

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition seeking the establishment of an unconstitutional omission of legislative duty as well as the establishment of the unconstitutionality and the annulment of a statute, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that an unconstitutional situation – in the form of an omission – violating Article 70 para. (1) of the Constitution has resulted from the failure of the Parliament to adopt provisions on the manner and guarantees of the exercise of the active voting rights of citizens entitled to vote on the basis of the Constitution who are staying abroad on the day of the vote, in respect of the election of Members of Parliament and participation in national referenda.

The Constitutional Court calls upon the Parliament to comply with its legislative duty without delay, with consideration to the deadlines related to national referenda and parliamentary elections.

2. Acting *ex officio*, the Constitutional Court holds that an unconstitutional situation violating the basic principle of election defined in Article 71 para. (1) of the Constitution has resulted from the failure of the legislator to include in Act C of 1997 on the Election Procedure provisions guaranteeing the secrecy of voting in respect of votes at foreign representations.

The Constitutional Court calls upon the Parliament to comply with its legislative duty as prescribed in point 1 above.

3. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of Sections 99/N and 99/O of Act C of 1997 on the Election Procedure.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

1. In his request for legal remedy against Parliamentary Resolution 46/2004 (V. 18.) OGY on ordering a referendum, the petitioner has also asked – in connection with the request – the Constitutional Court to establish an unconstitutional omission because the Parliament has failed to adopt provisions on the conditions of the exercise of the active voting rights of voters staying abroad on the day of the vote, and in the same petition, the petitioner has requested the establishment of the unconstitutionality and the annulment of Sections 99/N-99/O of Act C of 1997 on the Election Procedure (hereinafter: “AEP”).

The request for legal remedy against the resolution ordering a national referendum has been separated and judged in another procedure by the Constitutional Court. Therefore, in the present procedure, the Constitutional Court has examined the constitutional problems raised in the petition seeking the establishment of an unconstitutional omission of legislative duty and a posterior constitutional examination, concerning the procedure of elections and referenda in general.

2. In his request for the establishment of an unconstitutional omission of legislative duty, the petitioner points out that for the exercise of the voting right specific procedural rules are necessary in addition to the relevant rules of substantive law, as without such procedural rules voting citizens cannot actually cast their votes. On the basis of Article 70 para. (1) of the Constitution – having entered into force on 1 May 2004, concurrently with the entry into force of the Act promulgating the international treaty on accession to the European Union –, voting citizens staying outside the territory of the Republic of Hungary on the day of the vote may participate in parliamentary elections and national referenda. The AEP in force includes procedural rules on the participation of such citizens in voting only in relation to the election of Members of the European Parliament. According to the petitioner, the active voting rights of voting citizens staying abroad on the day of the vote are violated by the failure of the Parliament to regulate the participation of such citizens in voting during parliamentary elections and national referenda.

3. In the petitioner's opinion, Sections 99/N-99/O of the AEP violate the requirement of secrecy included in Article 71 para. (1) of the Constitution. According to the rules of the AEP, at the election of Members of the European Parliament, persons staying abroad on the day of the election may cast their votes at the foreign representations of the Republic of Hungary, provided that they have requested their inclusion in the relevant register at the foreign representation. When there is only one voting citizen requesting inclusion in the register at the foreign representation, there will be no more than five voting citizens casting their votes at the foreign representation concerned – including the members of the returning board as well –, thus the vote of a single voter can be calculated with a probability of twenty percent. With reference to Decision 20/1990 (X. 4.) AB, the petitioner argues that although the secrecy of voting is not an absolute requirement and it may be restricted in line with the test of necessity/proportionality, this test also includes the requirement that the legislator is bound to employ the least severe tool suitable for reaching the desired objective. In the case concerned, when regulating the order of voting, the legislator could have chosen a tool – widely applied in constitutional democracies – that is less restrictive in respect of the secrecy of voting.

The petitioner also points out that the unconstitutionality of the challenged provisions is not affected by the amendment to the AEP adopted by the Parliament at its session of 24 May 2004, according to which Section 99/O of the AEP would not be applicable to the election of Members of the European Parliament in 2004, and the provisions of Section 99/N would have to be applied with the difference that the votes cast at all foreign representations would have to be counted by the National Electoral Committee. As these temporary rules were only applicable to a single election procedure, the challenged regulations have remained in force.

II

The Decision of the Constitutional Court is based on the following statutory provisions:

1. The provisions of the Constitution referred to by the petitioner are as follows:

“Article 70 para. (1) All adult Hungarian citizens having a place of residence in the territory of the Republic of Hungary are entitled to vote and to be elected in parliamentary elections, as well as to participate in national referenda and popular initiatives.”

“Article 71 para. (1) Members of Parliament, Members of the European Parliament, members of representative bodies of local governments, Mayors and the Mayor of the Capital are

elected by direct, secret ballot by voting citizens, based on their universal and equal right to vote.”

2. The rules of the AEP challenged by the petitioner are as follows: “Section 99/N para. (1) Voting at a foreign representation is possible if the host state does not object thereto. Voting shall not take place at foreign representations where no voting citizen is registered.

(2) Voting citizens entered in the register at a foreign representation may vote at the foreign representation, or, if the building of the foreign representation is not suitable for voting, in other premises provided by the foreign representation. Section 61 para. (3) need not be applied. In all polling rooms at least one polling booth shall be set up and at least one ballot box shall be placed.

(3) At foreign representations votes may be cast on the polling day in Hungary, between 6 a.m. and 7 p.m. local time. At foreign representations where the time difference is -1 hour compared to Central European time zone (GMT), votes may be cast between 6 a.m. local time and 7 p.m. CET. At foreign representations in the American continent votes may be cast on the day before polling day in Hungary, between 6 a.m. and 7 p.m. local time. (4) Votes shall be cast personally. The returning board operating at the foreign representation shall – on the basis of a passport or a certificate issued by a Hungarian authority and suitable for establishing identity – establish the identity of the citizen intending to vote, and whether the citizen is included in the register at the foreign representation. Anyone who cannot prove his or her identity as set forth above or is not included in the register at the foreign representation shall be rejected. (5) If until an hour before closing the vote no vote has been cast at the foreign representation, the first voter may be a member of the returning board. (6) The vote shall also be closed when all voters registered at the foreign representation have cast their votes.”

“Section 99/O para. (1) The report on the results of the vote held at the foreign representation shall be immediately forwarded – electronically – by the head of the electoral office at the foreign representation to the National Electoral Office. The electronically forwarded data of the report shall be handled in the same manner as the data of the data sheets, and no separate data sheet is to be made on the results of the vote at the foreign representation. (2) The data specified in paragraph (1) shall be stored by the National Electoral Office, allowing access to them only after closing the vote in Hungary. After closing the vote in Hungary, such data

shall be published by the National Electoral Office as informative data on the non-authentic results of the vote.

(3) The report on the results of the vote held at the foreign representation and other documents of the elections – except for the report mentioned in paragraph (5) – shall be immediately transported by the chairman of the returning board at the foreign representation to the National Electoral Committee.

(4) The results of the election shall be established by the National Electoral Committee after receipt and on the basis of the reports made by the returning boards and the returning boards operating at foreign representations and forwarded to the National Electoral Committee in accordance with paragraph (3).

(5) A copy of the report on the results of the vote at the foreign representation shall be available for inspection for three days – after closing the vote in Hungary – at the foreign representation. Thereafter the report shall be forwarded to the National Electoral Office.

(6) The documents of a vote held at a foreign representation shall be handled in the National Electoral Office in accordance with Section 75 para. (3).”

III

On the basis of the petition, the Constitutional Court first examined whether an unconstitutional omission of legislative duty can be established because of the failure of the AEP to define the procedural rules of participation in voting by citizens staying abroad on the day of the vote in the case of parliamentary elections and national referenda.

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: “ACC”). Pursuant to Section 49 para. (1) of the ACC, if an unconstitutional omission to legislate is established by the Constitutional Court *ex officio* or on the basis of a petition by any person because the legislature has failed to fulfil its legislative duty mandated by a statute, and this has given rise to an unconstitutional situation, it shall call upon – by setting a deadline – the organ in default to perform its duty. 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 – 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 potential to enforce their

constitutional rights [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]. The Constitutional Court also establishes an unconstitutional omission of legislative duty in the case of the lack of the statutory guarantees necessary for the enforcement of a fundamental right [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232].

The Constitutional Court has already dealt with the constitutional issues related to the legal regulations on the exercise of the active voting rights of voting citizens staying abroad on the day of the vote. Decision 3/1990 (III. 4.) AB established the unconstitutionality of and annulled the provision in Act XXXIV of 1989 on the Election of Members of Parliament according to which persons staying abroad on the day of the election were prevented from casting their votes. According to the reasoning of that Decision, the rule concerned is not unconstitutional in respect of citizens not having a place of residence in Hungary, but it violates the fundamental right, enshrined in Article 70 para. (1) of the Constitution, of those Hungarian citizens who have a place of residence in Hungary but are staying abroad on the day of the election. “With the modern means of telecommunication and transport, staying temporarily abroad cannot hinder the exercise of citizen’s rights.” (ABH 1990, 25, 26)

In the Decision in question, the Constitutional Court also called the legislator’s attention to the following: “Due to the partial annulment of the statutory provision at issue, a legal gap has emerged since the Act on Election does not contain any provision on the manner of exercising the voting rights of Hungarian citizens staying abroad on the day of the election. In view of this, the Parliament should adopt legislation to fill this legal gap with consideration to the requirement of secret elections, preferably with an effect including the present elections.” (ABH 1990, 25, 26-27)

At that time, the Parliament resolved the unconstitutional situation caused by the lack of regulations by narrowing down the scope of Hungarian citizens with an active voting right through amending the Constitution. Section 2 para. (1) of Act LXI of 1994 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary amended Article 70 para. (1) of the Constitution as follows:

“(1) All adult Hungarian citizens residing in the territory of the Republic of Hungary have the right to be elected and the right to vote in Parliamentary elections, local government elections or minority self-government elections, provided that they are present in the country on the day of the election or referendum, and furthermore to participate in national or local referenda or popular initiatives.”

In view of the above amendment of Article 70 para. (1) of the Constitution, no regulation on the order of voting abroad was deemed necessary at the time of enacting the AEP.

The provision of Article 70 para. (1) of the Constitution in force, established by Section 7 of Act LXI of 2002 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary, in force as of 1 May 2004, has eliminated the previous constitutional restriction of active voting rights, guaranteeing both an active voting right and the right of participation in national referenda for all adult Hungarian citizens having a place of residence in Hungary. Thus, on the basis of Article 70 para. (1) of the Constitution, an active voting right and the right of participation in national referenda may also be exercised by adult Hungarian citizens having a place of residence in Hungary but staying abroad on the day of the vote.

The active voting right and the right of participation in national referenda enshrined in Article 70 para. (1) of the Constitution are fundamental constitutional rights which can only be enforced if the State ensures the conditions of their exercise, and if their exercise and the related system of guarantees are regulated in an Act of Parliament. The lack of such regulation makes it impossible for voting citizens to exercise their fundamental rights. The AEP only contains rules on the exercise of the active voting rights of voting citizens staying abroad on day of the vote in its new Chapter XI/A introduced by Section 20 of Act CXIII of 2003 on the Election of Members of the European Parliament (hereinafter: “AMEP”). These rules, however, only apply to the election of Members of the European Parliament and not to parliamentary elections or national referenda.

The lack of rules on voting abroad excludes the exercise of fundamental rights by a group of citizens entitled to vote on the basis of Article 70 para. (1) of the Constitution. Consequently, an unconstitutional situation violating Article 70 para. (1) of the Constitution has resulted from the legislator’s failure to harmonise the AEP with the new provision of Article 70 para. (1) of the Constitution, and to adopt procedural rules that ensure the conditions of the exercise of voting rights by all voting citizens, with consideration to the extension of voting rights in the Constitution.

In view of the above, the Constitutional Court – approving of the petition – has established an unconstitutional omission of legislative duty, stating that an unconstitutional situation violating Article 70 para. (1) of the Constitution has resulted from the failure of the

Parliament to adopt provisions on the manner and guarantees of the exercise of the active voting rights of citizens entitled to vote on the basis of the Constitution who are staying abroad on the day of the vote, in respect of the election of Members of Parliament and participation in national referenda.

In addition to establishing the unconstitutional omission, in accordance with Section 49 of the ACC, the Constitutional Court has called upon the Parliament to comply with its legislative duty. The Constitutional Court has made its call for legislation – differently from its previous practice – in view of the fact that at the date of adopting this Decision there are several procedures under way aimed at national referenda and mid-term elections. To avoid holding these referenda and mid-term elections in an unconstitutional situation – due to the deficiency of the regulations –, and with consideration to the ongoing discussions in the Parliament about the Bill aimed at the elimination of the omission, the Constitutional Court has called upon the Parliament to comply with its legislative duty without delay, with due account to the statutory deadlines (Sections 14-16 of Act III of 1998 on National Referenda and Popular Initiatives, Section 115 of the AEP) related to national referenda and parliamentary elections.

IV

1. On the basis of the petition, the Constitutional Court has also examined the constitutionality of Sections 99/N and 99/O of the AEP. The petitioner – with reference to Decision 20/1990 (X. 4.) AB (ABH 1990, 69, 71) – argues that the challenged rules violate Article 71 para. (1) of the Constitution because the legislator disproportionately restricts the secrecy of voting rights – due to not selecting the least severe tool to achieve the desired objective – in cases where only one voting citizen has requested inclusion in the register at the foreign representation concerned.

The petition is, in part, well-founded. The secrecy of voting as regulated under Article 71 para. (1) of the Constitution is not a fundamental right in itself, but it is a basic electoral principle, and one of the constitutionally defined procedural guarantees of the exercise of voting rights and the constitutional fundamental right to popular referendum, as well as of the democratic character of elections. Therefore, the so-called test of “necessity/proportionality” elaborated by the Constitutional Court for the constitutional assessment of statutes restricting the fundamental rights regulated in the Constitution cannot be applied to assess the

unconstitutionality of the procedural rules of voting on the basis of a violation of the secrecy of voting.

Article 71 para. (1) of the Constitution providing for secret voting is included in Chapter XIII entitled “The Basic Principles of Elections”. Article 71 para. (1) of the Constitution contains the classic principles of election systems – universal and equal suffrage, direct and secret ballot – and sets those constitutional requirements of a democratic election system for the enforcement of which a system of guarantees is to be provided in the course of establishing, regulating and operating the election system. The requirement of secret voting means that the content of any vote cast by individual voting citizens may not be made public in any case. This basic constitutional principle requires the State to adopt such rules on voting and on counting and totalling votes and to ensure such voting conditions that guarantee that the content of any vote cast by voting citizens cannot be identified by others.

Apart from the right to vote and the basic election principles, the Constitution does not contain provisions on the election system, and in Article 71 paras (3)-(4) it assigns the legislator to define the rules on the election system, including the system of guarantees related to the basic principles of election. Accordingly, the Parliament has a wide range of discretion in defining the rules of election.

“[...] [T]he Parliament has a wide scale of discretion in establishing the system of election and the rules of procedure of the election. The legislator is free to define the constituency systems and the rules pertaining to the nomination of candidates, voting and the obtainment of mandates. The Parliament may exercise this freedom of discretion in establishing the rules of election only within the constitutional limits, and it is required to adopt rules that do not violate the provisions of the Constitution and do not unconstitutionally restrict any fundamental right regulated in the Constitution.” (Decision 63/B/1995 AB, ABH 1996, 509, 513)

Consequently, the Parliament is also free to decide on the manner of voting abroad. In itself, the order of voting as regulated by the legislator is not a constitutional issue; a constitutional issue is only raised if the statutory provisions on voting or on counting votes are contrary to any constitutional provision.

The rules on voting at foreign representations, as special rules pertaining to the election of Members of the European Parliament, were introduced into the AEP by the AMEP, by adapting the general rules of voting to voting at foreign representations. Accordingly, Section 99/N of the AEP only contains a few special provisions on the manner of voting (duration of voting, provision of at least one polling booth and at least one ballot box), and it does not regulate the manner of counting votes. As provided in Section 99/A, Chapters I-X and Sections 89 and 93 of the AEP are also applicable to the election of Members of the European Parliament, with the differences defined in Chapter XI/A. Consequently, with regard to the manner of voting and the counting of votes, the general rules included in Chapter VIII of the AEP apply – with some exceptions – to European Parliamentary elections as well. Thus, the secrecy of voting at foreign representations is basically guaranteed by the general rules of the election procedure. Sections 99/N and 99/O of the AEP do not contain any provision that is in itself contrary to the requirement of secret voting regulated under Article 71 para. (1) of the Constitution.

In view of the above, the Constitutional Court has established that Sections 99/N and 99/O of the AEP do not violate Article 71 para. (1) of the Constitution, therefore it has rejected the petition seeking the annulment of the challenged provisions.

2. In the petitioner's opinion, the regulations on voting at foreign representations during the election of Members of the European Parliament are also unconstitutional because if only one person votes at a foreign representation, the content of the vote of that voter can be calculated by the returning board with a high probability, in violation of the secrecy of voting.

The Constitutional Court considers that the secrecy of voting is an absolute requirement at elections. The secrecy of voting is to be ensured by the State under any circumstances. The secrecy of voting is also violated if, in the course of counting votes, the content of the vote cast by a voting citizen can be identified, i.e. if the returning board can infer the vote cast by the voter.

The Constitutional Court has established that the current rules on voting at foreign representations indeed involve the constitutional concern raised by the petitioner. In the case of voting at a foreign representation, voting takes place under extraordinary circumstances different from the established and strictly controlled order of voting in the territory of Hungary, even though the general rules of voting are basically applicable. When voting at a

foreign representation, only a limited number of voters – not unusually only one voter – cast their votes. Therefore, in the case of voting at a foreign representation, the secrecy of voting requires extra guarantees. The Constitutional Court called the legislator's attention to the importance of ensuring the secrecy of voting as early as in Decision 3/1990 (III. 4.) AB cited above. The rules of the AEP on voting at foreign representations do not completely secure the guarantees of the secrecy of voting. Thus, the secrecy of voting is not ensured in the case mentioned by the petitioner, i.e. when only one voting citizen casts his vote at the foreign representation. In that case, the rules on voting make it possible for the returning board to identify the content of the vote of the voting citizen in the course of counting votes. The inference of the content of the vote cast by the voting citizen is made possible by the limited number of the votes cast, since the order of casting the votes can be identified due to the limited number of votes. (According to Section 64 of the AEP, the voting citizen present at the closing of the ballot box and at placing the review sheet in the ballot box shall be the first to cast his vote, and according to Section 99/N para. (5), a member of the returning board may only be the first voter if no voter has voted until an hour before closing the vote.)

In the opinion of the Constitutional Court, in such cases the possibility of identifying the content of the vote cast by the voting citizen violates the secrecy of voting.

In respect of the European Parliamentary elections of 2004, this constitutional problem has been solved by the legislator. Act XLIII of 2004 on the Amendment of Act C of 1997 on the Election Procedure introduced a new Section 172 into the AEP. It provided that in the course of the European Parliamentary elections of 2004, no returning boards would be in operation. Three designated members of the National Electoral Committee were in charge of opening the ballot box, counting the votes and establishing the results of the vote at the foreign representation. These rules were applicable only once, during the European Parliamentary elections of 2004, and they lost effect after the end of the elections in 2004.

Consequently, the system of guarantees in the current AEP related to the secrecy of voting is deficient in respect of voting at foreign representations, and this deficiency might result in a violation of the principle of secrecy during the next European Parliamentary elections. In view of the above, acting *ex officio*, the Constitutional Court has established that an unconstitutional situation violating the basic principle of election defined in Article 71 para. (1) of the Constitution has resulted from the failure of the legislator to include provisions guaranteeing the secrecy of voting in the regulations on voting at foreign representations. At

the same time, it has called upon the legislator to comply with its legislative duty as prescribed in point 1 of the holdings.

The Constitutional Court has ordered the publication of this Decision in the Official Gazette (*Magyar Közlöny*) with account to the wide scale of voting citizens affected.

Budapest, 13 September 2004

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