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# THE PERILS OF PRIVATISING PUBLIC POWERS*

One of the central concerns of contemporary constitutional discourse is to what extent the transfer of state sovereignty in the second half of the 20th century has affected the applicability of constitutional concepts rooted in the heritage of the Enlightenment. In Hungary, due to the recent accession to the European Union, the issues whether the division of competences between the European Union and its Member States can be interpreted within the framework of the classical sovereignty-discourse and the European Union could be vested with the characteristics of a state preoccupies constitutional theory[1].

The present paper does not address the issue of transfer of sovereignty as conceived from the perspective of domestic constitutional law and European Community law. Instead, it focuses on another phenomenon that affects sovereignty-discourse: the constitutional implications of privatising certain aspects of sovereignty. Delegation of state powers to private entities, which often seem to be suicidal, [2] may serve as a common denominator of strange coalitions. As the examples below show privatisation—to a different degree—may adversely affect football fans, authors and—somewhat surprisingly—the head of the executive branch. The most important features of the privatisation of public powers are the possible diminution of liberty and, by granting privileges to preferred groups, the impairment of the cohesion of the political community.

The analysis of certain examples of the Hungarian regulation reveals that the different techniques of privatising state powers are based on different considerations. The classic example of privatising public powers aims at empowering privileged interest-groups or factions[3] thereby threatening the fundamental rights of individuals (see Part I and II). In other cases, however, the notion is related to the twisted logic of self-defence or deference of the decision-makers. Privatisation in these cases aims to provide immunity to decision-makers from political accountability. The self-limitation of the executive's power to enact delegated legislation is a good example of this (see Part III). This paper does not intend to provide a general recipe for restoring liberty, nor does it argue that delegation of private powers is unconstitutional *per se*. Nevertheless, mapping the consequences of privatisation schemes is an important step towards finding the principles that justify the constitutionally acceptable ones. The paper builds on the assumption that the integrity of the political community is jeopardised if the interest-groups with public powers are not prevented from realising their constitutionally and socially unacceptable goals and the state does not get rid of its suicidal tendencies.

## 'FREEDOM FOR ULTRAS!'[4]

Since the dissolution of the 1950's Golden Team or the Magical Magyars it is difficult to conceive Hungarian football from a transcendental perspective. Nowadays, football drives fans into despair instead of awe. However, if one examines the governing body of football, the Hungarian Football Association's (MLSZ) regulation on football matches and contrasts it with the constitutional requirements on freedom of expression, the MLSZ appears to enjoy a privileged, Jovanian position in which different constitutional requirements apply as compared to those applicable to law-makers.

Hungarian law defines the MLSZ as an national sport association. The law applicable to national sport associations is Article 66 of the Civil Code (Act IV of 1957), the Act on Sport (Act I of 2004) and the Act on the Right of Association (Act II of 1989). These provisions typically regulate the private sphere, providing that a sport association is a body with self-government and registered membership established by the organisations functioning in the given sport discipline; individuals are excluded from membership. Under Article 20(1) of the Act on Sport a national sport association pursues tasks provided by law and exercises special powers as regulated in that act. Article 20(3) holds out the prospect that acts of parliament may define tasks that may only be fulfilled by national sport associations.

* A different version of this paper was published in Chronowski Nóra (ed), *Per Pedes Apostulorum* (Pama, Pécs 2008) 185–202.

At first impression the goal of the MLSZ appears to be enhancing private autonomy in the field of football. In its own definition the MLSZ is an autonomous (self-governing) organisation governing football in the Republic of Hungary that coordinates and supports the activity of bodies and individuals involved in this discipline of sport.[5] Each year the MLSZ enacts a number of regulations on professional football. Under Article 23(1) of the Act on Sport the MLSZ is required to enact three major regulations: the regulation on competition, registration and transfers. Compliance with these regulations is a precondition of participating in the competitions organised by the MLSZ (the professional championship, the national cup etc.). Examining the Act on Sport and the MLSZ regulations, however, questions whether the MLSZ is truly in support of private autonomy and, more importantly, its regulations meet the constitutional requirements of free speech.

The decreasing community of devout football supporters, who decided to follow the fixtures of Hungarian football clubs in person had to get used to the fact that for the purpose of their 'own personal safety' surveillance cameras keep them under observation during the matches and upon entry to the stadium they are subject to clothing and baggage searches.[6] In order to reduce anti-social behaviour in stadiums and to exclude racist expressions from football stadia the MLSZ launched a 'zero tolerance' campaign[7] in the 2007-2008 season. A heavily criticised manifestation of the zero-tolerance policy was the requirement of a prior authorisation on all signs displayed by supporters in MLSZ events.[8] The policy, the effectiveness of which has been questioned recently by many,[9] produced unprecedented unity among football fans' associations, the relationship among which is often characterised by extreme violence and hatred. Being well aware of the new limitation on their freedom of expression they responded in unity[10] to the MLSZ regulation for the 2007-2008 season[11], arguing that it interferes with their free speech rights.[12]

In order to determine whether freedom of expression prevails in football stadia as required by the Constitution, the provisions of the Act on Sport on entry to and expulsion from football stadia and the MLSZ's disciplinary regulation need to be examined. The duty of applying the relevant rules of the Act on Sport on entry and expulsion is placed upon the private party (company) organising the sports event. Apart from obvious cases excluding entry to football grounds such as being under the influence of drugs or alcohol, Article 71(1)d of the Act on Sport denies entry from football supporters in possession of signs or flags capable of inciting hate against others or any totalitarian symbols prohibited by law. When the prohibition is breached in the course of the sports event, the organiser is required by Article 71(3) of the same act to expel the person in question. Under Article 73(1) of the Act on Sport the organiser is entitled to deny the person expelled the sale of entry tickets and to prevent his participation in later events. The act sanctions the mere *possession* of signs or flags capable of inciting hate against others or any totalitarian symbols prohibited by law. It follows that the act incorporates an irrebuttable presumption that the possession of such signs, flags and symbols will entail their use in public, which irrespective of the potential effect of the sign must be prevented upon entry to the football stadia.

Football matches have a specific ambience when compared with political rallies or public cultural events. Weekend games provide one of the most important opportunity of self-expression for many football fans, especially for the so-called ultras who are fanatic, organized supporters. For the ultra, 'as in case of many other subcultures, the expression of own values that are at variance with the general values of society is essential. With the notices (messages on a gigantic piece of textile revealed for a few minutes making it visible in the whole stadia) and the supporters' songs the ultra intends to intimidate the opponents (or to express its devotion to the club or the town). Verbal insults are commonplace, but humour is never neglected. For this reason the chants and the songs are not to be taken seriously in all circumstances: their message is only valid in the specific social environment of the football stadium questioning whether they should be understood as in normal circumstances. The message '*Lazio delenda est*' displayed by the Roma supporters is a good example of supporters' creativity, historical awareness and that the messages need not be taken seriously'.[13]

It appears that the Hungarian legislator and the MLSZ overlooked the classical thesis that 'freedom of expression is the freedom to offend others'.[14] The Act on Sport does not include the condition that the breach of public order by football supporters must entail a direct and genuine threat to or violation of individual rights (e.g. by the possible use of violence).[15] Neither does it require that the totalitarian symbols prohibited by law are distributed, used or displayed in public.[16] The possession of the incriminated items which assumes that the person's clothing and other personal items will be searched[17] provides in itself sufficient grounds for denying entry or expulsion.

This means that different standards apply as regards the limitations of freedom of expression in a sports event and a political rally. Irrespective of the effect induced by the signs capable of incitement to hatred or no matter whether the totalitarian symbols prohibited by law are displayed their possession is sanctioned *per se*. In the light of the Hungarian Constitutional Court's jurisprudence on free speech (see, below) the Act on Sport imposes limits on freedom of expression that are more severe than those regulated in the Criminal Code and the Civil Code. The mere content of symbolic speech or the possession of items with inciting or totalitarian content serves as a basis of restriction. The organizer may not take into consideration the effect of symbolic speech in the expulsion procedure. The act does not address the effect of symbolic speech, and, hence, evidently the civil law requirement that the breach of individual rights must take place is ignored, as well.

It remains unclear why the law-maker incorporates different standards depending upon the place of exercising freedom of expression. Why should more severe sanctions be applicable to those supporting a football team in the evening as compared to participating in a political rally in the afternoon? Parliament might have shared the opinion that freedom of expression is jeopardised less when means less restrictive than criminal law (administrative measures) are applied.[18] This, however, is mere speculation as the act remains silent on this matter. Nevertheless, the Constitutional Court in its decision on the civil law sanctions of hate speech made it clear that the standards of limitation of freedom of expression as determined in 30/1992. (V. 26.) AB decision of the Constitutional Court (prohibition of content-based restriction, only external boundaries may serve as a basis of restriction, the protected interest must be concrete) are applicable to all cases where the constitutionality of measures restricting freedom of expression is at stake. This approach provides an unequivocal response to the question whether the irrebuttable presumption introduced in the Act on Sport limiting freedom of expression. The mere possession of a form of symbolic expression with inciting or totalitarian content or the display of an inciting sign, regardless of the effect of speech, cannot be sanctioned in the light of Article 61 of Constitution which guarantees the right to free speech to everyone.[19]

The cause of the unprecedented unity among football supporters' organisations was, however, not the impugned provision of the Act on Sport. The MLSZ, given its duty under the Act on Sport to enact regulations passed a disciplinary code that presents an even stricter restriction on freedom of expression of football supporters. Under the code denigration in public, discriminatory or defamatory statements and actions on grounds of race, colour, language, religion or ethnicity constitute disciplinary misconducts. The disciplinary committee of the MLSZ is responsible for commencing proceedings against the sport club responsible for such conduct by the spectators.[20]

This provision sanctioning defamatory or discriminatory expression mirrors the provision of the Criminal Code that was declared unconstitutional in 95/2008. (VII. 3.) AB decision by the Constitutional Court.[21] The practice of the Court regarding hate speech is clear on the point that the constitutional protection of speech cannot be denied on the grounds that the content of expression violates the interests, views, sensitivities of others or that it is considered as offensive or degrading by certain individuals. The limitation of freedom of expression may not be based on the content of the extreme viewpoint, only on its direct and foreseeable effect.[22] At the same time, one could argue that spectators should be protected from unwanted communication in a physically confined environment. The captive audience doctrine could hardly be generally applicable in football stadia. Spectators participate at football games open to the general public of their own volition and in exchange of an entry fee. Moreover, spectators are aware that that they will witness forms of communication that would be found disrespectful by 'the general public'.

Furthermore, responsibility for the conduct of spectators is placed only partially on the spectators, as the sports club the supporters of which were involved in the prohibited conduct will pay the pecuniary penalty. It is far from clear what principles justify that the said provision of the disciplinary code imposes an objective liability on sports organisations for the supporters' speech. The penalty is paired with the obligation to organise the following match without the presence of spectators. In case the affiliation of football supporters cannot be determined the responsibility of the organiser sports club will be established.[23]

In the light of the decisions of the Constitutional Court on hate speech it is hard to say on what basis the MLSZ disciplinary code sanctions some forms of expression that are not contrary to the Criminal and Civil Code. Not only the relevant provisions of the Act on Sport limiting freedom of expression appear unconstitutional, but the regulations of the MLSZ also raise constitutional problems. In such

case the public prosecutor—in its supervisory function—may exercise its powers to commence proceedings against the MLSZ before domestic courts for the protection of freedom of expression of football supporters.[24]

Without showing a constitutionally justifiable reason for departing from the general constitutional requirements on free speech, the application of double standard to football matches is unacceptable. This is so even if the supporters express their opinion as regards Hungarian football and its management in non-literary style or, as a result of undesirable mingling of politics and sport, the supporters express such extremist and racist opinion in the stand that cannot be conciliated with the Constitution. The provisions of the Act on Sport restricting freedom of expression and the standards established by the autonomous body of MLSZ which appear to be at variance with the standards established in constitutional law provide an example how freedom of expression can be threatened by the delegation of public powers (duties) to private bodies and by the state failing to exercise its supervisory powers to hold that private body to account.[25]

## ASSOCIATIONS AS LAW-MAKERS

Organisations for the collective administration of rights (hereinafter: OCARs) which function as associations have a peculiar relationship with their masters, the authors. The relationship is not marked by the classic problems of freedom of artistic expression e.g., how state regulation via censorship or the cut of funding may silence authors[26]. Hereinafter, I will concentrate on the problems caused by authorising OCARs essentially with law-making power. OCARs exersice their law-making power by regulating the rules of distribution of authors' royalties in the course of the obligatory form of collective administration of authors' rights.

Article 85(1) of the Copyright Act (Act LXXVI of 1999) defines the concept of collective administration of authors' rights[27]. Collective administration is the task of associations established under the Act on the Right of Association (Act II of 1989). Article 86(2) grants monopolistic position to OCARs, as nation-wide only one association may be registered for the collective administration of authors' rights related to one particular type of work and product. A precondition of accepting an association as an OCAR registration by the appropriate state authority is required. Under Article 93(1) of the Copyright Act and under Article 17 of the Act on the Right of Association the activity of OCARs is supervised by the minister of culture and education.[28]

The aim of OCARs is not simply realising the aims determined by its members. The Copyright Act regulates two forms of collective administration of authors' rights, a voluntary and an obligatory form. The consequence of collective of administration of authors' rights in both cases is that when an OCAR authorises the use for or enforces a claim to remuneration against a user the user shall be entitled to the use of the work or the performances of neighbouring rights of the same genre covered by collective administration, provided that the user pays the appropriate remuneration.[29]

The Act enables that right-holders may exclude certain works from the framework of collective administration of authors' rights.[30] In this respect a written declaration must be produced by the right-holder addressed to the OCAR objecting the authorisation of the use of his works or performances of neighbouring rights. In such circumstances authorisation will be provided directly by the author.[31] The possibility of such an objection (withdrawal from the framework of collective administration of rights) is, however, not possible in cases when the Copyright Act provides for obligatory collective administration of authors' rights.[32] In such instances the enforcement of authors' rights protected by Article 13(1) of the Constitution on the protection of private property falls within the exclusive competence of the given OCAR.[33]

Since OCARs must be established in the form of associations, the negative aspect of freedom of association potentially excludes that the Copyright Act would include obligatory membership in the association.[34] At the same time, in cases of compulsory collective administration of authors' rights, OCARs are in a monopolistic position[35], which is justified with the alleged necessity of effective rights enforcement. The use of public powers, affecting the rights of authors' protected under Article 13(1) of the Constitution,[36] is manifest when the OCAR regulates the distribution of royalties in the course of collective administration of rights. The rules of distribution regulate the distribution of royalties among the right-holders collected by the OCAR that remain after the reduction of administration costs. Regulating the distribution of royalties is independent from membership in the OCAR. Under the Act on the Right of Association the rules of distribution are to be determined by the governing body of the OCAR; in some instances other bodies of the OCAR (the management body) may act instead. Under Article 88(1)f(5) the rules of distri-

bution not only cover the members of the OCAR, but non-member right-holders obliged by law to enforce their rights through the OCAR also fall under its scope.[37] On this basis, the rules of distribution cannot be regarded as an internal measure of the association binding only its members based on their voluntary undertaking. Right-holders who are not members of the association have no influence on determining the rules of distribution established by an association that was granted monopoly by law in enforcing authors' rights.

When the collective administration of rights is obligatory the power of OCARs to enact the rules of distribution, substantially, stands for an empowerment to law-making. The association's regulatory nature manifests clearly in the fact that the scope of the rules of distribution covers non-member right-holders. Moreover, it is questionable whether the rights and obligations included in the rules of distribution could be contested before courts. Surprisingly, ordinary courts consider the rules of distribution as part of the internal autonomy of associations.[38] The judicial practice neither addresses the issue how the internal autonomy argument can be applied to those authors' who are not member of the OCRAs, nor raises the problem of normativity. The judicial interpretation of yearly publication of copyright tariffs that is closely related to the rules of distribution also seems to be problematic. The tariffs publications that are subject to approval by the Minister of Culture (in effect these are joint acts of the association and the minister) and published in the Hungarian Official Gazette are regarded as 'facts' or general terms of contract by ordinary courts[39] This interpretation also questions their contestability before courts.

Entrusting associations with the task of obligatory collective administration of authors' rights raises issues as regards the conditions of delegating regulatory competences and enforcing claims relating to proprietary rights. It is doubted that the constitutional requirements of law-makings can be appropriately implemented in case of OCAR regulations (even if subjected to approval by a minister of government). If the legislator entrusts associations to perform public functions, especially lawmaking power, the exclusion of obligatory membership only complies with the requirements that flow from the negative aspect of the right to freedom of association. . When regulatory competences are delegated to associations the results of which bind non-member individuals not only the transparency of enforcing authors' rights must be ensured, the constitutional constraints of delegating law-making activity must be taken into account. . Finally, I will briefly address the issue of what are the constitutional constraints of delegating law-making power to private entities (such as the OCRAs) or organisations comprising of state and private entities.

## THE SELF-LIMITATION OF GOVERNMENTAL REGULATORY COMPETENCES

The act on the National Interest Reconciliation Council (NIRC) is a rare example of government deciding to share regulatory powers with a body lacking constitutional legitimacy and political accountability. From the perspective of the doctrine of separation of powers the rationale of delegation can hardly be explained.

The main purpose of the Act on the NIRC and the related Act on the Committees of Sectoral Dialogue and Certain Issues of Middleware Social Dialogue (Social Dialogue Act) was to comply with Decision 40/2005. (X. 19.) of the Constitutional Court[40] that established the breach of Article 2(1) of the Constitution (the rule-of-law provision) on the grounds that Parliament had failed to legislate on the structure and functioning of organisation of national employment interest reconciliation. The acts in question, apart from establishing the NIRC, provide a comprehensive regulation of sectoral social dialogue.

The President of the Republic of Hungary initiated an ex ante constitutional review of the said acts. He questioned the constitutionality of those provisions that regulate the composition and the powers of the NIRC and the powers of national trade unions participating in the NIRC.[41]

The reason for questioning the provisions concerning the powers of the NIRC was that they empowered the participation of the NIRC in law-making activity in relation to which neither the NIRC nor the participating trade unions enjoy democratic legitimacy. The NIRC Act and Social Dialogue Act provided that in the course of regulating certain areas of the terms of employment (such as the amount of minimum wage of or the system of work appraisal)[42] the NIRC's and assent must be obtained in a co-decision procedure. The President argued that according to 16/1998. (V. 8.) AB decision of the Constitutional Court, the constitutional condition of exercising public powers, including law-making, to comply with the requirements of democratic legitimacy flowing from Articles 2(1) and (2) of the Constitution[43]. The provisions on the composition of the NIRC were

suggested to be unconstitutional as the composition of the NIRC fails to ensure that the public powers exercised by the NIRC are based on democratic legitimacy. This conception of democratic legitimacy would require that the national trade unions participating in the NIRC would represent the overall majority of the voters or the addressee of the laws (the employees) that were passed in a co-decision procedure, but said acts do not guarantee this.

In its 124/2008. (X. 14.) AB decision[44] the majority of the Court held that the observance of the requirements of democratic legitimacy per se does not make the transfer of public powers constitutional. The majority opinion pointed out that in the specific case Parliament empowered the NIRC with a right of co-decision in governmental and ministerial law-making. Based on its precedents, the Constitutional Court made it clear that the right of co-decision or consent in the law-making grants the addressee of that right the role of the law-maker. Without the consent of the NIRC the given ministerial or governmental decree would be invalid.

The requirements of democratic legitimacy flowing from Articles 2(1) and (2) of the Constitution has little effect on the transfer of public powers (powers of co-decision) regulated concisely in the Constitution. Sharing law-making powers requires a settlement on the level of the Constitution. Invoking its 2006 precedent on the unconstitutionality of the right of the political state secretary to substitute the minister in promulgating ministerial decrees, the Constitutional Court recalled that law-making powers are 'the most significant powers of state bodies. The Constitution contains an exhaustive list of law-making measures available to state bodies (…) The Constitution has established a comprehensive system as regards law-making powers: it determines the body entitled to regulate, the form of regulation, the hierarchical relationship between different forms of regulation and by virtue of Article 32/A(1) [i.e. constitutional review] the compatibility of that hierarchy with the Constitution is ensured.'[45] As a result, the requirements of democratic legitimacy may only ensure the constitutionality of the transfer of public powers if the transfer does not require constitutional amendment. Otherwise direct empowerment by the overwhelming majority of the electorate or the addressee of the public power in question is sufficient. [46] In absence of a constitutional amendment, the presence of democratic legitimacy appears to fail to ensure the constitutionality of transfer of law-making powers to a body such as the NIRC that is not entrusted with law-making competences by the Constitution.

Since the majority[47] deemed the issue of democratic legitimacy as an irrelevant factor in assessing the right of consent in the law-making process, the judges need not have had to examine whether the non-governmental members of the NIRC (the employers' and employees' national interest groups) represented the overwhelming majority of the addressee of the ministerial and governmental decrees in question. [48]

On this basis, the self-limitation in exercising law-making competences is forbidden. The right of consultation in the course of the law-making process cannot be mingled with ensuring social participation in the formal decision-making process. The relevant constitutional principles seem to enable the head of the executive to resist such neo-corporativist claims advanced in this regard. At the same time, the Constitution not only excludes the open challenges of interest-groups to share law-making powers without sharing political responsibility. Based on the same principles, the anomalies emanating from the law-making powers—that are currently disguised under the slogan of self-governing autonomy of associations—of the OCRAs could also be redressed.

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The examples of privatising certain aspects of sovereignty provide support to the assumption that the transfer of public powers to private bodies could jeopardise fundamental rights to the same extent as in case of the abuse of powers by public authorities. Given the lack of transparency and the absence of constitutional accountability of such private bodies the transfer of sovereignty may entail an increased risk of rights violations. Privatisation may not only reduce the effectiveness of the state, it may easily have an adverse effect on the cohesion of the political community.

The list of potential cases is far from being exhausted by these examples. The potential violation of the fundamental rights of football supporters and authors, and the constitutionally unsound transfer of law-making powers to the NIRC are not the only instances when slices of public powers are on offer to private bodies. Anglers[49] and dog breeders[50] or private undertakings operating speed cameras[51] provide further controversial instances of transfer of public powers. In connection with the aims and functioning of the association labelled Hungarian Guards (Magyar Gárda), causing the most anxiety in this respect today in Hungary, János Kis suggested that

freedom of association provided by the Constitution must not cover attempts to gain parts of the state's monopoly on the use of force.[52]

While classical constitutional theory focuses mainly on the protection of fundamental rights *vis-à-vis* the state, it never turned a blind eye on the perils of private groups acting against what Madison called 'the long-standing and general interests of society'. The system of separation of powers is based in part on the idea that the '*causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its effects'.[53].

Privatising public powers may have numerous rationales. Some instances could be explained by reference to logic of self-defence applied by the decision-makers. In other cases one may speak of privileging certain private interest groups. Nevertheless, not all transfers of public powers to private groups find its reasons in the undue influence of private interest-groups or in the 'suicidal' tendencies of decision-makers. Often the reason is the economic impotence of the state or an argument from efficiency. In Europe air traffic control is performed by private undertakings under thorough state supervision. The USA pays out billions of dollars every year to private undertakings to perform military or related tasks. The number of private employees performing military duties in Iraq these days can only be estimated.[54]

Apart from the potential effects on fundamental rights, considerations of efficiency in the state machinery also influence how the limits of privatising public powers are conceived. The privatisation of certain public functions and certain sections of public powers appears unavoidable. However, it needs to be determined with clarity which principles govern the constitutional choice between public functions that may be transferred to private actors and those that are excluded from privatisation. For this purpose an assessment is needed on the effects of privatisation on fundamental rights and whether state supervision could ensure the constitutionality of the transfer. This is not only a matter for regulation; the prudent use of state resources is needed, as well.

Granting public powers to private actors with conflicting interests so that their conflicts would diminish their ambitions in exercising excessive public powers is not the proper solution. By relying on the classical concepts of constitutionalism and their reinterpretation, the Constitutional Court and ordinary courts are properly empowered to engage in defining the constitutional boundaries of privatising public powers.

*Translated by Márton Varju*

## NOTES

1. For the latest Hungarian literature, see, Chronowski Nóra, *„Integrálódó" alkotmányjog* ['Intergrating' Constitutional Law] (Dialóg Campus, Budapest, Pécs 2005) 47 et seq., Sonnevend Pál, Jeney Petra, Kardos Gábor, Kende Tamás, Lattmann Tamás, Mink Júlia, *A közösségi jogrend* [The Community's Legal Order] Kende Tamás, Szűcs Tamás, Jeney Petra (eds), *Európai közjog és politika* [European Public Law and Politics] (Complex, Budapest 2007) 743 et seq.
2. According to András Sajó, in response to occurrences questioning the rule-of-law state points out that 'the state as opposed to dolphins, whales and human beings is not inclined to commit suicide. On the contrary, the most fundamental characteristic of the state is that it is capable of defending itself: the pack of thieves (magna latrocinium) was raised to be the state on the basis of the purpose of self-defence. Self-defence incorporates the maintenance of public order and on this pretext the conservation of existing power structures. Sajó András, *Önvédő jogállam* [Self-Defending Rule of Law] [2002] 2–3. Fundamentum 55.
3. See James Madison, 'The Federalist Papers, No. 10' in Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (New American Library, New York 1961) 77 et seq.
4. The banner of a Hungarian football club's, Kispest-Honvéd supporters protesting against the restrictions on freedom of speech imposed by the MLSZ <http://www.basildon.hu/img_view.php?imgid=12416).
5. http://www.mlsz.hu/anyagok/szabalyzat/2006-2007/mlszalapszabaly.pdf> accessed 8 January 2009.
6. The present paper does not discuss the issue of surveillance of supporters at sports events. On rejecting the necessity of such measures, see, the dissenting opinion of Judges László Kiss and István Kukorelli in 35/2002. (VII. 19.) AB decision of the Constitutional Court. They saw not only the breach of Article 59(1) of the Constitution on informational rights, but they also held that there is no manifest need in sports events to employ private organisations exercising the state's criminal competences. Article 74(3-6) of the Act on Sport remains to contain the obligation of organisers of sports events to provide public authorities with a copy of the recording. ABH 2002, 199, 221 et seq.
7. <http://www.mlsz.hu/anyagok/szovetseg/zero.pdf> accessed 8 January 2009.
8. Tóth Gábor Attila, 'Szabadláb. Az állam orra' [2006] 27 October Élet és Irodalom <http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0643&article=2006-1029-1825-14VXRT> accessed 8 January 2009.

9. See, e. g., Bernard E. Harcourt, Jens Ludwig, 'Broken Windows: New Evidence from New York City and a Five-City Social Experiment' [2006] 26 University of Chicago Law Review. Available at SSRN: <http://ssrn.com/abstract=743284> accessed 8 January 2009. In the Hungarian literature, see Sárosi Péter, 'Zéró tolerancia. Veszélyes illúziók a rend fenntartásáról' [Zero Tolerance. Dangerous Illusions about Maintaining Public Order] <http://drogriporter.hu/hu/node/941> accessed 8 January 2009.
10. <http://www.urb1991.hu/?aps=artc&f_artcid=110&lng=hu> accessed 8 January 2009.
11. <http://www.mlsz.hu/anyagok/szabalyzat/2007-2008/FEGYELMI_SZABaLYZAT_2007-08.pdf>
12. One of the most severely criticised provision is Article 63(4)c of the 2007-2008 MLSZ Regulation on Competition: '[the football game must be suspended or aborted] when supporters express degrading opinion of the players and the manager of the opponent team and the representatives of the MLSZ.'
13. Balázs Gábor, 'Se szentek, se bűnözők, egyszerűen ultrák' [Neither Saints, Nor Criminals, Simply Ultras] [2008] 15 February Élet és Irodalom. <http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0807&article=2008-0217-1555-02YXQE> accessed 8 January 2009.
14. Sajó András, 'Mit is akarunk védeni?' [What Do We Really Want to Protect?] [2006] March Beszélő <http://beszelo.c3.hu/cikkek/mit-is-akarunk-vedeni> accessed 8 January 2009.
15. 18/2004. (V. 25.) AB decision of the Constitutional Court, ABH 2004, 318.
16. Article 269/B(1) of Act IV of 1978 on the Criminal Code.
17. Article 71(4) of the Act on Sport.
18. In the Hungarian literature it was András Sajó who emphasised that criminal sanctions are not, in all circumstances, the most pervasive limitation on free speech. András Sajó, 'A faji gyűlölet igazolása büntetendő' [The Justification of Racial Hatred is Punishable] [2004] 4 Fundamentum 33, footnote 23.
19. See point III.2 of 96/2008. (VII. 3.) AB decision of the Constitutional Court. ABK 2008. június 916, 918 et seq.
20. Article 8 of the MLSZ Disciplinary Code <http://www.mlsz.hu/anyagok/szabalyzat/2007-2008/FEGYELMI_SZABaLYZAT_2007-08.pdf> accessed 8 January 2009.
21. 'Those who before the general public use or propagate an expression related to the Hungarian nation or certain groups within it, particularly national, ethnic, racial or religious groups, that may curtail the integrity of the members of the group in question or offend their dignity, commit a misdemeanour.'
22. See 95/2008. (VII. 3.) AB decision. ABK 2008. június 900, 903.
23. Article 8(9) of the MLSZ Disciplinary Code.
24. Article 27(1) of the Act on Sport; Article 16 of the Act on the Right of Association.
25. The effectiveness of judicial review—inter alia—depends on how ordinary courts would classify the disciplinary code as a legal measure. See, per analogiam, footnotes 46-47, infra, concerning the rules of distribution and the regulation on royalties of collective administrators of authors' rights.
26. For the contemporary issues of state subsidies of artistic expression in the European context, see, Christoph Germann, 'The "Rougemarine Dilemma": how much Trust does a State Deserve when it Subsidises Cultural Goods or Services?' < http://cadmus.iue.it/dspace/bitstream/1814/9027/3/MWP_2008_22.pdf> accessed 8 January 2009. For the history of literary censorship in the U.S. context, see, Edward de Grazia, *Girls Lean Back Everywhere* (Random House, New York 1992). For the problem of oppressing artistic expression through financial measures see, e.g., *Brooklyn Institute of Arts & Sciences v City of New York* 64 F. Supp. 2d 184 (E.D.N.Y. 1999).
27. "The collective administration of rights shall mean the exercise of authors' rights and neighbouring rights as well as database creators' rights respectively related to authorial works, productions of performers, sound recordings, and programmes broadcasted or transmitted by cable as well as the creating of films and databases which are individually non-exercisable due to the character and circumstances of utilisation and therefore exercised through organisations of right-holders established to this end whether it is legally prescribed or based on the resolution of right-holders."
28. For this purpose the following documents must be made available to the Minister: the internal statute of the association; the organisational and operational rules, the rules of distribution, the list of its members who have consented to publishing their names for such purpose, the list of members participating in its administrative and representative organisations, the annual report, agreements on reciprocal representation concluded with foreign associations performing collective administration of rights (Articles 88 and 93(2) of the Copyright Act). For the role of minister of culture in passing tariffs and other regulations, see, Article 90(2) of the Copyright Act.
29. Article 91(1) of the Copyright Act.
30. This was provided by Article 74 of Act CII of 2003 from 1 May 2004.
31. First sentence of Article 91(2) of the Copyright Act.
32. Articles 19(1), 20(7), 21(7), 23(6), 27(1), 28(3), 70(5), 73(3), 77(3), 78(2) of the Copyright Act.

33. According to the Constitutional Court, the right to property protected by Article 13(1) of the Constitution extend to rights with a pecuniary value [17/1992. (III. 30.) AB decision, ABH 1992, 104, 108.]. This protection also includes copyright as made clear by decision 482/B/2002 of the Constitutional Court. This raises issues of limitation of the right of self-determination or freedom of artistic expression, but these will not be addressed in this paper. The Constitutional Court has not ruled upon this issue directly (see footnote 36).
34. 22/1994. (IV. 16.) AB decision of the Constitutional Court, ABH 1994, 127-128-129. On this, see, Halmai Gábor, 'Az egyesüléshez való jog' [The Right of Association] in Halmai Gábor, Tóth Gábor Attila (eds), *Emberi jogok* [Human Rights] (Osiris, Budapest 2003) 504; Drinóczi Tímea, Petrétei József, 'Az egyesülési jog' in Chronowski Nóra e. a., *Magyar alkotmányjog III. Alapvető jogok* [Hungarian Constitutional Law III. Fundamental Rights] (Dialóg-Campus, Budapest, Pécs) 405.
35. The Ombudsman for Data Protection and Freedom of Information in case 1264/A/2006. held that Article 19(5) of the Act LXIII of 1992 on the Protection of Personal Data and Freedom of Information regarding entities performing state function is applicable to the OCARs. In the ombudsman's view the monopolistic position of OCARs question that OCARs are genuinely private law entities.
36. 482/B/2002 AB decision of the Constitutional Court only per tangentem addresses the issue of collective administration of authors' rights. Under the Copyright Act the contract with the user is concluded by the OCAR. It was questioned whether this is compatible with Article 70/G of the Constitution, as it prevents the author from prohibiting the use of the work when the circumstances of the use would breach the integrity of the work. The exclusion of authors from the process was suggested to violate Article 54(1) of the Constitution on the right of self-determination and the right to property as provided in Article 13 of the Constitution. The Constitutional Court review was based on a test that is applied to chambers of profession. However, an Act of Parliament creates chambers and membership is obligatory. In the Court's opinion, the interference with authors' rights, including the right of self-determination and freedom of artistic expression, is necessary and proportionate as technological developments and the mass use of authorial works demand the particular solution provided in the Copyright Act (ABH 2007, 1448, 1450-51.).The Constitutional Court would probably reach a different conclusion if OCARs qualify as law-making entities.
37. Under the rules of distribution non-members are also entitled to their appropriate share of royalties.
38. As regards the rules of distribution see the judgments 8.Pf.20.304/2007/7. and 8.Pf.21.300/2007/4. of the Regional Appeal Court in Budapest (Fővárosi Ítélőtábla). In the latter case the court rejected a claim on the modification of the rules of distribution on the grounds that courts are not entitled to interfere with the internal functioning of the defendant association as guaranteed in the Act on the Right of Association.
39. The Supreme Court, pursuant to Section 209(5) of Act IV of 1959 on the Civil Code, treats tariffs as general contract conditions determined by law which excludes the possibility of contesting them due to unfairness (see judgement Pf. IV.25 653/1999/6.). On treating the yearly publication of tariffs as a fact, see, judgments Pf.I.20.064/2007/6 of the Debreceni Ítélőtábla (Regional Appeal Court in Debrecen), Pf.I.20.136/2007/4 of the Győri Ítélőtábla (Regional Appeal Court in Győr) and 8.Pf.20.679/2007/5 of the Fővárosi Ítélőtábla (Regional Appeal Court in Budapest). As a result, it still remains to be clarified what is the status of yearly published tariff rules in the Hungarian legal system. It could well be argued that similarly to the rules of distribution, on the basis of their content they may be regarded norms establishing rights and obligations for individuals.
40. ABH 2005, 427 et seq. In case the Court holds that there is an unconstitutional omission, the law-maker is obliged to legislate in the given issue within the time-limit determined by the judgement.
41. For the ex ante presidential motion on the NIRC and the Act on Sectoral Dialogue see: <http://www.keh.hu/admin/data/00000003/_fix/00000000/_fix/00000002/_fix/00000002/_file/20061228Abinditvany_orszagos_erdekegyezteto_tanacs.pdf> accessed 8 January 2009.

The Presidents' view regarding the participation of NIRC in exercising public powers is detailed in Sólyom László, *Pártok és érdekszervezetek az Alkotmányban* [Parties and Interest Groups in the Constitution] (Rejtjel, Budapest 2004) 199–206.

42. Ministerial of governmental decrees regulate these terms of employment.
43. 'Article 2 (1) The Republic of Hungary is an independent, democratic constitutional state. (2) In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives.'
44. ABK 2008. október, 1352 et seq.
45. 37/2006. (IX. 20.) AB decision. ABH, 2006, 480, 485.
46. The typical cases when the requirements of democratic legitimacy constitutionally suffice the transfer of public powers include the establishment of chamber of a certain profession with compulsory membership that pre-

scribe rules of professional conduct for a certain profession and have sanctioning power over their members.

47. Four judges dissented. Judge László Kiss (to whom judge Lévay and Kovács joined) argued that in ex ante review procedures the Court is more confined to the President's motion than in ex post review procedures, therefore the majority should have decided the case on democratic legitimacy grounds. In his dissenting opinion Judge Bragyova not only shared Judge Kiss' interpretation of the ex ante review competence of the Court, but also argued that the President's petition should have been rejected. According to Article 35(1) l of the Constitution the Government shall attend to those responsibilities assigned to its sphere of authority by law. Article 36 of the Constitution stipulates that in the course of fulfilling its responsibilities, the Government shall co-operate with the relevant social organizations. The questioned provisions only specify the constitutional obligations and assign the Government the responsibility to negotiate and come to terms with employment interest-groups. If no consensus is reached in the negotiating procedure Parliament exercises the law-making powers. As opposed to the French constitutional system, Parliament may freely limit the government's decree-making power. Nothing in the challenged provisions point to the direction that the NIRC would have been granted formal law-making power.
48. Strangely enough, the President's ex ante review only addressed the issue of trade union representation, but not the employees' national interest groups'.
49. As regards anglers' associations, see, the critique of obligatory membership by László *Sólyom*. Sólyom László, *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginnings of Constitutional Review in Hungary] (Osiris, Budapest 2001) 513, 518. See, in this respect, 939/B/1997 AB decision of the Constitutional Court. ABK 2008. május 744 et seq.
50. The question was addressed in part by point III.3.47/2008. (IV. 17.) AB decision of the Constitutional Court. ABK 2008. április, 553, 563-564.
51. See 410/2007. (XII. 29.) Governmental Decree on traffic violations attracting administrative sanctions and 18/2008. (IV. 30.) Ministerial Decree of Transport and Economy on speed cameras. The privatisation of the operation of speed cameras was criticised from the perspective of effectiveness and potential corruption. Juhász Ádám 'Gyorshajtás' [Speeding] [2008] 25 April Élet és Irodalom.
52. Kis János, 'A gárda és az állam' [The (Hungarian) Guards and the State] *Népszabadság* (Budapest 15 September 2007) <http://nol.hu/cikk/464123> accessed 8 January 2009.
53. Madison (n 3) 80.
54. These private employers were also responsible for torture in the Abu Ghraib prison. On outsourcing sovereignty in the US context see: Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge University Press, Cambridge 2007).