Decision 27/2002 (VI. 28.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a petition seeking a posterior examination of the unconstitutionality of a statute, the Constitutional Court – with dissenting opinions by dr. János Németh and dr. Éva Tersztyánszky-Vasadi, Judges of the Constitutional Court – has adopted the following

decision:

The Constitutional Court holds that Minister of Welfare and Healthcare Decree 5/1988 (V. 31.) SZEM on the Measures Necessary for the Prevention of the Spread of Acquired Immune Deficiency Syndrome and on Ordering Screening is unconstitutional, and therefore annuls it as of 31 December 2002.

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

Reasoning

I.

1. According to the petitioner, Section 1 items *a)* and *b)* of Minister of Welfare and Healthcare Decree 5/1988 (V. 31.) SZEM on the Measures Necessary for the Prevention of the Spread of Acquired Immune Deficiency Syndrome and on Ordering Screening (hereinafter: the Decree) define too broadly and vaguely the scope of persons subject to compulsory AIDS screening: the petitioner holds that "the terms 'in a condition pointing to' and 'environment' create a possibility for abuse by healthcare staff applying the statute". The petitioner claims on similar grounds the unconstitutionality of the term "environment" in Section 9 para. (2) of the Decree. According to the petitioner, the challenged provisions violate the right to self-determination pertaining to information granted in Article 59 para. (1) of the Constitution.

2. The petitioner holds that Section 3 para. (3) of the Decree violates the prohibition of discrimination guaranteed under Article 70/A of the Constitution, as it applies "an unjustified

and discriminative differentiation between infection through the blood stream and infection through sexual contact." The petitioner claims that this provision of the Decree violates the right to human dignity granted in Article 54 of the Constitution, and in particular Section 54 para. (2) if – as assumed by the petitioner – the separate collection of data serves the purpose of performing unauthorised medical tests.

As of 1 April 2002, Section 3 para. (3) of the Decree was replaced with a new provision specified in Section 1 of Minister of Healthcare Decree 10/2002 (III. 12.) EüM on the Amendment of Minister of Welfare and Healthcare Decree 5/1988 (V. 31.) SZEM on the Measures Necessary for the Prevention of the Spread of Acquired Immune Deficiency Syndrome and on Ordering Screening, but the new provision is essentially similar to the former one. During the constitutional review, the Constitutional Court examined the text in force of Section 3 para. (3) of the Decree.

3. According to the petitioner, Article 57 para. (5) of the Constitution is also "circumvented by the Decree as it practically applies detention and other serious sanctions without rendering legal remedy possible."

4. In addition to the above, the petitioner holds it justified to annul the Decree as a whole, since in his view "a partial annulment can hardly repair a statute". He also objects to the regulatory level of the whole Decree, claiming that its contents should be regulated "in a statute of higher level". He holds that the Decree violates Article 8 para. (1) of the Constitution, according to which the respect and protection of inviolable and inalienable fundamental human rights is a primary obligation of the State.

5. During the procedure the Constitutional Court has obtained the opinion of the Minister of Healthcare and asked for a statement by the Ombudsman for Data Protection.

II.

1. The provisions of the Constitution relevant in respect of the petition 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 37 para. (3) In the course of administering their duties, Members of the Government may issue decrees. Such decrees, however, may not stand in conflict with the law or with Government decrees or resolutions. Decrees shall be promulgated in the Official Gazette.”

“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 57 para. (5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions which infringe on his rights or justified interests. A law passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time.”

“Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data.”

“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.”

2. The provision of Act XI of 1987 on Legislation (hereinafter: the AL) involved in the examination is as follows:

"Section 15 para. (1) In the empowerment to issue an implementing statute, the empowered entity as well as the subject and the framework of the empowerment shall be specified. The empowered entity shall not give further empowerment to another entity to issue the legal regulation in question.
(2) No empowerment may be given to regulate the fundamental rights and obligations in the scope of the regulation."

3. The concrete provisions of the Decree relevant in respect of the petition are as follows:

"Section 1 The following persons shall be subject to compulsory screening performed for the purpose of detecting infection with the virus causing Acquired Immune Deficiency Syndrome (hereinafter: AIDS):
a) persons with a venereal disease, and persons in a condition pointing to a venereal disease;
b) sexual partners of persons infected with the virus of AIDS; those members of the infected person's environment in the case of whom there is a suspicion of infection; (…)"

"Section 3 para. (3) The person whose infection is confirmed shall be cared for
a) by the Centre of National Blood Supply Service, and the specialised unit of transfusiology of the territorially competent regional blood supply centre specified in the Annex to Minister of Healthcare Decree 44/1999 (IX. 30.) EüM on the National Blood Supply Service, in case of an infection presumably caused by an infected blood product;
b) by the National Institute of Cutaneous and Venereal Diseases, or the dispensary of patients with cutaneous and venereal diseases competent with respect to the patient's place of residence, if infection was probably due to sexual contact."

"Section 9 para. (2) The physician at the dispensary is obliged to look into the endangered environment of the person infected with the AIDS virus, and to perform or order the clinical examination of such persons in order to find out whether they are infected with the AIDS virus or not. The physician at the dispensary of patients with cutaneous and venereal diseases is obliged to find the person's sexual partners even if the patient was registered for care at another institution."

III.

The petition is well-founded.

1. The Constitutional Court has primarily examined the request made in the petition for annulling the whole Decree, based on the assumption that the subject of the Decree should have been regulated in a statute of a higher level, and that the given manner of regulation violates Article 8 para. (1) of the Constitution.

As explained by the Constitutional Court in its Decision 64/1991 (XII. 17.) AB, the State obligation to respect and protect fundamental rights in line with Article 8 para. (1) of the Constitution includes both refraining from violating such rights and guaranteeing the conditions necessary for their enforcement. (ABH 1991, 297, 302). It follows from the State's obligation to ensure fundamental rights that such rights may only be restricted as permitted by the Constitution. In this respect, Article 8 para. (2) of the Constitution is to be applied, according to which the rules pertaining to fundamental rights and duties are determined by Acts of Parliament.

Decision 4/1993 (II. 12.) AB of the Constitutional Court – with reference to Decision 64/1991 (XII. 17.) AB – pointed out regarding the restriction of fundamental rights that "it is not in all respects that fundamental rights are to be regulated by Acts of Parliament." As established by the Constitutional Court, »not all kinds of relationship with fundamental rights call for regulation in an Act of Parliament. The determination of the content of a certain fundamental right and the establishment of the essential guarantees thereof may only occur in Acts of Parliament; furthermore, the direct and significant restriction of a fundamental right also calls for an Act of Parliament. However, when the relationship with fundamental rights is indirect and remote, a decree is sufficient. If it were otherwise, everything would have to be regulated by an Act of Parliament.« Thus it follows that whether there is a need for regulation in an Act »must always be determined on the basis of the particular measure, depending on the intensity of its relationship to fundamental rights.«" (ABH 1993, 48, 60).

In its Decision 2012/B/1991 AB, the Constitutional Court has already dealt with the issue of the constitutionality of prescribing an obligation to participate in screening, with respect to

Section 19 of Minister of Welfare Decree 18/1998 (VI. 3.) NM on the Epidemiological Measures Necessary for the Prevention of Communicable Diseases and Epidemics (hereinafter: the NM Decree). This former Decision of the Constitutional Court examined, in terms of both form and content, the constitutionality of obligatory screening performed for the purpose of preventing the danger of tuberculosis infections. Point III.1 in the Reasoning of Constitutional Court Decision 2012/B/1991 AB dealt with the constitutional review of the regulatory level of obligatory screening that may be ordered in the case of tuberculosis. In Point III.1 of the Reasoning of Decision 2012/B/1991 AB, the Constitutional Court examined the constitutionality of the regulatory level of the challenged provision of the NM Decree in relation to Article 70/D of the Constitution. In that respect, the Constitutional Court referred to Decision 64/1991 (XII. 17.) AB establishing that in the case of an indirect and remote connection with fundamental rights, regulation in a Decree would suffice. Consequently, the Constitutional Court rejected the petition claiming the formal unconstitutionality of the relevant provision of the NM Decree. (ABH 2001, 1169, 1171-1172)

At the same time, the Constitutional Court pointed out when interpreting Article 8 para. (2) of the Constitution that the appropriate regulatory level of restricting a fundamental right could be determined on the basis of the concrete measure, depending on the intensity of its relationship to fundamental rights. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 300] Therefore, the Constitutional Court – acting in accordance with the arguments made in Decision 2012/B/1991 AB – has to assess on the basis of the present Decree, i.e. the concrete regulation, whether it complies with the constitutional requirements concerning the restriction of fundamental rights. The present Decree contains several provisions for the prevention of the spread of Acquired Immune Deficiency Syndrome [e.g. ordering compulsory screening in order to detect infection with the virus of Acquired Immune Deficiency Syndrome, the vague definition of the scope of persons obliged to participate in screening (Section 1), the implementation of obligatory screening, tolerating the performance of other examinations, as well as looking into and clinically examining the environment endangered by the infected person (Sections 4, 6, and 9), or the obligatory supply of data (Section 11)] that affect fundamental rights: the general personality right deducible from the right to human dignity, and the various aspects thereof such as the right to develop one's personality freely, the right to self-determination, the general freedom of action, or the right to privacy [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44-45], and the right to self-determination pertaining to information.

Decision 21/1994 (IV. 16.) AB of the Constitutional Court pointed out that the constitutionality of restricting a fundamental right depends on the extent of the restriction (ABH 1994, 117, 121). The same train of thought was followed in Decision 58/2001 (XII. 7.) AB of the Constitutional Court; it provided for the application of a differentiated constitutional review depending on the restriction of the fundamental right. In that respect, the Constitutional Court referred to one of its earlier statements according to which the criteria of evaluating constitutionality may be loosened or tightened according to the type of restriction concerned. (ABH 2001, 527, 543).

With regard to the present Decree, the Constitutional Court has established that several of its provisions restrict several fundamental rights. Consequently, the Decree is considered to restrict fundamental rights significantly and directly. In the case of a regulation restricting several fundamental rights significantly and directly, it is undisputable that regulation in the form of a decree is not sufficient. A significant and direct restriction of fundamental rights may only be implemented through an Act of Parliament.

2. The Decree referred to empowerment by Section 15 para. (2) of Act II of 1972 on Healthcare (hereinafter: the former AH) – already out of force – and by Council of Ministers Decree 16/1972 (IV. 29.) MT on the Implementation of the Act on Healthcare and on the Powers of the Minister of Healthcare. The above provisions empowered the minister to issue decrees pertaining to a subject affecting fundamental rights and duties. Pursuant to Section 15 para. (2) of the AL in force at the time of issuing the Decree and still in force, no empowerment may be granted for the regulation of fundamental rights and duties, as they may only be regulated in Acts of Parliament. However, the statutory empowerment allowing the issue of an implementing rule pertaining to a subject to be regulated by an Act of Parliament was contrary to Section 15 para. (2) of the AL. Therefore, the Decree issued on the basis of unlawful empowerment also violated Section 15 para. (2) of the AL. The Minister's Decree contradicting Section 15 para. (2) of the AL violated Article 37 para. (3) of the Constitution.

Decision 64/1991 (XII. 17.) AB of the Constitutional Court as referred to above established the unconstitutionality of the statutory empowerment relating to the issue of a regulation in a subject to be regulated in an Act of Parliament, and also declared the unconstitutionality of the implementing regulation issued on the basis of the above empowerment, and annulled the

statutes considered unconstitutional on formal grounds (ABH 1991, 297, 306-307). In the present case, too, obligations requiring regulation by an Act of Parliament have been specified in a minister's decree. Restricting in a minister's decree fundamental rights that may only be regulated in Acts of Parliament violates Article 8 para. (2) of the Constitution, which states that fundamental rights may only be restricted in Acts of Parliament.

3. On the basis of the above, the Constitutional Court has annulled the unconstitutional Decree. The effective date of annulment of the Decree has been set by the Constitutional Court on the basis of Section 43 para. (4) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) so that sufficient time be left for the adoption of constitutional regulations instead of the annulled provisions.

The Constitutional Court – acting in line with its consistent practice [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 307; Decision 30/2000 (X. 11.) AB, ABH 2000, 202, 209] – has not examined the elements in the petition claiming the unconstitutionality of the Decree in terms of content, because the Decree has been annulled as a whole on formal grounds.

The publication of the Decision is based on Section 41 of the ACC.

Budapest, 25 June 2002

Dr. János Németh
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
presenting Judge of the Constitutional Court

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
Judge of the Constitutional Court

Dr. János Németh
President of the Constitutional Court
on behalf of
Dr. László Kiss
Judge of the Constitutional Court, unable to sign

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. János Németh, Judge of the Constitutional Court

I do not agree with the establishment of the unconstitutionality and with the annulment of Minister of Welfare and Healthcare Decree 5/1988 (V. 31.) SZEM on the Measures Necessary for the Prevention of the Spread of Acquired Immune Deficiency Syndrome and on Ordering Screening (hereinafter: the Decree).

According to the Decision, the establishment of unconstitutionality is based on several of the Decree's "provisions restricting several fundamental rights. Consequently, the Decree is considered to restrict fundamental rights significantly and directly. In the case of a regulation restricting several fundamental rights significantly and directly, it is undisputable that regulation in the form of a decree is not sufficient."

Nevertheless, I agree with the majority of the Reasoning of the Decision, with the exception of the statement quoted above and the conclusions drawn therefrom. According to the consistent practice of the Constitutional Court, fundamental constitutional rights may, in line with Article 8 para. (2) of the Constitution, only be restricted in Acts of Parliament, save their essential contents, which may not be restricted at all. When examining a restriction, the Constitutional Court applies the test of necessity and proportionality, i.e. it only considers the restriction of a fundamental right constitutional when it is based on a forcing necessity and when the importance of the desired objective is in line with the weight of the injury caused to the fundamental right in order to achieve that objective [Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 71]. In the present case, the Decision has not examined the contents and the necessary or proportionate nature of restricting the fundamental rights; it has only assessed the level of regulation.

As established by the Constitutional Court in Decision 64/1991 (XII. 17.) AB, "not all kinds of relationship with fundamental rights call for regulation in an Act of Parliament. The determination of the content of a certain fundamental right and the establishment of the essential guarantees thereof may only occur in Acts of Parliament; furthermore, the direct and significant restriction of a fundamental right also calls for an Act of Parliament. However, when the relationship with fundamental rights is indirect and remote, a decree is sufficient. If it were otherwise, everything would have to be regulated by Acts of Parliament. Thus it

follows that whether there is a need for regulation in an Act must always be determined on the basis of the particular measure, depending on the intensity of its relationship to fundamental rights" (ABH 1991, 297, 300).

Empowerment to issue the Decree had been given in Act II of 1972 on Healthcare (hereinafter: the Act) – in force at that time – and Council of Ministers Decree 16/1972 (IV. 29.) MT on the Implementation of Act II of 1972 on Healthcare and on the Powers of the Minister of Healthcare (hereinafter: the ID). As mentioned in the Decision, the Act provided that "in the case of a communicable disease, compulsory screening may be ordered in order to prevent the danger of infection" [Section 15 para. (2)]. The ID empowered the Minister of Healthcare to specify the rules for the implementation of the Act, including regulations on public health and epidemiological measures [Section 37 para. (1)]; as well as to require notification of certain diseases, together with specifying the scope of persons obliged to make a notification, the manner and time of notification, and the data to be notified [Section 37 para. (2)]. It is clear from the text of the Act and the ID that the Minister of Welfare and Healthcare had been empowered to specify regulations and rules for the implementation of the Act, and – in my opinion – by issuing the Decree, the Minister did nothing else but complied with this obligation.

The fundamental rights mentioned in the Decision, i.e. "the general personality right deducible from the right to human dignity, and the various aspects thereof such as the right to develop one's personality freely, the right to self-determination, the general freedom of action, or the right to privacy (…), and the right to self-determination pertaining to information" were restricted by the Act itself. In addition to Section 15 para. (2) of the Act mentioned above, it provided – in the framework of epidemiological regulations – for the obligatory medical examination and the compulsory medical treatment of persons with a communicable disease and persons under the suspicion of having a communicable disease [Section 16 paras (1)-(2)], if and when necessary, the separation, for the duration of communicability, of patients with a communicable disease and persons under the suspicion of having a communicable disease [Section 17 para. (1)], and it ordered the persons living in the environment of the patient with a communicable disease to comply with the regulations aimed at preventing the spread of the infection [Section 16 para. (3)]. The Act provided for an epidemiological quarantine during the incubation period of the disease for those who had had contact with a patient having a communicable disease or a person under the suspicion of having a communicable disease, as well as for those who could cause an infection because of their state of health. On the above

grounds, everyone could be obliged to participate in screening in order to verify whether he could have infected another person with the agent of a communicable disease specified by the law, without himself actually suffering from the disease in question [Section 19 paras (1)-(3)]. Besides, as far as the medical treatment and care of patients with a venereal disease is concerned, the Act expressly provided that when treating a patient with a communicable venereal disease or a person under the suspicion of having a communicable venereal disease, the physician should identify those persons who could have caused the infection of the patient and who could have been infected by the patient. The patient was obliged to supply information on the above [Section 32 para. (3)].

As far as its contents are concerned, the Decree only specifies the rules for the practical implementation of the Act, and it contains no further restrictions. On the basis of Decision 64/1991 (XII. 17.) AB of the Constitutional Court, according to which fundamental rights may only be restricted directly and significantly in an Act of Parliament, however, "when the relationship with fundamental rights is indirect and remote, a decree is sufficient" (ABH 1991, 297, 300), and in view of the practice of the Constitutional Court [Decision 56/1993 (X. 28.) AB, ABH 1993, 345, 347; Decision 60/1993 (XI. 29.) AB, ABH 1993, 507, 511-512; Decision 990/B/1995 AB, ABH 1997, 824, 827; Decision 3/1998 (II. 11.) AB, ABH 1998, 61, 65-66; Decision 173/B/1996 AB, ABH 1999, 728, 730-731; Decision 54/2000 (XII. 18.) AB, ABH 2000, 516, 519-520], the petition should have been rejected.

In this respect, special attention is to be paid to Decision 2012/B/1991 AB referred to in the Decision, too, as it rejected the petition aimed at the establishment of the unconstitutionality and annulment of Minister of Welfare Decree 18/1998 (VI. 3.) NM on the Epidemiological Measures Necessary for the Prevention of Communicable Diseases and Epidemics with reference – among others – to the fact that "its constitutionality cannot be questioned on the basis of the claim that its provisions define rules pertaining to the fundamental right to the highest possible level of physical and mental health specified in Article 70/D of the Constitution, and that therefore they violate Article 8 para. (2) of the Constitution according to which rules pertaining to fundamental rights and duties may only be specified in Acts of Parliament. (…) Neither is the petitioner's claim well-founded in alleging that the Decree regulates issues affecting fundamental rights without empowerment. According to Section 56 para. (1) (…) of Act CLIV of 1997 on Healthcare, the objective of epidemic-related activities is to prevent and control the spread of infectious diseases and epidemics, and to increase

human resistance to infectious diseases. In order to achieve this goal, in paragraph (2) the health authority is empowered to oblige natural and legal persons as well as organisations without legal personality to tolerate or take the measures defined in the Act.
According to Section 59 para. (1) of the Act on Healthcare, the objective of screening for epidemiological reasons is to detect the presence of infectious diseases in an early phase, to identify the sources, and to avert the danger of infection. Pursuant to paragraph (2), the Minister of Healthcare shall issue a decree setting forth the infectious diseases for the prevention of which the health authority may order the obligatory screening of the entire population, specific groups of the population, the residents of a specific area, all people at a workplace, in a family or other community, persons arriving from other countries, and persons having had contact with one or several infected persons.
It was on the basis of this empowerment that the Minister of Welfare issued the Decree, Section 19 of which specifies the criteria for ordering compulsory screening for the early detection of tuberculosis cases" (ABH 2001, 1169, 1171-1172).

Let me note that Act CLIV of 1997 on Healthcare currently in force (hereinafter: the AH) provides in its Sections 56, 59, and 70/A for more severe restrictions of fundamental rights than the ones contained in the Act. As the Decree serves the purpose of implementing the AH, the statements concerning its formal unconstitutionality are unfounded in view of the AH in force, too.

Budapest, 25 June 2002

Dr. János Németh
Judge of the Constitutional Court

I concur with the dissenting opinion:

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Constitutional Court file number: 663/B/1996
Published in the Official Gazette (Magyar Közlöny) MK 2002/90