Decision 27/2007 (V. 17.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior examination of the unconstitutionality of a statute and establishment of an unconstitutional omission of legislative duty, the Constitutional Court has – with a dissenting opinion by Dr. László Trócsányi Judge of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds that an unconstitutional omission of legislative duty is caused by the Parliament's failure to regulate in an Act how long the Parliament shall be bound by a decision passed at a successful decisive national referendum and, likewise, by its failure to determine from when an Act adopted on the basis of (or reinforced by) a referendum may be amended or repealed according to the general rules of legislation. In addition, the Parliament has failed to provide for a rule on how long it is prohibited to call for another referendum on the same question.

The Constitutional Court calls upon the Parliament to meet its legislative duty by 31 December 2007.

2. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and annulment of Section 8 para. (1) of Act III of 1998 on National Referenda and Popular Initiatives.

3. The Constitutional Court rejects the petition seeking establishment of an unconstitutional omission of legislative duty in respect of Sections 1 and 13 of Act XI of 1987 on Legislation.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

The Constitutional Court has received two petitions seeking establishment of an unconstitutional omission of legislative duty in respect of Act XVII of 1998 on National Referenda and Popular Initiatives (hereinafter: the ANR). 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, the Constitutional Court has consolidated the petitions and judged them in a single procedure as they are of the same subject.

The first petitioner has submitted an alternative motion affecting two competences of the Constitutional Court. The petitioner firstly requests the Constitutional Court to annul Section 8 para. (1) of the ANR in the framework of posterior examination, and secondly – should the request of annulment be dismissed – it asks for establishing an unconstitutional omission of legislative duty with regard to the challenged statutory provisions.

Under Section 8 para. (1) of the ANR, the result of a successfully held national referendum shall be binding for the Parliament. The petitioner holds the challenged statutory provision to be unconstitutional due to "the lack of a moratorium defining the earliest date for the Parliament to amend the decision resulting from the referendum."

In the petitioner's opinion, this leads to allowing the Parliament to amend at any time the Act passed as a result of a successfully held referendum, impairing the requirement of legal certainty as an element of the rule of law under Article 2 para. (1) of the Constitution, and making the constitutional provision on the binding force of a successful referendum – as granted in Article 28/C para. (3) of the Constitution – uninterpretable and empty.

Upon examining the questions related to the Act of Parliament – as a source of law – passed on the basis of a successfully held decisive national referendum, the petitioner objects to the fact that such Acts of Parliament have no well-defined position in the hierarchy of the sources of law, and it is similarly unclear when and in what form the Parliament may amend those Acts.

The petitioner holds that – although the Acts of Parliament are on the same hierarchical level under the legal regulations in force – the Act passed on the basis of a successfully held national referendum should enjoy priority over ordinary Acts of Parliament. According to the petitioner, there are constitutional grounds to justify the restrictions on allowing the amendment of the Acts passed on the basis of a successfully held national referendum, or to provide for a mandatory period of maintaining such Acts in force. In the petitioner's view, the above deficiencies result in a lack of guarantees for the decision (result) of a referendum binding for the Parliament to have a binding force as a source of law, too.

Based on the above arguments rooted in the theory on the sources of law, the petitioner proposes to establish the unconstitutionality of Section 1 of Act XI of 1987 on Legislation (hereinafter: the AL) determining the hierarchy of the sources of law, and of Section 13 of the AL regulating the statutes' being in force, depending on the Constitutional Court's position about the ANR.

Another petitioner has submitted a petition seeking establishment of an unconstitutional omission of legislative duty concerning the statutory regulation of the ANR. As challenged by the petitioner, the ANR fails to regulate "how long the Parliament shall be bound by a decision passed at a successful decisive national referendum."

In the petitioner's opinion, "the lack of a regulation on the deadline for potential legislation may lead to several conclusions, which are all unacceptable with regard to constitutionality".

According to the first interpretation, "in the lack of a moratorium for amendment or repealing", the Parliament might – right after a successfully held referendum – adopt an Act contrary to the result of the referendum. The petitioner considers this "interpretation" to be clearly against the constitutional institution of the referendum, emptying the constitutional provision on the direct exercise of power as laid down in Article 2 para. (2) of the Constitution.

The other possible interpretation – also held unacceptable by the petitioner – would impose a "final ban of legislation" on the Parliament. In the petitioner's opinion, restricting without a deadline the legislative and other (constitutional) competences of the Parliament would violate the legislative competence granted to the Parliament in Article 19 para. (3) of the Constitution, and it would create "exclusive subjects of referendum" – not regulated in the Constitution in force – being contrary to the constitutional provision under Article 19 para. (1) of the Constitution, specifying the Parliament's character as "the supreme body of State power and popular representation".

According to the petitioner, as a referendum may only be held on a question falling into the Parliament's scope of competence, holding a successful referendum would prohibit the Parliament passing any future decision in the given matter, and the same question could not be put to a referendum any more, thus resulting in a "true eternal clause", i.e. a hidden amendment of the Constitution. In the petitioner's opinion, withdrawing the Parliament's power – in certain scopes of legislation – for an indefinite time would violate Article 19 para. (1) and Article 2 para. (2) of the Constitution.

To support his arguments, the petitioner refers to Section 31 para. (3) of Act XVII of 1989 on National Referenda and Popular Initiatives (hereinafter: ANR1), which contained the moratorium regulation missed by the petitioner with regard to the Acts of Parliament reinforced by referenda. In addition, as argued by the petitioner, the missing regulation – serving the purpose of a constitutional enforcement of the referendum's results – is to be provided in an Act of Parliament.

II

1. The provisions of the Constitution relevant to the petition and included in the review are as follows:

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

(2) In the Republic of Hungary the supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives."

"Article 19 (1) The Parliament is the supreme body of State power and popular representation in the Republic of Hungary.

(2) Exercising its rights based on the sovereignty of the people, the Parliament shall ensure the constitutional order of society and define the organisation, orientation and conditions of government.

(3) Within this sphere of authority, the Parliament shall

a) adopt the Constitution of the Republic of Hungary;

b) adopt Acts of Parliament; (...)"

"Article 28/B para. (1) Only a question falling under the jurisdiction of the Parliament can be the subject of national referenda or popular initiatives.

(2) A majority of two thirds of the votes of the Members of Parliament present shall be required for the Parliament to pass the Act of Parliament on national referenda and popular initiatives."

"Article 28/C (1) A national referendum may be held for reaching a decision or for an expression of opinion. Carrying out a national referendum may be mandatory or may be the result of consideration of a matter.

(2) A national referendum shall be held if so initiated by at least 200,000 voting citizens.

(3) If a national referendum is to be held, the result of the successfully held national referendum shall be binding for the Parliament.

(4) Based on its consideration, the Parliament may order a national referendum upon the initiative by the President of the Republic, the Government, by one third of Members of the Parliament or by 100,000 voting citizens.

(5) National referendum may not be held on the following subjects:

a) on the contents of Acts of Parliament on the central budget, the execution of the central budget, taxes to the central government and duties, customs tariffs, and on the central government conditions for local taxes,

b) obligations set forth in valid international treaties and on the contents of Acts of Parliament prescribing such obligations,

c) the provisions of the Constitution on national referenda and popular initiatives,

d) personnel and restructuring (reorganisation, termination) matters falling under Parliamentary jurisdiction,

e) dissolution of the Parliament,

f) the Government's program,

g) declaration of a state of war, a state of emergency or a state of national crisis,

h) use of the Armed Forces abroad or within the country,

i) dissolution of the representative body of local governments,

j) amnesty.

(6) A national decisive referendum shall be considered successful if more than half of the validly voting citizens, but at least more than one-quarter of all eligible voters, have given the same answer in the referendum.

2. The provisions of the ANR relevant to the petition and included in the review are as follows:

"Section 8 (1) The result of the successfully held national referendum shall be binding for the Parliament.

(2) An advisory referendum secures contribution by the citizens in passing decisions by the Parliament, but it does not bind the Parliament to pass a decision of determined content.

A mandatory referendum can only be a decisive one, while a referendum ordered upon consideration (hereinafter: a facultative one) can be either a decisive or an advisory one – with the restriction under paragraph (4) – as decided by the Parliament.

(4) A referendum ordered for the ratification of an Act adopted by the Parliament but not yet signed by the President of the Republic shall be decisive."

3. The provisions of the AL challenged by the petitioner are as follows:

"Section 1 (1) The legislative organs shall adopt the following statutes:

a) Acts of Parliament by the Parliament,

b)

c) Decrees by the Government,

d) Decrees by the Prime Minister and the Members of the Government (hereinafter jointly: Ministers),

e)

f) Decrees by local governments.

(2) In compliance with the above order, a statute of lower rank may not be contrary to a statute of higher rank."

"Section 13 A statute shall cease to be in force when it is put out of force by another statute or upon the lapse of the period defined in the statute."

III

The petitions are, in part, well-founded.

1. With regard to national referenda, the relevant regulations are laid down in the Constitution, the ANR, and Act C of 1997 on the Election Procedure (hereinafter: the AEP). Article 28/C para. (1) of the Constitution distinguishes between decisive and advisory national referenda according to the binding force of the referendum. Under the Constitution and the ANR, a decisive referendum may be held in three cases.

A mandatory referendum held by virtue of Article 28/C para. (3) of the Constitution upon the initiative of at least 200,000 voting citizens is decisive.

"A referendum ordered for the ratification of an Act adopted by the Parliament but not yet signed by the President of the Republic" is also decisive [Section 8 para. (4) of the ANR].

Finally, a referendum ordered upon consideration under Article 28/C para. (4) of the Constitution may also be decisive (i.e. a so-called "decisive facultative referendum") [Article 28/C para. (1) of the Constitution, Section 8 para. (3) of the ANR].

Article 28/C para. (3) of the Constitution provides for the decisive character of the referendum to be held mandatorily, vesting the decision made in the course of the successfully held referendum with a binding force upon the Parliament. When compared to Article 28/C para. (3) of the Constitution, Section 8 para. (1) of the ANR challenged by the first petitioner provides for the general binding force upon the Parliament of all three types of decisive referenda.

The constitutional concern mentioned by the petitioners is related to the (deficient) regulations on decisive national referenda.

2. The Constitutional Court has to take positions in two constitutional questions based on the petitions.

On the one hand, the Constitutional Court has to form an opinion on whether the regulatory deficiencies mentioned by the petitioners with regard to the legal institution of the national decisive referendum regulated in the Constitution result in an impairment of the constitutional requirement of legal certainty – including the foreseeable, calculable and secure operation of the legal institutions – as an element of the rule of law guaranteed in Article 2 para. (1) of the Constitution.

On the other hand the Constitutional Court has to decide whether the regulatory deficiencies mentioned above violate the fundamental right to referenda enshrined in Article 2 para. (2) and Article 28/C para. (3) of the Constitution and the constitutional provision under Article 19 para. (3) item *b)* of the Constitution, granting the Parliament's right to legislation.

3. Firstly, the Constitutional Court has judged upon the petition challenging Section 8 para. (1) of the ANR and proposing a posterior examination of constitutionality.

The first petitioner has submitted in an alternative motion a definite request for establishing the unconstitutionality of, and for annulling Section 8 para. (1) of the ANR.

The petitioner's motion for the posterior examination of unconstitutionality is supported by the reasoning of the petition seeking establishment of an unconstitutional omission of legislative duty, with the petitioner alleging a violation of the same constitutional provisions as the ones specified in his petition mentioned above [Article 2 paras (1) and (2) and Article 28/C para. (3) of the Constitution].

Under Section 8 para. (1) of the ANR, the result of the successfully held national referendum shall be binding for the Parliament. The Constitutional Court holds that the arguments put forward in the petition do not support the unconstitutionality of Section 8 para. (1) of the ANR. In the opinion of the Constitutional Court, the binding force upon the Parliament of a successfully held decisive national referendum (let it be any of the three types of decisive referenda specified in part III point 1 of the present Decision) follows (can be deducted) directly from the constitutional provision on popular sovereignty as granted in Article 2 para. (2) of the Constitution.

Section 8 para. (1) of the ANR is a statutory provision for the implementation of Article 2 para. (2) of the Constitution, i.e. the statutory guarantee of the constitutional principle of popular sovereignty.

In view of the above, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality and annulment of Section 8 para. (1) of the ANR. As argued by the petitioner, the challenged statutory provision does not violate Article 2 paras (1) and (2) of the Constitution, and it does not impair the constitutional provisions under Article 28/C para. (3) of the Constitution.

4. The Constitutional Court has also examined the petitions seeking establishment of an unconstitutional omission of legislative duty.

Having regard to the contents of the consolidated petitions, the petitioners allege unconstitutional omissions of legislative duty in three questions.

On the one hand, the petitioners object to the legislature not regulating in the ANR how long the Parliament shall be bound by a decision passed at a successful decisive national referendum and, on the other hand, they claim that the ANR fails to regulate how long it is prohibited to call for another referendum on the same question.

Thirdly, the petitioners object to the ANR not providing for a period of time under which the Parliament shall be bound by the Act of Parliament passed as a result of, or reinforced by, a referendum.

The competence of the Constitutional Court concerning the establishment of unconstitutional omissions is regulated by Section 49 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC). Under Section 49 of the ACC, an unconstitutional omission of legislative duty may be established if the legislature has failed to fulfil its statutorily mandated legislative duty, and this has given rise to an unconstitutional situation. For the purpose of applying this statutory provision, the two essential conditions – i.e. an omission and the resulting unconstitutional situation – shall exist at the same time. [Decision 1395/E/1996. AB, ABH 1998, 667, 669]

According to the established practice of the Constitutional Court, the legislature shall be obliged to legislate even when there is no concrete mandate given by a statute if the unconstitutional situation – i.e. the lack of legal regulation – is the result of the State's interference with certain situations of life by way of a statute, thus depriving some of the citizens of their potentials to enforce their constitutional rights. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]

The Constitutional Court shall also establish an unconstitutional omission of legislative duty if the statutory guarantees necessary for the enforcement of a fundamental right are missing. [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 231]

The Constitutional Court establishes an unconstitutional omission of legislative duty not only if there is no regulation at all regarding a certain subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205] but also if a statutory provision with a content deducible from the Constitution is missing from the regulatory concept concerned. [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113, Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128]

Even when an unconstitutional omission is established due to the incomplete contents of the regulation concerned, the omission itself is based on the non-performance of a legislative duty deriving either from an explicit statutory authorisation or – if there is no such authorisation – from the absolute necessity to have a statutory regulation. [Decision 4/1999 (III. 31.) AB, ABH 1994, 52, 57]

As established by the Constitutional Court, Section 31 para. (1) of ANR1, in force prior to the adoption of the ANR, had provided for a statutory regulation on how long it was prohibited to call for another national referendum on the same question. (According to the statutory provision mentioned above, it was prohibited for two years to call for another national referendum on the same question.)

In addition, as regulated in Section 31 para. (1) of ANR1, an Act of Parliament reinforced with a referendum could be amended – after the expiry of the two years upon its taking force – under the general constitutional provisions on legislation.

The Constitutional Court holds that the present statutory regulations on national referenda do not contain any rules of moratorium similar to the ones in the relevant provisions of ANR1.

[However, as noted by the Constitutional Court, the rules on local referenda – in Section 48 of Act LXV of 1990 on Local Governments – provide that no local referendum may be held on the same question within one year even if the local referendum was not successful. In accordance with the above, under Section 133 para. (2) item *c)* of the AEP, initiating a local referendum on the same question within one year is an obligatory cause of rejection among the rules on rejecting authentication of the sheet of signatures. Thus, with regard to local referenda, a repeated referendum on the same question falls under a moratorium of one year.]

As held by the Constitutional Court in view of the above reasons, neither the ANR nor the other statutory regulations pertaining to national referenda contain any provision regarding the questions mentioned by the petitioners, and therefore the regulatory deficiency claimed by the petitioners does exist.

The next question to be examined by the Constitutional Court is whether the regulatory deficiency challenged by the petitioners does impair the constitutional provisions referred to by the petitioners.

Several decisions of the Constitutional Court deal with certain substantial elements of the constitutional requirement of legal certainty as part of the rule of law enshrined in Article 2 para. (1) of the Constitution. As explained by the Constitutional Court in its Decision 9/1992 (I. 30.) AB, legal certainty is a fundamental criterion of the rule of law, and "legal certainty requires not only the unambiguity of individual legal norms but also the predictability of the operation of individual legal institutions." (ABH 1992, 59, 65) Also other decisions of the Constitutional Court stress the requirement of predictable operation of the legal institutions on the basis of legal certainty and the rule

of law. [Decision 47/2003 (X. 27.) AB , ABH 2003, 525, 535; Decision 33/2005 (IX. 29.) AB, ABH 2005, 352, 358]

As pointed out by the Constitutional Court, "it is one of the fundamental requirements of the rule of law that the organs exercising public authority shall operate within the organisational limits specified by the law, in the order of operation determined by the law, and within the limitations regulated by the law, in a manner which is calculable and which can be known by the citizens." [Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 61]

The Constitutional Court holds that the constitutional rule of legal certainty requires the institution of national referendum – as a prominent constitutional tool for the direct exercise of power – to operate predictably, calculably and safely. In the opinion of the Constitutional Court, the regulatory deficiencies result in a situation where the adequate operation of this constitutional institution is not fully secured according to the requirements of the rule of law.

In the opinion of the Constitutional Court, there should be no factor of insecurity concerning either the citizens entitled to initiate a national referendum or the Parliament in charge of executing the decision passed at a decisive national referendum that might pose a threat on the foreseeable, calculable and secure operation of the constitutional institution concerned.

In the case under review, the regulatory deficiencies challenged by the petitioners result in insecurity for the citizens, as they may not know in advance when they may initiate another referendum on the same question (i.e. how long it is prohibited to call for another referendum on the same question).

There is an insecurity in respect of the Parliament as well, with this body responsible for executing the decision passed at the referendum not knowing how long the Parliament shall be bound by a decision passed at a successful decisive national referendum and, likewise, when and in what manner an Act adopted on the basis of (or reinforced by) a referendum may be amended or repealed.

It is to be noted that due to the regulatory deficiencies challenged by the petitioners, on a judicial interpretation of Article 28/C para. (3) of the Constitution and of Section 8 para. (1) of the ANR, several different answers can be given to the questions mentioned above, but neither the "eternal clause" referred to by the petitioners (i.e. the unchangeable nature of the decision passed at the referendum) nor its changeability ("at any time") without a time limit can be regarded as an "answer" being in compliance with the requirements of the rule of law.

Consequently, the judicial interpretation of the above mentioned constitutional and statutory provisions may not lead to a constitutionally satisfactory answer to the constitutional questions raised by the petitioners to substitute for the missing regulations.

Under Article 2 para. (2) of the Constitution, people are the source of all power, and they exercise popular sovereignty indirectly through their elected representatives as well as directly. As already established by the Constitutional Court in one of its early decisions, popular referendum is a form of practising the right to the direct exercise of power, enjoying constitutional protection as a fundamental right, similar to the right to vote. (Decision 987/B/1990 AB, ABH 1991, 527, 528)

As pointed out by the Constitutional Court in Decision 52/1997 (XI. 14.) AB, the right to holding a referendum is a fundamental political right, implying the State's obligation of objective institutional protection for securing the conditions of exercising this right. [Decision 52/1997 (X. 14.) AB, ABH 1997, 331, 343]

It was established by the Constitutional Court in the reasoning of the decision referred to above that "if the representative organ is bound by the result of the referendum, then the people become »participants« or »determining factors« of the decision of the representative organ." (ABH 1997, 331, 339) According to the reasoning, the result of the referendum changes power relations and makes the voter a "participant" in the exercise of power, and although the direct exercise of power is an exceptional form of exercising sovereignty by the people, in the exceptional cases of its implementation it enjoys supremacy over exercising power through representation: in such cases, the Parliament takes an executive role. (ABH 1997, 331, 340, 341)

It is emphasised by the Constitutional Court that the State shall – under its obligation of objective institutional protection – provide for the full scale of guarantee regulations that secure the enforcement of the fundamental political right to referendum granted in Article 28/C para. (3) of the Constitution. The regulatory deficiencies noted by the petitioners mean the lack of guarantees without which the fundamental political right granted in Article 28/C para. (3) of the Constitution might become emptied.

Allowing the Parliament in the lack of a moratorium to amend ("at any time") without a time limit the decision passed at a successful decisive national referendum and to repeal or amend without a time limit any Act of Parliament adopted on the basis of (or reinforced by) a referendum would empty the right to referendum regulated in Article 28/C para. (3) of the Constitution, violating at the same time the constitutional provision on the direct exercise of power, i.e. the form of asserting popular sovereignty as granted in Article 2 para. (2) of the Constitution.

Under Article 19 para. (3) item *b)* of the Constitution, the Parliament shall adopt Acts. The lack of the above mentioned guarantee provisions does affect the legislative competence of the Parliament granted in the Constitution. There should be no insecurity concerning the legislative competence of the Parliament in respect of whether there is any time limit for amending or repealing an Act of Parliament adopted as a result of (or reinforced by) a successful decisive national referendum. Regarding the

foreseeable, calculable and secure operation of the Parliament's legislative process, i.e. the constitutional institution of legislation, it is important to have a clear and unambiguous guarantee on having or not having a moratorium restricting the above mentioned constitutional competence of the Parliament.

In view of the above arguments, the Constitutional Court holds that in the case under review, the deficiencies challenged by the petitioners have resulted in an unconstitutional omission of legislative duty. Article 2 para. (1) of the Constitution is impaired by not guaranteeing the foreseeable, calculable and secure operation of the constitutional institution of decisive national referenda, regulated under Article 2 para. (2) and Article 28/C para. (3) of the Constitution, in line with the requirements of the rule of law.

Besides violating Article 2 para. (1) of the Constitution, the lack of guarantees in the statutory provisions serving the enforcement of the fundamental political right to holding a referendum does impair the constitutional provision on popular sovereignty granted in Article 2 para. (2) of the Constitution.

Similarly, the constitutional provision enshrined in Article 19 para. (3) item *b)* of the Constitution – granting the legislative competence of the Parliament – has also been violated as there is legal uncertainty about the Parliament amending or repealing an Act adopted as a result of (or reinforced by) a successful decisive national referendum.

The Constitutional Court, acting *ex officio* as required under Section 49 para. (1) of the ACC, has then extended the scope of examination on the unconstitutional omission of legislative duty to establishing whether in the case under review, the regulatory deficiencies challenged by the petitioners may lead to the violation of the constitutional provision granted in Article 28/B para. (2) of the Constitution.

Article 28/B para. (2) of the Constitution under review provides a constitutional authorisation for the legislation to adopt – with a majority vote of two thirds of the MPs present – an Act on national referenda and popular initiatives in order to secure the framework for regulating those areas of operation of the constitutional institution of national referenda that are not covered by the Constitution.

In Decision 64/1997 (XII. 17.) AB (hereinafter: the CCDec), the Constitutional Court reviewed the constitutionality of the provisions laid down in Section 9 para. (3) item *c)* and in Section 12 para. (3) of Bill No T/4752 (the Bill on the ANR), establishing their unconstitutionality.

Under Section 9 para. (3) item *c)* of the Bill, no new initiative on holding a referendum may be submitted in a question of the same content if there was a referendum held in the past two years in the relevant question.

As laid down in Section 12 para. (3) of the Bill, no new referendum may be held in a question of the same content [Article 28/B para. (1) of the Constitution] within a course of two years.

The Constitutional Court explained in the reasoning of the CCDec that "the amendment of the Constitution by Act LIX of 1997 introduced – among others – Article 28/C para. (5), specifying the cases when no national referendum may be held.

Thus, the scope of subjects excluded from holding a national referendum has become a constitutional rule. On the level of the Constitution, this listing is deemed to be full and exhaustive, and therefore this fundamental political right may only be restricted in the framework of the Constitution as far as determining the prohibited subjects of referendum and further causes of exclusion are concerned.

As Article 28 para. (5) of the Constitution does not contain a provision giving any authorisation for further regulations on a statutory level, the legislation may not provide for any other cause of exclusion beyond the scope defined in Article 28 para. (5) of the Constitution.

The regulation laid down in Section 9 para. (3) item *c)* and Section 12 para. (3) of the Bill, according to which no new referendum may be held in a question of the same content within two years, is considered to be a cause of exclusion.

As the Constitution itself exclusively determines all the cases when no national referendum may be held, any other statutory restriction would be against Article 28/C para. (5) of the Constitution.

The Constitutional Court has established due to the statutory level of the regulation the unconstitutionality of Section 9 para. (3) item *c)* of the Bill and of Section 12 para. (3) – containing the same normative text." (ABH 1997, 380, 384)

In the present case, the Constitutional Court emphasises that the provision in Article 28/B para. (2) of the Constitution is a constitutional authorisation for the legislation under which the legislation may and shall provide for statutory regulations on the areas of the constitutional institutions of national referenda and popular initiatives which are not regulated in the Constitution.

Article 28/C para. (5) of the Constitution defines the scope of subjects excluded from national referendum, and these so-called "prohibited subjects" have become constitutional provisions due to the amendment of the Constitution by Act LIX of 1997.

Since the relevant provision of the Constitution does not give an authorisation for the legislation to regulate on a statutory level further subjects excluded from holding a referendum, the constitutional listing is deemed to be full and exhaustive in this respect.

However, the Constitutional Court holds that all the above arguments do not lead to a ban for the legislation to provide – based on the constitutional authorisation granted in Article 28/B para. (2) of the Constitution – for statutory regulations (save in the field of "prohibited subjects of referendum")

containing restrictions on the operation of the fundamental political right and the constitutional institution of referendum not affecting the essential contents of this legal institution.

When laying down the constitutional rules on the "prohibited subjects" [Article 28/C para. (5) of the Constitution], the legislation has only specified the scope of subjects of this legal institution requiring regulation on a constitutional level, but it has not prohibited the adoption on a statutory level of further restrictive provisions pertaining to the operation of this constitutional institution.

Therefore, it is held by the Constitutional Court in the present case – contrary to the reasoning of the CCDec – that Article 28/C para. (5) of the Constitution only requires regulation on a constitutional level in respect of the subjects finally and fully excluded from the scope of referenda rather than in respect of the provisions posing a restriction on the operation of the constitutional institution of referendum. In the former CCDec, the Constitutional Court did not differentiate between "prohibited subjects" (i.e. the subjects under absolute prohibition, when no referendum may be held at all) and further causes of exclusion that do not impose an absolute ban on, but, for example, provide for temporary restrictions (e.g. a moratorium for initiating a new referendum) or strict formal requirements related to initiating or holding a referendum. However, it would be contrary to Article 28/B para. (2) of the Constitution to interpret the constitutional provisions on holding a referendum – and in particular, the constitutional regulation on prohibited subjects – in such a way that any cause even temporarily restricting the initiation or the holding of a referendum may only be regulated in the Constitution and not in an Act of Parliament.

It is to be noted that the "requirement of unambiguity" specified in Section 13 para. (1) of the ANR is a statutory provision restricting the operation of this constitutional institution, but it is not considered to determine a new constitutionally prohibited subject.

In the opinion of the Constitutional Court, regulating the restrictive measures (moratoria) specified in point 1 of the holdings – based on the constitutional authorisation laid down in Article 28/B para. (2) of the Constitution – falls into the competence of the legislation.

At the same time, the Constitutional Court holds that the Parliament is free to decide whether to supplement the missing regulations on a constitutional or a statutory level since – as explained above – Article 28/C para. (5) of the Constitution does not imply that the provisions mentioned above shall be regulated only on a constitutional level.

Since, having regard to the reasons explained in the present Decision, the regulatory deficiencies mentioned in point 1 of the holdings have resulted in the impairment of several constitutional provisions as referred to in the petitions, the Constitutional Court, acting *ex officio*, holds that the omission of legislative duty does also impair the provision under review in Article 28/B para. (2) of the

Constitution on account of the fact that by its failure to adopt the regulations mentioned above, the legislation has failed to fully comply with the regulatory obligation resulting from Article 28/B para. (2) of the Constitution.

In view of all the above, the Constitutional Court has – pursuant to point 1 of the holdings – established on the basis of the consolidated petitions an omission and a resulting unconstitutionality under Article 2 paras (1) and (2) as well as Article 19 para. (3) item *b)* of the Constitution, furthermore, acting *ex officio*, under Article 28/B para. (2) of the Constitution, and it has set a deadline for the Parliament for the termination of the unconstitutional omission.

5. The Constitutional Court has also examined the petition seeking establishment of the unconstitutionality of Sections 1 and 13 of the AL. The petitioner has filed the petition as "an alternative motion" for establishing the unconstitutionality of the statutory provisions mentioned above, based on the impairment of the constitutional provisions on the rule of law granted in Article 2 para. (1) of the Constitution. As indicated by the contents of the petition, the petitioner does not request annulment of the challenged statutory regulations, but proposes to establish unconstitutionality due to the lack of the statutory provisions "considered desirable" by the petitioner.

The petitioner challenges Section 1 of the AL – on the hierarchy of the sources of law – and Section 13 of the AL – on the force of the Act in time – alleging that, on the level of the legislative system, they do not provide adequate guarantees for securing the binding force of the referendum's result upon the Parliament. According to the petitioner, an acceptable provision of guarantee would be to require in the AL the holding of a new referendum on the amendment of the Act of Parliament adopted on the basis of a referendum's result.

As held by the petitioner, the regulations should "clarify" the position of the Act of Parliament adopted on the basis of a referendum among the sources of law. The petitioner would like to have statutory regulations to guarantee that an Act of Parliament adopted on the basis of a referendum enjoys a rank in the hierarchy of laws higher than other Acts, and he also considers it necessary to regulate – as an exception – the limitations on the amendment of an Act of Parliament adopted on the basis of a referendum.

The Constitutional Court has assessed the petition, in line with its contents, as a petition aimed at establishing an unconstitutional omission of legislative duty, and it has established that the constitutional provision on the rule of law cited by the petitioner does not lead to the requirement of having a statutory regulation as required by the petitioner.

As held by the Constitutional Court in the reasoning of Decision 4/1993 (II. 12.) AB in respect of the Acts to be adopted with a majority of two thirds, those statutes do not stand above other Acts of Parliament in the hierarchy of norms, and according to the Constitution each Act is "equal", regardless of whether it shall be passed by a simple or a qualified majority. (ABH 1993, 48, 63)

It consequently follows from both the Constitution and the established practice of the Constitutional Court on the interpretation of the Constitution that there is no relation of hierarchy among the Acts of Parliament based on the voting rate required for their adoption. Undoubtedly, the Acts of Parliament passed with a qualified majority or adopted on the basis of (or reinforced by) a referendum enjoy broader legitimacy than other Acts but this does not change (i.e. does not "raise") their positions in the hierarchy of norms, as it represents nothing more than a difference in the procedure of adopting the Acts.

Article 2 para. (1) of the Constitution does not imply such a requirement, nor does it require the legislation to provide a time limit in Section 13 of the AL – regulating the statutes' being in force – for the Parliament to repeal an Act of Parliament adopted on the basis of a referendum.

Having regard to the above arguments, the Constitutional Court has rejected the petition seeking establishment of an unconstitutional omission of legislative duty in respect of Sections 1 and 13 of the AL.

The Constitutional Court has ordered the publication of this Decision in the Hungarian Official Gazette in view of the establishment of an unconstitutional omission of legislative duty.

Budapest, 15 May 2007

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Judge of the Constitutional Court, Rapporteur

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Dissenting opinion by *Dr. László Trócsányi*, Judge of the Constitutional Court

I do not agree with point 1 of the holdings in the Decision. In my opinion, the petitions should have been rejected by the Constitutional Court in that respect. Under the Constitution's provisions in force, only the Constitution may regulate how long the Parliament shall be bound by a decision passed at a successful decisive national referendum and, likewise, from when an Act adopted on the basis of (or reinforced by) a referendum may be amended or repealed according to the general rules of legislation, furthermore, how long it is prohibited to call for another referendum on the same question. However, the power determining the Constitution may also decide not to adopt any regulation in these questions.

Under Article 2 para. (2) of the Constitution, "in the Republic of Hungary all power belongs to the people, who exercise popular sovereignty through their elected representatives as well as directly." As established by the Constitutional Court as early as in Decision 849/B/1990 AB, from the two forms of exercising popular sovereignty, i.e. exercising power through representatives and by way of holding a referendum, the latter is an exceptional tool (ABH 1990, 247, 248). As reinforced later on in Decision 2/1993 (I. 22.) AB, "according to the constitutional order of the Republic of Hungary, representation is the primary form of exercising popular sovereignty." A referendum may only decide matters falling within Parliament's jurisdiction within the framework of the Constitution and constitutional laws." (ABH 1993, 33) However, it was also stressed by the Constitutional Court that in the exceptional cases of its implementation, the direct exercise of power enjoys supremacy over exercising power through representation, and the Parliament shall have an executive role in such cases. [Decision 52/1997 (X. 14.) AB (hereinafter: CCDec1), ABH 1997, 331, 343] In the case of a mandatory referendum, power is actually and exclusively exercised by the people, while in the case of a facultative referendum, power is exercised jointly by the voting citizens and the Parliament. A decision by a successfully held decisive referendum is a constitutional form of restricting the Parliament's competence granted in Article 19

para. (3) item *b)* of the Constitution, and the Parliament is obliged to pass the decisions resulting from the successfully held referendum. [Decision 52/2001 (XI. 29.) AB, ABH 2001, 399, 403]

For a long time, the Constitution contained only few regulations on national referenda. Act LIX of 1997 has changed this significantly by including into the Constitution the most important provisions on national referenda "to demonstrate that exercising power directly by the people is of primary importance in a democratic state under the rule of law". (CCDec1, ABH 1997, 331, 335) This was the amendment of the Constitution introducing the constitutional list of the cases excluded from the scope of referenda [Article 28/C para. (5) of the Constitution], furthermore, the requirement that a mandatory referendum shall be held upon an initiative by 200,000 voting citizens, with the result of such a referendum to be binding upon the Parliament. The Constitutional Court interpreted the above regulations as rules on the division of competence between the representative and the direct exercise of power: the scope of the prohibited referendum subjects was interpreted as a substantial rule, while the provision on the number of citizens required for a popular initiative on a mandatory referendum was interpreted as a procedural rule on the division of competence. (CCDec1, ABH 1997, 331, 341) In addition to the above provisions, some basically procedural rules have also been incorporated into the Constitution such as, for example, how long it is allowed to collect signatures (Article 28/E of the Constitution).

Having regard to the level of regulation, Act LIX of 1997 has resulted in a significant change compared to the previous period: the earlier regulations of the Constitution have become more detailed and meaningful, and thus the statutory regulation based on Article 28/B para. (2) of the Constitution may not be extended to the questions of principle about the relation between the two forms of exercising power, directly affecting the exercise of popular sovereignty.

Any regulation directly and clearly affecting (restricting) the Parliament's right – and obligation – of legislation, and determining the interrelated contents of Article 2 para. (2) and Article 19 para. (3) item *b)* of the Constitution shall be implemented in the present regulatory construction on the level of the Constitution. By that, the Constitutional Court is clearly empowered to establish the unconstitutionality of, and to annul, any Act of Parliament repealing or amending – in violation of the moratorium – an Act passed on the basis of a referendum.

According to the present regulations, the Constitution may not impose a moratorium on the Parliament's right to legislate, and consequently, the Parliament and the MPs bear only political responsibility for repealing or annulling an Act passed on the basis of (or reinforced by) a referendum. Knowing the above, and bearing in mind the changed social-economic situation, the number of the people who participated at the referendum, the numerical results of the referendum, and other factors as

well, the MPs may, at their own discretion, decide on amending or repealing the Act of Parliament. In addition to political responsibility, other (legal) restrictions may also be set up, however, as they necessarily affect the relation between direct and representative democracy originating in Article 2 para. (2), Article 19 para. (3) item *b)*, and Article 28/C para. (5) of the Constitution, such regulations are to be implemented solely on the level of the Constitution.

It is to be regulated in the Constitution whether a moratorium is needed at all, or the MPs should be left "free to decide" on amending – within any short period of time – the essential or non-essential contents of an Act of Parliament adopted as a result of a referendum, in line with their political responsibility. Similarly, it is up to the Constitution to require that another referendum would be needed for the amendment of an Act of Parliament adopted as a result of, or reinforced by, a referendum, or to allow the amendment of such Acts in the ordinary course of legislation only after the expiry of a definite period of time (e.g. "x" years or an election cycle).

As the amendment of the Constitution in Act LIX of 1997 has regulated the cases when no referendum may be held, the scope of the excluded subjects has become a constitutional provision. In the course of the prior examination set out in Decision 64/1997 (XII. 17.) AB (hereinafter: CCDec2), the Constitutional Court already took a position establishing the unconstitutionality of the legislative will aimed at regulating at a statutory level that no new referendum may be held in a question of the same contents within two years (ABH 1997, 380.). In my opinion, in the framework of the Constitution in force, any statutory regulation on restricting in time referendum initiatives shall be considered a further cause of exclusion as interpreted in CCDec2. Restriction in time means that during the period determined by the legislation, no new referendum may be held on the same question. The circumstance that this restriction only applies to a provisional and definite period of time does not change the fact that no national referendum may be held in a question with a particular content. As referred to in CCDec2, the Constitution itself exclusively determines all the cases when no national referendum may be held, and therefore any other statutory restriction would be against Article 28/C para. (5) of the Constitution. (ABH 1997, 380, 384)

As already explained by the Constitutional Court in Decision 1260/B/1997 AB, "according to the constitutional and statutory provisions on the Constitutional Court's scope of competence, the Constitutional Court is not competent in reviewing, amending or changing the rules of the Constitution (...)". (ABH 1998, 816, 818) Having regard to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court, under which an unconstitutional omission of legislative duty shall only be established when the legislature has failed to fulfil its legislative duty mandated by a statute and this has given rise to an unconstitutional situation, the Constitutional Court – in the lack of a relevant

competence – may not call upon the Parliament, as the body determining the provisions of the Constitution, to perform a task of legislation. Since the rules related to the moratoria in question may only be regulated in the Constitution, the petitions should have been rejected.

Budapest, 15 May 2007

Dr. László Trócsányi
Judge of the Constitutional Court

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