Decision 29/2006 (VI. 21.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior review of the unconstitutionality of a statute, the Constitutional Court has – with dissenting opinions by dr. *Mihály Bihari, dr. András Holló* and *dr. László Kiss,* Judges of the Constitutional Court – adopted the following

d e c i s i o n :

1. The Constitutional Court rejects the petition aimed at establishing the unconstitutionality of, and at annulling Act II of 2000 on independent medical practice in its entirety and also of its Section 1 para. (2), Section 2 para. (3), the text "in six months from the death of the previous rightholder" from the second sentence in Section 2 para. (6), Section 2 para. (7), furthermore, Section 3 paras (3), (6) and (7) item *a)* of the same Act.

2. The Constitutional Court rejects the petition aimed at establishing an unconstitutional omission of legislative duty on the ground that Act II of 2000 on independent medical practice has failed to regulate the subsistence of the operation right regarding a concrete general practitioner district.

3. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and declaration of the annulment of Government Decree 18/2000 (II. 25.) Korm. on the obtaining and withdrawal of a general practitioner's operation licence as well as on the loan conditions of acquiring the movable and immovable property and the operation licence required for pursuing general practitioner's professional activity in its entirety, furthermore, of Section 13 para (3), Section 14 para. (1) item *b)* and Section 14 para. (2).

4. The Constitutional Court rejects the petition aimed at establishing the unconstitutionality of, and at annulling Minister of Health Decree 4/2000 (II. 25.) EüM on the activities of general practitioners, paediatricians and dentists in its entirety and Section 1 para. (4) the same decree, as appropriate.

The Constitutional Court publishes this Decision in the Official Gazette.

R e a s o n i n g

I

1. The Constitutional Court has received a number of petitions regarding Act II of 2000 on independent medical practice (hereinafter: the AIMP), Government Decree 18/2000 (II. 25.) Korm. on the obtaining and withdrawal of a general practitioner's operation licence, as well as on the loan conditions of acquiring the movable and immovable property and the operation licence required for pursuing general practitioner's professional activity (hereinafter: the Implementation Decree or the ID) and Minister of Health Decree 4/2000 (II. 25.) EüM on the activities of general practitioners, paediatricians and dentists (hereinafter: the D).

2. One petitioner regards the AIMP and the ID in their entirety as well as Section 1 para. (3) of the D as unconstitutional, requesting annulment of these regulations based on Article 2 para. (1), Article 8 para. (2), Article 13 para. (1), Article 35 para. (2) and Article 70/ A para. (1) of the Constitution. The petitioner sets out the arguments for the unconstitutionality of certain provisions of the AIMP and the ID, holding however that the unconstitutional situation cannot be remedied by annulling these individual provisions, and therefore it is necessary to annul the relevant statutes in their entirety.

a/ In the petitioner’s opinion, the AIMP and the ID violate Article 2 para. (1) of the Constitution as their regulations are unclear and ambiguous. It is, namely, uncertain whether “the operation licence is allocated to a concrete general practitioner district, i.e. whether operation licences may only be held by those who provide services in one GP district or who are to be contracted for providing services in one such district.” The exact meaning of Section 3 para. (3) in the AIMP cannot be established as “the provision indicated may be interpreted in such a way that physicians pursuing general practitioner's activities on the day the statute becomes effective may pursue such activities until their decease and are not required to hold a licence regardless of which GP district they pursue their activities in.” The petitioner believes that the legal status of a physician pursuing GP activities is also obscure due to the fact that the AIMP does not distinguish physicians that are civil servants from those that are entrepreneurs, while the ID specifies them as separate categories. “Presumably, the operation

licence as an intangible asset does not have the same scope in case of GPs being civil servants as in case of GPs being entrepreneurs."

b/ As explained by the petitioner, Section 3 para. (7) item *a)* of the AIMP authorizes the Government to regulate issues that are vitally important with regard to the guarantees under the right to property. Article 8 of the ID regulates the withdrawal of the operation licence based on this authorization.

The petitioner considers that the provision in Section 3 para. (6) of the AIMP prohibiting the alienation of the operation licence for the period until 31 December 2000 qualifies as an unjustified restriction of the right to property.

In the petitioners' opinion, the provisions of the AIMP and the ID listed above violate Article 13 para. (1) and also Article 8 para. (2) of the Constitution.

c/ The petitioner is of the opinion that the rule in Section 3 para. (3) of the AIMP is contrary to the general prohibition of discrimination specified in Article 70/A para. (1) of the Constitution as it does not allow the alienation and the continuation of the operation licence to physicians who pursue general practitioner's activities without a duty to provide services in one particular area. Also, the petitioner raises constitutional concerns about the rule that no fee is to be paid for the alienation only until 31 December 2000.

d/ The petitioner thinks that Section 13 para. (3) of the ID contravenes Article 35 para. (2) of the Constitution as, when phrasing the regulation, the provision in Section 8 of Act LXV of 1990 on Local Governments (hereinafter: the ALG) was not taken into consideration.

e/ The petitioner believes there are multiple reasons why Section 1 para. (3) of the D is unconstitutional. First, the challenged provision allegedly violates a statute of a higher rank. Also, the Minister has set this rule without authorization, and, finally, the phrasing of the rule is ambiguous.

3. Another petitioner challenges Section 1 para. (2) and the second indent in Section 3 para. (3) of the AIMP, as well as Section 14 para. (1) item *b)* and Section 14 para. (2) of the ID as they allegedly contravene Article 70/A paras (1) and (3) of the Constitution. This is because these regulations make a distinction between physicians with a duty to provide services in a particular area and physicians with no such obligations. The petitioner has asked for the annulment of the abovementioned provisions with a "retroactive" effect. In the first petition the petitioner referred to Article 70/A para. (2) and Article 70/B para. (1) of the Constitution in general, but in a petition filed since then, the same petitioner has not specified these provisions of the Constitution as grounds for unconstitutionality.

4. In a joint petition, several petitioners have requested the following:

a/ annulment of the text “personal valuable right” in Section 2 para. (3) of the AIMP, annulment of the text “in six months from the death of the previous rightholder”, also annulment of Section 2 para. (6) and Section 2 para. (7) based on Article 2 para. (1) of the Constitution (claiming that the language of the phrase is ambiguous and there has been a serious violation of the rules of legislative procedure) as well as on Article 13 para. (1) of the Constitution,

b/ establishment of an unconstitutional omission of legislative duty and establishment of the legislator’s obligation to comply with its legislative tasks since “the AIMP does not regulate the territorial constraints of operation licences regarding geographical areas” as “without regulating these, the regulations of the Act are not implemented in accordance with the requirement of legal certainty and they violate the freedom of property. The legislator should have regulated the effect the implementation of the operation licence has on the autonomy of local governments. This omission of the legislator violates the principle of the rule of law specified in Article 2 para. (1) of the Constitution and the right to property under Article 13 para. (1) of the Constitution.”

The petitioners have fully upheld their requests in the petition filed after the amendment of the challenged statutes.

5. The Constitutional Court has consolidated the petitions and judged them in a single procedure as they are of the same subject under Section 28 (1) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court’s Provisional Rules of Procedure and on the Publication Thereof. (ABH 2003, 2065)

The statutes challenged by the petitions have been modified several times since the filing of the petitions. Nevertheless, the provisions challenged by the petitioners have remained in force. As a result, the Constitutional Court has considered the constitutionality of the statutory text in force at the time the decision was made.

The Minister of Health and the Minister of Justice have notified the Court on their positions regarding the petitions.

II

The Constitutional Court has reviewed the petitions on the basis of the following statutes:

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

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

“Article 8 (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined in Acts of Parliament; such Acts, however, may not restrict the essential contents of fundamental rights.”

“Article 13 para. (1) The Republic of Hungary guarantees the right to property.”

“Article 35 (2) Within its sphere of authority, the Government shall issue decrees and pass resolutions, which shall be signed by the Prime Minister. Government decrees and resolutions may not conflict with Acts of Parliament. Government decrees shall be promulgated in the Official Gazette.”

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

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

“Article 70/B. (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.”

2. The relevant provisions of the AIMP are the following:

“Section 1 (2) For the purposes of this Act

a) independent medical practice shall mean the healthcare services provided by the general practitioners, paediatricians and dentists (hereinafter jointly: “general practitioner” or “GP”) in the scope of the territorial obligation of providing services, in accordance with Act CLIV of 1997 on Healthcare;

b) physician shall mean a person with medical or dentistry qualification registered in the general and the operational registry kept according to specific statutory provisions;

c) operation licence shall mean the licence granted in the permission for pursuing independent medical practice by the Hungarian Medical Chamber for physicians defined in item *a)*.

“Section 2 para. (3) The operation licence is a personal valuable right (intangible asset) that may be alienated and continued by the successor if conditions specified in laws are met.

(4) The persons entitled to succeed the rightholder in case the rightholder deceases are the following:

a) the spouse, or

b) a lineal descendent.

The order of the persons entitled to succeed the rightholder are determined by the degree of linear descent.

(…)

(6) If the person entitled to succeed the rightholder under para. (4) does not meet the statutory requirements

– the person may waive the right to continue the operation licence and transfer it to the person next in line meeting the statutory requirements or

– may alienate the operation licence free or for consideration in six months from the death of the rightholder.

(7) If the person entitled to alienate the licence as specified in para. (6) does not exercise this right within the deadline specified therein, the operation licence will terminate.

(…)"

"Section 3 para. (3) The restrictions below shall be applicable to physicians that pursue a medical practice [as defined by Section 1 para. (2) item *a)*] without a territorial obligation as financed by the National Health Insurance Fund for at least 200 patients they have registered on the effective date of this Act.

– they are required to verify their operation licence rights in 30 days form the effective date of the present Act at the Hungarian Medical Chamber; also,

- – their operational rights are strictly personal; it may not alienated or transferred to a successor.

(…)

(6) The operation licence may not be alienated until 31 December 2000 except if the person holding an operation licence does not qualify under the licensing regulations and therefore he/she is required to alienate it under Section 2 para. (3). No duty is payable for the succession to and the alienation of the operation licence until 31 December 2000.

(7) The following authorizations shall apply:

a) The Government shall be authorized to regulate by decree the cases and conditions of obtaining and withdrawing operation licences and to specify the organs having competence to issue the licences, to regulate the cases of substitution and the rules governing loans and the transfer of operating licences,

b) The Minister of Health may establish by decree the detailed professional regulations of the activities under the licences, the regulations concerning substitution and special qualifications and aptitude tests required for pursuing the activity."

3. The relevant provisions of Act XXVIII of 1994 on the Hungarian Medical Chamber (hereinafter: the AHMC) are as follows:

"Section 1 para. (1) The Hungarian Medical Chamber (hereinafter: the HMC) is a professional representative and self-governing public corporation for physicians and dentists (hereinafter: physicians)."

"Section 2 (1) The HMC

a) represents the medical profession in issues related to medical practice and medical activities and protects the prestige of the medical profession and the interests of the professional organs and medical professionals and (within the framework specified by separate statutes) contributes to the exercising of these rights in individual cases;

…

f) it may deliver an opinion regarding

fa) any statute that directly affects the physician's professional activities and financial status and all statutes that otherwise affect public health"

"(2) In order to enable the exercising of the right to deliver opinions as specified in item *f)*, the organs and persons responsible for drafting the statutes and preparing other decisions are required to

a) send the drafts of the statutes and decisions as well as their reasoning to the HMC, providing that the Chamber have sufficient time and information to deliver an opinion;

b) take the opinion of the HMC into consideration during the drafting process and

c) notify the person or the organ entitled to make the decision or to pass the statute and — except for the case of statutes and employer's decisions regarding manager employees — the HMC in writing about the relevant reasons in case the opinion of the HMC is disregarded or only a part of it is taken into consideration;

d) notify he HMC on the decisions adopted under para. (1) items *fb)* and *fc)*."

"(3) The HMC shall exercise its right to deliver an opinion as specified under para. (1) item *f)* within the deadline specified by the person or entity requesting an opinion, and, in case the deadline specified does not comply with the requirements under para. (2) item *a)*, the HMC may request an extension of the deadline. In case the HMC does not deliver an opinion within the deadline specified or does not request an extension, the entities or persons responsible for

the drafting of the statutes or the preparation of the decisions may initiate the passing of the decision or the issuance of the statute. This deadline for the HMC to deliver an opinion may not be extended if the consequence of such extension is that the entity entitled to make the decision fails to comply with the procedural deadline specified by another Act of Parliament for passing the decision."

4. The relevant provisions of the ALG are as follows:

"Section 8 para. (1) Within the scope of the local public services, the tasks of the local government of the settlement are in particular the development of the settlement, settlement planning, protection of the built and of the natural environment, housing management, water resources planning and drainage (of rain water), canalization and sewerage, maintenance of the public cemetery, maintenance of the local public roads and public areas, local mass transit, public sanitation and ensuring the cleanliness of the settlement; providing for the local fire protection, and for the local duties of public security; participation in the local supply of energy, in issues of employment; provision of kindergartens and primary education; providing health and social benefits, as well as providing for duties concerning children and young people; also, providing community space; supporting public education and scientific and artistic activities and sports; ensuring that the national and ethnic minorities may exercise their rights and the promotion of providing for the community conditions of a healthy way of life.

(2) In respect of the tasks included in para. (1), the local government of the settlement decides itself (on the basis of the needs and depending on the financial means of the local government) which duties it will provide for, to what extent, and in what way."

5. The challenged provisions of the ID are as follows:

"Section 13 para. (3) Following the effective date of the present decree, the minimum duration of a contract concluded with a business association or a private physician for independent medical services [defined in Section 1 para. (2) item *a)* of the AIMP] is 5 years [Section 226 para. (1) of the Civil Code]."

"Section 14 para. (1) The rightholder that has obtained an operation licence under the AIMP may receive an exceptional interest subsidy with the conditions listed below based on a loan contract with a credit institution for the purchase of the doctor's surgery (and the doctor's apartment if the surgery is within the same premises as the apartment) and for the purchase of the surgical instruments.

a) in order to contribute to the payment of the interests payable on the loan from the financial institution applied for the purpose of purchasing or renovating the doctor's surgery or apartment, the physician is entitled to an additional interest subsidy in accordance with the general regulations on subsidies for purchasing apartments on condition that the regulations on age, number of children and conjugal community are not applicable;
b) interest subsidy for a maximum period of 5 years may be applied for to cover the costs of procuring a personal computer with a remote network access, the machines, devices and equipment that are necessary for providing health services and that are professionally reasonable and also furnishings enabling the physician to welcome patients in appropriate circumstances. The rate of interest subsidy (as a percentage of the base rate of the national bank) in the first year is at least 70%, in the second minimum 60%, in the third year at least 50% and from the fourth year at least 40%.
(2) An interest subsidy may be applied for in connection with the loan received from a financial institution for the purpose of purchasing machines, devices and other equipment that meet the professional requirements of operation and that are not bought from the local government. The rate of interest subsidy (as a percentage of the base rate of the national bank) in the first year is 60%, in the second 50%, in the third year 40%, and in the fourth and fifth year at least 30%."

6. The challenged provision of the Decree (numbered as amended) is as follows:
"Section 1 para. (4) The provisions of the decree apply to independent sick-nursing and other health services that are connected to the activities of general practitioners."

III

1. The Constitutional Court has examined the issue of formal unconstitutionality first.

The petitioners consider Section 2 para. (3) in certain parts and Section 2 para. (7) of the AIMP unconstitutional because the Ministry of Health and the Government have failed to consult on the draft of the AIMP with the Hungarian Medical Chamber, the Association of Paediatricians and the National Association of General Practitioners in Villages. Ever since the beginning of the process, including the professional preparations done by the Chamber concerning the AIMP, "the petitioners have voiced their opinion that the operation licence should apply to a specific GP district. The issue of restricting the operation licence to a particular GP district was included in the preparatory material the petitioners presented in

October 1999 to Dr. Árpád Gógl (the Minister of Health at that time).” The Minister of Health also announced that the petitioners had not been consulted but the Government only discussed the draft of the bill on 2 November 1999.

The petitioners believe that the requirements of the rule-of-law principle specified in Article 2 para. (1) of the Constitution have been violated as the Ministry has not prepared the draft of the AIMP in accordance with the recommendations of the petitioners and has failed to consult the petitioners despite the fact that the HMC has the right to deliver its opinion under Section 2 para. (1) item *f)* of the AHMC.

2. Article 2 para. (1) of the Constitution declares that the Republic of Hungary is a democratic state under the rule of law. Based on the rule-of-law principle, the Constitutional Court does not only annul statutes when their contents contravene a provision of the Constitution but also when “such a serious procedural breach is committed causing invalidity of the statute under public law which can only be remedied by the annulment of the statute”. [Decision 52/1997 (X. 14.) AB, ABH 1997, 331, 345]

a/ In Decision 496/B/1990 AB, the Constitutional Court already determined the consequences of a failure to seek the opinions of the affected non-governmental organizations and interest groups during the phase of drafting statutes. Such omissions may have legal consequences under administrative law or may result in political responsibility but this alone does not affect the validity of the given Act of Parliament. (ABH 1991, 493, 495-496) As further confirmed in Decision 13/1992 (III. 25.) AB, neglecting the contributions of the relevant interest groups may not make the Act of Parliament unconstitutional. (ABH 1992, 95, 99)

In Decision 50/1998 (XI. 27) AB, the Constitutional Court established that the omission of the entities responsible for the preparatory work of a statute concerning consultation did not in itself affect the validity of the statute. If the opinions of professional representative organizations that have no public authority are not obtained, this will not qualify as a serious violation of procedural rules and will not make the statute invalid under public law. (ABH 1998, 387, 396, 397) As declared by the Constitutional Court summarizing its practice in Decision 488/B/1999, the entity preparing the draft has no obligation to prepare the wording of the statute in accordance with the relevant opinions received”. Any failure to request the opinion of non-governmental organizations and interest groups that have no public authority, or violating the regulations on establishing the deadlines for giving such opinions will not result in the invalidity of the statute under public law. (ABH 2003, 1104, 1108).

The aforementioned practice was not followed by the Constitutional Court in Decision 30/2000 (X. 11.) AB as in that case the Act of Parliament required the decision-maker to obtain the opinion of a non-governmental organization that had been founded by an Act of Parliament and that did not qualify as an interest group. The purpose of requesting an opinion in the case was to provide professional, scientific and social grounding to the draft of the statute. As established by the decision in principle, "the Constitutional Court must assess in each case whether the violation of a procedural rule of legislation determined in specific Acts of Parliament is serious enough to reach the level of unconstitutionality". (AB 2000, 202, 207) The decision made was evaluated by the Constitutional Court in Decision 7/2004 (III. 24.) as follows: "The seriousness of the failure to obtain an opinion in this case from the aspect of constitutionality is aggravated by the fact that it has posed a direct threat to the implementation of the right to a healthy environment". (ABH 2004, 98, 104, 106)

b/ The Constitutional Court has not expressed its general opinion on the public powers of public corporations. Decision 16/1998 (V. 8.) AB only refers to cases when the public corporations exercise public authority, but these powers cannot be separated from other tasks of the public corporation. (ABH 1998, 140, 145) In certain cases the powers granted by Acts of Parliament must be evaluated to establish whether the public corporation has public authority.

Certain issues in the AHMC were already reviewed in Decision 39/1997 (XII. 1.) AB. As established in the decision, the powers granted to the Hungarian Medical Chamber by the Act of Parliament are partly related to the interest group role and self-governing role of the Chamber, while some of its powers are related to public authority. The Constitutional Court declared that the right of approval concerning certain decisions made by the Minister were of a public authority character, but the right of the Chamber to deliver its opinion as defined by the Act of Parliament was not held by the Constitutional Court to be of a public authority character. (ABH 1997, 263, 268, 270)

c/ Under Section 1 para. (1) of the AHMC, the HMC is a professional representative and self-governing public corporation and interest group for physicians. Under Section 2 para. (1) of the AHMC, the tasks of the HMC include but are not limited to the following: the HMC represents the medical profession in issues related to medical practice and medical activities, it protects the prestige of the medical profession, the interests of the professional organs and medical professionals and the rights of the physicians, it has a right of approval in defining the general conditions of contracts to be concluded with health insurance organs, and in questions related to issuing specific medical activities it has extensive rights to deliver its opinion.

In the present case, the right to deliver an opinion by the HMC is specified in Section 2 para. (1) of the AHMC. This right is exercised by the HMC primarily to protect the interests of the profession. Section 2 para. (3) provides that the entities or persons responsible for the drafting of the statutes or the preparation of the decisions may initiate the passing of the decision or the issuance of the statute even in case the HMC fails to deliver an opinion within the deadline specified or does not request an extension. Therefore, the Act of Parliament does not consider the delivery of the opinion an indispensable element of the legislative process.

d/ Having examined the constitutionality issues surrounding the participation of interest groups in legislation, the Constitutional Court confirmed its standing practice and declared that legislation were not to be bound by the opinions of trade unions and other organs that had no public authority. [Decision 40/2005 (X. 15.) AB, ABH 2005, 427, 439] In Decision 7/2004 (III. 24.) AB, the Constitutional Court established that there was a difference between the two tasks of the Government, that is, issuing decrees and drafting bills. In case of drafting a bill, an omission "may only lead to the invalidity of the Act under public law if at the same time another regulation of the legislative process is violated and the violation results in unconstitutionality as well". (ABH 2004, 98, 107)

The petitioners do not claim that the rules of the legislative procedure have been violated; they only claim that the competent ministry had failed to request the HMC to deliver an opinion on the draft of the bill before the draft was submitted to the HMC. Based on the abovementioned arguments, such omission will not result in invalidity of the challenged Act of Parliament under public law and in the establishment of unconstitutionality.

IV

1. Several petitioners have claimed that the definitions are ambiguous in the AIMP and this violates Article 2 para. (1) of the Constitution. They believe that the contents of the rights granted in the operation licence are unclear. They doubt that the operation licence has material value if there is no GP district connected to the licence. They think it does not make sense that the operation licence is bound to the person exercising it. They are concerned about the consequences of the provision that a doctor practicing as a general practitioner on the effective date of the Act is not required to hold an operation licence. They believe that the provisions governing the legal status of doctors practising as general practitioners are confusing. They believe that the provisions of the ID do not help interpret the provisions of

the Act. They have also challenged Section 1 para. (4) of the D as, they believe, its wording is ambiguous.

2. Under Article 32/A para. (1) of the Constitution, the Constitutional Court has the right to review the constitutionality of the statutes. The Constitutional Court has no competence to decide any professional debates that may arise regarding statutes.

The Constitutional Court examines the constitutionality issues regarding the clarity of statutes based on Article 2 para. (1) of the Constitution. Legal certainty, as an important element of the rule of law declared in Article 2 para. (1) of the Constitution, requires that the text of a statute should be reasonable and have clear normative contents that may be interpreted and applied even if the provision itself is possibly vague. [Decision 26/1992 (IV. 30.) AB, ABH 1992, 135, 142] It is up to the legislator to decide what terms and definitions are applied, but under the rule-of-law principle, the terms and definitions must be clear and the consequences must be calculable. (Decision 544/B/1997 AB, ABH 1999, 589, 590)

The wording of statutes is general and abstract; and it is the task of those applying the law to apply the rules to individual cases. General and abstract wording does not mean that the wording is unclear or that it cannot be interpreted. (Decision 1160/B/1992 AB, ABH 1993, 607, 608) The Constitutional Court will not establish that the rule-of-law principle is violated if the provision does not grant the opportunity to make arbitrary decisions and does not result in any incapacity to make decisions. (Decision 713/B/2002 AB, ABH 2004, 1644, 1646) The provision is not unconstitutional if its interpretation provision does not allow passing subjective decisions during the application of law that would violate legal certainty. It is not the task of the Constitutional Court to examine whether the provisions are expedient or whether the legislative technique applied is appropriate. (Decision 21/B/1994 AB, ABH 1996, 476, 478)

3. In the present case, the challenged provisions of the AIMP are unambiguous. They declare that the operation licence shall mean a right to pursue independent medical practice and that it is a personal right. Nevertheless, if certain conditions are met, it is transferable and has material value. The AIMP does not bind the licence to a specific GP district.

Quite similarly to other significant statutes, the solutions applied by the AIMP are subject to professional debates. However, the provisions challenged are not obscure to the extent that they would lead to arbitrary decisions or to an incapacity of decision-making.

The provision in Section 1 para. (3) of the D takes it into consideration that the general practitioner does not perform his/her tasks alone. The D includes regulations in connection with the tasks of GPs that affect those who pursue sick-nursing and other health services connected to the activities of general practitioners. Due to the above, the D applies the common legislative technique of declaring that the provisions applicable to the core staff are to be applied appropriately to the cases of indirect effect. Based on the reference in Section 18 para. (2) of the D, Appendix 2 includes provisions on the nursing activities related general practitioner activities. As a result, Section 1 para. (3) of the D contains no provisions that would make it necessary to establish its unconstitutionality.

In view of the above, the Constitutional Court has rejected the petitions regarding Article 2 para. (1) of the Constitution.

V

1. The petitioners believe that the challenged statutes violate the right to property guaranteed by Article 13 para. (1) of the Constitution.

One of the petitioners is of the opinion that Section 3 para. (7) item *a)* of the AIMP is incompatible with the constitutional protection of the right to property as this provision authorizes the Government to regulate issues that are significant regarding the constitutional protection. The ID regulates the withdrawal of the operation licence based on this authorization. The petitioner also objects to the provision in Section 3 para. (6) of the AIMP that prohibits the alienation of the operation licence until 31 December 2000 since the petitioner believes it to restrict the right to property in an unjustified manner. The petitioner believes that the provisions of the AIMP and the ID violate Article 13 para. (1) of the Constitution. These provisions — so the petitioner claims — violate Article 8 para. (2) of the Constitution as well.

A number of other petitioners have also presumed that the regulations of the AIMP violate Article 13 para. (1) of the Constitution but they have only challenged the material value of the licence as well as issues related to the application of law, and they have not specified their concerns regarding the constitutionality of the specific regulations.

2. Pursuant to Section 110 para. (1) of Act CLIV of 1997 on Healthcare, healthcare activities may only be pursued by a person holding a qualification for the relevant activity (or a specialized qualification in the field). Also, such person needs to be registered in the

relevant register. In Section 1, the AIMP includes definitions under this system. Under para. (2) item *b)*, physicians include persons with appropriate qualifications registered in the basic and the operational registry. Para. (2) item a) defines independent medical practice. Under this provision, independent medical practice includes the healthcare services provided by the general practitioners, paediatricians and dentists in the scope of the territorial obligation of providing services.

The Minister's reasoning of the AIMP has specified the purpose of the Act as follows: "That is why it is necessary to establish the statutory background to enable the physician to perform his or her task of public service in a more direct manner in the future; otherwise, physicians remain less significant items in the medical service network. As a prelude to the regulations, for the last ten years it has been possible to pursue medical practice as an enterprise and since 1992 GPs and paediatricians have been entrepreneurs predominantly."

Under Section 1 para. (2) item *c)* of the AIMP, the operation licence is a right granted in the permit issued by the Hungarian Medical Chamber based on an Act of Parliament and allowing the pursuit of independent medical activities. Under Section 2 para. (3), the operation licence is a personal valuable right (intangible asset) that may be alienated and continued by the successor if the specified conditions are met. Under para. (4), in case the rightholder dies, his/her spouse or a lineal descendent inherits the licence. Under para. (6), the persons entitled to succeed the rightholder may alienate the operation licence.

3. Under Article 13 para. (1) of the Constitution, the Republic of Hungary guarantees the right to property. The Constitutional Court considers the right to property one of the fundamental rights and protects it accordingly. [Decision 7/1991 (II. 28.) AB, ABH 1991, 22, 25] Article 13 para. (1) of the Constitution applies not only to the right to property but to guaranteeing other valuable rights as well. [Decision 17/1992 (III. 30.) AB, ABH 1992, 104, 108] The Constitutional Court has extended the application of Article 13 para. (1) protecting the right to property to entrepreneurial activities as well. When examining the rules governing the licence to pursue construction design activities, the Constitutional Court established that the protection of the right to property was applicable to profitable entrepreneurial activities. [Decision 40/1997 (VII. 1.) AB, ABH 1997, 282, 286, 287] The Minister's reasoning of the AIMP bill explains that the purpose of the operation licence is related to the pursuit of medical activities as an enterprise. Accordingly, the constitutional protection of the right to property applies to the operation licence as a valuable right under Section 1 para. (2) item *c)* of the AIMP.

The right to property is given constitutional protection in its capacity of serving as the means of securing an economic basis for the autonomy of individuals. The extent of the constitutional protection of property depends on the restrictions applicable to it under public and private law and it also depends on the subject, object and function of the property as well as on the nature of the restriction. [Decision 64/1993 (XII. 22.) AB, ABH 1993, 373, 380]

4. As a general rule, Section 3 para. (6) of the AIMP did not allow the transfer of the licence from the effective date of the Act (26 February 2000) until 31 December 2000. There is no doubt that this rule has restricted certain elements of the pecuniary right.

The AIMP granted the licence as a new right. The Constitutional Court has examined the issue of restricting newly granted property rights in connection with the transformation of the property structure. As consequently established by the Constitutional Court regarding property transfer to local governments, the Constitution includes no provision on the acquisition of property by the local governments, and therefore the protection of the right to property only applies to rights already acquired. [Decision 37/1994 (VI. 24.) AB, ABH 1994, 238, 243] The title of acquiring property is appropriate and thus protected if the method for the acquisition of property and the scope are guaranteed by an Act of Parliament. (Decision 893/B/1994 AB, ABH 1996, 496, 500) However, it may be established that the scope and the contents of the licence are defined by Section 2 of the AIMP. Under Section 1 para. (2) item *c)*, the operation licence may only be granted if the Hungarian Medical Chamber permits the pursuit of independent medical activities. Section 2 para. (4) has, however, listed the conditions required for granting a permit (membership in the Chamber, registration in the operation registry, and no conflicts of interest or grounds for exclusion specified by statute). Based on the above, the acquisition of operation licence is guaranteed by an Act of Parliament if the conditions in the Act are met. Therefore, this title for property acquisition is not dubious as opposed to the property transfers at the time the property structure was transformed. Accordingly, it must be examined first whether the restriction of the protected property right is constitutional.

As pointed out in Decision 64/1993 (XII. 22.) AB, nowadays property rights are restricted quite often and it is a frequent constitutionality issue when the owner is required to accept the restriction without any compensation. Furthermore, it is made clear in the decision that when restricting property, similar protection shall be granted as in the case of expropriation. The main issue in deciding on the constitutionality is public interest and the proportion of restriction. (ABH 1993, 373, 381)

The protection of the right to property specified in Article 13 of the Constitution is special as compared to the protection of other fundamental rights since Article 13 para. (2) allows the cancellation of the right but under such conditions that allow the protection of the essential contents under the property rights (by providing for the compensation to be paid). However, Article 13 does not regulate the restriction of property rights. The principles established by the practice of the Constitutional Court for Article 8 para. (2) are also applicable to the cases of restriction; therefore the restriction must be necessary and proportionate to its desired objective. [Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 70, 71] Nevertheless, Article 13 para. (2) of the Constitution must be taken into consideration when examining the restriction of the right to property, which allows a complete withdrawal of property rights against compensation. Accordingly, public interest should be considered when establishing whether the restriction is necessary. Proportionality is a requirement in this case as well.

The legislator applies the technique to specify the effective date a certain period after promulgation in case of more significant new regulations. By granting this extra period, the legislator ensures that the persons applying the new rules have time to prepare for and get familiar with the new provisions, and any uncertainties concerning application may be reduced [for the analysis of the constitutionality of this issue, see Decision 28/1992 (IV. 30.) AB, ABH 1992, 155, 158, 159]. Similarly, the solution in the challenged provision is meant to protect legal certainty. In the given case, the necessity of preparing for the application of the new regulations is a reasonable ground for prohibiting the use of the licence temporarily, which means that the property rights are restricted. The duration of the restriction is a few months, which is not proportionate to the desired objective. Therefore, the Constitutional Court has rejected the petition submitted in this respect.

5. One of the petitioners considers Section 3 para. (7) item *a)* of the AIMP unconstitutional because it authorizes the Government to regulate issues that are vitally important with regard to the guarantees under the right to property.

Under Article 8 para. (2) of the Constitution, rules pertaining to fundamental rights and obligations may only be determined by an Act of Parliament. As already established by the Constitutional Court in Decision 64/1991 (XII. 17.) AB, not all issues regarding fundamental rights need to be regulated in an Act of Parliament. When the relationship with fundamental rights is indirect and remote, a decree is sufficient. (ABH 1991, 297, 300) According to the explanation given by the Constitutional Court when examining the

constitutionality of subordinate legislative rights granted to the HMC, although the content of a fundamental right may only be established or restricted in essence or to a significant degree by an Act of Parliament, the restriction of practising a profession is generally deemed constitutional when it is based on professional and practical reasons. “The right of the chamber of profession to regulate and decide a question affecting fundamental rights and determining the essence of the profession must be regulated by an Act of Parliament which determines at least the basic content and the limits of that right”. [Decision 39/1997 (VII. 1.) AB, ABH 1997, 263, 269, 270]

The AIMP regulates the fundamental rules of the operation licence. The authorization granted to the Government to regulate minor issues is not unconstitutional. For this reason, the Constitutional Court has rejected the petition challenging Section 3 para. (7) item *a)* of the AIMP.

6. Several petitioners have requested the Constitutional Court to establish an unconstitutional omission of legislative duty and to call upon the legislator to perform its legislative duty. They believe that the requirements under the rule of law and the implementation of the right to property are violated if the AIMP does not regulate the territorial constraints of the operation licence. The petitioners have also detailed the contents of the regulations they consider appropriate.

Following the submission of the petition, Section 26 item *n)* of Act CVII of 2001 on the provision of public health services and on the forms of practising medical activities modified the contents of Section 2 paras (1) and (2) of the AIMP, providing that the operation licence may be continued in a GP district specified by the local government. The petitioners have not modified their petition accordingly, being of the opinion that “the provisions referred to should not express that the local government may specify the GP district for the GP to pursue his/her activities but they should establish that an operation licence may be used in one specific GP district rather than in any GP district in the country”.

The AIMP was then modified by Act XLIII of 2003 on healthcare providers and on the organization of public health services. Section 33 para. (3) item *m)* of the same Act modified Section 2 paras (1) and (2) of the AIMP but even these new regulations were different from the ones requested by the petitioners. This Act passed in 2003 was annulled by Decision 63/2003 (XII. 15.) AB (ABH 2003, 676) due to invalidity under public law.

Under Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the CCA), an unconstitutional omission to legislate may be established if the

legislature has failed to fulfil its legislative duty mandated by a legal norm, and this has given rise to an unconstitutional situation.

The provision of the CCA specified above was interpreted in Decision 22/1990 (X. 16.) AB, establishing that a mere failure to accept legal regulations governing an issue that requires to be governed by legal regulations does not result in the establishment of an unconstitutional omission of legislative duty. However, it is a different case if the need of legal regulation is the result of state interference with certain situations of life, thus depriving some of the citizens of a practical opportunity to exercise their constitutional rights. (ABH 1990, 83, 86) Based on the CCA, an unconstitutional omission of legislative duty is also established by the Court when the realization of a fundamental right is impeded by the absence of regulations inevitably necessary to give it full effect. [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232]

As a general rule, Section 3 of the AIMP provides that the medical activities and the operation licence apply to a single GP district. In case of a permit granted following the effective date of the Act, the operation licence is not related to a GP district. The activities to be pursued in a GP district in this case are determined by an agreement with the local government. The operation licence is a precondition of applying for a GP district. This regulation may require interpretation but it cannot be established that there is an unconstitutional omission of legislative duty resulting in an unconstitutional situation. The Constitutional Court has no power to replace with new regulations the regulatory concept adopted by the Parliament and it has no competence to make them compulsory. (Decision 677/B/1995 AB, ABH 2000, 590, 592)

In view of the above, the Constitutional Court has rejected the petitions.

VI

1. Several petitioners have challenged various provisions in the AIMP based on the prohibition of discrimination specified in Article 70/A para. (1) of the Constitution.

According to the interpretation of the prohibition of discrimination given by the Constitutional Court in Decision 9/1990 (IV. 25.) AB, everyone should be treated as equal (as a person of equal dignity) by the law. (ABH 1990, 46, 48) The issue of whether discrimination remains within the constitutional boundaries may only be determined with regard to the objective and subjective contexts of the effective regulations. Equality must apply to the essential element of a given statutory provision. It is considered discrimination if

different regulations apply to a specific group within the same regulatory concept. [Decision 21/1990 (X. 4.) AB, ABH 1990, 73, 77, 78] The Constitutional Court deems a specific statute discriminatory if it differentiates subjects of law that are in the same category from the aspect of the regulation without having a constitutional reason for this. (Decision 191/B/1992 AB, ABH 1992, 592, 593) Not only does the prohibition of discrimination defined in Article 70/A para. (1) of the Constitution apply to fundamental rights but it is applicable to other rights as well. [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281] In case of discrimination affecting fundamental rights, the Constitutional Court will decide on the constitutionality of the statute by applying the test of necessity and proportionality. If no fundamental right is affected, the Constitutional Court will establish that the discrimination is unconstitutional if the discrimination has no reasonable justification and is arbitrary. [Decision 30/1997 (IV. 29.) AB, ABH 1997, 130, 139, 140]

2. According to one of the petitioners, the provision in Section 3 para. (3) of the AIMP prohibiting the alienation and continuation of the operation licence for physicians pursuing GP activities without a territorial obligation to provide services is an unconstitutional discriminatory measure. Another petition challenges Section 1 para. (2) of the AIMP because it excludes physicians without a territorial obligation to provide services.

It is a significant element in the regulation of the AIMP that the general practitioner has a territorial obligation to provide services. The physicians that fall into this category are different from those that provide medical services under certain conditions without the obligation to provide services in a particular territory.

Based on the above, not even the second indent in Section 3 para. (3) of the AIMP contravenes Article 70/A para. (1) of the Constitution. This is another special regulation applicable to persons pursuing medical activities without a territorial obligation to provide services. These physicians are granted by the legislator an operation licence as a bonus under certain conditions, while this bonus is not to be granted to other physicians as well. This exception from the general rule is not discriminatory.

3. Section 3 para. (6) of the AIMP has been challenged by one of the petitioners as in the petitioner’s opinion, the regulation granting a duty exemption for any alienation until 31 December 2000 is discriminatory.

Section 3 para. (6) of the AIMP prohibits the alienation of the operation licence until 31 December 2000. Therefore, the system introduced actually did not operate in the

transitional period. However, out of necessity, the Act of Parliament specified two exceptions from the above. The first exception was granted if by statute it became required to alienate the licence under certain conditions; the transitional period did not apply in this case. This category of persons complied with their obligation prescribed by statute by alienating the licence and the duty exemption granted was meant to lessen the burden of this obligation. Another reason for granting an exception was the death of the rightholder. Duty exemption was also granted in addition to the exceptional suspension of the whole system. The special rule governing the cases falling into these two regulatory categories does not violate the prohibition of discrimination.

One of the petitioners considers Section 14 para. (1) item *b)* and Section 14 para. (2) of the ID discriminatory because the relief specified in these provisions are not granted to general practitioners without a territorial obligation to provide services. As already established in Decision 9/1990 (X. 25.) AB, positive discrimination may be applied in certain cases if a social objective that does not violate the Constitution or a constitutional right may only be implemented through positive discrimination. (ABH 1990, 46, 48, 49) In accordance with Decision 33/1993 (V. 28.) AB, reliefs may be allowed for the achievement of objectives related to economic policy. (ABH 1993, 247, 253) It is a determinant element in the regulation of the AIMP that the provisions applicable to physicians with a territorial obligation to provide services are defined. The challenged provisions of the ID are in line with this regulatory concept and they grant reliefs in the interest of providing more effective health services. Therefore, the prohibition of discrimination is not violated. As declared in Decision 652/G/1994 AB regarding Article 70/A para. (3) of the Constitution, this constitutional provision does not define a concrete measure, and no one has a constitutional right to demand positive discrimination. (ABH 1998, 574, 580)

In view of the above, the Constitutional Court has rejected the petitions regarding Article 70/A paras (1) and (3) of the Constitution.

VII

1. One of the petitioners considers Section 13 para. (3) of the ID and Section 1 para. (3) of the D unconstitutional as they allegedly contravene a statute of a higher level, and in case of the D there has been no authorization to pass the statute.

2. Section 13 para. (3) of the ID provides that the minimum duration of a contract for independent medical practice is 5 years. However, in contrast to the petitioner's opinion, the ID does not regulate the contract to be concluded with the local government. Under Section 83 para. (2) item *a)* of Act LXXXIII of 1997 on the benefits of compulsory health insurance the Government has been granted the power to conclude financing contracts and to establish the detailed regulations of financing health services. Based on this authorization, Government Decree 217/1997 (XII. 1.) Korm. has been passed and Section 13 para. (4) of the ID has modified Section 7 of this Government Decree. Both para. (4) and the challenged para. (3) refer to the contract to be concluded with the National Health Insurance Fund. Section 13 para. (3) of the ID therefore does not contravene Section 8 of the ALG, nor does it violate Article 35 para. (2) of the Constitution.

3. Under Section 1 para. (4) of the D, the provisions of the decree apply to persons providing independent sick-nursing and other health services. The opening lines of the D refer to the power granted under Section 247 para. (2) item *f)* of Act CLIV of 1997 on Healthcare in addition to the authorization granted in the AIMP. The former authorization is for regulating the individual health services in detail. When regulating the services, the Act on Healthcare applies to staffing issues related to the particular services. For example, Section 98 on sick-nursing defines the tasks of a nurse and under Section 150, the minister’s powers for management apply to all healthcare activities and all service providers in healthcare. It is coherent with this system of regulation that Section 1 para. (4) of the D includes a provision of reference to include those who pursue sick-nursing activities related to general practitioner activities. Therefore, this regulation is based on an authorization specified by an Act of Parliament and as a result it does not contravene the Constitution.

In view of the above, the Constitutional Court has rejected the petitions regarding Section 13 para. (3) of the ID and Section 1 para. (3) of the D.

The Constitutional Court publishes its Decision in the Hungarian Official Gazette as its content is of public interest.

Budapest, 16 June 2006

Dr. Mihály Bihari
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Elemér Balogh
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Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court

Dissenting opinion by Dr. Mihály Bihari, Judge of the Constitutional Court

I do not agree with point 1 of the holdings in the Decision.

In my view, the rules on the legislative procedure were gravely violated when creating Act II of 2000 on the Independent Medical Practice (hereinafter: the AIMP). Consequently, the Constitutional Court should have established the invalidity of the AIMP under public law and should have annulled it.

1. It is the standing practice of the Constitutional Court to review the constitutionality of the legislative procedure and decide on the constitutionality of a legislative procedure that has violated formal requirements.

As already declared by the Constitutional Court in Decision 11/1992 (III. 5.) AB “Procedural guarantees follow from the principles of the rule of law and legal certainty. These are of fundamental importance from the perspectives of predictability and foreseeability of the operation of legal institutions. Only by following the formal rules of procedure may a valid statute be created (…)” (ABH 1992, 77, 85)

The Constitutional Court has examined the cases of invalidity under public law in several of its decisions. Under Decision 29/1997 (IV. 29.) AB, “a legislative procedure violating formal requirements constitutes a ground for annulment in the future if an appropriate petition is submitted”. (ABH 1997, 122) In the reasoning of the decision it is stated that “[the] ground for annulment is public law invalidity, which is one possible type of formal unconstitutionality in case of statutes”. (ABH 1997, 122, 128)

The Constitutional Court reiterated in the holdings of Decision 52/1997 (X. 14.) AB its former position as to which a procedural violation of the Constitution committed in the course of the legislation process may lead to the nullification of the Act of Parliament. (ABH 1997, 331, 332) The reasoning has established yet again that a serious violation of procedural rules results in invalidity under public law.

The Constitutional Court has also stressed in several decisions [as a general principle in Decision 39/1999 (XII. 21.) AB (ABH 1999, 325, 349)] that “compliance with the individual procedural rules of the legislative process is a requirement under the rule of law regarding the validity of the Act, deducible from Article 2 para. (1) of the Constitution. Therefore, the Constitutional Court annuls the statute when during the legislative process a serious procedural breach was committed – causing invalidity of the statute under public law – which can only be remedied by the annulment of the statute. [Decision 3/1997 (I. 22.) AB, ABH 1997, 33, 39-40; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128; 52/1997 (X. 14.) AB, ABH 1997, 331, 332, 345]”

The Constitutional Court defined it as a constitutional requirement in Decision 8/2003 (III. 14.) AB that “Legislation may only be performed in compliance with the constitutional principle of legal certainty. The principle of legal certainty requires that legislation (...) is made on the basis of reasonable rules.” (ABH 2003, 74)

2. The Constitutional Court has interpreted the consultation obligation of the legislator in several decisions. In accordance with the standing practice of the Constitutional Court regarding the requirements of legislation, “it is not a precondition of validity under public law to obtain the opinions of professional representative organizations that have no public authority”. [Decision 39/1999 (XII. 21.) AB, ABH 1999, 325, 349; earlier in: Decision 7/1993 (II. 15.) AB, ABH 1993, 418, 419; Decision 50/1998 (XI. 27.) AB, ABH 1998, 387, 397]

As established by the Constitutional Court in Decision 30/2000 (X. 11.) AB in line with Act XI of 1987 on Legislation (hereinafter: the AL), "it is necessary to clarify the 'public authority character' of the organ delivering an opinion in case of the general consultation obligation under the AL because under the provisions of the AL it is uncertain which organs are required to be involved in the legislative process. The question whether the special duty of the legislator to obtain the opinion of a given organ may be established based on the general consultation and cooperation obligation of the legislator depends on the 'public authority character' of the organ delivering the opinion in the preparatory process. If the general consultation duty under the AL was a formal constitutionality criterion in case of each professional and other representative organ, the Government would not be able to pass a decree or prepare a bill as in such a case there would be newer and newer representative organizations claiming that their opinions must be delivered." (ABH 2000, 202, 206)

In its Decision 30/2000 (X. 11.) AB, the Constitutional Court "has come to the conclusion that organizations specified by statute as having the right of approval or the right of consultation qualify as organs of public authority regarding their consultation rights, and due to their role in the democratic decision-making process as well as to their public authority character their opinion is indispensable for the legislator." (ABH 2000, 202, 206)

In accordance with Decision 30/2000 (IX. 11.) AB, "in the practice of the Constitutional Court, special emphasis has consistently been laid on Article 2 para. (1) of the Constitution, establishing that 'the Republic of Hungary is an independent democratic state under the rule of law'. Any violation of decision-making rules that are elements of the rule-of-law principle may result in the invalidity of the decision under public law. If there is no such consequence, the system of democracy itself may become illegitimate as it is no longer possible to harmonize and implement sectional interests and, therefore, no consensus will be reached. In case a specific Act of Parliament requires a concrete and institutionalized opinion request duty and it is not complied with, such failure may be considered a serious violation in the legislative procedure that threatens the constitutional rule-of-law principle and may result in the invalidity under public law of the statute that has been passed in an illegal manner. The Constitutional Court must assess in each case whether the violation of a procedural rule of legislation determined in specific Acts of Parliament is serious enough to reach the level of unconstitutionality." (ABH 2000, 202, 205-208)

3. By its Decision 30/2000 (X. 11.) AB, the Court has annulled the statute "based on the rule-of-law principle [Article 2 para. (1) of the Constitution] due to the formal unconstitutionality of the statute" as the obligation to seek opinions was violated in the legislative procedure. According to the reasoning of this decision, "the failure to comply with the obligation to seek opinions prescribed by an Act of Parliament violates the rule-of-law principle. (ABH 2000, 202, 208)

As declared by the Constitutional Court in its Decision 30/2000 (X. 11.) AB, "it is not necessary to examine the 'public authority character' of the organ delivering an opinion as the duty of the legislator to request opinions is based on Section 44 para. (2) of the AEP rather than on Article 36 of the Constitution or on the AL", i.e. on a specific provision in an Act of Parliament obliging the legislator to seek opinions. (ABH 2000, 202, 206)

Section 44 para. (2) of the AEP (Act LIII of 1995 on the general regulations of environment protection) effective at the time Decision 30/2000 (X. 11.) AB was passed included the following provision: "The drafts of statutes shall be sent to the National Council on the Environment prior to submission to the decision-making organ, and the Council may express its opinion concerning the draft." The Council shall be granted a period of minimum 30 days for expressing its opinion from the day the draft is delivered.

It is established in Decision 30/2000 (X. 11.) AB that "under the obligation to seek opinions the Government is required to comply with the regulations in the relevant Act of Parliament and contact the entity specified in the Act and ask the entity to deliver its opinion on the draft of the statute. The entity specified in the Act of Parliament (…) is required to deliver its opinion within a specified deadline and, as a result, the legislative procedure will not be unreasonably delayed. In this case no exemption may be granted to the Government from the obligation based on a specific provision of an Act of Parliament to seek opinions. The Constitutional Court wishes to point out in this respect that it is the general obligation of the Government based on Article 35 para. (1) item *b)* of the Constitution to comply with the Acts of Parliament and to ensure they are complied with." (ABH 2000, 202, 208)

With this decision, the Constitutional Court has further developed its earlier practice concerning the examination of the formal unconstitutionality of a statute. In Decision 30/2000

(XI.11.) AB, the Constitutional Court namely established the cases when a violation of the duty to seek opinions may lead to the invalidity of a statute under public law.

4. In the present case it may be established that according to Section 1 para. (1) of Act XXVIII of 1994 on the Hungarian Medical Chamber (hereinafter: the AHMC), "The Hungarian Medical Chamber (hereinafter: the HMC) is a professional representative and self-governing public corporation for physicians and dentists (hereinafter: physicians)."

Section 2 of the AHMC defines the tasks and the competence of the HMC. These include under Section 1 item *a)* the following: the HMC "represents the medical profession in issues related to medical practice and medical activities and protects the prestige of the medical profession and the interests of the professional organs and medical professionals and (within the framework specified by separate statutes) contributes to the exercising of these rights in individual cases."

Section 2 of the AHMC specifies the duty to seek opinions which is challenged by the petitions. Under Section 2 para. (1) item *fa)*, the HMC "has a right to deliver its opinion concerning any statute that directly affects the physician's professional activities and financial status and all statutes that otherwise affect public health"

Section 2 para. (2) of the AHMC prescribes that "In order to enable the exercising of the right to deliver opinions as specified in item *f)*, the organs and persons responsible for preparing the statutes and other decisions are required to
a) send the drafts of the statutes and decisions as well as their reasoning to the HMC, providing that the Chamber have sufficient time and information to deliver an opinion;
b) take the opinion of the HMC into consideration during the drafting process and
c) notify the person or the organ entitled to make the decision or to pass the statute and — except for the case of statutes and employer's decisions regarding manager employees — the HMC in writing about the relevant reasons in case the opinion of the HMC is disregarded or only a part of it is taken into consideration;
d) notify the HMC on the decisions adopted under para. (1) items *fb)* and *fc)*."

Under Section 2 para. (3) of the AHMC, "the HMC shall exercise its right to deliver an opinion as specified under para. (1) item *f)* within the deadline specified by the person or

entity requesting an opinion, and, in case the deadline specified does not comply with the requirements under para. (2) item *a)*, the HMC may request an extension of the deadline. In case the HMC does not deliver an opinion within the deadline specified or does not request an extension, the entities or persons responsible for the drafting of the statutes or the preparation of the decisions may initiate the passing of the decision or the issuance of the statute. This deadline for the HMC to deliver an opinion may not be extended if the consequence of such extension is that the entity entitled to make the decision fails to comply with the procedural deadline specified by another Act of Parliament for passing the decision."

It is, therefore, expressly laid down in the provisions of the AHMC that "the entities or persons responsible for the drafting of the statutes or the preparation of decisions (…) are obliged to send to the HMC the drafts of the statutes and decisions as well as their reasoning" and the HMC may deliver its opinion on these drafts. The duty of the entities to seek opinions and the entities themselves are specified by a concrete Act of Parliament, and the provision establishing this obligation is clear and unambiguous. The statute drafts affected by this duty are also sharply defined by the AHMC. The duty of consultation is not based on the decision of the person responsible for drafting the statute but on an Act of Parliament. The AHMC also establishes that the drafts of the statutes and decisions as well as their reasoning shall be sent to the HMC in a way securing that the latter have sufficient time and information to deliver an opinion. Also, the opinion of the HMC must be taken into consideration during the drafting process. In case the opinion of the HMC is disregarded or only a part of it is taken into consideration, the person or the organ entitled to make the decision or to pass the statute is required to notify the HMC in writing.

As the right of the HMC to deliver an opinion is granted by an Act of Parliament (the AHMC), the 'public authority character' of the HMC is not required to be examined in accordance with Decision 30/2000 (X. 11.) AB. (ABH 2000, 202, 206) The duty of the legislator to consult the HMC is established by the AHMC. The responsible entity under the AHMC (in this case, the Government) may not be exempted from its duty under the Act as it is the obligation of the Government based on Article 35 para. (1) item *b)* of the Constitution to comply with the Acts of Parliament and to ensure that they are complied with.

5. It is doubtless that the duty to consult the HMC under the AHMC was disregarded when the provisions challenged by the petitioners were passed. The entity responsible for drafting

the Act failed to comply with its duty under the Act of Parliament as it did not send the draft and the reasoning of the bill to the HMC. Also, it did not notify the legislator on why the opinion of the HMC was disregarded.

As the AIMP has been passed by disregarding specific regulations of the HMC, it may be established that the failure to comply with the obligation to seek opinions prescribed by an Act of Parliament violates the principle of the rule of law. Based on the above, the Constitutional Court should have annulled the AIMP due to formal unconstitutionality based on the rule-of-law principle defined by Article 2 para. (1) of the Constitution and the obligation of the Government specified in Article 35 para. (1) item *b)* of the Constitution. The Constitutional Court has not established the formal unconstitutionality of the AIMP in the present Decision. As the present Decision is a step back in ensuring the implementation of the rule-of-law principle compared to the holdings of Decision 30/2000 (X. 11.) AB, I do not agree with it.

6. In its Decision 62/2003 (XII.15.) AB, the Constitutional Court emphasized that "a democratic state under the rule of law is required (…) to have procedural rules accepted in a democratic manner and to pass decisions based on such procedural rules. Constitutional democracies are complex systems that regulate in detail the procedures of (sometimes continuous) cooperation between different organs. The rules of cooperation and the provisions ensuring that they mutually check the other's activities are significant since the result of the process (the decision) is only legitimate in a democracy if there are applicable procedural rules that are fully and unconditionally complied with. The violation of procedural rules with constitutional significance results in passing formally invalid (invalidity under public law) and illegitimate decisions. (…) Each procedural rule and phase has equal significance in making the statute legitimate. It is a fundamental requirement under the democratic rule-of-law principle to comply with the procedural rules unconditionally and without any exceptions." (ABH 2003, 637, 647)

Therefore, it is a fundamental principle to comply with procedural rules in a democratic state under the rule of law. A decision in violation of rules on the legislative procedure means that the democratic rule-of-law principle has been violated, and this results in the invalidity of the given statute. The violation of the rules applicable to legislation cannot be remedied by the fact that the legislator passes the statute anyway following the violation. Therefore, not even

the Parliament may remedy the violation that is caused by the Government in the drafting process.

It is incompatible with the democratic state under the rule of law (and legal certainty as part of it) if the entities responsible for legislation and for the drafting of statutes (such as the Government) may break specific procedural rules of legislation and face no legal consequences. For the protection of the democratic state under the rule of law, any statute that is passed in serious violation of procedural rules must be declared formally invalid (invalidity under public law) and annulled. This way, the legislation complies with the constitutional regulations and other provisions specified by Acts of Parliament and (as against legal uncertainty) legal certainty is ensured, which shall prevail in a democratic state under the rule of law.

Budapest, 16 June 2006

Dr. Mihály Bihari
Judge of the Constitutional Court

I second the above dissenting opinion.

Dr. László Kiss
Judge of the Constitutional Court

Dissenting opinion by Dr. András Holló, Judge of the Constitutional Court

1. I agree with points 1, 3 and 4 in the holdings of the Decision rejecting the petitions for posterior constitutional examination, but I do not agree with point 2 of the holdings rejecting the petitions for establishing unconstitutionality by omission. I hold that the Constitutional Court should have confirmed the unconstitutional omission of legislative duty as the Parliament has not regulated in Act II of 2000 on independent medical practice (hereinafter: the AIMP) the issues of guarantees for implementing both the operation licence as a valuable right protected in Article 13 para. (1) and the fundamental rights of local governments specified under Article 44/A para. (1) of the Constitution.

2. The petitioner has also requested examination of medical practice rights from the aspect of local government autonomy, explaining that the approval of the Hungarian Medical Chamber is not sufficient for exercising the operation rights as the rightholder may only run a medical practice in a given GP district if the local government concludes a contract for services with the given physician.

Section 1 para. (2) item *a)* defines independent medical practice. It reads as follows: "For the purposes of this Act, *independent medical practice* shall mean the healthcare services provided by the general practitioners, paediatricians and dentists (hereinafter jointly: general practitioner or GP) in the scope of the territorial obligation of providing services, in accordance with Act CLIV of 1997 on Healthcare;" Therefore, the AIMP includes the territorial obligation to provide services as an element in the definition of independent medical practice. The territorial obligation to provide services is a precondition of granting an operation licence. Section 8 para. (4) of Act LXV of 1990 on Local Governments specifies the provision of primary medical care as a mandatory task of the local governments in each settlement. Based on the statutory provisions mentioned above, the selling of the operation licence (a valuable right protected by the Constitution) is very closely related to the performance of the local government's obligation to provide for primary medical care. This way, it is a precondition of sale (in addition to the Hungarian Medical Chamber approval) that the buyer is accepted by the local government. The local government is required to declare that it will either appoint the GP a civil servant or agree on the transfer of the territorial obligation to provide services on the entrepreneur GP. The local governments may not be bound by the resolution of the Hungarian Medical Chamber because of its fundamental rights specified in Article 44/A para. (1) of the Constitution and, therefore, the local government may not be obliged by the Chamber to employ the new rightholder under the sale. However, the new rightholder of the operation licence as a valuable right is protected by Article 13 para. (1) of the Constitution. This applies, however, vice versa: the fact that the Hungarian Medical Chamber has not granted an approval should not jeopardize the performance of territorial obligations.

The contradiction between the specified provisions of the Constitution affecting the operation licence should have been eliminated by the AIMP through rules that establish a balance between the provisions from a constitutionality aspect regarding the implementation of Article 13 para. (1) and Article 44/A para. (1) item *a)* of the Constitution. The deficiencies in the regulations may result in situations that violate either fundamental rights of the local

government or the right to property, and therefore guarantees should be provided in the AIMP to prevent these occurrences. When regulating this issue, the legislator is required to clarify whether the operation licence only applies to the given GP district or it applies in principle to the country as a whole. Based on the above, I consider it justified to establish an unconstitutional omission of legislative duty.

Budapest, 16 June 2006

Dr. András Holló
Judge of the Constitutional Court

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