Decision 45/2005 (XII. 14.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking interpretation of certain provisions of the Constitution, posterior examination of the unconstitutionality of a statute, and establishment of an unconstitutional omission of legislative duty, the Constitutional Court has – with concurrent reasonings by dr. András Bragyova and dr. Péter Kovács, Judges of the Constitutional Court – adopted the following

decision:

I

Acting in the competence of interpreting the Constitution, the Constitutional Court establishes the following:

1. Article 68 para. (2) of the Constitution provides for the protection of national and ethnic minorities. Personal decisions on belonging to a certain national or ethnic minority and the disclosure of this decision are parts of the right to self-identification and self-determination – deducted from human dignity – safeguarded under Article 54 para. (1) of the Constitution.
2. The handling of personal data related to one's belonging to a national or ethnic minority, and the disclosure of such data, depend on the affected person's approval – on the basis of the right to informational self determination granted in Article 59 para. (1) of the Constitution; this right may only be restricted within the limits specified in Article 8 para. (2) of the Constitution.
3. Article 68 para. (2) of the Constitution grants for the persons belonging to national or ethnic minorities the right of collective participation in public affairs.
4. National and ethnic self-government as enshrined in Article 68 para. (4) of the Constitution is one of the forms of collective participation in public affairs by national and ethnic minorities.
5. The provisions on the creation and the competences of national and ethnic self-governments are not defined in the Constitution, and these rules are to be adopted by

the Parliament according to Article 68 para. (5) of the Constitution with a majority of two-thirds of the votes of the Members of Parliament present.

6. In adopting the regulations on national and ethnic minority self-governments, the legislator has a wide scale of discretion; the limits of this decision-making freedom are set by the provisions of the Constitution, and in particular by the rules on fundamental rights.

II

1. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and annulment of Sections 115/E and 115/F of Act C of 1997 on the Election Procedure.
2. The Constitutional Court rejects the petition seeking determination of an unconstitutional omission.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

1. Acting in the power vested in Section 22 item e) of Act LIX of 1993 on the Ombudsman for Civil Rights (hereinafter: the AO), the Ombudsman for National and Ethnic Minority Rights has initiated that the Constitutional Court

- establish the unconstitutionality of and annul Section 50/B para. (2) and Section 50/C para. (1) of Act LXIV of 1990 on Electing the Members of Representative Bodies of Local Governments and Mayors (hereinafter: the AELG),
- establish an unconstitutional omission of legislative duty in relation to Section 50/A para. (2) of the AELG,
- jointly interpret Article 68 para. (4) and Article 59 para. (1) of the Constitution in the above context.

The petitioner's arguments are based on Article 2 para. (1) and Article 68 of the Constitution.

2. As held by the petitioner, it is unconstitutional that according to Section 50/B para. (2) and Section 50/C para. (1) of the Constitution, all voting citizens – and not only the actual members of the minority communities concerned – may vote and can be elected at the elections of minority self-governments. The petitioner refers to the fact that many complaints were filed after the 2002-2003 elections, and the occurrence of misuses have been established in respect of all minorities. According to the petitioner, the deficiencies in the relevant legal regulations threaten the existence of the system of minority self-governments. He argues that the regulation on minority self-government elections would only comply with the requirement of democratic legitimacy if the representatives of minority self-governments were elected from the members of the community, by the members of the minority community in question. The petitioner holds that it is a false concept to deduct form Article 70 para. (1) of the Constitution the provision entitling all voting citizens to vote and to be elected at minority self-government elections. In the petitioner's opinion, the challenged provisions violate the enforcement of the fundamental rights enshrined in Article 68 paras (1) to (4) of the Constitution.

For the purpose of preventing misuses, the petitioner has asked for the annulment of the unconstitutional provisions, and for a joint interpretation of Article 68 para. (4) and Article 59 para. (1) of the Constitution.

The petitioner has also asked for the establishment of an unconstitutional omission of legislative duty, as the statutes do not require the introduction of a name register of minority voting rights, nor do they contain an obligation of the voting citizens to make a statement on their belonging to a minority community and on the verification of this statement. Therefore, the petitioner has asked for "the establishment of the violation of legal certainty originating in the principle of the rule of law, and for calling upon the Parliament to adopt legislation on the enforcement of the minorities' rights to self-government".

3. After the submission of the petition, the Parliament adopted at its session of 13 June 2005 an Act on the amendment of the election of the representatives of minority self-governments, and of certain Acts related to national and ethnic minorities (hereinafter: the Act). However, the President of the Republic did not sign the Act but sent it to the President of the Constitutional Court – by attaching his constitutional concerns – to have it reviewed.

Based on the motion by the President of the Republic, the Constitutional Court established in its Decision 34/2005 (IX. 29.) AB (ABK September 2005) the unconstitutionality of the provisions of the Act in whose respect the President of the Republic

had raised his concerns. After that, the Parliament adopted Act CXIV of 2005 on the amendment of the election of the representatives of minority self-governments, and of certain Acts related to national and ethnic minorities (hereinafter: the Amended Act). Section 72 para. (5) item j) of the Amended Act repealed – among others – the provisions of the AELG challenged by the petitioner.

4. The petitioner argues in his petition connected to the motion submitted by the President of the Republic that the Act does not guarantee the truthfulness of the statement on belonging to a national or ethnic minority, and it does not provide for a sanction for the case of making a false statement. Thus the petitioner has maintained his claim on the alleged unconstitutionality, asking for the establishment of an unconstitutional omission of legislative duty.

5. After the publication of Decision 34/2005 (IX. 29.) AB, the petitioner has filed another petition supplementing the original claim. In his opinion, the Amended Act does not remedy the constitutional concerns explained in the earlier petitions.

The petitioner has maintained his request to have Article 59 para. (1) and Article 68 of the Constitution interpreted jointly. The purpose of interpreting the Constitution would be to clarify whether "in order to enforce the right of the minorities to self-government, the right to the protection of personal data could be restricted in a constitutional manner – as being absolutely necessary, of the necessary extent and proportionate – by obliging the voting citizens to make a statement in the course of the election procedure on their belonging to a minority community, and whether the State (the election committee and the courts) may verify the truthfulness of such statements within the statutory limits".

In the petitioner's opinion, Sections 115/E and 115/F of Act C of 1997 on the Election Procedure (hereinafter: the AEP), with their texts specified in Section 65 of the Amended Act, allow that any Hungarian citizen be entered into the name registry of minority voters on the basis of his/her statement on belonging to a national or ethnic minority – when other conditions are met as well. The new regulations do not allow verification of one's actual belonging to a minority, and do not impose sanctions on making a false statement. This opens up the way for misuses. Therefore, in the petitioner's opinion, the challenged provision violates – as explained in the earlier petitions – "the requirement of the rule of law granted in Article 2 para. (1) of the Constitution, and it prevents the enforcement of the fundamental rights enshrined in Article 68 paras (1) to (4) of the Constitution." For this reason, the

petitioner has asked for the annulment of Section 65 in the Amended Act, as well as of Sections 115/E and 115/F of the AEP upon taking effect.

The petitioner – repeating the request made in his earlier petition for the establishment of an unconstitutional omission of legislative duty – has asked the Constitutional Court "to call upon the Parliament to adopt legislation on the enforcement of the minorities' rights to self-government".

II

The petitioner has referred to the following statutory regulations:

The relevant provisions of the Constitution are as follows:

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

"Article 54 (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily deprived of these rights."

"Article 59 (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."

"Article 68. (1) The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.
(2) The Republic of Hungary shall provide for the protection of national and ethnic minorities. It shall ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the use of names in their native languages.
(3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country.
(4) National and ethnic minorities shall have the right to form local and national bodies for self-government.
(5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the rights of national and ethnic minorities."

The relevant provisions of the Amended Act are as follows:

"Section 65 The following Chapters XII/A and XII/B shall be added to the AEP (Section 115/B-115/U):

…

Section 115/E (1) In the year of the election, not later than on 31 May, the local election office shall inform by mail the voting citizens reaching the age of discretion until 1 October who have a right to vote at the election of local government representatives and mayors, on all the information related to registration in the name registry of minority voters, and shall send them the form according to Annex 11. The text of the notification shall be drafted by the government agency in charge of national and ethnic minority affairs upon consulting with the national minority self-governments.

(2) Registration in the registry of minority voters may be requested until 15 July of the year of the election at the head of the local election office competent according to the residence of the voter by putting the request in the collection box placed in the building of the local government. Registration in the registry of minority voters may also be requested in mail, provided that the letter of request is received at the election office not later than on 15 July in the year of the election.

(3) Requests for registration in the registry of minority voters may be filed by using the form attached in Annex 11.

(4) The request for registration in the registry of minority voters shall contain the following data of the citizen:

a) family name and first name
b) family name and first name at birth
c) residence
d) personal identification number
e) statement on belonging to the relevant national or ethnic minority, and
f) signature

(5) When the citizen requests registration in more than one registry of minority voters, all requests shall be considered null and void.

Section 115/F (1) The head of the local election office shall decide not later than on 15 July on registering the applicant in the registry of minority voters.

(2) The head of the local election office shall verify the citizenship and the voting right of the applicant on the basis of the registry of personal data and addresses of residence, and the registry of the citizens of the age of discretion without voting rights. For the purpose of verifying the voting right, the registry of personal data and addresses of residence may be connected to the registry of the citizens of the age of discretion without voting rights.

(3) The applicant shall be registered in the list of minority voters when the application contains the data specified in Section 115/E para. (4) and the applicant is a Hungarian citizen with a right to vote at the election of local government representatives and mayors; otherwise the registration in the list of minority voters shall be rejected.
(4) The head of the local election office shall inform the applicant without delay on the decision about rejecting the registration of the applicant in the registry of minority voters. The resolution on rejecting the registration in the list of minority voters shall contain the reason of the rejection and the proofs thereof, as well as the information on the possible legal remedies against the resolution.
(5) Against the resolution on rejecting the registration in the list of minority voters, a complaint may be filed at the head of the local election office within three days upon receiving the notification on the rejection."
"Section 72 (1) This Act shall enter into force on the 30th day upon its promulgation.
The text of the Amended Act was published in the Official Gazette in Vol. 141 of 26 October 2005.

III

1. The petitioner has requested a joint interpretation of Article 59 para. (1) and Article 68 para. (4) of the Constitution. According to Section 22 item e) of the AO and Section 20 para. (2) of Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (hereinafter: the ARM), the Ombudsman for National and Ethnic Minority Rights may initiate an interpretation of the Constitution.

2. According to the petitioner, the purpose of a joint interpretation of Article 59 para. (1) and Article 68 para. (4) of the Constitution would be to clarify whether "in order to enforce the right of the minorities to self-government, the right to the protection of personal data could be restricted – as being absolutely necessary, of the necessary extent and proportionate – by obliging the voting citizens to make a statement in the course of the election procedure on their belonging to a minority community, and whether the State (the election committee and the courts) may verify the truthfulness of such statements within the statutory limits".

It is to be established from the petition that – although he has specifically mentioned Article 68 para. (4) only – the petitioner has actually requested in respect of the whole of

Article 68 that the rights of the minorities are clarified in the context of Article 70 para. (1) of the Constitution as amended in 2002. In the petitioner's opinion, until the year 2002, there had been a contradiction between Article 68 and Article 70 para. (1) of the Constitution, and this contradiction was terminated – as from 1 May 2004 – by the 2002 Amendment of the Constitution, creating the basis upon which the election of minority self-governments is to be regulated. Interpreting constitutionality the above way requires the election of the members of minority self-governments by the minority community after having the persons entitled to vote registered in the list of minority voters and having the minority voters checked in respect of their belonging to the minority.

The Constitutional Court has established that the contents of the petition comply with the requirements specified in earlier decisions concerning the interpretation of the Constitution [summarised in: Decision 62/2003 (XII. 15.) AB, ABH 2003, 637, 643; Decision 42/2000 (XI. 8.) AB, ABH 2000, 329, 331-332]. Therefore, the Constitutional Court has performed the interpretation of the Constitution.

3. In accordance with its established practice, when interpreting the Constitution in the present case, too, the Constitutional Court

- acts under the principle of the division of power – it does not take over the tasks of the legislation but seeks an answer from the Constitution to the concrete constitutional problem [Decision 31/1990 (XII. 18.) AB, ABH 1990, 136, 137-138; Decision 25/1995 (V. 10.) AB, ABH 1995, 427, 428],
- holds that the need to define the future regulatory principles based on the Constitution does not justify an exercise of the competence of interpreting the Constitution in a narrow sense (Decision 996/G/1990 AB, ABH 1993, 533, 534-535),
- explains the contents of the fundamental rights bearing in mind the coherent constitutional system of rights, the operability of the system, and – where appropriate – the international set of facts and the commitments under international law [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 83].

4. Acting on the basis of the petition for interpretation, the Constitutional Court has first of all examined the contents of Article 68 of the Constitution.

Article 68 para. (1) of the Constitution expresses the prominent role of minorities: they represent a constituent part of the State. Having regard to this prominent role, Article 68 para. (2) declares – among others – that the Republic of Hungary shall ensure collective

participation in public affairs by national and ethnic minorities. Under Article 68 para. (3), the laws shall ensure representation for the national and ethnic minorities living within the country. Under Article 68 para. (4), national and ethnic minorities shall have the right to form local and national bodies for self-government.

5. In accordance with the petitioner's request, the Constitutional Court has also examined Article 59 para. (1) of the Constitution in respect of the representation of national and ethnic minorities. However, as the petitioner has also raised the question of making and verifying the statement on belonging to a minority, Article 54 para. (1) of the Constitution is also to be examined.

The rights of national and ethnic minorities as enshrined in Article 68 of the Constitution are to be enjoyed by those persons who belong to one of the national or ethnic minorities. The acknowledgement of being a member of a national or ethnic minority and the public disclosure of such a statement is a personal decision based on self-determination. Similarly to the protection – under Article 54 para. (1) of the Constitution – of the right to have a name [Decision 58/2001 (XII. 7.) AB, ABH 2001, 527, 542], as a manifestation of the right to self-identity, the acknowledgement of belonging to a certain national or ethnic minority is an element of self-identification and self-determination.

The right to self-determination is based on the right to human dignity, granted in Article 54 para. (1) of the Constitution as a general personality right [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44-45]. The right to human dignity is a subsidiary fundamental right derived from the protection of individual autonomy [Decision 56/1994 (XI.10.) AB, ABH 1994, 312, 313]. However, it is also a part of the right to self-determination to respect one's decision not to disclose his or her belonging to a specific minority. This is where the protection of secrecy in private affairs and personal data is linked to self-determination.

Under Article 59 para. (1) of the Constitution, everyone has the right – among others – to the protection of secrecy in private affairs and personal data. Based on the practice of the Constitutional Court followed since 1990, this right may be restricted – on an exceptional basis – by an Act of Parliament, but such restriction must comply with the constitutional requirements [Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 70]. Under the principle explained in Decision 15/1991 (IV. 13.) AB and followed ever since, the right to the protection of personal data means informational self-determination. It is a part of the content of this right that everyone is in control of the disclosure and use of his or her personal data. In general, personal data may only be recorded and used upon the approval of the affected

person [ABH 1991, 40, 42; for a more recent overview of this practice, see: Decision 22/2004 (VI. 19.) AB, ABH 2004, 367, 370-371].

Section 1 para. (1) of Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest was adopted in line with the decision of the Constitutional Court containing the above principle. Under Article 2 para. (2) of this Act of Parliament, data on one's belonging to a national or ethnic minority qualify as special data. Under Section 3 para. (2), special data may only be handled upon the approval of the affected person or – among others – when ordered by an Act of Parliament in the interest of enforcing a fundamental right granted in the Constitution.

Restricting the right to informational self-determination is also governed by the constitutional requirement that such restriction may only be accepted as constitutional when it is based on a forcing necessity and performed by the most suitable means [earlier practice summarised in Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 206]. Accordingly, the acceptability of restricting a fundamental right always depends on the regulations concerned [Decision 27/2002 (VI. 28.) AB, ABH 2002, 143, 147].

The right to establish national and ethnic minority self-governments may serve as the basis of certain restrictions on the right to self-determination related to the disclosure of belonging to a specific minority. Making a significant number of false statements about belonging to minorities may disturb the establishment of minority self-governments. Adequate legislation may be needed in order to prevent the emergence of such problems. However, the Constitution does not provide for a single and well defined solution. The constitutionally acceptable way of restricting the right to informational self-determination for the purpose of verification (on what ground, by whom, and in what procedure) of the correctness of the statement on belonging to a certain national or ethnic minority cannot be defined by interpreting the Constitution. An interpretation of the Constitution does not vest legislative powers on the Constitutional Court. The constitutionality of the given restriction may only be established by examining the concrete rule adopted by legislation.

6. The Constitution regulates the rights of national and ethnic minorities as part of the fundamental rights. The fundamental rights include the right to participate in public affairs, but the Constitution provides for collective participation. After the rule on the right to the representation of minorities, the Constitution provides for the minorities' right to establish bodies of self-government. In the above cases, the constitutional provisions are restricted to guaranteeing the right in principle, and all the other rules are to be specified – under Article

68 para. (5) – in an Act of Parliament adopted by a majority of two-thirds of the votes of the Members of Parliament present. Thus the Constitution does not define the way of establishing the minorities' bodies of self-government and their place in the system of the State, or their connection to the State agencies (Decision 435/B/1997. AB, ABH 1998, 711, 714).

In respect of the representation of minorities and the regulations on local and national minority self-governments, the authorisation given to the legislation is also subject – as appropriate – to the following statement made by the Constitutional Court with regard to local governments in general: the legislation enjoys a wide scale of discretion in regulation, and this decision-making freedom is only subject to the fundamental rights [Decision 56/1996 (XII. 12.) AB, ABH 1996, 204, 206].

7. In interpreting the rules of the Constitution, the Constitutional Court has also taken note of the manner in which the provisions on minority self-governments have been developed.

The constitutional rules on minority rights have been formed through repeated amendments of the Constitution since the democratic transformation of the political regime.

(a) Prior to the transformation of the regime, the Constitution declared the equality of the nationalities as well as the rights to use their native languages, to obtain education in their native languages and to preserve and foster their cultures, but it did not contain further regulations.

Act XXXI of 1989 on the amendment of the Constitution significantly changed the chapter of the Constitution on fundamental rights and obligations on the basis of the international treaties pertaining to human rights. Taking into account the historical traditions of Hungary, the Constitution stated – in addition to the declaration, by introducing a new paragraph (1) in Article 68 – that the national and ethnic minorities participate in the sovereign power of the people and they represent a constituent part of the State. Act XVI of 1990 on the next amendment of the Constitution added paragraph (3) to Article 68. According to the new regulation, the participation of the minorities shall be secured in the Parliament and in the councils. This provision required having a separate Act of Parliament adopted on the minorities' representation in the Parliament, further providing that the election of the minorities' representatives was to be independent from the elections based on general and equal voting rights granted in Article 71 para. (1) of the Constitution.

Act XL of 1990 on the amendment of the Constitution amended paragraph (3) of Article 68. The new paragraph (3) only stated that the laws of the Republic of Hungary grant the representation of minorities. In addition, the new paragraph (4) ruled that a majority of two-thirds of the votes of the Members of Parliament present was required to pass the law on the rights of national and ethnic minorities. This way, the above amendment of the Constitution deleted the rule allowing derogation from the constitutional provisions on general and equal voting rights when electing the minorities' representatives in the Parliament. No provision with a similar content has ever been reintroduced into the text of the Constitution since then.

The rules on self-governments were introduced in the Constitution by Act LXIII of 1990 on the amendment of the Constitution. This amendment of the Constitution has repealed the constitutional provisions on councils and declared the right to self-government. According to the new paragraph (1) of Article 44, eligible voters exercise the right to local government through the representative body that they elect and by way of local referenda. The new Article 44/A has also defined the content of the fundamental right to self-government. Furthermore, the reasoning of the Act of Parliament amending the Constitution has made it clear that the right to form bodies of self-government on the basis of popular sovereignty is vested in the communities of voting citizens of villages, towns, the capital and its districts as well as of counties; the voting citizens elect representative bodies for the continuous exercise of self-government.

Similarly, Act LXIII of 1990 has introduced in the Constitution Article 68 para. (4) on forming local and national bodies for self-government by national and ethnic minorities. However, this new provision on minority self-governments has only provided that the minorities might form bodies of self-government. This way, one of the forms of representation of the minorities has been defined, but neither the content of self-governance nor the way of establishing self-governments nor the rules of their election have been fixed.

This is how Article 68 of the Constitution as in force has been developed step-by-step.

(b) In Decision 35/1992 (VI. 10.) AB, the Constitutional Court has already examined the steps taken by the legislature in order to secure the enforcement of the rights granted in Article 68 of the Constitution, establishing an unconstitutional omission of legislative duty (ABH 1992, 204, 205). The ARM was then adopted in 1993 by the Parliament. The ARM was based on the principle that the declaration and the disclosure of belonging to a national or

ethnic group or minority are the exclusive rights of the individual, and no one may be obliged to make a statement in that respect (Section 7).

The ARM connected the organisation of local minority self-governments to the election system of municipal local government representatives. Accordingly, Act LXIV of 1990 on the election of local government representatives and mayors (hereinafter: the AELG) was amended appropriately.

Section 64 of the ARM amended the AELG. Under the amended Section 52 para. (3) of the AELG, any voting citizen can be a candidate to the minority's local body of self-government provided that he or she undertakes to represent the minority. The new text contained in Section 53 para. (1) of the AELG provides that the persons entitled to vote at the election of representatives of a local government may participate in the election of the minority's body of self-government.

(c) After the adoption of the ARM, Act LXI of 1994 on the amendment of the Constitution established the text of Article 70 para. (1) of the Constitution, stating that all Hungarian citizens were entitled – among others – to vote and to be elected at the minority self-government elections. The minister's reasoning attached to the Bill on the amendment of the Constitution pointed out that the aim of this amendment was to extend the right to vote – as a fundamental right – to the election of minority self-governments in order to harmonise it with the ARM.

Parallel with the amendment of the Constitution, Act LXII of 1994 amended both the AELG and the ARM in the framework of changing the election system. This was the time when the provisions of the AELG challenged by the petitioner were introduced or kept in place with some editing modifications. However, the amendments made in 1994 caused no changes of principle in respect of minority self-governments; they merely harmonised the rules contained in the Constitution, the ARM and the AELG.

In its Decision 435/B/1997 AB, the Constitutional Court established that as the result of the new regulations, the local minority self-governments built into the system of local governments secure the exercising of minority rights. The ARM defined the rules pertaining to local minority self-governments in line with the provisions of the Constitution (ABH 1998, 711, 714-715).

(d) Act LXI of 2002 on the amendment of the Constitution has changed the regulation on voting rights. The new text contained in Article 70 para. (2) of the Constitution – in

contrast to the former wording – does not mention together with the election of the members of representative bodies of local governments and mayors the election of national and ethnic minority self-government representatives and the eligibility to be elected as such a representative. The amended text of the Constitution does not regulate this right elsewhere either.

(e) In 2005, the Amended Act introduced a new system of electing the members of the representative bodies of minority self-governments. According to the new regulation, the right to vote and to be elected at local minority elections shall to be enjoyed by those persons who – among others – comply with the requirement specified in Section 2 para. (1) by declaring and disclosing their attachment to a certain minority. The adoption of the Amended Act did not entail the amendment of the Constitution.

According to the above, it has been established that the Constitution grants the protection of national and ethnic minorities among the fundamental rights. Guaranteeing collective participation in public affairs and the representation of minorities are parts of the above protection. However, no clear constitutional principle has been developed since 1990 in respect of the manner of representation and participation in public affairs. The Parliament has made attempts to adopt different solutions, and the text of the Constitution has allowed such attempts.

8. The constitutional provisions on minority self-governments may only be interpreted with due respect to other rules of the Constitution.

Article 2 para. (1) of the Constitution declares the principle of a democratic state under the rule of law. Article 2 para. (2) declares popular sovereignty and establishes that people exercise power directly and through elected representatives.

As explained by the Constitutional Court in Decision 30/1998 (VI. 25.) AB, the principle of a democratic state under the rule of law together with the principle of popular sovereignty lays the foundations of the requirement of democratic legitimacy. This decision has set regarding the legal norms the requirement of being based on democratic legitimacy originating in popular sovereignty (ABH 1998, 220, 233). Other decisions of the Constitutional Court have also established that the legitimacy of public power may be based on either direct or indirect elections. In the case of indirect legitimacy, the chain of appointments and elections can be traced back to the voting citizens [Decision 38/1993 (VI. 11.) AB, ABH 1993, 256, 262-263; Decision 16/1998 (V. 8.) AB, ABH 1998, 140, 146;

Decision 50/1998 (XI. 27.) AB, ABH 1998, 387, 399; Decision 7/2004 (III. 24.) AB, ABH 2004, 98, 108-109].

9. According to the above, it has been established that the Constitution grants, as a fundamental right, the right of national and ethnic minorities to participate in public affairs and to have representation. One of the forms of participation in public affairs and of having representation is the right to form local and national self-governments. However, the Constitution does not contain the concrete contents of those rights or the rules of exercising them. The regulations on representation, participation in public affairs, as well as on the establishment of self-governments are related to several fundamental constitutional provisions. Among those provisions, the election system plays a particularly important role, with the structure and the competences of local governments as well as their links to other State agencies being of similar importance. The legislature enjoys a wide scale of discretion when making laws on the basis of Article 68 para. (5) of the Constitution. This freedom of discretion is limited by the provisions of the Constitution.

10. The Constitutional Court has also examined the commitments binding the Republic of Hungary under international law as well as the principles enforced in the international practice.

According to Article 27 of the International Covenant on Civil and Political Rights, promulgated in Hungary by Law-Decree 8 of 1976, persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In 1992, the General Assembly of the United Nations adopted Resolution 47/135 on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Under Article 2 para. (2) of the Declaration, persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. Paragraph (3) contains concrete provisions about the right to participate in public life by declaring that persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong. According to the explanation attached to paragraph (3), the most appropriate way of participation in decision-making can be chosen on the basis of several factors. One should take into account for example whether in the given country the members

of the minority live in a well-defined territory or dispersed around the country; in large or in small numbers. Also the election system applied in the country may have an impact on the decision.

The UN Committee on the Elimination of All Forms of Racial Discrimination adopted on 22 August 1990 General Recommendation VIII, examining the question of identification with a particular racial or ethnic group. The Committee held the view that, in general, if there was no justification to the contrary, such identification should be based upon self-identification by the individual(s) concerned (The Committee on the Elimination of Racial Discrimination, Thirty-Eighth Session, 1990, Document A/45/18).

In Act XXXIV of 1999, the Republic of Hungary promulgated the Framework Convention of the Council of Europe dated in Strasbourg on 1 February 1995 on the Protection of National Minorities. According to Article 15 of the Framework Convention, the Parties shall – among others – create the conditions necessary for the effective participation of persons belonging to national minorities in public affairs (in particular those affecting them).

The recommendation adopted by the Venice Commission in October 2002 on the Code of Good Practice in Electoral Matters (Opinion No. 190/2002) also covered the participation of minorities in public affairs, elaborated on the request of the Parliamentary Assembly of the Council of Europe, adopted by the Parliamentary Assembly on 30 January 2003 and recommended for application by the Member States [Resolution 1320 (2003)]. According to Section 2 d) of the recommendation, the following measures are proposed for the purpose of securing the representation of minorities:

- the participation at the elections of parties representing national minorities must be permitted,
- special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for minorities do not in principle run counter to equal suffrage,
- neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.

The Constitutional Court has elaborated its position in the holdings of the decision on the interpretation of the Constitution with due respect to the above.

IV

1. In the petitioner's opinion, Section 115/E and 155/F of the AEP violate Article 2 para. (1) and Article 68 paras (1) to (4) of the Constitution.

Article 2 para. (1) of the Constitution declares the principle of the state under the rule of law. However, the contents of the rule of law must be examined with regard to the specific constitutional principles and rights [Decision 32/1991 (VI. 6.) AB, ABH 1991, 146, 158]. Article 2 para. (1) of the Constitution does not contain an individual standard (Decision 799/E/1998. AB, ABH 2001, 1011, 1016). The challenged provisions of the AEP are not contrary to the provisions enshrined in Article 68 paras (1) to (4) of the Constitution. Consequently, the Constitutional Court has rejected the petition seeking annulment of Section 115/E and Section 115/F of AEP.

2. In fact, not the actual contents of the rules laid down in Section 115/E and 155/F of the AEP but the content that is – in the petitioner's opinion – missing from them is what has been challenged in the petition. The petitioner has alleged the existence of unconstitutionality by referring to the fact that the regulations do not allow verification of the truthfulness of the statement on belonging to a minority, and they do not impose sanctions against the persons who make false statements. That is why the petitioner asked – already in the petition filed before the adoption of the Amended Act – for the establishment of an unconstitutional omission of legislative duty and for obliging the Parliament to adopt the missing legislation.

Under Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the CCA), an unconstitutional omission to legislate may be established if the legislature has failed to fulfil its legislative duty mandated by a legal norm, and this has given rise to an unconstitutional situation.

For the purpose of enforcing the right to establish ethnic and national minority self-governments, the Constitutional Court established in Decision 35/1992 (VI. 10.) AB an unconstitutional omission of legislative duty, as the Parliament had failed to adopt the Act on the rights of minorities (ABH 1992, 204). Then the Parliament passed the law and the Amended Act re-regulated the election of the members of the bodies of minority self-governments.

According to the established practice of the Constitutional Court, an unconstitutional omission of legislative duty may also be established when the need of the legal regulation is the result of the State's interference with certain situations of life, thus depriving some of the citizens of their potential to enforce their constitutional rights [Decision 22/1990 (X. 16.) AB,

ABH 1990, 83, 86]. In the present case, the election rules do not deprive the persons belonging to minorities of exercising their rights. The omission may not be established on the above ground.

The Constitutional Court also establishes an unconstitutional omission of legislative duty in the case of a lack of statutory guarantees necessary for the enforcement of a fundamental right [earlier practice summarised in Decision 15/1998 (VI. 8.) AB, ABH 1998, 132, 138]. In addition, an omission may also be established when serious regulatory deficiencies, causing an unconstitutional situation, are identified [Decision 12/2004 (IV. 7.) AB, ABH 2004, 217, 226].

The petitioner has alleged the lack of regulations granting the enforcement of the fundamental right by referring to the lack of a provision allowing the verification of the truthfulness of the statement on belonging to a national or ethnic minority and the imposition of sanctions against the persons who make false statements. Based on the petition, the Constitutional Court should oblige the Parliament to adopt a legislation containing specific rules on controlling and sanctioning.

As established by the Constitutional Court in Decision 161/E/1992 AB1993, it falls within the competence of the legislature to decide whether it regulates or not a certain situation of life, and if it does so, to what details (ABH 1993, 765, 766). In the present case, the petitioner misses the regulations that could prevent misuses. Indeed, the lack of the regulations referred to by the petitioner may cause problems in the application of the law. However, the elimination of the regulatory deficiency would imply a restriction of the rights to self-determination and to the protection of secrecy in private affairs to be enjoyed by the persons making the statements. The establishment of an unconstitutional omission of legislative duty and obliging the Parliament to pass a law may not result in the Constitutional Court obliging the legislature to adopt specific rules of law implying a restriction of fundamental rights.

Based on the above, the Constitutional Court has rejected the petition seeking establishment of an unconstitutional omission of legislative duty.

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

Budapest, 13 December 2005.

Dr. Mihály Bihari
President of the Constitutional Court

Dr. István Bagi,
Judge of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court, Rapporteur

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

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

I agree with the holdings of the majority decision. Nevertheless, I hold it necessary to supplement the reasoning of the majority decision in respect of three questions. These are the following: the nature and the subjects of minority rights, the relation between the right to self-determination and belonging to a minority, and finally the obligations of the legislature in regulating minority elections.

1. 1The nature and the subjects of national and ethnic minority rights

Ethnic and national minorities are cultural and political communities within the Hungarian political community; this is demonstrated in Article 68 para. (1) of the Constitution, calling the national and ethnic minorities a “constituent part of the State”. Minorities form special groups in the society, differentiated from the majority on the basis of their national-ethnic and (the resulting) cultural identities. Being acknowledged as a “constituent part of the State” is at the same time an acknowledgement of their right to equal treatment as compared to the

majority: the constituent part of the State shall not enjoy less right than the members of the majority nation.

Article 68 of the Constitution mentions "national and ethnic minorities" and their rights several times. Without interpretation, the Constitution is not clear about who (or what) are the subjects of the rights of national and ethnic minorities. The fundamental problem in the interpretation of the constitutional rights of national and ethnic minorities – as against other constitutional rights – is the fact that these rights are the constitutional rights of only a part (which is by definition less then the whole) of the citizens. The answer is that the rights of national and ethnic minorities are in fact the *same* constitutional rights as the "majority" rights; their only speciality is that they serve the purpose of compensating the disadvantages – but at least the differences – resulting from the different situations of national and ethnic minorities in respect of exercising certain constitutional rights. The constitutional role of the rights of minorities is to guarantee the equality of national and ethnic minorities with regard to the exercise of fundamental rights.

The fundamental rights of the members of national (and ethnic) minorities are guaranteed in Article 70/A para. (1) of the Constitution, according to which "human rights and civil rights" are to be granted for all persons, without – among others – "discrimination on the basis of [...] language, [...], national [...] origins". However, this constitutional norm in itself only prohibits negative discrimination in respect of the constitutional rights – and all rights by virtue of Article 54 [see in: Decision 9/1990 (IV. 25.) AB, ABH 1990, 46, 48; Decision 21/1990 (X. 4.) AB, ABH 1990, 73, 77-78; Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 203, serving as the basis of the Constitutional Court's present practice] – and it does not grant special rights for the national and ethnic minorities to be enjoyed exclusively by them. Accordingly, the constitutional rights of the members of national and ethnic minorities are based on a double foundation: one is Article 70/A para. (1) of the Constitution, according to which fundamental rights are to be granted for the members of national and ethnic minorities without discrimination. The other basis is granting – in Article 68 – special conditions for exercising the fundamental rights – that cannot be secured merely by non-discrimination, due to the specific features of national and ethnic minorities – in particular in the form of guaranteeing collective rights to be exercised (jointly) by the members of the minority.

The rights of national and ethnic minorities are primarily the constitutional rights of individuals with specific common – national and ethnic – features and, on the other hand, they include the participatory rights (in particular the right to vote and to be elected) in the institutions established for the collective and joint exercising of the individual rights, in the form of self-government, i.e. self-administration, as well as the right to use the services provided by national and ethnic self-governments. These rights are the special constitutional rights of the national and ethnic minorities, and such rights cannot be exercised by the minorities – due to their special features different from those of the majority, in particular in the field of culture – in the institutions set up for the majority, in the majority society. (For example, a member of a national minority cannot receive education in his or her mother tongue in a school where the mother tongue of the majority is used; the member of the minority cannot use that language among the people who do not speak it.) Therefore, the constitutional rights of national and ethnic minorities are special ones, allowing the minorities to practically exercise the rights that may be enjoyed "naturally" by the members of the majority. These special constitutional rights may only be enjoyed by the members of the minority, as the members of the majority may exercise them "in a natural way" in different institutions of the majority society. The constitutional rights of the persons belonging to national or ethnic minorities are based on their special cultural and social status different from that of the majority, and they are entitled to enjoy those rights to the extent of that special status. Accordingly, to speak about national or ethnic minority rights is only possible with regard to the rights exercised in a different way by the members of national and ethnic minorities and by the members of the majority society.

Therefore, the subjects of national or ethnic minority rights may only be the persons who have a different national or ethnic identity than the majority; this is the only fact justifying their special rights. Consequently, it is a constitutional requirement that the minority rights may only be exercised by those people who belong to the minority – and no other persons may exercise those rights on behalf of them. The constitutional right of the national or ethnic minorities to form self-governments [Article 68 para. (4) of the Constitution] may only be enforced when the self-government is actually formed by the persons belonging to the national or ethnic minority intended to be represented and administered through the self-government. The constitutional right to establish national and ethnic minority self-governments may only be exercised by the subjects of national and ethnic minority rights. It is quite natural that the persons who do not belong to the national and ethnic minority – in

particular the members of the national majority – have no such constitutional right, as the national and ethnic minority rights are special ones, justified by the special position of the minority members as compared to the majority. It is a different issue that under the right of association [Article 63 para. (1) of the Constitution], any association established for the representation of a non-existing national or ethnic minority – or one not acknowledged by the law – is protected by the law, but such an association may not exercise the public law competencies vested on national and ethnic minority self-governments.

2. Belonging to a national and ethnic minority and the right to self-determination

The community character of the fundamental rights of minorities is based on the individual's right to self-identification as the member of the minority – with national or ethnic identity – and the right to exercise the above. Therefore, it is of primary importance to clarify the relation between belonging to national and ethnic minorities and self-determination. According to the decision, the acknowledgement of being a member of a national or ethnic minority and the public disclosure of this statement is a personal decision based on self-determination and being a part of it. This statement is correct, however, there is something to add.

One's right to self-determination, based on the right to human dignity as granted in Article 54 para. (1) of the Constitution, is – according to the practice of the Constitutional Court [see: first in Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44-45, and then in Decision 1/1994 (I. 7.) AB, ABH 1994, 29, 35-36] – a right of the individual (to be exercised free of interference by the State, to be acknowledged unconditionally, and not being subject to any review) to dispose over his/her own self (body and life) by his/her own will, to make the fundamental decisions about his/her own life, and thus to form his/her life and personality. This right includes the way the individual interprets the facts of his/her own life, the self-identification of the person, and the actions representing the foregoing. Accordingly, the individual's general freedom of action is one of the contents of the right to human dignity [e.g: Decision 27/1990 (XI. 22.) AB, ABH 1990, 187, 189 on the transfer of sportsmen; Decision 24/1996 (VI. 25) AB, ABH 1996, 107, 111-112., on the Hungarian Institute for Culture and Art]. This right of the individual is safeguarded by several specific constitutional rights, all of them being specific cases of the right to self-determination.

For example, the Constitutional Court deduced from the right to self-determination (disposal) the right to the freedom of marriage [Decision 22/1992 (IV. l0.) AB, ABH 1992, 122], the right of disposal related to the party's participation in the litigation [Decision 9/1992 (I. 30.) AB, ABH 1992, 59; Decision 1/1994 (I. 7.) AB; (ABH 1994, 29)], and the right of disposal related to the prevailing party in the litigation [Decision 4/1998 (III. 1.) AB, ABH 1998, 71]. Decision 57/1991 (XI. 8.) AB (ABH 1991, 272) deals with a special issue concerning the right to self-identification, deducting from it the right to ascertain one's parentage as an element of self-identity. Similarly, the right to one's name is connected to self-identification, and it "is closely linked to at least two personality rights: the right to self-identification and the right to privacy" [Decision 58/2001 (XII. 7.) AB, ABH 2001, 527, 545, a case of the right to names]. All of the decisions referred to above affected issues where the individual faces the conditions of his/her existence: parentage or family name. Those cases can hardly be interpreted in the framework of "self-determination" as they are more about getting acquainted with facts; self-determination by the individual can be found in determining the relation to those facts.

In the respect of belonging to a national and ethnic minority, the right to self-determination means that the individual himself/herself may determine his/her belonging to a certain national or ethnic community. The individual identifying with the community makes his/her own decision about being the member of the community: the attachment is the individual's self-identification. It means that the individual holds his/her belonging to the national or ethnic minority to be a part of his/her own personality. In that respect, the right to self-determination is the individual's right to determine his/her own personality, including the national or ethnic identity. However, this self-determination can never be arbitrary, as the individual's right to self-determination can only include the things the person may change, i.e. the ones that can be influenced or changed through the individual's decision or determination and his/her actions – practically the things about which the individual is able to make a decision. However, the self-identity of a person is based, to a great extent, on the facts of his life the changing of which is impossible. Accordingly, the national and ethnic identity of the individual is an attribute, which is only in part the result of the individual's determination and own decision. In the other part, it is the endowment of the individual's (existential) being, determining the identity of the individual. These are endowments the individual cannot change, but he/she can determine his/her relation to those endowments, and the person can

interpret them as he/she likes. Of course, the constitutional rights safeguard those decisions of the individual against interventions by the State.

The individual's fundamental endowments (mentioned above as existential ones) – as the date and the place of birth, sex, age, mother tongue, family and many other – determine the person's identity *independently from the individual's will*. The constitutional rights – jointly and separately – safeguard the individual's freedom to determine his or her self-image and identity, on the basis of his/her endowments. The constitutional rights – such as Article 54 para. (1) – also grant that the individual may determine what facts of his/her life he/she considers important, which are the ones he/she wants to identify with, or to refuse. Still, being a member of a national or ethnic minority is not simply the result of the individual's decision. Based on the right to informational self-determination (Article 59), the individual may decide what facts of his/her life he/she wants to disclose to the public (and how), and the person's right to human dignity allows the determination (or the construction) of the elements of one's personality, presenting the "meaning" or the essence of one's life for the person him/herself and the outer world.

The issue of the rights to self-determination was most thoroughly examined by the Constitutional Court in the case of the self-determination about human life [see: Decision 48/1998 (XI. 23.) AB, ABH 1998, 333, 362, the so-called abortion decision; Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 287, the so-called euthanasia decision; Decision 43/2005 (XI: 14.) AB, *Magyar Közlöny* 2005, 149, 8581, decision on sterilisation]. In the above decisions, the practice of the Constitutional Court makes a distinction between the *content* and the *manner* of exercising self-determination. The State may not review or change the individual's decision of self-determination; however, it may obtain a proof of whether the public disclosure of the content of self-determination is the individual's own serious decision. "The legislature may only allow the enforcement of a terminally ill patient's right to self-determination to the extent it is able to ensure that the decision represents the patient's own true will formed free of external influence." (Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 265, euthanasia-decision)

The prohibition of intervention imposed on the State in the scope of self-determination does not exclude the possibility of a law containing rules on *how* to exercise one's right to self-determination, and it may require the verification of whether the will of self-determination is a

serious and well-founded one, and the verification can also be formalised. As a constitutional requirement, the legislature may not change the *content* of the individual's decision, and in particular it may not replace that decision with another one made by State agencies or by persons designated by the State. It is the fundamental essence of belonging to a minority as a form of self-determination that *no identity* may be imposed on anyone by way of *external* pressure (or obligation). Neither the State nor the law may constitutionally determine one's national-ethnic identity (position). Nevertheless, selecting one's national-ethnic identity – position – is more than the individual's self-determination (decision) and indeed it can be questioned. In the question of national-ethnic affiliation, the individual's freedom is negative, in the sense that no person is obliged to identify with any national (or ethnic) group he or she does not want to, despite other people thinking that he/she should do so.

Accordingly, belonging to a national or ethnic minority, as a precondition of exercising the rights vested in minorities (and only in them), is more than the question of the individual's self-determination. The existence of national and ethnic minorities is a fact of the society to which the Constitution and the legal system connect certain legal consequences, such as – first of all – the minority rights and the prohibition of discrimination on the basis of national origin [Article 70/A para. (1) of the Constitution]. The existence of national and ethnic minorities is the common existence of a group of individuals, maintained through their shared consciousness of identity. Therefore, the existence of minorities is not the result of individual determinations and consciousnesses; it depends on the existence of people with a shared identity. A national or ethnic minority is considered to exist when certain people *mutually accept each other* as members of a national-ethnic group. Undoubtedly, individuals have a constitutional right not to acknowledge this affiliation – which is a potential one in that case – or not to communicate it to the others. However, no one has a constitutional right to declare himself/herself unilaterally (arbitrarily) to be the member of a national or minority group, based simply on his/her "self-determination". In respect of belonging to a national or ethnic minority, the individual's right to self-determination only exists in the negative sense and not in the positive one.

However, it does not follow from the relatively restricted nature of the right to self-determination about belonging to a national or ethnic minority that the national (ethnic) affiliation [identity] of an individual could be determined by others' acknowledgement of it with a legal effect. To the contrary, it follows from the above that everyone has the right to

have his/her national or ethnic identity acknowledged, and at the same time it is prohibited for the State to restrict – directly or indirectly – the disclosure of it (by way of allowing others to verify the "correctness" of the disclosed identity). The only requirement is to make a statement *bona fide* [in good faith] about one's national (ethnic) identity; external legal control by the State may only examine the "seriousness" of the statement – verifiable externally as well [see earlier in the case of the euthanasia decision]. If the seriousness of the statement is beyond doubt, everyone has the right to have his/her national (or ethnic) identity acknowledged by the State and the law. This right is about the individual's relation to himself/ herself, and as such it cannot be the basis of a legal claim against other persons – let them be ones who belong to the selected identity-group, or ones outside that group, or even members of the majority.

The national and ethnic minority self-governments are public bodies established by the law on the basis of the Constitution for exercising the constitutional rights of the minorities. The bodies of self-government of the national and ethnic minorities establish and maintain the personal, material and intellectual conditions necessary for the constitutional rights to be exercised only jointly by the members of the minorities. National and ethnic minority self-governments are self-administering bodies where the administrative tasks are performed by the subjects of the administration – the members of the national or ethnic minority. Self-administration is a way of administration where the subjects of the administration enjoy a wide scale of self-determination in the administration pertaining to them. Therefore, even without a specific constitutional provision, self-administration ("self-government" or "autonomy") should be granted in each case where a certain constitutional right can only be exercised jointly by the subjects of the fundamental right [see in: Decision 41/2005 (X. 27.) AB, ABK October 2005, 613, 620-621, Act on Higher Education]. Also with regard to the close relation between the right to self-determination and self-government (self-administration), it is fundamental that the voters and the officials of minority self-governments shall in fact be members of the national or ethnic minority.

As a consequence, it is a constitutional requirement for the Parliament to grant the legislative preconditions for the special constitutional right to be exercised only by the subjects thereof. When persons who do not belong to the national and ethnic minority exercise the rights of national and ethnic minorities, it is considered a restriction of the essential content of the constitutional right of the persons who actually belong to the minority, and no statute may

impose such restriction [Article 8 para. (2) of the Constitution]. As the members of the minority are by definition less than the majority, the legislation has to pay special attention to safeguarding the exercise of minority rights from any interference by the majority.

3. The Parliament's obligation of self-correction

I agree with Points II.1 and 2 in the holdings of the decision when establishing that the regulations on the national and ethnic minority elections, and in particular the provisions on setting up the registry of names in Section 115/E and Section 115/F of Act C of 1997 on the Election Procedure are not unconstitutional. In the present case, the Constitutional Court should have also stated that although the regulation adopted by the legislation was not unconstitutional, it is the constitutional obligation of the Parliament to pay special attention to the application and the enforcement of the regulations in force and to be determined to prevent any misuse – primarily by way of amending the Act as necessary.

Of course, the legislation can never fully exclude the possibility of misusing or eluding constitutional rights. The prevention of misuses is one of the practical tasks to be solved by the legislation, and as such the correct solution can only be found on the basis of practical experience. In the case of fundamental rights, the legislation can be expected to step up against major potential misuses – and in particular the ones happened before and the ones reasonably expectable – attempting to prevent them. There are many examples for the above in the Hungarian legislation. In the subjects closely related to this decision, such statutes include Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest (Data Protection Act) and Act C of 1997 on the Election Procedure containing very detailed rules on the prevention of election frauds. With regard to the protection of fundamental rights – and in particular the fundamental rights interpreted (also) as collective rights to be exercised collectively, as the rights of national and ethnic minorities – it is a fundamental precondition that the minority rights – and not only the right to self-government – shall only be exercised by persons who belong to the minority.

The practical questions of preventing misuses related to certain fundamental rights are beyond the Constitutional Court's competence; however, in the case concerned, it should have been stated that it is the duty of the legislature to verify that the constitutional regulatory solution chosen by the Parliament is the most effective one for securing the fundamental rights. The

legislation's duty of self-control is based on the general duty of protecting constitutional rights [Article 8 para. (2) of the Constitution]. If, according to practical experience, the statutory regulation does not grant adequate protection for certain fundamental rights – despite the expectations by the legislation – then it is the constitutional duty of the Parliament to correct the statutory provisions that proved to be defective. The Constitutional Court used similar arguments in Decision 22/2005 (VI. 17.) AB on the correction of constituencies by stating the following: "The continuous changes in the number of voting citizens registered in the specific constituencies, and especially internal migration, justify the revision of the borders of the constituencies from time to time, as well as that of the proportions of mandates obtainable from the regional lists." (ABK June 2005, 363, 366) In general, the legislature is not obliged to change any legal regulation when it has failed to reach its goal; however, in the case of legal regulations serving the purpose of safeguarding fundamental rights or securing their exercise, the goal of the legislation is determined in the Constitution – although the legislature is free in selecting the tools.

It is in the nature of practical problems that some of them cannot be foreseen by the legislation or the Constitutional Court. Therefore, the Constitutional Court should have established that in such cases the legislation is bound to monitor with special attention the implementation of the regulation, and it is obliged to perform self-correction to remedy the deficiencies identified as soon as possible upon being convinced about the unconstitutional effects of the regulation.

Budapest, 13 December 2005.

Dr. András Bragyova
Judge of the Constitutional Court

Concurrent reasoning by Dr. Péter Kovács, Judge of the Constitutional Court

I. In its practice, the Constitutional Court has addressed the question of the self-governments of national and ethnic minorities on several occasions, but it has not examined the merits of the election rules that form the basis of self-governments.

I/1 “Article 68 of the Constitution guarantees the fundamental right to establish minority self-governments. Nevertheless, the Constitutional Court does not specify how to establish the self-governments, how to set them up, what their position is in the structure of the State, and how they are linked to the State agencies. Under the authorisation of the Constitution, a specific Act of Parliament provides for the above questions. (Decision 435/B/1997 AB, ABH 1998, 711, 714) However, this does not mean that the Constitutional Court is not interested in the manner of the solution since – as pointed out by the Constitutional Court itself – this issue is to be settled “to the extent and in the manner specified by the provisions of the Constitution” and – as also mentioned by the Constitutional Court – it is the Parliament’s duty to provide for the conditions and the order of establishing local and national minority self-governments. [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205.] Thus, securing the establishment of minority self-governments is not a tool-oriented obligation but a result-oriented one: consequently, the Constitutional Court is – in my opinion – entitled to examine if the solution chosen by the legislation is suitable for the realisation of the constitutional provision.

I/2 I nonetheless hold that during the examination, one should also take into account the coordinates determined in general by the Constitutional Court in respect of the principles of self-governance. In one of its decisions on the autonomy of higher education [Decision 41/2005 (X. 27.) AB, ABK, October 2005, 613], the Constitutional Court elaborated several principles affecting the question of autonomy as such and to be followed *mutatis mutandis* in the present case as well:

“Higher education institutions, similarly to all institutions with autonomy, i.e. self-government, must have an elected representative organ: a self-government. It is the right of those concerned to set up the autonomous representative organs, and the rights of self-government vested with the higher education institution can be exercised by such organs. The holder and subject of the autonomy of higher education is the higher education institution, i.e. the community of teachers, researchers and students. Therefore, the participation of teachers, researchers and students in the autonomous representative organs and in the exercise of the rights of self-government resulting from autonomy is to be ensured. In addition to teachers, researchers and students, other experts or the representative of the founding and maintaining organisation may be involved in such activities, provided that the autonomy of the higher education institution is retained. (...) The Constitutional Court has a constitutional duty concerning the protection of autonomy and the organisations possessing autonomy. (...) The

Constitutional Court explained that autonomy "provides a constitutional guarantee for local governments primarily against the Government and the organs of public administration". According to the Constitutional Court, self-government "provides constitutional protection for local governments' right to make decisions on their organisation and rules of operation with independent responsibility". (...) Statutory rules are unconstitutional if they regulate the organisation of local governments by restricting the essential content of the right to set up an organisation, leading to the emptying of the content of the right to self-government and to the actual takeover of this right, and depriving the local government of the opportunity to make decisions on its own organisation with independent responsibility." [Decision 1/1993 (I. 13.) AB, ABH 1993, 27, 28-29]" (ABK October 2005, 613, 620-621)

I/3 In my view, the theoretical line-up of Decision 41/2005 (X. 27.) AB, i.e. the requirement that external persons – the ones outside the autonomy – should not have a decisive impact on the institutions of autonomy is to be applied in the present case as well. If – under Article 68 para. (4) of the Constitution – national and ethnic minorities are entitled to set up their self-governments, then [the Constitutional Court] "has a constitutional duty concerning the protection of autonomy and the organisations possessing autonomy" (ABK October, 2005, 613, 621) to define the borderline beyond which – and upon the realisation of the potential dysfunctions contained in the present system – local or national minority self-governments cannot fulfil their constitutional mission, i.e. when the way of setting up the self-government becomes an issue of constitutionality. It is not necessary to take over the duty of the legislature to clarify the borders within which the rules under Section 68 can be enforced.

I/4 As there can be a link between self-governance and the form of election, in certain cases affecting the essence of self-governance, I hold it important to examine it with regard to the assessment of the provisions challenged in the petition. Since the petitioner challenged – in his interrelated petitions – the compatibility of certain elements of the election system with the Constitution, the answer must also contain a review of the relevant election regulations, and it should not be restricted to the problem of the so-called individual right to self-determination.

II. At the time of transformation of the political regime, there were long debates about how to set up the minority self-governments and the solution was developed in a process harmonised

with the organisations representing Hungarian national and ethnic minorities. Since that time, some elements of the system have been changed due to the dysfunctions detected, and as termed in the present decision, the legislature has tried many ways to solve the problems. In those attempts, the legislature used the approaches developed by the Government in cooperation with the minority self-governments established under the Act of Parliament and replacing the representative organisations of national and ethnic minorities.

III. The questions raised by the petitioner have relevance under the international law as well. The issue of harmonisation between the international law and the domestic law has to be examined although the petitioner has not referred to it in the lack a *locus standi* offered to him under Section 21 para. (3) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC). However, there is a clear-cut relation – acknowledged also by the Constitutional Court – between the rule of law granted in Article 2 para. (1) of the Constitution and the principle of *pacta sunt servanda:* "The constitutional principle of the rule of law means on the one hand the submission of the subjects of law to domestic law (the Constitution and constitutional statutes), and on the other hand the obligation to comply with the international law obligations undertaken by the State of Hungary. (...) The performance of the international law obligation (the performance of the task of legislation when necessary) is a duty resulting from Article 2 para. (1) of the Constitution enshrining the rule of law including the *bona fide* performance of international law obligations, as well as from Article 7 para. (1) of the Constitution requiring the harmony of international law and domestic law." [Decision 7/2005 (III. 31.) AB, ABK March 2005, 112, 114] According to the Constitutional Court [Decision 40/2004 (X. 27.) AB, ABH 2004, 512, 514], the principle of *pacta sunt servanda* is a constituent element of the harmony between the rules of the international law and the domestic law, and, in my view, this is a question to be addressed – due to the close correlation – by virtue of the *ex officio* competence granted in Section 21 para. (7) of the ACC. The Constitutional Court itself stressed that "the State may not take measures – either during legislation related to promulgation or afterwards (...) which impair the enforcement of the principles and requirements contained in international treaties or cause distortions in the enforcement of the contents thereof as specified in normative rules." [Decision 54/2004 (XII. 13.) AB, ABH 2004, 690, 755-756] The international law commitments binding Hungary are not considered to be alien law as they are the country's own law, and the only difference between them and the domestic law is in their origin. The domestic law and the international law are in a symbiosis, almost breathing together, in each

country. The coordinates of the international law on the universal and the European scale – with the most important international documents mentioned in the present decision as well – seem to contain little concrete and relevant information. However, the network of international law obligations is wider than that, and in fact the obligation to take steps is supported by the international law and it also helps finding the way to the solution.

III/1 As far as the obligation of taking steps is concerned, it is to be emphasised that Hungary has undertaken to grant the establishment of the minorities' *own* self-governments under the bilateral agreements on the protection of minorities (such as Article 8 of the Hungarian-Slovenian agreement on the protection of minorities signed in Ljubljana on 6 November 1992, Article 9 of the Hungarian-Croatian agreement on the protection of minorities signed in Osijek on 5 April 1995, Article 9 of the Hungarian-Serbian agreement on the protection of minorities signed in Budapest on 21 October 2003) and under Article 6 of the Hungarian-Ukrainian declaration on the protection of minorities signed on 31 May 1991. It is to be further noted that in the report on the implementation in Hungary of the Framework Convention on the Protection of National Minorities concluded under the aegis of the Council of Europe, even the Government of Hungary referred to this well-known problem, acknowledged by the implementation monitoring body, too: "The Advisory Committee shares the concern demonstrated in the country report and also reinforced by other sources about the odd-one-out phenomenon, namely the situation when, due to the openness of the election system, persons who do not belong to the given minority manage to have themselves elected as the representatives of that minority. The Advisory Committee knows that several creative proposals have been made to solve the problem, allowing the limitation of the risks – without reaching as far as the introduction of an ethnic registry. According to the Advisory Committee, the Hungarian authorities must keep on actively searching for the remedy of the situation, in order to maintain the credibility of the whole system." (Document ACFC/INF/OPI(2001)4, Section 52) Based on the above, the Council of Europe Committee of Ministers acknowledges in the report on the implementation in Hungary of the Framework Convention that "there are legal steps under way related to the amendment of the Act on the Rights of National and Ethnic Minorities for the purpose of preventing persons belonging to a certain minority from establishing minority self-governments under the name of another minority." (Decision ResCMN(2001)4)

Although the latter documents do not directly bind Hungary, it is clear that they affect not only the harmony between the Hungarian obligations under international law and the domestic law, but also refer to the fact that the Government of Hungary has undertaken to eliminate the ostentatious dysfunctions. This promise is clearly stated in the Hungarian Government's report of 21 May 1999, serving as the basis of the above documents: "The provisions pertaining to election should also be revised to create the necessary background to allow only the persons known to and recognised by minority communities to be elected members of minority self-governments."

III/2 The underlying basic problem – allowing misuses – is the Hungarian interpretation of the concept of the so-called "free choice of identity" and the rejection of any form of the so-called minority registration, and the rigidity of this attitude was present in Hungary until the adoption of Act CXIV of 2005 on the amendment of the election of the representatives of minority self-governments, and of certain Acts related to national and ethnic minorities, affected in the petition as well. In respect of both, one has to conclude that the Hungarian application of the concepts is not conform to the wording used in the international law.

III/2/1 Of course, it is not problematic at all if the Hungarian law is more generous or grants more guarantees in respect of human rights issues than the international treaties signed by Hungary. On the one hand, this follows from the nature of the regulations, and it is usually stated even in the treaties themselves that none of their provisions shall be interpreted to the derogation of more favourable domestic regulations. On the other hand, the domestic law must reach the minimum level of legal protection required by the rule under the international law. From a constitutional point of view – and with due account to the requirement of harmonisation under Article 7 para. (1) of the Constitution – no theoretical support should be given to the avant-garde interpretation of the terms used in the international treaties and to their unfounded "further development" as it causes serious practical problems. As the legislature and the judiciary may only interpret international treaties in conformity with the international law, special attention is to be paid to the international documents containing interpretations by bodies authorised by the States Parties to that effect. This obligation of consideration does not depend on the legal nature of the document under international law in which it is presented, i.e. whether or not the document itself imposes any direct obligation on Hungary. With respect to the above, I hold that not only the interpretations contrary to the

international law but also the ones leading to clearly absurd results are to be considered incompatible with the requirement under Article 7 para. (1) of the Constitution.

III/2/2 According to Article 3.1 of the European Framework Convention on the Protection of National Minorities, “every person belonging to a national minority shall have the right to freely choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.” As stated in Point 35 of the official Explanatory Report on the Framework Convention – made together with the Convention by the special committee elaborating the Convention – about Article 3.1, “This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity.” It is, therefore, clear that the question is about acknowledging one’s identity, i.e. about acknowledging or rejecting one’s own inherited identity, which means that no person should be classified into a certain group against his or her own will.

III/2/3 As stated in the report by the above mentioned Advisory Committee of the Framework Convention, “the Advisory Committee sees a wide scale uniform position formed in Hungary against the registration of personal data on national and ethnic belonging. At the same time, the Committee holds that the Government should consider how to obtain reliable statistical data. The Hungarian authorities can hardly operate effectively without such data in hand, and also the international monitoring bodies face difficulties in verifying Hungary’s compliance with the obligations resulting from the Framework Convention.” (Document ACFC/INF/OPI(2001)4, Section 17)

Another committee of the Council of Europe, the European Commission against Racism and Intolerance (ECRI) also referred to the need to set up a database or a statistical pool of data about the population – in line with the principles of data protection and respect for privacy – as the lack of it prevents effective cooperation between the countries in the field of the joint fight against racism. (General policy recommendation n°1 CRI (96) 43 rev. and General policy recommendation n°4 CRI (98) 30)

According to Recommendation n° R(97) 18 concerning the protection of personal data collected and processed for statistical purposes adopted by the Council of Europe Committee

of Ministers, in respect of the so-called sensitive data (including ethnic background), such data may only be collected in a form in which the data subjects are not identifiable, with the exception of legitimate statistical purposes necessitating it – with adequate legal safeguards – or if it would be manifestly unreasonable or impracticable to do otherwise. Under Article 6 of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data dated 28 January 1981 (promulgated by Act VI of 1998), personal data revealing ethnic background (and other sensitive data) may not be processed automatically unless domestic law provides appropriate safeguards.

Consequently, not all ethnic registers and statistics are prohibited as such, as the Council of Europe only rejects the ones with personal identification and without security safeguards.

III/3 In fact, the above rules only reinforced – in light of the experience of the post World War II era – what had been stated in principle by the Permanent Court of Justice in 1928 in the judgement about the minority schools in Upper Silesia. In the case concerned, the Permanent Court of Justice provided for the following interpretation of the German-Polish treaty about Upper Silesia, signed in 1922 in Geneva:

Under Article 74 of the Treaty, "The question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities." Does this stipulation provide a sufficient basis for the construction (...) according to which it is a question of intention alone (the "subjective principle")? The Court does not think so. (...) The prohibition as regards verification or dispute which is comprised in the article can be quite easily understood. (...) If the authorities wish to verify or dispute the substance of a declaration by a person, it is very unlikely that in such cases [referring to the so-called double identity and the uncertainty of language skills as explained in the preceding paragraph by the Permanent Court of Justice – KP] they would be able to reach a result more nearly corresponding to the actual state of facts. Such a proceeding on the part of the authorities would, moreover, very easily assume in public opinion the aspect of a vexatious measure which would inflame political passions and would counteract the aims of pacification which are also at the basis of the stipulations concerning the protection of minorities. In the opinion of the Court, the prohibition of verification and dispute has as its object not the substitution of a new principle for that which in the nature of things and according to the provisions of the Minorities Treaty determines membership of a racial, linguistic or religious minority, but

solely the avoidance of the disadvantages (...) which would arise from a verification or dispute on the part of the authorities as regards such membership. (...) It must be admitted that the prohibition of any verification or dispute on the part of the authorities may lead to certain persons, who, in fact, do not belong to a minority, having to be treated as though they belonged thereto. That, in the opinion of the Court, is a consequence which the contracting Parties accepted in order to avoid the much greater disadvantages which would arise from verification or dispute by the authorities. If, according to what has been stated above, a declaration which clearly does not conform to the Geneva Convention, it does not follow (...) that the prohibition to verify or dispute ceases to be applicable in such a case. The prohibition which is expressed in unqualified terms cannot be subject to any restriction. But it must not be inferred from this that the construction given above, according to which the declaration must on principle be in conformity with the facts, is therefore of no value. It is indeed of some importance to establish what the situation at law is." (PCIJ: Rights of Minorities in Upper Silesia (Minority schools), n°12 April 26, 1928, Collection of Judgments, Series A n°15, pages 33-35)

III/4 The European Court of Human Rights has already judged upon several cases that bear relevance for the evaluation of self-government registries (*Gillow v. United Kingdom,* 24 November 1986), for self-government elections by religious minorities, with the religious minority being identical with a language minority in the given cases (*Serif v. Greece,* 14 December 1999; *Hasan and Chaush v. Bulgaria*, 26 October 2000), for religious identity (*Metropolitan Church of Bessarabia v. Moldova,* 13 December 2001), and for the evaluation of the so-called ethnic identity (*Sidiropoulos v. Greece,* 10 July 1998; *Gorzelik v. Poland,* 20 December 2001). Based on the above cases, the legislature must be able to draw adequate consequences, with particular regard – applicable *mutatis mutandis* – to the fact that "the autonomous existence of religious communities is an indispensable element of the pluralism of a democratic society (...), it affects directly not only the organisation of the community, but also the religious life of all of its active members. Without safeguarding the organisational life of the community (...) all other aspects of the individual's freedom of religion would become more vulnerable." (Judgement passed in the *Hasan and Chaush* case, Section 62)

IV How does the regulation in force and challenged by the petition fit into this set of coordinates?

IV/1 Sections 7 and 8 of Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (hereinafter: the ARM) deal with the issue of identity. The provisions in force are the following:

"Section 7 (1) The acknowledgement and statement of the fact that one belongs to a minority is the exclusive and inalienable right of the individual. No one is obliged to make a statement concerning the issue of which minority one belongs to.

(2) An Act of the Parliament or a statute issued for the implementation thereof may bind the exercise of certain minority rights to a statement to be made by the individual.

(3) The right to national and ethnic identity and the acknowledgement and statement of membership of such a minority do not preclude the recognition of dual or multi-affiliation"

"Section 8 It is the right of the citizen belonging to a national or ethnic minority to state in secret and anonymously during a census to which minority group he/she belongs."

It is clear from the title of the Act on the Rights of National and Ethnic Minorities and from the title of the chapter containing the above mentioned Sections 7 and 8 ("Individual Minority Rights") that the aim of the legislation is in line with the approach found in the relevant international documents, and in particular in Article 3.1 of the Framework Convention on the Protection of National Minorities. Accordingly, only those individuals who belong to the minority are entitled to this special *facultas alternativa.*

IV/2 In 1998 the parliamentary commissioners for data protection and for minority rights issued a joint recommendation (317/K/1998), stating that a certificate may only be issued about the declaration of one's ethnic affiliation but not about the fact of one's ethnic origin: "In our opinion, the issuing of any form of 'Certification of Origin' is contrary to the provisions of the DPA [Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] and of the ARM. No official certificate may be issued about one's national or ethnic origin, since no State authority may have any official information or record about such facts. Such a certificate would appear as though the issuer were in possession of some documentation or registry supporting the facts declared in the certificate. According to the provisions of the ARM and the APAP [Act IV of 1957 on the General Rules of Public Administration Procedure], the minority self-government is not an authority, and therefore it has no empowerment to issue an official certificate on any fact or status. The declaration of one's ethnic identity and the issuing of a document thereon may

only be lawfully acceptable in the following cases: i. a certificate is issued by a minority self-government or a social organisation of a minority attesting that a certain person is its member, official, or a candidate at the elections, ii. the person (possibly accompanied by others) presents himself/herself before one of the above organisations, and requests a written certificate on his/her statement on belonging to the minority in question, and the other persons support this statement, iii. the local government may lawfully issue a certificate stating that the person in question was a candidate at the minority self-government elections or he/she is a member of the minority self-government. It is also possible – though without any public law effect – for a minority party, cultural association, or organisation to issue on the member's request a certificate containing an ethnic data." In 2002, the parliamentary commissioners for data protection and for minority rights issued another joint recommendation (58/K/2002) reinforcing the above.

IV/3 Having regard to the sensitivity of the data about one's religious belonging, I hold that it is worth considering the practices of the Hungarian churches applied – in the cases where it follows from the structure of the church – when organising their own internal elections, setting up their election lists, offering the believers a chance to observe those lists and make comments, and managing the appeals.

V. However, as shown in the above examples, the requirement that only or predominantly the minority members should take part in the elections can also be secured by means other than the individual checking of personal statements – a method deemed problematic by the international law and rejected by the present decision as well. In my opinion, the election committee has to interpret properly Section 3 item d) of Act C of 1997 on the Election Procedure – pertaining to the establishment of minority self-governments as well – about the requirement of a purposeful exercise of the rights in good faith, as a principle to be enforced, and Section 115/I para. (5) item d) on the steps to be taken in the case of taking note of an unlawful event influencing the merits of the election procedure, with particular regard to the 2004 amendment of Article 70 of the Constitution, giving a clear-cut answer to the question. It is within the discretion of the legislation to decide whether the present form of Section 115/ I para. (6) item a) of the Act on the election procedure provides for adequate guarantees subject to the constitutional interpretation explained above, with the practice of, and the experience on, implementing minority elections to be taken into account when deciding this question.

VI Consequently, I hold that it is possible to define the coordinates within which the legislation may have a freedom of choice:
- the self-governments of national and ethnic minorities must be actually built upon active and passive voting rights exercised by the affected persons;
- State control of the individual statements would imply problems under constitutional and international law, although the utilisation of authentic statistical data about the population would be in line with the domestic and the international data protection regulations;
- with due respect to the rules on the election procedure, there should be an opportunity to prevent and filter out reasonably absurd and untrue initiatives as well as the anomalies distorting the reality of minority elections – through the application of the sanction of annulment as appropriate;
- in assessing the level of anomalies, special attention must be paid to the official statements made in the subject by the national self-government of the relevant minority.

VII Nevertheless, bearing in mind the above, I agree with the provisions of the decision and share the position taken in the decision establishing that the procedure of minority self-government elections – together with its recent amendments – is not incompatible with the Constitution.

Budapest, 13 December 2005.

Dr. Péter Kovács
Judge of the Constitutional Court

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