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Decision 36/2000 (X. 27.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition seeking a posterior examination of the unconstitutionality of a statute and the annulment thereof as well as the examination of an unconstitutional omission of legislative duty – with dissenting opinions by Constitutional Judges Dr. István Bagi, Dr. Árpád Erdei, Dr. Attila Harmathy, Dr. János Németh, and Dr. Éva Tersztyánszky-Vasadi – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that restricting the right of self-determination related to medical care (the right of consent and refusal) of patients with limited disposing capacity to the same extent as in the case of incapable patients is a violation of Article 54 para (1) of the Constitution.

Consequently, the Constitutional Court annuls as from 31 December 2001 the text "or limited disposing capacity" in Section 16 para. (2) of Act CLIV of 1997 on Healthcare.

2. The Constitutional Court holds that the Parliament has caused an unconstitutional omission of legislative duty by not regulating in Act CLIV of 1997 on Healthcare the statutory conditions for applying methods (procedures) seriously restricting personal freedom – including the freedom of movement – guaranteed in Article 55 para. (1) of the Constitution in the case of psychiatric patients, and thereby failing to adequately guarantee the enforcement of the prohibition contained in Article 54 para. (2) of the Constitution.
Therefore, the Constitutional Court calls upon the Parliament to meet its legislative responsibility by 31 December 2001.

3. The Constitutional Court rejects the petitions aimed at establishing the unconstitutionality of, and at annulling Section 12 para. (1), Section 16 para. (4), Section 17 para. (2), Section 20 para. (1), Section 21 paras (2)-(3), Section 190 item c), Section 191 para. (1), Section 192 para. (1), Section 196 item b), Section 197 para. (8), Section 199 paras (1) and (4)-(5), Section 200 para. (1), and Section 201 para. (1) of Act CLIV of 1997 on Healthcare.

4. The Constitutional Court dismisses the request aimed at amending Section 201 para. (9) of Act CLIV of 1997 on Healthcare.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

The Constitutional Court received several petitions aimed at the constitutional review of the provisions of Act CLIV of 1997 on Healthcare (hereinafter: AH) regarding the medical treatment of patients with no or limited disposing capacity as well as of psychiatric patients. The Constitutional Court consolidated the petitions and judged them in a single procedure.

1. One of the petitioners holds that Section 21 paras (2) and (3) violate several provisions of the Constitution by allowing the therapist to use in certain cases the assistance of the police in the interest of performing an obligation to complete justified medical care or to implement the necessary interventions. According to the same petitioner, the provision challenged is contrary to the protection of the fundamental right provided for in Article 8 para. (1), to the prohibition of discrimination regulated in Article 70/A, to the right to human dignity under Article 54 para. (1), to the prohibition of torture, cruel, inhuman or humiliating treatment provided for in para. (2), furthermore, to the right to personal freedom guaranteed in Article 55 para. (1), and to the right to health specified in Article 70/D para. (1) of the Constitution.

2. Another petitioner requested the Constitutional Court to review Section 192 of the AH. This provision contains rules for restricting the psychiatric patients' personal freedom. According to the petitioner, the right to human dignity specified in Article 54 para. (1) and the right to personal freedom under Article 55 para. (1) of the Constitution are violated in Section 192 of the AH by "not defining exactly the methods of restriction and not excluding the use of such tools which may violate the Constitution". In addition, the petitioner raised objections to the rule by which the patient may be deprived of personal freedom on the grounds of both an endangering conduct and a directly endangering one. The petitioner referred to the reasoning of the Bill on Healthcare concerning the above provision of the Act containing the possibility

of using the so-called net-bed. In the petitioner's opinion, net-beds are the most humiliating tools of restricting personal freedom ("one can only sit up, but cannot stand up in there, and its door is padlocked from outside"). Finally, the petitioner concluded that "of course, various restrictions may be needed sometimes, but it is constitutionally required to specify in an exact way what restrictions may be used".

Based on its content, the above petition is aimed at the review of an unconstitutional omission.

3. Subsequently, the petitioner filed another petition asking the Constitutional Court to review and annul several provisions of Chapter X of the AH related, on the one hand, to patients with no or limited disposing capacity and, on the other hand, to the medical treatment and care of psychiatric patients. The petitioner's arguments were actually centred about three problems. Firstly, with regard to patients with no or limited disposing capacity the petitioner raised objections to the scope of the right of consent and refusal concerning decisions made in the course of medical treatment. In this respect, the petitioner compared the provisions of the AH to Act IV of 1959 on the Civil Code (hereinafter: the CC), concluding that "while they could, indeed, make a valid representation (for example on refusing treatment) on the basis of the CC", the AH applies stricter rules to restricting personal participation in decision-making.
Secondly, on the basis of several constitutional rules, the petitioner requested the Constitutional Court to review the provisions of the AH allowing a restriction of the patient's rights on the grounds of his endangering or directly endangering conduct. Thirdly, the petitioner – referring basically to the prohibition of discrimination – challenged the rule by which the courts act in non-litigious procedures in the case of regulated processes during the medical treatment of psychiatric patients. According to the petitioner, the non-litigious nature of the procedures applied to psychiatric patients results in the discrimination of such patients.
The petitioner asked the Constitutional Court to review and annul – certain parts of – the following provisions:

3.1. In the petitioner's opinion, the text in the first sentence of Section 12 para. (1) of the AH restricting the patient's right to leave the medical institution if the exercise of such right endangers the lives or physical integrity of others, while being discriminative, is against the provision of Article 8 of the Constitution protecting and restricting fundamental rights, as appropriate.

3.2. Section 16 paras (2)-(5) of the AH regulate in detail what persons may, in what order and to what extent, exercise the right of consent and refusal on behalf of patients with no or limited disposing capacity. In the petitioner's opinion, this regulation qualifies as a restriction of fundamental rights violating human dignity and the prohibition of discrimination in comparison to the provision applicable to patients with full disposing capacity. Furthermore, the petitioner asked for the deletion of the word "invasive" from the first sentence of Section 16 para. (4) of the AH. In the petitioner's opinion, the majority of treatments applied in psychiatric departments are not deemed invasive interventions and, therefore, the persons acting on behalf of patients with no or limited disposing capacity are not allowed to make a statement about interventions – resulting from the use of substances influencing the patient's consciousness – that violate personality rights, personal freedom and human dignity. In the petitioner's opinion, all the above violate Articles 8, 54, and 70/A para. (1) of the Constitution.

3.3. According to the petitioner, Section 17 para. (2) of the AH is an unconstitutional restriction of a fundamental right, thus violates Article 8 of the Constitution. This provision provides that the patient's consent is not required if the default of the intervention would seriously endanger the health or physical integrity of others, or if the patient's life is in immediate danger. The petitioner argued that although the freedom of conscience and religion may not be constitutionally suspended even in an emergency, the provision in question allows interventions contrary to objections based on conscience or religion.
Essentially, the same reasons were raised to justify the petitioner's request of annulling the text beginning with "except for" in Section 20 para. (1) of the AH. This rule declares the right of refusing medical care to be exercised by patients with full disposing capacity, while excluding such refusal if the omission of such care would endanger the lives or physical integrity of others.

3.4. According to Section 190 item c) of the AH, during psychiatric treatment, restrictive or coercive measures, or placement among restrictive conditions may only be applied in extremely justified cases when the patient is a clear danger to self or others. The petitioner challenged the constitutionality of the above provision with reference to its restricting a fundamental right [the right to personal freedom guaranteed in Article 55 para. (1) of the

Constitution] merely on the basis of endangerment, and alleged that the above provision discriminates psychiatric patients, thus violating Article 70/A of the Constitution.

3.5. In addition to the above constitutional concerns, the petitioner referred to the violation of the right to human dignity regarding the possibility of dispensing with the patient’s consent in certain cases of treating psychiatric patients in medical institutions if the patient’s conduct is of an endangering or directly endangering nature. The provision requested to be annulled is found in Section 191 para. (1) of the AH.

3.6. In the petition concerned, the petitioner specifically challenged Section 192 para. (1) of the AH, referred to in the former petition regarding the use of net-beds.

3.7. Section 196 item b) of the AH allows psychiatric patients to be immediately admitted to a medical institution for treatment if the patient's conduct is of a directly endangering nature. In the petitioner’s opinion, this form of putting someone under institutional medical treatment is discriminative and unconstitutionally restricts the fundamental rights to personal freedom and to human dignity. Based on the above constitutional principles, the petitioner’s request covers further provisions, too, on the emergency treatment of psychiatric patients. Section 199 para. (1) of the AH provides for the following: if a patient manifests directly endangering behaviour because of a mental state or an addiction, and if the danger may only be averted by immediate admission to and treatment in a psychiatric institute, the physician observing this behaviour shall take immediate measures to transport the patient to the proper psychiatric institute, and may even resort to the assistance of the police. The petitioner pointed out in this respect that the concept “mental state” is not defined anywhere, claiming that “all of us are at every time in a certain mental state”.

3.8. Based on the above constitutional concerns, the petitioner asked the Constitutional Court to also annul the provision of Article 197 para. (8) of the AH specifying that a patient admitted to a medical institution on a voluntary basis may not be discharged, either, in case his conduct during the medical treatment proves to be of an endangering or directly endangering nature.

3.9. According to Article 199 para. (5) of the AH, the court shall order mandatory treatment for a patient admitted in an emergency if he exhibits endangering behaviour and the need for

institutional treatment exists. According to Article 200 para. (1) of the AH, the court shall order the mandatory treatment of a patient in a psychiatric institute in a case when said patient exhibits endangering conduct, but there is no cause for emergency treatment. In such cases, the patient may only be obligatorily submitted to medical treatment in an institution after the court's ruling. In the petitioner's opinion, the above provisions, while violating the prohibition of discrimination, unconstitutionally restrict personal freedom on the basis of endangering conducts.

3.10. With regard to emergency medical treatment, the AH requires the court to rule within 72 hours on the justification of admission to a medical institution. Section 199 para. (4) of the AH regulates the medical measures necessary before obtaining the court's ruling. The Act provides in this framework that "to the extent and in a way professionally possible", interventions making it impossible for the court to judge the patient's mental condition shall be avoided. In the petitioner's opinion, it violates human dignity and, at the same time, it is discriminative that the Act does not prohibit in such cases, either, the use of drugs altering the patient's consciousness.

3.11. Finally, the petitioner asked for the annulment of the word "non-litigious" in Section 201 para. (1) of the AH regulating the common rules of procedure for procedures at court. According to the petitioner, a non-litigious court procedure is merely a formal guarantee, as the courts pass such decisions solely on the basis of the opinions delivered by the head of the institution and the attending physician. Therefore, the court procedure applicable to psychiatric patients deprives people of their fundamental rights as well as of their capacity to act based exclusively on the subjective concept of "endangering conduct" without offering proper guarantees and, therefore, it is discriminative.
The petitioner further challenged the fact that "the court is not obliged to pass a decision on a certain form of putting under guardianship"; to remedy this problem, the petitioner asked the Constitutional Court to amend Section 209 para. (9) of the AH.

4. During its procedure, the Constitutional Court requested the Minister of Healthcare and the Hungarian Psychiatry Association to make their comments on the petition.

II

1. According to the relevant provisions of the Constitution:

Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.

(...)

(4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54 to 56, Article 57 paragraphs (2) to (4), Article 60, Articles 66 to 69, and Article 70/E.

Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.

(2) No one shall be subject to torture or to cruel, inhuman or humiliating treatment or punishment. Under no circumstances shall anyone be subjected to medical or scientific experiments without his prior consent.

Article 55 (1) In the Republic of Hungary everyone has the right to freedom and personal security; no one shall be deprived of his freedom except on the grounds and in accordance with the procedures specified by law.

Article 60 (1) In the Republic of Hungary everyone has the right to the freedom of thought, freedom of conscience and freedom of religion.

(2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.

Article 70/A (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.

Article 70/D para. (1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health.

(2) The Republic of Hungary shall implement this right through institutions of labour safety and health care, through the organisation of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment.

2. The provisions of the AH affected by the petition contain the following:

The right to leave the healthcare facility

Section 12 (1) The patient shall have the right to leave the healthcare facility, unless he threatens the physical integrity or health of others by doing so. This right may only be restricted in the cases defined in an Act of the Parliament.

(2) The patient shall inform his attending physician of his intention to leave, who shall enter up this fact in the patient's medical record.

(3) If the patient has left the healthcare facility without notification, the attending physician shall enter up this fact in the patient's medical record, furthermore, if required by the patient's condition, he shall notify the competent authorities, or the legal representative of a legally incapable patient or a patient with limited disposing capacity of the fact that the patient has left the healthcare facility.

(...)

The right to self-determination

(...)

Section 16 (1) Unless otherwise provided by this Act, a person with full disposing capacity may, in a statement incorporated into a public deed, into a fully conclusive private deed, or, in the case of inability to write, a declaration made in the joint presence of two witnesses,

a) name the person with full disposing capacity who shall be entitled to exercise the right of consent and refusal in his stead, and who is to be informed in line with Section 13,

b) exclude any of the persons defined in paragraph (2) from exercising the right of consent and refusal in his lieu, or from obtaining information, as defined in Section 13, by or without naming a person as in item a).

(2) If a patient has no, or limited disposing capacity, and there is no person entitled to make a statement on the basis of paragraph (1) item a), the following persons shall be entitled to

exercise, in the order indicated below, the right of consent and refusal within the limits set out in paragraph (4), subject to the provisions of paragraph (1) item b):

a) the patient's legal representative, and in the absence thereof,

b) the following individuals with full disposing capacity and sharing household with the patient:

ba) the patient’s spouse or common-law spouse, and in the absence thereof,

bb) the patient’s child, and in the absence thereof,

bc) the patient’s parent, and in the absence thereof,

bd) the patient’s sibling, and in the absence thereof,

be) the patient’s grandparent, and in the absence thereof,

bf) the patient’s grandchild;

c) in the absence of a relative indicated in item b), the following individuals with full disposing capacity and not sharing household with the patient:

ca) the patient’s child, and in the absence thereof,

cb) the patient’s parent, and in the absence thereof,

cc) the patient’s sibling, and in the absence thereof,

cd) the patient’s grandparent, and in the absence thereof,

ce) the patient’s grandchild.

(3) In the event of contrary statements made by the individuals qualified in the same line to make a statement, the decision that is likely to impact upon the patient's state of health most favourably shall be taken into account.

(4) The statement of the persons defined in paragraph (2) shall be made exclusively following the provision of information, as in Section 13, and it may refer to giving consent to invasive procedures recommended by the attending physician. However, such a declaration – with the exception of the case defined in Section 20 para. (3) – apart from the risks inherent with the intervention may not unfavourably affect the patient’s state of health, and in particular may not lead to serious or lasting impairment to the health. The patient shall be informed of such statements immediately after he regains his full disposing capacity.

(5) In making decisions on the health care to be provided, the opinion of a patient with no disposing capacity or with limited disposing capacity shall be taken into account to the extent professionally possible also in cases where the right of consent and refusal is exercised by the person defined in paragraph (2).

Section 17 (1) The patient's consent shall be assumed to be given if the patient is unable to make a statement of consent as a result of his health condition and

a) obtaining a declaration from the person defined in Section 16 para. (1) item a) would cause a delay;

b) in the case of invasive interventions, if obtaining a declaration from the person defined in Section 16 para. (1) item a) or in Section 16 para. (2) would result in a delay and the delayed performance of the intervention would lead to a serious or lasting impairment of the patient's state of health.

(2) The patient's consent shall not be required if failure to carry out the given intervention or action

a) would seriously endanger the health or physical integrity of others, including also the foetus beyond the 24th week of pregnancy, furthermore,

b) if the patient's life is in direct danger – also taking into account Sections 20 – 23.

(...)

The right to refuse healthcare

Section 20 (1) In consideration of the provisions set out in paragraphs (2)–(3) and with the exception of the case defined in paragraph (6), a patient with full disposing capacity shall have the right to refuse healthcare, unless the default would endanger the lives or physical integrity of others.

(2) A patient shall be required to refuse the provision of any care the absence of which would be likely to result in serious or permanent impairment of his health in a public deed or in a fully conclusive private deed, or in the case of inability to write, in the joint presence of two witnesses. In the latter case, the refusal must be entered up in the patient's medical record and certified with the signatures of the witnesses.

(3) Life-supporting or life-saving interventions may only be refused, thereby allowing the illness to follow its natural course, if the patient suffers from a serious illness which, according to the current state of medical science, will lead to death within a short period of time even with adequate health care, and is incurable. The refusal of life-supporting or life-saving interventions may be made in keeping with the formal requirements set out in paragraph (2).

(...)

Section 21 (1) In the case of a patient with no disposing capacity or with limited disposing capacity, healthcare as defined in Section 20 para. (2) may not be refused.

(2) If in the case of a patient with no or limited disposing capacity, healthcare as in Section 20 para. (3) has been refused, the healthcare provider shall institute proceedings to obtain the required consent from the court. The attending physician shall be required to deliver all medical care necessitated by the patient's condition until the court passes its final and absolute decision. In the case of a direct threat to life, it shall not be required to obtain a substitute statement by the court for the required interventions to be carried out.

(3) An attending physician, in the interest of satisfying his obligation defined in paragraph (2), may use the assistance of the police if necessary.

(4) In the course of the proceedings to substitute for the statement defined in paragraph (2), the court shall proceed in non-litigious proceedings with priority. Such proceedings shall be exempt from charges. Unless it follows otherwise from this Act or from the non-litigious nature of the proceedings, the provisions of Act III of 1952 on Civil Proceedings shall apply, as appropriate.

Special rules on the rights of psychiatric patients

(...)

Section 190 Every psychiatric patient shall be entitled (to the following:)

(...)

c) in the course of psychiatric treatment, the application of restrictive or coercive measures, or placement among restrictive conditions shall occur only in extremely justified cases, when the patient is a clear danger to self or others.

Section 191 (1) General rules for consent (Sections 15-19) shall apply in the treatment of a psychiatric patient. In the case of a patient being treated under Section 196 paras (b) and (c), as long as the patient displays endangering or directly endangering conduct, patient consent shall not be mandatory, but even in such cases, an attempt shall be made to inform the patient to the extent possible.

(...)

Section 192 (1) Only a patient who exhibits endangering or directly endangering conduct shall be restricted in his personal freedom in any manner whatsoever. The restriction shall only be maintained for a period and shall only be employed to the extent and in the manner that is absolutely necessary to avert the danger.

(2) Section 10 paras (4)-(5) shall apply to ordering restraints and to the mode of restriction. The physician shall immediately be notified of the restriction, and said physician shall have to

approve the measure within 2 hours. In the lack of the above approval, the restriction shall immediately be discontinued.

Institutional treatment of psychiatric patients

Section 196 A psychiatric patient may be admitted to an institute for treatment

a) with the agreement of the patient, or at the request of the person set forth in Section 16 paras (1)-(2) (hereinafter: voluntary treatment),

b) when displaying a directly endangering conduct requiring immediate institutional treatment, following measures taken by the physician assessing the behaviour (hereinafter: emergency treatment),

c) when a court issues a decision ordering mandatory institutional treatment (hereinafter: mandatory treatment).

Voluntary treatment

Section 197

(...)

(8) A patient admitted voluntarily shall not be discharged if in the course of treatment he displays endangering or directly endangering conduct and the need for institutional treatment exists for that reason. In this case the procedure regulated by Section 199 shall apply.

Emergency treatment

Section 199 (1) If a patient manifests directly endangering behaviour because of a mental state or an addiction, and if the danger may only be averted by immediate admission to and treatment in a psychiatric institute, the physician observing this behaviour shall take immediate measures to transport the patient to the proper psychiatric institute. If necessary, the police shall assist in transporting the patient.

(2) Within 24 hours of admission of the patient, the head of the psychiatric institute shall notify the court and initiate a court finding that there were grounds for the admission, and request a court order for mandatory treatment of said patient in a psychiatric institute.

(3) The court shall issue a decision within 72 hours of notification. Until the court decision is rendered, the patient may be temporarily detained in the institute.

(4) Before the decision is rendered, endeavours shall be focused on eliminating the acutely threatening behaviour or on preventing a rapid deterioration in the patient's condition. To the extent and in a manner professionally possible, interventions making it impossible for the court to judge the mental condition of the patient during the course of a personal interview shall be avoided. When such interventions are nevertheless applied, they shall be fully documented and the reasons shall be set forth.

(5) The court shall order mandatory treatment for a patient admitted in an emergency if the patient exhibits endangering behaviour and the need for institutional treatment exists.

(...)

Mandatory treatment

Section 200 para. (1) The court shall order mandatory treatment for a patient in a psychiatric institute when said patient exhibits endangering conduct, but when there is no cause for emergency treatment.

(...)

Common rules of procedure

Section 201 (1) The court shall conduct non-litigious proceedings in the proceedings set forth under this chapter. Unless it follows otherwise from this Act or from the non-litigious nature of the proceedings, the provisions of Act III of 1952 on Civil Proceedings shall apply, as appropriate. (...)

III

The Constitutional Court first examined the petitions related to the provisions found in Chapter II of the AH covering the patients' rights and obligations.

1. The petitioner requested the review of the causes of restricting certain rights of the patients that are based on endangering of the lives, physical integrity or health of others, as regulated in Sections 12 para. (1), Section 17 para. (2), and Section 20 para. (1) of the AH.

1.1. Section 12 (1) of the AH declares the patient's right to leave the healthcare facility, "unless he threatens the physical integrity or health of others by doing so". The petitioner asked for the annulment of the above provision on the grounds of its violating – according to Article 8 para. (2) of the Constitution – the right to personal freedom guaranteed in Article 55 para. (1) of the Constitution, and being discriminative contrary to Article 70/A of the Constitution.

According to Article 55 para. (1) of the Constitution, "in the Republic of Hungary everyone has the right to freedom and personal security; no one shall be deprived of his freedom except on the grounds and in accordance with the procedures specified by law". In the practice of the Constitutional Court, the concept of "freedom" specified in the provision of the Constitution quoted before has been interpreted as the constitutional definition of personal freedom. [Decision 74/1995 (XII. 15.) AB, ABH 1995, 369, 372]

The provision of Section 12 para. (1) of the AH on the right to leave the healthcare facility should be assessed in the regulatory environment where it is placed.
Section 12 para. (1) of the AH guarantees the principle of the right to leave the healthcare facility; the Act provides for two cases of leaving the facility. On the one hand, the patient may report this to the attending physician [Section 12 para. (2)] and, on the other hand, the patient may leave the facility without reporting it [Section 12 para. (3)]. Thus, the possibility that the patient may leave the facility without informing the attending physician thereon has originally been taken into consideration by the legislator as an "irregular" way of leaving the facility.

The provisions found in Section 12 of the AH support the arguments that such measures should not be considered some kind of forced withdrawal of personal freedom – or deprivation, by the term used in the Constitution. Section 12 para. (1) alone does not affect the deprivation of personal freedom regulated in Article 55 para. (1) of the Constitution as it does not deal with forcing the patient to stay in the healthcare facility. Section 12 of the AH provides no legal sanction for leaving the facility. Even in the case of a patient leaving the facility without reporting it, the only obligation the attending physician has is to enter up this fact in the patient's medical record, and, if required by the patient's condition, he shall notify the competent authorities thereon [Section 12 para. (3) of the AH]. Therefore, in the opinion of the Constitutional Court, the rule that allows leaving the facility in a lawful way only in

case the exercise of such right causes no threat to the physical integrity or health of others is in itself not related – and consequently, not contrary – to Article 55 para. (1) of the Constitution.

The Constitutional Court holds that the above provision is not in conflict with Article 70/A of the Constitution either, as the regulation of the patients' rights in a way different to the general rules is based on reasonable grounds: protecting the rights of others. The Constitutional Court has been engaged in interpreting Article 70/A para. (1) of the Constitution in several of its decisions. According to the established practice of the Constitutional Court, this provision of the Constitution is interpreted as a constitutional requirement specifying the general principle of equal rights. It has been pronounced by the Constitutional Court that the prohibition specified in the Constitution primarily covers discrimination regarding constitutional fundamental rights; if the discrimination does not concern a fundamental right, the unconstitutionality of the differing regulation may only be established if violating the right to human dignity. In its practice so far, the Constitutional Court has considered discrimination between the subjects of law to be unconstitutional in the latter scope if the legislature arbitrarily differentiates between the subjects of law under the same regulatory scope without due reasons. [Decision 9/1990 (IV. 25.) AB, ABH 1990, 48; Decision 21/1990 (X. 4.) AB, ABH 1990, 77-78; Decision 61/1992 (XI. 20.) AB, ABH 1992, 280-282; Decision 35/1994 (VI. 24.) AB, ABH 1994, 203; Decision 30/1997 (IV. 29.) AB, ABH 1997, 138, etc.]

Consequently, the Constitutional Court established no violation of Article 55 para. (1) and Article 70/A para. (1) of the Constitution in respect of Section 12 (1) of the AH and, therefore, rejected the petition aimed at the annulment of Section 12 para. (1) of the AH.

1.2. According to Section 17 para. (2) item a) of the AH, the patient's consent shall not be required if failure to carry out the intervention concerned would seriously endanger the health or physical integrity of others, including also the foetus beyond the 24th week of pregnancy. As provided for in Section 20 para. (1), a patient with full disposing capacity shall have the right to refuse healthcare unless its omission would endanger the lives or physical integrity of others. Based on the contents of the petition, such rules are alleged to violate the freedom of conscience and religion guaranteed in Article 60 para. (1) of the Constitution as well as its

Article 8 para. (2) on the restriction of fundamental rights as they allow no refusal of medical care on the grounds of conscience or religious convictions.

The Constitutional Court has, in several of its decisions, dealt with the fundamental right specified in Article 60 of the Constitution. It was established in Decision 4/1993 (II. 12.) AB that – among others - the close relation between the freedom of religion and the right to human dignity should also be taken into account when considering the other two elements of the freedom of religion, i.e. worship or acting and living according to one's convictions. Special emphasis is given to the freedom of action based on the general right of personality if the action follows from one's religious and conscientious convictions. (This is acknowledged by the right to refuse military service by referring to conscientious objections). (ABH 1993, 48, 51). The constitutional protection of acts based on one's religious or conscientious convictions has been addressed in other cases as well, e.g. in respect of physicians refusing the implementation of abortion [see Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 314-315]..

The Constitutional Court holds that the problem examined in the present decision is not identical with the constitutional concerns mentioned above. The restrictions (on the right of consent and refusal) found in both Section 17 para. (2) item a) and Section 20 para. (1) of the AH are justified by the protection of the lives, health or physical integrity of others. It does not mean that conducts based on one's conviction are not protected by the regulations, but that conducts based on one's conviction may not result in the violation of the fundamental rights (e.g. the right to life or health) of others. In the opinion of the Constitutional Court, the consent to decisions related to medical care or the refusal of such care may necessarily be restricted on the grounds of protecting the lives, health or physical integrity of others. The provision of the AH specifying that in such a case – as long as the above conditions prevail – the patient may not exercise the above rights is a proportionate restriction of the conduct based on one's conviction.
Section 17 para. (2) item a) and Section 20 para. (1) of the AH comply with the requirements set forth on the basis of Article 8 para. (2) of the Constitution in respect of Article 60 para. (1) of the Constitution, without being contrary to such constitutional provisions. There is no interrelation between the provision found in Article 8 para. (4) of the Constitution concerning the suspension of fundamental rights and the rule reviewed in the present case.

2. Section 16 of the AH contains the rules on the right of consent and refusal of patients with no or limited disposing capacity. In this respect, the petitioner's request is manifold. On the one hand, comparing the AH and the CC, it raised objections to the fact that the AH limited the scope of personal participation in decision-making as provided for in the CC rules applicable to persons with no or limited disposing capacity. On the other hand, it also challenged the scope of the right of consent of the legal representative or of another entitled person specified in Section 16 para. (4) of the AH that refers to Section 16 (2). In order to assess the contents of the constitutional concerns raised by the petitioner, the Constitutional Court deemed it necessary to comprehensively review Section 16 paras (2)-(5) of the AH.

2.1. The AH contains provisions guaranteeing the right to human dignity under Article 54 para. (1) of the Constitution in respect of the patients' right to self-determination. The patients' right to self-determination includes – among others – the right to consent to or refuse medical interventions or care. According to Section 15 para. (3) of the AH, unless otherwise provided for in the Act, the patient's informed consent is a precondition of implementing any medical intervention. In addition to the above general provision, the AH contains further rules on exercising the right of consent, e.g. by naming the specific cases when a written consent is needed [Section 19 para. (1), Section 159 para. (1) item e)], and in certain cases it underlines the importance of consent [e.g. Section 129 para. 82)].

The AH makes a clear division between patients with full disposing capacity as opposed to patients with no or limited disposing capacity as far as their rights of self-determination including the right of consent and refusal are concerned. The AH allows a patient with full disposing capacity to name the person who shall be entitled to exercise the right of consent and refusal in his stead [Section 16 para. (1) item a)], or the patient may exclude any of the persons entitled to representation [Section 16 para. (1) item b)]. In connection with the right to refuse healthcare, the Act furthermore allows a patient with full disposing capacity to refuse certain examinations or interventions "in advance" [Section 22 para. (1)], or to name the person who shall be entitled to exercise the right to refuse certain interventions or examinations [Section 22 para. (2)]. The above rights instituted by the AH may be exercised by patients with full disposing capacity. If a patient has no or limited disposing capacity and there is no person formerly named by the patient to act as his representative, the provisions of

the Act apply regarding the list of persons entitled to represent the patient by exercising the right of consent and refusal. [[As an interpretation of Section 16 para. (2) of the AH, only persons with full disposing capacity named by patients with full disposing capacity are empowered to make a declaration under paragraph (1) item a).]
Section 16 of the AH providing for the general rules on representation applies the same provisions to patients with no or limited disposing capacity as both of them are prevented in exercising their rights of consent and refusal. The regulation itself institutionalises the role of other persons by listing the persons entitled to exercise the right of consent and refusal.

According to the reasoning of the Bill concerning Sections 20-22, "The right to self-determination of a patient with no or limited disposing capacity shall be exercised by the patient's legal representative or the person empowered by the patient to act so". Not only the reasoning but the normative text of the Act mentions the statutory "transfer" of the right of self-determination: according to the last sentence of Section 28 on enforcing the patient's rights, "this provision shall be applied appropriately to other persons entitled to exercise the right of self-determination".
In the opinion of the Constitutional Court, the right of self-determination is attached to the person as the manifestation of the autonomy to act originating from human dignity. It is a separate issue that legal rules may, in certain cases, restrict the right of self-determination (by setting conditions, or by not acknowledging the enforcement thereof). When the law institutionalises the action of another person in the scope of an individual's autonomy to act, the right of self-determination is not being "transferred" to anyone. "Exercising one's rights in his stand" empowers the other person to make a decision and, at the same time, restricts the right of self-determination; "exercising one's right of self determination in his stand" is not possible theoretically as the right of self-determination is inseparable from the individual's personality. Therefore, in constitutional aspects, the above mentioned provisions of the AH provide that the exercise of the right to self-determination of patients with no or limited disposing capacity is statutorily prohibited – as long as their state of incapacity or limited capacity lasts – and the patient's legal representative or another person empowered to act so may act on the patient's behalf.

Patients with no or limited disposing capacity are offered a chance by the provision of Section 16 para. (5) of the AH to have some kind of participation in-decision making related to the right of consent and refusal regulated under Section 16. Accordingly, "in making decisions on

the health care to be provided, the opinion of a patient with no or limited disposing capacity shall be taken into account to the extent professionally possible also in cases where the right of consent and refusal is exercised by a person defined in paragraph (2)". This rule formally acknowledges in both personal scopes (i.e. incapable patients and ones with limited disposing capacity) the possibility of taking into account, in certain cases, the patient's opinion when passing decisions about him. This statutory regulation on taking into account such "opinion" is not considered to be a meaningful provision as in the scope of the persons concerned the allocation of the right of decision-making (the right of consent or refusal) to the legal representative or to another authorised person means the total withdrawal of the right of self-determination. The method applied in Section 16 para. (2) of the AH makes it impossible for the "opinion" to have any influence.

According to Section 13 para. (5) of the AH, also patients with no or limited disposing capacity have the right to adequate information by age and mental state.

Such rules alone cannot guarantee the practical enforcement of the right of self-determination.

Under Article 54 para. (1) of the Constitution, in the Republic of Hungary every human being has the inherent right to life and to human dignity, of which no one shall be arbitrarily deprived. The Constitutional Court pointed out in its Decision 8/1990 (IV. 23.) AB (ABH 1990, 42, 44-45) and Decision 57/1991 (XI. 8.) AB that "the right to human dignity is considered one of the specific manifestations of the 'general right of personality'". It was stated that in modern constitutions and in the practice of constitutional courts, the general right to personhood encompasses various aspects, such as the right to free personal development, the right to free self-determination, the general freedom of action or the right to privacy. The general right of personality is a "mother right" i.e. a subsidiary fundamental right which serves the purpose of protecting an individual's autonomy when none of the specific fundamental rights is applicable to the particular facts of the case. According to the Constitutional Court, the right of self-determination and self-identification is also part of the "general right of personality." (ABH 1991, 272, 279).

In the practice of the Constitutional Court, the absoluteness and the unrestrictability of the right to human dignity may only be interpreted together with the right to life as determining the status of an individual. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 308, 312] However, the partial rights deducted from its nature as a mother right (such as the right of self-determination and the right to one's physical integrity) may be restricted in accordance with

Article 8 para. (2) of the Constitution just as any other fundamental right. [Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383]
In the opinion of the Constitutional Court, the consent and the refusal related to interventions becoming necessary in the course of medical care may not be separated from the exercise of personality rights. Therefore, the constitutional question to be decided is whether the restriction of the right to self-determination contained in the AH is necessary and proportionate to the purported objective. The above constitutional concern needs to be evaluated by the Constitutional Court with special regard to the fact that the Act applies the same rules in essential aspects related to personality rights – regarding the right of consent and refusal according to Section 16 para. (2) of the AH – to the different "degrees" of restricting one's autonomy to act, namely, to incapable persons and persons with limited disposing capacity.

2.2. The AH contains no individual rules on the capacity of discretion needed for making declarations related to health care, and nor does it define the concepts of "limited disposing capacity" or "incapacity" for the purposes of the Act. In the absence of the above, the provisions of the CC are certainly applicable to the contents of such concepts. In the system of the CC, the existence of the above "conditions" is diversified on the basis of the causes thereof; thus, limited disposing capacity may be based on age (Section 12 of the CC), or on guardianship ordered by the court with such effect, due to mental state, mental decline or a pathological addiction (Section 13 of the CC). The causes of incapacity include age (Section 15 of the CC) and – in addition to the cases of guardianship based on mental state or mental decline (Section 16 of the CC) – if the person in question has absolutely no capacity of discretion needed for managing his affairs (Section 17 of the CC).
According to the CC, there is a difference of weight between limited disposing capacity and incapacity. While in the former case, individual capacity of discretion is limited to a significant extent, in the latter case, it is non-existent. The court may also order guardianship restricting the disposing capacity of a person whose capacity of discretion decreases to a great extent in a periodically recurring manner.

Within a limited extent, the CC acknowledges the right of discretion – individual autonomy to act – of a person with limited disposing capacity: he may make certain legal declarations even without involving the legal representative. According to Section 85 para. (1) of the CC, persons with limited disposing capacity may act in the protection of the rights attached to his

personality. According to Section 219 para. (1) of the CC, a person with limited disposing capacity may act as the representative of a person with full disposing capacity, and on the basis of Section 624 para. (2) a person with limited disposing capacity may only make a testament in the form of a public deed; such a testament shall be valid even without the legal representative's consent or an approval by the court of guardianship.
It is clear from the above provisions of the CC that the restriction of the right of self-determination may statutorily be differentiated (by the various degrees of the capacity of discretion) and the restriction may be made proportionate according to the specific features of the different legal declarations. A certain part of the independent legal declarations according to the CC are connected to the enforcement of the personality rights of persons with limited disposing capacity – the rights originating in Article 54 para. (1) of the Constitution. Persons with limited disposing capacity may make such declarations personally, and it is not necessary to have anyone‘s approval (prior consent or authorisation).

In elaborating its decision, the Constitutional Court has, furthermore, considered the fact that as far as abortion in the sense of medical intervention is concerned – disregarding at this point its problems related to the right to life – Act LXXIX of 1992 on the Protection of the Life of the Foetus (hereinafter: "Act on the Protection of the Foetus") contains differentiated rules, similar to those of the CC, applicable to incapable persons and persons with limited disposing capacity. According to Section 8 para. (3), an application for abortion shall be submitted on behalf of an incapable person by her legal representative, but as far as persons with limited disposing capacity are concerned, Section 8 para. (2) provides that for the validity of the declaration of such persons it is necessary to have the legal representative's declaration of consent regarding the application for abortion. In other words, the Act on the Protection of the Foetus makes a distinction on the basis of the provisions of the CC between persons with limited disposing capacity and incapable persons. In the case of incapable persons, the right of independent application is not acknowledged, and the application may only be filed by the legal representative acting on her behalf. However, the right of independent application of a person with limited disposing capacity (i.e. personal participation in decision-making) is accepted, but the legal representative's consent is required for the validity of the declaration. The reasoning of the Act on the Protection of the Foetus expressly mentions the need to be in line with the provisions of the CC.

The AH applies similar differentiation regarding the right to leave the healthcare facility, where the legal representative's consent is only required for incapable patients [Section 12 para. (5)], furthermore, for exercising the right to inspect documents [Section 24 para. (6)] as well as under Section 211 para. (1) of the AH as amended by Section 17 of Act LXXI of 1999. According to Section 211 para. (1) of the AH as presently in force, any person with limited disposing capacity may, without involving the legal representative, make a declaration opposing the donation of his organs or tissues for the case of his death. Naturally, such provisions do not apply to the right of consent and refusal regarding decisions to be made in the course of medical care, but they illustrate that in certain cases making a distinction between incapable patients and patients with limited disposing capacity is possible and necessary even within the regulatory concept of the AH.

In regulating the right of consent and refusal, Section 16 (2) of the AH applies the same restriction to personal participation by both incapable patients and ones with limited disposing capacity as far as their autonomy to act affecting their personality rights is concerned. The CC provides that persons with limited disposing capacity may act personally in the protection of their personality rights. Furthermore, it is important that based on the CC (and under the Act on the Protection of the Foetus as well), persons with limited disposing capacity may make valid legal declarations with the consent or a posterior approval of the legal representative, while under the AH, the legal representative or another person empowered to act so shall make the declaration instead of a patient with limited disposing capacity.

2.3. In the opinion of the Constitutional Court, the statutory regulation applying the same rules on the right of consent and refusal related to medical care concerning incapable patients and patients with limited disposing capacity without due regard to the relevant causes is unconstitutional. Restricting the right to self-determination of patients with limited disposing capacity the same way as applied to incapable patients violates Article 54 (1) of the Constitution. The Constitutional Court holds that although a limited capacity of discretion may constitutionally justify the statutory restriction of one's autonomy to act, the method of restriction institutionalised in a uniform manner – and the same way as in the case of incapable patients – in Section 16 para. (2) of the AH is not proportionate to the purported objective. The legislature's objective that independent legal declarations made in the course of medical care should be based on the patient's due discretion does not necessarily mean that in the case of persons with limited disposing capacity this purpose may only be achieved by

absolutely restricting their rights of consent and refusal. Both the need to consider the cause of limited capacity (such as age) and the fact that different forms of medical treatment may determine the disposing capacity related to medical care justify the lifting (mitigation) of the general restriction. In the opinion of the Constitutional Court, the right of consent and refusal of patients with limited disposing capacity should be regulated within the "range" of rules falling between those applicable to incapable patients and the ones applicable to patients with full disposing capacity.
The Constitutional Court is aware of the fact that guardianship affecting one's disposing capacity may, in certain cases, guarantee the rights and the protection of interests of the patient. In addition, proportionality is of similar importance in that the Act shall not restrict personal actions with general effect in cases not justified by any constitutional restriction on exercising personality rights.

The Constitutional Court also points out that the rule under Section 16 para. (5) of the AH providing for the patient's opinion to be taken into account – as according to Section 16 para. (2), the patient has no right of discretion, such right is exercised by the legal representative - does not resolve the unconstitutionality of the situation. The decision-making responsibility to be allocated to the judicial practice should also be based on a definite statutory rule. However, the essence of the constitutional concern is the disproportionate restriction of the right of consent and refusal of a patient with limited disposing capacity as compared to the purported objective. The Act does not provide legal guarantees even in the scope of cases regulated under Section 16 para. (5) for the practical enforcement – in duly justified cases – of the opinion of patients with limited disposing capacity. This way, no possibility is offered for exercising the right of self-determination under specific conditions (which is otherwise acknowledged by the law for persons with limited disposing capacity).

2.4. In assessing the enforceability of the right of self-determination on the basis of Article 54 para. (1) of the Constitution, the Constitutional Court took into account the following aspects, too:

Point 3.5 of the *Declaration on the Promotion of Patients' Rights* (Amsterdam, March 1994) adopted in the framework of the World Health Organisation of the UN provides that "when the consent of a legal representative is required, patients – whether minor or adult – must

nevertheless be involved in the decision-making process to the fullest extent which their capacity allows."

Article 6 of the Council of Europe's *Bioethical Convention* (Oviedo, April 1997) expressly provides that only in the case of "having no capacity to consent" may it be allowed to follow the decision of a person other than the patient regarding the patient's treatment.

The Recommendation of the Council of Europe on the *Principles concerning the Legal Protection of Incapable Adults* (No. R. 99.4) provides that the legal environment available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations." (Principle 2 Point 1) In addition, the recommendation contains that "a measure of protection should not automatically deprive the person concerned of the right (…) to consent or refuse consent to any intervention in the health field". (Principle 3 Point 2)

The international tendencies reflect that in medical care, the enforceability of the right of self-determination is a priority, and such concepts as "capacity to consent" or "capacity of discretion" have well defined meanings. As the AH provisions under review use the concepts applied by the CC, the Constitutional Court has had to substantiate its decision primarily in this context, as illustrated above. [These are, namely, the concepts that determine the contents of Section 16 (2) of the AH as well as of its other provisions related to disposing capacity. Nevertheless, one should not forget that the concept of disposing capacity used in the CC as "the capacity of discretion necessary for managing affairs" was originally and primarily created as a precondition for the validity of declarations related to property rights. Transferring such concepts into other branches of law should be done by duly observing the peculiar features of the field concerned.

2.5. On the basis of the reasons set out in points 2.1 to 2.4, the Constitutional Court has established that the text "or limited disposing capacity" in Section 16 para. (2) of the AH is unconstitutional. The Constitutional Court has annulled Section 16 para. (2) of the AH with future effect as from 31 December 2001, leaving appropriate time for the legislature to adopt new rules on the medical care of patients with limited disposing capacity, to define the rules on enforcing the right to self-determination of patients with limited disposing capacity in between the provisions applicable to incapable patients and patients with full capacity. This may be based on considering both the causes of limited disposing capacity specified in the CC

and/or the various methods of medical treatment, but following the Constitutional Court decision, the legislature may also decide to elaborate in the AH a separate set of concepts and guarantees for the decision-making capacity related to medical care.

In the course of its procedure, the Constitutional Court has noted that the AH contains several provisions which refer to Section 16 para. (2), and by allowing the exercise of certain rights for patients with full disposing capacity only, it practically provides the same regulation as in Section 16 para. (2). Regarding the group of problems assessed, the Constitutional Court has not found it justified to annul – besides the text “or limited disposing capacity” in Section 16 para. (2) of the AH – any other provision for the following reasons:

a) In certain parts of the Act, the reference to Section 16 para. (2) applies exclusively to incapable patients (Section 11 para. (3), Section 12 para. (5), and Section 24 para (6)), and in the present decision the Constitutional Court has only established unconstitutionality concerning persons with limited disposing capacity.

b) The rule under Section 16 para. (5) of the AH that merely provides for considering the patient’s “opinion” is limited to the scope of cases when the right of consent and refusal is exercised by a person according to Section 16 para. (2). When a person with limited disposing capacity may – on the basis of the new rules to be adopted by the legislature – personally exercise his right of self-determination in a specific scope, such cases may neither theoretically nor technically be covered by Section 16 para. (5) [as the rule under Section 16 para. (2) applies to representation].
The same relationship exists in respect of Section 129 para. (2) item a), Section 159 para. (4) item d), Section 160, and Section 187 para. (2) of the AH. The right of discretion and the possibility of personal participation in decision-making to be guaranteed by the future statutory rules influence the scope of applying the rules. However, such rules may still be applied in the remaining set of cases.

c) Sections 20 to 23 of the AH provide the special rules on refusing medical care. According to Section 20 para. (1), “the right to refuse care may be exercised by “patients with full disposing capacity”. This provision (as well as the ones derived from it) follows, in fact, the rules specified in Section 16 para. (2). In the holdings of the present decision, the Constitutional Court has set up the principle that it is unconstitutional to restrict the right of

consent and refusal of patients with limited disposing capacity the same way as in the case of incapable patients, and annulled the corresponding "central" provision in the structure of the Act in the relevant text of Section 16 para. (2). Beyond that, Constitutional Court has held it unnecessary to extend the annulment to Section 20 para. (1) as the Constitutional Court is not a legislative body and the differentiated application of the provisions in question demands further legislative work. The annulment of Section 20 para. (1) of the AH would affect not only patients with limited disposing capacity but incapable ones as well (as in the case of any other similar provision applicable to patients with full disposing capacity only).

Another group of rules [Section 13 para. (5), Section 14, and Section 134 para. (2)] refer to Section 16 para. (2) of the AH concerning the right to information. As these provisions actually guarantee additional rights, their relation to Section 16 para. (2) raises no constitutional concern.

e) The provisions on the treatment and care of psychiatric patients found in Chapter X of the Act also refer to Section 16 para. (2) of the Act. In the opinion of the Constitutional Court, based on the reasons detailed in the next part of the decision, such rules imply different constitutional concerns (taking into account the special features of this form of medical treatment), and thus the annulment of the provisions concerned is not justified. As pointed out above, the legislature has several ways to eliminate the unconstitutionality of Section 16 para. (2), and it depends on the measures chosen whether (and to what extent) the changes affect Chapter X.

3. The Constitutional Court has not established the unconstitutionality of the term "invasive" found in Section 16 para. (4) of the AH.

According to Section 3 item m) of the AH, invasive intervention is a physical intervention penetrating into the patient's body through the skin, mucous membrane or an orifice, excluding interventions which pose negligible risks to the patient from a professional point of view. Section 16 para. (4) of the AH defines the related rights of the legal representative (or another person so empowered) of a patient with no or limited disposing capacity by stating that the representative's declaration is limited to giving consent to invasive procedures recommended by the attending physician.

The petitioner requested the review of Section 16 para. (4) of the AH with particular regard to the fact that most of the treatments applied in psychiatric departments are not considered invasive interventions, and thus the persons representing the patients with no or limited disposing capacity treated in such departments are not allowed to make statements in important issues related to personality rights. In the petitioner's opinion, Section 16 para. (4) of the AH violates Articles 54 and 70/A para. (1) of the Constitution.

The Constitutional Court holds that it is not unconstitutional for the AH to order the application of the general rules on the scope of the right of consent and refusal to be exercised by the legal representative or by other persons acting on the patient's behalf even in respect of psychiatric patients. The mere fact that the Parliament has adopted special provisions for psychiatric patients (taking into account the nature of treatments) shall not mean on the basis of Article 70/A para. (1) of the Constitution that special rules shall be adopted in each and every question, such as the right of consent or refusal to be exercised by persons acting as representatives in respect of the decisions made in the course of medical treatment. The lack of differentiation in the scope of exercising the rights of representation (i.e. the lack of specific rules) does not by itself result in a situation detrimental to the psychiatric patients themselves. The exercise of the personality rights originating in Section 54 para. (1) of the Constitution has relevance primarily in the aspect of exercising such rights personally (the Constitutional Court's opinion has been pointed out above), and the scope of the rights to be exercised by persons acting as representatives is a separate issue.

In assessing on the merits the actual problem raised by the petitioner, one should take into account a further rule found under Section 16 para. (4) of the AH, by which, "however, such a declaration – with the exception of the case defined in Section 20 para. (3) – apart from the risks inherent in the intervention may not affect unfavourably the patient's state of health, and in particular may not lead to a serious or lasting impairment to health. The patient shall be informed of such statements immediately after he regains his full disposing capacity."
This means that taking into account the patient's health status may "prevail" over the right of consent of his representative even if under the Act, such right applies to the intervention concerned. Therefore, the regulation contains a sharp dividing line not in between invasive and non-invasive interventions as alleged by the petitioner, but along the patient's interests. For this reason, the violation of Article 70/A para. (1) of the Constitution as alleged by the petitioner is unfounded.

Furthermore, the Constitutional Court points out that it does not violate the patients' rights originating in Article 54 para. (1) of the Constitution to have the regulation founded upon the remedy and improvement of the patient's state of health – regarding representation as well – (provided that the patient's right of disposition originating in personality rights is also guaranteed).

Based on the above, the Constitutional Court has established that Section 16 para. (4) of the AH violates neither Article 54 para (1) nor Article 70/A para (1) of the Constitution.

4. The petitioner's concern related to Article 21 paras (2)-(3) of the AH is based on a misunderstanding. According to the petitioner, these rules allow the attending physician to use the assistance of the police against the patient in order to meet the physician's obligation of performing justified medical care and the interventions becoming necessary.

Section 21 para. (2) of the AH regulates the cases of euthanasia when the legal representative or another empowered person refuses a life-supporting or life-saving intervention on a patient with no or limited disposing capacity. In such cases, the healthcare provider shall institute proceedings to obtain the required consent from the court.

If such decision is referred to the court, refusal is out of question as in such a case, the respective declaration is replaced by the court's decision. The attending physician shall, however, deliver all medical care necessitated by the patient's condition until the court passes its final and absolute decision, acting „if necessary" against the legal representative or any other empowered person by using the assistance of police force [Section 21 paras (2)-(3) of the AH].

Therefore, it may be concluded that this rule allows – contrary to the petitioner's interpretation – the use of police assistance against the person making a declaration instead of the patient rather than against the patient himself when there is conflict between the attending physician and the legal representative which cannot be resolved by other means. The scope of cases concerning Section 21 para. (3) of the AH [based on Section 21 para. (2) and Section 20 para. (3)] applies to life-supporting or life-saving interventions on patients with a serious illness which will lead to death within a short period of time, furthermore, the whole of Section 21 deals with the "exercise of rights" by the legal representative or another person empowered to act so.

Therefore, the Constitutional Court, having examined the problem raised by the petitioner in the present case, has rejected the petition for the annulment of Section 21 paras (2)-(3) of the AH.

IV

The Constitutional Court has assessed the petitions aimed at the review of certain provisions – on the medical treatment and care of psychiatric patients – regulated in Chapter X of the AH as follows.

1. The petitioner referred to the violation of Article 70/A of the Constitution concerning every regulation requested to be reviewed on psychiatric patients. Therefore, the Constitutional Court first examined Section 190 item c), Section 191 para. (1), Section 192 para. (1), Section 196 item b), Section 197 para. (8), Section 199 paras (1), (4) and (5), and Section 200 para. (1) of the AH in respect of the prohibition of discrimination.

The AH provides an independent set of rules on psychiatric patients. It gives specific interpretation provisions about certain concepts used in the chapter in question (Section 188) and contains a separate title about the specific rules on the rights of psychiatric patients (Section 189). As far as the rights of psychiatric patients are concerned, the AH desires to apply positive action by declaring that the personality rights of psychiatric patients shall enjoy extra protection in the course of their medical care with regard to their status. There is another kind of “extra right” guaranteed by the provision stating that the patient admitted to the psychiatric institution shall be informed – in addition to the information given under Section 13 – orally and in writing on the patients’ rights with special regard to the essence of procedure by the court as well as to the patient’s procedural rights [Section 191 para. (2)]. As psychiatric patients are ab ovo in an unfavourable and defenceless situation, the Act provides that the validity of certain declarations and the decisions related to medical care are guaranteed by the procedure of the court (Section 201).

The Constitutional Court holds that the problem in itself that the rules pertaining to psychiatric patients are different at certain points from the general provisions on patients’ rights cannot be questioned from the point of view of constitutionality. Based on the psychiatric patients’ special status, the need to apply positive action comes from Article 70/A

of the Constitution itself. According to the practice of the Constitutional Court, the prohibition of discrimination specified in Article 70/A para. (1) of the Constitution does not mean that all kinds of discrimination are prohibited. The prohibition of discrimination means that everyone should be treated as equal (as a person of equal dignity) by the law. [Decision 9/1990 (IV. 25.) AB, ABH 1990, 46, 48] In its above decision defining the constitutional possibility and the conceptual elements of positive action, the Constitutional Court established that positive action may only be applied if "a social purpose not in conflict with the Constitution, or a constitutional right may only be achieved if equality in the strict sense cannot be realised". (ABH 1990, 48-49)

According to the petitioner, the discriminative nature of the provisions under review lies in the fact that the patient's endangering or directly endangering conduct may serve as the basis of restricting the patient's rights. In the opinion of the Constitutional Court, these provisions may not be interpreted as ones that result in a less favourable situation for psychiatric patients than in general. These provisions are part of the independent statutory construction having due regard to the psychiatric patients' special status, similar to other provisions that differ from the general rules and guarantee extra rights for such patients. One may also note that conducts similar to the endangering or directly endangering conduct in the case of psychiatric patients may, according to the general rules of the AH, serve as the basis of restricting the rights of other patients as well. The difference is that in the case of psychiatric patients, endangering both themselves and the public justifies all restricting measures.
Having due regard to the nature of psychiatric diseases, it is reasonably justified that not only the endangering of others' lives, physical integrity and health may serve as the basis of restrictions but "endangering themselves" as well, and it does not violate the constitutional requirement of being treated as persons of equal dignity. Therefore, the Constitutional Court established that the above provisions of the AH alone are not contrary to Article 70/A of the Constitution. Of course, it is not precluded to review certain restrictive measures as subjects of separate examination on the basis of other constitutional provisions.

2. The petitioners also proposed the examination of certain provisions related to psychiatric patients on the basis of Article 55 para. (1) of the Constitution. They challenged the rules providing that both endangering and directly endangering conducts may justify the restriction of personal freedom concerning the application of restricting or coercive measures [Section 190 item c) of the AH], the right of consent in case of psychiatric patients [Section 191 para.

(1)], the restriction of personal freedom [Section 192 para. (1)], and the right of a patient under voluntary treatment in a psychiatric institution to leave the facility [Section 197 para. (8)], while the restriction of the fundamental right specified in Article 55 para. (1) of the Constitution is based on directly endangering conduct in case of emergency treatment [Section 196 item b) and Section 199 para. (1)] and on endangering conduct in case of mandatory treatment [Section 199 para. (5) and Section 200 para. (1)]. The Constitutional Court examined the petitions challenging the restriction of the personal freedom of psychiatric patients in the context of the above question as the essence of the petition concerned is related to all provisions challenged in Chapter X of the AH.

2.1. The possibility for restricting the personal freedom of mental patients as well as the guarantees of the restriction (detention) are regulated in international treaties on human rights. Article 5 of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: European Convention of Human Rights) guarantees the right to freedom and security as applicable to the restriction of freedom, "detention" on the ground of a mental illness. Recommendation R (83) 2 of the Committee of Ministers of the Council of Europe on protecting the rights of mental patients subject to mandatory psychiatric treatment gives guidance for the Member States about the practices to be followed in the treatment of mental patients within hospitals and concerning the effective protection of the patients' rights.
There are also UN documents – without mandatory force – on the protection of the rights of mental patients. One of the international documents on the legal problems related to the rights of mental patients is Decision 119 of the General Assembly of the United Nations, "The protection of persons with mental illness and the improvement of mental health care".

These documents encompass a wide range of issues related to restricting the personal freedom of mental patients, from the problems of deciding on the method of treatment (coercive measures), through the provisions on the patient's rights to the procedural questions of judicial guarantees.

According to Article 5 of the European Convention of Human Rights:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority for reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(...)

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants,

(...)

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph (1) item c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(...)

The provisions of the European Convention of Human Rights – obligatory to Hungary – and the judgements of the European Court of Human Rights (hereinafter: the Court), the content of which is to be followed, are related to many aspects of the deprivation of personal freedom on the ground of mental illness. In the context of this problem, the review might as well cover not only the provisions of Article 5 referred to above, but also the prohibition of torture, inhuman and humiliating treatment regulated under Article 3, just as other provisions of the European Convention of Human Rights. One can find in the practice of the Court significantly more cases when the petitioner had committed a criminal offence and his mandatory medical treatment was ordered on the basis of the court's judgement. In such cases, the mental patients enjoy all the guarantees offered in Article 5 point (3) for persons (of criminal accountability) suspected to have committed a crime. The Court also dealt with some cases when the petitioner had not committed a crime, and coercive measures such as detention were executed

upon him solely on the ground of his mental state. In such cases, special emphasis has to be laid on Article 5 point (4) of the European Convention of Human Rights.
According to Article 5 point (1) of the Convention, the general condition of the deprivation of liberty is the application of a “lawful procedure” (when it is necessary to have a legitimate objective in a democratic society). In practice, it refers to the internal law, and thus the procedure should be lawful according to the internal law, which must correspond to the expressed or implied principles of the Convention. Therefore, both substantive law and procedural law may play a role concerning compliance with the Convention. (c.p. Request no. 10448/83; Rep. 14. 5. 87., D.R. 55, p. 5)

The Court explained in its decisions that the special status of mental patients requires the courts to hear them personally or through their representatives if necessary. The national legal systems should set up special guarantees in order to protect the interests of persons who are incapacitated to act personally due to their mental state. (Winterwerp v. Netherlands Judgment of 24 October 1979, 1980, Series A. no. 33)

In the above decision, the Court defined several criteria for the assessment of the lawfulness of restricting liberty on the grounds of diagnosing a mental illness, such as:
– The individual concerned should “reliably” show to be of unsound mind, in emergency cases this may be verified *ex post facto*. To decide whether the person subject to the measures concerned proves to have a true mental disorder “calls for objective medical expertise”.
– The mental disorder must be of a degree warranting compulsory confinement.
– The duration of the confinement shall depend upon the persistence of such a disorder.

The Court stresses the need to have a court ruling on the coercive measures applied against mental patients. However, according to the bodies in Strasbourg, the requirement of having a court procedure concerning the “review process” mentioned in Article 5 point (4) should not be interpreted strictly in the sense of demanding the procedure of an “ordinary” court integrated into the structure of the judiciary (X v. United Kingdom Judgment of 5 November 1981, Series A. no. 46)

When the mental patient regains his capacity of understanding, he must be informed without delay of the deprivation of liberty and the decision ordering that. (Van der-Leer v. Netherlands Judgment of 21 February 1990, Series A. no. 170)

Taking all this into account, the bodies in Strasbourg allow a relatively wide margin of appreciation for the States concerned in the application of restrictions on freedom (c.p. Luberti v. Italy Judgment of 23 February 1984, Series A. no. 75)

2.2. It can be established on the basis of the European Convention of Human Rights and the judicial practice of the Court's case-law as well as the international documents mentioned that in the case of mental patients, the endangerment of the patient himself or of the public may justify the restriction of personal freedom and mandatory psychiatric medical treatment. Both the international documents and the case-law of the Court focus on procedural guarantees, namely that the restriction of liberty on the grounds of mental illness should not be arbitrary and it shall be limited to the necessary degree and duration.

In fact, the AH also justifies the various coercive measures with the endangerment of the patients themselves or of the public (by defining the concepts of endangering and directly endangering conducts). The AH contains separate definitions on endangering and directly endangering conducts; it uses the following concepts in Chapter X related to psychiatric patients. According to Section 188 items b) and c) of the AH:

– endangering conduct: the patient, as a result of a disturbance in his psychotic condition, may pose a significant threat to his own or others' physical well-being or health, while the nature of the disorder does not warrant urgent institutional treatment;

– directly endangering conduct: the patient, as a result of his acute psychotic condition, poses an immediate and serious threat to his own or others' lives, physical well-being, or health.

In the opinion of the Constitutional Court, the fact alone that the law gives separate definitions on endangering and directly endangering conducts as grounds that may be used for the application of measures against persons of unsound mind, and then – in accordance with the special cases of emergency medical treatment and mandatory medical treatment) it uses such concepts (and the underlying conducts) to justify the measures.

The AH makes a distinction as far as the forms of medical treatment are concerned: "directly endangering" conduct is linked to emergency medical treatment, while "endangering" conduct is related to mandatory medical treatment; the circumstances causing endangering or directly endangering conducts are defined as "disturbance in psychotic condition" and as "acute

psychotic condition", respectively, and it differentiates also according to the degree of the danger ("may pose a significant threat", "poses an immediate and serious threat").

The Constitutional Court holds that it is constitutionally acceptable to specify in Chapter X of the Act the "conducts" contained in Section 188 items b) and c) of the AH as the abstract causes necessitating various medical treatments or measures. Therefore, using the terms "endangering" and/or "directly endangering" in Section 190 item c), Section 191 para. (1), Section 192 para. (1), Section 196 item b), Section 197 para. (8), Section 199 paras (1) and (5), and in Section 200 para. (1) does not violate Article 55 para. (1) of the Constitution. It may also be accepted in itself that in case of certain restrictions of rights [Section 191 para. (1), Section 192 para. (1), Section 197 para. (8)] both conducts are specified by the Act as grounds for the restriction.

2.3. However, in the opinion of the Constitutional Court, the question forming the essence of the petition cannot be decided on the basis of the above, namely whether the regulation does comply with the criteria of proportionality – according to Article 55 para. (1) of the Constitution – between the purported objectives and the measures applied in the course of psychiatric treatment. In this respect, Section 190 item c) and Section 192 have special relevance. One of the petitioners challenged Section 192 para. (1) in a separate petition, for the applicability of the so-called net-beds, complaining of the lack of a statutory provision on the method of the restriction.

Section 190 item c) of the AH governs the conditions of restrictive and coercive measures, while Section 192 para. (1) regulates the other side by securing the guarantees of restricting personal freedom. In the opinion of the Constitutional Court, the constitutionality of the statutory regulations related to restricting the personal freedom of mental patients – in case of an alleged violation of Article 55 para. (1) of the Constitution – may only be assessed on the basis of jointly evaluating the causes of the restriction, the method of the restriction (its proportionality), and the introduced procedural guarantees. ("Endangering" and "directly endangering" conducts are elements of this "set of rules".)

According to Section 190 item c) of the AH, during psychiatric treatment, restrictive or coercive measures, or placement among restrictive conditions may only be applied in extremely justified cases when the patient is a clear danger to self or others.

According to Section 192 para. (1) of the AH, only a patient who exhibits endangering or directly endangering conduct shall be restricted in his personal freedom in any manner whatsoever. The restriction shall only be maintained, and shall only be employed to the extent and in the manner that is absolutely necessary to avert the danger. According to paragraph (2), Section 10 paras (4)-(5) shall apply to ordering restraints and the mode of restriction. The physician shall immediately be notified of the restriction, and said physician shall have to approve the measure within 2 hours. In the lack of the above approval, the restriction shall immediately be discontinued.

Section 10 para. (4) covers the restriction of the patient's personal freedom by "physical, chemical, biological or psychological methods or procedures" and as far as prohibitions are concerned, it only sets the "final" limit: the restriction of the patient may not be of a punitive nature. Nevertheless, the Act does not specify either the main methods applicable to restricting the personal freedom – including the freedom of movement – of psychiatric patients, or the main reasons for the differentiated application of various methods that also affect the scale of restricting freedom. The Constitutional Court holds that the abstract provision found in Section 192 para. (1) of the Constitution whereby the restriction shall only be maintained, and shall only be employed to the extent and in the manner that is absolutely necessary to avert the danger, or the rule contained in Section 10 para. (4) whereby the restraint may only last as long as the cause for which it was ordered exists – taking into account other provisions of the AH as well – are not sufficient for restricting a fundamental right according to Article 55 para. (1) of the Constitution. The Constitutional Court accepted the definitions given by the AH on endangering and directly endangering conditions as abstract causes necessitating the restriction. At the same time, in the aspect of constitutionality, it is of special importance that the regulation should not contain further abstract terms applicable to deciding about the proportionality of the restriction.
Although the Act provides for the requirement of proportionality in an abstract manner – as illustrated above – it does not contain further rules on the methods of restriction. Thus the provisions on the restriction of personal freedom do not exclude – as it could be achieved through normative legislation – the possibility of arbitrary application of the law.

2.4. Until now, the fundamental right of personal freedom has been interpreted by the Constitutional Court typically in relation to the criminal procedure and the related application of the State's or the authorities' coercive force [Decision 66/1991 (XII. 21.) AB, ABH 1991,

342, 347; Decision 723/B/1991/6. AB, ABH 1991, 632, 637; Decision 31/1997 (V. 16.) AB, ABH 1997, 154, 159; Decision 63/1997 (XII. 11.) AB, ABH 1997, 365; see summary in Decision 5/1999 (III. 31.) AB, ABH 1999, 75, 84].. At the same time, it is clear that the right to personal freedom is wider than that, and the enforcement of such right can be examined in assessing the constitutionality of all State measures that actually affect personal freedom. All the above can be deducted from the context of the Constitution as well, since while Article 55 para. (1) declares this freedom on a general scale, its further guarantees related to the criminal procedure can be found under Article 55 paras (2)-(3). Article 57 of the Constitution has the same structure, as its paragraph (1) guarantees in general the principle of equality before the law, and paragraphs (2)-(4) declare the guarantees in the criminal law procedure. Article 58 para. (1) of the Constitution guarantees the right to move freely. According to the practice of the Constitutional Court, the right to move freely is a fundamental right that encompasses the right to free movement. [[Decision 60/1993 (XI. 29.) AB, ABH 1993, 507, 509-510; Decision 3/1998 (II. 11.) AB ABH 1998, 61, 65-66]
The Constitutional Court holds that on the basis of the interrelation of Article 55 para. (1) and Article 58 para. (1) of the Constitution, the right to personal freedom can be invoked on the merits in assessing the constitutionality of any statutory regulation restricting free movement and locomotion. The fundamental right contained in Article 58 para. (1) of the Constitution can also be interpreted together with the right found in Article 55 para. (1) of the Constitution. [see Decision 46/1994 (X. 21.) AB, ABH 1994, 260, 268] The constitutionality of restricting such rights can be assessed on the basis of the requirements – found in Article 8 para. (2) of the Constitution – applicable to any restriction of fundamental rights.

The provisions of the AH on psychiatric patients undoubtedly influence the enforcement of the right to personal freedom specified in Article 55 para. (1) of the Constitution. In addition to using the terms "application of coercive measures" and "placement among restrictive conditions" [Article 190 item c)], the text of the Act provides for a statutory possibility to restrict the personal freedom of a "patient who exhibits endangering or directly endangering conduct" [Section 192 para. (1)].

The Constitutional Court pointed out in interpreting the provision prohibiting the restriction of the essential content of fundamental rights according to Article 8 para. (2) of the Constitution – in the context of Article 54 para. (1) of the Constitution – that "Personality itself is

untouchable by the law (this is expressed by the unlimited right to life and human dignity); the law can only help to ensure this autonomy by guaranteeing its external conditions" (Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 51] The practice of the Constitutional Court is consequent in that the right to human dignity is an unrestrictable fundamental right in unity with the right to life, and the full scope of this right is deemed to be essential content [Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 99], and as such, it is the ultimate limit of the restrictability of all other fundamental rights. Thus the Constitutional Court set up a kind of absolute prohibition within the essential content specified in Article 8 para. (2) by declaring the unrestrictability of the "impalpable essence" on the basis of Article 54 of the Constitution see [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308.].

However, Article 54 of the Constitution contains not only the right to life and dignity. Article 54 para. (2) of the Constitution provides for the prohibition of torture as well as cruel, inhuman and humiliating treatment. In the opinion of the Constitutional Court – in line with the relevant international documents and the interpretation thereof – it is an absolute prohibition, and thus no other constitutional right or task may be weighed against it. The absolute prohibition found in Article 54 para. (2) of the Constitution is part of the right to human dignity specified under Article 54 para. (1).

The constitutionality of a restriction not violating the absolute nature of Article 54 para. (1) of the Constitution or the prohibition contained in Article 54 para. (2) – within the limits of Article 8 para. (2) – can be assessed on the basis of the test of necessity/proportionality. The above interrelation of Article 8 para. (2) of the Constitution and Article 54 paras (1) and (2) thereof applies to all fundamental rights, including the right to personal freedom found under Article 55 para. (1) of the Constitution.

Having regard to the constitutional concern reviewed in the present case, the constitutional requirement on restricting personal freedom can be defined in detail on the basis of the above:

On the one hand, the restriction may not violate the "impalpable essence" of this right, and the prohibition of torture, cruel, inhuman and humiliating treatment. The normative provisions of the AH affect only one aspect of the absolute enforcement of this prohibition, as Section 10 para. (4) of the Act provides that the restraint may not be of a punitive nature. It can be established on the basis of a mere grammatical interpretation that the prohibition specified in Article 54 para. (2) of the Constitution is wider than that.

On the other hand, there is a further requirement concerning the restriction of personal freedom: it should be compliant with the criterion of necessity/proportionality. It has been

illustrated above by the Constitutional Court in the examination of the normative provisions of the AH that the Act actually repeats the abstract standard applied by the Constitutional Court: as far as the cause of necessity is concerned, it uses the terms "only in extremely justified cases, when the patient is a clear danger to self or others" [Section 190 item c)], and "endangering or directly endangering conduct" [Section 192 para. (1)], and in terms of proportionality it states that "the restriction shall only be maintained for a period and shall only be employed to the extent and in the manner that is absolutely necessary to avert the danger" [Section 192 para. (1)] and "the restriction may only last as long as the cause for which it was ordered exists" [Section 10 para. (4)]. Although the Constitutional Court accepted the constitutionality of the causes specified in the AH justifying the necessity of restricting personal freedom (the Act defines the conducts applied as causes), it has not found adequate guarantees in the AH assuring the necessary enforcement of the criteria of proportionality securing that the scale of the restriction remains within the limits of Article 8 para. (2) of the Constitution – not reaching the ultimate limit specified in Article 54 para. (2) of the Constitution.

In the opinion of the Constitutional Court, the criteria of constitutionality for a law allowing the restriction of freedom are not met if the statutory regulation merely repeats the abstract standard of constitutionality. The Constitutional Court holds that the provisions found in Section 190 item c) and the last sentence of Section 192 para. (1) of the AH – in the aspect of the constitutional requirements concerning a law allowing the restriction of freedom – are only adequate if other provisions of the Act give guidance about the kinds of coercive measures that may be applied together with the related rules of periodical supervision and care as well as the maximum duration of the restraint. In the lack of the above, the – mandatory – statutory requirement of taking into account the "extent", i.e. the scale of the restraint, becomes deflated. The restriction of fundamental rights must be based on a firm statutory regulation in terms of the relation between the desired objective and the measures applied. The provisions specifying that only the attending physician may order or approve restraints or the mode of restriction [Section 192 para. (2)] and that restraints together with their reasons and the duration of application have to be entered up in the patient's medical records, and when applying restrictive methods or measures the patient's condition and physical needs shall be observed regularly [Section 10 para. (5)], do not substitute for the missing statutory guarantee, namely the statutory regulation of the measures seriously

restricting personal freedom and the firm prohibition of methods violating Article 54 para. (2) of the Constitution.
The Constitutional Court holds that the “arbitrary” restriction of freedom may be realised not only in the form of implementing it without due grounds, but it may lead to “arbitrariness” if there are no concrete provisions binding those who apply the law regarding the selection of the methods of restricting freedom.

(It should be noted that there are provisions in the AH defining various methods and their limitations in relation to the protection of fundamental rights. For example, Section 166 para. (1) of the AH gives a detailed list of methods applicable as reproduction procedures, and the amendment to the AH by Section 16 of Act CXIX of 1999 sets a clear limitation: only methods specified under Section 166 para. (1) may be used as reproduction methods. Therefore, it is not unusual in the system of the AH to regulate professional issues by normative provisions for guarantee reasons.)

2.5. According to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the CCA), an unconstitutional omission to legislate may be established if the legislature has failed to fulfil its legislative duty mandated by a legal norm, and this has given rise to an unconstitutional situation.
The Constitutional Court has pointed out – among others – in relation to exercising this power that the legislature shall be obliged to legislate even in the lack of a concrete mandate given by a statute in case the statutory guarantees necessary for the enforcement of a fundamental right are missing [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205, Decision 37/1992 (VI. 16.) AB, ABH 1992, 227, 231.]. According to the standing practice of the Constitutional Court, when there are no sufficient guarantee provisions in the existing rules for the enforcement or the protection of a certain fundamental right, the Constitutional Court may establish – even ex officio on the basis of Section 21 para. (7) of the CCA – an unconstitutional omission to legislate. [c.p. Decision 48/1998 (XI. 27.) AB, ABH 1998, 333, 343] The lack of guarantees necessary for the enforcement of the fundamental right naturally includes the case of lacking the guarantees indispensable for the constitutionality of restricting the fundamental right.

In the opinion of the Constitutional Court – based on the above reasons – the guarantees supplied by the AH are inadequate in relation to restricting the fundamental right specified in

Article 55 para. (1) of the Constitution. Consequently, the Constitutional Court established that the Parliament has caused an unconstitutional situation by not regulating in the AH the statutory conditions for applying methods (procedures) seriously restricting the personal freedom of psychiatric patients – including the right to move freely – specified in Article 55 para. (1) of the Constitution; it does not contain appropriate guarantees for the constitutionality of implementing the restriction of personal freedom during the medical treatment and care of psychiatric patients.

In addition to establishing the unconstitutional omission, the Constitutional Court has rejected the petitions aimed at declaring the unconstitutionality and the annulment of Section 190 item c), Section 191 para. (1), Section 192 para. (1), Section 196 item b), Section 197 para. (8), Section 199 paras (1) and (5), and Section 200 para. (1) – based on the alleged violation of Article 55 para. (1) of the Constitution. On the basis of the reasons detailed above, the Constitutional Court holds that the normative content itself of these provisions of the AH is not contrary to Article 55 para. (1) of the Constitution.
As the competence of the Constitutional Court is limited to the examination of normative provisions, the Constitutional Court has not examined on the merits the petitioner's concerns about using "net-beds" on the basis of Section 192 para. (1) of the AH.

3. On the grounds of violating the right to human dignity, the petitioners requested separate examination of Section 191 para. (1) of the AH that restricts the right of consent of psychiatric patients and of Section 197 para. (8) that restricts the voluntarily admitted patients' right to leave the facility, as well as of Section 199 para. (1) that regulates the ordering of emergency medical treatment.

3.1. The Constitutional Court has already expressed its opinion in the present decision about the general provisions on the patients' rights regulating the right of consent and refusal (see point III/2 of the reasoning).
Section 191 para. (1) of the AH provides in addition to the general rules that in the case of a patient submitted to emergency or mandatory treatment, as long as the patient displays endangering or directly endangering conduct, obtaining the patient's consent shall not be mandatory. The Constitutional Court holds that this provision is a necessary and proportionate restriction of the right of consent of psychiatric patients, as endangering the patient or the public on the basis of the patient's acute psychotic condition may justify restriction of the

right of consent even if the psychiatric patient is otherwise statutorily entitled to exercise such right. Neither Article 54 para. (1), nor Article 60 para. (1) of the Constitution is violated by such provision. Section 191 para. (1) of the AH provides however that even in such cases an attempt shall be made to inform the patient.

3.2. The Constitutional Court has not established the violation of human dignity under Article 54 para. (1) of the Constitution in respect of Section 197 para. (8) of the AH either. This provision restricts the right to leave the healthcare facility of a patient admitted voluntarily if the patient displays endangering or directly endangering conduct and the need for institutional treatment exists for that reason.

According to the Act, even in case of voluntary treatment the court shall investigate the need for the treatment and the validity of the consent [Section 197 para. (3)]; if the patient has been admitted for emergency treatment, the court shall decide on the justification of the patient's admission [Section 199 paras (2)-(3)]. Mandatory treatment shall be ordered by the court [Section 200 para. (1)].

Based on the above, the Constitutional Court holds that it has no relevance in terms of constitutionality – if there are grounds for medical treatment in the facility independently from the voluntary admission – that the patient displaying endangering or directly endangering conduct had originally applied for the treatment on a voluntary basis. Section 197 para. (8) of the AH provides for a procedure with the guarantee rules of emergency treatment to be applied in such case (the procedure specified under Section 199 is applicable), and thus the court shall make a decision on the justification of the treatment.

3.3. Section 199 para. (1) of the AH provides for the following in relation to emergency treatment: "If a patient manifests directly endangering conduct because of a mental state or an addiction, and if the danger may only be averted by immediate admission to and treatment in a psychiatric institute, the physician observing this behaviour shall take immediate measures to transport the patient to the proper psychiatric institute. If necessary, the police shall assist in transporting the patient."

The petitioner holds that the concept of "mental state" not being defined anywhere may lead to an arbitrary application of this provision. The petitioner's concern is based on a misunderstanding. The provision concerned provides not only for the "mental state" in allowing emergency treatment, as the precondition for ordering such treatment is – among others – a directly endangering conduct displayed by the petitioner. The definition of directly

endangering conduct specified in Section 188 item c) presupposes that the conduct posing an immediate and serious threat to his own or others' lives, physical well-being or health is the result of the "patient's acute psychotic condition".
Section 199 paras (2) and (3) of the AH regulate the procedure in the context of preventing arbitrary application of the law.
Based on the above, the Constitutional Court has not established the unconstitutionality of Section 199 para. (1) either.

V

Finally, the Constitutional Court reviewed the petitions related to the court procedure about psychiatric patients.

1. Section 199 para. (4) of the AH regulates the parts of emergency treatment that precede the court's ruling. The procedural rules on a patient admitted to emergency treatment [Section 199 paras (2)-(3) of the AH] provide that within 24 hours of admission of the patient, the head of the psychiatric institute shall notify the court and initiate a court finding that there were grounds for the admission, and request a court order for mandatory treatment of said patient in a psychiatric institute. The court shall issue a decision within 72 hours of notification. Until the court decision is rendered, the patient may be temporarily detained in the institute. The challenged paragraph (4) provides that "before the decision is rendered, endeavours shall be focused on eliminating the acutely threatening behaviour or on preventing a rapid deterioration in the patient's condition. To the extent and in a manner professionally possible, interventions making it impossible for the court to judge the mental condition of the patient during the course of a personal interview shall be avoided. When such interventions are nevertheless applied, they shall be fully documented and the reasons shall be set forth.

The petitioner asked for the annulment of the text "to the extent that it is professionally possible", alleging the violation of Article 54 para. (1) and Article 55 para. (1) of the Constitution. Section 199 para. (6) provides that the court shall hear the patient prior to taking its decision.
The Constitutional Court holds that the petitioner neglected other relevant provisions found in the AH. Undoubtedly, Section 199 para. (4) of the AH contains the possibility that the court

shall not be able form a realistic picture on the patient's state – from the patient himself – due to the medical treatment (medical intervention) prior to the court's ruling.
At the same time, Section 199 para. (4) does not give before the court's ruling a general authorisation for the attending physician to start a medical treatment (on the long run, as appropriate) with the tools and methods available. It provides that endeavours shall be focused on eliminating the acutely threatening behaviour or on preventing a rapid deterioration in the patient's condition. Any intervention that may prevent the court to assess the case on the basis of a personal interview must be documented and reasoned, and therefore the court shall be informed of it. It must also be considered that the court shall pass its decision not only on the basis of hearing the patient. The decision shall be passed on the basis of considering more opinions at the same time. According to Section 199 para. (6), the court shall hear the head of the institute or a physician delegated by him, furthermore, the court shall obtain the opinion of an independent forensic specialist psychiatrist who has not participated in the medical treatment of the patient. In addition, the patient shall not be left unrepresented. Section 201 para. (4) of the AH provides for the adequate mandatory representation of the patient in the court procedure. It states that the patient may also be represented by the patient advocate mandated by the patient or the legal representative thereof. If the patient has no legal or mandated representative in the procedure, the court shall appoint a guardian *ad litem*. According to Section 201 para. (5), the patient advocate or the guardian *ad litem* shall visit the patient before the court's hearing to acquire information on the circumstances of admittance and to inform the patient on his procedural rights.

Therefore, it can be established on the basis of the above provisions connected to Section 199 para. (4) of the AH that there are guarantees in the Act – also covering the protection of the fundamental rights found in Article 54 para. (1) and Article 55 para. (1) of the Constitution – for the scope of cases when the court is not able to assess the psychic state of the patient in the course of the personal interview. The petition alleging that there are no guarantees in the court procedure and this leads to the violation of the rights specified in Article 54 para. (1) and Article 55 para. (1) of the Constitution is unfounded.
On the above grounds, the Constitutional Court has rejected the petition aimed at the annulment of Section 199 para. (4) of the AH.

2. The petitioner asked for the annulment of the text "non-litigious" in Section 201 para. (1) of the AH. According to Section 201 para. (1) of the AH, the court shall conduct non-litigious

proceedings in the proceedings set forth under this chapter. The petitioner claimed the unconstitutionality of this provision on the basis of violating the prohibition of discrimination found in Article 70/A of the Constitution, as there are extra guarantees in case of a litigious procedure, and the lack of these guarantees in a non-litigious procedure affects the psychiatric patients adversely. The petition is unfounded in this respect as well.

In cases of civil law, a non-litigious procedure is a form of administering justice. In such procedures in general there is no legal debate in the classic sense; they are directed at the protection, acknowledgement, verification or enforcement of a certain right. Such proceedings are more flexible and simpler than lawsuit procedures. However, civil non-litigious procedures are not homogeneous, and in some cases not even courts are in charge but a notary public (e.g. inheritance). It follows from the above that the requirement of reasonable justification according to Article 70/A of the Constitution may only be assessed on the basis of the particular features of the individual proceedings: whether there is any interest or cause attached to the given procedure that puts it out of the scope of litigious procedures and in particular, whether the type of the procedure is suited to the rights desired to be enforced or protected with the procedure, and whether there are appropriate guarantees enforced in the procedure.
The procedural rules related to the institutional treatment of persons of unsound mind are partly based on the rules of the AH and partly on the relevant provisions of Act III of 1952 on the Code of Civil Procedure. This procedure is administered by the courts as it is necessitated by the protection of the interests of mental patients. The AH specifies short deadlines for the court to pass a decision and it serves the purpose of a guarantee to decide within a short period of time. (Short deadlines also follow from Article 5 point 1(e) and point 4 of the European Convention of Human Rights – quoted earlier.) The AH provides that within 72 hours, the court shall investigate to determine whether the conditions of voluntary treatment are being met [Section 197 para. (5)]. The same deadline of 72 hours apply to passing the decision in case of an emergency treatment [Section 199 para. (2)] and the deadline is 15 days for mandatory treatments [Section 200 para. 39]. The above facts alone may justify the need for a non-litigious procedure. It shall be considered as a guarantee that in respect of both voluntary treatment and emergency or mandatory treatment the AH provides for the rule that the court shall hear – among others – the patient before passing a decision [Section 197 para. (5), Section 199 para. (6), Section 200 para. (4)]. Finally, it must be noted that in the court

procedure (sensitive) data may be revealed concerning the patient's state of health that may otherwise lead to the exclusion of the public.

The Constitutional Court has established on the basis of the above that there are reasonable grounds to use a non-litigious procedure as applicable in the medical treatment and care of psychiatric patients and the provisions concerning the concrete procedures secure even within a non-litigious procedure the guarantees that would be enforced in a lawsuit. Consequently, the Constitutional Court rejects the petition seeking – on the basis of Article 70/A of the Constitution – the establishment of the unconstitutionality and the declaration of the nullification of Section 201 para. (1) of the AH.

3. The petitioner proposed an amendment to the Act in relation to the court procedure, asking the Constitutional Court to modify Section 201 para. (9) of the AH by requiring the courts to decide on some form of guardianship when ordering mandatory medical treatment. [[After filing the petition, Section 201 of the AH was amended by Section 16 para. (1) of Act LXXXI of 1999 and the numbering of the Section concerned was also changed. With regard to the problems raised by the petitioner, the prevailing Section 201 para. (10) of the AH shall govern – instead of the former para. (9) – providing that "when in the opinion of the forensic psychiatric expert the patient is not competent to manage his affairs because of reduced insight or an absence of insight, the court shall forward the expert opinion to the public guardianship authority with jurisdiction at the patient's place of residence, to initiate proceedings to appoint a guardian."]

The competences of the Constitutional Court and the consequences of unconstitutionality in the various competences can be found in the ACC. Neither the ACC, nor any other Act empowers the Constitutional Court to independently propose an amendment of a statute or to modify or amend a statute. Therefore, the Constitutional Court has refused without examination on the merits the petition aimed at amending the Act. The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon Section 41 of the Act on the Constitutional Court.

Budapest, 24 October 2004

Dr. János Németh

President of the Constitutional Court

Dr. István Bagi Constitutional Judge	Dr. Mihály Bihari Constitutional Judge
Dr. Ottó Czúcz Judge of the Constitutional Court	Dr. Árpád Erdei Judge of the Constitutional Court
Dr. Attila Harmathy Judge of the Constitutional Court	Dr. András Holló presenting Judge of the Constitutional Court
Dr. László Kiss Judge of the Constitutional Court	Dr. István Kukorelli Judge of the Constitutional Court
Dr. János Strausz Judge of the Constitutional Court	Dr. Éva Tersztyánszky-Vasadi Judge of the Constitutional Court

Dissenting opinion by Dr. István Bagi, Judge of the Constitutional Court

I agree with the rejecting resolution under points 3 and 4 of the holdings of the Decision.

I do not agree with the resolution on annulment found in points 1 and 2 of the holdings.

The freedom of the legislature includes selection of a method of regulation different from the one in force, and the legislature is not bound to apply in the course of regulation the categories defined according to criteria of assessing the transactions of private law, but it may form – within the limits of constitutionality – one or more groups of different legal status instead of the present unified group. According to the requirement of Article 70/G para. (2) of the Constitution, the representatives of scientific life are entitled to form an opinion about the criteria of setting up groups on a scientific basis as far as the understanding and weighing of the information given and the relevant decision-making is concerned. In my opinion, it may not be deducted from the Constitution as a direct requirement that the legislature should adopt regulations for persons with limited disposing capacity different from those applicable to incapable ones regarding their consent to medical interventions.

As far as the enforcement of the prohibition specified in Article 54 para. (2) of the Constitution is concerned, it is a criterion of paramount importance that the Act should not allow physicians to act arbitrarily. However, in this respect, one should take into account the set of other rules that form the basis of professional and ethical concerns as well as the

determination of liability. In my opinion, in the case of persons with no or limited disposing capacity, the declaration made by the legal representative or by the relative specified in the Act, together with the judicial way offer adequate constitutional guarantees.

Budapest, 24 October 2004

Dr. István Bagi
Judge of the Constitutional Court

Dissenting opinion by Dr. Attila Harmathy, Judge of the Constitutional Court

I do not agree with the arguments presented in point 1 of the holdings and in the related part of the reasoning. In my opinion, the Decision should have stated the following: the Parliament has caused an unconstitutional omission of legislative duty by not specifying for the case of medical examination, treatment and intervention affecting persons who do not qualify as having full disposing capacity the rules guaranteeing the right to self-determination and the protection of the interests of such persons when they are prevented in exercising this right. The Constitutional Court calls upon Parliament to meet its legislative responsibility by 31 December 2001.

The grounds for declaring the unconstitutional omission are the following:

1. Although Section 15 para. (3) of Act CLIV of 1997 on Healthcare (hereinafter: the AH) pronounces that the patient is entitled to participate in decision-making related to his examination or treatment, Section 16 deprives the patients with no or limited disposing capacity of the exercise of this right. Section 16 para. (5) merely provides that the opinion of a patient with no or limited disposing capacity shall be taken into account to the extent professionally possible, but the right of consent and refusal is exercised by the person defined in Section 16 para. (2).

According to Article 54 of the Constitution, everyone has the inherent right to life and human dignity. The Constitutional Court pointed out as early as in 1990 that in modern constitutions and in the practice of the constitutional courts, the right to self-determination is considered a form of manifestation of the right to human dignity – also represented in the

provision of the Constitution referred to above [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44-45]. This principle has been applied by the Constitutional Court in its subsequent decisions [e.g. Decision 57/1991 (XI. 8.) AB, ABH 1991, 272, 279, Decision 22/1992 (IV. 10.) AB, ABH 1992, 122, 123].

According to the Hungarian law, persons who have completed their 18th year are of full age [Section 12 para. (2) of Act IV of 1959 on the Civil Code (hereinafter: the CC)]. Persons above that age are presumed to be able to understand the legal consequences of their conduct. Therefore, persons over the age of 18 are entitled to perform acts of legal relevance and may make legal representations. There are, however, persons who cannot comprehend the legal consequences of their acts despite being of full age. Such persons over the age of 18 and the ones who have not completed their 18th year are not entitled to make legal representations independently, but (depending on the legal consequences concerned) they are prohibited or restricted in making any legal acts or representations [e.g. according to Article 70 paras (1) and (3) of the Constitution, minors and the persons of full age who are under a guardianship limiting or excluding their disposing capacity have no right to vote; according to Section 10 para. (3) of the Act IV of 1952 on Marriage, Family and Guardianship, persons over the age of 16 may marry with the approval of the court of guardianship].

Medical examinations, treatments and interventions may have influences of different nature or extent and with different consequences on the person subject to them. The disposing capacity to give consent – on the basis of the right to self-determination – to the implementation of the above is based on the presumption that the person in question can, on the basis of the information received, assess without professional medical qualification the consequences of his consent or refusal to consent. In such cases, the capacity of discretion required is not the one related to contracts regarding proprietary rights, but one related to the comprehension of the events that may influence health, physical integrity or life.

It had already been acknowledged in the Hungarian private law before World War II that the categories of full disposing capacity, limited disposing capacity and incapacity related to legal transactions may only be applied within certain limits. By the principle applied at that time concerning eligible acts in “non-transactional legal matters”, the applicability of the rules on disposing capacity was to be assessed on a case-by-case basis, taking into account the objectives concerned. At that time, the judgment of the patient’s consent to medical

interventions was not based on the constitutional right to self-determination; the question was whether or not the patient's consent to a medical intervention terminated unlawfulness as a ground for the payment of damages [Károly Szladits (editor), Magyar Magánjog, Budapest 1941, Vol. I, 534, 552].

On the basis of Article 54 para. (1) of the Constitution, the State is obliged not only to respect the right to human life and human dignity, but to establish the preconditions necessary for the protection of these rights by measures such as appropriate legislation. As far as persons with limited disposing capacity are concerned, the legislature has not defined rules specifying different measures on the different categories of medical examinations, treatments or interventions concerning the different groups of such persons with various capacities of comprehension, allowing the exercise of the right to self-determination in each case when it bears no risks having due regard to the interests of the person concerned. The regulation that provides for taking into account the opinion of the person with limited disposing capacity to the extent professionally possible, generally empowering another person to decide on which medical examination, treatment or intervention may be implemented on a person with limited disposing capacity does not primarily serve the enforcement of the right to self-determination and, in some cases, it may hinder the exercise of the right to self-determination.

2. According to Article 67 para. (1) of the Constitution, in the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development. Paragraph (3) states – among others – that the protection of the youth is the responsibility of the State. Based on the above provisions, the State is obliged to establish rules guaranteeing the fundamental rights of children and young ones in general, such as their right to life and to human dignity.

Independently from the above mentioned provisions of the Constitution, the State has a general responsibility to form the legislative and institutional background necessary for the protection of human life and dignity [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302]. It has been pointed out in several decisions of the Constitutional Court that the right to self-determination is considered a fundamental right, as a form of manifestation of the right to human dignity [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 67; Decision 22/1992 (IV. 10.) AB, ABH 1992, 122, 123; Decision 48/1998 (XI. 23.) AB, ABH 1998, 333, 351-357].

As explained by the Constitutional Court earlier, the statutes adopted for the protection of minors may restrict fundamental rights on the basis of their lack of capacity to assess the consequences. [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 80]. However, in addition to the rule justifying the restrictions on decision-making, other ways of protection are to be secured as well. In the reasoning of Decision 48/1998 (XI. 23.) AB, the Constitutional Court presented an outline of the State obligations specified in order to protect the various subjective rights with regard to the establishment of legal guarantees as well (ABH 1998, 333, 342-343). The guarantee shall not be limited to defining by the law certain persons who may make declarations on behalf of persons with limited disposing capacity when a person under full age is incapable of making a decision on consent to a certain medical examination, treatment or intervention. For example, in other cases where the necessary capacity of discretion is missing and when legal transactions of serious consequences are concerned in the field of propriety rights, the declaration made by the legal representative acting instead of a person with limited disposing capacity shall only be valid with the approval of the court of guardianship [Section 19 para. (1) of the CC], and according to an amendment adopted recently to the German Civil Code, in certain cases, it is necessary to have a special court approval in addition to the consent given instead of a person with limited disposing capacity in case of medical examinations, treatments or interventions (BGB 1904. §). The provisions of the AH contain no such guarantees concerning the consent given instead of a person with limited disposing capacity to medical examinations, treatments or interventions.

Due to the lack or the inadequacy of regulation (not being based on the right to self-determination), the right to self-determination is violated causing an unconstitutional situation.

3. According to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court, "If an unconstitutional omission to legislate is established by the Constitutional Court *ex officio* or on the basis of a petition by any person since the legislature has failed to fulfil its legislative duty mandated by a statute, and this has given rise to an unconstitutional situation, it shall call upon – by setting a deadline – the organ in default to perform its duty."

According to the practice of the Constitutional Court established in 1990, the legislature shall be obliged to legislate even in the lack of a concrete mandate given by a

statute if it realises that legislation is needed within its scope of responsibility and competence, and the constitutional omission to legislate may even be established if a certain group of the citizens is unable to enforce its rights due to an existing rule of law [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]. A constitutional omission of legislation may also be established if there are no guarantees necessary for the enforcement the fundamental right [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232-233]. In the present case, the omission shall be established *ex officio* on the above grounds.

Budapest, 24 October 2004

Dr. Attila Harmathy
Judge of the Constitutional Court

Dissenting opinion by Dr. János Németh, Judge of the Constitutional Court

1. I agree with the arguments presented in points 1, 3 and 4 of the holdings and with the related part of the reasoning.

2. I do not agree with declaring that the legislature has caused an unconstitutional omission of legislative duty by not regulating in Act CLIV of 1997 on Healthcare the statutory conditions of applying methods (procedures) seriously restricting personal freedom – including the freedom of movement – guaranteed in Article 55 para. (1) of the Constitution in the case of psychiatric patients, and thus the Parliament has failed to guarantee adequately the enforcement of the prohibition contained in Article 54 para. (2) of the Constitution.

In the Decision, the definitions given by the AH on endangering and directly endangering conditions as abstract causes necessitating a restriction of the personal freedom of psychiatric patients are accepted. However, as far as the proportionality of restriction is concerned, the Decision holds that it is not right to provide for the requirement of proportionality in an abstract manner without specifying further rules on the methods of restriction. According to the Decision, the challenged rules of the AH are only adequate if other provisions of the Act give guidance on what kind of coercive measures may be applied together with the related rules of periodical supervision and care as well as the maximum duration of the restraint. The

Decision holds that in the lack of the above, the – mandatory – statutory requirement of taking into account the "extent", i.e. the scale of the restraint, becomes deflated.

My opinion differs from the holdings in the latter respect. Medical care is directed at the prevention and curing of diseases, at the elimination of threats to life, and at rehabilitation. The examinations and the therapeutic procedures applied may undoubtedly result in restricting personal freedom, but this is not their primary objective. As referred to in the Decision, the AH specifies among the patients' general rights that "in the course of health care, the patient's personal freedom may be restricted by physical, chemical, biological or psychological methods or procedures exclusively in case of emergency, or in the interest of protecting the lives, physical integrity and health of the patient or others. Restriction of the patient may not be of a punitive nature, and it may only last as long as the cause for which it was ordered exists" [Section 10 para. (4)]. The application of restrictive methods or procedures shall be ordered by the patient's attending physician, unless otherwise provided by this Act. Prior to applying such restrictive measures – or if it is not possible, within the shortest possible time after the initiation of their application – the attending physician shall enter up the restrictive methods or procedures in the patient's medical record, indicating precisely the reasons for and the duration of application. ... If restrictive methods and measures are applied, the patient's condition and physical needs shall be observed regularly, in compliance with professional rules. The observation and the findings shall be entered up in the patient's medical records" [Section 10 para. (5)] As far as the selection of methods is concerned, the law provides that "it shall be the right of the attending physician to choose freely among the scientifically accepted methods of examination and therapy, within the framework of the law in force, the ones to be applied as known to and practiced by him or the persons participating in the care and that can be carried out under available objective and personnel conditions" [Section 129 para. (1)]. "The prerequisite for applying the method of examination and therapy chosen shall be" that "the patient has consented thereto within the rules of this Act", and "the risk of the intervention is lower than the risk of non-completion of the intervention, or that there be a well-founded reason for taking the risk" [Section 129 para. (2)].

With regard to psychiatric patients, in order to take into account their special situation, the Act points out that their personality rights deserve "enhanced protection" in the course of healthcare [Section 189 para. (1)]. Their rights may only be restricted "according to this Act,

and only to the degree and for the duration of time absolutely necessary, (…) only if the patient's conduct qualifies as endangering or directly endangering. However, the right to human dignity shall not be restricted, even in this case" [Section 189 para. (2)]. The patient shall be treated "with the least restrictive method, causing the least discomfort, as suited to his conditions, while protecting the physical well-being of the other patients" [Section 190 item b)]. "The restriction shall only be maintained, and shall only be employed to the extent and in the manner that is absolutely necessary to avert the danger" [Section 192 para. (1)], and it "shall be documented in detail and the reasons for them shall be expounded" [Section 194 para. (2)].

I agree that repeating this abstract constitutional standard alone does not comply with the constitutional criteria raised in respect of the Act allowing the restriction of freedom. Nevertheless, in my opinion, the AH complies with the relevant requirements specified in the Decision. In the standing practice of the Constitutional Court, the restriction of a fundamental right is deemed proportionate "if the importance of the purported objective is proportionate to the related restriction of the fundamental right concerned" and the legislature is bound to employ the most moderate means suitable for reaching the specified purpose" [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171; and in: Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 71; Decision 7/1991 (II. 28.) AB, ABH 1991, 22, 25; Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 85; Decision 11/1993 (II. 27.) AB, ABH 1993, 109, 110; Decision 22/1999 (VI. 30.) AB, ABH 1999, 176, 194-195; Decision 18/2000 (VI. 6.) AB, ABK June-July 2000, 211, 214].

In the present case, the AH provides adequate guarantees for the proportionality of the restriction by specifying the causes of ordering the treatment of psychiatric patients with the deprivation of their freedom (with the patient's consent, or without such consent when the patient manifests endangering or directly endangering conduct), the selection of the methods employed (only the least restrictive, scientifically accepted methods, causing the least discomfort, as suited to the patient's condition), the preconditions for the application of restrictions (only to the extent and in the manner that is absolutely necessary to avert the danger), the obligation of continuous care (regular monitoring of the patient's state and physical needs), and the conditions for controlling the above (detailed documentation and reasoning) as well as by declaring the unrestrictability of the right to human dignity.

Based on the above, the petition on declaring the omission of legislation should have been rejected.

Budapest, 24 October 2004

Dr. János Németh
Judge of the Constitutional Court

I second the above dissenting opinion:

Dr. Árpád Erdei
Judge of the Constitutional Court

Dissenting opinion by Dr. Éva Tersztyánszky-Vasadi, Judge of the Constitutional Court

1. I agree with the part of the Decision rejecting the petition as well as with the related reasoning.

2. I do not agree with the conclusion that restricting the right of consent and refusal of patients with limited disposing capacity related to invasive interventions to the same extent as in the case of incapable patients is a violation of the right to human dignity. Nor do I consider it justified that as compared to the guarantees existing in the present rules, more, or more differentiated regulations would be constitutionally required for the enforcement of the rights of patients with limited disposing capacity.

In my opinion, the Decision addresses only one aspect of the issues raised and, therefore, its conclusions differ from my point of view.

To adopt a well-founded decision on the interpretation of the particular petition reviewed, the relation between the physician and the patient, the physician's liability in terms of ethics (Sections 25-31 of Act XXVIII of 1994 on the Hungarian Medical Chamber), labour law, civil law, and criminal law, as well as the aspects and the particular features of the right of consent should be taken into account and interpreted as a whole.

Practically, the issue of consent or refusal is raised in case of interventions of a serious scale. The voluntary undertaking of a serious intervention with the conscious assessment of its potential risks is a decision and a responsibility that may justify the legislature's deviation from the general rules of civil law. In other words, it does not follow from the right to human dignity that the right of consent of a person with limited disposing capacity should be regulated differently, in a least restrictive manner, or with less guarantees as compared to incapable persons. In my opinion – in the absence of a constitutional standard – it is a question that falls into the competence of the legislature and it should be decided primarily on the basis of "the relation between objectives and tools".

It follows from the above that the constitutional concern is whether in the case of persons with limited disposing capacity, the complete and unconditional (as far as the causes of limited disposing capacity are concerned) lack of the capacity of consent to the decision – as alleged in the Act – is unconstitutional on the grounds of violating human dignity. In my opinion, exercising the right of consent is a decision of such subject, weight and consequences that justify the application of legal consequences (set of conditions) when there is a deficiency of any scale or on any basis in the capacity of discretion.

Therefore, as far as the right of consent and refusal is concerned, the AH regulates special relations, namely those existing between the physician and the patient or the healthcare facility and the patient – in a differentiated manner, taking into account the special situation. (Of course, there are certain connections between these legal relations.)

The purposeful and purported (conscious) exercise of the "right of consent and refusal" is one of the medical-professional decisions made in the patient's interest. The unquestionability of this is equally important for both the patient and the medical facility in charge of the patient's treatment. One of the important legal consequences of the patient's consent is relieving the facility of the liability for any event within the scope of ordinary risks of an intervention according to the state of the art of science that might be applicable in the absence of consent. Therefore, consent shall also mean that the patient or the person empowered to give consent acquire information from the physician on, and understands the possible harmful consequences within the scope of ordinary risks of, the intervention by assessing its expected benefits and risks.

It does not follow from the rights to human dignity, self-determination, or freedom to act that in case of decisions related to certain medical interventions of a serious scale persons with limited disposing capacity should be treated either as ones with full capacity or as incapable.

I do not hold it unconstitutional that in this field, persons with limited disposing capacity are treated by the Act more severely, i.e. equally to incapable persons. This is not a restriction but, on the contrary, an additional guarantee applied – in line with the purported objectives – in the interest of those with limited disposing capacity. If the rules are nonetheless interpreted as restrictions, they qualify as necessary and proportionate restrictions related to the right of physical and mental health specified under Article 70/D of the Constitution. Although the civil law institutions of incapacity and limited disposing capacity protect, first of all, the security of transactions, the minor (or another person deemed, for any other reason, to be in a situation of not being able to make certain responsible decisions) is also protected from careless losses and from risks in general. The freedom to act may also be restricted to secure the optimum operation of certain institutions (e.g. right to vote, higher age limit for undertaking certain public offices). Everyone may harm himself and may assume risks if he is capable of a free, informed and responsible decision [Decision 21/1996 (V. 17.) AB, ABH 1996, 74]. Restrictive "guardianship" by the State may only be subjected to constitutional considerations in marginal cases. The legislature decided on applying the institutions of civil law for the capacity of consent by selecting from the theoretically available constitutional solutions and legal tools.

3. Examining the regulation in force, it should be noted that according to Article 5 of the Bioethical Convention of the Council of Europe (to which Hungary is not a party), consent is interpreted as "free and informed" consent. The capacity of consent is dependent upon adequate prior information covering the purpose, the nature, the consequences and the risks of the intervention. A similar rule is applied by the AH (Section 13 paras (1) to (8), Section 15 para. (3), and Sections 134 to 135).

According to the Convention, the lack of capacity of consent and its causes are linked to the civil law concept of disposing capacity and the specific causes of limited disposing capacity – similar to the rules in force of the AH. This is what follows from points 2 and 3 of Article 6 of the Convention. Point 2 deals with the lack of capacity of consent in respect of "minors" and – similar to the AH – its paragraph 2 provides for taking into account the opinion of the minor

concerned. Point 3 covers persons of "full age" without capacity of consent and – similar to the Hungarian regulations – the lack of capacity of consent is linked to the "traditional" causes that lead to the complete lack of disposing capacity. In both cases the Convention provides – similar to the provisions of the AH – that the patient's consent may be substituted for by an approval given by the patient's representative or another person or body appointed to do so.

The provision contained in Section 16 para. (5) of the AH on taking into account the patient's opinion to the extent professionally possible cannot be considered an uncertain condition. The real weight of this provision is guaranteed by the physician's obligation to follow the professional rules as underlined by the various forms of liability. It results in considering nothing else but interventions that may improve the patient's condition. At the same time, in making a decision about refusing an intervention medically justified and proposed, the patient's interests shall prevail even if there is another person making a declaration instead of the patient on the consent or refusal – possibly contrary to the patient's opinion. However, according to Section 16 para. (4) of the AH, the enforcement of the declaration of the person representing the patient is not unlimited: it may not adversely affect the patient's state of health. Taking into account all the above provisions when applied adequately, it is impossible to implement or decline an intervention on a patient against his express refusal or request, respectively, if the intervention concerned is not medically justified or would not serve the purpose of improving the patient's health.

4. Furthermore, I do not agree with the requirement that the conditions of applying certain methods or procedures seriously "restricting" the personal freedom of psychiatric patients should be regulated in more detail than in the present Act in force.

The provisions of the AH on the right of consent and refusal apply to all patients waiting for a certain intervention. On the other hand, the alleged lack of regulating on a statutory level the conditions of the methods and procedures "restricting" personal freedom applies to psychiatric patients only.

As far as the protection of the principles defined in Article 55 para. (1) and Article 54 para. (2) of the Constitution are concerned, the decisive factor is that the AH covers medical treatment and care. These are, namely, activities not aimed at the deprivation of liberty, at

torture, or at cruel, inhuman, humiliating treatment. The latter are explicitly prohibited by the provisions of the AH (Section 10 paras (1), (4) of the AH).

Undoubtedly, certain examinations or treatments cause an intervention into the physical or mental integrity of the patient, nonetheless, this is not a constitutional concern affecting psychiatric patients but a purposeful and inevitable tool and consequence of medical treatment, and as such, it is a medical-professional issue.

Therefore, in case of psychiatric patients the concern of constitutionality is whether there are due guarantees for referring into, and detaining in healthcare facilities patients who are not co-operative. The AH offers adequate guarantees for using the tools of medicine as well as for controlling them (Section 10 paras (1)-(2) and (5), Section 24, Section 29 para. (1), Section 123, Sections 136-137, Section 190 item c), Section 192 paras (1)-(2) of the AH). The AH provides for detailed rules concerning the tools, the conditions of application, as well as the rules of ordering, controlling, maintaining and cancelling them.

In general, the constitutional concern is not related to the lack of more detailed statutory rules concerning the conditions for the application of methods and procedures, but the cases when they are used for other purposes, such as disciplinary tools. The provisions of the AH guarantee an adequate framework for the constitutional application of the law. (Nevertheless, the casual occurrence of arbitrary acts not aimed at improving the patient's health cannot be excluded by further legislation either.)

There is no well-founded ground or explanation for regulating on a statutory level the conditions for applying certain processes or methods that fall within the scope of medical-professional protocols. Such regulation would have the consequence of endangering medical treatment tailored to the person (illness) concerned, making the outcome of medical treatment insecure, and rendering relative the physician's professional liability.

As far as co-operating psychiatric patients and non-psychiatric patients are concerned, the issue of restricting their personal freedom by applying to them the same tools shall not even be raised having regard to their necessary consent. There is no constitutional reason for regulating in more details exclusively in respect of psychiatric patients the conditions for applying the tools considered restrictive methods or procedures applied not only in psychiatry.

It is to be noted that in the course of procedure by the Constitutional Court, the Minister of Healthcare and the Hungarian Psychiatric Association considered the present statutory conditions of applying the methods (procedures) adequate in terms of the medical profession. I agree to that and do not see any reason for further regulation expected as a constitutional standard. I also agree with the opinion of the Hungarian Psychiatric Association in that a statutory regulation of the therapeutic procedures applied in the scope of medicine concerned would, contrary to the desired objective, result in an unreasonable discrimination of psychiatric patients.

5. The international practice does not justify a broader interpretation of the relevant provisions of the Constitution, namely the requirement to give additional guarantees in the statutory rules – in a more detailed form than currently in force – for the conditions of application of certain methods (procedures) presently contained in the AH and in professional protocols.

On 3 January 2000, the Council of Europe published the “White Book” on the protection of the human rights and dignity of mental patients, with particular regard to patients unwillingly detained in psychiatric facilities.
The study deals, among others, with the conditions of applying coercive measures in the treatment of mental patients, with the protection of the patients' human rights and dignity as well as with the guarantees thereof.
The study does not mention the need to regulate in a statutory form the applicable coercive measures, procedures, interventions or their applicability.
On the contrary, it is explicitly stated in point 6.1 that the treatment/intervention shall be applied in each case on the basis of the clinical symptoms revealed, with the purpose of healing, in the interest of actually improving the patient's health. Other aspects, such as the patient's welfare, family, social or criminal law status, may only be assessed afterwards, by respecting the priority of the foregoing. (The wording refers to the necessity of taking into account the latter aspects as well, but a statutory regulation would not allow for that.)
Under point 11.4, it is explicitly provided that treatment/intervention shall be selected and applied in each case on an individual basis, taking into account the patient's state of health and the expected course of his illness.

Regulating on a statutory level the application criteria for the various tools and procedures of medical treatment would result in rendering impossible individual and complex professional evaluation.

Points 11.3 to 11.6 define in detail the criteria and the guarantees of application, namely:
– as soon as the patient's state of health allows, less severe treatment shall be applied (cp. Section 10 para. (4) of the AH)
– any individually tailored treatment shall be consulted with the patient in advance or, if it is not possible, with the patient's representative (cp. Section 13 para. (1) of the AH),
– treatment shall be monitored on a constant basis (cp. Section 10 para. (5) of the AH)
– the aspects of necessity and proportionality shall be taken into account on a constant basis (cp. Section 10 paras (3) and (4) of the AH)
– a detailed written record shall be made on each treatment (cp. Section 10 para. (5) of the AH)
– treatments/interventions may only be ordered by a physician, and the attending physician's subsequent approval is needed in case of an emergency, etc. (cp. Section 10 para. (5) of the AH).

All the above confirm that the AH presently in force regulates the treatment of psychiatric patients in accordance with the European practice and contains the statutory guarantees necessary for the enforcement of the fundamental rights specified in Article 55 para. (1) and Article 54 para. (2) of the Constitution.

Consequently, the petition should have been rejected completely.

Budapest, 24 October 2004

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

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