Decision 39/2007 (VI. 20.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a constitutional complaint seeking posterior examination of the unconstitutionality of a statute, and acting *ex officio* for the elimination of an unconstitutional omission of legislative duty, the Constitutional Court has – with dissenting opinions by *dr. Péter Kovács* and *dr. Barnabás Lenkovics*, Judges of the Constitutional Court – adopted the following

d e c i s i o n:

1. The Constitutional Court holds that the second sentence in Section 58 para. (4) of Act CLIV of 1997 on Healthcare is unconstitutional, and therefore annuls it as of the publication date of this Decision.
Section 58 para. (4) of Act CLIV of 1997 on Healthcare shall remain in effect as follows: "(4) If the person obliged to receive vaccination fails to comply with this obligation in spite of a written warning, the health authority will order the vaccination through a decision."

2. The Constitutional Court holds that Section 4 para. (2) of Minister of Healthcare Decree 9/1972 (VI. 27.) EüM on the Implementation of the Epidemiological Provisions of Act II of 1972 on Healthcare was unconstitutional.

3. The Constitutional Court rejects the petition that would prohibit the application in the concrete case of Section 4 para. (2) of Minister of Healthcare Decree 9/1972 (VI. 27.) EüM on the Implementation of the Epidemiological Provisions of Act II of 1972 on Healthcare.

4. Acting *ex officio*, the Constitutional Court establishes that an unconstitutional situation violating Article 50 para. (2) and Article 57 para. (2) of the Constitution has resulted from the omission of the Parliament to provide for an effective legal remedy against rejecting to grant immunity from compulsory vaccination.
The Constitutional Court therefore calls upon Parliament to meet its legislative duty by 31 March 2008.

5. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and annulment of Section 58 paras (1) and (3) and the first sentence in para (4) of Act LIV of 1997 on Healthcare.

6. The Constitutional Court rejects the constitutional complaint seeking declaration of the unconstitutionality of Section 4 paras (1) and (3) of Minister of Healthcare Decree 9/1972 (VI. 27.) EüM on the Implementation of the Epidemiological Provisions of Act II of 1972 on Healthcare.

7. The Constitutional Court rejects the constitutional complaint seeking declaration of the unconstitutionality of Section 6 para. (3) of Act II of 1972 on Healthcare.

8. In other respects, the Constitutional Court rejects the petitions.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

Through an administrative decision the Tata Institute of the National Public Health and Medical Officer Service obliged the petitioner spouses to have their children receive the vaccination they had missed. The authority declared the decision enforceable regardless of any appeal. The petitioners appealed, but the Komárom-Esztergom County Institute of the National Public Health and Medical Officer Service upheld the decision of first instance.

Following this, the petitioners initiated court proceedings for the review of the administrative decision. The Town Court of Tatabánya as the court of first instance rejected the claim by its judgement No 9.P.22.419/1994/11 dated 16 October 1995. The petitioners appealed, and the Komárom-Esztergom County Court as the appellate court upheld the judgement of the court of first instance by its judgement No Kf.20.264/1996/3 dated 18 June 1996. However, the holdings of the appellate judgement declared that the court would omit the early enforceability of the administrative decision and it also omitted a sentence from the court of first instance judgement that had questioned the parenting skills of the petitioners.

Based on the reasoning of the appellate judgement, the parents were obliged to comply with the public health related provisions in Section 6 paras. (2) and (3) and Section 7 para. (3) of Act II of 1972 on Healthcare (hereinafter: AH1) and Sections 1 to 4 of Minister of Healthcare Decree 9/1972 (VI. 27.) EüM on the Implementation of the Epidemiological Provisions of Act II of 1972 on Healthcare (hereinafter: D1) and have their children receive the vaccination they had missed. In the reasoning of the judgement, the appellate court discussed the petitioners' position explained in the statement of claims, according to which compulsory vaccination was contrary to their religious beliefs and ideology. As pointed out by the court, under Article 60 of the Constitution everyone has the right to the freedom of thought, freedom of conscience and freedom of religion, yet – unless otherwise provided by law – exercising these rights does not relieve anyone from the duties of citizenship according to Section 4 of Act IV of 1990 on the Freedom of Conscience and Religion and on the Churches. Nevertheless, in the reasoning of the judgement the court drew the petitioners' attention to the option that they had the right to lodge a constitutional complaint with the Constitutional Court if they believed that the decision passed by the defendant and the court judgements upholding this decision violated their constitutional rights.

The final judgement was delivered to the petitioners on 1 October 1996. The petitioners submitted a constitutional complaint at the Constitutional Court on 27 November 1996 (hereinafter: Petition 1). In their view, the judgement of the Komárom-Esztergom County Court constitutes a limitation on the essential contents of fundamental rights, that is, it violates Article 60 paras. (1) and (2), Article 67, Article 70/A and Article 70/D of the Constitution. The petitioners raise constitutional concerns regarding Section 6 of AH1 out of the statutes applied. They consider compulsory vaccination a type of medical intervention that causes final and irreversible changes in the human body and thus creates a reasonable danger of health damage to the individual. The petitioners argue that "the current Hungarian legal background is unconstitutional since the State acts as an unwanted guardian and makes decisions about the citizens and risks their lives for its own objectives without providing an opportunity for deliberation and making decisions in a responsible manner." In addition, as declared by the petitioners, "it is against a principle of our religion to keep the body healthy by injecting antigenic materials into the veins." The constitutional complaint further argues that AH1 only allows rejecting the reception of vaccination if it is detrimental to physical health although the Constitution recognizes the right to mental health as well.

The petitioners have attached three sets of documents to the constitutional complaint. The first attachment produces international scientific evidence to prove that vaccination is actually hazardous to health and may even be fatal in certain cases. The foreign scientific references listed in the second attachment exemplify that even vaccinated persons may contract the given illness and may infect others even if they are asymptomatic. The third attachment includes the reply letters of the embassies of Denmark, Finland, Great Britain, Norway and Switzerland in Hungary that inform the petitioners on the fact that in those countries there are no compulsory vaccinations in childhood, and it is up to the parents to decide which recommended vaccinations their children should receive. The replies from the Finnish and the Norwegian embassies include that the government or the health minister may order compulsory vaccination of a part or the whole of the population to prevent an epidemic.

Following the receipt of the petition, the Constitutional Court received a letter from the National Public Health and Medical Officer Service, namely from the deputy director of the National Chief Medical Officer's Office. As emphasized by the deputy director in the letter, the petitioners' information given on vaccination has no reasonable scientific ground, while the role of vaccination is vital in preventing certain childhood diseases. In support of the statement above, the deputy director included a letter written by the chairperson of the Association of Infectology.

In 2000, due partly to the amendment of the laws governing vaccination, the petitioners submitted another petition to the Constitutional Court in which they supplemented and clarified the constitutional complaint and they also submitted a new petition for the posterior establishment of unconstitutionality (hereinafter: Petition 2). Through the modified constitutional complaint, the petitioners requested the Constitutional Court to establish that Section 6 para. (3) and Section 15 para. (1) of AH1 and Section 4 of D1, which are repealed by now, were unconstitutional when they were applied in the case the constitutional complaint is based on.

In the part of Petition 2 requesting posterior constitutional examination the petitioners specifically request the Constitutional Court to establish the unconstitutionality of, and annul, Sections 58 paras. (1), (3) and (4) of Act CLIV of 1997 on Healthcare (hereinafter: AH2) and they also ask the Constitutional Court to "set the constitutional criteria that the legislator needs to meet to secure compliance with the Constitution".

In the reasoning of the petition, the petitioners explain their views on the constitutionality of compulsory vaccination and also on the vaccination of children. Bearing reference to Article 54 para. (1), Article 60 para. (1), Article 67 para. (1) and Article 70/D of the Constitution, the petitioners argue that by passing Minister of Welfare Decree 18/1998 (VI. 3.) NM on the Epidemiological Measures Necessary for the Prevention of Communicable Diseases and Epidemics (hereinafter: D2) and AH2 the State "has restricted fundamental rights by making vaccination compulsory in order to decrease certain personal and health risks, to protect the rights of those obliged to receive vaccination as well as of other persons' rights, furthermore, to safeguard public interest". The petitioners believe that making vaccination compulsory is not unconstitutional in itself; what makes it unconstitutional is the failure of the provisions in force to appropriately regulate certain guarantees that are significant from the aspect of fundamental rights.

Petition 2 raises constitutional concerns regarding several provisions of AH2 and refers to problems with their applicability. As a result, it recommends setting criteria for constitutionality. Petition 2 includes definite requests regarding three provisions of AH2.

Section 58 para. (1) of AH2 on exemption from compulsory vaccination is in the petitioners' opinion against Article 2 para. (1) (the principle of the rule of law), Article 50 para. (2) (the judicial review of public administration resolutions) as well as Article 57 para. (1) (the right to have one's case judged by the court) and para. (5) (the right to legal remedy) of the Constitution. The petitioners are concerned that neither the challenged provision nor other regulations of AH2 clarify whether exemption is granted by request or *ex officio,* furthermore, they do not clarify the exact role of the health authority in the process, and it is also unclear whether the decision may be disclosed to the affected parties, and whether the latter may have recourse to a legal remedy against the decision of the administrative authority or the attending physician. The petitioners argue that in practice the administrative authority does not decide on the approval in the resolution. One of the objections the petitioners raise regarding the constitutionality of the exemption regulations is that based on Section 11 para. (1) of D2, a Methodology Letter issued by the National Epidemiological Centre includes the contra-indications of vaccination and thus several provisions that are compulsory. For instance, Section II.E. provides the following: "Only children with the required vaccination may be admitted in a community of children and in an institute of elementary-level education (under the age of 15).

The petitioners believe that Section 58 para. (3) of AH2, the first sentence of which provides that the person obliged to receive vaccination shall be notified on the method, the purpose, the date and the venue of the vaccination violates the right to legal remedy under Article 57 para. (5) and the right to health under Article 70/D of the Constitution. The petitioners are concerned by the fact that it is unclear from the regulations whether the person obliged to receive vaccination shall have the right to information as specified in Sections 13 and 14 of AH2.

The petitioners believe that Section 58 para. (4) of AH2 (the second sentence of which provides that the resolution ordering vaccination may be enforced without delay regardless of any appeal) is unconstitutional since it violates Article 50 para. (2) and Article 57 paras. (1) and (5) of the Constitution. The petitioners believe that this provision makes the judicial review pointless since the enforcement of the resolution means actual vaccination; therefore the court is not able to decide on the merits of the case and provide actual remedy for an illegal resolution. The petitioners refer to Petition 1 and in particular to the provisions in force when that petition was submitted and they claim that AH2 regulates the issue in a stricter manner than AH1 since AH1 did not require immediate enforceability, and the judgement underlying the constitutional complaint declared that the immediate enforceability ordered under the general rules of public administration procedure was unsubstantiated.

II

1. The provisions of the Constitution relevant in respect of the petitions are as follows:

“Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law.”
“Article 8 (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.
(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.”
“Article 37 (3) In the course of administering their duties, Members of the Government may issue decrees. Such decrees, however, may not stand in conflict with the law or with Government decrees or resolutions. Decrees shall be promulgated in the Official Gazette.”
“Article 50 (2) The courts shall review the legality of the decisions of public administration.”
“Article 54 (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily deprived of these rights.”

“Article 57 (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just public trial by an independent and impartial court established by law.

(…)

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

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

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

“Article 67 (1) In the Republic of Hungary all children have the right to receive the protection and care of their family as well as of the State and society which is necessary for their satisfactory physical, mental and moral development.

(2) Parents have the right to choose the form of education given to their children.

(3) Separate regulations shall establish the responsibilities of the State with regard to the situation and protection of the family and youth.”

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

(2) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1).

(3) The Republic of Hungary shall endeavour to implement equal rights for everyone through measures that create fair opportunities for all.”

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

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

2. The provisions of AH1 relevant in respect of the petitions are as follows:

“Section 6 (3) The screening tests, examinations and vaccinations mandatory under public health and epidemic prevention laws are free of charge.
Section 15 (1) In case of an infectious disease, the mandatory vaccination of a person at risk and the preventive medicinal treatment of the same (hereinafter jointly: vaccination) may be ordered. The person vaccinated may be obliged to undergo medical examination to verify the efficiency of the vaccination."

3. The provisions of AH2 relevant in respect of Petition 2 are as follows:

“Section 57 (1) The purpose of vaccination is to provide combined active and passive protection against infectious diseases.
(2) The minister may define those infectious diseases in cases of which
a) with regard to age,
b) in case there is a risk of infection or
c) in case of travelling abroad at the cost of the traveller
mandatory vaccination may be ordered.
(3) The minister may prescribe mandatory vaccination as a prerequisite in certain occupations at the expense of the employer.
(4) A person not obliged to receive vaccination may be vaccinated by request (or, in case of a minor, with the approval of the legal representative) if it is reasonable medically.
(5) Preventive medicinal treatment applicable in case of certain infectious diseases shall be regarded as vaccination for the purposes of this regulation.
(6) Vaccination may only be performed with the vaccine permitted by the health authorities and with the purpose and conditions specified in the document granting permission.
(7) A separate statute governs the production, distribution and official examination of vaccines and other immune-biological products.
Section 58 (1) The attending physician may grant a temporary or (with the approval of the health authority) final exemption to the patient on whose health or illness the vaccination is expected to have a detrimental effect.
(2) A register shall be kept of the persons that are obliged to receive vaccination and on the persons that have been vaccinated.

(3) The person that is obliged to be vaccinated (and his or her statutory representative) shall be notified on the mode, purpose, venue and date (time) of the vaccination. The statutory representative is obliged to secure that the minor is present at the vaccination.
(4) If the person obliged to receive vaccination fails to comply with this obligation in spite of a written warning, the health authority will order the vaccination through a decision. The resolution ordering the vaccination may be enforced without delay, regardless of any legal remedy applied."

The provisions of D1 relevant in respect of the petitions are as follows:

"Section 4 (1) Children may be vaccinated against tuberculosis, diphtheria, whooping cough (pertussis), tetanus, acute anterior poliomyelitis (polimyelitis anterior acuta), measles (morbilli and rubeola) and mumps (parotitis epidemica) at certain ages.
(2) The health minister shall publish information materials on how and at what age to apply the vaccinations listed in (1).
(3) The vaccination obligation shall apply
a) until the age of 7 in cases of the first, second and third vaccinations missed against diphtheria, whooping cough and tetanus,
b) until the age of 14 in case of the fourth missed vaccination against diphtheria and tetanus, and in cases of missed morbilli, rubeola and mumps vaccinations."

The provisions of D2 relevant in respect of Petition 2 are as follows:

"Section 11 (1) The contra-indications of vaccinations are included in the ML published by the NEC annually.
(2) The medical opinion granting exemption from vaccination (including the approval of the town institute in case of a final exemption) shall be registered in the vaccination records of the person obliged to receive vaccination and also in the records of the vaccination area.
"Section 14 (1) The person obliged to receive vaccination is obliged to be present at the venue and at the time prescribed for vaccination and, in case a screening examination is required before or a check-up is required after the vaccination verifying the result of the vaccination, the person is obliged to be present at the examination or check-up. The statutory representative is obliged to secure that the minor is present at the vaccination."

III

The petition is, in part, well-founded.

1. First, the Constitutional Court has examined whether the constitutional complaint in Petition 1 as amended and supplemented by Petition 2 is in line with the requirements under Section 48 paras (1) and (2) in Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC):
"(1) Anyone may lodge a constitutional complaint with the Constitutional Court for the violation of his/her rights guaranteed by the Constitution if the injury is consequential to the application of the unconstitutional statute and if he/she has exhausted all other possible legal remedies or no further legal remedies are available to him/her.
(2) Constitutional complaints are to be submitted in writing not later than 60 days of serving the final decision."

According to the relevant practice of the Constitutional Court, the statutory conditions laid down in Section 48 paras. (1) and (2) of the ACC shall be construed as a whole. [Order 23/1991 (V. 18.) AB, ABH 1991, 361-362; Decision 41/1998 (X. 2.) AB, ABH 1998, 306, 309]

2. The final judgement (No Kf.20.264/1996/3) of the Komárom-Esztergom County Court was delivered to the petitioners on 1 October 1996. The petitioners have used all the available legal remedies against the administrative decision. The constitutional complaint was submitted on 27 November 1996, that is, in compliance with Section 48 para. (2) of the ACC, since it was submitted at the Constitutional Court within 60 days of serving the final decision.

3. According to Section 48 para. (1) of the ACC, a constitutional complaint may be submitted if rights have been injured due to application of law, that is, the application of a statute which is unconstitutional. In this case the Constitutional Court examines whether the petitioners are affected. [Decision 50/2003 (XI. 5.) AB, ABH 2003, 566, 585]

The petitioners have submitted a constitutional complaint due to the fact that by administrative and court decisions they were obligated to have their children receive the vaccinations they had missed. Therefore, in the present case fundamental rights are presumed to have been violated by the mandatory vaccination of the children and the related legal regulations. As a result, the provisions of the

Constitution specified in the petitions (Article 54 para. (1), Article 60 paras. (1) and (2), Article 67, Article 70/A and Article 70/D) were referred to as the fundamental rights of the affected children and also as the rights of the parents to take care of their children in accordance with their ideological beliefs and conscience.

4. In the constitutional complaint modified by Petition 2, the petitioners request the Constitutional Court to find Section 6 para. (3) and Section 15 para. (1) of AH1 as well as Section 4 of D1 unconstitutional. Section 246 para. (1) item *a)* of AH2 has repealed the challenged provisions of AH1 as of 1 July 1998. Section 42 para. (2) item *a)* of D2 has repealed the challenged provisions of D1 (also as of 1 July 1998).

The Constitutional Court only examines the unconstitutionality of a repealed statute if its applicability is to be decided. (Decision 335/B/1990 AB, ABH 1990, 261, 262) Repealed laws may only be subjected to specific constitutional examination in two cases: in the case of a judicial initiative under Section 38 para. (1) of the ACC and in that of a constitutional complaint under Section 48 of the ACC since in these cases it is possible to declare the applied regulation unconstitutional and (if it is necessary due to a particularly significant interest of the petitioner) to establish that the regulation may not be applied in the particular case. Therefore, the Constitutional Court holds that the constitutionality of the challenged provisions may be examined in the particular case in spite of the fact that they have already been repealed.

5. The judgement of the Komárom-Esztergom County Court challenged by the constitutional complaint makes references to several provisions of AH1 and D1. Such provisions include Section 6 para. (3) of AH1 and Section 4 of D1 that are challenged by the petitions. However, the judgement does not refer to Section 15 para. (1) of AH1 specifically.

If the petitioner challenges the constitutionality of a regulation that has not been applied by the court rendering the final judgement in the particular case, the Constitutional Court refuses to examine the constitutional complaint in its merits. [Order 1050/D/1999 AB, ABH 2005, 1581, 1582; Order 870/D/2002 AB, ABH 2005, 1634, 1638; Decision 177/D/2004 AB, ABH 2006, 1557, 1566; Decision 725/D/2004 AB, ABH 2006, 1617, 1626]

In its judgement challenged in the constitutional complaint, the Komárom-Esztergom County Court makes references to the general principles of AH1, namely to the following: Section 6 para. (2) generally describing epidemiological tasks, Section 6 para. (3) regulating the free-of-charge nature of the examinations and actions that are mandatory due to epidemiology and public health reasons, and Section 7 para. (3) specifying the obligation of citizens in general to comply with and implement public health measures.

Section 15 para. (1) of AH1 provides that in case of an infectious disease, the mandatory vaccination of a person at risk and the preventive medical treatment of the same may be ordered. The person vaccinated may be obliged to undergo medical examination to verify the efficiency of the vaccination. The Constitutional Court believes that the mandatory vaccinations were allowed by this provision of AH1. Section 4 of D1 (also quoted by the judgement and challenged by the petitioners) enforces Section 15 of AH1 and thus regulates mandatory vaccinations for various age groups.

The constitutional complaint submitted by the petitioners refers to the mandatory vaccination of children and the related legal regulations as violations of fundamental rights. As a result, the Constitutional Court has considered it possible – based on the request in the constitutional complaint and the judgement in its entirety – to examine the constitutionality of Section 15 para. (1) although the court applied this provision in the reasoning section of the final judgement without specifying its exact number.

6. Pursuant to Constitutional Court practice, it is a requirement under Section 48 of the ACC to have a direct link between the violation of rights and the challenged provision. [Decision 7/1994 (II. 18.) AB, ABH 1994, 68, 72-73, Decision 104/D/1994 AB, ABH 1994, 693, 694, Decision 382/B/1995 AB, ABH 1997, 810, 813, Decision 725/D/2004 AB, ABH 2006, 1617, 1629]

Section 6 para. (3) of AH1 provides that the examinations and treatments mandatory under epidemiological and public health regulations (including vaccinations) are free of charge. The constitutional complaint expresses reservations by the petitioners concerning the constitutionality of age-dependent vaccinations and the judgement enforcing the mandatory vaccination regulations. Therefore, the Constitutional Court sees no link between Section 6 para. (3) of AH1 (prescribing that vaccinations are free of charge) and the violation of fundamental rights that would substantiate a Constitutional Court procedure.

Hence the Constitutional Court has established that the constitutionality of Section 15 para. (1) of AH1 and Section 4 of D1 may be considered in merits based on Section 48 paras. (1) and (2) of the ACC.

Therefore, acting subject to Section 29 item *e)* of Decision of the Full Session 3/2001 (XII. 3.) Tü. as amended on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof and in line with Decision 725/D/2004 AB (ABH 2006, 1617, 1629), the Constitutional Court has rejected the constitutional complaint regarding Section 6 para. (3) of AH1 as there is no legal ground for examination in the merits.

IV

1. The Constitutional Court has examined the constitutionality of Section 15 para. (1) of AH1 and Section 4 of D1 based on the constitutional complaint. The petitioners challenge the regulations making vaccinations mandatory for children, and the petitioners believe that this mandatory character violates Article 51 para. (1), Article 60 paras. (1) and (2), Article 67, Article 70/A and Article 70/D of the Constitution. As a result, the Constitutional Court has examined whether it is constitutional that the challenged provisions of AH1 and D1 prescribe *age-dependent* mandatory and possible vaccinations. The Constitutional Court has not formed an opinion on mandatory vaccinations *for different purposes* and *concerning a different scope of persons* (risk of infection, travelling abroad, and in certain occupations). This is due to the fact that the ground for the constitutional complaint in Petition 1 is a court judgement prescribing mandatory vaccination for children that have missed vaccinations, while Petition 2 (supplementing the constitutional complaint and initiating posterior and abstract review of regulations) does not challenge the institution of mandatory vaccination.

Due to the complexity of the constitutionality issue and also to the system of the provisions quoted in the constitutional complaint, the Constitutional Court has first examined which constitutional provisions are affected and limited by the challenged regulations.

2. In healthcare, one way of preventing infectious diseases and epidemics is vaccination. In the course of vaccination, killed or weakened pathogens (or components of these pathogens triggering the production of antibodies) are injected in the human body. The main purpose of vaccination is to make the human body react by producing anti-bodies and thus it becomes immunized against the particular

pathogens. The majority of vaccinations are injected under the skin or in the muscles but there are also vaccines that are injected orally. Thus obligatory vaccinations can be considered *invasive medical interventions for public health and epidemiological purposes*.

The purpose of the system of age-dependent mandatory vaccinations is to immunize *children*. At the time when Petition 1 was submitted, Section 15 para. (1) of AH1 and Section 4 of D1 defined against which diseases children were to be vaccinated and by what age. Paragraph (1) set the list of diseases against which children needed to be vaccinated. These were tuberculosis, diphtheria, whooping cough (pertussis), tetanus, acute anterior poliomyelitis (polimyelitis anterior acuta), measles (morbilli and rubeola) and mumps (parotitis epidemica). Paragraph (3) provided that in case of certain vaccinations, the obligation to receive vaccination was applicable until the age of 7, while for others it was applicable until the age of 14. The procedure of vaccination was, however, not regulated by D1. Paragraph (2) provided that the health minister would publish information materials on how and at what age the vaccinations listed were to be applied.

The Constitutional Court has taken the above into consideration when deciding whether the vaccination system specified in Section 15 para. (1) of AH1 and Section 4 of D1 restricted the fundamental rights referred to in Petition 1.

3. When examining the constitutionality of the challenged mandatory system of age-dependent vaccination, the Constitutional Court's starting point is the notion that (according to its practice) medical interventions affect the *right to human dignity* the most. As held by the Constitutional Court in Decision 8/1990 (IV. 23.) AB, the right to human dignity enshrined in Article 54 para. (1) of the Constitution is a designation of the "general personality right" in the Constitution. "The general personality right is a 'mother right', i.e. a subsidiary fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete fundamental rights named are applicable to a particular set of facts." (ABH 1990, 44-45)

3.1. Also, the Constitutional Court has adopted several decisions on the basis of the *right to self-determination* and the right to privacy as "special personality rights" deriving from Article 54 para. (1) of the Constitution. [Decision 57/1991 (XI. 8.) AB, ABH 1991, 279; Decision 1/1994 (I. 7.) AB, ABH 1994, 29, 35-36, Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 380; Decision 5/1996 (II. 23.) AB,

ABH 1996, 47; Decision 11/1996 (III. 13.) AB, ABH 1996, 240; Decision 20/1997 (III. 19.) AB, ABH 1997, 85; Decision 4/1998 (III. 1.) AB, ABH 1998, 71; Decision 10/2001 (IV. 12.) AB, ABH 2001, 123]

Decision 36/2000 (X. 27.) AB establishes that based on the right to human dignity enshrined in Article 54 para. (1) of the Constitution, the patients' rights include (but are not limited to) the right to consent to, or refuse, medical interventions or treatment. "In the opinion of the Constitutional Court, the consent and the refusal related to interventions becoming necessary in the course of medical care may not be separated from the exercise of personality rights." [ABH 2000, 241; confirmed in: 56/2000 (XII. 19.) AB, ABH 2000, 527]

It also follows from the practice of the Constitutional Court that the right to self-determination concerning medical interventions (the right to self-determination in healthcare) is a category broader than the right to refuse medical interventions. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 301; Decision 48/1998 (XI. 23.) AB, ABH 1998, 333, Decision 36/2000 (X. 27.) AB, 2000, 241; Decision 56/2000 (XII. 19.) AB, ABH 2000, 527]

As pointed out in general by the Constitutional Court about the relation between the right to human dignity and individual risk-taking in Decision 21/1996 (V. 17.) AB, "Everyone can harm him- or herself and can assume risks if he/she is capable of a free, informed and responsible decision.
The law gives a wide range of possibilities for this since it does not regulate the field and the rights to self-definition and activity (Article 54 of the Constitution) following from the general right of personality guarantee this possibility.
The restrictive paternalism of the State is a matter of constitutional debates only in borderline cases (from the punishment of drug use to euthanasia)." (ABH 1996, 74, 80)

It can be concluded on the basis of the practice of the Constitutional Court that Article 54 para. (1) of the Constitution grants a wide scale of protection for the right to self-determination of persons capable of making free, informed and responsible decisions about their own bodies and lives. [In summary: Decision 43/2005 (XI. 14.) AB, ABH 2005, 536, 541-543]

3.2. Based on the Constitutional Court practice the given person's decision-making ability determines his or her ability to exercise the right of self-determination. Decision 21/1996 (V. 17.) AB declares that

“the fundamental rights are granted to children as well. The Constitution denies them explicitly only the right to vote. Children (similarly to everyone else) can exercise fundamental rights under the conditions set forth by the individual fields of law. However, such restrictions can be the subject of constitutional review.
Where laws do not regulate minors' and juveniles’ exercise of rights, it has to be determined from case to case which fundamental rights and in what respect the child can exercise on his/her own, or who should exercise them on his/her behalf and in his/her interest, and whether with regard to his/her age and Article 67 of the Constitution, the child can completely be excluded from exercising certain aspects of a fundamental right. The possibility of the child's exercise of fundamental rights – including the right personally to exercise them – gradually widens by age and by the development of an ability of decision considering the consequences of exercising a right. (ABH 1996, 74, 78-79)

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

Decision 43/2005 (XI. 14.) AB establishes that ”the discretionary capacity concerning medical interventions includes that the person concerned is able to understand the information necessary for making a decision; he or she is able to understand all possible consequences of his or her decision; and can communicate this decision to the physician. According to the CC, even a person with limited disposing capacity may have discretionary capacity in respect of certain medical examinations and interventions.” (ABH 2005, 536, 547-548) “In general it may be established that in case of certain interventions, even children and the mentally challenged are able to make decisions autonomously". (ABH 2005, 511)

3.3. In the system of age-dependent mandatory vaccinations, based on D1, children have to receive certain vaccinations by the age of 7, and the others by the age of 14. D1 did not detail the regulations applicable to the vaccination programmes or the exact deadlines for receiving each vaccination. Nevertheless, it can be established that certain vaccinations are given to babies right after birth and during early infancy. D1 set the age of 14 as the age after which no age-dependent vaccination is mandatory.

The Constitutional Court has established in the present case that in Section 4 of D1, the subjects of institutionalized vaccinations for public health and epidemiological purposes do not have the capacity of discretion necessary for exercising the right of self-determination under Article 54 para. (1) of the Constitution. Babies are naturally incapable of exercising the right of self-determination in case of any medical intervention. For children under the age of 14 and above a certain age the possibility of exercising the right to self-determination should not be excluded (in principle) and granting such rights may be examined (for instance, in case of interventions for research and experiment purposes). However, due to the special aspects to consider when weighing the short-term and long-term advantages and disadvantages of vaccinations, children under fourteen are not capable of making an informed and responsible decision. Therefore, the provisions under review in the present case do not restrict the right to self-determination since *the subjects lack the ability to make these decisions*.

4.1. The Constitutional Court considers *the right to the integrity of the personality* an element of the general personality right based on Article 54 para. (1) of the Constitution, and the right to physical integrity is part of that. Decision 75/1995 (XII. 21.) AB establishes the following: “Thus the right to human dignity includes both the constitutional fundamental right to freedom of self-determination and the fundamental right to one’s physical integrity. Therefore, they may only be restricted under Article 8 para. (2) of the Constitution." (ABH 1995, 376, 381; confirmed in: Decision 4/1998 (III. 1.) AB, ABH 1998, 71, 74; Decision 1270/B/1997 AB, ABH 2000, 713, 717; Decision 43/2004 (XI. 17.) AB, ABH 2004, 597, 603)

As declared in Decision 36/2005 (X. 5.) AB, it is the essential conceptual element of privacy that others should not have access to or insight into such private sphere against the affected person’s will. If an unwanted insight nevertheless happens, the violation may affect not only the right to privacy itself, but also other rights in the realm of human dignity, such as the freedom of self-determination or the right to physical and personal integrity.” (ABH 2005, 390, 400)

Decision 22/2003 (IV. 28.) AB, summarizing earlier decisions, defines the contents of the right to physical integrity in healthcare as follows: "It is an important element of the patient’s human dignity (…) that under no circumstances may a human be made an instrument or an object: The right to human dignity means that the individual possesses a core of autonomy and self-determination beyond the reach of all others, whereby – according to the classic formulation – the human being remains a subject

and cannot be transformed into an instrument or object [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308]. Another aspect that follows from the patient's right to human dignity is the fundamental right to physical integrity. "Thus the right to human dignity includes both the constitutional fundamental right to freedom of self-determination and the fundamental right to one's physical integrity" [Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 381]. The Constitutional Court holds that the right to physical integrity means in respect of patients that, as a general rule, no one is allowed to touch the patient's body without his or her consent or approval." (ABH 2003, 235, 266)

4.2. Vaccinations can be considered invasive medical interventions for public health and epidemiological purposes (see Point IV.2 of the reasoning). The Constitutional Court believes that the legal regulation that introduces the mandatory vaccinations and defines the conditions of their applicability constitutes a restriction of the right to physical integrity. A person is entitled to the right to physical integrity regardless of whether he or she has decision-making capacity and whether he or she is able to exercise the right to self-determination. "A person may never be regarded as an instrument to reach a public objective." This principle is significant in case of a legal regulation through which vaccine is injected in the human body for preventive and treatment purposes and with reference to public interest. Therefore, the provisions regulating age-dependent vaccination have to comply with the requirements for restricting the right to physical integrity as defined in Article 54 para. (1) of the Constitution.

5.1. The petitioners quote *the children's right to health* and Article 70/D of the Constitution in connection with that. As declared by the Constitutional Court during the constitutional review of mandatory pulmonary screening, "(…) the petitioner's reference to the Constitution is unfounded. This is because the challenged provision restricts no fundamental right under Article 70/D of the Constitution. However, it is doubtless that if pulmonary screening (among certain circumstances) becomes mandatory, it restricts the right to self-determination and the right to physical integrity (which may be regarded as so-called special fundamental personality rights that may be derived from the general personality right related to the right to human dignity). Therefore, the constitutionality of the challenged provisions should be examined under Article 54 para. (1) rather than Article 70/D of the Constitution." (Decision 2012/B/1991 AB, ABH 2001, 1169, 1172)

In a later decision, the Constitutional Court established a link between the right to the integrity of the personality and the right to health: "According to the definition of the UN World Health Organization,

health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. (Preamble of Act XII of 1948 on the promulgation of the Constitution of the World Health Organization.) This idea shows that the definition of health/illness cannot be identified with the approach characteristic of clinical practice (ability to operate the organs as typical for the species or better), health is rather a physical and mental state making it possible for people to live in society as long as possible without physical/mental problems. The Constitution is in accordance with the above, as Article 70/D para. (1) refers to physical and mental health, and Article 54 para. (1) is the source of the right to personal integrity, among other rights." (ABH 2005, 549)

5.2. Therefore, the right to physical and mental health recognized by Article 70/D para. (1) is closely related to the right to the integrity of personality under Article 54 para. (1) of the Constitution. The objective (institutional) conditions of the right to health are defined by Article 70/D para. (2), which declares that the State is obliged to implement this right through "institutions of health care and through the organization of medical care". The subjective aspect of the fundamental right may be defined as the right to the physical and mental integrity of the personality under Article 54 para. (1).

Consequently, in the present case it is not possible to examine the constitutionality of restricting the fundamental right under Article 70/D independently. The examination of restricting the right to the integrity of the personality includes the examination of restricting the subjective aspect of the right to health.

6.1. In the complaint, the petitioners also refer to Articles 60 and 67 of the Constitution. In the present case, these constitutional provisions are believed to be violated by the challenged provisions having deprived *the parents of their right to choose the education for their children in accordance with their conscience*.

An important aspect of Article 60 para. (1) of the Constitution was first highlighted by Decision 64/1991 (XII. 17.) AB: "The right to freedom of conscience pertinent in connection with this regulation means that the State cannot compel anyone to accept a situation which sows discord within, or is irreconcilable with, those fundamental convictions which mould that person's identity. The duty of the State extends beyond refraining from such compulsion to the safeguarding (within reasonable limits) of the exercise of alternative behaviour. [ABH 1991, 297, 313; confirmed in: Decision 4/1993 (XI. 12.) AB, ABH 1993, 48, 51]

Article 67 para. (2) of the Constitution grants parents the right to choose the education for their children. When construing this provision of the Constitution, the Constitutional Court believes the following findings of Decision 21/1996 (V. 17.) AB to be decisive: “In the private sphere the right and the duty of protection and care are due primarily to the parents. Thus, for instance, a statute can prohibit (with a general preventive aim) the selling of alcohol to children in public places, the selling of pornographic printed matter or the opening of sex shops in close proximity to schools. The law can prohibit children form entering such places. However, it is the responsibility of the parent to decide whether the child can have access to alcohol or pornography at home. The State only intervenes if the development of the child is seriously and concretely violated or endangered, for instance, by suspending parental supervision. (ABH 1996, 74, 80)

6.2. Therefore, Article 60 para. (1) and Article 67 para. (2) of the Constitution jointly define the right of parents to take care of their children in accordance with their ideological beliefs and conscience. It is primarily the right of parents (guardians) to make decisions in issues affecting the physical and mental development of children. The parents may choose the mental service provider or the education institute for their children and they may also choose the ideological education their children should receive. The parents may also choose the medical treatment from the alternatives available.

However, it must be considered that the children’s mental capacity develops with age and their decision-making capacity broadens. As a result, they become entitled to information from their parents in more and more issues and with time they may have a word in shaping their lives more and more frequently. It is straightforward that babies are unable to exercise rights, but children at kindergarten age can understand more about the purpose, objectives, procedure and expected consequences of medical examinations and interventions; above the age of 14, children can make decisions in daily medical issues (about seeing a doctor, taking medicine and using an alternative form of treatment).

The parents’ views on upbringing and the actual relationship between the parents and the children are decisive factors in the development of the children’s ability to exercise their rights. Therefore, the life of children is also shaped by the peculiar interaction of parents’ and children’s rights. These rights constitute the most significant limits of state intervention.

Consequently, the challenged regulations of age-dependent vaccinations restrict the parents' rights under Article 60 para. (1) and Article 67 para. (2) of the Constitution.

7. Based on the above, the Constitutional Court has come to the conclusion that the challenged provisions of AH1 and D1 limit the following from the fundamental rights referred to in the complaint:
– first, the right of the child to the integrity of personality [Article 54 para. (1)]
– second, the right of *parents* to take care of their children in accordance with their ideological beliefs and conscience [Article 60 para. (1) and Article 67 para. (2)].

Accordingly, the Constitutional Court has established that in the light of the constitutional complaint, the challenged provisions do not constitute a restriction of the right to health under Article 70/D para. (1) and the right to self-determination under Article 54 para. (1) of the Constitution.

Thus, from a constitutional law viewpoint, the prohibition of negative discrimination defined by Article 70 para. (1) of the Constitution may not be connected to the fundamental law violation referred to in the constitutional complaint.

Hence the Constitutional Court has examined the fundamental right restrictions of the challenged AH1 and D1 provisions with regard to Article 54 para. (1), Article 60 para. (1) and Article 67 para. (2) of the Constitution.

V

1. Article 8 para. (2) of the Constitution specifies *the general conditions for restricting fundamental rights*: “In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by acts; such an act, however, may not restrict the basic meaning and contents of fundamental rights.” In the permanent practice of the Constitutional Court, a regulation that restricts a fundamental right is only constitutional if it is suitable to achieve a legitimate objective of the legislator and also if it meets the requirement of proportionality and necessity. The individual fundamental rights of people may be restricted on the basis of the legitimate objective of protecting the fundamental rights of others [first in: Decision 2/1990 (II. 18.) AB, ABH 1990, 18, 20], the State’s duty to institutionally (objectively) guarantee fundamental rights [first in: Decision 64/1991 (XII. 17.) AB, ABH 1991, 297,

302], and the achievement of certain constitutional public objectives. [for example: Decision 56/1994 (XI. 10.) AB, ABH 1994, 312, 313]

The State may only restrict fundamental rights if that is the only way to protect the above legitimate objectives. "The constitutionality of restricting a fundamental right also requires that the restriction comply with the criterion of proportionality; the importance of the desired objective must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to apply the most moderate means suitable for reaching the specified purpose." (Summary: Decision 879/B/1992 AB, ABH 1996, 401)

2.1. The Constitutional Court summarized its practice on *the possible restrictions of the component rights deduced from the right to human dignity* in Decision 22/2003 (IV. 28.) AB as follows: "the right to human dignity is absolute and may not be restricted only as a determinant of one's human status and in its unity with life. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308, 312]. Therefore, the component rights derived from it as a "mother right" (such as the right to self-determination and the right to one's physical integrity) may be restricted in accordance with Article 8 para. (2) of the Constitution similarly to any other fundamental right. [Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383]" (ABH 2003, 235, 260)

On the basis of these holdings, the Constitutional Court has compared the challenged provisions and the right to personal integrity derived from the right to human dignity with regard to the general conditions of restricting fundamental rights.

2.2. The Constitutional Court considers it a subjective right of the *parents* under Article 60 para. (1) and Article 67 para. (2) of the Constitution to take care of *their children* in accordance with their ideological beliefs and conscience. Therefore, the Constitutional Court believes that the State may only restrict this right in respect of the general conditions for restricting fundamental rights.

As a result, uniform criteria may be applied in examining the constitutionality of the children's right to personal integrity and the right of parents to take care of their children in accordance with their ideological beliefs and conscience.

3. The Constitutional Court has examined whether the mandatory vaccinations for children introduced by the challenged provisions of AH1 and D1 qualify as *necessary and suitable* interventions *for achieving a constitutional objective of the legislator*.

3.1. The petitioners quote scientific results when stating that vaccinations to children do not protect the individual and the society efficiently and that they are actually hazardous to the health of the vaccinated person and may even be fatal in certain cases. There is no doubt that even certain scientists are of the opinion that illnesses are not caused by pathogens, and therefore vaccinations are pointless and even harmful.

The Constitutional Court wishes to refer to past holdings from its practice regarding this issue. Decision 34/1994 (VI. 24.) AB declares the general principle that "only science itself can be competent to take a stand in questions of scientific truth". (ABH 1994, 177, 182) A holding of the Constitutional Court laid down in Decision 21/1996 (V. 17.) AB may be applied when judging the external effects risking the rights and freedom of children in general: "qualifying risks cannot exclusively depend on the evaluation of a branch of science that is confined to its own specialization, but it has to ponder what effects these risks can have on the development and future of the affected group of children in the given social context." (ABH 1996, 74, 81)

On the basis of these findings, the Constitutional Court has come to the conclusion that only scientists have the right to evaluate scientific truth. However, a broader inquiry than examining the views of science may be necessary in order to decide constitutionality issues related to scientific knowledge.

3.2. It is to be pointed out that the purpose of the Constitutional Court procedure is not to clash scientific truths and opinions in order to choose between them. The Constitutional Court considers the competence and autonomy of science very significant. In a democratic society the findings of science and the recommendations of scientists are taken into consideration within the framework of sufficiently regulated, reasonable and public legislative procedures.

In the present case the Constitutional Court has taken into consideration the fact that the *Department of Immunization, Vaccines and Biologicals of the World Health Organization makes recommendations and publicizes surveys on vaccinations on a regular basis. At the time the petitions were filed, the document entitled Immunization policy: Global Programme for Vaccines and Immunization (1996) and*

*later the document entitled Vaccines, Immunization and Biologicals (2002-2005 Strategy) listed the measures the individual States need to take in order to enhance the protection of their children and the other members of society against infectious diseases.* The most recent survey results are included in the document entitled *WHO vaccine-preventable diseases: monitoring system 2006 global summary* (http:// www.who.int/vaccines-documents/).

3.3. The Constitutional Court has accepted the fact that in line with the current scientific world view, the World Health Organization is conducting a global campaign for the immunization of children. The Hungarian legislation complies with these guidelines. The strategic objective of the World Health Organization is to achieve an immunization rate of 95% for the population worldwide. The statistics about Hungary suggest that the immunization rate in Hungary is better than this; the domestic vaccination system has achieved results that are recognized at an international level. Due to the above, in the Constitutional Court procedure it is not possible to challenge the fact that vaccinations (including age-dependent vaccinations) improve the resistance of the human body against infectious diseases and they also contribute to preventing the spread of infectious diseases. Therefore, they protect the individuals (the children) from infection and also the entire society from epidemics.

It is a known fact that epidemics, which are created through the spread of pathogens, often cause suffering to humanity, including death and health damage. As discovered in medical science at the end of the 18$^{th}$ century, vaccinations stimulate the creation of anti-bodies in the human body. These anti-bodies are proteins that protect the human body from the proliferation of pathogens. The traditional model of epidemic protection was developed at the end of the 19$^{th}$ century to fight mass infections in industrialized countries. The strategy involves immunizing the members of risk groups.

Several infectious diseases causing terrible harm earlier have disappeared by today, and extremely efficient systems of epidemic prevention are in place in western civilization. The development of vaccinations and the immunization of the members of societies have had a very significant role in achieving all this. Of course, the improvement of hygiene, better nutrition and the changing eating habits have also contributed to the decline of several illnesses.

3.4. As a result, when examining the suitability and the necessity of age-dependent vaccinations, the Constitutional Court has considered, on the one hand, the interest of children's appropriate mental,

physical and moral development and, on the other hand, the protection of the whole of society against infectious diseases and epidemics.

3.4.1. According to Article 67 para. (1) of the Constitution, in the Republic of Hungary *all children have the right* to receive the protection and care of their family as well as of the State and society which is necessary for *their satisfactory physical, mental and moral development*. Consequently, guaranteeing rules have to be formed in order to protect the fundamental rights of children. As explained by the Constitutional Court earlier, the laws adopted for the protection of children may restrict fundamental rights on the basis of their lack of capacity to assess the consequences. [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 80]

3.4.2. As declared by the Constitutional Court in its Decision 2012/1991 (V. 26.) AB examining the constitutionality of mandatory pulmonary screening, the restriction of fundamental rights is admissible due to the community interest of epidemic prevention. “The Constitutional Court believes that in the present case the purpose of restriction is the community interest in the prevention of epidemics; the objective is to recognize the infectious disease as early as possible, to identify the sources of the illness and to eliminate the danger of infection. The petitioner is wrong since the regulation specified in the D does not violate the right to health of the persons obliged to undergo screening. Instead, the regulation restricts their right of self-determination for the constitutional objective quoted above.” (ABH 2001, 1169, 1173) The Constitutional Court declared in its Decision 43/2005 (XI. 14.) that the State’s duty of protecting health based on Article 70/D para. (1) of the Constitution may have priority in exceptional cases over the choice of a person with discretionary capacity.

In case of age-dependent vaccinations, the protection of children's rights and the community interest in epidemic prevention may not be fully separated since vaccinations also protect the health of children living in a community. The children in kindergarten, school and other communities affect each other’s health, and infectious diseases often spread in such groups. Therefore, the relationship has to be taken into consideration between the constitutional obligations of the State regarding the protection of children’s rights (Article 67 para. (1) of the Constitution), on the one hand, and the epidemiological tasks of the State (as part of the health protection obligation under Article 70/D of the Constitution), on the other hand.

3.5. When establishing the suitability and the necessity of age-dependent vaccinations, the Constitutional Court has kept in mind that based on the recommendations of the World Health Organization it is required to introduce a compulsory vaccination system that is judicially enforceable. The documents attached to Petition 1 give evidence to the fact that several democratic countries do not regard compulsory vaccination as the method to improve the immunization rate of society.

The policy of the World Health Organization reflects the bioethical view that has become popular for the last few decades. It suggests that epidemics, which ignore country borders, should not be eliminated by the restriction of human rights. Experience has showed that in processes strictly based on coerciveness and obligations, people do not always comply with the official regulations and they tend to secretly or publicly breach the regulations, wherefore, the efforts to eliminate epidemics have often failed. The key to effective public health measures is cooperation between the authorities and the people. It is vital to inform the people on the infectious diseases and to earn the trust of the affected persons. If the necessary material resources are allocated without any discrimination, if general practitioners are involved instead of officials and if communication is mutual, the affected citizens will not consider the public health interventions offensive but instead they will see them as a beneficial service. When the government wishes to achieve public health objectives, obligatory and coercive legal measures should be the last resort.

Nevertheless, the Constitutional Court believes that the protection of children's health and protection from infectious diseases are constitutionally acceptable grounds for restricting fundamental rights. Children, if vaccinated, are immunized against infectious diseases. For the so-called *collective immunity* of children's communities and society in general, it is vital that a large majority of the affected persons are vaccinated against each disease. One condition of preventing the spread of infectious diseases and the outbreak of epidemics may be prevented if the number of immunized persons in children's communities and society in general does not fall below a critical level. Let us add that missing a vaccination would constitute an unacceptable exemption for those (including their children) who miss vaccination not because of their health status or conscience but because they trust others to receive the vaccination, and if there is no epidemic, they can also avoid infection.

3.6. Consequently, the Constitutional Court has established that the system of age-dependent vaccinations regulated by AH1 and D1 may not be considered an unnecessary restriction of fundamental rights. Due to scientific presumptions, the age-dependent vaccinations prescribed by AH1

and D1 are suitable and necessary methods, on the one hand, to secure the children's *appropriate mental, physical and moral development* and, on the other hand, *to protect the whole of society against infectious diseases and epidemics*. The right of children to mental and physical integrity and the fundamental the right of parents to take care of their children themselves are necessarily restricted by the duty of the State to institutionally (objectively) guarantee fundamental rights under Article 67 para. (1) of the Constitution and the constitutional objective under Article 70/D (the community interest in public health and epidemiology).

4.1. The *proportionality* of restricting fundamental rights may be assessed by comparing the constitutional objective and the method of restriction. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. In Decision 21/1996 (V. 17.) AB, the Constitutional Court evaluated the question of proportionality and whether the restrictive regulation protected the children from a concrete and threatening danger, establishing that when evaluating risks, the exact circumstances must be considered. (ABH 1996, 74, 81-82)

Decision 201/B/1991 AB on mandatory pulmonary screening compared the epidemiological community interest, the extent of health intervention and the guarantees provided by the laws. "The regulation actually allows out of community interest a minor intervention, that is, a non-invasive examination resulting in minimal radiation. The challenged provisions of the Decree prescribe mandatory screening only in cases when the chances of tuberculosis in a given community are high. However, to avoid unnecessary radiation, Section 19 para. (5) of the Decree provides that if a person has undergone chest screening within one year and no sign of tuberculosis has been discovered, it is not required to conduct the examination.
The Constitutional Court believes that the challenged provisions of the Decree constitute a proportional and necessary restriction of the right to self determination and physical integrity due to the community interest in epidemic prevention." (ABH 2001, 1169, 1173)

As held in Decision 43/2005 (XI. 14.) AB regarding proportionality, "when assessing the permissibility of the intervention, the objectives of personality protection and the necessary medical means and methods always have to be taken into account." (ABH 2005, 536, 550)

4.2. The proportionality of the vaccinations as interventions restricting fundamental rights may be defined by comparing *epidemiological reasons and objectives* and *the restrictions and guarantees* of

the regulation. In the present case, based on the constitutional complaint the Constitutional Court may examine the proportionality of the general regulations in Section 15 para. (1) of AH1 as well as of Section 4 of D1, being the enforcement decree of AH1.

4.2.1. Missed vaccinations constitute a risk to the individual affected and the community. However, there are no risk-free vaccinations. In principle, the risks may range from moderate reactions to the vaccination (allergic symptoms, mild temperature, headache etc.) to permanent disability or death of the vaccinated person. When the State declares that certain vaccinations are mandatory, it actually decides on bearing the risk. It is the obligation of the State to prescribe mandatory vaccinations for illnesses only in cases when it is absolutely necessary, and children should receive only those vaccinations that result in the least health risk possible. The State must also guarantee that the children receive the vaccinations at an appropriate age. From the aspect of risks it is vital that the State should guarantee the quality, reliability and constant monitoring of vaccines. This is required by the children's right to the integrity of personality under Article 54 para. (1) of the Constitution and also by the obligation of the State to protect the life and health of the people under Article 54 para. (1) and Article 70/D of the Constitution.

Section 4 para. (1) of D1 defines the diseases against which children must be vaccinated based on Section 15 para. (1) of AH1. Under paragraph (3), in case of certain vaccinations, the obligation to receive vaccination applies until the age of 7, while for others the obligation applies until the age of 14.

The petitioners do not challenge individual vaccinations or age limits; they challenge the entire vaccination system. The Constitutional Court holds that these provisions are based on such scientific presumptions that the legislator was required to take into consideration. Also, the vaccination system defined by these regulations (the illnesses and the age limits) complies with the recommendations of the World Health Organization. The Constitutional Court has accepted the scientifically substantiated presumption of the legislator that the advantages of compulsory vaccinations for the individual and the society far outweigh any disadvantage that may arise as a side effect of the vaccination for the children. Missing a vaccination is a far greater risk in general for the health of the child then receiving the vaccination.

Based on their competence under the Constitution, the health minister, the Government and the Parliament must seek the most efficient means of protection against certain infectious diseases in

accordance with scientific knowledge, surveys and prognoses. In the present case, the Constitutional Court has not found a reason to declare Section 4 para. (1) and (3) of D1 unconstitutional based on the constitutional complaint.

4.2.2. In case the legislator prescribes an obligation to vaccinate children in order to prevent certain infectious diseases, the right of personal integrity of the children and the right of the parents to take care of their children in accordance with their beliefs and conscience require several guarantees in the legislation. A number of these are simply required to inform the affected persons on their duties and to make the people comply with their obligations. In addition, the statutes have to grant excessive rights that are indispensable due to the vaccination obligation. In the opinion of the Constitutional Court, age-dependent vaccination obligation is not an unnecessary restriction of fundamental rights. However, the proportionality of such restrictions depends on the contents of the legal provisions concerned.

Those democratic States that have introduced mandatory vaccination in certain cases prevent an excessive restriction of fundamental rights through providing statutory guarantees. The Slovenian Constitutional Court has passed a comprehensive decision on the constitutionality of vaccinations, establishing that the information provided to the persons obliged to receive vaccination (or in case of children, to the parent or the guardian), the possibility of (temporary or final) exemption for medical reasons, and a due exemption process are all significant rights. (U-I-127/01 Uradni list RS 25/2004) The Italian Constitutional Court holds that the legislator shall pay compensation for any harmful consequences of vaccination. (118/1996 Gazzetta Ufficiale, Prima Serie Speciale, 24/04/1996)

4.3.1. At the time when the constitutional complaint was filed, D1 regulated the rights and obligations of the persons (that is, the children and their relatives) affected by childhood vaccinations. For instance, Section 6 regulated exemption from mandatory vaccination, Section 8 regulated the notification of the persons obliged to receive vaccination (and their relatives), while Section 12 regulated compensation. In the present case, the Constitutional Court has only examined the constitutionality of Section 4 of D1 based on the constitutional complaint. Paragraphs (1) and (3) of Section 4 (as mentioned in the previous section) specified the age-dependent vaccinations and set the age limits. Section 4 para. (2) of D1 provided that the health minister had to publish information materials on how and at what age to apply the vaccinations listed in para. (1).

Under Section 55 para. (1) of Act XI of 1987 on Legislation (hereinafter: the AL), a minister or the head of an organ with national competence may issue guidelines and information materials. Paragraph (3) defines “information materials” as a document that includes data or facts that the organ obliged to enforce the law is required to know. Numerous decisions of the Constitutional Court have already dealt with the differences in constitutionality requirements concerning the legislation before and after the entry into force of the AL. As established in Decision 45/1991 (IX. 10.) AB, under Section 61 para. (2) of Act XI of 1987 on Legislation, the AL “shall not affect the force of any statute, decision, directive, standard, price fixing or legal guidance adopted before the entry into force of this Act.” According to the legislator's reasoning relevant thereto, “This provision is aimed at preventing any disturbance in legal practice caused by the application of this Act. In respect of the statutes, decisions, directives, and legal guidelines adopted before the entry into force of this Act, the provisions of this Act shall be put into practice on a continuous basis, when reviewing the above.
The Constitutional Court holds that this rule specified in the AL does not violate any constitutional provision. On the contrary, it is in line with Article 2 para. (1) of the Constitution declaring that the Republic of Hungary is a state under the rule of law. Legal certainty (the preservation of which is the purpose of the AL provision) is an important element of the rule of law. (ABH 1991, 206, 207)

As explained first in Decision 58/1991 (XI. 8.) AB, under a resolution of principle about its own practice [Statement of Position of the Full Session 2/1991 (X. 29.)] the Constitutional Court may only annul for formal unconstitutionality any statutes (and other legal instruments of state administration) being contrary to the order of sources of law defined in the AL if they are passed following the effective date of the AL. This practice of the Constitutional Court applies both to statutes issued on the basis of authorization and to authorizing laws. [ABH 1991, 288, 289-290; confirmed in: Decision 32/1992 (VI. 10.) AB, ABH 1992, 227, 228; Decision 14/1994 (III. 10.) AB, ABH 1994, 410, 411; Decision 61/1995 (X. 6.) AB, ABH 1995, 317, 318; Decision 22/2000 (VI. 23.) AB, ABH 2000, 444, 447] According to Decision 1312/B/1991 AB, ”The Constitutional Court [... considers sub-delegation unconstitutional in cases of legal provisions that were enacted and became effective after the effective date of Act XI of 1987 on Legislation, that is, following 1 January 1988.” (ABH 1992, 677, 679)

In the present case, the Constitutional Court has established that D1 (that became effective on 1 July 1972) originally allowed sub-delegation in Section 4 para. (3) of D1 as follows: “The age and the method of receiving tuberculosis vaccinations shall be regulated by the health minister separately.” At the time the complaint was submitted, the regulation in force was determined by Section 1 of Minister

of Social Welfare and Health Decree 24/1988 (XII. 26.) SZEM on modifying Minister of Healthcare Decree 9/1972 (VI. 27.) EüM on the Implementation of the Epidemiological Provisions in Act II of 1972 on Healthcare, which provision modified the contents and the numbering of certain paragraphs of Section 4. The modifications entered into force on 1 January 1989. As a result, the provisions modifying D1 had to comply with the regulations of the AL.

4.3.2. Section 4 para. (2) of D1 and the provisions issued on the basis thereof are all *actual norms*. D1 is an authorization regulation, while the ministerial information materials are binding regulations issued based on the authorization. The phrase related to age in Section 4 para. (2) of D1 means that the minister had the right to issue information materials on the exact age (expressed in weeks, months or years) when new-born babies, infants and other children were required to receive the individual vaccinations. Based on the provision on the method of vaccination, the minister was permitted to issue information materials on school vaccination programmes, on the scope of physicians entitled to vaccinate, on the vaccination procedure in general etc. Any information materials issued by the minister based on the authorization of the decree qualify as other legal instruments of state administration (in the subcategory of legal guidelines under Section 55 paras. (1) and (3) of the AL).

The Constitutional Court holds that the subject matter of regulation specified in Section 4 para. (2) of D1 does not only include data and facts necessary for the tasks assigned to the organs responsible for implementation, but it specifies norms on the obligations of the persons obliged to receive vaccinations and of their relatives, including provisions on the time, scope and method of fulfilling these obligations. The age and method of receiving the vaccination may not be considered an issue of the medical profession that does not materially affect the rights and duties of the affected parties. A number of the regulations currently in force, for example Section 5 and Sections 11 to 16 of D2, include rules that could have been issued by virtue of D1 in the form of ministerial information materials.

Section 9 para. (1) specified the following general duty: “The person obliged to receive vaccination is obliged to be present at the venue and at the time prescribed for vaccination and, in case a screening examination is required before or a check-up is required after the vaccination to verify the result of the vaccination, the person is obliged to be present at the examination or check-up. In case the person obliged to receive vaccination is a minor, the relative (guardian) of the minor is obliged to assure that the minor is present at the vaccination.” However, the regulation laid down in Section 4 para. (2) of D1 had the result that a part of the obligations for the children and the parents related to the vaccination

were not defined by the statutes. When R1 was effective, the practice of the epidemiological authorities was basically the main source of information for parents on the age and the method of vaccination for different infectious diseases. In case of school vaccination campaigns it was not even guaranteed that the parents would be informed in advance on the day, the method and the expected consequences of the vaccination. The regulation laid down in Section 4 para. (2) of D1 reflects the approach that in case of compulsory vaccinations the parents and the children have practically nothing else to do but to abide by the orders of the epidemiological authorities.

The provision laid down in Section 4 para. (2) of D1 is closely connected to the issue of whether the restriction of fundamental rights is proportional since proportionality can only be defined by comparing the epidemiological reasons and objectives and the restrictions and guarantees of the regulation. Since due to Section 4 para. (2) of D1, no law specified a part of the rights and obligations of the persons obliged to receive age-dependent vaccinations, *no actual consideration of proportionality is possible* in this issue. There is, namely, no legal regulation that could be regarded as counterbalancing the epidemiological community objectives.

Consequently, the Constitutional Court has established that Section 4 para. (2) of D1 violated Section 55 para. (3) of AL and, as a result, it violated the first two sentences in Article 37 para. (3) of the Constitution, quote: “In the course of administering their duties, Members of the Government may issue decrees. Such decrees, however, may not stand in conflict with the law or with Government decrees.”

5.1. Finally, when examining proportionality, the Constitutional Court has considered the significant constitutionality issue raised by the petitioners and also voiced during the court procedure that they are entitled to request exemption for their children from vaccination *on the basis of their conscience and religious conviction* under Article 60 para. (1) of the Constitution. Section 15 para. (1) of AH1 prescribed the general obligation to receive vaccination but the statute did not regulate exemptions. At the same time, the first sentence in Section 6 of D1 only permitted exemption for health reasons: "An exemption from compulsory vaccination may be granted to a person on the physical condition or illness of whom the vaccination is expected to have a detrimental effect.”

Compulsory vaccinations as regulated in AH1 and D1 have undoubtedly caused *more serious grievance* to parents who believe vaccinations are against their conscience and strongly held religious

beliefs. In constitutional democracies it is a frequently debated issue whether citizens may be exempted based on their conscience and religious beliefs from statutes that prescribe general obligations. (Such questions are whether they may use narcotics for religious ceremonies; whether they may wear in the army clothes required by their religion; whether they may deviate from rules governing marriage and family ties, for example, from monogamy, etc.) When considering the proportionality of the fundamental right restriction in this type of regulation, the Constitutional Court applies a different so-called “comparative test of burdens” for those whose conscience and religious freedoms are also violated by the regulations.

On the one hand, one should take into consideration the basic principle of a state under the rule of law which says that everybody has rights and obligations in the same legal system, and therefore the statutes apply to all in such a way that the law treats everybody as equals (as individuals with equal dignity). On the other hand, it should not be ignored that the fundamental values of a constitutional democracy include variety within the political community and also the freedom and autonomy of individuals and their communities. Therefore, it may not be established as a general rule that the freedom of conscience and religion should always be an exception to the laws that apply to all, and likewise, the rule of laws may not be declared fully applicable to the internal life of a religious community.

Due to the various and sometimes contradicting constitutionality criteria, the constitutionality issue of whether an exception should be made from the general laws due to the freedom of religion may only be decided case by case. The decision is largely influenced by, for example, the question of whether the requested exception is closely related to a dogma, religious ceremony and also whether the exception violates the rights of non-members of the religious community. Therefore, the concrete facts of the case must be studied to judge whether the affected persons should be granted exemption from the general rules and whether the State "should allow alternative rules of conduct within reasonable limits". [Decision 21/1991 (V. 17.) AB, ABH 1991, 297, 313; confirmed in: Decision 4/1993 (II. 12.) AB ABH 1993, 48, 51]

5.2. Regarding the constitutionality of the challenged provision, the Constitutional Court considers it highly significant that in the present case the debated issue is not whether adults having the capacity of discretion are allowed to refuse vaccinations that protect their health and also the health of others but whether they may refuse this on behalf of their children. This is no subtle difference since under Article

67 para. (1) of the Constitution both the family and the State are obliged to provide the children the care and protection that are necessary for their satisfactory physical, mental and moral development. Therefore, the State must protect *the children's own interests* against even the parents. Since vaccination protects the health of the affected individual and the health other members of society as well, it is in the interest of the children to receive the age-dependent vaccinations. Also, the members of children's communities benefit from the higher level of immunization in the community.
It is another distinctive element of the regulation that it has an adverse effect on those who are forced by the regulation to act against their conscience and religious beliefs but the *verification* of the regulation complies with the requirement that the State should be *neutral* (under Article 60 of the Constitution). This is due to the fact that the provisions of AH1 and D1 are not based on accepting the truth of ideologies or dogmas, that is, they do not favour one dogma over the other; instead, they include regulations based on scientific facts that apply to all equally, regardless of their beliefs.

In addition, it is also imperative that compulsory vaccinations pose physical and mental burdens *to all obliged persons* and not only to those who have a certain world-view. This general obligation achieves its objective if the number of immunized members of society does not fall below a critical level. Therefore, if it does not jeopardize epidemiological objectives, the legislator (based on scientific surveys and predictions) may consider introducing a regulation that would provide exemption based on religious and ideological beliefs.

Finally, the Constitutional Court has taken into consideration the circumstance that a part of those who refuse compulsory vaccination for religious reasons or because of their conscience do not disapprove of vaccinations as a whole; they usually only object to *vaccines* of a certain composition (quite similarly to condemning blood transfusion). If there are several types of vaccines available, there is an opportunity to provide "alternative rules of conduct within reasonable limits" by applying vaccines of different compositions.

Based on the above, the Constitutional Court has established that it does not violate Article 60 para. (1) and Article 67 para. (2) of the Constitution that the parents were not allowed by Section 15 para. (1) of AH1 and Section 6 of D1 to reject the vaccination of their children based on their conscience and religious beliefs.

6.1. Consequently, having considered the constitutional complaint in merits, the Constitutional Court holds that Section 4 para. (2) of D1 violates the first sentence in Article 37 para. (3) of the Constitution. The Constitutional Court rejects the constitutional complaint seeking declaration of the unconstitutionality of Section 15 para. (1) of AH1 and Section 4 paras. (1) and (3) of D1.

6.2. In accordance with its standing practice, the Constitutional Court has construed the constitutional complaint as if it included a request to exclude the applicability of the challenged provision in the concrete case. [Decision 36/2006 (IX. 7.) AB, ABH 2006, 473; Decision 2/2007 (I. 18.) AB, ABK 14 January 2007]

Under Section 43 para. (4) of the ACC, the Constitutional Court decides on the applicability of a rule in a concrete case separately when this is justified by legal certainty or by an especially important interest of the party initiating the procedure. In the present case, based on the constitutional complaint, the prohibition of applicability could have been justified by the interests of the petitioners. However, the Constitutional Court has found that the result of the process the constitutional complaint was based on did not depend on the application of the unconstitutional Section 4 para. (2) of D1. The final completion of the procedure and the enforcement of the administrative and judicial decisions meant that the children had to receive the vaccinations missed. Section 4 para. (2) of D1 did not affect this duty.

Consequently, the Constitutional Court has rejected the petition seeking exclusion of the applicability in the concrete case of D1 Section 4 para. (2).

VI

In Petition 2, the petitioners have filed – in addition to the constitutional complaint – a request for posterior constitutional examination: they have requested the Constitutional Court to declare unconstitutional and annul Section 58 paras. (1), (3) and (4) of AH2 out of the regulations in force. During the posterior constitutional examination, the Constitutional Court has considered applicable the statements included in sections IV and V of the reasoning in this Decision concerning the restriction of fundamental rights in general and age-dependent vaccinations in particular. However, the Constitutional Court has also kept in mind that the request for posterior constitutional examination does

not only challenge the constitutionality of age-dependent vaccinations but it also questions the constitutionality of all types of compulsory vaccinations.

Section 58 para. (1) of AH2 regulates exemption from vaccination while para. (4) regulates the process of ordering vaccination through administrative resolutions. First, the Constitutional Court has examined the constitutionality of these two provisions, which regulate procedures that are closely related. The petitioners claim that these two provisions violate Article 2 para. (1) (the principle of the rule of law), Article 50 para. (2) (the judicial review of public administration resolutions), as well as Article 57 para. (1) (the right to have one's case judged by the court) and para. (5) (the right to legal remedy) of the Constitution. Second, the Constitutional Court has examined Section 58 para. (3) of AH2 that regulates notification of the person obliged to receive vaccination. [Section 58 para. (2) of AH2 (regulating the register of persons vaccinated and obliged to be vaccinated) is not challenged by the petitioners.]

1.1. Regarding Section 58 para (1) of AH2 on granting exemption, the petitioners claim that neither the challenged provision nor other regulations of AH2 clarify whether exemption is granted on request or *ex officio,* what role the health authority does exactly have in the procedure, whether the decision may be disclosed to the affected parties, and whether the latter may have recourse to a legal remedy against the decision passed by the administrative authority or the attending physician. It is pointed out by the petitioners that in practice the administrative authority does not decide on the approval in the form of a resolution. One of the objections the petitioners raise regarding the constitutionality of the exemption regulations is that under Section 11 para. (1) of D2, the contra-indications of vaccination are set out in a Methodology Letter issued by the National Epidemiological Centre, which includes several compulsory provisions as well.

Regarding Section 58 para. (4) of AH2 on ordering the vaccination, the petitioners object to the fact that this provision makes the judicial review pointless since the enforcement of the resolution means actual vaccination; therefore, the court is not able to decide on the merits of the case and provide true remedy for the illegal action by the authority.

1.2. The Constitutional Court has explained in several decisions what requirements the related provisions of the Constitution on the judicial review of public administration resolution, on the right to have one's case judged by the court and on the right to legal remedy make regarding statutes (in line with the principle of the rule of law).

The first sentence in Article 57 para. (5) of the Constitution declares that “in the Republic of Hungary *everyone may seek legal remedy* in accordance with the provisions of the law to judicial, administrative or other official decisions which infringe on his rights or justified interests.” It is the standing practice of the Constitutional Court that “the essential content of the right to legal remedy as a fundamental right is that there needs to be a possibility of turning to another organ or […] to a higher forum within the same organization against the authorities’ decisions on the merits.” [Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31; Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 109]

The Court has indicated several times that granting the right to one appeal is sufficient, and under the Constitution it is up to the legislator to fix the number of the levels in the system of legal remedies. [Decision 1437/B/1990 AB, ABH 1992, 453, 454, Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 110] As established in Decision 66/1991 (XII. 21.) AB in this context, the judicial review of administrative resolutions meets the constitutional requirement of granting legal remedy. (ABH 1991, 342, 350; Decision 138/B/1992 AB, ABH 1992, 729)

Article 50 para. (2) of the Constitution declares that *the courts review the legality of administrative decisions.* The Constitutional Court has established that "the constitutional provision on the judicial review of administrative resolutions regulates the function of the courts in checking public administration in order to define the relationship between the individual branches of government.” (First in: Decision 953/B/1993 AB, ABH 1996, 432, 434)

Decision 39/1997 (VII. 1.) AB declares concerning Article 50 para. (2) of the Constitution that taking into account Article 57, this provision should be interpreted in such a way that the court shall in fact “determine” the civil rights and obligations of the claimant; all the requirements determined by the Constitution, i.e. that the court should be independent, impartial and established by law, and that the court should be fair and open to the public serve this aim; only by fulfilling these requirements may the court constitutionally decide on the merits of the case and only this way may the court render a final decision which determines a right. The judicial review of the legality of public administration decisions may, therefore, not be limited constitutionally to reviewing only the formal legality of the decisions of this kind”. (ABH 1997, 263, 272)

According to the practice of the Constitutional Court, the possibility of "remedying" is an essential and immanent element of all legal remedies, i.e. the concept and the substance of a legal remedy contains the possibility to remedy the rights injured. [Decision 23/1998 (VI. 9.) AB, ABH 1998, 182, 186; 49/1998 (XI. 27.) AB, ABH 1998, 372, 382; Decision 19/1999 (VI. 25.) AB, ABH 1999, 150, 156; Decision 2868/1995 AB, ABH 2001, 795, 797]

As declared in Decision 71/2002 (XII. 17.) AB, "The procedure before the administrative organ and the procedure before the court are closely related; their role is to counterbalance and supplement each other. Concerning the relationship of these two procedures it must be examined whether the right of legal remedy may actually be applied. Legal remedy must be granted in an administrative procedure or in a judicial procedure aimed at the review of the public administration decision. In both cases the efficiency of legal remedy is a requirement concerning the possibility to remedy the injury: in general, legal remedy must be granted before the decision is actually enforced. This latter requirement is not general; there are several exceptions in the legal system. It may be justified by the parties' particularly important interests or other reasons that applying for legal remedy shall have no staying effect or that a law enforcement decision be actually enforced regardless of the application for legal remedy. (ABH 2002, 417, 426-427)

1.3. D2 and the two challenged provisions of AH2 regulate *the procedure of vaccination and the possibility of exemption*. Section 58 para. (4) declares that "if the person obliged to receive vaccination fails to comply with this obligation in spite of a written warning, the health authority will order the vaccination through a decision. The resolution ordering the vaccination may be enforced without delay, regardless of any legal remedy applied." Under Section 58 para. (1) "The attending physician may grant a temporary or (with the approval of the health authority) final exemption to the patient on whose health or illness the vaccination is expected to have a detrimental effect."

1.3.1. According to Section 3 para. (1) of D2, the local public health tasks aimed at preventing and eliminating infectious diseases fall into the competence of the National Public Health and Medical Officer Service (hereinafter: the Service) and its town or county institutions. It is the task of the child care officer to notify the person to receive vaccination (or his or her legal representative) on the date, time, significance and venue of the vaccination in the district and in the school the officer is responsible for, including the reactions that may be expected and the consequences of missing the vaccination [Section 15 para. (1) item *c)* of D2]. In case the vaccination is missed, the officer will send a second

notification and following three failed notifications concerning the same person, the officer is obliged to inform the town institute competent for the area [Section 15 para. (1) item *b)* of D2]. The town institute obliges the person to receive vaccination through a resolution [Section 16 para. (1) item *f)* of D2]. Based on the provision of AH2 under review, the town institute resolution may be enforced without delay.

*Ordering the vaccination* qualifies as a public administration matter under Section 12 para. (2) of Act CXL of 2004 on the General Rules of Public Administration Procedure and Service (hereinafter: the AAPS) since the town institute as an administrative organ establishes a duty affecting the client. Under Section 98 para. (1) and Section 99 para. (1) of the AAPS, the client may appeal the decision of first instance in 15 days from the day the client is notified on the decision. The county institute of the Service will decide on the appeal in accordance with Section 3 para. (1) of D2. Section 109 para. (1) of the AAPS grants the client the right to request (in 30 days from the receipt of the resolution, with reference to the violation of a statute) the judicial review of the county institute resolution from the court competent in public administration matters by filing an action against the organ passing the resolution.

1.3.2. The *exemption procedure* is not regulated by D2 in detail. Since Section 58 para. (1) of AH2 allows exemption for medical reasons, it seems logical that this does not apply to all vaccinations; instead, it applies to specific vaccinations or vaccines, or for specific periods or conditions (for example in case of fever or pregnancy etc). According to the statutory rule, exemption for a specific vaccine or vaccination may be temporary or final, depending on the nature of the medical reason. Temporary exemption is granted by the attending physician. For final exemption, the attending physician is required to procure the “approval” of the health authority (the town institute of the Service). The wording used in Section 11 para. (2) of D2 is confusing since the decision passed by the attending physician is called “medical expert opinion”, while the “approval” given by the health authority (actually prior to decision) is referred to as (subsequent) “consent”.

In practice, the exemption may be part of the procedure in which the vaccination is ordered but it may also be a separate procedure. For example, if before vaccination the attending physician recognizes a contra-indication, he or she will obviously choose not to inject the vaccine. The person obliged to receive vaccination (or the legal representative) may reveal the contra-indication before or irrespective of the scheduled vaccination, in which case, the attending physician must come to a decision. Neither

AH2 nor D2 regulates the process of the physician's decision specifically or (in case of final exemption) the process and form of the health authority approval. Also, they do not grant a legal remedy explicitly.

1.4. Based on the comparison of the constitutionality criteria quoted in section 1.2 and the elements of the legal remedy system listed in section 1.3, the Constitutional Court has established that the regulation of the procedure for *ordering* the vaccination meets the *formal* requirements: the client may appeal the first instance administrative resolution ordering the vaccination to the appellate organ, and the court may be requested to review the appellate decision. The single-level appellate system and the option of a judicial review provide appropriate opportunities for an effective legal remedy.

However, it is questionable whether the (formally constitutional) system of legal remedies related to ordering the vaccination may be applied in case of the *exemption* procedure as well. Hence the Constitutional Court has had to examine how the quoted provisions of the Constitution are implemented in the procedures on deciding exemptions (section 2). In addition, the Constitutional Court has established that the formally constitutional system for legal remedies actually restricts the essence of efficient and actual legal remedies. This is due to the fact that according to the second sentence in Section 58 para. (4) of AH2, the first instance resolution ordering the vaccination is *enforceable without delay*, regardless of any legal remedy applied. Therefore, the Constitutional Court has examined subject to the general conditions of restricting fundamental rights whether restricting the right to legal remedy as such is necessary and proportional (section 3).

2.1. The Constitutional Court holds that from the aspect of constitutionality, granting and rejecting exemption from vaccination are distinct issues. It does not follow from the quoted provisions of the Constitution that the legislator is obliged to provide a chance for legal remedy or judicial review in case temporary or final exemption from compulsory vaccination is granted. This is due to the fact that it may not be considered a violation of rights if before vaccination the attending physician recognizes a contra-indication and decides to postpone the vaccination or if the person obliged to receive the vaccination is exempted from the vaccination due to a contra-indication.

2.2.1. Rejecting or omitting exemption may be related to both *temporary* and *final exemptions*. AH2 does not regulate the form and process of making this decision and it fails to regulate the possibility of legal remedy as well. According to the interpretation of the Constitutional Court, if the attending

physician rejects granting *temporary* exemption, the person obliged to receive vaccination (following the notifications from the officer) may refer to the presumed ground for exemption in the appeal against the resolution issued by the town institute of the Service. This way, the person obliged to receive vaccination may apply the legal remedies regulated in AH2, D2 and AAPS related to ordering the reception of a missed vaccination. Since the public administration resolution passed in the appellate procedure may be reviewed by the court, the final decision on temporary exemption may be made by the court.

Consequently, if temporary exemption is rejected, the person obliged to receive the vaccination has an efficient system of legal remedies available. However, for this it is necessary that the obliged person does not comply with the decision of the physician and ignores the notifications of the officer. As a result, the obliged person may only use the legal remedies granted by Article 50 para. (2) and Article 57 para. (5) of the Constitution if he or she formally violates the rules of AH2 and D2.

2.2.2. The regulations of AH2 and D2 may not be applied to the cases of rejecting or omitting *final* exemption. If the attending physician (by his or her choice or because the town institute of the Service does not grant its approval) refuses to grant final exemption from any vaccination, the final exemption may not obtained through a legal remedy applied against the resolution of the administrative organ ordering the vaccination. The decisions on final exemption are to be made in separate procedures from the procedures ordering vaccination. (It should not be expected from the obliged person to apply legal remedies continuously because of the multiple orders received.)

Under Section 58 para. (1) of AH2, final exemption is subject to “the approval of the health authority”. In case an affected person receives final exemption from a compulsory vaccination under AH2, the person will become entitled to refuse to comply with the duties under AH2 and R2. Under Section 10 para. (1) of Act XI of 1991 on Health Authorities and Health Administration, the health authority has competence over all natural and legal persons (including business associations without legal personality), except for the armed forces and law enforcement agencies.

Section 12 para. (2) item *a)* of the AAPS defines “public administration matter” as a matter in which the authority establishes a right or an obligation that affects the client, or a matter in which the authority certifies data, facts or rights, or keeps an official record, or conducts an official audit. Consequently, it may be established that *due to its subject matter* a procedure aimed at granting or rejecting exemption

from a certain vaccination must be regarded as a public administration matter. However, due to the deficiencies of the regulation, the provisions of the AAPS may not be applied to the procedure for final exemption. Based on the effective legal provisions, the attending physician does not qualify as a "decision-making authority" under Section 44 para. (2) of the AAPS which incorporates the decision (approval or rejection) issued by the specialized authority into a resolution in accordance with Section 45 para. (1) of the AAPS. Therefore, the Service may not be considered a specialized authority as defined by Sections 44 and 45 of the AAPS and, consequently, it is not possible to apply Section 45 para. (2) of the AAPS either, which prescribes that "No appeal may be lodged against the decision of the specialized authority; the client may challenge the opinion of the specialized authority in the appellate procedure against the resolution." As a result, in case final exemption is not granted or no decision is made, *there is no statutory opportunity to apply for a legal remedy before the appellate organ and no judicial review may be requested.*

2.3. The legal remedy [Article 57 para. (5) of the Constitution] against and the judicial review [Article 50 para. (2) of the Constitution] of decisions rejecting temporary or final exemption from compulsory vaccination have significance from the aspect of constitutional law because these decisions prescribe invasive health interventions that severely limit the right to self-determination [Article 54 para. (1) of the Constitution] of persons with a capacity of discretion and also the right to personal integrity. It is the essence of exemption based on contra-indication that vaccination risking the life or the health of the obliged person should not be administered. Therefore, the legal institution of exemption protects *the right to life and health* defined under Article 54 para. (1) of the Constitution.

Section 11 para. (1) of D2 prescribes that the contra-indications of vaccinations are included in the Methodology Letters published by the National Epidemiological Centre annually. The Methodology Letter contains information on compulsory and voluntary vaccinations as well as on the vaccines available in pharmacies and at the Service. Also, the Methodology Letter lists the conditions and illnesses that qualify as vaccination contra-indications.

Methodology Letters are a significant source of information for the attending physicians and other affected parties as well. However, according to the Constitution and the AL, *neither the persons outside of the health system nor the courts are bound by Methodology Letters*. In principle, it is possible that a person is exempted from a vaccination temporarily or permanently based on a contra-indication that is not included in the current Methodology Letter. A particular psychic state or a somatic

illness may both result in exemption. In addition, even for the contra-indications listed in the Methodology Letter, the personal circumstances need to be evaluated when making a decision on exemption. The epidemiological situation and the nature of the vaccine-preventable disease must be taken into consideration as well as the expected damage the vaccination may cause in the health of the obliged person. High fever is a contra-indication for all vaccinations; for pregnant women, vaccination is only allowed in exceptional cases; in case of HIV-positive persons, the situation must be evaluated carefully before making a decision etc.

2.4. In constitutional democracies, special legal remedies are available when such medical treatments or interventions are applied that obviously restrict or threaten fundamental rights. The psychiatric treatment of mentally ill people that are a danger to themselves or to others is decided in special *habeas corpus* procedures, where the courts promptly decide on ordering or cancelling the treatment. Also, courts are competent for extending treatments, for conducting periodic reviews and also for checking the justification of the methods and devices applied. In Decision 36/2000 (X. 27.) AB (ABH 2000, 241) the Constitutional Court discussed these substantial and procedural requirements, and the regulations in force are included in Chapter X of AH2 entitled “The treatment and care of the mentally ill”.

Also, special legal remedy procedures and related court procedures are available to prevent any abuse concerning life support and life saving treatments and to secure the right to reject these treatments. In Decision 22/2003 (IV. 28.) AB (ABH 2003, 235) the Constitutional Court outlined the constitutional foundations of the right to refuse treatment. Sections 20 to 23 of AH2 include the regulations in force.

The Constitution requires that the right to legal remedy and the right to a fair court procedure be secured in the temporary or final exemption procedures concerning compulsory vaccinations. In the course of a legal remedy procedure or a contradictory court procedure, there is a possibility to personalize the application of the general rules *with regard to the individual circumstances* in case of a dispute. Similarly to civil and criminal procedures or to the special procedures related to the right of medical self-determination, it is often the case that matters of the medical profession are to be decided in the exemption procedure. In administrative and judicial procedures that are constitutional, the obliged persons are granted an opportunity to present their views with the involvement of experts and through appropriate scientific facts. Thus they may challenge the position of the Service. The legal remedy and the impartial judicial review are indispensable for the evaluation of personal

circumstances, of the positive and negative effects on health and of other aspects that are beyond the issues of the medical profession.

2.5. Based on the above, the Constitutional Court has come to the conclusion that the current regulations on the temporary and final exemption procedures do not meet the requirements specified in Article 50 para. (2) and Article 57 para. (5) of the Constitution. However, the unconstitutionality is not caused by the provision in Section 58 para. (1) of AH2 as challenged in the request for posterior examination but by a legislative deficiency. If temporary exemption is not granted, the person obliged to receive vaccination may apply legal remedies related to the ordering of vaccination but only if he or she violates beforehand the rules of AH2 and D2. And, in case final exemption is not granted or no decision is made, there is no statutory opportunity to apply for a legal remedy before the appellate organ and no judicial review may be requested. The legislator has provided no opportunity for the obliged person to exercise his or her right to legal remedy or judicial review by not making the system of legal remedies under the AAPS or special legal remedies available.

The Constitutional Court holds that in the exemption process the exercising of rights and the application of legal remedies are only efficient in case the person obliged to receive vaccination may turn to an appellate organ without ignoring or circumventing the legal regulations before vaccination, and the organ is entitled to make a substantial decision on temporary or final exemption. Also, the efficiency of the procedure is related to public health and epidemiological objectives: an imminent danger of infection or a threat of epidemics require a swift procedure.
According to Section 49 para. (1) of the ACC, an unconstitutional omission of legislative duty may be established – either *ex officio* or on the basis of a petition – if the legislature has failed to fulfil its statutorily mandated legislative duty, and this has given rise to an unconstitutional situation. The legislature shall be obliged to legislate even in the lack of a concrete mandate given by a statute if it recognizes that there is an issue requiring statutory determination within its scope of competence and responsibility. The Constitutional Court shall establish an unconstitutional omission if the guarantees necessary for the enforcement of a fundamental right are missing, or if the omission of regulation endangers the enforcement of a fundamental right. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232] As the primary responsibility of the Constitutional Court – specified in the preamble of the ACC as well – is the protection of constitutional fundamental rights, the Court may, when needed, act *ex officio* to declare an unconstitutional omission. [Decision 30/1990 (XII. 15.) AB, ABH 1990, 128]

In the present case, the Constitutional Court has established both an omission and the occurrence of an unconstitutional situation. As a result, acting *ex officio*, the Constitutional Court has established that an unconstitutional situation violating Article 50 para. (2) and Article 57 para. (2) of the Constitution has resulted from the omission of the Parliament to provide an effective legal remedy against rejecting to grant immunity from compulsory vaccination as regulated by Article 58 Section (1) of Act CLIV of 1997 on Healthcare. The Constitutional Court has called upon Parliament to meet its legislative duty by 31 March 2008.

The Constitutional Court has rejected the petition seeking determination of the unconstitutionality and declaration of the nullification of Section 58 para. (1) of AH2.

3. The Constitutional Court has separately examined the issue of whether the second sentence in Section 58 para. (4) of AH2 ordering that vaccination is *enforceable without delay* is a necessary and proportional restriction of the right to legal remedy.

3.1. To start with, when examining *the necessity and the proportionality* of the fundamental right restriction the Constitutional Court has established that the epidemiological public interest analysed in sections V.3 and V.4 is an appropriate constitutional objective for introducing compulsory vaccination and for regulating the legal conditions of compulsory vaccination. Section 101 para. (3) item *g)* of the AAPS conforms with this objective by prescribing that the immediate enforcement of a resolution regardless of any appeal may be ordered if it is permitted by a statute for public health or epidemiological reasons.

Furthermore, the Court has regarded the Constitutional Court practice on legal remedies summarized in section VI.1.2 of the reasoning as applicable when examining the constitutionality of the second sentence in Section 58 para. (4) of AH2. The Constitutional Court considers the interpretation of the Constitution first detailed in Decision 39/1997 (VII. 1.) AB applicable to the case at hand, and according to this interpretation, it is a requirement under Articles 50 para. (2) and Article 57 para. (5) of the Constitution to provide substantial and effective legal remedy that exceeds the level of a formal revision.

This interpretation by the Constitutional Court complies with the approach of the European Court of Human Rights, according to which it is a significant element of the right to an effective remedy under Article 13 of Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950) to provide *remedial and material effectiveness*. Therefore, the legal remedy should not be just a theoretical possibility. It must be a legal remedy in practice that the applicant may actually have recourse to and that results in a process of material review.

3.2. When examining the *proportionality* of restricting the right to effective remedy, the Constitutional Court has taken note of the fact that the second sentence in Section 58 para. (4) of AH2 limits the most substantial element of the right to appeal available under the right to legal remedy, since according to Section 101 para. (1) of the AAPS, the appeal has a staying effect on the enforcement of the decision (except when the authority excludes the staying effect of the appeal and orders enforcement). Consequently, the most serious legal effect of lodging an appeal in general is preventing the enforceability of the first instance resolution passed by the public authority.

By virtue of the second sentence in Section 58 para. (4) of AH2, the first instance authority shall order *the enforcement of the decision without delay* and without any discretion. By virtue of the second sentence in Section 101 para. (4) of the AAPS, the first instance authority shall separately pronounce if it orders enforceability regardless of any appeal and it shall also justify the ordering of immediate enforceability. In the present case, the obligation of justification is met by referring to Section 58 para. (4) of AH2 that constitutes a ground for immediate enforceability. If the first instance authority specifies a deadline for performance, ordering enforceability is only possible if the deadline passes without performance. Therefore, the enforceability of the resolution ordering the vaccination does not depend on the discretion of the organ passing the first instance resolution or on the client lodging an appeal or on whether the deadline for appeal has passed.

Immediate enforceability is constitutional if it is absolutely necessary for the protection of the rights of others or for the achievement of a constitutional public interest, and there is no other way to achieve the intended goal. Under Section 101 para. (3) of the AAPS, the authority of first instance may declare its resolution enforceable without delay regardless of any appeal in case such provision is necessary for the prevention or elimination of a situation that may risk lives or cause serious damage, for an important reason of public order, or for the prevention of serious or irreparable damage. In the cases listed above, the authority has discretionary powers to make its decision based on the specific

circumstances of the case, with particular regard to the severity of the restriction applied to reach the intended goal. However, the second sentence in Section 58 para. (4) of AH2 does not allow or prescribe the consideration of *any specific factors* (for instance the level of epidemic threat, the type of vaccination, and the personal conditions of the obliged person), and therefore the ongoing exemption procedure does not prevent the administration of the vaccination. It is only the subject matter of the resolution (establishing an obligation to receive vaccination) that justifies immediate enforcement.

Based on the above, it is to be emphasized that only an epidemiological emergency may justify a special public administration procedure. In such emergencies, even more severe restrictions of fundamental rights are acceptable since an extremely pressing community interest must be considered when proportionality is evaluated. As a result, from the aspect of immediate enforceability, the constitutionality evaluations on age-dependent vaccinations and vaccinations ordered due to the outbreak (or an imminent danger of the outbreak) of an epidemic are different. The regulations of AH2 and D2 distinguish age-dependent vaccinations and vaccinations to be administered due to a risk of illness. Nevertheless, the provision on mandatory and immediate enforceability, which is only reasonable when there is an epidemic threat, applies to all cases.

Another characteristic of the resolution ordering vaccination is that enforcement means vaccination, and therefore the intervention is *irreversible*. By virtue of the second sentence in Section 130 para. (1) of the AAPS, if the authority orders the enforcement of the decision regardless of any appeal, the method of enforcement and execution needs to be specified in the decision or the order. Under Section 140 para. (1) item *e)*, if the enforcement is aimed at performing a specific action or conduct and it is not performed, the organ executing the decision may enforce the specific action or conduct with the assistance of the police. Besides, a procedural fine may also be imposed to secure enforcement. As laid down in Section 141 para. (2), “the procedural fine may be imposed repeatedly if the obliged person fails to perform the specific action by the new deadline included in the order imposing the fine or if the person violates the provision of the specific action again." Consequently, the AAPS provides coercive measures and procedural fines that may be imposed several times to secure early enforcement of the first instance resolution.

Based on the regulations, all conditions are granted to have the person vaccinated by the time of the appellate procedure or by the time of the judicial review proceedings, i.e. by the time the exemption application is resolved. Therefore, if the first instance resolution is found illegal, restitution of the

lawful situation is no longer possible through the legal remedy proceedings. Due to the immediate vaccination, it is of no relevance that the judge in charge of the administrative procedure initiated because of the immediate vaccination may at any time suspend the enforcement of the challenged administrative decision on request under Section 332 para. (3) of Act III of 1953 on the Code of Civil Procedure. [2/2006 Law Uniformity Resolution of Administrative Law, MK (Official Gazette) 49/2006; Decision 1/2007 (I. 18.) AB, ABK 10 January 2007]

3.3. Therefore, the Constitutional Court holds that the second sentence in Section 58 para. (4) of AH2 disproportionately restricts the right to legal remedy recognized in Article 57 para. (5) of the Constitution since the provision requires the first instance authority to order the enforcement of the decision without delay, regardless of the circumstances of the case and the irreversibility of the intervention. Consequently, the Constitutional Court has annulled the second sentence in Section 58 para. (4) of AH2 as from the publication date of this Decision.

Having established the unconstitutionality of the challenged provision under Article 57 para. (5) of the Constitution, the Constitutional Court – acting in line with its established practice – has not performed any further review of unconstitutionality with regard to other constitutional provisions referred to in the petitions. [Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision 16/2000 (V. 24.) AB, ABH 2000, 425, 429; Decision 56/2001 (XI. 29.) AB, ABH 2001, 478, 482; Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 213; Decision 4/2004 (II. 20.) AB, ABH 2004, 66, 72; Decision 9/2005 (III. 31.) AB, ABH 2005, 627, 636]

4. In the petitioners' opinion, Section 58 para. (3) of AH2 violates Article 57 para. (5) of the Constitution, that is, the right to legal remedy, and it also violates Article 70/D, that is, the right to health. The petitioners object to the fact that the regulation on the notification of the person obliged to receive vaccination is unclear in terms of whether such person shall have the right to information specified in Sections 13 and 14 of AH2. The resolution under review declares that "the person that is obliged to be vaccinated (and his or her statutory representative) shall be notified on the mode, purpose, venue and date (time) of the vaccination. The statutory representative is obliged to secure that the minor is present at the vaccination."

4.1. In accordance with the practice of the Constitutional Court, the right to information under Sections 13 and 14 of AH2 derive from the right to human dignity under Article 54 para. (1) of the Constitution.

[First in: Decision 36/2000 (X. 27.) AB, ABH 2000, 241; Decision 56/2000 (XII. 19.) AB, ABH 2000, 527, 529-530] It is a part of the right to self-determination granted to persons with the capacity of discretion that they may make decisions freely in issues regarding their medical treatment. Having regard to Article 54 para. (1) of the Constitution, certain dissenting opinions attached to Constitutional Court decisions have already established that the person subjected to medical treatment may only come to a responsible decision on whether to undergo a medical treatment (and if yes, what type of treatment the person should choose) in cases when he or she is informed on, for instance, his or her health condition, prognosis without treatment, as well as on the possible advantages and disadvantages of the interventions *(informed consent).* [Decision 684/B/1997 AB, ABH 2002, 813, 828, Decision 43/2005 (XI. 14.) AB, ABH 2005, 536, 560]

Sections 13 and 14 of AH2 recognize and regulate in detail the right to information. Section 14 para. (3) is essential in the case at hand, and it declares that "the patient shall have the right to information even in cases when his or her consent is otherwise not required for commencing his or her treatment". [Under Section 3 item *a)* of AH2, for the purpose of the Act, a patient is “a person receiving or using a medical treatment”.] In line with the general rule, Section 56 para. (3) of AH2 specifically declares the following: “The patient's consent is not required for the execution of a compulsory epidemiological measure; nevertheless, the patient shall have the right to information even in these cases, bearing in mind the specific circumstances”. Under Section 13 para. (5) of AH2, “also patients with no or limited disposing capacity have the right to adequate information with regard to their age and mental state”. Under paragraph (8), “the patient shall have the right to be informed in a comprehensible manner, with due regard to his age, education, knowledge, state of mind and his or her wish expressed on the matter (…).”

According to the position of the Constitutional Court, the right to information (in accordance with their age and condition) of persons with no discretionary capacity derives from the right to personal integrity under Article 54 para. (1) of the Constitution. Additionally, the provision of information is a precondition for the effectiveness and success of the medical treatment since an appropriately informed person shows more trust regarding the professionals involved in the treatment and is better at complying with the doctors' instructions.

4.2. Based on the above, the right to information specified in Sections 13 and 14 of AH2 is granted in connection with age-dependent vaccinations. Article 56 para. (3) of AH2 specifically recognizes this

right. Having regard to Article 54 para. (1) of the Constitution, it is essential that the right to information is granted not only to the legal representative (the parent) but also to the child, depending on his or her age. Section 13 paras. (2) to (6), which define the contents of information, apply to vaccinations as well.

By virtue of the first sentence in Section 58 para. (3) of AH2, the person (and his or her statutory representative) that is obliged to be vaccinated shall be notified on the mode, purpose, venue and date (time) of the vaccination. The Constitutional Court holds that due to the regulations under Section 14 para. (3) and Section 56 para. (3) of AH2, this provision does not qualify as a special provision overruling the general requirements of providing information. The contents of Section 58 para (3) is based on the compulsory nature of the medical treatment, since the obliged person (or the representative) needs to be notified in advance on when, where and how he or she must comply with the obligation. This duty to provide information is necessary for the affected persons to meet their obligations and exercise their rights. The notification is required, for example, to implement the provision in the second sentence in Section 58 para. (3): "The statutory representative is obliged to secure that the minor is present at the vaccination." Therefore, Section 58 para. (3) of AH2 does not cancel but supplement the obligation to provide information under Sections 13 and 14 of AH2.

Consequently, the Constitutional Court has not shared the petitioners' view that the rule under review violates the right to legal remedy under Article 57 para. (5) and the right to health under Article 70/D of the Constitution. The right to information stems from Article 54 para. (1) of the Constitution, and therefore, as opposed to the petition, Section 58 para. (3) of AH2 may not be associated with Article 70/D of the Constitution. Furthermore, the challenged provision does not restrict the right to legal remedy under Article 57 para. (5) of the Constitution; on the contrary, it provides the necessary information for the affected persons to exercise their rights and meet their obligations.

5.1. In Petition 2 aimed at establishing the unconstitutionality of, and at annulling, Section 58 paras. (1), (3) and (4) of AH2, the petitioners raise further concerns regarding the constitutionality of other provisions of AH2 and D2. However, they have partly failed to specify the provisions of the Constitution they believe are violated, and regarding certain other provisions they have not initiated the establishment of unconstitutionality and the nullification of the provisions concerned. These elements of Petition 2 do not comply with Section 22 para. (2) of the ACC, stipulating that the petition must contain a definite request in addition to specifying the cause that serves as the basis of the request.

Consequently, the Constitutional Court has rejected the petition under Section 22 para. (2) of the ACC and Section 29 item *d)* of the Rules of Procedure.

5.2. The petitioners have also proposed that the Constitutional Court establish constitutional standards regarding the application of certain provisions of AH2. The ACC does not grant a right to petition the establishment of constitutional standards. The Constitutional Court shall reject the petition under Section 29 item *c)* of the Rules of Procedure if it finds that the petitioner has no right to initiate the procedure. [Order 292/B/2001 AB, ABH 2001, 1591-1592] For this reason, the Constitutional Court has rejected the part of the petition requesting the establishment of constitutional standards.

The Constitutional Court has published this Decision in the Official Gazette (*Magyar Közlöny*) based on Section 41 of the ACC.

Budapest, 19 June 2007

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

I

I do not agree with section 2 of the holdings in the majority Decision establishing the unconstitutionality of Section 4 para. (2) of Minister of Healthcare Decree 9/1972 (VI. 27.) EüM on the Implementation of the Epidemiological Provisions of Act II of 1972 on Healthcare (hereinafter: D1); I do not agree with section 1 of the majority Decision annulling the second sentence in Section 58 para. (4) of Act CLIV of 1997 on Healthcare, and I do not agree with section 4 of the majority Decision establishing an unconstitutional omission. Finally, I do not agree with the items in the reasoning that support the above-mentioned sections of the holdings.

I agree with the arguments presented in the other sections of the holdings that reject the rest of the petition items and also with the related part of the reasoning.

In my opinion, the effective system of vaccinations in Hungary constitutes a level of restriction of human rights that does not exceed the requirements of either necessity (as recognized in the majority Decision, too) or proportionality.

I do not agree with applying the criteria of the system of legal remedies in administrative procedures automatically to medical interventions. Although the rule of law must (and does) govern medical professional practice, I believe that the law and the individual legal regulations should refrain from labelling legal institutions as decisive in this field which is predominantly non-legal and require specialized knowledge and skills and which is primarily based on the trust between the physician and the patient; therefore, in this field legislation should keep a low profile instead of stressing the importance of formal regulations, and an excessive number of regulations would hinder the efficiency of the system.

II

Based on the established practice of the Court, the restriction of a fundamental right is only proportionate if the importance of the objective to be achieved is proportionate to the restriction of the fundamental right concerned, and the legislator must apply the most moderate method to reach the objective. [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171]

In Hungary 99% of the population may be considered immunized against the fatal childhood epidemics that used to be common in Europe. (The missing 1% is due partly to the statistical margin of

error, the postponement of vaccinations due to illness, and, in practice, to the risk arising out of migration, and partly to the fact that certain groups at the bottom of society are impossible to handle through the traditional methods of the public health system. As a result, a 100% immunization rate is impossible to reach for any country.) The objective set by the WHO was a 95% immunization rate and for this purpose the European Immunization Week between 16 April 2007 and 22 April 2007 was to increase the level of immunization even in Western European countries. The objective of the current WHO and UNICEF programmes is to maintain and increase the level of immunization (for more details see: *Global Immunization Vision and Strategy* WHO 2005 Geneva; *State of the World's Vaccines and Immunization*, WHO 2002 Geneva). In addition to basic health reasons, these policies are rational since it is evidenced that preventing epidemics is less costly than handling them.

Several factors influence the immunization programmes in different countries*: (i)* the risk of diseases and the geographical position (localization) of the disease; (*ii*) the costs of immunization and the domestic or international resources available to cover these; (*iii)* the severity of actual epidemics in the past and their recollection; (*iv)* the size and availability of the population to be immunized and also their attitude to health; (*v*) the capacities, the operability and the size of the medical system; (*vi*) the relationship between the State and the individual, the concept of autonomy, and finally the accessibility of members of society with the methods of modern public administration and their geographical location.

Based on the statistical data of the WHO, the health risks of vaccination are minimal (1 to 1 million), and it must be considered at the same time that the risk of being infected is relatively large if the person is not immunized (1 to 20, see: *State of the World's Vaccines and Immunization*).

Due to the fact that a significant number of childhood diseases prevented by vaccination have not been eliminated (either in Hungary or elsewhere) but only contained, the pathogens still do exist in our environment, and, as a result, epidemics may break out not only if the pathogens arrive externally; therefore, the question is not whether there is a critical level below which the immunization rate should not fall without taking a risk, but whether the restriction arising out of an established, closed (and from this aspect effective), internationally recognized and fortunate system is proportional and, therefore, constitutional. I believe that the current system of vaccination complies with this requirement.

In this respect, let me quote the Slovenian Constitutional Court decision (U-I-127/01, 12 February 2004), referred to in the majority Decision as well, which found the Slovenian regulation – which is quite similar to the Hungarian solution – compatible with the requirement of proportionality.

III

As pointed out in my dissenting opinion attached to Decision 43/2005 (XI. 14.) AB (ABH 2005, 536, 558) on artificial sterilization, the obligation to respect human rights through continuous abstractions should not make the human right approach independent from other approaches and it should not result in ignoring other factors.

Nevertheless, with regard to the human rights aspect I consider it important to note that regarding the acceptability of medical interventions it may not be deducted from the practice of the European Court of Human Rights that a prior legal remedy system must be introduced before invasive medical interventions are applied. The practice of the European Court of Human Rights does include a possibility to review the decisions of physicians from the aspect of human rights; however, this possibility is granted not in connection with the right of legal remedy (Articles 6 and 13 of the European Convention of Human Rights) but typically in connection with Article 5 para. (1) item *e)* and the *habeas corpus* provision [Article 5 para. (4)], with the physical integrity and privacy of the individual (Article 8) as well as with the freedom of religion and conscience (Article 9). In certain cases, even the prohibition of inhuman and humiliating treatment (Article 3) may be applied.

The posterior judicial review of a physician's decision typically arises in cases of placement in a mental hospital. (See the judgement in the *Winterwerp v. the Netherlands* case dated 24 October 1979, the judgement in the *Ashingdane v. the United Kingdom* case dated 25 May 1985, the judgement in the *Herczegfalvy v. Austria* case dated 24 September 1992, and as a more recent one, the judgement in the *Filip v. Romania* case dated 14 March 2007 etc.)

The issue of *fair* trial and legal remedy arises in cases that are reverse compared to the one the petition is based on. One example is the English case with the legal background where – in case a relative of a child without legal capacity refuses to grant approval without an appropriate reason to a medical measure that is considered reasonable by the physician – the physician may request the court to issue a statement that would substitute for the approval of the relative. Save for the case of distress, the physician is required to turn to the court, especially in case there are several options of medical intervention. (*Glass v. the United Kingdom,* date of judgment: 9 March 2004. Articles 80 to 84) The extension of a medical malpractice litigation gave rise to applying Articles 6 and 13 (*DM v. Poland,* date of judgement: 14 October 2003, Articles 38 and 39). In a court case for the modification of a compensation settlement between the State and the parents of a child that suffered health damage due to vaccination, the length of the litigation exceeded the justified period (*Kellner v. Hungary*, judgement date: 28 September 2004, Articles 22 to 24). The 29 April 2002 judgement in the *Pretty v. the United Kingdom* case concerned a petition for euthanasia; in this case the petitioner (requesting euthanasia

from doctors who refused) quoted the prohibition of inhuman treatment, the right to privacy and the freedom of conscience and religion and also the prohibition of discrimination but did not refer to the right to legal remedy. In an Italian case for compensation due to damage suffered because of vaccination, the European Court of Human Rights declared that the institution of mandatory vaccination is related to the right of privacy (*Salvetti v. Italy*, judgement date: 9 July 2002). This is in accord with the decision of the European Commission of Human Rights back then in the case *X v. the United Kingdom* dated 12 July 1978, with the Commission declaring the principle that "*it is a legal act by the State to let the specialist decide whether there are contra-indications.*"

These findings do not contradict the Council of Europe's Convention adopted in Oviedo on 4 April 1997 *for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (promulgated by Act VI of 2002) and the additional protocols thereto.

Under Article 5 of the Oviedo Convention entitled "*Consent*", "an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time." However, regarding vaccination for children, Article 6 entitled *"The protection of persons not able to consent"* is also relevant here: "1. Subject to Articles 17 and 20 (research and transplantation – addition by P. K.) below, an intervention may only be carried out on a person who does not have the capacity to consent for his or her direct benefit. 2. Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorization of his or her representative or an authority or a person or body provided for by law."

Therefore, this regulation in international law, while giving effect to the principle of "informed consent", does not consider the will of parents absolutely decisive, and regarding the review of the decision the Convention refers to *authorities* in general, and therefore it does not specifically require judicial review.

IV

The finding in the majority Decision that declared D1 unconstitutional is related to the legal relevance of methodology letters, guidelines and similar documents. The Constitutional Court has already dealt with this issue several times.

The majority Decision itself quotes the following passage from Decision 45/1991 (IX. 10.) AB: ”1. Under Section 61 para. (2) of Act XI of 1987 on Legislation, the AL “shall not affect the force of any statute, decision, directive, standard, price fixing or legal guidance adopted before the entry into force of this Act.” According to the legislator's reasoning relevant thereto, “This provision is aimed at preventing any disturbance in legal practice caused by the application of this Act. In respect of the statutes, decisions, directives, and legal guidelines adopted before the entry into force of this Act, the provisions of this Act shall be put into practice on a continuous basis, when reviewing the above.” The Constitutional Court holds that this rule specified in the AL does not violate any constitutional provision. On the contrary, it is in line with Article 2 para. (1) of the Constitution declaring that the Republic of Hungary is a state under the rule of law. Legal certainty (the preservation of which is the purpose of the AL provision) is an important element of the rule of law.” (ABH 1991, 206, 207)

The logic of the decision is based on the finding that the methodology letters include certain information that may not regarded as exclusively medical matters but these pieces of information actually affect certain rights of the individuals.

The petitioner claims that the appropriate age for certain vaccinations was defined “mostly the practice of the epidemiological authorities”, and in case of the school vaccination programmes there was no guarantee that appropriate information was given on the time and method of vaccination and on the expected consequences. In my judgement, however, the operation of the so-called child care officer system, the vaccination register and the school information system did provide the required basic information in an organized manner. Hence I find it hard to accept the statement of the petitioners that has been accepted even by the majority Decision (and, therefore, I reject the conclusions made based on the statement) that the methodology letters included new information that had significance in connection with the exercise of personal rights and the fulfilment of personal obligations.

However, this way the cited part of Decision 45/1991 (IX. 10.) AB also supports the conclusion that is contrary to the majority Decision if the necessary changes are made.

V

In case the application for final exemption is rejected, immediate enforceability in case of vaccinations is, in my judgement, not equivalent to instant enforceability regardless of the circumstances since in case, for example, at the given time the basic exceptions of temporary exemption apply (for example, the patient has high fever), the intervention may not take place anyway

due to the Act on Healthcare as well as to the medical and professional rules; instead, the vaccination is delayed and a new date is set for the vaccination.

I accept the general possibility and legality of final exemption, but I do believe it should only be applicable for evident medical reasons; for example, there is no point in vaccination in case a person suffers from a fatal illness and according to the current state of medical science he or she will enter the end stage shortly. Some rare types of certain immune deficiency illnesses may be regarded as appropriate medical reasons. However, in such cases the physician has to provide passive immunization through applying specific globulins. Since final exemption for medical reasons is only possible if several rare circumstances arise simultaneously, and it may only be granted because of the health state of the particular person, I believe that the current regulation complies with the requirement of harmonising public and private interests.

Therefore, the problem referred to in the petition is not of such significance that would require a complete review of the current regulation and or some kind of a paradigm shift.

VI

This is particularly important since several other laws and legal situations are connected with receiving vaccinations on which the parents are informed through the new type of vaccination register that details vaccinations by age brackets. One of these legal situations is the school age. As parents and citizens we come across the following rule: “Only children with the required vaccinations may be admitted in a community of children and in an institute of elementary or intermediate education.” This well-known provision only appears methodology letters (see, for example, the methodology letter of the Béla Johan National Epidemiological Centre on the vaccinations for 2005, EPINFO, Year 12, Special Issue 1, 27 January 2005) although it should be undoubtedly included in the Act on Public Education. From the aspect of sources of law, the situation is a bit better since several local governments have included this rule in their decrees, often word by word. In case an application for granting final exemption is rejected, and therefore legal remedies are applied and the case goes to several appellate forums, should the child be allowed to start school before a final decision is made? If yes (since the position of this rule is questionable in the hierarchy of norms), several other issues may arise due to the unconstitutionality of the regulations in force, including the mandatory notification of the school board, the parents and the NPHMOS etc. in the settlement, the handling of all possible problems, etc.

Due to the nature of education, the final exemption or the delay of vaccination at a certain age because of the lengthy legal remedy procedures may cause further difficulties. For schoolchildren today, travelling abroad with the school or parents is common. The 99% immunization level in Hungary provides some security for a not immunized person visiting Hungary. However, an unimmunized child faces higher risk in a foreign country where the level of immunization is low. Also, regarding data protection regulations, the issue is the relationship between the enhanced protection of health-related data and the responsibility of the teacher concerning the immunized and unimmunized children in his or her care.

There is a logical link between these regulations and the strict public health regulations concerning migration and refugee law. For example, under Section 16 para. (1) item *c)* of Act CXXXIX of 1997 on the Right of Asylum, foreigners seeking recognition as refugees "are obliged to participate in medical screening, undergo treatment and receive any missed vaccination that is mandatory or ordered by the competent health authorities due to a risk of illness". (Section 19 para. (2) item *b)* includes the same requirement for temporarily protected persons.) On the basis of Section 4 para. (1) item *e)* of Act XXXIX of 2001 on the Foreigners' Entry and Stay in Hungary, a person risking the public health interests of the Republic of Hungary may not enter or settle in Hungary.

Making the current regulations more lenient will make it more difficult to enforce these regulations. This is because the principle of "immediate enforceability" will not be applicable as well in case of non-Hungarian citizens. If a chance to apply legal remedy is provided regarding mandatory vaccination, a person entering the territory of Hungary and requesting asylum will be granted the same right under the asylum laws in force, and therefore he or she may in general refuse to accept the regulations concerning immunity and, in the concrete case, he or she may apply for final exemption.

## VII

Finally, I would like to emphasize that in my opinion it is not possible to introduce pre-intervention legal remedy regarding vaccination that would not result in changes in the effective regulations concerning practically all medical interventions. Similarly, even if the constitutionality of methodology letters and guidelines is doubtful, I believe that because of the protection of the public health system efficiency, the requirements of legal formality should not overrule the requirements of medical science, medical deontology, professionalism and functionality. As a result, I consider the current posterior remedies as well as the compensation and other guarantees of the current regulations governing vaccination sufficient and constitutional.

Budapest, 19 June 2007

*Dr. Péter Kovács*
Judge of the Constitutional Court

I second the above dissenting opinion.

*Dr. Barnabás Lenkovics*
Judge of the Constitutional Court

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