Constitutional judgment 3-4-1-13-15

JUDGMENT
in the name of the Republic of Estonia

Case number	3-4-1-13-15
Date of judgment	23 September 2015
Composition of court	Chairman: Priit Pikamäe; members: Eerik Kergandberg, Saale Laos, Ivo Pilving and Jüri Põld
Case	Review of constitutionality of § 141 (2) of the Penal Code to the extent that it prescribes six years' imprisonment as the minimum sanction for aggravated rape
Basis for proceedings	Tallinn Court of Appeal judgment [dated] X in criminal case X
Hearing	Written proceedings

OPERATIVE PART

To declare unconstitutional and repeal the sanction under § 141 (2) of the Penal Code to the extent that it prescribes six years' imprisonment as the minimum sentence for committing an act of a sexual nature without violence towards a child of less than ten years of age.

FACTS AND COURSE OF PROCEEDINGS

1. In a judgment [dated] X Harju County Court convicted X under § 141 (2) clauses 1 and 6 of the Penal Code (PC) and sentenced him to six years' imprisonment. X was convicted of having, repeatedly on different dates and at various unspecified times between January 2014 and 25 March 2014, placed his hand in the underpants of the seven-year-old victim and touching and caressing her genitals.

The court found that X's activity involved several aggravating features under the statutory definition of the offence, providing grounds to assess his guilt as aggravated. An aggravating circumstance under § 58 clause 4 of the PC is commission of the offence by X towards a person who is in a dependent family relationship with the offender. A mitigating

circumstance under § 57 clause 3 is the genuine remorse shown by X. Considering that X has no prior criminal and misdemeanour record, the court imposed on him the minimum sentence of six years' imprisonment prescribed as the sanction under § 141 (2) of the PC.

As the criminal case was heard by way of abridged procedure, the court reduced the sentence imposed by one third, i.e. to four years, under § 238 clause 2 of the Code of Criminal Procedure (CCrP).

2. X's counsel filed an appeal against the County Court judgment, seeking to reverse the County Court judgment as regards the sentence, to impose a less severe sentence on X, and to enforce the sentence either fully or partially on probation. Counsel requested initiation of constitutional review proceedings with regard to § 141 (in the version in effect since 23 December 2013) of the PC due to a conflict with the principle of equal treatment established under § 12 of the Constitution.

JUDGMENT OF THE COURT OF APPEAL

3. By judgment [dated] X Tallinn Court of Appeal partially reversed the County Court judgment and imposed a term of three and a half years' imprisonment on X under § 141 (2) clauses 1 and 6 of the PC, which it reduced by one third, i.e. to two years and four months, under § 238 (2) of the CCrP. The Court of Appeal declared § 141 (2) of the PC unconstitutional with regard to the minimum sanction prescribed under it.

4. The Court of Appeal found that § 61 (1) of the PC, which establishes a possibility, in the case of special circumstances, to impose a less severe sentence than the minimum sanction prescribed in the Special Part of the Code, was not applicable to X. In the appeal, the opinion was expressed that, in comparison with other potential acts of a sexual nature, the act of which the County Court convicted X was rather of a less severe nature. The Court of Appeal found that this did not constitute an exceptional circumstance within the meaning of § 61 (1) of the PC – a certain type of act that corresponds to the statutory definition of an offence cannot be exceptional within the context of the statutory constituent elements of the offence. The act should be exceptional in comparison with other similar acts; however, no such circumstances exist in the present case. The Court of Appeal also did not find any exceptional circumstances characterising the personality of the accused. The Court of Appeal did not consider the fact that X had no prior criminal record to be a circumstance calling for imposition of a lighter sentence than the minimum sanction, because law-abiding behaviour should be customary, not exceptional.

5. The sentence falling within the sentencing framework under § 141 (2) of the PC cannot be enforced on probation either under § 73 or § 74 of the PC. In line with the practice of the Supreme Court Criminal Chamber, the above provisions should be interpreted so that in case of suspension of the sentence on probation the period of probation of a conditionally sentenced offender should be longer than the sentence imposed (see, e.g., Supreme Court Criminal Chamber judgment of 26 November 2007 in case No 3-1-1-59-07, para. 13). In a case of suspension of sentence on probation under § 73 of the PC the maximum length of the period of probation is five years (§ 74 (3) PC). The sentence of imprisonment imposed on X exceeds the maximum period of probation even if it was enforced partially (in line with the practice of the Supreme Court the part of the imprisonment to be enforced must be short, measurable in months; see Supreme Court Criminal Chamber judgment of 20 February 2007 in case No 3-1-1-99-06). The possibility not to enforce the sentence is also not derived from the fact that under § 238 (2) of the CCrP the County Court reduced the six-year sentence imposed on X by one third, i.e. to four years, because the period of probation should be longer than the original, i.e. unreduced, sentence.

6. The legislator has a wide margin of discretion in defining the sentencing framework, as it is based on the values adopted by society, which the democratically legitimised parliament is properly competent to express. Nevertheless, the Court of Appeal reached the conclusion that the minimum scale of sanction under § 141 (2) of the PC was in conflict with the principle of proportionality arising from § 11 of the Constitution, amounting to a disproportionate interference with the fundamental right to liberty under § 20 of the Constitution. Punishment is based on a person's guilt. This means that the severity of a sentence should correspond to the gravity of the act committed. In the opinion of the Court of Appeal, § 141 (2) of the PC clearly does not allow for imposition of a sentence corresponding to X's guilt.

7. Six years' imprisonment as a minimum sanction shows that the legislator considered the offence particularly serious. A similar minimum sanction is established, for example, for manslaughter (§ 113 PC) or for handling large quantities of narcotic drugs or psychotropic substances if committed for the purpose of significant proprietary benefits (§ 184 (21) PC). Likewise, imprisonment of at least six years is prescribed mostly for crimes against the state or war crimes.

8. The Court of Appeal does not call into question the fact that six years' imprisonment as a minimum sanction is justified in the case of sexual intercourse against a person's will and other acts of a sexual nature of comparable gravity (i.e. equally damaging the victim's right of sexual self-determination) against a person's will if the aggravating features under § 141 (2) of the PC are also present. None of the acts of a sexual nature against a child can be considered as minor criminal offences. However, the act imputed to X is not comparable in its gravity with other criminal offences for which imprisonment of at least six years has been prescribed. Other criminal offences listed in the Special Part of the Penal Code as subject to a minimum six years' imprisonment are characterised either by particular cruelty (e.g. § 97 PC), endangering a large number of persons (e.g. § 95, § 110–112 PC) or a serious consequence (e.g. a person's death – § 113, 96, 1001 PC). The minimum sanction under aggravating circumstances in the case of offences considered as serious criminal offences, such as robbery (§ 200 PC), human trafficking (§ 133 PC) or inducing a person to illegally consume narcotic drugs or psychotropic substances or other narcotic substances (§ 187 PC), is three years' imprisonment.

9. In order to assess the severity of the minimum sanction under § 141 (2) of the PC, sanctions prescribed for other sexual offences similar in nature to the act imputed to X should also be taken into account. In the opinion of the Court of Appeal, these include § 145 of the PC (sexual intercourse or other act of a sexual nature with a child) and § 1451 of the PC (buying sex from minors). § 145 (1) of the PC prescribes imprisonment of up to five years and subsection (2), which imposes liability in the case of repeated commission of the offence, prescribes imprisonment of two to eight years. § 1451 (1) prescribes imprisonment of up to three years, subsection (2) imprisonment of up to five years, and subsection (3) imprisonment of up to eight years.

10. Although § 145 of the PC imposes liability for sexual intercourse or other act of a sexual nature with a child, the act committed by X cannot be qualified under § 145 of the PC for the reason that under § 147, within the meaning of sexual offences, a person of less than ten years of age is deemed to be incapable of comprehending. This means that any act of a sexual nature towards a person under ten years old is considered to have taken place against their will and, due to their inability to comprehend, even in the event of obtaining their consent, the presumption is that they were abused and the act is qualified as rape under § 141 of the PC. As committing an act towards a person less than eighteen years of age is an aggravating element of rape under § 141 (2) clause 1 of the PC, any act of a sexual nature in respect of a child less than ten years of age is always qualified under § 141 (2) of the PC, regardless of the presence of any other aggravating circumstances listed in the same subsection.

11. The explanatory memorandum to the Draft Act, with the amendments to § 141 of the PC, entering into force on 23 December 2013, emphasised that other acts of a sexual nature against a person's will violate a person's sexual liberty and cause serious consequences to them equally or even more than sexual intercourse against a person's will. As the legislator, by relying on the value judgments of society and on penal policy objectives, is entitled to significantly harshen sanctions prescribed for criminal offences, the disproportionality of the new level of sanction derives not only from the fact that a similar offence was punishable by a lighter sentence. The court also disagreed with the argument of counsel that § 141 (2) of the PC was contrary to the principle of equality of law-making by setting the same legal consequence for acts of a different nature. The issue of possible unjustified uniform treatment could arise if only one specific level of imprisonment had been prescribed as a sanction. However, § 141 (2) of the PC prescribes imprisonment of six to fifteen years as a sanction.

12. The Court of Appeal found that even though any act of a sexual nature against a child was deplorable, this does not mean that all such acts were of equal gravity. Under § 56 (1) of the PC, punishment is based on a person's guilt. This means that the punishment should take into account the gravity of a particular act, i.e. also taking into account the level of injustice of a particular act. Thus, in assessing a particular act, a factor that should be taken into account is how seriously it violates the legal right protected under the norms of the Special Part of the Penal Code. The court did not consider that

touching or caressing the pubic area of the victim violated her right of sexual self-determination equally seriously in comparison with sexual intercourse.

13. With the amendments entering into force on 23 December 2013 the range of acts qualified under § 141 (2) of the PC was extended to include acts which by nature violate a victim's right to sexual self-determination and to bodily integrity less seriously than sexual intercourse. However, the sanctions under both subsections of the provision were not amended. When introducing the amendment, the legislator had in mind acts of a sexual nature with a high level of injustice for which the same framework of sanctions is justified as in the case of sexual intercourse against a person's will. However, in the opinion of the Court of Appeal the legislator failed to consider that the notion of another act of a sexual nature is so wide that it also covers acts which by their level of injustice are not equal to sexual intercourse against a person's will.

14. Although touching and caressing a victim's genitals should be considered as falling within the lighter category of different potential acts of a sexual nature, the Court of Appeal in imposing a sentence on X proceeded from the premise that the sentence should be harsher than imprisonment for at least two years prescribed under § 145 (2) of the PC, because an act of a sexual nature against a person under ten years of age should be considered more serious and, consequently, X's guilt for committing the offence should also be considered more serious. The Court of Appeal also took into account that X committed acts of a sexual nature towards the victim on at least four occasions during a relatively short period (about 3 months). Moreover, an aggravating circumstance under § 58 clause 4 of the PC exists, i.e. committing an offence against a person who was in a dependent family relationship with the offender. In the opinion of the Court of Appeal, the mitigating circumstance was the genuine remorse shown by X (§ 57 (3) PC). The Court of Appeal also took into account that X had no prior criminal or misdemeanour record.

15. On that basis, the Court of Appeal imposed on X a sentence of imprisonment of three years and six months. As the criminal case was heard under the abridged procedure, the court reduced the sentence imposed by one third, i.e. to two years and four months, under § 238 (2) of the CCrP.

16. The Supreme Court received the Tallinn Court of Appeal judgment on 18 March 2015.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

17.–21. [Not translated.]

PROVISION DECLARED UNCONSTITUTIONAL

22. § 141 of the Penal Code:

"(1) Sexual intercourse or commission of another act of a sexual nature with a person against his or her will by using force or taking advantage of a situation in which the person is not capable of offering resistance or comprehending the situation, –

[---]

(2) The same act:

1) if committed against a person of less than eighteen years of age;

[---]

6) if committed by a person who has previously committed a criminal offence as laid down in this Division, –

is punishable by six to fifteen years' imprisonment."

OPINION OF THE CHAMBER

23. First, the Chamber will identify the relevant provisions (I), then it will ascertain interference with a fundamental right and assess the constitutionality of the interference (II) and adjudicate the request by the Tallinn Court of Appeal (III).

I

24. The provision of which the Supreme Court is assessing the constitutionality must be relevant for adjudication of the dispute (§ 14 (2) Constitutional Review Court Procedure Act). In assessing relevance, it is crucial whether the provision declared unconstitutional was of decisive importance for adjudicating the case. A provision is of decisive importance if in case of unconstitutionality of the Act the court should adjudicate differently than in the case of constitutionality of the Act (see Supreme Court *en banc* judgment of 22 December 2000 in case No 3-4-1-10-00, para. 10; judgment of 28 October 2002 in case No 3-4-1-5-02, para. 15).

25. Tallinn Court of Appeal declared § 141 (2) of the PC unconstitutional to the extent that it establishes six years' imprisonment as the minimum sanction for aggravated rape. The sanction under the norms of the Special Part of the Penal Code has relevance within constitutional review proceedings initiated as part of specific constitutional review of legislation if the penalty prescribed in it should be applied in respect of the accused in the case of the constitutionality of the sanction. However, under the principle of legality of penal law arising from § 23 (1) of the Constitution, the application of any penalty established under the sanction norm in the Special Part of the Code may occur only if the accused has committed a criminal offence described in the disposition of the same norm. There is no dispute that the act imputed to X in the charges against him has been correctly subsumed under § 141 (2) clauses 1 and 6 of the PC.

26. § 141 (2) of the PC establishes a sanction of imprisonment from six to fifteen years for aggravated rape. If the provision that was set aside had been found constitutional, the Court of Appeal could not have sentenced X to three years and six months' imprisonment and reduced it by one third, i.e. to two years and four months, under § 238 (2) of the CCrP.

27. Since 23 December 2013, § 141(2) of the PC, which should be lent meaning through the description of the act in subsection one of the same section, constitutes a definition of the offence through alternative acts. The statutory elements of the definition include, alongside sexual intercourse with a person against their will, another act of a sexual nature if committed by violence or by taking advantage of a person's situation in which they were incapable of offering resistance or comprehending the situation. First, the Chamber notes that the Court of Appeal has declared the minimum sanction under § 141 (2) of the PC in its entirety relevant and unconstitutional.

28. The courts established that X repeatedly placed his hand in the underpants of the seven-year-old victim and touched and caressed her genitals. The courts subsumed the act under § 141 (2) clauses 1 and 6 of the PC. Qualifying X's act under § 141 (2) clause 1 of the PC arises from the fact that he committed an act of a sexual nature towards a child of under ten years of age, and under § 147 of the PC a child of that age is considered incapable of comprehension. Thus, committing any act of a sexual nature against a child of under ten years of age would be subsumed under § 141 (2) of the PC, regardless of the presence of other aggravating circumstances listed as statutory elements of the offence in the same section. This gives rise to the conclusion that in the present constitutional review proceedings the minimum sanction under § 141 (2) of the PC cannot have relevance with regard to all the clauses listed in subsection 2, as this would also include a penalty for rape of an adult victim in the case of presence of aggravating circumstances listed in clauses 2–6 of subsection 2, as well as sexual intercourse with a minor qualified under clause 1 or another violent act of a sexual nature in respect of a minor.

29. As X committed the act repeatedly, his behaviour also corresponds to another aggravating element under § 141 (2) of the PC (clause 6). If the minimum sanction of six years' imprisonment is considered unconstitutional in the case of repeated commission of the act, it is even more excessive in the case of a single instance of committing a similar act.

30. When checking for the relevance of a norm in cases of dispute over the constitutionality of levels of sentence established in the sanction norms in the Special Part of the Penal Code, it should also be taken into account that the provisions of the General Part of the Penal Code broaden the margin of judges' discretion, including in sentencing offenders. The constitutionality of a sentence prescribed in a section or subsection of the Special Part of the Penal Code can only be reviewed if, in a criminal matter, it is not possible to apply a mitigating regulation under the General Part which allows imposition of a less severe sentence than the prescribed minimum sanction and the application of which would result in a sentence which the court deems to be correct (Supreme Court Constitutional Review Chamber judgment of 25 November 2003 in case No 3-4-1-9-03, para. 13).

31. In this connection, the Chamber will assess whether the Court of Appeal correctly interpreted the provisions setting the conditions and extent of application of the (minimum) sanction under § 141 (2) which was declared unconstitutional. These norms include first and foremost § 61 (1) of the PC, as well as § 73 and 74 of the PC.

32. Under § 61 (1) of the PC, taking into consideration special circumstances, a court may impose a less severe sentence than the minimum term or rate prescribed by law, which under § 141 (2) of the PC is six years' imprisonment. The Chamber has found that the presence or absence of the special circumstances mentioned in § 61 (1) of the PC is a factual circumstance which must be established in the course of criminal proceedings, and arising from § 14 (2) of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber itself is not competent to adjudicate the issue (Supreme Court Constitutional Review Chamber judgment of 25 November 2003 in case No 3-4-1-9-03, para. 20). In their judgments, both the County Court and the Court of Appeal assessed whether the criminal case involved any special circumstances arising from the personality of X which could have provided grounds for imposing on him a lighter sentence than the minimum sanction under § 141 (2) of the Penal Code, and concluded that no such special circumstances existed.

33. In its opinion the Riigikogu finds that the court may consider the constitutionality of a norm in the Special Part of the Penal Code only if the court would not be entitled in any event to impose a sentence below the minimum level established by the sanction, and that the absence of special circumstances in X's act cannot be equated to such a situation. However, in its judgment the Court of Appeal notes that an act corresponding to the statutory definition of the offence cannot be deemed a special circumstance within the meaning of § 61 (1) of the PC merely due to the low intensity of the act. In the opinion of the Chamber, in the case of § 141 (2) clause 1 of the PC it would also be extremely difficult to imagine circumstances which in terms of characterising the act or the personality of the offender would enable the court in any event to impose a sentence below the minimum sanction. In their opinions, the parties have also failed to point out any such circumstances. Therefore, the abstract possibility in the law to impose a sentence below the minimum sanction established in the norm in the Special Part does not affect its constitutionality in a situation where the courts have not ascertained any special circumstances in a specific case.

34. § 73 and 74 of the PC prescribe the legal framework for probation and subjecting an offender to supervision of conduct. The Court of Appeal denied the possibility of applying § 73 and 74 of the PC in respect of X and found that in the case of probation the period of probation of the offender should be longer than the imprisonment imposed (unreduced). In line with established case-law, a sentence within the sentencing range under § 141 (2) of the PC cannot be suspended on probation as the probation period is shorter than the sentence imposed (Supreme Court Criminal Chamber judgment of 20 February 2007 in case No 3-1-1-99-06, para. 20; judgment of 26 November 2007 in case No 3-1-1-59-07, para. 13; judgment of 2 December 2011 in case No 3-1-1-96-11, para. 7.4).

35. Thus, in accordance with established case-law, the Court of Appeal has correctly found that § 73 and 74 of the PC are not applicable to X. Probation would also not affect the relevance of the minimum sanction under § 141 (2) of the PC

in the present case because it is not a separate type of punishment but an alternative to actually serving the imprisonment imposed (Supreme Court Criminal Chamber judgment of 18 April 2011 in case No 3-1-1-18-11, para. 8.2). In the case of probation, it is not ruled out that a person may violate their terms of probation or commit another offence during the probation period, thus triggering enforcement of imprisonment. Therefore, probation does not rule out that in reality an offender would have to serve a term of imprisonment imposed on them to the extent of the minimum sanction under § 141 (2) of the Penal Code. It is precisely the constitutionality of the minimum level of this sanction that was questioned by the Court of Appeal in the criminal case of X.

36. The relevance of § 141 (2) of the PC above with regard to six years' imprisonment as the minimum sanction is also not affected by the fact that the term of imprisonment imposed on X was reduced by one third in abridged proceedings. It should be taken into account that even though § 238 (2) of the CCrP establishes the obligation of the court to reduce by one third the sentence imposed while rendering a conviction in abridged proceedings, in constitutional review proceedings only the sanction established in a section or subsection of the Special Part of the Code based on which the sentence was imposed, i.e. the norm from which the court proceeds in choosing the sentence corresponding to the degree of guilt, has decisive importance. The purpose of reducing the sentence imposed by one third in abridged proceedings is to compensate for depriving the offender (or renouncement by the offender) of certain procedural guarantees (Supreme Court Criminal Chamber judgment of 24 October 2011 in case No 3-1-1-77-11, para. 14). Thus, a sentence imposed in abridged proceedings does not necessarily correspond to the the legislator's assessment of the actual level of injustice caused by the act. Moreover, in this connection it should also be kept in mind that the consent of the prosecutor's office (§ 234 (2) CCrP) is also a precondition for applying the abridged procedure in criminal proceedings, i.e. abridged proceedings taking place depends not only on the will of the accused.

37. On this basis, the Chamber will review the sanction under § 141 (2) of the PC to the extent that it prescribes a minimum of six years' imprisonment for committing – either once or repeatedly – an act of a sexual nature without violence in respect of a child of less than ten years of age.

II

38. A sentence of imprisonment interferes with the fundamental right to physical liberty guaranteed under § 20 (1) of the Constitution. The Constitution does not allow arbitrary interference in anyone's liberty except for the purposes listed in § 20 (2) (see Supreme Court *en banc* judgment of 10 April 2012 in case No 3-1-2-2-11, paras 48–49). Under § 20 (2) clause 1 of the Constitution, a person may be deprived of their liberty under the law to enforce a judgment of conviction. Under § 11 of the Constitution, interference with a fundamental right should be proportionate to the aim sought.

39. The Chamber notes that arbitrary deprivation of liberty also includes imposing a clearly excessive sentence of imprisonment. Deprivation of liberty on the basis of a conviction under § 20 (1) and (2) clause 1 of the Constitution is constitutional when, on the one hand, it has taken place in accordance with the procedure prescribed by law, while, on the other hand, it has brought about applying a sentence of imprisonment in respect of a person which is proportionate to the level of injustice of their act, i.e. the gravity of the offence committed, and the degree of guilt of the person arising from this. Deprivation of liberty as a criminal sanction for a longer duration than required by the gravity of the offender's act is not compatible with the prohibition of arbitrary deprivation of liberty under § 20 of the Constitution. In accordance with the principles of human dignity and rule of law under § 10 of the Constitution, a person may be punished for a specific act but not more than required by the gravity of the offence committed (the principle of individual guilt). Sanctions prescribed by law comply with the requirement of proportionality arising from § 11 of the Constitution and are compatible with the principles of human dignity and rule of law if the provision establishing a sanction, including the minimum sanction, enables the court to impose a sentence which is not excessive in view of the level of injustice of the act and the aim of preventing commission of new offences and protecting the legal order (Supreme Court *en banc* judgment of 27 June 2005 in case No 3-4-1-2-05, para. 57). Proceeding from these guiding constitutional principles, the legislator must develop a system of sanctions allowing for differentiation of penalties corresponding to the gravity of offences.

40. Thus, in the present constitutional review case in the frame of specific constitutional review of legislation it is

necessary to answer the question whether the minimum sanction under § 141 (2) of the PC allows imposition of a sentence on X which would not be clearly excessive in view of his guilt (i.e. the level of injustice of the act).

41. Establishing sanctions under penal law falls within the sole competence of the legislator, who has a wide margin of discretion in specifying a sanction corresponding to a particular offence (i.e. the sanctioning framework). Levels of sanction are based on value judgments accepted by society, and it is the legislative power which is competent to express them. This way the parliament is also able to develop the state's penal policy and influence criminal behaviour (Supreme Court Constitutional Review Chamber judgment of 25 November 2003 in case No 3-4-1-9-03, para. 21 and Supreme Court *en banc* judgment of 27 June 2005 in case No 3-4-1-2-05, para. 57). Under the principle of separation of powers, courts cannot assume the role of the legislator relying on abstract penal policy objectives and start shaping the system of sanctions themselves. However, the legislator's broad margin of discretion does not rule out the competence of the courts to assess a penal law norm, i.e. the conformity of a sanction with the Constitution (§ 152 Constitution).

42. § 142 of the PC valid until 22 December 2013 prescribed a penalty for involving a person in satisfaction of sexual desire against his or her will in a manner other than sexual intercourse by using force or taking advantage of a situation in which the person was not capable of offering resistance or comprehending the situation. In combination with § 147 of the PC, such an act (without using violence) directed towards a child of under ten years old was qualified under the aggravating elements of the offence as defined in this section. It was punishable by a sentence of imprisonment from one to ten years. Under amendments to the PC entering into effect on 23 December 2013, § 142 of the PC was repealed and the offences that had previously been subject to aggravation under this provision were mechanically merged in the statutory elements of the offence in § 141 (rape) of the PC. The sanctions under § 141 (1) and (2) were not amended. As a result of the above amendment, the previously applicable sanctioning range of one to ten years' imprisonment for another act of a sexual nature within the meaning of § 141 of the PC against a child of less than ten years of age was replaced by a sentencing range of six to fifteen years.

43. The Chamber agrees with the opinion expressed in the judgment of the Court of Appeal that, by relying on value judgments of society and penal policy objectives, the legislator may significantly change the sanctions to be imposed for criminal offences, including harshening them, so that the disproportionality of the new level of sanction does not arise merely from the fact that a similar act was previously subject to a lighter penalty. There is also no dispute that the right of the child to bodily inviolability and the child's physical and mental health are significant values the protection of which presumes penal policy intervention (see also European Court of Human Rights judgment of 12 November 2013 in Söderman v. Sweden, paras 78–85).

44. The Riigikogu claims in its opinion that establishing the sanctioning range under § 141 (2) of the PC was a conscious penal policy choice by the legislator in order to discourage commission of sexual offences against children through a harsher sanction. The Chamber agrees with the opinion of the Riigikogu that sexual offences against children are serious by nature, and the age of a victim may be used as a basis for differentiating levels of sanction. Sexual offences committed against next of kin, in particular children, constitute a social problem in the case of which severe sanctions are justified for protecting the legal order and fundamental rights and freedoms of persons.

45. The Court of Appeal has deduced the unconstitutionality of the minimum sanction under § 141 (2) of the PC first and foremost from a comparison of the sentence described in this provision of the Special Part of the Code with the levels of sanction established in other sections of the Special Part (see paras 8–9 above). The Chamber notes that a comparison of different levels of sanction as value judgments expressed by the legislator indeed gives an idea of the weight attached to different legal rights.

46. In the present case, the disposition of the disputed norm covers engaging in sexual intercourse with a minor as well as committing another act of a sexual nature by using violence or by taking advantage of a minor's condition in which they were incapable of offering resistance or comprehending the situation, while the same minimum sanction has been set for such criminal offences. Section 141 (2) clause 1 of the PC would apply equally to touching the genitals of a child of less than ten years of age, as well as to sexual intercourse against their will or another sexual act committed by using

violence in respect of a child of any age. Thus, the statutory definition of the criminal offence under § 141 of the PC covers unlawful acts of a different nature and very different levels of gravity, while prescribing the same type and level of sentence for them.

47. The Chamber finds that the Constitution does not prohibit the legislator from grouping acts interfering with the same legal right with different degrees of intensity under one provision (i.e. one set of elements of a statutory definition) of the Special Part, on condition that the applicable sanction enables the court, on a case-by-case basis, to impose a (proportionate) penalty corresponding to the guilt of the offender for the act committed. Consistent case-law of the Supreme Court Criminal Chamber requires that the starting point in imposing a penalty should be the average level of sanction established under the norm in the Special Part of the Penal Code, followed by finding a level of penalty corresponding to the degree of guilt of the offender in any particular case (e.g. Supreme Court Criminal Chamber judgment of 6 June 2014 in case No 3-1-1-28-14, para. 29; judgment of 17 June 2013 in case No 3-1-1-58-13, para. 7). The sentencing range under § 141 (1) and (2) of the PC generally allows differentiating a sentence according to the gravity of a specific act and the degree of an offender's guilt, and in individualising a sentence to proceed from the duration of imprisonment falling close to the lower, middle or upper level of the sanction. Therefore, in the opinion of the Chamber, in the present case no issue of legislative inequality (§ 12 of the Constitution) internally within § 141 of the PC arises.

48. The Chamber notes that the legislator has not established separate definitions of sexual offences against a child of less than ten years of age in the Penal Code. In combination of § 141 and 147 of the PC, it is not possible to qualify an act of a sexual nature against a child of less than ten years of age under the principal definition in § 141 (1) of the PC (see para. 28 above).

49. By setting a minimum sanction of six years' imprisonment for touching the genitals of a child of less than ten years of age, the legislator equated the gravity of the offence, inter alia, with manslaughter (§ 113 PC), which protects human life as one of the most valuable legal rights requiring the highest level of protection in a country governed by rule of law (Supreme Court *en banc* judgment of 22 March 2011 in case No 3-3-1-85-09, para. 87). With amendments to § 141 of the PC, the legislator has equated the level of injustice of all the acts qualified under subsection 2 of this provision as regards the minimum applicable sanction, i.e. considering all the acts corresponding to the statutory elements of the offence as falling within the category of most deplorable acts.

50. Rape is an aggregate offence constituting an attack (violence or taking advantage of a situation of helplessness) against a victim's right of sexual self-determination as well as their physical and mental health (see also Supreme Court Criminal Chamber judgment of 26 November 2006 in case No 3-1-1-59-07, para. 15). Therefore, equating the causing of death, leading a person to suicide or suicide attempt, rape committed by a group or against a minor or by a person with a prior conviction for a sexual offence with manslaughter under § 141 (2) is justified in view of the need for protection of legal rights. Touching the genitals of a child under ten years of age for sexual purposes may damage a child's normal development, and is therefore utterly deplorable, but even in the case of repeated commission (charges against X, see para. 1) such an act by its degree of gravity is not necessarily equal to manslaughter or sexual intercourse against a person's will or another sexual act resulting in the victim's death or serious health damage. The Chamber notes that, at the same time, for example for touching the genitals of a child aged ten to fourteen years, if no violence was used, under § 145 (1) of the PC the legislator has prescribed imprisonment of thirty days to five years, and under subsection (2) for repeated commission of the same aggravated offence two years' imprisonment as the minimum sanction. Under § 1432 of the PC, engaging in sexual intercourse or committing another act of a sexual nature towards a child of ten to fourteen years of age by taking advantage of the dependency of the victim on the offender, is punishable by a minimum of two years' imprisonment, and in the case of repeated commission of the offence by three years' imprisonment. Under § 144 of the PC, sexual intercourse with a descendant or another act of a sexual nature towards a descendant, including a descendant of ten to fourteen years of age, is punishable by at least two years' imprisonment, and in the case of repeated commission three years' imprisonment. Thus, (repeated) commission of an act of a sexual nature without using violence towards a victim of less than ten years of age is subject to a minimum term of imprisonment which is two times higher (6 years vs. 3 years) or three times higher (6 years vs. 2 years).

51. Next, the Chamber will assess whether interference with the fundamental right to liberty resulting from a sentence of

imprisonment imposed under § 141 (2) of the PC can be mitigated by substituting the sentence imposed under § 69–692 of the PC.

52. According to the assessment of the Chamber, in the present constitutional review case it is justified to examine first and foremost § 692 (2) of the PC, which allows substitution of imprisonment of six months to two years by complex treatment of sex offenders if the act was committed due to a treatable or controllable mental disorder and if the (adult) person consents to it. In order to fulfil a preventive aim in the case of a high risk of recidivism, e.g. in the case of sexual offenders with a diagnosis of paedophilia, the precondition for potential substitution of a person's sentence with complex treatment is always partial serving of the sentence. Under § 692 (3) of the PC, complex treatment may also be applied as a precondition for release on parole (§ 76 PC).

53. [---] As a target group for complex treatment, the legislator envisaged, inter alia, sex offenders (explanatory memorandum 176 SE of the XII composition of the Riigikogu upon submission of the Draft Act). According to the information in the explanatory memorandum, for example, 61 persons were convicted and 3 persons acquitted of sexual offences in 2010, and 70 percent of those convicted had committed a sexual offence against a child. Thus, in order to assess the proportionality of the minimum sanction under § 141 (2) of the PC, the Chamber should reach an opinion whether it is justified to exclude from the scope of § 692 (2) of the PC criminal offences with the same degree of gravity as the act committed by X.

54. When establishing § 692 (2) of the PC the legislator saw complex treatment of sexual offenders as an alternative to deprivation of liberty, as one of the preconditions for substitution is imposing a sentence of imprisonment. Under § 692 (1) of the PC, substitution is admissible only in the case of a conviction for committing an offence due to a treatable or controllable mental disorder, and under subsection (4) treatment can be substituted in place of imprisonment only with the consent of the convicted offender, which the Chamber believes to be an indication that the substitute sanction should rather be seen as non-punitive (i.e. of a medical nature). This also gives rise to the conclusion that despite the relatively high level of injustice of the act (the level of guilt requires deprivation of liberty), the legislator accepted the possibility to apply, instead of a punishment, a measure focusing on the treatment or control of the cause contributing to commission of the offence. However, inter alia, evading treatment, disregarding the treatment instructions, withdrawing consent or committing a new criminal offence would trigger a punitive sanction, i.e. imprisonment would be enforced (§ 692 (9) and (10) PC).

55. In the case of conviction under § 141 (2) of the PC, complex treatment of sexual offenders can be applied only in the event of release on parole (§ 692 (3) and § 76 PC), as a precondition for an immediate partial substitution of treatment in place of imprisonment is a sentence of imprisonment for up to two years (§ 692 (1) PC). However, such a possibility of subsequent application of treatment does not affect assessment of the proportionality of minimum imprisonment under § 141 (2) of the PC.

56. The Chamber reiterates that due to a different degree of gravity of criminal offences against sexual self-determination of persons, including children, the sanctioning system should also allow for imposition of a sentence corresponding to a person's degree of guilt in each particular case. It is clear that due to their level of development a child under ten years of age needs enhanced protection, and any criminal offence against such a child (cf. § 58 clause 3 PC) results in a more severe condemnation by the state in the form of a relatively harsher punishment. However, in the opinion of the Chamber there is no reasonable justification why the minimum sanction under § 141 (2) of the PC excludes the possibility of substituting complex treatment in place of imprisonment for sexual offenders who have committed acts which are qualified under this section but are less serious on the scale of sexual acts, including partial substitution of the imprisonment imposed on X.

57. However, absence of the possibility of substituting the sentence in the case of relatively milder sexual offences means that the risk of repetition of a sexual offence is excluded only temporarily, not allowing a more targeted handling of the causes of the offence in order to minimise the possibility of repetition of the offence after serving the sentence.

58. The Chamber finds that a heavy maximum term of imprisonment for an act in the Special Part of the Penal Code, including in § 141 (2) of the PC, allows emphasis on the deplorability of sexual offences against minors and creates a lawful basis for imposing a term of imprisonment conforming to the level of guilt of perpetrators of particularly serious sexual offences.

59. The Chamber finds that grouping under the same sanction under § 141 (2) of the PC unlawful acts of inherently different degrees of gravity, thus essentially equating through the minimum sanction the offence committed by X in terms of its level of injustice with taking a person's life (manslaughter), is clearly a disproportionate interference with the fundamental right to liberty, given that the provisions of the General Part of the Penal Code do not provide for a legal possibility to alleviate it in the case of X. The present case involves an act constituting a relatively less serious attack against a legal right protected on the scale of acts described in § 141 (2) clause 1 of the PC. Under § 145 of the PC, the same act if committed against a child older than ten years of age and younger than fourteen years of age would generally result in a minimum term of imprisonment of thirty days, and in the case of repeated commission a minimum of two years' imprisonment, or under § 1432 or 144 of the PC by taking advantage of a victim's dependency or if committed against a descendant at least two years' imprisonment, and in case of repetition at least three years' imprisonment. The legislator has enabled substitution of complex treatment for imprisonment for an offence committed due to a sexual orientation disorder. In the opinion of the Chamber, there is no reasonable justification why the legislator has excluded application of the treatment merely due to a victim's age even if other preconditions have been fulfilled.

60. On that basis, applying the minimum sanction of six years' imprisonment does not correspond to the degree of injustice of the act committed by X and thus constitutes a clearly disproportionate interference with his fundamental right to liberty.

III

61. In the circumstances, the Constitutional Review Chamber is of the opinion that the interference with the fundamental right to liberty arising from the minimum sanction under § 141 (2) of the PC is disproportionate in respect of X and unconstitutional. Based on § 15 (1) clause 2 of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber repeals the sanction under § 141 (2) to the extent that commission either once or repeatedly of an act of a sexual nature without violence in respect of a child of less than ten years of age is punishable by a minimum of six years' imprisonment (see also para. 29 of the judgment). Until the legislator has established a new minimum sanction with regard to the above statutory definition of the offence, the minimum imprisonment established under § 45 (1) of the PC should be observed.

Dissenting opinion of Supreme Court Justice Saale Laos to the Constitutional Review Chamber judgment of 23 September 2015 No 3-4-1-13-15

I concur with the starting point (para. 41 of the judgment) that in a situation where the legislator enjoys a wide margin of discretion in establishing penal law, but judicial scrutiny of its constitutionality is not ruled out, serious reasons should exist for declaring a penal law norm unconstitutional. The main legal issue is whether a sentence prescribed under the Penal Code – in the present case a minimum sanction of six years' imprisonment under § 141 (2) of the Penal Code – is clearly excessive in view of the gravity of the offence committed by X.

The arguments to justify the decision of the Chamber, in particular the comparison with the punishment for taking human life, for other sexual offences against children, as well as the impossibility of substitution with complex treatment, are in my opinion a clear indication of inconsistency in systematic interpretation of the Penal Code (PC) as a whole. I concur

with the majority of the Chamber (criticism in paras 46–48 of the judgment) that adding another act of a sexual nature in § 141 of the PC is not a good solution in terms of legislative technique, as it results in a situation where touching a child of any age who is incapable of comprehension for sexual purposes is equated with rape under aggravating circumstances as regards the minimum sanction, and also excludes applying complex treatment (partially) instead of the sentence.

Indisputably, six years' imprisonment as a minimum sanction is heavy and to "deserve" it the criminal offence committed should be a serious one. In addition, no difference of opinion occurs with the legislator's criminal policy choice, namely that a harsh response to offences against children is constitutionally justified. However, my opinion dissents from the majority of the Chamber with regard to the issue whether bearing in mind, inter alia, the aim of crime prevention and protecting the legal order the legislator may equate the minimum sanction for any act of a sexual nature against a child of less than ten years of age with the minimum sanction applicable for manslaughter. In other words, my opinion differs with regard to the issue of what level of severity of the sanction would still be considered constitutional, i.e. would not be excessive, in the case of the act committed by X.

It seems to me that, in the light of the reasoning of the judgment, six years' imprisonment for the act committed by X would be constitutional if the legislator raised the minimum sentence for manslaughter and/or changed the preconditions for applying complex treatment. In this case, factual interference with the fundamental right to liberty arising from imprisonment imposed under § 141 (2) of the PC would be the same (four years' imprisonment under abridged proceedings) in case of non-compliance with the conditions for partial substitution of treatment for imprisonment, or with other conditions applicable for substitution of the sentence, as the sentence imposed would be enforced in reality.

To conclude. In my opinion, the Constitution does not prohibit also prescribing the same minimum imprisonment as prescribed for the protection of human life for other inherently serious criminal offences (generally under aggravating circumstances, e.g. recidivism), including for sexual abuse of a child as an offence with a high risk of recidivism. Therefore, I am not convinced that inconsistency in establishing penal law norms is sufficient for a finding of unconstitutionality of the minimum sanction under § 141 (2) of the PC in its relevant part (para. 37 of the judgment), i.e. its clear excessiveness in view of the degree of injustice of the act committed by X and the aim of preventing crime and protecting the legal order. Therefore, I find that the request by Tallinn Court of Appeal should have been rejected.