

## **Decision 11/2014 (IV. 4.) AB**

### **rejecting the petition for a declaration that Section 2:22 (1) and (2) of the Act V of 2013 on the Civil Code are in conflict with the Fundamental Law and contrary to an international treaty**

The Constitutional Court, sitting in plenary session, in a procedure for the ex post examination of the conflict of a law with the Fundamental Law and for the examination of the conflict with an international treaty – with concurring reasoning by Justices dr. *Barnabás Lenkovics*, dr. *László Salamon* and dr. *Mária Szívós* – adopted the following

decision:

The Constitutional Court rejects the petition aimed at establishing that Section 2:22 (1) and (2) of the Act V of 2013 on Civil Code are in conflict with the Fundamental Law and an international treaty, and rejects the petition aimed at their annulment.

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

#### Reasoning

I

[1] 1 In a motion filed with the Constitutional Court on 12 July 2013, the Commissioner for Fundamental Rights (hereinafter referred to as the “petitioner”) initiated the declaration that section 2:22 (1) and (2) of the Act V of 2013 on the Civil Code (hereinafter referred to as the “Civil Code”) are in conflict with the Fundamental Law and in breach of an international treaty, and initiated their annulment.

[2] The challenged paragraphs of the Civil Code regulate juridical acts made by incapacitated adults: without changing the rules of the Act IV of 1959 on the Civil Code (hereinafter referred to as the “old Civil Code”), the juridical act of an incapacitated adult is generally null and void, irrespective of the cause of incapacity, and a custodian acts on his or her behalf and makes a valid juridical act. The Civil Code itself (in the same way as the old Civil Code) creates an exception to the general rule of nullity in the cases defined conjunctively in the contested section 2:22 (2) in the context of the so-called petty transactions.

[3] According to the petitioner, section 2:22 (1) and (2) of the Civil Code violate the right to human dignity as defined in Article II of the Fundamental Law, the right to privacy as declared in Article VI of the Fundamental Law, and are contrary to the

provisions under Article 12 of the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto (hereinafter referred to as CPRD), promulgated by the Act XCII of 2007 and under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and its eight Additional Protocols (hereinafter referred to as the "Convention"), promulgated by the Act XXXI of 1993.

[4] 2 The petitioner is concerned that, under both the old and the current Civil Code, in the case of custodianship which completely excludes or completely restricts the capacity to act, the Act states that only the custodian can make valid legal juridical acts on behalf of the individual under custodianship – the declaration made by the individual under custodianship is therefore automatically invalid – and this is the case even in the most personal decisions affecting the most intimate private sphere (marriage, acknowledgement of paternity).

[5] The petitioner notes that, although under the Civil Code a substitute decision-making may only be ordered as a last resort, it is constitutionally questionable that the imposition of a custodianship, which completely restricts the capacity to act, automatically renders almost all juridical acts null and void. Moreover, there is no constitutional guarantee that, in the course of the custodianship procedure, the proceeding court will be able to consider the legal consequences of a custodianship which completely restricts capacity to act and to determine them on the basis of individual aspects.

[6] According to the petitioner, the legal institution of custodianship (substitute decision making) in the contested provisions of the Civil Code, which completely restricts capacity to act, generally restricts the exercise of certain specific personality rights of the individual concerned, and the affected person's right to human dignity. By not allowing the affected individual to make a valid juridical act, the law-maker disproportionately interferes with his or her private life, restricts his or her freedom of choice, and thus violates his or her right to self-determination and privacy. According to the petitioner, there are many areas of the life of the person concerned, in addition to the legal transactions which occur on a massive scale in everyday life, where the total exclusion of the right to make a valid declaration justifies an examination of proportionality from a constitutional point of view. In the case of the most personal decisions – marriage, suffrage, medical interventions – the fact that they can only be taken on the basis of a substitute decision of the custodian constitutes a disproportionate restriction. It is a constitutional guarantee in the case of custodianship that a judicial decision is always required to impose a general restriction; the petitioner holds that this should also apply to the legal consequences to be applied: the imposition of automatic, indiscriminate legal consequences in individual cases is a violation of the right to human dignity, the right to self-determination and a

disproportionate restriction of privacy. The petitioner does not dispute that the protection of the rights and interests of the persons placed under custodianship and of those who have a legal relationship with them is a legitimate aim in the context of the limitation of rights, but holds that this could also be achieved, for example, by ensuring that they are open to challenge.

[7] 3 With reference to the alleged violation of international treaties, the petitioner argues that the legal consequence of automatic nullity regulated in section 2:22 (1) and (2) of the Civil Code and the disproportionate limitation based on substitute decision-making are contrary to the provisions under Article 12 of the CRPD and exceed the discretion of the States Parties in the implementation of the obligations undertaken. According to the case-law of the European Court of Human Rights, the contested rules also violate and are incompatible with the right to respect for private and family life as declared in Article 8 of the Convention.

[8] The Constitutional Court has obtained the opinion of the Minister for Public Administration and Justice on the petition.

## II

[9] 1 The affected provisions of 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."

"Article VI (1) Everyone shall have the right to respect for his or her private and family life, home, communications and reputation."

[10] 2 The relevant articles of the CRPD:

"Article 12 - Equal recognition before the law

1 States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2 States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3 States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4 States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to

the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5 Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

[11] 3 The relevant articles of the Convention:

"Article 8 Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[12] 4 The challenged provisions of the Civil Code:

"Section 2.22 [Juridical acts of an adult having no capacity to act]

(1) Juridical acts of an adult having no capacity to act shall be null and void; his custodian shall act on his behalf.

(2) Contracts of minor importance concluded and performed by an adult having no capacity to act shall not be null and void for the lack of capacity to act if their conclusion is widely practiced in everyday life and does not require special consideration."

[13] 5 Act IV of 1959 on the Civil Code:

"Section 15/A (1) With the exception of paragraph (2), the juridical act of an incapacitated person shall be null and void; his or her custodian shall act on his or her behalf. The custodian should listen to and, if possible, take into account the wishes and requests of the person placed under custodianship who is able to express an opinion, for example on his/her place of residence, before taking decisions. If the custodian persistently breaches this obligation, it may result in his/her removal under section 19/C (2).

(2) The incapacitated person may himself or herself conclude contracts of minor importance which occur in everyday life on a massive scale and do not require special consideration.”

### III

[14] The petition is unfounded.

[15] 1 The Constitutional Court found that the petitioner is entitled to file a petition for an ex- post review of the statutory provision and for a declaration of its conflict with an international treaty on the basis of Article 24 (2) (e) and (f) of the Fundamental Law and section 24 (2) and section 32 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter referred to as ACC).

[16] In terms of its content, the petition complies with the provisions under section 24 (2) and section 52 (1) of the ACC.

[17] 2 The regulation of legal capacity in the Civil Code has changed significantly compared to the old Civil Code. At the same time, the Civil Code maintains the same principle as the old Civil Code: different rules apply to the capacity of minors and adults. The present case concerns the set of rules on the capacity of adults. In the Civil Code, too, the general rule is that “persons having capacity to act may enter into contracts or make other juridical acts on their own”. [Civil Code, section 2:8 (2)].

[18] The capacity to act may be restricted to a greater extent only if a less severe restriction would not ensure the protection of the rights of the adult person concerned. Section 2:19 of the Civil Code provides for the possibility of partial restriction of capacity to act – affecting certain categories of cases – and also for the possibility of a complete restriction of capacity to act (Section 2:21 of the Civil Code). This is supplemented by assisted decision-making which does not affect capacity to act (Title IX of the Civil Code) and by prior declaration (provision for future limitation of capacity to act, Title X of the Civil Code).

[19] Section 2:21 of the Civil Code provides for a total restriction of capacity to act, which the court may order only “if the protection of the rights of the person concerned cannot be ensured by a means not involving capacity to act or by a partial restriction of capacity to act”. Instead of a general restriction of capacity to act, the court may, on a gradual basis, partially restrict the capacity to act of the adult concerned in respect of a specific category or categories of cases and may restrict it completely only in the last resort, in the event of a permanent and total lack of capacity to cognise, The Civil Code fails to give any guidance – not even an illustrative list – on the possible categories of cases concerned, so the court needs to determine the cases in which

capacity to act should be limited on an individual basis in each case. In all other cases, the person concerned retains full capacity to act.

[20] According to the foregoing, it is no longer possible to order the placing of a person under custodianship excluding capacity to act, since, under section 2:21 (2) of the Civil Code, the mere fact that the person concerned has a permanent and total lack of the discernment necessary for the conduct of his or her affairs – as a result of a mental disorder – does not make a total restriction of capacity to act inevitable. In assessing the latter, account should be taken of the individual circumstances of the person concerned and his or her family and social relationships. Judicial case-law – following the Supreme Court's civil law decision of principle No. 1597/2007 – has so far proceeded in this way, and now the Civil Code already provides for this.

[21] The procedural rules for placing a person under custodianship are laid down in the Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as the CCP). Section 310 (2) of the CCP provides that the proceeding court shall appoint a forensic psychiatric expert to assess the mental state of the person concerned. Under the Civil Code, however, the court cannot base its judgement solely on the opinion of the medical expert, since the expert only gives an opinion on one of the conditions required for the restriction of capacity to act, namely the state of mind. It is for the court to assess the personal circumstances of the person concerned and to examine his or her family and social relationships, and thus to decide on a case-by-case basis to what extent the right of self-determination should be restricted. If a restriction of the capacity to act is necessary at all, the court will decide on the scope of cases in which it is necessary or, in the last resort, will order a complete restriction.

[22] On this basis, it is also possible to lodge a constitutional complaint with the Constitutional Court against a specific judicial decision, as provided for in section 27 of the ACC, if, after exhausting the legal remedies, it is considered that the decision disproportionately infringes the right of self-determination of the person concerned.

[23] Chapter XVIII of the CCP, which contains the rules on custodianship, provides for the status and representation of the persons involved in proceedings: according to section 306 (1), "in proceedings for placement under custodianship, the plaintiff with limited capacity to act and the defendant shall have full procedural capacity to act". In addition, according to section 312 (1), "the termination of a custodianship, the modification, in the case of a custodianship with limited capacity to act, of the categories of cases in respect of which the court has limited the capacity of the person to act, the change of a custodianship with limited capacity to act to a custodianship excluding capacity to act, the modification of a custodianship excluding capacity to a custodianship with limited capacity to act, disqualification from suffrage and the termination of disqualification from suffrage, the action shall be brought against the

person on the basis of whose application the court has ordered the custodianship or against the person placed under custodianship if he or she has applied for the termination or modification of custodianship, disqualification from suffrage or the termination of disqualification from suffrage. If the person on whose application the court has ordered custodianship has died or is in an unknown place or abroad, the action shall be brought against the guardian ad litem appointed by the court". Section 312 (3) declares that "the person placed under custodianship shall have full procedural capacity to act".

[24] 3 The Civil Code introduces differentiated rules with regard to capacity to act: it ensures the protection of the rights of the person concerned, the possibility of enforcing rights even without limiting capacity. This is the purpose of the legal institution of assisted decision-making, which has two cases under section 2:38 of the Civil Code: (1) in the case of a minor impairment of the person's capacity to cognise, the person concerned may apply to the guardianship authority and, in order to avoid the restriction of his or her capacity to act, request the appointment of a support person, which the authority shall decide on; (2) in an action brought for placement under custodianship affecting one's capacity to act the proceeding court may find that the restriction of the person's capacity to act is not justified but that he or she needs assistance in certain matters; it shall notify the guardianship authority of its judgement, rejecting the action for placement under custodianship. In the latter case, the guardianship authority also appoints the support person, in agreement with the person concerned. Under this differentiated system, a person may have limited capacity to act in some cases and be assisted by a custodian, while in other cases he or she may have no capacity limitation but use a support person and otherwise manage his or her affairs independently.

[25] 4 Similarly to assisted decision-making, making a prior juridical act is a new legal institution introduced in Title X of the Civil Code. It provides that adults having capacity to act may make a prior juridical act in a public deed, a private deed countersigned by an attorney-at-law, or in person before the guardianship authority, concerning future limitation of their capacity to act, whether full or partial. This declaration may be aimed at two directions: on the one hand, it can be positive, i.e. naming the person who the person concerned proposes to act as his or her custodian, if necessary, in the future, or negative, i.e. it can exclude certain persons from the scope of potential custodians. In addition, by strengthening the right of self-determination, the person concerned may also determine how the future custodian should act in his or her personal and property matters. For the juridical act to take effect, it is necessary that it be registered [section 2:39 (3) of the Civil Code]. The court will subsequently order the application of the prior juridical act in its decision on placement under custodianship affecting the capacity to act. It is a rule of guarantee that the person making the juridical act may modify the

content of the juridical act and that “if, after the limitation of the capacity to act of the person who made a prior juridical act, the circumstances have changed in such a way that the implementation of the provisions of the prior juridical act would be contrary to the interests of the individual under custodianship, then he, the custodian, the guardianship authority or the prosecutor may request the court not to apply that provision” (section 2:41 of the Civil Code).

[26] No legislation has yet been enacted on the detailed regulation of assisted decision-making and the amendment of the prior juridical acts, and the support service provided for in sections 39/A to 39/E of Decree 1/2000 (I. 7.) SzCsM on the professional tasks of social institutions providing personal care and the conditions of their operation was not created exclusively for the assistance of persons placed under custodianship with full or partial restriction of their capacity to act.

#### IV

[27] 1 The Constitutional Court first examined whether section 2:22 (1) and (2) of the Civil Code, which the petitioner contested, violate the right to human dignity guaranteed by Article II of the Fundamental Law.

[28] The Constitutional Court took a position on the applicability of previous Constitutional Court decisions in the Decision 13/2013 (VI.17.) AB, which was made necessary by the fact that Article 19 (2) of the Fourth Amendment to the Fundamental Law of Hungary (25 March 2013) changed clause 5 of the Final and Miscellaneous Provisions of the Fundamental Law, with effect from 1 April 2013. According to the Decision, “in the course of reviewing the constitutional questions to be examined in the new cases, the Constitutional Court may use the arguments, legal principles and constitutional relationships elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant section of the Fundamental Law and of the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed. The Constitutional Court may, subject to the above conditions, refer to or cite the arguments and legal principles developed in its previous decisions, indicating the source of the repealed decision of the Constitutional Court, and presenting the content or text of the substantive constitutional issue raised in the case in question to the extent and scope necessary for the decision. In a democratic state governed by the rule of law, the reasoning and sources of constitutional law should be accessible and verifiable for everyone, and the need for legal certainty requires that the considerations in the decision be transparent and comprehensible.” {Reasoning [32] to [33]}.



[29] Article II of the Fundamental Law is identical in content –and to a large extent verbatim – to the provision contained in Article 54 (1) of the former Constitution. The Fundamental Law emphasises the founding role of human dignity in its value system even more strongly than the Constitution: it explicitly declares human dignity to be “inviolable”. The Constitutional Court therefore finds no reason to change its previous understanding of human dignity. Thus, the Constitutional Court considers its position laid down in its previous decisions on the right to human dignity to be applicable to the present case as well. This understanding does not consider the right to self-determination, despite its fundamental nature, to be unrestrictable.

[30] Accordingly, the fundamental element of human dignity is the equal freedom and equal worth of all human beings. The consequence of equal liberty is the legal self-determination of each individual, which is “inviolable” according to the Fundamental Law. Human self-determination – determination for oneself – is the legal realisation of equal liberty: every human being may decide for himself or herself on fundamental moral and practical matters of his or her own life without external coercion; this right may be restricted only in exceptional cases. Rejecting this concept would result in the need to accept the right of certain persons to dispose of other people's lives, which would be contrary to the value system of the Fundamental Law. This is of paramount importance in the case in point – the restriction of capacity to act – because it is precisely a case of someone else acting in the place of the person entitled to act, because he or she is incapable of doing so. In this case, care must be taken to ensure that the custodian does not dispose of the life of the incapacitated person/human being, but takes decisions in his/her place, but as far as possible, on his/her behalf.

[31] The Constitutional Court in its Decision 36/2000 (X.27.) AB has analysed and summarised in detail the nature of the right to self-determination and the possibility of limitation: “in the opinion of the Constitutional Court, the right of self-determination is attached to the person as the manifestation of the autonomy to act originating from human dignity. It is a separate issue that legal rules may, in certain cases, restrict the right of self-determination (by setting conditions, or by not acknowledging the enforcement thereof). When the law institutionalises the action of another person in the scope of an individual's autonomy to act, the right of self-determination is not »transferred« to anyone. »Exercising one's rights in one's stand« empowers the other person to make a decision and, at the same time, restricts the right of self-determination; »exercising one's right of self determination in one's stand« is not possible theoretically as the right of self-determination is inseparable from the individual's personality. Under Article 54 (1) of the Constitution, in the Republic of Hungary every human being has the inherent right to life and to human dignity, of which no one shall be arbitrarily deprived. 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 [Decision 64/1991 (XII.17.) AB, ABH 1991, 258 to 294]. However, the partial rights deducted from its nature as a mother right (such as the right of self-determination and the right to one's physical integrity) may be restricted in accordance with Article 8 (2) of the Constitution just as any other fundamental right [Decision 75/1995 (XII.21.) AB, ABH 1995, 376, 383]".

[32] Human dignity, as a right to self-determination, is seriously affected by the deprivation or restriction of the capacity to act. In this context, the Constitutional Court stated in the Decision 74/2009. (VII.10.) AB: "the existence of the capacity to act is indispensable not only in judicial and administrative proceedings, but also in the legal relations between private parties. The primary purpose of the rules on placement under custodianship is to protect the person and property of an adult who is incapable of managing his or her affairs and is therefore vulnerable. Custodianship is an institution that helps people whose decision-making capacity is permanently or temporarily impaired because of mental illness or mental incapacity. It appoints a custodian to manage their affairs. In cases of total lack of decision-making capacity, the custodian acts independently. This is why section 15/A (1) of the Civil Code provides that the juridical acts of an incapacitated person are null and void, with the exception of contracts of minor importance which occur in large numbers (e.g. the purchase of bus tickets). The starting point of the rule is that the decision-making capacity of a person who has been placed under custodianship because of incapacity to act is impaired to such an extent that the law must also protect the person concerned from the consequences of his or her own decisions. In this case, the custodian of a person who is incapable of representing him/herself can indeed help to enforce the fundamental rights of the person who is the subject of the custodianship. [Decision 1071/B/1998 AB, ABH 2002, 901, 903] However, the provisions relating to the imposition of custodianship are intended to protect not only the person who is placed under custodianship, but also the personal and property interests of the persons who enter into a legal relationship with the person placed under custodianship. In order to ensure the security of transactions, it is appropriate that a custodian should be appointed by the court in the course of the action brought for placement under custodianship for persons who are unable to make decisions independently in personal and property matters, to manage their affairs. It is the consent or subsequent approval of the custodian that makes certain juridical acts made by the person placed under custodianship valid". [ABH 2009, 750, 758-759.]

[33] The rules under review undoubtedly restrict the individual's right to self-determination. The fundamental right is limited by any general statutory regulation – which normally can only be an Act of Parliament according to Article I (3) of the Fundamental Law – and by any individual administrative act, judicial decision or other state action based on it, which interferes with the scope of protection of the

fundamental right. The scope of protection is the totality of the conducts and legal situations protected – permitted or guaranteed – by the fundamental right. A norm interfering with any conduct or legal situation within the scope of protection of a fundamental right requires justification under fundamental rights. The finding of interference with the scope of protection of a fundamental right does not imply that the legislation is unconstitutional, only that a constitutional review is justified. The constitutionality of the legislation under scrutiny depends on the outcome of this examination: not all restrictions of fundamental rights are unconstitutional.

[34] The petitioner is correct in his assertion that the nullity of the juridical acts of the persons under custodianship and the exclusion of the most personal declarations restrict the right to human dignity of the person concerned. According to the petitioner, this restriction is contrary to the Fundamental Law, in particular: it is necessary but disproportionate. The Constitutional Court examined the constitutionality of the restriction accordingly.

[35] In the light of the Constitutional Court's case-law, the restriction of fundamental constitutional rights has developed as follows. The wording of Article I of the Fundamental Law is identical to Article 8(2) of the Constitution in that the rules governing fundamental rights and obligations shall be laid down by Acts of Parliament. According to Article 8 (2) of the Constitution, not even an Act of Parliament could restrict the essential content of a fundamental right. Further requirements of the restriction were laid down by the Constitutional Court in the so-called test of fundamental rights the essence of which is that "the State may only use the tool of restricting a fundamental right if it is the sole way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved 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. Restriction of the content of a right is unconstitutional if it is arbitrary and without compelling justification, or if the severity of the restriction is disproportionate to the aim pursued" Decision 30/1992 (VI.26.) AB, ABH 1992, 167, 171].

Thus, according to the case-law of the Constitutional Court, the restriction of a fundamental right is deemed proportionate "if the importance of the purported objective is proportionate to the related restriction of the fundamental right concerned" and "the law-maker is bound to employ the most moderate means suitable for reaching the specified purpose" [Decision 30/1992 (V.26.) AB, ABH 1992, 167, 171; and in: Decision 20/1990 (X.4.) AB, ABH 1990, 69, 71; Decision 7/1991 (II.28.) AB, ABH

1991, 22, 25; Decision 11/1992 (III.5.) AB, ABH 1992, 77, 85; Decision 11/1993 (II.27.) AB, ABH 1993, 109, 110; Decision 22/1999 (VI.30.) AB, ABH 1999, 176, 194 to 195; Decision 18/2000 (VI.6.) AB, ABH 2000, 117, 123].

[37] The Fundamental Law makes this case-law a written rule when it provides [Article I (3)] that a fundamental right may be limited to the extent strictly necessary for the exercise of another fundamental right or for the protection of a constitutional value, in proportion to the aim pursued. There is also a similarity of content between Article I of the Fundamental Law and Article 8 (2) of the Constitution as regards the protection of essential content.

[38] On this basis, the Constitutional Court had to examine whether the contested legislation restricts the right to human dignity and, if so, whether it does so in a constitutionally permissible manner. The Constitutional Court, like other constitutional courts and the European Court of Human Rights and the European Court of Justice, examines the restriction of fundamental rights by the standard of necessity and proportionality (or only proportionality). [Decision 6/1998 (III.11.) AB, ABH 1998, 98 to 99; Decision 18/2000 (VI.6.) AB, ABH 2000, 122 to 123, 130].

[39] This standard, contrary to the Constitution, is based on a specific basis expressed in the Fundamental Law: Article I (3) of the Fundamental Law – based on the previous case-law of the Constitutional Court, primarily on the basis of the Decision 30/1992 (V.26.) AB [ABH 1992, 167, 171] – defines the conditions for the restriction of fundamental rights.

[40] The necessity of the restriction of a fundamental right consists of two elements: the restriction of the fundamental right has to follow a constitutional aim and it has to be suitable for achieving the aim. The petitioner does not dispute that the protection of the rights of persons with diminished capacity to discern is a constitutional objective, the achievement of which may be achieved by narrowly restricting the ability to make juridical acts. The differentiated system of the Civil Code allows for the possibility that the complete restriction of capacity to act, as the most serious measure, may only be applied in a narrow range of exceptional cases to persons with a mental condition where the involvement of a custodian is indispensable to safeguard their rights (interests).

[41] Proportionality (in the strict sense) requires that the necessary restriction should not be more than is necessary to achieve the constitutionally justified aim. In particular, it should be examined whether there is a less restrictive way of achieving the constitutional objective than the one chosen by the law-maker in the particular case. The Civil Code only permits placemen under custodianship with a total restriction of capacity to act [section 2:21 (3)] if “the protection of the rights of the person concerned cannot be ensured by a means not involving capacity to act or by a partial restriction

of capacity to act". This clause is sufficient, at the level of the abstract normative control, to ensure the proportionality of the restriction of capacity to act that may be ordered by the court. The main guarantee of proportionality is judicial control over the restriction of capacity to act. Therefore, a more detailed constitutional review would only be possible in the case of an examination of judicial decisions on the basis of a constitutional complaint [Article 24 (2) (d) of the Fundamental Law and sections 27 to 28 of the ACC]. This is reinforced by the regular, mandatory review of court decisions under section 2:29 of the Civil Code.

[42] The detailed rules of the methods of restriction, the appointment of the custodian, his/her responsibility (rules on control, care) and procedure are not contained in the Civil Code (or the old Civil Code), but in the Government Decree 149/1997 (IX.10.) on guardianship authorities and child protection and guardianship procedures (hereinafter referred to as GDCP). The petitioner did not request its examination, but the Constitutional Court also took this legislation into account on the basis of Article 24 (4) of the Fundamental Law, because of the close connection between the relevant provisions. According to this provision, abuse or negligence of an adult person who has been placed under custodianship with the partial or full restriction of the capacity to act may result in the custodian failing to fulfil his or her statutory obligations (under the GDCP) or possibly making a decision which is contrary to the wishes and interests of the person placed under custodianship. These problems are due to the lack of guarantees in the procedural rules governing the establishment and operation of the custodianship [prevention of abuse, training of custodians: Decree 25/2003 (V.13.) ESzCsM on the qualification requirements for professional custodians].

[43] The restriction of the capacity to act, even a total restriction, under the Civil Code restricts the person placed under custodianship only in legal transactions, not in other actions which do not have legal effect, that is to say, in his or her personal freedom.

[44] Section 6:4 (1) of the Civil Code defines juridical acts, on the basis of which: "juridical act means a declaration of intent aiming at producing legal effect". The inviolability of human dignity, including the right to self-determination, requires that the personal freedom of the person under custodianship in his or her manifestations and actions which do not constitute a juridical act (everyday actions) [Article IV (1) of the Fundamental Law] be preserved to the greatest extent possible. It is true that the reason for the custodianship restricting the capacity to act – in most cases a mental illness or pathological condition – may justify a restriction of the personal freedom of the person under custodianship. However, this is not regulated by the Civil Code, but by Chapter X (sections 188 to 201/B) of the Act CLIV of 1997 on Health-care (hereinafter referred to as the AHC).

[45] Sections 201 to 201/B of the AHC contain procedural rules on the institutionalisation of psychiatric patients. Pursuant to section 201 (10), "if the forensic psychiatrist's expert opinion is that the patient's mental capacity to manage his or her affairs is reduced or lacking, the court shall send the expert opinion to the guardianship authority for the purpose of initiating proceedings for placement under custodianship". The Decision 36/2000 (X.27.) AB cited above analysed in detail the procedural rules relating to the institutionalisation of persons with mental disorders: "the procedural rules related to the institutional treatment of persons with mental disorders are partly based on the rules of the AHC and partly on the relevant provisions of the Act III of 1952 on the Code of Civil Procedure. This procedure is administered by the courts as it is necessitated by the protection of the interests of mental patients. The AHC specifies short deadlines for the court to pass a decision and it serves the purpose of a guarantee to decide within a short period of time. (Short deadlines also follow from Article 5 item 1 (e) and item 4 of the European Convention of Human Rights – quoted earlier.) The AHC provides that within 72 hours, the court shall investigate to determine whether the conditions of voluntary treatment are being met [section 197 (5) of the AHC]. The same deadline of 72 hours apply to delivering the decision in case of an emergency treatment [section 199 (2) of the AHC] and the deadline is 15 days for mandatory treatments [section 200 (3) of the AHC]. The above facts alone may justify the need for a non-litigious procedure. It shall be considered as a guarantee that in respect of both voluntary treatment and emergency or mandatory treatment the AHC provides for the rule that the court shall hear – among others – the patient before adopting a decision [section 197 (5), section 199 (6), section 200 (4) of the AHC]. Finally, it must be noted that in the court procedure (sensitive) data may be revealed concerning the patient's state of health that may otherwise lead to the exclusion of the public. The Constitutional Court has established on the basis of the above that there are reasonable grounds to use a non-litigious procedure as applicable in the medical treatment and care of psychiatric patients and the provisions concerning the concrete procedures secure even within a non-litigious procedure the guarantees that would be enforced in a lawsuit." [ABH 2000, 241, 265 to 266.]

[46] Since persons placed under custodianship with the total exclusion of their capacity to act are typically treated in hospital or institutional care, the Constitutional Court could consider this issue in detail when examining the constitutionality of the relevant legislation, on the basis of an appropriate petition. Suffice it to say here that the restriction of the capacity to make a juridical act should not constitute an unjustified restriction on the personal freedom of the person concerned. This would require a specific law, such as sections 15 to 19 of the AHC. The same applies as appropriate to the partial restriction of the capacity to act.

[47] Section 4:10 (1) of the Civil Code provides that the marriage of a person who is incapacitated due to placement under custodianship is invalid. According to the petitioner, this is a disproportionate restriction: in his view, therefore, it should be possible for a person who is completely incapacitated to marry, at least with the assistance of the custodian, if there is no other solution. This would, however, be contrary to the personal nature of marriage [Article L (1) of the Fundamental Law and section 4:5 (1) of the Civil Code], since the juridical act would be made by the custodian (or giving consent in the case of assisted decision-making), which would be a marriage by proxy, which is not recognised by Hungarian law: marriage can only be contracted in person. The only narrow exception to this rule in Hungarian law was in wartime: at the end of 1916, an attempt was made to increase the very low marriage rate by introducing the institution of the so-called "distance marriage". The Decree No 3.984/1916 M.E. on the exceptional permission to marry by proxy (entered into force on 1 December 1916) allowed prisoners of war, hostages and displaced persons under enemy authority to be represented by proxy at their marriage. In the power of attorney, designating the name of the proxy, the person concerned had to indicate with whom he wished to marry, and on this basis the proxy, by reference to his capacity as such, would then substitute the person who gave the power of attorney in the marriage in accordance with the normal marriage formalities. Instruction No. 60.300/1916 I.M. laid down the procedure to be followed for marrying by proxy and for registering such marriages. Decree No 925/1917 M.E. supplementing Decree No 3.984/1916 M.E. also provided that persons on military service during the war "who are under the care of a medical institution, whether military or civilian, in or near the area of military operations" could also marry by proxy." (Taking force on 9 March 1917.)

[48] Circular decree No. 37.119/1917 B.M. contained detailed provisions on the above legislation. Finally, Decree No. 5.230/1922 M.E. repealed the legislation authorising marriages by proxy. [Source: Heinz Ervin: Népesedéspolitikai intézkedések 1945 előtt. Demográfia. 2000. Vol 4, 477 to 498. [http://www.demografia.hu/letoltes/kiadvanyok/Demografia/2000\\_4/Heinz.pdf](http://www.demografia.hu/letoltes/kiadvanyok/Demografia/2000_4/Heinz.pdf) (19 February 2014)]

[49] In the light of the above, the Constitutional Court found no violation of Article II of the Fundamental Law and dismissed the petition in this respect.

## V

[50] 1 The Constitutional Court further examined whether section 2:22 (1) and (2) of the Civil Code violate Article VI (1) of the Fundamental Law.

[51] The Decision 32/2013 (XI.22.) AB defined the scope of protection of this right as follows: "in terms of the essence of privacy, however, the general statement, developed in the former case-law of the Constitutional Court can be maintained, specifying as the essential conceptual element of privacy that others should not have the possibility to intrude or even look into it despite of the will of the affected person [Decision 36/2005 (X. 5.) AB, ABH 2005, 390, 400]. There is a particularly close link between the right to privacy enshrined in Article VI (1) of the Fundamental Law and the right to human dignity granted in Article II of the Fundamental Law. Article II of the Fundamental Law lays down the foundations for the protection of an untouchable realm of developing one's privacy, which is closed against any intrusion by the State as it is the basis of human dignity. However, according to the Fundamental Law, the protection of privacy is not limited to the inner or intimate sphere also protected by Article II of the Fundamental Law, but is also extended to privacy in the broad sense (keeping contacts) and also to the spatial sphere where one's private and family life evolves (home). In addition to the above, the image of an individual's life (the right to reputation) also enjoys individual protection." (Reasoning [83] to [84]).

[52] The Constitutional Court has also interpreted Article VI (1) of the Fundamental Law in its Decision 19/2013 (VII.19.) AB in the context of the operation of the national security services: "under Article VI (1) of the Fundamental Law, everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. The Fundamental Law significantly extends the right to undisturbed privacy as compared to the rules of the previous Constitution. The term private secret is not used in the Fundamental Law, protecting instead the private and family life, home and communications. From a constitutional point of view, it is a matter of concern that the provisions referred to "continuously" allow the inspector to collect data that reveal the most intimate and protected areas of the privacy of the person subject to national security screening, limiting the inviolability of private home and privacy, too. [...] The application of the suspended rules of the amendment of the Act on National Security could cause serious and irreparable consequences of significant disadvantage by interfering with the private life of the person concerned, within a foreseeable period after entry into force. This is so because, after entry into force, the persons concerned would, in the wording of the Act, be under continuous control. In the course of examining sections 9 and 13 of the amendment of the Act on National Security the existence of a breach of the Fundamental Law may be presumed on the basis of the State's obligation to respect the fundamental right to the protection of private and family life and the home, as enshrined in Article VI (1) of the Fundamental Law. Those provisions of the amendment of the Act on National Security contain severely restrictive provisions which, by their manner, continuity and extent of interference with the private sphere, are likely to constitute an infringement of the fundamental right. The restriction of a fundamental right becomes disproportionate if



the national security screening in question is not a periodic, purpose-specific check but may be carried out continuously over a relatively long period of time, even without the occurrence of a specific circumstance giving rise to the check and without a specific purpose, that is to say, it constitutes a general screening and investigation activity". (Reasoning [23] to [28]).

[53] In the petitioner's view, the restrictions set forth in the challenged section 2:22 (1) and (2) of the Civil Code are disproportionate to the persons concerned, since they cannot make the most personal statements of life without the decision of the custodian or statutory representative, thus alleging the violation of Article VI (1) of the Fundamental Law.

[54] The rules of the Civil Code do indeed exclude the possibility for the persons concerned to make a statement, but the legislation is not directly aimed at restricting the right to privacy; it lays down a legal consequence for a decision to impose custodianship which completely restricts one's capacity to act. Even in the event of the possible annulment of the contested section 2:22 (1) and (2), the general rule laid down in section 2:8 (2) of the Civil Code would remain in force, according to which a person with capacity to act may conclude a contract or make other juridical act. The violation of the Fundamental Law challenged by the petitioner, the infringement of the right to privacy does not result directly from the provisions of the Civil Code challenged, but from the deficiencies of the detailed rules on the objective criteria, procedure and control of the selection of the custodian, as well as the deficiencies of the detailed rules on the development of complaint mechanisms (which ensure the review of the custodian's failure to act).

[55] What has been said in point IV on personal liberty also applies, as appropriate, to the right to privacy. Freedom of private life is closely linked to personal freedom, since freedom of private life is impossible without personal freedom. Respect for private and family life, which is a fundamental right under Article VI of the Fundamental Law, requires that the State should not interfere in the intimate sphere of the individual. Article 59 of the Constitution recognised this right as a right to reputation, the inviolability of the private home and the protection of private secret (or similar rights). Respect for private and family life means, in addition to the prohibition of State interference, that information about private life should not be disclosed or come to the knowledge of the State without the consent of the person concerned (or by virtue of the law). It also includes the traditional fundamental right to the inviolability of the private home, specifically referred to by that name in the Constitution, since private home is the scene of private life – but it is not relevant in this case. Part of the protection of privacy is the right to the protection of personal data, which is contained in Article VI (3) of the Fundamental Law and which the Constitutional Court has understood as a "right of informational self-determination" since the Decision 15/1991 (IV.13.) AB [ABH

1991, 40, 44 to 57.]. »Personal data« is in any case information about one's private and family life; thus, the law allows one to have information about one's private and personal life exclusively at one's disposal: it follows that its restriction is permissible under the conditions of the fundamental right restriction. Self-determination is possible if each person decides what information about himself or herself – about the person's private life (which is his or her own life) and family life – he or she shares and with whom. This approach has not been changed by the Fundamental Law, because the Fundamental Law, just as the Constitution, includes the concept of the "protection of personal data", and, unlike the Constitution, explicitly considers it as a fundamental right. ["Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected." [Article VI (1) of the Fundamental Law.]

[56] Any form of placement under custodianship restricts the right to privacy of the individual placed under custodianship, since the custodian has access to information (data, knowledge) relating to the private and family life of the person placed under custodianship, to larger or lesser extent depending on the circumstances, but in any case without the consent of the individual placed under custodianship – with the authorisation of the public authorities, more specifically the court and the guardianship authority. The necessity of the restriction is not disputed by the petitioner, and its proportionality can be established on the basis of the rules of the Civil Code, within the framework and the limits of the abstract norm control. Pursuant to section 2:19 (2) of the Civil Code, in the case of a person with limited capacity to act, the court shall determine the categories of cases in which the person's capacity to act is limited "having regard to his or her individual circumstances and family and social relationships". The quoted turn of phrase is acceptable for the protection of family and private life, since the scope of the concepts mentioned in the law is coextensive with the concept of privacy under the Fundamental Law. The Civil Code thus obliges the court to protect the privacy of the individual placed under custodianship – to the extent this is compatible with the protection of the rights of the person concerned. A more detailed constitutional review would only be possible on the basis of a constitutional complaint under section 27 of the ACC, because the regulation is a general clause.

[57] On the basis of the foregoing, the Constitutional Court also found no violation of Article VI (1) of the Fundamental Law.

## VI

[58] In the present case the petitioner also alleged a violation of Article 12 of the CRPD and Article 8 of the Convention. According to section 32 (2) of the ACC, the infringement of an international treaty may be raised by a quarter of the members of

Parliament, the government, the president of the Curia, the prosecutor general, the commissioner for fundamental rights and, under certain conditions, a judge acting in a particular case.

[59] 1 The petitioner is of the opinion that by enacting the challenged section 2:22 (1) and (2) of the Civil Code, the law-maker exceeded the scope of discretion of the States Parties in the implementation of the obligations undertaken, since the objectives of the CRPD could be achieved by introducing assisted decision-making.

[60] The Constitutional Court had to examine whether the contested provisions of the Civil Code were contrary to Article 12 of the CRPD. In making that assessment, the Constitutional Court had to take into account not only Article 12 of the CRPD, but also the objectives and principles.

[61] The foreseen objectives of the CRPD, together with the definition of disability, are set out in Article 1 as follows: "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

[62] This definition of disability is therefore much broader than that in the Civil Code [section 2:21 (2)], since it covers not only mental disorders but also physical and sensory impairments. In addition, Article 3 of the CRPD lists equal opportunities and access as general principles.

[63] The Constitutional Court, in its Decision 40/2012 (XII.6.) AB, analysed the above-mentioned provisions of the CRPD in the context of the provision of benefits to persons with disabilities and noted that "the different branches of law use different concepts of disability. [...] Therefore, the Constitutional Court based its interpretation of the Fundamental Law on the definition of the term used in the Act XCII of 2007 on the promulgation of the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, adopted in the framework of the United Nations. [...] This definition covers both cases where a person's disability is congenital and cases where the impairment occurs over time or as a result of, for example, an accident. Article XV (5) of the Fundamental Law, when it refers to people with disabilities, therefore requires measures to promote equal opportunities for this group of persons. The provision of such measures is an obligation of the State under Article XV (4) and (5) of the Fundamental Law. This is referred to in the wording of the Fundamental Law, according to which Hungary »assists« and »protects« those in need by means of special measures. The emphasis on assistance and protection means that the State should not only fulfil its duty to protect fundamental rights, which otherwise derives from Article I (1) of the

Fundamental Law, but is also obliged to take additional measures to ensure equal opportunities. In contrast to the existing measures, these provisions of the Fundamental Law, with regard to the equal dignity of the human person, which is the ultimate basis of equality (Articles I and II of the Fundamental Law), impose the substantive requirement to promote the full and equal (with those who are not in need) participation of the needy in society as soon as possible." (ABH 2012, 229, 246-247)

[64] The Civil Code is not in conflict with Article 12 (2) of the CRPD, since according to section 2:8 (1) of the Civil Code, "everyone shall have the capacity to act, unless his capacity is limited by this Act or by court judgment on placement under custodianship". Thus, the requirement set out in Article 12 (2) of the CRPD is fulfilled, as the mere fact that a person is disabled does not automatically render him or her incapable.

[65] The obligation laid down in Article 12 (3) of the CRPD – that persons with disabilities shall receive all assistance from the State in exercising their capacity to act – is guaranteed by the Civil Code by means of the legal instruments of placement under custodianship (Title VII of the Civil Code), assisted decision-making (Title IX of the Civil Code), which has already been analysed, and prior juridical acts (Title X of the Civil Code).

[66] The differentiated system of rules on capacity to act under the Civil Code is in line with the provisions of Article 12 (4) of the CRPD. The conclusion to be drawn from the analysis of paragraph 5 of the CRPD is that Article 12 does not prohibit the institution of substitute decision-making, since only through differentiated rules and individualised judicial decisions can the person concerned in his or her capacity to act be given assistance which is appropriate to his or her condition and thus provides adequate protection in the exercise of his or her rights.

[67] The Civil Code complies with the supportive-helpful model formulated in Article 12 of the CRPD, since in section 2:39 it provides for the possibility of making a prior juridical act; in section 2:22 (3) it states that the interests of the person concerned shall prevail; in section 2:21 it declares that the appointment of a general custodian may only be made in exceptional cases on the basis of a court judgement; and in section 2:19 (4) it reinforces the subsidiary nature.

[68] On this basis, the Constitutional Court has held that the challenged paragraphs (1) and (2) of section 2:22 of the Civil Code do not infringe Article 12 of the CRPD.

[69] 2 The petitioner also invoked a violation of Article 8 of the Convention. According to the said Article of the Convention, "everyone has the right to respect for his private and family life, his home and his correspondence" – similarly to the wording of Article VI (1) of the Fundamental Law. The petitioner holds that the contested provisions of the Civil Code, by declaring the application of fully restrictive custodianship,

automatically nullify the most personal declarations of the person concerned and are therefore incompatible with Article 8 of the Convention.

[70] The Constitutional Court has held that paragraphs (1) and (2) of section 2:22 of the Civil Code do not contain any provision contrary to Article 8 of the Convention. The rules of the Civil Code relating to capacity to act and the restriction thereof contain important guarantees: the restriction of capacity to act, whether partial or total, may be imposed only on the basis of a court judgement, in which, in addition to the opinion of a forensic psychiatrist, the court shall examine all the circumstances of the person concerned, his personal and family circumstances.

[71] Pursuant to section 310 (2) of the CCP, "the court shall appoint a forensic psychiatric expert to examine the defendant's mental state and to assess the question specified in section 11/A of Act C of 1997 on Electoral Procedure. The appointment of a psychiatric expert may be dispensed with only for the reasons set out in section 309 (3). If, in connection with the expert examination, the defendant needs to be observed for a prolonged period or if the defendant fails to appear at the expert examination despite repeated summons, the court may order the defendant to be placed in an appropriate in-patient hospital for a period not exceeding thirty days. A separate appeal may be lodged against this decision". On this basis, the court shall order a hearing of the person concerned and make a specific provision on the question of disqualification from suffrage.

[72] 2.1 The petitioner relies on a number of judgements of the European Court of Human Rights (hereinafter referred to as the "Court") [ECtHR, Shtukaturv v Russia (44009/05) 27 March 2008; ECtHR, Krušković v Croatia (46185/08) 21 June 2011; ECtHR, X and Y v Croatia (5193/09) 3 November 2011], which found a violation of Article 8 of the Convention. Looking at the cases cited by the petitioner and the ECtHR cases Salontaji-Drobnjak v Serbia (36500/05), 13 October 2009; ECtHR, Lashin v Russia (33117/02), 22 April 2013, it should be pointed out that the Court found a violation of Article 8 of the Convention in the above cases because there was no possibility of review after the imposition of a custodianship order which completely restricted capacity to act. In the case Lashin v Russia (33117/02), 22 April 2013, the Court also refers to its finding in Shtukaturv v Russia (44009/05), 27 March 2008, that the disqualification was for an indefinite period, which could be changed only at the request of the custodian.

[73] According to section 2:29 (1) of the Civil Code: "the court shall, in the judgement ordering, maintaining or modifying the limitation of capacity to act, specify the date of launching the statutory review of the placement under custodianship; this date

(a) shall not exceed five years from the date when the judgement became final and binding, with regard to partial limitation of the capacity to act;

(b) shall not exceed ten years from the date when the judgement became final and binding, with regard to full limitation of the capacity to act.”

[74] Pursuant to section 2:29 (2) of the Civil Code, the guardianship authority shall initiate the review proceedings *ex officio*. The action may aim at terminating the placement under custodianship limiting partially or fully the capacity to act, maintaining its effects, changing custodianship partially limiting capacity to act to custodianship fully limiting capacity to act, changing custodianship fully limiting capacity to act to placement under custodianship partially limiting capacity to act or, with regard to custodianship partially limiting capacity to act, for modifying the categories of affairs covered by the limitation.

This is in line with the provisions of section 312 (2) of the CCP and section 144 (3) to (4) of the GDCP.

[75] The arguments put forward on alleging of a breach of Article 8 of the Convention are therefore unfounded, since under the Civil Code (and under section 14/A of the old Civil Code), after the expiry of the period laid down by the Act, custodianship orders imposing not only partial but also total restrictions on capacity to act shall be reviewed at the initiative of the authority (guardianship authority). The review is initiated by the guardianship authority *ex officio* (it has no discretionary power in this respect), after the expiry of the statutory period following the judgement has become final.

[76] Consequently, no violation of Article 8 of the Convention by paragraphs (1) and (2) of section 2:22 of the Civil Code can be found, and the Constitutional Court has therefore rejected the petition in this respect as well.

[77] The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of section 44 (1) of the ACC.

Budapest, 1 April 2014.

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*Dr. Elemér Balogh* Justice of the Constitutional Court

*Dr. István Balsai* Justice of the Constitutional Court

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