



## Case 48/1998 (XI. 23.)

Decision 48/1998 (XI. 23.) AB

**Country:** Hungary

**Region:** Europe

**Year:** 1998

**Court:** Constitutional Court

**Health Topics:** Health information, Sexual and reproductive health, Violence

**Human Rights:** Right to a clean environment, Right to bodily integrity, Right to life, Right to privacy

### Facts

This case concerned the impact of Hungary's constitutional guarantee of the right to life on its parliament's ability to pass abortion laws. Petitioners submitted that Hungary's Act LXXIX/1992 on the Protection of Foetal Life (the Act), regarding permissible abortion, was unconstitutional. The Act allowed a pregnant woman to have an abortion if she was in a situation of serious crisis. The petitioners argued that the Act's definition of serious crisis practically allows unrestricted abortion.

The Court consolidated several petitions regarding the Act concerning the constitutionality of Sections 6, 12, and 9 of the Implementing Decree. Section 6 enumerated situations where it was legally permissible to obtain an abortion, including a situation of serious crisis (Section 6 para. (1) item d), section 12 provided the definition of a situation of serious crisis, and section 9 provided the statement which pregnant women were required to sign when seeking an abortion.

### Decision and Reasoning

The Court held that Section 6 of the Act was constitutional as the section's enumeration of situations of serious crisis did not violate the constitution. However, the Court held that Section 12 of the Act, specifically the definition of situations of serious crisis, and Section 9 of the Implementing Decree were unconstitutional as they removed the constitutionally-required minimum protections owed by the State to fetuses.

The Court first compared the qualified protection of the life and dignity of the fetus with the absolute protection available to born humans as per Article 54 para. (1) of the Constitution (the right to life and human dignity). The Court confirmed that while fetuses do not have legal subjectivity, the State's obligation to protect life goes beyond the individual's subjective right to their own life, and encompasses an obligation not to violate human life in general, including lives without legal subjectivity. The Court concluded that the State thus has an obligation to protect fetal life derived from its general obligation in Art. 54 of the Constitution to protect life.

The Court then balanced the fetus's right to protection with the mothers' right to health and self-determination. The Court found that the Act did not secure the constitutionally-required minimum protection for the fetus. The State's duty to protect fetal life was incompatible with the Act's policy of allowing pregnant women to declare their situation to be a serious crisis, and secure an abortion by simply signing an application form. This was reinforced by the fact that Section 9 of the Implementing Decree gave the Family Protection Service staff no discretionary power regarding the validity of the woman's statement.

However, the Court refused to find the entire Act was unconstitutional on the basis that it did not define the fetus's legal status, legal subjectivity, or rights. The Court concluded that by remaining silent on the legal subjectivity of the fetus the position taken by the Act was that the fetus was not a subject of law. Consequently, the Act could not provide for the rights of the fetus.

The Court annulled both Section 12 para. (6) of the Act and Section 9 para. (3) of Minister of Healthcare Decree 32/1992 (XII. 23.) NM.

One judge, Dr. László J. J. J. J., dissented with the majority decision and would have declared that the fetus had the legal status of a person, i.e., a living human. He reasoned that no man could have been born without being a fetus. He called for the State to intervene if the number of abortions did not decrease relative to the number of births, considering it the State's constitutional duty to eventually eliminate abortion.

Another judge, Dr. Tersztyńszky, would have annulled and declared Section 6 para. (1) item d) of the Act unconstitutional. He reasoned that specifying a constitutional precondition to apply item d) did not remedy unconstitutionality. He warned that if a new Act was not adopted by 30 June 2000, a pregnant woman's situation of "serious crisis" would remain undefined: there would be no provision in the Act to verify such "serious crisis" and no countervailing provision to protect fetal life.

Two other judges concurred in the order, emphasizing, inter alia, that there other constitutional provisions other than the right to human life which obliged the State to protect pregnant women and the fetuses jointly, that the Act's interpretation that the fetus was not a subject of law was in accordance with the Constitution (and any other interpretation would have impermissibly amended the Constitution) and that the majority's solution of a controlled indication for a "serious crises" would unconstitutionally restrict the pregnant woman's right to self-determination and privacy.

### Decision Excerpts

"[t]he duty of the State based on the right to life goes beyond its obligation not to violate the individual's subjective right to life and to employ its legislative and administrative measures to protect this right, but it must protect human life in general and the conditions thereof. The protection of human life cannot be limited to the protection of the life of men born and having legal subjectivity." Page 12.

"[The Court] must weigh both the woman's right to self-determination, to life and to physical integrity as well the State's duty to protect life—including foetal life—that follows from the right to life. A complete ban on abortion would, therefore, be unconstitutional." Page 14.

"The fact that the Hungarian law (too) considers abortion an act which is in principle detrimental to the society is clearly reflected by the Criminal Code, qualifying and punishing unlawful abortion as a crime (Section 169 of Act IV of 1978 on the Criminal Code). Expressing the exceptional and negative nature of abortion is an obligation of the State that results from its duty to protect life." Pages 24-25.

"The pregnant woman's personality rights, and in particular, her right to self-determination may have primacy over the right to life and the State's obligation to protect foetal life only in exceptional cases when there is a conflict arising from the mother's rights being seriously endangered. In case the enforcement of such rights is allowed by the law to as great an extent as provided by the Act on the Protection of the Foetus when regulating the situation of serious crisis, foetal life, too, must be protected by firm and effective provisions in order to re-establish the constitutional balance." Page 30.