

**Decision 3074/2016 (IV. 18.) AB**  
**on the dismissal of a constitutional complaint**

In the matter of a constitutional complaint, the Panel of the Constitutional Court has rendered the following

decision:

1. The Constitutional Court hereby dismisses the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the judgement of the Curia No Bhar.III.1659/2014/19 in relation to Article XIII (1), Article XXVIII (1) and (4) of the Fundamental Law.
2. As to the remainder, the Constitutional Court rejects the constitutional complaint.

Reasoning

I

[1] 1. On 19 May 2015 the petitioners (hereinafter referred to as the "First Petitioner" and the "Second Petitioner"), through their legal representatives, lodged constitutional complaints to the Regional Court of Gyula. The petition was received by the Constitutional Court on 3 June 2015, and the addendum to the petition submitted on the basis of a notice of deficiency was received on 4 September 2015, respectively (hereinafter together referred to as the "petition").

[2] 2. In its bill of indictment No.B.2386/2007/9, the Public Prosecutor's Office for Bács-Kiskun County charged the petitioners with the felony of kidnapping in violation of Section 175/A (1) of Act IV of 1978 (hereinafter referred to as the "former Criminal Code"), and the Second Petitioner as an accessory.

[3] In the course of the retrial, the Regional Court of Gyula, in its judgement of 18 July 2013, No 14.B.116/2011/492., found the First Petitioner guilty of the felony of private justice [Section 273 (1), first clause, of the former Criminal Code] and the attempted felony of private justice [Section 273 (1), first clause, of the former Criminal Code], and the crime of illegal restraint committed as an instigator [Section 175 (1) of the former Criminal Code] and therefore sentenced him to 2 years' imprisonment as a cumulative penalty, the execution of which was suspended for 5 years' probation; furthermore, the trial court found the Second Petitioner guilty for the felony of private justice committed as an accessory [Section 273 (1), first clause, of the former Criminal Code] and the attempted felony of private justice committed as an accessory [Section 273 (1), first clause, of the former Criminal Code], and therefore sentenced

him to 1 year and 6 months' imprisonment as a cumulative penalty, the execution of which was suspended for 3 years' probation.

[4] The Regional Court of Appeals of Debrecen proceeding as the court of second instance, in its judgement of 18 June 2014 No Bf.II.899/2013/21, reversed the judgement rendered by the court of first instance and acquitted the First Petitioner of the charge of the felony of illegal restraint committed as an instigator [Section 175 (1) of the former Criminal Code] and the Second Petitioner of the charge of the attempted felony of private justice committed as an accessory [Section 273 (1), first clause, of the former Criminal Code].

[5] The Curia as the court of third instance in its judgement of 17 February 2015 No Bhar.III.1659/2014/19., reversing the judgement of the court of appeal, found the First Petitioner guilty of the felony of illegal restraint committed as an instigator [Section 175 (1) of the former Criminal Code], and found the Second Petitioner guilty of the attempted felony of illegal restraint committed as an accessory [Section 175 (1) of the former Criminal Code]. The main sentence of the petitioners was left untouched and they were sentenced to 2 years of disqualification from engaging in an occupation subject to a university degree in law and their *ex ante* removal by the court of any mention of the conviction from the criminal record (*ex ante* removal) was dispensed with. The petitioners and the Third Defendant were ordered jointly and severally to pay HUF 226,548 in criminal costs.

[6] According to the facts established in the final judgement, the petitioners were a married couple and practised their profession as attorneys at law. By a disciplinary decision of 18 August 2008, the Bar Association for Bács-Kiskun County suspended the petitioners from practising as attorneys at law until the final conclusion of the criminal proceedings. From the day after the receipt of the decision, as of 27 August 2008, they were prohibited from practising as attorneys at law. The First Petitioner was, at his own request, stricken from the list of the Bar Register on 28 February 2015 and the Second Petitioner was, also at her own request, stricken from the list on 30 April 2012.

[7] The court record containing the facts of the final judgement states that the petitioners had, on several occasions, lent money to the aggrieved party in order to carry out his business. Due to the insolvency of the aggrieved party's business, the creditors gathered at a private house on 10 April 2005 to seek a solution to the financial problems. The First Petitioner then told the victim that he could not leave the house until he had settled his debts in some way and until he had signed new contracts drawn up by them to settle his debts. If he failed to do so, the First Petitioner threatened to harm the aggrieved party, his civil partner and his children. The First Petitioner asked the Third Defendant in the case to accompany the aggrieved party everywhere and to keep an eye on his every movement.

[8] 3. According to the petitioners' position, the judgement of the Curia No Bhar.III.1659/2014/19 is contrary to the Fundamental Law.

[9] They argue that

- the selection of the accused violates the principle of equality before the law [Article XV (1) of the Fundamental Law];

- by failing to obtain the decision of the investigating judge in the case of the Third Defendant before the indictment, he was deprived of his lawful judge [Article XXVIII (1) of the Fundamental Law];
- there were no lawful charges in the case because of the failure to obtain the decision of the investigating judge [Article XXVIII (1) of the Fundamental Law];
- the finding of illegal restraint violates the principle of *nullum crimen sine lege* [Article XXVIII (4), as well as Article I (3) of the Fundamental Law];
- the provision in the judgement concerning the disqualification from engaging in an occupation infringes the principle of *nulla poena sine lege* and the right to property [Articles XXVIII (4), XIII (1) and I (3) of the Fundamental Law];
- the provision in the judgement concerning the payment of the costs of the criminal proceedings infringes the right to property [Article XIII (1) of the Fundamental Law].

## II

[10] The provisions of the Fundamental Law concerned by the petition read as follows:

"Article I (3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

"Article XIII (1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[...]

(4) No person shall be held guilty of, or be punished for, an act which, at the time when it was committed, did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty and a legal act of the European Union, under the law of another State."

## III

[11] The Constitutional Court first considered whether the constitutional complaint is admissible, that is, whether it meets the criteria for admissibility of complaints as laid down in Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act").

[12] 1. The complaint complies with the formal requirements for petitions under Section 52 (1) and (1b) of the Constitutional Court Act, as it contains

- the statutory provision establishing the material competence of the Constitutional Court [Section 27 of the Constitutional Court Act];
- the provisions of the Fundamental Law which are alleged to have been infringed [Articles I (3), XIII (1), XV (1), XXVIII (1) and (4)];
- the contested judicial decision (judgement of the Curia No Bhar.III.1659/2014/19);
- the statement of reasons relating to unconstitutionality by non-conformity with the Fundamental Law; and
- an express request that the Constitutional Court find the contested judgement contrary to the Fundamental Law and annul said judgement.

[13] Pursuant to Section 30 (1) of the Constitutional Court Act, the constitutional complaint shall be filed within sixty days of the notification of the decision challenged, addressed to the court of first instance. The petitioners received the contested judgement of the Curia on 20 March 2015 and their legal representative received it on 23 March 2015. The constitutional complaint was posted by the petitioners' legal representative on 19 May 2015, and was lodged within the prescribed time limit.

[14] 2. The Constitutional Court then examined the substantive requirements for the admissibility of the constitutional complaint under Sections 27 and 29 of the Constitutional Court Act.

[15] Pursuant to Section 27 (a) of the Constitutional Court Act, the person or organisation concerned in an individual case may lodge a constitutional complaint with the Constitutional Court against a judicial decision that is contrary to the Fundamental Law, if the decision on the merits or other decision ending the court proceedings violates the petitioner's right guaranteed by the Fundamental Law.

[16] The petitioners base their constitutional complaint on Section 27 of the Constitutional Court Act. In the underlying criminal case, the petitioners were the defendants, and therefore they are entitled to submit a petition and, accordingly, are deemed to be concerned in relation to the submitted petition.

[17] According to the petition, the Third Defendant was deprived of his lawful judge by the public prosecutor's failure to obtain the decision of the investigating judge during the criminal proceedings against him, thus violating the right of the Third Defendant to an independent and impartial tribunal. The constitutional complaint was lodged by the First and Second Petitioners through their legal counsel. The Third Defendant is not a petitioner in this case, although his criminal case, which has been finally disposed of, is inextricably linked to the petitioners' case. The petitioners and the Third Defendant were charged in a single indictment in a single criminal case by the prosecution and their criminal liability was established by the courts in a single judgement. However, the Third Defendant, and after the final conclusion of the criminal proceedings the Third Defendant, now as a convicted person, is not a petitioner

within the meaning of the relevant provisions of the Constitutional Court Act, and therefore his concernment cannot be established. In the case of the petitioner, the Constitutional Court is obliged to take a position on the question of concernment.

[18] The petitioners relied upon to Decision 166/2011 (XII. 20.) AB on the right of the Prosecutor General to prosecute in priority cases before another court, and Decision 36/2013 (XII. 5.) AB on the competence vested in the president of the National Office for the Judiciary to reallocate cases from one court to another.

[19] The Constitutional Court notes that in the present case the petitioners and the Third Defendant were tried by a court of different territorial competence not because the Regional Court of Appeals of Szeged designated the courts of jurisdiction in a different manner than the aforementioned Constitutional Court decisions, but because the judges of the Bács-Kiskun County Court had filed an objection of bias, and by decision of the Regional Court of Appeals of Szeged No Bkk.II.188/2008/2, the Békés County Court was designated to conduct the criminal proceedings.

[20] Pursuant to Section 27 (b) of the Constitutional Court Act, a constitutional complaint against a judicial decision may be filed if the petitioner has exhausted his or her legal remedies or if the legal remedy is not available to him or her. The petitioners filed this constitutional complaint following the judgement of the Curia proceeding at third instance and there is no room for review of that decision. The petitioners have exhausted their remedies, and the constitutional complaint therefore meets the requirements of Section 27 of the Constitutional Court Act.

[21] Pursuant to Section 29 of the Constitutional Court Act, a further condition for the admissibility of a constitutional complaint is that it must raise a conflict with the Fundamental Law or a constitutional law issue of fundamental importance that substantively affects the judicial decision. These two conditions are of an alternative nature; therefore, the existence of one of them in itself justifies the Constitutional Court's proceedings on the merits {on this point, see Decision 3/2013 (II. 14.) AB, Reasoning [30], and Decision 34/2013 (XI. 22.) AB, Reasoning [18]}. It is within the discretion of the Constitutional Court to determine whether the conditions are met.

[22] The petition did not identify and the Constitutional Court did not find any constitutional law issue of fundamental importance in the case; thus, it reviewed the possible violation of the Fundamental Law that could have had a substantive impact on the judgement.

[23] 2.1 The petition reads that the selection of the accused persons violates the principle of equality before the law and Article XV (1) of the Fundamental Law, as the public prosecution did not indict certain persons due to the interpretation of the statutory definition of the criminal offences and the accessory conduct, although, in to the petitioners' view, the facts recorded in the indictment would have led to the opposite, that is, the indictment made an unacceptable distinction in the determination of the accused persons.

[24] In the interpretation of the Constitutional Court, Article XV (1) of the Fundamental Law contains the general rule of equality of rights, which ensures the requirement of equal

treatment with regard to all rules of the legal order, because the ultimate basis of equality is equal dignity. A rule does not meet the standard in Article XV (1) of the Fundamental Law if it ultimately infringes the right to human dignity. The Equal Rights Clause is a constitutional imperative for those exercising public authority to treat all persons as equal in dignity and to take into account their individual considerations with equal weight and fairness. This requirement permeates to the entire legal system, and those exercising public authority are obliged to ensure equal treatment for all persons within their jurisdiction. However, the principle of equality of rights does not prohibit discrimination of any kind, but only discrimination that violates human dignity. Discrimination contrary to the Fundamental Law, that is, contrary to human dignity, can be established if the distinction is arbitrary {Decision 8/2015 (IV. 17.) AB, Reasoning [41] and[42]}.

[25] However, this part of the petition does not concern the part of the fundamental right to human dignity related to equal treatment, but is related to the constitutional role of the prosecution, the exercise of the monopoly on prosecution, which the Constitutional Court will consider subsequently in connection with the legality of the charge; therefore, no constitutional connection can be established in relation to Article XV (1) of the Fundamental Law.

[26] 2.2 In their constitutional complaint, the petitioners also referred to the fact that during the investigation the prosecution terminated the proceedings against the Third Defendant and then resumed them without obtaining the decision of the investigating judge. The petition states that the legality of the charge can be called into question by the procedural irregularities committed during the investigation.

[27] In the judgement under review, the Curia explained that possible procedural violations during the investigation, such as the failure to obtain the decision of the investigating judge, do not affect the legality of the charge. The procedural irregularity referred to does not prevent the evidence obtained from forming the basis of the prosecution's case and being used in the court proceedings, having regard to Section 78 (4) of the Code of Criminal Procedure (judgement under review, p. 10, paragraphs 1-3).

[28] The Constitutional Court recalls that it is for the general courts to conduct the evidentiary procedure, to weigh the evidence and, on this basis, to establish the facts. {Order 3219/2014 (IX. 22.) AB, Reasoning [17]} Therefore, alleged or actual breaches of law committed by the general courts cannot in themselves constitute grounds for bringing a constitutional complaint. Otherwise, the Constitutional Court would implicitly become a court of fourth instance. {Order 3268/2012 (X. 4.) AB, Reasoning [28]}

[29] 2.3 Pursuant to Section 29 of the Constitutional Court Act, the Constitutional Court admits constitutional complaints in the case of an infringement of the Fundamental Law or a constitutional law issue of fundamental importance that has a substantive impact on the judicial decision.

[30] Section 31 (6) of the Rules of Procedure, however, allows the Justice-Rapporteur to submit to the panel a draft decision containing the merits of the complaint instead of a decision on the admission of the complaint.

#### IV

[31] The constitutional complaint is unfounded.

[32] According to the petitioners, the application of the disqualification from engaging in an occupation and the condemnation of the petitioners to pay the costs of the criminal proceedings in the first and second instance proceedings violate their right to property under Article XIII (1) of the Fundamental Law.

[33] 1. The petition is indicative of the opinion that the Curia violated the right to property enshrined in Article XIII (1) of the Fundamental Law when in its judgement it excluded the petitioners from practising not only the profession of an attorney at law but also the profession subject to a university degree in law, thus making them financially ruined.

[34] In relation to the violation of the fundamental right to property, the petition refers to Article I(3) of the Fundamental Law, according to which "[a] fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

[35] The Constitutional Court in its Decision 26/2013 (X. 4.) AB (Reasoning [161]) - referring to Decision 64/1993 (XII. 22.) AB - summarised its practice regarding the fundamental right to property as follows: "the scope and manner of constitutional property protection do not necessarily follow the concepts of civil law and cannot be identified with the protection of abstract civil law property. The content of the right to property, protected as a fundamental right, shall be interpreted at all times together with the applicable limitations of public law and the (constitutional) limitations under private law. The extent of the constitutional protection of property is always specific; it depends upon the subject matter, the object and the function of the property, as well as upon the nature of the restriction as well. Viewed from the other side: The constitutional permissibility of interference by the public authorities into property varies pursuant to these considerations." {ABH 1993, 373, 380, last cited in Decision 3209/2015 (XI. 10.), Reasoning [64]}.

[36] The Constitutional Court recalls that the Decision 26/2013 (X. 4.) AB interpreted the right to the protection of property in such a manner that the property clause of the Fundamental Law - according to the consistent practice of the Constitutional Court and as a general rule [Decision 64/1993 (XII. 22.) AB, ABH 1993, 373.; Decision 10/2001 (IV. 12.) AB, ABH 2001, 123., Decision 819/B/2006 AB, ABH 2007, 2038, 2041.] - only protects property already acquired (Reasoning [193]) or, in exceptional cases, future entitlements to property {Decision 3209/2015 (XI. 10.) AB, Reasoning [65]}.

[37] The State is therefore under no obligation to assist a private individual to acquire or enjoy property [Decision 35/1994 (VI.24.) AB, ABH 1994, 197, 201; Decision 936/D/1997 AB, ABH 1999, 615, 619].

[38] The Constitutional Court refers to the principle, expressed in several of its decisions, that the monopoly of the State's power to prosecute clearly implies the obligation to establish a system of criminal law control against socially harmful acts, to prosecute, and to pursue

prosecution of crime and the criminal justice system under constitutional conditions. This constitutional obligation justifies providing the bodies of State's punitive power with effective means to carry out their functions, even if these means are severely restrictive in their nature {Decision 61/1992. (XI. 20.) AB, ABH 1992, 280, 281; Decision 31/1998 (VI. 25.) AB, ABH 1998, 240, 247; Decision 13/2002 (III. 20.) AB; most recently: 3 Decision 025/2014 (II. 17.) AB, Reasoning [58], Decision 23/2014 (VII. 15.) AB, Reasoning [39]}. It is precisely the fundamental constitutional rights of other persons that are threatened or violated. The restriction of the fundamental constitutional rights of the defendant in criminal proceedings is therefore in the interest of the protection of other persons and of society {Decision 3025/2014 (17.II.) AB, Reasoning [58]}.

[39] The Constitutional Court states that the loss of potential income as a result of a disqualification from engaging in an occupation is only a possibility of a general nature and does not concern an already acquired, e.g. statutory or contractual, specific and determinable asset value to which the petitioners are entitled.

[40] On the basis of the above, the Constitutional Court is of the opinion that there is no substantive constitutional connection between the loss of income due to disqualification from engaging in an occupation subject to a university degree in law and the constitutional protection of property.

[41] 2. The petitioners consider it a violation of the right to property that the Curia ordered the petitioners to pay the costs of the criminal proceedings which incurred before the court of first instance in the case that was retried after setting the judgement aside, although they were acquitted at this stage - due to the unfounded nature of the first instance judgement.

[42] According to the statement of reasons of the judgement of the Curia, these costs of the criminal proceedings were incurred as travel expenses of witnesses related to the guilt of all three defendants (page 25, paragraph 3 of the judgement under review). The finding of the guilt of the petitioners justified the amendment of the provision on costs of the criminal proceedings.

[43] The Constitutional Court, referring back to the foregoing, reiterates that the scope of constitutional property protection cannot be identified with the abstract protection of property under civil law; therefore, the erroneous assessment of the criminal charge in this case is not related to the constitutional protection of property.

[44] In view of all the above, the Constitutional Court finds that there is no substantive constitutional connection between Article XIII (1) of the Fundamental Law and this part of the petition, and therefore dismissed the petition in this respect as well.

V

[45] In relation to the right to a fair trial as enshrined in Article XXVIII (1) of the Fundamental Law, the petition alleges that the charges are not lawful.

[46] According to the petitioners, the charges against them were not lawful because the accused persons were selected arbitrarily by the prosecution, and in the absence of charges



against the perpetrator, the charges against the accomplices (instigators or accessories) cannot be lawful, either.

[47] 1.1 The Constitutional Court points out that the concept of a lawful charges is clearly defined in Section 2 (2) of Act XIX of 1998 on Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure"), pursuant to which is the charges are lawful if the person entitled to bring the charges initiates court proceedings on the basis of a precisely defined act of a person specified in his or her motion to the court, which is contrary to the Criminal Code.

[48] The Criminal Division of the Curia in its Opinion No 1/2007 BK on the interpretation of certain provisions of the Criminal Code has clarified that the formal condition of the legality of the charge is that the conduct of the court proceedings must be initiated by a person with the right to bring the charge. The prosecutor, as the *accusateur public*, generally has the right to prosecute [Section 28 (1) of the Code of Criminal Procedure]. However, in cases provided for by law, a private prosecuting party or a substitute private prosecuting party represents the prosecution [Sections 52 (1), 53 (1) of the Code of Criminal Procedure]. It is not lawful for a private prosecuting party to prosecute a criminal offence subject to public prosecution or for the aggrieved party to act as a substitute private prosecuting party in a case where the law does not permit this.

[49] Section 2 (2) of the Code of Criminal Procedure defines the minimum content requirements for a lawful charge. The minimum substantive requirement for a lawful charge is that a specific person initiates court proceedings for a precisely defined act of a specific person that is contrary to the Criminal Code. If these requirements are not met, no legal proceedings may be initiated or continued. The express will to initiate legal proceedings, that is, the charges (the act of accusation), is fulfilled by the filing of the bill of indictment (with the court).

[50] The essential elements of the lawfulness of the charge are that it must be directed against a specific person and contain a precisely defined act that is contrary to the criminal law. The description of the act charged is accurate if the material facts set out in the prosecutor's motion (bill of indictment) contains all the specific facts corresponding to the elements of the statutory definition of the criminal offence: the conduct (*actus reus*), the place and time of the commission of the act, etc. The classification of the act charged in accordance with the former Criminal Code is not an essential element of the legality of the charge. The Code of Criminal Procedure also requires the court, in the course of the preparation of the trial, to assess whether the charge is lawful and whether the indictment complies with the requirements of the law. If the charges are not lawful or are formally incomplete and the prosecutor fails to comply with his obligation to rectify such deficiencies, the court shall terminate the proceedings [Section 267 (1) (j) or (k) of the Code of Criminal Procedure].

[51] The Constitutional Court has also stated that the termination of proceedings for lack of lawful charges is distinguished from other grounds for termination of proceedings by the fact that in the case of the latter, the continuation of proceedings becomes impossible due to a circumstance that can be considered definitive, such as the death of the accused, the statute of limitations of the criminal offence or the absence of a substantive legal condition. By contrast, the absence of lawful charges cannot in itself be regarded as a reason which would

make it permanently impossible to proceed with the criminal proceedings. A judicial decision on a lawful charge does not assess the facts as described in the charge, but the act itself, that is, it leaves the charge undecided (see, by analogy, Case C-469/03 Filomeno Mario Miraglia, 10 March 2005, paragraphs 33-34, and Case C-491/07 Vladimir Turanský, 22 December 2008, paragraphs 42 and 45). In such cases, the court does not assess the facts, does not consider the evidence of the crime and does not decide on the question of criminal liability. In assessing the legality of the charge, the court is obliged to refrain from performing the procedural act of establishing the facts and therefore cannot take evidence or infer further facts from the facts when reaching its decision. In the assessment of the legality of the charge, the formulation of the facts is excluded, in other words, the question of the merits of the charge remains unaffected in the examination of the legality of the charge. Therefore, in such cases, the court does not fulfil the obligation to prosecute arising from the indictment principle and the complete assessment of the charges incumbent on the court [Section 2 (4) of the Code of Criminal Procedure]. On the basis of these considerations, the Constitutional Court recently concluded that the reindictment for the same act following a court order terminating proceedings on the grounds of lack of a lawful charge does not violate the constitutional principle of *ne bis in idem* enshrined in Article XXVIII (6) of the Fundamental Law. {Decision 33/2013 (XI. 22.) AB, Reasoning [30]}

[52] 1.2 Pursuant to Article 29 (1) of the Fundamental Law, "[t]he Prosecutor General and prosecution service shall be independent and shall contribute to the administration of justice by exclusively enforcing the State's demand for punishment as public prosecutor [...]"

[53] Under the Fundamental Law, the exercise of the monopoly on prosecution is the exclusive responsibility of the prosecution service. Article 29 (1) of the Fundamental Law expressly states that the prosecution service is a contributor to the administration of justice.

[54] In criminal proceedings, the various functions of the judiciary become separated. In accordance with the principle of separation of functions, adjudication is the duty of the court in deciding on the merits of the case and on the charges, and is therefore subject to the highest constitutional guarantees, such as judicial independence.

[55] Within the system of justice, the prosecution service has the rights and is obliged to perform the duties set out in the Fundamental Law. The prosecution service, by virtue of its function as *accusateur public*, is the holder of the monopoly on prosecution, and in the case of criminal offences which are to be prosecuted by public prosecution, the decision to indict, amend or drop charges, except in the cases of private prosecution or substitute private prosecution as provided by law, may be taken only by the prosecution service; no other body may compel the prosecution service to change its decision to indict or drop charges. {Decision 3072/2015 (IV. 23.) AB, Reasoning [58]} The way in which the prosecutor assesses the facts and data available to him in a specific case and the conclusions he draws from them is a matter for his free discretion and professional responsibility. [Decision 3/2004 (II. 17.) AB, ABH 2004, 48, 58, 63.] The prosecutor "in the exercise of his function as *accusateur public* must also act in accordance with the requirements of professional responsibility of the prosecutor" [Decision 34/B/1996 AB, ABH 2001, 849, 853.]. This includes deciding, on the basis of the available evidence and depending on the outcome of the investigation, to press charges or file formal

charges only in respect of a part of the indictment, to suspend or terminate the investigation, to refer the case to mediation (diversion) or to postpone filing formal charges. It also has the possibility to carry out further investigative measures or have such measures carried out, for example, if the facts of the case have not been fully established or if there has been a material procedural irregularity which substantially affects the handling of the case.

[56] The prosecution service carries out its constitutional function and duties through the Fundamental Law, the cardinal Acts applicable to the prosecution service and the application of the Code of Criminal Procedure.

[57] The Constitutional Court has already stated in an early decision that the Constitution does not grant a subjective right to the enforcement of substantive justice. These are the purposes and functions of the rule of law. The Constitution gives the right to the procedure necessary, and in most cases appropriate, for the enforcement of substantive justice. However, the procedural method of the right to prosecute, that is, criminal proceedings, is subject to the fundamental requirement of establishing the truth as to the commission of the offence, the identity of the perpetrator and his or her eligibility for punishment. This is a fundamental prerequisite for a just judicial decision on the issue of criminal liability [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 266].

[58] In several decisions, the Constitutional Court has consistently held that in a State governed by the rule of law, prosecution of crime must be conducted within strict substantive and procedural legal limits, while the risk of failure of prosecution of crime is borne by the State. This allocation of risk is a constitutional guarantee of the presumption of innocence [Decision 9/1992 (I. 30.) AB, ABH 1990, 59, 70].

[59] The prosecutor's monopoly on public prosecution may therefore have adverse consequences (e.g. failure to prosecute or unjustified dropping of the charges) that may adversely affect the interests of aggrieved parties. The way to remedy such errors and deficiencies is through a system of correction of charges (e.g. substitute private prosecution) established by the legislator. [Decision 14/2002 (III. 20.) AB, ABH 2002, 101, 113.] In addition, the system of remedies provides the accused with the opportunity to have the decisions affecting his rights reviewed {Decision 3072/2015 (IV. 23.) AB, Reason [59]}.

[60] In a previous decision, the Constitutional Court stated with regard to the monopoly on prosecution that, in accordance with the Constitution, the Code of Criminal Procedure imposes the responsibility for the decision to prosecute for criminal offences subject to public prosecution on the prosecutor without exception. [Decision 14/2002 (III. 20.) AB, ABH 2002, 101, 108] This can nowadays be corrected by means of the correction of charges (e.g. substitute private prosecution), but it is the prosecutor's duty to consider whether the conditions for indictment against certain persons are met and whether the reasonable suspicion is supported by sufficient evidence.

[61] 2. The criminal proceedings against the Third Defendant as accused for the crime of illegal restraint were conducted in his capacity of perpetrator, while the criminal proceedings against the First Petitioner for the same crime were conducted in a capacity of complicity (as instigator).

[62] The petition states that the charge was also not lawful because if there is no lawful charge against the perpetrator (the Third Defendant in the criminal case), there cannot be a lawful charge against the instigator (First and Second Petitioners) either.

[63] The Constitutional Court notes that, in line with established and constant judicial practice, the criminal liability of the instigator, which affects the legal classification of the act, is adapted to the acts of the perpetrator (BH1997. 466). The criminal liability of the instigator or the accessory is also applicable if the perpetrator is not held liable, the condition being the realisation of the basic act of the perpetrator. It does not follow from the ancillary nature of complicity that the criminal liability of the instigator and the accessory is conditional on the criminal prosecution of the perpetrator, and the parties may be held liable even if the identity of the perpetrator(s) could not be established during the criminal proceedings or if the perpetrator cannot be held criminally liable for some reason [BH2014. 38., BH1999. 53., BH2000. 185., EBH1999. 84.].

[64] In the Constitutional Court's view, the courts did not violate the constitutional requirements of the lawful charge against the petitioners, and therefore dismissed the constitutional complaint in this respect.

## VI

[65] The Constitutional Court stated in its Decision 16/2014 (V. 22.) AB that the prohibition of retroactive criminal legislation in Article XXVIII (4) of the Fundamental Law sets a similar fundamental rights standard to the limited possibility of retroactive legislation derived from the requirement of legal certainty. This constitutional rule is conveyed by the provisions of the Criminal Code on the temporal scope of the Criminal Code, which, in addition to this prohibition, provide for the retroactive application of less severe criminal law rules. This constitutional rule, which enshrines the principles of *nullum crimen sine lege* and *nulla poena sine lege*, represents one of the most historic guarantees of the rule of law: the requirement of the foreseeability of the conditions surrounding the limitation and exercise of the State's punitive power. It also follows that the requirements of Article XXVIII (4) of the Fundamental Law, such as the prohibition on retroactive criminal legislation and retroactive application of the law, include the rules of criminal law that are relevant to the determination of individual criminal liability. In accordance with this practice of the Constitutional Court, the protection afforded by the principles of *nullum crimen sine lege* and *nulla poena sine lege* cannot be limited to the elements of the special part of the Criminal Code and the punishable offences contained therein, but encompasses all the relevant rules of criminal liability [see, for example, Decision 35/1999 (XI. 26.) AB, ABH 1999, 310, 316] (Reasoning [33]).

[66] 1. According to the petitioners, the Curia, with the interpretation of the law set out in the judgement, extended the range of possible criminal conduct under the offence of illegal restraint to such an extent that it resulted in complete legal uncertainty and thus violated the principle of *nullum crimen sine lege* as enshrined in Article XXVIII (4) of the Fundamental Law.

[67] In the contested decision, the Curia also stated that the criminal offence of illegal restraint is what is known as a felony with an open statutory definition, in relation to which it is irrelevant whether the passive subject intended to change his place of location and any conduct that

deprives him of the possibility to change his place of location is considered to be factual conduct under the statutory definition. The petition did not justify the reference to Article I (3) of the Fundamental Law in this respect.

[68] The Constitutional Court reaffirms the principle already stated in its previous decisions, under which the Constitutional Court does not have the competence to "review" the practice of the judiciary in order to decide on doctrinal questions concerning the substantive criminal law, nor to determine the possible scope of the conduct of a given offence, nor to criticise the practice of sentencing. Consistent judicial practice based on professional legal doctrine can only be directly subject to review by the Constitutional Court if it is capable of causing a fundamental rights violation that is incompatible with the Fundamental Law and overrides the proven and accepted findings of science {Decision 3077/2012 (VII. 26.) AB, Reasoning [5] and [6]}.

[69] 2. According to the petitioners, the Curia deviated from Opinion No 18 BK when in the judgement under review it did not prohibit the petitioners from practising as attorneys at law, but disqualified the petitioners from engaging in an occupation subject to a university degree in law. In the petitioners' view, this significantly increased the legal disadvantage caused and changed the content of the penalty with retroactive effect, thereby infringing the principle of *nulla poena sine lege* enshrined in Article XXVIII (4) of the Fundamental Law.

[70] The Constitutional Court has consistently held that legal certainty is an indispensable element of the rule of law. Legal certainty requires the State, and primarily the legislator, to ensure that the law as a whole, its individual domains and rules are clear, unambiguous, predictable in their effects and foreseeable for the recipients of the norm. One of the most important basic requirements for legal certainty is the predictability of the law and the clarity of individual legal rules. {Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65; Decision 38/2012 (XI. 14.) AB, Reasoning [84]; Decision 3047/2013 (II. 28.) AB, Reasons [13] and [16]; Decision 3106/2013 (V. 17.) AB, Reasoning [8]; Decision 24/2013 (X. 14.) AB, Reasoning [48]; Decision 33/2014 (XI. 7.) AB, Reasoning [32]} Specifically in relation to criminal law norms, the Constitutional Court has stated that "criminal law requires the disposition describing the conduct prohibited by threatening with a sanction in criminal law to be straightforward, well-defined and clear. It is a constitutional requirement to clearly express the intentions of the legislature concerning the protected legal interest and the conduct constituting the offence" {Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176; reaffirmed in Decision 4/2013 (II. 21.) AB, Reasoning [59]}.

[71] At the same time, the practice of the Constitutional Court is also consistent that the vagueness, contradictory nature and uncertainty of the content of the challenged legislation is only unconstitutional if the interpretation of the legislation by the courts is no longer sufficient to resolve the ambiguity of the content of the legislation {Decision 1263/B/1993 AB, ABH 1994, 672, 673-674; Decision 534/E/2001 AB, ABH 2002, 1283, 1288-1289; reaffirmed by Decision 4/2013 (II. 21.) AB, Reasoning [59]}. In line with a previous decision of the Constitutional Court, "[i]t is a characteristic of the codification of criminal law that the statutory definitions contain not only descriptive elements requiring mere recognition, but also normative elements requiring assessment by the court." (Decision 334/B/2000 AB, ABH 2003, 1180, 1182.)

[72] In the Constitutional Court's view, questions that do not exceed the permissible possibilities of interpretation of the law by those applying the law and the limits of the constitutionally accepted system-building interpretation of the law do not require interpretation of the Fundamental Law {Decision 3032/2012 (VI. 21.) AB, Reasoning [35]; Decision 3106/2013 (V. 17.) AB, Reasoning [11], Decision 16/2014 (V. 22.) AB, Reasoning [52]}.

[73] The disqualification from engaging in an occupation subject to a university degree in law is known and applied in judicial practice (e.g. BH2015. 2019.); thus, there is no question of a new, hitherto unknown, retroactive interpretation of disqualification from engaging in an occupation beyond the statutory regulation.

[74] In its judgement, the Curia referred to the fact that the petitioners' activities as attorneys at law had been suspended by the Bács-Kiskun County Bar Association. The Constitutional Court reiterates that, under Section 13 (1) of Act XI of 1998 on Attorneys at Law, a person may practise as an attorney if he or she is a member of the Bar Association and has taken the oath as an attorney at law. However, pursuant to Subsection (4) (c) (cc), a person whose sentence of imprisonment has been suspended on probation for a period of three years from the expiry of the probation period shall not be admitted to the Bar.

[75] The Constitutional Court notes that the Curia banned the petitioners from engaging in an occupation subject to a degree in law for a period of 2 years. Since their admission to the Bar can only take place 3 years after the expiry of the probationary period (5 and 3 years), the 2 years of disqualification also expire during that period. It is therefore not the disqualification that prevents them from practising as attorneys at law, but the waiting period for readmission to the Bar provided for in the Act on Attorneys at Law. If the Curia had disbarred the petitioners only from practising as attorneys at law, there would be no legal disadvantage. The duration of the disqualification imposed is less strict than the condition under the Act on Attorneys at Law; therefore, the petitioners can resume their activities in law prior to the date of readmission to the Bar.

[76] In view of the foregoing considerations, the Constitutional Court dismissed the constitutional complaint for lack of any Fundamental Law violation affecting the merits of the judgement under review, also with regard to Article XXVIII (4) of the Fundamental Law.

[77] As to the remainder, the Constitutional Court rejected the constitutional complaint on the basis of Section 64 (a) and (d) of the Constitutional Court Act.

Budapest, 12 April 2016

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