DECISION 43/2005 (XI. 14.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In a procedure of the posterior constitutional examination of statutory provisions, the Constitutional Court – with dissenting opinions by Dr. Attila Harmathy, Dr. Péter Kovács and Dr. Éva Tersztyánszky-Vasadi, Judges of the Constitutional Court – has adopted the following

decision:

1. The Constitutional Court holds that Section 187 para. (2) of Act CLIV of 1997 on Healthcare is unconstitutional, and therefore annuls it as of 30 June 2006.

2. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of the text "and if married or cohabiting, to the spouse or cohabitant as well" in Section 187 para. (5) of Act CLIV of 1997 on Healthcare.

3. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of the text "and if married or cohabiting, to the spouse or cohabitant as well" in Section 3 para. (1) and Section 6 para. (1) of Minister of Health Decree 25/1998 (VI. 17.) NM on Sterilisation.

4. The Constitutional Court terminates the procedure for the establishment of the unconstitutionality and the annulment of Minister of Health Decree 12/1987 (VIII. 19.) EüM on Sterilisation.

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

Reasoning

I

1. The Constitutional Court has received two petitions seeking the constitutional examination of certain elements of the regulations on sterilisation.

1.1. One of the petitioners requested, in his petition submitted in 1992, the establishment of the unconstitutionality and the annulment of Minister of Health Decree 12/1987 (VIII. 19.) EüM on Sterilisation (hereinafter: "D1"). According to the petitioner, the decree is contrary to Article 8 para. (2) of the Constitution for formal reasons, as it is not an Act of Parliament yet it contains rules restricting people's fundamental rights. Besides, the petitioner also challenges the content of the regulations, since – in his opinion – they contain "unjustified restrictions (on age and the number of children)" and thus violate Article 8 para. (2) and Article 54 para. (1) of the Constitution.

The statute challenged by the petitioner was repealed as of 1 July 1998 by Section 7 of Minister of Health Decree 25/1998 (VI. 17.) NM on Sterilisation (hereinafter: "D2"). The Constitutional Court informed the petitioner thereon, who subsequently upheld the petition seeking the establishment of the unconstitutionality of D1 in respect of the "period of its being in force", at the same time claiming the request for annulment to have become causeless. Furthermore, the petitioner – with reference to Article 8 para. (2) and Article 54 para. (1) of the Constitution – has initiated the establishment of the unconstitutionality and the annulment of the first sentence in Section 187 para. (2) of Act CLIV of 1997 on Healthcare (hereinafter: "AH") repeating the content of the previous regulations.

1.2. The other petitioner challenges Section 187 para. (2) of the AH with reference to Article 2 para. (1), Article 8 paras (1) and (2), Article 54 para. (1) and Article 70/A para. (1) of the Constitution. In his opinion, the challenged provision violates the right to self-determination and includes arbitrary and discriminative conditions.

In addition, the petitioner challenges the text "and if married or cohabiting, to the spouse or cohabitant as well" in Section 187 para. (5) of the AH and the text with similar content in Section 6 para. (1) of D2. According to the petitioner, the two challenged provisions violate

the right to privacy stemming from Article 54 para. (1) of the Constitution, as they "oblige the person requesting sterilisation to share a decision belonging to one's most intimate sphere (sterilisation) with another person (spouse/cohabitant)". On the same basis, the petitioner also requests the establishment of the unconstitutionality and the annulment of Section 3 para. (1) of D2.

2. The provisions of the Constitution referred to by the petitioners are as follows:

"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law."
"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."
"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."
"Article 70/A para. (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."

The provisions of Section 187 of the AH under examination are as follows:

"(2) Sterilisation for family planning purposes may be performed on a person over the age of 35 years, or a person having three blood children. For the validity of an application by the persons specified in paragraphs (1)-(2) of Section 16 for sterilisation for family planning purposes, the approval of the court of guardianship shall be necessary."

"(5) Prior to beginning the intervention, the physician appointed by the healthcare provider that is to conduct the intervention shall provide information to the applicant, and if married or cohabiting, to the spouse or cohabitant as well, on other possibilities of contraception, as well as on the nature of the intervention and the possible risks and consequences thereof."

The provisions of D2 under examination are as follows:

“Section 3 para. (1) The existence of the precondition of sterilisation for family planning purposes as defined in Section 187 para. (2) of the AH shall be checked on the basis of the data in the applicant’s personal identification document, and the birth certificates of his or her blood children.”

“Section 6 para. (1) Prior to beginning the intervention, the physician appointed by the healthcare provider that is to conduct the intervention shall provide information to the applicant, and if married or cohabiting, to the spouse or cohabitant as well, in addition to the information specified in Section 13 of the AH, on the following:
a) other possibilities of contraception, and
b) the nature of the intervention and the possible risks and consequences thereof, and
c) the possibilities of having a child subsequently to the intervention.”

II

The Constitutional Court first examined the constitutional relation between sterilisation for family planning purposes regulated in Section 187 para. (2) of the AH and Article 54 para. (1) of the Constitution.

1. Sterilisation is an invasive medical intervention to prevent (terminate) procreative or conceptive capacity [Section 3 item m) of the AH; Section 187 para. (1) of the AH]. Sterilisation – of both men and women – may be performed for family planning purposes or for medical reasons.

Section 1 para. (2) of D2 provides for a significant and constitutionally justifiable distinction between sterilisation for medical reasons and for family planning purposes: “In the course of sterilisation, the gonads may only be removed or damaged and other operative interventions causing the final loss of procreative or conceptive capacity may only be performed when justified by the interest of
a) preserving the health of the patient or restoring the patient’s health to the extent possible, and when this is not possible,

b) slowing down the impairment of health."
Consequently, any final intervention irreversible in all respects (castratio, ovariectomia, hysterectomia) may only be performed for medical reasons. In contrast, in the case of sterilisation for family planning purposes the operative method which is "the least invasive, but, in the case concerned, the most suitable for preventing pregnancy" [Section 1 para. (1) of D2] is vasectomy for men and the blocking of the tuba uterina for women. However, even in the case of applying these methods, the success of a subsequent operation aimed at restoring procreative or conceptive capacity is uncertain. At the same time, in certain cases, there is a subsequent possibility to give birth to "blood" children by way of the human reproduction methods regulated in the AH.

Overall, it can be concluded that sterilisation for family planning purposes is a method of birth control (contraception) offering, by way of a single intervention without any significant risk, a high level of security in preventing the conception of the foetus, at the same time not requiring subsequent financing and attention. However, it is a disadvantage of the method (in addition to the disadvantages necessarily involved in an operation) that the freedom of making a choice (the possibility of having a child) in the future significantly narrows or even ceases to exist in certain cases.

2. When examining the constitutional relations between the right to self-determination and sterilisation, the Constitutional Court took account of the relevant tendencies in constitutional democracies.

In 1942, the Supreme Court of the United States established the unconstitutionality of the statute ordering the sterilisation of certain recidivist criminals [Skinner v. Oklahoma, 316 U.S. 535 (1942)]. In that decision, the Court considered that a free decision on having a child was one of the fundamental rights of individuals. Later on, the Court acknowledged, on the basis of the right to privacy, the right of married couples and persons of different sexes living together to use contraceptives. [Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)] Today, in many countries with a democratic legal order, no statute or court judgement questions – similarly to the right to use contraceptives – the right of persons with discretionary capacity in a legal sense to request sterilisation regardless of their age, marital status or the number of their own children. (For example: United Kingdom, Japan, Canada, Switzerland, Spain.) However, the age limit of discretionary capacity

concerning sterilisation changes from state to state, and it is not necessarily the same as the general age limit of discretionary capacity. (For example, it is 25 years in Austria and Denmark, 21 years in the United States, 20 years in Japan, and 18 years in Spain.) In several countries, such as Germany, there are no special rules on the conditions of sterilisation, they are established in the judicial practice in relation to specific cases.

Ensuring the freedom of contraception including sterilisation has become an important issue in certain states in relation to the democratic transformation of political systems institutionalising or tolerating discrimination based on race, ethnicity, sex or other arbitrary criteria. For example, the Sterilisation Act adopted in 1998 in the Republic of South Africa grants this right to persons over the age of 18 with discretionary capacity, on the basis of the principle – set out in the preamble – that the constitutionally acknowledged right to physical and psychological integrity includes the right to make a free decision on reproduction. However, cases in several European states and in the United States show that despite the existing regulations based on the principles of voluntariness and non-discrimination large-scale misuse can be found in practice. For example, in the United States, in spite of the regulations adopted at the federal level in the 1970's, native Americans, African Americans and other minorities have been sterilised under disputed legitimacy. (Ronald Munson: Intervention and Reflection. Basic Issues in Medical Ethics. Wadsworth, Belmont, California, 1988, 420) However, the seriously unlawful sterilisations took place in violation of, rather than due to, the adoption of the rules ensuring the right to self-determination. The absence of regulations securing individual autonomy and containing effective guarantees increases the danger of misuse.

In an international comparison, regulations prescribing objective conditions – in addition to the age limit of discretionary capacity – for sterilisation for family planning purposes can be regarded as exceptional. (In Belarus: at least three children, or over the age of 30 and two children, or over the age of 35 for women and over the age of 45 for men. In Slovenia: over the age of 35.)

Part of the current legal debates – with theoretical significance – pertain to sterilisation performed without the spouse's approval [in the United States: Murray v. Vandevander, Court of Appeals of Oklahoma, Division No.1. 522 P.2d. 302.]; others deal with the obligations resulting from the private law contract between the physician and the patient (e.g. failure to

provide information, liability for pregnancy or birth after sterilisation etc.) [in the United Kingdom: Eye v. Measday, (1986) 1 All ER 488; Gold v. Haringey Health Authority (1988) QB 481]; in Germany: BVerfGE 96, 375. (1997).; often – mostly in the case of sterilising minors or mentally disabled persons – issues related to decision-making by the deputy are in focus [in the practice of the Constitutional Court of Spain: 215/1994 (14.07.1994.)].

3. Although the Constitutional Court has examined several times the relation between Article 54 para. (1) of the Constitution and the right to dispose over one's own body and life, it has examined the constitutional context of sterilisation for the first time. As stated by the Constitutional Court in Decision 8/1990 (IV. 23.) AB, the right to human dignity enshrined in Article 54 para. (1) of the Constitution is a designation of the "general personality right" in the Constitution. "The general personality right is a 'mother right', i.e., a subsidiary fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete, named fundamental rights are applicable to a particular set of facts." (ABH 1990, 44-45) Subsequently, the Constitutional Court adopted several Decisions on the basis of the right to self-determination and the right to privacy as "special personality rights" deriving from Article 54 para. (1) of the Constitution. [Decision 57/1991 (XI. 8.) AB, ABH 1991, 279; Decision 1/1994 (I. 7.) AB, ABH 1994, 29, 35-36; Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 380; Decision 5/1996 (II. 23.) AB, ABH 1996, 47; Decision 11/1996 (III. 13.) AB, ABH 1996, 240; Decision 20/1997 (III. 19.) AB, ABH 1997, 85; Decision 4/1998 (III. 1.) AB, ABH 1998, 71; Decision 10/2001 (IV. 12.) AB, ABH 2001, 123]

In the assessment of the present case, the Constitutional Court follows several of its earlier Decisions interpreting Article 54 para. (1) of the Constitution.

As established by the Constitutional Court in Decision 22/1992 (IV. 10.) AB, "the freedom of marriage – as part of the right to self-determination – is a fundamental right under constitutional protection". [ABH 1992, 122, 123. Confirmed: Decision 183/B/1992 AB, ABH 1995, 598, 602] In Decision 64/1991 (XII. 17.) AB, it was established that on the basis of the right to human dignity, the pregnant woman's right to self-determination also covers – within constitutional limits – her decision-making on abortion. "Pregnancy entails so much change in the mother's body and the raising of a child – normally – impacts on the mother's life to such an extent that in the opinion of the Constitutional Court the exclusion of the possibility of

abortion [...], even on a limited scale, directly and substantially affects the mother's right to self-determination." [ABH 1991, 297, 301; Confirmed: Decision 48/1998 (XI. 23.) AB, ABH 1998, 333]

According to Decision 36/2000 (X. 27.) AB, the AH contains provisions guaranteeing the right to human dignity enshrined in Article 54 para. (1) of the Constitution in respect of the patients' right to self-determination. The patients' rights include – among others – the right to consent to or refuse medical interventions or care. [ABH 2000, 241. Confirmed: 56/2000 (XII. 19.) AB, ABH 2000, 527] As pointed out in general by the Constitutional Court about the relation between the right to human dignity and individual risk-taking in Decision 21/1996 (V. 17.) AB on the limits of the children's right of association, "Everyone can harm him- or herself and can assume risks if he/she is capable of a free, informed and responsible decision. The law gives a wide range of possibilities for this by its non-interference, and the rights to self-definition and activity (Art. 54 of the Constitution) following from the general right of personality guarantee this possibility. The restrictive paternalism of the State is a matter of constitutional debates only in borderline cases (from the punishment of drug usage to euthanasia)." (ABH 1996, 74, 80)

Taking into account this aspect among several others, in Decision 22/2003 (IV. 28.) the Constitutional Court acknowledged the right to decide on one's own death, on the basis of Article 54 para. (1) of the Constitution. "The decision of a terminally ill patient not to live until the natural end of his life filled with sufferings is part of the patient's right to self-determination and, therefore, it falls within the scope of Article 54 para. (1) of the Constitution. The right to decide upon one's own death is to be enjoyed by all persons, regardless of being healthy or ill – either terminally, according to the current state of the art of medicine, or not. (…) A legal system based on ideologically neutral constitutional foundations may not reflect either a supporting or a condemning view about one's decision to end one's life; this is a sphere where, as a general rule, the State has to refrain from interference. The role to be played by the State in this respect is limited to the absolutely necessary measures resulting from its obligation of institutional protection concerning the right to life." (ABH 2003, 235, 261)

The Constitutional Court deduced the right to personal integrity, being inseparable from the right to self-determination, from Article 54 para. (1) and Article 60 para. (1) of the Constitution. "According to the practice of the Constitutional Court – from Dec. 8/1990 (IV.23) AB (MK 1990/35; ABH 1990, 42; (1990) HCCR 000) – the right to human dignity is

the “general right of personality” which includes the right to the free development of one’s personality. The Constitutional Court also interpreted the freedom of conscience in Dec. 64/1991 (XII.17.) AB as a right to personal integrity. (The State cannot compel anyone to accept a situation which sows discord within, or is irreconcilable with, those fundamental convictions which mould that person’s identity.)” [Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 51]
Furthermore, the Constitutional Court relies on its earlier statement about the requirement of enforcing the freedom of conscience in the physician’s work as well, according to which the physician may refuse to perform interventions not constituting an essential part of his professional duties. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 315]

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

It also follows from the practice of the Constitutional Court that the right to self-determination concerning medical interventions (the right to self-determination in healthcare) is a category broader than the right to refuse medical interventions. This was acknowledged by the Constitutional Court in the case of abortion [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 301; Decision 48/1998 (XI. 23.) AB, ABH 1998, 333], and in general as well [Decision 36/2000 (X. 27.) AB, ABH 2000, 241; Decision 56/2000 (XII. 19.) AB, ABH 2000, 527]. Decision 22/2003 (IV. 28.) AB provided for a limited category of exceptions by acknowledging the right to refuse life-saving or life-supporting treatments without extending the right to self-determination to suicide committed with the help of a physician.

4. According to the first sentence in Section 187 para. (2) of the AH challenged by the petitioner, there are two alternative objective preconditions to sterilisation for family planning purposes. The applicant must either be older than 35 years or have three blood children. The Constitutional Court considers these two provisions to be restrictions of the right to self-determination stemming from the right to human dignity. In respect of those who can make

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

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

Besides, the Constitutional Court emphasises that decisions on issues of family planning and contraception are often not results of isolated individual choices, but rather those of the joint determination of spouses or cohabitants of different sexes after the joint assessment of the circumstances. Sterilisation is most frequently sought by spouses not intending to have more children and considering sterilisation as a reasonable and effective solution.

On the basis of the petition and the provision of the AH in force, the Constitutional Court only has to form an opinion on the prohibiting rule. In the present case, the Constitutional Court does not have to decide whether those concerned have a right to enforce from the State the financial, institutional and personal conditions necessary for performing specific medical interventions, i.e. operations of sterilisation.

III

On the basis of Article 54 para. (1) and Article 8 para. (2) of the Constitution, the Constitutional Court has examined the constitutionality of the restriction of the right to self-determination in Section 187 para. (2) of the AH.

1. The practice of the Constitutional Court on the restrictability of the component rights deduced from the right to human dignity was summarised by the Constitutional Court in Decision 22/2003 (IV. 28.) AB. "The Constitutional Court holds the right to human dignity to be of special importance among the fundamental rights. This is reflected by the fact that this right, together with the right to life, is found in the Constitution at the beginning of the

chapter on fundamental rights and obligations, and the Constitution declares this right to be an inherent right of man, and as such, it is the "greatest value over all the others" as termed in Decision 23/1990 (X. 31.) AB (ABH 1990, 88, 93). As already established by the Constitutional Court in the above decision, the right to human life and the right to human dignity are considered to be an unrestrictable fundamental right of indivisible unity. Later on, the Constitutional Court elaborated the context of the unrestrictable nature of human dignity. The Constitutional Court has held that the right to human dignity is absolute and unrestrictable only as a determinant of one's human status and in its unity with life. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308, 312] Therefore, the component rights derived from it as a mother right (such as the right to self-determination and the right to one's physical integrity) may be restricted in accordance with Article 8 para. (2) of the Constitution just like any other fundamental right. [Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383]" (ABH 2003, 235, 260)

According to the practice of the Constitutional Court, the individual fundamental rights of people may be restricted on the basis of the legitimate objective of protecting the fundamental rights of others [first: Decision 2/1990 (II. 18.) AB, ABH 1990, 18, 20], the State's duty to institutionally (objectively) guarantee fundamental rights [first: Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302], and the achievement of certain constitutional public objectives [for example: Decision 56/1994 (XI. 10.) AB, ABH 1994, 312, 313].

The State may only restrict fundamental rights if that is the only way to protect the above legitimate objectives. "The constitutionality of restricting a fundamental right also requires that the restriction comply with the criterion of proportionality; the importance of the desired objective must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose." (Summary: Decision 879/B/1992 AB, ABH 1996, 401) Consequently, the specific standard of "restrictions not justifiable with the provisions of the Constitution" mentioned in point II.4.1. of the Reasoning is in the present case the suitability of the prohibiting and restricting regulations for the desired objective, as well as their necessity and proportionality.

2. The two provisions restricting the right to self-determination in the first sentence of Section 187 para. (2) of the AH are linked to a public objective of population policy and the State's

duty of institutionally protecting fundamental rights. The Constitutional Court has examined these separately.

The fulfilment of public objectives of population policy can be regarded as justification for the application of the precondition of having 3 blood children or that of being over the age of 35 in the case of sterilisation for family planning purposes. It is well known that the population of Hungary is decreasing and the age composition is becoming less and less favourable. The termination of unfavourable processes is a legitimate aim of the legislator. The State has many tools to facilitate the increase of the number of births. Aspects of population policy can be applied – within the limits of the Constitution – for example in taxation policy, social security regulations, and primarily in the regulations on family and maternity support.

In democratic states, the expedient tools for improving demographic statistics are the above-mentioned regulations on sharing public burdens and social policy as well as the development of the culture of birth control, rather than the restriction of the right to self-determination. The positive or negative influencing of the size of the population through extreme measures of prohibition and restriction is only possible in political systems not acknowledging fundamental rights. The administrative restriction of contraception results in an increase in the number of abortions rather than in that of live births. (In Europe, the most liberal rules on abortion are applied in the Scandinavian countries and the Netherlands, still there the number of abortions is among the lowest.) Recognising the above interrelations when examining the constitutionality of the regulations on abortion [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297; Decision 48/1998 (XI. 23.) AB, ABH 1998, 333], the Constitutional Court did not weigh public objectives of population policy against the pregnant woman's right to self-determination, but it rather emphasised the State's duty to protect life.

Accordingly, the Constitutional Court has concluded that the restriction of the right to self-determination in Section 187 para. (2) of the AH is not a suitable and therefore – evidently – not a necessary tool for the realisation of otherwise legitimate objectives of population policy.

3. The State's duty of institutionally protecting fundamental rights can be examined in the context of both restrictive provisions included in the first sentence of Section 187 para. (2) of the AH. Sterilisation for family planning purposes is, in an ideal case, reversible, but

sometimes it has final and irreversible consequences. It is a real danger that the applicant might choose sterilisation without being fully aware of its potential consequences. It might also happen that the person requesting sterilisation subsequently – after changing her partner, family relations or views of life – wants a child of her own born naturally, but that is not possible due to the previous sterilisation (leaving the only possibility of *in vitro* fertilisation). Consequently, the Constitutional Court has had to take into account, within the scope of the objective protection of fundamental rights, Article 54 para. (1) of the Constitution requiring the institutional guarantees of self-determination, Article 67 para. (1) providing for the protection of children, Article 16 and Article 67 para. (3) on the protection of the young, and Article 70/D outlining the State's duties concerning the protection of health. Accordingly, the Constitutional Court has examined whether it is constitutionally justified to require the fulfilment of the condition of being older than 35 or that of having 3 blood children for sterilisation for family planning purposes in order to institutionally guarantee self-determination and the long-term freedom of individual choice, to protect children and the young, as well as to perform public duties concerning the protection of health.

3.1. 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. Consequently, guaranteeing rules have to be formed in order to protect the fundamental rights of children. 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]. Therefore, the Constitutional Court has established the constitutionality of the first sentence in Section 187 para. (2) of the AH in respect of children (under the age of 18) not being allowed to make a decision on sterilisation for family planning purposes.

3.2. According to the law of Hungary, persons over the age of 18 are presumed to be able to understand the legal consequences of their conduct. [Section 12 of Act IV of 1959 on the Civil Code (hereinafter: "CC")] There are, however, persons who – due to their mental state – cannot comprehend the legal consequences of their acts despite being of full age. They – similarly to those under the age of 18 – may not make all legal representations independently; depending on the legal consequences concerned, they may not perform legal acts or make legal representations at all, or may only do so to a limited extent. As the restrictions

applicable to the exercise of the rights related to healthcare are included in the provisions of the CC and the AH not challenged in the petition, the Constitutional Court has not examined them.

The challenged provision of the AH excludes a group of persons otherwise considered to have disposing capacity in Hungarian law from exercising the right to self-determination. If the restriction of the fundamental right is claimed to be justified by the State's duty of institutionally protecting fundamental rights rather than by public objectives of population policy, then the basic assumption can be on the one hand that the persons affected by the restriction do not have the discretionary capacity required for sterilisation, as they cannot assess the extraordinary consequences of their decision. On the other hand, the State's duties in protecting health and the young can also justify prohibition.

As explained by the Constitutional Court in Decision 36/2000 (X. 27.) AB, the concepts of disposing capacity as per the CC and discretionary capacity concerning healthcare are not necessarily identical. "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. The provisions of the AH under review use the concepts applied by the CC, (...). 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." (ABH 2000, 260) Thus, in the field of healthcare the capacity of discretion required is not the one related to contracts regarding property, but one related to the comprehension of the events that may influence health, physical integrity or life.

The discretionary capacity concerning medical interventions includes that the person concerned is able to understand the information necessary for making a decision; he or she is able to understand all possible consequences of his or her decision; and can communicate this decision to the physician. According to the CC, even a person with limited disposing capacity may have discretionary capacity in respect of certain medical examinations and interventions. [For example, in the absence of an explicit statement by the judge on restricted disposing capacity on the basis of Section 14 para. (6) item 8 of the CC, the exercise of the rights related

to healthcare is not limited.] At the same time, as certain medical interventions require special consideration, special guarantees are needed in order to qualify persons with disposing capacity as having discretionary capacity in respect of the given medical intervention. Article 54 para. (1) requiring institutional guarantees for self-determination and Articles 16 and 67 para. (3) on the protection of the young require that the rules of sterilisation contain limitations and conditions.

The AH contains several guarantees aimed at ensuring that the applicant makes an informed and free decision upon due consideration on interventions related to sterilisation. Pursuant to Section 187 para. (5) of the AH: "Prior to beginning the intervention, the physician appointed by the healthcare provider that is to conduct the intervention shall provide information to the applicant, and if married or cohabiting, to the spouse or cohabitant as well, on other possibilities of contraception, as well as on the nature of the intervention and the possible risks and consequences thereof." Paragraph (4) provides that – in the absence of special medical reasons – "sterilisation may be performed after three months reckoned from the date of submitting the application". The process of approving sterilisation is defined in D2, and Section 2 para. (2) thereof guarantees that "the application can be withdrawn before the operation even verbally". The general provisions of the AH on information and consent, as well as the special guarantees required for sterilisation, namely the process of approval, the provision of further information and the obligatory waiting time facilitate the applicant's making an informed decision upon due consideration.

4. The age of 35 and having three blood children constitute two separate conditions. There is a significant difference between the two conditions in terms of constitutionality.

4.1. Ensuring discretionary capacity and the protection of the young can make it necessary to apply restrictive provisions even in the form of age limits. It is primarily up to the legislator to decide whether it is justified to apply, in determining the conditions of sterilisation, an age limit different from that of general disposing capacity, and if yes, to what extent. By providing for an age limit of 35 years, on the one hand, the legislator focused on the protection of the young. On the other hand, it expressed the approach – widely accepted in the past decades – that pregnancy under the age of 35 entails fewer risks for the foetus (the newborn child) and the mother. However, the AH does not exclude all persons under the age of 35 from sterilisation: persons having three blood children are entitled to the intervention

under the same terms as ones over 35. Therefore, the constitutionality of the current regulatory framework of sterilisation for family planning purposes depends on the constitutional evaluation of the condition restricting a fundamental right in the form of an age limit.

4.2. In the opinion of the Constitutional Court, neither aspects of population policy nor the State's duty to protect health make it constitutionally acceptable to render the enforcement of the fundamental right dependent on the number of blood children.

4.2.1. The State may not prescribe the ideal number of children for people, and it may not enforce legitimate aspects of population policy and social policy by violating the right to self-determination based on Article 54 para. (1) of the Constitution. As explained by the Constitutional Court in point III.2 of the Reasoning of the present Decision, the restriction of the right to self-determination in Section 187 para. (2) of the AH is not a suitable and therefore – evidently – not a necessary tool for the realisation of otherwise legitimate objectives of population policy. Furthermore, the enforcement of the fundamental right may not depend on whether the parents have blood children or adopted ones.

4.2.2. In exceptional cases, the State's duty of protecting health based on Article 70/D para. (1) of the Constitution may have priority over the choice of a person with discretionary capacity. It is constitutionally acceptable for the law to prohibit operative interventions that cause the irreparable impairment of health and that cannot be reasonably justified. The Constitution does not guarantee a "right to self-mutilation" for people. However, that is typically not the case for sterilisation, which cannot be regarded as a merely health-damaging intervention.

The AH allows sterilisation for medical reasons or family planning purposes [Section 187 para. (1)]. According to the wording of the AH and Sections 2 and 4 of D2, the medical reason for sterilisation can be the applicant's physical disease or a genetic cause. (The constitutional examination of that part of the regulations is not part of the present procedure.) According to the definition of the UN's World Health Organisation, "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". (Preamble of Act XII of 1948 on the promulgation of the Constitution of the World Health Organisation.) This idea shows that the definition of health/illness cannot be

identified with the approach characteristic of clinical practice (ability to operate the organs as typical for the species or better), health is rather a physical and mental state making it possible for people to live in society as long as possible without physical/mental problems. The Constitution is in accordance with the above, as Article 70/D para. (1) refers to "physical and mental health", and Article 54 para. (1) is the source of the right to personal integrity, among other rights. According to the Constitutional Court, the following essential conclusions are to be drawn from the above with regard to sterilisation.

The removal or damaging of gonads, or the termination of procreative or conceptive capacity (possible only for medical reasons according to the AH) cannot be interpreted in itself, but only in comparison with the desired objective. (The consequences of sterilisation for family planning purposes are, ideally, not irreversible.) According to the AH, sterilisation on account of a physical disease is to be performed expressly in order to preserve health or to slow down the impairment of health. This way, on the whole, considering the benefits achieved as well, the intervention does not necessarily cause an impairment of health. Besides, irreversibility cannot be stated in general, in view of the *in vitro* fertilisation techniques and the possibility of reversing certain interventions through operations.

Sterilisation can be aimed at the protection of more than physical health. In addition to the person's physical health, his or her mental state and family and other circumstances are also to be taken into account. In Decision 34/1992 (VI. 1.) AB, the Constitutional Court took a position in general about the interrelation of the various aspects of personality. As stated in the reasoning of that Decision, "In the constitutional context of the general personality right, the law (...) must not only consider and handle single (individual) persons as persons of equal dignity, but it must also avoid any differentiation concerning the various levels and content elements of the personality itself.
(...) The right to physical integrity and health is not more valuable and does not deserve more protection than the individual freedoms or, for example, the right to self-determination." (ABH 1992, 197-199)

Thus, in the interest of protecting physical and mental health, or for the purpose of preserving personal integrity, a medical intervention may be performed even if such an intervention in itself would qualify as harming physical health. In the assessment of the permissibility of the intervention, the objectives of personality protection and the necessary medical means and

methods always have to be taken into account. Several interventions of this type are acknowledged in the legal regulations in force and in the medical practice, for example the operations aimed at changing the gender of transsexual persons, or the removal of organs or tissues form the body of a living person for the purpose of transplanting them into the body of another person who is a relative of or a person having close emotional ties with the donor.

The statutory prohibition of interventions should always be the result of comparing the specific aims of personality protection and the expected consequences of the operative intervention. The social circumstances, family ties, number of children and state of the person seeking sterilisation as well as other aspects may be decisive in assessing the well-foundedness of the request. In a typical situation, the state of the wife's health (e.g. she cannot take contraceptive pills) necessitates the sterilisation of the husband (who has no medical cause for sterilisation), in view of the fact that vasectomy is a simpler and less risky intervention. However, the first sentence in Section 187 para. (2) of the AH does not allow the consideration of individual interests: it includes a specific and objective indication.

4.2.3. Based on the above, the Constitutional Court considers that Article 54 para. (1) and Articles 16 and 67 para. (3) of the Constitution may necessitate the restriction of sterilisation for family planning purposes, but the restriction contained in the first sentence of Section 187 para. (2) of the AH exceeds the extent justified by the desired constitutional objectives, therefore it is disproportionate and thus unconstitutional.

Because of the manner of regulation, the Constitutional Court could not evaluate the two individual statutory conditions completely separately, since in the absence of the text "having three blood children" the regulations would be stricter and more restrictive than in their present form. (Persons with disposing capacity under the age of 35 would not be entitled to sterilisation even if they had three or more blood children.)

The Constitutional Court is not in a position to determine the concrete statutory regulations necessitated by the guaranteeing of discretionary capacity and the protection of the young, but it has had to establish in the present case that the requirement of having three blood children is disproportionate with the legitimate objectives. If there are health service providers that can – according to the current state of the art of medicine, in compliance with the medical, technical etc. requirements – perform the intervention, then the State may not prohibit the performance

of justified interventions through regulations disproportionately restricting the right to self-determination.

The Constitutional Court emphasises that the legislator – within the framework of the Constitution – may define special provisions not corresponding to the ones of the CC on disposing capacity, in order to ensure the discretionary capacity related to medical interventions and to guarantee the protection of the young. It can be stated in general that even children and mentally disabled persons can make autonomous decisions on certain interventions, while in some cases even persons considered to have full disposing capacity may be required to make a decision upon particularly thorough consideration, taking into account the long-term consequences and the arguments in favour of and against the intervention. When setting age limits, the legislator must also consider the fact that social mobility and lifestyle have considerably changed and become more diverse as compared to the past. Furthermore, is also to be taken into account that, due to the development of medical science and clinical infrastructure, giving birth over the age of 35 is less risky today than previously.

The Constitutional Court points out that in its earlier Decisions it was not considered to be a disproportionate restriction of fundamental rights when the legislator made the enforcement of individual decisions in the spheres of self-determination and the freedom of conscience dependent on the existence of a reasonable cause manifested in actual cases. The Constitutional Court acknowledged the constitutionality of the statutory regulations requiring reference to a "reason of conscience" in the context of applying for unarmed military service or civil service, as the term "reason of conscience" is an adequately wide category to allow the applicant to act in compliance with his religious, moral or other conviction. [Decision 46/1994 (X. 21.) AB, ABH 1994, 260, 270] The right to self-determination of pregnant women is not violated by the law when it provides for a specific reason as a precondition to approving abortion, and the "exemplary statutory listing of certain typical matters of fact" qualifying as critical situations considered to be legitimate indications is acknowledged as constitutional. [Decision 48/1998 (XI. 23.) AB, ABH 1998, 333, 359]

5. In view of the above, the Constitutional Court has annulled – in accordance with Section 43 para. (4) of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"), in the interest of legal certainty – the first sentence in Section 187 para. (2) of the AH as of 30 June

2006. The *pro futuro* annulment serves the purpose of allowing due time for the legislator to assess the need for the amendment of the Act and the conditions of regulations that are in accordance with the Constitution.

6. In the absence of a relevant petition, the Constitutional Court has not examined the second sentence in Section 187 para. (2) of the AH. At the same time, the Court has considered whether the annulment of the first sentence in Section 187 para. (2) without that of the second sentence results in legal uncertainty. According to the second sentence, for the validity of an application by the person entitled to make a decision as a deputy on the basis of Section 16 of the AH for sterilisation for family planning purposes, the approval of the court of guardianship is necessary. This rule thus provides for an extra guarantee in comparison with the general provisions of the AH. However, the Constitutional Court considers that the transformation of the framework and statutory conditions of sterilisation for family planning purposes necessarily affects decision-making by the deputy as well. In line with the prospective rules, the legislator must transform the guaranteeing provisions related to decision-making by the deputy. Therefore, the Constitutional Court – in the interest of legal certainty stemming from Article 2 para. (1) of the Constitution – has also annulled the second sentence in Section 187 para. (2) of the AH as of 30 June 2006.

7. Since the Constitutional Court has established the unconstitutionality of the first sentence in Section 187 para. (2) of the AH as a result of the constitutional examination performed on the basis of Article 54 para. (1) – and, in relation thereto, Article 8 – of the Constitution, it has become unnecessary to examine the petition objecting to the arbitrary and discriminative character of the regulations with reference to Article 2 para. (1) and Article 70/A para. (1) of the Constitution. [Decision 44/1995 (VI. 30.) AB, ABH 1995, 203, 205; Decision 4/1996 (II. 23.) AB, ABH 1996, 37, 44; Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision 15/2000 (V. 24.) AB, ABH 2000, 420, 423; Decision 16/2000 (V. 24.) AB, ABH 2000, 425, 429; Decision 29/2000 (X. 11.) AB, ABH 2000, 193, 200; Decision 50/2003 (XI. 5.) AB, ABH 2003, 567, 588]

IV

The Constitutional Court has examined the petition challenging, with reference to the right to privacy resulting from Article 54 para. (1) of the Constitution, the text “and if married or

cohabiting, to the spouse or cohabitant as well" in Section 187 para. (5) of the AH and the text of similar content in Section 6 para. (1) of D2, as well as Section 3 para. (1) of D2. One of the petitioners claims that the regulations violate the right to privacy based on Article 54 para. (1) of the Constitution because they oblige the person requesting sterilisation to share a decision belonging to his or her most intimate sphere with his or her spouse or cohabitant.

1. Section 187 para. (5) of the AH and Section 6 para. (1) of D2 contain essentially identical provisions. They oblige the physician to inform the applicant and the spouse or cohabitant (if any) on other possibilities of contraception, as well as on the nature of the intervention and the possible risks and consequences thereof, and – according to D2 – on the possibilities of having a child subsequently to the intervention. It follows from D2 that the spouse or cohabitant is to be informed at the same time as the applicant.

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

However, it follows from Section 187 para. (5) of the AH and Section 6 para. (1) of D2 that sterilisation may not be performed without the knowledge of the spouse or cohabitant. This means that the applicant's right to dispose over his or her medical data is restricted. The petitioner refers to Article 54 para. (1) of the Constitution, even though the right to the protection of secrecy in private affairs and personal data is explicitly named in Article 59 para. (1) of the Constitution. Therefore, the Constitutional Court has rejected the petition challenging Section 187 para. (5) of the AH and Section 6 para. (1) of D2 solely on the basis of Article 54 para. (1) of the Constitution.

2. As Section 3 para. (1) of D2 contains a provision not related to informing the spouse or cohabitant, it is not relevant in respect of the constitutional problem raised in the petition. Therefore, the Constitutional Court has also rejected the petition in this respect.

V

One of the petitioners has also initiated the examination of the unconstitutionality of D1 in his petition seeking a posterior and abstract constitutional examination. Section 7 of D2 repealed D1 as of 1 July 1998. According to the practice of the Constitutional Court, in the case of a norm out of force, no abstract and posterior constitutional examination is performed if – in the case of the establishment of unconstitutionality – the only procedural consequence of the examination would be the declaration of the norm losing force. (Decision 1449/B/1992 AB, ABH 1994, 561, 564; Order 1239/B/1990 AB, ABH 1991, 905)

Pursuant to Section 31 of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof, the Constitutional Court terminates its procedure – among others – if
"a) the statute under review is repealed after submission of the petition, thus making the petition irrelevant".

In view of the above, the Constitutional Court has terminated the procedure based on the petition seeking the establishment of the unconstitutionality of D1.
The publication of this Decision in the Official Gazette (*Magyar Közlöny*) is based on Section 41 of the ACC.

Budapest-Esztergom, 12 November 2005

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court, Rapporteur

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

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

I do not agree with point 1 of the holdings in the Decision and the reasoning thereof. In my opinion, the petitions should have been rejected. My arguments are as follows:

1. The petitioners have requested the establishment of the unconstitutionality and the annulment of Section 187 para. (2) of Act CLIV of 1997 on Healthcare (hereinafter: "AH"). Although Article 8 para. (2) and Article 70/A of the Constitution are referred to by the petitioners to support their claim, their arguments are in fact based on Article 54 para. (1).

2. Article 54 para (1) of the Constitution provides that everyone has the inherent right to life and to human dignity. In the practice of the Constitutional Court, the right to human dignity is regarded as one of the manifestations of the general personality right. This personality right and its constitutional designation, the right to human dignity, constitute the origin of the specific rights which are not covered by any of the rules of the Constitution on specifically named fundamental rights, yet which require constitutional protection. The right to self-determination is one of these rights [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44-45]

The right to self-determination is manifested in several contexts. In the reasoning of the Decision on the right pertaining to names, the Constitutional Court pointed out that rights related to the right pertaining to names and belonging to the sphere of self-determination, such as the rights to choose and to change one's name, enjoy less protection than the right pertaining to names [Decision 58/2001 (XII. 7.) AB, ABH 2001, 527, 541-542]. In the field of healthcare, the constitutional protection of the right to self-determination is manifested differently in the various cases. The right to self-determination of terminally ill patients manifested in the right to refuse life-supporting medical interventions and the restriction thereof can only be evaluated in relation to the right to life and the State's duty to protect life

[Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 269-270]. The right to choose a physician and the right to choose natural healing methods instead of a conventional medical intervention, as well as the restriction thereof are to be evaluated differently; here even the application of fundamental rights protection is questionable [Decision 684/B/1997 AB, ABH 2002, 813, 821]. Similarly serious restrictions may be applied in respect of choosing artificial fertilisation in order to give birth. The fulfilment of the request of persons seeking such medical interventions may be made subject to medically justified conditions (Decision 750/B/1990 AB, ABH 1991, 728, 729). The Constitutional Court did not establish the applicability of fundamental rights protection in the case of choosing surrogacy as a specific reproduction technique, either (Decision 108/B/2000 AB, ABH 2004, 1414, 1419-1420).

Thus, on the basis of the cases examined in the practice of the Constitutional Court and the Decisions adopted thereon, it can be concluded that in the field of healthcare the constitutionality of restricting the individual's decisions within the sphere of self-determination is to be evaluated on a case-by-case basis.

2. To evaluate the petition, it is also necessary to take account of the international convention pertaining to the specific area and the judicial practice of the European Court of Human Rights.

a/ Act VI of 2002 promulgated the Council of Europe's Convention adopted in Oviedo on 4 April 1997 for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine and the Additional Protocol adopted on 12 January 1998 in Paris (hereinafter: "Oviedo Convention"). Article 16 of the Convention pertains to persons who submit themselves to research. Even with the explicit consent of the person concerned, research may only be undertaken if the following conditions are met: there is no alternative of comparable effectiveness to research on humans, and the risks which may be incurred by that person are not disproportionate to the potential benefits of the research. Article 19 provides for preconditions to organ and tissue removal from living donors for transplantation purposes. Accordingly, removal of organs or tissue may be carried out solely for the therapeutic benefit of the recipient and where there is no suitable organ or tissue available from a deceased person and no other alternative therapeutic method of comparable effectiveness.

On 17 December 1996, the Committee of Ministers of the Council of Europe ordered the publication of an Explanatory Report on the Oviedo Convention. Point 38 of the Report gives an interpretation of Article 5 on consent to the medical intervention by the person concerned. Pursuant to Article 5 para. (3), consent may be withdrawn at any time. However, according to the interpretation, on the basis of professional standards the physician may be obliged to continue with the operation despite the withdrawal of the patient's consent during the operation, so as to avoid seriously endangering the health of the patient.
Thus, according to the Oviedo Convention, in certain cases the aspects of health protection prevail over the decisions of the patient.

b/ The European Court of Human Rights examined the issue of restricting the right to self-determination in Case Laskey, Jaggard and Brown v. The United Kingdom (Judgment of 19 February 1997, No. 109/1995/615/703-705). According to the facts of the case, the person concerned consented to being assaulted in a sado-masochistic way, still the assailants were sentenced to imprisonment. The Court held that the criminal judgement constituted an interference by the State with the right to self-determination protected under Article 8 of the European Convention on Human Rights. However, in examining whether that interference qualified as a violation of Article 8 of the Convention, the Court considered it necessary to take health protection aspects into account (point 44). In view of the dangerousness of the act and health protection aspects, the Court held that the imprisonment of the assailants regardless of the victim's consent did not qualify as a violation of Article 8 of the Convention (point 50).
In Case Rees v. The United Kingdom (Judgment of 17 October 1986, No. 2/1985/88/135), the Court acknowledged that it was medically justified to operate a transsexual person in order to change his sex so as to solve his serious psychological problems (point 38). Still, the Court did not establish the violation of Article 8 of the Convention on the basis of the failure of the English State to ensure that the applicant's sex changed as a result of exercising his right to self-determination is recorded in the personal registries (points 46 and 47).

As shown by the above examples, the restriction of the right to self-determination on the basis of health and public interest can be found in the Oviedo Convention and the practice of the European Court of Human Rights.

3. The Minister's reasoning related to Section 87 of the bill of the AH contains the following:

"Due to the basically irreversible nature of the sterility caused by sterilisation, for the application of sterilisation the Act requires the existence of objectively defined causes and an approval procedure based on other conditions related to age and social circumstances as specified in the Act."

Pursuant to Article 70/D para. (1) of the Constitution, everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. Summarising previous practice, it was established in Decision 37/2000 (X. 31.) AB that this provision of the Constitution does not result in a subjective right, but it only entails the State's duty to protect health, concretised under Article 70/D para. (2) in the form of the establishment of medical institutions and the provision of medical care (ABH 2000, 293, 296-297).

Other methods of contraception can be used instead of sterilisation performed by way of a basically irreversible intervention. Sterilisation is an intervention in relation to which the freedom of decision-making is in contrast with the obligation to protect health. Similarly to surrogacy or giving birth after artificial fertilisation, making a decision on sterilisation cannot be regarded as a fundamental right based on the right to self-determination. The age limit defined for sterilisation is based on medical experience. Besides, the restriction related to the number of children is justified partly by the financial burdens of bigger families and partly by the significant difficulties in living conditions. Neither of these restrictions can be regarded as arbitrary. In this framework, such a restriction of the right to make a decision on sterilisation, which is based on the State's duty to protect health in the form of preventing permanent impairment of health and which is substantiated with additional arguments cannot be considered unconstitutional.

Accordingly, the petitions seeking the annulment of Section 187 para. (2) of the AH should have been rejected.

Budapest – Esztergom, 12 November 2005

Dr. Attila Harmathy
Judge of the Constitutional Court

Dissenting opinion by Dr. Péter Kovács, Judge of the Constitutional Court

1. I do not agree with the establishment of unconstitutionality in the majority Decision and with several points of the relevant reasoning. I agree with the dissenting opinion of Dr. Éva Tersztyánszky-Vasadi, Judge of the Constitutional Court.

2. When the Decision examines whether the age limit of 35 years for voluntary sterilisation for family planning purposes is justified – considering the international practice as well –, although it acknowledges the arguments therefor, the Decision basically considers that age limit to have been set by the State within its own discretion, and regards the abolishment of such limits as a tendency characteristic of countries with democratic legal systems. In this context, the Decision also considers the rigidity of the rule to be medically unjustified, due to reflecting an approach which dominated the past decades, but which has been contradicted by recent developments in the medical sciences. However, the Constitutional Court has pointed out in several contexts that the Constitutional Court is not a court of facts. [Decision 1287/H/1993 AB, ABH 1994, 803, 806; Decision 36/1998 (IX. 16.) AB, ABH 1998, 263, 292; Decision 26/2001 (VI. 29.) AB, ABH 2001, 242, 251; Decision 1051/B/2001 AB, ABH 2002, 1572, 1577] However, to my knowledge, there are several arguments for applying the age limit of 35 years: in the medical sciences, it is regarded as an age limit above which a statistically significant increase in the risk factors endangering pregnancy is experienced, therefore various additional examinations are recommended – or even required in certain countries – for women over that age in order to identify the occurrence of Down and other syndromes, and to inform the pregnant mother thereon. During the preparatory works for liberalising the French regulations – only allowing medically recommended sterilisation before 2001 –, the French national ethical consultative council published a report (Comité consultatif national d'éthique, Rapport sur la stérilisation envisagée comme mode de contraception définitive n°50, 3 avril 1996), according to which the rate of women undergoing sterilisation for the purpose of contraception was 0.5% in the age groups of 20-24 and 25-29, 1.5 % in the age group of 30-34, 6.4% in the age group of 35-39, 12.7% in the age group of 40-44 and 21% in the age group of 45-49. These figures correspond to the age phases requiring enhanced attention when the pregnant woman is not young, and to the increase of risk rates. Another argument in support of the age limit is that in the case of a sterilisation performed after the age of 35, any subsequent medical intervention aimed at restoring fertility – in the case of a patient regretting her earlier decision – would have to be

done at an age with accumulated risk factors, consequently, her decision on sterilisation is objectively a final one.

3. As regards sterilisation, it is mentioned several times in the Decision that "ideally" the intervention does not entail final and irreversible consequences. As the potential success of restoring reproductive capacity depends on the favourable coincidence of several factors, the various national legal and medical deontological rules emphasise that the patient must be informed so as to make him or her aware of the fact that the decision might – and most often will – result in an irreversible situation. This is why I cannot agree with the arguments in the majority Decision in respect of the reversibility of the intervention and the conclusions drawn therefrom.

4. Although there is indeed a medical possibility to have a child despite sterilisation of certain types, but in that case similarly serious constitutional problems arise. In theory – and in certain cases – such an intervention can be performed by reopening the closed oviduct of women or testicular duct of men, but experience shows that fertility is rarely restored that way. Therefore – as referred to in the Decision – in most cases, the solution is *in vitro* fertilisation and the placement of the inseminated egg into the uterus. However, according to the current legal regulations – Minister of Health Decree 46/1997 (XII. 17.) NM on Services not Financed from the Mandatory Health Security Fund – sterilisation for family planning purposes (when not performed upon medical recommendation) is to be paid for, and the same logic is followed by Section 4 of Minister of Health Decree 49/1997 (XII. 17.) NM on Procedures of Infertility Treatment Applicable in the Framework of Mandatory Health Security, providing that "Those having used the service of sterilisation not upon medical recommendation may only use the (...) services upon payment of full compensation." However, such interventions (in Hungary: *in vitro* fertilisation, intracytoplasmatic sperm injection, *in vitro* fertilisation with a method facilitating adhesion) are so expensive that in fact only wealthy families could finance the reversal of their earlier decision made prematurely or in some other situation of life. At the same time, in a significant part of the cases the reason behind sterilisation – as pointed out in the Decision itself – is the social situation of the person(s) concerned. Consequently, the apparently neutral legal regulations – in respect of the theoretical possibility of reversal – practically affect patients with different social backgrounds in consistently different ways. I consider that such *de facto* differentiation

also raises concerns in the light of the legal practice of non-discrimination in the European Union.

5. In my opinion, the key issue is the relation between the right to self-determination and the adequacy of consent. It is mentioned in the Decision itself that certain countries were monitored by international organisations to verify whether the alleged mass sterilisations were performed there with the consent of those concerned, and the Decision adds that where such allegations proved to be true, the violation of the relevant domestic statutes was found. It is a fact that in many cases the procedure had to be terminated for lack of evidence. However, it is conspicuous that in many countries the same problems occur in the practice of sterilisation, including several countries of *a priori* good reputation in the field of human rights. The international documents dealing with issues of medical ethics as well stress the importance of informed consent. Nevertheless, experience shows that it is usual for complainants to report to domestic and international organisations protecting rights that their consent was given without their being informed of the consequences, or that they did not – or not fully – understood the information received. Such problems accumulate in social groups that are in an unfavourable situation with regard to qualification and financial and social background. As a consequence, in many countries the institution of consent has been safeguarded through substantive and procedural guarantees much stricter than before (for example, through involving the court in the case of young persons or ones having a limited capacity for judgement). Thus, my opinion on the issue is related to the warning fact that in many countries the difference between the legal regulations and the practice is significant in the field concerned despite the legislator's intention, and serious dysfunctions are experienced repeatedly in great numbers.

6. Pursuant to Section 187 para. (3) of Act CLIV of 1997 on Healthcare, "Sterilisation for family planning purposes may only be performed on Hungarian citizens with a permanent or temporary place of residence in Hungary." This means that the provisions in force considerably differentiate between Hungarian and non-Hungarian citizens. The petition does not deal with this aspect of the issue – although it refers to Article 70/A of the Constitution –, still I have had to consider this fact in forming my opinion, as it is a clearly prohibiting rule limiting the right to self-determination of foreign citizens living in Hungary to a much greater extent than that of Hungarian citizens: *de jure* it fails to acknowledge that right. Due to the Decision, discrimination will increase in respect of foreigners and Hungarians, since previously the differentiation only applied to persons over the age of 35 or having three blood

children, but as a result of the Decision discrimination will exist between practically all domestic and foreign persons of full age living in Hungary. Without prejudice to the principle of adherence to the petition as crystallised in the practice of the Constitutional Court, I cannot explain to myself on the basis of the above – in view of Articles 54 para. (1) and 70/A para. (1) of the Constitution and the internal coherence of Section 187 of Act CLIV of 1997 on Healthcare – how the law of Hungary can constitutionally restrict the right to self-determination of foreign citizens differently and more deeply than considered unconstitutional in the case of Hungarian citizens.

Budapest-Esztergom, 12 November 2005

Dr. Péter Kovács
Judge of the Constitutional Court

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

1. I do not agree with point 1 of the holdings in the majority Decision establishing unconstitutionality and with the related theoretical reasoning.

The provision of the AH under examination prohibits sterilisation for family planning purposes in the case of persons of full disposing capacity who are under the age of 35 or do not have three blood children. Although the majority Decision acknowledges the legislator's right to adopt rules counterbalancing the right to self-determination, the annulment of the provision opens up the possibility of sterilisation for all persons of full age having disposing capacity.

The subject of the present case – in line with the orientation of the petition – is only the constitutionality of the rules considered to be of a restrictive character, therefore the Constitutional Court has not examined all questions related to the constitutionality of sterilisation requested for family planning purposes. In the given case, the Constitutional Court has only formed an opinion in respect of the constitutionality of the provisions included in the first sentence of Section 187 para. (2) of the AH and claimed to constitute a restriction.

2. The Decision is based on the idea that the right to sterilisation for family planning purposes is part of the general personality right and more specifically the right to self-determination, and therefore the restriction of that right may be the subject of a constitutional examination. I agree that citizens may do anything not prohibited explicitly. This does not mean, however, that the State must in general allow anything that is possible due to the professional development of medical sciences and to the technical background. I am convinced that sterilisation performed for reasons other than medical ones causes a disability which in itself entails the impairment of human dignity, and which is thus not subject to the right to self-determination. [My opinion was the similarly negative concerning "the right to decide on one's own death" – cf. concurring reasoning in Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 286.] From another point of view, this means that the State has a general constitutional duty to prohibit and punish medical assistance in mutilation/sterilisation performed for reasons other than medical ones. This general duty can be deduced from the fundamental rights to life, human dignity and the highest possible level of physical and mental health. According to the general rule, the State has to punish those who cause a permanent disability

to another person. The enforcement of this State duty to protect life may only be dispensed with on the basis of pressing reasons. Such pressing reasons may be medical reasons, including psychic health as well. However, there is no such pressing reason in the case of sterilisation for family planning purposes; a wide range of effective and harmless contraceptive tools not causing disability or impairment of health are freely available in Hungary.

The statement that "everyone may harm him- or herself" is not of general and unconditional applicability, and it cannot be applied in the present case, either. This idea was formulated by the Constitutional Court in a different context, namely in relation to the membership of persons in an association of homosexuals. The State may and must prevent self-destruction through the application of restrictive provisions, other counterweights and prohibitions. The State's commitment to constitutional values – such as life, human dignity, or the highest possible level of physical and mental health – does not constitute paternalism in relation to individuals. In my opinion, it is a question to be specifically examined whether the right to self-determination can theoretically include cases where the person harms him- or herself with the active participation of another person (medical institution, physician) without a due reason – e.g. a medical one.

3. If the evaluation of the petition is based on the assumption that requesting sterilisation for family planning purposes is within the sphere of the right to self-determination but that right is restrictable, then the Constitutional Court must perform the constitutional examination of restricting the fundamental right on the basis of criteria that allow the exercise of discretion by the Constitutional Court. The proportionality of the restriction of the fundamental right with the desired objective is such a criterion.

I agree that objectives of population policy are in general not sufficient to justify the restriction of the right to self-determination. However, in my view, if the legislator permits the requesting of a self-mutilating medical intervention for family planning purposes rather than for medical reasons, then it must at least provide for adequate counterweights and objective restrictions to exclude the possibility of both misuse and irresponsible decisions. The provision of the AH under examination, regulating the conditions of sterilisation for family planning purposes, cannot be regarded as a disproportionate restriction even if the Constitutional Court's examination is based upon the practically unlimited nature of the right to self-determination as referred to in the majority Decision. The restriction can be duly

justified with the rights to life, human dignity and health. Accordingly, the aim of the restriction under examination is to protect persons deemed to be young by the legislator from undergoing a mostly irreversible intervention seriously impairing health (causing a disability), even if that is done "voluntarily". The exercise of the right to self-determination – interpreted broadly – by a person of full age but of immature personality could make it impossible for him or her to exercise his or her right to self-determination in the future. (Neither the obligation of information defined in the AH, nor the three-month period of consideration can be regarded as an effective counterweight to such an extended right to self-determination.)

In respect of sterilisation, it is indispensable to have guarantees ensuring that the person concerned actually makes an independent, personal decision without any external force or influence, upon consideration of all necessary information. After removing the objective criteria (being over the age of 35 or having three blood children) from the Act, there is no adequate guarantee for uninfluenced decisions made upon consideration of all necessary information. The obligation of information and the waiting time are not adequate guarantees. It may not be ignored that even persons of full age can temporarily find themselves in a helpless situation where they cannot actually make a free decision. The partial annulment of the rules under examination does not reckon with such situations.

According to Article 16 of the Constitution, the State protects the interests of the young. In the regulations pertaining to family support, the general age limit of eligibility for support (being young) is set at the age of 35. The convictions of a person – especially in the years of youth – may change over time, and the State must provide for adequate guarantees to protect the possibility of such change. This way, it can happen that after reaching full age, in a given situation of life (under the effect of a shocking experience, in an insecure relation of cohabitation, as a prostitute etc.) a person wishes to be sterilised, but after a few years and changes in circumstances or convictions, the same person wants to have a child.

In this context, self-determination is to be examined not only in respect of sterilisation for family planning purposes, but with regard to the wide scale of possibilities of contraception. Although birth control belongs to the sphere of the right to self-determination, some of its tools may be subject to certain restrictions. As there are many available tools of family planning not causing damage to health or a lasting disability, the restriction of the extreme "solution" of sterilisation cannot be considered unconstitutional.

The Constitutional Court has already established in relation to certain procedures of reproduction that no one has a fundamental right to such procedures [artificial fertilisation – Decision 750/B/1990 (ABH 1991, 728); surrogacy – Decision 108/B/2000 (ABK 2004/3)]. Certain methods of family planning can be restricted on reasonable grounds, upon objective consideration. The restriction included in the first sentence of Section 187 para. (2) of the AH qualifies as such a non-arbitrary restriction.

4. In the context of sterilisation, it must be noted that sterilisation based on liberal laws but requested as a result of the external force of the social, economic and political environment is an existing problem yet to be solved in countries of the third world. (In the 1990's a programme was launched in Peru offering financial benefits to those over the age of 30 and having at least three children. In practice, the statutorily defined requirement of consent was often ignored, serious instances of misuse occurred, and 300 thousand women were sterilised in the period of 1995-1998.) As indicated in the Decision as well, there are shocking examples of forced sterilisations performed under liberal statutes even closer in time and space.

Budapest-Esztergom, 12 November 2005

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