



## Case 2012/B/1991

**Country:** Hungary

**Region:** Europe

**Year:** 2011

**Court:** Constitutional Court

**Health Topics:** Health care and health services, Infectious diseases, Informed consent

**Human Rights:** Right to bodily integrity, Right to health, Right to life

### Facts

The petitioner sought a declaration of the unconstitutionality and annulment of a Minister of Health Decree which required mandatory lung screening. This initial Minister of Health Decree was overruled by a Decree of the Minister of Public Welfare (the “challenged Decree”) which regulated “mandatory screening of epidemiological interest content wise”, (it was aimed at detecting cases of tuberculosis in the early phases).

The petitioner argued that the challenged Decree was unconstitutional because it regulated a fundamental right in a decree (as opposed to in a statute, as required by the Constitution for the regulation of a fundamental right) and because it determined a duty pertaining to a fundamental right and, in accordance with the Constitution, the right to health could only be suspended or restricted during a national crisis or state of emergency.

### Decision and Reasoning

The Court found that the petition was unfounded and that the challenged Decree was constitutional. Noting prior precedent, the Court determined that that a statute was not required when legislation indirectly or distantly affected a fundamental right; in such cases the level of decree was sufficient. The Court also rejected the petitioner’s argument that the challenged Decree regulated a fundamental right. It noted that the relevant healthcare law expressly permitted that the Minister of Health could pass a decree ordering mandatory screening of infectious diseases.

The Court determined that the challenged Decree did not contravene Article 70/D of the Constitution (guaranteeing the right to health) as the petitioner argued, but rather should be examined in connection with the right to life and human dignity (encompassing the right to self-determination as a subsidiary right) set forth in Article 54 of the Constitution. The Court then explained that the fundamental rights set forth in Article 54 of the Constitution could not be restricted, however the subsidiary rights deduced from such fundamental rights could be, in accordance with Constitutional law.

Thus, the Court held that the question at hand was whether the challenged Decree’s restriction of the individual’s right to self-determination and physical integrity was necessary and proportionate to the objective. Considering the constitutional and important public interest of the restriction (to detect infectious diseases at an early stage) and the minimal invasive nature of such intervention, the Court found that such restrictions were necessary and proportional.

### Decision Excerpts

“The Constitutional Court has called to attention the fact that in several decisions... that fundamental rights are not in every aspect subjects of legislation, ‘... not all types of connections with fundamental rights require regulations at the level of statutes. The content and substantial guarantees of a fundamental right can only be determined by statute. Furthermore, a statute is necessary for the direct and significant restriction of a fundamental right. In case of indirect or distance coherence, the level of a decree is sufficient. If that were not the case, everything should be determined by statute.’” Section III.

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“According to the practice of the Constitutional Court the right to human dignity is absolute and cannot be restricted as only a determinant of human status, with the right to life as a whole. ...However, certain subsidiary

right deducted from its basic right nature (such as the right to self-determination or the right to personal physical integrity) are, similar to other fundamental rights, and can be restricted according to Article 8 Paragraph 2 of the Constitution.” Section III

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“Hence the constitutionality question is whether the restriction of the individual’s right to self-determination and the right to physical integrity stated in the Decree is necessary and proportionate with the objective.” Section III

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“According to the judgment of the Constitutional Court the reason for the restriction is epidemiological public interest: to detect the presence of infectious diseases in an early phase, to track down their sources, and to avert the danger of contagion. Contrary to the opinion of the petitioner the provisions in the Decree do not violate the right to health of those mandated to undergo lung screening, but they restrict their right to self-determination in the interest of a constitutional objective. The screening, with reference to the epidemiological public interest, allows – with a minimal radiation - a non-invasive and very mild intervention.” Section III.

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