

## HUNGARIAN REGULATION OF SUBJECTS EXCLUDED FROM THE REFERENDUM

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### ABSTRACT

*The paper aims to explore the issues of the excluded and forbidden subjects of the referendum under the Hungarian rules, thus making it comparable with similar legislation in other jurisdictions. A consistent examination of these rules and jurisprudence will lead to an exploration of the requirements that a referendum initiative in Hungary must actually meet in order to pass the scrutiny of the body that controls the issues.*

### KEYWORDS

Excluded subjects, referendum, question, authentication, constitution, budget issue, international treaty.

### I. Introduction

Article 8 Section (3) of the Fundamental Law of Hungary lists the issues in which a national referendum may not be held. Essentially this can be understood as a rule of competence, because there is no place for the direct will of people on what cannot be held in a national referendum, but it has to be decided by the National Assembly.<sup>1</sup> The Fundamental Law lists in ten points the subjects in which a referendum may not be held and on the basis of which the National Election Commission (hereinafter referred to as: NEC) after an in-depth examination refuses to certify the question proposed for referendum by its resolution.

The Fundamental Law entered into force on the 1st of January, 2012 and partly took over the wording of the previous Constitution, but partly amended them taking into account the decisions of the Constitutional Court. The subjects are generally in line with the content to European constitutions and concern the classical prohibited subjects. The prohibited subjects are as follows:

- a) any matter aimed at the amendment of the Fundamental Law;
- b) the content of the Acts on the central budget, the implementation of the central budget, central taxes, duties, contributions, customs duties or the central conditions for local taxes;

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<sup>1</sup> Chronowski Nóra – Vincze Attila: Népszavazások uniós ügyekben és a magyar gyakorlat. [Referendums on EU matters and Hungarian practice]. *Közjogi Szemle*, 2019/1., p. 20-21.

- c) the content of the Acts on the elections of Members of the National Assembly, local government representatives and mayors or Members of the European Parliament;
- d) any obligation arising from international treaties;
- e) person- and organisation-related matters falling within the competence of the National Assembly;
- f) the dissolution of the National Assembly;
- g) the dissolution of a representative body;
- h) the declaration of a state of war, state of national crisis and state of emergency; furthermore, on the declaration and extension of a state of preventive defence;
- i) any matter related to participation in military operations;
- j) the granting of amnesty.<sup>2</sup>

## II. Consideration, legal and judicial requirements of referendum related to the Fundamental Law amendments

The most significant restriction of the prohibited subjects is that no national referendum may be initiated in any matter aimed at or lead to the amendment of the Fundamental Law.<sup>3</sup> This prohibition has already been declared by the decision 2/1993. (I. 22.) of the Constitutional Court, the Constitutional Court of Hungary stated that the result of a popular referendum cannot result in an implied amendment of the Constitution. The reason for this, as pointed out by the Constitutional Court, is that the Constitution, as fundamental law, regulates the basis of the state system, the relationship between the state and its citizens. Therefore only within its own system, by the constitutional power empowered by it and in accordance with the procedure laid down therein shall be amended. The basic norm regulates the constitutional/constitutioning process differentially within the competence of National Assembly. The making and amending of the basic norm falls within the exclusive competence of the National Assembly, and the National Assembly may act in this competence in accordance with the procedural and decision-making requirements governing the constitutional amending, on the basis of a direct and express constitutional power provision aimed to constitutional amending. Also on the basis of an international review of the constitutional process, the Constitutional Court could find that a referendum is usually presented as an additional constitutional power in the constitutional process, the function of a referendum is almost exclusively to confirm or reject the constitutional text adopted by the representation. Taking all this into account, the Constitutional Court has

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<sup>2</sup> Summary report of the jurisprudence-analysing working group of the Curia of Hungary on cases related to legal remedy in election proceedings and referendum proceedings Budapest, 2018. (hereinafter referred to as: Curia's summary report) p. 106

<sup>3</sup> Komáromi László: A népszavazásra vonatkozó szabályozás változásai az Alaptörvényben és az új népszavazási törvényben [Changes to the referendum legislation in the Fundamental Law and the new Referendum Act]. *MTA LAW WORKING PAPERS*, 2014/35., pp. 5-6.

stated several times that a referendum on the question of amending the Constitution cannot be called on voter's initiative that would deprive the National Assembly of its constitutional competence due to its binding nature. The main judicial forum of Hungary, the Curia declared as a general rule in its decision Knk.IV.37.387/2015/3 that according to Article 8 Section (3) a) of the Fundamental Law that national referendum cannot be held on any question aimed at the amendment of the Fundamental Law. In case the question on the signature sheet of the national referendum concerns a restriction of fundamental rights, it shall be also examined in the concerned case, whether the restriction of fundamental rights remains within the framework of Article I Section (3) of the Fundamental Law. If either the NEC or the Curia of Hungary concludes, that the constitutional collision being potentially in question or the conflict of the given fundamental right with a constitutional value can only be resolved by amending the Fundamental Law, the question shall not be ordered for national referendum in accordance with Article 8 Section (3) a) of the Fundamental Law. Article I Section (3) and Article 8 Section (3) a) of the Fundamental Law are connected as such.<sup>4</sup> The Curia of Hungary, as a review court, in its decision of Knk.IV.37.584/2016/2 emphasized in connection with a law-making initiative of make all contracts relating to the state budget, EU funds and state-owned assets available on the Internet, that the question is relating to the right of access to data of public interest, gives effect to the principle of transparent spending of public funds.<sup>5</sup> It referred to the practice of the Constitutional Court regarding the disclosure of data of public interest, and declared at the same time that the majority of fundamental rights are not unrestrictable. Identifying the substance of the question, it emphasized that the unrestricted availability of named contracts has the consequence that personal data are entered into the internet database without the consent of the data subjects, which entails a restriction on the right to protect personal data.<sup>6</sup> The right of access to data of public interest and the right to the protection of personal data may therefore be in conflict through this question. According to the decision of the Curia of Hungary, in the event of a valid and effective referendum, the National Assembly should enact a law that would disproportionately restrict the right to the protection of personal data, the law could only remain in force by amending the Fundamental Law, so the initiative aims to an implied amendment of the Fundamental Law. Several decisions have dealt with the publication of the declaration of assets of persons living in the same household as the persons required to make a declaration of assets. The Curia of Hungary pointed out in its decision of Knk.IV.37.416/2015/2 that the disclosure of this statement

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<sup>4</sup> Kukorelli István – Milánkovich András – Szentgáli-Tóth Boldizsár Artúr: Népszavazási jogorvoslatok – a modellváltás tapasztalatai [Referendum remedies-the experience of model change]. *MTA Law Working Papers*, 2018/15., 19.o.

<sup>5</sup> Hohmann Balázs: *The interpretation of transparency from the legal point of view*. In: Haffner Tamás (Eds.): *Proceeding of 4th FEU Conference*. Pécs, Sopianae Association, 2018. pp. 160-161.

<sup>6</sup> Kis Kelemen Bence et. al.: *A Schrems ítélet hatásai az európai uniós és magyar adattovábbítási gyakorlatokra*. Infokommunikációs Jog, 2016/66-67., pp. 65-68.

constituted a necessary restriction of the right to the protection of personal data through the declaration of the assets of the relatives connecting to the purity of public life. However, it considered that the disclosure of this statement constituted a disproportionate restriction on the fundamental right regarding to the group of the concerned persons, in particular that relatives do not have the freedom to decide on the disclosure of data since they do not decide themselves about the public competition and the additional burdens in association with this role. The Curia of Hungary examined in its decision Knk.IV.37.359/2015/3 whether the Government may be obliged by the National Assembly to support the establishment of a European Public Prosecutor's Office established under Article 86 of the Treaty on the Functioning of the European Union (hereinafter referred to as: TFEU) in case of the proposal of the European Commission during the procedure of the Council of the European Union or the European Council. According to its interpretation, the organizer with its referendum intended question wanted to gain the support of the establishment of a European Public Prosecutor's Office with defined powers on the basis of Article 86 of of the Treaty on the Functioning of the European Union (TFEU) by the member state of Hungary.

In the above decision the Curia of Hungary did not share the view that the establishment of the European Public Prosecutor's Office does not require an amendment to the Fundamental Law. According to the Curia of Hungary, the question is in conflict with Article 8 Section (3) a) of the Fundamental Law. The intention to amend the Fundamental Law arose in a special way in the case of Knk.IV.37.394/2017/3. The Curia examined the certifiability of the question of “*Do you agree that Act XLIII of 2010 on central state administrative organs and on the legal status of Government members and state secretaries should be amended so that a person who has previously been elected as Prime Minister at least twice by the National Assembly cannot be nominated and elected to Prime Minister again?*” In connection with the question asked by the applicant the Curia pointed out primarily that the Prime Minister has no comparable relationship in relation to re-election with most of the public dignities and public law officers listed by the applicant. The possibility of re-election of the Prime Minister is in close relationship to the character of the government form, only the President of the Republic is in a comparable position. The relationship between the President of the Republic (Head of State) and the Prime Minister (Head of Government) - and at the same time the possibility of re-election per cycle or its limitation - fundamentally determines the character of the form of government. Therefore according to the declaration of the Curia the relationship between the legislation, the head of state and the Government settled in the Fundamental Law the balance position established in this relationship must be taken into account during the judgement of the question. However, the referendum question intervenes radically in this relationship: a valid and effective referendum on the question would result that the legislation power restricts the re-election of the head of the executive power, whose mandate is linked to parliamentary cycles, independently of the result of the election. The responsibility of the executive power, the institution of trust,

and the constitutional position of the Government in Hungary were developed by the concrete historical situation after the 1990 parliamentary elections. “*The essential feature of the form of parliamentary government defined by the Constitution, the responsibility of the Government before the National Assembly is ultimately prevailed through the person of the Prime Minister. The Constitution puts the Prime Minister at the center of the Government's work.*” This decisive role gives the Prime Minister a special public law status [see decision 122/2009. (XII. 17.) of the Constitutional Court]. The Fundamental Law did not change the essence of this, i.e. the German-like form of prime ministerial government. Limiting the re-election of the head of state who is exercising the executive power provides the protection against overpowering ambitions in the presidential and semi-presidential systems of government, while in parliamentary systems the accountability of the prime minister and Government by the Parliament and the institutions for enforcing parliamentary responsibility provides the limitation. It is unusual to parliamentary systems that in addition of restricting the re-election of the head of state a restriction is placed on the re-election of the prime minister which does not allow the prime minister to hold the office after two cycle even if he/she wins the election. Such a restriction would rearrange the possibility of exercising executive power, rearrange the relationship between the legislation, the head of state and the Government, i.e. a characteristic operating principle of the parliamentary government form. Though it is certain, that any such restriction, since it affects the operation of the government form, shall be placed in the constitutional rules, in the Fundamental Law. The solution included in the referendum question would add another limit to the formation of the government, independently from the parliamentary responsibility, in addition to the Government's trust and responsibility before the National Assembly. The Fundamental Law characterizes the relationship between the National Assembly and the Government, within that primarily the Prime Minister with the political responsibility towards the National Assembly. The Prime Minister's mandate is arising from the decision of the popular representation organ acquiring public power through direct election, which, in addition to reasons specifically related to his/her person, is maintained by parliamentary trust based on political responsibility to the Prime Minister for the duration of the parliamentary term. The crisis or termination of the confidence of the National Assembly leads to the termination of the mandate. Thus, according to the Fundamental Law, the right to elect the Prime Minister belongs to the sovereignty of the current popular representation organ (elected on cyclical basis). Limiting the sovereignty of this decision of the National Assembly is inconceivable without the relevant rule of the Fundamental Law.<sup>7</sup> Pursuant to Article 8 Section (3) a) of the Fundamental Law, a national referendum on the question of amending the Fundamental Law may not be held. In the decision of the Curia in connection

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<sup>7</sup> Erdős Csaba: *Áttekintés a közvetlen demokrácia fogalmi körének meghatározására tett jogtudományi kísérletekről* [An overview of jurisprudential attempts to define the concept of direct democracy]. In: Rechnitzer Sándor (Szerk.): *Új Nemzeti Kiválóság Program 2017/2018 Tanulmánykötet* [Proceedings on New National Excellence Programme 2017/2018]. Győr, Széchenyi István University, 2018. pp. 239-248.

with the person nominated as prime minister, the criterion related to the number of previously held prime ministerial mandate(s) requires an amendment of the Fundamental Law, therefore Article 8 Section (3) a) of the Fundamental Law is an obstacle to hold a national referendum in that question. It can be seen from the above examples that there were three type of cases in connection with referendum initiatives aimed to amend the Fundamental Law. On one hand, with the initiative aimed to amend the state organization part of the Fundamental Law, and on the other hand - according to a separate interpretation thereof - the problem of a referendum affecting fundamental rights issues, and finally with the surprising initiative which includes the intention to amend the Fundamental Law in the question itself. The part of the state organization was affected by the referendum initiatives related to the European Public Prosecutor's Office and the re-election of the Prime Minister. With regard to fundamental rights questions – i.e. a referendum initiative, which restricts fundamental rights may be against the Fundamental Law - the Curia laid down in cases related to the declaration of assets and questions on the disclosure of data of public interest. Finally it is clear that a valid and effective referendum on the following judged question would result the amendment of the Fundamental Law: "*Do you agree that the Fundamental Law shall provide the right to a Sunday rest?*" Article 8 Section (3) a) of the Fundamental Law makes barrier to this. Thus, on the basis of practice it can be stated that the question is aimed to the prohibited amendment of the Fundamental Law if it openly endeavours to the amendment of the Fundamental Law, even if the question itself raises an opposition to the Fundamental Law, but the result of the certification of the question forces the National Assembly to such legislation which requires the amendment of the Fundamental Law. With this latter shall be identical when the question involves a conflict of fundamental rights and the resolution thereof supposes a disproportionate and unnecessary restriction of the fundamental right.<sup>8</sup>

### III. Budget issue and national referendum

Prohibition of central budgetary implications is one of the most flexibly interpretable areas.<sup>9</sup> According to Article 8 Section (3) b) of the Fundamental Law, no national referendum may be held on the content of the Acts on the central budget, the implementation of the central budget, central taxes, duties, contributions, customs duties or the central conditions for local taxes. Article 8 Section (3) b) of the Fundamental Law is worded in the same way as the regulation of Section 28/C Subsection 5 a) of the former Constitution. The Constitutional Court has ordered a number of significant decisions in relation to the initiative concerning the central budget and the exclusion of public charges. The principal statement shall be strongly emphasized that it follows from the constitutional listing

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<sup>8</sup> Curia's summary report pp. 106-110.

<sup>9</sup> Tóth Attila Gábor: *Túl a szövegben. Értékezés a magyar alkotmányról [Beyond the text. Interpretation of the Hungarian Constitution]*. Budapest, Osiris, 2009. p. 59.

accordingly that the closed and strict interpretation of prohibited subjects is in line with the outstanding significance of the constitutional regulation. The statement that in the definition of Budget Act should not be included all the legislation that have financial and budgetary implications shall also be considered as a general line of measure. The turn on the implementation of the budget does not mean in any way the content of all laws serving the enforcement of budget, but refers specifically to the final account act. The Curia in its decision of Knk. IV.37.339/2015/3. held during the examination of the question intending to change the transfer of the retail sale of tobacco products from exclusive state competence, that the Constitutional Court considered in three circle of cases the relationship between the referendum and the Budget Act as direct and substantive: a) the question is specifically aimed to the amendment of the Budget Act; b) the question reasonably results the amendment to the Budget Act; c) finally, a valid and effective referendum will concretely define the issuance of a future budget act. Citing the Constitutional Court's argument, the Curia emphasized that the purpose of the distinction between the revenue and the expenditure side beyond the enforceability of the budget is to guarantee in the budget the fulfillment of state tasks<sup>10</sup> and the preservation of manageability. While the revenue side of the budget is prohibited once and for all by the Fundamental Law by classifying the content of the laws on central taxes, duties and contributions, customs duties and the central conditions for local taxes as excluded subjects, there is no such guarantee on the expenditure side. In the interpretation of the Constitutional Court to protect the expenditure side, one of the excluded subjects was the referendum on a concrete expenditure item which is part of a future budget act not yet adapted. The question provided for certification intended to put the act classifying tobacco retail trade as a state monopoly to a referendum. The question has budgetary implications according to the Budget Act, as the current Budget Act records the expected fee income from the usage of the monopoly through a concession on a specific revenue line. The question therefore concerns to such a legal title of revenue specified in the budget which regardless of its amount would mean the total cessation of the legal title of revenue in the event of a valid and successful referendum. The Curia also refers to the fact that Article 8 Section (3) point (b) of the Fundamental Law precludes the possibility of holding a referendum in the case of certain sources of income. These resources and all statutory payment obligations serve as revenue to cover common needs. Statutory obligations that impose a payment obligation on citizens, therefore in addition to other fees concession fees as well, usually exercise affects with their existence or termination on the content of the budget act. Thus, statutory obligations that impose a payment obligation on citizens, therefore in addition to other fees concession fees as well usually exercise affects with their existence or termination

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<sup>10</sup> Hohmann Balázs: *The Principles and Fundamental Requirements of the Transparency on the Public Administrative Proceedings*. In: P., Suresh (szerk.): *Proceedings of THE IIER Dubai Conference*. Dubai, International Institute of Engineers and Researchers, 2019, pp. 1-2.

on the content of the budget act. Several other decisions could be mentioned, such as for example toll road becoming free of charge would affect on the revenue side of the budget and therefore have a budgetary impact (decision with case number Kvk.IV.37.361/2015/3) or the support of spectator team sports with tax advantages and tax credits narrows the scope of state tax revenues (decision with case number Kvk.IV.37.341/2015/3). However, in Resolution No. Kvk.IV.37.456/2015/3 the Curia stated that the referendum on the following question had no direct budgetary impact: „Do you agree that the state should provide free child feeding for children who receive regular child protection benefits every day of the year?” The reason is that during child feeding, the rules for free meals have been amended within the budget frames for that year. During the budget year the state has already expanded the range of benefits, without amending the central budget, so the budgetary connection of the question is not so direct that it would raise an infringement of Article 8 Section (3) point (b) of the Fundamental Law. The reason for the request for revision is correct as in the event of a valid and effective national referendum, the National Assembly can choose from several solutions to fulfill its legislative task, many of which are solutions that do not require an amendment of the Budget Act. The Curia of Hungary confirmed that it adheres to the previous position of the Constitutional Court that the concept of the Budget Act should not include all the legislations that have financial and budgetary implications, since there are hardly any issues within the competence of the National Assembly that have no budgetary connection. The Curia in its decision with case number Kvk.IV.37.467/2015/3 dealt with the amendment of pension legislation. It examined the opportunity to secure for men to retire with benefits on equal terms with women. According to the opinion of the Curia, the question requested to be certified does not affect entirely the content of the obligation to pay contributions, its manner or extent, nor does it implicitly contain the intention to amend the pension scheme set out in Article XIX. Section (4) of the Fundamental Law and in Article 40, and does not affect entirely the determination of the pension fund or the level of pensions either. When drafting and then proposing the future budget law, it may be necessary to pass on any amendments, but the direction and concrete amount of the amendments may be decided by the National Assembly in a sovereign manner. The Curia noted in this case that the last sentence of Article XIX Section (4) of the Fundamental Law legitimizes the positive discrimination against women in terms of the conditions for entitlement to a state pension. However, the indicated constitutional possibility, legislative power do not constitute an obligation at the same time: according to the decision of the National Assembly - or the will of the people - the requirement undertaken by the state for increased protection of women may appear in the conditions of the entitlement to a state pension, but it is not necessary. The Curia held that the question was intended to amend basically Act LXXXI of 1997 on the Eligibility for Social Security Benefits and Private Pensions instead of the current Budget Act and does not follow thereof either that the voter would determine certain specific expenditures in the future budget act. Thus the



question shows only a distant, indirect connection with the Budget Act, as it seeks only to unify the conditions for the “retirement” of women and men. The distant and indirect connection with the subject circle of a prohibited referendum does not result the question becoming a subject of a prohibited referendum. The mere fact that a valid and effective referendum affects the framing what National Assembly can do at the next drafting of the budget act does not make the referendum prohibited. The Constitutional Court annulled the order of the Curia Knk.IV.37.467/2015/3 with its decision of case number 28/2015. (IX. 24.). As a result, the Curia ordered a new decision on the request for review in the referendum case with its Resolution of Kpkf.37.938/2015/2. Finally in its Resolution of Knk.IV.37.989/2015/2 in the repeated review procedure, citing the decision of the Constitutional Court, the Curia took the position that in the event of a successful referendum, the question would result such legislation which aimed to determine a future budget expenditure item. The question results in legislation an increase in the amount for pensions provided in the Budget Act. In addition, interpreting the second sentence of Article XIX Section (4) of the Fundamental Law stated as well, also referring to the decision of the Constitutional Court, that women’s right to positive treatment is guaranteed by the Fundamental Law. Thus, an effective referendum on the benefits provided to women in the conditions of state pension benefits would be an obstacle to the prevail of both Article XV Section (5) and the second sentence of Article XIX Section (4) in case of a successful referendum, it would essentially empty it. The Curia in its decision with case number Knk.IV.38.133/2015/3 examined the question on the prohibition of sale of state-owned agricultural land. According to the Curia’s point of view, the sale of state-owned agricultural land is not a direct budgetary issue, but above all the management of asset with special legal status belonging to the national property. The subject of the referendum is related to the sale of state-owned agricultural land. The Curia emphasized that the Constitutional Court had referred in several decisions to the fact that land ownership had specific natural and property characteristics. According to the Constitutional Court, *“the finite nature of land (because land as a natural object is limited and cannot be reproduced or replaced with anything else), its indispensability, renewable capacity, special risk sensitivity and low profitability embody the special social constraints of land ownership. These circumstances may justify the enforcement of the public interest over property rights. The Constitutional Court has already previously stated that due to its peculiarities, the legal treatment of land ownership, differently from other property objects, is justified in a certain respect”* [Decision 16/1991. (IV.20.) AB, Constitutional Court Decision 1993, 381.]. The specific subject-matter of regulation, to which the judged question in the present case relates dissolves the direct link between the issue and the Annual Budget Act. The relationship is considered as indirect, since the question intends above all how the state cannot dispose over the land it owns. In case no. Knk.IV.37.349/2016/2 had to be examined whether or not affects the budget the initiative on grant of guaranteed benefit for every Hungarian citizen with registered residence in Hungary. The Curia held that the resolution of the NEC on the refuse of

certification was in line with current practice of the Curia, since the success of the initiative would burden the current and any additional budget act fundamentally with measurable billions in expenditures, questioning the functioning of the state where appropriate. Therefore in case of the success of the question intended to be put to referendum would justify an amendment of the Fundamental Law contrary to Article 8 Section (3) point (a) and would affect the prohibited subject matter of Article 8 Section (3) (b).<sup>11</sup> Therefore we can say that it alone is not enough in itself to be in the circle of prohibited budgetary subject if the question falls within the scope of budget issue. Not all legislation is subject to budget which has budgetary implications. However, the question falls within the scope of this subject, if it specifically aims to amend the Budget Act, reasonably follows therefrom the amendment of the Budget Act, or it determines concrete expenditures, concerns revenues of the future Budget Act. The distant, indirect connection does not specify the subject matter of the prohibited subject, therefore the question may be ordered to a referendum, which restricts the margin of discretion of the National Assembly when drafting the Budget Act.<sup>12</sup>

#### IV. Conflict with an international treaty

From the point of view of conflict with an international treaty, the wording of the Fundamental Law is slightly extensive compared to the previous Constitution, as, on a literal interpretation, it governs not only to existing international treaties.<sup>13</sup> The Constitutional Court stated about the rule contained in the previous Constitution that the provision itself contains a completely clear and unambiguous provision free from uncertainty of interpretation. The prohibition in that provision precludes the direct exercise of power from further development of international obligations already in force. Referendum on the undertaken commitments themselves cannot be ordered constitutionally, completely regardless of whether the result of the referendum contradicts or even confirms these commitments.<sup>14</sup> It should be mentioned that the referendum on the accession to the European Union was required to be enacted to the Constitution by Act LXI of 2002 due to this rule. This provision was subsequently repealed at the time of accession. The Curia gave opinion on referendum initiative on the intention of secession from the North Atlantic Treaty in the decision with case number Kvk.II.37184/2012/2, from the European Union in the decision with case number Kvk.II.37.185/2012/2, from the International Monetary Fund in the decision with case number

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<sup>11</sup>Curia's summary report pp. 110-113.

<sup>12</sup>Curia's summary report p. 114.

<sup>13</sup>Sulyok Gábor: A nemzetközi jog és a belső jog viszonyának alap-törvényi szabályozása [The basic law regulation of the relationship between international law and domestic law]. *Jog Állam Politika*, 4(1), 2012, p. 31.

<sup>14</sup>Kelemen Katalin: Van még pálya. A magyar alkotmánybíróság hatásköreiben bekövetkező változásokról [There is still a track. On changes to the powers of the Hungarian Constitutional Court]. *Fundamentum* 2011/4., p. 88.

Kvk.II.37.186/2012/2. In all three decisions it was indicated that also the applicant had acknowledged that a treaty (therefore international treaty as well) is a set of rights and obligations. Consequently, forcing the termination of an international treaty by a referendum is not only about the exercise of law but also a decision on the obligations arising from the international treaty. An international treaty is a commitment of one state to other state(s), the observance of the undertaken obligations or the release from them shall be performed within the framework regulated by international law, which justifies the constitutional exclusion of referendums to be ordered within this circle. The rules for entering and leaving an international treaty are not the same due to the nature of the matter, and this also justifies the different rulings on the possibility of a referendum on the two question. The Curia therefore concluded that the referendum question which intends to withdraw from a valid international treaty falls within the scope of the prohibited referendum accordingly to Article 8 Section (3) point (d) of the Fundamental Law, and therefore the decision refusing to certify the question is lawful. The Curia in its decision with case number Knk.37.178/2014/3 outlined during the examination of the question "no new nuclear power plant units should be built in Hungary from loan increasing the public debt", that the Government of Hungary and the Government of the Russian Federation concluded an international convention on the co-operation in the peaceful uses of nuclear energy (hereinafter referred to as: Convention), which was enacted into the internal law. It was not disputed that it was about an international convention in this case. The question put to referendum is clearly related to the Convention, a possible valid and effective referendum would affect the provisions of the international treaty. The Curia examined the provisions of Article 1 Section (1) and Article 9 of the Convention. In its point of view Article 9 furtherly enforces that the enacted Convention contains an obligation arising from an international treaty. However, Article 8 Section (3) point (d) of the Fundamental Law can be interpreted as an existing obligation to one of the parties of an international agreement, and an international agreement can hardly be imagined as imposing an obligation on only one of the parties. The question intended to be ordered to referendum is directly related to Article 9 of the Convention, when it questions as follows: do you agree that no new nuclear power plant units should be built in Hungary from loan increasing the public debt? The Curia finally pointed out that the Convention deals separately with the obligations of the parties, also in respect thereof cannot be said that they are not constitute as obligation arising from an international treaty. Resolution with case number Knk.IV.37.446/2014/3 examined the question initiating the amendment - which restricts the acquisition of the ownership of Hungarian agricultural land - of our accession treaty to the EU. It stated that the Accession Treaty is such an international agreement from the point of view of the law of the European Union, which has been concluded by the European Union and its Member States with a third state, namely Hungary. Referred to the Decision 143/2010. (VII. 14.) AB and to the Decision 22/2012. (V. 11.) AB of the Constitutional Court maintaining the statements thereof,

emphasizing that all such treaties by which Hungary exercises any of the powers specified in the Fundamental Law together with the institutions of the European Union shall be deemed as an international treaty. The decision on the issue of the transfer of competences, the procedure for concluding the treaty follows the general order of concluding international treaties, with that the Fundamental Law orders the assumption of obligation under special ratification regime. According to Article E Section (2) of the Fundamental Law such international treaty is first and foremost the Treaty of Accession. Despite the fact that since the entry into force of the Accession Treaty, it has necessarily amended the founding treaties of the European Union, i.e. its primary sources of law, and thus became part of domestic law as EU law, its international contractual form cannot be ignored. The National Assembly promulgated the Accession Treaty and the obligations contained therein in act, making with it part of the Hungarian legal system. The Accession Treaty is part of the EU legal order as regards the obligations it entails, while it has not been dissolved in EU law as an international treaty. The Curia did not have to compare the question to be certified with the Accession Treaty, not yet entered into force but had to answer the situation when the question aimed to amend the current Accession Treaty, which paved the way for the EU legal order. The current Accession Treaty in the domestic law is that international document which recorded the content of the Hungarian membership's legal relationship at the moment of accession. The question submitted for certification was considered by the Curia as multi-layered, since it intends to induce the Government to amend the Accession Treaty in a specific direction through the obligation of the organ of popular representation. Based on the content of the question the Curia of Hungary interpreted it as it seeks to amend the condition system of Hungary's membership in the European Union set out in the international document, to achieve a more favorable situation with concretely defined direction in the question, and for this asks the support of the voters. The Curia of Hungary did not accept the argument that the question wanted to be ordered to referendum does not seek to change the international obligation itself, but only intends to start negotiations about it. The prohibition pursuant to Article 8 Section (3) point (d) of the Fundamental Law shall be applied if a successful referendum affects not only the promulgating law but also the obligations arising from the international treaty. The endeavoring to renegotiate the membership conditions of the European Union necessarily affects these obligations. In the decision of the case number Knk.37.358/2015/3 the Curia examined the question of the disclosure of all financial information related to the expansion of the Paks Nuclear Power Plant.<sup>15</sup> It referred to its decision with case number Knk.IV.37.178/2014/2, essentially this case was judged along that line as

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<sup>15</sup> The publication of environmental information relating to a major project is also considered desirable as a means of social control. See: Hohmann Balázs: *A hatósági eljárás társadalmi ellenőrzésének lehetőségei [Possibilities for social control of the administrative proceedings]*. Pécs, TAKE, 2018. pp. 25-27.; Glied Viktor: Social Conflicts in the Shadow of the Paks Nuclear Power Plant. *Geographical Locality Studies*, 1(1), 2013, pp. 209-210.

well. The Curia in its decision with case number Knk.IV.37.222/2016/9 on the resettlement quota disagreed with the position that the question of the possibility of a referendum should be examined solely in terms of the decision-making, organization and functioning order of the European Union and concludes on this basis that ordering a referendum in connection with the functioning of the European Union is excluded. The question was as follows: "Do you agree that the European Union is able to mandate the obligatory resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?" The EU context of the certified question prevails partly on the international nature of EU law and partly on the provision of the Fundamental Law related to the European Union, in particular according to Article E). The question intended to be ordered to referendum is not against Article E Section (2), as this provision of the Fundamental Law specifically refers to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, is exercised some of the competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. From the point of view of the Hungarian referendum rules, the question is not aimed to amend the Accession Treaty nor impose additional conditions for the implementation by Hungary of the decisions taken by the institutions of the EU, thus it does not violate Article 8 Section (3) point (d) of the Fundamental Law. According to the opinion of the Curia, the resolution of the dispute related to the certification of the question can be based solely on the provisions of the Fundamental Law and the Act CCXXXVIII of 2013 on Initiating Referendums, the European Citizens' Initiative and Referendum Procedure, it does not require either the direct application or the interpretation of EU law. It stipulated in connection with the asked referendum question that the certified question concerned the introduction of a measure by a Council decision falling within the scope of secondary EU law. From EU law, thus between obligations arising from Council decision adopted as a secondary source of law and those arising from an international treaty cannot be drawn parallel. According to the case law of the European Court of Justice, the EU legal order is a specific and special legal order. Accordingly „By contrast with ordinary international treaties, the EEC Treaty has created its own legal system, (...) by creating a Community of unlimited duration, with real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.” (Flaminio Costa v E.N.E.L., Case 6-64., ECLI:EU:C:1964:66). Among the specific classification of EU law, the Curia referred to the case law of the Constitutional Court. The Constitutional Court stated in its Decision 143/2010. (VII.14.) AB on the constitutionality of the Act CLXVIII of 2007 of promulgation of the Lisbon Treaty during the ex-post review of conformity with the Fundamental Law, that according to Decision 1053/E/2005 AB of the Constitutional Court the Treaties establishing and amending the European Communities are not international

agreements from the scope of competence of the Constitutional Court (Decisions of the Constitutional Court 2006, 1824. 1828. ABH). Pursuant to Articles E) and Q) of the Fundamental Law, Hungarian constitutional practice attributes different legal effects to EU law and international law. According to the Decision 22/2012. (V.11.) AB of the Constitutional Court on the interpretation of Articles E Sections (2) and (4) of the Fundamental Law, the Constitutional Court stated that the definition of “international treaty (concluded) in order to participate in the European Union as a Member State” has a different classification of international treaty bound to the European Union. This classification does not necessarily require the Treaty to classify itself as European Union law or to be one of the founding treaties of the European Union. In this respect, the parliamentary mandate to formally recognize the binding force of an international treaty under Article E Section (4) of the Fundamental Law and the promulgation under Article Q Section (3) of the Fundamental Law also differ. This is also expressed in the guarantee requirement under Article E Section (2), which requires a two-thirds majority of votes of the members of National Assembly for an authorization under Article E). In this regard, the Decision 22/2012. (V.11.) AB of the Constitutional Court considered the Treaty on Stability, Coordination and Governance in Economic and Monetary Union as being EU law under Article E) of the Fundamental Law instead of an international treaty under Article Q. The implications of an obligation under an international treaty should be treated differently accordingly the subject of prohibited referendum under Article 8 Section (3) point (d) of the Fundamental Law on International Treaties, that the referendum question refers to „an international treaty concluded on the basis of participating in the European Union as a Member State” according to Article E of the Fundamental Law or an international treaty under Article Q. By transfer of competences according to Article E the Member State, while limiting its own sovereignty, provides the possibility of creating binding legislation for itself, its nationals and its residents. The guarantee possibility of this legal institution is indicated by the stricter ratification procedure and terminological difference than in Article Q of the Fundamental Law required for the recognition of its binding force. Therefore it is legally incorrect to refer to the bilateral international treaty and the European Union treaties as a restriction with the same content in referendum issues. According to the Curia's view, the subject circle of a prohibited referendum under Article 8 Section (3) point (d) of the Fundamental Law does not exist in the present case, as the question of the referendum initiative concerns to the EU law under Article E of the Fundamental Law, which cannot be classified as an international treaty under Article Q of the Fundamental Law or an obligation arising therefrom. In its decision with the case number of Knk.IV.37.712/2016/2 the Curia examined the question supporting the withdrawal from the European Union. It pointed out that in its practice it has taken several decisions on referendum initiatives concerning international commitments, with regard to the obligations arising from the international treaties linking Hungary to the European Union. The Curia of Hungary did not see in this case either any reason

to allow a referendum initiative openly representing the intention to change membership status in the European Union based on international treaties and the obligations arising therefrom. The Curia of Hungary referred to its decision with the case number Kvk.II.37.185/2012 in which clearly stated that accession to an international treaty and the withdrawal therefrom requires a different decision, which also justifies a derogation from the relevant rules. He also stated that, prior to the accession to the European Union, the national referendum held on 12 April 2003 was an unusual referendum, it could be ordered on the basis of Section 79 of Act LXI of 2002 on the amendment of the contemporary Constitution, which also determined the decisive nature of the referendum and its date. Accession to the European Union was therefore ordered by the Constitution, with all the details according to the importance of the issue was determined at the same time. The Curia therefore did not see a parallel between the referendum on accession in 2003 and the referendum to be held on the basis of the question which the applicant intended to ask. It emphasized that the possible consequences of the result based on logical reasoning of the referendum held on 2 October 2016 in connection with the Resolution 1065/2015 of the Council of the European Union, do not justify the Curia to change the decision of the NEC against the Article 8 Section (3) point (d) of the Fundamental Law and certify the applicant's question. In summary we can state that an international treaty can be a commitment of one state to other state(s), compliance with the undertaken obligations or exemption from them can be provided within the framework regulated by the international law, which justifies the constitutional exclusion of a referendum to be ordered in this circle. The rules for joining and withdrawal from an international treaty are not the same, due to the nature of the matter, and this also justifies the different rules on the possibility of a referendum on the two issues. The Treaties establishing and amending the European Communities are not international treaties. With regard to the subject circle of a prohibited referendum the implications of an obligation under an international treaty should be treated differently accordingly that the referendum question concerns to „an international treaty concluded on the basis of participating in the European Union as a Member State” under Article E of the Fundamental Law, or an international treaty under Article Q of the Fundamental Law. By transfer of competences according to Article E the Member State, while limiting its own sovereignty, provides the possibility of creating binding legislation for itself, its nationals and its residents. The guarantee possibility of this legal institution is indicated by the stricter ratification procedure and terminological difference than in Article Q of the Fundamental Law required for the recognition of its binding force. Therefore it is legally incorrect to designate the bilateral international treaty and the European Union treaties as a restriction with the same content in referendum issues.<sup>16</sup>

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<sup>16</sup> Curia's summary report pp. 114-118.

## V. Personnel and organizational formation powers within the competence of the National Assembly

According to the interpretation of the Constitutional Court, not every organization-related matters of all public institutions fall within the scope of personal and organization-related competencies of the National Assembly, but only those organization-related matters and personnel issues that are specifically within the competence of the National Assembly.<sup>17</sup> Such was for example the case with the initiative to reduce the size of the National Assembly [Decision 25/2004. (VII. 7.) AB of the Constitutional Court] or the initiative to restructure the composition of the National Judicial Council [Decision 45/2010. (IV. 22.) AB of the Constitutional Court]. The Curia in its decision with case number Knk.IV.37.356/2015/2 dealt with the settlement of the institution exercising the function of public power in the Buda Castle District. The NEC in its decision refusing the certification argued *inter alia*, that the result of the referendum on the question would necessarily imply a legislative obligation concerning the seat of the office of the President of the Republic, as a person exercising executive powers, which organization-related matter falls within the competence of the National Assembly pursuant to Article 8 Section (3) point e) of the Fundamental Law. The Curia of Hungary agreed with this argument supplementing it. In its decision with case number Knk.II.37.997/2016/4 the Curia of Hungary examined the adequacy of the initiative to repeal Act LVIII of 2016 on the tender and organization of the XXXIIIrd Summer Paralympic Games. Due to the decision of the NEC it examined the question whether the initiative affects the prohibition contained in Article 8 Section (3) point (e) of the Fundamental Law. It considered the Decision 51/2001. (XI. 29.) AB of the Constitutional Court relevant, accordingly “*the fact that the question to be put to a referendum is remotely, indirectly related to a prohibited referendum subject, does not result in the question becoming a prohibited subject*”, and Decision 105/2007. (XII. 13.) AB of the Constitutional Court according to which “*the question of the establishment, transformation or abolition of a specific body or type of body may be classified as an organization-related matter covered by the prohibition on ordering a referendum*”. According to the opinion of the Curia of Hungary, the question on the signature sheet concretely not aimed to organizational change, based on the question the voters have to take a position on whether they agree with the repeal of the law. The fact that the repeal of this law has also organization-related consequences cannot be a reason itself for refusing to certify the question. To adopt the opposite position would unduly narrow and disproportionately restrict the exercise of a fundamental right compared to the goal to be achieved. The Curia of Hungary noted principally in the case that if the question to be ordered to referendum does not directly aimed to an organization-related matter falling within the competence of the National Assembly, only indirectly affects it, or if the involvement is only apparent, the certification of the issue may

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<sup>17</sup> Kis János: A népszavazás a harmadik köztársaság alkotmányában [The referendum in the Constitution of the Third Hungarian Republic]. *Fundamentum*, 2009/4., p. 17.



not be refused with the reference of Article 8 Section (3) point e) of the Fundamental Law. Thus we can state that in the case of person- and organisation-related matters falling within the competence of the National Assembly an individual examination is necessary if the question to be ordered to a referendum does not directly aimed for such an issue, only indirectly affects it, or if the involvement is only apparent, certification of the question cannot be refused.<sup>18</sup>

## **VI. Summary**

In Hungary, from the prohibited subjects most commonly the violation of the Fundamental Law or an international treaty, as well as the involvement of the budget leads to the refusal to certify the question. On the content of the Acts on the elections of Members of the National Assembly, local government representatives and mayors or Members of the European Parliament, the dissolution of the National Assembly, the dissolution of a representative body, the declaration of a state of war, state of national crisis and state of emergency; furthermore, on the declaration and extension of a state of preventive defence, any matter related to participation in military operations and furtherly the granting of amnesty and other questions containing prohibited issues are by their very nature very rare or non-existent in the practice of certification procedures. The above mentioned can be well illustrated having regard to the absence of review application on these subject matters, the Curia of Hungary did not take a position on similar matters.

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<sup>18</sup> Curia's summary report p. 119.