DECISION 19/2019. (VI. 18.) OF THE CONSTITUTIONAL COURT

The plenary session of the Constitutional Court in the subject of a judicial initiative aimed at establishing the conflict with the Fundamental Law of a law – with concurring reasoning by Justice *dr. Béla Pokol* and with dissenting opinions by Justices *dr. Ágnes Czine, dr. Ildikó Hörcherné dr. Marosi, dr. Imre Juhász, dr. Balázs Schanda, dr. István Stumpf and dr. Péter Szalay* – adopted the following

decision:

1. The Constitutional Court – acting *ex officio* – states that in the course of applying in the case of homeless people Section 178/B of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System it is a constitutional requirement resulting from Article XXII (2) and (3) of the Fundamental Law that a sanction under the law applicable to minor offences shall only be applied, if the placement of the homeless person in the support system was verifiably granted at the time of committing the conduct. The application of the sanction under the law applicable to minor offences should be in line with the constitutional aim of the prohibition of dwelling habitually on public ground, the inclusion into the support system of vulnerable persons who cannot care for themselves.

2. The Constitutional Court rejects on formal ground the judicial initiatives aimed at establishing the lack of conformity with the Fundamental Law and annulling Section 178/B of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The judge of the Kaposvár District Court (hereinafter: "Petitioner 1") submitted a judicial initiative to the Constitutional Court by way of its ruling No. 9.Sze.4348/2018/3 – along with suspending the proceedings in course, on the basis of Section 25 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC)

– in the case in process before the court because of the violation of the rules on habitually dwelling on public ground. Petitioner 1 initiated the declaration of the conflict with the Fundamental Law and the annulment of Section 178/B paragraph (1), paragraph (5), paragraph (6) *a)* and *b)*, paragraph (7) and paragraphs (13) to (15) of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System (hereinafter: AO), as well as the ordering of the prohibition of the application of the challenged provisions of the law in the case of minor offence pending before the Kaposvár District Court under No. 9.Sze.4348/2018 because of the violation of the prohibition of habitually dwelling on public ground, and the ordering of the review of the minor offence procedures closed with final decisions.

[2] 2. The judge of the Central District Court of Pest (hereinafter: "Petitioner 2") in four cases pending before the court because of the minor offences of violating the rules on dwelling habitually on public ground – along with suspending the proceedings in course, on the basis of Section 25 (1) of the ACC – submitted four judicial initiatives to the Constitutional Court by way of the ruling No. 2.Sze.18.467/2018/4, ruling No. 2.Sze.21.334/2018/2, ruling No. 2.Sze.48/2019/2 and ruling No. 2.Sze.3715/2019/3. In these rulings, the judge initiated the declaration of the conflict with the Fundamental Law and the annulment of Section 178/B (1), (4) and (7) of the AO as well as of the full Section 178/B of the AO.

[3] 3. The judge of the Székesfehérvár District Court (hereinafter: "Petitioner 3") submitted a judicial initiative to the Constitutional Court by way of its ruling No. 13.Sze.5810/2018/4. – along with suspending the proceedings in course, on the basis of Section 25 (1) of the ACC – in the case in process before the court because of the violation of the rules on habitually dwelling on public ground. In the ruling, the judge initiated the declaration of the conflict with the Fundamental Law and the annulment of Section 178/B (2) *b)*, (7) of the AO as well as the full Section 178/B of the AO, and the ordering of the review of the minor offence procedures closed with final decisions.

[4] 4. Another judge of the Central District Court of Pest (hereinafter: "Petitioner 4") submitted a judicial initiative to the Constitutional Court by way of its ruling No. 3.Sze.20.621/2018/2 – along with suspending the proceedings in course, on the basis of Section 25 (1) of the ACC – in the case in process before the court because of the violation of the rules on habitually dwelling on public ground. In the ruling, the judge initiated the declaration of the conflict with the Fundamental Law and the annulment of Section 178/B (1), (4), (7) and (13) of the AO as well as the full Section 178/B of the AO.

[5] 5. A third judge of the Central District Court of Pest (hereinafter: "Petitioner 5") submitted a judicial initiative to the Constitutional Court by way of its ruling No.

12.Sze.6534/2019/3 – along with suspending the proceedings in course, on the basis of Section 25 (1) of the ACC – in the case in process before the court because of the violation of the rules on habitually dwelling on public ground. In the ruling, the judge initiated the declaration of the conflict with the Fundamental Law and the annulment of Section 178/B (1), (4), (6) and (7) of the AO as well as the full Section 178/B of the AO, and the ordering of the prohibition of applying the challenged statutory provisions in the minor offence procedure pending before the Central District Court of Pest under No. 12.Sze.6534/2019 because of the violation of the rules on dwelling habitually on public ground.

[6] 6. The Constitutional Court verified that the subject matters of the petitions are the same, therefore, it consolidated the petitions and judged them in a single procedure on the basis of Section 58 (2) of the ACC and Section 34 (1) of the Rules of Procedure.

[7] 7. In the case underlying the initiative of Petitioner 1, the Police Office of Kaposvár arrested the person subject to the procedure, brought before the court, and it reported committing the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of the crime, on 25 October 2018, the person subject to the procedure was sleeping on a cardboard sheet on the steps of a department store. Before the event, the person subject to the procedure had been warned on site on three occasions. According to Petitioner 1, the provisions of the AO applicable in the present case as amended by the Act XLIV of 2018 on the amendment of the Act II of 2012 on Offences, the Procedure in Relation to Offences and the Offence Record System (hereinafter: "Amending Act") are contrary to the Fundamental Law. Petitioner 1 then turned to the Constitutional Court.

[8] 8. In the case underlying the initiative of Petitioner 2, the Minor Offence Representation Department of the Budapest Police Headquarters reported committing, by the person subject to the procedure, the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of the crime, on 19 October 2018, during a police action carried out on public ground, the person subject to the procedure was lying on the ground with a large bag, a blanket and with food stored in a plastic container. The person told the police officers in charge that he does not have a registered address, he does not dwell in a homeless shelter, he has been living on the street for seven years and he does not want to use the help of an aid organisation. During a hearing held by the court with the use of remote hearing in the course of an expedite procedure of bringing the person before the court, the court stated that the statutory conditions of bringing the person before the court were not fulfilled.

[9] In the second case underlying the initiative of Petitioner 2, the IXth District Police Office of the Budapest Police Headquarters reported committing, by the person subject to the procedure, the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of crime, on 11 December 2018, police officers carried out police action against the person subject to the procedure in an underpass of the subway at Ecseri Street. The person subject to the procedure failed to leave the site despite of being called upon by the police to do so, he also failed to accept the help offered by the staff members of the Hungarian Charity Service of the Order of Malta and to leave the site with them. The Budapest Police Headquarters ordered the detention of the person subject to the procedure under the law applicable to minor offences for the purpose of carrying out expedite court proceedings.

[10] In the third case underlying the initiative of Petitioner 2, the Minor Offence Representation Department of the Budapest Police Headquarters reported committing, by the person subject to the procedure, the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of crime, on 29 December 2018, police officers carried out police action against the person subject to the procedure in an underpass. The person subject to the procedure failed to leave the site despite of being called upon by the police to do so and he also told that he would not accept any help from an aid organisation. The Budapest Police Headquarters arrested the person concerned and ordered the detention of the person subject to the procedure under the law applicable to minor offences for the purpose of carrying out expedite court proceedings. During a hearing held by the court with the use of remote hearing in the course of an expedite procedure of bringing the person before the court, the court stated that the statutory conditions of bringing the person before the court were not fulfilled, therefore, it closed the procedure in the framework of the expedite court proceedings and it ordered the continuing of the procedure according to the general rules under Section 120 of the AO. Petitioner 6 also referred to the fact that, according to the reporting of crime, the person subject to the procedure had also mentioned his alcoholism, and in the course of the preparatory procedure, the minor offence authority had failed to investigate, with regard to Section 187/B (11) of the AO, the existence of the conditions of exclusion laid down in Section 10 of the AO.

[11] In the fourth case underlying the initiative of Petitioner 2, the XVth District Police Office of the Budapest Police Headquarters reported committing, by the person subject to the procedure, the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of crime, on 3 February 2019, police officers carried out police action

against the person subject to the procedure in Budapest, at 3 Hősök Street, XVth district, because of lying there in a sleeping bag on a sheet of cardboard placed on the ground at the entrance of a medical station. The person subject to the procedure refused to accept the help offered to him and he refused to go to a homeless shelter. During the police action, it has been verified that the person subject to the procedure has already been warned on 26 December 2018 and on 6 January 2019 because of committing the minor offence of habitually dwelling on public ground. The physician in the detention facility found that the person subject to the procedure was a person with reduced mobility, therefore, his placement in the detention facility was not recommended on medical grounds. The person subject to the procedure has not been detained. During the interrogation by the police, the person subject to the procedure failed to admit committing a minor offence. Petitioner 2 holds that Section 178/B of the AO applicable in the course of the above procedures is contrary to the Fundamental Law. Petitioner 2 then turned to the Constitutional Court.

[12] 9. In the case underlying the initiative of Petitioner 3, a procedure under the law applicable to minor offences was started at the Székesfehérvár District Court against the person subject to the procedure because of committing the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of the crime, the police officers checked on public ground the identity of the person subject to the procedure several times (on 17, 18 and 20 of October 2018) and they warned him on the site on all the three occasions. Then after the fourth check of identity on 24 October 2018, the police office made a reporting of crime against the perpetrator. The Székesfehérvár Police Office brought the person subject to the procedure before the court. As referred to by Petitioner 3, then he should have applied Section 178/B of the AO during the procedure. The petitioner holds that the relevant regulation is contrary to the Fundamental Law. Petitioner 3 then turned to the Constitutional Court.

[13] 10. In the case underlying the initiative of Petitioner 4, the Minor Offence Representation Department of the Budapest Police Headquarters reported committing, by the person subject to the procedure, the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. According to the reporting of the crime, on 29 November 2018, the person subject to the procedure was sleeping on a bed mattress under several blankets in a pedestrian underpass in the XIVth district. As verified by the documents, the person subject to the procedure was clearly habitually dwelling on public ground, he refused to leave the place despite of being called upon to do so by the police officers in action, and despite of being offered support, he refused to cooperate for the purpose of using the services granted for homeless persons. During a hearing held by the court with the use of remote hearing in the course of an expedite procedure of

bringing the person before the court, the court stated that the statutory conditions of bringing the person before the court were not fulfilled. According to Petitioner 4, Section 178/B of the AO is contrary to the Fundamental Law and it must be applied by the court in the course of judging upon the reporting of the crime. Petitioner 4 then turned to the Constitutional Court.

[14] 11. In the case underlying the initiative of Petitioner 5, the Administrative Policing Department of the 1st District's Police Office of the Budapest Police Headquarters reported committing, by the person subject to the procedure, the minor offence of violating the rules on habitually dwelling on public ground as regulated in Section 178/B (1) of the AO. As laid down in the reporting of the crime, on 22 March 2019, the person subject to the procedure was sleeping on the stone pavement of the underpass of the South Railway Station with a rucksack by his side. As it has been verified during the police action, the person subject to the procedure had been warned by the police officers in action several times. The person subject to the procedure refused to leave the place despite of being called upon to do so by the police officers in action, and despite of being offered support, he refused to cooperate for the purpose of using the services granted for homeless persons. After being arrested, the person subject to the procedure failed to admit before the minor offence authority the committing of the minor offence, and he told that all homeless shelters were fully occupied on the Buda side of the city. He also told that he had no place of residence where he could habitually dwell. According to Petitioner 5, Section 178/B of the AO is contrary to the Fundamental Law and it must be applied by the court in the course of judging upon the reporting of the crime. Petitioner 5 then turned to the Constitutional Court.

[15] 12. As held by Petitioner 1, Section 178/B (1) of the AO qualifies habitual dwelling on public ground a minor offence. According to the reasoning of the Amending Act, the amendment is necessary in order to harmonise the AO with the Seventh Amendment of the Fundamental Law, referring to the fact that with the amendments of the Fundamental Law the former legal framework – which allowed an Act or a local government decree to render this conduct unlawful in the interest of protecting public order, public security, public health or the cultural values – has been terminated.

[16] As argued by Petitioner 1, declaring homelessness, as a – typically – forced and helpless situation, a minor offence is incompatible with the requirement of the rule of law enshrined in Article B) (1) of the Fundamental Law, the provisions under Article I (3) of the Fundamental Law on the restriction of fundamental rights as well as with the provision of the National Avowal on the obligation of helping the vulnerable and the poor. The Seventh Amendment itself of the Fundamental Law does not justify or

make necessary the criminalisation of dwelling habitually on public ground. On the one hand, the amendment of the Fundamental Law only provides a general character for a codified prohibition partially existing on a lower level of the hierarchy of the sources of law, and on the other hand, the constitutional requirements of introducing a statutory definition of minor offence have not been complied with. The Constitutional Court has already reviewed in several decisions, including the Decision 38/2012. (XI. 14.) AB (hereinafter: "CCDec 1"), the constitutional requirements of criminal legislation, including the establishing of the statutory definition of a minor offence. As stated in the petition, the Constitutional Court annulled, in the decision referred to above, a statutory definition in the AO that had the same content as the one applicable in the present case. Petitioner 1 holds that the provisions introduced with the Amending Act do not have a legitimate justification deductible from the Fundamental Law, as the conducts, which are dangerous to the society and which are occasionally performed by homeless persons (e.g. begging, breach of peace, public cleansing minor offence) are sanctioned individually in the AO. In fact, the amended provisions criminalise homelessness, and by threatening with the legal consequences under the law applicable to minor offences, the legislator is making an attempt to force the affected persons to use the social services that are not available to full extent. According to Petitioner1, making homelessness a minor offence would still require the legislator to define the constitutional values the protection of which necessitates this form of protecting the rights. Declaring a general prohibition shall not be regarded as a justification on the merits.

[17] According to Petitioner 1, Section 78/B (5) of the AO that provides an interpretation of the conduct of performing the minor offence of habitually dwelling on public ground, is incompatible with the requirement of legal certainty in a State governed by the rule of law, declared in Article B) (1) of the Fundamental Law. With a tautological way of editing, the interpreting provision defines the conducts of performance with conjunctive conditions based, on the one hand, on the perpetrator's intentions, and on the other hand on conclusions deductible on the basis of external circumstances. In the scope of the latter, the Act only requires for establishing the conduct of performance that the external circumstances described there should indicate that the perpetrator regularly and in short intervals recurrently performs activities on the public ground typically used for dwelling. Therefore, performing the same conduct (e.g. washing, eating) would be qualified as a minor offence depending on the fact whether one performs it – seemingly – occasionally, or – as homeless persons, also seemingly – recurrently from time to time. Consequently, on the basis of the AO, the personal liberty of a homeless perpetrator may even be deprived in the case of properly using the public ground, which is discriminative and against human dignity.

[18] Differently from the general rules, Section 178/B (6) *a)* and *b)* of the AO do not allow imposing a pecuniary fine or an on-the-spot fine, and – also differently from the general rules – it provides more severe legal consequences in the case of repeated perpetration, as according to paragraph (20), the only applicable punishment shall be confinement, if the minor offence specified in paragraph (1) is committed for the third time within a period of six months. According to the petition, as the perpetrators of this minor offence are clearly the homeless persons, the provisions referred to above violate Article XV (1) and (2) of the Fundamental Law (equality before the law and the prohibition of discrimination).

[19] As held by Petitioner 1, in line with Section 178/B (7) of the AO – with the exceptions laid down there – the person subject to the procedure shall be taken into custody. The provisions introduced by the amendment do not allow the court to assess the justification of detention under the law applicable to minor offences, the detention shall last – without a judicial decision – until the deadline specified in Section 178/B (13) of the AO, while in the case of committing a wilful criminal offence punishable with deprivation of liberty, the affected person may, as a general rule, perform his or her defence at large. Otherwise, the general Section 73 (5) of the AO provides for a legal remedy against ordering or extending detention. In the case of violating the rules on habitually dwelling on public ground, due to taking into, and extending, custody *ex lege*, a legal remedy would not be effective – although the court may provide a formal way for it – as the detention follows from the text of the Act itself, rather than from an assessment by the organ ordering it. As in certain cases the duration of the detention under the law applicable to minor offences is extended automatically by virtue of the Act, lodging an appeal against it would be forlorn. As argued by Petitioner 1, in addition to violating the equality before the law and the prohibition of discrimination [Article XV (1) and (2) of the Fundamental Law], these provisions are also in breach of the requirement of fair trial and the right to legal remedy [Article XXVIII (1) and (7) of the Fundamental Law]. With regard to the fact that the applicable provisions provide in a discriminative manner for the content of the duration of detention under the law applicable to minor offences, as far as the homeless perpetrators are concerned, it is against the right to liberty enshrined in Article IV (1) of the Fundamental Law, and its restriction is incompatible with the condition under Article I (3) of the Fundamental Law.

[20] Petitioner 1 also referred to the conflict between the above provisions of the AO and Articles 5 to 6, as well as Articles 13 to 14 of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter: "Convention") and Article 2 of the Seventh Additional Protocol,

therefore, the conformity of Hungarian law with the international under Article Q (2) of the Fundamental Law is not granted. The Convention allows the restriction of the right to legal remedy in the case of minor crimes and offences, but it does not allow the exclusion of effective remedy.

[21] According to Petitioner 1, irrespective of the fact whether or not the Constitutional Court entertains the petition for the annulment of Section 178/B (1) of the AO, the annulment of further provisions of the Amending Act is justified, as the annulment of the rules of the discriminative sanction system, in itself, would result in leaving the AO without any state in time that allows the application of any legal sanction in the case of a minor offence under Section 178/B (1) of the AO, because the application of the general rules would be excluded in the absence of statutory provision. Therefore, the additional special provisions applicable to the procedures started because of the violation of the rules on dwelling habitually on public ground would become unnecessary, thus the requirement of legal certainty justifies the annulment of such further provisions.

[22] 13. Petitioner 2 referred to the applicable provisions (points 1 and 3 of Article 12) of the International Covenant on Civil and Political Rights (hereinafter: "Covenant"), according to which, the right to the freedom of movement and the right to choose one's place of residence may only be made subject to those restrictions specified in an Act, which are required for the security of the State, public order, public health, public morality or for the protection of other people's fundamental rights and freedoms, provided that they are in harmony with other rights acknowledged in the Covenant. According to Petitioner 2, Section 178/B (1) of the AO results in the restriction and the violation of the fundamental right to the freedom of movement and the right to choose one's place of residence granted in Article XXVII (1) of the Fundamental Law. Section 178/B (1) of the AO restricts, without granting the protection of another fundamental right, the fundamental right interpreted as a fundamental freedom according to the provision of the Fundamental Law referred to above. As laid down in the reasoning provided by the minister for the Amending Act, the amendment of the AO is necessary in the interest of providing for the coherence with the Fundamental Law on the basis of Article XV (3) [correctly: Article XXII (3)] of the Fundamental Law. The minister's reasoning also refers to the fact that the Fundamental Law contains an unconditional prohibition on dwelling habitually on public ground. As argued by Petitioner 2, the prohibition on dwelling habitually on public ground is not applicable unconditionally. According to the interpretation by Petitioner 2, the granting of the fundamental rights in the scope of human liberties (the fundamental right to the freedom of movement and the right to choose one's place of residence) shall always enjoy primacy over the fundamental concepts in the scope of social rights (Article XXII of the Fundamental Law).

[23] In the opinion of Petitioner 2, Section 178/B (1) of the AO is also in breach of Article I (1) and (4) as well as Article II of the Fundamental Law. In this respect, the petitioner referred to the findings made in CCDec 1, as well as to the fact that neither the provisions of the AO, nor its reasoning provide any grounds about the reason for declaring that a situation of life included into the scope of social benefits under the Act III of 1993 on Social Administration and Social Benefits (hereinafter: ASB) on the basis of the duty of the State undertaken in Article XIX of the Fundamental Law, is a criminal behaviour dangerous to the society.

[24] According to Petitioner 2, Section 178/B (4) of the AO violates the requirement of legal certainty in a State governed by the rule of law (clarity of norms) under Article B) (1) of the Fundamental Law, as follows. As laid down in Section 178/B (4) of the AO, launching a minor offence procedure may not be dispensed with at the time of committing yet another minor offence by the person who has been warned 3 times on-the-spot within 90 days because of committing the minor offence under paragraph (2). The legislator provided the police with the opportunity to give three warnings within 90 days, however, it does not specify the necessary period of time between the warnings. In the case of changing the habitual dwelling, with regard to the prohibition specified by the legislator, a period of few hours is not sufficient to set up a new place of stay.

[25] Petitioner 2 also referred to the fact that Section 178/B (6) of the AO automatically excludes the application of a pecuniary fine as the least severe punishment under the AO against the persons who perform the challenged statutory definition of minor offence. The minister's reasoning does not specify the reasons of the above, nevertheless, it may be justified on grounds of expedience, as the challenged statutory definition is typically performed by persons in poor financial conditions, however, it is the duty of the entity applying the law to assess the aspects of expediency in the course of sentencing.

[26] 14. According to Petitioner 3, Section 178/B of the AO violates Article II (right to human dignity) and Article III (1) of the Fundamental Law (prohibition of inhuman and degrading treatment). Petitioner 3 made references to the statements made in the CCDec and he stressed that, according to the AO, an act or omission shall qualify as a minor offence, if it is dangerous to the society, namely it violates or endangers the social, economic or State order according to the Fundamental Law, the personality or the rights of natural persons, legal entities or unincorporated bodies to an extent lower than the one needed for ordering the punishment of it as a criminal offence. In this context, he referred to the Decision 176/2011. (XII. 29.) AB, in which the Constitutional Court pointed out that in itself the abstract constitutional values

related to public order and public peace shall not justify the establishing of such a preventive statutory definition of minor offence. The simple fact that a homeless person habitually using the public ground may disturb other persons who also use the public ground is not equal to dangerousness to the society. To assume that such a person would commit a criminal or minor offence more frequently than other persons is against the inviolability of human dignity.

[27] Section 178/B (2) *b)* regulates a case of dispensing with launching the minor offence procedure (a cause excluding punishability): this is the case when the person dwelling habitually on public ground accepts the help offered by the authority, organ or organisation on-the-spot, and he or she is ready to cooperate for the purpose of using the services reserved for homeless persons. Petitioner 3 pointed out that, in the case concerned, the person subject to the procedure had an infectious disease, thus, even if he was ready to cooperate, the various social services available are limited. Should the person subject to the procedure use – against his will, in a forced situation, for the purpose of avoiding liability under the law applicable to minor offences – the services offered for homeless persons, his right to the inviolability of human dignity, his right to the freedom of self-determination and his general freedom of action would also be violated.

[28] In the opinion of Petitioner 3, the statutory definition under Section 178/B of the AO is incompatible not only with the requirements under Section 1 (1) and (2) of the AO – as, according to the above arguments, dwelling habitually on public ground could not, in itself, be dangerous to the society –, but it is also in conflict with Article II of the Fundamental Law. Based on the above, the procedural provision under Section 178/B (7) is considered to be a degrading treatment and thus to violate Article III (1) of the Fundamental Law, as according to it, the perpetrator of the minor offence under paragraph (1) shall be arrested by the police for the purpose of bringing before the court, he or she shall be interrogated and, unless the causes of exclusion under Section 10 of the AO apply, he or she shall be taken into custody according to the law applicable to minor offences. Thus, Section 178/B (7) of the AO does not provide the minor offence authority with a scope of discretion to assess the necessity of the detention, as the restriction of the right to liberty granted in Article IV (1) of the Fundamental Law, because of a conduct, which – according to Petitioner 3 – is not dangerous to the society.

[29] 15. Petitioner 4 held – on the basis of the same reasons and the same constitutional context as the ones explained in the petition of Petitioner 2 – that the challenged provisions of the AO are against the Fundamental Law, and he also alleged the violation of the same provisions of the Fundamental Law as the ones claimed by

Petitioner 2. Petitioner 4 also underlined that Section 178/B (7) and (13) regulate in a discriminative way the content of detention under the law applicable to minor offences with regard to the scope of homeless perpetrators, the rules offer a chance for the restriction of personal freedom without a judicial decision and without the possibility of terminating the detention, and these provisions are contrary to the right to personal freedom granted in Article IV of the Fundamental Law. Although Article IV (3) refers to the entitled person as one suspected with committing a criminal offence, on the basis of the principles of interpretation under Article R) (3) of the Fundamental Law, this fundamental right should be granted for the case of the deprivation of liberty applied not only in a criminal prosecution, but also in the course of a procedure carried out according to the law applicable to minor offences.

[30] 16. Petitioner 5 held – essentially on the basis of the same reasons as the ones explained in the petitions of Petitioner 2 and Petitioner 4 – that the challenged provisions of the AO are against the Fundamental Law, and he also alleged the violation of the same provisions of the Fundamental Law as the ones claimed by Petitioner 2 and Petitioner 4.

[31] 17. To sum up, on the basis of the petitions:
a) By declaring that dwelling habitually on public ground is a minor offence, the law-maker attempts to handle with the tools of criminal law an issue that has already been described by the Constitutional Court as one that belongs fundamentally to the scope of the State's obligation of protecting institutions in the field of the right to social security. The Seventh Amendment itself of the Fundamental Law does not justify or make necessary the criminalisation of dwelling habitually on public ground. On the one hand, the amendment of the Fundamental Law only provides a general character for a codified prohibition partially existing on a lower level of the hierarchy of the sources of law, and on the other hand, the constitutional requirements of introducing a statutory definition of minor offence have not been complied with.
b) Some provisions of Section 178/B [paragraphs (4) and (5)] violate the principle of the rule of law as they fail to meet the requirement of the clarity of norms and they open the gate for the arbitrary application of the law. The clarity of norms and the prohibition of the arbitrary application of the law are important elements of the system of criteria for the constitutionality of criminal law as elaborated in the case law of the Constitutional Court.
c) The statutory definition of the criminal offence regulated in Section 178/B of the AO is aimed at homeless persons, leading to prohibited discrimination on the basis of property- and social status.
d) Section 178/B (2) of the AO practically forces homeless persons subject to the procedure to use the services – available only to a limited extent – reserved for homeless persons. If they do not use this opportunity, a minor offence procedure

shall be started against them instead of being warned on-the-spot, and the procedure may imply imposing detention. Launching a minor offence procedure may not be dispensed with at the time of committing yet another minor offence by the person who has been warned 3 times on-the-spot within 90 days. As a result, if the homeless person wishes to avoid starting a minor offence procedure against him or her, the only option is to use the services reserved for homeless persons. The challenged regulation, therefore, violates the right to human dignity.

e) Certain provisions of the AO exclude the possibility of exercising discretion by the acting police officer or by the court, as law-applying entities, with respect to the deprivation of liberty of the person subject to the procedure. The acting police officer shall be bound by the law to arrest and take into custody the person subject to the procedure. The justification of neither ordering the arrest nor maintaining/expanding it can be weighed by the court, and, finally, the court's right of discretion in the field of imposing the sanction is more limited than under the general rules. In certain cases, the duration of the detention under the law applicable to minor offences is extended automatically by virtue of the Act, and lodging an appeal against it would be futile. Therefore, in the context of the right to personal freedom, the challenged regulation violates the right to equality before the law, the right to equal treatment and to fair court proceedings (including the right to a fair trial) as well as the right to an effective legal remedy.

[32] 18. In the course of its procedure, on the basis of Section 57 (1) and (2) of the ACC, the Constitutional Court obtained opinions from the minister of the interior, the minister of justice, and the minister of human capacities. The three affected ministers formed a unified opinion (hereinafter: "joint opinion of the ministers"). Additionally, on the basis of Section 27 (2) of the ACC, the Constitutional Court also requested the Public Foundation for Homeless Persons, the Hungarian Charity Service of the Order of Malta and the Shelter (Menhely) Foundation to put forward their professional opinion related to the petitions.

II

[33] 1. The provisions of the Fundamental Law referred to in the petitions:

"National Avowal
We hold that we have a general duty to help the vulnerable and the poor."

"Article B) (1) Hungary shall be an independent and democratic State governed by the rule of law."

"Article Q) (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law."

"Article R) (3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution."

"Article I (1) The inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights.
(2) Hungary shall recognise the fundamental individual and collective rights of man.
(3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.
(4) Fundamental rights and obligations which, by their nature, do not only apply to man shall be guaranteed also for legal entities established by an Act.

Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.

Article III (1) No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude. Trafficking in human beings shall be prohibited."

"Article IV (1) Everyone has the right to liberty and security of the person.
(2) No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.
(3) Any person suspected of having committed a criminal offence and taken into detention must, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall without delay make a decision with a written statement of reasons to release or to arrest that person."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.
(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

"Article XIX (1) Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the event of maternity, illness, invalidity, disability, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.

(2) Hungary shall implement social security for those persons referred to in paragraph (1) and for others in need through a system of social institutions and measures.
(3) The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity."

"Article XXII (1) The State shall provide legal protection for homes. Hungary shall strive to ensure decent housing conditions and access to public services for everyone.
(2) The State and local governments shall also contribute to creating decent housing conditions and to protecting the use of public space for public purposes by striving to ensure accommodation for all persons without a dwelling.
(3) Using a public space as a habitual dwelling shall be prohibited."

"Article XXVII (1) Everyone residing lawfully in the territory of Hungary shall have the right to move freely and to choose his or her place of residence freely."

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

"Article XXVIII (7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

[34] 2. The provisions of the AO challenged in the petitions:

"Section 178/B (1) Anyone habitually dwelling on public ground shall be guilty of committing a minor offence.
(2) Launching the minor offence procedure shall be dispensed with and a warning on-the-spot shall be applied, if
a) the perpetrator leaves the site of committing the offence upon being called upon by the police to do so, or
b) by accepting the help offered by the authority, or another organ or organisation on-the-spot, the perpetrator engages in cooperation aimed at using the services offered for homeless persons.
(3) At the same time of warning on-the-spot, the police officer shall provide the perpetrator with information on the legal consequences specified in paragraph (4).
(4) Launching a minor offence procedure may not be dispensed with at the time of committing yet another minor offence by the person who has been warned 3 times on-the-spot within 90 days because of committing the minor offence under paragraph (2).
(5) For the purpose of the application of paragraph (1), habitual dwelling means any conduct on the basis of which it may be verified that the habitual dwelling on public

ground is performed in the interest of a long-term stay on public ground without any intention to return to a place of residence, a place of stay or to another place of accommodation, and the circumstances of the stay on public ground or the conduct indicate that the perpetrator regularly and in short intervals recurrently performs activities (in particular sleeping, washing, eating, dressing, keeping animals) on the public ground typically used for dwelling.

(6) For the minor offence laid down in paragraph (1)

a) no pecuniary fine shall be imposed,

b) no fine on-the-spot shall be imposed against a person caught in the act.

(7) For the purpose of bringing before the court, the perpetrator of the minor offence specified in paragraph (1) shall be arrested and interrogated by the police, and – with the exception specified in paragraph (11) – he or she shall be detained under the law applicable to minor offences.

(8) During the detention under the law applicable to minor offences, the police shall provide for the perpetrator's washing and it shall provide him or her with clean clothes.

(9) During the arrest of the person who committed the minor offence under paragraph (1), the organ specified in the Government's decree shall take into temporary storage the movable assets not taken but still claimed by the perpetrator as well as the ones regarding which a declaration may not be obtained during the police action on-the-spot.

(10) The organ specified in the Government's decree shall retain the movable assets under paragraph (9) for 6 months. After the expiry of the retention period, the general minor offence authority shall take measures to annihilate the movable assets. Perishable goods and movable assets not suitable for storing shall be annihilated without delay.

(11) The procedure shall be terminated by the organ carrying out the preparatory process with respect to the person who is subject to a cause of excluding detention as specified in Section 10.

(12) If, during the interrogation, the perpetrator states to undertake community service, the organ carrying out the preparatory process shall, during the time of the detention under the law applicable to minor offences, provide for obtaining the expert opinion on employability.

(13) Regarding the perpetrator of the minor offence under paragraph (1), the detention under the law applicable to minor offences shall last until the final decision of the court, but not longer than the time of confinement under the law applicable to minor offences imposed without final force. In the case of a punishment of community service imposed without final force by the court of first instance, the detention under the law applicable to minor offences shall last until the offsetting

term specified in Section 14 (2a). If the court of first instance applies a warning, the perpetrator shall be set free without delay.
(14) The court shall deliver its decision of first instance within 72 hours from the time of taking into custody. An appeal against the decision of first instance may be declared at the hearing after the announcement of the ruling, and the court shall put it down in writing. The court shall transfer the documents to the regional court without delay.
(15) The court shall deliver its decision of second instance within 30 days from the decision of first instance.
(16) If the technical means are available, the presence of the perpetrator in the court proceedings may be secured by way of a telecommunication equipment.
(17) Because of committing a minor offence under paragraph (1), a warning, community service or confinement may be imposed, provided that the conditions laid down in this Act are fulfilled. If the perpetrator refuses to do community service, confinement may be imposed.
(18) If the court imposes a punishment of confinement, it shall order its execution without delay.
(19) The community service imposed according to paragraph (17) shall be implemented in the settlement where the offence had been committed.
(20) If the person subject to the procedure has already been condemned on two occasions with final force within six months preceding the date of committing the minor offence under paragraph (1), no community service shall be imposed and no warning shall be applied because of repeatedly committing the minor offence under paragraph (1).
(21) If the perpetrator undertakes to perform the community service specified in paragraph (17), but he or she fails to perform it, and the personal attendance of the perpetrator is necessary in the court proceedings held for the purpose of transforming the community service punishment to confinement, the general minor offence authority shall order the warrant of caption of the perpetrator."

III

[35] The judicial initiatives are unfounded.

[36] 1. On the basis of the authorisation provided in Article 24 (2) *b)* of the Fundamental Law, upon a judicial motion under Section 25 (1) of the ACC, the Constitutional Court reviews the compliance with the Fundamental Law of a law applicable in the individual case. Therefore, the Constitutional Court first examined whether the judicial initiatives meet the conditions under Section 25 of the ACC.

[37] Under an independent title – "Judicial initiative for norm control in concrete cases" –, the special rules applicable to this type of cases are laid down in Section 25 of the ACC, with further formal and material conditions specified in Sections 51 to 52 of the ACC. These have already been interpreted by the Constitutional Court in its earlier decisions {see the summary in the Decision 3058/2015. (III. 31.) AB, Reasoning [8] to [23]}. In several decisions, the Constitutional Court has interpreted further formal and material conditions of the petitions. The petition shall comply with the requirement of being explicit as specified in Section 52 (1) of the ACC, if it meets the conditions listed in paragraph (1b), i.e. it clearly and exactly specifies the reasons of the petition, the law or provision of the law challenged by the petition, the violated provision of the Fundamental Law or of the international treaty. Moreover, the petition should provide a reasoning why the contested law or the provision of the law is contrary to the specified provision of the Fundamental Law or the international treaty. In the case concerned, the petitions have not provided a reasoning, with regard to the challenged provision of the AO, why it violates the provisions of the Convention and the Covenant referred to in the petitions. In the present case, although the petitions mentioned Article Q), Article IV (2), Article XXVII (1) and Article XXVIII (1) of the Fundamental Law, as the violated provisions of the Fundamental Law, but they failed to submit any further relevant constitutional argument about why the challenged regulation was contrary to the indicated provisions of the international treaties referred to in the petitions. Accordingly, the Constitutional Court stated that these parts of the petitions do not fulfil the condition specified in Section 52 (1b) of the ACC.

[38] As laid down in Section 52 (4) of the ACC, the petitioner shall verify the existence of the conditions of the Constitutional Court's procedure. According to Section 52 (2) of the ACC, the review shall be limited to the indicated constitutional request. As, for the reasons explained above, the judicial initiatives do not comply with the condition laid down in Section 52 (1b) *e)* of the ACC and interpreted in the Ruling No. 3058/2015. (III. 31.) AB, the Constitutional Court stated that, due to the lack of compliance with this substantial condition, the relevant parts of the petitions shall not be judged on the merits.

[39] The Constitutional Court established that in other respects the judicial initiatives meet the condition laid down in Section 52 (1b) *e)* of the ACC and interpreted in the Ruling No. 3058/2015. (III. 31.) AB.

[40] 2. The Constitutional Court then examined whether the CCDec 1, referred to by the petitioners, is still applicable with unchanged content in the present case, or if the regulatory legal environment has changed since the adoption of CCDec 1 to such extent, which excludes, in the present case, the applicability of the CCDec 1 and the

former case law of the Constitutional Court built on it. In this respect, the Constitutional Court notes the following.

[41] As pointed out by the Constitutional Court, with regard to the applicability of its former case law, the Constitutional Court should take into account its own guiding practice. In the Decision 13/2013. (VI. 17.) AB (hereinafter: "CCDec 2"), upon the petition made by the commissioner for fundamental rights, the Constitutional Court stated in principle that "the road of Hungarian and European constitutional development that has been completed so far and the rules of constitutional law have a necessary impact on the interpretation of the Fundamental Law as well. In the course of reviewing the constitutional questions to be examined in the new cases, the Constitutional Court may use the arguments, legal principles and constitutional relationships elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant section of the Fundamental Law and of the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed" (Reasoning [32]), [Decision 6/2018. (VI. 27.) AB, Reasoning [42]).

[42] It follows from the above that the Constitutional Court shall always examine on case-by-case basis the applicability of the arguments laid down in its earlier decisions, with due regard to the individual nature of the case concerned. Therefore, in the present case as well, the Constitutional Court has performed the review with due account to all the above.

[43] In CCDec 1, the Constitutional Court has already examined the constitutional requirements of establishing a statutory definition of a minor offence, and it annulled a statutory definition in the AO that had the same content as the law applicable in the present case. As stated by the Constitutional Court in CCDec 1, the mere fact that using public ground for habitual dwelling implies the violation of the rights of others, the possibility of breaching public order, shall not be regarded as a legitimate reason for criminalisation. The Constitutional Court recalls that in the Decision 176/2011. (XII. 29.) AB it pointed out that in itself the abstract constitutional values related to public order and public peace shall not justify the establishing of such a preventive statutory definition of minor offence.

[44] Due to the Fourth Amendment of the Fundamental Law on 25 March 2013, Article XXII of the Fundamental Law has been replaced by the following provision:

"Article XXII (1) Hungary shall strive to ensure decent housing conditions and access to public services for everyone.
(2) The State and local governments shall also contribute to creating decent housing conditions by striving to ensure accommodation for all persons without a dwelling.
(3) An Act of Parliament or local government decree, with regard to a specific part of public ground, may provide that the habitual stay on public ground is illegal, in order to protect public order, public security, public health and cultural values."

[45] The Seventh Amendment of the Fundamental Law modified Article XXII of the Fundamental Law as follows, by replacing Article XXII (1) of the Fundamental Law with the following provision:
"(1) The State shall provide legal protection for homes. Hungary shall strive to ensure decent housing conditions and access to public services for everyone."

[46] Article XXII (2) to (3) of the Fundamental Law have been replaced by the following provisions:
"(2) The State and local governments shall also contribute to creating decent housing conditions and to protecting the use of public space for public purposes by striving to ensure accommodation for all persons without a dwelling.
(3) Using a public space as a habitual dwelling shall be prohibited."

[47] According to the reasoning attached to the Seventh Amendment of the Fundamental Law in force as from 15 October 2018: "in Article XXII, the amendment aims to emphasize the rules on the physical protection of home. It is still a state goal to ensure decent housing conditions and access to public services for everyone. Dwelling habitually on public ground violates the using of public ground for public purposes, therefore, it is justified to take action against it."

[48] According to the reasoning of the Amending Act, which introduced Section 178/B of the AO, the introduction of the statutory definition of dwelling habitually on public ground is necessary for the purpose of providing coherence with the amended provision of Article XXII (3) of the Fundamental Law.

[49] Thus, the paragraphs (2) and (3) of Article XXII referred to above, as the Seventh Amendment of the Fundamental Law that entered into force on 15 October 2018, introduced new provisions into the Fundamental Law, providing, with their particular content (the constitutional protection of using public ground for public purposes, an explicit prohibition in the Fundamental Law of dwelling habitually on public ground to grant the constitutional protection mentioned above), a new constitutional background to the case under review, also as compared to the totality of the

Fundamental Law. Consequently, in the present case, the constitutional issue to be reviewed is a different and new one as compared to the cases underlying the earlier decisions of the Constitutional Court adopted before the Seventh Amendment of the Fundamental Law.

[50] Based on the above, the Constitutional Court established that after the adoption of CCDec 1, the relevant and reviewed provisions of both the Fundamental Law and of the AO have been modified, therefore, the statements made in the CCDec 1 and in the relevant earlier case law of the Constitutional Court are no longer applicable in the regulatory environment reviewed on the basis of the present petitions, they do not bind the Constitutional Court in the examination of the constitutionality of the new statutory definition under the law applicable to minor offences.

[51] 3. The Constitutional Court then examined to what extent the amended content of Article XXII of the Fundamental Law binds the Constitutional Court during the constitutional review.

[52] On 28 June 2018, the Seventh Amendment of the Fundamental Law introduced into the Fundamental Law paragraphs (2) and (3) of Article XXII, and as a result – not questioned by the petitioners themselves – the relevant constitutional regulation after the adoption of CCDec 1 has fundamentally changed. The law-maker adopting the Fundamental Law introduced on the highest level of the sources of law, in the Fundamental Law, a general prohibition applicable to everyone on banning the habitual dwelling on public ground in the interest of the constitutional protection of public grounds. The former Article XXII (3) introduced by the Fourth Amendment of the Fundamental Law, as a provision setting an exception, only provided for the prohibition of dwelling habitually on public ground with regard to a certain area and a purpose, authorising local governments to designate public grounds, in the interest of protecting specific constitutional values (public order, public security, public health), where dwelling habitually qualifies as a minor offence.

[53] Due to the Fourth Amendment of the Fundamental Law, Article 24 (5) of the Fundamental Law allows carrying out the Constitutional Court's procedure only with regard to the Fundamental Law and the amendment of the Fundamental Law concerning the procedural requirements under the Fundamental Law applicable to its adoption and promulgation. In the CCDec 2, referred to earlier, on examining the Fourth Amendment of the Fundamental Law, the Constitutional Court took a stand stating that it would not create and would not change the Fundamental Law, the protection of which is its duty, thus it dissociated itself from reviewing the constitutionality of the content of the Fundamental Law or of the amendment of certain provisions of it.

[54] The Constitutional Court emphasizes in the present case as well that for the Court the Fundamental Law is the constitutional standard, therefore – in the absence of any relevant competence allowing such review – it cannot judge the content of the positive provisions of the Fundamental Law and of its amendments. Consequently, Article XXII introduced by the Seventh Amendment of the Fundamental Law is a mandatorily applicable standard in the present case, too. The law-maker's intentions and aims presented in the reasoning attached to Article XXII of the Fundamental Law should not be disregarded either. In this scope, in the changed regulatory environment of the Fundamental Law, the constitutional content of Article XXII of the Fundamental Law is of primary importance.

[55] 4. The Constitutional Court then examined the constitutional content of Article XXII of the Fundamental Law, with due regard to the law-maker's aim related to this provision of the Fundamental Law and attached to the amendment of the Fundamental Law referred to above.

[56] In addition to formulating a State goal, Article XXII (2) of the Fundamental Law grants constitutional protection for using public ground for public purpose. This protection is closely related to the prohibition under the Fundamental Law laid down in paragraph (3). Paragraphs (2) and (3) need to be interpreted together and with regard to each other: the constitutional prohibition under paragraph (3) shall secure protection for using of public ground for public purpose. This interpretation is also supported by the reasoning of the Fundamental Law, stating that dwelling habitually on public ground violates the constitutionally protected use of public ground for public purpose. Thus paragraph (3) referred to above is a prohibition formulated on the level of the Fundamental Law and applicable to everyone. The constitutional protection of the use of public ground for public purpose is justified by the fact that it is of "finite number", and use for public purpose means usage open for the whole community (anyone) in the interest of the whole community. Any other usage should be exceptional and tied to conditions under the law. Consequently, using the public ground by anyone for a public purpose shall also be limited by respect to be paid to the rights of others.

[57] 5. The Constitutional Court then examined the issues of exercising individual rights as a member of the community and the obligation of cooperation.

[58] The Fundamental Law lays down the catalogue of fundamental rights (freedoms) as well as the connected elements of responsibility in the Chapter FREEDOM AND RESPONSIBILITY. According to Article I (1) of the Fundamental Law, "the inviolable

and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights." According to paragraph (2) of the same article, "Hungary shall recognise the fundamental individual and collective rights of man".

[59] As laid down in Article II of the Fundamental Law, "human dignity shall be inviolable. Every human being shall have the right to life and human dignity [...]".

[60] The individual shall exercise the constitutional rights entitling him or her, including the right of self-determination stemming from the fundamental right to human dignity, as a member of the community. All members of the community are individually entitled to the constitutional rights, and also in the course of exercising the individual's right to self-determination, he or she shall exercise his or her constitutional right in a manner not violating the exercising of constitutional rights by others, with due regard to the system of requirements of necessity and proportionality. However, the Fundamental Law also contains another side of the rights: the individuals' responsibility for the society. Freedom, namely, is the field and the scope of freely unfolding the individual's personality, while responsibility means paying respect to others' freedom and obeying the rules of living together in the society peacefully. As laid down in the National Avowal, "we hold that individual freedom can only be complete in cooperation with others". Therefore, a balance should exist between exercising the individual's constitutional rights and the interests of the community, the exercising of the rights of other persons constituting the community. The violation of the constitutional prohibition laid down in Article XXII (3) of the Fundamental Law breaks up this balance. The exercising of constitutional rights is inseparable from performing constitutional obligations. Obeying the prohibition laid down in Article XXII (3) of the Fundamental Law is a constitutional obligation of everyone. If an individual breaches this constitutional obligation, then he or she necessarily breaks up the balance between the individual's constitutional right and the interest of the community (the constitutional rights equally entitling all members of the community). The State is also bound by an objective obligation of protecting institutions with regard to implementing the State goal laid down in Article XXII (2) of the Fundamental Law, as well as in the protection of the related fundamental rights. In the course of exercising his or her constitutional rights and performing the constitutional obligations, the individual shall be bound to cooperate not only with the members of the community, but also with the State obliged to grant protection for the institutions.

[61] According to Article O) of the Fundamental Law: "Everyone shall be responsible for him- or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities." The formula of the

man's image first emerged in the Decision 3110/2013. (VI. 4.) AB. As pointed out by the Constitutional Court in the relevant decision, "the Fundamental Law defines relation between the individual and the community by focusing on the individual being tied to the community, without, however, affecting his or her individual value. This follows from in particular from Article O) and Article II of the Fundamental Law." (Reasoning [49]), reiterated in the Decision 32/2013. (XI. 22.) AB, Reasoning [88]. With respect to the formula of the man's image, in the Decision 3132/2013. (VII. 2.) AB, the Constitutional Court examined whether imposing the patients' obligation of cooperation was compatible with the Fundamental Law. As emphasized in the above decision of the Constitutional Court, "the man's image in the Fundamental Law is not that of an isolated individual, but of a responsible personality living in the society. This follows in particular from Article O) of the Fundamental Law." (Reasoning [95]). As interpreted by the Constitutional Court, the following consequences shall be drawn from the above. Individuals live in the community, thus, also in the course of exercising his or her constitutional rights, the individual is responsible not only for himself or herself, but also for the other members of the community; the exercising of constitutional rights should be in balance with his or her responsibility, taken as the member of the community, also for the community. Performing the obligation of cooperation is indispensable for maintaining this balance. An unlawful conduct or the breach of a constitutional prohibition falls outside the scope of the constitutional protection of fundamental rights, as it breaks up the above balance. The State is bound to guarantee the objective protection of institutions in the interest of securing the State goal laid down in Article XXII (2) and the related constitutional rights. In line with Article O) of the Fundamental Law, the person responsible both for himself or herself and for the members of the community shall be obliged to contribute to the performance of this duty of the State, and he or she should actively cooperate in performing it effectively. In other words, the individual has to cooperate with the State in performing the State's duty. The responsibility of the individual for himself or herself and for the community shall result in the obligation of constructive cooperation with the State, rather than in the voluntary, free choice of dwelling habitually on public ground, which would imply the breach of the prohibition laid down in the Fundamental Law.

[62] The effective and objective protection of the institutions, as the constitutional obligation of the State, cannot be implemented without the cooperation of the affected individuals. It is the interest of the public that public grounds to be used by "anyone", within the framework of legal regulations, shall be used in the public interest, in line with the original purpose of the public ground concerned. Public grounds may only be used for a purpose other than the original one exceptionally, restricted in time and within the limits set by the law, and it should not change the

original purpose of the public ground; it shall not unlawfully restrict or hinder the using of public ground by "anyone" within the limits of the law and in line with the law. As long as the State performs its constitutional obligation of protecting the institutions in the field of reaching the State goal laid down in Article XXII (2) of the Fundamental Law and of the related fundamental rights (securing and protecting the material side of fundamental rights), and as long as it performs the resulting duties of the State, the individual shall not be entitled to refuse contributing to the performance of the duties effectively, or to refuse the cooperation with the State.

[63] However, in this context, the State has a constitutional obligation of elaborating and maintaining legal regulations and institutions that can effectively provide for the realisation of the State goals laid down in Article XXII (1) and (2) of the Fundamental Law, in line with the capacities of the economy, as well as for the protection of the fundamental rights closely linked to it, in particular the enforcement of the fundamental rights granted in Article II of the Fundamental Law. In this respect, the Constitutional Court has accepted as facts the content of the answers provided by the institutions and organisations requested by the Constitutional Court in the present case. The Constitutional Court found that even at present the State maintains and operates, within the framework regulated by the law, a system of institutions, and in performing this duty the State acts in a wide scale cooperation with the local governments as well as the social organisations and the churches involved, according to their basic activity, in performing or supporting such activities.

[64] The Constitutional Court is not competent to assess from a constitutional point of view the reasonableness or the efficiency of the construction and the operation of the institutional system. Nevertheless, it has to assess, in the framework of the obligation of cooperation, whether the State has performed its objective obligation of protecting the institutions, and whether it has provided for the conditions of the constitutionally expected cooperation. The Constitutional Court reiterates repeatedly in this context that the obligation of cooperation is not the free choice of the individual: it is the constitutional obligation of the individual who bears responsibility for himself or herself as well as for the community. Without cooperation, the State shall not be able to guarantee the implementation of the State goal laid down in Article XXII (2) of the Fundamental Law, even if the State's protection of the institutions is otherwise effective.

[65] 6. The Constitutional Court then reviewed the regulation under the AO that "implements" the constitutional prohibition in the absence of voluntary law abidance.

[66] As underlined in particular in the reasoning attached to the Seventh Amendment of the Fundamental Law, dwelling habitually on pubic ground violates the use of public ground for a public purpose under constitutional protection, therefore, "it is justified to act against it". The challenged regulation of the AO – in the absence of voluntary law abidance – provides for this justified action; it imposes legal consequences on the breach of the constitutional prohibition and the obligation of cooperation. As the AO shall impose sanctions on "anyone" who breaches the constitutional prohibition, the allegations in the petitions about imposing legal sanctions only in relation to homelessness, as a situation of life, are not verified.

[67] The challenged regulation of the AO sanctions the wilful and repeated refusal of the obligation of cooperation and the continuous neglecting of this obligation, rather than sanctioning a situation of life: homelessness. The challenged regulation of the AO is an *ultima ratio* tool only to be used as last resort, when the obligation of cooperation is violated wilfully and repeatedly (three times). As the manifestation of the principle of gradualism, according to the AO, sanctioning under the law applicable to minor offences shall be preceded by a measure: the officers of the authority shall request the perpetrator at least three times to leave the site. Thus the provision differs from the rules of the general procedural order of minor offences that there shall be no sanctioning or reporting of the minor offence in the case of the first, the second and the third committing of the offence, but the perpetrator shall be requested to leave the site. In the case of yet another committing of the offence, the procedure under the law applicable to minor offences shall only take place if the perpetrator had failed to obey the call to leave the site three times.

[68] There are other restrictive conditions set out in the AO: no pecuniary fine or fine on-the-spot shall be imposed. As a general rule, confinement shall not be imposed, however, according to the regulatory logic of the AO, those who do not undertake to perform community service, or those who commit the minor offence repeatedly (if the person subject to the procedure has been condemned twice with final force within a period of six months due to the violation of the rules on dwelling habitually on public ground), similarly to the perpetrators of other minor offences, the court may – or in the case of the repetition of the offence, the court shall – impose the sanction of confinement.

[69] As underlined by the Constitutional Court, the regulation of the AO enforces the principle of gradualism and proportionality, and it also complies with the requirements of constitutionality regarding the law applicable to minor offences: it enforces the guarantees elaborated by the Constitutional Court in its decisions about the constitutional review of certain provisions of the AO. Dwelling habitually on

public ground does not form part of properly using the public ground in line with its purpose. Using public grounds for the public purpose, which is open for all members of the community – also with regard to the finite number of public grounds – means usage according to the rules set by the law; there are some laws that provide for conditions or impose restrictions on using the public ground with account to its particular purpose. "Anyone" may use the public ground, but not without limitations and not for any purpose; using should be aligned with the purpose of the relevant public ground and it should be implemented within the limits of the provisions of the law applicable to the usage. (Certain fundamental rights, for example the right to assembly enjoying primary constitutional protection and typically exercised on public ground, may only be exercised within the statutory limitations, and exercising the right in an unlawful way shall imply sanctions. Furthermore, as another limitation on exercising a fundamental right enjoying primary protection, exercising it should not perform a criminal offence or a call for committing it.) Dwelling habitually on pubic ground, in addition to being a breach of a prohibition under the Fundamental Law and of the obligation of cooperation, means using the public ground for a non-public purpose, i.e. a usage other than its original purpose; it is a legally unregulated and at the same time constitutionally prohibited conduct.

[70] The Constitutional Court is the "principal organ for the protection" of the Fundamental Law; it follows from the Constitutional Court's protective function that it should enforce the values and the prohibitions laid down in the Fundamental Law. The Constitutional Court should take it into account in the course of reviewing the constitutionality of specific legal regulations. The prohibitions laid down in the Fundamental Law are prohibitions specified on the highest level of the hierarchy of laws, therefore, they are not only applicable to anyone, but they are also enforceable in the absence of voluntary law abidance.

[71] According to the National Avowal, "we hold that we have a general duty to help the vulnerable and the poor". Therefore, the State should support and help those persons who are beyond doubt the most vulnerable members of the society, and this undertaking by the State is reinforced in Article XXII (2) of the Fundamental Law. To implement it, the general mechanisms of the social security system and the various model programs institutionalise complex forms of support for the homeless persons.

[72] The law-maker handles the question of dwelling habitually on public ground with the more lenient tools of the law applicable to minor offences, rather than the ones of criminal law, as it sanctions committing the conduct as a minor offence and not as a criminal offence. To decide about the manner (the particular form of legal regulation) by which the law-maker enforces a value protected under the Fundamental Law or

the refraining from a conduct prohibited by the Fundamental Law, is not a constitutional question; the Constitutional Court may only review the constitutional question whether the challenged regulation found in the AO (as the particular method of regulation chosen by the law-maker) is contrary to the Fundamental Law.

[73] The person struck by marginalisation should not be legally responsible for the fact itself of being drifted to the periphery of the society, and the relevant regulation does not even imply such a responsibility. If follows from the State's obligation of protecting vulnerable persons that the authorities and the courts must act with respect to the affected persons as the enforcers of State care by making it clear that the enforcement of the prohibition of living on public ground is the common interest of both the affected person and the of the society.

[74] With regard to all the above, the Constitutional Court established that the AO's challenged statutory definition of the minor offence does not sanction an objective fact, which is independent from the affected person (being homeless), but the active violation of a cooperation obligation of policing nature, therefore, the challenged regulation does not violate Article B) (1), Article I (3) and the aims specified in the National Avowal.

[75] 7. The Constitutional Court then examined the petitioners' arguments about Section 178/B (4) and (5) of the AO violating the principle of the rule of law, as they do not comply with the requirements of the clarity of norms and legal certainty and they give way to the arbitrary application of the law.

[76] The petitions hold that Section 178/B (4) of the AO violates the requirement of legal certainty (clarity of norms) in the State governed by the rule of law under Article B) (1), as, according to the relevant regulation, launching a minor offence procedure may not be dispensed with at the time of committing yet another minor offence by the person who has been warned 3 times on-the-spot within 90 days because of committing the minor offence under paragraph (2). The legislator provided the police with the opportunity to give three warnings within 90 days, however, it does not specify the necessary period of time between the warnings.

[77] According to Petitioner 1, Section 78/B (5) of the AO that provides an interpretation of the conduct of performing the minor offence of habitually dwelling on public ground, is incompatible with the requirement of legal certainty in a State governed by the rule of law, declared in Article B) (1) of the Fundamental Law. The interpreting provision defines the conducts of performance with conjunctive conditions based, on the one hand, on the perpetrator's intentions, and on the other hand on conclusions

deductible on the basis of external circumstances. In the scope of the latter, the Act only requires for establishing the conduct of performance that the external circumstances described there should indicate that the perpetrator regularly and in short intervals recurrently performs activities on the public ground typically used for dwelling. Therefore, performing the same conduct (e.g. washing, eating) would be qualified as a minor offence depending on the fact whether one performs it – seemingly – occasionally, or – as homeless persons, also seemingly – recurrently from time to time. Consequently, on the basis of the AO, the personal liberty of a homeless perpetrator may even be deprived in the case of properly using the public ground.

[78] The Constitutional Court points out that the clarity of norms is a constitutional requirement also with respect to a norm under the law applicable to minor offences, just as the prohibition of the arbitrary application of the law. The difficulties resulting from the wording of the norm only raise the issue of the violation of legal certainty and make it unavoidable to annul the norm where the law is genuinely uninterpretable and it makes the application of the norm unpredictable and unforeseeable for those addressed by the norm {Decision 3106/2013. (V. 17.) AB, Reasoning [10]}.

[79] In the present case, in the context of Section 178/B (4) of the AO, there is no adequate ground to conclude that its provision on the requirement of three prior warnings within 90 days, as the precondition of the mandatory start of the minor offence procedure, would be, in itself, uninterpretable and, therefore, inapplicable.

[80] When the conflict of a law with the Fundamental Law is examined, the Constitutional Court shall always interpret the relevant law as well. This is necessary in each case, as the content and the scope of application of the law needs to be established. In the case of a new law yet without any case law, the Constitutional Court can only relay upon its own interpretation. The mutual application of the law's abstract statutory definition and the actual facts of the specific case, together with the interpretation of the law, is the primary duty of the courts of general competence; in the course of examining the law, the Constitutional Court carries out the mutual application of the Fundamental Law and the law concerned, together with the constitutional interpretation of the law. According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the interpretation of the Fundamental Law and of the laws one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good. Interpretation in accordance with Article 28 of the Fundamental Law is a constitutional obligation for the proceeding courts. In the case under review, the

challenged text of the norm provides the law-applying organs with a possibility of flexible assessment to determine the conducts qualified as "habitual". It should be furthermore emphasized that washing oneself on public ground, in itself, does not form part of properly using the public ground in line with its purpose. However, the elaboration of this framework of interpretation is the duty of the adjudicating courts.

[81] The Constitutional Court emphasizes in the context of Section 178/B (5) of the AO that in the particular case the description of the given situation of life is necessary for the verification of the scope of persons who are bound to cooperate and who fail to do so (the subjects of the statutory definition of the minor offence). The AO only provides an exemplary list on the criteria of habitually dwelling on public ground; the elements of the list reflect the most typical actions and circumstances in the context of habitual dwelling. The statutory definition of habitual dwelling cannot be described by way of an exhaustive list, and it would also be against the purpose of the law, as the careful assessment of all circumstances shall be required in the particular case to verify whether or not the dwelling on the pubic ground is habitual. This is, indeed, in each case, the duty of the law-applying organs.

[82] The Constitutional Court points out that in the present case the generality of the concepts found in the provision interpreting the conduct of committing the offence does not exceed the level of abstraction customary for the legal concepts of legislation.

[83] With regard to the above, the Constitutional Court established that neither the requirement of the clarity of norms, nor the requirement of legal certainty was violated by the challenged regulation.

[84] 8. The Constitutional Court then examined the issues related to the discriminative nature of the statutory definition of the minor offence, as alleged in the petitions, and the questions connected to the deprivation of liberty. According to the petitions, the statutory definition of the minor offence is aimed at homeless persons and certain provisions of the AO exclude the possibility of exercising discretion by the acting police officer or by the court, as law-applying entities, with respect to the deprivation of liberty of the person subject to the procedure. The acting police officer shall be bound by the law to arrest and take into custody the person subject to the procedure. The justification of neither ordering the arrest nor maintaining/expanding it can be weighed by the court, and, finally, the court's right of discretion in the field of imposing the sanction is more limited than under the general rules. In certain cases, the duration of the detention under the law applicable to minor offences is extended automatically by virtue of the Act, and lodging an appeal against it would

be futile. Therefore, the challenged regulation violates the right to equality before the law, the right to equal treatment and to fair court proceedings (including the right to a fair trial) as well as the right to an effective legal remedy in the context of, and through the right to personal freedom.

[85] The petitioners claimed from two sides that there was a collision between the challenged provision of the AO and Article XV (1) and (2) of the Fundamental Law. On the one hand, according to the petitioners, the statutory definition of the minor offence is applicable to a specific group of the society, the homeless persons. In this context, the Constitutional Court points out that this statement cannot be verified on the basis of the text of the norm itself. The statutory definition of the minor offence has a general subjective side: the refusal of the obligation of cooperation in the context of dwelling habitually on public ground is prohibited for everyone without exception. The Fundamental Law itself contains a general prohibition, and it has not been questioned by the petitioners either. The petitioners failed to support with facts that the challenged regulation of the AO would only sanction homeless persons because of breaching the general prohibition under the Fundamental Law. In the absence of any guiding law-applying and judicial case law, we do not know at present how many times and who in particular have been condemned by the courts on the basis of the new statutory definition of the minor offence in the AO. It should be emphasized that, differently from the case judged upon in the Decision 176/2011. (XII. 29.) AB, in the present case, the law does not connect the sanction to a conduct (dwelling habitually on public ground), which is a necessary condition of the life of those who live in a specific social situation, because the applicability of the sanction is related to the breach of the constitutional principle of the obligation of cooperation between the individual and the State, as laid down in the legal system.

[86] On the other hand, according to the petitions, the provisions violate the requirement of equal treatment, because in the case of the challenged statutory definition of the minor offence, the law-maker created sanctioning options different from the general rule of the AO. In the scope of the differences, in the context of the mandatory application of detention, the petitioners raise the issue of the violation of Article IV of the Fundamental Law. In line with the consistent case law of the Constitutional Court: "discrimination shall be deemed to exists if the assessment of the subjects, the determination of their rights and obligations is different with respect to an essential element of the regulation. However, no discrimination shall be established when the law provides for different rules regarding a different scope of subjects" {Decision 26/2013. (X. 4.) AB, Reasoning [183]}.

[87] It is verified that the law-maker provides for the possibility of applying the sanction with respect to the special scope of subjects who resist to dispense with dwelling habitually on public ground despite of the relevant prohibition laid down in the Fundamental Law and despite of receiving multiple explicit warnings. Accordingly, by taking into account the arguments detailed above, the challenged regulation of the AO provides for special rules concerning a well-distinguishable group of perpetrators, rather than regarding the explicit focus-group of homeless persons, and the challenged regulation shall be applicable to each member of this well-distinguishable group, therefore, it is not in conflict with the prohibition of discrimination.

[88] The Constitutional Court, therefore, established that the challenged regulation does not violate Article XV (1) and (2) of the Fundamental Law (equality before the law, requirement of equal treatment).

[89] 9. Then the Constitutional Court examined the elements of the petitions related to the restriction of personal freedom (Article IV of the Fundamental Law).

[90] According to Article IV (3) of the Fundamental Law, any person suspected of having committed a criminal offence and taken into detention must, as soon as possible, be released or brought before a court. According to the CCDec 1, this provision and the requirements deductible from it shall be applicable as appropriate also to the detention under the law applicable to minor offences.

[91] In line with the case law of the Constitutional Court, with regard to the constitutionality of the deprivation of liberty, the length of the time and the justification of the deprivation of liberty have a determining importance, just as, in the case of an unlawful deprivation of liberty, the right to legal remedy, the specification of other legal consequences as well as their suitability.

[92] As emphasized by the Constitutional Court in its earlier decision – that has already been referred to after the entry into force of the Fundamental Law – the individual's right to personal freedom and personal security stemming from the Fundamental Law shall enjoy effective protection, if the actual length of the procedure remains within the maximum period of time specified by the law, and it is adequate with regard to the special features of the case [Cp. Decision 3/2007. (II. 13.) AB, reinforced in CCDec 1].

[93] Section 178/B (13) of the AO introduced multi-sided guarantees regarding the determination of the maximum period of detention. On the one hand, it specifies that the detention under the law applicable to minor offences shall last until the final decision of the court, but not longer than the time of confinement under the law

applicable to minor offences imposed without final force. On the other hand, it states that in the case of a punishment of community service imposed by the court of first instance – to be delivered, according to paragraph (14), within 72 hours, i.e. within the time-limit applicable to detention under the law of minor offences as specified in Section 14 (2a) of the AO –, the detention under the law applicable to minor offences shall last until the offsetting term specified in Section 14 (2a). Otherwise Section 178/B (17) and (20) of the AO shall apply to the sanctions that may be imposed; in the basic case, these provisions offer a possibility for judicial discretion, which shall only be restricted in the case of recidivist perpetrators (condemned twice within the period of 6 months), as in their case, confinement shall be the only possible punishment. If the court of first instance applies a warning, the perpetrator shall be set free without delay. This way, the determination of the term of detention under the law applicable to minor offences shall modify the general rule of the AO only to the extent absolutely necessary with regard to the peculiar character of the conduct, and, at the same time, it provides multiple-sided guarantees for the purpose of maximising the term of the detention under the law applicable to minor offences. The possibility of effective legal remedies against detention under the law applicable to minor offences is also granted in accordance with the general rules of the AO, therefore, the regulation is in line with the requirements laid down in CCDec 1.

[94] The Constitutional Court established with due regard to the arguments explained above that in the context of the right to personal freedom, the challenged regulation does not violate the right to equality before the law, the right to equal treatment and to fair court proceedings as well as the right to an effective legal remedy.

[95] 10. Finally, the Constitutional Court examined the arguments of the petitioners about Section 178/B (2) of the AO practically forcing the homeless persons subject to the procedure to use the services – available only to a limited extent – reserved for homeless persons. If they do not use this opportunity, a minor offence procedure shall be started against them instead of being warned on-the-spot, and the procedure may imply imposing detention. Launching a minor offence procedure may not be dispensed with at the time of committing yet another minor offence by the person who has been warned 3 times on-the-spot within 90 days. As a result, if the homeless person wishes to avoid starting a minor offence procedure against him or her, the only option is to use the services reserved for homeless persons. The challenged regulation, therefore, violates the right to human dignity.

[96] First of all, the Constitutional Court points out that the limited availability of differentiated social services for homeless persons has not been verified by the petitioners. Also in the course of the assessment of this element of the petitions, the

Constitutional Court has accepted as a fact the relevant statements and the data found in the answers provided by the institutions and organisations requested by the Constitutional Court. According to the statistical facts and data found in the ministers' joint reply sent to the Constitutional Court's request, there are extra capacities in most fields of the social services, i.e. the capacities available are not fully used. The Constitutional Court points out that fulfilling the constitutional obligation of cooperation and obeying the prohibition laid down in the Fundamental Law can only be expected from the affected persons, if, at the same time, the State also fulfils its objective obligation of protecting institutions, i.e. if it sets up, operates and – to the extent allowed by the capacity of the economy – continuously develops the system of benefits to provide differentiated services for homeless persons.

[97] However, the Constitutional Court also underlines that in the present case the constitutional review does not focus on the untouchable "core dignity" in the scope of the constitutional protection of Article II of the Fundamental Law (the right to human dignity). The present review deals with the right to self-determination, which is a sectional right of the above, as the restrictable element of the right to human dignity, as well as with the alleged violation of the autonomy of action (the right to the freedom of movement and the right of residence).

[98] It follows from Article XXII (2) of the Fundamental Law requiring the ensuring of decent housing conditions, that in the interest of implementing this State goal, the State and the local governments shall strive for providing accommodation for all homeless persons. As a result of the enhanced role undertaken by the State, it intends to fulfil its duties in the field of protecting the institutions and of protecting life. The Constitutional Court points out that actually living on the street is the situation that results in inhuman living conditions. Indeed, for the protection of dignity and human life is the State bound to secure the protection of the institutions, with due regard to the provisions laid down in the National Avowal of the Fundamental Law on protecting the poor and the vulnerable.

[99] In the framework of the obligation of protecting institutions, and as a tool of *ultima ratio*, the State sanctions, in the form of a statutory definition of a minor offence, the violation of the affected person's obligation of cooperation for the purpose of using the system of benefits regulated by the law and maintained adequately This is the basis of the Fundamental Law's provision on the general prohibition in the context of dwelling habitually on public ground. As a constitutional consequence of this prohibiting provision, the State has an enhanced obligation of protecting the institutions, with regard to homeless persons – with due account to Article XXII (2) of the Fundamental Law –, as it must secure that homeless persons have at all times a

place of dwelling not located on public ground. The State can only fulfil its enhanced obligation of protecting the institutions that results from the prohibiting provision of the Fundamental Law, if the homeless persons enter the system that provides them for social services. When, in the absence of voluntary law abidance, this is not the case, the purpose of the constitutional order prescribing the State's obligation of protecting the institutions becomes emptied out, and in this context, the State cannot fulfil its obligation of protecting life.

[100] The petitioners have not verified that in the case of using the services of the social system the affected persons are subject to dehumanisation and that they are treated like non-human objects. Neither is it verified that in case of using the services of the support system, the affected persons are placed among circumstances without human dignity. If, indeed, such a situation still occured, the protection of the fundamental rights of the affected persons would be ensured through the commissioner for fundamental rights and the system of ordinary courts.

[101] The right to self-determination and the autonomy of action are sectional rights of the fundamental right to human dignity. With regard to the alleged violation of these rights, the close relations between the constitutional rights (self-determination, autonomy of action) and obligations (cooperation) as well as the prohibitions (dwelling habitually on public ground) have to be taken into account, together with the fact that the conducts prohibited in the Fundamental Law and minor offences, as conducts that endanger the society – to less extent than criminal offences –, always delimit the sectional rights mentioned above. The exercising of constitutional rights is inseparable from performing constitutional obligations and obeying constitutional prohibitions. The right to self-determination and the autonomy of action shall not extend to the breach of a prohibition under the Fundamental Law, choosing a conduct prohibited in the Fundamental Law or committing a minor offence. The right to self-determination and the autonomy of action is subject to a necessary restriction by way of the challenged regulation of the AO, because the constitutionally protected value (using public grounds by "anyone" for public purpose within the framework of the legal regulations) and the connected rights of others require it. At the same time, the restriction is considered to be proportionate, since the sanction of the minor offence is a tool of *ultima ratio* and it complies with the constitutional requirements applicable to the law on minor offences (gradualism, proportionality); it allows "anyone" to the public ground within the framework of the legal regulations, and no one shall be excluded from such usage.

[102] The general prohibition clause of the Fundamental Law clearly fits into the system of values of the Fundamental Law, which focuses on human dignity. According to the

National Avowal: "We hold that human existence is based on human dignity. We hold that individual freedom can only be complete in cooperation with others. We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are loyalty, faith and love. We hold that the strength of a community and the honour of each person are based on labour and the achievement of the human mind. We hold that we have a general duty to help the vulnerable and the poor." The Constitutional Court also concludes, on the bases of the foregoing, that freedom comes with responsibility and individual freedom unfolds in the course of living together in the society.

[103] According to Article II of the Fundamental Law, human dignity shall be inviolable. Every human being shall have the right to life and human dignity. Human dignity, as the basis of all human freedom, can only unfold in the human society, in the course of living together as humans; according to the Fundamental Law, human dignity is the dignity of the individual living in the society and bearing the responsibility of living together in the society. However, not only the individual is responsible for living together in the society, as the society also bears responsibility for the individual. According to the system of values of the Fundamental Law, the purpose of living together in the society is the common pursuit of happiness, based on labour and the achievement of the human mind, and the main framework of which is the family and the nation. The purpose and the supreme framework of the human society clearly identifies the role of the State in achieving these goals and in protecting and supporting the main frameworks. Homeless persons, as the potential – but not exclusive – scope of perpetrators of the statutory definition of the minor offence reviewed in the present case, have lost the potential of the common pursuit of happiness, based on labour and the achievement of the human mind – mainly as also the victims of tragic human stories of life –, and they have been marginalised in the society. Poverty and the lack of a human dwelling is a serious burden for every human. When it comes together with negligence or even a negative value judgement by the members of the society, the situation of the person affected may become so disadvantaged that the only way out for the individual is the support provided by the State. In line with the values of the Fundamental Law, no one shall have the right to be destitute or homeless; this state is not part of the right to human dignity. To the contrary, this situation is the result of the interrelated dysfunctions of living together in the society and of individual life that need to be treated – and preferably eliminated – by the society on the basis of its fundamental principles of loyalty, faith and love. In this process, the aims of the individual and of the State representing the interests of the society are the same. The right to human dignity is seriously violated due to the marginalisation of humans to the periphery of the society, nevertheless, the injury of human dignity would actually result from a situation where the individual

is left alone by the State in his or her vulnerable and socially marginalised position. The State that represents the values laid down in the Fundamental Law should never leave alone a helpless, vulnerable person incapable of caring for himself or herself; the State's obligation of protecting the institutions follows from the system of values of the Fundamental Law, the State's obligation of protecting the poor and the vulnerable.

[104] Based on the above arguments, the Constitutional Court established that the fundamental right to human dignity is not violated by the challenged regulation.

[105] 11. As the Constitutional Court has not annulled the challenged provisions of the AO, it did not have to decide about ordering a prohibition of application.

IV

[106] The Constitutional Court pointed out: it is a fact, according to the factual data found in the joint opinion of the ministers, that the State and the local governments – in close cooperation with social organisations and the churches – presently operate a system offering differentiated social services for homeless persons. In the case under review, however, the Constitutional Court held it necessary, acting *ex officio*, to prescribe a constitutional requirement, on the basis of the provisions under Section 46 (3) of the ACC, in the interest of the enforcement of the State goal and the constitutional prohibition laid down in Article XXII (2) and (3) of the Fundamental Law, with due regard to the effective enforcement of the above as well as the individuals' related obligation of cooperation.

[107] The constitutional requirement shall support the interpretation of the law by the law-applying bodies in accordance with Article XXII (2) and (3) of the Fundamental Law, in the context of the new statutory definition found in the AO challenged by the petitions.

[108] The Constitutional Court points out as a principle that in the course of the application of the challenged provision of the AO in the case of homeless persons, the law-applying organs should take into account, on the one hand, the State's constitutional obligation aimed at the protection of vulnerable persons, and on the other hand, the fact that the State's enhanced obligation of protecting the institutions and protecting life can only be guaranteed if the affected persons are included in the social support system, which implies, on the side of the affected persons, an obligation of cooperation. The aim of applying the minor offence sanction as *ultima ratio* is to introduce the affected person into the support system created and maintained by the

State for the above purpose, as it is the only way to guarantee the affected person's right to life and to human dignity, by taking into account the avoiding of dangerous situations that pose a risk to human life and that come necessarily with dwelling habitually on public ground (extreme weather conditions, attacks against life, exposure to diseases). In the case of the affected persons, the basic conditions for human life could be secured within the above regulatory framework; with respect to the individual's obligation of cooperation (using the services provided by the State for the affected person, if his or her placement in the support system is secured), the State can only guarantee effectively the fundamental conditions of human life within this regulatory framework as a last resort for those who are incapable to do it on their own, without the help of the State. As pointed out by the Constitutional Court, Section 178/B (8) to (10), as well as the Government Decree No. 178/2018. (X. 2.) Korm. on the designation and the duties of certain organs contributing in the context of the minor offence of violating the rules on dwelling habitually on public ground (hereinafter: "Government Decree") contain guarantees related to the personal and material conditions of the affected persons. As laid down in the Government Decree, on the request of the police officer in action, the dispatcher centre operating according to Section 65/E (2) of the Act III of 1993 on social administration and social services shall provide information on the institutions with free capacities located in the area of support where the offence has been committed. Upon the request of the police officer in action, the dispatcher centre shall contact the organisation in charge of the social work on the street in the area where the offence has been committed or the homeless shelter organised in the framework of a model program, the staff member of which shall provide support in organising transfer to the homeless shelter, provided that, due to the condition of the affected person, he or she is unable to travel alone to the shelter with free capacity and ready to admit him or her.

[109] According to the case law of the Constitutional Court, in the context of the right to health, the State is considered to fulfil its constitutional obligation, if it organises and operates the social support system. The Constitutional Court may only specify the critical level of the State's obligation in an abstract way with general criteria, if it is limited to very extreme cases (no provision of service, the lack of the adequate number of places): it is the necessary constitutional minimum level, the absence of which would lead to unconstitutionality. The assessment from a constitutional point of view of the reasonableness or the efficiency of the construction and the operation of the institutional system maintained by the State is not a constitutional question, thus the level of the services, in itself, does not have a constitutional standard. However, in the course of performing its constitutional obligation, the State should not cause a situation with no service in certain areas or for specific groups of the society. The Constitutional Court emphasizes: the affected persons may file a

constitutional complaint to the Constitutional Court against the court's decision delivered in a particular case, therefore, the possibility for the individual protection of fundamental rights is guaranteed in the context of the regulation of the AO under review.

[110] In the course of elaborating the constitutional requirement, the Constitutional Court focused on the obligation of the State and the local governments to provide, in line with their economic capacity, the conditions necessary for achieving the State goal laid down in the constitutional requirement, and to enforce the prohibition specified in Article XXII (3) of the Fundamental Law. For the above purpose, a system of institutions providing differentiated social services for homeless persons and serving the purpose of their social reintegration is maintained and continuously developed in line with the economic capacity of the State and of the local governments.

[111] The obligation of helping the poor and the vulnerable as mentioned in the National Avowal, as well as the unconditional enforcement of the provisions of Article XXII (2) and (3) of the Fundamental Law – with due regard to the differentiated needs for support in the context of providing care for homeless persons – can be guaranteed by way of the constitutional requirement laid down in the holdings of the decision.

V.

[112] The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the ACC.

Budapest, 4 June 2019.

Dr. Tamás Sulyok
President of the Constitutional Court,
Justice rapporteur

Dr. István Balsai
Justice of the Constitutional Court

Dr. Áges Czine
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Attila Horváth
Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court

Dr. Imre Juhász
Justice of the Constitutional Court

Dr. Béla Pokol
Justice of the Constitutional Court

Dr. Balázs Schanda
Justice of the Constitutional Court

Dr. István Stumpf
Justice of the Constitutional Court

Dr. Marcel Szabó
Justice of the Constitutional Court

Dr. Péter Szalay
Justice of the Constitutional Court

Dr. Mária Szívós
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Béla Pokol*

[113] I support the holdings and the reasoning of the decision, however, I wish to add further supporting arguments to the reasoning of the constitutional requirement laid down in the holdings. By providing that the minor offence sanction under Section 178/B of the Act II of 2012 is only applicable, if the placement of the homeless person in the social support system was guaranteed, the specified requirement is making an attempt to resolve the tension and the partial contradiction between paragraph (2) and paragraph (3) of Article XXII of the Fundamental Law.

[114] In this context, it needs to be pointed out that Article XXII (2) of the Fundamental Law only provides for a constitutional obligation of the State and of the local governments to strive for supplying accommodation to homeless persons. Accordingly, this regulation does not provide homeless persons with a constitutional fundamental right of being placed in a homeless shelter, and neither are the State and the local governments obliged to provide actual accommodation for each and every homeless person. However, in contrast with the above, paragraph (3) of this article explicitly prohibits dwelling habitually on public ground and this prohibition takes a concrete form on the level of an Act of Parliament qualifying this conduct as a minor offence that implies a sanction. Although this sanctioning is supported by the prohibition on the level of the Fundamental Law in Article XXII (3), paragraph (2) specifies its institutional background without a mandatory force. Thus, the constitutional requirement laid down in the present decision eliminates this tension from the Fundamental Law by providing that if, in the particular case, the homeless

person facing the punishment had not have the actual possibility of being placed in the homelessness support system, then this sanction shall not be applied against him or her.

Budapest, 4 June 2019.

Dr. Béla Pokol,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Ágnes Czine*

[115] I do not agree with the decision found in the holdings, as in my view the provision of the law challenged by the petitioners (Section 178/B of the AO) is against the Fundamental Law, therefore, the Constitutional Court should have annulled it.

[116] 1. First of all, I would like to underline that homelessness is a very diverse and complex social problem. As stated by the Constitutional Court in the Decision 38/2012. (XI. 14.) AB (CCDec 1): "for the homeless persons, living on public ground is a very serious crisis situation, which is the result of various forcing factors, and it is very rarely the consequence of their conscious, deliberated and free choice. Homeless persons have lost their homes and they do not have an opportunity to arrange for their housing, therefore, in the absence of any real alternative, they need to live on the pubic ground, as it is the only public space open for use by anyone." (Reasoning [50])

[117] In the present case, the Constitutional Court made requests to some of the social organisations engaged in providing help for homeless persons. As seen from the replies received to the requests: the staff members of the aid organisations often experience that those who live on the street have diverse and serious problems, and to solve these problems it is not enough to have a free bed in the homeless shelter. Therefore, I agree with the statement made in CCDec 1: "homelessness is a social problem that the State should handle with the tools of social administration and social benefits, rather than with punishment" (Reasoning [53]).

[118] After laying down the foregoing, I disagree with the decision found in the holdings for the following reasons.

[119] 2. I disagree with the statement that Article XXII (3) introduced with the Seventh Amendment of the Fundamental Law, which entered into force on 15 October 2018, provided a new constitutional background for the present case under review, thus the statements made in the CCDec 1 are no longer applicable.

[120] In CCDec 1, the Constitutional Court examined the conflict with the Fundamental Law of Section 186 of the AO, a provision partly similar to the provision of the law challenged in the present case. According to Section 186 (1) of the AO, "anyone who uses the public ground within the municipal borders in a manner different from its designated function for the purpose of habitual dwelling, or who stores on the public ground movable assets for habitual dwelling, shall be punishable for committing a minor offence."

[121] The Constitutional Court established that the deficiencies and the contradictions of the statutory definition result in serious problems related to the clarity of norms that may not be resolved by way of interpretation by the law-applying bodies, therefore, it does not meet the requirement of the rule of law. Thus, in the CCDec 1, the Constitutional Court examined the violation of the Fundamental Law by Section 186 of the AO on the basis of Article B) (1) and not on the basis of Article XXII of the Fundamental Law. Therefore, in my view, the changed content of Article XXII of the Fundamental Law does not exclude making references to CCDec 1, and the statements made there are still applicable in the present regulatory environment as well.

[122] 3. Accordingly, based on the above, the Constitutional Court should have examined the petitions on the basis of the criteria of interpretation laid down in CCDec 1.

[123] 3.1. As stated by the Constitutional Court in CCDec 1, "the minor offence has lost its role fulfilled in sanctioning the conducts against public administration, and its "petty crime" character has become dominant. With the AO, minor offences have become the third, least severe level of the trichotomous criminal law system. Its role in the legal system is similar to that of the institution of "petty offence" introduced with the Act XL of 1879 entitled "Hungarian Criminal Code on Petty Offences" and terminated with the Decree-law No. 17 of 1955 on the Termination of the Institution of Petty Offence and the Judiciary of Petty Offences" (Reasoning [27]).

[124] With respect to the changed position in the legal system of the law applicable to minor offences, the Constitutional Court pointed out that, due to its criminal character, the minor offence procedure should comply with the fundamental requirements applicable to criminal procedure {CCDec 1, Reasoning [34]}.

[125] Therefore, in CCDec 1, the Constitutional Court reiterated its earlier practice, according to which, "it is a requirement of content following from constitutional criminal law that the legislature may not act arbitrarily when defining the scope of conducts to be punished. A strict standard is to be applied in assessing the necessity

of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law necessarily restricting human rights and liberties may only be used if such use is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, society and the economy that can be traced back to the Constitution" [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176].

[126] Thus, on the basis of the criteria presented above, the Constitutional Court first would have had to assess whether or not the qualification as a minor offence had any legitimate reason.

[127] 3.2. In the present case, the Constitutional Court deducted from Article XXII (2) of the Fundamental Law the legitimate reason of the qualification as a minor offence. As established by the Court, the individual may not refuse to cooperate with the State in the interest of achieving the State goal laid down in the relevant provision. Therefore, the statutory provision challenged by the petitioners does not sanction an objective fact, which is independent from the affected person (being homeless), but the wilful and repeated refusal, or the continuous neglecting of the cooperation obligation.

[128] I hold that these factors do not justify qualifying of habitually dwelling on public ground as a minor offence, and the reasons referred to by the Constitutional Court do not follow from Article XXII of the Fundamental Law.

[129] According to Article XXII of the Fundamental Law that entered into force on 1 January 2012, "Hungary shall strive to ensure decent housing conditions and access to public services for everyone." The law-maker that adopted the constitutional provisions emphasized in the reasoning attached to the original text of the norm: "the Fundamental Law lays down as an objective that the State should support – in line with the available capacities – the avoiding and the elimination of homelessness, the securing of the elemental living conditions." (Reasoning attached to the proposed normative text of the Fundamental Law)

[130] With the Fourth Amendment of the Fundamental Law amending Article XXII with the paragraphs (2) and (3), the law-maker that adopted the constitutional provisions declared that "along with ensuring decent housing conditions [...] it does not support the disorderly usage of public grounds: dwelling habitually on public ground. An Act of Parliament or local government decree may [therefore] provide that the habitual stay on public ground is illegal, in order to protect public order, public security, public health and cultural values. As a guarantee, the declaration of illegality may only take place in the interest of the realisation of the indicated objectives, and the declaration

of illegality may only be applicable to a specific part of the public ground." (The reasoning attached to the proposed normative text of the Fourth Amendment of the Fundamental Law) Article XXII (3) of the Fundamental Law still refers to the potential legitimate objectives or constitutional reasons that may justify the unlawfulness of staying on public ground, and, according to the intentions of the law-maker, it was a rule of guarantee that the declaration of illegality was conditional upon the realisation of the aims indicated.

[131] The Seventh Amendment of the Fundamental Law modified Article XXII (3) of the Fundamental Law with a brand new content, and it stated: "using a public space as a habitual dwelling shall be prohibited." According to the reasoning presented by the law-maker adopting the constitutional provisions, "dwelling habitually on public ground violates the using of public ground for public purposes, therefore, it is justified to take action against it."

[132] In my view, it may be concluded on the basis of the above that the provisions under Article XXII of the Fundamental Law serve the purpose of making the State avoid and eliminate homelessness, to the extent allowed by its capacities. The law-making power adopting constitutional provisions introduced into the Fundamental Law the prohibition under Article XXII (3) of the Fundamental Law, because dwelling habitually on public ground" violates the using of public ground for public purposes". However, the law-making power adopting constitutional provisions has not declared – and neither is it deductible from Article XXII (3) of the Fundamental Law – that staying on public ground should be punished.

[133] 3.3. Section 178/B of the AO was introduced in the Act LXIV of 2018. According to the reasoning attached to this Act, "the amendment of the statutory definition of the minor offence of habitually dwelling on public ground is justified by the amendment of Article XXII (3) of the Fundamental Law entering into force on 15 October 2018." It means that the law-maker held that Article XXII (3) of the Fundamental Law provided due ground for qualifying habitual dwelling on public ground as a minor offence. Consequently, also the reason for the qualification as a minor offence can only be that "dwelling habitually on public ground violates the using of public ground for public purposes, therefore, it is justified to take action against it."

[134] According to the case law of the Constitutional Court, "it is fundamentally within the law-maker's scope of responsibility to assess which conducts to include into the area of regulations to protect public order. However, when the limits of penalisation are determined, the law-maker has to take into account that on the basis of the general freedom of action, in a constitutional democracy, the citizens may – in the legal sense

– do anything, provided that it is not prohibited by a normative provision. […] The State must assess the interest of all individuals equally, and the restriction of liberty must be appropriately justified with reasonable arguments. Therefore, a law may only qualify a conduct as one violating an individual right or the public order, and consequently a prohibited one, if it has an adequate constitutional reason. In the case of criminal minor offences, it is typically the case when the act endangers human life, physical integrity, health or a right, or violates a generally accepted rule of living together in the society, provided that the introduction of the conduct of committing the offence fulfils the requirement that sanctioning under the law applicable to minor offences can only be applied as the *ultima ratio*." [Decision 176/2011 (XII. 29.) AB, ABH 2011, 622, 628] As pointed out by the Constitutional Court: "the fact that someone lives his or her life on public ground does not injure the rights of others and does not cause a damage, does not endanger the orderly use of public ground and the public order." {CCDec 1, Reasoning [52]}

[135] As explained above, I hold that one cannot find a constitutionally justified legitimate aim for declaring the staying on pubic ground as a minor offence. It is not classified as an act that endangers human life, physical integrity, health or rights, or which violates a generally accepted rule of living together in the society. In my opinion, the mere fact that it injures the using of public grounds for public purposes should not justify declaring it as a minor offence.

[136] 4. In my view, Section 178/B of the AO fails to meet the requirements of legal certainty for other reasons as well.

[137] 4.1. As pointed out by the Constitutional Court, "in the present case the generality of the concepts found in the provision interpreting the conduct of committing the offence does not exceed the level of abstraction customary for the legal concepts of legislation. With regard to the above, the Constitutional Court established that neither the requirement of the clarity of norms, nor the requirement of legal certainty was violated by the challenged regulation."

[138] At the same time, with regard to legal certainty, the case law of the Constitutional Court emphasizes that "legal certainty compels the State – and primarily the legislature – to ensure that the law in its entirety, in its individual parts and in its specific statutes, is clear and unambiguous and that its operation is ascertainable and predictable by the addressees of the norm. Thus, legal certainty requires not merely the unambiguity of individual legal norms but also the predictability of the operation of the individual legal institutions." [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65]

[139] In CCDec 1, the Constitutional Court reiterated its case law by stating that "the disposition describing a prohibited conduct by foreseeing a sanction under criminal law should be definitive, explicit and clearly formulated. The clear expression of the legislative will related to the protected legal subject and the conduct of committing the offence is a constitutional requirement. A clear message should be conveyed about when the individual is considered to commit a breach of law sanctioned under criminal law. At the same time, any potential arbitrary interpretation of the law by the judiciary should be prevented." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176]. Thus these criteria are also applicable to the statutory definition of the minor offence as laid down in CCDec 1.

[140] 4.2. Based on the above, I hold that the constitutionality of Section 178/B of the AO should primarily be assessed in comparison to the provisions under Section 1 of the AO. According to this provision, "a minor offence is an activity or omission that this Act orders to punish and which is dangerous to the society."

[141] Thus, on the basis of Section 1 of the AO, only an act or an omission may qualify as a minor offence.

[142] As I have already referred to above, I hold that there is no obligation of cooperation deductible from Article XXII of the Fundamental Law that could justify the qualification as a minor offence. In the CCDec 1, the Constitutional Court considered homelessness as a state of existence, when it referred to the application of a minor offence sanction as an unsuitable tool for solving the social problem of homelessness, because the affected persons have fallen into this situation due to their incapacity to arrange for their housing in the absence of any income. Therefore, in my view, homelessness as a state of existence cannot be qualified as a minor offence.

[143] According to Section 1 of the AO, only an act or an omission posing a danger to the society may qualify as a minor offence.

[144] In this context, the Constitutional Court has already stated: dwelling habitually on public ground "does not, in itself, violate or endanger the social, economic or State order according of Hungary, the personality or the rights of natural persons and legal entities". Therefore, the law-applying bodies "cannot verify when does living on public ground qualify as an act dangerous to the society to the extent that justify the application of a punishment for a minor offence" (CCDec 1, Reasoning [55]). I hold that the Constitutional Court should have stated the same in the present case as well.

[145] 4.3. According to Section 2 (1) of the AO, a wilful or a negligent act shall form the basis of being accountable for a minor offence. Thus, in line with Section 2 (1) of the AO, liability for a minor offence is subjective form of liability.

[146] As referred to by the Constitutional Court in CCDec 1, "for the homeless persons, living on public ground is a very serious crisis situation, which is the result of various forcing factors, and it is very rarely the consequence of their conscious, deliberated and free choice." (Reasoning [50]). Bearing this in mind, I hold that in the case of the particular minor offence, the examination of wilfulness or negligence is uninterpretable, because – as also mentioned by the Constitutional Court –: for the homeless persons, living on the public ground is not the result of their conscious or deliberate decision.

[147] As the statutory definition challenged by the petitions orders the punishment of state of life existing as an objective fact, rather than a conduct (an act or omission), in the framework of which culpability cannot be interpreted, the earlier statement made by the Constitutional Court can be held applicable even on the basis of the present regulation: "the statutory definition essentially creates a practically objective liability, which is independent from the subjective side" (CCDec 1, Reasoning [55]).

[148] 4.4. It is a fundamental requirement stemming from the principle of legal certainty that the text of the law should bear an identifiable normative content. This requirement shall be considered to be fulfilled, if "the regulation does not qualify as incomprehensible by the law-applying body, and there is no ground for subjective and arbitrary application of the law due to the excessively broad formulation of the norm {Decision 34/2014. (XI. 14.) AB, Reasoning [97], [116]}.

[149] In the case concerned, the alleged violation of these requirements was the very reason for the judges – expected to apply the statutory definition – to turn to the Constitutional Court. As pointed out by one of the petitioners: "with a tautological way of editing, the interpreting provision defines the conducts of performance with conjunctive conditions based, on the one hand, on the perpetrator's intentions, and on the other hand on conclusions deductible on the basis of external circumstances. In the scope of the latter, the Act only requires for establishing the conduct of performance that the external circumstances described there should indicate that the perpetrator regularly and in short intervals recurrently performs activities on the public ground typically used for dwelling. Therefore, performing the same conduct (e.g. washing, eating) would be qualified as a minor offence depending on the fact whether one performs it – seemingly – occasionally, or – as homeless persons, also seemingly – recurrently from time to time."

[150] Thus, the conduct of committing the offence as laid down in Section 178/B (1) – also with account to its interpretation under paragraph (5) – does not convey a clear normative content for the law-applying bodies. With regard to the above, the Constitutional Court should have established the violation of the clarity of the norm.

[151] 4.5. I hold it important to point out, that, in my view, the application of the paragraphs (2) and (4) of Section 178/B of the AO with mutual regard to each other shall cause an uncertainty of interpreting the law. Section 178/B (4) provides without allowing for judicial discretion: launching a minor offence procedure may not be dispensed with at the time of committing yet another minor offence by the person who has been warned 3 times on-the-spot within 90 days because of committing the minor offence.

[152] In this regard, the petitioners underlined: it is problematic that the law fails to specify the minimum period of time required between the three warnings. In the case pending before one of the petitioning judges, the person subject to the procedure had been warned on 17, 18 and 20 October 2018, then a procedure was launched against him on the 24th day of October. In the case pending before another petitioning judge, the person subject to the procedure had been warned for the first time on 15 October 2018, then on the 19th day of October at 10:40 hours and at 12:15 hours. The fourth warning and the launching of the procedure also took place on the 19th of October, at 15:10. In this respect, the petitioner pointed out: the period of few hours between the warnings was clearly not sufficient to set up a new place of stay.

[153] Therefore, the regulation raises the violation of legal certainty in this regard as well, because its too general wording offers a chance for the subjective and arbitrary application of the law, which is incompatible with the requirement of legal certainty, with due regard to the case law of the Constitutional Court referred to above, and included in the Decision 34/2014. (XI. 14.) AB.

[154] 4.6. It is beyond doubt that the Government Decree No. 178/2018. (X. 2.) Korm. on the designation and the duties of certain organs contributing in the context of the minor offence of violating the rules on dwelling habitually on public ground regulates in part the scope and the duties of the organs and organisations the support by which shall be regarded as cooperation with respect to the minor offence of violating the rules on dwelling habitually on public ground. At the same time, these rules are of technical nature and they do not resolve the constitutional problems explained above.

[155] For example, the Government Decree regulates that, if the perpetrator of the minor offence of violating the rules on dwelling habitually on public ground is willing to cooperate, on the request of the police officer in action, the dispatcher centre operating according to Section 65/E (2) of the Act on social administration and social services shall provide information on the homeless shelter institutions with free capacities located in the area of support where the offence has been committed The Government Decree also regulated that upon the request of the police officer in action, the dispatcher centre shall contact the organisation in charge of the social work on the street in the area where the offence has been committed or the homeless shelter organised in the framework of a model program, the staff member of which shall provide support in organising the perpetrator's transfer to the homeless shelter, provided that, due to the condition of the perpetrator, he or she is unable to travel alone to the shelter with free capacity and ready to admit him or her.

[156] However, in my opinion, the quoted provisions are not suitable for eliminating the uncertainties of the interpretation existing on the basis of Section 178/B of the AO. Actually, these rules do not provide a remedy for the problems of interpretation referred to above and challenged by the judges who proceed with the particular cases.

[157] 5. Based on the above, I hold that the Constitutional Court should have established that Section 178/B of the AO violated the requirement of legal certainty.

Budapest, 4 June 2019.

Dr. Ágnes Czine,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Imre Juhász*

[158] I do not agree with the constitutional requirement under point 1 of the holdings of the Decision and the reasoning thereof due to the following.

[159] 1. Article XXII (3) of the Fundamental Law provides as follows: "Using a public space as a habitual dwelling shall be prohibited." In Section 178/B (1) of the AO, the law-maker adopted the following rule: "Anyone habitually dwelling on public ground shall be guilty of committing a minor offence." Thus the quoted provision of the statutory definition of the minor offence does not contain any further distinction about the "conduct of committing the offence" and its sanctions.

[160] The provisions of the Act that follow the quoted paragraph – mainly specifying the procedure – also fail to provide for any condition of material law, the existence of which would exclude the application of the sanction (a warning in the least severe case) or make it conditional. Nevertheless, the constitutional requirement laid down in point 1 of the majority decision make the application of the sanction (any sanction) conditional upon whether or not the realisation of the State goal specified in Article XXII (2) of the Fundamental Law was ensured at the time of committing the conduct, and whether or not it is verifiable. I hold that this way the Constitutional Court attached a new provision to the statutory definition – using the explicit *prohibition* under Article XXII (3) as a counterweight against the endeavour laid down as a *State goal* in Article XXII (3) –, and neither is this new provision deductible from the mutual interpretation of paragraphs (2) and (3) of Article XXII of the Fundamental Law.

[161] One should note that Section 186 of the AO in force until 14 November 2012 – its annulment with CCDec 1 – did indeed contain, in a completely different regulatory environment, a clause similar to the present constitutional requirement as follows: "(2) The minor offence specified in paragraph (1) shall not be considered to exist, if the local government obliged to perform the duty fails to guarantee the conditions of providing support for homeless persons."

[162] I do not know whether the constitutional requirement stated in the majority decision was inspired by the rule quoted here, and annulled more than six years ago, or by any other consideration, but, in my view, the Constitutional Court had no constitutional authorisation to declare it.

[163] 2. It is beyond doubt that when the Constitutional Court lays down, under its authorisation granted in Section 46 (3) of the ACC, a constitutional requirement, it has to balance on a narrow path, and sometimes – just as the Curia in the case of delivering uniformity decisions – it may get close to the limits of legislation. However, these cases must be clearly distinguished from the ones when the elaborated requirement is not deductible from the Fundamental Law, even with the application of the general rules of interpreting the law. As a Justice of the Constitutional Court (for example, as the Justice rapporteur of two decisions of the Constitutional Court that annulled uniformity decisions because of the breach of the law-maker's competence), I have always taken the position that the constitutional order is based on the principle of the separation of powers declared in Article C) (1) of the Fundamental Law, and consequently, the courts may not extend beyond their scope of competence and they may not vindicate a law-maker's competence.

[164] I firmly believe that this is applicable to the Constitutional Court as well.

[165] To sum up: in my opinion, the constitutional requirement laid down in the majority decision is, on the one hand, not deductible from the Fundamental Law, and on the other hand, it by-passes the law-maker and provides the law-applying bodies (namely the minor offence authority and the courts) with a mandatory order of interpretation, although, according to the text of the law, there has not been any such intention of the law-maker.

Budapest, 4 June 2019.

Dr. Imre Juhász,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Balázs Schanda*

[166] I hold that the punishability (the possibility of qualifying it as a minor offence) of dwelling habitually on public ground does not evidently follow from its constitutional prohibition; it needs to be justified by the law-maker. In this respect, I consider that a distinction is to be made between the situation when the law-maker takes action for the protection of values under public order, public security, public health or cultural values, and the case when it orders the punishment of staying on public ground that results from the state of homelessness.

[167] I agree with the arguments detailed in point 5 of chapter III of the decision (Reasoning [57] and following) that the State must strive for securing appropriate conditions of life (guaranteeing human dignity and privacy) and it should help those persons who miss those conditions. The individuals – including our homeless fellow-citizens –, as the members of the community, must engage in cooperation for the purpose of performing these constitutional duties, by paying respect to the rules of living together in the society. However, with respect to individual liability, one should note that some homeless persons are not (any more) able – or only to a limited extent – to engage in cooperation. The Constitutional Court cannot remedy the social challenge of housing poverty, but even when it acts in its constitution-protector role, it should not forget about the social reality.

[168] I agree with the content of the constitutional requirement laid down in the decision: "The application of the sanction under the law on offences should be in line with the constitutional aim of the prohibition of dwelling habitually on public ground, the inclusion into the support system of vulnerable persons who cannot care for themselves." The other way round, it means that the minor offence sanction is contrary to the Fundamental Law, if its aim is not taking care of and supporting the

vulnerable persons. Based on the above ground of principle, my conclusion is that, within the limits of the Fundamental Law, the homeless person may be called on to move away or to engage in cooperation with the organisations providing support for homeless persons, but it may not be brought before the court because of his or her homeless life-status, as such a procedure would not directly serve the purpose of taking care of him or her and supporting him or her. The minor offence procedure shall not serve the purpose of inclusion into the support system; the person under the procedure is merely the object of the court procedure and not the subject of it: this is against his or her human dignity. Therefore, in my view, Section 178/B (4) [and the connected paragraph (3)] are contrary to the Fundamental Law, and the provision should have been annulled by the Constitutional Court.

Budapest, 4 June 2019.

Dr. Balázs Schanda,
Justice of the Constitutional Court

[169] I second the above dissenting opinion.

Budapest, 4 June 2019.

Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court

[170] I second the above dissenting opinion.

Budapest, 4 June 2019.

Dr. Péter Szalay
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. István Stumpf*

[171] I agree with the majority decision that the State "should never leave alone a helpless, vulnerable person incapable of caring for himself or herself; the State's obligation of protecting the institutions follows from the system of values of the Fundamental Law, the State's obligation of protecting the poor and the vulnerable" [Reasoning [103]).

[172] However, I doubt that the constitutionality of the challenged regulation is deductible from certain statements made in the National Avowal or from Article O) and Article II of the Fundamental Law. As also pointed out in the reasoning of the majority decision (Reasoning [40] and following), in CCDec 1, the Constitutional Court annulled a statutory definition in the AO that had similar content as the law applicable in the

present case. The Constitutional Court established in CCDec 1: "it is incompatible with the protection of human dignity regulated in Article II of the Fundamental Law to qualify as dangerous to the society and punish those, who have lost their housing for some reason and, therefore, they are forced to live on public ground, but they do not violate the rights of others, do not cause a damage and do not commit any other illegal act. The freedom of action stemming from the individual's human dignity is also violated when the State forces with the tools of punishment to use social services" (Reasoning [53]). The relevant parts of the Fundamental Law have not been modified since the adoption of CCDec 1. In my standpoint, the obligation and the option of the constitutional punishment of habitually dwelling on public ground, in itself, – when it causes no other injury – is deductible neither from the right to human dignity, the responsibility of the individual to be borne for himself or herself, the obligation of cooperation with others, the man-image of the Fundamental Law, nor the values of loyalty, faith and love. Therefore, I do not agree with the relevant arguments of the majority reasoning (c.p. Points III.5 and 10, Reasoning [57] and following; and Reasoning [95] and following).

[173] Undoubtedly, as compared to CCDec 1, the Seventh Amendment of the Fundamental Law that added to Article XXII of the Fundamental Law the prohibition of habitually dwelling on pubic ground, is a new circumstance. However, the prohibition does not mean that the detailed rules of a statutory regulation of any content adopted for the purpose of its enforcement are also necessarily in line with other provisions of the Fundamental Law.

[174] As laid down in the majority decision [Point III.6] during the review, "the regulation of the AO enforces the principle of gradualism and proportionality, and it also complies with the requirements of constitutionality regarding the law applicable to minor offences: it enforces the guarantees elaborated by the Constitutional Court in its decisions about the constitutional review of certain provisions of the AO." (Reasoning [69]) I miss the clear identification of the constitutional guarantees taken into account as the basis of the above conclusion, and of the decisions of the Constitutional Court that explain them.

[175] In the reasoning related to the restriction of personal freedom [Point III.9], after presenting the challenged regulation, the decision makes a summarising statement without any detailed arguments of comparison with the relevant constitutional standards: "in the context of the right to personal freedom, the challenged regulation does not violate the right to equality before the law, the right to equal treatment and to fair court proceedings as well as the right to an effective legal remedy". (Reasoning [94])

[176] I hold that the decision's reasoning related to the violation of human dignity [point III. 10] is contradicting, as first it states that "the right to self-determination and the autonomy of action shall not extend to the breach of a prohibition under the Fundamental Law, choosing a conduct prohibited in the Fundamental Law or committing a minor offence" (Reasoning [101]) (the last element of the above is questionable, in itself, as the content of the fundamental right may not depend on the legislation related to minor offences), then it still engages in examining the necessity and the proportionality of the restriction. Here I also hold that the arguments about necessity are not convincing, namely that the provision of the AO would protect the using of public ground by others and the rights of others, as the statutory definition of the minor offence does not contain any element referring to it.

[177] Based on all the above, I hold that the majority decision failed to support that the provision under review implements Article XXII (3) of the Fundamental Law by restricting the fundamental rights referred to in the petitions in line with Article I (3) of the Fundamental Law, i.e. necessarily and proportionately.

Budapest, 4 June 2019.

Dr. István Stumpf

Justice of the Constitutional Court