CONSTITUTIONAL COURT DECISION 3/2019. (III. 7.) AB

The plenary session of the Constitutional Court in the subject of a constitutional complaint, with concurring reasonings by Justices *dr. István Stumpf* and *dr. Mária Szívós* and with dissenting opinions by *dr. Ágnes Czine, dr. Béla Pokol* and *dr. László Salamon* adopted the following

d e c i s i o n:

1 The Constitutional Court establishes: in the interpretation and the application of Section 353/A (1) of the Act C of 2012 on the Criminal Code – on the basis of Article XXVIII (4) of the Fundamental Law – it is a constitutional requirement that the relevant provision shall not extend to the altruistic conducts not related to the prohibited aim specified in the statutory definition, provided that they perform the obligation of helping the vulnerable and the poor.

2 The Constitutional Court rejects the petition seeking the declaration of Section 353/A of the Act C of 2012 on the Criminal Code being in conflict with the Fundamental Law and its annulment.

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

R e a s o n i n g

I

[1] 1 The Law Office of Dr. Dániel Karsai (1056 Budapest, 10 Nyáry Pál utca, represented by: dr. Dániel Karsai attorney-at-law) representing Amnesty International Hungary (1064 Budapest, 44 Rózsa utca, Registration No.: 01-01-00011273, represented by: Ágnes Fülöp) petitioner submitted a constitutional complaint on the basis of Section 26 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC). The petitioner asked the Constitutional Court to establish that Section 353/A of the Act C of 2012 on the Criminal Code (hereinafter: "Criminal Code") is contrary to Article B) (1) (principle of the rule of law, in particular the clarity of norms), Article I (3)

(necessity-proportionality), Article VIII (2) (right of association), Article IX (1) (freedom of speech) and Article XXVIII (4) (*nullum crimen sine lege*) the Fundamental Law, and therefore to annul it. The Constitutional Court judged upon the petition according to its content.

[2] 1.1. To support the petition, the complaint goes into details by presenting the general background of the case, according to the wording used in the petition, and by introducing the petitioner. In this context it mentions the manner of presenting non-governmental organisations (NGOs) in today's public discourse and in the legislation in Hungary, the background of amending the challenged regulation, and the relation between the State and certain NGOs.

[3] 1.2. The petitioner refers to the fact that it has submitted the complaint on the basis of Section 26 (2) of the ACC, and in such cases the affectedness of the petitioner as well as the direct effectiveness of the challenged regulation need to be verified among others.

[4] With regard to affectedness, the complaint refers (in addition to international examples) to the case law of the Constitutional Court: according to it, affectedness may also be verified when no action has been taken so far to apply or enforce the law, but a legal situation has been created by virtue of the law from which it is evident that the complained injury of rights is going to take place with compelling force within a directly foreseeable period of time. By referring to the statements made in the Decision 32/2013. (XI. 22.) AB, the petitioner claims that the definition of the criminal offence laid down in the law is so wide and vague that practically anyone might be subject to it at any time, thus – similarly to the case of covert surveillance – the affectedness can be verified in this case, too. As referred to by the petitioner, in case of not acknowledging personal affectedness, one should wait until the start of a particular criminal prosecution against someone and then probably there would be no way to submit a constitutional complaint due to being late, implying further waiting until the closing of the criminal procedure and the potential criminal sanctions, which is unacceptable in a State under the rule of law. According to the content of the petition, with regard to a provision of substantive criminal law, where it is impossible to determine to whom and to what action will it be applicable because of the highly vague wording of the norm – as in the present case – the right to submit a petition shall not be refused. The challenged text of the Criminal Code uses definitions so wide that encompass almost anything and anyone, the law is uninterpretable and it leaves ample space for interpretation in bad faith.

[5] However, according to the petition, for the same reason it is also possible to establish the realisation of the requirement of directness (direct effect). The norms of criminal law are of absolute structure in the sense that if the statutory definition is realised, the norm shall be applicable to the perpetrator without exception. Due to the

vagueness mentioned above, the complainant may not assess in advance whether the norm shall be applied to him or not.

[6] 2 According to the petitioner, the present petition contains a question of fundamental constitutional importance in line with Section 29 of the ACC: the Constitutional Court has to take a stance about the constitutionality of unpredictable norms of criminal law similar to the one challenged in the present case, as well as about the possibility of restricting, with the tools of criminal law, the freedom of expression and the right of association in the scope of migration, and what the constitutional limitation of such restriction are.

[7] 2.1. According to the complaint, Section 353/A of the Criminal Code is not a norm of criminal law as it fails to meet any of the criteria of constitutional criminal law. The disposition is unclear, unforeseeable, not explicit and not delimited. It orders to punish all "organising activities" that allow the initiating of an asylum procedure or the obtaining of a title of residence for persons not subject to "persecution". The law provides an exemplary list of organising activities. It is, in itself, a violation of the clarity of norms and of explicitness in the sense of constitutional criminal law – criminal liability must be defined in a closed way and *per definitionem* an exemplary list can practically never achieve this. It is not by coincidence that the Criminal Code uses the term "in particular" only once as a tool for an exemplary list (violation against the member of a community – Section 216 of the Criminal Code), otherwise it strictly refrains from using it.

[8] Also one of the elements of the exemplary list of the law ("organising border monitoring") is against the rules of grammar of the Hungarian language and it is uninterpretable. Other norms of the legal system do not provide any clue and there is not connected judicial practice. The wording "prepares, disseminates information materials or gives commission to do so" is similarly uninterpretable. The term "information material" has not been used in the Hungarian law so far. Anything can be considered as information material, therefore this term is impermissibly wide and it should not be used as a basis for criminal liability. Also the wording "builds or operates a network" is unclear, as one can not be sure exactly what network and what building was in the thoughts of the legislator.

[9] 2.2. According to the complaint, Section 353/A of the Criminal Code fails to comply with the *ultima ratio* character of criminal law. Only one thing is clear from the intentionally vague law having double or multiple meanings: it is aimed at intimidating those who work in the field of asylum, or who simply disagree with the stigmatisation campaign carried out by the Government in this field. The law threatens with criminal sanctions completely legal activities such as the provision of legal representation or humanitarian services for asylum seekers in Hungary. The absurdity of the law and its conflict with the Fundamental Law is clearly demonstrated

by the fact that the unfoundedness of the asylum seeker's application should be known in advance – because if, for example, the asylum authority subsequently rejects the application of an attorney's client, he or she may easily find him- or herself threatened by this criminal sanction. The regulation is also considered as an indirect criminalisation of the asylum application itself. In a State under the rule of law – and even in a moderate authoritarian system – everyone shall be entitled to legal representation; the participation in legal representation by private individuals or by organisations should not be punished.

[10] 2.3. According to the petition, the Act violates the petitioner's right to the freedom of expression granted in Article IX of the Fundamental Law by threatening the petitioner with a criminal sanction, thus unnecessarily and disproportionately intervening in how the petitioner may take part in the democratic public debates, inducing a so called chilling effect. By referring to several decisions of the Constitutional Court, the petitioner claims that, according to the position taken by the Constitutional Court, with regard to expressing opinion in public affairs, protection under criminal law – as the *ultima ratio* – is limited to sanctioning extremist conducts and the decriminalisation of protected expression of opinion has been a tendency in the European countries for a long time. By analysing the criminal law intensity of constitutional protection, the Constitutional Court established a long ago that, as a clear tendency seen in the European countries, less and less tools of criminal law are applied with regard to the expression of opinion in public affairs. The deterring and stigmatising effect of a criminal sanction may have a serious restraining force regarding the expression of one's opinion. Consequently, according to the consistent case law of the Constitutional Court, maintaining the restriction of the expression of opinion in public affairs through the tools of criminal law should only offer protection against the most serious cases when the expressed opinion injures a constitutional right or there is a direct threat of the injury of right {Decision 13/2014. (IV. 18.) AB, Reasoning [30], Decision 3328/2018. (XII. 8.) AB, Reasoning [78]}.

[11] According to Article I (3) of the Fundamental Law, 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. As held by the complaint, the aim of the Act is clear: intimidation. Actually it does not have any other aim, it does not help the enforcement of another fundamental right, it does not protect another constitutional value, although one may allege that it serves the enforcement of the term "no foreign population shall be settled in Hungary" contained in Article XIV (1) of the Fundamental Law. Whether the relevant section of the Fundamental Law does indeed transfer such a value should always be examined in the complete context of the relevant relations of life desired to be regulated. There is no identifiable threat, verifiable with objective evidence, of any "foreign

population" settling or being induced to be settled in Hungary. The first sentence of Article XIV (1) of the Fundamental Law is purely a declaration, its real and interpretable content is limited to a narrow scope. This content is nothing else but propaganda. This section of the Fundamental Law is aimed at propaganda rather than a constitutional aim. The application of the test of fundamental rights could even be stopped at this point, as in the absence of a fundamental right or value to be protected, the examination of necessity and proportionality is meaningless.

[12] Article B) of the Fundamental Law declares the principle of the rule of law as a rule pervading all laws. Foreseeability as a partial element of the principle of the clarity of norms is part of the principle of the rule of law. The challenged norm of criminal law is so generally worded that it is impossible to foresee against whom it will be applied – or not applied. This reason alone would be sufficient to prevent its application as a constitutionally acceptable restriction of the freedom of expression.

[13] All statutory definitions of the Act qualify as "expression" as they make a stand for an idea: namely for human rights (in the case concerned: procedural rights). The Act tries to render making this stand impossible, or at least difficult. This chilling effect is incompatible with the presented standards of both the Constitutional Court and the Strasbourg court. The settlement of foreign population in Hungary is not a real threat. The norm is only formally a provision of criminal law, in fact, it may be discretionally imposed on anyone. It is a norm that imposes a criminal sanction on expressions made in public affairs of primary importance, although only one is certain about this norm: its uncertainty is a repressive force considered neither absolutely necessary, proportionate with the desired objective, nor respecting the essence of the freedom of expression.

[14] There are several other tools available for the mitigation of migration, including criminal law itself, as in the Criminal Code Section 353 punishes illegal immigrant smuggling, Section 354 sanctions the facilitation of unauthorised residence, Section 355 punishes the abuse by establishing family ties and Section 356 orders the punishment of the unlawful employment of third country nationals. There are plenty of criminal law tools available for the fight against illegal immigration, thus introducing a new criminal offence is not "absolutely" necessary.

[15] According to the complaint, the requirement of proportionality is clearly not complied with. In this scope, the obligation of deletion and ordering the payment of the costs of procedure, that are relatively weak sanctions in the sense of civil law, failed to pass the human rights test. In the light of the above, it seems needless to explain that a statutory definition / sanction of criminal law, which may even imply imprisonment, would probably be rejected by the Strasbourg court – at least on the basis of the Constitutional Court's case law presented above.

[16] According to the complaint, at least one of the terms used in the Act surely qualifies as "expression", namely the wording "prepares, disseminates information materials or

gives commission to do so" in Section 353/A (5) *b)*. Participation in the flow of information is in itself the expression. To communicate by way of information materials in and about the topic of migration is considered as participation in the discourse about this very acute issue. It is possible to debate or refuse such information materials, or to engage in a debate with those who prepare such materials.

[17] 2.4. The petition also claims that the Act is contrary to and violates the rights of the petitioner granted in Article VIII (2) of the Fundamental Law.

[18] Although the Fundamental Law only specifies the establishment of organisations and the accession to such organisations, the content of this right is wider: it also contains that the organisations may operate freely for the purpose of achieving their lawful aims. The right of association is a fundamental freedom, everyone – including natural persons and legal entities – shall be entitled to it; as the aim of the organisation established on the basis of the right of association is not specified concretely by the legislator adopting the constitution or the law, organisations may be established for any purpose that is in line with the Fundamental Law and not prohibited by the law. In the case law of the Constitutional Court the content of the right of association means that everyone shall be entitled to establish organisations or communities with others and to take part in their operation. It is up to the affected person to decide about establishing any organisation or community or to participate in their activities.

[19] Fundamental rights may entitle not only natural persons; as even legal entities may suffer violation of certain rights. Organisations of the society and companies also possess "acting autonomy". They should make decisions on the basis of the aims laid down in their statutes, deed of foundation, or articles of association prepared on their foundation, by taking into account their economic or other, e.g. public interest purpose. According to the Constitutional Court, the acting autonomy of such organisations should also be protected. This protection is different from the protection of the constitutional rights of natural persons. The Fundamental Law grants a right to everyone to establish and join organisations for any purpose not prohibited by the law. This right primarily means the freedom to select the purpose of the association as well as the freedom to set up an organisation for this purpose and to join or leave such associations voluntarily.

[20] The associations founded freely and voluntarily shall also guarantee the freedom of conviction, speech, conscience, and expression of opinions. In constitutional democracies, associations are the autonomous organisations of the civil society. The Fundamental Law grants strong fundamental rights' protection for the freedom of establishing and operating such organisations. The case law of the Constitutional Court acknowledges the acting autonomy of associations, on the basis of which associations set up their articles of association and adopt individual decisions in line with their purpose of public interest specified by them. Accordingly, the autonomy of

the association is linked to the aim, purpose of the organisation. State control over the activities of the associations, restricting their organisational autonomy, can only be considered constitutional if it is unavoidably necessary for achieving a constitutional aim of paramount importance and the level of the control is proportionate with the desired objective.

[21] According to the authentic public registry of NGOs, in line with the purpose of the petitioner of this constitutional complaint, Amnesty International Hungary endeavours to let every people in this world live equally with the rights enshrined in the Universal Declaration of Human Rights and in other conventions on human rights. The aim of Amnesty International Hungary is to engage in research and activity to stop or prevent the violation of these rights. Thus the aim of this NGO registered in Hungary in 1990 and lawfully operating ever since is to promote the human rights entitling every human being, within the frameworks of the law and with lawful means. It is not a political party and it does not follow political aims. Consequently, the aims of the petitioner extend beyond the will to enforce the rights of Hungarian citizens as it intends to provide these rights to all universally, without regard to origin and citizenship. The petitioner operates to achieve its lawful aim and this lawful aim includes the provision of legal protection and help to those who flee their own countries and arrive to the territory of Hungary. According to the case law mentioned above, operation to achieve a lawful purpose should enjoy constitutional protection, and the statutory definition of the Criminal Code challenged in this petition actually attacks and blocks with its chilling effect the activity entitled to constitutional protection, the operation in the interest of the lawful aim.

[22] The challenged norm of criminal law is so generally worded that it is impossible to foresee against whom it will be applied – or not applied. This reason alone would be sufficient to prevent its application as a constitutionally acceptable restriction of the freedom of association. The petitioner holds that in the present case no other fundamental right may be taken into account for the restriction of the right to association, therefore only a constitutional value might be taken into consideration (e.g. national security, protection of public order etc.). With regard to the question whether there is actually a constitutional value to be protected in the context of the restriction, the complaint refers back to the arguments detailed about the freedom of speech and which should also be followed concerning the right of association – indeed, there is no such constitutional value to be protected in reality. Assuming that a constitutional value is a sufficient argument to support the necessity of the restriction, three subsequent questions need to be answered. These are: a) suitability, i.e. a logical link between the desired objective and the tool; b) necessity: if there is an alternative way of restriction or the intervention to the fundamental right is unavoidable; c) proportionality in the narrow sense: whether the damage caused and the desired objective are proportionate to each other.

[23] It is not generally true that the criminalization of an act has a restraining effect. In the present situation, this would not be the case, as the activity that would be prohibited by criminal law is an immanent element of achieving the aim of the petitioner as laid down in the framework of its right of association. As a whole, criminalization is not a suitable instrument to achieve the protection of the constitutional value. If actually there are reasons justifying the restriction of the petitioner's right of association, the present legal system in force allows for the supervision of the operation on the basis of legality, which, in the most serious case, may also lead to the termination of the association by the court. Consequently, if the legislator holds that certain activity carried out under the aegis of the right of association is harmful or illegal, there is no reason to set up a parallel regulation, as there is a tool to step up against associations of this type without criminal law intervention. Thus there is no reason to justify the use of criminal law as the "strongest arm" in the present case. The application of a sanction actually emptying out the exercising of the petitioner's right of association by referring to interests of national security and the protection of public order should not be made subject to a question of proportionality.

II

[24] 1 The provisions of the Fundamental Law referred to in the petition:

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

"Article I (3) The rules relating to fundamental rights and obligations shall be laid down in an act of Parliament. 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 VIII (2) Everyone shall have the right to establish and join organisations."

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

"Article XXVIII (4) No one shall be held guilty of any criminal offence on account of any act which did not constitute a criminal offence under Hungarian law or – within the meaning specified by international treaty or any legislation of the European Union – at the time when it was committed."

[25] 2 The affected provisions of the Criminal Code:

"Facilitating, supporting illegal immigration

Section 353/A (1) Anyone who conducts organising activities

a) in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded, or

b) in order to make the person entering Hungary illegally or residing in Hungary illegally obtain a residence permit, if a more serious criminal offence is not committed, is punishable by confinement for the misdemeanour.

(2) Anyone who provides financial means for committing the criminal offence specified in Paragraph (1), or who regularly carries out such organising activities, is punishable by imprisonment of up to one year.

(3) Those shall be punishable according to Paragraph (2), who commit the criminal offence specified in Paragraph (1)

a) for the purposes of financial gain,

b) by providing support for more than one person, or

c) within an area of 8 kilometres from the external borders of Hungary as specified in point 2 of Article 2 of the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (hereinafter: "Schengen Borders Code") or from the border signs.

(4) The punishment may be mitigated without limits – and may be lifted in cases meriting particular consideration – against the perpetrator of the offence specified in Paragraph (1) if the perpetrator reveals the circumstances of committing the offence before the indictment has been brought.

(5) For the purpose of the application of this section, organising activity shall mean in particular if, with the purpose specified in Paragraph (1), the perpetrator

a) organises border monitoring at the external borderline of Hungary as specified in point 2 of Article 2 of Schengen Borders Code or at the border sign,

b) prepares, disseminates information materials or gives commission to do so,

c) builds or operates a network."

III

[26] 1 On the basis of Section 29 of the ACC, the Constitutional Court shall admit the constitutional complaint 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 that instead of the decision on admitting the complaint the judge rapporteur may submit to the body a draft containing the decision on the merits of the complaint.

[27] 1.1. The complaint complies with the statutory requirement of containing an explicit request as laid down in Section 52 (1b) of the ACC.

[28] The petition indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [Section 51 (1) and Section 52 (1b) *a)* of the ACC]; the procedure of the Constitutional Court was requested in the competence laid down in Section 26 (2) of the ACC. The petitioner also indicated the statutory provision to be reviewed by the Constitutional Court [Section 52 (1b) *c)* of the ACC], and the violated provisions of the Fundamental Law [Section 52 (1b) *d)* of the ACC]. The petitioner justified the starting of the procedure, it explained the essence of the violation of the rights granted in the Fundamental Law and referred to in the petition [Section 52 (1b) *b)*], and it provided reasons why the challenged provision of the law is contrary to the relevant provisions of the Fundamental Law [Section 52 (1b) *e)*]. The petitioner submitted an explicit request for the annulment of the challenged statutory provision [Section 52 (1b) *f)*].

[29] The Act had entered into force on 1 July 2018, the constitutional complaint was submitted in due time on 16 October 2018.

[30] On the basis of Section 56 (2) of the ACC, the Constitutional Court shall examine in its discretionary power the content-related requirements of the admissibility of a constitutional complaint – in particular the affectedness pursuant to Sections 26 to 27 of the ACC, the exhausting of legal remedies and the conditions specified in Sections 29 to 31 of the ACC.

[31] 1.2. The petitioner initiated the Constitutional Court's procedure in the competence laid down in Section 26 (2) of the ACC.

[32] According to Section 26 (2) of the ACC, the procedure of the Constitutional Court may be initiated exceptionally if, due to the application of a provision of the law contrary to the Fundamental Law, or when such provision becomes effective, rights have been violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights. The Constitutional Court should pay a special attention to verifying the conditions of the exception in order to prevent this kind of the complaint becoming an *action popularis* (a successful petition without direct involvement in the absence of any injury of rights resulting from the application of the law). "The primary aim of the legal institution of the constitutional complaint under Article 24 (2) *c)* and *d)* is [...] the individual, 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. [...] being personally affected is a condition of the admissibility of the complaint, namely that the legal provision deemed by the complainant to be contrary to the Fundamental Law shall provide a rule directly, factually and actually affecting the concrete legal relationship of the complainant in person, resulting in the violation of the complainant's fundamental rights. {Decision 33/2012. (VII. 17.) AB, Reasoning [61]–[62], [66]}" {Decision 3367/2012. (XII. 15.) AB, Reasoning [13], [15]}.

[33] Therefore, "in case of an exceptional complaint, as it is aimed directly at the norm, it is particularly important to examine affectedness, 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." {Decision 3105/2012. (VII. 26.) AB, Reasoning [3]}. According to the Constitutional Court's consistent case law, with regard to the exceptional constitutional complaint, the affectedness should be personal, direct and actual {Decision 3110/2013. (VI. 4.) AB, Reasoning [27], Decision 3120/2015. (VII. 2.) AB, Reasoning [55]}.

[34] The affectedness of the petitioner shall not be established when the challenged provision of the law has not been applied against the petitioner or if the petitioner has not been directly affected by the relevant provision becoming effective (i.e. when the injury of rights has not taken place, it is not actual) {Ruling 3170/2015. (VII. 24.) AB, Reasoning [11]}. "If an implementing act of constitutive effect is needed for the enforcement of the law, the petitioner should first challenge the act of State power directly realising the injury of rights, to be followed by the indirect review of the norm as well, [...] The requirement of actual affectedness means that the affectedness must be actually existing at the time of submitting the constitutional complaint" {first in Decision 3110/2013. (VI. 4.) AB, Reasoning [30]–[31], last reinforced in: Decision 3123/2015. (VII. 9.) AB, Reasoning [12]}.

[35] 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 ACC 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.

[36] 1.3. Section 353/A of the Criminal Code is a statutory definition of substantive criminal law. It orders to punish the facilitating, support of illegal immigration, this way it possesses a restraining effect concerning the conducts to which it is applicable, it becomes directly effective and it is enforced without the intermediation 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. The petition explains in details that the petitioning organisation – through the actions of its members and staff – was set up for activities that may become prohibited and punishable due to the new statutory definition of criminal offence. The Constitutional Court thus established that Section 353/A of the Criminal Code may become directly effective regarding the natural persons engaged in the activity of the petitioning organisation that supports the existence of the condition of exceptionality.

[37] 1.4. Section 353/A of the Criminal Code addresses, however, natural persons. The offence is carried out by the person "who" implements the offence specified in the statutory definition as a perpetrator or a contributor. The statutory definition is not directly applicable against a legal entity and the petitioner is indeed a legal entity. Therefore, the Constitutional Court had to examine whether, on the one hand, the condition of exceptionality and, on the other hand, the direct affectedness may be established concerning the legal entity.

[38] Section 63 (1) of the Criminal Code specifies among measures the ones according to the Act on the measures of criminal law applicable against legal entities. The challenged provisions change the petitioner's legal position with the intermediation of a further implementing act. The Act CIV of 2001 on the measures of criminal law applicable against legal entities (hereinafter: ACT) specifies the conditions of applying the measures (Section 2). These provisions include that measures are applicable against a legal entity if the perpetration of such an act was aimed at or has resulted in the legal entity gaining benefit, or the criminal act was committed with the use of the legal entity and by a) the legal entity's executive officer, its member, employee, officer, managing clerk entitled to represent it, its supervisory board member or by agents of the above, within the legal entity's scope of activity, b) its member or employee within the legal entity's scope of activity, and it could have been prevented

by the executive officer, the managing clerk or the supervisory board by fulfilling their supervisory or control obligations.

[39] The existence of these conditions may usually be identified and examined during the application of the law.

[40] However, Section 353/A of the Criminal Code is a new provision of the law. There is no judicial practice connected to the interpretation of the specific elements of the statutory definition that 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 ACC. The petitioner considers itself to be an organisation helping, through its members and volunteers, among others, the persons who hold themselves immigrants without admitting its illegality. The statutory definitions of the Criminal Code of "facilitation of unauthorised residence" (Section 354 of the Criminal Code) and "illegal immigrant smuggling" (Section 353 of the Criminal Code) – also punishing the preparation for the offence in case of the latter – implement the Directive EC 2002/90 of the Council of 28 November 2002 (hereinafter: "Directive").

[41] According to paragraph [28] of the reasoning of the Decision 3110/2013. (VI. 4.) AB, although personal affectedness means an injury of the affected person's own fundamental right, the personal affectedness of the petitioner may also be verified if the petitioner is not the addressee of the norm. If the norm is addressed to a third person, the requirement of personal affectedness shall be realised if there is a close link between the petitioner's fundamental rights' position and the norm. In the present case, the existence of a close link is substantiated by the fact that, according to the petitioner's own claim, "it participates in the campaign aimed at receiving the fleeing persons among more humane conditions and at the development of a global system where each country takes proportionate shares in performing the duties."

[42] Section 353/A of the Criminal Code applies to organising activities and it orders to punish also those who provide financial means for committing the criminal offence. Furthermore, according to Section 3 (2) of the ACT, the application of a measure against a legal entity shall not be conditional upon establishing in the investigation the identity of the perpetrator or on condemning the perpetrator because of committing the offence.

[43] The Constitutional Court also considers the following circumstances to be of particular importance. As of 1 January 2019 the text of Article 28 of the Fundamental Law amended by the Seventh Amendment of the Fundamental Law has entered into force. Accordingly, in the course of ascertaining the purpose of a law, the court shall give primary consideration to the preamble of that law and the reasoning of the proposal for adopting or amending the law. Therefore, the court applying the new statutory definition of a criminal offence shall take into account the minister's reasoning in the course of interpreting the law.

[44] Section 353/A has been introduced into the Criminal Code by Section 11 of the Act VI of 2018 on the amendment of certain Acts in the context of the measures against illegal immigration. According to the minister's reasoning attached to Section 11, the new rule is explicitly aimed at threatening organisations (and not only natural persons): "practical experience confirms that unauthorized entry into Hungary and the entering into Hungary by persons residing in Hungary illegally is assisted not only by international organizations, but also by Hungarian organizations, which justifies stepping up against it with a criminal law instrument. By introducing the new legal provisions, the responsibility of legal entities providing organizational, personal and material frameworks for such activities may also be examined and – under the conditions set out in the Act CIV of 2001 on the measures of criminal law applicable against legal entities – will be sanctionable." The petition refers to the fact that the petitioner provides organisational, personal and material conditions for the reception of fleeing persons, i.e. the 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 minister's reasoning, thus the amendment of the Criminal Code would force them to cease this activity, if it was applicable to them. In accordance with the above, the Constitutional Court established that the complaint adequately verified – in the relevant regulatory framework – the existence of the conditions under Section 26 (2) of the ACC. With account to the conduct of the legal entity, or as appropriate to that of the organiser or the leader of the association, the effect of Section 353/A of the Criminal Code may be directly applicable to the legal entity petitioner without any further application of the law. Although only a natural person may be the perpetrator of the criminal offence under review in the present case, the exceptional application of the legal consequences to an organisation shall not be excluded, in particular with account to the ACT. Consequently, the Constitutional Court established that in this respect, too, the exceptionality required under Section 26 (2) of the ACC justifies the need to have a review on the merits carried out by the Constitutional Court.

[45] 1.5. Nevertheless, in the opinion of the Constitutional Court, the most important reason determining the need to carry out a review on the merits is the necessity of harmonising, in accordance with Article 28 of the Fundamental Law, the judicial application of the law – without any case law at present – applicable to the new statutory definition in the Criminal Code with the events of illegal mass immigration that have taken place since 2015, as an undoubtedly exceptional situation with respect to the application of Section 26 (2) of the ACC, where the Constitutional Court – in line with Article 24 (1) of the Fundamental Law and Section 2 of the ACC – should play a fundamental and decisive role due to its function of protecting the constitution.

[46] Even at the time of its entry into force, the Fundamental Law – as stated in the National Avowal that provides its framework of interpretation (in particular in its second, fifth, sixth and eighteenth point) – has already contained the features that serve the purpose of protecting and safeguarding sovereignty. The events that have taken place since 2015, the uncontrollable masses that have illegally crossed the external borders of the European Union during a short period of time, as well as the resulting challenges for the Schengen system of border control and the lack of a common system to tackle these phenomena by satisfying all, have required new solutions. In this context, by adopting the Seventh Amendment of the Fundamental Law, in the presently nineteenth point of the National Avowal, Hungary has made the protection of Hungarian sovereignty and of the constitutional identity a clear requirement to rely upon. It states the following: "we hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State". It is the basis of adopting new cardinal Acts as well as making existing laws, such as the Criminal Code in the present case, stricter in the interest of enforcing the fundamental obligation of the State, in compliance with not only the Fundamental Law but also with Hungary's obligations resulting from its membership in the European Union, in particular with its obligations to protect the Schengen borders.

[47] 1.6. In accordance with Section 29 of the ACC, a further condition of the admissibility of the constitutional complaint in the procedure started on the basis of Section 26 (2) of the ACC is to raise a constitutional issue of fundamental importance.

[48] According to the petition, the constitutional issue of fundamental importance is whether the criminalisation, under Section 353/A of the Criminal Code, of the organising activity connected to unauthorized immigration is in compliance with the Fundamental Law in the light of the principle of *nullum crimen sine lege* as well as of the freedom of opinion and the freedom of association.

[49] 1.7. On several occasions, the Constitutional Court suspended its own procedure in the context of procedures of the European Union, if there was a procedure pending in the same subject before the Court of Justice of the European Union. [Ruling 3198/2018. (VI. 21.) AB, Ruling 3199/2018. (VI. 21.) AB, Ruling 3200/2018. (VI. 21.) AB, Ruling 3220/2018. (VII. 2.) AB]. In the subject affected by the present constitutional complaint, there is an infringement procedure pending against Hungary (European Commission, procedure No. 20182247, Communication No. IP-19-469), but it has not yet proceeded into the court phase, the European Commission sent a reasoned opinion to the Government of Hungary on the basis of Article 258 of the TFEU. Therefore, the Constitutional Court held that this was not a cause to prevent the assessment of the constitutional complaint.

IV

[50] The Constitutional Court provided an overview of the public law relations of the new statutory definition of criminal offence.

[51] 1 The seventh amendment of the Fundamental Law of Hungary amended Article XIV of the Fundamental Law. According to the provision presently in force, Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, belonging to a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.

[52] Article XIV (4) of the Fundamental Law lays down the – positive and negative – conditions of substantive law for granting asylum, detailed and supplemented with procedural conditions in the Act LXXX of 2007 on Asylum (hereinafter: AA). In the context of this status, a person seeking recognition as refugee shall be entitled – among others – to stay in the territory of Hungary under the conditions set forth in AA and to a permit authorising stay in the territory of Hungary as defined in a separate law [Section 5 (1)]. This regulation provides the framework, which shows close links with Article XIV of the Fundamental Law and with other provisions of it, thus a protection of fundamental rights shall be applicable those persons who were recognized as refugees (or as persons entitled to subsidiary protection) as well as those, to a limited extent, who are participants of the recognition procedure. However, the protection of fundamental rights shall not extend to the activities not covered by the right of asylum or not closely linked thereto, such as illegal immigration or stay, and clearly the protection of fundamental rights shall not apply to the cases when someone legalises his stay in Hungary by misusing the asylum procedure. After the amendment of the Fundamental Law, the protection shall clearly not be applicable to those persons who arrive to the territory of Hungary through any country where they were not persecuted or directly threatened with persecution. Consequently, the requirement under Article I (3) of the Fundamental Law on the restriction of fundamental rights shall not apply to the regulation applicable to the cases listed above with respect to asylum.

[53] Nevertheless, the legislator also created a new statutory definition of criminal offence in the Criminal Code. According to the reasoning of the Act VI of 2018 on the amendment of certain Acts in the context of the measures against illegal immigration, introducing the challenged provision into the Criminal Code, "the change in the nature of the organising and supporting activities related to illegal immigration and the increased risk of its effects justify the modification of the Criminal Code and the introduction of the new statutory definition of a criminal offence. In connection with illegal migration, the abusive use of asylum procedures and the organising activity

promoting the stay in the country, which is increasingly threatening public order and public security, justifies having to tackle with such conducts by means of the most rigorous instruments of public authority, i.e. by criminal sanctioning.

With this in mind, the Criminal Code chapter on crimes against public order is complemented by a new statutory definition: facilitating illegal immigration."

[54] 2 In order to assess the regulatory environment, it is necessary to provide an overview of the provisions of the Directive as well. The fight against illegal immigration can be found among the aims of the European Union. In compliance with that, the preamble of the Directive states:

"(2) Consequently, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.

(3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence."

[55] The Directive deals with defining the facilitation of unauthorised entry, transit and residence. In this framework, Article A (1) binds the Member States to adopt sanctions against the following:

"(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens."

[56] The Directive also states that "Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned" [Article 1 (2)].

[57] The Directive also orders to punish the instigator, the accomplice and the attempt (Article 2).

[58] According to the Directive, the sanctions of facilitation of entry and transit are not connected to the objective of financial gain, while the facilitation of unauthorized stay shall be punishable if committed "for financial gain". The rules directly implementing the Directive in Hungary are illegal immigrant smuggling and facilitation of unauthorised residence. The latter ones mean facilitating the unlawful basic acts of

other persons (the basis act is the unauthorized entry, transit or stay in the territory of the Member State).

[59] The effect of the Directive covers, in principle, the obligation of establishing sanctions applicable to the wilful facilitation of unauthorised entry or transit manifested under the umbrella of humanitarian action [Article 1 (2)], except when the Member State decided on applying its national laws and practice in the cases when this conduct is aimed at humanitarian assistance.

[60] The detailed examination of the relation between the Directive and Section 353/A of the Criminal Code is not required in this procedure. It is sufficient to state that the Directive obliges the Member States to impose sanctions on the facilitation of unauthorised entry, transit and stay in the scope specified therein, however it also allows the Member States to take further measures.

[61] 3 The criminal offence of "facilitation of illegal immigration" is different from the offences of "illegal immigrant smuggling" and "facilitation of unauthorised residence". The new statutory definition offers further protection as compared to the older ones, since it does not require the new criminal offence to connect directly and unconditionally to the basic offence of illegal immigration or stay (i.e. to the acts of illegal immigrants) as in the case of illegal immigrant smuggling or the facilitation of unauthorised residence. Illegal immigrant smuggling sanctions the facilitation of the basic action itself specified in the statutory definition of illegal immigrant smuggling (crossing the state border by violating the provisions of the law). The facilitation of unauthorised residence orders to punish the facilitation of the basic act of unauthorised stay in the territory of the Member State. Unauthorised stay is connected to crossing the border of the Member State concerned; if the conditions of entering the territory of the given country are not complied with at the time of entry, the stay of the alien shall be unauthorised. (In this case the entry into the territory of the country, the crossing of the state border shall also be unauthorised, irrespectively to the fact if there is or is not border control. It means that in the case of the latter, there is no criminal offence without a basic act, or at least an attempt or the preparation of it.) The basic case of Section 353/A of the Criminal Code may be realised even without a similar basic act; the conduct of committing the crime of the basic case is the organising activity carried out for the prohibited purpose rather than the facilitation of another illegal basic act. At the same time, the new statutory definition of criminal offence is connected to the former offences, as the essence of the new offence is an organising activity, which has an inducing and supporting effect for the potential perpetrators of the basic acts (i.e. illegal immigration) of the other two criminal offences. Knowing that in Hungary natural persons may be engaged in organising activity for the purpose of letting the perpetrators of unauthorised immigration initiate asylum procedures and of allowing the persons staying illegally in the country still obtain a legal title of residence, may be reassuring for aliens

considering unauthorised entry, transit or stay (sucking effect). It is the responsibility of the legislator to classify a conduct as a criminal offence and to assess, in this respect, the conduct’s dangerousness to the society (although the compatibility of a particular statutory definition with the Fundamental Law may be reviewed). This is manifested in Section 4 (1) to (2) of the Criminal Code: a criminal offence committed wilfully or – if this Act orders the punishment of committing the act negligently – negligently, provided that it is dangerous to the society and that is punishable under this Act. An act or omission shall be dangerous to the society if it violates or endangers the person or the rights of others or the social, economic or State order of Hungary according to its Fundamental Law.

[62] The facilitation of unauthorized entry or unauthorized stay are offences against the order of public administration. The facilitation of such acts as an organising activity may be declared punishable in general. In the case of a short stay, the conditions of crossing the external border shall be specified in Article 4 (1) of the Regulation 562/2006/EC of 15 March 2006, the Borders Code. The conditions of entry are the same at the external borders of all Schengen Member States. “External borders may be crossed only at border crossing points and during the fixed opening hours.”

[63] Section 353/A of the Criminal Code does not punish committing the offence negligently. The offence can only be committed intentionally. This is expressed in paragraph (1) by stating that the prohibited organising activity shall be carried out “in order to” make it possible to initiate asylum procedure for a person not entitled to asylum in Hungary; the organising activity shall be carried out “in order to” allow the person illegally entering to or illegally staying in Hungary to obtain residence title in Hungary. Paragraph (5) explicitly refers to the purpose when it provides support to interpret the term of organising activity: it shall be qualified as an organising activity when border monitoring is organised at the borderline of the external Schengen border or at the border sign, or information materials are prepared “with the purpose specified in Paragraph (1)”.

[64] With regard to Section 353/A (1) *a)*, it is irrelevant whether the person committing the criminal offence can foresee the result of the procedure of the authority. Several elements shall be examined in the asylum procedure on the basis of which a decision shall be made about granting the status or rejecting the application. These elements include whether the applicant is able to verify or at least substantiate persecution or the well-founded fear of it due to any of the so called five causes, the fact that his or her country of origin or country of habitual residence is unable or unwilling to provide protection to him or her; the authority shall examine the existence of the causes of inadmissibility (e.g. whether the applicant arrived from a safe country, where the applicant may provide evidence to the contrary), the causes of exclusion (e.g. terrorist act, Section 8 of AA), the entitlement to subsidiary protection is also assessed, just as the existence of *non-refoulement* etc. These questions should be

assessed subject to a procedure of taking evidence. On the other hand, with regard to the purpose, the offence shall be deemed to have been committed when the perpetrator is conscious of – i.e. knows that – being engaged in the organising activity in the interest of a person who is not subject to persecution due to the so called five causes (e.g. the future applicant tells him or her that he/she is in fact not subject to persecution, but intends to settle down in the territory of Hungary or any other country of the European Union without the authorisation to do so), or whose fear of persecution is not well-founded. It is the duty of the investigating authorities to prove that the perpetrator was aware of the above.

[65] With regard to Section 353/A (1) *b)* of the Criminal Code, on the basis of the statutory definition, the perpetrator shall be aware of the fact that the person, in the interest of whom he or she carries out organising activity in the interest of obtaining residence title had entered illegally into the territory of Hungary or is staying illegally in Hungary. The first part of Section 353/A (1) *b)* applies to the persons entering the country illegally that may include persons whose right to asylum is subsequently verified. However, the statutory definition covers engagement in the organising activity to be performed with straight intention, in the context of the prohibited purpose. Providing legal representation in itself does not mean an engagement in organising activity.

[66] The misdemeanour is a subsidiary criminal offence the committing conduct of which is similar to certain elements of the committing conducts of preparation. The courts of general competence are in charge of differentiating this offence from the criminal offences of "illegal immigrant smuggling" and "facilitation of unauthorised residence". The initiating of asylum procedure or obtaining residence title by unauthorised persons due to the committing conducts is not a necessary precondition for the realisation of the offence. The criminal offence may be committed many ways in the scope of the organising activity, but all committing elements of the statutory definition are intentional and aimed at a purpose.

V.

[67] The petition is unfounded.

[68] 1 As pointed out 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 the foreseeability of the conditions upon the exercising and exercisability of the State's penal authority. Consequently, all rules of penal 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 prohibition of criminal legislation and application of the law of retroactive force." In this decision, the Constitutional Court also underlined that "the 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 should 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, as it encompasses all relevant rules of criminal responsibility [see for example: Decision 35/1999. (XI. 26.) AB, ABH 1999, 310, 316.]. This way the protection guaranteed by constitutional law applies to the rules on punishability, the imposing of punishments and to all rules of penal law that may affect the individual's constitutional freedoms in the course of applying criminal law" {Decision 16/2014. (V. 22.) AB, Reasoning [33]}.

[69] All norms require interpreting and the increasing number as well as the complexity of laws continuously increases this demand for interpretation.

[70] The difficulties resulting from the wording of the norm only raise the issue of the violation of legal certainty and make it unavoidable to annul the norm where the law is genuinely uninterpretable and it makes the application of the norm unpredictable and unforeseeable for those addressed by the norm {Decision 3106/2013. (V. 17.) AB, Reasoning [10]}. At the same time, regarding the statutory definitions found in the Criminal Code, there are further requirements than not being uninterpretable: the condition of constitutionality also includes that the declaration of an "act" according to Article XXVIII (4) of the Fundamental Law as a criminal offence should not contain vague legal terms. A vague disposition would be incompatible with the principle of *nullum crimen sine lege* as in this case the addressees of the statutory definition cannot decide which conduct they should refrain from and what conduct may imply a punishment according to the statutory provision. The judicial authority should not apply a punishment for a conduct not included by the legislator in any of the statutory definitions in the special part of the Criminal code. In Hungary, the source of penal law is the Act of Parliament; according to Article XXVIII (4) of the Fundamental Law, an Act of Parliament shall lay down the statutory definitions of specific criminal offences.

[71] 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 – organising activity, organising border monitoring, network building or operation – are in themselves uninterpretable and therefore inapplicable. Other statutory definitions of the Criminal Code do contain elements referring to organisation, organising activity. The case law connected to the above may provide support in the assessment of what qualifies as carrying out organising activity; the court of general competence may reach the conclusion that organising shall include, among others, recruiting, or the intermediation between those who commit the

smuggling of illegal immigrants or the facilitation of illegal stay and the persons who commit the basic acts of these criminal offences. It is because of the features of the statutory definition that the Act qualifies certain conducts of committing the offence as organising activities "in particular": according to the legislator, the facilitation, the support of illegal immigration may be carried out by using information materials or by maintaining networks serving the purpose of exploiting people.

[72] 1.2. Section 353/A of the Criminal Code contains some provisions in the scope of purpose-oriented organising activity. It does not impose any restriction on the content of public debates, on the mere dissemination of any idea or on making a stand to support this idea. The Fundamental Law links the freedom of expression to the freedom and the diversity of the press as well as to the freedom to provide information necessary for the development of democratic public opinion. Neither does Section 353/A of the Criminal Code, in itself, prohibit the expression of opinions that deal with evaluation of illegal immigration or stay. In the public discourse, anyone may freely express his or her opinion about the phenomenon generally called migration. It is also possible to express any opinion about the desirable attitude towards the persons generally called migrants in the public discourse.

[73] This is not what is prohibited in Section 353/A of the Criminal Code; the prohibited conduct is an expression of opinion manifested in the scope of the organising activity, aimed at inducing others to perform an illegal conduct. In the present case, the restriction is contained in an Act of Parliament.

[74] The reason for restricting the freedom of expression is the protection of the order of public administration, indirectly the interest of the society in repressing illegal migration, the protection of public order, the success of the fight against organised crime. Section 353/A of the Criminal Code is targeting the purpose-oriented conducts connected to the smuggling of illegal immigrants, the facilitation of illegal stay.

[75] Freedom of expression primarily protects the words (speech); it is possible to adopt prohibiting regulations, in the manner specified in Section 353/A of the Criminal Code, on other conducts, including the purpose-oriented organising activity that facilitates, supports illegal immigration. According to Section 353/A (5) of the Criminal Code, preparing, disseminating information materials or giving commission to do so for the purpose specified in paragraph (1) (i.e. for facilitating illegal immigration) shall qualify as organising activity. In the present case, the danger or injury that the restriction aims to avert applies not merely to the communication, but to the conduct induced by the communication, aimed at by the perpetrator as a promoted and desired conduct, the presumed reaction of persons (unauthorised application for asylum procedure, efforts to obtain a residence title, in the case of illegal stay). The sanction is a relatively light one within the system of penal law: in the basic case it is confinement. The punishment may be mitigated without limits or it may be lifted against the perpetrator of the basic offence, if the perpetrator reveals

the circumstances of committing the offence before the indictment has been brought. Consequently, it may not be established with account to the above circumstances that the new rule – without any judicial practice – unnecessarily and disproportionately restricts the freedom of opinion. On the basis of a petition, in a constitutional complaint procedure, the Constitutional Court might have the opportunity in the future to review whether the application of Section 353/A of the Criminal Code to the particular statutory definition is in line with the Fundamental Law.

[76] 1.3. According to the Fundamental Law, everyone shall have the right to establish and join organisations. Exercising the right to association is not unlimited. Section 3 (3) and (4) of the Act CLXXV of 2011 on the Freedom of Association, Non-profit Status and the Operation and Support of Civil Organizations (hereinafter: "Civil Act") states that the exercising of the right of association should not violate Article C) (2) of the Fundamental Law, it should not perform a criminal offence or a call for committing a criminal offence and it should not result in the violation of the rights and freedoms of others. According to the law on the right of association, an organisation may be set up for carrying out any activity, which is in line with the Fundamental Law and not prohibited by an Act of Parliament.

[77] Section 353/A of the Criminal Code does not prohibit the establishing of organisations or the right to join organisations; it prohibits an organising activity aimed at a special purpose. Ordering the punishment of this organising activity – on the basis of the arguments detailed above in this decision – is not contrary to the Fundamental Law in the light of the Fundamental Law's *nullum crimen sine lege* rule, neither for the vagueness of the applied elements of the statutory definition, as alleged in the petition, nor due to the alleged lack of the legitimate aim of the statutory definition; moreover, Section 353/A of the Criminal Code does not restrict the freedom of opinion in a manner contrary to the Fundamental Law. As the scope of protection provided by the right of association is not extended to carrying out any activity, which is prohibited by an Act of Parliament, and in the present case this prohibition is not against the Fundamental Law, the challenged rule is not contrary to the right of association. Section 353/A of the Criminal Code does not prevent natural persons and organisations from endeavouring empowering every people in the world to live equally with the rights enshrined in the Universal Declaration of Human Rights and in other conventions on human rights. Nor does it prohibit the research made for this purpose, the withholding of human rights violations and the prevention of abusing such rights.

[78] The challenged provision does not prohibit anyone from having a goal of promoting universal human rights, the granting of human rights to all, irrespectively to origin or citizenship, supporting the legal protection of people who arrive to Hungary fleeing from their own country, by noting that according to Section 1 (5) of the Act LXXVIII of

2017 on the Activity of Attorneys-at-law, exercising the activity of the attorney-at-law shall not be aimed at the circumvention of the law, a purpose against the law or the contribution in a legal transaction of this kind.

[79] 2 The petition is based on the allegation that the provisions of the Criminal Code – despite of the fact that the statutory definition contains the purpose – may also be interpreted and applied in a way to extend it to the cases when the aim of the organising activity is, without any other interest, humanitarian assistance, i.e. the purpose of the organising activity is mitigating the suffering of those in need and the human treatment of the indigent ones. This possibility may have a restraining effect on the helpers of those organisations that hold as their duty to help, without interrogation, the needy and poor people they encounter.

[80] The Constitutional Court interprets the constitution when it acts in its specific competences, even if this interpreting activity is not abstract as in the competence under Section 38 (1) of the ACC, but it is connected to the review of a law or a judicial decision. When the conflict of a law with the Fundamental Law is examined, the Constitutional Court also interprets the relevant law. This is necessary in each case, as it has to verify the law's scope of action. In the case of a new law without any case law, the Constitutional Court can only relay upon its own interpretation. The mutual application of the law and the actual facts of the specific case, together with the interpretation of the law, is the primary duty of the courts of general competence; in the course of examining the law, the Constitutional Court carries out the mutual application of the Fundamental Law and the law concerned, together with the interpretation of the law. According to the National avowal – which is, on the basis of Article R) (3) of the Fundamental Law, the mandatory framework of interpretation of the Fundamental Law – "we hold that we have a general duty to help the vulnerable and the poor." According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the interpretation of the Fundamental Law and of the laws one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good. Threatening with punishment the altruistic organising activity aimed at the obligation of helping the vulnerable and the poor would be incompatible with the obligation laid down in the Fundamental Law on helping the vulnerable and the poor, with common sense and with the moral purpose complying with the public good. This is not referred to in the text of the statutory definition reviewed and neither may any court reach such conclusion based on a reasonable interpretation required by the Fundamental Law.

[81] 3 Therefore, based on the review of Section 353/A (1) of the Criminal Code, the Constitutional Court established that the concern raised by the petitioner is

completely unfounded, as it is evident that the new statutory definition included in the Criminal Code only orders to punish the intentional conducts contained therein and it does not order to punish any other conduct, i.e. the new statutory definition shall not be applicable to any conduct not related to the purpose prohibited in the statutory definition and carrying out the altruistic obligation of helping the vulnerable and the poor. Regarding the new regulation, it shall be up to the judicial practice to specify the conditions under which an organising activity should be considered as humanitarian assistance, to state which forms of assistance are not punishable and when these limits are deemed to be crossed.

[82] Considering the above, the Constitutional Court rejected the constitutional complaint.

[83] 4 Nevertheless, regarding the gravity of the fact of threatening with a penal sanction, in the interest of legal certainty, the Constitutional Court held it necessary to reinforce, acting ex officio, on the basis of Section 46 (3) of the ACC, the interpretation of the new statutory definition introduced in the Criminal Code in line with Article XXVIII (4) of the Fundamental Law, in the form of a constitutional requirement.

[84] In the formulation of the requirement, in accordance with its practice on the constitutional dialogue {Decision 22/2016. (XII. 5.) AB, Reasoning [33]}, it has taken into account the conclusion reached by the court of another Member State of the European Union in a similar case. It established that in France, the *Conseil constitutionnel* in the case No. 2018/717-718, upon the motion of the penal panel of the *Cour de cassation*, reached a conclusion similar in many respects with regard to the criminal offence of facilitating the illegal entry, movement and residence of a foreign person found in the Act No. 2012-1560 (with a statutory definition similar to that of the Criminal Code). For the first time in its case law, the *Conseil constitutionnel* rendered constitutional importance to the slogan-word "fraternity" found in the preamble and in Article 2 of the Constitution of France. It stated that "no principle nor any constitutional rule ensures foreign nationals general and absolute rights of entry and residence within the French national territory. Furthermore, the objective of fighting against illegal immigration partakes of the safeguarding of public order, which is an objective that has constitutional value". It also established that the French Act excluded voluntary humanitarian assistance, therefore the *Conseil constitutionnel* annulled parts of the law in a mosaic-manner.

[85] The statutory definition of the Hungarian Criminal Code under review does not contain any such provision worded too broadly, and, as explained above, it may not even be reasonably interpreted to that effect. At the same time, the obligation of helping the vulnerable and the poor, as laid down in the National Avowal, and the unconditional enforcement of Article I (3) and Article XXVIII (4) can be guaranteed with the constitutional requirement formulated in the holdings of the decision.

VI

[86] Due to the importance of the case, the Constitutional Court ordered the publication of this decision in the Hungarian Official Gazette on the basis of the last sentence of Section 44 (1) of ACC.

Budapest, 25 February 2019

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. István Balsai
Justice of the Constitutional Court

Dr. Ágnes Czine
Justice of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Attila Horváth
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Dr. Marcel Szabó
Justice of the Constitutional Court

Dr. Péter Szalay
Justice of the Constitutional Court

Dr. Mária Szívós
Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court, rapporteur

Concurring reasoning by Justice Dr. István Stumpf

[87] In the present case, the Constitutional Court faced a serious dilemma even at the time of assessing the admissibility of the constitutional complaint with regard to assessing the affectedness of the petitioner.

[88] According to the case law of the Constitutional Court, "being personally affected is a condition of the admissibility of the complaint, namely that the legal provision deemed by the complainant to be contrary to the Fundamental Law shall provide a rule directly, factually and actually affecting the concrete legal relationship of the complainant in person, resulting in the violation of the complainant's fundamental rights", however "a person can also be considered as affected when no actions serving the purpose of applying or enforcing the legal regulation have taken place yet, but the force of the law resulted in a legal situation from which it is evident that the violation of rights complained about would inevitably take place within a directly foreseeable timeframe" {Decision 33/2012. (VII. 17.) AB, Reasoning [66]}

[89] The majority decision points out with due ground that the direct constitutional complaint under Section 26 (2) of the ACC should not become a petition of *actio popularis* – in the sense of empowering the petitioner to be entitled to have his petition judged on the merits without substantiating the violation of his rights and without being affected.

[90] At the same time, I agree with the pioneer interpretation adopted in the majority decision about admissibility, stating that the direct constitutional complaint is also admissible "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", in particular if "the criminalised conduct means a direct restriction of a fundamental right" (Reasoning [35]). At first glance, this interpretation may seem to be an activist one, however I hold that it is contrary neither to the text of the ACC, nor the logic of direct constitutional complaint. In the case of a statutory definition of a criminal offence, the direct violation of the right may be established merely "due to [...] a provision of the law [...] becoming effective", provided that, as an effect of being threatened with criminal prosecution, the petitioner is forced to dispense with a certain activity he had been engaged in before, or if he is not allowed to do something that he would otherwise do in the scope of exercising one of his fundamental rights.

[91] However, I disagree with the part of the interpretation of admissibility related to the "condition of exceptionality". This term is mentioned so frequently in the reasoning of the majority decision (c.p. Resoning III. 1.2., 1.3., 1.4., 1.5.) as if there was such a well-developed concept in the practice of the Constitutional Court – but actually this is the first decision since the year 2012 putting forward the idea that the word "exceptionally" mentioned in Section 26 (2) of the ACC is a "condition" the "existence" of which should be examined explicitly and specifically by the Constitutional Court. The majority decision then applies this fresh doctrine to the present case by partly acknowledging the priority of aspects beyond the realm of law in the assessment of exceptionality: "nevertheless, in the opinion of the Constitutional Court, the most important reason determining the need to carry out a review on the

merits is the necessity of harmonising, in accordance with Article 28 of the Fundamental Law, the judicial application of the law – without any case law at present – applicable to the new statutory definition in the Criminal Code with the events of illegal mass immigration that have taken place since 2015, as an undoubtedly exceptional situation with respect to the application of Section 26 (2) of the ACC" (Reasoning [45]–[46]). In my opinion, the calculability of the judicial practice and the prevention of (the semblance of) arbitrariness can only be secured if the Constitutional Court does not make the admissibility of direct constitutional complaints dependent on the political importance of the cases.

[92] Form me (and hopefully also for the majority of the justices of the Court in the future) the admission and the adjudication on the merits of the direct constitutional complaint in the present case means that in the case of adopting other (new) statutory definitions of criminal offences or minor offences, they shall be challengeable the same way by the persons affected in their activities or in their exercising of fundamental rights.

[93] With regard to the rejection of the petition related to Section 353/A of the Criminal Code and reviewed in the present case, I hold that the decisive factor is the purpose-oriented character of the criminal offence. As pointed out in the majority reasoning, "the statutory definition covers engagement in the organising activity to be performed with straight intention, in the context of the prohibited purpose", "criminal offence may be committed many ways in the scope of the organising activity, but all committing elements of the statutory definition are intentional and aimed at a purpose", the perpetrator has to be conscious of the purpose and the investigation authorities have to provide evidence of the existence of this condition (see Reasoning IV.3. [61]–[66]). Consequently, although there may be several interpretations of "carrying out organising activity" as the committing conduct as well as of other elements of the statutory definition, persons and organisations acting in good faith (i.e. those who do not aim at an explicitly prohibited illegal purpose or intend to abuse the law) are unable commit the criminal offence as it cannot be committed negligently or by coincidence. The majority reasoning is also clear about stating that certain conducts – enjoying constitutional protection – shall not be classified within the scope of the criminal offence, including the withholding of human rights violations and the prevention of abusing such rights, the organising activity carried out in the interest of providing fleeing people with legal protection, providing legal representation; similarly, public debates and the provision of information about migrants and migration shall not be prohibited.

[94] With regard to the above arguments I agreed with the majority decision that a conflict between the new rule – that has no judicial practice of application – and the Fundamental Law cannot be established beyond doubt. Should judgements be adopted in the future in individual cases with the application of Section 353/A of the

Criminal Code, the Constitutional Court may then review on the basis of a petition under Section 26 (1) or Section 27 of the ACC whether the provision itself, in other contexts (or even in one of the contexts reviewed here, due to the change of circumstances), or the interpretation of the provision as presented in the court judgement is in compliance with the Fundamental Law.

[95] Regarding the constitutional requirement laid down in the holdings of the decision, I share the opinion presented in the concurring reasoning by Justice dr. Mária Szívós.

Budapest, 25 February 2019

Dr. István Stumpf Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Mária Szívós*

[96] I agree with rejecting the decision and I do not argue with the necessity – in principle – of setting up a constitutional requirement in the matter, but, on the basis of the reasons below, I hold it important to attach the following concurring reasoning.

[97] In my opinion, in the constitutional requirement, the term that the criminal offence shall not be applicable to "any conduct not related to the purpose prohibited in the statutory definition" is useless. As laid down also in the majority decision, the provision of the Criminal Code under review contains a purpose-oriented criminal offence, moreover, the legislator has – in a way – "doubled" the purpose by repeatedly referring to the purpose in the interpretative provision connected to the committing conduct [see Section 353/A (5) of the Criminal Code].

[98] Indeed, an act shall only qualify as a criminal offence if the conduct under review has implemented all elements (criteria) of the statutory definition set forth in the special part of the Criminal Code. In the case of the criminal offence concerned, it means that the existence of purpose – as one of the elements of the definition in the subjective side of the statutory definition – is also needed for establishing criminal liability. Therefore, if someone carries out the organising activity not "in the context of the prohibited purpose", it means that purpose mentioned in the statutory definition is missing, consequently the criminal offence shall not be established.

[99] Taking all the above into account, it was unnecessary to state the quoted part of the constitutional requirement, as the courts may easily reach the result intended by the constitutional requirement simply by applying the special rules of the law.

Budapest, 25 February 2019

Dr. Mária Szívós
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Ágnes Czine*

[100] I do not agree with examining the merits of the petition, as I hold that the admissibility conditions set forth in Section 26 (2) of the ACC are not complied with in the case concerned.

[101] 1 Since the entry into force of the Fundamental Law, the Constitutional Court has been consistently enforcing the exceptional character of the constitutional complaint based on Section 26 (2) of the ACC. So far, in the case law of the Constitutional Court, the exceptional character justified the strict interpretation of the statutory conditions applicable to this type of complaint. {Ruling 3003/2018. (I. 10.) AB, Reasoning [13]}. Therefore, due to the strict interpretation of the statutory conditions based on Section 26 (2) of the ACC, the Constitutional Court rejected without examination on the merits the vast majority of such constitutional complaints [for example: Ruling 3264/2012. (X. 4.) AB, Ruling 3053/2013. (II. 28.) AB, Ruling 3071/2013. (III. 14.) AB, Ruling 3160/2014. (V. 23.) AB, Ruling 3233/2014. (IX. 22.) AB, Ruling 3084/2015. (V. 8.) AB, Ruling 3021/2016. (II. 2.) AB, Ruling 3268/2017. (X. 19.) AB, Ruling 3283/2017. (XI. 2.) AB, Ruling 3003/2018. (I. 10.) AB]. The rigour of strict interpretation is in particular remarkable in the practice of the Constitutional Court in the cases when the petitioner explicitly verified the actual injury of his right due to a law directly effectuated against him, but this injury occurred not within one hundred and eighty days from the day of entry into force of the law. In these cases, the Constitutional Court has not acknowledged that the deadline set forth in Section 30 (1) of the ACC should be calculated, with respect to the petitioner, from the day of actual effectuation. Thus in this case, the Constitutional Court failed to examine the merits of the conflict with the Fundamental Law alleged in the constitutional complaint, despite of the petitioner being able to verify personal, direct and actual affectedness {e.g.: Ruling 3264/2012. (X. 4.) AB, Reasoning [2]; Ruling 3192/2013. (X. 22.) AB, Reasoning [9], Ruling 3153/2017. (VI 14.) AB, Reasoning [6]}.

[102] 2 In accordance with the consistent case law of the Constitutional Court, "in case of an exceptional complaint" based on Section 26 (2) of the ACC, "as it is aimed directly at the norm, it is of particular importance to examine affectedness, as the personal, direct and actual injury of the petitioner's fundamental right is the element that differentiates the exceptional complaint from *actio popularis*" {E.g.: Decision 3110/2013. (VI. 4.) AB, Reasoning [27]; see also: Ruling 3105/2012. (VII. 26.) AB, Reasoning [3]; Ruling 3033/2014. (III. 3.) AB, Reasoning [19]; Ruling 3245/2014. (X. 3.) AB, Reasoning [14]}. In the case concerned, due to the reasons detailed below, I hold that with the admission the Constitutional Court has actually returned to the institution of *actio popularis*.

[103] 2.1. Directness includes the requirement that the injury of the (fundamental) right alleged in the petition should exist – directly – without any law-applying (judicial) decision. If indeed an implementing act of constitutive effect is needed for the enforcement of the law, then the petitioner should first challenge the act of State authority directly realising the injury of right, to be followed by the indirect review of the norm {Decision 3110/2013. (VI. 4.) AB, Reasoning [27]}. Therefore, in the case of laws not effectuating directly, i.e the ones that result in any actual legal effect (creating, amending or terminating a right or obligation) not by virtue of their entry into force (*ex lege*), but through a certain judicial act, the constitutional complaint based on Section 26 (2) of the ACC has been, so far, typically unavailable. {Ruling 3170/2015. (VII. 24.) AB, Reasoning [10]}. Accordingly, "in the case of laws [**...**] that cannot be effectuated directly due to their essence, [**...**] no direct affectedness shall be established in the procedure based on Section 26 (2) of the ACC" {Ruling 3246/2014. (X. 3.) AB, Reasoning [10]}

[104] In contrast with the above, in the present case, the Constitutional Court stated the following: if, as a consequence of a new norm, the affected persons must immediately stop their conduct carried out lawfully previously, in particular when the norm concerned is a norm of penal law, it is not necessary to wait for the law-applying (judicial) act, as affectedness may also be verified without that, merely due to the "*ultima ratio* character of the criminal procedure as well as its stigmatising effect immediately influencing other legal relations as well" (Reasoning [35]). In my opinion, however, this interpretation – with due regard to the consistent case law of the Constitutional Court followed until this day – is not deductible from the statutory conditions based on Section 26 (2) of the ACC. I hold that, on the basis of the Constitutional Court's case law, the verification that the challenged norm has a restraining effect influencing certain conducts has not been sufficient for establishing the "directness" of effectuation, as the norm had to cause a direct legal effect in one of the legal relationships of the affected person. However, in the case concerned, the challenged norm can only result in an actual legal effect as the result of a judicial decision, therefore, in my view, the statutory condition of directness cannot be established.

[105] 2.2. Establishing affectedness also requires the "actual" occurrence of the injury of right. Actual affectedness thus means that the petitioner's injury must be real. {Decision 3110/2013. (VI. 4.) AB,, Reasoning [31]; Ruling 3123/2015. (VII. 9.) AB, Reasoning [12]; Ruling 3170/2015. (VII. 24.), Reasoning [11]}. The only exception allowed by the Constitutional Court has been the possibility to verify affectedness even in the case when the acts for the application, enforcement of the law have not taken place, but there has been a legal situation by virtue of the law from which it has been clear that "the violation of rights complained about would inevitably take place within a directly foreseeable timeframe" {Decision 33/2012. (VII. 17.) AB, Reasoning

[66]; Decision 3244/2014. (X. 3.) AB, Reasoning [19]}. Thus the Constitutional Court has considered affectedness to be well-founded also in the case of the injuries of rights that "would inevitably take place within a directly foreseeable timeframe".

[106] However, the establishment of affectedness shall be precluded if the injury of right is the result of the petitioner's "(individual) determination of will for the future" {Ruling 3196/2016. (X. 11.) AB, Reasoning [9]} This is why the Constitutional Court emphasized in the quoted case: if the petitioner's status depends on subsequent decisions, this circumstance shall exclude the possibility of establishing an injury of right occurring unavoidably within a short period of time.

[107] In my opinion, it can be established in the case concerned as well that the petitioner's actual injury of right is about to happen according to its own determination of will, rather than occurring inevitably within a foreseeable time.

[108] 2.3. The injury of right being personal is yet another condition of establishing affectedness. This condition includes that the affected person may refer to the injury of his own fundamental right, but at the same time it does not mean that this condition is only considered to be met if the addressee of the challenged norm is the petitioner. If the addressee of the norm is a third person, the requirement of personal affectedness shall be considered to be fulfilled if there is a close link between the fundamental rights' position of the petitioner and the norm {Decision 3110/2013. (VI. 14.) AB, Reasoning [28]}. In this context, I also hold it important to note that the subjective protection of rights is the primary function also of the constitutional complaint based on Section 26 (2) of the ACC, although a successful petition does have an objective effect on the protection of rights, too. Bearing this in mind, the Constitutional Court explained that in the case of non-natural persons it shall examine individual affectedness with regard to the particular features of the organisation. Stepping up in the interest of the members or other persons shall not, in itself, verify affectedness. {Ruling 3091/2012. (VII. 26.) AB, Reasoning [3]; Ruling 3092/2012. (VII. 26.) AB, Reasoning [3]; Ruling 3027/2013. (II. 12.) AB, Reasoning [19]}.

[109] In the relevant case, the Constitutional Court determined the necessity of developing, in accordance with Article 28 of the Fundamental Law, the judicial application of the law – without any case law at present – applicable to the new statutory definition in the Criminal Code as "the most important reason determining the need to carry out a review on the merits". However, I hold that this bears the consequence of significantly expanding the possibilities of establishing personal affectedness, and in the future the Constitutional Court should establish affectedness in the case of any constitutional complaint based on Section 26 (2) of the ACC, provided that it challenges a new norm or an amended provision of the Criminal Code, irrespectively to having applied or not the provision of the Criminal Code challenged by the petition.

[110] Nevertheless, in my view, these criteria should not be assessed as circumstances justifying the personal affectedness of the petitioner, therefore I do not agree with evaluating them as a condition justifying the examination of the petition on the merits.

[111] 3 On the basis of the above arguments, I hold that in the case concerned, the petitioner could not verify to be affected directly, actually and personally. Accordingly, with account to the decisions of the Constitutional Court, the constitutional complaint should have been rejected on formal grounds.

Budapest, 25 February 2019

Dr. Ágnes Czine Justice of the
Constitutional Court

Dissenting opinion by Justice *Dr. Béla Pokol*

[112] I can agree neither with the holdings of the majority decision, nor with the majority of the reasoning.

[113] The petition was submitted in the framework of the exceptional complaint procedure laid down in Section 26 (2) of the ACC, and I hold that the justification of exceptional admissibility should have been based on arguments other than the ones used in the majority reasoning. In my opinion, the arguments of the majority reasoning of the admission opened up excessively the possibilities of establishing 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" (Reasoning [35]). In my view, this condition offered too much space for exceptionality, and in the future cases of new statutory definitions of criminal law, the justices of the Constitutional Court might become the first ones to interpret the statutory definitions even before the specialised penal judges whose decisions apply and interpret the law. Justices of the Constitutional Court are, however, not chosen for the above duty, which requires specialisation. I hold that the only reason for exceptional admission in the present case could have been the fact that the infringement procedure launched by the Commission of the European Union challenged this statutory definition together with the second sentence of Article XIV (4) of the Fundamental Law, and the Government could only put separately the challenged sentence of the Fundamental Law before the Constitutional Court for assessment, by using the option of requesting an abstract interpretation of the Fundamental Law. Thus the exceptional situation that the other part challenged in the infringement procedure, the new statutory definition in penal law was also put before the Constitutional Court by way of a parallel constitutional complaint, provided us

with a possibility of examining together the two related parts. I hold that only the above reasons justify the exceptional admission, and by stating it, the expanding of the reasons for admitting constitutional complaints submitted on the basis of Section 26 (2) of ACC would not have been necessary.

[114] Neither do I agree with stating the constitutional requirement under point one of the holdings. On the one hand, because it sets an open normative – "shall not be applicable to any conduct [...] carrying out the altruistic obligation of helping the vulnerable and the poor" – not applicable constitutionally due to the requirement of exactness (*nullum crimen sine lege*) of the statutory definitions in penal law. The mere fact that this formula is a part of one of the declarations within the National Avowal, does not make it suitable for indirectly supplementing a penal statutory definition with it. On the other hand, I do not agree with the constitutional requirement as instead of it, the wording resulting in uncertainty contrary to the Fundamental Law – duly challenged by the petitioner – should have been remedied by mosaic-like annulment to lessen the uncertainty. Indeed, in addition to listing the punishable organising activities, by inserting the word "in particular", paragraph (5) of the challenged Section 353/A relativizes these activities and makes the list prone to discretionary extension by the legislative authorities and the courts. Therefore, I supported in the debate the option of deleting by way of mosaic-like annulment the word "in particular" from Section 353/A (5) and this way we could have mitigated the uncertainty of criminalisation in line with the principle of *nullum crimen*.

[115] In addition to the above, I consider the reasoning of the majority decision to be incomplete as it failed to explain the link between Section 353/A as a new criminal statutory definition and the second sentence inserted into Article XIV (4) of the Fundamental Law by way of the seventh amendment of it. This is the provision that prohibited the granting of asylum to those want-to-be immigrants who arrive through a safe third country: "A non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution". The challenged penal statutory definition contains a concrete provision related to this amendment of the Fundamental Law by penalising the organising and other assistance activities that imply the motivation and the help of the relevant scope of immigrants. In my judgement, when the Constitutional Court assesses the constitutionality of this penal statutory definition, it should not disregard the fact that this rule was actually adopted for the purpose of providing a concrete provision under penal law regarding the above-mentioned new prohibition under the Fundamental Law. (Just as the Commission of the Union challenged them together.) Still the reasoning only includes this in a general way in the argumentation, as a new fundamental rights' limitation for the right of asylum. "After the amendment of the Fundamental Law, the protection shall clearly not be applicable to those persons who arrive to the territory of Hungary

through any country where they were not persecuted or directly threatened with persecution. [...] the requirement under Article I (3) of the Fundamental Law on the restriction of fundamental rights shall not apply to the regulation applicable to the cases listed above with respect to asylum" (Reasoning [52]). In my opinion, this wording is incompatible with the second sentence inserted in Article XIV (4), as it has not been formulated as a (relative) limitation on granting asylum to the relevant scope of immigrants, but as a clear prohibition: the persons concerned are not entitled to asylum. Therefore I hold that the reasoning of the majority decision is inadequate, as it assesses the constitutionality of the statutory definition concerned in comparison with the freedom of association and the freedom of expression that only have a distant link to it (see Reasoning [72]–[78]).

[116] However, the inclusion of the amendment of the Fundamental Law – directly linked to the challenged penal statutory definition – into the review raises another dilemma, too, the answering of which is a precondition of assessing the constitutionality of the challenged penal statutory definition. Actually while the seventh amendment of the Fundamental Law introduced the prohibition of granting asylum to the relevant scope of immigrants ("not entitled to..."), still the attached justification provided an explanation stating that, despite of the prohibition, the Parliament may provide a statutory regulation that nevertheless grants asylum to such persons: "the Parliament shall be free to decide whether to provide them asylum or a similar form of protection, and if it does, under what conditions of substantive law and of procedural regulations." However, this justification is clearly in conflict with the relevant text of the Fundamental Law it intended to support. If, by any chance, we tried to resolve the contradiction by assuming that the text of the Fundamental Law only provided for prohibiting the granting of asylum on constitutional level and not preventing the Parliament to grant asylum on simple statutory level, then actually the remaining content of the text of the Fundamental Law would be to prohibit the legislative Parliament to grant a right on the level of the Fundamental Law to the relevant scope of immigrants without prohibiting to grant them a simple statutory right. However, as the legislative Parliament as such is not entitled at all to grant a right on the level of the Fundamental Law as it could only do this as a constitution-setting power – with the special procedure required and with its qualified majority –, such a prohibition would be nonsense and such an interpretation would lead to a nonsense result under constitutional law.

[117] Accordingly, we need to arrive to the conclusion that the second sentence of Article XIV (4) of the Fundamental Law is in an irresolvable conflict with its justification and it raises the question of how the Constitutional Court is bound in the interpretation of the Fundamental Law by the justification having an enhanced potential for legal interpretation and also introduced with the seventh amendment of the Fundamental

Law. Does it bind us, justices of the Constitutional Court, or does it only bind the judges or ordinary courts who apply the law?

[118] To answer this question, let us first examine how the justification – of enhanced potential due to the seventh amendment of the Fundamental Law – is inserted in the text of Article 28 for the purpose of the interpretation: "In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for or for amending the law." Although literally this rule only applies to the judges of ordinary courts who apply the laws and not to the justices of the Constitutional Court who interpret and apply the Fundamental Law, as the Fundamental Law is not a law, but it stands above laws as the foundation of the legal order, we might also apply a broad interpretation to assume that this order of the Fundamental Law is also applicable to the justices of the Constitutional Court who interpret the Fundamental Law. At first sight, an evident argument to support this approach would be to raise the question: how could the ordinary judges be held accountable under this order if the justices of the Constitutional Court hold that this is not applicable to themselves with regard to the Fundamental Law and its justification? However, after thorough considerations, I hold that the correct standpoint is that the order under Article 28 should only be applicable to interpreting the law by the ordinary judges and its application should be excluded concerning the justices of the Constitutional Court. In addition to the text of the Fundamental Law, this rule should not be extended to its justification. My reasons to support this argument are as follows: while ordinary judges interpret the provisions of the Acts and other laws that regulate a certain segment of life, where the inclusion of *ad hoc* legislative intent and political motivation through the justification is permissible to a greater extent, in the case of the Fundamental Law that regulates in a unified way the whole life of the State and of the law, the protection of coherent systemic reason should not allow to bind the justices to the justifications that provide ground for *ad hoc* motivations.

[119] In the present case it means that in my opinion the justification contradicting the provision of the Fundamental Law under review may be set aside. As a logical consequence, I hold that there is a prohibition in the Fundamental Law for the legislative Parliament to grant asylum to those immigrants who arrive to the territory of Hungary through a safe country. Thus I can accept the constitutionality of the criminalisation of the actions of organising and facilitating such conduct.

Budapest, 25 February 2019

Dr. Béla Pokol Justice of the
Constitutional Court

Dissenting opinion by Justice *Dr. László Salamon*

[120] In my view, with regard to the petitioner, the direct, personal and actual affectedness required by Section 26 (2) of the ACC and according to the relevant case law of the Constitutional Court does not exist.

[121] As only a natural person can be the perpetrator of the conduct specified in the challenged statutory definition of the Criminal Code, the fulfilment of the above conditions by the petitioning legal entity is conceptually impossible. Undoubtedly, if the specific actions of the persons listed in the Act implement all the elements contained in the statutory definition of the criminal offence under review, the legal entity should count with the application of the Act. However, I hold that the link between the reviewed provision of the Criminal Code and the petitioner as a legal entity is conditional and indirect to such extent that does not qualify as direct, personal and actual affectedness.

[122] In the case of the explicitly exceptional constitutional complaints under Section 26 (2) of the ACC – in particular with regard to penal laws that bind everyone the same way – I cannot agree with the broad interpretation of the petitioners' affectedness, as it would qualify as the repeated acknowledgement of *actio popularis* in certain cases, or at least it could justify a practice of the Constitutional Court very similar to that (which, at the same time, would be slightly unpredictable and casual in the future, due to the case-by-case assessment). In addition to the fact that the high level of uncertainty associated with opening up this option would not be evidently beneficial for the petitioners seeking justice with such petitions either, it is also clearly contrary to the will of the legislator manifested in Article 24 (2) of the Fundamental Law and in Section 26 of the ACC.

[123] Based on the above arguments, I hold that the admissibility of the constitutional complaint should have been rejected due to the lack of the petitioner's affectedness.

Budapest, 25 February 2019

Dr. László Salamon Justice of the
Constitutional Court

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