Decision 30/2013. (X. 28.) AB

on declaring that certain provisions of the Decree No 5/1998 (III. 6.) IM of the Minister of Justice on the health-care of convicts is in conflict with the Fundamental Law and annulling them

On the basis of a petition seeking the ex-post examination of the violation of the Fundamental Law by legislation, the plenary session of the Constitutional Court has adopted – with the dissenting opinion of Justice *dr. Béla Pokol* – the following

d e c i s i o n:

The Constitutional Court holds that section 4 (3) and section 5 of the Decree No 5/1998 (III. 6.) IM of the Minister of Justice on the health-care of convicts are in conflict with the Fundamental Law and therefore annuls them as of 31 December 2013.

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

R e a s o n i n g

I

[1] 1 In a motion submitted on 28 May 2010, the Parliamentary Commissioner for Citizens' Rights requested the Constitutional Court to annul, in a procedure seeking the ex-post examination of the legislation's conflict with the Fundamental Law, section 4 (3) and section 5 of the Decree No 5/1998 (III. 6.) IM of the Minister of Justice on the health-care of convicts (hereinafter: DHC), as the contested provisions are contrary to Article 8 (2) and Article 54 (1) of the Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter: "Constitution"). In the petitioner's view, the restriction on the right to refuse health-care to prisoners laid down in the DHC is also inconsistent with the provisions of the Act CLIV of 1997 on Health-care (hereinafter: AHC).

[2] Pursuant to section 4 (2) of the AHC, "the Act may lay down rules for certain categories of natural persons which differ from those provided for in this Act". However, the minister responsible for the penal enforcement and the minister responsible for the policing are empowered, under section 247 (5) of the AHC, only "to lay down, in agreement with the minister, rules on the health-care of convicts in a decree". In the petitioner's opinion, it follows from a joint interpretation of these rules that the above provisions regulating the cases of limitation of the right to self-

determination in connection with the refusal of health-care to a convict are formally contrary to Article 8 (1) of the Constitution, because the rules limiting the right to self-determination deriving from the right to human dignity are not regulated by an Act but by a decree.

[3] The restriction implemented by the DHC is also unnecessary and disproportionate and therefore, in addition to Article 8 (2) of the Constitution, also infringes Article 54 (1) of the Constitution. In support of his position, the petitioner cites the case-law of the Constitutional Court. He refers to the opinion explained in the Decision 36/2000. (X. 27.) AB that "The AHC contains guarantee provisions enforcing the right to human dignity specified in Article 54 (1) of the Constitution in respect of the patient's right to self-determination. The patient's right to self-determination includes – among others – the right to consent to medical interventions or to refuse care." (ABH 2000, 241, 254 to 255). He also refers to the fact that "according to the permanent practice of the Constitutional Court, the State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, 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 law-maker is bound to employ the most moderate means suitable for reaching the specified purpose" (ABH 1992, 167, 171.).

[4] According to the petitioner, the challenged provisions are not in line with sections 20 to 23 of the AHC, which lay down the right to refuse care.

[5] 2 In his application of 6 February 2012, the Commissioner for Fundamental Rights, referring to the Constitutional Court's Ruling II/1201/2012 AB, indicated the provisions of the Fundamental Law infringed by the DHC in the context of the petition [Article I (1) to (3) and Article II].

[6] The petitioner also pointed out that the Constitutional Court's consistent case-law derives the patient's right to self-determination, which includes the right to consent to medical interventions and the right to refuse care, from the fundamental right to life and human dignity. Sections 20 to 23 of the AHC make it possible to restrict the right to refuse care in order to protect the life or physical integrity of others, whereas the contested provisions of the DHC create the possibility of restricting the fundamental right concerned in a much broader context, in the context of the protection of the patient detainee himself and of the community as a whole. It is in that context that the regulation also imposes on the medical staff concerned an obligation to carry out the examination or treatment if the detainee refuses to cooperate. In the petitioner's view,

that legislation allows the restriction of a fundamental right in an unnecessarily broad and indeterminate manner and can thus be regarded as manifestly disproportionate.

[7] On the basis of the foregoing, the Commissioner for Fundamental Rights maintained his application for annulment of the contested provisions of the DHC.

II

[8] In its proceedings, the Constitutional Court took into account the following statutory provisions:

[9] 1 The affected provisions of the Fundamental Law:

“Article I (1) The inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights.

(2) Hungary shall recognise the fundamental individual and collective rights of man.

(3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.

(4) Fundamental rights and obligations which, by their nature, do not only apply to man shall be guaranteed also for legal entities established by an Act.”

"Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.”

[10] 2 The provisions of the AHC affected by the petition:

"The scope of the Act

Section 4 (1) The scope of this Act shall extend to the following persons and activities in the territory of Hungary

(a) resident natural persons,

(b) operating health-care providers,

(c) health and health promotion activities.

(2) An Act may lay down rules for certain categories of natural persons that differ from those contained in this Act.”

“The right to human dignity

Section 10 (1) The patient's human dignity shall be respected in the course of providing health-care.

(2) Unless otherwise provided for in this Act, a patient may undergo only the interventions necessary for his or her care.

(3) In the course of care, the patient may be restricted in the exercise of his or her rights only to the extent and in the manner prescribed by an Act for the period justified by his or her state of health.

(4) In the course of providing care, the patient's personal freedom may be restricted by physical, chemical, biological or psychological methods or procedures exclusively in case of emergency, or in the interest of protecting the lives, physical integrity and health of the patient or others. The application of restrictive measures of a tortuous, cruel, inhuman, degrading or punitive nature are prohibited. The restrictive measure may last only as long as the reason for its imposition persists.

[...]"

"The right to self-determination

Section 15 (1) The patient shall have the right to self-determination, which may only be restricted in the cases and in the ways defined by an Act.

(2) Within the framework of exercising the right to self-determination, the patient is free to decide whether he wishes to use health-care services and which procedures to consent to or refuse when using such services, taking into account the restrictions set out in Section 20.

(3) The patient shall have the right to be involved in the decisions concerning his examination and treatment. Apart from the exceptions defined in this Act, the performance of any health-care procedure shall be subject to the patient's consent thereto granted on the basis of appropriate information, free from deceit, threat and coercion (hereinafter: "consent").

(4) The patient may give his consent specified in paragraph (3) verbally, in writing or through implicit conduct, unless provided otherwise by this Act.

[...]"

"The right to refuse care

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

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

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

(4) Refusal as defined in paragraph (3) shall be valid only if a committee composed of three physicians has examined the patient and made a unanimous, written statement to the effect that the patient has taken his decision in full cognizance of its consequences, and that the conditions defined in paragraph (3) have been met, furthermore if on the third day following such statement by the medical committee, the patient repeatedly declares his intention of refusal in the presence of two witnesses. If the patient does not consent to his examination by the medical committee, his statement regarding the refusal of medical treatment may not be taken into consideration.

(5) The members of the committee defined in paragraph (4) shall be the patient's attending physician, one physician specialising in the field corresponding to the nature of the illness who is not involved in the treatment of the patient, and one psychiatrist.

(6) A patient may not refuse a life-supporting or life-saving intervention if she is pregnant and is considered to be able to carry the pregnancy to term.

(7) In the event of refusal as defined in paragraphs (2) to (3), an attempt shall be made to identify the reasons underlying the patient's decision through a personal discussion and to alter the decision. In the course of this, in addition to the information defined in Section 13, the patient shall be informed once again of the consequences of the non-performance of the intervention.

(8) The patient may withdraw his or her statement regarding refusal at any time and without any restriction regarding the form of withdrawal.

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

(2) If in the case of a patient with no or limited disposing capacity health-care as in Section 20 para. (3) has been refused, the health-care provider shall institute proceedings to obtain the required consent from the court. The attending physician

shall be required to provide all medical care necessitated by the patient's condition until the court passes its final and absolute decision. In the case of a direct threat to life, it shall not be required to obtain a substitute statement by the court for the necessary interventions to be carried out.

(3) The attending physician, in the interest of meeting the obligation laid down in paragraph (2), may use the assistance of the police if necessary.

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

Section 22 (1) A person with full disposing capacity, for the case he or she should become incapable in the future, may refuse in a public deed

(a) certain examinations and interventions specified in section 20 (1),

(b) interventions under section 20 (3), and

(c) certain life-supporting or life-saving interventions if he or she has an incurable illness and as a consequence of the illness is unable to take care of himself or herself physically or suffers from pain that cannot be eased with appropriate therapy.

(2) A person with full disposing capacity may name in a public deed, for the event of his or her possible subsequent incapacity, the person with full disposing capacity who shall be entitled to exercise the right defined in paragraph (1) in his or her stead.

(3) The statement specified in paragraphs (1) and (2) shall be valid if a psychiatrist has confirmed in a medical opinion given not more than one month earlier that the person had made the decision in full awareness of its consequences. The statement shall be renewed every two years, and may, at any time, be withdrawn, regardless of the patient's disposing capacity and without formal requirements.

(4) In the case of a declaration of refusal of medical intervention made by a person with full disposing capacity defined in paragraph (2), the committee defined in paragraph (4) of section 20 shall make a declaration on whether

(a) the conditions set out in paragraph (1) are met, and

(b) the person defined in paragraph (2) has made the decision in cognizance of its consequences.

Section 23 (1) An intervention as defined in section 20 (3) may only be terminated or dispensed with if the will of the patient to that effect can be established clearly and convincingly. In case of doubt, the subsequent personal declaration made by the

patient shall be taken into account; in the absence of such declaration, the patient's consent to the life-supporting or life-saving intervention shall be assumed.

(2) A patient or a person referred to in section 22 (2) shall not be forced to change his or her decision by any means when refusing treatment. Even in the event of refusal to undergo an intervention pursuant to section 20 (3), the patient shall be entitled to treatment to alleviate suffering or reduce pain."

"Section 247 (5) Authorisation is granted to

(a) the minister responsible for penal enforcement and the minister responsible for policing to make, in agreement with the Minister, to lay down rules on the health-care of convicts,

[…]

in a decree."

[11] 3 The relevant provisions of the Law-Decree 11/1979 on the Execution of Punishments and Criminal Measures (hereinafter: LDP) affected by the petition:

"Section 33 (1) The convict shall – in particular –

[…]

f) allow the carrying out of any compulsory medical examination required by law or necessary to assess his or her state of health and undergo compulsory or life-saving medical treatment required by law, surgery being governed by health legislation;

[...]"

"Section 36 (1) The convict shall be entitled to

(a) healthy accommodation in accordance with hygienic conditions, food and medical care appropriate to his or her state of health and his or her activities during the period of imprisonment;

[...]"

"Section 47 (1) The health-care of the convict shall be governed by the health and social security legislation. The convicted person shall be entitled to receive medicines and medical aids in accordance with the provisions of special legislation."

[12] 4 The provisions of the DHC affected by the petition are as follows:

Section 4

[…]

(3) The right of self-determination of a convict in the context of refusing health-care – in order to protect his or her health and the health of the community –

(a) in the case of a dangerous or imminently dangerous condition,

(b) for the purpose of preventing a life-threatening condition or a foreseeable permanent impairment of health,

(c) in the public health or epidemiological interest,

(d) in cases provided for by an Act

may be restricted.

[…]

Section 5 If the convict refuses to cooperate in the cases listed in section 4 (3) despite receiving prior information, the physician shall carry out the examination or treatment, in addition to the measures specified in the Act CVII of 1995 on the Peal Enforcement Organisation."

III

[13] The petition is well-founded.

[14] 1 The petition contains a request for ex-post normative review, in connection with which the Constitutional Court points out that its competence is based on section 24 (1) and (2) of Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), since, according to petition – containing a specific request – submitted by the Commissioner for Fundamental Rights, the legislation is contrary to the Fundamental Law.

[15] In its examination of the statutory provisions challenged in the petition, the Constitutional Court proceeded in the light of the fourth amendment to the Fundamental Law (25 March 2013) and the criteria set out in its decision of 13/2013. (VI.7.) AB on the applicability of the provisions of previous decisions of the Constitutional Court.

[16] Accordingly, it compared in the specific case the underlying provisions of the Fundamental Law and the Constitution. Although the wording of the provision on human dignity has been slightly modified, it can be stated that the Fundamental Law (Article II "Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.") lays down for all men the right to human dignity, similarly to the Constitution [Article 54 (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."]. On

the basis of the substantive consistency of the relevant section of the Fundamental Law with the Constitution, the contextual consistency of the Fundamental Law as a whole, taking into account the rules of interpretation of the Fundamental Law and the specificities of the case, the panel held that there was no obstacle to the applicability of the arguments and findings of the Constitutional Court made in its previous decisions with regard to the interpretation of human dignity and the right to self-determination deriving from it.

[17] A similar conclusion was reached in relation to the regulatory level requirement. Article 8 of the Constitution prescribed are ("In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by Act of Parliament; such law, however, shall not restrict the essential contents of fundamental rights.") and Article I (3) of the Fundamental Law ("The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.") also lays down that the rules for fundamental rights and obligations shall be laid down in an Act of Parliament. Based on the consistency of the provisions declaring the obligation to regulate at the statutory level, and taking into account the principles of interpretation of the Fundamental Law, the Constitutional Court considered that there was no obstacle to the applicability of the previous findings made in relation to the level of regulation, and that it was necessary to include them in the reasoning for the decision to be taken, and therefore interpreted the specific case using its previous case-law.

[18] 2 The Constitutional Court first examined the domestic legislation related to the content of the petition and its theoretical background.

[19] 2.1 The rights and obligations of convicts are set out systematically in Chapter IV of the LDPE, which is currently the highest level legislative regulatory instrument applicable to the penal enforcement system. It stipulates that convicts are entitled to healthy accommodation in hygienic conditions, food and medical care appropriate to their state of health and their activities during the period of imprisonment, and to undergo compulsory medical examinations required by law or necessary for the assessment of their state of health and to receive compulsory or life-saving treatment required by law. The law-decree also stipulates that the health-care of the convicted person shall be governed by health and social security legislation.

[20] The basic rules relating to citizens' right to self-determination in the field of health-care are laid down in Chapter II of the AHC, which also defines the other rights and obligations of patients. The provisions set out the content of the right to self-determination and declare the framework for exercising the right to refuse care.

[21] The two scopes of specific relationships described in the LDPE and the AHC, i.e. the intersection of convict status and patient status, are embodied in the system of rules specified in the DHC.

[22] 2.2 With regard to the interpretation of the provisions of the AHC, the Constitutional Court stated in its Decision 36/2000 (X. 27.) AB that: "the AHC – [...] enforcing the right to human dignity – contains guarantee provisions with regard to the right of patients to self-determination [ABH 2000, 254 to 255]." It declared that the right to consent to medical interventions and the right to refuse care are part of the right of patients to self-determination. In this sense, the consent and the refusal related to interventions becoming necessary in the course of medical care may not be separated from the exercise of personality rights.

[23] At the same time, it is important to emphasize – as also referred to in the Decision 29/2009 (II. 20.) AB – that "fundamental constitutional rights may be restricted. This also applies [...] to the right to human dignity. In the case-law of the Constitutional Court, the right to human dignity is absolute and unrestrictable only as a determinant of men's status, in its unity with the right to life, however, certain partial rights of it, just as in the case of other fundamental rights, may be restricted (ABH 2009, 235)."

[24] In the present case, the Constitutional Court also upholds its views explained with regard to the restriction under 20 (1) of the AHC in the context of the right of consent and refusal: "the reason for the restriction is to protect the life, health or physical integrity of others. It does not mean that conducts based on one's conviction are not protected by the regulations, but that conducts based on one's conviction may not result in the violation of the fundamental rights (e.g. the right to life or health) of others. In the opinion of the Constitutional Court, the consent to decisions related to medical care or the refusal of such care may necessarily be restricted on the grounds of protecting the lives, health or physical integrity of others. The provision of the AHC specifying that in such a case – as long as the above conditions prevail – the patient may not exercise the above rights is a proportionate restriction of the conduct based on one's conviction [Decision 36/2000 (X. 27.) AB, ABH 2000, 254]."

[25] 2.3 In its previous decisions, the Constitutional Court has set out the criteria for examining the constitutionality of the penal enforcement system. It established that it is in this phase of holding the individual liable under criminal law that the execution of punitive power affects him most strongly. "Although the legal ground for interfering with the fundamental human rights is undoubtedly based upon the final judgement passed in the criminal procedure, the actual restriction and interference takes place in the phase of penal enforcement. Despite the fact that from a legal point of view, the individual's position is changed by the judgement, in practice, it is the act of execution which causes the actual change [Decision 5/1992 (I. 30.) AB, ABH 1992, 31, 31]."

[26] In its reasoning, the Decision 13/2001 (V. 14.) AB further explained that "the convict is not an object of the execution of the sentence, but a subject who has rights and obligations. A group of the convict's rights comprises the constitutional fundamental rights maintained without restriction or with some modification, while the rest are special rights related to the fact and the conditions of executing the punishment or the criminal measure. The extreme constitutional limits of executing punishments are delimited, on the one hand, by the right to human dignity and personal security and, on the other hand, by the prohibition of torture, cruel, inhuman and humiliating treatment and punishment. More specifically, the acceptable degree of the State's intervention into one's life and of the State restricting one's fundamental rights and freedom on account of the execution of punishments and measures can be deduced from the principle of the rule of law and the constitutional prohibition on restricting the substantial contents of fundamental rights [ABH 2001, 193]."

[27] 3 The Constitutional Court basically examined the element of the petition according to which the law-maker's enactment of a regulation concerning the restriction of the right of health self-determination of convicts in a decree was contrary to the Fundamental Law.

[28] 3.1 The Constitutional Court has already addressed the question of the level of regulation on several occasions. As pointed out in its earlier decisions, it follows from the State's obligation to ensure fundamental rights that such rights may only be restricted in a manner permitted by the current constitution [Decision 27/2002 (VI. 28.) AB, ABH 2002, 146]. In this respect, Article 8 (3) of the Fundamental Law is to be applied, according to which "the rules pertaining to fundamental rights and duties are determined by Acts of Parliament."

According to the case-law referred to above, "[...] not all kinds of relationship with fundamental rights call for regulation at the level of 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 [Decision 64/1991 (XII. 17.) AB, ABH 1991, 300]." The promulgation of rules in the form of a regulation which are also related to constitutional rights, but which affect them only remotely and indirectly, and which are of a technical and non-restrictive nature, is not considered in itself unconstitutional [Decision 29/1994. (V.20.) AB, ABH 1994, 155]." However, in the case of an indirect and remote connection with a fundamental right – it should be stressed that only with respect to the regulation and not the restriction – a regulation by decree is also admissible [Decision 64/1991 (XII.17.) AB, ABH 1991, 300; Decision 31/2001 (VII. 11.) AB, ABH 2001, 261]. Thus it follows that whether there is a need for statutory regulation should be determined on the basis of

the particular measure, depending on the intensity of its relationship to fundamental rights.

[30] 3.2 In accordance with its previous case-law, the Constitutional Court further examined whether the contested provisions of the DHC, which were enacted on the basis of the authorisation pursuant to section 247 (5) of the AHC, contain provisions that fall within the scope of legislation.

[31] Section 4 (3) of the DHC lays down the range and system of criteria under which a convicted person's right to self-determination in relation to the refusal of health-care may be restricted.

[32] According to the interpretation of the Constitutional Court, the right to human dignity includes, as a kind of partial right, the fundamental constitutional right to freedom of self-determination. In line with this interpretation, the AHC contains provisions guaranteeing the right to human dignity in respect of the patients' right to self-determination. It declares that the patients' right to self-determination includes – among others – the right to consent to or refuse medical interventions or care. In this sense, the consent and the refusal related to interventions becoming necessary in the course of medical care may not be separated from the exercise of personality rights. The fundamental right to human dignity is therefore undoubtedly affected in the case of the regulation that sets the framework for the exercise of the right to health self-determination.

[33] However, further examination is required of the aspect of the impact on the intensity and directness of the relationship between the regulation at the level of a decree and the fundamental constitutional right. The Constitutional Court points out, in relation to the provisions relied on: the rules set out in the DCH and challenged by the applicant clearly impose restrictions on the exercise of the right to health-care self-determination of convicts. Its provisions create a specific structure of conditions for the possibility of limitation, based on specific criteria and objectives, thereby defining the limits to the exercise of the right of health-care self-determination of convicts. In this context, the Constitutional Court states that there is no legal instrument which affects the content of a fundamental right more directly and significantly than the restriction of its exercise.

[34] It follows from all this that there is a constitutional requirement for legislation at the level of an Act of Parliament in cases of restriction of the right to health-care self-determination, which is a fundamental right to human dignity. It may also be concluded that the law-maker developed rules contrary to this requirement when it laid down provisions in a decree restricting the right of health-care self-determination of prisoners in section 4 (3) of the DHC.

[35] 3.3 Due to the nature of the contested provision as a restriction of the fundamental right to health-care self-determination, the Constitutional Court found that the rules laid down in of section 4 (3) of the DHC do not comply with the constitutional requirement resulting from the first sentence of Article I (3) of the Fundamental Law, and therefore annulled it on the basis of Article 41 (1) of the ACC, as stated in the holdings of the decision.

[36] Since the violation of the Fundamental Law by the challenged provisions could be established on the basis of Article I (3) of the Fundamental Law, the Constitutional Court did not further examine their content in relation to Article I (1) to (3) and Article II of the Fundamental Law.

[37] 4 The Constitutional Court then examined the alleged violation of the Fundamental Law by section 5 of the DHC.

[38] In his motion, the Commissioner for Fundamental Rights put forward the same arguments as in the case of section 4 (3) of the DHC. He also considered that the obligation imposed on medical staff allows the restriction of a fundamental right in an unnecessarily broad and indeterminate manner and can thus be regarded as manifestly disproportionate.

[39] According to the contested provision, in a case in which section 4 (3) of the DHC provides for a legitimate possibility to restrict self-determination, but the convict refuses to cooperate, even after having been informed, the physician is obliged to carry out the examination or treatment. The decree also stipulates that in such a situation, the measures provided for in the Act CVII of 1995 on the Organisation of Penal Institutions may be used to carry out the treatment.

[40] However, the law-maker has provided that section 5 of the DHC may be applied only in cases falling within section 4 (3). The Constitutional Court therefore assessed the conflict with the Fundamental Law by section 5 of the DHC primarily in the light of its close connection with section 4 (3). In doing so, it concluded that section 5 regulates the consequences of the restriction of the fundamental right laid down in section 4 (3) in relation to the right of convicts to self-determination in health-care by obliging the physician to carry out the examination and provide the care in the cases specified. The purpose of section 5 is therefore clearly technical and its function is to give effect to the requirements laid down in section 4 (3).

[41] On the basis of the foregoing, the Constitutional Court has concluded that the content of section 5 of the DHC is so closely related to the provisions of section 4 (3) that the same consequences apply to it as to the latter provision. Thus, due to the annulment of the rule contained in section 4 (3) of the DHC and the close connection between the provisions, section 5 was also annulled.

[42] 5 In general, according to section 45 (1) of ACC, the law or provision thereof annulled by the Constitutional Court shall cease to have effect on the day after the publication of the Constitutional Court's decision on annulment in the Hungarian Official Gazette and shall not be applicable from that day; a law which has been promulgated, but has not yet entered into force shall not enter into force. However, pursuant to section 45 (4) of the ACC, the Constitutional Court may depart from the general rule when deciding on the annulment of a legislation contrary to the Fundamental Law or on the inapplicability of the annulled law in general, or in concrete cases, if this is justified by the protection of the Fundamental Law, the interest of legal certainty or a particularly important interest of the entity initiating the proceedings.

[43] In the specific case, the Constitutional Court, when determining the date of annulment, took into account the changes that will occur in the near future in the regulation of the enforcement of sentences, and concluded that temporarily keeping the legislation in force results in a lesser breach of legal certainty than if the relevant laws were amended at times close to each other, with excessive frequency. Therefore, the Constitutional Court decided to annul the legislation *pro futuro*, as from 31 December 2013, leaving time for the law-maker to draft new legislation in conformity with the Fundamental Law.

[44] The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based on section 41 (1) of the ACC.

Budapest, 21 October 2013.

Dr. Péter Paczolay, President of the Constitutional Court

Dr. Elemér Balogh, Justice of the Constitutional Court

Dr. András Bragyova, Justice of the Constitutional Court

Dr. Imre Juhász, Justice of the Constitutional Court

Dr. Péter Kovács, Justice of the Constitutional Court

Dr. Miklós Lévay, Justice of the Constitutional Court, rapporteur

Dr. László Salamon, Justice of the Constitutional Court

Dr. Péter Szalay, Justice of the Constitutional Court

Dr. István Balsai, Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, Justice of the Constitutional Court

Dr. László Kiss, Justice of the Constitutional Court

Dr. Barnabás Lenkovics, Justice of the Constitutional Court

Dr. Béla Pokol, Justice of the Constitutional Court

Dr. István Stumpf, Justice of the Constitutional Court

Dr. Mária Szívós, Justice of the Constitutional Court