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The relation between the judgements of the European Court of Human Rights and the national law in Hungary

According to Alexandre Charles Kiss, in ideal case the Convention takes effect directly in the national law and order, therefore it directly determines rights for private persons.[2] Rigths are, however, first of all ensured by the establishement of internal legal norms or the adjustment of existing legal norms to the provisions of the Convention, depending on the characteristics of the law and order of the given state. In those states which interpret the relation between international law and internal law according to the theory of dualism, internal legislation is absolutely necessary, while in legal systems of monist view, international legal norms can take effect in a simplier way, by simple publication. At the same time the judgements of the European Court of Human Rights mean an obligation for the state only in the given case if the Court states the violation of the Convention and the obligation to pay indemnificatin of damage. The Strasbourg judgement – as stated by Frédéric Sudre – does not possess the character of *erga omnes*.[3] Neverthless states modify in general those provisions of their legal system which are criticised or breach the Convention, and those practices of their organs which breach the Convention, in order to avoid the failure of a lawsuit in the future for similar violation of law.[4] All these mean the indirect but not negligeable enforcement of the jurisprudence of the European Court of Human Rigths, although neither the Convention, nor the judgements of the Court contain the obligation to amend internal laws or any reference to this. In my point of view, in the case of a condemning judgmenet brought against the accused state, consequences cannot be limited to the indemnification of damage paid to the applicant. Giving satisfaction will not abolish the law which is contrary to the Convention or the practice which breaches the Convention, therefore if the state wishes to meet its undertaken obligations – and not only in order to avoid further payments of indemnification of damage for subsequent failures of lawsuit – it must modify them. Frédéric Sudre was right when stating that the Court does not adjudicate *in abstracto* in respect of the compliance of a norm with the Convention, it decides only on the application of the norm in the case of the given person,[5] but the problem can be further graded (even if the jurisprudence of French courts backs up Sudre's statements),[6] since the Strasbourg judgement do not influence directly the criminal

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[2] KISS, Alexandre: La protection des droits de l'homme et les techniques de mise en oeuvre du droit international. In: *La protection des droits de l'homme et l'évolution du droit international.* Société Française pour le Droit International, Pedone, Paris, 1998, p. 143.
[3] SUDRE, Frédéric: *above-cited* p. 452.
[4] See e.g. the amendment of 1881of the French Press Act following the condemnation in the *Ekin-case.*
[5] SUDRE, Frédéric: *above-cited* p. 452.
[6] Examples in connection with the French jurisprudence can be seen in: SUDRE, Frédéric: *above-cited* pp. 464-465.

responsibility or the imprisonment penalty imposed by the internal law on the applicant who won the case and received the indemnification of damage. As a consequence, it can happen that the applicant receives indemnification of damage for the penalty found to be incompatible with the provisions of the Convention or imposed for a reason that is contrary to the Convention, but the applicant must serve his prison sentence according to internal law. The French Code on the Criminal Procedure amended in 2000 offers a solution to this problem since it allows the revision of the judgement in the above case if the just satisfaction worded in Article 41 of the Convention does not offer an appropriate solution for putting an end to the illegally caused disadvantage.[7]

In András Baka's opinion, the Court exercises at the same time with its judgements an influence upon European legal mechanisms „which may be harmonised in a certain way in the future"[8]. The relation between the judgements and the internal law raises a further question: whether the statements of the European Court of Human Rights brought in the course of its statutory interpretation activity carried out in the field of the interpretation of the rather reticent Convention and its notions must also be taken into consideration besides the European Convention on Human Rights promulgated in an Act in the internal law, the respect of which was undertaken by the state.[9] According to Patrick Wachsmann, the Court is sometimes in a difficult situation as to the interpretation during which it has to determine the *„necessity in a democratic society"* and similar notions,[10] but as stated by Ganshof van der Meersch, the European Court of Human Rights opposes in general the categorical attitudes in its Convention interpretation practie.[11] Gábor Kardos described its activity as *„a constitutional jurisdiction of human right of European level"* with the difference that it can not abolish those norms which are incompatible with the Convention, and it does not have the right to change the decisions of national judges.[12]

The signatory states of the European Convention on Human Rights, as we have already mentioned, undertook to respect the rights specified in the Convention when resolving the

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[7] According to Article 626-1 of the French Code on the Criminal Procedure, in the opinion of the European Court of Human Rights the French court brought a legally binding condemning decision as a result of the breach of the Convention, and the just satisfaction ensured by Article 41 of the Convention does not suspend the disadvantageous legal consequences for the convict, the decision can be revised.
http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode?code=CPROCPEL.rcv&art=626-1 (2005. október 19.)

[8] BAKA, András: „We show the direction but we do not intervene brusquely into national laws." – JAVORNICZKY, István and KARDOS, Gábor conversation with András BAKA. *Fundamentum,* 2000. No. 4., p. 39.

[9] See: BLUTMAN, László: A nemzetközi jog a magyar joggyakorlatban. (The international law in Hungarian jurisprudence) In: TÓTH, Károly: (editor): *In memoriam Nagy Károly, Acta Universitatis Szegediensis-Acta Juridica et Politica,* Tomus LXI, Fasc. 1-26, Szeged, 2002. pp. 47–49.

[10] WACHSMANN, Patrick: Les méthodes d'interprétation des conventions internationales relatives à la protection des droits de l'homme. In: *La protection des droits de l'homme et l'évolution du droit international.* Société Française pour le Droit International, Pedone, Paris, 1998, p. 160.

[11] GANSHOF VAN DER MEERSCH, Walter: Les méthodes d'inerprétation de la Cour européenne des droits de l'homme. In: D. TURP és G. BEAUDOIN (szerk.): *Perspectives canadiennes et européennes des droits de l'homme.* Actes des journées strasbourgeoises de l'Institut canadien d'études juridiques supérieures. Yvon Blais, 1986, p. 192.

[12] KARDOS, Gábor: Értelmezési különbségek és a feloldás módjai – megjegyzések az emberi jogi egyezmények belső jogi alkalmazásáról. (Interpretation differences and the methods of resolvation – remarks on the application of the conventions on human right in internal law.) In: HALMAI, Gábor (responsible editor): *Sajtószabadság és személyiségi jogok. (Freedom of press and personality's rights)* Emberi Jogi Információs és Dokumentációs Központ (Information and Documentation Centre of Human Rights) – Adu Print, Budapest, 1998, p. 59-60.

interpretation questions arising during their application, but state authorities and courts may face problems which they cannot resolve without interpreting the text of the agreements. During the interpretation – if the necessity arises in single cases –, the state judge cannot disregard the Convention interpretation established in the course of the jurisprudence of the European Court of Human Rights of Strasbourg. According to Tamás Bán's standpoint, the appropriate conclusion must be drawn even if the Strasbourg judgement was not brought in a case affecting the given state.[13] Even if by ratifying the European Convention on Human Rights the Republic of Hungary undertook to secure to individuals within its jurisdiction the rights and freedoms defined in the Convention, and to abide by the judgments of the Court (in cases to which it is a Party)[14], „rationality and the demand of the bona fide fulfilment of the international contractual obligation lead also to the fact that states must draw the necessary conclusions even from those Strasbourg judgements which are brought by the Court in the subject of a complaint submitted against another state".[15] Prior to the ratification of the Convention, his standpoint was the following: *„Ratification and the recognition of the jurisdiction of the Court is enough in itself in every case in connection with the interpretation and application of the Convention for that when Hungarian courts apply the Convention as a law, they do it in the way as interpreted and filled with content by the case law of Strasbourg."*[16] In Viktor Mavi's opinion, it is *necessary* to take into consideration the Convention interpretation even in those cases which do not affect the given state, since „the essence and the real content of the rights and ensurances of the Convention can be determined only on the basis of these decisions"[17]. It can therefore be stated that the Convention does not contain any *stricto sensu* obligation in respect of this question, neverthless Hungarian judges cannot avoid to study the case law of the Court if reference is made to any of the rights contained in the Convention in a case brought before them. It must also be remarked that it is impossible to fully take into consideration the Anglo-Saxon Strasbourg judgements of case law character because of the different merits of the case. In László Blutman's opinion, *„it would be a possible solution if the Supreme Court obiter dicta laid down in a case that Hungarian Courts must take into consideration the Strasbourg judgements when they act in a subject laid down in the Convention, or must size up the content of the reasons worded by an international forum in the case brought before them if any party makes reference to it".*[18] We can agree with Tamás Bán's opinion which is similar to the abovequoted standpoint and according to which *„Even if state orders could hardly procure that case law be taken into consideration in judicial litigation and other law-application activites, a relation should have been established by a technique between the case law of Strasbourg on the one part, and Hungarian legislation, judicial litigation activity and administrative law-application on the other part."*[19] In

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[13] BÁN, Tamás: Vigyázó szemünket Strasbourgra vessük, avagy a nemzetközi szerződések és a jogalkalmazók. (Let's lay our caring eye on Strasbourg or the international agreements and the law applicators) In: HALMAI, Gábor (responsible editor): *Sajtószabadság és személyiségi jogok (Freedom of press and personality's rights).*. Emberi Jogi Információs és Dokumentációs Központ (Information and Documentation Centre of Human Rights)– Adu Print, Budapest, 1998, pp. 46-47.

[14] The following Articles of the European Convention on Human Rights are referred to: Article 1: „*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."* And Article 46: *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties"*

[15] BÁN, Tamás: Vigyázó szemünket Strasbourgra vessük, avagy a nemzetközi szerződések és a jogalkalmazók… (Let's lay our caring eye on Strasbourg or the international agreements and the law applicators) p. 47.

[16] BÁN, Tamás: Az Egyezmény hatása a belső jogrendszerre. (The impact of the Convention on the internal legal system) *Acta Humana,* 1992. No. 6-7., pp. 19-20.

[17] MAVI, Viktor: *above-cited* p. 44.

[18] See: BLUTMAN, László: *above-cited* pp. 47–49.

[19] BÁN, Tamás: Strasbourg és a magyar joggyakorlat. (Strasbourg and the Hungarian jurisprudence) (Fórum) In: Fundamentum, 2005/1, p. 47.

2004, the Constitutional Court gave its opinion also on the relation between the case law of Strasbourg and the Hungarian jurisprudence when investigating the unconstitutionality of the amendment of 8 December 2003 of Article 269 of the Criminal Code, since in its decision no. 18/2004 (V. 25.) it qualified the jurisdiction of Strasbourg directly binding (!) on Hungarian jurisprudence.[20] Paul Tavernier sees the enforcement of the jurisprudence of the Court in the internal law from a kind of monist perspective, moreover he thinks that the development is more or less directed in a federalist direction as a result of which the Convention could become the *„real constitution of a Europe of human rights"*[21]. Contrary to this opinion, Constance Grewe's standpoint is less optimistic when she states that *the development of the rule of law appears much more as a limit for the rules of international law than a condition for the expansion of the impacts of international law and in particular of the European Convention on Human Rights.*[22]

In practice, besides the interpretation of the Convention by constitutional courts, the courts of the member states acting in civil or criminal cases can also face the analysis of the Articles of the Convention, especially if the parties expressively make reference to them. The reasons of the applicant of the case entitled *Ekin Association v. France* were rejected by the administrative court (*Tribunal administratif)* on the basis of the arguments of the Court of Strasbourg – expressivily interpreting the provisions of the Convention –, since according to its standpoint, the order of the Ministry of Interior which put the book published by the applicant on the index was not unproportional for protecting public order.[23] In the appellate procedure of this same case, the State Council (*Conseil d'État*) found that the law was in conformity with the Convention when it investigated the violation of the Convention by the French Press Act which contains the possibility of putting press products of foreign origin on the index by the Ministry of Interior, and finally the Court made a contrasting decision and stated not only the violation of the Convention but also the breach of the Convention by the French law.[24] We can agree with Diane de Bellescize's statement according to which the Court prescribed for France, even if indirectly, to abolish the said provision of law when it stated in paragraph 62 of the judgement that *„the argument that a system that discriminated against publications of that sort (writings of foreign origin)*[25] *should continue to remain in force would appear to be untenable"*[26] The standpoint of the Court formulated in its judgement brought in the case *Modinos v. Ciprus* backs up the fact that those Strasbourg judgements which qualify the laws and the practices of other states as breaching the Convention must be taken into consideration (or we could even say must *be quasi followed*), since the judges laid in this judgement a charge on the courts of Cyprus for the fact

[20] „In the comprehension of the European Court of Human Rights, which *forms* and *obligates* Hungarian jurisprudence (stressed by P. Cs.), the freedom of expression is one of the conditions of the basic pillars and the progress of a democratic society, and of the indivudial's development." Decision of the Constitutional Court no. 18/2004. (V. 24.) part II, paragraph 1.1, 2.

[21] TAVERNIER, Paul: La Cour européenne des droits de l'homme applique-t-elle le droit international ou un droit de type interne? In: TAVERNIER, Paul (editor): *Quelle Europe pour les droits de l'homme?* Bruylant, Bruxelles, 1996, pp. 33-34.

[22] GREWE, Constance: La question de l'effet direct de la Convention et les résistences nationales. In: TAVERNIER, Paul (editor): *Quelle Europe pour les droits de l'homme?* Bruylant, Bruxelles, 1996, p. 157.

[23] ECHR, *case Ekin Association v. France,* judgement of 17 July 2001, § 16.

[24] *Judgement,* § 63. The detailed analysis of the case can be seen in: MASSIS, Thierry: Publications de provenance étrangère et liberté d'expression. (Arrêt Association Ekin du 17 juillet 2001) In: TAVERNIER, Paul (editor): *La France et la Cour Européenne des Droits de l'Homme, La jurisprudence de l'an 2001.* Université Paris Sud, Centre de recherches et d'Études sur les Droits de l'Homme, Cahiers du CREDHO No. 8 – 2002, p. 181.

[25] Inserted by P. Cs.

[26] BELLESCIZE, Diane de: *above-cited:* p. 236.

that the Supreme Court of Cyprus did not qualify neither anti-conventional nor anticonstitutional the merits of the case of the Criminal Code of Cyprus which was identical to a law found to be incompatible with the provisions of the Convention in a previous condemning judgement brought against the United Kingdom.[27] In its judgement brought in 1996 in the case *Wingrove v. United Kingdom,* the Court presented in detail its standpoint on the fact why it rejected the judgement of internal laws, but it also stated that: *„Strong arguments have been advanced in favour of the abolition of (blasphemy)*[28] *laws"*[29]. When assessing this latest judgement, Mario Oetheimer asks the following question: „Does not this sentence mean a clear signal towards competent British authorites?"[30]

In the course of its Convention interpretation, the Court of Strasbourg often uses the reasons of the judgements of other international courts. This happened in the *Akdivar v. Turkey case,* where it made reference to the judgement brought by the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez*[31] in respect of the statement of the burden of proof if internal legal remedy possibilities are exhausted[32] - but a certain mutuality can be observed in this respect, sometimes the jurisprudence of the Inter-American Court of Human Rights contains also European cases in connection with the freedom of expression (*Handyside, Lingens, Otto-Preminger-Institut),* which were used by the Inter-American Court in the case of the film entitled *The last temptation of Christ* in the reason of its judgement brought on 5 February 2001.[33]

Besides the examination of the relation between international law and internal law, we can often meet some cases of the European Court of Human Rights in the decisions of the Constitutional Court, which requires in itself a more serious investigation. The Constitutional Court quotes several Strasbourg judgements when talking about the „necessary" limitation of the right of the freedom of expression „in a democratic society", but there is no consistency in respect of this practice. In Mónika Weller's opinion, the Constitutional Court makes this in an excessively simplified way.[34] (The Constitutional Court quotes not only the judgements of the European Court of Human Rights, sometimes it presents also the legal solutions of European member states - with little consistency.)[35] According to László Sólyom's wording, this reference practice which seems to be of simplifying character, characterises the first period of the operation of the Constitutional Court, and its intention was only to express that the newly

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[27] ECHR, *Case Modinos v. Cyprus,* judgement of 22 April 1993, § 20: „*Moreover, the Supreme Court of Cyprus in the case of Costa v. The Republic considered that the relevant provisions of the Criminal Code violated neither the Convention nor the Constitution notwithstanding the European Court's Dudgeon v. the United Kingdom judgment of 22 October 1981"*

[28] Stressed by P. Cs.

[29] ECHR. *Case Wingrove v. United Kingdom,* judgement of 22 October 1996, § 57.

[30] OETHEIMER, Mario: *L'harmonisation de la liberté d'expression en Europe. Contribution à l'étude de l'Article 10 de la Convention européenne des droits de l'homme et de son application en Autriche et au Royaume-Uni.* Pedone, Paris, 2001, p. 107.

[31] Inter-American Court of Human Rights, *Velásquez Rodríguez case,* judgement of 26 June 1987. http://www.corteidh.or.cr/seriec_ing/seriec_01_ing.doc (2005. október 13.)

[32] ECHR, *Case Akdivar v. Turkey,* judgement of 16 September 1996, § 68.

[33] In § 69 of its judgement brought in the case of the file entitled *The last temptation of Christ*, the Inter-American Court summerised the European jurisprudence in connection with the freedom of expression. See: KOVÁCS, Péter: Szemtől szembe, (avagy hogyan kölcsönöznek egymástól a nemzetközi bíróságok, különös tekintettel az emberi jogi vonatkozású ügyekre) (Face to face, i.e. how the international courts borrow from each other, with special regard to human right related cases) *Acta Humana,* No. 49., 2002, p. 5. See the judgement on: http://www.corteidh.or.cr/seriec_ing/seriec_73_ing.doc (13 October 2005)

[34] See: WELLER, Mónika: *Emberi jogok és európai integráció. (European rights and the European integration)* Budapest, Public Foundation of Hungarian Centre of Human Rights, 2000. pp. 298–299.

[35] See: the above outlook relating to Press Act.

formed judicial body took into consideration and looked for „European standards" much more in order to link Hungarian leagal thinking with „European norms" than using them for concrete decisions of constitutional law questions.[36]

Development should however go in the direction – and not only because of the increasing number of cases – that not only the Constitutional Court, but also first and second level courts should face in internal cases the quoting of Strasbourg judgements, but reality shows a different picture.

Freedom of expression and certain questions relating to its limitation in applicable Hungarian law

Pursuant to paragraph (1) of Article 54 of the Constitution "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." At the beginning of the political transformation in the early 1990s, the Constitutional Court regarded the right to human dignity as a kind of wording of the „general personality's right", which is the „parent law", the source of other named and not-named personality's rights.[37] Pursuant to Article 61 paragraph (1) of the Constitution „In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest. Pursuant to Article 61 paragraph (2) „The Republic of Hungary recognizes and respects the freedom of the press". In its decision no. 30/1992 (V. 26.), the Constitutional Court qualified the right of free expression as the „parent law" of communiactions rights. „This decision stated also that the favoured role of the right of free expression does not have as a consequence that this right – similarly to the right to life or to human dignity – cannot be limited, but it means in any case that the right to free expression must give in only to very few laws, that is that those laws which limit the freedom of expression must be interpreted in a restrictive way."[38] The Constitution does not specify directly those cases where this constitutional basic law can be limited. In its decision no. 37/1992. (VI. 10.), the Constitutional Court stated that the freedom of the press has first of all external limits which are embodied amongst others in press corrections, but this right is first of all ensured by the non-intervention of the state. At the same time our applicable Press Act, the abovementioned European Convention on Human Rights promulgated by Act no. XXXI of 1993 and the International Covenant of Civil and Political Rights[39] promulgated by the law-

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[36] SÓLYOM, László: The interaction between the case-law of the European Court of Human Rights and the protection of freedom of speech in Hungary. In: MAHONEY, Paul; MATSCHER, Franz; PETZOLD, Herbert; WILDHABER Luzius (editor): *Protection des droits de l'homme: la perspective européenne / Protecting Human Rights: The European Perspective. Mélages à la mémoire de / Studies in the memory of Rolv Ryssdal.* Carl Heymanns, Köln, Berlin, Bonn, München, 2000, p. 1319. (The Hungarian translation of the study made by Weller Mónika can be found in: SÓLYOM, László: *Az alkotmánybíráskodás kezdetei Magyarországon. (The beginnings of constitutional jurisdiction in Hungary)* Osiris Kiadó, Budapest, 2001, pp. 201-222.)

[37] ABH 1990, 42.

[38] Point 1. b), chapter II of the decision of the Constitutional Court no. 20/1997 (III. 19.).

[39] Pursuant to Article 7 of the Constitution *„The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law."* (Source: Homepage of the Constitutional Court of the Republic of Hungary, http://www.mkab.hu/en/enpage5.htm) This study does not wish to deal with the relation between international law and internal law, the international agreements on the freedom of expression constitute part of the Hungarian legal system since they habe been promulgated by law.

decree no. 8 of 1976 contain also provisions on the basis of which the right of expression may be limited in certain cases. The preambulum of applicable Press Act (Act no. II of 1986) affirms that „Everyone has the right to communicate his/her views and works by the means of the press if they do not harm the constitutional order of the Republic of Hungary." As to limitations, reference to the already mentioned public order and morals can be found in Article 3 of Press Act according to which „the practice of the freedom of press cannot realise crime or call for the execution of crime, cannot harm morals and cannot be accompanied by the harm of others' rights linked to the person."

The notion of morals

The abovementioned legal limitation of the expression of opinion is however not sufficient for solving the arising problems. The question of the definition of the notion has already been brought before the Hungarian Constitutional Court as well, we can quote from its jurisprudence the decision no. 20/1997. (III. 19.) which states the anticonstitutional character of certain provisions of the Press Act. In this decision the Constitutional Court stated, making reference to the decision of the Constitutional Court no. 21/1996 (V. 17.), that the Constitutiona Court „does not revises the content of morals".[40] This means that it did not undertake to determine the notion of morals. According to András Sajó's wording – which is not exempt from a certain sarcasm –morals are not listed amongst the constitutional values, *„but this lack has never meant a problem for the Constitutional Court when the freedom of expression was limited by law in order to protect morals"*[41]. The Constitutional Court expressed the following opinion in this question: „As it basically left the definition of the notion of »public interest« to the democratic legislation (ABH 1993, 382.), public order, including morals as well, should also be enforced by the deputies as long as they do not encounter the borders of the Constitution for any other reason."[42] According to the Constitutional Court "Since the notion and the content of morals is not defined by any law in the examined relation, its definition belongs to law application."[43] It has stated at the same time that the "limiting provision relating to the injury of morals" of the already mentioned applicable Press Act "cannot be qualified as unnecessary and of unproportional degree".[44] Neverthless, "since the Constitutional Court does not have a legislative competence",[45] the baby was thrown out with the bathwater when the Constitutional Court "had to abolish the complete paragraph (3) of Article 15 of Press Act because of the abolition of partial anticonstitutionality"[46] together with the rules judged to be

[40] Point 3, Chapter III of the decision of the Constitutional Court no. 20/1997 (III. 19.).
[41] SAJÓ, András: *A szólásszabadság kézikönyve… (Manual of the freedom of speech)* p. 176.
[42] *Ib.*
[43] *Ib.*
[44] *Ib.* The decision reflects at the same time the division of the constitutional judges in respect of this question. Tamás Lábady and László Sólyom judges set forth in their separate opinion linked to the decision the follwings: *„morals – as an abstract value behind which the violation of individual basic rights can be stated the less – belong to the group of the less suitable goods for limiting the freedom of expression if measured with constitutional measuring".* Ödön Tersztyánszky and János Zlinszky judges worded a rejecting separate opinion to the decision, but it does not touch the notion of morals, the motion – and the decision – found anticonstitutional the prosecutor's right stated in the Press Act to bring an action.
[45] Point 6, Chapter III of the decision of the Constitutional Court no. 20/1997 (III. 19.).
[46] *Ib.*

constitutional.[47] Legislation has not filled the gap in spite of the fact that the Constitutional Court found anticonstitutional only the prosecutor's right to bring an action independently of the affected persons' will, the questioned paragraph has not been reworded by the National Assembly. As a consequence, the possiblity of limitation, which is otherwise qualified as constitutional, cannot be enforced since 1997 because of the lack of legislative and political will. It must also be mentioned that comparative analysis of foreign legal solutions, which are often referred to by the Constitutional Court[48], has been unfortunately omitted this time. According to László Sólyom's evaluation *„There was probably a silent agreement in the subject that morals can limit the freedom of press (in the frame of an appropriate procedure)"*[49] when the decision of the Constitutional Court no. 20/1997 was brought. From amongst the counter-examples we can emphasize the Austrian regulation: the legal system of the neighbouring Austria knows the prosecutor's right to bring an action independently of the parties in order to „withraw" *(Einziehung)* a press product. This right has been abolished in Hungary.[50] Prohibiting the publication or the distribution of a press product (newspaper, periodical) independently of the affected persons' will is allowed by the French Press Act as well for the Council of Ministers if the publication comes from abroad. The Minister of Interior can also use the right of prohibition if the above conditions are fulfilled, though his competence is limited to prohibit the distribution of certain numbers.[51]

When clearing up the notion of morals, we can first of all rely, from amongst the jurisprudence of the Supreme Court, on the case decision no. BH 1992. 454 of the Civil College which determines the governing points of view for the judgement of an application relating to the prohibition of the public publication of a press product. This decision states that „The notion of morals is not defined by law. Those behaviourial rules can be listed here which are generally accepted by the society." In addition it remarks that „one must procede extremely cautiosly when applying these legal consequences so that the basic constitutional rights be not damaged gratuitously", and that „The collision of press products with morals can be stated if this

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[47] The paragraph abolished by the Constitutional Court is the following: *„Upon the prosecutor's motion, the court prohibits the public publication of those press products or documents not qualified as press product, which are in collision with paragraph (1) of Article 3, and paragraph (2) of Article 12. The prosecutor can immediately suspend the public publication of such press products or documents. The prosecutor's decision on the suspension of public publication will loose its force when the court's decision on the merits becomes legally binding."* Hungarian jurisprudence is qualified by the fact that according to the decision, the Constitutional Court whished to allow by delaying the date of the force of repeal that the legislator abolishes the anticonstitutional character by rewording the affected provisions. With regard to the aforesaid facts, paragraph (1) of Article 19 of the regulation of the Council of Ministers no. 12/1986. (IV. 22.) on its execution was of course kept in force when paragraph (3) of Article 15 of the Press Act wasabolished, according to which *„The court decides on the prohibition of public publication in a civil non-trial procedure out of turn"*; and paragraph (1) of Articel 17 of the Press Act which makes reference to the abolished paragraph (3) of Article 15 in respect of the prohibition of the public publication… The question how the current situation is in conformity with the principle of legal security so many times asserted by the Constitutional Court could be the subject of another study.

[48] See: decision of the Constitutional Court no. 36/1994 (VI. 24.).

[49] SÓLYOM, László: *Az alkotmánybíráskodás kezdetei Magyarországon. (The beginnings of the constitutional jurisdiction in Hungary).* Osiris Kiadó, Budapest, 2001, p. 484.

[50] According to point 2 Article 33 of the Austrian Act on Media: *„Forfeiture shall be ordered in separate proceedings at the request of the public prosecutor if a publication in the media satisfies the objective definition of a criminal offence and if the prosecution of a particular person cannot be secured or if conviction of such person is impossible on grounds precluding punishment ..."*
ECHR, Case *Otto-Preminger-Institut v. Austria,* judgement of 20 September 1994, § 28.

[51] Article 14 of the French Press Act of 29 July 1881 provides as follows: *„La circulation en France des journaux ou écrits périodiques publiés à l'étranger ne pourra être interdite que par une décision spéciale délibérée en Conseil des ministres. La circulation d'un numéro peut être interdite par une décision du ministre de l'intérieur."* State of 31 December 2004, http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm (10 October 2005)

character is clear and indisputable according to public opinion." The Supreme Court did not hesitate to refer to public opinion supposing that the judges who act in the cases are able to differentiate this from the opinion of the different social strata. (The jurisprudence of Strasbourg does not condemn the reference to public opinion, it did not qualified this as incompetent with the provisions of the Convention in the *Otto-Preminger-Institut* case, when the authorities of Tyrol ordered the confiscation of a film qualified as blasphemous and religion reviling, since they thought that according to the public opinion of Tyrole it represented an illegal attack against the Roman Catholic Church.[52]) If national authorities judge incorrectly those works of art and writings created and sold by the press which may have undoubtedly at least two interpretations, the possibility of appeal is open to any party, and failing all else, individual complaints can be submitted to the European Court of Human Rights if the decision is, in the applicant's opinion, contrary to Article 10 of the Convention. In this question, as it is shown by the above presented facts, it is impossible to make a definition by law, in this case we are compelled to have recourse to judges's „limits of the margin of appreciation". All these are possible in Hungarian judicial practice when a given legal relation, in the sense of the aforesaid facts, is allowed by a domestic law which arranges it according to the content of the international agreement, in compliance with the Constitution.[53] According to the quoted decision of the Civil College, stating the collision with morals cannot come up to an obstacle from the part of courts which have not only approptiate formation but, let us admit, also appropriate cautiousness. All the less since the courts, besides their interpreting activity carried out in the field of basic law jurisdiction – in the course of which they base the judments on concrete provisions of the Constitution as well –, they follow with more and more attention the jurisprudence of the European Court of Human Rights which ensures the control mechanism of the European Convention on Human Rights.[54]

Limiting the freedom of expression with reference to morals or reasons similar to morals and difficultly determinable without discretion is allowed not only by the Press Act but also by Articles 5 and 5/A of Act no. LVIII of 1997 on Economic Advertising Activity, since they prohibit the publication of advertisments which may impair children's and minors' physical, mental or moral development, and of those which are pornographic or relate to sexual services, sexual stimulation or telecommunications services with an increased tariff. This Act does not define what the danger of minors' moral development mean, it mentions only some examples,[55] and determines similarly, but slightly more exactly, the borders of pornography,[56]

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[52] *Ib.* paragraph 56.

[53] Such a possibility is for example to determine *„important rights"* in the case of the prohibiton of the usability of evidences obtained by violating the important rights of the person participating in the criminal procedure. See: FRECH, Ágnes: Szabadságok és kötöttségek – az emberi jogok érvényesülése a bírói gyakorlatban. (Freedoms and ties – the enforcement of human rights in the jurisprudence) In: HALMAI, Gábor (responsible editor): *Sajtószabadság és személyiségi jogok. (Freedom of press and personality's rights)* Emberi Jogi Információs és Dokumentációs Központ (Information and Documentation Centre of Human Rights) – Adu Print, Budapest, 1998, p. 68.

[54] See: LOMNICI, Zoltán: Mire alkalmas a bíró? Az alapjogi bíráskodás elméleti és gyakorlati kérdései. (What a judge is suitable for? Theoretical and practical questions of the basic law jurisdiction.) In: HALMAI, Gábor (responsible editor): *Sajtószabadság és személyiségi jogok. (Freedom of press and personality's rights)* Emberi Jogi Információs és Dokumentációs Központ (Information and Documentation Centre of Human Rights) – Adu Print, Budapest, 1998, p. 40.

[55] Pursuant to paragraph (2) of Article 5 of Act no. LVIII of 1997 *„Advertisements which might impair children's and minors' physical, mental or moral development, in particular if children or minors are represented in dangerous or violent situations or in situations which emphasize sexuality, are prohibited to be published ."*

since it is much easier to determine the meaning of a behaviour *that presents sexuality with such an openness which is seriously pornographic,* than determining the meaning of morals.

From amongst our applicable laws we must mention Act no. I of 1996 on Radio and Television Broadcasting which was amended in 2002 with special regard to the broadcasting time of programs which might *exercise a disadvantageous or seriously disadvantageous* influence on *minors' moral development*. The broadcasting of such programs is allowed by law late at night or at early dawn, or is expressely prohibited.[57] The possiblity of discretion is given in this case as well, the Committee of Complaint of the National Radio and Television Body is the competent organ in this question (ORTT). Article 23 of Act on Media prescribes also for public service programme providers and public programme providers that they must pay attention to the „presentation of programmes which enrich minors' knowledge and serve their physical, spiritual and moral development and interest".[58]

It can be stated that several items of the Hungarian law system provides a possiblity for limiting the freedom of expression for the sake of the protection of public morals or morals or when they are hurt, The decision is entrusted to the organs of jurisdiction or to other organs, the Committe of Complaint of ORTT or the Inspectorates for Consumer Protection.

As to the relation between the Convention and the internal law of the member states we can state that the „guidelines" for the future of the decisions of the European Court of Human Rights and the conformity of Hungarian jurisprudence with the Convention are such questions which cannot be circumvented longtime neither by those courts which make decisions in single cases, nor by law seeking citizens. The Court of Strasbourg can examine the *necessity* of the interventions *in a democratic society* in respect of its application to every member state, even if morals are different in each state. In addition to this, the courts will probably more and more often meet clients who make reference to the Convention already before the internal courts in order to enforce their rights.

Cases of the limitation of the expression of opinion

In Hungarian jurisprudence, the prohibition of the public publication of press products is relatively rare, but in the majority of cases it creates a stir. The part of the already mentioned paragraph (3) of Article 15 of the Press Act, according to which the court could prohibit the public publication of press products or documents not qualified as press product upon the

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[56] Pursuant to paragraph (2) of Article 5/A of Act no. LVIII of 1997 *„In the application of paragraph (1) are qualified as pornographic advertisment all those advertisments which illustrate sexuality with a seriously pornographic openess, especially those which openly represent a sexual act or a sexual organ."*

[57] Pursuant to Article 5/B of Act no. I of 1996 *„(3) Programmes which might disadvantageously influence the physical, mental or moral development of minors under 16 years of age, in particular by making direct reference to violence or sexuality, or having for determining element a violently resolved conflict, must be ranged into category no. III. The qualification of such programmes is: not recommended for children under 16.*
(4) Programmes which might disadvantageously influence minors' physical, mental or moral development, in particular by having for determining element the direct and natural illustration of violance or sexuality must be ranged into category no. IV. The qualification of such programmes is: not recommended for children under 18.
(5) Programmes which might disadvantageously influence minors' physical, mental or moral development, in particular by containing pornography or exessive or unjustified violance must be ranged into category no. V."

[58] Point b) of paragraph (4) of Article 23 of Act no. I of 1996

prosecutor's motion independently of the affected persons' will, or the prosecutor could immediately suspend the public presentation of the press product or the document, was qualified as anticonstitutional by the Constitutional Court in its decison no. 20/1997 (III. 19.), and as a consequence it abolished paragraph (3) of Article 15 of the Press Act.[59] Nevertheless before the abolishment of paragraph (3), the judicial practice met several cases where the competent judge used the right ensured by law, though it is true that in the majority of the cases a contrasting decision was made in the second-degree procedure. In spite of all these facts it is worth revising the legal argumentation of the courts of first and second instance, since we can trace how morals are approached in the legal sense. In November 1991, the Capital Court took a decision in the case of the periodical entitled *Új Hölgyfutár* in which it prohibited, after the suspension of the publication by the prosecutor general's office, the public publication of the leap number of 1990/1991 of the said periodical with reference to the offense of morals. The illustration of the cover page of the periodical represented the Hungarian Saint Crown in the company of obscene figures what the Capital Court of first instance found offensive to morals, stating the following: the "*notion of morals is not really worded in its deepness but […] in spite of this the notion of morals exists".*[60] According to the court, the representation of nudity on the cover page of the periodical in the way as it could be seen on the cover page offended morals and "the taste, the prudency and moral sense of those people who bow their head in front of a church, make the sign of the cross in front of a crucifix, and who do this and did this in every social system whether it is a dictatorship or a democracy. And this comprises the majority of people […] According to the standpoint of the court, the respect of national symbols without conditions belongs also to the notion of morals".[61] In its legally binding decision, the court of second instance admitted the appeal of the periodical. The decision provoked a dispute in the special literature as well,[62] first of all because of the judgement of morals and the question of the qualification of artistic works, though it is true that the amendment of 1993 of the Criminal Code decided of the question definitively (?) in this direction as well.[63] The Decision of the Constitutional Court no. 13/2000 (V. 12.), which was brought in connectin with the offense of national symbols and rejected the motion for the statement of the anticonstitutional character of the aforesaid part of the Criminal Code, thinks that the role and the purpose of criminal law sanction or sentence is to maintain the soundness of legal and moral norms when the sanctions of other law branches cannot help.[64] If we analyse the decision of the Capital Court – taking no notice of and disregarding from the concrete case, i.e. the illustration of the incriminated cover page – it is apparently similar to the abovequoted case decision of the Supreme Court brought in 1992 (one year later) which, by referring to „public comprehension" [65] actually backed up the argumentation detaled in the abolished decision of the Capital Court brought in the case of the *Új Hölgyfutár* which made

[59] According to decision of the Constitutional Court no. 20/1997 (III. 19.) *„It is anticonstitutional that the prosecutor can initiate, by making reference to the offense of others' rights linked to the person and to the realisation of a private charge crime, independently of the affected persons' will, that the court may prohibit on this basis the public publication of a press product or a document not qualified as press product, and that the prosecutor can immediately suspend the public publication of such press products or documents."*

[60] Quoted by: HALMAI, Gábor: *A véleményszabadság határai…(The limits of the freedom of expression)* p. 262.

[61] Quoted by: HALMAI, Gábor, *Ib.*

[62] See: HALMAI, Gábor, *Ib.*

[63] The offense of national symbols was enacted into the Criminal Code by Article 55 of Act no. XVII of 1993 as Article 269/A.

[64] Point 1 of Chapter IV of the decision of the Constitutional Court no. 13/2000 (V. 12.)

[65] According to the abovequoted case decision of the Supreme Court *„The collision of the press product with morals can be stated if this character is clear and undiscutable according to public comprehension".*

reference to the moral sense of the „majority of people" when prohibiting the publication of the „leap number" of the periodical. In my opinion the standpoint according to which: "The reasoning that the 'glaring illustration' of nudity offenses the moral sense of the 'overwhelming majority' of those people who bow their head in front of a church is not enough for prohibiting the periodical"[66] can be hardly defended after the case decision of the Supreme Court if we disregard the concrete case.

Hungarian jurisprudence offers also examples for decisions relating to the freedom of expression in respect of a religion or the Catholic Head of the Church and similar to the cases of Strasbourg. The Chief Inspectorate for Consumer Protection negotiated the so-called *„case of the placard of the yawning Pope"*, in which it imposed a penalty as well since the placards illustrating the yawning John Paul II and relating to the advertisment of a TV channel were found to be unethical by the Ethics Committee of the Advertising Association. In the reason of its decision the Chief Inspectorate referred to the provisions of Act on Advertising relating to the protection of personality's rights and others' religious conviction.[67] We can found several examples for measures taken for the protection of morals not only at the Inspectorate for Consumer Protection but also in the sphere of activity of the National Radio and Television Body. From amongst the procedures of the Advertising Standards Authority, the procedure against the periodical entitled *Cosmopolitan* worth being mentioned at the first place. In this procedure of 1997, the Inspectorate qualified the large placard entitled "the Cosmopolitain reader's favourite bra" as harmful to children's and minors' moral development. The placard represents the naked bust of a lady as a man's hands are embracing from the back her uncovered breast.[68] The authoriy decided to prohibit the campaign which popularised the periodical, but the periodical had meanwhile covered the placards, so after the appeal the National Chief Inspectorate for Consumer Protection disregarded from the payment of the penalty. A good example for the changing of the notion of morals and of moral behaviour is that in November 2002 the similar cover photo – though with a different meaning - of another magazine, which was distributed also nationwide, did not provoke the same indignation.[69]

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66 HALMAI, Gábor: *A véleménynyszabadság határai…(The limits of the freedom of expression*) p. 263. From amongst those who represent this standpoint, see the abovementioned separate opinion of László Sólyom and Tamás Lábady constitutional judges annexed to the decision of the Constitutional Court no. 20/1997 (III. 19.).

67 HALMAI, Gábor: *A sajtónyilvánosság határainak módosulásai…(Modifications of the limits of the publicity of the press)* p. 102.

68 HALMAI, Gábor: *Kommunikációs jogok. (Communications rights)* Új Mandátum kiadó, Budapest, 2002, p. 143.

69 The cover photo of the *Penthouse* magazine of November 2002 represents György Faludy, writer, with his young wife in a position similar to the cover page of the *Cosmopolitan* of 1997. In spring 2003, the large placards of the League Against Cancer represented uncovered breasts – without the hands of a man.