Decision 15/2020 (VII. 8.) AB

On establishing a constitutional requirement for the interpretation and application of Section 337 (2) of Act C of 2012 on the Criminal Code

In the matter of a constitutional complaint, with dissenting opinion by Justice *dr. Ágnes Czine*, the Plenary Session of the Constitutional Court rendered the following

decision:

1. The Constitutional Court, acting *ex officio*, holds as follows: It is a constitutional requirement for the interpretation and application of Section 337 (2) of Act C of 2012 on the Criminal Code, pursuant to Article IX (1) and Article XXVIII (4) of the Fundamental Law, that the statutory definition only criminalises the communication of a fact which the perpetrator ought to have known, at the time the act was committed, to be false or which he himself had distorted and which was capable of obstructing or frustrating the defence during the special legal order.

2. The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Section 337 (2) of Act C of 2012 on the Criminal Code.

The Constitutional shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The petitioner filed a constitutional complaint pursuant to Section 26 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"). The petitioner requested the Constitutional Court to declare that Section 337 (2) of Act C of 2012 on the Criminal Code (hereinafter referred to as the "Criminal Code") is in conflict with the provisions of Article B (1) (principle of the rule of law, with particular regard to the clarity of the norms), Article I (3) (principle of necessity and proportionality), Article IX (1) (freedom of expression) and Article XXVIII (4) (*nullum crimen sine lege certa*) of the Fundamental Law and therefore annul it. The Constitutional Court adjudicated the petition according to its content.

[2] 1.1 The petitioner points out that the complaint was submitted on the basis of Section 26 (2) of the Constitutional Court Act, in which case the petitioner's involvement and the contested rule being directly given effect must be proved.

[3] The petitioner further points out that the general requirements may partly be enforced differently in the case of reviewing the rules of substantive criminal law: extra attention should be paid to the fact that criminal law is a final instrument (*ultima ratio*) in the system of legal liability; the most serious legal consequences are applied in criminal law Of course, in the context of the Criminal Code, too, the admission of a complaint based on Section 26 (2) of the Constitutional Court Act shall require the examination of exceptionality. Admission may be considered when a new statutory definition of criminal law criminalises a conduct, which had been allowed as a lawful conduct before the entry into force of the new provision. Admission may be even more justified when the criminalised conduct means a direct restriction of a fundamental right. As on the basis of Article R (2) of the Fundamental Law, the laws shall be binding on everyone, in these cases the entry into force of the statutory definition of the criminal offence implies that the affected persons must immediately stop their conduct carried out lawfully previously and they shall face criminal prosecution if they fail to do so. Due to the *ultima ratio* character of the criminal procedure as well as to its stigmatising effect immediately influencing other legal relations as well, the affected person shall not be expected to take the risk of the punishment connected to the prohibition {Decision 3/2019 (III. 7.) AB (hereinafter referred to as the "2019 Court Decision"), Reasoning [35]}.

[4] 1.2 According to the petition, the petitioner is a person who speaks regularly in public affairs. The petitioner also contributes to public debates on his social networking site, which can reach hundreds or even thousands of people, but which contributions, in principle, are definitely available to the widest public. He has also spoken on a number of occasions in connection with the epidemiological emergency, and he plans to do so in the future, as the discussion of public affairs cannot stop during a health crisis, and even in such a situation the pluralist debate is of paramount importance.

[5] The contested statutory definition of substantive criminal law is a new provision and has not been included in Hungarian law so far. It unquestionably restricts a fundamental right, the right to freedom of expression, as it criminalises certain types of speech. In the already cited 2019 Court Decision, the petitioner's personal involvement was found for similar reasons: The Constitutional Court ruled that, concerning conduct subject to the new statutory definition of substantive criminal law, possesses a restraining effect, it becomes directly effective and it is enforced without the intermediary of any further judicial decision. The challenged Act actually and directly affects those natural persons who had been lawfully engaged, before the entry into force of the statutory definition, in the conduct prohibited therein, thus the

challenged provisions change, without any further implementing act, the legal position of natural persons (2019 Court Decision, Reasoning [36]). The present case is entirely analogous, and the new type of statutory provision of the crime of scaremongering can, in principle, be applied to the petitioner at any time during an epidemiological emergency due to his position on it.

[6] 2. As contended by the petitioner, the petition clearly formulates a constitutional law issue of fundamental importance under Section 29 of the Constitutional Court Act, because the Constitutional Court must take a position on the constitutionality of completely unpredictable criminal law norms such as the one challenged in the present case, and whether it is possible to restrict the right to freedom of expression in a state governed by the rule of law by criminal law in the case of a special legal order and what its constitutional limits are (point 10 of the petition at p. 10).

[7] 2.1 As stated in the complaint, the contested rule violates Article XXXVIII (4) and Article B (1) of the Fundamental Law. Citing the decisions of the Constitutional Court, pursuant to the complaint, the complainant maintains that serious constitutional concerns may be raised in connection with Section 337 (2) of the Criminal Code, which has just been inserted. This rule of the Criminal Code penalises the assertion or rumour of any untrue fact or a true fact distorted in broad publicity during a special legal order in such a manner that is likely to obstruct or frustrate the effectiveness of the defence.

[8] This rule of the Criminal Code keeps those concerned, virtually anyone who speaks in public affairs during a special legal order or even just uses social media, in complete uncertainty as to exactly what speech criminal law criminalises to be punishable by imprisonment for up to five years at that. At first glance, assertion of an untrue fact or distorting a true fact seems unproblematic, as it is included in many other places among the substantive rules of the Criminal Code. However, in the context of the crime of scaremongering, this clause is not without problems either. Illustrated by a specific example of the complaint: In preparing this submission, there is a heated debate among both experts and lay people as to whether to wear a face mask obligatorily in connection with the control of the coronavirus pandemic. The WHO itself would not make it mandatory, whereas other undisputed authorities would. If someone presents one or the other position as an “indisputable professional position” but such position will later, tragically, turn out to be wrong, will that person be held accountable? Pursuant to Section 337 (2) of the Criminal Code, this eventuality cannot be ruled out. Similarly, it is conceivable that a mayor who becomes aware that there is an outbreak site or one or more infected persons in the locality will think twice before notifying the residents.

[9] Also of serious concern is the clause in the contested legal provision that an untrue fact or distortion must be "likely to" obstruct or frustrate the defence. The current

epidemiological emergency aptly shows that such legal wording is completely elusive. We do not yet know what the best defence against the coronavirus is. What's more, we don't even know if we have good protection at all or if we just have bad and worse choices to make. For this reason, in the debates here and now, it is impossible to say, with very few exceptions, what actually obstructs or frustrates the defence. It is easy to imagine that a critique of a method of defence now seems heresy, but later proves to be correct. The same is true for alternative treatments, and protocols for society as a whole.

[10] The investigating authority is not in a position (at least in most cases) to decide whether a false or distorted statement is currently likely to obstruct the defence, the authority will decide, even with the best of intentions, arbitrarily in the vast majority of cases, but at least there is a realistic chance of that happening. This question is not only impossible to be resolved by the police, who do not have epidemiological expertise, but also by the professionals with the requisite certainty in the field of criminal law. This criminal statutory provision also carries the risk that the defendant will become a victim of "hindsight", that is, will now be prosecuted, and it will indeed turn out during the proceedings that he was wrong; however, no one will remember, nor will it be possible to assess to measure the subjective manifestation of the "perpetrator" against the objective state of knowledge at the time of the offence was committed and examine whether the defendant's error could have been saved. One will project one's subsequent wisdom back to the time of the perpetration, which could lead to a constitutionally impermissible restriction on freedom of expression, as regulation makes the scope of the norm completely unpredictable.

[11] Overall, therefore, Section 337 (2) of the Criminal Code provides a completely unpredictable and broad scope for arbitrary application of the law, leaving the recipients of the norm in complete uncertainty on account of its utter incomprehensibility. Therefore, it does not comply with the principles of constitutional criminal law and the relevant practice of the Constitutional Court and therefore should be annulled.

[12] 2.2 As stated in the complaint, the law violates the petitioner's right to free expression, also guaranteed by Article IX of the Fundamental Law, by providing for the imposition of a criminal sanction against him, and in doing so, it interferes in an unnecessary and disproportionate way in how the petitioner can participate in democratic public debates, creating what is known as a chilling effect.

[13] The petitioner refers to several Constitutional Court decisions and argues that, pursuant to Article I (3) of the Fundamental Law, a fundamental right may be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent strictly necessary, in proportion to the objective pursued, while respecting

the essential content of the fundamental right. The challenged statutory definition of the Criminal Code certainly do not pass this test, for the following reasons.

[14] Pursuant to the complaint, the purpose of the contested statutory provision of the Criminal Code is clear: It seeks to prevent, by all possible means, the defence against an event giving rise to a special legal order from being undermined. In such cases, each State is struggling with two enemies: The specific serious crisis situation, such as the coronavirus pandemic in Hungary now, and the potential panic in the minds of those affected, which can also cause serious damage. The amendment to the Criminal Code challenged in the present petition intends to oppose the latter. The objective itself cannot be constitutionally disputed, in the case of a special legal order, panic must be avoided at all costs.

[15] At the same time, avoiding by any means does not mean fighting at all costs. The fight against crises is a matter of society as a whole, where—like it or not—no one owns exclusively the Philosopher's Stone, no one and no State or other body has exclusive knowledge of the path to a solution. The way out of the crisis is evolutionary and not arrow-straight, inevitably a complex thought process laden with mistakes and setbacks. This is the most optimal way to go if the ideas and information related to the crisis situation can flow as freely as possible. Proposed solutions should be discussed as widely as possible, and this should be allowed by the State and the law, and subject to the minimum restrictions that exist. This is in no way inconsistent with the fact that, in times of special legal order, the executive branch has, on a temporary basis, greater powers than usual for effective and rapid defence, and in many cases has the final say on contentious issues.

[16] In summary, in times of special legal order, therefore, in many cases taking into account the principle of common sense contained in Article 28 (1) of the Fundamental Law, not only should one start from a greater restriction of freedom of speech, but on the contrary: the degree of the greatest possible prevalence is the decent standard. This is justified by the interest of the most effective defence against a given crisis, which, in turn, is obviously a constitutional value.

[17] 3. In the proceedings initiated on the basis of the constitutional complaint, the President (Chief Justice) of the Constitutional Court ordered the extraordinary adjudication of the case on the basis of Section 16 (5) (a) of the Rules of Procedure.

[18] The Constitutional Court invited the Minister of Justice and the Prosecutor General to inform the Constitutional Court of their positions on the case. The Constitutional Court requested that the Prosecutor General also inform the Constitutional Court about the practice in the application of the law related to the provision contested by the petition.

[19] 3.1 In the Minister of Justice's view, it is doubtful whether the conditions for admission are met as set out in the complaint. Substantively speaking, the Minister of Justice took the position that the definition of the special legal order is included in the Fundamental Law, within the special legal order there was a separate legal act on the declaration of a state of danger, which made it possible to delimit the scope of the defence. The connection between the defence activity and the state of danger can be established without concern. Obstruction or frustration related to the effectiveness of the defence are known clauses in criminal law and there exists judicial practice developed in connection with their content. These criminal acts can also be found in the criminal offence of contempt (Section 279 of the Criminal Code), which also criminalises conduct that acts specifically against definable activity. Other elements of the statutory definition do not differ from the first default case of the criminal offence of scaremongering [Section 337 (1) of the Criminal Code].

[20] Under Article 54 (1) of the Fundamental Law, the exercise of fundamental rights under a special legal order may, with a few exceptions, be suspended or may be restricted beyond the extent specified in Article I (3). The contested provision is a special default case concerning the period of special legal order for scaremongering. Article IX of the Fundamental Law is not included in Article 54 (1) of the Fundamental Law, therefore it may be limited during the special legal order according to the common rules of the Basic Law concerning the special legal order. The reasoning attached to the impugned provision states that the constitutional requirement of proportionality in criminal law requires that an assertion that is not likely to interfere with the effectiveness of the defence, and therefore does not have an objective effect on public peace, should not be penalised. Only the intentional commission of the criminal offence is criminalised (Section 4 of the Criminal Code) and statements of fact the untrue nature of which the perpetrator was unaware of, even out of carelessness or negligence (Section 8 of the Criminal Code), cannot be included in the impugned statutory provision. Proportionality to the criminality posed by criminal law is also ensured by the fact that the effectiveness of the defence can be directly linked to the formal measures for the defence. The statutory definition of scaremongering at issue in the present case can be realised only by directly endangering a specific defence activity, without being subject to any emerging result.

[21] 3.2 According to the information of the Prosecutor General, one cannot talk about the legal practice developed in connection with scaremongering during the special legal order, given the short time that has passed since the statutory definition was introduced into the Criminal Code. According to the data available to the prosecutor's office, ten criminal cases have so far been the subject of the criminal offence under review. Due to the crime of scaremongering in violation of Section 337 (2) of the Criminal Code, the investigating authority decided to reject the crime report in one

case and to terminate the proceedings in one case, in the absence of a criminal offence, seven cases are under investigation, and indictment was issued in one case. Due to the unlawful actions of the investigating authority, prosecutorial action was taken in three cases, in two of which the prosecutor's office upheld the complaint against the suspect and established the termination of the suspect status. In these cases, the investigating authorities wrongly considered the critiques and political opinions about the epidemiological situation published on Facebook social networking site by the persons interviewed as suspects to be in conflict with the statutory definition. In one case, the subject of the suspicion was, in addition to political expression, a statement of fact. In the third case, the investigating authority erroneously classified as scaremongering the act under investigation giving rise to a suspicion of insult. In order to ensure the uniformity of the law enforcement and judicial practice, the Office of the Prosecutor General, on 25 May 2020, issued guidelines concerning the criminal offence specified in Section 337 (2) of the Criminal Code.

II

[22] 1. Pursuant to the provisions of the Fundamental Law invoked in the petition:

"Article B (1) Hungary shall be an independent, democratic rule-of-law State."

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

"Article IX (1) Everyone shall have the right to freedom of expression."

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

[23] 2. The relevant provisions of the Criminal Code are as follows:

"Section 337 (1) Any person who, at a place of public danger or before the public at large, asserts or rumours an untrue fact or a true fact in such a distorted manner in the context of the public danger that is likely to cause disturbance or unrest in a larger proportion of the population is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who, during a special legal order asserts or rumours in broad publicity an untrue fact or a true fact in such a distorted manner that is likely to obstruct of frustrate the effectiveness of the defence is guilty of a felony punishable by imprisonment for one to five years."

III

[24] 1. The complaint complies with the legal conditions for an explicit request set out in Section 52 (1b) of the Constitutional Court Act.

[25] The petition indicated the legal provision establishing the petitioner's entitlement and the competence of the Constitutional Court [Sections 51 (1) and 52 (1b) (a) of the Constitutional Court Act]; and requested the proceedings of the Constitutional Court within the competence contained in Section 26 (2) of the Constitutional Court Act. The petitioner also indicated the statutory provision to be reviewed by the Constitutional Court [Section 52 (1b) (c) of the Constitutional Court Act] and the infringed provisions of the Fundamental Law [Section 52 (1b) (d) of the Constitutional Court Act]. The petitioner provided grounds for initiating the procedure, explained the essence of the violation of the rights enshrined in the Fundamental Law and invoked in the petition [Section 52 (1b) (b) of the Constitutional Court Act], and also explained why the impugned statutory provision contradicts the [Section 52 (1b) (e) of the Constitutional Court Act]. The petitioner submitted an express request for annulment of the impugned statutory provision [Section 52 (1b) (f) of the Constitutional Court Act].

[26] The Act entered into force on 31 March 2020, the constitutional complaint was lodged on 15 April 2020, within the set deadline.

[27] Pursuant to Section 56 (2) of the Constitutional Court Act, the Constitutional Court determines whether the petitioner has fulfilled the statutory conditions for the admissibility of a constitutional complaint, in particular the involvement under Sections 26 to 27 of the Constitutional Court Act, exhaustion of legal remedies, and the conditions under Sections 29 to 31 of the same Act.

[28] Pursuant to Section 29 of the Constitutional Court Act, the Constitutional Court shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance. However, Section 31 (6) of the Rules of Procedure allows the Justice delivering the opinion of the Court (as Rapporteur) to submit to the Bench a draft containing the decision on the merits of the complaint instead of the decision on admitting the complaint.

[29] 2. The petitioner requested the proceedings of the Constitutional Court within the competence pursuant to Section 26 (2) of the Constitutional Court Act.

[30] Pursuant to Section 26 (2) of the Constitutional Court Act, Constitutional Court proceedings may also be initiated by exception if due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights

[31] Section 337 of the Criminal Code in force until 30 March 2020 already contained a similar crime, also under the designation 'scaremongering'. Under this rule, any person who, at a place of public danger or before the public at large, asserts or rumours an untrue fact or a true fact in such a distorted manner in the context of the public danger that is likely to cause disturbance or unrest in a larger proportion of the population at the place of public danger is guilty of a felony punishable by imprisonment not exceeding three years.

[32] That is, some acts may have realised both the old and the new statutory definition. Among the penalised conduct under Section 337 of the Criminal Code, as amended, there may be conduct that was previously prohibited by the Criminal Code. However, it cannot be stated beyond a shadow of a doubt that the new rule does not apply to conduct that was not previously prohibited in the Criminal Code. With regard to the conduct that has now become prohibited, the Constitutional Court has thus established that Section 337 (2) of the Criminal Code may become directly effective in relation to natural persons, which confirms the existence of the condition of exceptionality.

[33] Section 337 (2) of the Criminal Code is a new piece of legislation. There is no judicial practice providing joint interpretation of the specific elements of the statutory definition jointly which could be taken into account in the assessment of the realisation of the conditions of direct constitutional complaint laid down in Section 26 (2) of the Constitutional Court Act.

Consequently, the Constitutional Court established that in this respect the exceptionality required under Section 26 (2) of the Constitutional Court Act justifies the need to have a review on the merits carried out by the Constitutional Court. This is also justified by the fact that there is a debate in the public discourse about the initiation of a relatively large number of proceedings in a relatively short period of time, but not yet concluded with indictment.

[35] A similar decision was made by the Constitutional Court in the 2019 Court Decision (Reasoning [32] to [35]). A deviation from that decision is that the applicability of the Criminal Code Statutory definition under review in the present case is limited in time, the act can be committed only “during a special legal order”. The requirement of actual

involvement means that, as a general rule, the involvement must exist at the time of submitting the constitutional complaint {Decision 3110/2013 (VI. 4.) AB, Reasoning [31]}, but at least at the time of its assessment {Decision 3002/2015 (I. 12.) AB, Reasoning [12]}. In the present case, when submitting the constitutional complaint, the conditions set out in Section 26 (2) of the Constitutional Court Act were met, similarly to the 2019 Court Decision.

[36] 3. Pursuant to the provisions of Section29 of the Constitutional Court Act, a further condition for the admissibility of a constitutional complaint in a proceeding initiated on the basis of Section26(2) of the Constitutional Court Act is to raise a constitutional law issue of fundamental importance.

[37] The fundamental question of constitutional importance in the light of the complaint is whether Subsection (2) of the current statutory definition of scaremongering meets the requirement of determinacy against criminal law norms and restricts the right to freedom of expression in accordance with the Fundamental Law.

[38] In assessing the constitutionality of criminal law, it must be examined whether the specific provision of the Criminal Code provides a moderate and appropriate response to the phenomenon deemed dangerous and undesirable, that is, whether the assessed regulation is limited to the narrowest possible scope in order to achieve its objective, in accordance with the requirement governing the restriction of fundamental constitutional rights.

[39] The Constitutional Court has also stated in several decisions that the freedom of the legislature is widely exercised when declaring a crime; however, this has its limits: It also depends on what right or abstract value is the object of protection and what right of persons is restricted by the criminal statute.

IV

[40] The petition is unfounded.

[41] 1. As underscored by the Constitutional Court in an earlier case, "the constitutional rule laying down the principles of *nullum crimen sine lege* and *nulla poena sine lege* represents one of the most traditional guarantees of the States governed by the rule of law: The requirement of prior knowledge of the conditions surrounding the limitation of the exercise of the State's punitive power and the State's capability of exercising such power. Consequently, all rules of criminal law bearing importance with respect to the establishment of individual criminal liability belong to the scope of protection under the requirements stemming from Article XXVIII (4) of the

Fundamental Law, including the scope of prohibition of criminal legislation and application of the law of retroactive force." In this decision, the Constitutional Court also pointed out that "the previous case law of the Constitutional Court represents a similar practice, according to [...] which the protection provided by the *nullum crimen sine lege* and *nulla poena sine lege* principles may not be narrowed down to the elements of the statutory definition and the punishments of the criminal offence in the special part of the Criminal Code, but it encompasses all relevant rules of assuming criminal liability [...]. This way the protection guaranteed by constitutional right applies to the rules on criminality, the imposition of punishments and to all rules of criminal law that may affect the individual's constitutional freedoms in the course of applying criminal law." {Decision 16/2014 (V. 22.) AB, Reasoning [33]}.

The difficulties resulting from the wording of the norm only raise the issue of the violation of legal certainty and make annulment of the norm unavoidable where the legal act defies interpretation from the outset and it makes the application of the norm unpredictable, and unforeseeable for the recipients of the norm {Decision 3106/2013 (V. 17.) AB, Reasoning [10]}. However, regarding the statutory definitions found in the Criminal Code, there are further requirements than defying interpretation: The condition of constitutionality also includes that criminalisation of an "act" under Article XXVIII (4) of the Fundamental Law should not contain indeterminate legal concepts. An indeterminate statutory definition in the Special Part of the Criminal Code would be incompatible with the principle of *nullum crimen sine lege* as in this case the recipients of the statutory definition cannot decide which conduct they should refrain from and what conduct may imply a punishment under the statutory provision. The judicial authority should not impose a punishment for a conduct not included by the legislator in any of the statutory definitions in the Special Part of the Criminal Code. Any application of criminal law that exceeds the content of the criminal law norm is prohibited to the detriment of the defendant. Neither the conditions of criminality nor the statutory definition elements of the criminal offences covered by the Special Part of Criminal Code are amenable to a liberal interpretation. An act not fitting the statutory definition cannot be included in the scope of criminalisation by analogy.

[43] 1.1 In the present case, in the context of the new statutory definition in the Criminal Code, there is no adequate ground to conclude that the specific definitions found therein—fact, assertion of a fact, assertion of an untrue fact, distortion of a true fact, distinction between assertion and rumour, special legal order, broad publicity, etc.—defy interpretation from the outset and are therefore inapplicable. Other statutory definitions of the Criminal Code do contain elements referring to the above. The related judicial practice may provide a basis for assessing what constitutes scaremongering as defined in Section 337 (2) of the Criminal Code. A court of general jurisdiction may conclude that the offence cannot be the subject of criticism of certain measures taken

by the government during the special legal order, nor of forecasting future events, nor of speculating on data not disclosed in the context of the special legal order. It is also up to judicial practice to determine what mode of perpetration, that is, what act is likely to "obstruct or frustrate the effectiveness of the defence". Neither the effectiveness of the defence, nor obstruction or frustration is an element of the statutory definition that defies interpretation. In several statutory definitions, the Criminal Code requires that the act be likely to produce a consequence. This likelihood indicates the objective impact capacity and direction of effect of the act.

[44] 1.2 Section 337 (2) of the Criminal Code is one of the crimes against public peace. That is, the statutorily protected legal interest is public peace. However, Section 337 (2) of the Criminal Code, taking into account that it can only be committed during a special legal order and in a manner that obstructs the defence at least, also indirectly protects the life and health of persons. It is an intentional crime in all its elements. It also includes the time and manner of the perpetration.

[45] These statutory provision elements are not always included in criminal offences, but they are known as contingent (or situational) criteria. However, the place, time, manner and means of committing a crime become relevant in the statutory definition of many crimes. All crimes are committed in some way by the perpetrator, to which the law usually does not attach importance. Yet, sometimes the manner in which the offence is committed becomes relevant in the statutory definition. Except in the case of mere negligence, the state of mind constituting guilt must cover all the elements characterised by the statutory definition of the offence under review, the object of the offence (passive subject); the act, in the case of result-offences, the result and the causal link; and, where the statutory definition includes such criteria, the place, time, manner and means of committing the offence. Criminal guilt is thus the psychological relationship between the material side and the state of mind of the perpetrator at the time of committing the offence.

[46] The crime of scaremongering can only be committed intentionally. Consequently, the perpetrator must be aware that he is committing his act in a time of special legal order; that the fact he asserts is untrue or has significantly distorted the real fact, and that the communication of his assertion is (objectively) likely to obstruct or frustrate the effectiveness of the defence. And the intention of the perpetrator must encompass committing the above-mentioned conscious communication before the public at large. If his state of mind or intention does not extend to any element, or if the assertion is not objectively likely to obstruct or frustrate the effectiveness of the defence, the offence will not be committed under the rules of criminal law. Whether the crime of scaremongering has taken place as described must be proven by the authority covering all the elements of the statutory definition.

[47] 1.3 Thus, based on the dogmatics of criminal law, Section 337 (2) of the Criminal Code cannot be applied to the content of public debates in general either. The measures of public authorities can be subject to criticism. The rule of the Criminal Code restricts prohibited communication to the scope of (untrue) information that may obstruct or frustrate the effectiveness of the defence, during a special legal order. The same follows from the provisions of the Fundamental Law.

[48] Pursuant to Article 54 (1) of the Fundamental Law, under a special legal order, the exercise of fundamental rights, with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6), may be suspended or may be restricted beyond the extent specified in Article I (3). The special legal order is a special part of the constitutional regulation, the right to manage periods deviating from peace and more generally from the general rules of state operation with an extended set of instruments. According to the target system of the concept, on the one hand, it is a State organisational level projection of the category of extreme necessity, and on the other hand, it is a form of deterrent toolbox for ensuring the stability of the constitution-based system. In times of special legal order, protection against situations giving rise to such legal order shall be based on the Fundamental Law. It cannot therefore be concluded that it would be unnecessary to block communications which could obstruct or frustrate the defence. The assessed rule of the Criminal Code applies to all forms of special legal order, not only to a state of danger. Section 337 (2) of the Criminal Code does not generally cover all disclosed facts related to the epidemic giving rise to the statutory amendment. Nor does it cover statements of fact which are disputed at the time of the communication or even come to light after the communication that such fact is untrue, where the untrue nature of the statement of fact is not known to the perpetrator because his conduct is incomplete as far as the fulfilment of the statutory definition elements are concerned.

[49] The prohibition therefore only applies to knowingly untrue (or distorted) statements of fact, not to critical opinions. There is a well-established judicial practice that these should be included in the scope of protected opinion and, as epidemiology is currently one of our most important public affairs, the strictest protection should be given to public debates on this subject within the framework of positive legal norms. Freedom of criticism is also broadly interpreted by courts in civil cases. Pursuant to general court decisions in the Court Reports under BH1993. 89 and BH2001. 468, the content of the expression of opinion is not infringing if it does not involve untruth.

[50] It is sometimes very difficult to distinguish between facts and opinions that carry value judgements. In this connection, the Constitutional Court explained in its Decision 13/2014 (IV. 18.) AB that the common feature of value judgements in contrast to statements of fact is that their truthfulness cannot be verified and justified. In contrast to value judgements, statements of fact always contain specifics whose reality

can be proved and verified by evidence. Thus, freedom of expression in public affairs is unrestricted in respect of facts which have been proved to be true, whereas protection against the allegation or rumour of a false fact is protected only if the person spreading the rumour was unaware of the falsehood and did not fail to exercise due diligence required by his occupation. Such allegations capable of degrading honour are among the statutory elements of the crime of defamation and are therefore punishable. The distinction between value judgements and factual statements is also of decisive importance in classifying opinions that do not affect public affairs. That classification determines the limits of the tolerance which may be allowed in relation to a given opinion. While opinions that represent value judgement require greater tolerance, more care can be required for statements that state or rumour facts. Differing judgement on value judgements and statements of fact are thus correlated with regard to speeches debating public affairs and those affecting other matters {*See* Decision 13/2014 (IV. 18.) AB, Reasoning [40] to [41]}.

[51] In this context, however, the Constitutional Court also emphasised that "it is necessary to interpret restrictively the statutory definitions which constitute exceptions to the freedom of expression in disputes in public matters. Otherwise, the criminalisation of speech debating public affairs would run counter to the free exercise of a fundamental right guaranteed in Article IX (1) of the Fundamental Law. It follows that the words »asserts or rumours a fact ... or uses an expression directly referring to such a fact« written in the statutory facts of the crime of defamation may be interpreted only in accordance with the requirements of Article IX (1) of the Fundamental Law." {Decision 13/2014 (IV. 18.) AB, Reasoning [42]} To some extent, false statements of fact may also enjoy protection, which has arisen primarily in connection with rumours. Freedom of public debate has made it necessary, subject to certain conditions, to relieve those who have disclosed unproven allegations from liability. If the press procedure was appropriate, in good faith ("responsible"), did not abuse the right to freedom of opinion, or if the person asserting the fact had no reason to verify the truthfulness of the information for a justifiable reason, the Hungarian legal system provides him with some protection.

[52] Pursuant to its objective, Section 337 (2) of the Criminal Code does not contain a restriction on public debates. The Fundamental Law links freedom of expression to freedom and diversity of the press and to the free dissemination of information necessary for the formation of democratic public opinion. False communication alone does not contribute to this, although its refutation already does. Section 337 (2) of the Criminal Code does not in itself prohibit the expression of an opinion concerning the assessment of the special legal order or the measures taken. In the public discourse, a position can be freely expressed on the issues raised in the complaint concerning what constitutes the debate between experts and lay people, whether certain measures are

justified or what facts should be communicated to the public. Section 337 (2) of the Criminal Code does not prohibit this in itself, but the expression of an opinion based on knowingly false (or distorted) facts which, taking into account the place and time of the commission and, in particular, the manner of the commission, may obstruct the defence due to its effect on the audience. The restriction in this case is contained in an Act. The reason for restricting speech during the special legal order is the social interest in the defence, the management of the reason for the special legal order, its effectiveness, that is, the immediate return to the normal order of exercise of constitutional power.

[53] The threat or harm which the restriction seeks to remedy in the present case does not relate solely to the communication but to the effect of the communication. In line with the guidelines of the Office of the Prosecutor General issued on 25 May 2020 for the uniformity of the practice of those applying the law, the criminal act specified in Section 337 (2) of the Criminal Code is the assertion or rumour of an untrue fact or that of distorted fact which is likely to obstruct or frustrate the effectiveness of the defence. According to the guidelines, such conduct constitutes the assertion or rumour of an untrue or distorted fact which goes beyond the criticism of each measure and is capable of causing human action, omission or consequence thereof, which is contrary to the epidemiological measures for the defence or to other provisions laid down to prevent the spread of the epidemic or to prevent or eliminate its adverse effects.

[54] In view of the above, it cannot therefore be concluded that the new rule, in which the opening of proceedings currently reflects the legal interpretation of the investigating authority and the public prosecutor's office, unnecessarily or disproportionately restricts freedom of expression. In the constitutional complaint procedure, the Constitutional Court will be able to review, on the basis of a petition, whether the application of Section 337 (2) of the Criminal Code to a specific factual situation is in conformity with the Fundamental Law.

[55] 2. The petition assumes that the contested provisions of the Criminal Code can, from a grammatical point of view, be interpreted and applied in such a way that they cover cases belonging to public debate, where the act is a communication in which the manner in which it obstructs or frustrates the effectiveness of the defence is not foreseeably clear but doubtful. The petitioner maintains that such "criminal statutory definition carries the risk that the defendant will become a victim of »hindsight«, that is, will now be prosecuted, and it will indeed turn out during the proceedings that he was wrong". The complaint presupposes that the person whose mistake can be excused can also be prosecuted.

[56] The Constitutional Court, acting in its individual competences, interprets the Constitution, even if it is not abstract, as in the competence under Section 38 (1) of the

Constitutional Court Act, but is related to the assessment of legislation or a judicial decision. When reviewing the unconstitutionality by non-conformity with the Fundamental Law of a legal act, it also interprets the legal act. This is necessary in all cases because the Court needs to establish the scope of the legal act. In the case of new legislation to which no judicial practice adheres, the Constitutional Court can only rely on its own interpretation. Relating to one another the legal act and the material facts, and in this connection the interpretation of the legal act, lies primarily with the courts of general jurisdiction; when reviewing the legal act, the Constitutional Court shall relate the Fundamental Law and the legal act to one another, and in this connection shall interpret the legal act.

[57] As explained above, the wording of the reviewed statutory definition does not refer to this concern expressed in the petition, and with a reasonable interpretation required by the Fundamental Law, no court can reach such a conclusion. Guilt must exist when the criminal act is being committed. In keeping with the established dogmatics of criminal law, when assessing the untruthfulness or falsehood of a statement of fact, the reality/untruth in the objective sense is relevant, that is, whether the statement of fact corresponds to the objective reality. On the one hand, that concept of substantive law clearly does not include "disputed" facts and, on the other hand, in criminal proceedings, only facts established beyond a reasonable doubt may be assessed against the defendant.

[58] When a crime is committed, it is also the untruth in a subjective sense that is of significance whether the perpetrator himself was aware of the untruth. This is assessed by criminal law within the framework of guilt. Because it is an intentional crime, criminal liability can only be established if the perpetrator has been shown to be aware of the untruthfulness (distortion) of the communication of facts. The perpetrator's state of mind at the time of his act is relevant to criminal prosecution. Communication of facts disputed at the time of the commission, meaning that neither the untruth nor the reality of which was known to the perpetrator at that time, and only such communication of facts that later prove to be false shall not be covered by Section 337 (2) of the Criminal Code.

[59] As a result of the review of Section 337 (2) of the Criminal Code, the Constitutional Court found that the concerns raised by the petitioner were unfounded. The new statutory definition of the Criminal Code penalises only the intentional conduct contained therein and nothing else, that is the scope of the new statutory definition shall not extend to the free dissemination of information necessary for the formation of democratic public opinion. This is not usually accompanied by the dissemination of false statements, because it can only contribute to the shaping of democratic public opinion together with its refutation.

[60] In summary, the crime of scaremongering pursuant to Section 337 (2) of the Criminal Code applies to a narrow range of communications: It prohibits the communication to the general public of knowingly false or distorted facts, but only if, during the period of the special legal order, at least in such a way as to obstruct the defence; thus, it does not cover the free dissemination of information needed to shape democratic public opinion.

[61] In view of the above, the Constitutional Court rejected the constitutional complaint.

[62] 3. However, in view of the gravity of the threat of a criminal penalty, the Constitutional Court, on the basis of the provisions of Section 46 (3) of the Constitutional Court Act, acting ex officio, it considered necessary to affirm the statutory definition of the new Criminal Code and its interpretation in accordance with Article IX (1) of the Fundamental Law in the form of a constitutional requirement.

[63] Therefore, it is a constitutional requirement for the interpretation and application of Section 337 (2) of the Criminal Code, pursuant to Article IX (1) and Article XXVIII (4) of the Fundamental Law, that the statutory definition only criminalises the communication of a fact which the perpetrator ought to have known, at the time the act was committed, to be false or which he himself had distorted and which was capable of obstructing or frustrating the defence during the special legal order. The communication of facts disputed at the time of the commission and only later proving to be false cannot be included in the scope of Section 337 (2) of the Criminal Code.

[64] 4. In view of the significance of the case, the Constitutional Court ordered the publication of its Decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 16 June 2020

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of Justice
dr. Ágnes Czine
prevented from signing

Dr. Tamás Sulyok sgd.,
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on behalf of Justice delivering the opinion of the Court
dr. András Varga Zs.
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Dissenting opinion by *dr. Ágnes Czine*:

[65] I do not agree with the operative part; therefore, I did not vote in favour of the Decision.

[66] 1. In my dissent from the 2019 Court Decision, I did not agree with the substantive assessment of the petition, because in my opinion the conditions of admission contained in Section 26 (2) of the Constitutional Court Act were not met in the given case. In the context of the examination of the admissibility of the petition, also based on Article 26 (2) of the Constitutional Court Act, this Decision assesses the relevance in accordance with the criteria applied in the 2019 Court Decision, with express reference to them. It states that "[i]n the present case, when submitting the constitutional complaint, the conditions set out in Section 26 (2) of the Constitutional Court Act were met, similarly to the 2019 Court Decision." (Reasoning [35]).

[67] Maintaining my position in my dissenting opinion enclosed to the 2019 Court Decision regarding the present case, I did not support the admission of the petition because I believe that, based on the case law of the Constitutional Court, there should have been a rejection due to lack of involvement.

[68] Pursuant to Section 26 (2) of the Constitutional Court Act, Constitutional Court proceedings may also be initiated by exception if due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights. In this type of proceedings, the Constitutional Court must bear in mind that "[t]he primary aim of the legal institution of the constitutional complaint under Article 24 (2) (c) and (d) is […] the individual and subjective protection of rights: Providing remedy for the injury of rights caused by law or by a judicial decision, which is contrary to the Fundamental Law and which caused an actual violation of rights." {Order 3367/2012 (XII. 15.) AB, Reasoning [13]} Therefore, "in case of an exceptional complaint, as it is aimed directly at the norm, it is particularly important to examine involvement, as the personal, direct and actual injury of the petitioner's fundamental right is the element that differentiates the exceptional complaint from the former version of posterior norm control, which was open to petitioning by anyone" {Order 3105/2012 (VII. 26.) AB, Reasoning [3]; Decision 3/2019 (III. 7.) AB, Reasoning [33]}. In line with the Constitutional Court's consistent case law, with regard to the exceptional constitutional complaint, involvement should be personal, direct and actual {Decision 3110/2013 (VI. 4.) AB, Reasoning [27], Order 3120/2015 (VII. 2.) AB, Reasoning [55]; Decision 3/2019 (III. 7.) AB, Reasoning [33]}.

[69] Involvement of the petitioner shall not be established when the challenged legal provision has not been applied against the petitioner or if the petitioner has not been directly concerned with the relevant provision becoming effective, that is, the violation of rights has not taken place or it is not actual) {Order 3170/2015 (VII. 24.) AB, Reasoning [11]; Decision 3/2019 (III. 7.) AB, Reasoning [34]}. The requirement of actual involvement means that the involvement must actually exist at the time of submitting the constitutional complaint" {first in Decision 3110/2013 (VI. 4.) AB, Reasoning [30] to [31], last reaffirmed in Order 3123/2015 (VII. 9.) AB, Reasoning [12]; Decision 3/2019 (III. 7.) AB, Reasoning [34]}.

[70] As a result of a sufficiently careful assessment of all these conditions, the Constitutional Court should, in my view, have also concluded in connection with the present petition that there is no personal, direct and actual involvement of the petitioner.

[71] In addition, I consider it necessary to emphasise, in connection with the issue of involvement, that this petition does not pass the admissibility test, even on the basis of the considerations set out in the 2019 Court Decision. The petition on which the 2019 Court Decision was based set out in detail that "the petitioning organisation, through the actions of its members and staff, had been established for activities that might become prohibited and punishable due to the new statutory definition of a criminal offence." (2019 Court Decision, Reasoning [36]) The petition referred to the fact that "the petitioner [...] legal entity organisation (and its members) is formally engaged in an activity, as a part of their humanitarian activity, that resembles the activity referred to in the accompanying annotation by the Minister, thus the amendment of the Criminal Code would force them to cease this activity, if it was applicable to them" (2019 Court Decision, Reasoning [44]). In view of all the foregoing, the Constitutional Court established the fulfilment of the conditions of personal, direct and exceptional involvement required in the 2019 Court Decision in connection with Section 26 (2) of the Constitutional Court Act, which advocated the need for a substantive examination.

[72] In comparison, the present decision assessed the aspects arising from the case law of the Constitutional Court and also set out in the 2019 Court Decision regarding involvement in a general manner, detached from the individual characteristics of the petitioner, disregarding them in the course of the assessment and on the sole basis of an assessment of the new legislative text. This internal contradiction in the assessment should, in my view, also have precluded a finding of involvement.

[73] 2. With regard to the constitutional requirement in point 1 of the operative part, I would also like to point out that it was not necessary to establish such requirement in view of the statutory definition of the crime of scaremongering set out in

Section 337 (1) of the Criminal Code. I believe that with the help of the established criminal dogmatics, the elements of the statutory definition on the interpretation of which the constitutional requirement seeks to provide a basis can be interpreted with great certainty and correctness. I therefore agree with what the Minister of Justice wrote in his reply to the Constitutional Court's request. Accordingly, the definition of the special legal order is included in the Fundamental Law, within the special legal order a separate legal act provided for the declaration of a state of danger, by which it became possible to limit the scope of the defence. Depending on the effectiveness of the defence, obstruction and frustration are known criminal acts in criminal law and there exists judicial practice developed in connection with their interpretation. The Minister of Justice also referred to the fact that these criminal acts were included in the statutory definition of the crime of contempt (Section 279 of the Criminal Code). Other statutory definition elements do not differ from the default case of scaremongering [Section 337 (1) of the Criminal Code].

[74] I do consider that the elements of the statutory definition within the meaning of Section 337 (2) of the Criminal Code, as interpreted by the constitutional requirement, also appear among the elements of the facts set forth in Section 337 (1) of the Criminal Code; therefore, their interpretation may be carried out in accordance with the provisions of the Fundamental Law, taking into account the related practice of those applying the law. However, the constitutional requirement merely repeats but does not interpret other statutory definition elements of Section 337 (2) of the Criminal Code compared to Subsection (1) of the statutory rule; therefore, it does not provide guidelines for legal practice in order to apply them in accordance with the Fundamental Law. In view of all the above, I considered the formulation of the constitutional requirement in this form, regardless of the examination of admissibility, to be unnecessary.

Budapest, 16 June 2020

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court
on behalf of Justice
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