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REFERENDUM AND REPRESENTATIVE DEMOCRACY*

The introduction of seven referendum questions by the Hungarian opposition parties Fidesz and KDNP on 23rd October 2006 marked the beginning of a new chapter in the relationship between direct and representative democracy in the constitutional history of the post-regime transition era. These initiatives were openly aimed at discrediting the government with extra-parliamentary instruments. All referenda debates in the post-transition period have affirmed the fact—considered a commonplace—that this legal institution of popular sovereignty can be an efficient instrument for attaining political objectives. This was indeed the case several times since the beginning of transition, first with the "four times yes"[1] referendum, the result of which exerted a significant impact on the course of the ongoing transformations. This is the first time, however, when the initiators sought to use referenda to bring down a government. The politicisation of plebiscites was of course helped in no small measure by the circumstance that in the framework of continuously ongoing constitutional legislation the place of referenda in the new constitutional order was never clarified and, moreover, the legal regulation of referenda—starting with the first statutory provision in 1989 all the way to the constitutional amendment adopted in 1997—never ranked among the most successful legislative outputs. The recent political and constitutional law debate, which that lasted over a year, grew acrimonious in the process and challenged the authority of several constitutional institutions, did nevertheless yield two benefits. One is that the National Election Commission (OVB) and the Constitutional Court (AB), which engaged in bitter debates regarding the certification of specific referendum questions, arrived at the joint position that the several deficiencies of the referendum law constitute an unconstitutional omission. In response to the OVB's motions, the Constitutional Court obliged parliament to redress these deficiencies, and due to the political gravity of these issues for all political parties, the requested amendments took place at the end of 2007. Another beneficial outcome of this unfortunate conflict is that an investigation exploring the relation of representative and direct democracy in the domestic political and constitutional system commenced in the columns of several daily and weekly newspapers. The most fruitful of these debates was probably the one which began and concluded with a writing by János Kis in Népszabadság.[2] Before discussing the theoretical questions raised by this debate, it is worth recalling the constitutional provisions on referenda after 1989 and their interpretation by the Constitutional Court.

THE CONSTITUTION, THE PRACTICE OF THE CONSTITUTIONAL COURT AND THEIR INTERPRETATION

The fundamental theoretical question regarding referenda is how they, as manifestations of popular sovereignty, relate to representative democracy, the other form of popular power. The text of the Constitution, which was comprehensively amended in 1989, established that "in the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives." The Constitutional Court first interpreted this passage in its decision 2/1993. (I. 22.) AB, wherein it held: "In the constitutional order of the Republic of Hungary the primary form of exercising popular sovereignty is representation." This approach essentially reflects the liberal position that in a democratic state governed by rule of law the power derived from the people is exercised through constitutional organs, primarily representative bodies. Acknowledging this constitutional interpretation, I believe it is not worthwhile to address those "theoretical" views which argue that the two forms of expressing popular will are equal in rank, since these formulate an approach that is outside the pale of the current constitutional system.[3]

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This was the interpretation from which the Constitutional Court later derived its answer to the often posed question as to whether a constitution adopted by parliament can be amended by way of a popular referendum. The response of the Constitutional Court judges was a ban on referenda seeking to amend the Constitution: "A referendum can decide issues falling under the authority of the National Assembly only within the framework of the Constitution and the laws adopted in compliance with the Constitution. The exercise of rights derived from popular sovereignty either through the National Assembly or through a referendum can only take place in accordance with the provisions of the Constitution. A question put forth in a referendum may not contain a concealed constitutional amendment." Based on the above-cited approach concerning the relationship between representative and direct democracy, it is easy to see that this reasoning is sound. If namely an article of the fundamental laws is modified by the way of a referendum then in the future there is no basis for preventing changes in another passage of the Constitution. And thus within a brief period of time the entire Constitution can be replaced—naturally without regard for whether the individual amendments are consistent with each other. If this can be done then the power to draft a Constitution no longer rests with the National Assembly, but through the referendum it is entrusted directly to the totality of the voting public. Our fundamental laws, however, have entrusted the National Assembly with the power to change the Constitution.

A solution that would allow for amending the Constitution through referenda would—almost imperceptibly—gradually lead to our gliding into a constitutional system that is without precedent in modern constitutional democracies. (The only exception to this is the Swiss constitutional model, which is built on the primacy of direct democracy. But even in Switzerland the Federal Assembly, which is the body entrusted with the authority to amend the federal Constitution, may undertake to draft a counterproposal if it is not in accord with a constitutional amendment foisted upon it by the way of a referendum, and it may submit this proposal for approval by the people and the cantons.) If we scratch the surface of this interpretation of popular sovereignty we will see that it is based on the misconception that the people are not merely the source but at the same time also the subjects of state sovereignty.

At the same time it appears that the constitutional amendment of July 1997 changed the current text of the Constitution in a way that exactly contravened the Constitutional Court's understanding laid down in 1993. Article 28/C (5) lists the constitutional provisions on national referenda and popular initiatives among those issues that may not be subject to a referendum. Plain logic will easily lead to the conclusion that if the constitutional legislator expressly forbids holding a referendum on these provisions, then she sought to allow holding a referendum on all other passages of the Constitution. However, this apparently evident interpretation—which has not been affirmed by any body authorised to interpret the Constitution, though—not only contradicts the aforementioned Constitutional Court decision of 1993, which was handed down before the amendment in question, but also numerous decisions subsequently written by the Court, most crucially Constitutional Court decision 25/1999. (VII. 7.) AB. The antecedent of this decision was the OVB's—which was considerably more referendum friendly at the time than it is today—ruling that certified the referendum question on amending the constitutional provisions regarding the election of the President of the Republic. The OVB grounded its decision in the fact that since July 1997 the passage according to which the only provisions of the Constitution that may not be subject to a referendum are those on referenda and popular initiatives has been part of the Constitution. At the same time the petitioners invoked the 1993 Constitutional Court decision.

The situation was further complicated by the fact that the Constitutional Court's decision 52/1997. (X. 14.) AB—concerning a referendum initiated by the Government on the possibility of land ownership by foreign citizens, which sought to pre-empt a referendum on the same question initiated earlier by voters—contained a somewhat different understanding of the relationship between representative and direct democracy than the abovementioned 1993 decision. From the same constitutional provision from which they had previously deduced the primacy of representative democracy, the Constitutional Court justices arrived at the interpretation that even though "the direct exercise of power is an exceptional form of exercising popular sovereignty, in the exceptional cases when it is actually realised it stands above the exercise of power through representatives."

András Körösényi uses this diversion in the Constitutional Court's practice against Kis's reasoning, arguing as follows: Kis disregards Constitutional Court decisions that do not fit his line of thought, primarily the Court's decision 52/1997. (X. 14.) AB, which states that "with regard to a

given referendum question the National Assembly is relegated into an executive role".[4] Yet Körösényi for his part disregards that the subject matter of this decision—which undoubtedly contains several unfortunate formulations—concerns the relationship between the so-called mandatory referendum, initiated by the populace with 200 000 signatures, and the so-called facultative referendum, set on its path either by the government, the President of the Republic, or 100 000 signatures by citizens eligible to vote. In the decision at hand the Constitutional Court determined the primacy of the former over the latter.

In 1999 the Constitutional Court judges therefore had several potential solutions available to them in formulating their decision. One solution was to choose between contradictory constitutional provisions and to settle the issue. A less activist solution would have been for the Court to avoid a decision and to call on the constitutional legislator to resolve the contradiction in the Constitution instead. And what did Constitutional Court decision 25/1999. (VII. 7.) AB contain instead? First of all the assertion that in its decision of October 1997, the Court had not altered its position regarding the relationship between the exercise of power by means of representation or by the way of referendum. (This is all the more curious since the decision of 1997 explained the shift in the Constitutional Court's position with reference to the amendment in the Constitution that year). In other words in 1999 the Constitutional Court judges reverted back to their 1993 position, not only by treating the 1997 constitutional text as non-existent, but also by ignoring their previous decision based on that text.

A central element of the Court's reasoning in the decision is that generally the Constitution cannot be amended by the way of a referendum—and hence, naturally, the same applies for the rules pertaining to the election of the president of the republic—because the drafting and amendment of the Constitution belongs in the National Assembly's authority. "It follows that the Constitution cannot be amended—on the basis of a voter initiative—through a referendum"—the Constitutional Court's reasoning states. In the final part of its opinion, the Court excludes the procedure whereby the president is elected from the range of questions that may be subject to a referendum because this—as an issue in the National Assembly's exclusive legislative authority—would constitute a change in the constitutional order. A blemish in the Court's otherwise accurate reasoning is that it appears to contradict the Constitution's—undeniably misguided—text, which regrettably failed to list the amendment of the Constitution in general as an issue that may not be subject to a referendum.

Nevertheless, my opinion is that János Kis overstates the conclusions from the Constitutional Court's 1999 decision, which returned to the correct principles of 1993, when he goes as far as to argue that our Constitution does not grant any independent authority to referenda, that its result is never the law and that it only leads to legal consequences in that it places an obligation on the National Assembly. The "jurisdiction" of a referendum—with the exception of the banned topics listed in the Constitution and the constitutional amendment that emerges from the Constitutional Court's practice—happens to coincide with that of parliament, which the Constitution's paragraph 28/B (1) lays out by asserting that " [t]he subject of national referenda or popular initiatives may fall under the jurisdiction of the Parliament." A successful referendum will generally result in an obligation on parliament, and the question of how representatives might be obligated to vote into law a bill reflecting the contents of the referendum's text is a separate issue. This does not remove their obligation, however. Kis's reasoning, which argues that the referendum does not bind the representatives, is therefore incorrect. The provision in the Constitution's paragraph 28/C (3), according to which "[i]f a national referendum is mandatory, the result of the successfully held national referendum shall be binding for the Parliament", cannot be understood otherwise. As I just noted, it is an entirely different matter how this obligation can be enforced. We cannot claim that the representatives are not bound by the Constitution, even though they often violate its provisions and/or principles—on occasion even deliberately.

Nor is Kis's analogy correct in asserting that when the Constitutional Court obliges the legislator to redress an unconstitutional omission, then it does not mandate the substance of the law to be created because it would thereby violate the independence of the representatives. Let us consider the first decision in the history of the Constitutional Court when an unconstitutional omission was made out, decision 32/1990. (XII. 22.) AB, in which the judges obliged the National Assembly to regulate by law the contestability of administrative decisions. Parliament could not have fulfilled its obligation by, say, installing another administrative appeals forum. Only opening up a judicial route satisfied the Constitutional Court's decision—regardless of whether the representatives would have been pleased with the previous solution.

János Kis only allows one instance in which a referendum ordered pursuant to a citizens' initiative—that is a mandatory referendum—obliges representatives: if the objective of the referendum is to stop legislation. He agrees that such a referendum does not violate the independence of representatives. Though he does not provide a reason why this is any less of a violation of the autonomy of those representatives who wish to pass a law, the more important counterargument is that neither the Constitution nor the law on referenda recognises the distinction between a referendum directed at inducing legislation and those aimed at stopping it. Hence drawing a distinction in their respective binding force is hardly justifiable on legal grounds.

One of the main deficiencies in the 1989 legal regulation of referenda was precisely that it made fulfilling the conditions for the mandatory proclamation of a referendum so easy. After all, there is hardly any even moderately popular objective for which a hundred thousand signatures would have been impossible to collect. And as a result, in spite of the principles following from the Constitution, the referendum is inevitably strengthened vis-à-vis representative democracy. In other words the Sword of Damocles hung above nigh all acts adopted by the legislature. Neither the 1997 constitutional amendment nor the subsequent 1998 legal regulation fundamentally changed this, at most it significantly reduced the chances of success for civic initiatives by raising the number of signatures to 200 thousand. But for political parties, which have significant social support, collecting even this number is not much of a challenge. Thereby referenda became almost exclusively party political instruments used by the opposition, they emerged as the most potent right of the parliamentary minority—moreover, they fulfil this purpose on the constitutional level now.

The aforementioned hiatus of the legal regulation as well as the Constitutional Court's shifting practice had the effect that the referendum—which in a constitutional state governed by rule of law is not an omnipotent, but also not an insignificant instrument of popular sovereignty that may be used within the boundaries established by strictly defined legal criteria—may on the one hand become a political tool as a result of the uncertainty inherent in the constitutional provisions and the legal regulations deriving therefrom, and may at the same time emerge as an instrument of political activism by the Constitutional Court because of the lacking theoretical guidelines for its use.

THE DIVERGING ASSESSMENTS OF REFERENDA QUESTIONS AIMED AT "BRINGING DOWN THE GOVERNMENT"

It was amidst this slightly uncertain constitutional and legal regulation and the unsteady Constitutional Court practice that the leader of the opposition announced on 23rd October 2006 the so-called "seven times yes" referendum proposal, designed as a new strategic instrument of the Fidesz–MPSZ and the KDNP to bring down the government, following the failure of the previously tried street politics. The referendum aimed at undermining certain—obviously unpopular—elements of the government's programme, some of which were already encapsulated in the budget bill. In its decisions rendered on the 20th and 21st November 2006, the National Election Commission refused to certify four of the questions and allowed three initiatives to proceed. Objections were submitted to the Constitutional Court in connection with all seven decisions.[5] In its decision published on 9th March 2007, the Court upheld all three OVB decisions approving referenda questions, as well as two of those denying the approval of initiatives, while simultaneously striking down the two other denials and instructing the OVB to undertake a new proceeding regarding those two.

Tuition fees—the first round

One of the annulment rulings, Constitutional Court decision 15/2007. (III. 9.) AB, concerned the question on the financial contribution of students to their education, in other words tuition fees. In its decision 566/2006. (XI. 20.) OVB, the OVB had refused to certify this question citing point f) of the Constitution's Article 28/C. (5), which rules out a referendum on the government's programme. This prohibition does not merely mean that the specific document in its entirety may not be subject to a referendum, but that individual, clearly discernible elements thereof may also not be voted on in referenda. The OVB also noted that on the basis of the constitutional provisions in force regarding referenda, it is impossible to determine how long the result of a referendum would bind the legislature. Hence a successful referendum may potentially result in a concealed constitutional amendment, in as far the regulation of the issue—as an "issue exclusively subject to referenda"—would henceforth be removed from the jurisdiction of the National Assembly.

The initiators of the referendum filed an appeal against the OVB's decision. In their appeal they argued that only the government programme in its entirety is protected by the constitutional ban, but not its individual parts. They further pointed out that the regulatory deficiencies of a legal institution may not be the object of examination in a proceeding directed at certifying a referendum question; therefore a specific referendum may not be halted on the grounds that potential constitutional problems arose with regard to the regulation of the institution of referendum.

The Constitutional Court first of all held that the areas that may not be subject to a referendum based on Article 28/C (5) need to be construed restrictively. The Court argued furthermore that it is necessary to be mindful of the particularities of the form of government. As a result of our parliamentary form of government, a referendum on the government's programme would weaken the constitutional position of the government and the prime minister. The National Assembly adopts the government's programme and simultaneously elects the prime minister in one vote, and thus a referendum on the government's programme inevitably affects the prime minister's person. The inclusion of the government's programme among the prohibited subject areas therefore substantially serves the purpose of ruling out a referendum on the prime minister's person. It follows from the above that even though no referendum can be held on the government programme in its entirety, its individual parts may be subject to referenda initiatives since they do not affect the structural relations between prime minister, government and the National Assembly.

Nor did the Constitutional Court share the OVB's concerns regarding a concealed constitutional amendment, since a successful referendum would not result in the National Assembly facing a legislative obligation that it can only meet by amending the Constitution.

In his concurring opinion Judge András Holló differed from the Court's position and argued that in his view neither the government programme in its entirety, nor its individual elements may be subject to a referendum. At the same time, individual elements of the implementation of the government's programme, which fall into the National Assembly's authority, may be voted on in a referendum. This is why the issue of the tuition fee could be decided by a referendum. Justice András Bragyova, however, believes that the OVB's decision should have been upheld. In his dissenting opinion he expounded on why a referendum on the subject of tuition fees cannot be held for three distinct reasons. In addition to touching upon the government's programme, it does not belong in the National Assembly's authority and also affects the contents of the budget act. His position is that the form of government leads to different conclusions than those laid out by the majority. In a parliamentary democracy, the government's programme expresses the constitutional relationship between the National Assembly and the government, it encompasses the constitutional-political content of "confidence" and the notion that in the realisation of its objectives the majority of the National Assembly—legally this is the National Assembly's decision [Article 24 (2) of the Constitution]—supports the government. And none of the elements of the relationship between the National Assembly and the government belongs among those issues that may be decided by referendum. This follows from a principle established by the Constitutional Court long before, namely the primacy of representative democracy. Moreover, as a consequence of the principle of free mandate a successful referendum is only binding for the National Assembly as an organ of state.

The individual representative is not obligated to vote in a prescribed manner. Thus (in this sense) the result of the referendum creates a political obligation for the National Assembly just as the government programme does (which is also not binding in a legal sense). A successful referendum would compel the majority of representatives to adopt a decision that is exactly the opposite of the one they assumed obligation for by voting for the government's programme. In András Bragyova's view a referendum question seeking to oblige the National Assembly not to do something—that is not to decide—is impermissible, since a referendum question can only limit the National Assembly's authority in individual, specified decisions and not in an unspecified subject matter and indeterminate number of future decisions. A referendum question therefore needs to delimit a specific obligation met in a single instance through one act of the National Assembly. The National Assembly cannot take the referendum result as a grounds for prohibiting either itself or any future National Assembly to restore the tuition fee. This is not part of the legislature's right. On the contrary, it would mark the removal of a legislative authority. In addition, Bragyova argues that the students' financial contribution is an allocation in the budget's revenue plans and hence a referendum on this subject is inadmissible based on paragraph a) of the Constitution's Article 28/C. (5).

Doctor's fees—first round

The second injunction ordering the OVB to undertake a new certification procedure was submitted in Constitutional Court decision 16/2007. (III. 9.) AB regarding the doctor's fee. In its decision 568/2006. (XI. 21.) the OVB had justified its refusal to certify the sample signature sheet in this case on the grounds that the question pertains directly to the budget and is therefore in conflict with the Constitution's Article 28/C. (5) paragraph a), in view of the fact that the budget bill for the year 2007 (T/1145) already planned an intake of 22 billion forints from this levy for the benefit of the Health Insurance Fund. The initiators of the referendum appealed the OVB's decision. In their view a successful referendum would not causally result in modifying the budget act, nor did the question aim to achieve that in the future citizens determine individual expenditures in the budget act. Hence the OVB should have certified the question.

In repealing the OVB's decision, the Constitutional Court argued that it had already explained in its decision 51/2001. (XI. 29.) AB that the subject matters that may not be put to a referendum must be construed narrowly. It follows that the provision in the Constitution's Article 28/C. paragraph (5) point a) removes the contents of the budget act and the act on the implementation of the budget from the purview of referenda. Therefore a question may not be put to a referendum if it contains an amendment of the budget act or if it were to inevitably result in changing a law that falls within the prohibited subject areas. The Court notes in its opinion that it decides on a case-by-case basis whether the given referendum question has a direct and substantive impact on any individual income or expenditure item in the budget act.

The Constitutional Court noted that at the time of the OVB's decision the budget act had not made provisions regarding the doctor's fee, the item only appeared in the appendix to the budget bill. There are no grounds for denying the certification of sample signature sheets with reference to future budgets or to budget proposals. Following the guidelines of the Constitutional Court judges, the OVB needs to examine whether the referendum affects the already enacted budget allocations.

Judge András Bragyova once again disagreed with the annulment of the OVB's decision. In his dissent he argued that regardless of the provisions of the budget act there can be no referendum on the issue of the doctor's fee, since such a referendum would necessarily conflict with the Constitution's Article 28/C. (5) (a). In Bragyova's view assessing whether or not the issue of the doctor's fee may be put to a referendum depends on how we define the terms budget and doctor's fee. His opinion is that if we start from the generally accepted definition that the budget is an itemised list of the state's intakes and expenditures for a specified period of time, then by the content of the budgetary act we mean anything that touches on the budget's revenue or expenditure claims. The budgetary cycle is continuous—this is concomitant to the state's way of operation—and hence it cannot be identified with a law or laws in effect at any given time. The doctor's fee creates a revenue claim and thereby directly influences the budget's balance. It follows therefore that the referendum question by its very nature addresses an issue that affects the content of the budget as it is construed above, regardless of how it pertains to the current statutory legal situation.

As we thus observed above, the annulment in the case of the doctor's fee occurred only on formal grounds. The Constitutional Court's annulment decision argued that the budget act that contained the doctor's fee and therefore served as the basis for refusing to admit the referendum question was only a bill awaiting adoption by the National Assembly at the time of the OVB's decision. The bill was in fact passed before the Constitutional Court submitted its decision. Obviously sensing that following the Constitutional Court's decision the OVB's refusal to certify the question would be a mere formality, the initiators withdrew their question. At the same time, shortly thereafter they replaced it with a slightly reformulated question that only sought to prohibit levying a doctor's fee from the first of January of the year following the referendum, and they also augmented this question with another question proposing a ban on the hospital fee.

The OVB therefore had to argue again the three questions that were most important with regard to the objective of bringing down the government: the issue of the student contribution to higher education (tuition fee), the doctor's fee and the closely related hospital fee. In the latter two it had to decide the same issue with identical reasoning.

Tuition fees—second round

After a repeated proceeding, the OVB issued its decision 105/2007. (III. 29.), wherein it once again refused to certify the sample signature sheet. The Commission based its decision on Article 28/C. paragraph (5) point a), which prohibits a referen-

dum on the budget. Though the tuition fee is an income that accrues directly to the institutes of higher education, its abolition would necessitate funds from the central budget to offset the losses incurred by these institutions in order to preserve the viability of their operation. In the opinion attached to its decision, the OVB reiterated its position that a successful referendum would result in the amendment of the Constitution.

The OVB's negative decision was once again appealed. The appellants explained that the OVB ought not have referred to such grounds for refusal which it had failed to invoke in its first decision. In their view the issue does not directly impact the budget, and as far as the argument regarding the concealed constitutional amendment is concerned, it had already been adjudicated by the Constitutional Court.

In decision 32/2007. (VI. 6.) AB, the Constitutional Court first reviewed its own practice regarding the budget as a prohibited subject matter for referenda. As a result of this exercise it arrived at the conclusion that in this case it must be determined whether the referendum question aimed at abolishing the tuition fee contains an amendment of the current budget act (Act CXXVII of 2006), or whether it inevitably necessitates the amendment of that law. In the Constitutional Court's view the tuition fee was not listed among the intake of universities and colleges, and hence a successful referendum would not require an amendment of the budget act but rather that of Act CXXXIX of 2005 on higher education. The Constitutional Court thus concluded that the certification of the sample signature sheet could not be denied with reference to the question's conflict with the budget. The Constitutional Court did not even engage in a substantial discussion of the OVB's reasoning concerning the constitutional amendment. Instead, it noted that it had deemed this concern groundless in its decision 15/2007. (II. 9.) AB.

As a result of the above, the Constitutional Court granted the appellants' motion and struck down the OVB's decision once again, instructing the Commission to reconsider the issue in the framework of a new proceeding. In addition, in an unusual move it called the OVB's attention to the fact that in a renewed proceeding it would have to certify the sample signature sheet containing a referendum question that complies with the referendum act. The Court pointed out that in a renewed proceeding the OVB is not only bound by the holdings of the Constitutional Court decision, but also by the opinion attached. This unprecedented instruction to a constitutional body was stressed by the President of the Constitutional Court and by the judge who delivered the decision in the framework of an—also unusual—press conference.

In this instance, too, Judge András Bragyova dissented from the annulment of the OVB's decision, and he summarised his reasons in a dissenting opinion. He reiterated his reasoning laid out in his dissenting opinion attached to Constitutional Court decision 16/2007. (III. 9.) AB, according to which by the content of the budgetary act we understand everything that affects the allocations of the budget's revenues or expenditures. And it is indisputable that the tuition fee qualifies as budget revenue. Moreover, the student financial contribution can also be qualified as a levy, which is another reason why it may not be subject to a referendum. By levies we understand all those fees in the case of which the obligation to pay derives from the use of a public service or where one must pay for the readiness of a state-provided service, its being at the public's disposal.

Doctor's fee, second round, and hospital fees, first round

In its opinion denying the certification—with identical reasoning—of the modified and reintroduced questions on doctor's fees and hospital fees, the OVB undergirded its decision with several arguments developed in the opinion section of the decision. Following the Commission's reasoning, the referendum initiative seeks to have citizens precisely determine an item in a future budget act and thus the referendum question falls into a subject area excluded by the Constitution's Article 28/C. paragraph (5) point a). The OVB also called attention to the fact that the question may even impact the budget in effect during the year in which the referendum was to be held. The reason is that it may happen that the period for which the budget act is in effect is extended or that the National Assembly adopts the budget for a period that is longer than a year. The OVB explained further that the stability of the Health Insurance Fund's budget and potential changes in the structure of its revenue and expenditure streams need to be assessed by a different constitutional standard than those revenues collected by the central budget that are not earmarked for specific purposes. In the OVB's view an annual change in these rules would critically jeopardise the stability of the insurance-based healthcare system. The OVB further pointed out that at the mo-

ment it was impossible to determine how long the result of this referendum would oblige the legislature, and thus a successful referendum would simultaneously also result in a hidden amendment of the Constitution.

The initiators turned to the Constitutional Court with a complaint regarding the OVB's decision. They argued that the OVB had denied the certification of the signature sheet with reference to next year's budget, a reasoning that runs afoul of the Constitutional Court's 16/2007. (III. 29.)AB decision.

In adjudicating the complaints in decisions 33/2007. (VI. 6.) AB and 34/2007. (VI. 6.)AB, the Constitutional Court once again reviewed the practice it had developed regarding referendum initiatives affecting the budget. According to guiding decision 51/2001. (XI. 29.) AB, a question may not put to a referendum if it contains an amendment of the budget act or inevitably results in a modification thereof, or if its aim is for the voters to exactly determine individual expenditures in future budget acts. As a new argument, which did not appear in its previous practice, the Constitutional Court noted that the certification of the sample signature sheet may only be denied with reference to future budgets if the referendum question aims to predetermine individual expenditures. The hospital fee and the doctor's fee, in contrast, are not an expenditure but rather an income in the current budget of the Health Insurance Fund. The Constitutional Court's view is that even a successful referendum would not necessarily induce an amendment of the budget act, since the obligation to pay a doctor's fee or a hospital fee does not derive from the budget act but from Act LXXXIII of 1997 on the services of the mandatory health insurance. Nor is there a danger of the referendum affecting the budget in force, the Court believes, since there is no information which would suggest that the period for which the act on the budget of the Republic of Hungary for the year 2007 applies would be extended in time. The Court also did not find persuasive the OVB's argument that the abolition of the hospital fee would critically endanger the stability of the healthcare system. Pursuant to the Constitutional Court's decision, the content of the budget act as a subject matter excluded from the range of topics open to a referendum may not be construed this expansively. Furthermore, the nature of the doctor's fee and the hospital fee does not suggest that their abolition would seriously jeopardise the stability of the healthcare system. Just as in its decision 15/2007. (III. 9.) AB on the referendum initiative concerning the tuition fee, the Constitutional Court once again concluded that a successful referendum would not result in an obligation incumbent on the National Assembly that could only be met by amending the Constitution. It thus found that the reasoning invoking such a scenario is unsubstantiated.

Based on the above, the Constitutional Court granted the complainants' motion and obliged the OVB to undertake a new proceeding. Additionally, in the decisions and the press conferences following their publication, the Court called the OVB's attention to the fact that in a reopened proceeding it would have to certify the sample signature sheet containing the referendum.

Just as he had done in the case of decision 16/2007. (II. 9.) AB on the doctor's fee, András Bragyova again dissented from the majority decision. He pointed out once more that by the content of the budget act one must understand everything that affects the allocations in the budget's revenues and expenditures. And the doctor's fee and the hospital fee are budget allocations, regardless of whether their intake flows into the central budget, the Health Insurance Fund, or if they stay with the given institution where they were collected. Moreover, the hospital fee may also be considered a levy, which would render it additionally ineligible as a subject of a referendum.

This time Judge András Holló also wrote dissenting opinions to the Court's decisions, in which he was joined by Miklós Lévay. The judges emphasised that in interpreting the subject areas excluded from referenda one must start with their designated function. A referendum may not pertain to the budget because that would directly affect the safe realisation of the state's duties, as well as the financial and economic preconditions of the latter, and hence the country's governability. Given this function of the rules excluding certain subject areas from the scope of referenda, the Constitution's provisions extend to both, the budget's expenditures as well as its intake, and applies in the context of both, the current and future budgets, too.

Tuition fee and doctor's fee third round, hospital fee second round

In conducting the new proceedings, the National Election Commission started from the basis that—as the Constitutional Court stressed in Point 5 of its annulment decision—"in a renewed proceeding—in accordance with the provisions of Article 27 (2) of Act XXXII of 1989 on the Constitutional Court—it is not only the holding of the Constitu-

tional Court's decision that binds the OVB in its renewed proceeding, but also the Court's opinion. The OVB is obliged to consider the contents of the opinion in the renewed proceeding and in rendering its decision." Put differently—the OVB's opinion states –, this means that the Constitutional Court's decision in its entirety is binding for the OVB and the Commission cannot ground another decision in reasons that the Constitutional Court has already rejected. Legally, however, the Commission may well deny certifying the initiative once again in a new proceeding if it bases its decision exclusively on new reasons. Not even the Constitutional Court may curtail this right of the OVB. The Court would only have the right of constraining the OVB in this matter if it also had a power of revision In this case, however, a renewed proceeding would not make sense. As long as the legislator ties the annulment unequivocally and inevitably to an obligation to conduct a renewed proceeding, the OVB exercises its jurisdiction autonomously. Following the logic and the text of the relevant regulations, an order to undertake a new proceeding does not imply an obligation to render a specific decision.

In the context of the above case, in the renewed proceeding the OVB examined whether the changes in the legal situation that had taken place in the meanwhile had an influence on the evaluation of the referendum initiative. The majority found that no change had taken place that would have affected the issue touched upon by the referendum initiative. Hence in its decisions 154/2007. (VI. 25.), 155/2007. (VI. 25.) and 156/2007. (VI. 25.) the OVB certified the sample signature sheets.

At the same time the OVB's majority also maintained its professional standpoint that the referenda initiatives—also with regard to the contents of Constitutional Court decisions 51/2001.(XI.29.) AB and 15/2005 (IV.28.) AB—put forth questions that pursuant to point a) of the Constitution's Article 28/C. (5) fall under the subject heading "budget", and as such they belong among the "prohibited subject matters".

According to the OVB's position—outlined in an unusually lengthy and detailed opinion—the potential constitutional-amending result of the proposed referenda questions, which the OVB had pointed to several times in its previous decisions, also appears in a new context since the Constitutional Court laid down in its decision 27/2007. (V.17.) AB that "there is a breach of the Constitution resulting from an omission on the part of the National Assembly, which has failed to regulate how long a decision brought about by a binding referendum is binding for the National Assembly, nor when a law adopted on the basis of a referendum (reinforced by a referendum) may be amended or repealed in accordance with the general rules applicable to the legislature." The Constitutional Court called on the National Assembly to satisfy its regulatory obligation by 31st December 2007.

On the basis of the aforementioned Constitutional Court decision the OVB—the majority opinion says—saw the arguments laid out in both its previous decisions reinforced. To wit, these arguments said that as a result of the lacking legal provisions regarding a specific deadline by which to legislatively settle an issue decided upon affirmatively in a valid referendum, such a referendum decision would effectively impose an indefinite legislative moratorium—pertaining to the issue at hand—on the National Assembly, which can only be constitutionally justified through amending those provisions of the Constitution pertaining to the relationship between the respective institutions of representative and direct democracy. This—given the Constitutional Court's consistent practice laid down in several decisions—would constitute an obstacle to the certification of the question due to its constitutional-amending effect.

The OVB's majority, however—with three dissenting opinions, one of them penned by the author of this article—also acknowledged with regard to this reasoning that in decision 27/2007. (V. 17.) AB the Constitutional Court's ruling had not referred to the certification of the referendum initiative at hand, and that the decision's opinion provided no guideline in the case of this referendum since there was no legislative obligation incumbent on the National Assembly that could only be "satisfied" through a constitutional amendment.

In a departure from standard practice, the majority of the OVB's members found it necessary to issue a press statement to accompany their decision because of the "baseless political attacks and statements by individual party representatives containing open threats" relating to the Commission's work on this issue. In its statement the Commission emphasised that according to the laws in effect, the Constitutional Court cannot prescribe the contents of the OVB's decisions (or its professional viewpoint), nor cannot it deprive the OVB of its certification authority on the basis of rule of law standards. The Commission regarded the slanderous statements by political parties and certain media representatives, in which they cast doubt on the professional expertise, impartiality, and even decency of the OVB's members not only as attacks on their person, but al-

so as undue aggression against a fundamental constitutional institution of an European Union member state. In the arguments laid out in the opinion attached to its decisions, the OVB still rejects the constitutionality of curtailing the latitude of parliamentary governance in the area of budget management through an overly expansive interpretation of the legal institution of referendum. The OVB does not, however—thus the statement –, seek to dispute the Constitutional Court's ultimate discretion and responsibility in this area. At the same time it declares that it acknowledged the Constitutional Court's legal approach not out of professional conviction, but exclusively out of the respect for the supremacy of legality and the constitutional order.

Following the OVB's decisions, which were rendered at the prompting of the Constitutional Court, the Court approved the certifications four months later (!) in its decisions 58/2007. (X. 17.), 59/2007. (X. 17.) and 60/2007. (X. 17.) AB, and thus the collection of signatures was allowed to commence.

UNCONSTITUTIONAL OMISSIONS IN THE REGULATION OF REFERENDA

During the certification proceeding, which did indeed stretch out quite some time, the OVB and private citizens, too, called the Constitutional Court's attention to several unconstitutionalities stemming from omission, in response to which the Court obligated the legislature to redress the impugned deficiencies, which took place at the end of 2007.

The issues of binding force and repeated referenda

As the Constitutional Court—as we saw above—failed to address the constitutional questions repeatedly raised by the OVB in the context of specific cases, on 26th November 2006—thus shortly before the first decisions denying certification—the Commission submitted a motion to the Court to make out an unconstitutional omission, arguing that in the absence of regulation on the binding force of referenda a successful referendum would result in an unconstitutional situation. In its motion the OVB argued that in Act III of 1998 on national referenda and popular initiatives, the legislator did not mandate how long a decision rendered by a successful binding referendum binds the National Assembly. In this way a situation can occur—unless the referendum question itself contains a reasonable deadline—wherein the possibility of immediately passing legislation whose content contravenes the result of the referendum essentially hollows out the direct exercise of power enshrined in the Constitution's Article 2 (2) or, alternatively, another scenario could result in a permanent prohibition on enacting legislation on the given issue, thus unconstitutionally limiting the National Assembly in exercising its legislative authority pursuant to the Constitution's Article 19, including the Article's paragraph 3.

Pursuant to Article 8 (1) of Act III of 1998 on national referenda and popular initiatives, "[a] decision rendered by a successful binding referendum is binding for the National Assembly." At the same time the law does not contain a provision on how long the result of a referendum stops the National Assembly from exercising its constitutionally provided legislative prerogatives, and according to prevailing practice initiators were not required to provide such deadlines when requesting certification. According to Article 19 of the Constitution:

"(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 organization, orientation and conditions of government.

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

a) adopt the Constitution of the Republic of Hungary;

b) pass legislation […]"

In the absence of a rule regarding a deadline on curtailing the National Assembly's legislative options, we can arrive at several conclusions—all of which are equally unacceptable from a constitutional law perspective. One of these conclusions is that in the absence of a moratorium on amendments or repeals, the legislator can set out to pass a law that contravenes the result of the referendum already the very next day. Such an interpretation would clearly be antithetical to the constitutionally established institution of referenda, and indirectly to the Constitution's Article 2 (2) as well. According to the other unacceptable interpretation the prohibition on legislating in this subject matter is final, unless another referendum obliges the legislature to adopt a law on the previously prohibited subject matter. Limiting the exercise of the National Assembly's legislative and other authorities without any deadline attached to the limitations essentially results in the creation of "issues that are exclusively subject to referenda", since only another successful referendum can en-

force the National Assembly's renewed legislation in these subject areas. This is especially striking in the case of referendum initiatives aimed at prohibiting the adoption of laws of any kind in a given subject matter, but it also applies to positive obligations to adopt specific legislation, which could be tantamount to a permanent prohibition on amending or repealing the resultant laws. The text of the Constitution does not recognise "issues exclusively subject to referenda", these would contradict the National Assembly characterisation as the "supreme body of State power and popular representation" laid down in the Constitution's Article 19 (1).

Indeed, the question even arises whether a subsequent referendum could change the result of a previous successful referendum. After all, if referenda can be held on issues that fall within the authority of the National Assembly, but parliament is no longer entitled to make decisions regarding an issue as a result of a successful referendum, then the question may also no longer be raised in a referendum, thus resulting in a veritable "eternal clause", which would also constitute a concealed constitutional amendment since the Hungarian Constitution—in contrast to the German and French fundamental laws—does not recognise such clauses. Furthermore, indefinitely depriving parliament of its power in certain subject areas does not mesh with the National Assembly's role as specified by Article 19 of the Constitution, and it also violates—based on the explanation provided above—its Article 2 (2).

A curtailment of the National Assembly's constitutional authority as a result of the law's unconstitutional omission is also antithetical to the Constitutional Court's standing practice regarding the relationship between representative and direct democracy, which the Court first formulated in its decision 2/1993. (I. 22.) AB.

Moreover, Article 31 (3) of Act XVII of 1989 on referenda and popular initiatives, which was in force until 26th February 1998, contained provisions—which were lacking later—on limiting the temporal scope of the prohibition on legislation in the context of laws reinforced by a referendum. It states that "[t]he amendment of a law reinforced by a referendum can occur—two years after the law's entry into effect—in accordance with the constitutional provisions on legislation." The law's commentary provided the following constitutional explanation for the provision: "The Proposal seeks to limit the binding force of a referendum and in this sense parliament's legislative authority for a predetermined period—two years. Subsequently parliament should have the right to amend the law or to regulate anew the respective social relations in accordance with the relevant constitutional or legal provisions. The Proposal therefore does not seek to automatically designate the subject matter of an act once enacted on the basis of a referendum as an issue exclusively subject to referenda 'until the end of times'. In the case of an amendment, etc., to the law in question, the Proposal naturally ensures the legal possibility of initiating a referendum."

It emerged that almost simultaneously another petitioner argued that the lack of a rule on how long after an unsuccessful referendum the same question cannot be brought before the people again constituted an unconstitutional omission. In its decision 27/2007. (V. 17.) AB, the Constitutional Court responded to both petitions, stressing again "that an unconstitutionality on the grounds of omission does apply since the National Assembly has failed to regulate in law how long a successful binding national referendum obligates the National Assembly, nor has it regulated when a law adopted on the basis of a referendum (a law reinforced by a referendum) may be amended or repealed following the general rules relating to legislation. The National Assembly has furthermore also failed to regulate how long the same question may not be put to a referendum." On both questions the Constitutional Court gave parliament until 31st December 2007 to redress the legislative deficiencies.

In its opinion the Constitutional Court determined that the moratoria that the petitioners found lacking was indeed absent from Act III of 1998 on national referenda and popular initiatives (Nsztv.), in contrast to the law in effect before 1998. The Constitutional Court emphasised that the principle of the rule of law not only formulates a requirement that the meaning of individual legal norms be unequivocal, but also calls for the predictable functioning of individual legal institutions. The position of the Constitutional Court judges is that the preeminently important institution of the direct exercise of power is not properly constitutionally guaranteed due to the deficiencies raised by the petitioners. The judges also pointed out that the gaps in the regulation cannot be resolved by the legal interpretation of those applying the law, since the interpretive solutions referred to by the petitioners are constitutionally unacceptable. The Court stressed furthermore that the right to a referendum is a fundamental political right, which results in the state's objective institutional protection obligation. It follows that safeguard rules serving the enforcement of the fundamental political right to referendum need to be comprehensively created and adopted. In view of the

above, the Constitutional Court made out a breach of the Constitution manifested in an omission.

The Constitutional Court invoked its own decision 64/1997. (XII. 17.) AB, in which it had undertaken a preliminary review of the bill on national referenda and popular initiatives. Then the Court had taken the position that the two-year moratorium in the bill on calling or initiating a referendum on the same question was unconstitutional. In their reasoning the judges explained that since the adoption of Article 28/C (5) of the Constitution the fundamental laws themselves specify which questions may not be subject to a referendum. Beyond these constitutional limitations, the law may not contain further restrictions, they noted. The Constitutional Court construed the two-year moratorium in the bill as a further restriction. In the decision at hand, however, the Constitutional Court diverged from its previous reasoning and argued that the requirement for a constitutional-level regulation only refers to those subject areas entirely and permanently removed from the range of issues that may be subject to a referendum. Further reasons for exclusion, which do not constitute an absolute limitation on initiating or holding a referendum, may be established by law. These include temporary restrictions on holding a referendum. The operation of the constitutional institution of referenda may thus be limited by law, as long as the restriction does not pertain to its essential substance. The National Assembly is therefore free to choose whether to redress the lacking regulation by amending the Constitution or adopting a law.

As we saw above, however, even after its decision which made out the regulatory deficiency, the Constitutional Court nevertheless rejected the idea of asserting this constitutional consideration in the context of the approval of the referendum questions it had to address—including the three questions that were important to the Fidesz/KDNP. To be sure, the lack of a binding force does not constitute an unconstitutional situation in the case of every question, but most certainly in the case of questions pertaining to the prohibition of the parliament's legislative activity in those areas addressed by the questions put forth by the Fidesz/KDNP. In their decisions 94/2007. (XI. 22.), 95/2007. (XI. 22.) and then 98/2007. (XI. 29.) AB, however, the judges unexpectedly applied their May decision on omission. In these three decisions the Court, instead of certifying the question on dual citizenship or the two referenda questions relating to hospital privatisation, suspended the proceedings until 15th June 2008. The gist of the Court's reasoning is that the National Assembly had not regulated by law how much time must go by before the same question can be put to a popular vote again, and these two questions were already the subject of an unsuccessful referendum in December 2004. Pursuant to the Constitutional Court's argumentation, an unconstitutional "suspended legal situation" existed since an omission had been made out. This situation will persist up until the point at which the legal statute resolving it enters into effect. The opinion in the unanimous decision—while recognising that the suspension of the proceeding temporarily curtails the initiators' right to a referendum—adds as an explanation for the curtailment of the affected fundamental right that "in the case at hand the initiators were aware of the unconstitutional (temporarily 'suspended legal') situation when they handed in their referendum questions, they submitted their initiative with this in mind."

The only problem with this salutary decision is the following: why was its reasoning not applied by the Court's judges a month earlier, when certifying the three questions important to the Fidesz/KDNP? After all the lack of regulation on the binding force had created exactly the same unconstitutional "suspended legal situation" as the unregulated issue of prohibiting repeated referenda, which the Constitutional Court took exception to in its May 2007 decision. The initiators of referenda questions on the doctor's fee, the hospital fee and the tuition fee were aware of the unconstitutional situation, and as they rephrased the question on the doctor's fee—and right from the start only handed in the question on the hospital fee as an addendum to the original question—following the May decision, they could easily have inserted a proviso into the question on how long they sought to limit the National Assembly's legislation. As they failed to do so, an application of the Constitutional Court's reasoning in the November decision should have meant that the questions could not have been certified in October, either, and that the proceeding should have been suspended until the relevant law was enacted.

One can only guess, of course, why the Court used a different constitutional standard in October 2007 from the one applied in November. One assumption is that the October decision was politically motivated, that is the judges chose to overlook the state of unconstitutional omission in the case of the three questions that were crucial to the Fidesz/KDNP, while regarding the question relating to the ban on hospital privatisation—the question already once posed unsuccessfully—they consistently applied the logic of their own 2007 May decision.

Thus, once the certification of the over one million signatures collected—with lightning speed—

in support of three certified questions took place in early December 2007, the National Assembly decided upon holding a referendum, which took place on 9th March 2008 and ended in a valid result and the victory of "yes"-votes on all three questions. At the same time it ordered the referenda, the National Assembly also redressed two omissions through Act CLXXII of 2007. The following provision was adopted to replace Article 8 (1) of the Act on national referenda and popular initiatives: "A decision brought about by a successful referendum is binding on the National Assembly for three years from the date of the referendum—or, if the referendum resulted in a legislative obligation, then three years from the date of the adoption of the corresponding law. The National Assembly is obliged to immediately satisfy the decision of the referendum."[6] The act's Article 11 was amended to say that the OVB can also deny the certification of the signature collection sheet if the same question had been put to a referendum during the previous three years.

Competing referenda initiatives

With regard to the three citizens' initiatives introduced almost at the same time and with identical contents—but contradictory objectives—as the three Fidesz/KDNP questions that had already been certified by the OVB in the first round, the OVB also submitted a motion to the Constitutional Court to make out an unconstitutional omission on the grounds that the Act on national referenda and popular initiatives does not contain adequate provisions for the case that the Commission needs to decide on several referenda questions with the same content. The aforementioned act only provides guidance with regard to the question on the already certified signature sheet: no referendum signature collection sheet with a matching content can be introduced until the already initiated referendum has been concluded. According to Constitutional Court decision 57/2004. (XII. 14.) AB, the signature collection sheet can only be regarded as certified once the OVB's decision on certifying has become effective and the director of the National Election Commission has applied a certification clause to the signature sheet. There is however no guideline in the Act on national referenda and popular initiatives regarding the adjudication of a referendum question handed in again with an identical content after having been already previously submitted. The OVB believes that this legislative omission violates the principle of legal security and the right to a referendum.

Constitutional Court decision 100/2007. (XII. 6.) AB determined that the regulatory deficiency noted by the OVB does in fact apply. The OVB does indeed lack the authority to deny certification to either of two competing referenda initiatives. Thus questions with the same subject matter but antithetical content may be put to a referendum, as a result of which a situation may arise that the National Assembly must implement contradictory decisions. Hence the complained regulatory deficiency jeopardises the predictable and secure operation of the legal institution of referendum to such a degree that it violates the institution of legal security, which is part and parcel of the rule of law. The Constitutional Court also shared the OVB's opinion that the legislative omission violates the right to referendum. According to the opinion attached to the decision, the Constitutional Court's standing practice holds that in addition to formulating an individual claim to protection all fundamental rights also entail the state's objective obligation to ensure the conditions for exercising the given right. With respect to the fundamental right to a referendum, the legislator also violated this objective institutional protection obligation when it failed to create and adopt a comprehensive legal regulation. In light of all the above, the Constitutional Court made out the existence of an unconstitutionality manifested in an omission, and called upon the National Assembly to meet its legislative obligation by 31st March 2008.

This time, however, the Court did not react by suspending certification until the adoption of the requested legislation, but in its decision 101/2007. (XII. 12.) AB it took a position in support of a decision on the merits of certification. With its decision 171/2007. (VII. 18.), the OVB certified the sample signature sheet for the referendum, which contained the following question: "Do you agree that certain medications that do not require a prescription be distributed outside of pharmacies as well?" Simultaneously with the examined initiative, another referendum signature sheet with identical content was submitted for certification. In its decision the OVB held that neither the Constitution nor any laws in force authorise it to reject questions with identical contents as another, already submitted initiative, with reference to some sort of rule concerning which arrived first. The lawfulness of individual referendum initiatives needs to examined one-by-one. Several complaints were brought against the decision to certify. Many complainants took exception because in their view the OVB had failed to apply the principle of prevention and during certification had disregarded the fact it had al-

ready given a green light to a referendum initiative with identical content.

The Constitutional Court found that the complaints lacked foundation. It held that the OVB and the Constitutional Court may only examine whether the specific questions meets the Constitutional and legal conditions. As corresponding legal regulations were lacking, the OVB could not apply the principle of prevention. The Court pointed out that in the case of referenda initiated in an identical subject matter but with antithetical content, it is the responsibility of the initiators to use the campaign period to draw the voters' attention to the potential consequences of their decision. This reasoning is all the more cynical since data from public opinion research shows that voters are willing to give affirmative answers to questions that address the same issue but offer diametrically opposed outcomes for the same answer. This forecasts the case of lacking legislative clarity, in that the National Assembly may face a situation in which it needs to simultaneously pass a law allowing for the possibility of purchasing non-prescription drugs outside pharmacies and another law mandating the exclusive distribution of such drugs by pharmacies. The question is why this time the Constitutional Court did not avail itself of the possibility of suspending the proceeding, as it did on the issues of hospital privatisation and dual citizenship, when it had argued that the questions could not be certified because "the foreseeable, predictable and secure operation of the constitutionally established legal institution of national binding referenda…is not ensured". The question that now remains is whether in light of such an inconsistent practice the Constitutional Court's "foreseeable, predictable and secure operation" as a constitutionally established legal institution "in accordance with the requirements of rule of law" can be ensured?

Again we are left with nothing but guesswork in trying to explain such a rhapsodic application of the law. Might the judges have opted to certify these contradictory questions because one of the initiators, namely the Fidesz/KDNP, did not seek to collect signatures at all (as they had already once demonstrated), and as a plain citizen the other was in any case incapable of acquiring 200 000 signatures in support of the initiative?

The requirement of proper legal practice

In its decision 18/2008. (III. 12.) AB the Constitutional Court did not make out an unconstitutionality manifested in an omission. In basing its refusal to certify a referendum question on the violation of what is originally a fundamental principle applying to elections—the requirement of good faith and proper legal practice—and thus opening up the gates for the rejections of hundreds of initiatives on this basis, it signals that a clear legal regulation in this area would indeed be needed. The specific referendum question that served as the basis for the decision was one of the numerous initiatives by a husband and wife against the health insurance law adopted for the second time by the National Assembly in February 2008. The couple first initiated a national referendum on 27th March 2007 with the following question: "Do you agree that following its conversion into a company the National Health Insurance Fund should not be allowed to be privatised and that it should continue to be owned by the state?" The OVB certified the question in its decision 116/2007. (IV. 18.) OVB.

The Constitutional Court rejected the complaints regarding this decision and upheld the OVB's ruling in its decision 43/2007. (VI. 27.) AB. Subsequently, on 27th June 2007, the director of the National Election Office placed a seal of certification on the signature collection sheet in accordance with Article 118 (1) of the Act on election procedures, which opened the four months period of signature collection. The initiators did not take receipt of the certified signature collection sheet, but declared instead that they withdraw their proposal—which had been decided upon—and then initiated another certification proceeding on the same question. Citing Article 12 (c) of the Act on national referenda and popular initiatives, the OVB refused certification in its decision 166/2007. (VII. 18.) OVB. The cited provision prohibits the submission of new sample signature collection sheets relating to a question whose content is identical with that of an already submitted initiative if the OVB has already certified the question put forth by the latter. The couple filed a complaint with the Constitutional Court against the OVB's decision not to certify, arguing that the law does not prohibit the initiation of a new certification proceeding following the withdrawal of an initiative. They justified the withdrawal of their first question on the grounds that the three questions they submitted for certification achieve their purpose if they can collect signatures for them at the same time, because "separately the intention of the initiative may be circumvented, and the citizens would not understand these questions posed separately."

This complaint was rejected by the Constitutional Court in a unanimous decision that upheld the OVB's decision. A minority composed of five judg-

es, who wrote a concurring opinion, argued that the refusal to certify was correct for the reasons invoked by the OVB or—in the case of Judge András Bragyova—for other constitutional or legal reasons, while the majority believed that the initiators had violated the requirement of proper legal practice.

The majority's reasoning found the basis for refusing certification in the new point e) (previously point d)) of Article 10 of the Act on national referenda and popular initiatives, with the help of which they arrived at the fundamental principles regulated in the Act on election procedures. The cited provision of the Act on national referenda and popular initiatives makes it possible for the OVB (and thus also for the Constitutional Court, which reviews the latter's decision) to reject the question if "the signature collection sheet does not meet the requirements laid down in the Act on election procedure". And—thus the majority—the fundamental principles enshrined in Article 3 of the Act on election procedures—among them the good faith and proper legal practice, which is probably only applicable to referenda—constitute precisely such a requirement.

The decision's opinion section seeks to explain why the Constitutional Court chose this very moment to stress and to begin applying the requirement of proper legal practice from among the fundamental principles applying to elections. The Court's reasoning says that the OVB and the Constitutional Court are nowadays faced with a new situation with regard to national referenda initiatives. One element of the new situation is the unprecedented onslaught of initiatives: the OVB rendered 465 certification decisions between October 2006 and 30th January 2008, 148 of which were appealed before the Constitutional Court. (By comparison: in 2001, 11 OVB decisions were rendered in referenda cases, 18 in 2002, 33 in 2003, 21 in 2004, and 45 in 2005). Nevertheless, only three questions made it all the way to a referendum, which took place on 9th March 2008. (Two of the few voters' initiatives between 2001 and 2005 resulted in a referendum, the questions on hospital privatisation and dual citizenship, which were voted on on 5th December 2004). The other new phenomenon according to the Constitutional Court is that the initiators—because of the absence of a legal prohibition—introduce signature collection sheets for certification on similar or contradictory questions on the same subject matter at the same time or within a brief span of time (see the competitive initiatives of the Fidesz/KDNP and the linguist László Kálmán).

The third novelty is that among the vast mass of initiatives there is a significant number of dubious proposals lacking in seriousness. For a time both the OVB and the Constitutional Court tried to take seriously even those questions obviously not proposed in earnest by their initiators. There is for example the initiative on free beer, which the initiator presumably came up with to prove that on this question, as a budget issue par excellence, it is just as impossible to hold a referendum as it on the tuition fee, the doctor's fee or the hospital fee. After the Constitutional Court waved the latter questions through, though, it was compelled to take the free beer issue seriously as well, naturally not by letting it pass and thereby completely subjecting the institution of referendum and itself to ridicule. This is why the Constitutional Court judges came up with the grounds for refusal—never used before or since—that the initiators had failed to designate from which source they would finance the free beer in the case of a successful referendum. (As we know, the initiators had not designated the source from which the abolished fees might be compensated for, either, as the law does not impose such a requirement on the framers of the referendum question).

A few months ago the OVB became fed up with the stream of "What came first, the chicken or the egg?"-type of ridiculous questions, which were arriving by the dozen, and with a majority decision instituted a preliminary proceeding during which the OVB first decides whether a question can be taken seriously before undertaking an examination on the merits. If the majority responds negatively to this question, then the Commission does not undertake a substantive examination, it does not submit a decision in the case but rather informs the initiator in a letter that with her ludicrous question she has abused the requirement of good faith and proper legal practice. On the face of it, this is the same reasoning as the one contained in the Constitutional Court's decision under discussion here, with the difference that there was no possibility for appealing the OVB's decision, while the Constitutional Court declared the violation of proper legal practice in a perfectly regular decision, from which it follows that in the future that OVB must do the same, thus allowing for the possibility of appealing its decisions to the Constitutional Court.[7]

All signs indicate, therefore, that with its correct decision the Constitutional Court not only prevented an improper legal practice in the case of the married couple's referendum initiative—which in that case was manifested in the withdrawal for tactical reasons of the already certified question and its subsequent resubmission—but also created the possibility of preventing abusive (questions lacking in seri-

ousness, intentionally identical or diametrically opposed) questions in the future. The judges in the minority are of course correct that it would have been more fortunate if it had been the legislator who had created the necessary obstacles to improper legal practice, but we know that the possibility of such a regulation—given that it would take a two-thirds majority—is hardly realistic following the massive opposition success in the March 2008 referenda.

The Constitutional Court's otherwise accurate decision has only one flaw. In fact the same one as the aforementioned and in and of themselves also correct suspending decisions: namely that it is difficult to explain why the Constitutional Court has thus far failed to make out a violation of the requirement of proper legal practice in such cases. We may recall that in the first round on the three questions certified by the OVB, the Fidesz/KDNP had failed to collect signatures just as the married couple had now, because like them it wanted to wait for the other questions whose certifications were still pending. The only difference between the Fidesz/KDNP's actions back then and the couple's actions now is that while the couple almost immediately "withdrew" the original initiative and resubmitted the same question, the Fidesz/KDNP waited out the four months and only then introduced its questions again (this is when the linguist turned up with his questions that addressed the same subject matter with antithetical questions). The legal assessment of "withdrawing" the initiative could hardly differ from letting the deadline pass without collecting signatures, since the law does not recognise the legal possibility of withdrawal. What it does recognise, however, is identical in both cases: "the expiration of the deadline on submitting the signature collection sheets". And as we saw above, this is exactly what the Constitutional Court invoked in rejecting the repeated initiative of the married couple.

The question that now remains is why for instance the Constitutional Court judges certified the question proposed by the Fidesz/KDNP directed at interdicting the sale of non-prescription drugs outside pharmacies, which was also resubmitted with the same content, while later they—correctly—denied the couple the possibility of resubmitting their question. Again we are left with guessing, just as we were with the divergent handling of the abovementioned cases pertaining to the temporal scope of the binding force of referenda. In light of the potential explanations I will leave the guessing to the reader.

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I believe, however, that—at least from a constitutional law perspective—there are more important lesson to be drawn from the whole referenda fuss—which has led to an almost complete paralysis of governmental activity—discussed here than the investigation of potential political motivation in the Constitutional Court's behaviour. This lesson is that the regulation of the relationship between direct and representative democracy, a thought-out approach towards which has been lacking from the very beginning, needs comprehensive rethinking, also on the constitutional level. The situation in which referenda have practically emerged as an instrument of the parliamentary minority, used for the purposes of discrediting the government—in no small measure as a result of the arbitrary constitutional interpretation employed by the Constitutional Court—could be terminated most decisively by a removal from the Constitution of the institution of mandatory referendum organised by the voters.[8] This is the only way to restore the primacy of representative democracy as it operates in the Western European constitutional systems similar to ours. A realisation of this—obviously highly unrealistic—proposal—would not result in an elimination of direct democracy, not even of referenda, from the Hungarian legal system, since the facultative referendum, which may be initiated by parliament, the government, the president of the republic or the voters would persist, as would the institution of popular initiative, the other instrument of civic activity. What would be removed from the set of instruments available in a parliamentary democracy, however, is the possibility of mandatory referenda initiated by the people–which incidentally only constitute a minor percentage of the high number of referenda even in Switzerland, considered as the referendum's land of origin—suitable for discrediting existing or planned measures reflecting the intentions of the legitimate government.

Translated by Gábor Győri

NOTES

1. The most important of the four referendum questions was the one pertaining to the direct election of the president prior to the parliamentary elections, which held out the prospect of certain victory for Imre Pozsgay, a prominent leader of the Hungarian Socialist Workers' Party (MSZMP), the ruling party in the previous single-party regime. The other three questions (the dissolution of the party militia, the prohibition of party organizations at workplaces, and a report

on the party's property) had already been resolved by statutory regulations by the time of the referendum.

2. Kis János, 'A népszavazási versenyfutás' [The referendum race] *Népszabadság* (Budapest 10 November 2007); Kis János, 'A népszavazás-vitáról' [On the referendum debate] Népszabadság (Budapest 15 December 2007).
3. This is the position also taken by Tamás Fricz in the *Népszabadság* debate. Fricz argues that the conjunction "'and' clearly shows that there is no subordinated relationship between the two forms expressing political will, that they are equal in rank." Fricz also expresses his opposition to the current constitutional arrangement—as manifested in the Constitutional Court's interpretation of the Constitution—in noting that he does not accept the limitation on the use of referenda specifically mentioned in the Constitution, according to which they may not be used to compel the National Assembly to dissolve itself. In other words, his view is that "the constitutional amendment of 1989 does not reflect the conditions of 2007". See Fricz Tamás, 'Kis János téved' [János Kis is wrong] *Népszabadság* (Budapest 29 November 2007).
4. Compare Körösényi András, 'Alkotmányos-e a népszavazás?' [Are referenda constitutional?] *Népszabadság* (Budapest 2 December 2007).
5. According to the law anyone—even without any personal stake in the case—is entitled to challenge the decision of the Commission, regardless of whether certification of the question was granted or denied.
6. The government originally sought to place a similar provision—with a two-year binding force—in the Constitution's Article 28/C (Bill T/4408). After this proposal failed to garner the (grand) supermajority of two-thirds of the members of parliament necessary to amend the Constitution, a motion to amend the provision on thee three-year binding force was included among the rules of the Act on national referenda and popular initiatives, whose modification requires a (small) supermajority of two-thirds of members present.
7. The OVB's previous practice, which responded to motions lacking seriousness with a presidential letter rather than a decision, was rejected by two members of the Commission—the author among them—precisely because they were of the opinion that it unacceptably deprives the initiators' right to legal remedy in the case of the Commission's potentially faulty assessment.
8. It is remarkable that this view is shared by the Judge-Rapporteur of the three discussed referenda decisions, Péter Paczolay, who was since elected to head the Constitutional Court. See an interview with him in the weekly HVG: Paczolay Péter, 'Radikális lépésre volna szükség' [Radical measures would be needed] [2008] 5 July HVG 64–65.