European Integration Studies, Volume 20, Number 1 special edition (2024), pp. 7-20.
https://doi.org/10.46941/2024.se1.1

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Arrest practice and habeas corpus principle

ABSTRACT: The legal history of habeas corpus goes back to the period of the 'Golden Bull' issued by King Andrew II of Hungary. In the development of English law, the Magna Carta Libertatum marked the emergence of the principle before that. The essence of the principle is that deprivation of liberty may be pronounced by a person vested with judicial power and that the person concerned must be brought before a judge in order to be heard by the accused before an arrest can be ordered. The judicial order for arrest is also provided for in the Fundamental Law of Hungary. The principle raises a number of questions of law enforcement in domestic court practice, but also in the context of EU cooperation.

KEYWORDS: habeas corpus principle, criminal procedure, arrest practice.

1. Introductory thoughts

I was a student at the Miskolc University Faculty of Law when Professor Ákos Farkas aroused my interest in the science of criminal procedure. Later, at the Ferenc Deák Doctoral School, he undertook the supervision of my doctoral studies. I also owe my later scientific achievements to him. Dear Ákos! Thank you for letting me be your student!
By the habeas corpus procedure, we usually mean when the detained person can turn to the court with an urgent request for his release. The right to a judicial hearing and the right to judicial review are also closely related to the principle. The law on criminal procedure seeks to ensure that the pretrial detention of the accused takes place only in the context of adversarial proceedings. During the investigation, the investigative judge makes a decision in a meeting, during the preparation phase of the trial this is only possible in a meeting. However, there may be several procedural situations where there is no clear prescription for the given form of procedure.

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2. The origin of habeas corpus principle

Habeas corpus is the greatest safeguard of personal freedom, guaranteeing that an individual can only be deprived of liberty for a short period of time unless he is formally charged or arraigned before a judge.

The principle first appeared in the 13th Century as a means of preventing the arbitrary restriction of personal freedom during the war between England's barons and the king. An individual detained at the king's behest could receive a writ of habeas corpus from a judge, which would then be handed to the arresting authorities. In this manner, the detainee could demand that the authorities disclose the reasons for his arrest, grant him a court hearing and allow a judge to review the legality of the arrest. By sending back the writ, the authorities would confirm that they had fulfilled these conditions. The development of the habeas corpus principle covers several important milestones, including the prohibition on arbitrary detention enshrined in the Magna Carta.[1]

The very first written source of law in Hungary, the Golden Bull, shows that the Hungarian legal system was developing in parallel to that of England. Proclaimed in 1222 by King András II, this document qualifies the detention of suspects as the most basic restriction on the individual right to liberty. According to Ferdinandy, the Golden Bull represents "the basic code of personal freedom in Hungarian public law" since it mandates the state to respect the individual and, by extension, personal freedom.[2] The Bull deals with arrest and detention in Article II: "We also desire that neither [the current monarchy] nor any king that succeeds us shall arbitrarily arrest or oppress any nobleman unless he is previously convicted in a court of law and through proper procedure."

It is worth mentioning that the 1789 Declaration of the Rights of Man and of the Citizen also codified habeas corpus. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations, makes the principle mandatory. Habeas corpus also constitutes a significant part of the European Convention on Human Rights, signed on 4 November 1950 in Rome intending to defend human rights and fundamental freedoms.

Article 5 of the Convention lists the circumstances under which it is possible to deprive an individual of liberty. The Convention not only details the scope of circumstances but also discusses the most important

[1] Mezey, 2015, pp. 2-6

2 Ferdinandy, 1899, p. 169.

procedural necessities, such as the requirement that court proceedings be overseen by a judge. An arrested or detained individual must, with all deliberate speed, appear before a judge or other public official who is legally vested with commensurate powers. Throughout the period of arrest or detention, every individual who is deprived of liberty has the right to a hearing during which the court will decide on the legality of the detention; in case of unlawful detention, the court will order the petitioner released.[3]
The Convention's clause on arrests is supplemented by other recommendations. These include Resolution 11 (1965) of the Council of Europe's Committee of Ministers, which suggests that detention of suspects should not be an automatic requirement, but rather a decision made by a court of law following an examination of the facts and circumstances of the particular case. Arrest should be regarded as an exceptional measure that can be ordered and sustained only when absolutely necessary.[4]

In EU law it is also required by the Directive on the right to information in criminal proceedings that the Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which contains information about the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.[5]
The rules relating to the legality of detention also stem from the principles that ultimately led to the common rules of the European Arrest Warrant. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[6] The mechanism of the European arrest warrant is based on a high level of confidence between the Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union.

[3] Hungarian Act XXXI of 1993, the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome; Art. 5, Right to Liberty and Security.
[4] Elek, 2022, pp. 259-279.
[5] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[6] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

The execution of the European arrest warrant may be refused if there are reasonable grounds for believing that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation.

The requested person may not be transferred even if there is a risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The case law of the European Court of Justice has also raised the question of whether the execution of a European arrest warrant can be refused if there is a danger of judicial independence.

3. The right to a judicial hearing in the practice of the CJEU

The first legal instrument was adopted in 2002 on the European Arrest Warrant and the Surrender Procedures between the EU Member States.[7] The European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition. The EAW was introduced after the 9/11 terrorist attacks to create a fast-track extradition system in the EU. A new system was needed to ensure efficient cooperation in transnational cases. However, a legal institution had to be established without prejudice to fundamental rights to liberty and the right to judicial hearings.

The *right to liberty* is one of the most important principles in judicial cooperation between member states. The right to liberty requires that rules allowing for deprivation of liberty be enacted and enforced in an accessible and foreseeable way.[8] This means legal certainty. In law enforcement activities, the most common restriction on fundamental rights is the limitation on personal freedom – that is, the apprehension and preliminary detention of suspects. Habeas corpus proceedings are generally understood to be cases in which an individual in custody files an urgent petition to a court with the aim of obtaining his release. The principle is closely related to the accused party's right to a hearing before the bench and right to judicial review.

[7] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).
[8] Mancano, 2019, pp. 1-15.

A preliminary referral question was formulated in the context of the execution in Romania of four EAWs issued by the German authorities against a Romanian national who had not been heard before issuing the EAW.

The CJEU decided that the FD EAW cannot be interpreted as meaning that the requested authority may refuse to execute an EAW because the person had not been heard before issuing the EAW. The FD EAW grants the right to be heard in the state of execution which complies with the rights recognised under Articles 47 and 48 of the EU Charter.[9]

The CJEU underlined that Under Article 1(2) of Framework Decision 2002/584, the Member States are in principle obliged to act upon a European arrest warrant.

The Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a. Admittedly, under Article 4a of Framework Decision 2002/584, the infringement of the rights of the defence during a trial which has led to the imposition of a criminal sentence *in absentia* may, under certain conditions, constitute a ground for non-execution of a European arrest warrant issued for the purposes of giving effect to a custodial sentence. By contrast, the fact that the European arrest warrant has been issued for the purposes of conducting a criminal prosecution, without the requested person having been heard by the issuing judicial authorities, does not feature among the grounds for non-execution of such a warrant.

> The observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued. It must be stated that an obligation for the issuing judicial authorities to hear the requested person before such a European arrest warrant is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom,

[9] Case C-396/11, *Ciprian Vasile Radu v. Curtea de Apel Constanţa,* 29 January 2013.

> security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight. In any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such as way as not to compromise the effectiveness of the European arrest warrant system.
> Thus, it is apparent from Articles 8 and 15 of Framework Decision 2002/584 that, before deciding on the surrender of the requested person for the purposes of prosecution, the executing judicial authority must subject the European arrest warrant to a degree of scrutiny. In addition, Article 13 of that framework decision provides that the requested person has the right to legal counsel in the case where he consents to his surrender and, where appropriate, renounces his entitlement to the speciality rule. Furthermore, under Articles 14 and 19 of Framework Decision 2002/584, the requested person, where he does not consent to his surrender and is the subject of a European arrest warrant issued for the purposes of conducting a criminal prosecution, is entitled to be heard by the executing judicial authority, under the conditions determined by mutual agreement with the issuing judicial authorities.[10]

Framework Decision 2002/584 must be interpreted as meaning that the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued. [11]

[10] Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant and surrender procedures between Member States – European arrest warrant issued for the purposes of prosecution – Grounds for refusing execution. [Online]. Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=E03B61AB2C5EE15841503FE2DC5016A5?text=&docid=132981&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=624569 (Accessed: 30 July 2024).
[11] Ibid.

4. The practice of the European Court of Human Rights on the guarantee system for ordering coercive measures

The European Court of Human Rights has, in numerous judgments, addressed the legality of detention in light of the guarantee of due process enshrined in Article 5 of the European Convention on Human Rights.

In harmony with the provisions Article 5 (1c), every person who is arrested or detained must be brought promptly before a judge (or other public officer authorized by law to exercise judicial power); the arrested or detained individual has a right to a hearing on his case within a reasonable amount of time or must be released until the hearing takes place. His release must take place under conditions that will guarantee his appearance at the hearing.

In several judgments, the European Court of Human Rights dealt with the procedural guarantees of the legality of detention in relation to the provisions of Article 5 of the European Convention on Human Rights.

All persons arrested or detained in accordance with the provisions of Article 5.1.c) shall be immediately brought before a judge or other official empowered by law, and the arrested or detained person shall have the right to a hearing within a reasonable time limit or released pending trial. The release may be subject to conditions that ensure the appearance at the trial.

The European Court of Human Rights has pointed out that the purpose of interrogation during detention under Article 5(1)(c) is to supplement the criminal investigation by confirming or rejecting the suspicions that led to the arrest.[12] The same criteria were listed by the European Court of Human Rights in case of Goussinsky v. Russia in § 53 of the judgment of May 19, 2004.[13]

According to the European Court of Human Rights, the guarantee system in relation to detention and arrest is based on three conditions: it must work quickly, it must be automatic, it must be carried out by an independent, judicial institution that also has the right to release.[14]

The Strasbourg court also found a violation of Article 5, Section 3 of the Convention because the applicant, who was later sentenced to eighteen

[12] *Murray v. United Kingdom,* App. No. 14310/88, 21 September 1994, paras. 55-56.
[13] *Case of Gusinsky v. Russia,* App. No. 70276/01, 19 May 2004.
[14] *Zervudacki v. France*, App. No. 73947/01, 27 July 2006, paras. 33-35.

years and nine months in prison, was not immediately brought before a judge or other official with judicial powers after his detention.[15]
In the case of Gábor Nagy v. Hungary, the European Court of Human Rights stated that "in this case, the court is not convinced that the applicant was heard at reasonable intervals regarding the justification of his detention, not least because his requests for release were judged only in the framework of a written procedure. In particular, a period of around four months cannot be considered a reasonable interval."[16]

It is especially worth mentioning that in the Strasbourg judiciary, an emphasized part of the guarantee system related to coercive measures is the full fulfillment of the obligation to provide reasons. The justification must also exhaustively cover what was experienced during the personal interview. Perhaps an illustrative example of this can be when, due to the principle of ne bis in idem, no further proceedings could be conducted in the Member State related to the given crime, so the ordering of a coercive measure is also excluded if the defendant has already been held responsible for the same crime in another European country.[17] Due to the lack of available databases and the paucity of information, this is sometimes revealed only during the defendant's personal hearing.

The European Court of Human Rights insisted on the test established in this way, emphasizing the importance of the existence of judicial guarantees, even if the same should not be expected based on Article 5, paragraph 4, as according to Article 6, paragraph 1 (Wesolowski v. Judgment of September 22, 2004 in Poland, § 60). In such cases, a hearing is essential (Kampanis v. judgment of July 13, 1995 in Greece, § 47) and, in general, equality of arms must be ensured between the parties, i.e. the prosecutor and the detainee (Wesolowski v. Poland judgment, § 61). Equality of arms imposes the obligation on the state to ensure that the complainant appears at the same time as the prosecutor, so that he can reflect on his conclusions (Wesolowski v. Poland judgment, § 66).[18]

[15] Czine et al., 2008, p. 255.
[16] *Gábor Nagy v. Hungary*, App. No. 33529/11, 11 February 2014; *Erisen and Others v. Turkey*, App. No. 7067/06, 3 April 2012, para. 51.
[17] Marek, 2011, pp. 221-226.
[18] 1/2008. (I. 11.) Constitutional Court Decision, Dr. Kovács Péter judge dissenting opinion.

5. Constitutional aspects in domestic habeas corpus proceedings

We also occasionally use the technical term 'habeas corpus' for procedures restricting personal freedom in Hungary. This is especially noticeable in the practice of the Constitutional Court. The Constitutional Court clearly calls the ordering and extension of pre-trial detention and house arrest 'habeas corpus-type proceedings'. Section 55 of the previous Constitution was defined by the Constitutional Court as the right to security, as the right to freedom and personal security. "This provision is the habeas corpus rule of the Constitution, which continues in such a way that no one can be deprived of his liberty, except for reasons and procedures defined by law, and must be brought before a judge as soon as possible."[19]

In its 2007 decision, the Hungarian Constitutional Court found unconstitutional and violated the right to a fair trial, and annulled the provision of the previous law on criminal procedure, which made it possible to order the pretrial detention of the accused in his absence and without a hearing. The challenged provision, when making the decision on pre-trial detention, required only the absence of pre-trial detention as a fact. Not only the conduct of the defendant, but also the error of the court ordering the pretrial (for example, inaccurate, incomplete filling) or the discretionary decision of the executive body, and a number of other circumstances can lead to the failure of the pretrial. On the other hand, the former procedural law automatically based the presumption that all of this was due to the defendant's fault.

The Constitutional Court said, that this necessarily entails that the court does not actually conduct any investigation into the circumstances that are the basis of the pre-trial detention, which are the responsibility of the defendant. It also does not investigate whether the defendant is staying in an unknown place, even though in this case the ordering of the coercive measure is provided for in the Criminal Procedural Act it is excluded by the rules of its procedure against an absent defendant or a defendant residing abroad.[20]

The decision of the Constitutional Court examining the constitutional requirements of the investigative judge's procedure was also based on the practice of the Strasbourg court, according to which the requirements of Article 5, paragraph 3 of the Convention are met "if the judge or the person

[19] 67/2011. (VIII. 31.) Constitutional Court decision.
[20] 10/2007. (III. 7.) Constitutional Court decision ABK 2007.

entrusted with judicial authority hears the detainee and if he is obliged to examine the circumstances that speak for or against his detention, to decide on the reasons that justify it, and in the absence of these, to decide on his release. (Schiesser v. Switzerland, 4 December 1979, § 31)"[21]

During the Schiesser v. Switzerland decision, the dissenting judge expressed even more strongly: (Judge Ryssdal): „I am unable to agree with the conclusion of the majority of the Court that there has been no breach of Article 5 para. 3 of the Convention in the present case. The object and purpose of Article 5 is to give specific guarantees for the protection of personal liberty. It is fundamental that no person may be deprived of his liberty except when this is decided on the basis of very clear reasons prescribed by law. It is also fundamental that such a decision should be taken by an impartial and independent authority in accordance with a procedure prescribed by law. In criminal cases this applies not only to the detention of convicted persons but also to detention on remand. It would certainly be preferable if everyone arrested on suspicion of having committed an offence had to be brought promptly before a judge and if only the courts had competence to decide on the reasons for and against detention on remand. However, Article 5 para. 3 of the Convention leaves it to the Contracting States whether arrested persons are to be brought before a "judge" or before an "other officer authorised by law to exercise judicial power". This wording is not quite clear and it is difficult to say what its meaning is if it is considered apart from its context. Here the relationship between the provisions of Article 5 para. 3 and of Article 5 para. 4 is of importance. According to Article 5 para. 4, everyone who is deprived of his liberty by arrest or detention "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court ...". Paragraph 4 thus expressly requires the intervention of a court. Both the wording of paragraph 3 and the relationship between paragraphs 3 and 4 seem to support the view that Article 5 para. 3 does not require for the "officer" mentioned therein the same sort of judicial attributes as it does for the "judge".”[22]

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[21] 166/2011. (XII. 20.) Constitutional Court decision; *Schiesser v. Switerland,* App. No. 7710/76, 4 December 1979., para. 31; *Assenov and Others v. Bulgaria,* App. No. 90/1997/874/1086, 28 October 1998, paras. 146-149; *McKay v. United Kingdom,* App. No. 543/03, 3 October 2006, Vincent, 1999.

[22] *Case of Schiesser v. Switerland,* App. No. 7710/76, 4 December 1979.

6. The practice of Hungarian Supreme Court on the right of judicial hearing in connection with coercive measures

In a criminal procedure the Regional Court of Appeal ordered the arrest of the accused until the end of the second-degree proceedings. Prior to this, the Regional Court found the defendant guilty of attempted homicide and sentenced him to 15 years in prison as a repeat offender.
The verdict did not become legally binding when it was announced. The Regional Court rejected the prosecutor's motion to order the arrest. He justified the refusal with the fact that the accused is serving an other legally binding prison sentence, and the decision to order his arrest may be timely at the time of his release, which is the task of the second-instance court.

In the second-degree proceedings, the Regional Court of Appeal ordered the arrest of the accused after the jail office informed him of his expected release.
The defendant and his defense lawyer filed an appeal against the decision of the Regional Court of Appeal.

During the written justification of the appeal, the defender objected primarily to the form of the procedure leading to the decision to order the arrest. According to his point of view, the court made its decision in council meeting and not ensured the hearing of the parties. So the court rejected the procedural form that provides broader guarantees to a council meeting held without the possibility of personal participation of the parties is a measure that violates the spirit of the Basic Law, the Constitution. The Supreme Court found that the appeal filed by the accused and his defense attorney was well-founded. The Regional Court of Appeal made its decision at a council meeting and ordered the arrest of the accused. The Supreme Court found that the judgment reasoning regarding the procedural form of ordering the arrest was wrong. It is a general guarantee rule that the court can only decide on an arrest in the presence of the accused. The arrest of the accused cannot be ordered without his or her presence. In view of all this, the Supreme Court overruled the order of the Regional Court and ordered the court to proceed with a new procedure, and reserved the arrest of the accused until the second-instance court's decision in the repeated procedure.[23]

[23] Supreme Court decision Bpkf.II.1.045/2021/2.

7. The possibility of extraordinary legal remedies against pretrial detention orders in Hungarian law

It is perhaps indisputable that constitutional concerns may arise in connection with coercive measures. In several Hungarian cases, the Strasbourg court made a condemning decision, referring to the fact that the courts dealing with pre-trial detention did not adequately justify their decisions, thus the defendants were unnecessarily and unreasonably long in pre-trial detention. In the interpretation of Article 5 of the Convention, detention is considered illegal if it cannot be sufficiently justified, if, for example, the court decision does not adequately justify the existence of the conditions of detention.[24]
According to the practice of the Strasbourg court, it also constitutes a violation of Article 5 of the Convention if the court does not take into account the arguments put forward by the parties, but instead makes a mechanically repeated reference to the deprivation of liberty.[25]
According to the current rules, however, a constitutional complaint cannot be filed against pretrial detention.[26]

However, the constitutional judge Miklós Lévay, noting the parallel reasoning of the Constitutional Court's decision, drew attention to the contradictory situation that arose between the approach of the Constitutional Court and the European Court of Human Rights in Strasbourg regarding the reviewability of the decision on pretrial detention. Indeed, the European Court of Human Rights considers independent judicial decisions on coercive measures to be a separate substantive decision. This contradiction may lead to the fact that, in the case of a violation of the right to personal freedom guaranteed in both the Basic Law (Constitution) and the European Convention on Human Rights, in the case of pre-trial detention, according to the current rules of the Act on the Constitutional Court, the Constitutional Court cannot perform its function of protecting fundamental rights, instead the person concerned must turn directly to the court in Strasbourg for legal protection. Pursuant to Article 35 of the Convention, cases may only be

[24] Szabó, 2014, pp. 725-729.
[25] E.g: *Nikolova v. Bulgária*, App. No. 31195/96, 25 March 1999; *Klyakhin v. Italy*, App. No. 46082/99, 30 November 2004; *Maglódi v. Hungary*, App. No. 30103/02, 9 November 2004; *X.Y. v. Hungary*, App. No. 43888/08, 19 March 2013; *Hagyó v. Hungary*, App. No. 52624/10, 23 April 2013; *Hunvald v. Hungary*, App. No. 68435/10, 10 December 2013.
[26] 3002/2014. (I. 24.) Hungarian Constitutional Court Decision.

referred to the Strasbourg court if the applicant has exhausted all domestic remedies. What is considered a remedy depends on the legal system of each state. Based on the practice of the Strasbourg court, however, the exhaustion of legal remedies is only mandatory if it is accessible to the person concerned and can be classified as meaningful and effective.[27] Based on the practice of the Constitutional Court, it is not possible to file a constitutional complaint against a decision on pre-trial detention. At the same time, this also means that the appeal against the decision on pre-trial detention exhausts the domestic legal remedies, after which it is possible to appeal directly to the human rights court.

And according to the dissenting opinion of the constitutional judge András Bragyova, the constitutional complaint submitted against the final judicial decision on pre-trial detention should have been accepted by the Constitutional Court.

The pre-trial detention is the judicial deprivation of the defendant's personal freedom before a legally binding decision is made. The decision on pretrial detention is decisive in determining whether a person accused of a crime can be lawfully detained, but a person who is not considered guilty due to the presumption of innocence. In this matter, the judicial decision on pre-trial detention is decisive: the issue is the legality of pre-trial detention. "Nevertheless, the majority position leads to the fact that Article IV of the Basic Law The legal protection of the basic constitutional guarantee for the protection of personal freedom, similar to the rule of common law habeas corpus contained in Hungarian Constitution, remains incomplete."[28]

8. Closing thoughts

Today's procedural rules can only be understood through historical and European perspectives. Jurisprudence can only be well-founded if it is supported by high-level scientific activity. It is the eternal merit of Professor Ákos Farkas that criminal judgments can rely on outstanding scientific results at any time.

[27] *Cardot v France*, App. No. 11069/84, 19 March 1991; *Vernillo v. France*, App. No. 11889/85, 20 February 1991.

[28] 3002/2014. (I. 24.) Dissenting opinion of constitutional judge András Bragyova against the decision of the Constitutional Court, joined by constitutional judge Péter Kovács.

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