Decision 100/2007 (XII. 6.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a petition seeking establishment of an unconstitutional omission of legislative duty, the Constitutional Court has – with concurrent reasonings by *dr. András Bragyova* and *dr. András Holló*, Judges of the Constitutional Court, and a dissenting opinion by *dr. László Trócsányi*, Judge of the Constitutional Court – adopted the following

decision:

The Constitutional Court establishes an unconstitutional omission of legislative duty violating legal certainty as part of the rule of law and the constitutional provisions on the right to popular referendum by the failure of the legislation to regulate in Act III of 1998 on National Referenda and Popular Initiatives the procedure to be followed by the organ in charge of authenticating the sheets of signatures when new specimens of sheets of signatures are submitted in the same question prior to the authentication of the sheets of signatures (the case of competing referendum initiatives).

The Constitutional Court calls upon the Parliament to eliminate the unconstitutional omission by 31 March 2008. The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

The National Electoral Committee (hereinafter: the petitioner or the NEC) has submitted a petition to the Constitutional Court requesting establishment – under Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) – of an unconstitutional omission of legislative duty by the failure of the legislation to completely regulate in Act III of 1998 on National Referenda and Popular Initiatives (hereinafter: the ANR) the procedure to be followed by the organ in charge of authenticating the sheets of signatures underlying national referenda.

The petitioner holds an unconstitutional omission to exist in respect of the legislation's failure to "completely regulate in the ANR how the organ in charge of authentication is expected to proceed in

the cases similar to the one specified under Section 12 of the ANR but not enjoying the protection regulated there.”

Referring to the Constitutional Court’s opinion explained in Decision 57/2004 (XII. 14.) AB, the petitioner argues that Section 12 of the ANR pertains to the authenticated sheets of signatures as well as to the relevant questions, and consequently it does not regulate “the assessment of the initiatives under authentication and not yet being of final force.”

As referred to by the petitioner, the Constitutional Court has pointed out in the above decision that the authentication of a sheet of signatures is deemed to be completed upon the head of the National Electoral Office adding an attestation clause to the specimen of the sheet of signatures on the basis of Section 118 para. (1) of Act C of 1997 on the Election Procedure (hereinafter: the AEP). According to the relevant statutory provision under the AEP, the attestation clause can be added on the day when the defined time frame of legal remedy pursuant to Section 130 para. (1) has passed without any result, or, in the event of legal remedy, on the day the Constitutional Court's confirmatory decision on the attestation resolution is published in the Official Gazette of Hungary.

Consequently, as held by the petitioner, “no authenticated sheet of signatures” may be considered to exist beyond doubt prior to the above dates.

The petitioner holds that neither the Constitution nor the ANR empowers the organ applying the law by authenticating the sheets of signatures to refuse the authentication of another question on the ground of any temporal order or any other circumstance “in the case of an initiative of the same content received prior to the authentication of the original question with final force”.

According to the petitioner, due to the regulatory deficiencies of the ANR, “it would be possible to submit, even repeatedly, questions being identical even to the last word”, and “in the case of initiatives referring to the same subject but formulated differently, for different purposes, and equally resulting in successful referenda, the legislation would be in trouble establishing what the contents of the decision to be adopted should be”.

Having regard to the omission of legislative duty, the petitioner has alleged the violation of legal certainty [Article 2 para. (1) of the Constitution] and the political right to referendum as a fundamental right of the citizens granted in the Constitution.

II

1. The provisions of the Constitution relevant to the petition 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 70 (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, and furthermore to participate in national referenda or popular initiatives."

2. The provision of the ANR relevant to the petition is as follows:

"Section 12 If the National Electoral Committee has authenticated the sheet of signatures and the question, no new specimen sheet of signatures (Section 2) or a new initiative to hold a referendum (Section 9) may be submitted in the same question

*a)* until holding the referendum, or

*b)* until the refusal of the initiative, or

*c)* until the unsuccessful lapse of the period of time opened for the submission of the sheets of signatures."

**3.** The relevant provisions of the AEP are as follows:

"Section 118 (1) On the day when the defined time frame of legal remedy pursuant to Section 130 para. (1) has passed without any result, or, in the event of legal remedy, on the day the Constitutional Court's confirmatory decision on the attestation resolution is published in the Official Gazette of Hungary, the head of the National Election Office shall apply an attestation clause to the specimen of the signature-collecting sheet. The collection of signatures may be commenced with a copy of the signature-collecting sheet with the attestation clause applied to it."

"Section 130 (1) Objections against the resolution of the National Electoral Committee on the authentication of a signature-collecting sheet or on a concrete question may be filed at the National Electoral Committee – addressed to the Constitutional Court – not later than within fifteen days upon the publication of the resolution."

III

The petition is well-founded.

1. The Constitutional Court has dealt with the constitutional content of the rule of law – including legal certainty – granted under Article 2 para. (1) of the Constitution in several of its earlier decisions.

In the reasoning of its Decision 27/2007 (V. 17.) AB on petitions aimed at establishing an unconstitutional omission of legislative duty in respect of the ANR, having examined the constitutional relation between the statutory provisions regulating national referenda and the constitutional provision of legal certainty, the Constitutional Court recently pointed out the following:

"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 the 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 must 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 the national referendum – as a prominent constitutional legal tool of the direct exercising of power – to operate predictably, calculably and safely. (...) According to the Constitutional Court, neither the citizens entitled to initiate a national referendum, nor the Parliament in charge of the execution of the decision passed at a decisive national referendum should face any factor of insecurity which might pose a threat on the foreseeable, calculable and secure operation of the constitutional legal institution." (ABK May 2007, 387, 391)

2. Based on the petition, the Constitutional Court has to form an opinion in the constitutionality question whether the regulatory deficiency (default) mentioned by the petitioner does exist, and if it is considered to exist, whether or not the resulting unconstitutionality alleged by the petitioner can be established.

2.1. The Constitutional Court has first reviewed the relevant statutory regulations and its related practice about the Constitutional Court's competence of establishing an unconstitutional omission of legislative duty.

Section 49 of the ACC regulates the competence of the Constitutional Court concerning the establishment of unconstitutional omissions.

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 this statutory provision, the two conditions – the omission and the resulting unconstitutional situation – must 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 – 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, 231]

The Constitutional Court establishes an unconstitutional omission not only in the case of there being no regulation at all on a given subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205] but even if there is no statutory provision with a content deducible from the Constitution within 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 incompleteness of the content 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 1999, 52, 57]

**2.2.** The petitioner has challenged the incompleteness (defectiveness) of the regulation under the ANR due to its failure to regulate the process to be followed by the authenticating organ in the "practical" case expectable during the procedure of authentication when – in a question of the same content – new specimens of sheets of signatures or new initiatives to hold a referendum are submitted to the authenticating organ prior to the authentication of the sheets of signatures of a national referendum or of the question.

The petitioner holds the lack of the procedural rule to violate the constitutional provision of legal certainty as part of the rule of law due, on the one hand, to causing serious legal uncertainty in the judiciary and, on the other hand, to "making the unambiguity of the legislation doubtable".

As for the latter, the operation of the constitutional legal institution has been made unforeseeable, since – due to the defectiveness of the regulation – more than one national referenda may be held in the same subject, formulated in a contradicting manner, and the results of such referenda may cause an unpredictable situation for the legislation not knowing what the contents of the decision to be passed on the basis of the successful referenda should be.

2.3. On reviewing the ANR rules, the Constitutional Court has established about the regulatory deficiency challenged by the petitioner the following:

Under Section 12 of the ANR, referred to by the petitioner, the regulation prohibiting the submission — within the relevant statutory deadlines — of a new specimen sheet of signatures in the same question (Section 2 of the ANR) or a new initiative to hold a referendum (Section 9) is connected to the authentication of the sheet of signatures or the question by the NEC.

In Decision 57/2004 (XII. 14.) AB, referred to by the petitioner as well, the Constitutional Court interpreted the term "authentication" and the closing date of the authentication within the meaning of Section 12 of the ANR as follows: "As established by the Constitutional Court, the relevant provision of the ANR pertains, beyond doubt, only to the authenticated sheets of signatures and the authenticated question.

The authentication of a sheet of signatures is deemed to be completed upon the head of the National Electoral Office adding an attestation clause to the specimen of the sheet of signatures on the basis of Section 118 para. (1) of the ANR *[to be corrected to: AEP]*, as it is the precondition of starting the collection of signatures." (ABH 2004, 809, 815)

Under Section 118 (1) of the AEP, on the day when the defined time frame of legal remedy pursuant to Section 130 para. (1) of the AEP has passed without any result, or, in the event of legal remedy, on the day the Constitutional Court's confirmatory decision on the attestation resolution is published in the Official Gazette of Hungary shall the head of the National Election Office apply an attestation clause to the specimen of the signature-collecting sheet.

Under the second part of Section 118 para. (1) of the AEP, the collection of signatures may be commenced with a copy of the signature-collecting sheet with the attestation clause applied to it.

On the basis of the above, and upon reviewing the provisions of the ANR and the AEP, the Constitutional Court has established the existence of the regulatory deficiency challenged by the petitioner due to the failure of the ANR to regulate the process to be followed by the authenticating organ in the case when – in a question of the same content – new specimens of sheets of signatures (Section 2 of the ANR) or new initiatives to hold a referendum (Section 9 of the ANR) are submitted to

the authenticating organ prior to the authentication of the sheet of signatures underlying a national referendum or of the question.

3. As a result of the lack of a procedural rule, the organ authenticating the sheets of signatures may not refuse the authentication of the sheet of signatures or the question – on the ground of any temporal order or any other circumstance – prior to the authentication of the sheet of signatures or an initiative to hold a national referendum in the case of receiving new sheets of signatures or initiatives for holding a referendum, submitted in a question of the same content (hereinafter: the case of "competing" referendum initiatives).

The authentication of "competing" initiatives aimed at holding a national referendum may result in a situation where, on the basis of successful national referenda held in the same subject, but with questions formulated in a contradicting manner, the Parliament would not be able to implement the decisions passed at the national referenda binding the legislation.

The regulatory deficiency challenged by the petitioner also results in legal uncertainty for the organ applying the law by authenticating the sheets of signatures, as it would be unclear what procedural rule (principle of procedure) should be followed during the assessment of "competing" initiatives to hold a national referendum.

If in the absence of a statutory regulation to the contrary, the authenticating organ authenticates the specimen sheets of signatures and the questions in respect of each of the "competing" referendum initiatives, and a successful national referendum is held in all the authenticated questions, the lawful procedure by the authenticating organ (may) result(s) in incapacity to make a decision by the legislative body in charge of implementing the decisions by the referenda – as the legislation would/might be expected to implement decisions with contradicting contents.

In the opinion of the Constitutional Court, the regulatory deficiency challenged by the petitioner does– as explained above – endanger in the case concerned the foreseeable, calculable and secure operation of the constitutional legal institution of the national referendum to an extent which violates the constitutional requirement of legal certainty as an element of the rule of law guaranteed in Article 2 para. (1) of the Constitution.

The Constitutional Court reiterates its position elaborated in Decision 27/2007 (V. 17.) AB whereby legal certainty requires the institution of the national referendum – as a prominent constitutional legal tool of the direct exercising of power – to operate predictably, calculably and safely. (ABK May 2007, 387, 391) The above requirements resulting from legal certainty must be enforced in the procedure by both the organ in charge of authenticating the national referendum initiative and the legislative body bound to implement the decision made at the national decisive referendum.

The regulatory deficiencies found in the ANR with regard to not regulating the process to be followed by the authenticating organ in the procedure of authentication in the case of "competing" referendum initiatives are not considered constitutionally acceptable (due to the violation of the constitutional provision of legal certainty), and they are deemed to prejudice (or to make incalculable) the implementation by the legislation of the decisions passed at the successful national decisive referenda held on the basis of "competing" referendum initiatives.

As established by the Constitutional Court in Decision 52/1997 (X. 14.) AB, "the right to referendum as a subjective right extends to the initiation of a referendum, its support (including the signing of sheets and the gathering of signatures) as well as the participation in the vote.

Restricting this subjective right requires a provision in an Act of Parliament under Article 8 para. (2) of the Constitution, as already judged upon accordingly by the Constitutional Court in Case 987/B/1990/3 AB. (ABH 1991, 529)

According to the consistent practice of the Constitutional Court, however, every fundamental right entails not only an entitlement for a subjective protection but also an objective obligation of the State to provide the preconditions for the exercise of the right. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302, and Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171]

This institutional protection is particularly important in the case of referenda, as an institution serving the purpose of exercising popular sovereignty.

The constitutional requirement (measure) of the protection of the institution is not necessity and proportionality, but it accords to the realization of the constitutional function of the respective institution [see the constitutional requirements addressing the different forms of the media in Decision 37/1992 (VI.10) AB; ABH 1992, 227]." (ABH 1997, 331, 344)

In the opinion of the Constitutional Court – with due account to what has been explained in the reasoning of the decision mentioned above as well – the default by the legislation in the case under review also results in the violation of the constitutional fundamental right to the national referendum [Article 2 para. (2) and Article 70 para. (1) of the Constitution] in respect of the State (the legislation) not fully complying with its objective obligation to secure the conditions of exercising rights.

The Constitutional Court holds that securing the conditions of exercising rights includes the elaboration of the full scale of regulations to the extent necessary therefore.

In the present case, the default by the legislation in the case of "competing" referendum initiatives makes it unforeseeable for the persons initiating a national referendum whether their referendum initiative would/may reach the stage of holding a national referendum.

The default by the legislation (the resulting legal uncertainty) is an objective feature beyond the scope of the will of the persons initiating the national referendum that may threaten the very foundations of the enforcement of the essential content of the constitutional right: to allow that in the case of "competing" referendum initiatives, the referenda should be held on the basis of the initiatives, and the decisions adopted at the referenda should be suitable for implementation by the legislation.

Accordingly, the Constitutional Court has decided as laid down in the holdings, and it has determined a deadline for the legislation to eliminate the unconstitutional omission.

The Constitutional Court notes that with regard to the constitutional concern raised by the petitioner, it deems appropriate to review by the legislation all regulations in the ANR on the authentication process in order to have clear provisions - complying with the requirement of legal certainty in the case of both decisive and advisory national referenda and popular initiatives – regulating the process to be followed by the authenticating organ in the case of "competing" initiatives for referenda and popular initiatives.

In the above scope, the legislation should clearly define what to regard as questions of the same content, and what rule to follow by the authenticating organ during the authentication of questions of the same subject formulated in a contradicting way. The legislation should also regulate clearly whether a question already authenticated by the NEC can be withdrawn after authentication, and whether there is any legal consequence – and if so, what it is – of not performing the collecting of signatures based on a question already authenticated by the NEC. In addition, regulations should address the cases when the question initiated to be put on the national referendum is beyond doubt a "frivolous" one, contradicting the constitutional aim and the function of the national referendum.

In addition, the Constitutional Court holds it necessary – with due account to the unconstitutional omissions established in Decision 27/2007 (V. 17.) AB and in the present Decision – to review the full scale of the laws in force in the field of the constitutional institution of referenda so that the regulations destined to guarantee the enforcement of the constitutional fundamental right to referendum fully secure the enforcement of the constitutional fundamental right in compliance with the constitutional requirement of the rule of law (legal certainty).

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, 4 December 2007

*Dr. Mihály Bihari*
President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

*Dr. Elemér Balogh*
Judge of the Constitutional Court

*Dr. András Bragyova*
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*Dr. András Holló*
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*Dr. Péter Kovács*
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*Dr. István Kukorelli*
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*Dr. Barnabás Lenkovics*
Judge of the Constitutional Court

*Dr. Miklós Lévay*
Judge of the Constitutional Court

*Dr. Péter Paczolay*
Judge of the Constitutional Court

*Dr. László Trócsányi*
Judge of the Constitutional Court

Concurrent reasoning by *Dr. András Bragyova*, Judge of the Constitutional Court

I agree with establishing an unconstitutional omission, however, I would have done so on the basis of Article 28/B para. (2) of the Constitution.

1. In the constitutional system of the Republic of Hungary, the role of referenda (and of popular initiatives) is to enable the voting citizens to participate – in addition to the parliamentary elections to be held at regular intervals for the purpose of determining the composition of the Parliament and to set the main directions of its activity until the next elections – case by case in the direct exercising of legislative power. Referenda may be based on the individual decision of the Parliament and it may also be initiated by a significant minority of the voting citizens. In both cases, the constitutional function of the referendum is to enable the voting citizens to contribute to the fundamental decisions to be adopted by the Parliament in respect of questions pertaining to the whole political community and influencing the future of the State. Thus the constitutional role of the referendum is to supplement and strengthen

representative democracy: the referendum is a tool for cooperation and dialogue about the fundamental questions pertaining to the political community between the voting citizens and the Parliament representing them.

Consequently, in the Hungarian constitutional order, which is – according to the preamble of the Constitution – a "parliamentary democracy", the referendum is an institution of representative democracy, and therefore it may not be used for purposes contradicting, or being incompatible with, the essence of constitutional democracy, i.e. the constitutional structure. As the primary guarantee thereof, only the Parliament may order to hold a supportive referendum about the amendment of the Constitution. [Decision 25/1999 (VI. 7.) AB, ABH 1999, 251, 260] The legislative power determining the Constitution [Article 2 para. (2) of the Constitution] may not be exercised solely by way of popular referenda.

2. In my opinion, the main cause of the unconstitutional omission is the failure of the legislation to regulate exhaustively, i.e. covering all questions, the institution of the referendum in line with the whole of the Constitution (including its principles). All conditions of establishing an unconstitutional omission have been met.

The rules pertaining to the institution of the referendum are laid down partly in Articles 28 to 28/E of the Constitution and partly in the ANR. In my opinion, the unconstitutional omission by the legislation can be based on Article 28/B para. (2) of the Constitution, according to which the "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". This way, the Constitution empowers the legislation to regulate in an Act of Parliament all questions about referenda not regulated in the Constitution. Thus the authorization under Article 28/B para. (2) of the Constitution is a broad one, extending to all rules necessary for the operation of the constitutional institution of the popular referendum – together with the ones laid down in the Constitution. According to the Constitutional Court's practice, the legislative authorisation given in the Constitution – provided that it is necessary for supplementing the Constitution or for the enforcement of certain regulations of the Constitution – is to be regarded at the same time as a constitutional obligation. [see in: Decision 1621/E/1992 AB, ABH 1993, 765, 766]

Accordingly, the Constitutional Court should have established an omission concerning the whole of the ANR, obliging the legislation to re-regulate the institution of referenda. The deficiencies listed in the decision collectively result in the unconstitutionality of the whole regulation, i.e. the ANR as a whole.

The cause of the unconstitutionality is the lack of the regulations absolutely necessary for the regular operation of popular referenda as a constitutional institution.
The Act is made unconstitutional by what is missing from it, and therefore an unconstitutional omission should have been established concerning the whole Act of Parliament.

Budapest, 4 December 2007

*Dr. András Bragyova*
Judge of the Constitutional Court

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

I agree with the holdings of the Decision and with noting in principle that in addition to the elimination of the unconstitutional omissions established in the Constitutional Court previous [Decision 27/2007 (V. 17.) AB] and present decisions, it would be justified to review the "whole" of the regulations ("the laws in force") pertaining to referenda as a constitutional institution. The examples mentioned in the Decision are additional deficiencies of the regulation, not qualified in the Decision (*ex officio*) as unconstitutional omissions, and they are convincing arguments in support of a comprehensive review of the ANR. The review based on the authorisation provided in Article 28/B of the Constitution is within the legislation's freedom granted in the constitutional framework. This means that the interpretation of the law provided by the Constitutional Court acting in the position of providing legal remedy – i.e. not the interpretation of the Constitution provided in the competence of safeguarding the Constitution – may influence the legislation when reviewing the law, but it may also adopt different rules as well.

I hold that the recommendations for the legislation given in the Decision should have made reference to that aspect, too. The Decision has referred to Decision 57/2004 (XI. 14.) AB, quoted by the petitioner as well, as the interpretation to be followed with regard to Section 12 of the ANR.
When remedying the regulatory deficiency having resulted in the unconstitutional situation – and aiming to prevent the starting or the parallel processing of an authentication procedure in a question of the same content prior to authentication – it may become necessary to apply an interpretation of authentication (its "closing date") other than the one presented in the Constitutional Court decision referred to above. (The start of protecting the question to be authenticated and the start of collecting signatures do not necessarily concur during the procedure.)

The decision should have made reference to the legislator's freedom in that respect as well.

Budapest, 4 December 2007

*Dr. András Holló*
Judge of the Constitutional Court

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

I do not agree with either with the holdings or the reasoning of the Decision, as the petition should have been rejected for the lack of an unconstitutional omission.

1. The Constitutional Court has elaborated in details in its earlier decisions the criteria based on which the violation of the Constitution may be established due to an omission under Section 49 of the ACC. The two conditions regulated in Section 49 of the ACC are conjunctive, i.e. the omission of the statutorily required legislative obligation and the resulting unconstitutional situation must exist jointly. In the lack of either of the conditions, an unconstitutional omission of legislative duty may not be established. An unconstitutional omission may be established when the demand for adopting a legal regulation is the result of the State's statutory intervention into certain situations in life, thus depriving some of the citizens of their practical potential to enforce their constitutional rights. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 1395/E/1996. AB, ABH 1998, 667, 669]

Similarly, an unconstitutional omission of legislative duty may be established in the lack of the statutory guarantees necessary for the enforcement of a fundamental right. [Decision 37/1992(VI. 10.) AB, ABH 1992, 227, 231] The situation described in Section 49 of the ACC may also be established if there is a rule on the given regulatory subject but it fails to contain the norm deducible from the Constitution. [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128, Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138-139] Even when an unconstitutional omission is established due to the incompleteness of the 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 1999, 52, 57]

Accordingly, an unconstitutional omission may only be established if – due to any of the above reasons – there is a regulatory deficiency reaching the level of violating the Constitution. In such case

the Constitutional Court is bound to perform a thorough examination in order to "find" the rule within the existing regulatory concept and to determine the constitutional requirements. The Constitutional Court may not leave to the legislation the obligation to adopt a new and better formulated regulation in the case of each unclear rule. First, the contents of the regulatory framework pertaining to the life situations concerned must be analysed. If, upon such an examination, the Constitutional Court concludes that in fact there is no rule applicable to the given situation, and the lack of regulation results in unconstitutionality, an unconstitutional omission of legislative duty is to be established. The Constitutional Court shall examine the whole of the regulatory concept and the system of the norms and not only the norms directly applicable to the situations of life. The totality of the legal system is to be analysed as a unity, in order to find the rule or to declare that there is no such rule. [*c.p*. for example, Decision 40/2007 (VI. 20.) AB, ABK June 2007, 539, 549]

In the present case, as there is a rule within the regulatory concept applicable to the given situation of life, the establishment of the omission is – in my opinion –unjustified.

2. Accordingly, I hold that on the basis of the above, the Constitutional Court could have performed more investigation in many aspects to find the rule applicable to competing referendum initiatives.

2.1. I hold that for the purpose of handling the case of competing questions, the test of clarity, elaborated earlier and applied regularly by the Constitutional Court, should have been developed further, with particular regard to the fact that the Constitutional Court has already expressly referred to the need for such development in Decision 26/2007 (IV. 25.) AB. As declared by the Constitutional Court, "it is the essence of the requirement of unambiguity that the referendum question be suitable for decision-making, of which clarity in respect of both the legislation and the voters is an absolutely necessary but not the only precondition. Compatibility with the constitutional function of the referendum is examined by the Constitutional Court as part of the unambiguity of the referendum question and it is reviewed case by case. (...) As held by the Constitutional Court, it is also part of the requirement of unambiguity that the obligation of making a decision as contained in the referendum question should not be infeasible, unexecutable or incalculable with regard to its consequences. Therefore, in the future the Constitutional Court shall take this aspect into account in the assessment of the constitutionality of specific referendum questions. (ABK April 2007, 332, 334) Today, there is a new situation developed in the field of referenda: the NEC and the Constitutional Court have to face a "referendum dumping". This is why we have to pay special attention to the threat – on the level of both the legislation and the voters – posed to the requirement of clarity under Section 13 of the ANR by the

initiatives submitted at a short interval after each other, in the same subject, with questions of the same content, or even of contradicting contents. In my opinion, as an unavoidable consequence, competing questions should be assessed by the forums in charge by taking all of them into account, and therefore the test of clarity should be extended to the clarity of the competing questions examined jointly. Although a question may be clear when examined in itself, when assessed jointly with another question of the same content or of contradicting contents, it might fail to pass the test of clarity, and as a consequence, in such cases the authentication of all the questions may not be possible.

2.2. Based on the requirement of joint examination, in the case of competing referendum initiatives, special attention is to be paid to the rule of chronological order under Section 12 of the ANR. If the forum in charge of assessing the questions establishes that they mutually exclude each other at the test of joint clarity for the legislation and/or the voters, it is necessary to decide which of the two or more competing questions (individually suitable for authentication) should be the one to be authenticated .

Under Section 12 of the ANR, "If the National Electoral Committee has authenticated the sheet of signatures and the question, no new specimen sheet of signatures or a new initiative to hold a referendum may be submitted in the same question until *a)* holding the referendum, or *b)* the refusal of the initiative, or *c)* the unsuccessful lapse of the period of time opened for the submission of the sheets of signatures."

The "authentication" mentioned in the statute is a moment. According to the Constitutional Court's position elaborated in Decision 57/2004 (XII. 14.) AB, the authentication mentioned in Section 12 of the ANR is the moment when the National Electoral Office (hereinafter: the NEO) applies the attestation clause to the specimen sheet of signatures assessed by the NEC – and, if appropriate, in the appellate procedure by the Constitutional Court. (ABH 2004, 809, 815) I hold that the Constitutional Court should review its former decision, as the Constitutional Court has already departed from some of its earlier precedents in justified cases: for the last time in Decision 27/2007 (V. 17.) (ABK May 2007, 387, 393).

In my view, the statute clearly defines the moment of authentication: it is when the "National Electoral Committee has authenticated" the specimen. Neither Section 12 nor any other Section of the ANR allows us to conclude that the date of authentication would be the date when the clause is issued by the NEO.

In my opinion, the moment of authentication (the moment of time specified in Section 12 of the ANR) must be clearly distinguished from the future of the sheet of signatures and of the resolution authenticating it. Under Section 130 of the AEP, legal remedy may be sought against the authenticating

resolution by the NEC, and under Section 118 para. (1) of the ANR, on the day when the defined time frame of legal remedy has passed without any result, or, in the event of legal remedy, on the day the positive decision on the attestation resolution is published, the NEO shall apply a clause to the signature-collecting sheet already authenticated by the NEC. The final legal force of the authenticating resolution does not coincide with the adoption of the resolution – with the moment of authentication – and it may not be identified with that. Even less would it be possible to identify the authentication itself with the moment of adding the attestation clause, which merely verifies the final force in an administrative manner.

These posterior events do not affect the moment in time when authentication within the meaning of Section 12 of the ANR took place, as it can be clearly defined.

2.3. As pointed out in reasoning of the majority Decision, there are no regulations to address the cases "when the question initiated to be put on the national referendum is beyond doubt a »frivolous« one, contradicting the constitutional aim and the function of the national referendum". Another unregulated case mentioned in the Decision is when, after having the signature-collection sheet authenticated, the petitioners decide not to collect the signatures.

In my opinion, it would not be absolutely necessary for the legislation to regulate in more details the issues raised, as the questions could be answered by examining Section 3 item *d)* of the AEP.

As I have mentioned above, the NEC and the Constitutional Court have to face a new situation in respect of national referendum initiatives. Never before has the issue of the inappropriate exercising of rights been raised so urgently, with particular regard to the fact that there have been only five national referenda since the transformation of the regime. There have been no *en masse* attempts so far to use this institution contrary to its social purpose, and thus, until now no relevant constitutional requirement has been elaborated. Nevertheless, I agree that the new situation urges the Constitutional Court to address this problem and to develop the constitutional requirements related to this field.

As the authentication procedure implemented by the NEC in respect of national referenda is a kind of election procedure, the AEP and its Section 3 item *d)* applies to it as well as to any other election procedure. [*c.p*. Section 2 item (e) of the AEP] The examination of the appropriateness of the exercising of rights and making a decision based on it is not at all unprecedented in the history of the legal remedy procedures related to election procedures. Against the resolutions of the NEC (with the exception of the case regulated under Section 130 of the AEP) a bill of review may be filed at the Supreme Court [Section 83 para. (7) of the AEP]. The Supreme Court shall act as the appellate forum for the decisions of the NEC, and it shall review the decisions of the NEC with account to all

circumstances of the case, in accordance with the relevant laws. The applicants often refer to the violation of the provisions under Section 3 item *d)* of the AEP, and the Supreme Court regularly examines the applications filed on this basis (e.g. BH2004 299, BH2006 230, BH2006 232).

In the cases related to national referenda the Constitutional Court's role is twofold. On the one hand, it is in charge of reviewing the unconstitutionality of the laws related to referenda within its competence of protecting rights and, on the other hand, it is an appellate forum in respect of the NEC's resolutions related to authentication. In these cases, it must exercise both functions on equal rank. The above duty of the Constitutional Court is very much similar in this respect to the function of the Supreme Court: as an appellate forum it must review the NEC's resolution passed in the election procedure; the only difference is in the contents of the challenged resolution. Thus, in the decisions related to national referendum initiatives, both the NEC and the Constitutional Court – as the appellate forum of the NEC – must enforce during its procedure the provisions under Section 3 item *d)* of the AEP.

The same requirement follows from the principles determined by the Constitutional Court earlier in Decision 32/2001 (VII. 11.) AB, (ABH 2001, 287, 294-295) and Decision 26/2007 (IV. 25.) AB, (ABK April 2007, 332, 334).

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