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HUNGARY: VOTER REGISTRATION DECLARED UNCONSTITUTIONAL

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With its first decision delivered in 2013 ([Decision no. 1/2013 AB](#)) the Hungarian Constitutional Court annulled several provisions of the new law on electoral procedure. The new law has not entered into force yet, as the President of the Republic decided to send it to the Constitutional Court for a preventive review before signing it. [President János Áder](#), who was elected by the Parliament last May and was among the founders of the governing Fidesz party, requested a preventive control of constitutionality of six provisions, two of which were related to voter registration and other four set limits on political campaigning before elections. The Constitutional Court found unconstitutional and annulled all of them. This post will analyse only the part of the judgment dealing with voter registration.

The Constitutional Court's decision on voter registration was far from unanimous: four of the five dissenting judges did not agree with it. Their dissent relied on both procedural and substantive grounds. The rapporteur judge of the case was [Judge Stumpf](#), appointed to the Court in July 2010 by the current parliamentary majority. The challenged law (its text available in Hungarian [here](#)) was voted by the Parliament on 26

November, and President Áder decided to request its preventive review on 6 December (a copy of his letter, in Hungarian, can be downloaded [here](#)). He expressed his worries about the constitutionality of two rules concerning voter registration: art. 88, which outlines the procedure of registration, and art. 92, which applies the registration procedure provided for citizens resident abroad also to citizens living in Hungary who do not have a registered residence or domicile. According to President Áder the registration's modalities are defined too narrowly. The challenged law requires personal appearance at the local authorities or electronic registration via internet from resident citizens, while it offers the possibility to citizens resident abroad to register by post or via internet. The only exception to this rule is provided for persons with disabilities and detainees, who can request to be registered without leaving their home or the prison (art. 89). President Áder argues that requiring the citizens to register in the place of their residence is a disproportionate restriction of the right to vote protected by Art. XXIII of the new [Fundamental Law](#), as there is no constitutional reason that could justify it. This limitation is especially onerous for citizens who commute for work or work temporarily abroad, who could in practice register only via internet. (And also in order to obtain a username and password for the website where registration can be done, personal appearance at the local authorities is required.) The previous electoral law provided that citizens temporarily working abroad who keep their residence in Hungary could register at a diplomatic office (embassy or consulate) abroad. Finally, President Áder expressed his concerns about the rule that excludes people who do not have a registered residence or domicile (for example homeless people) from personal registration, which would violate the principle of non-discrimination laid down Art. XV (2) of the new constitution.

The arguments advanced in favour of the introduction of voter registration

The new law on the electoral procedure that (wanted to) introduce voter

registration actually extends voting rights to a broader range of citizens: for the first time since Hungary's democratic transition the right to vote is granted also to citizens resident abroad. This concession is coherent with the government's policy concerning Hungarian minorities living in the neighbouring countries, who since 1 January 2011 can request Hungarian citizenship. It was later written in Art. D of the New Fundamental law (adopted in April 2011) that "Hungary shall bear responsibility for the fate of Hungarians living beyond its borders". This extension of voting rights required a revision of the electoral system and of the voting procedure, and the government intended to create a central electoral register containing the names of all voters. However, there was also another reason. President Áder, in his letter sent to the Constitutional Court, refers to a report of the [Ombudsman](#) published in May 2012 (no. AJB-267/2012) which finds that "the Hungarian domicile register in practice does not offer reliable information on the place of residence and domicile of the people". Most of the complaints received by the Ombudsman were related to problems raised by the distinction between residence (*lakóhely*) and domicile (*tartózkodási hely*) made in Hungarian administrative law and that the former is a condition for the registration of the latter. Moreover, the government intended to use the voter registration system to adjust the electoral districts to the number of people effectively living in their territory. In the last years more and more Hungarians have gone to work abroad. Most of them, however, continue to be included in the domicile register. The Constitutional Court did not accept any of these arguments.

The Constitutional Court's decision

First of all it is to be underlined that the President of the Republic did not ask the Constitutional Court to declare unconstitutional voter registration as such. He expressed concerns about certain rules relating to the practical implementation of registration, but did not argue against voter registration. Actually he did not even examine the constitutionality of voter registration, as at the moment of his request for preventive review

the legal basis of voter registration was to be found in art. 23 (3)-(5) of the Transitional Provisions of the Fundamental Law. The legal background of the case changed fundamentally a few weeks later when the Constitutional Court, on petition by the Ombudsman, annulled art. 23 (3)-(5) of the Transitional Provisions ([Decision no. 45/2012 AB](#)). According to the Court several norms of the Transitional Provisions, among which that determining voter registration as a condition for the exercise of the right to vote, were unconstitutional as they did not contain transitional rules.

Three of the dissenters criticised the majority for not inviting the President of the Republic to reconsider and eventually modify his petition. According to Judge Pokol the President of the Republic could not know that his request for the review of certain technical rules of voter registration would have led to the annulment of the institution as such (see para. 181 of his dissenting opinion attached to the Court's decision). The majority opinion explains that the case was not sent back to President Áder for three reasons. First, art. 53 (6) of the [Constitutional Court Act](#) excludes the withdrawal of petitions (with the exception of constitutional complaints). Second, art. 52 (3) of the same Act allows the Court to “examine and annul other provisions of the challenged law if the contents of these provisions are closely related to each other and if failure to examine and annul the given provisions would entail infringement of legal certainty”. Finally, the Court argues that if it invited the President to reconsider his petition, it would have not been able to respect the time-limit of 30 days set by art. 6 (6) of the Fundamental Law for deciding on a petition received from the President of the Republic. Judge Pokol tries to refute this argumentation by stating that there is a gap in art. 53 (6) of the Constitutional Court Act, as it does not provide a solution for the case in which the constitutional provisions are modified after that the petition is presented to the Constitutional Court (para. 182). According to Judge Pokol it should have been for the Court to fill in this gap and to send the petition back to the President, considering also that the 30-days limit would logically start again in this case. Judge Szívós, on the other hand, in her dissenting opinion argues that sending back the petition and receiving

an answer would not have required more than three working (para. 200). The question is not merely an exercise for pedantic lawyers. It had a fundamental importance in this case, as President Áder could have changed his petition stating expressly that he did not intend to challenge the institution of voter registration, only certain rules related to its practical implementation. In this case the constitutional judges would have not been able to use art. 52 (3) of the Constitutional Court Act extending the review to the institution of voter registration itself.

As regards the merits of the question of constitutionality, the Court begins its analysis with an account of Strasbourg case-law, with particular reference to the judgment delivered in the case of *The Georgian Labour Party v. Georgia* ([application no. 9103/04](#)) in 2008 (para. 43-47, 1/2013 AB). Even if in this case no violation of the Convention was found, the ECtHR's reasoning contains some relevant findings concerning voter registration. For example, it states that „any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another” (para. 89, Appl. no. 9103/04), and that “the active system of voter registration cannot in itself amount to a breach of the applicant party's right to stand for election” provided by Art. 3 of Protocol no. 1 of the ECHR (para. 92, Appl. no. 9103/04). The Constitutional Court found that the Hungarian electoral roll is a working system that has not displayed such serious shortcomings as the Georgian electoral roll which “omitted «entire apartment blocs or streets», listed many deceased persons, contained a large number of duplicate entries, listed voters in the wrong districts, etc.” (para. 85, Appl. no. 9103/04). Thus, according to the Hungarian constitutional judges, the introduction of active voter registration is not justified by any objective need (para. 46, 1/2013 AB). Judge Kovács, professor of international law, in his concurring opinion makes a more in-depth analysis of Strasbourg case-law, in particular with the criteria laid down in the *Orujov v. Azerbaijan* case ([application no. 4508/06](#)) decided in 2011 which is to be considered a landmark case on the interpretation of Art. 3 of Protocol no. 1 ECHR (see

in particular para. 40-42, Appl. no. 4508/06). Judge Kovács makes also a brief comparative analysis, examining those countries that require active voter registration (e.g. the U.S., France, and Portugal), and concludes that the foreign solutions are more simple and less onerous for the voters than the one adopted by the Hungarian legislator (para. 136-139, 1/2013 AB).

The Court argues in its reasoning that there is no constitutional reason for requiring the citizens resident in Hungary to register in order to be able to exercise their constitutional right to vote. The state disposes of all necessary data even without their registration (para. 67). Moreover, the introduction of active voter registration is not suitable to adjust the electoral districts to the number of people effectively living in Hungary, as in virtue of art. 4 (8) of the new electoral law adjustments can be made only on the basis of the *previous* elections' experiences. In the year before the parliamentary elections the electoral districts cannot be changed (para. 71). The Court underlines that it does not consider voter registration as such to be unconstitutional, but only the modalities of its implementation. It observes that the new Fundamental Law actually extends the right to vote to all Hungarian citizens, regardless their place of residence, and in relation to citizens resident abroad registration is an essential condition for the exercise of this right (para. 75-77). But it does not justify the extension of the registration requirement to resident citizens. It is for the electoral roll to serve the exercise of voting rights and not to the contrary (para. 80).

After the decision of the Constitutional Court the Hungarian government decided to retreat and to give up the idea of active voter registration.

Act no. CCIII of 2011, entered into force on 1 January 2012. The Venice Commission and the OSCE/ODIHR delivered a joint opinion on this Act in June 2012: [Opinion no. 662/2012](#).