

## **Decision 3537/2021 (XII. 22.) AB**

### **On the dismissal of constitutional complaints**

In the matter of constitutional complaints, the panel of the Constitutional Court has adopted the following

decision:

The Constitutional Court dismisses the constitutional complaints seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Government Decree 27/2021 (I. 29.) Korm on the declaration of a state of danger and the entry into force of measures related to such state of danger and of Government Decree 449/2021 (VII. 29.) Korm on the compulsory recourse to vaccination against the COVID-19 coronavirus.

#### Reasoning

I

[1] 1. The contested regulation and the constitutional complaints can be summarised as follows.

[2] Government Decree 27/2021 (I. 29.) Korm on the declaration of a state of danger and the entry into force of measures related to such state of danger (hereinafter referred to as the "First Decree") entered into force on 8 February 2021. In its introduction, the First Decree refers to the fact that it was enacted by the Government in accordance with its powers under Article 53 (1) and (2) of the Fundamental Law, subject to Section 51/A of Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts (hereinafter referred to as the "Disaster Management Act"). By Section 1 of the First Decree, the Government declared a state of danger for the entire territory of Hungary "in order to avert the consequences of the SARS-CoV-2 coronavirus pandemic (hereinafter referred to as the 'coronavirus pandemic'), which is a mass epidemic threatening the safety of life and property, and to protect the health and life of Hungarian citizens". Pursuant to Section 3 (1) of the First Decree, "extraordinary measures relating to the state of danger shall be laid down in separate government decrees". The First Decree was reaffirmed by Section 1 of Act I of 2021 on the Protection Against the Coronavirus Pandemic, promulgated on 22 February 2021 (hereinafter referred to as the "Protection Act").

[3] 2. Government Decree 449/2021 (VII. 29.) Korm on the compulsory recourse to vaccination against the COVID-19 coronavirus (hereinafter referred to as the "Second Decree") entered into force on 1 August 2021, except for Section 3, which entered into force on 15 August 2021. The Second Decree was enacted by the Government acting within the scope of its original legislative powers under Article 53 (2) of the Fundamental Law.

[4] Pursuant to Section 1 (1) of the Second Decree, during a state of danger according to the First Decree (hereinafter referred to as the "state of danger"), from among the forms of care listed in Annex 2 to Decree No 2/2004 (XI. 17.) EüM of the Ministry of Health on the registration of health care providers and their operating licences and on the register of health care professions, a health care provider providing primary care, on-call care, outpatient specialised care, diagnostics, inpatient specialised care, care requiring rescue, patient transport, health care organised in a residential social or child protection institution, health care for armed and law enforcement forces (primary care for employees and prisoners), as well as the direct supply of medicinal to the population (hereinafter jointly referred to as the "health care provider"), no legal relationship may not be established, in the context of which the health care activity would be performed by a health care worker within the

meaning of Section 4 (a) of Act LXXXIV of 2003 on Certain Aspects of the Performance of Health Care Activities (hereinafter referred to as the "Health Care Activities Act") or a resident within the meaning of Section 4 (c) of the Health Care Activities Act who has not received the SARS-CoV-2 coronavirus vaccination (hereinafter referred to as the "vaccination"). Pursuant to Section 1 (2) of the Second Decree, during the state of danger, the health care provider may not establish a legal relationship for the purpose of carrying out the activity defined in Section 4 (b) of the Health Care Activities Act at the seat and premises of the health care provider with a person who has not received the vaccination.

[5] Pursuant to Section 1 (3) of the Second Decree, an employed person within the meaning of Section 1 (1) and (2) of the Second Decree (hereinafter referred to collectively as the "employed person") who has not received the vaccination before the entry into force of this Decree is obliged, in order to protect the health and life of citizens, to receive the vaccination in the case of a single-dose vaccine and the first dose of the vaccination in the case of a two-dose vaccine by 1 September 2021, and the second dose of the vaccine in the case of a two-dose vaccine by a date to be determined by the physician administering the vaccine. Government Decree 507/2021 (VIII. 31) Korm amending the Second Decree extended the deadline for receiving the first dose of the vaccine to 15 September 2021.

[6] Government Decree 637/2021 (XI. 18.) Korm amending the Second Decree, which entered into force on 19 November 2021, also provided for the obligation to receive the third vaccine. The employed person shall comply with this requirement within 180 days of receiving the first dose of the single-dose vaccine and the second dose of the two-dose vaccine. Where, on the date of entry into force of this amending Decree, the 180-day deadline has already passed, the employed person shall be required to take the booster vaccine by 10 December 2021.

[7] Pursuant to Section 1 (4) of the Second Decree, an employed person is exempted from this obligation if he or she is advised against vaccination for medical reasons and this is supported by a medical expert opinion.

[8] Pursuant to Section 1 (6) of the Second Decree, the employer may require the employed person to provide proof of having been vaccinated. The employed person shall provide in a credible manner proof of vaccination within five days of the employer's request, and only vaccines as defined in Section 1 (1) (b) of Government Decree 60/2021 (II. 12.) Korm shall be taken into account. Pursuant to Section 1 (8) of the Second Decree, the employer shall require employed persons who have not complied with this requirement within the time limit to vaccinate or to provide proof of exemption from vaccination. In the absence of such proof, the employment of the employed person shall be terminated with immediate effect in accordance with Section 1 (9) of the Second Decree, with the proviso that in such a case the employed person shall not be entitled to any period of exemption from work duty or notice period or to any severance pay.

[9] 3. The person who brought the First Petition, a private individual, sought a finding that Section 1 (6) and (8) to (10) of the Second Decree was contrary to the Fundamental Law as well as annulment of said provisions, on the ground that said provisions infringed the petitioner's right to human dignity under Article II of the Fundamental Law, the right to working conditions which respect health, safety and dignity under Article XVII (3) of the Fundamental Law and the fundamental right to physical and mental health under Article XX (1) of the Fundamental Law.

[10] The petitioner submits that the Second Decree abuses the right to bodily integrity, which is part of the general personality right, by forcing health care employees to undergo vaccination with the aim of increasing the vaccination rate statistics. The complaint also alleges that the medium- and long-term side effects of vaccines developed under the accelerated or what is known as conditional marketing authorisation procedure are unknown, that is, their administration entails increased risks and less

safety than vaccines developed under the normal procedure. Nevertheless, the petitioner does not dispute that "the available vaccines are effective and their side

effects, as currently known and published by the manufacturers, are negligible in the light of the consequences of the pandemic”.

[11] In the grounds of the First Petition it is stated that the legal disadvantage attached to the failure to vaccinate, that is to say, the termination of the employment of the employed person by *quasi* termination for cause of his or her employment, has financial and moral consequences which are disproportionate to the objective of containing the pandemic and unreasonable in relation to the date of its introduction. On the one hand, the current infection rates and their dynamics do not justify the introduction of new emergency measures, on the other hand, vaccination is available to all and, thirdly, health care workers are already subject to the strictest hygiene and infection risk prevention protocols. It is also disproportionate that, instead of termination for cause, the Government could have provided for the temporary teleworking of unvaccinated workers, suspension of employment until the state of danger situation has been resolved, or unpaid annual leave or unpaid special leave, among other things, as a legal consequence in the interests of health.

[12] 4. The author of the Second Petition is a private individual who, in a complaint lodged on 23 August 2021, sought a finding that the First Decree and the Second Decree were contrary to the Fundamental Law and the annulment of said Decrees. The petitioner claims that the First Decree and the Second Decree also violate Article C (2) of the Fundamental Law and Articles 53 and 54 of the Fundamental Law because Section 44 (c) of the Disaster Management Act goes beyond the Fundamental Law and the declaration of the state of danger by the Government was made in light of point (c) not contained in the Fundamental Law. The petitioner submits that the Government Decrees adopted during the state of danger are unconstitutional as constituting Government Decrees not based on Article 53 of the Fundamental Law. The petitioner also submitted that Section 57 (3) of Act CLIV of 1997 on Health Care (hereinafter referred to as the “Health Care Act”) empowered the Minister and not the Government to prescribe compulsory vaccination in certain jobs.

[13] The petitioner also put forward a reasoning concerning the Second Decree going beyond its invalidity under public law.

[14] The petitioner contends that Section 1 (1) and (2) of the Second Decree contains negative discrimination because it prohibits health care providers from employing persons who have not undertaken any of the vaccines authorised in Hungary. Section 1 (3) of the Second Decree is contrary to Article II of the Fundamental Law and to the non-discrimination guaranteed by Article XV (2) of the Fundamental Law because Government Decree 509/2020 (XI. 19.) Korm also considered a negative test result to be sufficient, and the current Decree 60/2021 (II. 12.) Korm accepts the vaccination with COVID-19 vaccines authorised not exclusively in Hungary and used for vaccination of

the population, and also recognises protective immunity by recovery from infection. The Second Decree therefore places workers with natural immunity (infection-induced immunity) at a disadvantage and infringes their fundamental rights in comparison with workers who have acquired immunity through vaccination (vaccine-induced immunity). The petitioner also considers that the legislature has infringed the principle of non-discrimination by imposing the obligation to vaccinate leading to the termination of employment only in the health sector.

[15] In the petitioner's view, Section 1 (6) and (7) of the Second Decree is contrary to the right to human dignity laid down in Article II of the Fundamental Law, the prohibition of human experiments laid down in Article III (2), the prohibition of discrimination laid down in Article XV (2), the right to working conditions which respect health, safety and dignity laid down in Article XVII (3) and the right to physical and mental health laid down in Article XX (1). The vaccine against the coronavirus has only a provisional conditional authorisation, has not undergone the usual testing procedures and is at an experimental stage. Consequently, the side effects of the vaccine are not fully known and therefore the vaccine may endanger the life and health of those who receive it, and no one can be obliged to take part in human experiments. The petitioner also pointed out that the challenged provisions of the Second Decree also violate Section 54 (2) of Act I of 2012 on the Labour Code (hereinafter referred to as the "Labour Code"), because an employer's instruction that endangers health may be refused under this provision of the Labour Code.

[16] The petitioner considers Section 1 (10) of the Second Decree to be contrary to Section 77 of the Labour Code, but has not identified any provision of the Fundamental Law which he claims to have been violated in this context.

[17] The constitutional complaint states that, in addition to the provisions listed above, the provisions at issue are contrary to the International Covenant on Civil and Political Rights (hereinafter referred to as the "Covenant"), the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, signed in Oviedo on 4 April 1997 (hereinafter referred to as the "Oviedo Convention"), the Charter of Fundamental Rights of the European Union (hereinafter referred to as the "Charter of Fundamental Rights"), Regulation (EC) 507/2006, Regulation (EC) 726/2004 and Resolution 2361/2021 of the Parliamentary Assembly of the Council of Europe.

[18] The petitioner has expressly undertaken not to take the vaccination by the date set out in the Second Decree and there are no grounds for exemption; therefore, his employer is obliged to terminate his employment.

[19] 5. The State Secretary for Health Care of the Ministry for Human Capacities and the Minister of Justice submitted *amicus curiae* submissions to the Constitutional Court arguing that the contested legislation was in conformity with the Fundamental Law. The Hungarian Civil Liberties Union, as an advocacy organisation, also filed an *amicus curiae* brief, alleging that the wording of the Second Decree "and severance pay" was unconstitutional.

## II

[20] 1. The relevant provisions of the Fundamental Law regarding the present case are as follows:

"Article C (2) No one shall act with the aim of acquiring or exercising power by force, and of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way."

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

"Article III (2) It shall be prohibited to perform medical or scientific experiment on human beings without their informed and voluntary consent."

"Article XV (2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

"Article XVII (3) Every employee shall have the right to working conditions which ensure respect for his or her health, safety and dignity."

"Article XX (1) Everyone shall have the right to physical and mental health."

"Article 53 (1) In the event of a natural disaster or industrial accident endangering life and property, or in order to avert its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

In a state of danger, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(3) The decrees of the Government referred to in paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends the scope of such decrees.

(4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect.

“Article 54 (1) Under a special legal order, the exercise of fundamental rights—with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6)—may be suspended or may be restricted beyond the extent specified in Article I (3).

(2) Under a special legal order, the application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted.

(3) A special legal order shall be terminated by the body entitled to introduce the special legal order if the conditions for its declaration no longer exist.

(4) The detailed rules to be applied under a special legal order shall be laid down in a cardinal Act.

[21] 2. The relevant provisions of the First Decree are as follows:

“The Government,

in accordance with the powers laid down in Article 53 (1) of the Fundamental Law,

in respect of Sections 2 to 4, in its original legislative competence as defined in Article 53 (2) of the Fundamental Law, subject to Section 51/A of Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts,

acting in accordance with its powers under Article 15 (1) of the Fundamental Law, hereby decrees the following:

#### 1. Declaration of a state of danger

Section 1 In order to avert the consequences of the SARS-CoV-2 coronavirus pandemic (hereinafter referred to as the “coronavirus pandemic”), which is a mass epidemic threatening the safety of life and property, and to protect the health and lives of Hungarian citizens, the Government hereby declares a state of danger throughout the territory of Hungary.

#### 2. Rules for averting the consequences of the coronavirus pandemic

Section 2 (1) The Government shall designate the Prime Minister as the member of the Government responsible for averting the consequences of the coronavirus pandemic.

(2) The Prime Minister shall be assisted in the performance of his duties under Subsection (1) by the Task Force established by Government Decree 286/2020 (VI. 17.) Korm on the duties of the Operational Staff in the course of the state of epidemic.

Section 3 (1) Extraordinary measures in connection with a state of danger shall be provided for in separate Government Decrees.

(2) The Government shall continuously review the necessity of the existence of a state of danger.

(3) The Government shall request the cooperation of citizens in the implementation of extraordinary measures related to the state of danger.

[...]

Section 5 This Decree shall enter into force on 8 February 2021."

[22] 3. The relevant provisions of the Second Decree are as follows:

[23] 3.1 The text in force from 1 August 2021 to 14 August 2021 contains the following provisions:

"Section 1 The Government

in accordance with its original legislative powers as defined in Article 53 (2) of the Fundamental Law, subject to Section 51/A of Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts,

in respect of Section 3, in accordance with its original legislative powers as defined in Article 53 (3) of the Fundamental Law, pursuant to the parliamentary authorisation under Section 2 (1) of Act I of 2021 on Combating the Coronavirus Pandemic,

acting in accordance with its powers under Article 15 (1) of the Fundamental Law, hereby decrees the following:

Section 1 (1) During a state of danger pursuant to Government Decree 27/2021 (I. 29.) Korm on the declaration of a state of danger and the entry into force of state-of-danger measures (hereinafter referred to as the "state of danger"), with the exception of the exemption pursuant to Subsection (4),

(a) from among the forms of care listed in Annex 2 to Decree No 2/2004 (XI. 17.) EüM of the Ministry of Health on the registration of health care providers and their operating licences and on the register of health care professions, a health care provider providing

(aa) primary care,

(ab) on-call care,

(ac) outpatient specialised care,



- (ad) diagnostics,
- (ae) inpatient specialised care,
- (af) care requiring rescue,
- (ag) patient transport,
- (ah) health care organised in a residential social or child protection institution,
- (ai) health care for armed and law enforcement forces (primary care for employees and prisoners), as well as

(b) the direct supply of medicinal products to the population,

(hereinafter jointly referred to as the "health care provider"), no legal relationship may not be established, in the context of which the health care activity would be performed by a health care worker within the meaning of Section 4 (a) of Act LXXXIV of 2003 on Certain Aspects of the Performance of Health Care Activities (hereinafter referred to as the "Health Care Activities Act") or a resident within the meaning of Section 4 (c) of the Health Care Activities Act who has not received the SARS-CoV-2 coronavirus vaccination (hereinafter referred to as the "vaccination").

(2) During the state of danger, the health care provider shall not establish a legal relationship with a person who has not received the vaccination for the purpose of carrying out the activity specified in Section 4 (b) of the Health Care Activities Act at the seat and premises of the health care provider, except for the exemption pursuant to Subsection (4).

(3) An employed person within the meaning of Subsections (1) and (2) (hereinafter collectively referred to as "employed person") who has not received the vaccination before the entry into force of this Decree shall, in order to protect the health and life of citizens, and with the exception of the exemption under Subsection (4), be required to receive the vaccination

(a) in the case of a single-dose vaccine and the first dose of the vaccination in the case of a two-dose vaccine by 1 September 2021, and

(b) the second dose of the vaccine in the case of a two-dose vaccine by a date to be determined by the physician administering the vaccine

.

[...]

(6) The employer may require the employed person to provide proof of having been vaccinated. Within five days of the employer's request, the employed person shall

provide proof of vaccination in a credible manner by means of presenting official document proving his/her identity accompanied by one of the following documents:

(a) an EU digital Covid certificate in accordance with Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 establishing a framework for the issuance, verification and acceptance of interoperable Covid-19 vaccination, test and certificate of health (EU digital Covid certificate) to facilitate free movement during the Covid-19 pandemic,

(b) the immunity certificate or the application pursuant to Government Decree 60/2021 (II. 12.) Korm on the certification of immunity against the coronavirus [hereinafter referred to as Government Decree 60/2021 (II. 12.) Korm], without expiry date,

(c) a certificate of vaccination against SARS-COV-2 issued by the physician who certified the vaccination, based on the model published on the website of the National Public Health Centre,

(d) an international vaccination certificate issued by the World Health Organisation, if it contains an entry issued by a vaccinating physician stating that the SARS-COV-2 vaccine has been administered.

(7) For the purposes of Subsections (1) to (6), only vaccines within the meaning of Section 1 (1) (b) of Government Decree 60/2021 (II. 12.) Korm may be taken into account.

(8) An employed person who has not undergone vaccination pursuant to Subsection (3) (a) or (b) within the time limit specified in Subsection (3) (a) or (b) shall be required by the employer's notice to undergo vaccination within 15 days of the date of such notice and to provide proof of taking the

vaccination in the manner specified in Subsection (6) (a) to (d) or to submit a medical certificate pursuant to Subsection (5).

(9) The employment of an employed person shall be terminated with immediate effect by exemption from work duty or by notice of termination if

(a) the employed person fails to provide the employer with proof of vaccination within 15 days of the notice referred to in Subsection (8) in the manner specified in Subsection (6) (a) to (d); and

(b) the employed person fails to produce the medical expert opinion referred to in Subsection (5) within 15 days of the date of the request referred to in Subsection (8).

(10) In the event of termination of the employment relationship for the reason specified in Subsection (9), the employed person shall not be entitled to any period of exemption

or notice period and severance pay. The reason for termination and the legal consequences thereof shall be communicated to the employee without delay.

[...]

Section 2 (1) This Decree shall enter into force on 1 August 2021, with the exception of Subsection (2).

(2) Section 3 shall enter into force on 15 August 2021."

[24] 3.2 The provisions of the Second Decree, which entered into force on 15 August 2021, read as follows:

"Section 3 (1) The Government shall extend the effect of this Decree until the expiry of Act I of 2021 on Combating the Coronavirus Pandemic.

(2) This Decree shall cease to have effect on the expiry of Act I of 2021 on Combating the Coronavirus Pandemic."

[25] 3.3 The provision of the Second Decree, as amended on 1 September 2021, reads as follows:

"Section 1 (3) An employed person referred to in Subsections (1) and (2) (hereinafter jointly referred to as the "employed person") who has not undergone vaccination before the entry into force of this Decree shall, in order to protect the health and lives of citizens, undergo vaccination [...] in the case of a single-dose vaccine, and the first dose of the vaccination in the case of a two-dose vaccine, by 15 September 2021, except for the exemption referred to in Subsection (4)."

[26] 3.4 The provisions of the Second Decree, as amended on 19 November 2021, read as follows:

"Section 1 (3) [...] (c) An employed person referred to in Subsections (1) and (2) (hereinafter collectively referred to as the "employed person") who has not undergone vaccination before the entry into force of this Decree shall, in order to protect the health and lives of citizens, be administered the booster vaccine within 180 days of the first dose in the case of a single-dose vaccine and within 180 days of the second dose in the case of a two-dose vaccine, except for the exemption referred to in Subsection (4)."

"Section 1 (8) An employed person who has not been administered the vaccination in accordance with Subsection (3) (a) to (c) within the time limit specified in Subsection (3) (a) to (c) shall be required by the employer to be administered the vaccine within 15 days of the date of the notice and to provide proof of its administration in the manner specified in Subsection (6) (a) to (d) or to submit a medical expert opinion in accordance with Subsection (5)."

"Section 4 (1) Any person who is in an employment relationship with an employer at the time of the entry into force of Government Decree 637/2021 (XI. 18.) Korm amending Government Decree 449/2021 (VII. 29.) Korm on the compulsory recourse to the coronavirus vaccine (hereinafter referred to as the "Amendment Decree") and 180 days have already elapsed from the date of the first dose of the single-dose vaccine or the second dose of the two-dose vaccine at the time of the entry into force of the Amendment Decree, shall, by 10 December 2021, have been administered the vaccine in accordance with Section 1 (3) (c) and provide proof of vaccination in accordance with Section 1 (6) or a medical expert opinion in accordance with Section 1 (5) to the employer.

(2) If the employed person fails to comply with the obligation set out in Subsection (1) within the time limit set out in Subsection (1), the procedure shall be as provided in Section 1 (8) to (10)."

### III

[27] 1. Pursuant to Section 30 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), a constitutional complaint may be filed in writing within one hundred and eighty days of the entry into force of the law contrary to the Fundamental Law in the case specified in Section 26 (2). The Second Decree entered into force on 1 August 2021, the First Petition was received by the Constitutional Court on 9 August 2021 and the Second Petition on 23 August 2021; therefore, this requirement is met for both complaints in relation to the Second Decree. However, the First Decree entered into force on 8 February 2021, and therefore the elements of the Second Petition seeking the annulment of the First Decree are out of time, which prevents the merits of the case from being examined.

[28] 2. Pursuant to Section 26 (2) of the Constitutional Court Act, an exceptional constitutional complaint may be lodged if the violation of rights has occurred directly, without a judicial decision, as a result of the application or the entry into force of a provision of a statute that is contrary to the Fundamental Law, and there is no legal remedy procedure to remedy the violation of rights, or the petitioner has already exhausted his legal remedies.

[29] Although Section 1 (6) of the Second Decree provides that an employer may—and not 'shall'—require an employed person to prove that he has been vaccinated or that he is exempt from that obligation, it does not allow any discretion as to the consequences to be drawn from the law. The employment of a health worker who is covered by the Second Decree and who fails to obtain the vaccination or to prove the

conditions for exemption shall be terminated immediately. In view of the imperative provision, a possible labour dispute cannot be considered as an effective remedy. It can therefore be concluded that the contested provision is directly implemented by a decision of the employer in an individual case.

[30] 3. In the case of an exceptional complaint, since it is directed directly against the norm, the assessment of concernment is of particular importance, since a personal, direct and actual violation of the petitioner's fundamental right distinguishes an exceptional complaint from the *actio popularis*. Personal concernment is an infringement of the petitioner's fundamental right, but the petitioner is not only personally concerned if he is the recipient of the norm. If the norm is addressed to a third party, the requirement of personal concernment is fulfilled if there is a close link between the petitioner's fundamental rights position and the norm. The decisive factor for the requirement of indirectness expressly mentioned in Section 26 (2) of the Constitutional Court Act is whether the challenged legal provision itself affects the petitioner's fundamental right; finally, the requirement of actual concernment means that the concernment must have existed at the time the constitutional complaint was filed. Whether the petitioner is actually prejudiced can only be decided in the specific case {Cf. Decision 3110/2013 (VI. 4.) AB, Reasoning [27] to [31]}.

[31] With regard to the personal, immediate and actual nature of the prejudice, the Constitutional Court also recalls that "prejudice may also be established in a case where the acts for the application and enforcement of a statute have not yet been performed, but a legal situation has arisen by virtue of the law, from which it is clear that the complained of prejudice will occur in a foreseeable and immediate manner" {Decision 4/2018 (IV. 27.) AB, Reasoning [28]}.

[32] The petitioners proved their direct and actual involvement by attaching their employment contracts.

[33] 4. A complaint under Section 26 (2) of the Constitutional Court Act may also be based only on a violation of the petitioner's right guaranteed by the Fundamental Law {Order 3232/2021 (VI. 4.) AB, Reasoning [9]; Order 3238/2021 (VI. 4.) AB, Reasoning [17]}. This requirement is met by Article II of the Fundamental Law, {Decision 24/2014 (VII. 22.) AB (hereinafter referred to as the "First 2014 Court Decision"), Reasoning [140]}, Article III (2) of the Fundamental Law {Order 3434/2020 (XII. 9.) AB, Reasoning [40]}, Order 3356/2020 (X. 14.) AB, Reasoning [16]}, Article XV (2) of the Fundamental Law {Decision 17/2021 (V. 13.) AB, Reasoning [30]}, az Article XVII (3) of the Fundamental Law {Decision 17/2014 (V. 30.) AB (hereinafter referred to as the "Second 2014 Court Decision"), Reasoning [30]}, as well as Article XX (1) of the Fundamental Law {Decision 3067/2021 (II. 24.) AB, Reasoning [33]} since each of them contains content that can be interpreted as a fundamental right of the petitioners. However, Articles 53

and 54 of the Fundamental Law do not meet this requirement, as they contain rules on the organisation of the State.

[34] 5. The standard of scrutiny in the constitutional complaint procedure is always the Fundamental Law, which follows from the “law contrary to the fundamental law” clause of Section 26 (2) (a) of the Constitutional Court Act: The Constitutional Court, as the supreme body for the protection of the Fundamental Law, may conduct an scrutiny from the constitutional point of view in the complaint procedure {Order 3179/2013 (X. 9.) AB, Reasoning [7], cited in Order 3079/2021 (III. 4.) AB, Reasoning [23]} Accordingly, the elements of the petition which allege that the contested legislation conflicts with sources of law other than the Fundamental Law, such as the Covenant, the Oviedo Convention, the Charter of Fundamental Rights, regulations falling within the scope of EU sources of law, the Resolution of the Parliamentary Assembly of the Council of Europe, the Health Care Act and the Labour Code, are also inappropriate for a decision on the merits.

[35] 6. Pursuant to Section 52 (1b) of the Constitutional Court Act, only a constitutional complaint containing an explicit request may be admitted, and the Constitutional Court therefore examined whether these conditions were met.

[36] The First Petition contains the provisions of the Fundamental Law that are alleged to have been infringed and an express request for the annulment of the provisions of the law that are the subject of the petition. The Second Petition also alleged that the contested legislation was discriminatory in that the legislature did not recognise the fact of having contracted the coronavirus as a circumstance exempting from the obligation to vaccinate. In substance, in this element of the petition a finding of an omission is sought. “However, under Section 46 (1) of the Constitutional Court Act, the Constitutional Court may establish the existence of a breach of the Fundamental Law by the legislature only in the exercise of its competences—as a legal consequence, of its own motion. Therefore, the finding of an omission may not be petitioned under the above provision of the Constitutional Court Act.” {Order 3215/2015 (XI. 10.) AB, Reasoning [10], see, in a similar vein, most recently Decision 13/2021 (IV. 14.) AB, Reasoning [42]}

[37] The petitions only partially comply with the requirement to state reasons laid down in Section 52 (1b) (e) of the Constitutional Court Act. The First Petition does not contain any substantive

reasoning with regard to the elements of the petition relating to Article XVII (3) and Article XX (1) of the Fundamental Law. The author of the Second Petition merely raised the unconstitutionality by conflict with the Fundamental Law of the contested legislation in that the legislature had made vaccination compulsory only in the health care sector and not in all sectors, without providing any substantive reasons in that

regard. It is the practice of the Constitutional Court that insufficient reasons under constitutional law constitute an obstacle to the assessment of the merits {Order 3015/2015 (I. 27.) AB, Reasoning [13]; Order 3119/2020 (V. 8.) AB, Reasoning [7]}.

[38] The Second Petition contains a unified statement of reasons in relation to Section 1 (6) to (7) of the Second Decree, claiming that they are contrary to the right to human dignity as laid down in Article II of the Fundamental Law, the prohibition of human experiments as laid down in Article III (2), the right to working conditions respecting health, safety and dignity as laid down in Article XVII (3) of the Fundamental Law and the right to physical and mental health as laid down in Article XX (1) of the Fundamental Law because the coronavirus vaccine is only provisionally authorised subject to conditions, has not undergone the usual testing procedures and is at an experimental stage of use. Of the provisions of the Fundamental Law listed by the petitioner, this reasoning is the most closely connected in substance with Article III (2) of the Fundamental Law, although it is also connected with Articles XVII (3) and XX(1) of the Fundamental Law, since a medical experiment may also result in damage to health. However, by highlighting the prohibition of human experiments without consent among the provisions ensuring the protection of dignity and health at the level of the Fundamental Law, the constitutional legislator has created a special rule in relation to Articles XVII (3) and XX (1) of the Fundamental Law. In the light of this, this element of the petition can be assessed under Article III (2) of the Fundamental Law.

[39] 7. Section 29 of the Constitutional Court Act prescribes as a condition for admissibility that a constitutional complaint, which meets the other statutory conditions, must raise constitutional law issue of fundamental importance. It is for the Constitutional Court to determine whether these conditions are met. In the present case, the Constitutional Court considered as a constitutional law issue of fundamental importance whether the compulsory vaccination of employees engaged in health care activities during a state of danger declared for epidemic reasons is in conformity with the right to self-determination in health matters derived from the right to human dignity under Article II of the Fundamental Law and the prohibition of human experiments under Article III (2) of the same.

[40] On the basis of the foregoing, the Constitutional Court found the elements of the petition which sought to ascertain whether the Second Decree is compatible with the self-determination in health matters, which is part of the right to human dignity enshrined in Article II of the Fundamental Law, and the prohibition on human experiments contained in Article III (2) of the Fundamental Law to be capable of examination on the merits.

[41] The petitions are unfounded, for the reasons set out hereunder.

[42] 1. The Constitutional Court notes that the Second Decree was issued by the Government within the scope of its original legislative powers under Article 53 (2) of the Fundamental Law. Pursuant to Article 54 (1) of the Fundamental Law, “[u]nder a special legal order, the exercise of fundamental rights—with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6)—may be suspended or may be restricted beyond the extent specified in Article I (3).” In its previous decision, the Constitutional Court has already confirmed that, in the case of the fundamental rights set out as exceptions in Article 54 (1) of the Fundamental Law, it applies the test for the restriction of fundamental rights under Article I (3) of the Fundamental Law—that is, not

amended in the light of the special legal order—even if the challenged regulation is contained in a government decree issued on the basis of Article 53 (2) of the Fundamental Law: “In a special legal order, the legislature may, pursuant to Article 54 (1) of the Fundamental Law, and subject to the exceptions provided for therein, adopt extraordinary measures which temporarily entail the total suspension of the exercise of a fundamental right.” {Decision 23/2021 (VII. 13.) AB (hereinafter referred to as the “First 2021 Court Decision”), Reasoning [25], as well as Decision 27/2021 (XI. 5.) AB (hereinafter referred to as the “Second 2021 Court Decision”), Reasoning [99]}

[43] 2. “The Constitutional Court has on several occasions dealt with the right of self-determination and its form in the field of health care, the right of self-determination in health matters. The Constitutional Court has also already stated that »Article II of the Fundamental Law and Article 54 (1) of the Constitution enshrine the right of every human being to human dignity with the same content, and the Constitutional Court sees no reason to depart from the applicability of the arguments and findings of its previous decisions with regard to the interpretation of human dignity and the right of self-determination deriving from it. Therefore, the Constitutional Court considers that the position it has taken in its previous decisions on human dignity and the right of self-determination remains applicable in the present case.« (the First 2014 Court Decision, Reasoning [130]) The source of the right of self-determination is the right to human dignity, and thus the right of self-determination is part of human dignity, a right derivable from it (the First 2014 Court Decision, Reasoning [131]). Taking into account that [...] the criteria for assessing the constitutionality of a restriction of a fundamental right under Article II of the Fundamental Law are the same under the normal legal order and under the special legal order, the Constitutional Court has taken its previous practice as a starting point for assessing the restriction of a fundamental right.” (the Second 2021 Court Decision, Reasoning [100])



[44] "With regard to the partial rights of the right to human dignity as a maternal right, the Constitutional Court has emphasised that »human dignity is unlimited only in the same way as the right to life, but some of its component rights, including the right of self-determination, may be limited in the same way as other fundamental rights« (the First 2014 Court Decision, Reasoning [131]). In the context of the autonomy of action, the Constitutional Court has also pointed out in a subsequent decision that it can be limited: »from the constitutional scope of protection of Article II of the Fundamental Law (right to human dignity), the focus of the constitutionality review was not on the inviolable 'dignity core', but on the right of self-determination as a limitable aspect of the right to human dignity, which constitutes its core right, and the alleged prejudice to the autonomy of action [...] in connection with it« {Decision 19/2019 (VI. 18.) AB (hereinafter referred to as the "First 2019 Court Decision"), Reasoning [97]}. In the light of the above, the constitutionality of the restriction of the right of self-determination in health matters in the present case must also be assessed on the basis of the test laid down in Article I (3) of the Fundamental Law." (the Second 2021 Court Decision, Reasoning [101])

[45] 3. The first step of the test for the restriction of fundamental rights is to determine whether there has been an interference with the fundamental right referred to in the petition, that is, whether a substantive connection can be established between the challenged regulation and the fundamental right designated {see, for example, Decision 24/2017 (X. 10.) AB, Reasoning [35]}.

[46] The essence of the right of self-determination is the individual's freedom of choice, which is embodied in his autonomy of action (*cf.* the First 2014 Court Decision, Reasoning [140]). As the Constitutional Court has pointed out in a previous decision, 'several levels of interference with the right of self-determination may be distinguished. [...] Any regulation which imposes a legal consequence on an individual decision necessarily influences the individual's choice, and the legal system may be interpreted as a norm which encourages certain conduct or transactions and

discourages others." (the Second 2021 Court Decision, Reasoning [103] and [104]) It does not follow, however, that the right to self-determination can be found to be affected by all rules which leave a wide margin for individual choice, since this requires an examination of the nature and severity of the sanction which the legislature attaches to the rule in question. The most grievous and most obvious interference is where the legislator deprives the individual of his freedom of choice by imposing a statutory prohibition or obligation. In the context of vaccinations, this may be the case if the legislator makes vaccination compulsory *pro forma*." (the Second 2021 Court Decision, Reasoning [103]) An example is Section 58 (7) of the Health Care Act, which provides that "[i]f a person who is obliged to receive vaccination fails to comply with this obligation when requested to do so in writing, the State health administration body

shall order vaccination. In the event of an imminent risk of epidemic, the State health administration body may declare the decision immediately enforceable in respect of the range of vaccinations determined in accordance with the state of danger.”

[47] In the present case, Section 1 (3) of the Second Decree makes vaccination compulsory *pro forma* for all health care workers who come into direct contact with patients. Apart from the medical indication, the only way in which the worker concerned can be exempted from that obligation is by terminating his employment. Even though the obligation does not lead to legal consequences within the meaning of Section 58 (7) of the Health Care Act, even if those consequences are imposed by State coercion, the legislature not only made the compulsory vaccination a *lex imperfecta*, but also attached to it an adverse legal consequence, namely the termination of the employment of an employed person who fails to comply with that obligation, without any severance pay or period of exemption from work duty. On this basis, the Constitutional Court concluded that there had been legislative interference with the petitioners’ right of self-determination.

[48] 4. The second element of the general test of limitation of fundamental rights is the examination of the legitimate aim of the legislature. This follows from Article I (3) of the Fundamental Law, pursuant to which “[a] fundamental right may be restricted in order to ensure the exercise of another fundamental right or to protect a constitutional value”. Already at the beginning of its work, the Constitutional Court pointed out that, in addition to the subjective, underlying aspect of fundamental rights, the objective institutional protection aspect of fundamental rights may also serve as a legitimate justification for the restriction of other fundamental rights {Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302, in a similar vein, Decision 39/2007 (VI. 20.) AB (hereinafter referred to as the “2007 Court Decision”), ABH 2009, 464, 483, from the post-entry into force of the Fundamental Law period, Decision 17/2020 (VII. 17.) AB, Reasoning [34]}.

[49] The Constitutional Court recalls from its practice in the context of the coronavirus epidemic that “[i]t can be stated unequivocally that the fight against the coronavirus epidemic, including the reduction of its health, social and economic effects, and the mitigation of the damage, are objectives which constitutionally justify the restriction of fundamental rights” (the First 2021 Court Decision, Reasoning [26]). In relation to compulsory vaccinations, the Constitutional Court has already pointed out that they “protect the individual [...] against infection on the one hand and [...] the smaller community [around him] and society as a whole against the emergence of epidemics” {Decision 3080/2019 (IV. 17.) AB (hereinafter referred to as the “Second 2019 Court Decision”), Reasoning [43]}. Infections caused by various epidemics pose a high risk to the life, or at least the health, of individuals. Therefore, the purpose of epidemic measures, including compulsory vaccination, derives from the institutional protection aspect of the right to life, that is, the State’s duty to protect life (on the duty to protect

life as an objective aspect of the right to life, see the First 2019 Court Decision, Reasoning [98]).

[50] The contested legislation imposes the obligation to vaccinate only on employed persons engaged in health care activities. Thus, the legitimate aim of the restriction of the right must also be examined on a sector-specific basis. In this context, the Constitutional Court finds that the contested regulation serves the continuous functioning of the health care system (*cf.* Health Care Activities Act, Preamble) and the safety of patient care [*cf.* Act C of 2020 on the Health Service, Preamble] and, within the framework of these State objectives, the right to life and health of the members of society, the patients. The State's (institutional) responsibility in this regard is also explicitly set out in Chapter VII of the Health Care Act. Section 141 (1) of the Health Care Act prescribes that the State is responsible for the health of the population within the framework defined by this Act, in particular for enabling communities and individuals to protect and improve their health and, where necessary, to restore it to the extent possible by creating the necessary conditions for health.

[51] On the basis of the foregoing, the Constitutional Court recognises in the present case the legitimate aim of the imposition of compulsory vaccination of employed persons as being the enforcement of the right to life and health guaranteed by Article II of the Fundamental Law and the institutional protection aspect of the right to health enshrined in Article XX (1) of the Fundamental Law, the reduction of the health, social and economic impact of the coronavirus epidemic, and, in particular, the continuous functioning of the health care system and the safety of patient care.

[52] 5. Under the necessity element of the general fundamental rights limitation test, the Constitutional Court assesses that the legitimate aim "cannot be achieved in any other way, so that the restriction is absolutely (that is, unavoidably) necessary." {Decision 3306/2020 (VII. 24.) AB, Reasoning [39]}. In the present case, the necessity element of the general test for the protection of fundamental rights can be put into specific terms by enquiring whether the protection of employees, recipients of health services and persons in need of health care against infection can realistically be achieved without the prospect of adverse legal consequences in the event of an obligation to vaccinate employed persons and failure to do so.

[53] In its previous decision, the Constitutional Court has already stated that "[o]n the basis of the scientific world view prevailing today, the WHO and other global institutions and organisations are campaigning for the widest possible vaccination, because vaccination is capable of containing the epidemic and reducing its negative social and economic effects. All this suggests that the Hungarian legislation is also in this framework." (the Second 2021 Court Decision, Reasoning [88]) The Constitutional Court refers here to the data, which also appear in the public domain, which show that

the probability of infection is lower after vaccination and that, even if it occurs, the course of the disease is typically milder (the Second 2021 Court Decision, Reasoning [91]).

[54] The Constitutional Court has maintained its practice that the purpose of its procedure "cannot be to take a position on questions which are disputed from a scientific point of view" {Decision 3292/2017 (XI. 20.) AB, Reasoning [23]}, but the panel acts in the light of the "prevailing scientific world view" at the time (the Second 2021 Court Decision, Reasoning [80]), the suitability of vaccines to combat the coronavirus epidemic is accepted. In addition, it states that the most effective way of combating the epidemic, with no alternative, is to vaccinate and to vaccinate as widely as possible. This is a priority in certain sectors, areas or groups of people. Obviously, this is the case in the health sector, which is all the more justified by the state of danger declared because of the epidemic. The petitioners have also not invoked the existence of any other form of combating the epidemic which would have an effectiveness comparable to that of a vaccination programme and which could be applied to health care activities requiring personal contact with patients (*cf.* isolation of affected employed persons). In that regard, the Constitutional Court also refers to the fact that, during the period of the epidemic when vaccinations were available only to a limited extent, it was health workers

who were the first to be able to receive them. The reason for the privileging of health workers at that time was also to maintain the viability of the health care system.

[55] In that context, the Constitutional Court points out that the legitimate aim outlined in point IV/4 of the Reasoning (Reasoning [48] *et seq.*) presupposes two elements which are distinct but interdependent. On the one hand, in the context of the safety of health care, it is necessary to ensure that unvaccinated persons do not carry out health care activities or come into contact with patients or colleagues, since this entails a greater risk even if otherwise strict rules of hygiene are observed. Health care activities necessarily involve contact with patients, so teleworking is not—or only in very limited cases—a solution. On the other hand, in the interests of continuity and effective access to healthcare, the legislator cannot be content with isolating unvaccinated workers who are at greater risk from an epidemiological point of view, either by taking leave or by terminating their employment contracts, but must also seek to ensure that the vaccination coverage of workers is as wide as possible. Only in this way can it be ensured that there is both an epidemiologically safe, continuous and accessible patient care, that is to say, that there is a sufficient number of health-care workers who are medically fit to carry out health-care activities, that is to say, who do not present a higher epidemiological risk to other employees or to patients and are therefore more likely to be resistant to infection (*see* the Second 2021 Court Decision, Reasoning [90]) and therefore less likely to be absent from work.

[56] The Constitutional Court has ruled that “recourse to compulsory and coercive legal means can generally be only a last resort in order to achieve public health objectives” (the 2007 Court Decision, ABH 2007, 464, 486-487). The Constitutional Court, in the aforementioned decision, based on the position of the World Health Organisation, stressed that the achievement of public health objectives, in particular the control of a serious epidemic and the mitigation of its consequences, may justify the use of coercive legal means. In the present case, although the legislature did not use coercion in order to require vaccination, it undoubtedly exerted strong pressure on employed persons by imposing adverse legal consequences in the event of failure to take the vaccination. In this respect, the Constitutional Court points out that the State had used various incentives to encourage vaccination not only in the health sector but in all sectors of society even before the entry into force of the Second Decree: from the extensive information campaign to the provision of benefits linked to the immunity certificate (*cf.* the Second 2021 Court Decision, Reasoning [98] to [105]). Therefore, in order to increase vaccination coverage in the health sector, which is the most critical sector for combating epidemics, the Constitutional Court considers the contested restriction necessary to achieve the legitimate objective.

[57] 6. “With regard to proportionality, pursuant to the case law of the Constitutional Court, the existence of an appropriate balance between the importance of the aim to be achieved and the weight of the impairment of the fundamental right caused in the interest of the foregoing should be assessed. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose, that is, the limitation should not exceed the level absolutely necessary for achieving the constitutionally justifiable objective. {See for example the First 2014 Court Decision, Reasoning [135]; Decision 3312/2017 (XI. 30.) AB, Reasoning [43]}. Thus, in the scope of the review of proportionality, the Constitutional Court had to compare the weight of the interference, the impairment of the fundamental right caused, with the objective to be achieved (protection of health).”{Decision 3/2020 (I. 3.) AB, Reasoning [56]}

[58] Accordingly, in the context of the proportionality of the restriction of fundamental rights in the present case, the benefits of the right to life and health must be weighed against the disadvantages inherent in the restriction of the right of self-determination in health matters. One of the petitioners justifies the disproportionality of the contested legislation, first of all, by arguing that the legislature

has imposed the termination of the employment relationship as a negative legal consequence of failure to comply with the obligation to vaccinate, and has not provided for less severe consequences, such as the employment of the employee on teleworking contracts or the taking of special leave or unpaid annual leave. The question which the Constitutional Court must answer is therefore not only whether the

obligation to vaccinate employed persons is compatible with the Fundamental Law, but also whether the penalties for that obligation are compatible with the Fundamental Law.

[59] 6.1 The petitioners justified their refusal to vaccinate against coronavirus primarily on the basis of the risks involved. The Constitutional Court has previously pointed out, in the context of compulsory vaccination of children, that "[a] failure to vaccinate may put the individual and the community at risk. However, there are no vaccines without risks. The risks range—in principle—from mild reactions to vaccination (allergic symptoms, fever, headache, etc.) to permanent disability and death of the vaccinated person. When the State makes certain vaccinations compulsory, it decides on the risks borne. The State has a constitutional obligation to require vaccination only for the prevention of diseases for which it is strictly justified and to ensure that children receive only vaccines that pose the least possible health risk. [...] The Constitutional Court accepted the legislator's assumption, based on scientific knowledge, that the benefits of institutionalised vaccination for individuals and society far outweigh the potential harm that could be caused to vaccinated children as a side effect. The risks to children's health from non-vaccination are generally much greater than those from vaccination." (The 2007 Court Decision, ABH 2007, 464, 488)

[60] Furthermore, the Constitutional Court also emphasised in this decision that the proportionality of the restriction of a fundamental right depends on the content of the specific legal provisions. In the context of a restriction of a fundamental right, account must therefore be taken of the conduct which the legislature expects of the persons concerned, but also of the seriousness of the harm which it attributes to the failure to comply with the prescribed conduct. The Constitutional Court therefore went on to assess the legal consequences of failure to comply with the obligation to vaccinate—termination of employment without exemption from work duty and without severance pay—in this context, since it is these consequences that determine the seriousness of the pressure to vaccinate and thus the depth of the interference with the right of self-determination.

[61] Job loss is the loss of the most important source of income for most members of society. In addition, in the present case, the worker concerned must also reckon with the temporary impossibility of exercising his profession on the basis of his skills and qualifications. The loss of severance pay, although undoubtedly a significant financial loss for the person concerned, cannot be regarded as a sanction of the same severity as termination of employment. The reason is that it is not intended to cover the continuous provision of basic living conditions, but is a one-off payment of a limited amount. The Constitutional Court, as stated in point IV/5 of the reasoning of the decision (Reasoning [52] et seq.), considers that these prospective legal disadvantages

are a form of pressure on the petitioners, but stresses that the contested legislation leaves room for discretion as regards the reception of vaccination.

[62] 6.2 In view of the seriousness of the sanctions imposed by the contested legislation, the Constitutional Court went on to assess the proportionality of the contested legislation in the light of the proportionality criteria applied in the context of the examination of the constitutionality of compulsory vaccination. In addition, the Constitutional Court notes that, in the present case, employees do not have to reckon with the fact that, in the event of failure to receive the vaccination, it will be administered, even by means including the use of the State's monopoly on the use of force, so that the Second Decree has not in fact created a *de facto* compulsory vaccination which can be enforced.

[63] 6.3 "Democratic States that have made certain vaccinations compulsory have legal safeguards to prevent excessive restrictions on fundamental rights. The Slovenian Constitutional Court, in its comprehensive decision on the constitutionality of vaccination, has identified as an essential right, *inter alia*, the right to adequate information [...] for those subject to vaccination, the right to a temporary or permanent exemption from vaccination on medical grounds and the right to an appropriate exemption procedure. (U-I-127/01. Uradni list RS 25/2004.)." (The 2007 Court Decision, ABH 2007, 464, 489)

[64] As regards the criteria to be assessed in the context of proportionality under the 2007 Court Decision, the State has complied with its obligation to provide information on vaccination against coronavirus and it cannot be ignored that in recent years the public has had significantly easier access to general information on vaccination and to knowledge of specific vaccines, which facilitates the provision of information. However, the information obligation covers not only health information on vaccines, but also the procedures for compulsory vaccination. This is regulated in detail in Section 1 of the Second Decree, as well as the possibility of exemption on health grounds and the way in which this is done. The proportionality of the interference with the right of self-determination in health matters is supported by the institution of the employer's notice provided for in Section 1 (6) and (8) of the Second Decree and the period during which the employed person may comply with the obligation without adverse legal consequences. This solution ensures that the employed person is not only properly informed but also has sufficient time to demonstrate the expected behaviour.

[65] 6.4 The Constitutional Court recalls, first, that the 2007 Court Decision was not adopted during a state of danger on epidemic grounds, second, that the personal scope of the legislation examined in that case was not sector-specific and, third, that the subject-matter was in fact compulsory, that is to say, vaccination, to be administered even under the coercion of public authority, with the help of the State's

monopoly of force, and that the legislation under review still passed the proportionality test.

[66] By contrast, the Second Decree came into force at a time of a raging epidemic, when there was not only an abstract danger of the re-emergence of the infection, or of its spread, which was difficult to control. However, a broader restriction of the right to self-determination may also be justified in order to eradicate a serious epidemic and mitigate its consequences, in particular where the legislation under attack applies to a section of the workforce in a sector which plays a key role in it.

[67] 6.5 In the present case, the only persons affected by the restriction of fundamental rights on whose side the right of self-determination in health matters arises are health care workers, health care professionals and residents. The scope of the contested legislation, and thus of the implied disability which it threatens, does not extend to the entire health sector, but only to those who come into direct contact with patients. Also, the specific nature of the persons concerned by the restriction is that unless they carry out the activity they are supposed to perform, patient care would collapse.

[68] The group of persons whose fundamental rights to health and life are protected by the restriction of rights at issue is much broader than the group of persons employed and extends to the whole of society. This follows from the function of all vaccinations—that is to say, not only those which are compulsory for employed persons—which “protect the individual [...] against infection on the one hand and [...] the smaller community [around him] and society as a whole against the emergence of epidemics” {the Second 2019 Court Decision, Reasoning [43]}.

[69] 6.6 Given the fact that the legal consequences of failure to comply with the obligation to vaccinate under the Second Decree are essentially of a labour law nature, the Constitutional Court has also examined the proportionality of the sanctions in this context.

[70] Pursuant to Section 49 (1) (b) and (d) of Act XCIII of 1993 on Occupational Safety and Health (hereinafter referred to as the “Occupational Safety Act”), the performance of work must not endanger the health or physical integrity of either the worker or any other person. One of the safeguards is a set of fitness requirements for the worker, including standards of medical fitness. The Constitutional Court recalls that the constitutional significance of the Occupational Safety Act was summarised by the Constitutional Court as follows: “The protection of the rights guaranteed by Article II and Article VI (1) of the Fundamental Law is given specific expression in Article XVII (3) of the Fundamental Law in relation to employment: »Every worker has the right to working conditions which respect his health, safety and dignity.« The working conditions of workers which do not endanger their health and are safe are guaranteed by the [...the provisions...] of Act XCIII of 1993 on Occupational Safety and Health.” (The



Second 2014 Court Decision, Reasoning [30]) As stated above, the health conditions of fitness for work have an explicit foundation in the Fundamental Law.

[71] Health sector workers are subject to even stricter fitness requirements than the general ones. Thus, pursuant to Section 20 (1) of the Health Care Activities Act, “[a] health worker shall be entitled to perform a health activity only if he is able and suitable for the performance of that activity, having regard to his state of health, mental and physical condition (hereinafter together referred to as ‘health’) [...]”. Section 26 (1) of the Health Care Activities Act provides that the fitness of a health worker must be assessed on an ongoing basis, not only during cyclical fitness tests, before he or she may engage in a health activity: “A health care worker who is assessed as fit to perform a healthcare activity shall not perform a healthcare activity if, as a result of his current state of health, he would pose a greater risk to the patient by performing that activity than he would pose by not performing it.” Section 2 (1) of Decree 40/2004 (IV. 26.) ESzCsM of the Ministry of Health, Social Affairs and the Family on the examination and certification of health fitness to perform health care activities states as the objective of this Decree that “a health care worker shall only perform health care activities or participate in health care activities which, in relation to his/her health, do not endanger his/her health or the health or physical integrity of himself/herself, the health care user or other persons”.

[72] Pursuant to Section 57 (3) of the Health Care Act, “[t]he Minister may impose an obligation to vaccinate as a condition of employment in certain jobs at the employer's expense”. It must be emphasised that that provision of the Health Care Act applies to workers in the health sector as well as to workers in other sectors.

[73] It follows from the rules cited that the vaccination provided for in the Second Decree may be required of employees even under normal law, and that the vaccination must be interpreted as part of the fitness for employment.

[74] Even before the introduction of the special legal regime and the entry into force of the Second Decree, employees were aware of the health fitness requirements for certain jobs, including the possibility of being required to take vaccinations.

[75] Employed persons who were employed before the entry into force of the Second Decree were aware of this when they established or maintained their employment relationship before the entry into force of the Second Decree. With the entry into force of the Second Decree, this specific content of the legal relationship was only “sharpened”, not a new obligation was imposed that was not known before. In other words, the possibility of a restriction could not be excluded even at the time the legal relationship was established.

[76] 6.7 In the context of the proportionality of a restriction of a fundamental right, the duration of the restriction must also be assessed, and the Constitutional Court therefore also examined this in relation to the contested legislation. In this respect, it should be noted, on the one hand, that pursuant to

Section 1 (1) of the Second Decree, the restrictions on the establishment and maintenance of a legal relationship contained therein are only applicable for the duration of the emergency situation within the meaning of the First Decree. On the other hand, it also follows from Section 3 (2) of the Second Decree that the period covered by the restriction on the fundamental right is limited, which makes the effect of the Second Decree conditional on the expiry of the Protection Act. On this basis, the Constitutional Court concludes that the employment restrictions are temporary, although there is no doubt that their effects may extend beyond the temporal scope of the Second Decree.

[77] 6.8 On the basis of the foregoing, the Constitutional Court has concluded that the importance of the objective pursued and the seriousness of the infringement of fundamental rights caused in order to achieve it are in proportion to each other.

[78] 7. The Constitutional Court "has already pointed out in Decision 6/1998 (III. 11.) AB that the limit to the restriction of fundamental rights is their essential content. The essential content of a fundamental right is »infringed by a restriction which is not unavoidably necessary in the interests of another fundamental right or constitutional objective and, even if necessary, the harm caused by the restriction is disproportionate to the objective pursued« (ABH 1998, 91, 98)." {Decision 19/2021 (V. 27.) AB, Reasoning [62]} The Constitutional Court also recalls that the State's "duty to protect health may, in exceptional cases, take precedence even over the choice of the individual who is capable of making a decision" [Decision 43/2005 (XI. 14.) AB (ABH 2005, 536, 550), cited in the 2007 Court Decision, Reasoning ABH 2007, 464, 486]; therefore, even a complete deprivation of the right to self-determination in a specific matter—for example, an obligation to take vaccinations, which also allows the use of state force—does not result in a violation of the essential content of the fundamental right.

[79] The Constitutional Court reiterates that the persons affected by a restriction of a fundamental right do not have to fear that, if they do not take the vaccination, the State may force them to do so, even by force, since the legislature envisages serious disadvantages in the field of labour law and related material disadvantages, which do not extend to the total withdrawal of the right of self-determination in that matter.

[80] Having regard to those circumstances and to the fact that, in accordance with the case-law of the Constitutional Court, even an obligation to vaccinate which allows the effective use of State force constitutes a proportionate restriction on the right of self-determination in health matters, the Constitutional Court finds that the adoption of the

penalty under the contested legislation did not result in a disproportionate interference with the applicants' right of self-determination in health matters which infringes the essential content of that right.

V

[81] 1. Second, the Constitutional Court reviewed the conformity of Section 1 (3) and (7) of the Second Decree with the prohibition of human experiments in Article III (2) of the Fundamental Law. The Second Petition alleged a breach of these provisions because, in its view, the vaccine against the coronavirus has only a provisional conditional authorisation, has not undergone the usual testing procedures and is at an experimental stage.

[82] 2. Pursuant to Article III (2) of the Fundamental Law, “[i]t shall be prohibited to perform medical or scientific experiment on human beings without their informed and voluntary consent.” The Constitutional Court must first select the test of limitation of fundamental rights under which the infringement of this provision of the Fundamental Law may be assessed.

[83] The Constitutional Court has not yet applied and interpreted Article III (2) of the Fundamental Law in its practice and it is therefore necessary to determine its essential content.

[84] Although the clause contains a prohibition, it can be interpreted as a fundamental right: The right of all persons not to be subjected to medical or scientific experiments without being informed or informed but without their consent. This provision of the Fundamental Law is closely linked, first and foremost, to the right to life and human dignity, in particular the right of self-determination, which is partial right of the right to human dignity. Since participation in a medical or other scientific experiment, whether informed or not or without consent, may cause physical and/or mental suffering to the person subjected to it, the holder of the fundamental right, that prohibition is also linked to the right to physical and mental health enshrined in Article XX (1) of the Fundamental Law and to the right to working conditions which respect health, as set out in Article XVII (3) of the Fundamental Law, which is rendered specific in the world of work. Because of the involvement of Articles II and XX (1) of the Fundamental Law, Article III (2) of the Fundamental Law can also be interpreted as an element of the right to self-determination in health matters.

[85] The right to self-determination—or its partial right, the right to self-determination in health matters—is a component right of human dignity, and is therefore not an absolute right, but a right that can be limited. The Constitutional Court decides on the

constitutionality of the restriction by applying the general test for the protection of fundamental rights set out in Article I (3) of the Fundamental Law (the First 2019 Court Decision, Reasoning [97], the Second 2021 Court Decision, Reasoning [101]). However, the fact that, like the other provisions of Article III of the Fundamental Law, the constitutional legislator declared this prohibition *expressis verbis*, separately from the right to life and human dignity, cannot be ignored. Having regard to the command of Article R (3) of the Fundamental Law to interpret it in accordance with its purpose, the Constitutional Court, presented an overview of the part of the Proposal for the Fundamental Law relating to Article III (hereinafter referred to as the "Proposal"). Accordingly, "[t]he Proposal lays down absolute prohibitions in the context of the right to human dignity. These prohibit the subjection of any person to torture, inhuman or degrading treatment or punishment or to slavery, and also prohibit trafficking in human beings. The Proposal also prohibits medical or scientific experiments on human beings without their consent and, in response to developments in biology and medicine, it includes a prohibition on the reproduction of human beings among the fundamental rights, along the lines of the Charter of Fundamental Rights. The Proposal also prohibits eugenic practices, practices for the purpose of human eugenics and the use of the human body or parts of the human body for profit."

[86] Since the wording of Article III (2) of the Fundamental Law as adopted by the National Assembly is identical to the relevant part of the Proposal, the Constitutional Court finds, in relation to Article III (2) of the Fundamental Law, that the intention of the constitutional legislator was to establish what is known as an absolute prohibition by the declaration of that provision. The specificity of absolute rights or prohibitions is that their limitation is not constitutionally permissible, since the full scope of their content is deemed to be essential. Therefore, the general test for the limitation of fundamental rights under Article I (3) of the Fundamental Law cannot be applied in examining whether a prohibition under Article III (2) of the Fundamental Law has been infringed, but it must be ascertained whether the elements of the prohibition are present in the case in question.

[87] 3. The petitioner alleged a violation of Article III (2) of the Fundamental Law because the vaccines that the employed person could obtain to fulfil his obligation under the Second Decree are at the experimental stage. Therefore, the concept of 'experiment' is the first of the elements of Article III (2) of the Fundamental Law to be interpreted.

[88] The Constitutional Court emphasises that it is not within its competence to determine the epidemiological question of which vaccination is required by the legislature for the exercise of a health care activity, while stating that "all vaccines used in Hungary are licensed by the National Institute of Pharmacy and Nutrition. All of them have been found by the competent Hungarian authority to be suitable for promoting

the development of immunity against infection.” (The Second 2021 Court Decision, Reasoning [82]) The Constitutional Court “has consistently held that where a position taken by a leading international institution on a scientific issue can be clearly identified, it will accept it, since the Constitutional Court has no jurisdiction to challenge the scientific basis for that position” (see most recently in the Second 2021 Court Decision, Reasoning [92]). The Constitutional Court refers to its previous decision, in which it reviewed in detail the legal policy documents and recommendations of the authoritative international fora on coronavirus vaccination and concluded that “on the basis of the scientific world view prevailing today, the WHO and other global institutions and organisations are campaigning for the widest possible vaccination, because vaccination is capable of containing the epidemic and reducing its negative social and economic effects. All this suggests that the Hungarian legislation is also in this framework.” (the Second 2021 Court Decision, Reasoning [88])

[89] In the light of the above, it cannot be concluded that the coronavirus vaccination programme constitutes an “experiment” within the meaning of Article III (2) of the Fundamental Law, and thus no infringement of the absolute prohibition relating thereto can be established.

## VI

[90] In the light of the foregoing, the Constitutional Court dismissed the petitions seeking a finding unconstitutionality by conflict with the Fundamental Law and annulment of the contested provisions of the First Decree and the Second Decree, as set out in the operative part hereof.

Budapest, 30 November 2021

Dr. Miklós Juhász sgd., presiding Justice on the panel, Justice delivering the opinion  
of the Court

Dr. Miklós Juhász sgd., presiding  
Justice on the panel, in lieu of Justice  
dr. Ágnes Czine, prevented from  
signing

Dr. Miklós Juhász sgd., presiding  
Justice on the panel, in lieu of Justice  
dr. Attila Horváth, prevented from  
signing

Dr. Miklós Juhász sgd., presiding  
Justice on the panel, in lieu of Justice  
dr. Imre Juhász, prevented from signing

Dr. Miklós Juhász sgd., presiding  
Justice on the panel, in lieu of Justice  
dr. Tamás Sulyok, prevented from  
signing