

Decision 23/2014 (VII. 15.) AB

on precluding the application of section 85 (4) of the Act IV of 1978 on the Criminal Code, in force from 23 July 2010 to 30 June 2013, in pending cases, declaring section 81 (4) of the Act C of 2012 on the Criminal Code to be in conflict with the Fundamental Law and annulling it, and ordering the review of criminal proceedings closed by final decision

The Constitutional Court, sitting in plenary session, in the subject of a judicial initiative aimed at establishing the conflict with the Fundamental Law of a law and annulling it, with the dissenting opinions of Justices *Dr. Egon Dienes-Oehm* and *Dr. Béla Pokol*, adopted the following

d e c i s i o n:

1 The Constitutional Court finds that the application of section 85 (4) of the Act IV of 1978 on the Criminal Code, in force from 23 July 2010 to 30 June 2013, is contrary to the Fundamental Law, and therefore it cannot be applied in the case pending before the Budapest-Capital Regional Court under No. 11.B.972/2011 and the case pending before the Budapest-Capital Regional Court of Appeal under No. 6.Bf.230/2012.

2 The Constitutional Court holds that section 81 (4) of the Act C of 2012 on the Criminal Code is in conflict with the Fundamental Law, and therefore annuls it with retroactive effect as of 1 July 2013, its effective date.

3 Pursuant to section 45 (6) of the Act CLI of 2011 on the Constitutional Court, the Constitutional Court orders the review of the criminal proceedings concluded by final decision with the application of section 85 (4) of the Act IV of 1978 on the Criminal Code and section 81 (4) of the Act C of 2012 on the Criminal Code.

The Constitutional Court publishes this decision in the Hungarian Official Gazette.

R e a s o n i n g

I

[1] 1 The panel of the Budapest-Capital Court of Appeal turned to the Constitutional Court with a judicial initiative, in which it requested a declaration that section 85 (4) of the Act IV of 1978 on the Criminal Code (hereinafter: "old Criminal Code") was in

conflict with the Fundamental Law and was null and void, and a prohibition of its application in the pending case.

[2] Under the contested provision, in the event of the commission, in a concurrence of criminal offences, of at least three offences of violence against a specific person the upper limit of the punishment is doubled. If the punishment limit thus increased would exceed twenty years or if any of the offences is punishable by life imprisonment under the law, the offender shall be sentenced to life imprisonment.

[3] In the opinion of the initiating judicial panel, the contested provision of the old Criminal Code is incompatible with the Fundamental Law in several respects. In its motion, the panel explains that section 85 (4) of the old Criminal Code is contrary to Article B (1) of the Fundamental Law, because the conditions of life imprisonment to be applied as a mandatory concurrent sentence are unclear and cannot be calculated precisely, taking into account the other provisions of the old Criminal Code and the Act XIX of 1998 on Criminal Procedure (hereinafter referred to as: ACP). The rules create the possibility that some offenders may face substantially different criminal threats for the same offence depending on whether their case is tried in a single proceedings or in different proceedings. The possibility of imposing a concurrent sentence only arises where the acts of the accused constitute a concurrence of criminal offences, but in order to find the existence of a concurrence of criminal offences, it is also required that the acts are tried in a single proceeding. The rules on the joining or separation of cases are not applied mandatorily, but are the result of a discretionary decision by the authority based on expediency. An offender whose offence of violence against a third person is tried in another proceeding may be treated more favourably than an offender whose offence is tried in a single proceeding and who shall be sentenced to life imprisonment without discretion. If the acts of the accused are separated in time and space, the facts of the criminal proceedings may make it random and unpredictable whether section 85 (4) of the old Criminal Code should be applied to the offender.

[4] The initiating judicial panel further submits that the imposition of a mandatory life sentence does not allow for the examination and enforcement of the sentencing aspects, which is also contrary to the requirement stemming from legal certainty that criminal law as a whole, including the sentencing system, should not be contradicting to itself. In the view of the referring judicial panel, the principle of equal treatment under Article XV of the Fundamental Law and the prohibition of discrimination against the accused are infringed by the fact that some persons who have committed the same acts are favoured and others disadvantaged by the fact that their acts are judged in one or more proceedings, depending solely on their procedural situation.

[5] On the basis of Article I (3) and Article II of the Fundamental Law, the petitioner considers that the imposition of a mandatory life sentence on first-time offenders who

have committed offences which do not carry a life sentence does not satisfy the requirement of proportionality expected from constitutional criminal law. In this connection, the petition also refers to the fact that, in the context of the current legislation, there is a real risk that – as the underlying criminal proceedings show – an accused with no criminal record will not have the opportunity in criminal proceedings to have a concurrent sentence imposed on him by the court, taking into account aggravating and mitigating circumstances, in line with the actual material gravity of the offences committed. This circumstance infringes the requirement of a necessary and proportionate restriction of fundamental rights to such an extent that it also infringes the prohibition of the inviolability of human dignity.

[6] The judicial panel does not consider section 85 (4) of the old Criminal Code to be compatible with the provisions of Article 25 (2) (a), Article 26 and Article 28 of the Fundamental Law, which determine the basis for the functioning of the courts, because it unduly restricts the constitutional functioning of the courts in the area of criminal law by removing judicial discretion and thus not allowing for judicial individualisation. The mandatory imposition of the most severe punishment would empty the courts of their sentencing function, which would seriously infringe the principle of judicial independence.

[7] 2 Declaring the conflict with the Fundamental Law and the annulment of Section 85 (4) of the old Criminal Code and section 81 (4) of the Act C of 2012 on the Criminal Code (hereinafter: "Criminal Code") have been initiated in another judicial petition by the panel of the Budapest-Capital Regional Court in connection with Article B (1) of the Fundamental Law.

[8] In the view of the petitioner judicial panel, the rule on the imposition of sentences contained in the contested statutory provisions, which is based on an institution of procedural law (merger) that is not clearly defined, does not satisfy the fundamental requirement of the rule of law that bodies vested with public authority shall carry out their activities within the organisational framework defined by law, in the manner of operation established by law, within limits that are regulated by law in a manner that is known and predictable by the citizens. The judicial panel points out that the justification for the imposition of accumulative sentence was also due to the fact that the offender would be placed in a more favourable position by being dealt with in a single procedure and that the accumulative sentence was intended to subsequently remedy any disadvantage suffered by the accused due to a potential lack of a single procedure. In the light of the above, the judicial panel considers that section 85 (4) of the old Criminal Code and, on the same grounds, section 81 (4) of the Criminal Code are also in conflict with the Fundamental Law.

[9] 3 The Constitutional Court consolidated the judicial initiatives on the basis of section 58 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) and section 34 (1) of the Rules of Procedure and judged them in a single procedure.

[10] 4 Pursuant to Article 24 (2) (b) of the Fundamental Law, the Constitutional Court shall, on the basis of a judicial initiative, examine the conformity with the Fundamental Law of the law applicable in an individual case. Pursuant to section 2 (1) and (2) of the Criminal Code, an offence shall be judged according to the criminal law in force at the time of its commission, but if the act is not a criminal offence or is to be judged less severely according to the new criminal law in force at the time of its judgement, the new criminal law shall be applied.

[11] The courts in the underlying cases have requested a constitutional review of the challenged provisions of both the old Criminal Code and the Criminal Code, given that the court is only in a position to decide which criminal law is more favourable to the accused when it makes its decision. The Constitutional Court therefore decided to conduct its procedure in respect of both section 85 (4) of the old Criminal Code and section 81 (4) of the Criminal Code.

II

[12] In its proceedings, the Constitutional Court took into account the following statutory provisions:

[13] 1 The provisions of the Fundamental Law affected by the petition:

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

“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.”

“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 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 25 (2) The courts shall decide on

(a) criminal cases, private law litigations and on other matters defined by an Act;"

"Article 26 (1) Judges shall be independent and shall answer only to the law. Judges may not be instructed in relation to judicature. Judges may only be removed from office on grounds and according to procedures specified in an implementing act. Judges may not be members of political parties and may not engage in political activities."

"Article 28 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."

[14] 2 The provision of the old Criminal Code affected by the petition:

"Section 85 (4) If, in respect of multiple counts of charges, at least three counts constitute violent crimes against persons as defined in point 17 of section 137, the upper limit of the applicable punishment set out in paragraph (2) shall be doubled. If the upper limit of the applicable punishment increased as per the above would exceed twenty years, or if either of the said crimes carry a maximum sentence of life imprisonment, the perpetrator in question shall be sentenced to life imprisonment."

[15] 3 The provision of the Criminal Code affected by the petition:

"Section 81 (4) If, in respect of the crimes in the concurrence of criminal offences, at least three crimes constitute completed violent offences against persons committed at different times, the upper limit of the applicable punishment set out in paragraph (2) shall be doubled. If the upper limit of the applicable punishment increased as per the above would exceed twenty years, or if either of the crimes in the concurrence of criminal offences carry a maximum sentence of life imprisonment, the perpetrator in question shall be sentenced to life imprisonment. However, where this is permitted under the General Part of this Act, the punishment may be reduced without limitation."

[16] The petition is well-founded.

[17] 1 The Constitutional Court first reviewed provisions similar to the Hungarian legislation introduced in the United States of America and Slovakia to improve public safety.

[18] 1.1 The so-called "Three Strikes" Act for recidivist, habitual offenders was first adopted in Washington State in 1993. The Act provides for a mandatory life sentence for a third offence, with parole eligibility after twenty-five years. By 2004, twenty-six of the fifty states had adopted "Three Strikes" Acts for recidivist offenders. A common feature of US Acts is that there are no time limits concerning the commission of offences, the rule applies only to multiple convictions, if the new offence occurred after the previous conviction, and a third conviction for only a minor offence may result in imposing a punishment of life imprisonment. The US Supreme Court has examined the constitutionality of the "Three Strikes Law" in two cases, and in both cases concluded that it does not violate the Eighth Amendment and therefore does not constitute "cruel and unusual" punishment or treatment. [Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003)]

[19] 1.2 In Slovakia, it was introduced in 2004 that if an accused is convicted of one of the offences defined in the law and has been sentenced to imprisonment twice for such an offence and has served at least part of his sentences, he shall be convicted to life imprisonment. The general condition for the application of a mandatory life sentence was that the degree of danger of the offence was very high, having regard to the particularly heinous nature of the offence, the motive or the particularly serious consequences. The law was later made more severe, whereby the general conditions no longer had to be met. Following the amendment of 1 January 2010, life imprisonment is only applicable for offences that are punishable by this penalty in the specific part. An additional condition for the imposition of life imprisonment is that the effective protection of society justifies the imposition of this penalty and that there is no longer any hope of the offender's rehabilitation. It is important to stress, however, that the application of the stricter rules is conditional on multiple convictions, and the "three strikes" rule cannot be applied in the case of concurrent sentences.

[20] 1.3 In Hungarian law, there is a legal history of stricter sanctions for repeat offenders and the mandatory deprivation of liberty after three offences. The so-called "Workhouse Act", Act XXI of 1913 on public menace shirkers, introduced more severe rules for repeat offenders in addition to public menace shirkers, if they had already been punished twice and two years had not yet elapsed since the last sentence was served. The institution of workhouse was applicable to offenders who had been sentenced to imprisonment in high-security or medium-security penal institution or at least three months of imprisonment in low-security penal institution for a crime or

misdemeanour against life, limb, indecency or property, and the offence was linked to the workless lifestyle of the offender.

[21] The Act X of 1928 introduced the institution of strict workhouse in order to impose stricter penalties on "habitual" offenders. The court sentenced to strict workhouse without a fixed term of imprisonment the offender who committed at least three offences against life, limb or property at different times and independently of each other, if the last and the immediately preceding offence were committed within five years, or the offences were committed in the course of business or "showed a permanent tendency" to commit offences. The shortest term of strict workhouse was three years, with no upper limit, so it could last for life. Release was possible at the discretion of the Minister of Justice. Unlike the workhouse, therefore, the application of the strict workhouse was not conditional on a previous conviction, but the commission of offences was taken into account.

[22] The Act IX of 1974 on the increased protection of society introduced the institution of strict custody in order to combat more effectively recidivist criminals who were particularly dangerous to public order and public safety. This criminal law measure was applicable to specific repeat offenders who had been convicted at least three times and had previously been sentenced to at least three previous terms of imprisonment, each exceeding one year, for, inter alia, intentional offences against life, limb, health, sexual morality, public officials, public security or property. Strict custody was introduced in the Act of 1978 on the Criminal Code, and then it was repealed by the Act LVI of 1989 amending the Criminal Code from 29 December 1989.

[23] The aim of the introduction of strict custody was to develop the need to obey the law and to lead an honest way of life, by means of a specific enforcement regime and intensive educational methods and tools, and thus to facilitate the reintegration of convicted persons into society. However, the strict custody did not have the desired effect because, in practice, no distinction was made between the punishment and the measure, and it was considered as an actual punishment by both the convicted persons and the prison staff. Its implementation did not differ in form or content from the implementation of a custodial sentence, thus strict custody was in fact a way to isolate a group of offenders from society and, by prolonging the period of separation, it reduced the chances of successful social integration. The ineffectiveness of the legal instrument was also demonstrated by the frequent recidivism of those released from strict custody. In the light of these factors, the law-maker considered it appropriate to abolish the institution of strict custody.

[24] 2 The contested provision of the old Criminal Code was enacted by the Act LVI of 2010 amending the Act IV of 1978 on the Criminal Code. The amending Act had three main innovations: the restoration of the median value, the aggravation of the

concurrent sentence and the amendment of the rules on multiple violent recidivist offenders.

[25] The "three strikes" provision described in the US and Slovak legislation can be matched in Hungarian law by the rule on multiple violent recidivist offenders. According to this provision, the person who commits a violent offence against a person (constituting a repeat offence) for the third time – i.e. who has already been convicted twice – is subject to the application of double of the upper limit of the punishment. If it exceeds twenty years or the offence is otherwise punishable by life imprisonment, a life sentence shall be imposed. [Section 90 (2) of the Criminal Code].

[26] The subject-matter of the present case is not the "three strikes" applicable to violent multiple recidivist offenders, but the examination of the constitutionality of the statutory provisions relating to the aggravation of a concurrent sentence. Under the stricter concurrent sentencing rules challenged in the judicial motions, if a person commits at least three offences of violence against a person and they are tried in the same proceedings, the upper limit of the punishment for the most serious of these offences is doubled. If this would exceed twenty years, or if one of the concurrent offences is otherwise punishable by life imprisonment, a life sentence shall be imposed.

[27] The fundamental difference between the concurrent sentencing rules and the rules for violent multiple recidivist offenders is that the concurrent rules may apply to an offender who has committed three violent offences against a person for the first time and at the same time or within a short period of time, but who has never been previously convicted. However, multiple violent offenders already have a criminal record and have been convicted twice before.

[28] The current rules of the Criminal Code clarify the possibility of applying stricter concurrent sentencing rules. Pursuant to section 81 (4) of the Criminal Code challenged in the judicial motions, the at least three offences of violence against persons must have been committed at different times. A further clarification is that the rule applies only to completed offences, so that attempts and preparation do not justify the application of stricter rules. It has also become possible to reduce the sentence without limits under the conditions set out in the General Part of the Criminal Code.

[29] The criminal chamber opinion 5/2013 (XII.11.) BK (hereinafter: CCO) explains and analyses in detail what the changes in the rules of the Criminal Code mean, how the possibility of applying the stricter concurrent sentencing rules has been narrowed. The fact that the more severe punishment can only be applied to completed offences committed at different times means that it can only be applied in the case of genuine substantive concurrence. Accordingly, the aggravating sentencing provisions for concurrent sentence cannot be applied where the acts of the accused form a legal or natural unit. Application is also excluded in the case of offences which are part of a

formal concurrence or if the offences to be judged upon are in partly formal and partly substantive concurrence with each other, but at least three completed offences of violence against a person which are part of a substantive concurrence cannot be identified among them. In addition, the application of more severe provisions is also excluded where the concurrent sentence was imposed following the termination of probation in respect of one of the three offences of violence against a person. (Paragraph I of the CCO)

[30] Compared to the provisions of the old Criminal Code, it is yet another restriction that the imposition of a more severe concurrent sentence may only be applied in the case of completed offences. Accordingly, application of the provision is excluded if no completion of three offences can be established in the case of offences of violence against persons in concurrence of criminal offences committed at different times. This also applies where the offence with the highest possible punishment of the three offences is an attempt. The more serious concurrent sentencing provisions shall not apply where the attempt to commit the more serious offence includes a qualified completed form of another offence of violence against persons. (Paragraph II of the CCO)

[31] It is also clear from the foregoing that the current provisions of the Criminal Code allow for a much narrower range of the application of an aggravated concurrent sentence than the old Criminal Code. It was with this in mind that the Constitutional Court carried out the constitutional review of the contested provisions of the old Criminal Code and the current Criminal Code.

[32] 3 In his report AJB-5138/2013 of February 2014, the Commissioner for Fundamental Rights analysed in detail the "three strikes" rule. In the context of the concurrent three strikes rule incorporated in section 81 (4) of the Criminal Code, he found that it violated legal certainty and the right to a fair trial, and therefore found it necessary to amend the law in line with the content of the Fundamental Law.

[33] 4 The discretion of the law-maker is broadly enforced in the process of criminalisation and in the development of the system of punishments. The separate treatment of certain groups of offenders and the possibility of providing for their more severe punishment in principle is a matter of criminal policy. It is not for the Constitutional Court to decide on the appropriateness and justification of the aims and requirements of criminal policy, in particular their expediency and effectiveness, but it may examine whether, in exercising its discretionary power to lay down rules on the system of sentencing, the law-maker has not infringed any provision of the Fundamental Law.

[34] The Constitutional Court is therefore empowered to examine criminal policy on the basis of the relevant provisions of the Fundamental Law, with particular regard to

the constitutional criminal law guarantees for the protection of fundamental rights. Constitutionally, it cannot be questioned whether a given criminal sanction is suitable for achieving the objectives of criminal policy, but the constitutionality of the legal conditions for its application may be examined.

[35] 5 In connection with Article B (1) of the Fundamental Law, the petitioning judicial panels argued that the challenged provision of the Criminal Code is contrary to the principle of legal certainty derived from the rule of law, because the conditions of mandatory life imprisonment as a concurrent punishment are unclear and not calculable. The petitions also consider the legislation to be contrary to the Fundamental Law under Article B (1) also on the ground that the imposition of a mandatory life sentence does not allow for the examination and enforcement of the sentencing aspects, which is contrary to the principle stemming from the requirement of legal certainty that criminal law as a whole, including the sentencing system, should not be contradicting to itself.

[36] In the course of examining the constitutionality of section 85 (4) of the old Criminal Code and section 81 (4) of the Criminal Code, the Constitutional Court has compared the legislation with the criteria of legal certainty under Article B (1) in two respects. On the one hand, it examined the predictability and foreseeability of applying the criminal law consequence specified in section 85 (4) of the old Criminal Code and section 81 (4) of the Criminal Code (Reasoning [43] to [54]), and, on the other hand, the extent to which the mandatory application of life imprisonment is compatible with the constitutional / Fundamental Law criteria relating to the system of punishments under the rule of law (Reasoning [55] to [64]).

[37] Following the entry into force of the Fourth Amendment to the Fundamental Law of Hungary (25 March 2013), the Constitutional Court ruled, with regard to clause 5 of the Final and Miscellaneous Provisions of the Fundamental Law, that "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" {Decision 13/2013. (VI.17.) AB, Reasoning [32]}. The Constitutional Court, on the basis of the content of Article B (1) of the Fundamental Law on legal certainty and Article 2 (1) of the Constitution, the contextual adequacy of the Fundamental Law as a whole, the rules of interpretation of the Fundamental Law and the specific case, concluded that there was no obstacle to the applicability of its previous findings on the constitutionality of

criminal legislation and that it was necessary to include them in the grounds of the decision to be taken.

[38] 5.1 The Constitutional Court first briefly reviewed the general features of the existing system of punishments, the purpose of punishment and the way in which sanctions are determined.

[39] The monopoly of the State's criminal authority clearly implies the obligation to establish a system of criminal law control over socially harmful acts, to enforce the criminal claim, and to operate law enforcement and the criminal justice system in accordance with constitutional conditions. This constitutional obligation justifies that the bodies exercising the State's punitive authority are given effective means to perform their tasks, even if these means are severely restrictive of rights in their essence. {Decision 61/1992. (XI.20.) AB, ABH 1992, 280, 281; Decision 31/1998. (VI.25.) AB, ABH 1998, 240, 247; Decision 13/2002. (III.20.) AB; most recently: Decision 3025/2014. (II.17.) AB, Reasoning [58]}.

[40] Criminal sanctions are the most serious restriction of citizens' fundamental rights, and it is therefore particularly important that criminal sanctions should be applied with appropriate safeguards. One of the most important guarantees is that the law-maker alone shall determine the legal consequences, but that the competence to apply them in a specific case is shared between the law-maker and the law enforcement authorities.

[41] Several solutions to this division of responsibilities have developed historically. In the case of an absolute definitive system of sanctions, which was prevalent in the early stages of criminal law, the court had to apply the sanction without discretion and in a mandatory manner. The main disadvantage of this system was that it did not allow for individualisation at all. The counterpoint to the absolute definite sanction system is the absolute indeterminate sanction system, in which the law merely stipulated that the conduct in question was punishable and the judge was free to choose the type and level of the criminal sanction. This system fully allows for individualisation, but the excessively wide discretion of the law allows for arbitrariness and legal uncertainty. The division of tasks between the law-maker and the body applying the law is reflected in the relatively definite and indefinite system of sanctions. In the relatively definite system of sanctions, the law-maker determines the type of criminal sanction and the upper and lower limits of its scope, and within this range it is the task of the judicial authorities to impose a specific legal sanction, adapted to the circumstances of the case and the personality of the offender. In a relatively indeterminate system, the law-maker determines the applicable sanction and the upper or lower limit of its level. (Hungarian law knows relatively indeterminate sanctions in the field of measures, such as compulsory medical treatment.) The system of criminal sanctions in the current

Criminal Code corresponds to the relatively definite model, in which the legal framework creates the possibility of individualisation in the assessment.

[42] The system of punishment and the normative standards of sentencing, which are adapted to the nature and gravity of each offence, serve together the function of punishment under the rule of law, the protection of society, the proportionate and deserved retribution by the sanction, as well as specific and general prevention. (Decision 1214/B/1990 AB, ABH 1995, 571, 577) When imposing a sentence, the offender's personal circumstances, including the offender's criminal record, repeat offences and other mitigating and aggravating circumstances, shall be taken into account. In the context of committing the offence, criminal law attaches particular, aggravating importance to repeated offending.

[43] 5.2 The Constitutional Court first examined, in relation to the challenged provisions of the Criminal Code and the old Criminal Code, whether the conditions for the application of the provision on the imposition of sentences under section 81 (4) of the Criminal Code and section 85 (4) of the old Criminal Code meet the criteria of predictability and foreseeability arising from the requirement of legal certainty, which is part of the rule of law.

[44] The Constitutional Court already stated in its Decision 9/1992 (I.30.) AB – and still considers it to be applicable today – that legal certainty is an indispensable element of the rule of law. Legal certainty requires of the State, and primarily the law-maker, that the law as a whole, its specific parts and provisions be clear, unambiguous, their impact predictable and their consequences foreseeable by those to whom the laws are addressed. (ABH 1992, 59, 65) One of the most important basic requirements of legal certainty is the predictability of legislation, the clarity of the law as a whole, of its individual parts and of individual legal norms and institutions. {Decision 38/2012. (XI.14.) AB, Reasoning [84]; Decision 3047/2013. (II.28.) AB, Reasoning [13] and [16]; Decision 3106/2013. (V.17.) AB, Reasoning [8]; Decision 24/2013. (X.14.) AB, Reasoning [48]}.

[45] From the point of view of legal certainty, legal provisions that guarantee that the conduct of the law enforcement authorities can be reasonably expected to comply with the requirements of the law are particularly important. Legal certainty and the protection of fundamental rights therefore require detailed and differentiated rules on the imposition of sentences. This requirement is not fulfilled if the wording of the legislation is unclear and allows for multiple interpretations, which means that the predictable operation of the legal instrument cannot be ensured.

[46] 5.2.1 The basic condition for the applicability of the provisions of section 81 (4) of the Criminal Code and section 85 (4) of the old Criminal Code is that at least three offences of violence against persons shall be tried in a single proceeding. Section 81

(4) of the Criminal Code regulates the applicability of the stricter concurrent sentencing rules in a partially different way from the old Criminal Code. Firstly, it narrows down the range of conducts to commit the offences, as the more severe punishment can be applied to at least three completed acts of violence against persons committed at different times. It also allows the provisions of the general part on allowing unlimited mitigation to be applied. Although the current rules of the Criminal Code specify differently the applicability of more severe concurrent sentencing rules, there is no difference between the current and the former rule as regards the offences being in a concurrence of criminal offences, which must be dealt with in a single procedure. In the light of the above, the Constitutional Court has examined the compatibility of the contested provisions with the Fundamental Law, not separately but jointly.

[47] Whether criminal offences are dealt with in a single procedure or in separate procedures may be influenced by several factors. It may depend on whether the law enforcement authorities or the courts are aware that all the offences have been committed, or whether they consider it appropriate to join cases in the criminal proceedings. However, the rule of joining based on expediency is not a mandatory rule, but merely an option.

[48] The rules of the ACP also allow for the subsequent consolidation of cases in the later stage of criminal proceedings, in the context of ordinary legal remedies, which may create the applicability of stricter concurrent sentencing rules. If the court of first instance was unable to join cases, for example because of closing one of the cases, and the joining of cases for the purposes of sentencing may be justified in the second or third instance proceedings, the law allows this (section 265, section 308 of the ACP). The ACP also provides a solution if the court of second or third instance finds that the cases were not joined at an earlier stage of the criminal proceedings, although it would have been expedient to do so.

[49] Until the final conclusion of the criminal proceedings, the ACP allows for the possibility to adjudicate in a single procedure three criminal offences of violence against persons, but the procedural rules do not provide for the mandatory joining of the proceedings in such cases either. Neither the Criminal Code nor the ACP contains any system of objective conditions or criteria which would determine or provide guidance as to when it is expedient to join proceedings, and thus to apply section 81 (4) of the Criminal Code or section 85 (4) of the old Criminal Code. It should also be noted that the provisions of the ACP on extraordinary remedies no longer allow for the subsequent adjudication of the acts in a single procedure.

[50] 5.2.2 Overall, it can be seen that the different procedural situations result in different sentencing for offenders who have committed three violent crimes against persons. The current legislation has not altered the fact that the different procedural

situations may lead to different sentencing. Nor does the narrowing of the scope of the offence resolve the possibility that offences may be dealt with in one or more proceedings, and thus the unpredictability of the applicability of the stricter concurrent sentencing rules.

[51] Indeed, if the three offences of violence against persons are tried in a single proceeding, the punishment shall be determined in accordance with the stricter concurrent sentencing provisions. If, however, the same three offences are not tried in a single proceeding and the offender committed all the offences before the promulgation of earliest first instance sentence, the punishment shall be imposed within the limits set by the Criminal Code in the Special Part, in accordance with the provisions on accumulative sentence, which will result in a different imposition of punishment. The sanction applied in such cases shall be imposed in accordance with the general provisions on concurrent sentence [section 81(1) to (3) of the Criminal Code] in a way that the total duration of the accumulative sentence shall be the sum of the most severe sentence and one third of the shorter sentence or sentences, but shall not exceed the total duration of the sentences (section 94 of the Criminal Code). Thus, in the case of an accumulative sentence, neither the stricter concurrent sentencing provisions, nor the doubling of the maximum upper limit of punishment, nor mandatory life imprisonment may be applied.

[52] The lack of consistency between the rules on concurrent and accumulative sentences and, in this context, the violation of legal certainty and the right to a fair trial are also highlighted in the report No. AJB-5138/2013 of the Commissioner for Fundamental Rights.

[53] On this basis, it can be concluded that for offenders who have committed at least three violent crimes against persons, it is not foreseeable when the stricter concurrent sentencing rules, including the mandatory life imprisonment, may be applied. The possible different procedural situation of these offenders creates the possibility that they will not face the same criminal threat, which makes the application of the contested provision of the Criminal Code and the old Criminal Code unpredictable and unforeseeable for these persons. The contradictory nature of the legislation cannot be adequately remedied by judicial interpretation, since it allows for conflicting interpretations which are not consistent with the legislative purpose.

[54] The conflict with the Fundamental Law lies in the fact that the law-maker has not fully created the substantive and procedural criminal law conditions which would allow the same conditions for the imposition of sentences, irrespective of the procedural position of the accused, i.e. irrespective of whether their acts are judged in one or more proceedings. In the light of the above, the Constitutional Court finds that section 81 (4) of the Criminal Code, as well as section 85 (4) of the old Criminal Code do not meet

the requirement of legal certainty deriving from the rule of law enshrined in Article B (1) of the Fundamental Law.

[55] 5.3 The Constitutional Court then examined the extent to which the mandatory application of life imprisonment under section 81 (4) of the Criminal Code and section 85 (4) of the old Criminal Code meets the constitutionality / Fundamental Law criteria for a punishment system based on the rule of law, as derived from Article B (1) of the Fundamental Law.

[56] A key element of the Fundamental Law's limits on criminal law is that the individual enjoys protection against arbitrary use of criminal law by the state. The extreme limits of the constitutional framework for the applicability of criminal sanctions are marked by the right to human dignity (Article II of the Fundamental Law), the right to personal liberty and security (Article IV of the Fundamental Law) on the one hand, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article III of the Fundamental Law) on the other. In comparison with the Constitution, Article IV (2) of the Fundamental Law has clarified the content of the right to personal liberty by not explicitly excluding the possibility of permanent deprivation of liberty, but only for the commission of a violent and intentional crime, on the basis of a final court judgement and with due regard to the criteria of necessity and proportionality.

[57] The extent to which the State may interfere in the life of the individual and restrict his fundamental rights and freedoms through the application of punishments and measures may be deducted from the rule of law and the constitutional prohibition on restricting the essential content of fundamental rights. The Constitutional Court does not have the power in that regard to overrule the law-maker's discretionary criteria, so long as it does not find that the coherence of the system of punishments, and thus legal certainty, has been infringed. The constitutional objective of coherent regulation is to exclude arbitrariness on the part of the State.

[58] 5.3.1 The Constitutional Court finds that the threat of a more serious punishment for multiple offences is based on constitutional grounds. The legislative assessment of multiple offences is necessary because it attaches particular importance to compliance with criminal law standards. Moreover, a more severe assessment may also be justified because it gives weight to the functioning of the criminal justice system.

[59] A more severe assessment of multiple offences in the current criminal law system meets the requirements of constitutional criminal law, the law-maker has the constitutional freedom to punish multiple offences more severely, but the limitation of rights by way of punishment shall also meet the constitutional requirements of criminal law.

[60] 5.3.2 It does not follow from the constitutionally recognisable aims of punishment that the law may not lay down rules of orienting nature or even mandatory rules for the imposition of the punishment. The system of the current Criminal Code also contains provisions which, under certain conditions, provide for the mandatory imposition of certain punishments (e.g. expulsion (section 59 (1) of the Criminal Code), prohibition from public office (section 61 (1) of the Criminal Code) or measures (e.g. suspended imprisonment or mandatory probationary supervision under release on probation (section 119 of the Criminal Code)). However, this is subject to one limitation: it shall be carried out for a constitutionally justifiable purpose and shall respect the criminal law guarantees explicitly provided for in the Fundamental Law, as well as other principles of criminal law and fundamental rights.

[61] 5.3.3 Section 85 (4) of the old Criminal Code provides for the mandatory application of the most severe sanction of the penal system, life imprisonment, in the case of at least three offences of violence against persons as defined by law, under certain statutory conditions. There are two cases of mandatory application of life imprisonment, where the upper limit of the increased punishment would exceed twenty years or where the law provides that any of the offences committed is punishable by life imprisonment.

[62] Section 81 (4) of the Criminal Code, although it narrows the cases of applicability to the commission of completed offences of violence against persons committed on at least three different dates, modifies the scope of offences of violence against the person, the punishment for certain offences and makes the rules of unlimited mitigation applicable, does not change the cases of the mandatory application of life imprisonment sentence. The contested provisions of the Criminal Code treat all the offences falling within the category of crimes of violence against the person in the same way as regards the mandatory application of the punishment, even though they are criminal offences with different substantive gravity. According to the Constitutional Court, the mandatory application of life imprisonment in certain cases, even in the case of multiple offences, cannot be constitutionally justified, even in the case of such a limited range of offences, which have different degrees of seriousness. The legislation under review does not allow the court to assess the actual gravity of each act committed, so there is no possibility for the court, when imposing the sentence, to properly assess the gravity of the acts, the danger of the offence and the offender to society, the degree of culpability, other aggravating and mitigating circumstances, and thus disrupt the coherent unity of the system of punishments under the existing rules.

[63] In the case of these special concurrence rules, differentiated sentencing in accordance with the gravity of the offences committed and in accordance with the fundamental criteria of the penal system would have been served if the law-maker had created the possibility for the courts to exercise discretion between the applicability of

a fixed-term sentence and a life sentence, which would have made it possible to impose an individualised sentence.

[64] In view of the above, the Constitutional Court held that the second sentence of section 81 (4) of the Criminal Code, and the second sentence of of section 85 (4) of the old Criminal Code, the mandatory application of the life sentence, is contrary to Article B (1) of the Fundamental Law, because it does not meet the requirements of the Fundamental Law relating to the penal system under the rule of law.

[65] 5.3.4 Since the Constitutional Court established that section 81 (4) of the Criminal Code, and section 85 (4) of the old Criminal Code are in conflict with the Fundamental Law on the basis of Article B (1) of the Fundamental Law, the Constitutional Court did not examine the content of the contested provisions in the context of other provisions of the Fundamental Law referred to.

[66] 6 In general, according to Article 45(1) of ACC, the legal regulation or provision thereof annulled by the Constitutional Court shall cease to have effect on the day after the publication of the Constitutional Court's decision on annulment in the Hungarian Official Gazette and shall not be applicable from that day; a legal regulation which has been promulgated, but has not yet entered into force shall not enter into force. However, the Constitutional Court may depart from the general rule when deciding on the repeal of a legal regulation contrary to the Fundamental Law or on the inapplicability of the annulled legal regulation in general, or in concrete cases, if this is justified by the protection of the Fundamental Law, by the interest of legal certainty or by a particularly important interest of the entity initiating the proceedings [Section 45(4) of ACC].

[67] In the present case, the Constitutional Court, in order to enforce the requirement of legal certainty, decided to annul section 81 (4) of the Criminal Code with retroactive effect to its promulgation. A statutory provision annulled with retroactive effect is void retroactively to the date of its enactment, which precludes its application. With regard to the Constitutional Court proceedings for specific review of a norm initiated on the basis of a judicial initiative, this means that, following the publication of the Constitutional Court's decision in the Official Journal, the suspended criminal proceedings shall be continued and judged on the merits. Since the legal consequences of annulment *ex tunc* are to be drawn by the sentencing judge, it was unnecessary to state in the operative part of this judgement the prohibition of application.

[68] The Constitutional Court found that section 85 (4) of the old Criminal Code was in conflict with the Fundamental Law, therefore, it could not be applied pursuant to section 45 (2) of the ACC in the case No. 11.B.972/2011 pending before the Budapest-

Capital Regional Court and the case No. 6.Bf.230/2012 pending before the Budapest-Capital Regional Court of Appeal.

[69] 7 Pursuant to section 45 (6) of the ACC, The Constitutional Court shall order the review of the criminal proceedings or infraction proceedings concluded with a final decision based on a law, which is contrary to the Fundamental Law, if the annulment of the applied law or provision thereof would result in the reduction or waiver of the punishment or measure or in the exemption from or limitation of criminal or infraction liability.

[70] Since the Constitutional Court found that section 81 (4) of the Criminal Code and section 85 (4) of the old Criminal Code were in conflict with the Fundamental Law, it ordered the review of the final criminal proceedings conducted by the application of the provisions of the law which were held to be contrary to the Fundamental Law.

[71] 8 In accordance with section 44 (1) of the ACC, the Constitutional Court ordered the publication of this decision in the Hungarian Official Gazette in view of the establishment of a conflict with the Fundamental Law.

Budapest, 7 July 2014.

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