institutions, and due to the inconsistencies in the norms allowing conditional exemption, these provisions are deficient to the extent of impairing the enforcement of the principles and detailed rules contained in the international treaties referred to in point 1.

2.1.1. It is defined in the Child Convention as an objective and as a duty requiring legislation to keep minors away from narcotic drugs and psychotropic substances – in order to ensure their proper mental and moral development – in view of their "mental immaturity" and considering the dangerousness of such substances. The implementation of the duty of protection from illicit consumption declared in Article 33 of the Convention and the obligation of keeping away from practices prejudicial to health defined in Article 24 necessitate the emergence of a situation where children have no access whatsoever (not even as employees, for example) to such substances and preparations. The above provisions and the Preamble reflect the very idea that for the appropriate mental and moral development of the child and for his or her becoming mature enough to make decisions about his or her own life it is not enough to provide the same level of protection as in the case of adults in general.

For the purpose of the enhanced protection of classified institutions, Section 282/B para. (2) item b) of the CC only extends the scope of stricter evaluation to acts of a distributing character (offers, hands over, distributes or trafficks in narcotic drugs). Here, the legislator ignored the fact that certain acts of a consumption type (e.g. cultivates or keeps narcotic drugs) may offer a possibility for minors to have access to or use drugs, therefore they pose a serious threat to minors, similarly to acts of a distributing character. Thus, the general differentiation between the two types does not have any reasonable grounds deducible from the Act, as the differentiation itself does not reflect, from the minors' point of view, the actual dangers of the specific acts constituting the offence.

2.1.2. The qualifying circumstance of committing the offence as a public official or a person performing public duties [Section 282/B para. (3) item b), second part] also applies only to acts of a distributing character. However, the person-specific qualification can only secure a limited level of institutional protection.

This part of the provision only applies to the persons expressly listed under Section 137 point 1 items a)-k) and Section 137 point 2 of the CC. The content of the definition of public officials and persons performing public duties – relating to public assignments, special professions or duties – in Section 16 para. (3) of Act LXXXIX of 1993 on Public Education and in Section 15 para. (7) of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship does not cover the full scope of persons who may be employed – either temporarily or full-time – in classified institutions or whose presence is unavoidable there (e.g. physical workers, administrative staff, guest lecturers and teachers, etc.). In addition, the graver sanctions applicable to public officials and persons performing public duties do not apply in the cases defined in Section 282/B para. (1) of the CC. Thus they are not applicable, either, to acts of a consumption type committed outside the territory of classified institutions by using minors and the special "status" of the perpetrator. The resulting situation is not suitable for ensuring the effective protection required by the relevant international conventions.

2.2. Similarly, the provisions of the CC on addicted consumers under Section 282/C – providing for privileged evaluation – and certain provisions of Section 283 providing for exemptions from criminal sanctions do not meet the requirements of the level of protection to be secured for minors on the basis of the international treaties.

Just as Section 282/B regulates the sanctioned cases involving the serious endangerment of persons under the age of 18 in an independent and uniform statutory definition, Section 282/C regulates all acts of addicted consumers in a uniform statutory definition. However, in the latter type of cases, no special rules guarantee the enhanced protection of minors. The act of an addicted consumer is evaluated less strictly than the basic case [Section 282 para. (1)] even if a minor obtains narcotic drugs in connection with the act in question or if the act of misuse is performed by using him or her.

In itself, the application of privileged rules to addicted consumers is not against the Conventions. The mere fact of applying a differentiation with regard to the criminal evaluation of the situation (state) of addicts is not unconstitutional, provided that the manner of regulation is not contrary to any specific provision of the Constitution or – as in the present case – the rights and interests of a social group – children – directly and expressly protected in the Constitution.

It is evident from the earlier decisions of the Constitutional Court that the protection of children's development from risks is considered to be a value that may even have primacy over the classic fundamental rights. Article 67 of the Constitution "establishes the duty of the State for the institutional protection of the child's personality development." The legal status of children results in the direct duty of the State "to protect the child 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. […] The risks involved are particularly increased if taking up a public position in relation to a question which society judges as controversial in the sense that it is widely judged to be negative." [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 75, 77-78, 80]

It was pointed out in Decision 1233/B/1995 AB with regard to differentiating under criminal law among perpetrators and victims that it is not unconstitutional to regulate differently certain categories of victims or perpetrators on the basis of the differences in the legal subjects protected by criminal law (ABH 2000, 619, 622-623). However, in the case of misusing narcotic drugs, this applies not only to the more favourable statutory evaluation of acts performed by addicted consumers, but also to imposing more severe sanctions for acts

committed to the detriment of children as a group of persons entitled to enhanced protection. When performing the differentiation under criminal law between these two categories, the question can only be resolved on the basis of the fact that the children's right to special protection is explicitly declared in the Constitution, while the differentiation of addicted consumers in the CC is not based on such a constitutional right.

The comparison of the duties originating from the international treaties has the same result. As explained above, (several) international treaties provide in detail for the requirement to protect children in relation to acts of misusing narcotic drugs, while the adoption of measures on the preferential treatment of addicted consumers is only an option offered to the States Parties. As detailed below, the legislator failed to take into account this fundamental difference with due weight when performing the permissible differentiation of the regulation.

2.2.1. Section 283 of the CC defines the cases when the proceedings may be terminated in respect of a defendant voluntarily undertaking to participate in medical or preventive treatment. In the case of a small amount of narcotic drugs, there is a general possibility of exemption, with the exception of acts of a transit character from among acts of a consumption type related to own use, and acts of a trafficking type from among acts of a distributing character. In the case of consumption, this is extended to certain cases of joint consumption, and in the case of addicted consumers, this option is applicable not only in the case of a small amount of drugs but also in that of a basic quantity, and with regard to transit-related acts, too.

The possible grounds of terminating the proceedings – generally in the case of a repeated offence, too – also apply to cases, specified in Section 282/B of the CC, where a person over the age of 18 perpetrates certain acts of a consuming or distributing type by using a person under the age of 18, or where the offence is committed in or in the vicinity of a classified institution. The scope of persons entitled to preferential treatment under the Act is further widened by partially expanding the category of minors to persons under the age of 21 – a solution not occurring anywhere else in the CC – in the cases where they commit acts of a consumption type together with or by using another person under the age of 18 (or 21) or in a classified institution. Since the provisions of the CC ensuring the enhanced protection of children do not apply – as explained above – to addicted consumers, there are further possibilities of conditional exemption in the case of such persons. According to the Act, they may enjoy preferential treatment without an age limit and even repeatedly, and such treatment

is applicable even in the case of offering and handing over drugs in relation to joint consumption in or in the vicinity of classified institutions.

The CC does not contain any restriction, either, on applying preferential treatment in respect of non-addicted adults who commit an offence by using a person under the age of 18. Similarly, there are no adequate rules in the provisions on the cases of exemption based on own use that regulate the situation of juveniles used by the exempted perpetrator in his or her own interest for an act of a consumption type. Consequently, in a particular case, the juvenile participating in the act might be the only person who has to face sanctions [Section 282 para. (6)]. In this respect, it must be taken into consideration that – as explained in Chapter IV of the Decision – certain vague legal concepts applied in the cases of exemption are in themselves contrary to the interests of juveniles, moreover, they make their situation worse. Thus, the inadequately enforced considerations of criminal policy violate Article 16 of the Constitution guaranteeing the institutional protection of minors, and collide with the legislator’s duty of protection prescribed by the Child Convention.

2.2.2. The situation outlined above is made worse by the fact that – due to the particular features of drafting the Act – in some cases, it is impossible to determine the actual scope of exemption from criminal liability, or it becomes dependent on interpretation by those applying the law that may vary from case to case. With regard to the specific parts of the norm, Section 283 of the CC merely contains references to the forms of the offence serving as the basis of terminating the criminal proceedings. However, the references contained in the items concerned point to statutory provisions that also contain references, in each case. As a result, by way of interpreting the law, the scope of exemption can also be extended to acts not mentioned in Section 283 of the CC, in violation of the obligation to protect minors.

As explained by the Constitutional Court several times, “the legislative technique of back-reference” is not unconstitutional, however, it may not cause legal uncertainty and problems of interpretation, and it may not cause unlimited possibilities of interpretation in the application of the law, either. These result – in themselves – in the violation of Article 2 para. (1) of the Constitution [e.g. Decision 31/2002 (VII. 2.) AB, ABH 2002, 567, 574].

2.3. Based on the arguments detailed in point 2.2, the Constitutional Court has established that the above provisions of Section 283 of the CC and the inherent deficiencies and

inconsistencies thereof – in themselves – significantly impair the enhanced protection of minors granted in Section 282/B. In addition, as explained in point 2.1, this protection is inadequate, and it is of a critical level with regard to legal certainty as well, as detailed in points 10.3.1 and 10.3.2 of Chapter IV of the Reasoning.

It is clear from point 2.2.1 that, although the Single Convention on Narcotic Drugs and the Psychotropic Convention allow the application of medical treatment instead of criminal sanctions, this is not a general option. The relevant rules must be interpreted together with the provisions of these two Conventions as well as the UN Convention and the Child Convention. According to these provisions – as explained previously – the use of minors and their "initiation" into the world of acts related to narcotic drugs is a serious act justifying the application of imprisonment.

The Single Convention on Narcotic Drugs declares that serious and intentional offences concerning narcotic drugs are to be sanctioned with imprisonment (Article 36 para. 1 subpara. a)). Such acts are considered, in agreement by the States Parties, as acts posing a serious threat, and they are acknowledged as acts justifying extradition even if no specific convention on extradition exists between them (para. 2 subpara. b) items i) and ii)). Article 22 para. 1 subpara. a) and para. 2 subpara. b) of the Psychotropic Convention contain similar provisions. It is expressly declared in the Preamble of the UN Convention that the measures specified by the two earlier Conventions are to be supplemented in order to reduce the illicit trafficking of narcotic drugs, and that the international community must ensure the enhanced protection of children. To achieve this objective, with regard to the offences and sanctions – in the manner explained under point 2.1 – it explicitly narrows down the scope of cases where the misuse of narcotic drugs is not considered to be a serious offence (Article 3 paras 4 and 5). Accordingly, neither the use of minors nor acts committed in the territory of classified institutions may be left out of the scope of acts actually subject to sanctions, and they do not belong to the category where the institution of conditional exemption is applicable. All the above is confirmed indirectly by Article 24 para. 3, and directly by Article 33 of the Child Convention.

It follows from Article 7 para. (1) of the Constitution that the State must not only formally comply with its obligations undertaken in international treaties. Consequently, the mere promulgation of the regulations of international law is not sufficient, and the State may not take measures – either during legislation related to promulgation or afterwards, during

transformation into domestic law – which impair the enforcement of the principles and requirements contained in international treaties or cause distortions in the enforcement of the contents thereof as specified in normative rules. Furthermore, the State has to take into account all provisions of international law aimed at restricting the discretionary powers of the States Parties or at ensuring the protection of the rights of persons falling under the scope of such restrictive measures. In respect of the regulation of the misuse of narcotic drugs under criminal law, this also means that with regard to children, the system of sanctions of the CC must comply with the obligations resulting from the Conventions in terms of results and not nominally.

However, based on what has been explained under point 2, it can be concluded that the provisions supporting the enhanced protection of minors under criminal law – through which the Child Convention provides for the primary obligation of the legislator to develop a high level of protection – are not enforced in the provisions of the CC under review due to their deficiencies. Furthermore, the criminal measures specified in Article 6 of the UN Convention for the purpose of securing maximum efficiency and preventive force are only enforced to a limited extent even in connection with classified institutions and in the case of persons bearing increased responsibility for the education of children.

As detailed in point 2.2, domestic legislation failed to settle the relations between addicted consumers and minors as groups to be distinguished and to be evaluated differently under criminal law, and in Section 282/B and 282/C of the CC, the priorities determining their relations, directly deducible from the Constitution and from the international treaties, were defined without due circumspection. At the same time, Article 16 of the Constitution is violated as the result of the evident disproportions between the basic cases of the acts constituting the offence and Section 282/B designed to provide enhanced protection to minors, as well as within the latter provision and in the case of Section 283/C. According to this constitutional provision, the State must be as active in the field of institutional protection as the legislator according to the Child Convention.

The lack of coherence in terms of content and form in Section 283 of the CC may, in itself, empty the rules under Section 282/B which serve the purpose of the enhanced protection of minors. Due to the application of the option of conditional exemption, the legal protection may dissolve in some cases, moreover, it is possible that – as an absurd consequence – the

only person accountable is the juvenile, while the adults endangering him or her are exempted from legal consequences. However, based on the philosophy of exemption and according to the special rules of the CC pertaining to juveniles, providing for the moderate and gradual application of criminal sanctions, they are to be treated by the law as victims of narcotic drugs, and this status – where possible – may not be made worse by the application of criminal sanctions. As the "result" generated by the CC violates the requirements under Article 16 of the Constitution, the protection of minors becomes so incomplete that even the annulment of the relevant provisions with immediate effect is justified, with the exception of the criminal acts of cultivating, producing, obtaining and keeping a small amount of narcotic drugs for own use.

As pointed out in Decision 1091/B/1999 AB of the Constitutional Court, Article 67 and Article 16 of the Constitution are to be interpreted together, and accordingly, "taking care of children is a complex duty." Based on Article 16, the State has significant obligations in performing this duty. Taking care of the young is an aim of the State that constantly demands extra attention to be paid to the safe existence and interests of the young. The State can effectively ensure the "enforcement of the children's rights enshrined in Article 67 para. (1) by performing its duties specified in Article 16. On the State's side, the enforcement of children's rights requires an active legal approach […]. In accordance with the principles found in the Constitution, it is primarily the duty of the legislator to develop the system of institutions and tools of the various branches of law in such a manner that renders possible the harmonisation of the State's objective defined above and the securing of rights." In addition, it was established that in the case of criminal law the causes terminating punishability and the rules on exemption from liability have to be in compliance with the State's objective defined in Article 16 of the Constitution and with the children's rights resulting from Article 67 para. (1). (ABH 2002, 1081, 1085, 1086-1087)

It is a special feature of children's rights that they are created not only when the law specifically provides for them, but also as the result of all duties imposed by statutes upon the adult society. Therefore, in the constitutional review of the provisions and sanctions of criminal law, the Constitutional Court has to examine the enforcement of the requirement according to which the children's "status" is a special value resulting in additional needs of children in relation to the methods of (criminal) protection as well. In the present case, the duty of enforcing these additional needs and the extent thereof are directly specified – in line

with Article 16 and Article 67 of the Constitution – by the detailed rules of the Child Convention, the Single Convention on Narcotic Drugs and the UN Convention referred to above.

In the light of the above, the Constitutional Court has established the existence of unresolvable contradictions and deficiencies between the rights resulting from the status of the child and under the absolute protection of Article 16 of the Constitution, the relevant provisions of the international treaties, and the reviewed rules of the CC. These contradictions and deficiencies can only be eliminated by the re-codification of the annulled provisions, together with remedying the omission established in respect of the international treaties.

3. The Constitutional Court stresses again that it considers the definition of criminal offences and the rules on exemption from criminal liability to be within the competence of the legislator, over which control may only be exercised by the Constitutional Court in exceptional cases. However, when the considerations of criminal policy and expediency embodied in a statute violate any provision of the Constitution, it is the "legitimate right" of the Constitutional Court – resulting from its duty to protect the Constitution – to decide thereon [in detail: e.g. Decision 1214/B/1990 AB, ABH 1995, 571, 575-576; Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 86-87]. In Decision 20/1999 (VI. 25.) AB, the Constitutional Court also decided on the method of constitutional control to be followed in such cases by stating that "it is obliged […] to annul any statute found unconstitutional." (ABH 1999, 159, 162, 163)

It was explained in Decision 1214/B/1990 AB that in the course of determining the constitutional limitations of criminal policy, the Constitutional Court must take due account of the "normative and institutional contexts" of both the Constitution and the CC. The results of the constitutional review are established on the basis of the coherent unity of the circumstances influencing criminal liability, the establishment thereof and – with regard to the person of the perpetrator – punishability and criminal sanctions (in detail: ABH 1995, 571, 574-576). Furthermore, as pointed out in Decision 1233/B/1995 AB, in the case of exemption from criminal liability, any differentiation among perpetrators may be neither arbitrary nor unreasonable (ABH, 2000, 619, 620).

In the present case, too, the Constitutional Court has followed its earlier position. The partial annulment of the relevant provisions does not affect the legislator's position manifested in the criminalisation of the misuse of narcotic drugs, and it does not mean "decriminalisation", either. After the annulment, the legislator may re-regulate the cases of exemption with conditions complying with the provisions of the Constitution and the normative rules of the international treaties, by taking into account the cases of exemption and the carefully defined standards prescribed by the Conventions for the protection of minors.

However, in the course of the annulment, the Constitutional Court has taken into account the principle of sparing statutes as well as the interests of addicted consumers deemed reasonable by international law as well. Furthermore, the Decision does not affect the limits of the legislator's free discretion reflecting the criminal evaluation of the status of occasional consumers, the specific acts constituting the offence in their case, and the quantitative limits closely related to the evaluation of such acts. Consequently, the Decision has no effect on the relevant cases of exemption regulated independently – although placed in the same section as the annulled provisions – and applicable regardless of any other case.

The partial annulment of a statute is based on Section 40 of the ACC, and it has been part of the practice of the Constitutional Court since the commencement of its operation. The relevant position of the Constitutional Court was most recently summarised in Decision 33/2002 (VII. 4.) AB on excise taxes. Accordingly, in all cases where the unconstitutionality can be isolated and one can identify the normative text independently applicable in practice and in accordance with the requirement of the clarity of norms, the norm is to be annulled in part. This method offers adequate information on the extent of unconstitutionality to the legislator as well. (ABH 2002, 173, 186-189)

4.1. The petition claiming that the Single Convention on Narcotic Drugs allows the application of conditional exemption only and exclusively in the case of addicted consumers is unfounded.

Although the official Hungarian translation of Article 36 para. 1 subpara. b) of the Single Convention on Narcotic Drugs is vague and its interpretation is problematic, the original English text, which was the basis of the promulgated norm, leaves no ground for any misunderstanding in this respect. ("Notwithstanding the preceding subparagraph, when

abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38."). As this text contains no reference to addiction, the States Parties may freely decide on applying the provisions of Article 38 (rehabilitation, treatment, etc.) instead of or in addition to punishment. Article 22 para. 1 subpara. b) of the Psychotropic Convention contains the same, and no other Convention contains any further limitation in this respect. When applying the law, the restrictions deducible from other provisions of the international conventions and from the national constitutions are to be taken into account.

It would clearly be contrary to the basic philosophy of the institution of conditional exemption to offer a possibility of exemption from penal sanctions in the case of more "active" persons who have committed the misuse of narcotic drugs on several occasions, while providing for obligatory punishment in the case of persons who have consumed a small amount of narcotic drugs only once, i.e. who are just "becoming familiar with" the effects of the drug. Conditional exemption can only have one acceptable objective: to prevent someone from finally becoming the slave of narcotic drugs and continuing this self-damaging conduct by "infecting" others as well. One may not give up hope for those – usually young – perpetrators who can relatively easily and effectively be deterred from their harmful habits for ever, and whose social marginalisation can thus be prevented. In the case of children, this would violate the provisions of the Child Convention (Article 24 para. 3), just as they are violated by the lack of the possibility of effective action against the endangerment of children, as explained in the previous point.

4.2. The petition according to which the possibility of conditional exemption violates in general and in all cases the provisions of the UN Convention requiring measures ensuring that the misuse of narcotic drugs to the detriment of or by using minors, or in the territory of classified institutions can be evaluated "with due weight" by the national courts is similarly unfounded.

As the introduction of this legal institution is promoted by the single Convention on Narcotic Drugs, the Psychotropic Convention and the UN Convention, it may have a place in the national legal system as well. Consequently, it follows from the Conventions, too, that there

must be a regulatory method by which the State can comply with its duty to protect minors and at the same time provide a possibility for conditional exemption.

Ensuring the possibility of conditional exemption in a closed system and on the basis of pre-defined criteria does not, in itself, affect the competence of the courts. In the course of regulating the misuse of narcotic drugs under criminal law, the protection of the constitutional values of society, public health, public safety, and the rights of children are to be harmonised with general and special prevention as aims of punishment on the basis of Section 37 of the CC. The institution of conditional exemption can be maintained in compliance with the Constitution and the Conventions, provided that the relevant criminal sanctions are reasonable, necessary for the protection of constitutional values, and adequately represent the abstract weight of the criminal offence.

In the present case, the international conventions are violated not as a result of maintaining the legal institution of conditional exemption, but due to the fact that the present provisions on the use of this opportunity do not meet the requirements contained in Article 16 of the Constitution and in the provisions of the Child Convention and the UN Convention. However, the required balance can be established by remedying the omissions detailed in point 4.1 and by partially re-codifying the institution of conditional exemption in compliance with the requirements contained in the Conventions.

Therefore, the Constitutional Court has rejected the relevant petitions.

VII

Upon examining the petitions, the Constitutional Court has found further omissions – not mentioned in the petitions – with regard to the criminal law regulation of the misuse of narcotic drugs in the context of the international treaties.

1.1. In the People's Republic of Hungary, the Single Convention on Narcotic Drugs was only partly promulgated by Law-Decree 4 of 1965 (hereinafter: LD1). LD1 did not contain any of the lists (from I to IV) – forming part of the Convention – of the substances under control. Neither were these lists promulgated in Government Decree 8/1968 (II. 9.) Korm. (hereinafter: GovDec4) issued for the implementation of LD1, on the performance of the tasks

related to the implementation of the "Single Convention on Narcotic Drugs" adopted in New York on 30 March 1961 and promulgated in Law-Decree 4 of 1965 of the Presidential Council of the People's Republic of Hungary. Finally, three years later, lists were published – however, ones different from the original lists – annexed to Minister of the Interior and Minister of Health Joint Decree 1/1968 (V. 12.) BM-EüM (hereinafter: "Joint Decree 1") on the regulation of the production, manufacture, processing, marketing, storage and use of narcotic drugs, issued for the further implementation of GovDec4. Joint Decree 1 created a mixed system including – without separations – the international list, the national list and a list of pharmaceutical preparations containing narcotic drugs, practically maintained by the legislation up to the present day.

1.2. The situation is the same in respect of the Psychotropic Convention. Law-Decree 25 of 1979 promulgating the Convention (hereinafter: LD2) did not contain the lists attached to the Convention. They were only published on 24 June 1980, at the time of promulgating Minister of Health and Minister of the Interior Joint Decree 4/1980 (VI. 24.) EüM-BM (hereinafter: "Joint Decree 2") on the manufacture, processing, marketing, import, export, storage and use of psychotropic substances, under similar circumstances and in the same manner as in the case of Joint Decree 1.

1.3. GovDec1, entering into force on 1 May 2004, repealed Joint Decree 1 and Joint Decree 2 with the exception of certain provisions. In its annex, it contains a list of narcotic drugs (under K1-K3) and a list of psychotropic substances (under P1-P4). These, however, merely contain a reference to the fact that GovDec1 includes the "updated" lists of the international conventions – not promulgated in any Hungarian statute of an adequate level, and not even available in an official Hungarian translation –, but the mixed regulatory system has been maintained, containing international and national elements as well as the relevant EU legislation.

2. The legal technique applied in promulgation entails legal consequences under criminal law that result in legal uncertainty. In the past decades, the joint decrees have been amended several times, but it cannot be verified beyond doubt, even after the detailed comparative analysis of the foreign language texts of the Single Convention on Narcotic Drugs and the Psychotropic Convention as well as the rules of the two joint decrees and GovDec1, whether a given amendment was related to a change in the content of the international Conventions or it

was only an amendment in domestic law. As the original lists were "promulgated" in a statute of an inadequate level and not independently of the national lists, the changes of the conventions have not been reflected in Acts of Parliament, and the statutes referred to above contain them only partially and through references.

Pursuant to Section 1 item g) of the LDIT, the promulgation of an international treaty means the inclusion of the international treaty into a statute. It follows from the comparison of Section 9 item a) (ratification of treaties) and Section 13 that international treaties ratified by the Parliament and the – then functioning – Presidential Council had to be promulgated in Acts of Parliament or Law-Decrees. Section 14 provides that the promulgating statute must contain the official Hungarian translation of the text of the treaty. Neither this provision nor any other rule in the LDIT allows the partial promulgation of the text of the treaty. Council of Ministers Resolution 2032/1982 (XI. 26) MT on the implementation of Law-Decree 27 of 1982 on the Procedure Related to International Treaties (hereinafter: "CM Resolution") explicitly supported full publication and warned against "selective promulgation". The law-decrees on the promulgation of the Single Convention on Narcotic Drugs and the Psychotropic Convention do not meet the above requirements. Furthermore, they violate the provisions of the AL providing that an international treaty containing a generally obligatory rule of conduct must be promulgated in a statute of a level corresponding to the content of the treaty [Section 16 para. (1)].

In Decision 47/2000 (XII. 14.) AB on doping – referred to several times – the Constitutional Court established that, based on the above provision of the AL, "the violation of the provisions" of a non-promulgated international treaty "may not form the basis of criminal liability". (ABH 2000, 377, 380-381)

All the above omissions, in themselves, "only" constitute violations of the law. However, as explained below, the combination of these violations of the law cause a legal uncertainty – affecting legislation, the application of the law and subjects of law as well – that directly violates Article 7 para. (1) of the Constitution.

The requirement of the harmonisation of international treaties and domestic law contained in Article 7 para. (1) of the Constitution is enforced through the promulgation of international treaties. Article 7 para. (1) of the Constitution means that the State must establish a legal

environment suitable for developing a practice complying with the strict rules of the international treaty in compliance with all other provisions of the Constitution.

Acceptance of international treaties by the State is an acknowledgement of the values protected by international law. It is within the limits set by such values that the State has a wide scale of discretionary power concerning the ways of enforcing the prohibitions on violating the resulting rights and obligations in its own legal system, with due consideration to the provisions of the Constitution.

The States Parties to the Single Convention on Narcotic Drugs, the Psychotropic Convention and the UN Convention expressed more than a general value judgement about acts to be prosecuted with the joint efforts of the community of nations. Realising an outstandingly high level of cooperation, they defined – leaving no place for exceptions – all "prohibited" materials, substances and preparations the use of which may only be permitted under strict conditions even for the lawful purposes specified in the Conventions. By way of ratification, the States Parties acknowledged the illegal use of the substances specified in the treaties as acts to be prosecuted under international criminal law as well. In addition, they accepted the provisions of a penal character expressing the – level of – obligation to apply the tools of national criminal law against those misusing such substances, and providing that international cooperation in criminal affairs (extradition) is applicable on the basis of the Convention even in the absence of other legal norms.

For the State, this entails the duty of developing for the subjects of law a coherent and unambiguous unity of the rules of international law and domestic law. The selective promulgation of an international treaty is not consistent with this system. If the full content of an international treaty is not made accessible and binding through promulgation, there is no basis for examining the level of harmony during legislation and the application of the law. The constitutional requirement of harmony is primarily enforced through accessibility, which sets requirements and limitations for domestic legislation, and which facilitates the development of law-abiding conduct by citizens, i.e. which finally guarantees the realisation of the requirement of legal certainty.

According to the texts of the Conventions as well, the lists form integral parts thereof. The lack of these lists empties all concrete provisions of the Conventions that refer to the lists or makes them uninterpretable for lack of a basis. The lists are the only sources of information

on the substances considered by the Conventions as narcotic drugs and psychotropic substances, and on the specific provisions applicable in the case of the various substances and preparations. Therefore – independently of Article 7 para. (1) of the Constitution – disregarding the lists directly violates the requirement of the clarity of norms as part of Article 2 para. (1) of the Constitution.

It is also necessary to consider that in respect of the statutory definitions of the CC on the misuse of narcotic drugs, all other statutes defining certain substances as narcotic drugs or psychotropic substances are provisions determining the content of those statutory definitions. In the absence of a uniform (criminal law) definition (see the explanation under III/A point 1), proceedings may only be instituted and conducted on the basis of further legal provisions concretising the general "definition of narcotic drugs and psychotropic substances". As these concrete provisions are primarily contained in the two international conventions, to which no domestic statute may be contrary, it is a primary question of legal certainty affecting the enforcement of Article 7 para. (1) of the Constitution that the lists attached thereto must be available to both those applying the law and everyone else.

In this context, it is pointed out by the Constitutional Court that the inappropriate promulgation of international treaties may have direct negative effects on Hungarian citizens. Independently of the omission in domestic law, the States Parties may apply criminal sanctions against Hungarian citizens on the basis of their own legal system, in the manner accepted in the international treaties, in the case of the acts and substances prohibited therein. As explained above, the same Conventions oblige the Hungarian State to support such action. According to the interpretation of legal certainty on the basis of the rule of law, citizens must be familiar with the content of the legal obligations and prohibitions acknowledged by the international community and with the quality of law-abiding conduct required beyond the borders of the State. In the case of rules forming the direct basis of the establishment of citizens' criminal liability, the requirement contained in Article 2 para. (1) of the Constitution – as it also follows from the provisions of the LDIT and the AL referred to above – can only be met through the full availability of the treaties.

It has been emphasised by the Constitutional Court several times that a statute promulgating an international treaty may be subjected to a constitutional review on the basis of essentially the same criteria as any other statute or other legal tool of State administration. According to

the holdings of Decision 4/1997 (I. 22.) AB, if the Constitutional Court finds a statute promulgating an international treaty unconstitutional, it declares the unconstitutionality thereof. It follows from Article 7 para. (1) of the Constitution that the harmonisation of the undertaken international obligation with domestic law must be ensured in any case (ABH 1997, 41, 48).

In the present case, "the unconstitutionality of the provisions of the international treaties" contained in the promulgating law-decrees is out of the question. The problem of constitutionality is caused by the fact that the legislator is in multiple default with regard to the promulgation of the treaties. The Constitutional Court established in its Decision 30/1998 (VI. 25.) AB – confirming its position stated in Decision 4/1997 (I. 22.) AB (ABH 1997, 41, 42) – that the constitutional review of a statute promulgating an international treaty includes the examination of the procedural issues related to the adoption of the promulgating statute. The Constitutional Court pointed out in summary that "– as a general rule – an international treaty with a generally binding content must be promulgated in an internal source of law in order to make the legal norm contained in the treaty applicable to Hungarian subjects of law." (ABH 1998, 220, 232, 233)

The rules of the LDIT provide for a formalised procedure and the appropriate level of the promulgating statute, and the international treaty can only become fully part of the domestic legal system if these guarantees are complied with. It results from the fundamental constitutional requirement of securing legal certainty and the clarity of norms in the field of criminal law – allowing in all cases a strong interference with freedoms – that the original content and text of the treaties must be made available and that such availability may not be prevented by using legal techniques that have a contrary effect.

Therefore, in accordance with the arguments in points 1-2, considering Section 47 of the ACC – upon noting the fact of omission *ex officio*, on the basis of the authorisation given in Section 21 para. (7) of the ACC – the Constitutional Court has called upon the legislator to remedy the omissions resulting from the failure to promulgate the international treaties at an adequate level.

3. The lack of the definitions of narcotic drugs and psychotropic substances, the omission of legislation related to the conventions as detailed above, and the regulatory manner chosen by

the legislator in criminal substantive law also raise questions of legal certainty with regard to the limits of criminal sanctions, both in respect of the object of the offence and the conduct constituting the offence.

3.1. The interpretative provisions of the CC under Section 286/A para. (2) provide – without specifying concrete statutes – that, for the purposes of Sections 282-283 of the CC, the substances specified in the statutes issued for the implementation of the Single Convention on Narcotic Drugs and the Psychotropic Convention qualify as prohibited substances. According to Section 286/A para. (3) of the CC, in the case of precursors, the rules on the implementation of the UN Convention fill in the framework with regard to Section 283/A.

The CC does not mention the definitions of concepts in the Conventions, the differentiation between the content of international and national lists, or the existence of supplementary legislation by the EU. In fact, the Conventions are not even mentioned in the CC as a reference basis, therefore the important rules of interpretation pertaining to the substances (e.g. poppy straw, coca leaf, cannabis) specifically named in their texts (in certain cases, in addition to the lists) are not incorporated into the system of criminal law. Another omission is the lack of mentioning a relevant fact with regard to the alternatives to criminal sanctions, namely that not all of the psychotropic lists are equivalent in respect of the enforcement of substantive law. There is only one – vague and inexact – reference to this, resulting in the violation of legal certainty, introduced by CC Amendment 2 into Section 286/A para. (2) item b): "the psychotropic substances which are dangerous from the point of view of misuse".

3.1.1. Any of the psychotropic substances included in the list can be "dangerous" from the point of view of criminal misuse, and they are certainly dangerous when used for an unauthorised purpose, not in the appropriate quantity, or by not complying with the relevant rules of application. This is why these substances are on the list of the Psychotropic Convention, and otherwise there would be no basis for mentioning them in GovDec1.

In addition, the reference to "statutes issued for the implementation of" in the interpretative provisions is a vague legal definition in itself. The legal uncertainty is further deepened by the lack of harmony between the statutes defining themselves as implementing statutes, as well as between such statutes and the statutes of substantive law (CC, CCInt) and the international treaties.

3.1.2. GovDec1 defines itself as an implementing statute with regard to all of the three international Conventions. However, it does not contain or make reference to the definitions of concepts in the international Conventions applicable to national law, moreover, it refers in a wide range to other statutes [e.g. Act CLIV of 1997 on Healthcare] containing definitions applicable in respect of the CC. The grouping of the lists of narcotic drugs and psychotropic substances does not reflect the aspects of criminal law on any level. The lists contain substances only suitable for misuse as well as medicines and pharmaceutical preparations in a broad sense, and the "types" of misuse are basically adjusted to the definitions of the latter. Furthermore, list K3 contains medicines of special composition, so-called "exceptions of narcotic drug content", which – according to Section 1 point 18 – are not considered to be narcotic drugs, although – as a result of the wording of the interpretative provisions of the CC – all substances on the lists constitute objects of committing an offence. Thus, however, the scope of application of the CC also extends to substances not classified as narcotic drugs. The provisions on the punishment of the misuse of narcotic drugs do not authorise the authorities acting in criminal cases to remove certain preparations from the scope of the lists, and this may not be done, either, in a statute of lower rank than an Act of Parliament (e.g. GovDec1 itself).

3.1.3. With regard to the misuse of certain substances, e.g. cannabis, GovDec1 generates further problems. According to Section 23 para. (2) of the CCInt, in the case of cannabis, any part of a single plant (e.g. the roots) can be the object of committing an offence, without any differentiation by GovDec1 in respect of hemp with low THC content, or at least between the terms "cannabis" and "cannabis plant". This circumstance can play an important role with regard to the very obligation of licensing and lawful use. However, GovDec1 does provide, either, for a definition of hemp with low THC content, but it merely refers to the relevant definition in GovDec2. This regulatory manner results in contradictions between the CCInt, GovDec1, GovDec2 and the Single Convention on Narcotic Drugs, having a direct effect on the application of the CC.

In addition to the uncertainties in domestic law, such incoherence – also with consideration to the rules on extradition in the Single Convention on Narcotic Drugs and the Psychotropic Convention – may have results during the application of the law that are contrary to the intentions and resolutions of the international community adopting the Conventions. These

intentions and resolutions – as detailed above – are manifested in the provisions of the Conventions imposing specific obligations on national legislation and law application concerning the adoption of domestic rules on preventing misuse and the contents thereof.

3.1.4. Pursuant to the Government Decree, the natural or synthetic substances listed in any of its four annexes are to be regarded as psychotropic substances (Section 1 point 28). However, later on – by "interpreting" the interpretative provisions of the CC referring to the lists of this Government Decree as a rule to fill in the framework – it provides that for the purposes of Sections 282-283 of the CC only the substances listed under P1 and P2 are applicable. However, this solution corrupting the law and thus incorrect in formal terms as well does not give a satisfactory answer from the point of view of legal certainty – not even together with the rules of the CC – to the question on the specific substances that may be regarded as objects of committing the "felony of offering assistance in or trying to persuade to the abnormal use of a substance or preparation that has a narcotic effect" as specified in Section 282/B para. (5) of the CC, presuming a special scope of perpetrators and a special object of committing the offence. This circumstance has a direct effect on both the determination of the scope of perpetrators and the applicable sanctions as a result of the qualification of the act.

Resulting from the above, a situation emerges where, due to the inexact definition of the objects of committing the offence, the deficiencies and variations – of minor importance – at the starting point of the system lead to the uncertain application and interpretation of the law, which cause, "at the output" of the system, differences that seriously affect the position of perpetrators.

3.1.5. GovDec2 – already referred to – containing supplementary rules in several respects in relation to GovDec1, was also issued as an implementing statute with regard to the Single Convention on Narcotic Drugs and the UN Convention. Concerning activities subject to licensing, it differentiates between industrial poppy, food poppy and decorative poppy. However, the provisions of the CCInt do not reflect this distinction.

The Single Convention on Narcotic Drugs defines – without the differentiation as in GovDec2 – the meaning of opium poppy, opium and poppy straw, but, on the basis of Article 25, cultivation may be licensed under special control measures on poppy straw. Thus, it is not impossible to adopt regulations complying with the international Convention in respect of the

assessment of the active substance content affecting the criminalisation of the act and the character and extent of the legal consequences applied, however, the consequences thereof under criminal law (or the lack of such consequences) must be clarified in advance. This has not happened in domestic law in a manner complying with the requirement of legal certainty.

3.1.6. In addition to the substances listed in the UN Convention, GovDec3 partly includes further substances specified in the regulations of the Council of the European Union and important from the point of view of preventing diversion (that is: the re-routing of narcotic drugs or psychotropic substances from lawful trade to illicit trafficking). At the same time, GovDec1 is also presented as the implementing statute of the UN Convention, but it does not specify any related international, national or EU list apart from narcotic drugs and psychotropic substances, and it does not even refer to GovDec3. Consequently, the parallel regulation may result in problems in the interpretation of the law with regard to Section 283/A of the CC when determining the objects of the offence and the acts constituting the offence.

3.2. Section 1 point 32, Section 2 para. (1) item c) and Section 27 of GovDec1 extend the force of the Decree – in addition to the narcotic drugs and psychotropic substances on the lists – to "the registration process of new substances dangerous from the point of view of misuse", i.e. the extension of the lists. However, neither the Decree nor any other statute provides any information on that procedure, the relevant qualification system and the competent organs.
GovDec1 merely provides for "information" to be published by the Minister of the Interior and the Minister of Health, Social and Family Affairs. However, publication and qualification are not identical concepts. In another context, the Constitutional Court has already referred to the clear and sharp difference between the content of the publication and the manner of forming the published list and the procedural rules thereof [Decision 54/2001 (XI. 29.) AB, ABH 2001, 421, 430]. "Information" does not have any force, and in particular it may not be used as the basis of applying the CC.

It cannot be established from the statutes, either, whether the "principle of similarity" declared in Article 3 of the Single Convention on Narcotic Drugs is applicable or not in the qualification process related to narcotic drugs. Concerning the criteria of qualification, Section 1 point 32 only provides that a dangerous new substance is one about which "it can be assumed on the basis of analyses and other data […] that it is used abnormally due to its effect on the central nervous system, causing narcosis or an altered state of consciousness". If "the

suitability of such a substance for abnormal use can be verified beyond doubt", it must be included in the appropriate list. Besides the fact that the qualification criteria referred to above contain vague concepts, the regulation of the procedure itself is incomplete. It contains no transparent and controllable rules on initiating and conducting the procedure, the parameters to be considered during the procedure, the system of professional requirements, the rules of evaluation and the final decision-making competence. As a result, the definition of the objects of committing the offences contained in the CC as part of the statutory definitions becomes uncertain.

Moreover, it is impossible to establish – even by way of deduction – the relation between the domestic qualification procedure and the amendment procedure acknowledged in Article 3 para. 1 of the Single Convention on Narcotic Drugs and in Article 12 para. 2 of the Psychotropic Convention, providing for relevant obligations for the States Parties. However, the Conventions intended to secure the globally uniform legal handling of new substances and dangerous preparations to be subjected to control by introducing these rules of amendment guaranteeing the responsibility of the States Parties.

3.3. Based on what has been explained under points 3.1 and 3.2, one can conclude that the provisions in Section 286/A paras (2)-(3) have resulted in an unconstitutional omission of legislative duty and legal uncertainty, in violation of an international treaty as well. Due to the references to numerous implementing statutes not specified in detail, and to the collision of the provisions of these statutes with the conceptual system of the CC, the object of committing the offence cannot be determined completely and in a uniform manner.

3.3.1. Interpretation by those applying the law cannot resolve the collisions between GovDec1, GovDec2 and the rules of the CCInt filling in the same provision of substantive law, and in respect of GovDec1 and GovDec3. Their contents lead to conclusions contradicting one another or varying on an unacceptably wide scale. As a result, the rules of international law can only be enforced in an unpredictable manner, or with a content different from their original objective. The interpretative provisions of the CC that exclude the normative content of international treaties or intend to enforce it with a content controlled and "reviewed" through domestic legislation when determining the content of the framework regulation directly violate Article 7 para. (1) of the Constitution.

3.3.2. At the same time, the lack of harmony between international law and domestic law and the contradictions within the rules of the latter violate Article 2 para. (1) of the Constitution as well. According to the consistent practice of the Constitutional Court, in the case of a collision of such an extent – as it has a direct effect on legal certainty – a substantive unconstitutionality is to be established, the elimination of which is the duty of legislation [in detail, e.g.: Decision 35/1991 (VI. 20.) AB, ABH 1991, 175, 177; Decision 27/1992 (IV. 30.) AB, ABH 1992, 150, 152; Decision 988/B/1993 AB, ABH 1999, 473, 474].

The Constitutional Court pointed out in several Decisions that under the rule of law, it is the duty of the legislator to guarantee legal certainty as a basic criterion of the rule of law [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65; Decision 37/1994 (VI. 24.) AB, ABH 1994, 238, 248]. "It is the responsibility of the legislator to provide for exact regulations fitting into the given field of law in the application of legal institutions taken over from other fields of law." [Decision 13/1999 (VI. 3.) AB, ABH 1999, 114, 119] It established several times as a principle that legal certainty requires, among other things, the determination of citizens' rights and obligations in statutes promulgated in a manner specified in an Act of Parliament and made accessible for everyone, and that subjects of law should have an actual possibility to adapt their conduct to the law [e.g. Decision 25/1992 (IV. 30.) AB, ABH 1992, 131, 132; Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 87]. This requirement must be enforced in particular with regard to the exercise of the State's punitive power, which involves in all cases a direct and very serious interference with the life, rights and freedom of citizens.

One cannot familiarise himself or herself with the law when the rules pertaining to certain statutory definitions are dispersed in the legal system, mixed with regulatory fields related to other acts to such an extent that the content of the norm can only be established through an extremely complicated interpretation even by the small minority able to handle the legal system and it becomes inaccessible for anyone else. The rules pertaining to the main elements of the statutory definitions of the acts to be sanctioned – including the provisions (filling in the framework) related to the object of committing the offence – must be clearly set by norms directly fitting into the system of the CC. In the case of the objects of committing the offence of misusing narcotic drugs, this requirement is not complied with, due to the problems of coherence in the legal system as detailed above.

As emphasised by the Constitutional Court in Decision 8/2003 (III. 14.) AB, "The constitutional requirement of legislation under the rule of law means more than […] compliance with the formal rules of procedure related to legislation. Legislation may only be performed in compliance with the constitutional principle of legal certainty. [It] requires that legislation – including the amendment of statutes and their entry into force – be made on the basis of reasonable rules, and that amendments be transparent and easily traceable both by subjects of law and the organs applying the law. […] The confusing and untraceable changing of statutes causes legal uncertainty for both those applying the law and subjects of law, and this is irreconcilable with the essential content of the constitutional principle of legal certainty […]" (ABH 2003, 74, 86). In the case under review, this means that the requirements set by the international Conventions accepted by the State delimit – in harmony with the rules of domestic law, as a coherent system complying with the requirement of the clarity of norms – the sphere that may be affected by the State's punitive power.

3.3.3. In view of the above, the Constitutional Court has annulled the relevant provision, setting a deadline, and it has called upon the legislator to remedy the omission. However, it has performed annulment with *pro futuro* effect, taking into consideration the need to prevent the annulment of the statute from having the undesired effect of the even temporary decriminalisation of certain types of the use of narcotic drugs to be sanctioned according to the international treaties and partly regulated at present, too. In the period thus made available for the legislator, it will have an opportunity to adopt regulations complying with both the international treaties and the Constitution.

VIII

As it has already been referred to by the Constitutional Court in the Reasoning of the Decision, the Conventions do not exclude the joint application of harm reduction and the tools of criminal law, and most of the States have used this opportunity.

The "eradication of drugs" is acknowledged as a social value by the Republic of Hungary, too. To increase efficiency, the CC in force has connected the application of the relevant methods with the system of tools of criminal law: this is the basis of the legally regulated system of the application of conditional exemption instead of punishment. International law also supports – in the Single Convention on Narcotic Drugs, the Psychotropic Convention and

the recommendations of the EU – the development of various programmes and their involvement in the criminal procedure.

Nevertheless, services of low threshold level and harm reduction programmes must also be operated in order to ensure connection to the service system, until reaching stable abstinence, and to eliminate damage on an individual and social level, for the purpose of reducing criminality and harm to health. This is supported by the recommendation of the WHO's European Office, the UN's Eastern and Central European initiatives on combating AIDS (e.g. the Kiev Agreement of 1999), and the action plans of the European Union on combating drugs.

However, disaccustoming, supportive and preventive programmes as well as their principles and rules have been developed and harmonised with the provisions of the CC only partially. The position of the legislator on the specific "methods" that can be used is unclear, for example, the real situation from the point of view of criminal law is not clarified in respect of consumption in "shooting rooms" or in the case of "needle exchange" programmes. The appearance of consumers at such places might lead to the "revelation" of their conduct. Consequently, if the authority of criminal prosecution institutes – in compliance with its obligation – proceedings against such persons caught in the act at such places, this renders the operation of programmes important in healthcare impossible.

The criminal law status of the medical and social staff providing "assistance" in the programmes is also unclear. The members of the assisting staff are to be formally considered to assist in a criminal offence merely by providing the tools to be used, and currently it is only the result of the self-restraint of the authorities that they do not apply the consequences of such criminal assistance. As neither the CC nor Minister of Health, Social and Family Affairs and Minister of Child, Youth and Sports Affairs Joint Decree 26/2003 (V. 16.) ESzCsM-GyISM on the rules of treatments curing addiction to narcotic drugs, other care for the treatment of the use of narcotic drugs and preventive-consulting services provides for the handling of such situations, such programmes and the "operators" thereof exist in an unregulated legal "vacuum". Besides, it is impossible to establish whether the implicit acknowledgement of existing programmes extends to the similar treatment of new methods (see point III/B 1.4) emerging in an increasing number world-wide.

On the basis of the constitutional right to the protection of life and the principle of the "equal value of lives", these programmes can be deemed necessary. A democratic state under the rule of law bearing responsibility for its citizens may not refuse to support the disaccustoming of persons addicted to narcotic drugs and seeking a way out from the consumption of narcotic drugs – independently from criminal proceedings – in order to restore their health and personality, and to avoid criminal proceedings. The "eradication of drugs" is an acknowledged aim of the State consisting of numerous steps, which is inseparably connected to the prevention of crime as well; the elimination of the dangers of infection related to the use of narcotic drugs (hepatitis, AIDS) serves the interests of the entire society, as shown by a cost-benefit analysis.

However, it is indispensable to clarify the criminal law situation at the level of an Act of Parliament, i.e. to declare that no criminal sanctions may be applied in the case of providing such assistance in consumption and disaccustoming. It is absolutely necessary to have a statute specifying the authority in charge of licensing the operation of premises used for the programmes and the conditions under which such services may be provided. On the level of the CC, it is also necessary to set the limits of assistance and to clarify in advance the criminal liability of persons participating therein in the form of ensuring the transparency of the system of causes excluding punishability that are in line with the role of such persons in such assistance. The defencelessness characteristic of the present situation is discriminative in a manner violating Article 70/A para. (1) of the Constitution, as the unpredictability of the actions of the authorities in respect of the individual programmes and the civil organisations operating such programmes is contrary to the requirement of legal certainty stemming from Article 2 para. (1) of the Constitution. Furthermore, the lack of legal certainty leads to the violation of Article 8 paras (1)-(2) of the Constitution by maintaining the threat of criminal sanctions with regard to persons participating in the development and operation of such programmes.

Since the commencement of its operation, the Constitutional Court has consistently emphasised concerning Article 8 paras (1)-(2) of the Constitution that it "is the basic rule […] protecting – in addition to the general normative content of the principle of the rule of law – the individual from the arbitrary application of the tools of criminal law by the State." [Decision 42/1993 (VI. 30.) AB, ABH 1993, 300, 304] Therefore, the rules of substantive and

procedural law – including the system of causes excluding punishability – must be in accordance with the constitutional provision concerned.

The lack of regulations concerning assistance programmes and the unclear legal situation of persons participating therein have resulted in an unconstitutional omission of legislative duty. Therefore, in accordance with the standing practice of the Constitutional Court, on the basis of the first part of Section 49 para. (1) of the ACC, the Constitutional Court has established *ex officio* – with due consideration to the contents of Chapter V point 4 of the Decision – the omission of legislative duty, and obliged the legislator to remedy it within the deadline specified in the holdings of the Decision.

IX

1. The constitutional issues of the rules (e.g. on advertisement) not included in the CC in force have not been examined in the Decision.

As a general rule, only the posterior review of statutes in force belongs to the competence of the Constitutional Court. The constitutional review of a repealed statute is only performed by the Constitutional Court on the basis of a judicial initiative as per Section 38 of the ACC or a constitutional complaint as per Section 48 thereof, i.e. only in exceptional cases [Decision 160/B/1996 AB, ABH 1999, 875, 876, Decision 1378/B/1996 AB, ABH 2001, 1609, 1610; Decision 418/B/1997 AB, ABH 2002, 1627, 1629; Decision 417/H/2003 AB, ABK May 2004, 470-471].

As the petition is neither a judicial initiative nor a constitutional complaint, the Constitutional Court has terminated the procedure related to the repealed provisions of the CC in view of Section 20 of the ACC and Section 31 item a) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court’s provisional rules of procedure and on the publication thereof.

2. Due to the rejection (as detailed above) of the petitions concerning the prohibitions under criminal law related to the consumption of narcotic drugs, the Constitutional Court has also refused to order the review of final judgements rendered in criminal proceedings.

3. The provision pertaining to the publication of the Decision is based on Section 41 of the ACC.

Budapest, 13 December 2004

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court, Rapporteur

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Dissenting opinion by Dr. Mihály Bihari, Judge of the Constitutional Court

I agree with points 7, 9, 10, 11, 12, 13 and 14 of the holdings of the majority Decision and with the related reasoning.

I do not agree, however, with the annulments contained in points 1, 2 and 3 of the holdings of the majority Decision and with the establishment of the omissions contained in points 4, 5, 6 and 8 thereof, as well as with the related reasoning.

1. In my opinion, the annulments contained in points 1, 2, and 3 of the holdings of the majority Decision constitute a correction of norms by the Constitutional Court "with a function of codification and fixing problems", which may have unforeseeable and undesired legal consequences.
The mosaic-like annulment of *ex nunc* effect contained in point 1 of the holdings (the annulment of the texts "to a person without the licence of an authority" and "without the licence of an authority") has changed the acts constituting the offence regulated in the

statutory definitions contained in Sections 282 para. (1), 282/A para. (1), 282/B para. (1), 282/C paras (1) and (2) and 283/A para. (1) of the CC.

In my view, this constitutes negative legislation by the Constitutional Court in the form of "writing into" the statutory definitions regulated in the special part of the CC (namely, providing for new acts constituting the offence, not regulated earlier) in a manner widening the potential scope of establishing criminal liability.

In my opinion, this normative correction with incalculable effects is such legislative activism on the part of the Constitutional Court that may cause – despite the intention of the Constitutional Court – a legal uncertainty violating the constitutional principle of legal certainty guaranteed in Article 2 para. (1) of the Constitution.

It is my firm belief that the Constitutional Court is not supposed to re-regulate (re-codify) the criminal law provisions of the CC in force or to correct codification mistakes concerning the statutory definition of the misuse of narcotic drugs. The preparation of the correction of codification mistakes belongs to the competence of the professional codification committees, while amendments necessary to be made in an Act of Parliament are to be implemented by the legislator.

With the *ex nunc* annulment of the statutory provisions under Section 283 para. (1) items b), c), d) and item e) point 2, as well as in para. (2) of the same Section of the CC, the Constitutional Court has annulled statutory provisions excluding punishability, and thus the acts constituting the offence which were not punishable in the past due to the causes excluding punishability have now become punishable.

This way, the Constitutional Court has expanded the scope of criminal liability by changing the statutory definition of the misuse of narcotic drugs.

In the case of the *pro futuro* annulment of the interpretative provisions in Section 286/A para. (2) of the CC, the reasoning of the majority Decision does not provide due constitutional justification for the annulment.

In my opinion, the violation of the constitutional requirement of legal certainty (the clarity of norms as part of it) contained in Article 2 para. (1) of the Constitution with regard to the statutory texts and provisions annulled in points 1-3 of the holdings of the majority Decision

is out of the question. I do not contest the fact that the annulled statutory texts and provisions and certain concepts (definitions) contained therein might raise concerns about the interpretation the law, and that there are deficiencies and inaccuracies in the definitions of some concepts, however, they are below the level of the Constitutional Court's competence to protect the Constitution.

The reasoning related to the statutory provisions annulled in points 1-3 of the holdings of the Decision bases the annulment on codification mistakes, deficiencies and inaccuracies the level of which is – in my opinion – below the level of unconstitutionality.

I consider that the annulled statutory provisions were sufficiently transparent for interpretation by those applying the law in respect of the questions requiring legal interpretation as raised in the petitions, and the professionally justified codification corrections below the level of unconstitutionality are to be performed by the legislator and not by the Constitutional Court.

In my view, the *ex nunc* annulments contained in points 1 and 2 of the holdings as well as the *pro futuro* annulment in point 3 constitute constitutionally unjustified interference with the statutory definition of misusing narcotic drugs as specified in the special part of the CC, and they do not make the rules on the establishment of criminal liability more comprehensible in respect of the statutory definitions affected by them, on the contrary: they may result in a situation with unforeseeable consequences and with a high level of legal uncertainty for the organs applying the law.

For the purpose of correcting codification mistakes of a level not reaching unconstitutionality and with reference to legal certainty (the clarity of norms) deduced from the requirement of the rule of law guaranteed in Article 2 para. (1) of the Constitution, it is not acceptable to annul with *pro futuro* effect the interpretative provisions related to the statutory definition of the misuse of narcotic drugs, to change the acts constituting the offence as regulated in the statutory definitions, and to narrow down the scope of causes excluding punishability.

The Constitutional Court's legislative activism qualifies as constitutionally unjustifiable interference with the statutory provisions of the special part of the CC.

2. I cannot agree, either, with the establishment of unconstitutional omissions as contained in points 4, 5, 6 and 8 of the holdings of the majority Decision and with the related reasoning.

The parts of the Reasoning related to the omissions established in points 4, 5, 6 and 8 of the holdings of the Constitutional Court's majority Decision are not convincing and they do not provide constitutional reasons of due weight in respect of establishing the unconstitutional omissions.

I consider that the omissions established in connection with the international conventions referred to in points 4 and 5 of the holdings and in respect of Sections 282-283/A of the CC in points 6 and 8 of the holdings are the results of codification problems (disorders) that do not reach the level of the constitutional protection of rights, consequently, they do not cause an unconstitutional situation.

Handling and solving such problems of codification – raising no constitutional concerns – is out of the Constitutional Court's competence.
The omissions established in points 4, 5, 6 and 8 of the holdings – in particular the omissions established *ex officio* – may not serve as tools of solving codification problems; by establishing omissions, the Constitutional Court may not raise codification problems – not reaching the level of the constitutional protection of rights – up to the sphere of constitutionality, and it may not establish an unconstitutional omission in their case.

In my opinion, point 4 of the holdings refers to an omission of legislative duty not resulting in unconstitutionality; it may only cause a conflict with the international treaties referred to, but that is not the same as the establishment of an unconstitutional omission belonging to the competence of the Constitutional Court. I believe that the Constitutional Court has no competence to establish an omission (incomplete codification) in relation to the violation of international law, and codification problems not raising constitutional concerns may not result in the establishment of an unconstitutional omission.
It is the duty of the legislator to perform domestic codification ensuring harmony between domestic law and international law, and this task may not be overtaken from the legislative bodies and performed by the Constitutional Court in the form of establishing omissions, as it is beyond the competence thereof.

In my view, with regard to the omission established in point 5 of the holdings, the relevant reasoning does not provide constitutional justification of due weight regarding the alleged obligation of the legislator to promulgate the original and prevailing texts (as in force after amendments) of Lists I-IV of the Single Convention on Narcotic Drugs and the text of Lists I-IV of the Psychotropic Convention in an Act of Parliament, and it does not specify, either, the constitutional provision serving as the basis of the alleged duty of promulgation in an Act of Parliament and the related reasoning. In my opinion, the codification problems – not reaching the level of constitutional concern – related to the promulgation of the lists referred to above have no relevance at all in respect of the clarity and the constitutional evaluation of the statutory definition of the misuse of narcotic drugs.

In view of the above, the Constitutional Court should not have established the unconstitutional omissions contained in points 4, 5, 6 and 8 of the holdings.

Budapest, 13 December 2004

Dr. Mihály Bihari
Judge of the Constitutional Court

Dissenting opinion by Dr. István Kukorelli, Judge of the Constitutional Court

I disagree with points 1-8 of the holdings of the Decision. This is the first occasion in its practice that the Constitutional Court establishes with immediate effect, by annulling several provisions of the CC, the punishability of acts – at the same time ordering the punishment of similar acts by setting a deadline – in the case of which the legislator did not consider the application of criminal sanctions to be absolutely necessary. In the present case, the scope of acts to be punished has been extended without due constitutional grounds, through the excessive extension of the State's punitive power, and in violation of legal certainty.

I

1. The Constitutional Court's Decision is based on the interpretation of the individual right to self-determination resulting from Article 54 para. (1) of the Constitution and the State's punitive power. I agree with the majority Decision in respect of the claim that Article 54 para. (1) of the Constitution does not ensure a subjective right to consume substances called

"narcotic drugs" in the statutes, i.e. the claim that the "right to stupor" is not a fundamental right. This is so because the Constitution grants the extraordinary protection of fundamental rights to individuals' interests of special importance. However, the consumption of drugs and psychotropic substances – with the exception of religious rites and indispensable medical applications – cannot be regarded as an individual interest of paramount importance or such a decision expressing autonomy that is to be safeguarded with special constitutional guarantees and to be protected institutionally by the State. On the contrary: there are obvious reasons in the field of healthcare and child protection as well as other constitutional reasons that support State regulation restricting the freedom of action of individuals.

Based on the principles of "constitutional criminal law" following from Article 2 para. (1) of the Constitution and the conditions of restricting fundamental rights originating from Article 8 para. (2), criminal law interference must be assessed under special constitutional considerations. The fundamental rights restrictions necessarily entailed by criminal proceedings, the severity of criminal sanctions (particularly the possibility of imprisonment) and the stigmatising effects of the proceedings and the sanctions justify the application of the test of necessity-proportionality of restricting fundamental rights by the Constitutional Court when examining the constitutionality of the provisions under the title "Misuse of Narcotic Drugs" in the CC. Although this is acknowledged in the majority Decision – in contrast to previous practice – my conclusions with regard to proportionality are different. In my opinion, the Constitutional Court has disregarded the most important part of the cannabis decision of the Federal Constitutional Court of Germany – although it has followed that decision in many respects – with regard to the restriction of fundamental rights: the criminalisation of the occasional consumption of a small amount of prohibited drugs does not violate the prohibition of disproportionate State interference as "the legislator empowered the authorities prosecuting crime to dispense with the imposition of punishment or the prosecution of the criminal offence. This way, the legislator took into account the insignificance of the unlawfulness and the low level of the perpetrator's culpability." (BVerfGE 90, 145)

According to the majority Decision, the application of a system of criminal sanctions not allowing exceptions is proportionate in itself. I consider that criminal law regulations are only proportionate – and thus constitutional – if they provide for the so-called "conditional

exemption" and other legal institutions that allow dispensing with punishment and the exercise of discretion by those applying the law.

2.1. My dissenting opinion in respect of proportionality is based on my different view – compared to the majority Decision – on the constitutional evaluation of the individual and social dangerousness of the various narcotic drugs. According to the Constitutional Court, alcohol, nicotine and coffee are part of European culture, and society has "learnt" to live with them, therefore the Constitutional Court has declared these substances to be much less dangerous than narcotic drugs. As explained in the Decision, narcotic drugs are consumed by a minority of society, there are no traditions of their use, and they pose an extraordinary danger to the individual and the community.

The significance of harm caused by narcotic drugs to individuals and society is beyond doubt. Nevertheless, I dispute the approach of the majority Decision, the comparison of the various substances and the relevant conclusions. In my interpretation, it follows from the principle of the State's neutrality – mentioned in the Decision as well – that, with regard to the constitutionality of the criminal prohibition and sanction, the social traditions of the prohibited act and the extent of its presence are not significant. The State may not condemn habits exercised by a minority and acts different from the traditions of the majority merely on the basis of their difference from the majority attitude.

Concerning the consumption of prohibited drugs, I do not agree with the initial assumption of the Constitutional Court, either. In Hungary, the consumption of narcotic drugs is not a deviant act of a small group within society. According to a national survey performed in 2002, 21.5 % of students between the ages of 15 and 17 have already used prohibited drugs. (Jelentés a magyarországi kábítószerhelyzetről. 2003. Budapest, Gyermek-, Ifjúsági- és Sportminisztérium, 2003, 54.) In Budapest, in 2001, more than 30% of persons between the ages of 18 and 35 admitted having tried prohibited drugs. (ib. 57) A national survey performed in 2003 has shown that 6.5% of persons between the ages of 18 and 65 have already consumed narcotic drugs. (Paksi Borbála: Drogok és felnőttek. Budapest, L'Harmattan, 2003, 40.) Consequently, this is a social question affecting a significant part of Hungarian society.

I also dispute the presupposition that does not take into account the harm caused by the consumption of alcohol and smoking. In the past three decades, 10.4 % and 19.6 % of the total mortality was caused by alcohol and smoking, respectively. (Az alkohol hatása a halandóságra 1970-99 között Magyarországon. Budapest, Központi Statisztikai Hivatal, 2003, 7.; A dohányzás hatása a halandóságra 1970-99 között Magyarországon. Budapest, Központi Statisztikai Hivatal, 2002, 7.) In 2003, the number of alcoholics was estimated at nearly 1 million. (Magyar Statisztikai Zsebkönyv, 2003. Budapest, Központi Statisztikai Hivatal, 2004, 115.) The consumption of alcohol can not only cause the death of the consumer, but it can also pose a threat to the life and health of others. In year 2003, 2451 of the road accidents caused under the influence of alcohol resulted in personal injury or death. (ib. 123) Between 1990 and 1998, more than 20% of the perpetrators of all known criminal offences against life resulting in death was under a medium or serious influence of alcohol at the time of committing the offence, and only 20% of the perpetrators led a sober life. (Dr. Kránitz Mariann: Zárójelentés a rendszerváltást követően – 1990-1998 között – elkövetett emberölések IM-OKRI közös kutatásáról. Budapest, Országos Kriminológiai Intézet Bűnözéskutatási Osztály, 33. Kézirat.)

As a consequence, the arguments of the majority Decision are inadequate for demonstrating the differences between prohibited and non-prohibited drugs and for drawing the relevant conclusions in terms of constitutional law.

2.2. According to the Decision, consumers – in addition to seriously damaging their physical health – lose their capacity for judgement and decision-making, and the negative effects of narcotic drugs on the environment of consumers and the entire society justify the application of a system of criminal sanctions not allowing exceptions. The undifferentiated qualification of the various narcotic drugs and psychotropic substances is, in my view, a simplification similar to the one applied in distinguishing between prohibited and non-prohibited drugs. These substances have different action mechanisms, and they influence human consciousness – and the capacity of self-determination – in different ways and to various extents. The substances called narcotic drugs do not have common chemical attributes different from other substances, it is rather the legal classification itself – the prohibition under criminal law – that unifies this category. The fact that the Constitutional Court presents the consumption of all narcotic drugs as an act connected with lethal consequences acts against the requirement of

being well-informed – emphasised by the majority Decision as well – and it lessens the persuasive force of the arguments thereof.

The majority Decision applies the single approach to narcotic drugs to reach the conclusion that consumers lose their capacity for judgement and autonomy, and therefore prohibition ensures the right to self-determination rather than limiting it. I contest both parts of the above approach: 1. It follows from the obvious difference between occasional consumption and addiction to drugs that the choice of the drug consumer cannot always be regarded as a decision made without autonomy. 2. However, it is when the consumer of narcotic drugs really loses his or her capacity to make free decisions that the application of criminal sanctions for consumption becomes least justifiable. I see no constitutional grounds verifying that the punishment of such consumers serves their interest, i.e. that it is good for them to be punished. (Győrfi Tamás: Drogfogyasztás és önrendelkezési jog. (http://www.uni-miskolc.hu/~wwwjuris/drogfogyasztas.pdf 16.)

In my view, a differentiated approach should be applied also in the case of the constitutional examination of the negative social effects of narcotic drugs. Narcotic drugs harm not only the health of the individual, they have negative effects concerning the entire society as well. As pointed out by the Federal Constitutional Court of Germany: "the shaping of the relations of living together in society is at stake". (BVerfGE 90, 145, 174) It follows from the "*ultima ratio*" character of criminal law – as mentioned in the Decision as well – that the mere disapproval of certain acts and the possibility of negative social effects do not constitute due grounds for the application of criminal law. In order to criminalise an act, the State must prove the danger or the actual occurrence of serious negative social effects. Although a consumer of narcotic drugs may cause serious negative effects ("damage") to others, some isolated cases of causing such negative effects (e.g. becoming an irresponsible parent or an unreliable employee, causing extra costs to the social security system) do not constitutionally justify the punishment of all consumers. (Győrfi Tamás: ib. 11-12) In my opinion, criminal sanctions can be justified by the cumulative effects of the misuse of narcotic drugs: the act of a single person does not cause negative social effects that are significant from the point of view of criminal law, and it does not seriously endanger the community, but such acts together – especially when many people consume prohibited drugs causing significant damage – pose a serious threat to living together in society.

In general, I agree with the majority Decision in respect of stating that the different legal evaluation of the use of narcotic drugs, alcohol and other substances does not violate Article 70/A of the Constitution. However, I consider on the basis of the principles of "constitutional criminal law" following from Article 2 para. (1) of the Constitution and the conditions of restricting fundamental rights originating from Article 8 para. (2) (requirements of necessity-proportionality) that the legislator may only punish the consumption of drugs for the purpose of protecting public interests – with reference to abstract dangers – if the following two conditions are met: 1. The criminal sanctions must be proportionate to the level of the actual dangers of the specific substances. The scientific knowledge on the characteristics of the specific substances – in particular on their health-damaging effects – must be taken into account in the course of the legislation. Changes in the circumstances serving as a regulatory basis must be monitored and the need for amendment must be considered on the basis of the new information. 2. If the legislator adopts punitive regulations not pertaining to specific dangers or, rather, injuries, then those applying the law must have a wide scale of discretion to consider the specific circumstances, with special regard to the aims of special prevention and the interest of individuals and society in the medical treatment of drug addicts. With due account to the characteristics of the narcotic drug, the quantity used, the manner of violating the law and other circumstances relevant in respect of danger, the endangerment of the protected public interest can be so insignificant that the punishment of the perpetrator (necessarily involving the restriction of his or her freedoms) is a disproportionate and thus unconstitutional sanction.

II

The Constitutional Court has annulled some of the provisions reviewed using formal arguments and referring to legal certainty, and it has established the unconstitutional omission of legislative duty on the basis of legal certainty. Due to the uncertainty of the concept of "licence of an authority", the majority Decision has established the unconstitutionality of the framework statutory definitions under the title "Misuse of Narcotic Drugs", and it has annulled with immediate effect the parts of the text referring to the licence of an authority. With reference to the uncertainty of the concept "on the occasion of consuming narcotic drugs jointly", the majority Decision has annulled with immediate effect most of the provisions offering – under certain conditions – the so-called "conditional exemption", i.e. an opportunity for drug addicts and occasional consumers to participate in medical treatment or

preventive-consulting services instead of being punished. According to the majority Decision, Sections 282-283/A of the CC violate legal certainty as they do not adequately specify the object of committing the offence and the acts constituting the offence. In my view, the annulled provisions are not unconstitutional, the establishment of the unconstitutional omission is unfounded, and the annulment with immediate effect is a violation of the rule of law enshrined in Article 2 para. (1) of the Constitution.

1. When the Constitutional Court requires, with reference to Article 2 para. (1) of the Constitution, that a statutory provision be only interpretable in a single way, it follows the canon of interpreting the law as accepted before Herbert L. A. Hart. Based on the requirement of "interpretability in a single way only", all statutes could be annulled as no statute complies with this requirement. The provisions included in statutes are "general classifying terms" ("vehicle", "contract", "party") the scope of application of which can never be completely fixed. The organisation of actions through general rules systematically produces border-line cases where the application of the rule necessarily becomes problematic, and this applies to criminal rules as well. (Herbert Lionel Adolphus Hart: A jog fogalma. <The Concept of Law> Budapest, Osiris, 1995, 146.; Vö. Bódig Mátyás: Jogelmélet és gyakorlati filozófia. Jogelméleti módszertani vizsgálódások. Miskolc, Bíbor, 2004, 338. és köv.) Therefore, the uncertainty or the possibility of multiple interpretation of the expressions "licence of an authority" and "on the occasion of consuming narcotic drugs jointly" as well as of other provisions do not justify the establishment of unconstitutionality. (It could be proved of any term used in the provisions under the title "Misuse of Narcotic Drugs" that it can be interpreted in several ways.) In my opinion, the violation of the rule of law can only be established when there are other acceptable objections in addition to "multiple meanings". For example: the uncertainty of the criminal law rule under review causes serious disorders during the application of the law (or there is a danger thereof) that cannot be eliminated in the system of legal remedies by the application of the tools serving the purpose of making the application of the law consistent; the application of the rule of uncertain content causes unjustified disadvantage to persons (or there is a danger thereof).

2. According to the majority Decision, the joint commission of the offence cannot be identified with the types of joint perpetration contained in the CC, and this uncertainty may cause problems in the application of the law. However, it does not follow from the Constitution that in the case of amending the CC only the concepts already used therein may

be used. The Decision merely declares the uncertainties of the new concept in terms of dogmatics and the application of the law, without supporting this claim through references to legal literature, examples taken from judicial practice or other means. The Constitutional Court has no monopoly to interpret the CC, and there are adequate tools in the judiciary system for rendering judicial practice consistent.

3.1. Sections 282, 282/A, 282/B, 282/C and 283/A containing the text "licence of an authority" are framework statutory definitions. As established by the Constitutional Court in Decision 1026/B/2000 AB, the codification technique of using framework statutory definitions is not unconstitutional in itself and in general as long as the criminal offence can be identified by anyone on the basis of a clear, comprehensible and interpretable norm. (ABH 2003 II, 1296, 1299) In my opinion, the essence of a criminal law norm is not the definition of lawful conduct or the conditions thereof but the specification of the act prohibited under criminal law. It is clear to anybody from the provisions of the CC that the commission of any of the acts constituting the offence without the licence of an authority qualifies as a criminal offence. I consider that the detailed specification of the conditions of law-abiding conduct is not part of the formal criteria of constitutional criminal law.

3.2. According to the majority Decision, it is obvious that no licence and no other act of an authority can be requested in respect of the activities defined in the CC as ones constituting the offence and not mentioned in the government decrees listed in the majority Decision. As several acts constituting the offence qualify as such, providing for the licence of an authority as an element of the statutory definition excludes punishability in their case, i.e. the asynchronicity of the background legislation with the CC impairs the enforcement of the CC itself. In my opinion, this argumentation is logically incorrect, and the examination of the relevant judicial practice is also missing from the majority Decision. The fact that a framework statutory definition in the CC indicates that certain acts prohibited under criminal law may be lawfully performed under the licence of an authority does not lead to the "absurd situation" outlined in the Decision. It does not follow from the regulations in force that in fact proceedings may only be instituted for acts defined in the CC against those perpetrators who are obliged to request a licence according to the government decrees and who fail to do so, while others are exempted from criminal liability despite having committed acts of the same type.

3.3. Furthermore, it cannot be deduced from the Constitution that – as stated in the Decision – the lack of harmony between the statutes pertaining to licences of authorities and the provisions of Sections 282-283/A of the CC on the acts constituting the offence results in a situation of unconstitutional omission of legislative duty violating Article 2 para. (1) of the Constitution in itself. From the point of view of legal certainty, the significance of the itemised listing of the acts constituting the offence is that the activities to be licensed do not automatically become acts constituting the offence under criminal law despite the extension or modification of their category by the domestic implementing decrees of the relevant international conventions. For example, the act of handing over narcotic drugs without the licence of an authority as specified in Section 3 para. (1) of GovDec1 is a criminal offence as one of the acts constituting the offence in Section 282/A of the CC is that of handing over, but research without the licence of an authority, included in the same paragraph, is not, as research is not included in the statutory definition of the misuse of narcotic drugs as an act constituting the offence. Consequently, it is not without reasons that the concepts used by the government decrees containing provisions on the licences of authorities are "incompatible" with the provisions of the CC defining the acts constituting the offence, thus the constitutional concerns about the differences are unfounded.

To sum up, I consider that the Constitutional Court has not provided due reasons for annulling the reviewed provisions and establishing an unconstitutional omission of legislative duty on the basis of legal certainty.

4. The Constitutional Court explained in several decisions quoted in the majority Decision as well that in the case of criminal statutes the requirement of predictability and calculability is extremely important. In the present case, the decisive argument of the Decision concerning the *ex nunc* annulment of the provisions allowing conditional exemption is that "the individual may not be kept in the uncertain legal situation caused by evaluation varying from case to case". However, the decision of the Constitutional Court pertains to a cause terminating punishability. Thus, this is not a case of eliminating the possibility of uncertain punishment, but – according to the majority Decision – a case of certain punishment instead of uncertain exemption from punishment. This means that the Constitutional Court has ordered the punishment of certain acts with immediate effect, even though that may only be done by the Parliament and only together with ensuring "due time for preparation" as required by the Constitutional Court. The majority Decision has disregarded Section 43 para. (4) of the

ACC, which provides authorisation for annulment with *pro futuro* effect in the interest of legal certainty.

5. According to the majority Decision, the Parliament has failed to perform its duty by not promulgating Lists I-IV of the Single Convention on Narcotic Drugs and Lists I-IV of the Psychotropic Convention in an Act of Parliament. Based on Article 2 para. (1) of the Constitution, the imposition of criminal sanctions may only be based on statutes available to everyone. However, the Decision has established the omission on a basis other than the violation of this constitutional requirement. The Decision obliges the Parliament to promulgate certain parts of international treaties on the basis of Section 47 of the ACC. According to Section 47 of the ACC, in the case of examining the violation of an international treaty, the Constitutional Court may establish that the legislature has failed to fulfil its legislative duty stemming from an international treaty. The omission may be established if an international treaty that is already in force and has become part of domestic law entails a legislative duty that is not fulfilled by the legislator. In the present case, promulgation has not taken place, therefore the Constitutional Court should have thoroughly examined whether – in accordance with Article 7 para. (1) of the Constitution – the legal system has harmonised domestic law and international law in other ways, i.e. through legislation or law application. However, even after such a comprehensive examination, the Constitutional Court could not have reached the conclusion that the omission can be remedied by the Parliament by merely promulgating the lists concerned in an Act of Parliament.

6. Point IV.10.3.2 of the Reasoning of the majority Decision has established the unconstitutionality of the concept "occasion of use" with reference to legal certainty, but the provisions under review do not contain this term but the expression "own use", which – correctly – is not declared by the Decision as unconstitutional. At the same time, from Section 283 of the CC allowing conditional exemption, the Constitutional Court has annulled – on the basis of legal certainty – para. (1) item c) including the term "own use", while leaving in force item a) and item e) point 1 that have the same content. (Compare point 2 of the holdings of the Decision with point I.3.1 of the Reasoning presenting the petition and with point IV.10.3.2.)

III

Further parts of the majority Decision establishing the unconstitutionality of statutory provisions and an unconstitutional omission of legislative duty are based on Article 16 of the Constitution on the protection of the young and Article 67 on the protection of children. In my opinion, it follows from neither the Constitution nor the international treaties examined by the Constitutional Court that the protection of children (under the age of 18) can only be secured by providing – without exception – for the criminal liability of young adults (between the ages of 18 and 21) who consume narcotic drugs.

1. In line with Articles 16 and 67 of the Constitution and on the basis of the UN Convention, the Single Convention on Narcotic Drugs, the Psychotropic Convention and in particular the Child Convention, the State has a duty to protect children and the young. This duty of the State can be performed in several ways. In Article 33 of the Child Convention, the Hungarian State has undertaken to take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs, and to prevent the use of children in the production and trafficking of such substances. The application of tools of criminal law is only one of the potential measures of the State, and it is the most severe one, restricting rights to the greatest extent. The majority Decision examines only a small part of the above field, namely the criminal provisions under the title "Misuse of Narcotic Drugs". However, upon merely examining these provisions of the CC, one cannot conclude with due grounds that the rules on the misuse of drugs to the detriment of and by using children are incomplete to the extent of impairing "the enforcement of the principles and detailed rules contained in the international treaties" referred to.

The international conventions to be followed in the present case do not provide for the adoption of a criminal norm of specific content, moreover, they leave a wide margin for the States Parties in forming their policy on narcotic drugs. The Hungarian State has undertaken both in Article 22 of the Psychotropic Convention and Article 36 of the Single Convention on Narcotic Drugs to adopt the necessary criminal regulations "subject to its constitutional limitations". In addition, as continuously referred to in the UN Convention, subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary [Article 3 para. 1 subpara. c), para. 2]. The range of necessary measures available is wide enough for the States Parties to choose the tools in accordance with their Constitution. The UN Convention provides for the possibility that in the case of minor offences the State may apply measures facilitating rehabilitation and social

reintegration instead of conviction and punishment [Article 43 para. 4 subpara. c)]. This Convention also allows the State to apply measures facilitating – as an alternative to conviction or punishment – the treatment, education and social reintegration of the perpetrator who has possessed, purchased or cultivated narcotic drugs and psychotropic substances for his or her own consumption [Article 43 para. 4 subpara. d)].

Consequently, the conditional exemption allowed by the legislator in the case of offering or handing over a small amount of narcotic drugs on the occasion of joint consumption (even in the territory or vicinity of an educational institution) is not against the international treaty, indeed it is based on the authorisation granted therein. The choice of the legislator is based on balancing between the interest in the enforcement of punitive power and the individual and social interest in protecting children between the ages of 14 and 18 and young adults between the ages of 18 and 21 (occasional drug consumers and drug addicts) from the restrictions of freedom necessarily entailed by criminal sanctions. However, the majority Decision has not taken into account the fact that, in line with Article 2 para. (1) and Article 8 para. (2) of the Constitution, criminal sanctions are to be evaluated in accordance with the restrictions of fundamental rights, therefore the provisions of the Constitution on the protection of children may not be interpreted in themselves.

2. On the basis of the interpretation of the international treaties, the Decision should have verified the failure of the State to comply with its undertaken obligations by providing for another statutory definition in the CC, by adopting another statute, or through the application of the law.

International legal norms introduced into domestic law become part of Hungarian law with their international content. When interpreting the international conventions, the Decision should have taken into consideration Articles 31-33 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969, to be followed when interpreting treaties. Accordingly, during the interpretation of treaties, one has to take into account the text, the context, any subsequent practice, the preparatory work of the treaty and the circumstances of concluding the treaty. When establishing the omission of a legislative duty resulting from an international treaty, the Constitutional Court has failed to specify the provision of the international treaty which has not been complied with by the legislator; it has ignored the special principles of interpreting international law; and it has failed to consider the practice of the organisations

controlling the implementation of the international treaty. The latter is especially important because in a significant part of the States Parties to the UN Convention the regulations on narcotic drugs are considerably less restrictive than the Hungarian ones. However, the majority Decision does not refer to any single objection raised by an international organisation concerning the legal regulations or the judicial practice of Hungary or any other state. Due to the lack of the above, I consider the conclusions drawn in the majority Decision to be unfounded.

IV

I agree with the majority Decision in respect of confirming in principle the previous practice according to which the Constitutional Court is empowered to set the constitutional limitations of criminal policy rather than to determine criminal policy. [In summary: Decision 13/2002 (III. 20.) AB, ABH 2002, 85, 90-91] It is the duty of the legislator to develop – with consideration to scientific knowledge and the judicial practice – a strategy on narcotic drugs and a criminal policy. (Lévai Miklós: Engedélyezni vagy tiltani. A kábítószer-fogyasztásra vonatkozó kriminálpolitika dilemmái. Magyar Jog, 1996/1., 16.) Although the majority Decision has maintained, in principle, the possibility to choose between various drug policies, its decisions on the provisions of the CC under review have enforced the primacy of a drug policy of cutting demand. The annulment of several provisions of the CC, rather than setting the constitutional limits of the criminal policy, has resulted in ordering – partly with immediate and partly with *pro futuro* effect – the punishment of consumer's acts in the case of which the legislator did not consider the application of criminal sanctions absolutely necessary. In my opinion, this has taken place without considering scientific facts and the judicial practice, without due constitutional grounds, through the excessive extension of the State's punitive power, and in violation of legal certainty.

Budapest, 13 December 2004

Dr. István Kukorelli
Judge of the Constitutional Court