Decision 6/2001 (III. 14.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

Acting on the basis of a constitutional complaint and examining, *ex officio,* the presumption of the unconstitutional omission of a legislative duty, the Constitutional Court – with dissenting opinions by Dr. István Bagi, Dr. Attila Harmathy, Dr. János Németh, Dr. János Strausz, and Dr. Éva Tersztyánszky-Vasadi, Judges of the Constitutional Court – has adopted the following

decision:

1. The Constitutional Court rejects the constitutional complaint seeking declaration of the unconstitutionality of the last sentence in Section 4 para. (1) of Act II of 1989 on the Right of Association.

2. Acting *ex officio*, the Constitutional Court holds the following: through an omission of its legislative duty, the Parliament caused an unconstitutional situation by not securing all the statutory preconditions for the enforcement of the freedom of association that would provide for appropriate safeguards against an unreasonable extension of the procedure of registration.

The Constitutional Court therefore calls upon Parliament to meet its legislative duty by 31 December 2001.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. In its Decision 27/1993 (IV. 29.) AB, the Constitutional Court annulled Sections 7 to 11 concerning artists' communities of Council of Ministers Decree 83/1982 (XII. 29.) MT

(hereinafter: DA) on the Regulation of Certain Questions related to Fine Arts, Applied Arts, Photographic Arts, and Industrial Design Arts. On 29 June 1995, the artists' community concerned submitted a petition to the Metropolitan Court stating that it had not lost its legal personality on the basis of the Constitutional Court decision, and its court registration was to be initiated by the authority which had formerly been responsible for supervision and registration, namely the Ministry of Culture and Public Education. On 23 April 1996, the court of first instance passed a ruling under No. 9. Pk. 60. 928/1995/10 refusing the registration of the applicant on the basis of its failure to provide additional documents as required by the court for proving that the applicant's establishment had been in compliance with the provisions of Act II of 1989 on the Right of Association (hereinafter: AA).

The petitioner appealed against the decision of first instance at the Supreme Court which, on 14 October 1996, approved the ruling of the court of first instance in its ruling No. Kny. II. 27. 756/1996/2. According to the reasons of the ruling, the artists' community had been established on the basis of the DA, and as the Constitutional Court annulled the provisions of the DA on artists' communities as from 29 April 1993, the applicant had no legal personality from the above date on. The court pointed out that the applicant should have been formed and should have requested its registration in compliance with the AA.

Subsequently, the petitioner filed a complaint to the Constitutional Court requesting the declaration of the unconstitutionality and for the annulment of the last sentence in Section 4 para. (1) of the AA. In the petitioner's opinion, the challenged provision, according to which social organisations are established by virtue of the act of registration, restricts the essential content of the freedom of association provided for in Article 63 para. (1) of the Constitution. As Article 8 para. (2) of the Constitution provides that no Act of Parliament may restrict the essential content of any fundamental right, the challenged provision of the AA violates the Constitution by requiring the registration of social organisations. According to the petitioner, the essential content of the right of association means that "if a social organisation is formed on the basis of and in compliance with the statutory rules on the right of association, it shall gain its legal personality as well, since its existence as a legal entity is an inseparable, essential part of the social organisation." The petitioner holds that "the fundamental right is restricted even by the fact that a period of time, which may be a short or a longer one, lapses between the formation of the organisation established on the basis of the right of association and the granting of a legal form making it able to undertake rights and obligations in relation with society and other organisations of society."

In the present case, the Constitutional Court established that the constitutional complaint was in line with the requirements under Section 48 of Act XXXII of 1989 on the Constitutional Court (hereinafter: ACC), and therefore it examined the complaint on the merits.

2. The decision of the Constitutional Court is based on the following provisions of the Constitution:

"Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights."

"Article 63 para. (1) On the basis of the right of association, everyone in the Republic of Hungary has the right to establish organisations whose goals are not prohibited by law and to join such organisations."

The Constitutional Court examined the following provisions of the AA:

"Section 4 para. (1) Upon the foundation of a social organisation it shall be required to request the court registration thereof. The registration of the social organisation shall not be refused if its founders complied with the conditions prescribed in the present Act. The social organisation shall be established upon its registration."

"Section 15 para. (3) The court shall decide on registration with priority, in a non-litigious procedure. The court shall deliver its decision on registration to the prosecutor's office."

II

The Constitutional Court first examined on the basis of the petition whether it violates the freedom of association to prescribe that social organisations shall be established upon their court registration.

1. Section 1 of the AA provides in accordance with the Constitution that the right of association is a fundamental freedom of all persons, and the Republic of Hungary acknowledges this right and guarantees the undisturbed practice thereof. Among the substantial elements of the right of association, Article 63 of the Constitution specifies the

foundation of organisations and the freedom to join an organisation. In addition, Sections 1 and 2 of the AA mention the right to freely decide on the aims of the association, as well as the right to participate in the activities of the organisation and the right to operate the organisation.

According to the practice of the Constitutional Court, the freedom of association is essentially related to the freedom of expression. The free foundation of associations and the force-free exercise of the association's activities shall guarantee the freedom of conviction, conscience, and expression. At the same time, the privileged constitutional protection of communication rights shall not be applied to all political freedoms, and therefore the right of association does not have the same primacy as the freedom of expression against other constitutional rights. [Decision 22/1994 (IV. 16.) AB, ABH 1994, 127, 128-129; Decision 21/1996 (V. 17.) AB, ABH 1996, 74-76]

The freedom of association is related to the general freedom of action and the right to free personal development that form part of the right to human dignity [Article 54 para. (1) of the Constitution]. Every person has the right to associate with others for any freely chosen purpose, among others, for the establishment of a cultural, religious, scientific, social or leisure community, furthermore, to set up, voluntarily join or freely leave an organisation. [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44-45; Decision 27/1990 (XI. 22.) AB, ABH 1990, 187, 189; Decision 22/1994 (IV. 16.) AB, ABH 1994, 127, 128-129; Decision 39/1997 (VII. 1.) AB, ABH 1997, 263, 274]

2. Similarly to other fundamental rights, exercising the freedom of association is not unlimited. As far as the restriction of the right is concerned, the aims of the organisation to be established on the basis of the right of association as well as the activities of the organisation established bear primary importance. According to Article 2 para. (3) of the Constitution, no activity of any social organisation may be directed at the forcible acquisition or exercise of public power, or at the exclusive possession of such power. Furthermore, Article 63 para. (1) guarantees the freedom of association for organisations the aims of which are not prohibited by law. Prohibited aims of association and prohibited activities are listed in Section 2 of the AA. Accordingly, the exercise of the right of association may not violate Article 2 para. (3) of the Constitution, it may not constitute a criminal offence or an incitement to commit a criminal offence, and it may not violate the rights and the freedoms of others. Social

organisations may not be founded with the primary objective of pursuing economic/business activities, and no armed associations may be set up on the basis of the right of association. In addition to the definition of prohibitions, Section 2 para. (3) of the AA specifies the positive side of the freedom of foundation: social organisations may be established for the pursuance of any activity that is in line with the Constitution and that is not prohibited by an Act of Parliament.

The above provisions of the AA represent the constitutional principle that the right of association may be restricted when this is necessitated by the protection of another fundamental right or constitutional value, and the level of limitation is in line with the desired objective. [Decision 21/1996 (V. 17.) AB, ABH 1996, 74, 78]

The Constitutional Court pointed out in Decision 58/1997 (XI. 5.) AB that the AA contains several provisions aimed at the prevention of abusing the freedom of association. On the basis of Section 4 para. (1), the court shall examine whether the social organisation was set up for an unconstitutional or unlawful purpose. Section 16 provides for the steps the court may take – on the basis of an action lodged by the prosecutor – when a social organisation operates in an unlawful way. Based on the above provisions, the court may refuse the registration of a social organisation or dissolve an operating social organisation in order to protect the Constitution or to secure the rights of others. (ABH 1997, 348, 350).

3. Based on the right of association guaranteed in Article 63 para. (1) of the Constitution, everyone has the right to establish organisations whose goals are not prohibited by law and to join such organisations. According to the Constitution and Section 5 of the AA, private individuals may decide on setting up a community which does not operate on a regular basis and the membership in which is not recorded or which has no organisational structure as specified in the AA. In this case, the community may operate freely, but it is not qualified as a social organisation. If, however, the founders set up a community with recorded membership and a lawful organisational structure and operating on a regular basis, it is a precondition under public law, based on Section 4 para. (1) of the AA, of the establishment of the social organisation that the organisation be registered by the court.

The Constitutional Court established that the mere fact of requiring court registration for the establishment of a social organisation does not violate the freedom of association guaranteed

in Article 63 para. (1) of the Constitution. The primary objective of court registration is in fact to preclude the establishment of social organisations set up for unconstitutional or unlawful purposes. Registration does not qualify as a restriction of the content of the right of association since the court may only examine the lawfulness of establishing the social organisation and the declared aims thereof. This is reflected in Section 4 para. (1) of the AA, which provides that the registration of a social organisation shall not be refused if its founders have complied with the conditions prescribed in the AA.

4. The scope of powers the State authorities have in the procedure of establishing social organisations is one of the best indicators of the level of the freedom of association and, in particular, of the autonomy of social organisations. Similarly to the regulations of several democratic European countries, the AA applies the so-called system of normative conditions. Within the framework of such a system, the State authority in charge may not refuse the registration of the social organisation if it proves its compliance with the statutory conditions applicable to its foundation. On the other hand, there are some democratic countries where no State registration is required for the establishment of associations.

Article 11 of the European Human Rights Convention, which guarantees that everyone has the right to freedom of peaceful assembly and to freedom of association with others, does not require that the organisations established on the basis of the right of association should become legal entities upon their foundation. Therefore, the European Human Rights Commission did not consider it to be a violation of Article 11 of the Convention if, according to the law of a State party to the Convention, the registration or listing of a social organisation is the precondition of its becoming a legal entity. (Application No. 14233/88; Lavisse v. France)

5. Hungarian customary law in the late 19th and early 20th century acknowledged the system of the so-called free establishment of associations. Accordingly, all voluntary associations with an organisational structure (permanent purpose, varying number of members, and body of representation) became legal entities under private law upon the execution of the deed of association. However, the regulations were made somewhat controversial by certain public law provisions restricting the freedom of association, providing that the association may only commence its activities upon the Minister of the Interior approving the statutes of the association. Refusing such approval could result in having the association dissolved, which

caused the termination of being a legal entity under private law, but as long as not dissolved, the association could act in public as a legal entity.

Both the normative system with adequate guarantees and the system of free association without disproportionate public law restrictions may be constitutional in a democratic society. The legislature is free to decide on guaranteeing the establishment of social organisations upon either their foundation or their court registration with constitutive force. One must, however, point out that in a normative system the legal guarantees delimiting the actions of the State and securing the enforcement of the freedom of association have constitutional importance. Historically, the freedom of association was opposed to the so-called concession system. History teaches us that the establishment of social organisations should be made subject to neither decisions adopted by State authorities within their discretionary powers nor whether or not the implementation of the aims pursued by the organisation is supported by the State.

III

The petitioner raised objections to the differences in approach applied by the legislature concerning the establishment of social organisations and business associations, respectively.

1. According to Section 16 para. (2) of Act CXLIV of 1997 on Business Associations (hereinafter: ABA), business associations shall be established upon entry into the register of companies as of the date of such entry. This means that business associations, similarly to social organisations, are established on the basis of a constitutive court registration with *ex nunc* effect. Nevertheless, there are significant differences in the relevant regulations in two fields: before their registration, business associations may operate as pre-companies, and in the company registration procedure the court must adopt a decision on registration within a statutorily defined deadline.

According to Section 14 para. (1) of the ABA, as of the date of countersignature of the articles of association (deed of foundation or statutes, as appropriate), or such being incorporated into a public document, until the day of registration, the business association to be established may operate as a pre-company. Pending registration, the organs of the company may commence their operation, the executive officers may act on behalf and for the benefit of the company,

and they may obtain rights and undertake obligations on behalf of the company. A pre-company may only pursue business-like economic activities after submitting the application for the registration of the company at the competent court of registration.

According to Sections 42 and 44 of Act CXLV of 1997 on the Register of Companies, Public Company Information and Court Registration Proceedings (hereinafter: ACR), the court of registration shall resolve whether to approve or reject the application for registration within 30 or 60 days – depending on the type of business association – of receiving the application. (This time limit shall not include the time elapsed between the mailing of the resolution on correction (if any) and the presentation of such correction.) In the event that the court of registration should fail to meet its obligation to resolve registration matters within the above deadline, the head of the court of registration shall take measures within 8 days following the above-specified deadline to resolve the application for registration in question. If the head of the court of registration should also fail to perform his obligation to have the matter resolved, the company in question shall be deemed registered by virtue of law on the 39th or 69th day, respectively, following the receipt of the application, with a content corresponding to the application.

2. Social organisations and associations are under the protection of Article 63 para. (1) of the Constitution. On the other hand, the constitutional protection of business associations is based on Article 9 para. (1) of the Constitution declaring the market economy as well as Article 9 para. (2) guaranteeing the right to enterprise and the freedom of economic competition. [Decision 13/1990 (VI. 18.) AB, ABH 1990, 54, 55; Decision 32/1991 (VI. 6.) AB, ABH 1991, 129, 135; Decision 54/1993 (X. 13.) AB, ABH 1993, 340, 341; Decision 37/1997 AB, ABH 1997, 234, 243] The Constitutional Court pointed out in its Decision 8/1993 (II. 27.) AB that the requirements for transforming into legal persons the organisations and communities established on the basis of the right of association or other constitutional rights may be regulated by the State in a different manner, in accordance with the particular characteristics of the given organisation or community. The act of legislature is deemed unconstitutional if it provides to some among several comparable organisations the opportunity to become a legal person, while arbitrarily excludes others, or renders, for the latter, the acquisition of such legal status disproportionately difficult. (ABH 1993, 99, 101) Business associations are established by their founders for performing business-like joint economic activities, while social organisations and associations are set up for cultural, public, leisure, social and other non-

economic or non-business-like activities. Therefore, the Constitutional Court found no unconstitutionality in the differences of approach applied by the legislature concerning the establishment of social organisations and business associations.

On the basis of the above, the Constitutional Court established that the last sentence of Section 4 para. (1) of the AA does not violate the freedom of association granted in Article 63 para. (1) of the Constitution. Therefore, the Constitutional Court rejected the constitutional complaint.

IV

In the petitioner's opinion, the right of association is restricted even by the fact that a "short or a longer period of time" may lapse between the formation of the social organisation and the establishment thereof. Based on the close relation between the subject of the above objection and Section 4 para. (1) as well as Section 15 para. (3) of the AA, the Constitutional Court examined *ex officio*, acting in the competence granted in Section 49 para. (1) of the ACC, whether the legislature secured all the statutory conditions that offer adequate protection against an unjustified delay in the registration procedure.

1. Social organisations are registered in a non-litigious procedure, primarily on the basis of examining the documents submitted (or upon a hearing). According to Section 15 para. (2) of the AA, the person entitled to represent the social organisation shall submit an application for registration and attach the minutes of the founding general assembly as well as the statutes adopted. The criteria to be applied by the court in the registration process are listed in Resolution No. 1 of the Supreme Court's Public Administration Board. Section 15 para. (3) of the AA provides that the court shall decide on registration with priority. In addition, neither the AA, nor Minister of Justice Decree 6/1989 (VI. 8.) IM on the Rules of Administration of the Register of Social Organisations, nor Minister of Justice Order 123/1973 (IK 1974. 1.) IM on the Rules of Administration of Courts contains any requirement concerning the deadline of the procedure of registration. According to Section 13 para. (3) of Council of Ministers Decree 105/1952 (XII. 28.) MT on the provisions necessary as a result of putting into force Act III of 1952 on the Code of Civil Procedure (hereinafter: ACCP), the rules of the ACCP are to be applied appropriately also in non-litigious procedures if no statute on individual non-litigious procedures provides otherwise or if nothing to the contrary follows from the non-

litigious nature of the procedure. Section 2 para. (1) of the ACCP requires the court to enforce the parties' right to have the procedures finished within a reasonable period of time.

2. In contrast to civil litigious procedures, and similarly to the company registration procedure as well as to several public administration procedures, the procedure of registering social organisations is not contradictory: there are no parties with contrary interests in the procedure, the court is not involved in the settlement of a legal debate but it is in charge of passing a resolution upon the registration of a social organisation on the basis of the requirements of the AA, the documents submitted and a hearing if necessary.

In its Decision 72/1995 (XII. 15.) AB, the Constitutional Court held it indispensable for guaranteeing legal certainty to make the behaviour of jurisdiction predictable. According to the decision, the client's right to a public administrative resolution/decision may not depend upon the fact of when the public administrative organ is willing to pass a resolution/make a decision in a case it is in charge of. For public administration has a constitutional obligation to pass a resolution/decision on the merits of the case within its sphere of competence by the deadline prescribed. Obligatory deadlines applicable to the administration of cases are indispensable in public administration. For example, the client may not build a house, start a business, engage in trade, or drive a car without a licence issued by the competent authority. Therefore, the applicant is bound to apply to the authority in order to have his request examined in a lawful manner. Based on the above, the Constitutional Court acted *ex officio* and established the unconstitutional omission of a legislative duty, as the statutory provisions did not guarantee effective legal means of protection for clients against the default of public administration authorities in keeping the specifically determined deadlines of administration provided for in the general and specific laws on public administration procedure. (ABH 1995, 351, 353-357)

In the present case, the Constitutional Court established that the above principles shall be taken into account in non-litigious civil procedures aimed at the registration of social organisations. If the court does not decide on the registration of the organisation and there is no statutory regulation providing for the legal consequences of the court's default, this on the one hand violates the principle of legal certainty as part of the democratic State under the rule of law declared in Article 2 para. (1) of the Constitution, and on the other hand impedes the exercise of the right of association guaranteed in Article 63 para. (1) of the Constitution. If the

legislature applies the system of normative conditions concerning the establishment of social organisations, it is a precondition of the enforcement of the freedom of association that the court shall decide on the registration of a social organisation as soon as possible. For the enforcement of the principle of a democratic State under the rule of law and the freedom of association, the length of the period of time lapsed between the submission of the application for registration and the passing of the final resolution on registering the organisation and allowing the commencement of its activities is of great importance.

3. According to Section 4 para. (1) of the AA, social organisations are established by way of registration with constitutive, *ex nunc* effect. Only after its registration may a social organisation appear as an organisation independent of its members. The Constitutional Court emphasises that autonomous social organisations play an important role in developing public democracy. Registered social organisations have many statutorily guaranteed public law powers related to the implementation of their aims as specified in their statutes. The Constitutional Court refers to the example of Section 149 item g) of Act C of 1997 on the Election Procedure empowering social organisations registered on the basis of the AA with the status of nominating organisations. In line with Section 47 para. (1) item c) of Act LXV of 1990 on Local Governments, the managing body of a local social organisation may initiate a local referendum. The establishment of political parties participating in the development and expression of popular will [Article 3 para. (2) of the Constitution] as well as of labour unions protecting the interests of employees [Articles 4 and 70/C para. (1) of the Constitution] is also covered by the provisions of the AA. [Sections 3 para. (3) and 4 para. (2) of the AA; Section 1 of Act XXXIII of 1989 on the Operation and Financial Management of Political Parties] For social organisations it is of primary importance that according to Section 4 para. (1) item b) of Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction, social organisations registered by the court at least three years before the first day of the year when the taxpayer made his instruction may – provided other requirements are met as well – benefit from one per cent of the tax paid.

4. The Constitutional Court holds that in the case of a procedure aimed at the registration of a social organisation, the importance of Article 8 para. (1) of the Constitution should be stressed, according to which it is the primary obligation of the State to respect and protect fundamental rights, together with Article 50 para. (1), which provides that the courts of the Republic of Hungary shall protect and guarantee the citizens' rights and legitimate interests.

The level of requirements raised in relation to State authorities, including courts, depends on the complexity of the given procedure, and whether the procedure is closely related to the enforcement of any fundamental right. In the opinion of the Constitutional Court, in the case of a procedure aimed at the registration of a social organisation, the priority mentioned in the AA and the requirement of a reasonable period of time specified in the ACCP are not sufficient for the enforcement of the provisions in question of the Constitution. The legislature can meet its constitutional obligation to protect the freedom of association if it defines objective statutory requirements in order to prevent an unjustified delay in the registration procedure.

5. The Constitutional Court notes that the adoption of guarantees concerning the registration procedure does not threaten with the possibility of the court acknowledging the operation of organisations established for unconstitutional or unlawful purposes. If, on the basis of the statutes, it is established that the purpose of the organisation is not in line with the constitutional order of law, then the court shall refuse registration according to Section 2 of the AA. (In the case of doubt, correction may be ordered, the period of which shall not be included in the deadline period.) According to Section 14 para. (1) of the AA, the public prosecutor shall exercise legal supervision upon the social organisation – with the exception of political parties. Section 15 para. (3) provides that the court shall deliver its decision on registration to the prosecutor's office as well. If no other means may be applied to secure the lawfulness of operation, the prosecutor may turn to the court. According to Section 16 para. (2) item d), the court shall dissolve the social organisation already registered if its operation violates Section 2 para. (2) of the AA.

6. According to Section 49 para. (1) of the ACC, an unconstitutional omission of legislative duty may be established – either *ex officio* or on the basis of a petition – if the legislature has failed to fulfil its statutorily mandated legislative duty, and this has given rise to an unconstitutional situation. The legislature shall be obliged to legislate even in the lack of a concrete mandate given by a statute if it recognises that there is an issue requiring statutory determination within its scope of competence and responsibility. The Constitutional Court shall establish an unconstitutional omission if the guarantees necessary for the enforcement of a fundamental right are missing, or if the omission of regulation endangers the enforcement of a fundamental right. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232] As the primary responsibility of the Constitutional Court

– specified in the preamble of the ACC as well – is the protection of constitutional fundamental rights, the Court may, when needed, act *ex officio* to declare an unconstitutional omission, and this may also happen in a procedure commenced on the basis of a constitutional complaint. [Decision 30/1990 (XII. 15.) AB, ABH 1990, 128; Decision 32/1990 (XII. 22.) AB, ABH 1990, 145; Decision 31/1997 (V. 16.) AB, ABH 1997, 154; Decision 63/1997 (XII. 11.) AB, ABH 1997, 365]

In the present case, the Constitutional Court established both the default and the violation of the Constitution. The legislature failed to secure all the statutory preconditions for the enforcement of the freedom of association that would provide for appropriate safeguards against an unreasonable extension of the procedure of registration. The default of the legislature has resulted in the violation of the freedom of association, as a delay in the registration impeding the commencement of full-scale operation of a lawfully founded social organisation would result in a pending situation, and maintaining that without due reasons may prevent the realisation of the aims of the social organisation.

One of the main guarantees of enforcing fundamental constitutional freedoms – such as the freedom of association – is the existence of a State limited by law. The legal limitations upon the State's actions have an especially significant constitutional importance in the legal model – characteristic of the AA as well – in which social organisations are constituted by State (court) decisions. When adopting the present Decision, the Constitutional Court took into account the fact that the freedom of association is in close connection with the right to free personal development as well as with the freedom of expression. The freedom of association is a constitutional fundamental right that fosters the enforcement of several further fundamental rights, such as the freedom of establishing political parties [Article 3 para. (1) of the Constitution], the freedom of founding a Church [Article 60 para. (2) of the Constitution], and the freedom of establishing labour unions and other organisations for the representation of interests [Article 70/C para. (1) of the Constitution]. Organisations established on the basis of the freedom of association are indispensable and important actors in a constitutional democracy. The provisions guaranteeing the enforcement of the freedom of association are indispensable. The factor of time which secures an undisturbed exercise of the freedom of association and the commencement of the actual operation of a lawfully established social organisation also has constitutional importance. It is the constitutional obligation of the legislature to respect, acknowledge, protect and guarantee an undisturbed exercise of the right

of association. Acts of Parliament should offer adequate safeguards against an unjustified extension of the procedures that impede the enforcement of fundamental constitutional rights.

The determination of statutory conditions complying with constitutional provisions falls within the competence of the legislature. The Parliament may use the example of guarantees applied in other procedures or may specify different rules as well.

Having regard to the importance of the matter, the Constitutional Court ordered the publication of this Decision in the Hungarian Official Gazette.

Budapest, 12 March 2001

Dr. János Németh
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
presenting Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Dissenting opinion by Dr. István Bagi, Judge of the Constitutional Court

I agree with the statement in the majority decision that in the case of a social organisation established on the basis of the right of association, an unjustified extension of the registration procedure may result in violation of the right of association. I also agree with the holding that the content of “reasonable time” mentioned in Article 6 para. (1) of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights), promulgated in Hungary in Act XXXI of 1993, and

also mentioned in Article 57 para. (5) of the Constitution may be determined differently in line with the nature of the specific procedures.

However, I am firmly convinced that there is no unconstitutional omission of legislative duty; on the contrary, Section 15 para. (3) of Act II of 1989 on the Right of Association expressly provides for the adoption of a resolution on the registration of a social organisation with priority. Therefore, I do not agree with point 2 of the holdings of the Decision, and I share the view and the reference to priority procedure expressed in the dissenting opinion of Dr. Éva Tersztyánszky-Vasadi, Judge of the Constitutional Court.

I do not agree with the majority opinion regarding the justification of connecting in the present case the issue of statutory regulation with the problem of "living law". Although the latter is not mentioned expressly in the majority opinion, one may conclude that in fact this was the basis for declaring the omission. Clearly, the priority procedure prescribed by the legislature offers an equally swift procedure as the one that would include guarantees against unjustified delays.

In my opinion, it should be examined separately, on the one hand, whether the regulations in force comply with the European Human Rights Convention and the Constitution – in this respect the Constitutional Court is competent – and, on the other hand, if delayed registration would violate the enforcement of the right of association with due regard to living law.

In the latter respect, the competence of the Constitutional Court – in line with its standing practice – may not be established as until today the Constitutional Court has not established any default on the basis of "living law".

Although this would be theoretically possible, in such a case the Constitutional Court should give a reasoning for deviating from its previous practice and it should declare that the establishment of the default is based not on statutory regulations but on a (potential) injury caused by the actual practice, that is, on "living law". In my opinion, it falls within the competence and the professional/political responsibility of the legislature to decide what measures of legal technique or other tools (e.g. legal interests) it might use for securing priority treatment in passing a resolution on registration.

It is not possible to consider the question of order in an issue where the court decision directly constitutes the establishment of an association. The examination of the association's purposes might, in certain cases, justify a longer procedure with special regard to the fact that in a non-litigious procedure the judge shall be bound to decide on – for example – the establishment of political parties or Churches with regard to the constitutionality of their purposes. On the basis of the regulations examined in the given case, the court is in charge of not only registration but of making a decision as well.

Maintaining and complementing my arguments explained in the concurrent opinion attached to Decision 2/2001 (I. 17.) AB (ABK 6 January 2001, 13; Hungarian Official Gazette MK 2001/6, 361, 367-368), I sum up my position by emphasising that the enforcement of constitutional fundamental rights is based upon, and therefore should primarily be interpreted on the basis of, the requirement that the State be under the rule of law and the requirement of legal certainty, the latter being one of the integral elements of the former. It is not justified to make a comparison between the enforcement of individual constitutional fundamental rights on the basis of the duration of the court procedure and on that of the guarantees of such a timeframe.

Budapest, 12 March 2001

Dr. István Bagi
Judge of the Constitutional Court

Dissenting opinion by Dr. Attila Harmathy, Judge of the Constitutional Court

I do not agree with the second point of the holdings of the Decision. The reasons for my position are the following:

1. The petitioner initiated the annulment of the last sentence in Section 4 para. (1) of Act II of 1989 on the Right of Association (hereinafter: AA), alleging that the essential content of the right of association is restricted by the provision that social organisations are established by virtue of the act of registration. The petition has been submitted concerning the

refusal by the court to register the petitioner (artists' creative community). In the petitioner's opinion, legal personality forms part of the essential content of the right of association and such right is restricted by the rule specifying that social organisations become legal entities, rather than by virtue of their foundation, upon their subsequent registration only.

2. According to Article 63 para. (1) of the Constitution, based on the right of association, everyone has the right to establish or join organisations. The term "organisation" does not mean that the right of association is identified in the Constitution with the right to set up legal entities.

Section 1 of the AA defines the right of association as one allowing the establishment of organisations and communities. However, in Section 2, social organisations are mentioned instead of organisations, and it is their legal personality that is declared. As opposed to social organisations, which are legal entities, communities have no legal personality. For communities not qualified as social organisations and established on the basis of the right of association, Section 5 provides that either their operation is not regular, or they have no recorded membership, or they do not have an organisational structure as specified by law. The list is incomplete as, pending registration, future social organisations may operate as communities. Therefore, such communities are either to-be-legal entities, or their operation does not necessitate legal personality at all.

Hungarian law before World War II acknowledged associations of private individuals established on the basis of the right of association and lacking legal personality. In the case of such associations, proprietary issues as well as legal relations between the association and its members and among the members themselves played an important role. In addition, the category of "maimed legal person" was in practice, in the case of which some degree of legal subjectivity was granted without the acknowledgement of legal personality (Károly Szladits, Magyar Magánjog, Budapest 1941, I 581-583, 591-592, 625-629).

One can find in the laws of other countries, too, communities which are established on the basis of the right of association, which do not qualify as legal persons and which, however, may have certain rights. For example, the Constitutional Court of Germany established as early as in 1954 about the activities of political parties that groups not qualifying as legal persons may also enjoy certain rights under public law. (BVerfGE 3, 383, 391-392).

Therefore, no legal personality is necessary for the exercise of the right of association. It is another issue that communities established on the basis of the right of association may only achieve certain goals completely if they create organisations with legal personality.

3. Communities without legal personality established on the basis of the right of association are only mentioned in Sections 1 and 5 of the AA but they are not regulated therein. The lack of regulation is understandable as the AA does not regulate the full scale of issues concerning organisations with legal personality, either.

It is no surprise that the provisions of the AA lack certain regulations. The AA was one of the major steps in the process of changing the political regime; its text was promulgated on 24 January 1989. At the time of preparing the draft of the AA, the Constitution declared in a general manner the right of association [Article 65 para. (1)], but it severely restricted the exercise thereof [according to Article 65 para. (2), the organisation of mass organisations and mass movements was only allowed for certain purposes, e.g. the protection of the order and the achievements of socialism]. Since the new regulations on the right of association were based on different grounds, the Constitution had to be amended before adopting them. The present constitutional provisions on the right of association under Article 63 paragraphs (1) and (2) were introduced on 23 October 1989 by Act XXXI of 1989 on the amendment of the Constitution.

At the time of preparing the draft of the AA, the right of association was primarily interpreted as a freedom. Although the Minister's reasoning pointed out the necessity to have the issues related to the right of association regulated in a comprehensive manner, no comprehensive regulation was adopted. In the given historical situation, this was quite natural; the most important political step on the path to democracy had been made. Although the regulation of the exercise of the right of association was considered the most important task, organisational issues gained more ground. The rules of the AA deal with legal persons, but not in a comprehensive manner. Only a few provisions cover the internal relations within the organisations with legal personality as well as the relations between the organisations and their members and proprietary issues. Sections 23 and 24 refer to the plans about adopting further statutes, and although several statutes were adopted concerning the right of association, the comprehensive regulation of the right of association was not continued. Subsequent statutes related to the right of association took organisations with legal personality as a basis.

4. The issues related to the enforcement of the right of association cover a scope wider than the questions concerning legal persons and they relate not only to the establishment and operation of organisations engaged in political activities or the protection of economic interests. However, at the time of changing the political regime, one could not expect to have the complex questions of the right of association – linked to many economic issues in addition to political aspects – regulated in a comprehensive manner. Nevertheless, a few years later several problems caused by the incompleteness of regulation emerged. This is reflected by the fact that the Supreme Court published nearly as much as twenty decisions in the Court Reports of 1991-1993, and in 1994 the Supreme Court's Public Administration Board published its guidelines in a resolution.

The lack of regulations concerning the legal issues related to artists' creative communities was a specific problem. This problem was dealt with by Decision 27/1993 (IV. 29.) AB of the Constitutional Court (ABH 1993, 444) as well as by a decision of the Supreme Court published in 1997 in the Court Reports (BH 1997/3 case 148) and another decision of the Supreme Court (BH 1993/1 case 31) illustrating the difficulty of qualifying the legal relation between artists' creative communities and their members.

5. According to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court, the Constitutional Court may establish *ex officio* the legislature's omission of a legislative duty based on a statutory provision, thus causing an unconstitutional situation. The application of the above provision has been raised in respect of the questions mentioned in the petition.

Article 63 para. (3) of the Constitution empowered the legislature to adopt the Act on the Right of Association (although this provision of the Constitution was inserted by Act XL of 1990 on the Amendment of the Constitution adopted after the promulgation of the AA).

In line with the practice of the Constitutional Court as established at the time of commencing its operation, an unconstitutional omission may be established even if the regulation necessary for the enforcement of a fundamental right is missing [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232], or if there is no adequate regulation to guarantee the exercise of a fundamental right [Decision 60/1994 (XII. 24.) AB, ABH 1994, 342, 369].

In 1993, the Constitutional Court established that it falls within the competence of the legislature to decide in what details it regulates a certain situation of life, and a constitutional concern may only be raised if the deficiency of the regulations prevents the enforcement of a

certain fundamental right (Decision 161/E/1992 AB, ABH 1993, 765, 766). Decision 1395/E/1996 AB reinforced the above statement by pointing out that in addition to the default, the existence of a resulting unconstitutional situation should be verified in order to establish the unconstitutional omission (ABH 1998, 667, 669).

The deficiencies in the AA and in the related statutes complicate the exercise of the right of association; nevertheless, they do not prevent the exercise of the right of association. The difficulties that may be faced do not reach the level that would justify the establishment of unconstitutionality. Therefore, in line with the Constitutional Court's practice referred to above, no unconstitutional omission may be established.

Budapest, 12 March 2001

Dr. Attila Harmathy
Judge of the Constitutional Court

Dissenting opinion by Dr. János Németh, Judge of the Constitutional Court

1. I agree with point 1 of the Decision rejecting the constitutional complaint, but I disagree with point 2 establishing *ex officio* an unconstitutional omission.

According to the Decision, the unconstitutional situation manifesting itself in an omission was occasioned by the legislature failing to secure all the statutory preconditions for the enforcement of the freedom of association that would provide for appropriate safeguards against an unreasonable extension of the procedure of registration.

Among the statutes regulating the registration of social organisations, there are – as referred to in the Decision as well – ones that incite courts to pass decisions as soon as possible.

Such statutes include

a) Section 2 para. (1) of the ACCP - applicable in matters of registration as well - that requires the court to enforce the applicants' right to have the procedure finished within a reasonable period of time, and

b) the first sentence of Section 15 para. (3) of the AA providing that the court shall decide on registration with priority.

It is on the basis of the above regulations that the Decision establishes that if the court fails to decide on the registration of the organisation, and if there is no statute defining the legal consequences of the default – delay – of the court in charge of the registration procedure, then – in addition to the violation of legal certainty – the exercise of the right of association guaranteed under Article 63 para. (1) of the Constitution becomes impossible (point IV/2).

In my opinion, the court's complete default or an unreasonable delay in performing the act of registration has its legal consequences even today. The court is responsible for the non-performance of the procedure or the delay thereof beyond an unreasonable period of time if caused by the judge in charge or by the head of the court.

In addition, I hold that the Decision should have taken into account the fact that Act CX of 1999 on the Definition of the Seat and the Area of Competence of the National Board of Appeal and on the Amendment of Certain Acts regarding the Operation of Jurisdiction amended Section 2 of the ACCP with a provision on the party's right to seek equitable compensation on the basis of his fundamental rights being violated, in the case of a violation of the right to have the procedure completed within a reasonable period of time. Although this rule shall be in force only from 1 January 2003 on, it reflects the legislature's endeavours to render more severe legal consequences to any default of the courts – without regard to the lack of the direct liability of the person acting on behalf of the court concerning the injury caused – including the legal consequences related to the delays in the registration procedure of associations.

2. The Decision explains that the severity of the requirements regarding the procedures of the courts depends, among others, on whether or not the procedure concerned is closely related to the enforcement of a fundamental right (point IV/4).

I share the view that the lack of statutory provisions intended to promote the enforcement of constitutional fundamental rights may, in a given case, be of more importance than the lack or the inadequacy of statutory provisions intended to promote the complete enforcement of a right not considered a fundamental one. However, I cannot accept the general statement made in the Decision. My arguments are the following:

– The fundamental requirements specified in Article 57 para. (1) of the Constitution about the court's operation shall be enforced in all types of procedures independently of the subject thereof. However, the reasoning of the Decision may lead to the establishment of a different requirement specifying that when the legislature defines the laws aimed at securing the efficiency of courts, it should apply a kind of weighted approach depending on whether or not the procedure concerns a fundamental right. Beyond doubt, the legislature is free to adopt additional guarantees or other measures in order to improve the efficiency of court procedures for the enforcement of certain constitutional fundamental rights – in addition to the basic requirements specified in Article 57 para. (1) of the Constitution. This is, however, only a possibility for the legislature – to be handled with due circumspection, taking into account other fields of the court's procedure as well – and not a necessity which the Constitutional Court would be required to prescribe as an obligation for the legislature.

The above argument is supported by the decision of the European Court of Human Rights adopted in the case of a complaint about the extension of the registration procedure of the following Hungarian association:

"The procedure commenced on 15 June 1993, when the fourth applicant applied at the Metropolitan Court for the registration of the association, and it ended on 20 June 1996 when the decision of the Supreme Court adopted in the review procedure was delivered to the applicants. The procedure in question lasted somewhat longer than three years. The Court notes that the rationality of the length of the procedure should always be assessed with due regard to the circumstances of the given case, namely with respect to the complexity of the case as well as to the conduct of the applicants and the courts. In the present case, the circumstances demand a comprehensive evaluation (see e.g. Judgement Ficara v. Italy, 19 February 1991, Series A no. 196-A, p. 9, Article 17). The Court holds that the procedure was not of particular complexity. As far as the conduct of the applicants is concerned, the Court establishes that their unsuccessful petition submitted in September 1993 to challenge the Metropolitan Court for bias contributed to a certain degree to the extension of the procedure of first instance.

Regarding the conduct of the judiciary bodies, the appellate procedure at the Supreme Court was in fact somewhat lengthy. However, the Court, taking into account the fact that the matter raised by the applicants was dealt with on two judiciary levels and furthermore in a

procedure of review, holds that, with regard to the circumstances of the present case, the complete period of the procedure did not exceed the reasonably acceptable timeframe. (cf., *mutatis mutandis*, Judgement Cesarini v. Italy, 12 October 1992, Series A no. 245, p. 26, Article 20). Thus the petitioners' complaint made about the procedure being extended revealed no breach of law with regard to Article 6 para. (1) of the Convention. Consequently, the petition […] is clearly unfounded." (APEH Üldözötteinek Szövetsége and others v. Hungary, case 32367/96).

3. With regard to the above arguments, in the case concerned, in my opinion, no default may be established that would justify the declaration of an unconstitutional omission on the basis of Section 49 para. (1) of the ACC or the standing practice of the Constitutional Court.

Budapest, 12 March 2001

Dr. János Németh
Judge of the Constitutional Court

Dissenting opinion by Dr. Éva Tersztyánszky-Vasadi, Judge of the Constitutional Court

I agree with point 1 of the holdings of the Decision establishing that the last sentence in Section 4 para. (1) of Act II of 1989 on the Right of Association (hereinafter: AA) is not unconstitutional.

I do not agree with point 2 of the holdings of the Decision establishing an unconstitutional omission. The law in force guarantees the enforcement of the freedom of association in accordance with the Constitution, and the regulations offer adequate protection against an unjustified extension of the registration procedure.

The institution of "social organisation" was introduced in the AA as the basic type of organisations with legal personality to be established on the basis of the right of association, covering – with some exceptions – political parties and labour unions as well. Organisations already founded shall gain legal personality by virtue of court registration (Section 4 para. (1) of the AA). The rule on registration only applies to organisations that seek legal personality.

Social organisations have self-government and they are founded for purposes specified in their statutes, they have recorded membership, and they organise the activities of their members in order to achieve their goals (Section 3 para. (1) of the AA). To set up a social organisation, at least ten founding members shall declare the foundation of the organisation, establish its statutes, and elect its managing and representative organs (Section 3 para. (4)). At the time of foundation, the statutes shall provide for the purpose of the social organisation (Section 6 para. (2) of the AA).

After the foundation of a social organisation, it is necessary to request its court registration (Section 4 para. (1) of the AA). In the procedure, the court shall verify whether the social organisation was established for an unlawful purpose. In certain cases, such verification may demand a careful examination, and may indeed necessitate the interpretation of the Constitution in a complex manner (see: Decision 21/1996 (V. 17.) AB, ABH 1996, 74).

In line with the provisions of the Constitution, the exercise of the right of association is not unlimited. The Constitution itself contains some express prohibitions: according to Article 2 para. (3), no activity of any social organisation may be directed at the forcible acquisition or exercise of public power, or at the exclusive possession of such power. Article 63 para. (1) – as quoted before – provides that the exercise of the right of association depends on the strict precondition of establishing an organisation the purpose of which is not prohibited by the law.

The registration related to the exercise of the right of association serves the purpose of enforcing all the limits specified in the Constitution; it reflects that the aim or aims of the actual organisation is/are acknowledged by the State as (a) legal one(s).

I agree with the statement made in the Decision that the purpose of court registration is the prevention of the establishment of legal persons founded as social organisations for the performance of unconstitutional or illegal activities. This is a constitutional concern of such weight that its enforcement may not be restricted by the law.

This is why registration is implemented by the court and not by public administration organs. Judges are independent and answer only to the law. The speciality of the judiciary branch, as

opposed to the other two "political" branches of power, is permanency and neutrality (Decision 38/1993 (VI. 11.) AB, ABH 1993, 256).

The registration procedure is a non-litigious court procedure. The law does not require obligatory legal representation for the commencement of the registration procedure; nor does it contain any strict rules concerning the formal requirements of application.

Even in the case of the non-litigious procedure at issue, the provisions of the ACCP are applicable to the obligation of the court to enforce the parties' right to have the procedure finished within a reasonable period of time. The ACCP applicable in the case of non-litigious procedures as well defines the reasonable period of time necessary for the completion of the procedure (Section 2 para. (2)). In addition, Section 15 para (3) of the AA provides that the courts shall pass a decision on registration with priority.

In accordance with the above, the law in force provides for a deadline for the completion of the procedure, thus prohibiting an unjustified extension of the registration procedure.

In my opinion, the enforcement of the freedom of association is guaranteed by the adequately closed regulations. Therefore, I see no grounds for the establishment of an unconstitutional omission.

The assessment of how a statute that is not unconstitutional is enforced in practice falls beyond the Constitutional Court's scope of competence.

Budapest, 12 March 2001

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

I concur with the dissenting opinion:

Dr. János Strausz
Judge of the Constitutional Court

Constitutional Court file number: 209/D/1997
Published in the Official Gazette (Magyar Közlöny) MK 2001/30