
Decision 64/1991. (XII. 17) AB
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ON BEHALF OF THE REPUBLIC OF HUNGARY

Based on the subsequent examination of the constitutionality of the legislation as well as other motions directed at abolishing an unconstitutional omission, the Constitutional Court, with concurring opinions from Dr. Antal Ádám, Dr. Géza Herczegh, Dr. Géza Kilényi, Dr. Thomas Lábady, and Dr. János Zlinszky, has adopted the following

Decision:

The Constitutional Court holds that the applicable rules governing the termination of pregnancy by a regulation are unconstitutional. Therefore, the Constitutional Court, effective as of 1992 December 31, repeals as unconstitutional the first sentence of Article 29(4) of the Health Act of 1972 (the "Health Act"), which states "The termination of pregnancy is permitted only in cases provided for by law and in accordance with regulations", and Article 87(2) of the Health Act, as well as Decree 76/1988.(XI. 3) MT, addressing abortions, and its implementing Decree 15/1988.(XII. 15) SZEM.

The Constitutional Court dismisses the motion to determine the unconstitutional omission.

The Constitutional Court publishes this Decision in the Hungarian Gazette.

Reasoning

A)

The Constitutional Court received several petitions relating to pregnancy termination (abortion) legislation: the unconstitutionality of Article 29(4) of the Health Act, Decree 76/1988. (XI.3.) MT, and its implementing Decree 15/1988. (XII. 15) SZEM, and determining and eliminating conflict between the legislation and Decrees with international treaties and determining and eliminating unconstitutional omissions with respect to the legislation and Decrees.

The Constitutional Court has consolidated the petitions and evaluated them together.

The constitutional objections and arguments contained in the motions are summarized as follows.

1. The ministerial Decree addressing pregnancy termination and its implementing Decree are contrary to the Legislative Act of 1987 ("Legislative Act"), Article XI(c)(5)(f) and (j) because the Decrees do not, as required by law, provide for provisions relating to the citizens' fundamental rights and duties. The Decrees also violate Article 8(2) of the Constitution, according to which the laws governing fundamental rights must be established, and Articles 35(2) and 37(3) of the Constitution, which prohibits the Government and its members from issuing regulations that are contrary to the Law.

2. One group of petitioners contends that the decrees regulating abortion are unconstitutional because they unconstitutionally permit abortions, or provide unconstitutionally broad permission to terminate a pregnancy.

a) The petitioners represent the view that the offending decrees are contrary to Article 54(1) of the Constitution, which provides that all people are born with an inherent right to life and human dignity that shall not be arbitrarily deprived. The petitioners' position is that human life begins with conception, and the prohibition of any restriction on the fundamental rights that are the essence of Article 8(2) of the Constitution are applicable to the fetus, just as they are to a fully-grown human being.

b) For similar reasons, Article 66(2) of the Constitution, and Article 67(1), addressing the protection of children, and Article 70/D(1), the provision providing the right to the highest possible level of protection for physical and mental health, are applicable to the fetus. The Decrees are contrary to these principles.

c) The petitioners contend that it is unconstitutional to discriminate against the fetus and for its life to not receive the same protection as any other life. (Article 70/A(1)).

d) In the view of the petitioners, permitting abortion is contrary to Article 56 of the Constitution, which ensures the right to legal capacity for human beings.

e) The petitioners believe the challenged Decrees are also unconstitutional because, despite the fact that Article 35(2) of the Constitution provides that the Government regulation must not conflict with the law, the Decrees violate provisions of criminal, civil and family law.

f) The abortion Decrees do not guarantee physicians and other health care providers the opportunity to refuse the performance of the abortion procedures, thereby violating Article 60 of the Constitution, which provides for the right to freedom of conscience.

3. The second group of petitioners argues that terminating a pregnancy is a decision that is a matter of conscience for a woman and any legislation interfering with respect to this decision is unconstitutional.

a) These motions argue that the right to decide to terminate a pregnancy stems from a woman's fundamental right to human dignity (Article 54(1) of the Constitution); therefore, any restriction on this right by governmental or ministerial decree is contrary to Article 8(2) of the Constitution.

b) According to the petitioners' position, the legislative provisions that permit women under the age of 35 or women who have given birth to two or fewer children to have an abortion only following an official examination is contrary to Convention on the Elimination of All Forms of Discrimination against Women, adopted in New York on 18 December 1979, as well as Article 16(1)(e) of the ten-year plan of the Convention proclaimed in 1982.

Thus, equal rights of women with respect to men should be guaranteed, in part to ensure that women have the freedom to decide the number of children and the amount of time between the birth of any children. The proponents requesting consideration for a determination that domestic legislation should agree with this principle also asked the Court on its own motion to determine that the challenged legislation is in conflict with international treaties.

c) The petitioners contend that the legislative provisions placing restrictions on women younger than thirty-five years of age and women who have fewer than two children are prohibited by Article 70/A(1) and (2) of the Constitution as unconstitutional discrimination.

d) The petitioners requested that, with a determination by the Constitutional Court to strike down the impugned legal provisions, it should also make a determination that the lack of statutory provisions regulating this issue is unconstitutional, because the remaining provisions of the Health Act of 1972 would prohibit abortion in all circumstances. Such a ban would violate Article 8(2) of the Constitution for women , which provides that no regulation can limit fundamental rights.

B)

At the request of the Constitutional Court, the Welfare Minister expressed his opinion in agreement with the proponents' position asserting that abortion regulations are contrary to the provisions of the Legislative Act, and thus unconstitutional. In his opinion, fundamental questions with respect to this issue are addressed under the Constitution; regulations should only control at the level of the details.

C)

Article 8(2) of the Constitution provides that "in the Republic of Hungary, rules pertaining to fundamental rights and duties shall be determined by statutory law ... " Thus, in order to determine the constitutionality of the challenged provisions, one must

first identify whose fundamental rights or obligations are affected by the abortion regulations and which rights are affected.
1. According to the motions, the current abortion regulation violates for the fetus the right to life (Article 54 of the Constitution), the right to legal capacity (Article 56) and the mother's right to human dignity (Article 54(1)).

The regulation of abortion is contrary to the prohibition of any restrictions on the essential subject matter of a fundamental right (Article 8(2)), the right of protection for children and mothers (Articles 66(2) and 67, respectively) and the prohibition against discrimination (Article 70/A), as well as the right to health (70/D).

2. Certainly, the regulation of abortion is closely related to the fundamental rights enumerated above. However, not every type of connection to a fundamental right requires regulation by statute. Determining the substance and essential guarantees of a certain fundamental right can only be done by statute. Additionally, a statute is required for the direct and significant restriction of a fundamental right. With respect to indirect and remote connections to a fundamental right, however, ministerial regulation is sufficient. Otherwise, everything would have to be regulated by statute.

As a result, whether or not there is a need for statutory regulation will always depend on the concrete regulation to be addressed and upon the strength of its relationship to a fundamental right.

3. A number of fundamental rights are affected by abortion regulations (see point 1 above). However, the relationship between abortion regulation and the right to life is qualitatively different from those pertaining to all other fundamental rights. Abortion is always a disposition over the life of the fetus, which invites legal classification. The regulation of abortion "applies to" the right to life of the fetus – which includes an initial question of whether the fetus can be considered a subject of law – and such regulation undoubtedly also "applies to" the legal capacity of the fetus.

The Constitutional Court has always considered the determination of whether or not the fetus is a legal subject to establish the context of understanding the issues. In other words, under what conditions would the right to life and human dignity be available to the fetus as a legal subject. Therefore, determination of whether the fetus is a subject of the law depends on whether the fetus is a human being or not.

The "application of" abortion regulations to a legal subject and the right to life in all cases for a legal subject stems from the initial determination or whether or not a legal status exists. Given the fact that a human being's right to life and his/her classification as a legal subject cannot be restricted, in other words, it exists or does not exist, the abortion regulations are connected to fundamental rights in the strongest possible terms.

All other future questions pertaining to a fundamental right, if abortion regulations "apply to" such fundamental rights, require statutory determinations. This reflects the fundamental affect of the legal classification of the fetus.

a) The mother's right to self-determination is the strongest, indeed classic, argument in favor of abortion. This argument has been followed in the decisions of numerous foreign constitutional courts. The classic argument in favor of the fetus, on the other hand, is that the obligation of the state to protect the life of the fetus stemming form the fundamental right to life can extend to the fetus without deciding the question of its legal capacity.

The connection between abortion and the right to life and the right to dignity (self-determination) certainly requires that abortion be regulated by statute. This is the case because regulating abortion substantially affects these two fundamental rights in every case, given that both the argument for the right to self-determination, as well as calling upon the objective obligation to protect human life inherently assumes the denial of the fetus as a legal subject. For, if the fetus does have a right to life, then the mother's right of self-determination cannot be considered, or only to the extent that it could be weighed against the right to life of any other human being imposing a comparable burden on the mother. Furthermore, in this case, a relative protection of the right to life is insufficient. The duty of the state to protect life or the right to self-determination necessitates the statutory regulation of abortion in this context.

b) Setting aside the connection between the fetus and its legal status, the strength of the connection between the mother's right to self-determination and the regulation of abortion, necessitating statutory regulation, remains controversial, at least in principle.

In its 8/1990 (IV.23) Decision, the Constitutional Court, with respect to the right to self-determination, found that with modern constitutions and the practice of constitutional courts there has been a parallel development of the right to freedom of personality, the general freedom of action and the right to privacy, which can be called the right to personality generally. The general right of personality is included within the wording of the right to human dignity (Article 54(1)).

The Constitutional Court held that the general right to personality is a "basic right", that is considered a subsidiary fundamental right such that both the Constitutional Court and the courts can call upon it to protect the autonomy of the individual, if a specific, named fundamental right is not applicable. Foreign constitutional court decisions have relied upon similar connections between the mother's right to self-determination, the right to privacy and the concept of a right to personality in addressing abortion related matters.

Pregnancy causes such changes in the mother's system, and under normal circumstances, child-rearing alters the remainder of the life of the mother that, in the view of the Constitutional Court, the possibility of regulations that narrow the scope or limit the availability of abortion will directly and substantially affect the right of the mother to

self-determination. This is the case even if self-determination is only curtailed with respect to the wishes of the mother to require her to carry the fetus to term and give birth to it; she will be free from the responsibility of upbringing. As previously mentioned, abortion should be regulated by statute. However, in principle, it is possible to have an extremely liberal abortion law. Under such a law, discussion on the subject of self-determination may be restricted by this regulation on its surface as to require further legislation to be brought about to address this restriction. (The hierarchy of the rules governing the sources of law is independent from the substance of the constitutional question, whether restrictions on the right of self-determination are necessary and proportionate.)

The right to self-determination as the basis for the disposition of the life of the fetus can only inherently arise when we assume that the fetus is not legally a human being. If the fetus is a legal subject, then such a subject has the right to life. If this is the case, then the mother's right to self-determination cannot be respected; but in a few exceptional cases, restrictions on the fetus' right to life may apply. In such cases, the right to self-determination cannot be relied upon to permit the termination of the pregnancy, just as it cannot be relied upon to kill the certainly more burdensome infant born with an open backbone at the ninth-month of pregnancy. (Nor can the right of medical self-determination be called upon to help bring about the death of a helpless old man in need of care; although the life and right of self-determination for the guardians may be more severely limited than the mothers who have to take care of their children.)

Consequently, if we want to state why abortion regulation affects the mother's right to self-determination, there is no way to avoid the question of whether the fetus is legally a human being, and if it has a subjective right to life and dignity. Of course, abortion restrictions are very closely affected by the mother's right to self-determination, and it can affect other fundamental rights as well. But this "connection" is awarded absolute relevance with respect to fundamental rights because a position with respect to the basic legal status of the fetus needs to be incorporated.

c) Article 54(1) of the Constitution states that the right to life is guaranteed to "every human being," on the one hand, and on the other hand – in harmony with Article 8(1) - that the "respect and protection" of human life shall be "the primary obligation of the state." The obligation of the state to "respect and protect" these subjective fundamental rights is not exhausted by protecting them from infringement, but incorporates the obligation to ensure the conditions necessary for their realization. People naturally exercise their fundamental rights from the perspective of their individual freedom and personal needs. The state, however, must guarantee performance of its duties such that all subjective fundamental rights of individuals are protected alongside those values and life situations in themselves. That is, the state needs to provide protection in relation to the needs of an individual, but also manage such needs in the context of other fundamental rights. The protection of fundamental rights by the state is only part of the maintenance and operation of the whole constitutional order. Due to the difference between the right to fundamental rights as opposed to the state's various considerations and duties, the

individual's subjective rights, as one aspect of the fundamental rights, is not necessarily of the same magnitude as its objective aspects. On the basis of its general and objective considerations, the state may exceed the realm protected by the subjective right while determining the boundaries of the objective, institutional protection of the same fundamental right. This is the situation, for example, when the individual's exercise of a civil liberty does not appear endangered, but taking the individual cases as a whole, the institution guaranteed by fundamental rights will be threatened. A single occurrence of an expropriation, for example, does not threaten property rights, yet such a threat to the institution of property would clearly emerge if dispossession beyond some threshold level were to become routine.

The situation with respect to the right to life is analogous. For an individual, the right serves to guarantee his/her own life. At the same time, the duty of the state goes beyond its obligation to not violate an individual's right to life and to employ its legislative and administrative measures to protect this right. It must also protect human life and its condition of existence in general. This latter duty is qualitatively different from aggregating the right to life of individuals. It is human life in general, consequently human life as a value, that is the subject of protection. Hence, the state's objective and individual duty to protect human life extends to those lives which are in their formation, no less than it has a duty to secure the conditions of life for the future generations. This duty, in contrast with the right to life, is not absolute. Accordingly, it is possible that this duty is restricted by other rights. Thus, the state's duty to protect the life of the fetus may be restricted by the mother's right to health or her right to self-determination.

There is no general guiding principle which can be derived from the state's duty to protect life. The most frequently cited argument in favor of protecting the fetus, which can explain why the law does not protect every fetus equally or why it protects the fetus only to a certain extent beyond which infringement upon its prospects for life is permitted. It is not readily apparent why the State's interest in a pregnancy which has progressed beyond the third month is more compelling than its interest in protecting a fetus less than three months old, which if protected would also develop into a viable being. Since the fetus's human potential is constant throughout the pregnancy, on what basis can one grade the intensity of protection afforded to it? If it is said that the nasciturust is accorded the right to life, then on what principled basis can one distinguish between the protection of life of the born and the still-born? Other countries' constitutional courts employ these questionable distinctions, albeit that they are always based on negotiated considerations, which are always debatable.

The state's duty to protect life, derived from Article 54 does not on its own require any statutory regulation. On the basis of Article 54, the state has to provide for the protection of life by institutions in general and impersonal manner with respect to "every human being" as a statistical multitude of people. Traffic regulations, environmental emission limits, and technical safety regulations do not require regulation by statute despite the fact that all of these regulations clearly touch upon the objective aspect of the right to life and the state's duty to protect it. This is the case, since such regulations seek

to protect life only to a limited extent. Beyond that, there is a knowing assumption of the risk of loss of some number of human lives in exchange for improving overall social welfare.

The case of abortion is not a situation where human life in the abstract is exposed to risk. Rather, it is always a specific individual life that is deliberately singled out for termination. This is so, even if for the sake of caution, one were to discuss "potential life." Therefore, abortion may only fall under the relative institutional protection of life pursuant to Article 54 if the individuality of the fetus were not legally recognized. Since the deliberate and specific nature of abortion as an act cannot be eliminated, the depersonalization of the other side must be increased in the extreme. Abortion may only "pertain to" the objective side of the right to life guaranteed by Article 54 of the Constitution. Thus, this right should not be taken into account as a subjective right if legally the fetus is not considered to be a human being. In contrast, if the fetus has a right to life and dignity, then this right cannot differ from those accorded to other human beings. That is, the fundamental rights of the mother will be compared no differently than to the rights of children already born. The fact that the fetus is in the mother's body (or in some other artificial conditions), it can, of course, advance its own specific preferences. The rivalry between the rights of the mother against the rights of the fetus is not necessarily analogous to self-defense. But all these features and facts address individuality and not the question of the legal status of the fetus.

The connection between regulation of abortion and the right to life also requires that abortion statutes be provided for, because regulation necessarily calls for the inclusion of the legal status of the fetus. Though, fundamentally different from each other, both are duly depending on the determination of whether the fetus is legally considered a human being or not. The connection is relevant in the reverse as well: the proclaimed regulations can only be in accordance with the specific legal status of the fetus.

d) If the abortion in itself is merely a physiological (medical) procedure, then this situation does not necessarily represent a direct and substantial relationship between the mother's right to life or right to health. The significant risk of surgery for a similar abortion does not require special statutes or even ministerial decrees. The general principles set out in the Health Act are sufficient. This is true even if the pregnancy is terminated to save the mother's life. Provisions on a statutory level would be needed if, in the case of a situation with the risk of loss of life or the health of the mother was at risk, such a surgery could not be performed; that is to say, there was a divergence from the general provisions of the Health Act. (The legal hierarchy of such a law is different from the question of whether such a law is constitutional.)

The less restrictive the possibility of abortion, the less affect abortion regulations will have on the mother's right to life and health. It does not follow that, from these recent rights, the artificial termination of a pregnancy should be regulated by statute. The regulations contested before the Constitutional Court do not include such restrictions that

would touch upon the mother's life or include any restrictions on her right to health that differ from the general rules, since a pregnancy may be terminated "if a pregnant woman has a medical reason for doing so." In this regard, there is no "connection" that would require the regulation of abortion in such cases to be controlled by statute.

The corresponding interests (or rights) of the fetus to its existence are weighed against the relevance of the mother's life and her right to health: the mother will call upon her fundamental rights to protect her interest against that of the fetus.

e) If abortion is conditional, then there will necessarily be a differentiation between pregnant women who meet the criteria, and those who do not. The extent to which the distinction in contained in Article 70/A is significant, and again basically depends on what a fetus is considered to be. If the fetus is a subject of law, then, abortion regulation would be impossible in the first place because of the right to life for the fetuses. However, if the fetus is not legally a human being, then an assessment with respect to which of the mother's fundamental rights would be affected and to what extent if distinctions were applicable.

f) The Constitutional Court holds that neither Article 66(2) of the Constitution, providing for mothers the guaranteed right to receive assistance and protection before and after the birth of a child, nor child's right for its family to receive from the state and society protection and care given(Article 67 (1)), are relevant with respect to abortion or of value in determining the problems of constitutionality with respect to abortion; nor will they influence the question of whether abortion should be regulated by statute. The question is not whether the fetus is a "child," but rather whether it is a subject of law.

4. In summary: induced abortion must always be regulated by statute because any regulation standing alone will include the determination of the fetus as a legal subject or not, and from here flow all determinations with respect to the fetus's right to life and other subjective rights of the fetus. This "connection" always exists. The link between other fundamental rights and abortion, however, may be questionable depending upon the concrete regulation, and referring to fundamental rights at any time to determine when specific content should be addressed by regulation or by statute will be debatable.

Based on this reasoning, the Decree 76/1988(I.3) MT and Decree 15/1988 (XII.15) SZEM are hereby held to be unconstitutional, given that, by regulating abortion, the decrees also decide the question of the legal capacity of the fetus, which pertains to Articles 54 and 56 of the Constitution, a decision which, pursuant to Article 8(2) of the Constitution, can only be made by statute. The first sentence of Article 29(4) of the Health Act which states that abortion is permitted only in circumstances and in the manner set forth by legal rules is in conflict with the Constitution. This provision of the Health Act authorizes the regulation of abortion by means ranking lower than statutes in the hierarchy of sources of law. As a matter of legal order, no decree can be elevated to the level of a statute by another law. The mere possibility of declaring a statute is unnecessary. The quoted provision shall not be attributable to the Constitution and the

Legislative Act, taken together, and after considering the Health Act, "legislation", only refers to the abortion legislation by the terms to be determined. As a result, the first sentence of Article 29(4) of the Health Act conflicts with Article 8(2) of the Constitution.

Article 87(2) of the Health Act is unconstitutional as well. This regulation permits termination of pregnancy for foreign nationals only in cases where the procedure would be necessary to save a woman's life. Since the rules relating to abortion regulation have been deemed to be unconstitutional, and the authorization pursuant to Article 87(2) referred to in the above ranks lower than that of a statute, this regulation is contrary to Article 8(2) of the Constitution. The Constitutional Court annuls the entire paragraph. If, indeed, only a statute can establish an exception to this rule, it is unnecessary to provide for authorization to do so. However, the exception referring to the formal reason for the annulment of the current rule, from the point of view of the Constitution, would significantly change the contents of the provision. In any case, it is the legislature that should address or become familiar with the fact that rules with respect to the termination of pregnancies for foreign nationals under the Health Law has changed. Furthermore, the Constitutional Court is not addressing the substantive question relating to abortion. The Constitutional Court strikes the aforementioned provisions of the Health Code relating to foreign nationals for the reasons outlined above.

The Constitutional Court declared the regulations null and void, which for formal reasons are deemed to be unconstitutional. The Constitutional Court has refrained from making a determination on the merits of the constitutionality of the regulations of abortion for the reasons discussed below.

D)

1. The question of whether the fetus is a legal subject cannot be resolved by interpreting the Constitution. Accordingly, it is only after a legislative decision determining whether the fetus if a subject of the law, and contingent on the determination, would the Constitutional Court be able to make a substantive evaluation of the constitutionality of abortion regulations.

The fact that according to the current law, the fetus is not a legal subject does not advance the resolution of the problem. A group of petitioners precisely questions the constitutionality of this situation, in part, by arguing that the fetus also belongs within the subjects of fundamental rights under the Constitution when it refers to "everyone" or "every human being."

In examining whether the fetus is a legal subject, one is not confronted with the usual task of constitutional interpretation. This is not a case in which one can apply a generally accepted and value-free notion in order to determine which of the possible interpretation are, and which are not, compatible with the Constitution. Whether or not the fetus is a legal subject gives rise to fundamentally different legal situations. The two interpretations are mutually exclusive, yet both of them can be reconciled with the

present Constitution. Interpretation of another fundamental right secured by the constitution cannot help the Court to decide in favor of one or the other. The Constitutional Court can interpret the meaning of the right to life and human dignity, as well as the right to be a legal subject, but their efficacy – whatever their content – hinges on who is considered to fall within the scope of "every human being."

The decision on whether the fetus is a legal subject is tantamount to the redefinition of the legal status of human beings. But such a determination, which must precede any interpretation of fundamental rights cannot be derived from the inner logic of the Constitution and is not to be found therein. It is an external decision due to the drafters of the Constitution that would most appropriately be regulated by incorporation into the Constitution itself. The Constitutional Court can contribute to the making of this decision by evaluating the relationship between the decision about redefining the category of legal subjects, on the one hand, and the present Constitution as well as the interpretation of fundamental rights by the Constitutional Court, on the other: what changes, if any, are needed and the possibilities and limits of redefining the institution of legal capacity. The Constitutional Court will state its view regarding the constitutionality of restricting the scope of the institution of legal subjectivity and, second, whether the extension of its scope alters the basic characteristics of the legal concept of a human being (natural person) and whether the Constitutional Court's interpretation of the right to life accords with such a modification.

2. According to Article 54(1) of the Constitution, every human being has the right to recognition everywhere as a human being before the law. Article 16 of the International Covenant on Civil and Political rights declares that everyone shall have the right to recognition as a person before the law.

a) Accordingly, international agreements on human rights and the Constitution state that every human being, everywhere, unconditionally has legal capacity, that s/he is a person in the legal sense. The recognition represents the universal triumph of the goals sought throughout a long historical process stretching back at least 200 years: human beings, not only in their "natural state" but also before the law, have become equal. The legal capacity is conferred on every human being, thus precluding slavery; and being not only universal but also equal to everyone, it excludes further differentiations (e.g., feudal ones) which are based on the graduation of legal status. Once every human being's legal capacity is recognized, "human beings," "legal subject," "everyone" and "person" all become synonyms legally. As a result, "human being" has become a normative or standard concept. At the time when every individual acquired this legal status, there was no tension between human rights concepts and biological concepts, or to determine the range of ethical views on the subject, which seems to create problems in contemporary situations. On the contrary, it was during this time that the different concepts of human beings came into existence. The standardization of the legal concept of human rights incorporated the concept of human being as "self-evident." It was with respect to the latter that the legal concept that every person must have the same status as legal subject.

This principle is based upon shared moral values of human beings. It was taken for granted that everyone who was born a human being is a human being.

b) Legal capacity is such an abstraction which no longer contains anything necessarily restricting its application to human beings. It is a formal quality. Every human being must have a legal personality, but it is not only human beings that can have a legal personality. The law can designate anything as a legal subject or a "person."

Accordingly, there are two substantive fundamental rights that supplement a human being's basic legal status, which give content to the formal requirements of the right to legal capacity and express a person's human quality: the rights to life and human dignity. The right to human dignity means that the individual possesses a core of autonomy and self determination beyond the reach of all others, whereby according to the classical formulation, the human being remains a subject, not amenable to transformation into an instrument or object. This concept of the right to dignity distinguishes human beings from legal entities, having legal capacity, the later being amenable to total regulation, lacking an untouchable essence. Dignity is a quality coterminous with human existence, a quality which is indivisible and cannot be limited, hence belonging equally to every human being. The right to equal dignity, coupled with the right to live, is inviolable for anyone who is a human being, irrespective of physical and intellectual development, and condition and irrespective of the extent of fulfillment of the human potential. We cannot even talk of a human being's right to life without positing that person's individual subjective right to life and dignity. The state's duties to secure the right to life merely contribute to this, but are not a substitute for subjective rights, and without respecting the subjective right to life and human dignity, those objective duties are meaningless with respect to living human beings.

c) During the second half of this century, the relationship between the biological and legal conception of human beings became problematic again. Given the plurality of equally prevalent moral views in society, we cannot even discuss a generally accepted moral concept of human being. The multifaceted and diverse situations as a third party disposes of the life of another person must all confront the legal concept of human being and its fundamental legal status, as discussed above: hence death penalty, euthanasia, abortion and every regulation pertaining to the fetus outside of the womb are inevitably constitutional problems.

Judging from the perspective of fundamental rights, there is a substantial difference between death penalty and euthanasia, on the one hand, and abortion on the other.

With respect to the death penalty or euthanasia, there is no question that it is the life of a human being with is being disposed of. The constitutionality of these acts can be determined by interpretation of the rights to life and dignity without necessarily having to inquire into the formal legal concept of human being.

That the death penalty is deemed unconstitutional in a growing number of countries is a clear indication that the development where by everyone, purely by virtue of being a human being, is to be accorded full legal status of a human being is approaching its culmination. This will occur if the unconditional right to life and dignity, akin to that of legal capacity, is recognized. In contrast, those countries which have the death penalty and permit euthanasia record the rights founding the uniquely human legal status as revocable or subject to limitations on the basis of specific criteria (such as guilt, quality of life, physical or conscious state) to this concept. The basic question of death penalty and euthanasia is accordingly, the decision on the unconstitutionality or the ability to place restrictions on of the right to life and dignity.

However, with respect to abortion, the question is not whether the fundamental rights shaping the uniquely human legal status are unconditional or subject to limitations, but concerns the preliminary question of whether the fetus is a human person, and thus capable of becoming a subject of these rights.

According to Hungarian law, the fetus is not a legal subject. That the Criminal Code protects the interest of the fetus by declaring abortion to be a crime is a different question. Likewise, that the Civil Code provides of the interests of the unborn child, technically by recognizing the fetus's conditional right to legal capacity, subject to its live birth, is a different question. This method of a conditional right is appropriate to ensure the property interests of the child until birth. But such a conditional legal capacity is not appropriate for solving the problem of abortion. The fetus's right to life – in effect, it's right to be born, cannot be made dependent on the condition of its being born.

d) Two conflicting developments regarding the concept of man compels a determination of whether the fetus is a legal subject. Both developments alter the traditional thinking about the fetus.

On the other hand, abortion has reached a historically unprecedented magnitude having become one of the main forms of contraception, while its directly associated health risks have become insignificant. Related to this trend, the negative moral evaluation of abortion which characterized previous eras is becoming increasingly neutral. The decriminalization of abortion has commenced. Social movements press for the total liberalization of abortion. The practice of abortion on a mass scale and its accompanying rationalizations and justifications mitigate the public's concerns about the disposal of the fetus. The precondition of the sought-after permissibility of abortion is the continued non-recognition of the fetus as a human being and its right to life. As a result of these changes, in the majority of states under the rule of law the constitutionality of applying penal sanctions to abortions were challenged before constitutional courts, hence raising the questions of the legal condition of abortion as well.

On the other hand, as a result of scientific progress, birth is no longer an obviously natural and qualitative line separating the life of a fetus from a "human person's life." Biological, and especially genetic, opinions maintain that individual

human life is a uniform progression from conception, not from birth, to death. Within this progression, several states can be distinguished, with birth not necessarily being the most important dividing line during the early stages of human life. The social position of the fetus is also changing. It participates in society on account of its independent physical presence and, increasingly, on its individual attributes, rather than on the basis of its impending social position (by conditional property rights). The progress of medical technology and the application of other technical devices now permit the gathering of a great deal of information about the fetus within the womb: its gender and physical characteristics can be known; it can be treated and operated upon; it can be made visible to the mother and her family, allowing them to follow its development. The individuation of the fetus is strengthening. Outside the womb, the fetus also appears independently in societal affairs. This is the basis, for instance, of surrogate motherhood. These changes are the direct outcome of technological advancement, and their dissemination and growing popularity is permanent. This transformation means that the conception of the fetus as a human being will become increasingly clear in public opinion.

These changes are moving toward the direction of incorporating the fetus as "self-evident" in the concept of human being, thereby bringing the latter into harmony with the moral and biological viewpoints which believe that human beings must be recognized from the moment of conception.

The two conflicting trends can be made seemingly compatible by positing, as tradition would also have it, that the concept of man can be extended only to the matured (viable) fetus. (Even abortion advocates limit their demands for the freedom to choose within the first three months of pregnancy.) However, intervention with the fertilized cells or during the initial stages of fetal development would require a uniform determination of the fetus' legal status based on a single principle. If the law at all extends human status prior to birth, and provided it maintains its existing principles, then the fetus must be recognized as a legal subject irrespective of its stage of development. This follows from the fact that the law does not distinguish, and cannot, while remaining within this conceptual framework, between those born on the basis of physical state, mental functioning or by any similar criteria.

Nonetheless, the legislature can decide that only the fully matured fetus is entitled to legal status with its concomitant absolute right to life, or can, alternatively, create a special legal status for the fetus, within which one can distinguish on the basis of age, maturity or even the "domicile" inside the uterus as opposed to outside in artificial conditions. Both solutions can increase the protection accorded to the fetus, but theoretically, the same problems of reasoning arise, which characterize the relative protection extended to the fetus by the well-known existing regulations. That is, determination of why the legal recognition of the fetus as a human person commences at a given certain moment, and not before, cannot be supported by any principle. Conversely, creating a special legal status does not extend to the fetus the absolute protection of the right to life and dignity just as present regulations fail to do so. From the

perspective of the law, the fetus is either a human person, or not. The relativity and restrictability of protection that would be accorded to the life of the fetus by making it a special legal person, enjoying *sui generis* legal protection would not result in more protection in practice than that already extended by the state on the basis of its objective duty to protect life.

3. The question is whether human legal status should follow the changing development of the concept of human being in natural and social sciences and in public opinion, thus extending the legal concept of human being before birth all the way back to conception. The nature of such an extension of the scope of legal capacity is comparable only to the abolition of slavery, but it exceeds even that event in significance. With this measure, the legal capacity of human beings would theoretically reach its final limits and completeness: the differing concepts of human beings would coincide.

(The question raised by the other tendency, how to ensure the greatest possible disposal of the fetus, would reduce the protection afforded to the fetus without effecting any change in its current legal status or requiring any review thereof.)

Interpretation of the current Constitution cannot furnish a resolution of the question whether the fetus is a legal subject.

Interpretation of the right to life and dignity can only be applied by the Constitutional Court to determine whether these bases of the legal status of human beings can be constitutionally limited. The interpretation of the proposition that "every human being has legal capacity" can only answer the question – if seeking to avoid a tautology – of whether legal capacity can be revoked. Nonetheless, such an interpretation by the Constitutional Court of these fundamental rights touches on the dispute concerning the concept of human beings, given that the normative concept of the human person whose substance is not constitutionally defined, and the standard of a human being applied by the Constitutional Court in interpreting fundamental rights must have common roots. The Constitutional Court holds that, based on its interpretation of the most important fundamental rights which form the foundation of a person's legal status, the Constitution does not permit the revocation of any part of the legal status already attained by a human being. Accordingly, the scope of legal capacity cannot be restricted. (Thus, the enactment of a law recognizing personality subject to the appearance of a specific human characteristic, hence conferring the legal status of becoming a human being on an infant when h/she is about one and a half years old – a view that accords with some theories expressed in discourse on ethics – would be held unconstitutional.)

In contrast, the expansion of the legal concept of human being is a question which the Constitutional Court can only address to the extent of declaring its position regarding the constitutional requirements of such an expansion. From what has been stated above, it follows that the only constitutional change in legal capacity and, correspondingly, in the legal concept of man, would be its expansion to the prenatal stage. The realization of this goal is constitutional, but only if it does not contradict the presently recognized legal

concept of human being in the constitutional hierarchy. The most important substantive component of that concept is equality in the abstract. In contrast, the beginning of legal capacity rests on a much less principled basis.

It is characteristic of a person's basic legal status that legal capacity is independent of that person's qualities. This is the case with respect to the right to life and dignity as well. (The debate concerning the recognition of the unconditional nature of these rights equally affects "everyone.") If the rights representing the human quality of the born are affected neither by his/her unique characteristics nor his/her circumstances (as, for instance, his/her age), then the fetus's development and its specific qualities could likewise prove irrelevant to his/her legal capacity and to the right to life and dignity. Equality in the abstract, the legal equivalent of the ethical concept of man guaranteed by the right to life, dignity and legal capacity, is not affected by the extension of legal capacity to the unborn.

The other main contemporary component of the concept of human being is that it begins at birth. This element was principally significant when it could harmonize differing conceptions of human being while justifying the equality of every human being. Whether it continues to achieve this end it doubtful given that the biological concept of man is expanding.

The legislature must evaluate the ethical and scientific viewpoints about the fetus, taking into consideration changes in thinking and conflicting social trends, and decide whether these changes should be followed by the law. From what has been discussed above, it neither follows from the Constitution that the fetus is a legal subject that must be fully recognized, nor that it is impossible to legally recognize the fetus as a human being. Such an expansion of the status of human being does not substantively affect the legal concept of human being or implicate important elements of fundamental rights.

E)

1. One group of petitioners requested a finding that, with the repeal of the challenged legal provisions, the Health Act of 1972 (II) is unconstitutional because it would ban abortion in all circumstances. This situation would be unconstitutional since it violates a women's right to self-determination.

The Constitutional Court holds that this motion is untimely. The first sentence of Article 29(4) of the Health Act states "The termination of pregnancy is permitted only in cases provided for by law and in accordance with regulations." The Constitutional Court, effective as of 31 December 1992, repeals the aforementioned abortion regulation.
The argument of an unconstitutional legislative omission could be raised if, following the expiration of the effective date, Parliament has failed to determine the legal status of the fetus by statute. The Constitutional Court notes that the evaluation of the constitutionality or lack thereof, of a lack of regulations governing abortion will depend upon how Parliament decides upon the legal status of the fetus.

2. Other petitioners allege an unconstitutional omission because the abortion regulations in force do not guarantee doctors and other health care professionals the possibility, on grounds of conscientious objection, to refuse to perform or assist in abortions.

The right of freedom of conscience relevant to this regulation is that the state cannot compel anyone to accept a situation which causes internal discord, or is irreconcilable with those fundamental convictions that shape the individual's identity. The duty of the state extends beyond refraining from such impulses to the safeguarding, within reasonable limits, the exercise of alternative behavior. Requiring a person to sacrifice in order to protect the principles of his/her conscience is not unconstitutional, provided that the burdens imposed on the person are not disproportionate.

The Constitutional Court will determine an unconstitutional omission in legislation in such circumstances where the legislative body, mandated by law, have failed to carry out its responsibilities; and this failure results in an unconstitutionality (XXXII. Article 49 (1989)). It is the holding of the Constitutional Court that the failure to issue regulations called for under legislation does not constitute an unconstitutional omission, except in circumstances in which the needed legislation interfered in some way with life situations, and thus a group of citizens were unable to exercise their constitutional rights or seek enforcement thereof. (Decision 22/1990. (X. 16) AB).

Conscientious objectors to abortion conscience were not provided a legislative exemption from performing abortion-related duties on the job. A legislative failure cannot be determined on this basis. The legislature is not obliged to make special accommodations for every particular exercise of freedom of conscience.
Article 60 of the Constitution provides sufficient general guarantees to the right of freedom of conscience and the right of freedom of religion. The aforementioned Article is sufficient to "execute" the legislature's obligations. In addition, the state must ensure that there is no legal impediment for an individual to freely exercise his/her freedom of conscience in contrast to other legal obligation. In some cases, statutes must provide a guarantee and special consideration is warranted. For example, when the right of freedom of conscience is invoked against the responsibilities for citizens contained in the Constitution. In other cases, the possibility to provide for alternative conduct is created by legislation. Both may be pertinent to certain aspects, such as the refusal of military service. While neither may be relevant, as with determining the validity of abortion.

With regard to the doctors opposed to abortion, the state's duty to uphold the right of freedom of conscience is met if an exemption from obligations under the labor law is granted, or alternatively, if the obstetrician/gynecologist is afforded an opportunity to create a work environment where s/he is not forced to undertake an abortion if doing so is contrary to his/her convictions. These opportunities are available under existing regulations.

The performance of legally permitted abortions and participation in the performance thereof, is an activity falling within the scope of the work of the doctors and health care workers specializing in the field. The general provisions prescribing performance of duties, compliance requirements and sanctions imposed for the refusal thereof are contained in the Labor Code (Article 34) [the "Labor Code"]. According to the Labor Code, a worker is obligated to follow the instructions of his/her supervisors unless the undertaking of those orders would gravely and directly endanger health or physical well-being or would encroach upon the employees legally protected interests. The appropriate instructions under the Labor Law already provide a rather low barrier. The law does not put the power of the workplace supervisor before the legally recognized interests of the employees (even if the interests of the individuals are aligned), or the personal integrity of some employees over another (even if the health problem of an employee is unpredictable, because, for example it is rare and atypical due to personal reasons). Even less conceivable would be to allow the order of the employer to impede the exercise of fundamental rights, including the right to freedom of conscience. Restricting the freedom of conscience can proceed only when directed by the interest of some other fundamental right or constitutionally mandated duty, and even then such restriction must be necessary and proportionate. Hence the worker can refuse to carry out instructions which violate his/her freedom of conscience. Such a refusal is judicially protected. The Constitutional Court notes that judicial protection of the right to freedom of conscience would apply even in the absence of the Labor Code provision to the same effect. That is, even without this provision, the judiciary could always invoke in a labor suit Article 60 of the Constitution, providing for the exemption from the duty to carry out orders. Hence there is no basis for asserting a failure to legislate. The petition is especially baseless with respect to existing regulations.

It is ridiculous to invoke freedom of conscience when the objectionable activity in general or in the workplace chosen by the employee is inherent in that sphere of work. In principle, the conduct of abortions which do not conceivably serve a medical purpose do not form a necessary part of the occupational sphere of an obstetrician/gynecologist. For this reason, a doctor opposed to abortion can invoke, in general, the right to freedom of conscience (unless s/he is employed in an abortion clinic). The state also has a duty to make it legally possible and, if need be, to participate actively in the creation of a work environment where the obstetrician/gynecologist is not forced to conduct abortions against his/her conscience. Whether there are sufficient numbers of such workplaces being formed, whether the burdens imposed on a doctor thus required to shift workplaces are excessive, and the degree of protection with freedom of conscience is to receive in work-related proceedings are all questions concerning the individual's ability to exercise his/her human rights, questions whose investigation according to existing law does not fall within the jurisdiction of the Constitutional Court.

The refusal to perform certain tasks within the scope of one's duties on the basis of freedom of conscience will receive the same treatment as refusing to follow an employer's instructions due to it conflict with the employee's freedom of conscience. Referencing freedom of conscience, either generally or with respect to specific activities,

when such activities are an essential element of the employees chosen workplace lacks justification. The doctor who does not believe in performing abortions does not necessarily have to join an obstetrician-gynecologist medical group that performs abortions. As a result, doctors opposing abortion are generally able to rely upon the right to freedom of conscience to refuse to perform an abortion (unless the doctor has taken a position in an abortion clinic). On its part, the State has the added obligation to ensure where a gynecologist conscientiously objecting to the performance of abortions is not obliged to perform abortions; or if it is not possible to do so, create professional opportunities to accommodate such doctors. Whether or not there is a sufficient number of such jobs in existence, or whether the physician required to make a job change will be disproportionately burdened, moreover what type of protection is afforded the exercise of the right of freedom of conscience in labor-related lawsuits (the only relevant question with respect to the enforcement of human rights laws) – these questions are not relevant to the examination of the current issues before the Constitutional Court and do not belong before it.

3. Based on the foregoing, the Constitutional Court rejects the petitioners' motions seeking to establish an unconstitutional omission in legislation.

F)

Finally, the Constitutional Court points to those constitutional boundaries which, subject to the decision of legislators concerning legal capacity of the fetus, limit the opportunities for abortion.

1. If the Legislature decides that the fetus is legally a human being, who is a legal subject entitled to the right to life and dignity, then abortion is permissible only in those situations where the law tolerates a choice being made between lives and accordingly does not punish the extinction of human life. Such is the case, for instance, if abortion is required to save the mother's life.

2. If the legislature decides that the fetus is legally not a person, not a legal subject under Article 56 of the Constitution, and therefore does not have the right to life and dignity, then the state is compelled to balance its duty to protect the fetus's life against the mother's right to self determination and her every other fundamental rights. The answer to the question of the extent to which constitutional rights, primarily the mother's personality rights, impose limitations on the state's duty to protect the fetus cannot be directly derived from the Constitution itself. Thus, the Constitutional Court can only designate the constitutional boundaries of the freedom of the legislature, wherein the law must lie. Alternatively, it can determine that an unconstitutional omission to legislate has occurred if the legislature fails to extend the minimum constitutionally required protection either to the mother's right or to the fetus.

Accordingly, if the fetus's legal personality were not recognized, the legislature, when called upon to designate conditions authorizing abortion, cannot ignore either of the two most important rights in conflict: It must weigh both the woman's right to self-determination and the state's duty to protect life. An outright ban on abortion would not be constitutional, for this would completely negate the mother's right to self-determination (and her right to health as well). Such a prohibition does not follow from the Constitution, given that in this scenario, the fetus does not have the right to life according to Article 54. It would likewise be unconstitutional if regulations would favor exclusively the mother's right to self-determination. The state has a duty to protect human life from the moment of its inception, and hence the right to self-determination cannot prevail alone even in the earliest stages of pregnancy. This duty to protect life means that the state cannot constitutionally permit unjustified abortions. Justification is especially necessary in the case of abortion as the state's duty to safeguard human life now serves the purpose, not of averting or minimizing anonymous statistical risks, but the willful termination of the life of an individual human fetus. Justifications deemed adequate by the legislature must be incorporated into abortion law as conditions with which to be complied.

The answer to the question of where the law should draw the line between the unconstitutional extremes of a total ban on abortions and an unrestricted availability of abortions and what indications would be required is the responsibility of and falls within the competence of the legislature. However, specific conditions cannot violate other constitutional rights. Every condition necessarily differentiates, for instance, on the basis of age, health, social position or ethical perspective, but such differentiation cannot conflict with Article 70/A, that it must comply with constitutional requirements for positive discrimination. Attention must also be paid to ensure that no one is compelled to act contrary to the dictates of his/her conscience and that the exercise of other abortion-related rights are duly respected.

G)

The Constitutional Court holds that the regulation indicated in the operative part of this Decision is null and void, effective as of 31 December 1992. If the Constitutional Court's decision to strike down these regulations were to be effective from the date of its publication, then every abortion would become a criminal act. But in this Decision, the Constitutional Court expressed no opinion on the substantive issues of abortion. Accordingly, it did not determine a date for invalidating regulations which, for all practical purposes, would be tantamount to taking a position on these substantive issues. There is ample time for the legislature to make its determination and enact a law on abortion and the legal status of the fetus.

Budapest, 9 December 1991.

Dr. László Sólyom,
Delivering the Opinion of the Constitutional Court
President of the Constitutional Court

Dr. Antal Ádám Constitutional Court Judge	Dr. Géza Herczegh Constitutional Court Judge
Dr. Géza Kilényi Constitutional Court Judge	Dr. Lábady Tamás Constitutional Court Judge
Dr. Péter Schmidt Constitutional Court Judge	Dr. András Szabo Constitutional Court Judge
Dr. Ödön Tersztyánszky Constitutional Court Judge	Dr. Imre Vörös Constitutional Court Judge
Dr. János Zlinszky Constitutional Court Judge	