DECISION 19/2017 (VII. 18.) AB

In the matter of a judicial initiative seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of a decision of the Curia adopted in proceedings to safeguard the uniformity of the law, ,with concurring reasoning by Justice *dr. Béla Pokol* and with dissenting opinions by Justices *dr. Ágnes Czine, dr. Ildikó Hörcher,Marosi, dr. Lászlo Salamon, dr. István Stumpf, dr. Marcel Szabó* and *dr. Péter Szalay, the Constitutional Court, sitting as the Full Court,,* adopted the following

d e c i s i o n :

The Constitutional Court holds that the decision of the Curia adopted in proceedings to safeguard the uniformity of the law in criminal law, Uniformity Decision No 2/2016 BJE on interpreting sexual violence against a person under the age of 12 years is in conflict with the Fundamental Law; therefore, the Court hereby annuls said decision on the uniform application of the law as of 31 October 2017.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

R e a s o n i n g

I

[1] By Order No 6.B.1226/2016/9, the judge of the Szolnok Court of Law (hereinafter referred to as the "First Petitioner"), by Order No 8.B.879/2016/16-II, the judge of Budapest High Court (hereinafter referred to as the Second Petitioner) ordered a stay in the criminal procedure pending before the court and pursuant to Article 24 paragraph (2) (b) of the Fundamental Law and Section 25 (1) and Section 37 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") requested the Constitutional Court to find that the decision of the Curia adopted in proceedings to safeguard the uniformity of the law in criminal law, Uniformity Decision No 2/2016 BJE on interpreting sexual violence against a person under the age of 12 years (hereinafter referred to as the "the Criminal Uniformity Decision") was in conflict with the Fundamental Law. As stated by the petitioners, the Criminal Uniformity Decision is in conflict with Article C) (1) and Article 25 (3) of the Fundamental Law, and it also violates Article XXVIII paragraph (4), therefore, with reference to Article 45 (4) and Article 45 (6) of Constitutional Court Act, they sought the

annulment of the Criminal Uniformity Decision with *ex tunc* effect as well as the review of the criminal procedures closed with a final decision, adopted with the application of the Criminal Uniformity Decision.

[2] 1. Based on the facts of the criminal case pending before the First Petitioner, the county chief prosecution office brought charges because of a single criminal offence of sexual violence committed to the detriment of a family member under the age of 12 years as defined in Section 197 (2) of Act C of 2012 on the Criminal Code (hereinafter referred to as the "Criminal Code") and classified under Subsection (4) (a) of the Criminal Code, with regard to Subsection (3) (b) thereof. As described in the facts of the case, relevant with respect to the petition and contained in the indictment, in the course of the year 2014, at a date that cannot be specified in more detail, the accused approached with a sexual intention the victim under the age of 12 years, who was his sister-in-law (the sister of his spouse). During family gatherings in their homes and upon meeting in the street, the accused acclaimed the womanly body figure of the victim, and in the period between February 2014 and March 2015 there were a minimum of three occasions when he embraced the victim, touched her breasts through her clothes and tried to stroke her genitals by reaching into her underwear, but did not succeed because of the defence exerted by the victim. As stated in the petition, the indictment brought by the county chief prosecution office complied with the classification found in the operative part of the Criminal Uniformity Decision.

[3] 2. In the criminal case pending before the Second Petitioner, the Budapest-Capital Chief Prosecution Office brought charges because of a three counts of cumulative criminal offences of sexual violence committed to the detriment of a person under the age of 12 years in the custody of the perpetrator, violating Section 197 (1) (b) of the Criminal Code and classified under Subsection (4) (a) of the Criminal Code, with regard to Subsection (3) (b) thereof, two counts of cumulative criminal offences of sexual exploitation committed to the detriment of a person under the age of 14 years, violating Section 196 (1) of the Criminal Code and classified under Subsection (3) of the Criminal Code, two counts of cumulative criminal offences of sexual exploitation committed to the detriment of a person under the age of 18 years in the custody of the perpetrator, violating Section 196 (1) of the Criminal Code and classified under Subsection (2) (a) and (b) of the Criminal Code, the criminal offence of child pornography committed by taking a pornographic recording of a person under the age of 18 years to the detriment of a person in the custody of the perpetrator, violating Section 204 (1) (b) of the Criminal Code and classified under Subsection (2) thereof and the criminal offence of child pornography committed by taking pornographic recordings of persons under the age of 18 years, violating Section 204 (1) (a) of the Criminal Code. The court established in Order No 8.B.879/2016/16-I that the acts included in the indictment contained partial acts that had taken place before the victims reached the age of 12 years, and those partial acts may also be classified, differently from the charges, with regard to the Criminal Uniformity Decision, as a criminal offence of sexual violence, violating Section 197 (1) and classified under Subsection (4) (a) of

the Criminal Offence, with regard to Subsection (2) and Subsection (3) (b) thereof. Second Petitioner, in its supplementary petition dated 10 February 2017, clarified its petition by requesting on the basis of Section 25 (1) of Constitutional Court Act the establishment of the the Criminal Uniformity Decision's conflict with the Fundamental Law and the exclusion of its applicability in the individual case pending before the court.

[4] 3. According to the petitioners, the Criminal Uniformity Decision has taken an affirmative position in the question of the applicability of the qualifying circumstance set forth in Section 197 Subsection (3) (b) of the Criminal Code to the basic case defined in Subsection (2) and the thus provided a possibility to classify the act under Subsection (4) (a). The petitioners claim that the Criminal Uniformity Decision, by not clarifying the dogmatic character of Subsection (2), taking it the more as a qualified case, but not stating this clearly either, reaches a result that the family member of a victim under the age of 12 years shall face imprisonment between five to fifteen years both where the sexual act is committed without coercion, with the victim's consent, and also if the act is performed by way of forcing the victim through violence or qualified threat. According to the petitioners, the uncertainty of the classification by the Curia is demonstrated by the mere fact that the operative part of the Criminal Uniformity Decision qualifies the act in general as the violation of Subsection (1), although two parts of it [points (a) and (b)] conceptually exclude each other. In contrast with that, the petitioners argue, essentially in the same way, that Section 197 Subsection (2) of the Criminal Code evidently constitutes an independent basic case that does not contain the element of coercion or the using of the child's state. This follows from Subsection (3) that lists the qualified cases by clearly stating that the qualifying circumstances described there are applicable to the basic cases defined in Subsection (1) and not to the basic case described in Subsection (2). The petitioners hold that the same interpretation is also supported by Section 197 (4) (a) of the Criminal Code that applies to the cases described in Subsection (1) (a) or in Subsection (3) (b) or (c), without any reference back to the basic case specified in Subsection (2).

[5] The Second Petitioner also believes the historical interpretation by the Curia in the Criminal Uniformity Decision to be false, whereby it makes a comparison between Section 197 of the Criminal Code and the "predecessor offences", Section 197 and Section 198 of Act IV of 1978 on the Criminal Code (hereinafter referred to as the "former Criminal Code"), but it fails to take note of the fact that the qualified case described in Section 197 (3) of the former Criminal Code was only applicable when the child under the age of 12 years had been forced to sexual intercourse or to sexual assault through violence or qualified threat. Thus, as claimed by Second Petitioner, the historical interpretation may give ground to draw a conclusion contradicting the Curia's standpoint. According to the petitioners, the reference made in the Criminal Uniformity Decision to the provisions of the Directive 2011/93/EU of the European Parliament and of the Council (hereinafter referred to as the "Directive") is erroneous both in terms of the premise and the methodology of the arguments. In accordance with Article 2 (b) of

the Directive, the Member States shall specify the age of sexual consent, and Article 3 (5) contains a differentiated regulation with account, among others, to whether the victim reached the age of sexual consent, or whether the perpetrator applied any coercion. In line with the above, with regard to victims under the age of sexual consent, the upper limit of the sentence specified in the Directive is at least eight years in case of committing the crime "without violence" and at least ten years in case of committing it violently. Indeed the legislator adopted much more severe regulations, as even in the basic case under Section 197 (2), the upper limit of the sentence is ten years, and in the case of applying force, as much as fifteen years of imprisonment may be imposed on the basis of Section 197 (4) (a) of the Criminal Code. As stated by the petitioners, although a reference is made in the Criminal Uniformity Decision to Article 28 of the Fundamental Law, in fact it does not apply the teleological interpretation resulting from it, it refers instead to the presumed intentions of the legislator, that is, it attempts to justify its position by way of a subjective teleological method of interpretation. However, as to the petitioners' arguments, conclusions about the purpose of a legal rule should be drawn from its own text and not from the reasoning provided by the minister, even more so as the minister's reasoning itself is rather cloudy or indeed false concerning the qualification system, specifying as a qualified case the committing of the offence to the detriment of a person incapable of self-defence. The petitioner also claims that the systematic interpretation of the reasoning of the Criminal Uniformity Decision is erroneous, whereby the qualification systems of sexual violence regulated in Section 197 of the Criminal Code and of sexual exploitation regulated in Section 196 of the Criminal Code are compared. Section 196 of the Criminal Code only orders to punish coercion-based acts, while the interpretation result established in the Criminal Uniformity Decision actually causes the more severe qualification of acts without coercion. The petitioner notes, moreover, that in fact the legislator picked out the examined statutory definition from the definition of sexual abuse (Section 198 of the Criminal Code) and not from sexual exploitation, and in this context, the enhanced protection under criminal law is not to be challenged. Based on the above, the petitioners hold that the Criminal Uniformity Decision in fact has not interpreted the norm, but extended, in conflict with the clear and unambiguous normative text, the scope of application of Section 197 (3) (b) and of the second phrase of Subsection (4) (a) to the detriment of the perpetrator, that is, it created a norm aggravating the liability, although there had been no question of legal interpretation requiring a solution to be reached with a teleological method, by way of secession from the text. Finally, the Second Petitioner made references to certain decisions of the Constitutional Court, including certain statements concerning the "limitations of judge-made law" in the Decision No 42/2004 (XI. 9.) AB, Decision No 11/2015 (V. 14.) AB and Decision No 2/2016 (II. 8.) AB, since, with regard to these decisions, the Criminal Uniformity Decision

is not an interpretation of the law, but legislation, moreover, a legislation aggravating liability,, therefore it is in conflict with Article C) Subsection (1), Article XXVIII Subsection (4) and Article 25 Subsection (3) of the Fundamental Law.

II

[6] 1. The provisions of the Fundamental Law affected by the petition read as follows:

"Article C) (1) The Hungarian State shall function based on the principle of the distribution of executive powers."

"Article XXVIII (4) No one shall be held guilty of any criminal offense on account of any act which did not constitute a criminal offense 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."

"Article 25 (3) In addition to those specified in Subsection (2), the Curia shall ensure uniformity of the application of the law by the courts, and make decisions on the unity of law which shall be binding on the courts."

[7] 2. At the time of publishing the Criminal Uniformity Decision, the effective provisions of the Criminal Code on sexual violence were as follows:

"Section 197 (1) Sexual violence is a felony punishable by imprisonment between two to eight years if committed:

a) by force or a direct threat against life or physical integrity,

b) by exploiting a person who is incapable of self-defence or unable to express his / her will, for the purpose of a sexual act.

(2) Sexual violence shall also include, and the penalty shall be imprisonment between five to ten years if the perpetrator commits a sexual act upon a person under the age of twelve years, or induces such person to perform a sexual act.

(3) The penalty shall be imprisonment between five to ten years if the criminal act described in Subsection (1) is committed:

(a) against a person under the age of eighteen years;

(b) by the perpetrator against a family member or against a person who is in the care, custody or supervision of or receives medical treatment from the perpetrator, or if abuse is made in position of other authority or influence over the victim; or

(c) by more than one person on the same occasion, in knowledge of each other's acts.

(4) The penalty shall be imprisonment between five to fifteen years if:

a) the criminal offence defined in Subsection (1) (a) and in Subsection (3) (b) or (c) is

committed against a person under the age of twelve years; or

b) if the offence specified in Subsection (3) (a) qualifies also under Subsection (3) (b) or (c).

(5) Any person who provides the means necessary for or facilitating the committing of sexual violence is guilty of a felony punishable by imprisonment not exceeding three years."

[8] 3. The operative part of the Criminal Uniformity Decision reads as follows:

"The criminal offence of sexual violence committed against a victim under the age of 12 years shall violate Section 197 Subsection (1) of Act C of 2012 on the Criminal Code and it shall qualify according to Subsection (4) (a), if the victim is a family member of the perpetrator or the victim is in the care, custody or supervision of or receives medical treatment from the perpetrator, or if abuse is made in position of other authority or influence over the victim, irrespectively to the fact whether the offence was or was not committed by coercion."

III

[9] 1. First the Constitutional Court determined whether the judicial initiatives comply with the criteria set forth in the Constitutional Court Act. Pursuant to Section 25 (1) of Constitutional Court Act, a judge, in the course of the adjudication of a specific case in progress, is bound to apply a legal regulation that he or she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall order a stay in the the judicial proceedings and, in accordance with Article 24 (2) (b) of the Fundamental Law, submit a petition seeking a finding that the legal regulation or a provision thereof is contrary to the Fundamental Law, and / or the exclusion of the application of the legal regulation contrary to the Fundamental Law. In the present case, the petitions are aimed at a finding that a decision by the Curia on the uniform application of the law (hereinafter referred to as a "uniformity decision"), rather than a legal regulation or a provision thereof is contrary to the Fundamental Law. However, pursuant to Section 37 (2) of the Constitutional Court Act, in the course of a norm control in specific cases on judicial initiative, the Constitutional Court shall review conformity with the Fundamental Law of uniformity decisions as specified in Article 25 (3) of the Fundamental Law, during which, the rules on the norm control of legal provisions shall be applied to the petitioners, the proceedings and the legal consequences. The judicial initiative seeking an individual norm control shall contain an explicit request pursuant to Section 52 (1) and (1b) of Constitutional Court Act. The request shall be held explicit if it indicates a reference to the competence of the Constitutional Court to adjudicate the petition, and establishes that the entity has the right to submit petitions, the reasons for initiating the proceedings, the provisions of the Fundamental Law that are violated, and if its

reasoning is relevant under constitutional law. As further criteria of an explicit request, it should indicate the challenged legal regulation (uniformity decision), and it should contain an explicit request for the establishment of being contrary to the Fundamental Law and for the exclusion of its application.

[10] 2. The judicial initiatives concerned contain the reference to the competence of the Constitutional Court and to the entitlement of the petitioners, contain the reasons for commencing the procedure, indicate the provisions of the Fundamental Law deemed to be violated and the uniformity decision to be examined, as well as a justification of why the Criminal Uniformity Decision is held to be contrary to the relevant provision of the Fundamental Law. With regard to the provisions of Section 25(1) of Constitutional Court Act, the Constitutional Court was also required to assess the necessity to apply the the Criminal Uniformity Decision. In this context, the Constitutional Court established, with regard to the age of the victims under 12 years at the time of committing the criminal offence, the character and the circumstances of the acts, as well as the family relations and supervising relations between the victims and the perpetrators, that the petitioners submitted a petition for reviewing a uniformity decision that they should apply in the criminal procedure pending before them. Based on the foregoing, the Constitutional Court holds that the judicial initiatives comply with the conditions prescribed in Section 25 (1) and Section 52 (1) and (1b) of the Constitutional Court Act.

IV

[11] The petitions are well-founded.

[12] 1. As stated by the petitioners, the Criminal Uniformity Decision is in conflict with Article (C) paragraph (1), Article XXVIII paragraph (4) and Article 25 paragraph (3) of the Fundamental Law, as the Curia has not interpreted the law, but performed legislation aggravating liability.

[13] 2. In part I of the reasoning for the Criminal Uniformity Decision, the Curia presented some criminal procedures where the perpetrator of an act violating Section 197 (2) of the Criminal Code, committed without violence or qualified threat, was the family member or a supervising person of the victim, who was under the age of 12 years. In the presented proceedings, the fundamental difference between the judgements, in certain cases between Orders establishing competence, adopted in the course of the procedure, having relevance with respect to the debated legal issue, handed down by the courts of first instance and of second instance was whether they qualified the relevant act pursuant to Section 197 (2) of the Criminal Code, or as an act violating Section 197 (2) of the Criminal code, but qualified pursuant to Subsection (4) (a) with regard to Subsection (3) (b). The the Criminal Uniformity Decision then, in the reasoning, provides an overview of the regulations in the former Criminal Code on rape

and sexual assault, the reasoning of the Criminal Code, and compares the statutory definitions of sexual violence and sexual exploitation regulated in Chapter XIX of the Criminal Code ("Offences against sexual freedom and sexual offences"). By quoting the text of the reasoning attached to the Criminal Code, the Criminal Uniformity Decision presents Article 2 points (a) and (b), Article 3 paragraph (5) points I, II and III of the Directive, and indicates Article 3 paragraph (6) of the Directive, as well as Article 18 paragraph (1) (b) of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (hereinafter referred to as the "Lanzarote Convention").

[14] 3. The Constitutional Court first provided an overview of the provisions of the Lanzarote Convention and of the Directive that had been referred to by the the Criminal Uniformity Decision by way of the reasoning attached to the Act of Parliament.

[15] 3.1 Hungary had signed the Lanzarote Convention on 29 November 2010 and although it was only published in Act XCII of 2015 on 2 July 2015, one may establish that the provisions of the Convention were taken into account by the legislator in formulating the Criminal Code. In accordance with the reasoning attached to the draft Act submitted on 27 April 2012 under the document number T/6958, the Lanzarote Convention was explicitly one of the international documents that made it necessary to implement changes to the regulation on "sexual offences", pursuant to the definition used in the former Criminal Code. Article 18 (1) (b) of the Lanzarote Convention referred to in the reasoning of the Criminal Code (and through it, in the Criminal Uniformity Decision) provides for the following:

"Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised: [...] b. engaging in sexual activities with a child where:, use is made of coercion, force or threats; or, abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or, abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence."

[16] Pursuant to Article 3 (a) of the Lanzarote Convention, a "child" shall mean any person under the age of 18 years, while Article 18 (2) vests each Party with the power to decide the age below which it is prohibited to engage in sexual activities with a child. By examining the individual statutory definitions set forth in Sections 196 to 198 of the Criminal Code, the Constitutional Court established, by taking into account the age limits applicable to the victim (and to the perpetrator), as well as the qualification system pursuant to other criteria, that the statutory regulations on sexual exploitation, sexual violence and sexual abuse comply with the requirements prescribed in the quoted provision of the Lanzarote Convention. The above provisions of the Criminal Code coherently regulate and criminalize the sexual acts committed against children with regard to passive subjects under the age of eighteen (in specific cases, under the

age of twelve or fourteen) by taking into account the age of the perpetrator as well.

[17] 3.2 The text of the Directive quoted by the legislator, and by the Criminal Uniformity Decision, is as follows:

"Aricle 3 Offences concerning sexual abuse

[...]

5. Engaging in sexual activities with a child, where:

(i) abuse is made of a recognised position of trust, authority or influence over the child, shall be punishable by a maximum term of imprisonment of at least 8 years if the child has not reached the age of sexual consent, and of at least 3 years of imprisonment, if the child is over that age; or

(ii) | abuse is made of a particularly vulnerable situation of the child, in particular because of a mental or physical disability or a situation of dependence, shall be punishable by a maximum term of imprisonment of at least 8 years if the child has not reached the age of sexual consent, and of at least 3 years of imprisonment if the child is over that age; or

(iii) use is made of coercion, force or threats shall be punishable by a maximum term of imprisonment of at least 10 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment if the child is over that age.

6. Coercing, forcing or threatening a child into sexual activities with a third party shall be punishable by a maximum term of imprisonment of at least 10 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment if the child is over that age."

[18] As the operative part of the Criminal Uniformity Decision contains a regulation pertaining to acts committed to the detriment of victims under the age of 12 years, the Constitutional Court examined in this respect the quoted provisions of the Directive. The Constitutional Court established that the upper limits of the sentence in the context of the basic case and the qualified cases of the offence of sexual violence regulated in Section 197 of the Criminal Code, if he victim is under the age of 12 years, are ten and fifteen years respectively, therefore the regulation in the Criminal Code is deemed to comply with the minimum requirements specified in the quoted provisions of the Directive [as to be determined in the national law pursuant to Article 2(b)] regarding the criminal offences committed against persons under the age of sexual consent. However, the Constitutional Court also establishes that on the basis of Article 27(1) of

the Directive, the Member States had the obligation to bring into force the laws necessary to make the Member States' regulations comply with the Directive by 18 December 2013. The Directive bears no direct applicability concerning the jurisdiction and thus the securing of the uniformity of the application of law. Finally, the Constitutional Court also notes that although the reasoning of the Criminal Uniformity Decision made some indirect references to the presented texts of the Lanzarote Convention and of the Directive, it has not drawn any conclusion from them regarding the relevant provisions of the Criminal Code, or about their compliance. Therefore, with due account to the above, the Constitutional Court has not carried out any procedure on examining the relevant normative text of the Criminal Code, with regard to the Lanzarote Convention due to the above reasons, and due to the lack of competence with regard to the Directive. It should be noted, nevertheless, that such a request has not even been filed by the petitioners.

[19] 4. In the framework of historical interpretation, the Criminal Uniformity Decision makes a reference to the provisions of the former Criminal Code as follows: "in Section 197(3), with regard to Subsection (2)(b), it ordered to punish the perpetrator of rape with imprisonment from five to fifteen years, if the victim under the age of 12 years was in the care, custody or supervision of or receives medical treatment from, the perpetrator, or if rape was committed by the perpetrator abusing his intimate or other relationship of power or dominance with the victim. The same punishment was applicable in the case of the criminal offence of sexual assault, pursuant to Section 198(3), with regard to Section 198(2)(b), if the victim under the age of 12 years was in the care, custody or supervision of or receives medical treatment from, the perpetrator, or if sexual assault was committed by the perpetrator abusing his intimate or other relationship of power or dominance with the victim. The Criminal Code orders to punish this criminal offence formerly regulated in two different statutory definitions, as rape and sexual assault, in one, condensed statutory definition, denominating the offence as sexual violence."

[20] In the context of making a reference to the "predecessor offences", the Constitutional Court finds it justifiable to recall that the Criminal Code provided an entirely new regulation of the scope of "sexual offences" pursuant to the former Criminal Code's terminology (of the title). The change of the chapter title of the Criminal Code (""Offences against sexual freedom and sexual offences") is a clear indication of the legislator's attitude change, also presented in further elements of the regulation. The changes included, among others, the names of the criminal offences, the individual statutory definitions, the regulation of qualified cases, and, as the most important change with regard to the legal question concerning the scope of passive subjects examined by the Criminal Uniformity Decision, the termination of the presumption of law about the incapability of self-defence of the persons under the age of 12 years that had been laid down in Section 210 of the former Criminal Code (and in Section 290 of Act V of 1961 on the previous Criminal Code). Due to these changes, it may be justified

to question the reasonableness of comparing the regulations of the former and the present Criminal Codes, for the purpose of identifying the legislator's intentions related to the level of the punishment. It may be established; however, when examining the case solely from the aspect of the level of the punishments, that the Criminal Code's regulation is altogether more severe than the previous regulation as it terminated, in the case of victims under the age of 12 years, the imprisonment of two to eight years applicable in the basic case, and, again in the case of victims under the age of 12 years, it terminated the imprisonment of five to fifteen years for certain qualified cases. The qualified case pursuant to Section 197 (3) of the former Criminal Code, as referred to by the Criminal Uniformity Decision, was only applicable, and in this respect the Constitutional Court shares the position taken by petitioner II, in the case of committing the offence by using coercion or qualified threat, therefore the comparison could not be suitable to support the statement made in the operative part of the Criminal Uniformity Decision, even if the regulation would not have been changed fundamentally.

[21] 5. In the context of the systematic interpretation, the Criminal Uniformity Decision explains the basic and qualified cases of sexual exploitation regulated in Section 196 of the Criminal Code, as well as the qualification system of sexual violence regulated in Section 197, on the basis of which it establishes the following: "Thus, if the intention of the legislator had been to provide a punishment more severe than regulated in Section 197 (2) regarding the criminal offences against persons under the age of 12 years, committed in the manner as specified in the qualified cases, only due to committing the sexual violence by using force or qualified threat, it would have been sufficient to consider the sexual acts performed with or having made to perform- without coercion, by a person under the age of 12 years, as being regulated in Section 196, in accordance with the above arguments,, and then, as they are also included in the scope of persons under the age of 18 years, it would not have been necessary to specify separately in Section 197(4)(a) the sexual coercion committed against them with force or qualified threat. By adopting a legal regulation that considers as sexual violence the mere sexual act, without coercion, performed with or having made to perform by a person under the age of 12 years, the purpose of the legislator could not have been to provide the same, and not higher, protection under criminal law for the persons of such age as for those between the ages of 12 and 18 years."

[22] Regarding the systematic interpretation of the Criminal Uniformity Decision, the Constitutional Court points out the following: the legislator decided to regulate the sexual acts committed against persons under the age of 12 years within the framework of the statutory definition of sexual violence under Section 197 of the Criminal Code. Section 197 (2) of the Criminal Code considers as sexual violence also the sexual acts performed or having made to perform without coercion (pursuant to Section 459 (1) point 27 of the Criminal Code: "'sexual act shall mean sexual intercourse and any gravely

indecent and obscene act, intended to stimulate, maintain or satisfy sexual desire;"). If the perpetrator applies force or qualified threat, then, provided that the victim is under the age of 12 years, the qualified case under Section 197 (4) (a) of the criminal offence shall take place. At the same same time, this legislative decision means that in the case of an act committed against passive subjects under the age of 12 years, the Criminal Code excludes the possibilities of establishing the criminal offences of both sexual exploitation under Section 196 and sexual abuse under Section 198, therefore no conclusion may be drawn regarding the content of the norm of Section 197, its internal structure, from the comparison made by the Criminal Uniformity Decision in this respect.

[23] 6. In the course of interpreting Section 197 Subsections (1) and (2), the Criminal Uniformity Decision establishes the following: "It means that in Subsection (2) the legislator does not specify a conduct different from the one described in Subsection (1), to be considered as an independent statutory definition, it rather extends the sexual violence described in Subsection (1) to the case when the sexual act is performed against a person under the age of 12 years, irrespectively to the fact whether the perpetrator used coercion against the victim, but applying a punishment more severe than in Subsection (1)."

[24] In contrast with the position quoted above, the standpoint taken by the Constitutional Court is as follows: the offence of sexual violence can be performed either by way of force or qualified threat under Section 197(1)(a) of the Criminal Code, or by using a person who is incapable of self-defence or unable to express his/her will, or, pursuant to the provisions in Subsection (2),, only in the case of a person under the age of 12 years, by the mere fact of performing (having made to perform) a sexual act. The Subsections (3) and (4) establishing the qualified cases of sexual violence only refer to, partly by way of direct reference and partly by way of a referring clause, the phrases described in Subsection (1), thus it follows from the wording of the law that the perpetrator's basic case pursuant to Subsection (2), in line with the rules of contextual interpretation, shall not have a qualified case. The actual verification of whether or not force or qualified threat has taken place in the specific case shall always require assessment by the court proceeding with the case.

[25] 7. In accordance with the above, extending beyond point 3, the Constitutional Court also examined the historical, systematic, structural and contextual legal interpretation of the reasoning attached to the Criminal Uniformity Decision. In the course of this, taking into account exclusively the criteria of constitutional review,, it concluded that neither of the methods of interpretation mentioned in the reasoning support the legislative objective referred to by the Criminal Uniformity Decision. Indeed, when none of the other methods of interpretation accepted in interpreting the norms of the given branch of law can be applied to support the teleological interpretation, the judicial

decision aimed at securing the uniformity of law would almost necessarily take over the role of legislation.

[26] 8. The Constitutional Court has addressed in several earlier decisions the relation between the principle of the division of powers and the judicial power's independent law-interpreting activity. In the course of this, reinforcing its judicial practice, it pointed out, among others, that "there can be several potential constitutional solutions within the judiciary system for the purpose of securing the uniformity of applying the law". The mere fact of the judicial power providing uniform applicable content for the legal regulations would not violate the legislative power and the constitutional competence of the law-making branch of power within it. "Judge-made law" shall not be in conflict with the principle of the division of powers as long as it is exclusively based upon interpreting the legal regulations (until the judiciary power takes over fundamentally and directly the function of the legislation)." {Decision 2/2016 (II. 8.) AB, Reasoning [40]}The Curia is authorised, and at the same time bound, by Article 25(3) of the Fundamental Law to ensure uniformity of the application of the law by ordinary courts and to make uniformity decisions which shall be binding on the ordinary courts. The procedure applicable to the uniformity decision, along with the regulations on the institutions of authoritative court rulings and authoritative court decisions, as well as on the operation of groups analysing the jurisprudence of courts, is described in Sections 25 to 44 of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter referred to as the "Courts Organisation Act"). As follows from the quoted provisions of the Fundamental Law and Courts Organisation Act, it is within the constitutional powers of the Curia to judge, acting on the basis of the motion submitted by an eligible petitioner, whether or not a procedure for the uniformity of the application of the law may take place pursuant to Section 32 (1) (a) or (b) of Courts Organisation Act, and similarly, it is inevitably within the Curia's non-distractable scope of competence to decide about any issue of principle necessary for granting the uniformity of judicial practice.

[27] A uniformity decision, despite of having a normative character stemming from its general binding power upon the courts, is a judicial decision. Judicial decisions, however, do have their own limit, resulting from their source, the judicial power. This limit is nothing else but the consistent axiom of legal interpretation, which is also an achievement of our historical constitution, that subordinates the judicial decision under Acts of Parliament; this approach has been consistently enforced, with the exception of the periods of dictatorship, throughout Hungary's constitutional history of more than 1000 years. Act IV of 1869 on exercising judicial power refers to the same by stating that the judge may not question the validity of the Acts of Parliament.

[28] Section 19 "Judges shall act and judge pursuant to Acts of Parliament, the decrees made and published on the basis of Acts, and the customs of law. Judges may not question the validity of any Act of Parliament ordinarily published, however in certain cases

judges shall judge upon the lawfulness of decrees." Accordingly, the only limit is the subordination to Acts of Parliament. And this is a limit never to be crossed, neither in our constitutional past, nor in the present, primarily due to Article 26(1) of the Fundamental Law. Of course, the interpretation of the law bears some marks, in particular in the case of the Curia, that may allow this activity to approach the boundaries of legislation, but this shall not change the subordination to the rules of law. The interpretation of the law may only take place, either in the context of a particular legal debate, or, just as in the present case, for the purpose of securing the uniformity of the permanent judicial practice, within the framework of the legal regulation.

[29] Consequently, the judicial power may not take over fundamentally and directly the function of legislation from none of the organs empowered to legislate pursuant to the order of the division of powers. Pursuant to the reasoning of the Criminal Uniformity Decision, the motion for the uniformity of the law is aimed at making the uniformity of the law council qualify the conduct of a perpetrator who performs a sexual act with a person under the age of 12 years, being a family member of, or with a person who is in the care, custody or supervision of or receives medical treatment from the perpetrator, or if abuse is made in position of other authority or influence over the victim, or who makes such person to perform such an act."

[30] In the Criminal Code's system the legislator lays down in the general part the rules applicable to specific types of sentences, while in the specific part it determines the special minimum and maximum imprisonments attached to the specific statutory definitions, pursuant to the gravity of the criminal offences. In the present case, the Criminal Uniformity Decision has taken over the competence of the legislative power when has drawn the act committed without coercion as regulated in Section 197 (2) of the Criminal Code under the effect of coercion, that is, Section 197 (1) (a) of the Criminal Code for the purpose of making the courts handle the conduct as a qualified case when a specific qualifying circumstance exist (committing the offence against a family member of, or a person who is in the care, custody or supervision of or receives medical treatment from the perpetrator, or if abuse is made in position of other authority or influence over the victim).

[31] 9. In the view of the Constitutional Court, the wording of Section 197 of the Criminal Code does not raise the issue of the clarity of norms, as the content of the norm can be established. The Curia is not allowed to choose from the different judicial decisions arbitrarily (in discretionary power). Pursuant to Article 28 of the Fundamental Law, the uniformity decision shall be based on interpreting the relevant statutory provision in accordance with the Fundamental Law. At the same time, in the course of a potential future amendment, depending on the legislator's decision, of the regulation under Section 197 of the Criminal Code pertaining to victims under the age of 12 years, judicial

aspects may also be taken into consideration. As noted by the Constitutional Court, the regulation of the statutory definition of the basic case under Section 197 (2) of the Criminal Code results in disproportions not only in the scope of cases intended, with due reasons, considering the qualification system, to be regulated by the Criminal Uniformity Decision, but in other cases as well, for example in the case of what is known as the "multiple" commission of the offence, pursuant to Subsection (3) (c).

[32] The legislative solution, which does not allow to attach a qualifying circumstance to the basic case under Subsection (2) that may otherwise incorporate many potential conducts of committing the offence (together with other circumstances that bear relevance under criminal law) clearly undermines gradation and narrows down the chances for judicial weighing. Taking into account the annulment of the Criminal Uniformity Decision by the Constitutional Court, in the course of reviewing, after a decision of legal policy, the relevant provisions of the Criminal Code, the National Assembly shall be in the position of removing the sexual acts against children from the present framework and regulate it in the form of an individual statutory definition. In that case, the legislator may regulate the limits of the sentences of the basic and the qualified cases in a more proportionate way compared to the present provisions, taking into account the judicial aspects as well. Of course, the legislator would also be free to choose as a starting point, by also taking into account the annulment of the Criminal Uniformity Decision as from 31 October 2017, the approach applied by the Criminal Uniformity Decision in the course of amending the Criminal Code.

V

[33] Based on the above, the Constitutional Court established that in the course of adopting the Criminal Uniformity Decision, the Curia went beyond the authorisation granted in the Fundamental Law to secure the uniformity of applying the law, resulting in the violation of Article C) paragraph (1) of the Fundamental Law. As the Constitutional Court established the the Criminal Uniformity Decision's conflict with the Fundamental Law on the basis of Article C) (1) of the Fundamental Law, it dispensed with the review related Article XXVIII (4) and Article 25 (3) of the Fundamental Law as claimed in the petitions. Pursuant to Section 37(2) of Constitutional Court Act, in the course of posterior norm control, in the course of norm control in specific cases on judicial initiative, on the basis of constitutional complaints and in the course of examinations of conformity with international treaties, the Constitutional Court shall review conformity with the Fundamental Law or international treaties of legal acts for the governance of bodies governed by public law and of uniformity decisions as specified in Article 25(3) of the Fundamental Law. The rules on the norm control of legal provisions shall be applied to the petitioners, the proceedings and the legal consequences. In general, pursuant to Article 45(1) of Constitutional Court Act, the legal regulation or provision thereof annulled by the Constitutional Court shall cease to have

effect on the day after the publication of the Constitutional Court's decision on annulment in the Hungarian Official Gazette and shall not be applicable from that day; a legal regulation which has been promulgated, but has not yet entered into force shall not enter into force. However, the Constitutional Court may depart from the general rule when deciding on the repeal of a legal regulation contrary to the Fundamental Law or on the inapplicability of the annulled legal regulation in general, or in specific cases, if this is justified by the protection of the Fundamental Law, by the interest of legal certainty or by a particularly important interest of the entity initiating the proceedings [Section 45(4) of Constitutional Court Act]. Pursuant to Article 25(3) of the Fundamental Law, the Curia shall ensure uniformity of the application of the law by the courts, and make decisions on the unity of law which shall be binding on the courts. For the purpose of protecting this competence, and this way the Fundamental Law, the Constitutional Court decided on the *pro futuro* annulment of the Criminal Uniformity Decision. This way the decision provides the necessary time for the Curia to draw the consequences of the conflict with the Fundamental Law and to take the measures needed for the uniform application of the law.

[34] With regard to establishing a conflict with the Fundamental Law, pursuant to Section 44(1) of Constitutional Court Act, this decision shall be published in the Hungarian Official Gazette.

Budapest, 11 July 2017

Dr. Tamás Sulyok

Chief Justice 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* Justice of the Constitutional Court
Dr. Ildikó Hörcher-Marosi Justice of the Constitutional Court	*Dr. Imre Juhász* Justice of the Constitutional Court
Dr. Béla Pokol Justice of the Constitutional Court	Justice-Rapporteur *Dr. László Salamon* Justice of the Constitutional Court
Dr. Balázs Schanda Justice of the Constitutional Court	*Dr. István Stumpf* Justice of the Constitutional Court
Dr. Marcel Szabó Justice of the Constitutional Court	*Dr. Péter Szalay* Justice of the Constitutional Court
Dr. Mária Szívós	*Dr. András Varga Zs.*

Justice of the Constitutional Court Justice of the Constitutional Court

Concurring reasoning by Judge *Dr. Béla Pokol*

[35] I support the decision, but I favour a different way of reasoning. Pursuant to the majority decision, the annulment of the challenged uniformity decision is based on the violation of the principle of the division of powers. I cannot support this argument. This is, indeed, a declaration in the reasoning holding that the Curia is not entitled to create a legal norm, as it is the exclusive right of the legislator, and when the Curia does set a norm, it violates the principle of the division of powers. In reality, however, in contrast with the above, modern legal systems could not survive without the norm-creating activity of supreme courts, concretizing on a continuous basis the statutory norms that are necessarily open ones. It implies different volumes of normative masses in the various branches of law, and in Hungary in the recent years in the field of civil law, due to the exceptionally wide character of the legal norms of this field (e.g. general clauses and the abstract normative provisions of other open legal principles) even a specific Act of Parliament has been adopted for the implementation of the provisions of the uniformity decision, concretizing a former statutory provision of civil law (!) and the Constitutional Court found it acceptable in the Decision 34/2014 (XI. 14.) AB. Nevertheless, in criminal law, the Curia's freedom of interpretation in the field of creating legal norms is narrower than in most of the branches of law. Here the principle of *nullum crimen sine lege* strictly reserves for the legislator the right to formulate the statutory definitions of criminal offences, and this principle shall be deemed to be violated if the Curia implements the slightest extension of such a definition under the title of interpreting the law. Since this principle has also been incorporated into Article XXVIII (4) of the Fundamental Law as a constitutional guarantee of criminal law, the Constitutional Court should annul in the course of protecting the Fundamental Law any such norm created by the Curia.

[36] It should be therefore underlined with great emphasis that, with regard to the limits of the Curia's interpretation of the law, the principle of the division of powers and the principle of *nullum crimen sine lege*, setting much narrower limits of interpretation, are not "interchangeable" in criminal law. If we declare something about the interpreting role of the Curia on the basis of the former one, then we state it with respect to the whole legal system, even when this is not stated explicitly as in the present case,, but if we do it on the basis of the *nullum crimen sine lege* principle, then it is evidently applicable only within the realm of criminal law. The interpretation of the Curia challenged here was a violation of the latter principle and not of the principle of the division of powers by creating a norm. The Curia shall continue to be free to set norms within the wide limits of statutory norms, but in the field of criminal law, it has to pay

respect to the limits of setting norms as narrowed down by the principle of *nullum crimen sine lege*. This is why I hold that the majority reasoning was falsely based upon the violation of the principle of the division of powers, and I can only accept a reasoning of annulment based on the *nullum crimen sine lege* principle.

Budapest, 11 July 2017

Dr. Béla Pokol

Justice of the Constitutional Court

Dissenting opinion by Judge *Dr. Ágnes Czine*

[37] I can fully agree neither with the operative part of the decision, not the reasoning of it. In my view, the annulment of the Criminal Uniformity Decision would not solve the present situation in conflict with the Fundamental Law.

[38] 1. Pursuant to the majority decision, by adopting the uniformity decision, the Curia extended beyond the limits of interpreting the law and it took the place of the legislator. The Constitutional Court therefore ruled on the annulment of the Criminal Uniformity Decision. With regard to the annulment, I do not hold the arguments in point 7 of part IV of the decision to be convincing. The reference to the systematic, structural and contextual methods of interpreting the law, without presenting the interpreting process and the results, seems to be insufficient to support the Constitutional Court's statement that the judicial decision affecting the Criminal Uniformity Decision is already qualified as legislation. I hold that a well-founded decision would have required the detailed presentation of applying to the individual case the specific methods of interpreting the law, provided that it intends to draw conclusions on the merits in the context of such methods. Nevertheless, I also hold that by adopting the the Criminal Uniformity Decision, the Curia extended beyond the limits of interpreting the law and it provided a guidance to the courts that has no legal foundations in Section 197 of the Criminal Code. By assessing the judicial practice related to the criminal offence of sexual violence, one may establish that persons who exercise care, custody or supervision or who are in a position of authority or influence over the persons under the age of 12 years pose the most serious threat to such persons. At the same time, in Section 197 of the Criminal Code, the legislator fails to regulate explicitly and independently this very case of committing sexual violence. In my view, the deficiencies of the regulation raise constitutional concerns with regard to the requirements that may be raised in respect of the normative content. Therefore neither could I accept the statements made in point 9 of part IV of the decision in the context of the clarity of norms. In my opinion, the mere uncertainty in the relevant judicial practice and the divergent nature of the related decisions raise the possibility of the violation of the requirement of the clarity of norms. With regard to the above, I hold that the Constitutional Court should have assessed the concerns raised in the petition about the normative content.

[39] In the judicial practice of the Constitutional Court, the requirement of the clarity of norms stemming from Article (B) (1) of the Fundamental Law is in particular important in the context of the norms of criminal law, as they obviously restrict fundamental rights. Pursuant to the Constitutional Court's practice related to the constitutional requirements about the norms of criminal law, the examination of the constitutionality of a punitive norm shall include addressing the question whether or not the specific provision of the Criminal Code provides a moderate and adequate reply to the phenomenon considered as dangerous and unwanted, that is, whether it is restricted to the narrowest possible scope necessary for reaching the desired objective, in line with the conditions applicable in the case of restricting constitutional fundamental rights. In line with the guarantees of criminal law resulting from the Fundamental Law, the disposition describing a prohibited conduct by foreseeing a sanction under criminal law should be definitive, explicit and clearly formulated. The clear expression of the legislative will related to the protected legal subject and the conduct of committing the offence is a constitutional requirement. A clear message should be conveyed about when the individual is considered to commit a breach of law sanctioned under criminal law. At the same time, any potential arbitrary interpretation of the law by the judiciary should be prevented. {From the judicial practice of the Constitutional Court, see: Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176.; Decision 12/1999 (V. 21.) AB, ABH 1999, 106, 110-111.; Decision 95/2008 (VII. 3.) AB, ABH 2008, 782, 786.; Decision 4/2013 (II. 21.) AB, Reasoning [59]; Decision 31/2015 (XI. 18.) AB, Reasoning [50].} I hold it important to emphasize in this respect that the Constitutional Court has expressed in many decisions related to criminal law: it is not authorised to adopt a decision about the correctness and the reasons, in particular of the reasonableness and the effectiveness of the needs, requirements and aims formulated by criminal policy. The Constitutional Court may only decide about the constitutionality or unconstitutionality of a political decision embodied in a norm. However, it will do so in the framework of a constitutional review during which it shall take into account not only the text of the Fundamental Law, but also it normative and institutional context, as well as the provisions of the Criminal Code and the coherence of its institutions.

[40] Thus the Constitutional Court is empowered to set the constitutional limits of criminal policy without deciding about the content of the policy, and in this process it shall pay particular attention to the criminal law guarantees of protecting the fundamental rights. [Decision 1214/B/1990 AB, ABH 1995, 571, 573, 574.; Decision 13/2002 (III. 20.) AB, ABH 2002, 85, 90-91.]. Pursuant to the above, in the present case, the Constitutional Court should have examined whether or not the statutory definition of sexual violence complied with the criteria set forth by the Fundamental Law with respect to the content of norms, complying, at the same time, with the limitations of criminal law as set by the Fundamental Law, i.e whether the statutory definition was definitive, explicit and clearly formulated in specifying the scope of conducts to be punished. In my view, by examining the statutory definition, the Constitutional Court should have concluded that the wording of the statutory definition of sexual violence under Section 197 of the Criminal Code did not comply with the requirement on the definitiveness and the

explicitness of the sanction-setting norm, as deductible from Article B) (1) of the Fundamental Law. The statutory definition fails to provide an explicit regulation regarding the case when the passive subjects are persons under the age of 12 years and the perpetrators are adults who provide care, custody, supervision of the victim, they are family members of the victim, or if abuse is made of a recognized position of trust, authority or influence over the victim. This way, the regulation leaves ground for subjective judicial interpretation.

[41] 2. The judiciary, the Curia, perceived the uncertain and diverging character of the judicial practice related to the statutory definition of sexual violence, and, in compliance with its obligation under Article 25 (3) of the Fundamental Law, by adopting the Criminal Uniformity Decision, it tried to secure the uniform application of the law by the courts. It aimed to provide guidance for the courts to guarantee the uniform application of the law. Thus it was the purpose of the uniformity decision to make the courts follow the same criteria in the course of imposing punishments on the perpetrators of the offences when the passive subjects are persons under the age of 12 years and the perpetrators are adults who provide care, custody, supervision of the victim, they are family members of the victim, or if abuse is made of a recognized position of trust, authority or influence over the victim. At the same time, pursuant to Article 25 (3) of the Fundamental Law and Section 32 of the Courts Organisation Act, a procedure for the uniformity of the application of the law may take place in a question related to the application of the law. Therefore, in addition to providing guidance on the application of a provision of the law, the uniformity decision may not substitute any deficiency in the legal regulation. Accordingly, the Criminal Uniformity Decision was not the right tool to remedy the deficiency perceived in the regulation of Section 197 of the Criminal Code.

[42] 3. The above arguments may lead to two conclusions. On the one hand, the Criminal Uniformity Decision should be annulled as it lays down an interpretation of the law that has no statutory basis. On the other hand, pursuant to the above, the annulment of the Criminal Uniformity Decision does not solve the conflict with the Fundamental Law, resulting from the violation of the requirements related to the normative content, existing due to the deficiency of the regulation. In my opinion, the Constitutional Court should have reached both conclusions as the result of the examination on the merits. Thus, in addition to the decision's conflict with the Fundamental Law, it should have also realised that the annulment of the uniformity decision does not solve the existing constitutional problem. Although with the annulment of the Criminal Uniformity Decision, the uniformity decision in conflict with the Fundamental Law is removed from the legal system, but the deficiency of the regulation and the resulting judicial uncertainty would remain unsolved. The judicial practice affecting the application of the statutory definition would remain just as divergent as it was before the the Criminal Uniformity Decision. As a conclusion, pursuant to Article 25 (3) of the Fundamental Law, the Curia shall be again bound to adopt a uniformity decision by the courts. However,, pursuant to the above, a new decision of the same subject on the uniform application

of the law would not be suitable to eliminate the conflict with the Fundamental Law resulting from the deficiency of the regulation and connected to the normative content. I hold that the constitutional concerns presented with regard to the the Criminal Uniformity Decision examined in the this decision of the Constitutional Court shall also be applicable to a new decision of the same subject on the uniform application of the law, as the divergent interpretations of the law experienced in the judicial practice can only be excluded by way of legislation. I hold that the fact of annulling the decision by the Constitutional Court with *pro futuro* (for the future) effect is in particular problematic. This way the Constitutional Court intended, as laid down in part V of the decision, to provide the necessary time for the Curia *"to draw the consequences of the conflict with the Fundamental Law, and to take the measures needed for the uniform application of the law*". However, in my opinion, pursuant to what has been explained above, the Curia has no appropriate means to eliminate, in the case concerned, the conflict with the Fundamental Law. Therefore I hold that the Constitutional Court provided for maintaining the established conflict with the Fundamental Law without due ground and in the absence of any constitutional interest.

[43] 4. In my view, the constitutional problem could have been eliminated by the Constitutional Court by establishing a conflict with the Fundamental Law rendered by legislative omission, at the same time calling upon the National Assembly to perform its related legislative duty. I hold the majority decision to be controversial due to not providing for any legal consequence of this kind and for not imposing any duty on the legislator in the context of remedying the conflict with the Fundamental Law. Nevertheless, the reasoning of the decision contains some references to the potential legislative activity that supposed to follow the established conflict with the Fundamental Law. (For example point 9 of part IV of the decision refers to the criteria to be taken into consideration *"in the course of a potential future amendment, depending on the legislator's decision, of the regulation"*, and the option for the National Assembly to remove *"the sexual acts against children from the present framework and regulate it in the form of an individual statutory definition".)* Pursuant to Section 37(2) of the Constitutional Court Act, when the Constitutional Court examines upon a judicial initiative the conformity with the Fundamental Law of uniformity decisions, the rules on the norm control of legal provisions shall be applied to the petitioners, the proceedings and the legal consequences. Thus, even in the case of reviewing a uniformity decision, in theory, the Constitutional Court may establish a constitutional omission as the result of its procedure. In the specific case it would be justified by Section 46(2)(c) of Constitutional Court Act, that is, that the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete. It is beyond doubt that the petitioners submitted the petitions that form the basis of the present procedure of the Constitutional Court in the interest of the annulment of the Criminal Uniformity Decision and not in relation to Section 197 of the Criminal Code. However, as the Criminal Uniformity Decision interprets the provisions of Section 197 of the Criminal Code, it was necessary for the Constitutional Court to include the latter in the constitutional review. I hold that with regard to the above arguments and with the joint

interpretation of Section 37(2) and Section 46(2)(c) of Constitutional Court Act, the Constitutional Court should have concluded that the conflict with the Fundamental Law could be remedied by establishing an omission of legislative duty and it should have called upon the National Assembly to perform its legislative duty related to Section 197 of the Criminal Code.

Budapest, 11 July 2017

Dr. Ágnes Czine

Justice of the Constitutional Court

Dissenting opinion by Judge *Dr. Ildikó Horcherne dr. Marosi*

[44] 1. Pursuant to Article 25 (3) of the Fundamental Law, in addition to its judiciary activity, the Curia "shall ensure uniformity of the application of the law by the courts, and make decisions on the unity of law which shall be binding on the courts". The former Act on the organisation and administration of courts and the present Courts Organisation Act contain essentially the same provisions about the formal/procedural and substantial questions related to the decisions on the unity of law. Undoubtedly, the purpose and the function of the decisions on the unity of law are not to solve legal disputes. The "facts of the case" in the Curia's decisions on the unity of law is giving account of the judicial practice in a given question of law; the scope of the decision shall include the abstract interpretation of the content of the legal regulations applied in the litigations that raise the same questions of law, for the purpose of securing the uniformity of the judicial practice. Pursuant to the Fundamental Law, decisions on the unity of law shall bind the courts. Thus the binding force of the operative part of the uniformity decision, together with the related system of logical arguments, stems directly from the Fundamental Law, reinforced by the cardinal provisions of the Courts Organisation Act [Section 24(1)(c) and Section 42(1)]. The uniformity decision is not connected to Section 6 of the Courts Organisation Act that deals with the binding force of the court decisions passed in litigations. The operative part of the uniformity decision contains a normative rule for the adjudicating judges as any deviation from the decision may result in a well-founded legal remedy.

[45] Accordingly, the uniformity decision bears normative content; this is why it is often called a *quasi* norm or *intern* norm. "The special features of a uniformity decision originate, among others, from the fact that its source is the supreme judicial body, the Curia, and on the other hand that it is addressed to the courts, for whom the *intern* norm is binding regarding its operative part and the related system of logical arguments" {Decision 3114/2017. (V. 22.) AB, Reasoning [13]}. Two conclusions may be drawn from the above: first, the uniformity decision is not a "judicial decision", as interpreted pursuant to Article 24 of the Fundamental Law. Actually it is a judicial decision only in the sense that the uniformity of the law council is made up of judges, but otherwise it is not. Secondly, however, the competence-interpreting Decision 42/2005. (XI. 14.) AB, that has determined up till today the Constitutional Court's relation to the uniformity decision, founded its competence for review on the very fact

of the normative character of the uniformity decisions. Pursuant to this decision, the subjective side of normative control has become complete through the constitutional control over the uniformity decisions, completing the Constitutional Court's constitutional purpose, which is today based on the Fundamental Law (ABH 2005, 504, 512-514.). This judicial practice has been codified by the legislator in Section 37 (2) of Constitutional Court Act. Thus, in my interpretation, on the basis of a judicial initiative, the Constitutional Court exercises its competence of specific normative control when, as in the present case, it reviews the compliance with the Fundamental Law of a uniformity decision. Therefore we should exercise extra caution, partly because the issue at stake is not only the constitutionality of a judicial (the Curia's) decision deciding in a specific legal debate, but also due to the integrity of the Curia's competence, based on the Fundamental Law, aimed at the uniformity of the judicial practice. The supreme guardian of the Fundamental Law should not grab the duty of securing the uniformity of the judicial practice as it would lead to a conflict with the Fundamental Law, as much as the one it might want to eliminate with its procedure.

[46] 2. Pursuant to Article C) (1) of the Fundamental Law, "the Hungarian State shall function based on the principle of the distribution of executive powers." The principle of the division of powers is a constituent element of the rule of law and it is among the functional principles of the rule of law, which is set out in the Fundamental Law, unlike in the Constitution, as a specific provision. At the same time, the Constitutional Court also provided a specific content to this operational principle in its practice deducted from Article 2(1) of the Constitution that has lost force. The essence of this practice is that it incorporates the organisational, competence-based, procedural and operational order of the most important functions of the rule of law. It is also clear that the enforcement of the principle of the division of powers shall exclude the joint exercising of functions, the concentration of power, the unlimited, arbitrary exercising of power by the State. Thus it is beyond doubt that in a state under the rule of law no branch of power should be unlimited or subject to no restriction. The risk of unlimitedness and that of the impossibility of restriction may arise to the least extent with regard to the judicial branch of power, as, unlike in the case of the executive and legislative (partial) powers, it is a politically inactive branch of power with no program to implement, and it is not bound to take part in daily political fights; to the contrary: it is stable and neutral {first in the Decision 38/1993 (VI. 11.) AB, ABH 1993, 256, 261252; most recently in the Decision 12/2017 (VI. 19.) AB, Reasoning [49]}. Therefore the concepts of the pursuit of concentrated power, singularity and single- centeredness are not applicable in the case of judicial power vested, as a part of divided public authority, with the function of the judiciary, the enforcement of the law.

[47] There are undoubtedly different views both in the legal literature and in the judicial practice of the Constitutional Court regarding the question whether the division of powers should be interpreted as a principle or as a normative rule. The normative function is supported by all statements made about the principle, examining the competence-bound operation of State bodies as an element of the material rule of law,

and refusing the unauthorised distraction of exercising competences. In that sense, the constitutional rule of the division of powers may form the basis of the constitutionality of an act of public authority. I do not want to argue with the above arguments. Indeed, I hold that Article C) (1) does possess normative content. This content, however, should only be "activated" in the absence of a special constitutional solution tailored to the question concerned, applicable to the release of the collisions found in the relations between State bodies, branches of power, parallel competences or specific conflicts. If such a specific provision can be found in the Fundamental Law, then the division of powers shall remain as a guiding principle, and the rule of law can and should be reinstated by enforcing the special rule. I could also explain it by stating that in such a case the violation of Article C) (1) is only a distant, deferred and indirect one. I hold that Article 25 (3) of the Fundamental Law is a provision that vest the special competence of the judiciary, as a partial power of the State's supreme authority, upon the judicial branch of power exercising this competence. Pursuant to the Fundamental Law, courts shall perform judicial activities in administering justice, including the adjudication in criminal cases, disputes of private law and administrative law, as well as performing norm control in a specific scope of lawfulness, as an "innovation" introduced by the Fundamental Law [Article 25 (1) and (2) of the Fundamental Law].

[48] The *quasi* norm-setting authorisation, binding upon the courts, is presented as the independent competence of the supreme judicial body, the Curia that serves the purpose of securing the unity of the judicial activity, in particular of the judicial practice. Accordingly, this competence is linked to the adjudicating activity, based on interpreting the law, of the judicial branch of power. This competence is specifically vested on the Curia; it may not be distracted from the Curia and it shall not be exercised instead of the Curia. However, on the other hand, the Curia is also bound by the above constitutional regulations: it exercises its competence within the limits of judicial activity, subordinated not only to the Fundamental Law, but, as a special feature of judicial power, to Acts of Parliament. The content of the normative part of the uniformity decision adopted by the supreme judicial forum should not be in conflict with the provisions of the Fundamental Law. This is an evident condition, and any conflict of content can be established relatively easily. At least it seems not to be more complicated than the constitutional review of a provision of the law. At the same time, it is much more interesting to address the issue of how could the Constitutional Court examine the formal unconstitutionality, or, as you like, its *ultra vires* character, of a uniformity decision, without taking over from the Curia the function of securing the uniformity of the law.

[49] 3. In my interpretation, determining the content of legal regulations, especially in the light of Article 28 of the Fundamental Law, is the duty of the courts engaged in judicial activity. Legal regulations come to life through the judgements delivered in the legal debates between the parties, or in other words: the content of law can be found in the series of judgements. In case of the same or similar questions of law, each and every judgement that follows the interpretation found in the preceding one (also) has a

stabilising effect, and it has a law-developing function as well, due to the individuality of the given litigation. The constant expansion of the content of law related to the judiciary is the judge-made law. In a state governed by the rule of law, it is an inevitable and necessary phenomenon, which has in its background the Fundamental Law's provision guaranteeing the judicial independence. I am convinced that a uniformity decision can only be an *ultima ratio* among the means of unifying the law, in particular with regard to the guidance found in the judicial practice of the Curia. Still, as a last resort, it should be applied when the judgements delivered in cases related to the same or similar questions of law take no account of each other, make each other's content uncertain, without developing the content of law, or indeed deteriorating each other. In this case, the function of a uniformity decision, as a special judge-made law,, in particular on the basis of the interpreting rule of the Fundamental Law (Article 28), is to determine and stabilize a content, which is in line with the Fundamental Law and with the objective purpose, that is, not some presumed purpose attributed to the legislator or set by the minister, through which the law may be enforced in a moral (and economic) manner serving reasonableness and the public interest. The Curia's position, pursuant to the Fundamental Law, at the top of the hierarchy of interpreting the law is justified by the fact that in principle it has the widest adjudicating horizon concerning the assessment of the compliance and the content of a specific legal regulation with regard to the totality of the legal system (serving constitutionality and the public interest). A uniformity decision is based on the Fundamental Law, but in a paradox way it is a judge-made law fixed at the moment of its inception as a *quasi* norm. With the exception of the cases of extreme deviations from the legal rules that can be identified without too much assessment, when the Constitutional Court itself examines the content of the statutory provision by applying the interpreting methods of the courts of general competence, it is deemed to take over the role of judicial development of the law as well as the role of unifying the judicial practice, instead of taking a position on the constitutionality of the judge-made law and about its limitations.

[50] 4. I can agree neither with the operative part of the decision, not the reasoning of it.

[51] 4.1. I hold that the Constitutional Court follows an arguable practice when it annuls a uniformity decision merely on the basis of claiming that the content of the legal regulation, in the interpretation of the Court, is different from the one attributed to it by the Curia's relevant uniformity of the law council. In contrast with the substantial and formal approach found in the Decision 42/2005. (XI. 14.) AB referred to in point 1, the recent practice has been shifted towards a formal approach [Decision 11/2015 (V. 14.) AB, 2/2016 (II. 8.) AB]. This direction, however, always raises (would raise) the question of where the borderline is that should/could be drawn between the Curia's interpretation of the law and its "legislative activity", between the uniformity decision adopted by the Curia "correctly" (that is, acting within its scope of competence) or *contra legem* [that is,: by extending beyond its competence, by the violation of Article C) (1) of the Fundamental Law, pursuant to the majority decision]. In the case of drawing this borderline, it is (it would be) justified to provide a dogmatic delimitation of legislation, interpretation of the law, "judge-made law". By relying on what has been

explained in points 2 and 3, I am convinced that the annulment of the uniformity decision can only be based upon the fact that the interpretation found in the decision (the "judge-made law") can be reached neither on the basis of the Fundamental Law, nor by applying any of the methods of interpretation accepted in the course of interpreting the norms of the relevant branch of law. However, this shall require more than providing a concurring grammatical interpretation, held by the Constitutional Court to be more convincing,: substantial reasons should also be provided to support the interpretation. First of all, the judicial interpretation, in particular the Curia's uniformity decision should be considered convincingly to be in conflict with the Fundamental Law if, in the given case, the violation of any provision granting a fundamental right can be detected.

[52] 4.2. Section 197(4) of the Criminal Code introduced a multi-level, so-called "superqualified" statutory definition. Due to the regulatory method of the qualification system, Section 197 of the Criminal Code undoubtedly requires interpreting. The content of the ten different criminal judgements presented in point I of the Criminal Uniformity Decision, under constitutional review on the basis of judicial motions, to be noted: without any motion from the accused's' side, provides a true illustration of the differences of interpretation within the judicial hierarchy. Accordingly, the Curia's action taken in its competence of securing the unity of law has been justified by the divergent judicial practice. For me, the *contra legem* character of the Curia's interpretation of the law in the Criminal Uniformity Decision is neither clear, nor undoubted; and neither is the reasoning of the majority decision convincing in this respect. Pursuant to the first phrase of Subsection (4) (a), coercion with force or qualified threat under Section 197 (1) of the Criminal Code, is in itself sufficient for establishing a more serious qualification in the context of victims under the age of 12 years. Thus, in the case of the second phrase of Subsection (4) (a) with challenged content, in fact, the question can only be whether establishing the existence of incapacity of self-defence is also necessary in addition to being a family member when the victims are under the age of 12 years. Consequently, it has been stated correctly in the normative operative part of the Criminal Uniformity Decision that coercion is not a necessary element of the statutory definition of the qualified case. In my view, the regulation on interpretation found in Article 28 of the Fundamental Law, is both an obligation and an authorisation for the judicial body. This provision of the Fundamental Law provided a new dimension to judicial independence, which is based upon Act IV of 1869 and which is considered by the Constitutional Court as an achievement of our historical constitution {Decision 33/2012 (VII. 17.) AB, Reasoning [72] to [81]}, and to the related competence of interpreting the law. Accordingly, the "judge-made law" should comply with the provisions of the Fundamental Law and, as I referred to it in point 3, it should be fitted into the entirety of the legal order serving the public interest. I hold that the operative part of the Criminal Uniformity Decision is fitted into the entirety of the legal order serving the public interest. As far as its content is concerned, the Criminal Uniformity Decision fully enforces the provisions under Article XVI (1) of the Fundamental Law. Pursuant to this provision: "every child shall have the right to the protection and care

necessary for his or her proper physical, intellectual and moral development". In compliance with the quoted provision of the Fundamental Law, the State is obliged to set up the institutional protection side of the fundamental right to be enjoyed by children who are vulnerable due to their age. The Curia should do nothing else but to contribute to it by acting in its scope of competence. I am convinced that if the Constitutional Court had included, acting in role of a kind of objective constitutional protection, Article XVI(1) as a reference point into the examination of the content of Section 197 of the Criminal Code, it would have reached another conclusion about the constitutionality of the Criminal Uniformity Decision.

Budapest, 11 July 2017

Dr. Ildikó Hörcher-Marosi

Justice of the Constitutional Court

[53] I hereby second to point 4 of the dissenting opinion.

Budapest, 11 July 2017

Dr. Marcel Szabó

Justice of the Constitutional Court

Dissenting opinion by Judge *Dr. István Stumpf*

[54] 1. I agree with finding a conflict with the Fundamental Law regarding the reviewed uniformity decision, and I also agree with the essential part of the majority decision's reasoning that supports the above statement. However, in my view, in the present case, the establishing of the conflict with the

Fundamental Law should have resulted in the retroactive or instant annulment of the uniformity decision: this would have been required to make the decision "complete". I hold that the *pro futuro* annulment, contained in the operative part of the decision, raises concerns both in theoretical and practical terms, therefore I could not support the decision. Pursuant to Section 45 (2) of Constitutional Court Act, if the Constitutional Court annuls a legal regulation applied in a specific case at judicial initiative, the annulled legal regulation shall not be applied in the case that lead to the proceedings of the Constitutional Court. Thus, by virtue of the law, an automatic prohibition of application shall be enforced in the case of *ex nunc* (and logically also in the case of *ex tunc)* annulment. A *pro futuro* annulment, however, creates uncertainty about the applicability of the Criminal Uniformity Decision in the underlying individual cases where the judges initiated the Constitutional Court's procedure. Perhaps, could the possible effect of *pro futuro* annulment be that in any ongoing case the judge in charge might decide whether to deliver a judgement before or after the effective date of annulment (31 October 2017), and the judge might apply or disregard the Criminal Uniformity Decision depending on the foregoing?

[55] I hold that the majority decision fails to serve the purpose of the uniform and calculable application of the law and thus the enforcement of legal certainty, as the above

questions are clarified neither in the operative part nor in the reasoning of the decision. Probably, also in terms of the unity of law, an immediate annulment would have been more preferable than temporarily maintaining the force of a uniformity decision, the applicability of which is questionable. I would have not only considered it indispensable to clarify the legal consequences of the majority decision, I also could not have agreed with all solutions. "In the Decision 35/2011. (V. 6.) AB adopted before the entry into force of the Fundamental Law and of Constitutional Court Act, the Constitutional Court established a constitutional requirement stating that the judge should decide in the relevant legal debate on the basis of the constitutional legal regulation, and it shall initiate the Constitutional Court's procedure when he or she notices that the law to be applied is unconstitutional [Decision 3136/2016 (VI. 29.) AB, Reasoning [16]}.

[56] In my view, this requirement can also be applied appropriately to uniformity decisions: the judge should decide in the relevant legal debate before the court not only on the basis of a constitutional legal regulation, but pursuant to a uniformity decision that interprets the constitutional legal regulation *in compliance with the Fundamental Law*. Taking all this into account, it would be thwarting, both in terms of constitutionality and pursuant to common sense, not to apply a prohibition of application to the decision's underlying cases with the judicial initiatives. Indeed, it would mean, despite of entertaining the judicial initiatives (submitted for the very reason of not to make the judges decide in their pending cases on the basis of a norm in conflict with the Fundamental Law), forcing the judges, without any compelling reason, to deliver their judgements in the individual cases on the basis of the Criminal Uniformity Decision, which is declared to be in conflict with the Fundamental Law. The *pro futuro* annulment applied in the present case reminds me of the folk-tale about the clever girl. It is a well-known tale about a king who ordered a girl, under threat of capital punishment, to give him a present and not to give it at the same time. The girl took a pigeon, put it in between two strainers, brought it to the king's court, but when she arrived, she set the bird free and it flew away. The present flew away, so she did give a present and she did not at the same time. In the tale, the clever girl was laudable because of her witty solution retorting the king's despotic conduct. Nevertheless, in my opinion, not letting the "present fly away" would be better suited to the Constitutional Court's duty, that is, if the Court establishes a conflict with the Fundamental Law, then we should draw the legal consequences clearly and resolutely in the interest of preventing any harm to the individual protection of rights.

[57] 2. I agree with the reasoning of the majority decision's holding that adopting the Criminal Uniformity Decision was a violation of the principle of the division of powers enshrined in Article C) of the Fundamental Law. However, in my view, the conflict with the Fundamental Law explored in the present case is not only a formal one: the continuation of the review could have lead to establishing the violation of the principle of *nulla poena sine lege* as well. Pursuant to the judicial practice of the Constitutional Court, as a consequence of this principle, guaranteed as a fundamental right under Article XXVIII (4) of the Fundamental Law,, the punishment imposed should not be more

severe than the punishment applicable at the time of committing the offence {Decision 30/2014 (IX. 30.) AB, Reasoning [24],[122]; Decision 16/2014 (V. 22.) AB, Reasoning [33]}. As established in point IV.8 of the majority decision's reasoning, the Criminal Uniformity Decision dragged the conduct regulated in Section 197 (2) of the Criminal Code under the effect of Section 197 (1) (a) of the Criminal Code for the purpose of making the courts evaluate the conduct, in the case a specific qualifying circumstance exists, as a qualified case under Section 197 (4) (a). The conduct under Section 197 (2) is punishable with imprisonment from five to ten years, while the conduct qualified under Section 197 (4) is punishable with imprisonment from five to fifteen years; thus in the latter case the maximum level of the punishment is longer by five years. If the Criminal Uniformity Decision implemented this (re)qualification, as established in the majority decision, by taking over the legislator's competence, then it allowed for imposing a punishment significantly more severe than the one that had been applicable under the law at the time of committing the offence. Such a uniformity decision, increasing the punishment as compared to the statutory provision, is against the principle of *nulla poena sine lege*.

[58] 3. Pursuant to point IV.9 of the majority decision's reasoning, the regulation of the basic case's statutory definition of Section 197 (2) of the Criminal Code results in a disproportionate situation, even beyond the scope of cases intended to be regulated in the Criminal Uniformity Decision. Pursuant to the reasoning, this legislative solution "clearly undermines gradation and narrows down the chances for judicial weighing", therefore it emphasizes that "in the course of reviewing, after a decision of legal policy, the relevant provisions," the legislator may determine the limits of sentences "in a more proportionate way compared to the present provisions". These remarks can be found in the reasoning following the end of the part examining compliance with the Fundamental Law; as they are comments of purely criminal policy nature, without any constitutional context, it is questionable whether it was the duty of the Constitutional Court to make such notes. However, as they are not related to providing grounds for the decision and they do not contain any interpretation of the Fundamental Law related to the future, I hold that they should not be reinforced or argued with. All that I consider worth pointing out in this respect is, from a constitutional aspect, that it is the duty of the legislator to determine the punishments of the specific types of human conducts evaluated as criminal offences, and in this context it enjoys a relatively wide discretion. The requirement of setting a specifically determined punishment of a specific criminal offence, or of making this punishment more severe could hardly be deducted from the Fundamental Law. This is indeed a fact, even if the statutory definition under criminal law protects such an important right or interest enshrined in the Fundamental Law as the right of the child to the protection necessary for his or her proper physical, intellectual and moral development [Article XVI (1)].

Budapest, 11 July 2017

Dr. István Stumpf

Justice of the Constitutional Court

[59] I join point 1 of the dissenting opinion by adding that, in my opinion, in the case of a uniformity decision, the consideration of legal certainty, pursuant to which, with *ex nunc* or *ex tunc* annulment, the relevant situation of life would remain unregulated, or the remaining regulation would become inapplicable due to the annulment of the provisions, should not play any role, as the annulment of the uniformity decision does not affect the legal regulation interpreted by it. Thus, the typical argument that may make the *pro futuro* annulment necessary in the case of legal regulations shall not be applicable to uniformity decisions.

Budapest, 11 July 2017

Dr. László Salamon

Justice of the Constitutional Court

Dissenting opinion by Judge *Dr. Péter Szalay*

[60] I agree neither with the legal consequence established in the operative part of the majority decision, the annulment with *pro futuro* effect, nor with the reasoning connected to it. In my opinion, the Criminal Uniformity Decision is not in conflict with the Fundamental Law; therefore the Constitutional Court should not have annulled it. Pursuant to the majority position, "in the course of adopting the the Criminal Uniformity Decision, the Curia went beyond the authorisation granted in the Fundamental Law to secure the uniformity of applying the law, resulting in the violation of Article C) (1) of the Fundamental Law." However, I hold that the interpretation of law provided by the Curia did not cross the border of legislation. Pursuant to Article 25 (3) of the Fundamental Law, the Curia shall ensure uniformity of the application of the law by the courts, and make decisions on the unity of law which shall be binding on the courts. In the present case, too, the Curia fulfilled this constitutional duty by adopting the Criminal Uniformity Decision; it did not wend beyond the limitations of interpreting the law when, upon perceiving the dividedness of the judicial practice, for the purpose of securing the uniform judicial interpretation of the law, it adopted a uniformity decision, establishing that, in the context of Section 197 of the Criminal Code, "in Subsection (2) the legislator does not specify a conduct different from the one described in Subsection (1), to be considered as an independent statutory definition, it rather extends the sexual violence described in Subsection (1) to the case when the sexual act is performed against a person under the age of 12 years, irrespectively to the fact whether the perpetrator used coercion against the victim, but applying a punishment more severe than in Subsection (1)." Nevertheless, should there still be a constitutional problem with regard to the statutory punishment applicable to those perpetrators of sexual violence who perform a sexual act with a victim under the age of 12 years or make such victims perform such act, provided that the victim is their family member or a person who is in

the care, custody or supervision of or receives medical treatment from the perpetrator, or if abuse is made in position of other authority or influence over the victim,, it should have been notified to the National Assembly by establishing a conflict with the Fundamental Law caused by omission, pursuant to Section 46(1) and (2) of Constitutional Court Act, instead of the annulment of the Criminal Uniformity Decision.

Budapest, 11 July 2017

Dr. Péter Szalay

Justice of the Constitutional Court