



Case 43/2005 (XI. 14)

Country: Hungary

Region: Europe

Year: 2005

Court: Constitutional Court

Health Topics: Aging, Health information, Informed consent, Mental health, Sexual and reproductive health

Human Rights: Freedom from discrimination, Right to bodily integrity, Right to family life, Right to privacy

Facts

The case involved two petitions that required the Constitutional Court to examine certain elements that imposed regulations on sterilization.

The first petitioner challenged the constitutionality of the Minister of Health Decree 12/1987 (VIII. 19.) EÅ¼M on Sterilization (hereinafter "D1"), which imposed certain restrictions (related to age and number of prior blood children) on a person seeking a sterilization for family planning purposes. The first petitioner claimed that D1 both procedurally and substantively violated Article 8 para (2) (guaranteeing protection of fundamental rights) and Article 54 para (1) (guaranteeing the right to life and dignity) of the Hungarian Constitution because D1 (i) affected fundamental rights but was enacted without an Act of Parliament and (ii) imposed arbitrary regulations on "age and number of children" required for an applicant to obtain a sterilization procedure.

The statute challenged by the first petitioner was repealed in 1998 by Section 7 of the Minister of Health Decree 25/1998 (VI. 17.) NM on sterilization (hereinafter "D2"), however the first petitioner challenged the constitutionality of D1 during the period it was in force. The first petitioner also challenged the constitutionality of the first sentence in Section 187 para (2) of Act CLIV of 1997 on Healthcare (hereinafter "AH"), which repeated the content of the contested D1 provisions.

The second petitioner challenged Section 187 para (2) of AH on similar constitutional grounds as the first petitioner, alleging that the provision violated the right to self-determination and included arbitrary and discriminative conditions. The second petitioner also challenged the provisions requiring a healthcare provider to give certain information or documents regarding sterilization to the spouse or cohabitant of the person seeking the sterilization procedure under Section 187 para. (5) of AH, Section 6 para. (1) of D2 and Section 3 para 1 of D2 (the "partner notification provisions"), arguing that the partner notification provisions violated the right to privacy encompassed in the Constitution.

Decision and Reasoning

The Court concluded that Article 54 para (1) of the Constitution granted broad protection of persons' right of self-determination in making free, informed decisions about their body and lives, thereby allowing persons to make decisions related to family, marriage and procreation. The Court further determined that the right to self-determination regarding health interventions encompassed more than simply the right to refuse medical intervention. Thus, the Court considered the two preconditions imposed by Section 187 para (2) for family planning purposes (that the applicant must either be older than 35 or have three blood children), to be restrictive of the right to self-determination, stemming from the right of human dignity.

The Court also examined the constitutionality of the restriction of the right to self-determination in Section 187 para (2) of the AH, with respect to Article 54 para (1) and Article 8 para (2). The Court held that restrictions on fundamental rights were possible only if such restrictions were proportional to legitimate State objectives (protecting the fundamental rights of others; the institutional guarantee of fundamental rights; or the achievement of constitutional public objectives). The Court stated that the two provisions concerned were not a legitimate tool to ensure (i) the objective of population policy, as there were other policy tools which could be used that were not restrictive of the right to self-determination, or (ii) prevention of an individual's making an uninformed and irreversible health decision, as it was not constitutionally acceptable to base enforcement of a right on the number of a person's blood children. (The Court noted that the age restriction might be acceptable as a measure to protect the young, but could not evaluate it separately as textually the age requirement was tied up with the number of children requirement.) The Court also noted that the decrees

in question allowed for sterilization for health reasons, which could mean mental as well as physical health. The Court held that Section 187 para (2) of AH was disproportionate and unconstitutional.

The Court also examined the petition challenging partner notification provisions, on grounds that such provisions violated the right to privacy as they required the person requesting the sterilization to share personal health information. The Court held that the partner notification provisions did not impose an obligation on the applicant to notify his or her spouse/cohabitant but that it could be inferred from the provisions that sterilization could not be performed without the knowledge of the spouse/cohabitant. However as the petitioner incorrectly referred only to Article 54 para 1 of the Constitution (and not Article 59, which dealt with the right to the protection of secrecy in private affairs and personal data) the Court rejected the petition challenging the partner notification provisions.

Three judges dissented. The first dissenting judge argued that in the field of healthcare the constitutionality of regulating an individual's decision within the sphere of self-determination should be examined on a case by case basis. This judge also determined that assistance of the European Court of Human Rights case law and the Oviedo Convention must be resorted to in determining the validity of the restrictions imposed on the right to self-determination in relation to health care and held that, considering the State's duty to protect permanent impairment of health, the challenged restrictions were not arbitrary. The second dissenting judge argued that the age limit of 35 imposed was viable as instances of pregnancy beyond this age could lead to health risks. This judge also noted the issue of ensuring that free and full consent was given for procedures of sterilization, considering the historical danger of forced sterilizations; he also stated that the provisions in force discriminated between Hungarian and non-Hungarian citizens. The third dissenting judge stated that "sterilisation performed for reasons other than medical ones causes a disability which in itself entails the impairment of human dignity, and which is thus not subject to the right to self determination." He argued that the Court had not examined the constitutionality of sterilization for family planning purposes holistically, as only the first sentence of the provision in question was examined (which contained the restrictions that he believed were not arbitrary). This judge also stated that sterilization, in addition to family planning, must be examined with respect to a of the possibility of wide-scale contraception.

Decision Excerpts

"In respect of those who can make responsible and reasonable informed decisions on their family lives, sexual lives, and on contraception and having children, the State may not prohibit sterilisation aimed at preventing the birth of children or further children in line with their own views of life, or on the basis of their social and financial circumstances.

It follows from the right to self-determination that the State may not take over from the people the responsibility of choosing between methods and means of contraception and that of assessing advantages and disadvantages; that would be unjustified paternalism. What is a serious burden for some people might not be a disadvantage at all for others, therefore State regulations cannot define a solution equally "advantageous" for all individuals." Section II(4).

"It can be concluded on the basis of the practice of the Constitutional Court that Article 54 para. (1) of the Constitution grants a wide scale of protection for the right to self-determination of persons capable of making free, informed and responsible decisions about their own bodies and lives. What is important in the present case is that on the basis of the right to self-determination, people may decide freely " within the limits set by statutes in accordance with the Constitution " on issues related to family life, marriage and having a child." Section II(3)

"The State may not prescribe the ideal number of children for people, and it may not enforce legitimate aspects of population policy and social policy by violating the right to self-determination based on Article 54 para. (1) of the Constitution. As explained by the Constitutional Court in point III.2 of the Reasoning of the present Decision, the restriction of the right to self-determination in Section 187 para. (2) of the AH is not a suitable and therefore " evidently " not a necessary tool for the realization of otherwise legitimate objectives of population policy. Furthermore, the enforcement of the fundamental right may not depend on whether the parents have blood children or adopted ones. Based on the above, the Constitutional Court considers that Article 54 para. (1) and Articles 16 and 67 para. (3) of the Constitution may necessitate the restriction of sterilization for family planning purposes, but the restriction contained in the first sentence of Section 187 para. (2) of the AH exceeds the extent justified by the desired constitutional objectives, therefore it is disproportionate and thus unconstitutional." Section III (4.2.1.)

"Sterilisation can be aimed at the protection of more than physical health. In addition to the person's physical

health, his or her mental state and family and other circumstances are also to be taken into account.â€• Section III (4.2.2.)

â€œConsequently, the provisions under examination do not prescribe an obligation for the applicant; they are rather based on the assumption that the applicant has requested sterilization with the knowledge of his or her spouse or cohabitant (of the opposite sex). According to the regulations, the decision subject to self-determination is to be made by the applicant alone; the spouse or cohabitant has no right of consent or refusal.â€• Section IV(1)

â€œThe petitioner refers to Article 54 para. (1) of the Constitution, even though the right to the protection of secrecy in private affairs and personal data is explicitly named in Article 59 para. (1) of the Constitution. Therefore, the Constitutional Court has rejected the petition challenging Section 187 para. (5) of the AH and Section 6 para. (1) of D2 solely on the basis of Article 54 para. (1) of the Constitution. the Constitutional Court terminates its procedure â€“ among others â€“ if a) the statute under review is repealed after submission of the petition, thus making the petition irrelevant...In view of the above, the Constitutional Court has terminated the procedure based on the petition seeking the establishment of the unconstitutionality of D1â€• Section IV(1)

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