DECISION 48/1998 (XI. 23.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the subject of petitions aimed at the establishment and annulment of the unconstitutionality of a legal rule, the Constitutional Court, with dissenting opinions by Judges of the Constitutional Court Dr. Tamás Lábady and Dr. Ödön Tersztyánszky and concurring reasoning by Dr. Antal Ádám and Dr. András Holló, has made the following

decision:

1. The Constitutional Court establishes that it is not unconstitutional to enact an Act of the Parliament permitting abortion in case the pregnant woman is in a situation of serious crisis. However, the legislature may only dispense, in a constitutional way, with the examination of the existence of a serious crisis situation if, at the same time, it establishes provisions creating adequate counterbalance with a view to protecting foetal life.

2. The Constitutional Court establishes that the concept and the application criteria for a situation of serious crisis may only be defined in an Act of the Parliament; the lack of such a definition may not be substituted for either in statute of a lower level, or by way of judicial interpretation.

3. The Constitutional Court establishes that it is a constitutional requirement in the application of Section 6 para. (1) item d) of Act LXXIX/1992 on the Protection of Foetal Life (hereinafter: the "Act on the Protection of the Foetus") to enforce the statutory concept of the situation of serious crisis and the criteria determined by the legislature in compliance with the present decision.

4. The Constitutional Court establishes that Section 12 para. (6) of the Act on the Protection of the Foetus and Section 9 para. (3) of Minister of Healthcare Decree 32/1992 (XII. 23.) NM are unconstitutional. Therefore, the Constitutional Court annuls these provisions as from the 30th day of June 2000.

5. The Constitutional Court rejects the petitions seeking to establish the unconstitutionality of,

and to annul Section 6 para. (1) item d) and Section 6 para. (2) item b) of the Act on the Protection of the Foetus. Similarly, the Constitutional Court rejects the petitions claiming the unconstitutionality of the entire Act on the Protection of the Foetus based on the lack of an explicit definition in the Act on the legal status of the foetus, the lack of a declaration in the Act on the legal subjectivity of the foetus, and the lack of provisions in the Act on the foetus' rights, furthermore, it rejects the petition raising objections to the alleged conflict between the Act on the Protection of the Foetus and Section 10 of Act IV/1959 on the Civil Code.

6. The Constitutional Court rejects the petition proposing that the Constitutional Court decide whether or not the foetus is a human.

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

Reasoning

I

1. The Constitutional Court received several petitions concerning certain provisions of the Act on the Protection of the Foetus, the entirety of the Act, and certain provisions of Minister of Healthcare Decree 32/1992 (XII. 23.) NM on the implementation of the Act (hereinafter: the "Implementing Decree".) The Constitutional Court consolidated these petitions into different cases according to their subjects. From among the consolidated petitions, the Constitutional Court assessed in the present decision the group of petitions concerning the provisions of the Act on the Protection of the Foetus by which abortion may be procured if the pregnant woman is in a situation of serious crisis, furthermore, the provisions of the Act related to the legal subjectivity of the foetus. The essence of the constitutional concerns raised by the petitions is the following:

According to Section 6 para. (1) item d) of the Act on the Protection of the Foetus, abortion may be procured until the 12th week of pregnancy if the pregnant woman is in a situation of serious crisis. Almost all the petitioners challenged the above provision, arguing that – taking into account Section 12 para. (6) defining the concept of a situation of serious crisis – it practically allows unrestricted abortion. In this context, one of the petitioners claimed the unconstitutionality of Section 9 para. (3) of the Implementing Decree, by which the existence

of a situation of serious crisis is verified by the statement of the pregnant woman seeking abortion, and the staff member of the Family Protection Service has no discretionary powers concerning the contents and the validity of her representation.

One of the petitioners claimed the unconstitutionality of Section 6 para. (2) item b) of the Act on the Protection of the Foetus allowing to extend the time limit for procuring abortion to the 18th week of pregnancy if the pregnant woman did not realise her pregnancy earlier due to a medical error or a health-related cause beyond her scope of responsibility, or if exceeding the 12th week of pregnancy was caused by the default of a healthcare institution or an authority.

Some of the petitioners challenged the entire Act on the Protection of the Foetus as unconstitutional, claiming that – contrary to its title – it does not contain any concrete provision on the protection and the rights of the foetus, and it does not declare the legal subjectivity of the foetus. Therefore, one of the petitioners asked the Constitutional Court to decide whether or not the foetus is a human.

The petitioners referred to several provisions of the Constitution including Article 54 para. (1) (the right to life and human dignity), Article 8 para. (1) (the obligation of the State to protect fundamental human rights), Article 66 para. (2) (mothers shall receive State support and protection before and after the birth of the child), Article 70/D (the right to physical and mental health), and Article 70/E (the right to social security).

Similarly, all of the petitioners referred to Decision 64/1991 (XII. 17.) AB of the Constitutional Court (ABH 1991, 297; hereinafter: the "Decision of the Constitutional Court") concerning the former regulations on abortion. The petitioners claimed that when adopting the regulations in force, the legislature had not complied with the constitutional requirements specified in the Decision of the Constitutional Court.

One of the petitioners claimed the unconstitutionality of the Act on the Protection of the Foetus as one conflicting with Section 10 of Act IV of 1959 on the Civil Code (hereinafter: the CC), prescribing that a guardian be appointed for the child already before birth if it is necessary for the protection of the child's rights, and in particular if there is a conflict of interest between the child and his or her statutory agent.

2. The following provisions of the Act on the Protection of the Foetus and of the Implementing Decree are examined in the present decision:

Act on the Protection of the Foetus:
SECTION 6 para. (1) Abortion may be procured until the 12th week of pregnancy if
a) it is justified by a cause seriously endangering the pregnant woman's health;
b) it is medically probable that the foetus suffers from a serious deficiency or any other damage;
c) the pregnancy is the result of a criminal act, and
d) the pregnant woman is in a situation of serious crisis.
(2) Abortion may be procured until the 18th week of pregnancy subject to the criteria specified in paragraph 1 if the pregnant woman
a) is of restricted disposing capacity or is incapacitated;
b) did not realise her pregnancy earlier due to a medical error or a health-related cause beyond her scope of responsibility, or if exceeding the period of pregnancy specified in paragraph 1 was caused by the default of a healthcare institution or an authority.

SECTION 12 para. (6) A situation of serious crisis is one which causes physical or mental breakdown or a subsequent impossible situation in social terms, thus endangering the healthy development of the foetus. The pregnant woman verifies the existence of the situation of serious crisis by signing the application form.

SECTION 9 para. (3) of the Implementing Decree: The existence of the criteria specified in SECTION 12 para. (6) [of the Act on the Protection of the Foetus] is verified by the statement of the pregnant woman seeking abortion, and the staff member has no discretionary powers concerning the contents and the validity of her representation.

Section 10 of the CC: a guardian must be appointed for the child already before birth if it is necessary for the protection of the child's rights, and in particular if there is a conflict of interest between the child and his or her statutory agent.

The petitioners cited the following provisions of the Constitution and the Constitutional Court assessed the petitions on the basis of the following constitutional provisions:

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

Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.

Article 66 para. (2) In the Republic of Hungary, mothers shall receive support and protection before and after the birth of the child, in accordance with separate regulations.

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

Article 70/E para. (1) Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, in case of sickness, disability, or being widowed or orphaned, and in case of unemployment through no fault of their own.

II

1. In the Decision of the Constitutional Court, Council of Ministers Decree 76/1988 (XI. 3.) MT on abortion, Decree of the Minister of Social Affairs and Healthcare 15/1988 (XII. 15.) SZEM on the implementation thereof, and the provisions of Act II of 1972 on Healthcare authorising that regulation be done in a decree were declared unconstitutional and annulled by the Constitutional Court on the basis of the formal cause of regulating the matters on a decree level. The Constitutional Court established that abortion must in each case be regulated on the level of an Act of the Parliament. By regulating abortion, the legislature decides, at the same time, on the legal subjectivity of the foetus – and this may only be done in an Act of the Parliament. The Constitutional Court did not examine the contents of the annulled provisions. However, it pointed out constitutional boundaries which – subject to the legislature's decision concerning the legal capacity of the foetus – limited the possibilities of regulating abortion in a constitutional way.

The general justification of the draft of the Act on the Protection of the Foetus referred merely to the formal causes of annulling the former legal norms, pointing out that the Constitutional Court had not examined in detail the contents of the annulled legal norms. The draft of the Act did not refer to the parts of the Decision of the Constitutional Court that had created the

constitutional framework for future regulations. The Constitutional Court first examines the compliance of the Act on the Protection of the Foetus with the formal requirement of regulating in an Act of the Parliament as specified in the Decision of the Constitutional Court, and then the position of the Act concerning the preliminary question determining the regulation of abortion, i.e. the legal subjectivity of the foetus. The Constitutional Court decides on the petitions related to this problem as well. The Decision deals separately with the constitutional review of the situation of serious crisis as a condition allowing abortion (Part III).

2. It was established in the Decision of the Constitutional Court that by the correct interpretation of Article 8 para. (2) of the Constitution, it is not necessary to regulate all issues related to fundamental rights on the level of an Act of the Parliament. The content of a certain fundamental right and the establishment of the essential guarantees thereof can only be determined in an Act of the Parliament; moreover the direct and significant restriction of a fundamental right calls for an Act as well. However, where the relationship with fundamental rights is indirect and remote, administrative regulation is sufficient. Naturally, regulating abortion directly affects the mother's right to self-determination and may affect her other rights as well, such as, for example, her right to life and health. However, with regard to abortion, regulation on the level of an Act of the Parliament is required because in each case where abortion is regulated, a statement on the status of the foetus in terms of fundamental rights must be made. For the same reason, regulations affecting the mother's right to self-determination and her right to health must in each case be provided for in an Act of the Parliament (ABH 1991, 300, 302).

The Constitutional Court establishes that the Act on the Protection of the Foetus covers the regulation of all issues that, according to the above, require regulation on the level of an Act of the Parliament. Although the Implementing Decree regulates important details regarding the criteria for allowing abortion, it is established by the Constitutional Court that as far as the relevance to fundamental rights is concerned, the rules contained in the Act on the Protection of the Foetus are sufficient. The same applies to the indication of a situation of serious crisis. Although it is the Implementing Decree that expressly specifies that the staff member of the Family Protection Service has no discretionary powers concerning the contents and the validity of the representation made by the pregnant woman, the nature of the indication in question is clear from the provision of the Act on the Protection of the Foetus itself,

specifying that the existence of a situation of serious crisis is justified by the woman's signing the application form, namely that the State abandons the right to examine the state of crisis and allows abortion solely at the request of the woman seeking it.

The Constitutional Court establishes that by adopting the Act on the Protection of the Foetus, the Parliament formally met the requirements specified in the Decision of the Constitutional Court, and therefore, the unconstitutional situation is deemed to be terminated in this respect.

3. In the Decision of the Constitutional Court, it was explained in detail that when regulating abortion, the legislator (or the constituent body) must decide on the preliminary question of whether or not the foetus is a human and, at the same time, a subject of law, i.e. whether the legal concept of man should include the foetal phase back to conception. The Constitutional Court established that the provisions of the Constitution do not contain any express rule regarding the legal subjectivity of the foetus, nor can it be determined by interpreting the Constitution. It does not follow from the Constitution that the foetus must be recognised as a subject of law or that it is legally impossible to accord it as a human (ABH 1991, 312).

a) On 23 March, 1993 the Parliament adopted Act XXXI of 1993 on the promulgation of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols (European Convention on Human Rights, hereinafter: the “Convention”). The Act came into force on 15 April, 1993.

Although, as far as fundamental rights are concerned, the provisions of the Convention have been taken into account in the practice of the Constitutional Court since the beginning of its operation, the Convention was promulgated as late as in 1993, i.e. it became obligatory for the Republic of Hungary to enforce the its provisions following the date of the Decision of the Constitutional Court only.

According to Article 2 paragraph (1) of the Convention, “Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally (...)”. When interpreting the words of the Convention, one may face the same problem as in the case of Article 54 para. (1) of the Constitution, namely, whether it can be stated beyond any doubt that the term "everyone" (“toute personne” in the French version and “jeder Mensch” in the official German translation – “all men” in the Hungarian Constitution) obligatorily covers the foetus

as well; in other words, does the Convention protect the foetus' right to life the same way as in the case of a man born. The practice of the European Human Rights Commission has been consistent in addressing this issue in several concrete cases: it has, namely, not taken a stand. In the Case X v United Kingdom [No 8416/79, 19 DR 244 (1980)] it stated concerning Article 2 paragraph (1) of the Convention the following: "It seems that the term "everyone" cannot be applied to an unborn child". It was added in the decision that even if supposing that the provision concerned secured for the foetus the right to life from the moment of conception, this right may be restricted – including by abortion – in order to protect the mother's life and health. The Commission adopted a statement with a similar content in the Case H v Norway [No 17004/90 73 DR 155 (1992)]. The Commission repeated its former statement concerning the subject of the right, explaining that it could not judge whether or not the foetus was entitled to protection based on Article 2 paragraph (1) of the Convention; the Commission, however, did not explicitly exclude that – in certain circumstances – this may be the case. Therefore, in the opinion of the Commission, the Member States have certain discretion on the basis of the Convention in regulating abortion.

The arguments of the Commission have the same results as the reasoning found in the Decision of the Constitutional Court. Neither the Constitution, nor the Convention contain any provision concerning the legal subjectivity or the right to life of the foetus; it cannot be undoubtedly determined whether the terms "all men" or "everyone", as the subjects of the right to life, include the foetus in addition to men born. Therefore, based on the Convention, the Member State Parties have certain discretion in extending to the foetus the legal subjectivity securing absolute protection, and if they do not do so, they are free to choose the way of securing protection for foetal life and to regulate abortion. As a consequence, the Constitutional Court maintains its arguments presented in the Decision of the Constitutional Court concerning the legal subjectivity of the foetus.

b) The Act on the Protection of the Foetus was adopted by the Parliament in 1992. As explained above, promulgating the Convention did not affect the arguments contained in the Decision of the Constitutional Court, and the constitutionality of the Act can be assessed by the Constitutional Court based on the Decision of the Constitutional Court.

The Constitutional Court establishes that – although the Act on the Protection of the Foetus does not contain an explicit provision on the legal subjectivity of the foetus – the Act in

question regarding abortion expresses the implicit opinion of the Parliament on the foetus not being a human in legal terms. It has been explained in detail in the Decision of the Constitutional Court that any regulation of abortion includes a decision on the legal subjectivity and, as a consequence, on the subjective right to life of the foetus (ABH 1991, 300-305). Any regulation allowing abortion in excess of cases where it is allowed by the law to choose between human lives must be based on the concept of the foetus not being a human in legal terms and, as a consequence, not being a subject of law (ABH 1991, 315, 316). Therefore, the Act on the Protection of the Foetus did not change the situation represented by the former legislation that had been in force before; the foetus is still not a subject of law in terms of Article 56 of the Constitution. Thus, the life and dignity of the foetus do not enjoy the absolute protection applicable to men born based on Article 54 para. (1) of the Constitution.

However, the lack of granting legal subjectivity for the foetus does not mean that foetal life is not protected by the Constitution. As explained in the Decision of the Constitutional Court, the foetus must enjoy protection – which is not absolute – resulting from the right to life (Article 54 para. (1) of the Constitution), to be secured by the State for conceived human life during its formation. This protection is not questioned by the Act on the Protection of the Foetus and, in line with the above concept, the legislator stated in the Preamble of the Act that "foetal life which starts in the moment of conception must be respected and protected" and repeated it in the text of the legal norm in the following form: "the foetus formed by the unification of an ovum and a spermatozoon, and developing in the womb, as well as the pregnant woman must be supported and protected" (Section 1). It is detailed in the draft of the Act that the Act on the Protection of the Foetus addresses the problem of abortion in the aspect of creating the conditions that secure the healthy development of the foetus, i.e. from the point of view of protecting foetal life.

4. a) Based on the above, the Constitutional Court rejected the petitions that challenged the constitutionality of the Act on the Protection of the Foetus on the grounds of the Act not specifying in an explicit way the legal status of the foetus and not containing the rights of the foetus, as – in the petitioner's opinion – these are essential elements of the protection of the foetus. Similarly, the Constitutional Court rejected the petition which had been based on the assumption that the foetus had the full legal status of a human and thus considered the provisions of the Act on the Protection of the Foetus as ones allowing homicide. According to

the Decision of the Constitutional Court, the legislature (the body adopting the Constitution) takes a stand on the legal subjectivity of the foetus by choosing the way of regulating abortion – without any express provision thereon. The position taken by the Act on the Protection of the Foetus is that the foetus is not a subject of law. Consequently, the Act cannot provide for the rights of the foetus.

b) The petition requesting the Constitutional Court to determine – due to the lack of an express provision in the Act on the Protection of the Foetus – whether or not the foetus is a human was rejected by the Constitutional Court with reference to the lack of its jurisdictional competence.

c) Among the petitions directly related to the legal subjectivity of the foetus, the Constitutional Court rejected the petition holding it "unlawful" that when deciding on abortion, the Act on the Protection of the Foetus does not provide for the protection of the foetus' rights by appointing a guardian in accordance with Section 10 of the Civil Code. It was already explained in the Decision of the Constitutional Court that the conditional legal capacity applied by the Civil Code as a technical tool to protect the interests of the child to be born is not appropriate for solving the problem of abortion (ABH 1991, 310). Therefore, there is no collision between the Acts of the Parliament – as alleged by the petitioner – between the Act on the Protection of the Foetus and the Civil Code, and thus the Constitutional Court did not engage in examining from a substantial point of view the potential unconstitutionality of a collision between the Acts, and it rejected the petition.

III

1. As stated in the Decision of the Constitutional Court, if the legislature or the body adopting the Constitution decides that the foetus is not a human from a legal point of view, i.e. a subject of law under Article 56 of the Constitution, and therefore, does not have the right to life and dignity, then – in accordance with the Constitution – it is not only possible but inevitable for the State to protect foetal life together with determining and considering other values defined in, and protected by, the Constitution against the mother's right to self-determination, and her other fundamental rights.

a) It is reinforced by the Constitutional Court that according to Article 54 para. (1) and

Article 8 para. (1) of the Constitution, the protection of human life is "the primary obligation of the State". The State's duty to "respect and protect" these fundamental rights is not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the conditions necessary for their realisation. In addition to securing the individual subjective fundamental rights, the related actual values and situations of life as such must be protected by the State – not only in connection with individual claims – by evaluating them in the context of the other fundamental rights. The State may exceed the province protected by the subjective right originating from the fundamental right while determining the objective and institutional boundaries of the very same fundamental right.

Therefore, the State's objective obligation of institutionalised protection resulting from the right to life is practised in harmony with its other objective obligations of a similar nature originating in the right to health, the right to a healthy environment, and the constitutional protection and support for the mother before and after the birth of her child. The right to life is the common root of the system of subjective rights and the State's obligations and goals that serve the purpose of protecting life. All the institutionalised protection obligations resulting from the above fundamental rights go beyond the rights of personally entitled subjects. For example, the right to health – similarly to the right to a healthy environment – serves the purpose of protecting the health of future generations as well. In some cases, the Constitution specifies the institutionalised protection obligations, while in other cases, they are not specified so; it also happens that the subjective right side remains in the background; and regardless of the differences in wording and emphasis, the fundamental rights contain both subjective rights and – more extensive – objective obligations of the State. (The wording of the right to health, for example, suggests as if the Constitution laid down not more than that the Republic of Hungary "enforces this right" by securing labour protection, healthcare etc. (Article 70 para. (2)), although it is clear that the fundamental right to health has a subjective right side as well.) The fact that the Constitution specifies rights which indirectly serve life protecting purposes extending beyond the subjective rights and not necessarily linked to individuals, i.e. the general protection of human life and the conditions of life, reinforces the statement applicable to all fundamental rights that the protection of foetal life – directly linked as an actual precondition to the subjective right to life – is within the scope of the State's obligation of protection without specifying it in an express way. The connection between the subjective and the institutionalised protection sides of the right to life is the most direct in respect of abortion (and its regulation): in this case, namely, an individual life is at stake in

both biological and ethical terms.

For the individual, the subjective right to life serves to ensure his/her own life. However, the duty of the State based on the right to life goes beyond its obligation not to violate the individual's subjective right to life and to employ its legislative and administrative measures to protect this right, but it must protect human life in general and the conditions thereof. The protection of human life cannot be limited to the protection of the life of men born and having legal subjectivity. Human life is a continuous process starting in the moment of conception. Primarily as legal subjectivity is regarded, certain sections of the life of the same individual human being are, however, qualified by the legislation in force in a different manner as permitted rather than made obligatory by the Constitution. The State's duty of protecting life is qualitatively different from aggregating the right to life of individuals; it is "human life" in general, and consequently, human life as a value that is the subject of protection. Hence, the State's objective and institutionalised duty to protect human life extends to lives which are in their formation. This duty, in contrast with the right to life, is not absolute. This is why the legislature may consider other rights – such as the mother's right to health or self-determination – against it.

It has been consistently elaborated and enforced in the practice of the Constitutional Court that the objective and institutionalised protection obligation of the State is linked to, while extending beyond, the protection of individual subjective rights. For example, it was established that in addition to the right of the individual to the freedom of expression, Article 61 of the Constitution imposes on the State the duty to secure the conditions for creating and maintaining democratic public opinion. The Constitutional Court applied the above obligation in determining the criminal law limits of the freedom of expression as well as the constitutional obligations of the State to set up the organisational and legal guarantees for the right to information and the freedom of the press when it specified the constitutional requirements to be applied to the Act on public radio and television (30/1992 (V. 26) AB, ABH 1992, 167, 172; and 37/1992 (VI. 10) AB, ABH 1992, 227, 229). From the freedom of religion, the Constitutional Court deducted the obligation of the State to make it actually possible for everyone to attend a "neutral" school without undertaking any disproportionate burden, and to legally allow the establishment of schools with religious commitment (4/1993 (II. 12) AB, ABH 1993, 48, 55); further decisions of the Constitutional Court assessing the constitutionality of funding religious schools have been based on the above obligation of the

State. There is a set of state obligations protecting the institution of the referendum linked to the subjective right to referendum covering the right to initiate, support, and participate in, a referendum, while guaranteeing the direct nature of exercising this form of popular sovereignty, and in particular, its freedom from any influence by the representative organs, and – in case of an obligatory referendum – the primacy of the referendum (52/1997 (X. 4) AB, ABH 1997, 331, 344).

According to the interpretation of the Constitutional Court, the right to a healthy environment is not a subjective fundamental right in its present form, still it is more than just a constitutional duty (state goal) as it is part of the objective and institutionalised protection side of the right to life, specifying the State's obligation to maintain the natural foundations of human life as an independent constitutional "right". In the absence of Article 18 of the Constitution, the same constitutional duties of the State could be deducted from Article 54 para. (1) of the Constitution; as the preservation of nature is closely linked to the right to life, its legally guaranteed level of protection may only be restricted on the same conditions as those applied to the constitutional restriction of any fundamental right (28/1994 (V. 20.) AB, ABH 134, 137-141). The above characteristics of the right to a healthy environment originate in the indefinite nature of the personal subject of this "right" – specified as such by the Constitution. Both the State's obligations concentrated in the right to a healthy environment and the restrictions applied to abortion protect – among others – the living conditions, and thus the lives of future generations. However, the "impersonality" of the subjects concerned is different in respect of the two rights. The State's obligation to protect life, which is following from the right to life and which is applicable to the regulation of abortion, is targeted at individual foetal life rather than a statistical population. On the one hand, this situation reinforces the State's protecting obligation as compared to the protection of the environment. On the other hand, however, the objective obligation of life protection concerning individual foetal life may be assessed in contrast with the subjective rights of the mother bearing the foetus. An exception from maintaining the environmental status quo is allowed if it is necessitated by the enforcement of another fundamental right in a specific case. It follows from the above that if the legal subjectivity of the foetus was not acknowledged by the legislature, it must always take into consideration the mother's rights against the State's obligation to protect foetal life.

For the above balancing act, the Constitutional Court may only designate the constitutional

boundaries of the freedom of the legislature wherein the law must lie; and alternatively, it can establish an unconstitutional omission of legislative duty if the legislature has failed to extend the constitutionally required minimum protection either to the mother's right or to the foetus' life. Accordingly, if the foetus' legal capacity is not recognised, the legislature – when called upon to designate conditions authorising abortion – may not ignore the sometimes conflicting rights and obligations determining the contents of regulation: this way, it must weigh both the woman's right to self-determination, to life and to physical integrity as well as the State's duty to protect life – including foetal life – that follows from the right to life.

A complete ban on abortion would, therefore, be unconstitutional. It would likewise not be constitutional if regulations would favour exclusively the mother's right to self-determination. The State has a duty to protect human life from the moment of conception, and hence, the mother's right to self-determination cannot prevail alone even in the earliest stages of pregnancy. This objective duty to protect life means that the State may not constitutionally permit unjustified abortion. Justification is especially necessary in the case of abortion as the State's duty to safeguard human life does not serve the purpose of averting or minimising anonymous statistical risks but concerns the wilful termination of individual human lives being formed (ABH 1991, 316). Individuality is the key word even if, for the sake of circumspection, one were to talk of "potential human life". As regards abortion, one should not deny the existence of an individual and wilful act actually performed – impersonalisation may only be taken to the extreme in the legal qualification of abortion [by the legislature's not acknowledging the personal status of the foetus (ABH 1991, 303)]. This is why the mother's right to self-determination may be weighted against foetal life; however, during such an assessment, one must constantly keep in mind the weight of the values constitutionally protected by the State's objective yet not absolute duty to protect life.

It is specifically emphasised by the Constitutional Court that the right to life and human dignity – ranked at the top in the hierarchy of constitutional fundamental rights – has, from the very beginning, been emphasised in the decisions of the Constitutional Court. The State's objective duty to protect life has the same status when applied to the protection of conceived individual human life. As explained in the Decision of the Constitutional Court, the above circumstances do not require that the foetus be declared a special subject of law, since any special legal status not reaching the legal status of a human would practically offer only relative protection to foetal life, similarly to the State's objective duty to protect life (ABH

1991, 311). Nevertheless, it is pointed out by the Constitutional Court that the special significance of foetal life to be protected under the State's duty to protect life may, in other legal systems, be reflected in the establishment of individual fundamental rights as "the human dignity of unborn human life" and "the unborn man's own right to life". For example, the German Federal Constitutional Court established that the foetus has its own individual right to life (BVerfGE 88, 203).

b) According to the petitions, the Parliament did not act in compliance with the Constitution when it performed the weighing specified in the Decision of the Constitutional Court and summarised above, as in Section 6 para. (d) of the Act on the Protection of the Foetus, the legislature allowed abortion to be procured if the pregnant woman is in a situation of serious crisis, and according to Section 12 para. (6) of the Act and the provisions of the Implementing Decree, the existence of a situation of serious crisis may be justified exclusively by the pregnant woman's declaration, without any control by another person. This way, abortion may legally be implemented in any case at the pregnant woman' request; the indication required in order to enforce the State's duty to protect life is a formal one; and the protection of foetal life does not at all restrict the mother's right to self-determination.

Although the Constitutional Court established that it is within the scope of responsibility and power of the legislature to set the limits between the unconstitutional extremes of prohibiting abortion and allowing abortion without a due cause; it was also stated in the Decision of the Constitutional Court that not only unjustified abortion is unconstitutional, but also if the legislature does not provide for the foetus the minimum protection required according to the constitutional interpretation of the Constitutional Court (ABH 1991, 316.). On the basis of the petitions, the constitutionality of the Act on the Protection of the Foetus must be examined on both of the following grounds: first, whether the "situation of serious crisis" – as defined in and under the conditions of the Act – is qualified as an indication at all (i.e. whether it is in between the extremities referred to above or it is, in fact, one of the unconstitutional extremities), and second, in case it is within these limits, whether it is appropriate to render the constitutionally required minimum level of protection.

The Constitutional Court notes that its statement contained in the Decision of the Constitutional Court, and referred to several times above, on the unconstitutionality of unjustified abortion remained in the conceptual scope setting a "deadline" and an "indication"

of abortion, as until the early 1990s, the constitutional debates concerning abortion were dominated by making a decision on which of the two of them to choose. Even the definition of the constitutional question to be examined is intended to demonstrate that the Constitutional Court – taking into account the changes taken place in other countries concerning the evaluation of abortion by constitutional law – transgresses the above conceptual framework: instead of examining the existence of an indication, it considers a proportional mutual restriction of the mother's constitutional rights and the State's constitutional duty to protect the life of the foetus the criterion of judging constitutionality. In this context, the contents and the role of indication becomes a decisive factor even if not by itself, but when its role in the balancing act is examined.

The Constitutional Court examined the statutory regulations concerning the situation of serious crisis first by themselves (points 2 and 3), then concerning the relationship between the Act on the Protection of the Foetus and the Criminal Code (point 4), and finally in the context of the other provisions of the Act on the Protection of the Foetus (point 5).

2. Section 12 para. (6) of the Act on the Protection of the Foetus contains the following definition: [in respect of a pregnant woman] a situation of serious crisis is one which causes physical or mental breakdown or a subsequent impossible situation in social terms, thus endangering the healthy development of the foetus.

a) The pregnant woman's "situation of serious crisis" is a criterion used in the legal systems of several countries when regulating abortion, although it may have different meanings and functions. It can be established in general that the situation of serious crisis is practically a concrete application of the condition of proportionality to the particular statutory definition of abortion. If a legal system – as most of the European legal systems – applies the State's obligation to protect foetal life or – exceptionally – the foetus' own right to life, which can nevertheless be restricted by the mother's right to self-determination, restricting the protection of foetal life by the mother's right becomes proportionate on the ground of assuming that bearing the child, i.e. enforcing the protection (in other legal systems: the right) of the foetus, would put a burden on the pregnant woman which is far bigger than the usual burden of pregnancy, and this way, the continuation of pregnancy cannot be expected from the woman. In a broad sense, all classically accepted indications are "situations of serious crisis": medical and ethical indications as far as the mother and genetic-teratological ones as

far as the foetus are concerned. However, in a narrow sense, the term “situation of crisis” is a social indication, which is a more recent concept subject to many debates. It may be regulated differently state by state whether or not it is necessary for the mother’s aggravated state of life to reach the weight of the other three potential indications of abortion, and it may be specified differently by the various legal systems whether or not objective facts of the case are required to justify the reference to social impossibility and how it is controlled, and – as is detailed by the Constitutional Court later on in connection with the controllability of the situation of crisis – its assessment is undergoing significant changes. However, the essence of the situation has not been changed: the *state of the pregnant woman* is in the focus and the enforcement of *her right* is justified by the “situation of serious crisis” *in conflict* with the “right” or the constitutionally protected legal status of the foetus. The changes referred to above have strengthened the exclusive and subjective role of the woman in determining from a substantial point of view the situation of serious crisis by way of acknowledging the existence of such a situation solely on the basis of the woman's representation.

The American law approaches in a different way the conflict between the pregnant woman and the foetus. There, for the last two decades, the mother’s right to decide on abortion in the first trimester of pregnancy has been accepted as a constitutional right [(Roe v. Wade, 410 U.S. 113 (1973)]. However, it became clear by 1992 that due to changes first occurring a decade ago, the State’s right to intervene into the mother’s right to privacy in the foetus’ interest should be accepted even in the first trimester. Although no majority opinion has been accepted concerning the constitutional standard of intervention, a concept that seems to correspond to the “situation of serious crisis” is presented in the opinions of three judges: restrictions by the State cannot unduly burden the woman’s freedom of decision. Thus, the function of undue burden is exactly the opposite as in Europe: it is not the exceptional burden of pregnancy why a woman cannot be expected to perform the obligation – that would normally result from the “foetus’ right to life” or the State’s duty to protect foetal life – of bearing the foetus and giving birth to the child, but her constitutionally protected freedom of decision is protected from being “unduly” restricted by the State. It is the concept of “undue burden” that limits (constitutionally allowed) intervention by the State, including consultations aimed at preventing abortion, useless medical examinations etc. However, in this case, “serious burden” is justified by the standard set by the Constitutional Court in the constitutional review of a legal norm [Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 883, 112 S. Ct. 2791 (1992)] rather than by the (potentially uncontrollable)

representation of the pregnant woman concerning her own state.

b) In the Hungarian law – similarly to other European legal systems using the concept of a situation of serious crisis, the theoretical basis of which is different from the American approach to abortion – the seriously critical state of the pregnant woman, as an independent indication, must qualify the state of the pregnant woman whose situation may justify derogation from the protection of the foetus. However, the definition given in the Act on the Protection of the Foetus concerning the pregnant woman's situation of serious crisis is in conflict with the nature and function of this indication. The present wording of the indication contains contradictions in itself that result in making the norm unclear and difficult to apply.

According to Section 12 para. (6) of the Act on the Protection of the Foetus, in case of a pregnant woman, a situation of serious crisis is one which causes physical or mental breakdown or a subsequent impossible situation in social terms, *thus* endangering the healthy development of the foetus. The draft of the Act submitted to the Parliament under No 6494 contains the above definition, and the Parliament rejected the proposals for amendment aimed at limiting the definition solely to the mother's state, leaving out the part referring to the foetus (Minutes of the Parliament, 17 December, 1992, col. 22856).

To the alternative criteria of physical or mental breakdown or a subsequent impossible situation in social terms, the Parliament must have added as a conjunctive condition the resulting endangerment of the healthy development of the foetus in order to render more stringent the criteria for a situation of serious crisis and – supposedly – to harmonise it with the principle contained in the Act at the beginning of the chapter on abortion, specifying that abortion may only be procured in case of endangerment, under the conditions laid down in the Act (Section 5). The conditions (Section 6) then take into account the endangerment of both the mother and the foetus. When defining the situation of serious crisis, the Act represents the endangerment of both of them.

However, as the definition of a situation of serious crisis puts the conditions into not only a conjunctive relation, but a relation of cause and effect as well, the endangerment of the healthy development of the foetus becomes the decisive feature in an indication the essence and the aim of which as well as its constitutional acknowledgement may only be justified by circumstances in the mother's life demanding disproportionate sacrifice. In the definition

found in Section 12 para. (6), these critical circumstances are not more than the causes of the endangerment of the foetus. This construction of cause and effect results in further logical contradictions. As already pointed out by the Constitutional Court, the mother being in a situation of serious crisis is the reason for restricting the State's duty to protect foetal life: therefore, these two aspects must be weighed against each other; the mother's rights and the State's duty to protect foetal life restrict each other.

The protection of foetal life may only exceptionally be restricted with reference to the endangerment of the foetus' health – a cause not related to the mother. This, of course, requires the verification of a serious foetal damage under strictly controlled medical circumstances. These conditions are covered by the genetic-teratological indication regulated in detail by the Act on the Protection of the Foetus (Section 6 para. (1) item b)). Serious foetal disability is accepted by the law as a legitimate indication of abortion because, on the one hand, the law is aimed at protecting the foetus from the burdens of disabled life in the future (having regard to the separation of cases, the Constitutional Court did not have to review the constitutionality of this argument in the present decision) and, on the other hand, it is not expected from the mother to bear the mental and physical burdens caused by the disability of her child. Therefore, in case of a genetic indication, the mother's situation of serious crisis is not the cause, but a result of the foetus' genetic disorder. Nevertheless, the statutory definition of the situation of serious crisis turns this relationship upside down.

While it is evident in case of a genetic indication why the foetus' serious damage can put the mother into a situation of serious crisis theoretically in every case, following the causal relationship set up by the Act on the Protection of the Foetus, it is hard to establish based on the definition found in Section 12 which cases of the mother's physical or mental breakdown or of her social impossibility result in endangering the healthy development of the foetus. Therefore, in the lack of further norms, one may face difficulties of interpretation and proof that lead to an arbitrary interpretation and uncertainty of the norm. On the other hand, this definition does not specify the criteria for allowing on an exceptional basis the constitutional restriction of the duty to protect foetal life with reference to the foetus' health damage. Indeed, according to Section 12 para. (6), even a slight endangerment of the foetus' healthy development may justify abortion. Consequently, contrary to the intentions of the legislature aimed at limiting and rendering more stringent the statutory definition of a situation of serious crisis by introducing the criteria of endangering the foetus' healthy development, the

deficiencies in the Act concerning the statutory definition of a situation of serious crisis have resulted in legal uncertainty and an inadequate protection of foetal life.

Based on the above, the Constitutional Court establishes that the first sentence of Section 12 para. (6) of the Act on the Protection of the Foetus is contrary to the principle of legal certainty, thus violating Article 2 para. (1) of the Constitution, while due to its further deficiencies it does not meet the State's obligation to protect foetal life either, and therefore, it violates Article 54 para. (1) of the Constitution as well.

3. However, it is necessary to examine the statutory definition of a situation of serious crisis, as a legitimate indication, in the context of all the legal criteria of abortion, as it is not applied in itself and the criteria of its enforcement together with its wider legal environment give rise to further important constitutional concerns. According to Section 12 para. (6) of the Act on the Protection of the Foetus, the pregnant woman verifies the existence of a situation of serious crisis by signing the application form. According to Section 9 para. (3) of the Implementing Decree, the staff member of the Family Protection Service – who is in charge of verifying the statutory indication of abortion – has no discretionary powers concerning the contents and the validity of her representation.

In compliance with the provisions referred to above, abortion based on a situation of serious crisis must be implemented solely on the grounds of the pregnant woman's statement – without specifying and controlling the causes. The above approach of the Act on the Protection of the Foetus is in line with one of the main contemporary trends which – when examined in itself – undoubtedly strengthens the pregnant woman's rights to the detriment of foetus protection. However, the regulation of abortion must be analysed as a whole to assess how the acknowledgement of such an indication would influence the balance between the conflicting constitutional rights, State duties and constitutional values.

a) It is a fact that in the law of many European countries, there has been a shift from the objective and professionally controlled social indication to a subjective and uncontrollable "general situation of crisis" based on a statement by the pregnant woman. The most significant shift may be seen in the German Federal Constitutional Court's decisions on abortion adopted between 1975 and 1993 and the resulting changes in legislation (BVerfGE 39, 1, and BVerfGE 88, 203). The first decision allowed the legislature to declare that the

pregnant woman may not be expected to continue pregnancy in case it represents an extreme burden similar to the weight of a state seriously endangering the pregnant woman's life or health, which is another legitimate indication of abortion. The existence of this indication of abortion, called a general state of emergency or social indication, had to be verified. However, the decision of 1993 and the amendments of the Act that followed it in 1995 expressly renounce verification of the indication by a third party, and what is more, it is not necessary to reveal the mother's identity during the obligatory consulting session. (Nevertheless, this development is part of comprehensive strategic changes in how abortion is treated by the State, and therefore, it may be evaluated in itself to a limited extent only.)

A similar indication has been introduced by the Belgian Act on Abortion in 3 April, 1990. Accordingly, abortion is legitimate in the first 12 weeks of pregnancy if there is a state of emergency and it is the firm will of the pregnant woman to have an abortion. However, as stated in the reasoning of the draft of the Act, there is practically no difference between these two conditions: the woman's determined and constant reluctance to have a child is, in fact, the state of emergency. The proponents of the Act were determined not to specify the state of emergency by objective criteria as this would entail control, which could result in "arbitrariness"; therefore, the state of emergency must be a subjective concept to be determined by the woman herself based on her personal situation, and consequently, this concept cannot be specified in general terms (Draft Act, Documents, Senate B.Z./S.E. 1988, Nr. 247/1, 9; Nr. 247/2, 83; and Documents, House of Representatives, 1989-90, Nr. 950/9, 4).

According to the Norwegian Act of 1975 on Abortion, abortion may be requested by the woman in the first 12 weeks if her pregnancy entails "serious complications". Abortion may be implemented even after the 12th week if the pregnancy, the birth or caring for the child would result in a "difficult situation of life" for the woman, but in such cases, the causes of abortion must be presented to a committee (Section 2, 5, 7, 8).

It is only a decision made by the Polish Constitutional Court in 1997 that follows a contrary approach. Accordingly, allowing abortion on the basis of the pregnant woman's financial or social difficulties violates the principle of proportionality of constitutional values. As stated in the reasoning of the decision, in the conflict of protecting the woman's interests on the basis of her subjective evaluation of the situation and the right to life, the latter has primacy

(Decision of 5 May, 1997).

b) The approaches presented above – with the exception of the decision of the Polish Constitutional Court cited above – consummate the woman's right to self-determination, similarly to the Act on the Protection on the Foetus. Although it is concealed in the statutory definition of a situation of serious crisis, the reasoning of the draft Act – similarly to the Belgian Act – is quite clear in stating the concept: it is not proposed to authorise any organ to qualify the situation of crisis as it may only be evaluated in respect of the individual concerned, and therefore, its assessment is up to the pregnant woman. The last part of the above sentence indicates the intention of the drafter of the Act, which, despite the reasoning in the draft, can still not be deducted from the individual nature of the crisis situation: it would take a committee to assess that. In any case, the proposed amendments trying to clearly state in the text of the norm as well what was explained in the reasoning – i.e. that the situation of crisis is determined by the pregnant woman alone – were rejected by the Parliament. However, the second sentence of Section 12 para. (6) of the Act on the Protection of the Foetus – introduced in the text at the individual initiative of a Member of Parliament – was accepted by the Parliament, specifying that the pregnant woman verifies the existence of a situation of serious crisis by signing the application form. According to the reasoning of the proposal submitted by the Member of Parliament concerned, it is necessary to document the situation of crisis as regulated in case of other indications as well (Section 12 para. (1)-(5)). This way, a significant change in the quality of regulating abortion – by allowing abortion solely at the pregnant woman's will – was introduced in the Act on the Protection of the Foetus to fill in an administrative gap (Minutes of the Parliament's session on 17 December 1992, col. 22856 and 22857, and the proposal for amendment filed under No 7648).

The Constitutional Court emphasises that the tendency of changes in regulation presented above has not been enforced by constitutional concerns either abroad or in Hungary. As far as it can be traced back, it was the inefficiency of the former regulations aimed at restricting abortion that had led the legislature to look for a new strategy or the constitutional courts to establish in advance the constitutionality of such a new way. This was expressly stated in a 1993 decision by the German Constitutional Court (BVerfGE 88, 264).

It has been constantly stated by the Constitutional Court that among the rights to be weighed against the State's duty to give increased protection to foetal life, the mother's right to self-

determination – as part of the right to human dignity – is the most important one. Undoubtedly, revealing details of the situation of crisis and having it assessed by a third party violate the woman's privacy and may in some cases violate her right to human dignity as well. Any violation of the above fundamental rights may only be evaluated in the context of abortion, where it collides with the State's duty to protect foetal life. Therefore, it is not constitutionally necessary to introduce the indication of an uncontrolled situation of serious crisis based on the woman's right to privacy; indeed, it is constitutionally required to have a balance in the mutually restrictive relationship between the woman's right to self-determination and the State's duty to protect life.

It was only in the United States where the right to privacy was applied (for a certain period of time) as a constitutional ground for the right to abortion, with no other right or state interest aimed at the protection of the foetus raised against it in the first trimester. It should be noted at the same time that under the right to privacy, it was the use of contraceptives that had originally been recognised as a private decision by a married couple to be constitutionally protected from any intervention by the State [Griswold v. Connecticut, 381 U.S. 479 (1965)], and later on, this right was extended to abortion as well.

Contrary to the interpretation of the American Constitution, according to the Constitutional Court it follows ab ovo from the Constitution of Hungary that – if the legal subjectivity of the foetus is not acknowledged by the law – the woman's right to dignity and privacy must be weighed against the State's duty to protect foetal life. It is always the State's life protecting duty – in the present case, protection from the wilful termination of an individual foetal life – which must be weighed against the woman's rights. In the conflict of the above rights and duties, obliging the woman by the law to give details on her situation of serious crisis does not qualify as a disproportionate restriction of the woman's right to privacy and dignity. This is justified by the fact that such an indication does not serve the purpose of allowing abortion in case pregnancy results from a forceful act, where the possible violation of personality rights must particularly be taken into account. When taking into consideration the woman's situation of serious crisis in order to protect foetal life, the protection of the woman's right to human dignity, and in particular, the mitigation of potential injury can be ensured by the law by means of several detailed rules to be applied in the statutory procedure concerning indications and the approval of abortion.

Within the scope of indication of a situation of serious crisis the Act could, namely, specify several typical statutory definitions that would not be "humiliating" to refer to. In such cases, it would not be necessary for the organ verifying the indication of abortion to assess the situation of crisis (as this has already been done by the legislature), but it would have to verify – in most cases, formally – the facts only. The regulation that had been in force before the Act on the Protection of the Foetus had detailed the legitimate causes of abortion. According to the statistics, the great majority of both social and medical causes were typical ones not requiring any additional justification.

It is supported by the above that a shift to the uncontrolled indication of a situation of serious crisis is not enforced by the woman's right to human dignity and privacy. Both solutions – revealing the causes or waiving this right – can be in harmony with the above constitutional rights.

c) Instituting a general indication of crisis and waiving the assessment of the case practically result in applying the deadline method, i.e. allowing abortion in the first 12 weeks at the pregnant woman's request without any further condition or discretion. However, maintaining the institution of indication at least symbolically has, in principle, great significance, which can only be fully comprehended in the context of all the changes that have taken place in the regulation of abortion. Examining the indication of crisis in itself, the function of the (formal) requirement of being in a critical situation is to set up – at least in principle – an adequate counterbalance against the "right" or the protection of the foetus. Maintaining the statutory requirement of a serious, disproportionate, extraordinary, unbearable etc. situation of crisis in the field of legitimate causes of abortion – as the most important and in constitutional terms most sensitive point of the former legal regulation of abortion – is aimed at demonstrating that the State, at least in principle and on constitutional grounds, does not give a free way to abortion, an act acknowledged by the law only in exceptional cases: abortion may only be legally implemented in case there is a serious conflict related to conscience or to a personal situation of life, and if the woman's rights to life, health and self-determination are violated to a great extent.

The fact that the Hungarian law (too) considers abortion an act which is in principle detrimental to the society is clearly reflected by the Criminal Code, qualifying and punishing unlawful abortion as a crime (Section 169 of Act IV of 1978 on the Criminal Code –

hereinafter: the CC). Expressing the exceptional and negative nature of abortion is an obligation of the State that results from its duty to protect life. The criminal punishment of abortion is one of the means to achieve the above objective, but it may not be constitutionally enforced comprehensively. It has already been concluded from the Constitution by the Constitutional Court (in the Decision of the Constitutional Court) that the mother does not and may not have a constitutional right to abortion in the sense of having any unconditional disposition over the foetus's life even in an early stage of pregnancy. Therefore, the Act on abortion must be clear in stating that abortion is in collision with the State's constitutional duty to protect foetal life, and the mother's rights may only be enforced to the detriment of this duty in exceptional cases when such rights (the right to life and health, and the mother's personality rights) would suffer an undue damage. The indication of a serious situation of crisis is aimed at representing the above principle.

If the right to verify the situation of crisis is waived by the law, other means are to be found to remedy the protection lost. In the international practice, the State's acknowledging a situation of serious crisis means a shift in the focus of protection from expressly banning and punishing abortion to regulating the circumstances thereof. Remaining in the realm of indications, one may find that in many laws, abortion based on an uncontrolled situation of serious crisis does not enjoy the support secured to other indications – related, in fact, to serious risks or a burden not expected to be borne – that can be assessed by the authorities. In line with the latest developments of the law, classical (medical, ethical, and genetic-teratological) indications as well as the qualification and consequences of a situation of crisis become more and more distinct.

In fact, the dividing line is drawn by controllability, i.e. the pregnant woman's state is practically not evaluated as there are probably many cases within the category of a "situation of serious crisis" where abortion is as clearly justified as in case the mother's health is seriously endangered or in case of serious foetal disability. This way, the pregnant woman's right to self-determination has become extended at the expense of an unjust adverse assessment of the factors mentioned before. Even according to the Act on the Protection of the Foetus and the implementing legal norms, different approval procedures and costs apply to abortion based on a classical indication and to abortion based on a situation of serious crisis. (Abortions based on medical reasons are financed by the social security system according to Section 15 of Act LXXXIII of 1997 on the benefits of compulsory social

security.) Nevertheless, the Act may remedy the unjust situation referred to above.

d) Section 12 para. (6) of the Act on the Protection of the Foetus and Section 9 para. (3) of the Implementing Decree – examining the norms themselves – are unconstitutional on the basis of the foregoing.

The Constitutional Court explained that regulating the situation of serious crisis in the Act on the Protection of the Foetus can be put into harmony with the mother's rights to self-determination and privacy, as controllable indications are not in conflict with such rights either. However, it is incompatible with the State's duty to protect foetal life to have the situation of serious crisis verified simply by the pregnant woman's signing the application form (Section 12 para. (6)), and (according to Section 9 para. (3) of the Implementing Decree) the staff member of the Family Protection Service – who is in charge of verifying the statutory indication of abortion – has no discretionary powers concerning the contents and the validity of her representation. Such provisions themselves cannot secure for the foetus the level of minimum protection required by the constitutional interpretation of the Constitutional Court, and in fact, they do not secure any protection, as the regulation is concerned with the mother's right to self-determination only. As already pointed out by the Constitutional Court in point 2 above, introducing the endangerment of the foetus' healthy development into Section 12 para. (6) of the Act on the Protection of the Foetus cannot be qualified as either protecting foetal life according to the constitutional requirements, or a counterweight against the mother's rights. Consequently, the legislature has failed to comply with the constitutional criteria specified in the Decision of the Constitutional Court for the case of the Parliament not acknowledging the legal subjectivity of the foetus (ABH 1991, 316).

e) According to Section 6 para. (2) item b) of the Act on the Protection of the Foetus, on the conditions specified in paragraph 1, including the pregnant woman's situation of serious crisis as well, it is allowed to extend the time limit for procuring abortion to the 18th week of the pregnancy if the pregnant woman did not realise her pregnancy earlier due to a medical error or a health-related cause beyond the scope of her responsibility or if exceeding the period of pregnancy specified in paragraph 1 (12 weeks) was caused by the default of a healthcare institution or an authority. In this case, abortion may only be implemented on the basis of "a medical reason justifying abortion" to be verified by the concordant opinions of two specialised physicians (Section 12 para. (1)). The condition that the medical reason

hindering the woman in realising her pregnancy must be “beyond the scope of her responsibility” may, in fact, cause difficulties in interpretation, damaging the clarity of the norm. Nevertheless, the Constitutional Court considered it unjustified to establish the unconstitutionality of and nullify the text [medical cause] “beyond the scope of her responsibility” in Section 6 para. (2) item b). The medical cause – usually of a gynaecological or mental nature – that may hinder the woman in realising her pregnancy in its first 12 weeks is a state the imputability of which could only be established in exceptional cases. From a practical point of view, the term "beyond the scope of her responsibility” contained in the text of the norm relates to the nature of the “medical cause” concerned rather than being a further condition. In accordance with that, the Act on the Protection of the Foetus does not specify any special forum or procedure for the establishment of imputability as it forms part of establishing the “medical cause justifying the establishment of pregnancy”.

4. Abortion is traditionally a punishable act; it was qualified as a crime against life in Act V of 1878, then – in 1952 – among the crimes against life, physical integrity and health. Act V/1961 – taking into account certain statutorily specified and legitimate causes of abortion – regulated the statutory definition of abortion in the Specific Part of the Act, followed by a special cause excluding criminal responsibility (Article 19 item (h)): i.e. one may not be punished for abortion performed in accordance with a permission issued by a competent authority on the basis of a statute (Article 256 para. (5)).

The Criminal Code in force specifies abortion as a crime against life, physical integrity and health. Performing abortion on the foetus of another person is a criminal act. The punishment is more severe if abortion is performed in a businesslike manner, without the woman’s consent, causing serious physical injury or danger to life, or if it results in death. Abortion performed personally, or on order, by the pregnant woman herself is qualified as a misdemeanour, i.e. another and less severe form of criminal offence (Section 169 of the CC). In case of this criminal offence, the CC does not specify any special cause excluding culpability. As reflected by the reasoning of Section 169, according to the standpoint of the legislature, all criminal offences are unlawful, and consequently, one does not commit a criminal offence by exercising rights guaranteed by the law. Based on this general principle of criminal law, the legislature considered it unnecessary to expressly declare that permitted abortion performed personally, or on order, by the pregnant woman is not a criminal offence.

Consequently, the provisions of the Act on the Protection of the Foetus exclude the unlawful nature of abortion in the Hungarian system of criminal law. The cases of "legitimate abortion" listed in Section 6 of the Act on the Protection of the Foetus all represent causes that exclude unlawfulness. The causes excluding unlawfulness usually eliminate the endangerment of the society by and the detrimental effect of the act, however, it occurs – in the very case of abortion - that a detrimental act endangering society is tolerated by the law merely on the basis of specific concerns outside of the scope of criminal law.

Section 12 para. (6) of the Act on the Protection of the Foetus and Section 9 paras (1) and (3) of the Implementing Decree allocate the establishment of the cause excluding unlawfulness to the person, i.e. the pregnant woman, who wishes to perform the act specified by the law, expressly excluding that her representation be controlled or assessed regarding its contents and truthfulness by the organ in charge of establishing the existence of the criteria for abortion. However, legal certainty (Article 2 para. (1) of the Constitution) requires that one could prove the existence of a particular circumstance exceptionally excluding the unlawful nature of an act which is dangerous to the society, and therefore, punishable in principle, and such an exception must be verified by the court or another competent institution. If abortion is allowed on the basis of a situation of serious crisis, the staff member of the institution concerned, i.e. the Family Protection Service, may only complete the form authorising abortion, but his or her right to verify the existence of the cause regarding the contents or truthfulness of the representation specifying the cause is expressly withdrawn by the law: in essence, the right to establish the cause excluding unlawfulness is allocated by the Act on the Protection of the Foetus and the Implementing Decree solely to the pregnant woman requesting abortion. As a consequence, Section 12 para. (6) of the Act on the Protection of the Foetus and Section 9 para. (3) of the Implementing Decree violate the principle of legal certainty in the context of Section 169 of the CC.

All this shall not mean that the State may not take certain cases of abortion out of the scope of criminal punishment, with reference either to the lack of actual endangerment of the society and the lack of unlawfulness (e.g. abortion based on medical or ethical indication), or to the supposed inefficiency of criminal punishment, where the State wishes to use other means to perform its constitutional duty of protecting life. In the present case, it is the way – resulting from the provisions of the Act on the Protection of the Foetus – of not punishing the performance of abortion based on an uncontrolled indication of a situation of serious crisis

that violates Article 2 para. (1) of the Constitution.

The Constitutional Court points out that in the law of several countries that also dispense with controlling the indication of a situation of serious crisis, this case no longer falls under the statutory definition of the criminal offence of abortion. (In the Netherlands, Belgium and Germany, the Acts on abortion themselves or the parallel modification of criminal legislation have amended the statutory definition of the criminal offence of abortion by omitting abortion performed without specifying the reasons therefor.)

5. As detailed above, the constitutionally required mutual weighing of the State's duty to protect foetal life and the pregnant woman's right to self-determination has been performed by the Act on the Protection of the Foetus in part not at all, and in part contrary to the Constitution, and therefore, the Constitutional Court established the unconstitutionality of Section 12 para. (6) of the Act on the Protection of the Foetus as well as of Section 9 para. (3) of the Implementing Decree, as examined both in themselves and in the context of Sections 22 and 169 of the CC.

It is a question whether the unconstitutionality resulting from a wrong weighing of the conflicting constitutional right and protected value is remedied by other provisions of the Act on the Protection of the Foetus that may protect foetal life and restore the constitutional balance by taking into account both interests adequately (or at least provide the constitutionally required minimum level of protection for the foetus). According to the changes of the law on abortion abroad, such results can be reached by a set of targeted and continuous consultation services and other measures aimed at preventing abortion.

The Constitutional Court establishes that Section 9 of the Act on the Protection of the Foetus assigns a merely informative task to the staff member of the Family Protection Service. After receiving the application for abortion, the staff member shall inform the pregnant woman on the statutory conditions of abortion [paragraph 1(a)], then on the financial allowances and benefits in kind available in case the child is born, as well as on the institutions offering support, the conditions of adoption, the circumstances, the method and the dangers of abortion, the medical institutions that perform abortion, and finally, the methods of contraception proposed personally to the woman concerned. According to paragraph 2, after giving the above information, the staff member shall complete the appropriate application

form to be signed by the applicant [as a verification of the situation of serious crisis in line with Section 12 para. (6)], and at the same time, he or she designates the institution chosen to perform the abortion. According to the Implementing Decree, in addition to the above information service, the Family Protection Service shall have administrative tasks only (Sections 9 and 10). The abortion fee is decreased by grades in proportion to the applicant's income (Sections 11 to 13). Finally, according to Section 15 of the Act on the Protection of the Foetus, it is banned to advertise or propagate abortion, institutions performing abortion, and tools or substances that may be used for abortion. In contrast, according to Section 2 of the Act on the Protection of the Foetus, elementary and secondary-level educational institutions have the duty of instruction on the value of health and human life, a healthy way of life, a responsible relationship between man and woman, family life meeting human standards, and contraceptive methods that are not detrimental to health; at the same time, the State supports the publication and the presentation in the mass media of brochures that serve the purpose of protecting foetal life.

The Constitutional Court establishes that the provisions of the Act on the Protection of the Foetus and of the Implementing Decree referred to before are not suitable for remedying the unconstitutional situation caused by the provisions of the Act. The pregnant woman's personality rights, and in particular, her right to self-determination may have primacy over the right to life and the State's obligation to protect foetal life only in exceptional cases when there is a conflict arising from the mother's rights being seriously endangered. In case the enforcement of such rights is allowed by the law to as great an extent as provided by the Act on the Protection of the Foetus when regulating the situation of serious crisis, foetal life, too, must be protected by firm and effective provisions in order to re-establish the constitutional balance. Although the information listed in Section 9 of the Act is important for deciding positively on keeping the foetus, the mere information obligation of the consulting body, without a statutory duty to positively encourage and support the continuation of pregnancy, is not sufficient to provide the constitutionally required minimum level of protection for the foetus against the extended possibilities of abortion on the other side.

Therefore, the "supply of information upon requesting abortion" required by the Act on the Protection of the Foetus may not be regarded as a tool constitutionally and appropriately enforcing the State's duty to protect foetal life against abortion based on an uncontrolled indication due – basically and in principle – to the fact that it is not specified in the Act that

consulting is aimed not merely at information supply but also at supporting the mother in her situation of crisis with the purpose of keeping the foetus. Only such a statutory purpose and the detailed regulation of its implementation can sufficiently counterweight the enforcement of the mother's right to self-determination allowed by the symbolic indication of a situation of serious crisis. However, the consultation aimed at keeping the foetus and giving birth to the child may not be limited to a single occasion, as it cannot be expected to relieve the situation of crisis. The consultation service can only meet its constitutional duty if it offers support throughout the period of pregnancy and after the birth of the child as well; nevertheless, it must offer support for the woman after abortion, too.

6. The Constitutional Court points out that the provisions on the information obligation specified in Section 9 are not unconstitutional by themselves, and similarly, the statutory introduction of the situation of serious crisis as an indication of abortion may not be regarded as unconstitutional in itself. Unconstitutionality results from the conceptual definition of the pregnant woman’s situation of serious crisis as specified in the Act on the Protection of the Foetus and the contents of the related implementing regulation. The Constitutional Court now reaffirms this opinion based on a comprehensive review of the Act on the Protection of the Foetus.

In order to stress that it is not the statutory introduction of indicating a situation of serious crisis that is unconstitutional in itself, the Constitutional Court did not extend on the basis of their coherence the establishment of unconstitutionality to all the provisions that contain the definition of a situation of serious crisis in the Act on the Protection of the Foetus.

There are several ways to re-establish constitutionality, with two of them to be pointed out by the Constitutional Court in the next part this decision, moreover, it is possible to find some solutions that allow keeping in force a part of the provisions now contested from a constitutional point of view because of the contextual structure of the Act. Therefore, the Constitutional Court considered it sufficient to restrict the declaration of unconstitutionality to the unconstitutional provisions defining the situation of serious crisis by nullifying Section 12 para. (6) of the Act on the Protection of the Foetus and Section 9 para. (3) of the Implementing Decree only.

As a consequence, after 30 June 2000, the indication of a situation of serious crisis remains in

force in Section 6 para. (1) item d) of the Act on the Protection of the Foetus "alone". However, it is evident from the second sentence of point 1 of the holdings in the Constitutional Court decision that – as detailed in its reasoning – the constitutionality of enforcing a situation of serious crisis as an indication of abortion depends on further criteria. Nevertheless, on repealing Section 12 para. (6), such criteria cannot be found in the Act on the Protection of the Foetus. However, these criteria must be specified in an Act of the Parliament and they may not be substituted for by judicial interpretation as it would lead to legal uncertainty.

Interpreting Section 6 para. (1) item d) of the Act on the Protection of the Foetus must be performed on a level other than that of the executive and judicial branches due – primarily – to the lack of the source of law required by Article 8 para. (2) of the Constitution rather than to the danger of legal uncertainty. The Constitutional Court established in point II. 2. of the reasoning in this decision that the Act on the Protection of the Foetus had satisfied the requirements specified in the Decision of the Constitutional Court as far as the hierarchy of legal norms is concerned, as it contains all the provisions that require regulation on the level of an Act of the Parliament regarding the indication of a situation of serious crisis as well.

After the nullification of Section 12 para. (6), with Section 6 para. (1) item d) remaining in force, the Act on the Protection of the Foetus may only comply with the requirements – already established in the Decision of the Constitutional Court – resulting from Article 8 para. (2) of the Constitution as far as the level of regulating the indication of a situation of serious crisis is concerned if the contents of the concept of a situation of serious crisis and the respective application criteria are regulated on the level of an Act of the Parliament.

After the nullification of Section 12 para. (6) of the Act on the Protection of the Foetus, the situation of serious crisis specified in Section 6 para. (1) item d) as a cause justifying abortion may not be constitutionally applied until the concept of a situation of serious crisis is defined on the level of an Act of the Parliament, and the adoption by the legislature of further provisions securing the constitutional balance between the mother's right to self-determination and the State's duty to protect the life of the foetus, in compliance with the legislature's decision on defining the situation of serious crisis and the examination thereof.

In order to stress that the lack of a definition on the level of an Act of the Parliament cannot

be substituted for by judicial or executive interpretation, in the holdings of the decision the Constitutional Court specified it as a constitutional requirement that Section 6 para. (1) item d) of the Act on the Protection of the Foetus may only be applied subject to the concept of a situation of serious crisis as specified in an Act of the Parliament and the conditions to be specified by the legislature in line with the present decision.

The purpose of setting a future date for nullification is twofold: on the one hand, the legislature should have enough time to adopt a constitutional regulation and, on the other hand, until that time, the possibilities of abortion should not be restricted to the classical indication alone. The latter would be clearly contrary to the legislature's will as presented in the Act on the Protection of the Foetus.

IV

The legislature has several ways to make the Act on the Protection of the Foetus constitutional.

1. The causes of unconstitutionality specified by the Constitutional Court may, on the one hand, be eliminated by the Parliament by winding up the contradiction in the definition of a situation of serious crisis (Section 12 para. (6)) caused by the reference to the development of the foetus and by allowing the verification of a situation of serious crisis. In this case, the unconstitutionality of Section 9 would not be raised at all. As far as re-establishing the verification of a situation of serious crisis is concerned, the woman's personality rights could be saved by an exemplary listing of certain typical facts of the case qualifying as critical situations defined in an Act of the Parliament.

2. On the other hand, the legislature can continue to waive the right to verify the indication of a situation of serious crisis and it may find new means to perform its duty of protecting the life of the foetus. In case the indications are liberalised, and also against the "situation of serious crisis" specified in the Act on the Protection of the Foetus, the State is constitutionally obliged to create adequate counterweight for the protection of foetal life. Such measures must focus primarily on cooperation with the pregnant woman, supporting her in the crisis situation with the purpose of making her keep her foetus. To achieve this objective, it takes adequate support of a psychological and medical nature as well as social and material help. The State

should not quit considering abortion a danger to the society. However, abortion should be sanctioned, instead of criminal law punishment, first of all by unfavourable legal consequences as specified in other fields of law against the mother requesting abortion on the basis of an uncontrolled indication. Finally, pregnancy must be protected against third persons who force the mother to have an abortion.

It is within the competence and the responsibility of the Parliament to set up and enact a system complying with the above principles and offering obligatory consultation and crisis management cooperation for the woman requesting abortion as well as securing favourable conditions for giving birth to the child, together with reforming the system of sanctions used by the State to perform its constitutional duty to protect life. The Constitutional Court merely calls the attention to certain questions of constitutionality that may be raised in the course of reforming the regulatory framework.

a) In case abortion is based on an uncontrolled indication, the woman can only be expected to trust the consulting service if she may look forward to receiving support to manage the conflict related to her conscience and state of life rather than having to focus on falling under certain statutory definitions. Neutral information is not sufficient to achieve that. It is the constitutional obligation of the State to open up for the mother the perspectives of giving birth to and bringing up the child. An obligatory consulting service aimed at the above objective would be a sufficient tool for the State to perform its life-protecting duty in addition to acknowledging uncontrolled indication.

The consulting service must not be limited to a single occasion but it must be ready to support the mother who has contacted the service in her critical situation throughout the period of her pregnancy and even after the birth of her child. The consulting service must offer support for women after abortion as well. Supporting the fostering of children by instruments specified in other legal norms is part of the State's duty, too. This duty is, however, directly linked to other constitutional provisions and state goals, and therefore, it has not been examined in the constitutional review of the Act on abortion.

In principle, such a consulting service would not unduly restrict the mother’s privacy or violate her freedom of conscience. As pointed out by the Constitutional Court in its decision on the freedom of expression, everyone – including the State – may support opinions they

find agreeable, or may act against them if deemed misguided or wrongheaded, provided that in doing so no other right is violated to such an extent that the freedom of expression is forced to retreat (30/1992 (V. 26) AB, ABH 1992, 167, 180). Here, however, the State does not simply propagate an opinion deemed right by the actual majority of the Parliament, but it carries out its constitutional obligation – originating at a level higher than that of simple legislature – when enforcing constitutional values that bind everyone at all times. As far as the freedom of conscience is concerned, the Constitutional Court pointed out that the neutrality of the State in matters of religion and conscience does not at all mean that it should support indifference; on the contrary, it results from the fundamental right of the freedom of conscience that the State has a constitutional duty of ensuring the possibility of free formation of personal convictions and of an informed and well-founded choice to be made thereon (4/1993 (II. 12.) AB, ABH 1993, 48, 53). The consulting service must support the mother-to-be in making a responsible decision on giving birth to her child or having an abortion. All information related to the abortion must also be accessible. The State may not compel anyone to accept a situation which sows discord within, or is irreconcilable with the fundamental convictions which mould that person's identity (Decision of the Constitutional Court, 313). This may be facilitated by maintaining anonymity throughout the consulting procedure until an abortion permit is issued. Obligatory participation in the consulting service does not disproportionately restrict the woman's freedom of conscience and it does not sow discord within her identity, having particular regard to the fact that she is only obliged to participate without any obligation of further cooperation.

Therefore, as far as its outcome is concerned, the consultation – while clearly focusing on the protection of the foetus – must be open and it must respect the woman's rights mentioned above.

Thus, it is a fundamental requirement for the constitutionality of the system to set up, license by the State and control on a continuous basis consulting organs with appropriate professional skills and trained on crisis management.

In addition, it is a constitutional requirement that the consulting service must explain the constitutional situation and the rights of the foetus and the woman, focusing primarily on the constitutional protection of foetal life against which the mother's right to self-determination concerning abortion may only be enforced if bearing the foetus would result in such

extraordinary difficulties for the mother that exceed the usual burdens of bearing a child to an extent surpassing the limits of expectable sacrifice.

b) If following the consultation, the State allows and does not punish abortion even if there is no controllable indication, under its duty to protect life the State may not constitutionally waive the application of other legal consequences. The pregnant woman's obligation to bear all the medical costs of abortion is an example for the above.

c) As the consulting service – supporting the pregnant woman in passing a responsible decision by offering help in the management of her conflict – should not exercise any pressure, the woman must be protected from a contrary pressure by her environment, too. Such an influence by her environment can damage the positive impacts of the support given by the consulting service and counteract the State's means of protecting the foetus, which is a constitutional condition of legal regulation. There may be several ways to prevent such harmful influences, depending on the actual situation. Involving the father or family members in the consulting process can be an effective method. However, the application of criminal law may not be neglected either. It results from the life-protecting duty of the State that criminal sanctions must be applied to everyone who forces a pregnant woman to have abortion by threatening her, violating an obligation of sustenance or in any other way. It is the obligation of the legislature to ensure the application, as appropriate, of the statutory definitions of the criminal offences which are, in principle, suitable for that purpose even at present.

3. The unconstitutional provisions of the Act on the Protection of the Foetus have been annulled by the Constitutional Court with effect from the 30th day of June, 2000. The above deadline is sufficient for both the adoption of constitutional rules and the establishment of the organisational, personal and other conditions necessary for the implementation thereof.

Budapest, 18 November 1998

Dr. László Sólyom
President of the Constitutional Court
presenting Constitutional Judge

Dr. Antal Ádám

Dr. István Bagi

Judge of the Constitutional Court

Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. Géza Kilényi
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Tamás Lábady
Judge of the Constitutional Court

Dr. János Németh
Judge of the Constitutional Court

Dr. Imre Vörös
Judge of the Constitutional Court

Dr. Ödön Tersztyánszky
Judge of the Constitutional Court

Dissenting opinion by Dr. Tamás Lábady, Judge of the Constitutional Court

1. I have stated in my concurring reasoning attached to Constitutional Court Decision 64/1991 (XII. 17.) AB (ABH 1991, 323-327) that I agreed with the establishment of the unconstitutionality of the then effective legal norms on abortion and the annulment thereof on the ground - other than the reasons set out in the majority view - that the unconditional acknowledgement of the foetus' right to life and the State's absolute duty to protect life, including that of the foetus to be born, can be deducted from the provision of Article 54 para. (1) of the Constitution. I maintain my opinion in an unchanged form, based on the interpretation of fundamental rights in the Constitution in force.

I am convinced that the legislature has no constitutional empowerment to qualify, in legal terms, foetal life differently from human life, as the foetus – regardless of being inside the mother's body or in an artificial environment outside her – must, from the moment of conception, be deemed a human, i.e. a subject of law, a person with legal capacity, and consequently, the foetus has a right to life against the mother as well. According to Article 54 para. (1) of the Constitution in the Republic of Hungary every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived. In the interpretation of the Constitutional Court, the right to life and human dignity is an absolute subjective right, i.e. it cannot be restricted and reduced, since it is a fundamental right which must be left intact by the law. Since in a biological sense, the foetus is a human, i.e. a genetically fully developed individual human being,

and since the term “inherent right to life” means – even in the terminology of international treaties (“droit inhérent à la vie”,“angeboneres Recht auf Leben”) – a right not gained through birth, but one “formed” together with the man, i.e. a right that originates in the existence, the humanity of the man, the lack of human dignity and having no right to life cannot be justified by the Constitution in case of a foetus not yet born. Therefore, in my opinion, the foetus as a new human life is a person, who is inviolable by the law and whose absolute right to life cannot be constitutionally restricted by the legislature with reference to the pregnant woman’s right to self-determination or any other fundamental right. The foetus’ right to life may only collide with the mother’s right to life.

2. Taking into account the arguments detailed above, I cannot agree either with the statements found in points 1, 2, and 3 of the majority decision, or with the provisions contained in points 5 and 6 thereof. In my opinion, the legislature cannot constitutionally acknowledge the pregnant woman’s situation of serious crisis as an indication making abortion constitutional; at the same time, the Constitutional Court should not have rejected the petitions – assessed in the decision – aimed at establishing the unconstitutionality of the whole and certain provisions of Act LXXIX of 1992, and it should have declared that the legal status of the foetus is a person, that is a human.

3. I consider it necessary to point out that even within the standpoint formed by the majority of the Constitutional Court, i.e. within the concept of the decision, I am convinced that the level of protection deducted by the decision from the Constitution as the State's objective obligation to protect life is not sufficient, and therefore, I attach – in addition to maintaining my basically different standpoint – an independent separate opinion to points 1, 2 and 3 of the decision.

3.1. As no man is born without having been a foetus, one can establish even without acknowledging the foetus’ right to life and to human dignity that the Constitution protects foetal life from the moment of conception. Therefore, instead of the statement found in point 1 of the decision, it must have been stated in the holdings of the decision that, on the one hand, “the State must not constitutionally allow unjustified abortion” and, on the other hand, "abortion is a phenomenon to surmount as far as the values of the rule of law are concerned” or that, in another form, “it is a constitutional requirement - resulting from the objective side of the right to life - concerning the

essence of the protection of life that the State must apply effective tools to combat the phenomenon of abortion".

If, according to the majority decision, the foetus has no subjective and inalienable right to life and thus the right to be born, the protection and respect of foetal life follow inevitably from the Constitution as expressly declared by the preamble of the Act on the Protection of the Foetus as well. Therefore, even within this concept, only a "serious" cause related to a fundamental right specified in the Constitution may be a constitutional indication of abortion; in order to combat abortion efficiently, the State must statistically monitor abortions. The State must actively intervene if the number of abortions or the ratio of abortions to the number of births does not decrease, as it is the constitutional duty of the State to work on gradually eliminating the phenomenon of abortion.

3.2. All abortions violate the right to life. The State must use the tools of legislation, information, training and education in acting against abortion. The legal norms and the constitutional concept of the State should not suggest that such a tolerated phenomenon is in line with the values and the human image of the Constitution. Increasing qualitatively the efficiency of protection shall be a standard in assessing the constitutionality of future legislative solutions, until the acknowledgment by the law of the legal personality of the foetus.

3.3. In compliance with the Constitution, protecting foetal life may only be changed by strengthening that and its efficiency should not be decreased. In its Decision 28/1994 (V. 20.) AB (ABH 1994, 134.), the Constitutional Court established when reviewing the obligation to maintain the environmental status quo that "the State must not reduce the degree of protection of nature as guaranteed under law unless this is unavoidable in order to enforce other constitutional rights or values. Even in the latter case, however, the degree of protection must not be reduced disproportionately with the goal set forth."

In my opinion, a more severe constitutional requirement should have been specified in the decision of the Constitutional Court - even on the grounds of its concept - for the objective protection of the right to life, taking into account the individuality of foetal life, i.e. the fact that each and every foetal life is the origin of an individual and

irreproducible human life. Therefore, the State must – in addition to cutting the "statistical risk" of abortion – work on letting all foetuses born without any discrimination.

Budapest, 18 November 1998

Dr. Tamás Lábady
Judge of the Constitutional Court

Separate opinion by Dr. Ödön Tersztyánszky, Judge of the Constitutional Court

I agree on the merits of the provisions set out in the decision with the exception of the one that rejects the petition seeking determination of the unconstitutionality and declaration of the nullification of Section 6 para. (1) item d) of the Act on the Protection of the Foetus.

I also agree with the arguments aimed at ensuring the theoretical foundation of the reasoning.

It follows from the statements in the holdings and the reasoning of the decision that it is unconstitutional by the Act to allow the termination of an unborn human being when the pregnant woman is in a situation of serious crisis without establishing, at the same time, adequate measures to form a counterweight for the protection of the foetus. The law in force does not contain provisions that form adequate counterweight.

I agree that it is not unconstitutional in itself to adopt an Act of the Parliament permitting abortion in case the pregnant woman is in a situation of serious crisis without verifying such crisis. However, in establishing the results of the review – that is rejecting the petition or declaring its unconstitutionality and annulling it – the Constitutional Court should have examined this rule on the merits in the context of the Act and not in itself.

In its practice, the Constitutional Court declares the unconstitutionality of and nullifies a provision which is not unconstitutional in itself if it is deemed unconstitutional in the context of other provisions of the legal norm under review (Dec. (24/1990 (XI. 8.) AB, ABH 1990/115; Dec. 46/1991 (IX. 10.) AB, ABH 1991/211; Dec. 57/1994 (XI. 17.) AB, ABH

1994/316; Dec. 28/1995 (V. 19.) AB, ABH 1995/138; Dec. 75/1995 (XII. 21.) AB, ABH 1995/376; Dec. 13/1996 (IV. 12.) AB, ABH 1996/50).

Similarly, in interpreting its powers related to the preliminary review of a bill, the Constitutional Court established that in general, the constitutionality of the individual provisions taken out of the context of the bill cannot be assessed (Dec. 16/1991 (IV. 20.) AB, ABH 1991/58).

Based on the above, Section 6 para. (1) item d) of the Act on the Protection of the Foetus should have been declared unconstitutional and annulled.

Specifying a constitutional requirement in the application of item d) cannot remedy unconstitutionality in the case examined, although it aims to do so. For those who apply the law, the effects of keeping item d) in force together with specifying a constitutional requirement create a situation as if it had been annulled, i.e. item d) cannot be applied until its definition and criteria are not specified in an Act. In a concrete case, it requires the legislature and the executive or judiciary organs to analyse and evaluate the provisions of the decision as well as to interpret them – and the reasoning – further, taking into account in particular the fact of item d) remaining formally in force.

The majority decision can result in a situation – taking into account other provisions of the decision as well – that after 30 June, 2000, if a new Act is not adopted by that time, the pregnant woman's "situation of serious crisis" as an indication of abortion will be undetermined and there will be no provision in the Act to verify it, while there will be no adequate counterweight int he Act, aimed at the protection of foetal life, either.

Budapest, 18 November 1998

Dr. Ödön Tersztyánszky
Judge of the Constitutional Court

Concurring reasoning by Dr. Antal Ádám, Judge of the Constitutional Court

I agree with both the statements in the holdings of the decision and the reasoning

thereof. I agree that the pregnant mother's right to self-determination and her rights to protect her health are to be counterweighted by the State's duty to protect the life of the foetus. In my concurring opinion, I point out the constitutional interrelations – not mentioned expressly in the decision – that strengthen and supplement the State's life protecting duty concerning the foetus. There are, in fact, other constitutional provisions – in addition to the right to human life – obliging the State to protect and support the pregnant woman and the foetus jointly or, in some cases, separately, as well as to protect the health of the mother and the foetus in order to facilitate the development of the foetus and the birth of a viable child.

Therefore, the Parliament must take into account other constitutional values as well when it determines the enforcement criteria and the proportions of the above fundamental rights and the State's duties. As a consequence, the legislature must bear in mind that all provisions of the Constitution form a complex system of values. The values specified in the Constitution form the basic and obligatory standard for the political and social acts as well as the State's, the community's and the individuals' behaviour. Undoubtedly, the core of such standards, enriched on a continuous basis, is the set of fundamental rights specified in detail by the legislature, the international jurisdiction related to fundamental rights and the decisions of the Constitutional Court. When the Constitutional Court examines constitutional concerns, it uses a synoptic approach by applying together with the fundamental rights the constitutional principles, prohibitions, state goals, state duties and other constitutional values specified. The potential collision of the fundamental rights and other components of the Constitution can only be solved, on the one hand, by taking into account the precedents of the Constitutional Court's former statements and, on the other hand, through a thorough assessment of the features of the actual constitutional problem. Therefore, adopting decisions regarding the fundamental rights and deciding in constitutional issues cannot be considered completely identical notions of the same meaning. The essential feature of deciding in constitutional issues – even in case adopting a decision in a concrete constitutional debate – is a coherent, verified, and generally binding constitutional interpretation covering the Constitution's complete set of norms.

In my opinion, with respect to the arguments detailed above, the State's duty of protecting the foetus is supported – in addition to the State's life protecting duty originating in man's right to life – and supplemented with important criteria and requirements by the Constitution's provisions on protecting by the State the institutions of marriage and family (Article 15), on the State' task to ensure a secure standard of living, instruction and education for the young, and to protect the interests of the young (Article 16), on supporting and

protecting the mother before and after the birth of the child (Article 66 para. (2)), as well as the children's constitutional right (Article 67 para. (1)) to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development.

Nevertheless, in addition, the legislature may seek to enforce other criteria of social and demographic policy as well as moral aspects that fall beyond the scope of the constitutional principles, fundamental rights, obligations and other values specified in the Constitution, provided of course that the above aims should not violate any provision of the Constitution and or be in conflict with any constitutional requirement declared in the decisions of the Constitutional Court as obligatory on everyone.

Budapest, 22 November 1998.

Dr. Antal Ádám
Judge of the Constitutional Court

Concurring reasoning by Dr. András Holló, Judge of the Constitutional Court

1. I start my concurring reasoning attached to the decision with raising a theoretical preliminary question and giving the answer thereto.
Does the Constitutional Court have competence to protect the level of constitution-making as a regulatory level? In other words: may the Constitutional Court annul an Act or a provision thereof (let us suppose that no other type of statute should be reviewed) if it is not unconstitutional in essence, but contains a norm supplementing the Constitution?

My answer is positive – on the basis of the following.

It is the constitutionally specified power of the Constitutional Court to review the constitutionality of legislation and annul Acts and other statutes that violate the Constitution (Article 32/A paras (1) and (2)). Reviewing the constitutional scope of the legislature's powers is part of the constitutional review of legislation (e.g. Article 35 para. (2) of the Constitution). The Constitutional Court established in its decision adopted in 1991 that "the constitutionally protected order of the hierarchy of legal norms is not only a formal question if a legal norm of an inferior level provides for drawing off a power ensured by a legal norm of

a higher level… For the violation of the above, the contested regulations are unconstitutional concerning their contents, too." (Dec. 31/1991 (VI. 6.) AB, ABH 1991, 136) A norm contained in the Constitution (the subject of regulation) is under the disposition of the constitution-making power; supplementing or amending such norms by the legislature qualifies as drawing off the legislative power.

To put it concretely: the legislature must not step into the regulatory field of constitution-making. In this context, the function of the Constitutional Court to protect the Constitution includes guarding over the coherence of the Constitution as well.
It means that all matters taken to the level of the Constitution as a regulatory subject and the contents thereof may only be amended, modified or repealed through constitution-making (an Act amending the Constitution). In this case, the Parliament acts as a constitution-making authority.
The legislature (the Parliament as legislative authority) may not adopt an Act of the Parliament which amends (or modifies) the Constitution. (The same relates to any statutory provision repealing a provision of the Constitution.)
It is up to the Constitutional Court to decide whether a certain Act is deemed to be one amending etc. the Constitution – based on the system of the Constitution, the given regulatory subject and the contents of the regulation – by examining the relationship between the statutory regulation and the constitutional provision concerned. In case the Constitutional Court acting in its power (preliminary review as amended, or – typically – posterior review) establishes that the provision in question of the Act under review contains any amendment to the Constitution (i.e. the legislature took over the role of the constitution-making power), it may annul the norm due to its unconstitutionality. On the basis of the Constitution, the Constitutional Court is not only in charge of enforcing the constitutional provisions in the legislature, but to protect against the level of legislation the level of constitution-making originating (by way of interpretation) from the Constitution.

2. The position of the Parliament – as established by the decision as well – is clear from the provisions on abortion of the Act on the Protection of the Foetus: the foetus is not a subject of law.
In my opinion, the decision of the Parliament was constitutional as it is the only interpretation deductible from the Constitution. The term "inherent" in the provision of Article 54 para. (1) of the Constitution, by which "every human being has the inherent right to life and to human

dignity", may be interpreted as a sign of drawing a constitutional division line between man born, human life and the so-called "potential life" (foetal life), regulating only the former. In my interpretation, the term of the Constitution, "every human being has legal capacity" (Article 56 of the Constitution) must be examined in the above context as well.
Acknowledging the human nature of the foetus in legal terms as a subject of law would clearly qualify to be a regulatory subject covered by the level of the Constitution – as amending or modifying Article 56 of the Constitution. If one agrees – as I do so – with the statement contained in the so-called first decision of the Constitutional Court on abortion that the "nature of such an extension of the scope of legal capacity is comparable only to the abolition of slavery, but it surpasses even that event in significance. With this measure the legal capacity of man would reach its theoretically feasible final limits and completeness…" (Dec. 64/1991 (XII. 17.) AB, ABH 1991, 311.), and therefore, such a statement itself would demand a constitutional-level declaration on the ground of its historical significance.
Consequently, had the legislature decided positively in the Act on the Protection of the Foetus on the legal capacity of the foetus, it would have amended the Constitution in an unconstitutional manner through a regulation in an Act of the Parliament. (See the arguments in point 1.)

3. It is a logical result of the legislative concept of not acknowledging the legal capacity of the foetus that the focus of the constitutional review of the provisions on abortion of the Act on the Protection of the Foetus has shifted from the field of the "competing" rights to life and to human dignity to the examination of the relationship and the balance between the pregnant woman's right to self-determination and the State's (not absolute) objective duty – deductible from Article 54 para. (1) of the Constitution, i.e. the right to life – to protect life. As it was worded rightly in the decision, "Accordingly, if the foetus' legal capacity is not recognised, the legislature – when called upon to designate conditions authorising abortion – may not ignore the sometimes conflicting rights and obligations determining the contents of the regulation: this way, it must weigh both the woman's right to self-determination, to life and to physical integrity as well as the State's duty to protect life – including foetal life – that follows from the right to life."

The review implemented by the Constitutional Court resulted in establishing that those provisions of the Act on the Protection of the Foetus and its implementing regulation that are specified in point 4 of the decision violate Article 2 para. (1) and Article 54 para. (1) of the

Constitution. I agree with the establishment of unconstitutionality and the annulment of the relevant normative provisions.

There are, in fact, two constitutional solutions of equal rank – although the Decision refers to "several ways" – proposed in the decision for the legislature to eliminate the unconstitutionality of the unconstitutionally regulated uncontrolled indication:

a/ ensuring the controllability of the situation of serious crisis, or

b/ maintaining the present (legally uncontrollable) situation of crisis and counterweighting it by establishing an efficient institutional framework aimed at the protection (keeping) of the foetus.

In my opinion, the unconstitutionality can only be eliminated by the second solution.

Consequently, the Constitutional Court should have established the unconstitutional omission of the legislature as well. According to the established practice of the Constitutional Court, it declares an unconstitutional omission in case there is a lack of statutory guarantees necessary for the enforcement of a fundamental right (Dec. 35/1992 (VI. 10.) AB, ABH 1992, 204; Dec. 22/1995 (III. 31.) AB, ABH 1995, 108). In the Act on the Protection of the Foetus, the legislature did not comply with its obligation based on the right to life as it did not ensure the constitutionally sufficient protection for foetal life; the Parliament did not balance the right to self-determination guaranteed by the uncontrolled indication with the regulation, in the Act of the Parliament, of a set of efficient measures aimed at protecting and keeping the foetus. Section 9 of the Act on the Protection of the Foetus does not comply with the above requirement. (See point IV/2 of the decision.)

4. In my opinion, the proposed solution offering a controlled indication would unconstitutionally restrict the pregnant woman's right to self-determination and would, at the same time, violate her constitutional right to privacy. Controlling the indication through the application of a statutorily prescribed typology and objective statutory definitions could not be implemented constitutionally. The subjective facts of the case of critical situations in private life are – as a result of the nature of such situations – "hidden" but real matters of fact. (For example, rape, and in particular domestic rape, does not in each case become the subject of criminal procedure; it is hard to imagine how to undertake publicly and evaluate a pregnancy that has resulted from a relationship outside marriage or, similarly, a spoilt marriage maintained at the expense of many mental conflicts…) The "typical" statutory definitions obligatorily specified by the law would clearly not cover the "intimate facts of the

case" of the special critical situations in one's private life evaluated on an individual basis. "Focusing on the statutory definitions" – as mentioned in the decision – may in certain cases lead to false verification or to choosing an illegal way instead of deciding to reveal the contents of real critical situations and to cooperate with the service protecting the foetus.
Introducing controlled indication through the specification of the so-called "statutory definitions" would exclude the subjective and hidden fact of the case that actually cause the critical situation and thus it would disproportionately restrict the pregnant woman's right to self-determination and the constitutional limits of her privacy (and her disposition over private secrets).

5. I agree with the Decision's statement specifying that the constitutionality of the statutory regulation of an uncontrolled situation of crisis should be built upon a "counterweight of protection", i.e. the establishment of a consulting service encouraging the mother to keep her foetus and offering her adequate support and cooperation. The "counterweight" should be aimed at creating a real decision-making situation for the pregnant woman by establishing the conditions necessary for exercising wisely her right to self-determination. However, I must note that refusing to cooperate with the service protecting the foetus or if the encouragement and persuasion performed by the service has no success, the personal decision made by the pregnant woman remains within the constitutional scope of the right to self-determination just as in case of her positive decision concerning the foetus. All the above results from the decision of the Constitutional Court interpreting the freedom of conscience, referred to by the decision as well: it results from the fundamental right to the freedom of conscience that the State has a constitutional duty of ensuring the possibility of an informed and well-founded choice (Dec. 4/1993 (II. 12.) AB, ABH 1993, 48).

The moral evaluation of the pregnant woman's personal choice is beyond the limits of constitutional law.

Budapest, 18 November 1998.

Dr. András Holló
Judge of the Constitutional Court

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