24 Decision of the Hungarian Constitutional Court on the Exercise of the Right to Vote of Hungarian Citizens Living Abroad

Eszter Bodnár & Benedek Varsányi[*]

24.1 The Motion

The Hungarian Parliament passed Act XXXVI of 2013 on electoral procedure (hereinafter Ep.) on 8 April 2013. Under Sections 265-266 which entered into force on 3 May, every Hungarian citizen, either with or without Hungarian residence, would have been entitled to request her enrolment in the register of postal voters. This provision, however, was changed with effect of 21 June 2013, as follows:

> "Section 266, paragraph (2) The National Election Office shall enrol in the register of postal voters all voters listed in the central electoral register with no Hungarian residence based on a request submitted no later than the fifteenth day before the day of voting. The National Election Office shall indicate in the central electoral register that the voter had been entered into the register of postal voters."

The petitioner challenged the text 'with no Hungarian residence' in Section 266 paragraph (2) Ep. by submitting a constitutional complaint under Act CLI of 2011 on the Constitutional Court of Hungary (hereinafter ACC), based on the following arguments.

a. The said part of the text directly violates the petitioner's rights as it prevents her, as a person having Hungarian residence and staying abroad at the day of elections from being enrolled in the register of postal voters excluding her from the possibility of postal voting. This violates the provisions of the Fundamental Law governing the right to vote (Article XXIII) and equality before the law (Article XV).

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b. Article XXIII paragraph (4) of the Fundamental Law allows the Parliament to differentiate among Hungarian citizens, however, only to the effect that the right to vote or its completeness may be subject to Hungarian residence.
c. With respect to the right to vote, voters who are abroad at the date of elections constitute a homogenous group, irrespective of whether they have Hungarian residence or not. Any distinction made between members of this homogenous group is inappropriate and thus in conflict with the prohibition of discrimination [Article XV paragraph (1) of Fundamental Law].
d. Lastly, the petitioner requested that the Constitutional Court establish unconstitutionality by omission *ex officio*, in the event that the annulment of said norm cannot in itself guaranteethe exercise of the right to vote without unconstitutional discrimination.

The petitioner was called upon by the Constitutional Court to submit a duly completed motion, and as a result, the petitioner amended her motion.[1]

On the subject of the motion the Constitutional Court contacted the Minister of Public Administration and Justice and the head of National Election Office who provided their opinion.

The Constitutional Court announced its decision 3086/2016. (IV. 26.) on 26 April 2016, two years after the motion was submitted and only following the general elections held in 2014. The judge rapporteur was Tamás Sulyok, concurring opinions were attached by István Balsai, Egon Dienes-Ohm, Imre Juhász, László Salamon, Tamás Sulyok, Mária Szívós, András Varga Zs., and dissenting opinions were attached by Ágnes Czine, Miklós Lévay, Béla Pokol, István Stumpf, and Péter Szalay.

24.2 Reasoning of the Decision

24.2.1 Majority Opinion

24.2.1.1 Admissibility

(I) The Constitutional Court held that the constitutional complaint fulfilled formal requirements, as it was submitted within the time limit and it also met the necessary substantive requirements prescribed for motions [Section 52 paragraph 1b) of ACC].

(II) According to the Constitutional Court, the motion also met the substantive requirements of admissibility.

1 The details may be found in Mária Szívós' concurring opinion, the majority reasoning alludes to it only incidentally. See also Reasoning [35].

(II-1) The violation of the petitioner's right did not occur prior to submitting the motion, since it occurs only on the day of elections by reason of the fact that she may only exercise her right to vote in Hungary or at a certain diplomatic mission of Hungary. According to the consistent case law of the Constitutional Court, however, she qualifies as someone affected by the legislation, since a legal norm gave rise to a situation, from it is clear that a violation of rights will directly occur within a foreseeable period of time.

(II-2) No judicial remedy is foreseen with respect to the application of the law concerned, since no decision is made on the issue of enrolling voters having Hungarian residence to the register for postal voting. This results in a direct violation of rights, without no decision taken by any body applying the law, and no remedy is provided to the petitioner.

(II-3) The constitutional issue raised by the motion is of fundamental constitutional importance, in part because it affects hundreds of thousands of voters who are in a similar situation as the petitioner.

(III) Consequently, the Constitutional Court considered the motion to be admissible.

24.2.1.2 On the Merits

(I) On the merits the Court first established that, as to its substance, the petitioner did not assert and argue the unconstitutionality of said law, but pleaded the unconstitutional omission of legislation. As the petitioner is a voter having Hungarian residence and staying abroad at the day of elections, the contested law is not related to the violation of her rights. Instead, it concerns the matter of enrolment of voters without Hungarian residence in the postal register. Consequently, the annulment of the contested law would not abolish the restriction of the fundamental right alleged by the petitioner;, moreover, it would exclude the possibility of postal voting for voters not having Hungarian residence. The constitutional complaint must be rejected in case there is no connection between the violation of the fundamental right stated by the petitioner and the contested provisions of the law.

(II) While the petitioner is not entitled to initiate the establishment of unconstitutionality by omission, the Constitutional Court, may however consider it *ex officio* in exercising its powers. The Court established that it does not deem the legal consequences of unconstitutionality by omission applicable for to the reasons indicated below, 'although, with regard to the particular social relevance of the examined case, it considered it important to establish the following.'

(III) Under the earlier case law of the Constitutional Court the right to vote was a fundamental right, and based on suffrage, the voter had a subjective right to vote and to contribute to the formation of the mandate of elected offices. Under the legislation in force suffrage in general elections is not subject to residence. As a consequence of its obligation to protect voting as an institution the state must actively ensure the exercise of the right to vote, including the adoption of procedural election rules. The legislator has

a wide margin of appreciation in determining the method of voting, nevertheless, it cannot pass law that is contrary to the Fundamental Law. Suffrage cannot be restricted solely on the basis of the fact that the voter is abroad. While the state is obliged to provide voters staying abroad with the possibility to exercise their right to vote, it may fulfil this obligation in multiple ways. The absence of a possibility for postal voting 'does not affect, and therefore does not violate the right to cast ballot, which is part of the right to vote.' The technical procedural rule establishing the method of voting does not bar voters from casting ballots, as they may vote at the diplomatic missions of Hungary or at their residential electoral wards in Hungary. Consequently, no restriction of fundamental rights occurs, and as such, the general test for the restriction of fundamental rights laid down in Article I paragraph (3) of the Fundamental Law is not applicable.

(IV) Since – according to the Court – distinction is not made with regard to a fundamental right, examination of the prohibition of discrimination was assessed by the method 'rational basis review', as follows.

(IV-1) As far as postal voting is concerned, from the perspective of the procedural rule governing the method of voting, Hungarian citizens staying abroad constitute a homogenous group, irrespective of whether they have Hungarian residence.

(IV-2) The distinction between the two groups, those having and those without Hungarian residence, however, is based on objective, reasonable grounds governing the aspects of discretion laid down in the Fundamental Law. Namely, under Article XXIII. paragraph (4) of the Fundamental law the completeness of the right to vote may be made conditional upon residence, and a cardinal law regulates it so, when it provides both list- and constituency vote only to voters having Hungarian residence, while voters without Hungarian residence may cast ballot only to lists.

The absence of the possibility for postal voting as a procedural rule does not restrict the completeness of the right to vote. The distinction is nevertheless based on the same objective aspect (residence). This objective aspect expresses the requirement of effectivity; that is, distinction may be made between members of a homogenous group with respect to the intensity of their relationship with the given state. Permanent residence is an intensive relationship with the state. Affording the option of postal vote is seemingly a benefit, but it must be examined together with the restriction of the essential substance of the fundamental right (absence of completeness), which is a disadvantage for those not having residence.

The Court therefore could not identify sufficient reasons for establishing unconstitutionality by omission.

(V) The decision refers to the fact, that in the case of Vámos and others v. Hungary[2] the European Court of Human Rights (ECtHR) declared the applications on the same subject inadmissible for essentially the same reasons.

2 *Vámos and Others v. Hungary*, Second Section Decision of 19 March 2015, no. 48145/14.

(VI) Although, according to the Court the obligation to pass said law may be derived neither from the Fundamental Law nor from an obligation under international law, the legislator has the opportunity to change the law, making postal voting available to all voters staying abroad.

24.2.2 Concurring and Dissenting Opinions

(C1) In his concurring opinion Egon Dienes-Ohm – as supported by András Varga Zs. – disagrees with the part of the majority opinion asserting that voters staying abroad constitute a homogenous group. He argues that since those having residence may elect candidates in single-member constituencies as well, their voting takes place by definition in the territory of Hungary (whereby he means diplomatic missions as well), where every necessary condition and guarantee of the election can be ensured. These factors are not ensured with respect to many millions of citizens living abroad and without Hungarian residence. Thus, they must be provided with the possibility of postal voting, with due consideration also to the National Avowal (preamble of the constitution), which foresees preserving intellectual and spiritual unity with those members of the nation, who had been torn from the country. The basis for the distinction is not postal voting, but the existence or absence of a permanent (stable) life in Hungary. The distinction is manifested solely in a procedural rule prescribing certain conditions for the exercising the right to vote, it cannot therefore be considered contrary to Articles XV and XXIII of the Fundamental Law.

(C2-I) According to László Salamon's concurring opinion – the second point of which was supported by András Varga Zs. – the reason for restricting the possibility of postal voting solely to voters without Hungarian residence is to prevent electoral fraud and to safeguard fair elections. In agreement with the opinion of the Minister of Justice and the head of the National Election Office (NEO), he holds that voters with Hungarian residence could make a false – but in practice non-verifiable – statement, claiming that they are staying abroad on the day of the election. Virtually anyone could claim the package of postal voting, and in this way parties could apply the method of purchasing votes by paying for the votes of those voters, who claim the postal ballot-paper and hand it to them and afterwards the political party sends the ballot-paper via postal services. He adds that although abuse cannot be excluded in the case of voters living abroad either, but he reckons that in practice – with respect to the fewer number of voters and their geographic distribution – it poses a much smaller threat to fair elections.

(C2-II) According to the concurring opinion, the contested regulation on the method is not the restriction of the right to vote, it only regulates the circumstances of the voting. The legislator may decide that the exercise of a right may be subject to conditions, except where the fulfilment of the condition is impossible or discriminatory. He argues, that the

restriction of a right by definition means a partial and unconditional exclusion from exercising or holding that right. The regulation of the method of voting is not considered to be a restriction, but much rather sets conditions of technical nature for the exercise of the right to vote. These conditions are not impossible to meet, and are not discriminatory.

(C3) In his concurring opinion, Tamás Sulyok agreed with the reasoning of the majority opinion, but added further arguments regarding the ECtHR decision, specifically, the question of legislative omission and discrimination. He argues that although the Constitutional Court was bound to apply the Fundamental Law as a standard, the case law of the Constitutional Court also enables it to take into consideration the relevant case law of ECtHR.

(C3-I) According to his opinion, which refers to the decision of ECtHR, the distinction made with regard to the method of voting cannot be considered arbitrary, as a voter with Hungarian residence differs in many significant aspects from a voter living abroad and not having Hungarian residence: the former has a closer relationship with Hungary; has wider knowledge of the parties and candidates participating in the election; moreover, in spite of their temporary absence they are willing to actively participate in shaping the electoral processes.

(C3-II) The pecuniary drawbacks (such as the travel to a diplomatic mission or to Hungary, and the additional expenses of travelling and lost working time) are not to be considered disproportionate with due consideration to the fact that their fundamental right is complete (they cast two ballots).

(C3-III) According to the cited ECtHR decision, States are not obliged to provide their citizens with the possibility of voting from abroad, but when they do, they have a wide margin of appreciation with respect to how they ensure this right; the only standard is that the regulation cannot be discriminatory. Justice Sulyok accepts that voters staying abroad on the day of elections constitute a homogenous group. But the distinction between the different voting possibilities do not, in his view, affect the essential substance of the fundamental right; it does not exclude the possibility to vote at a diplomatic mission or in Hungary; it does not affect the right to vote and does not restrict it; moreover, although it is related to the constitutionally protected substance of the fundamental right, it is not an immanent part of the same. This, the possibility of postal voting, is not a prerequisite of exercising the right to cast ballot, it does not need to be fulfilled in order to exercise the right to cast a ballot. As such, it is not a restriction of the right to vote, since the petitioner's right to vote (right to cast ballot) is complete and the petitioner may cast both of her ballots during the elections.

(C3-IV) The distinction enshrined in the challenged regulation, in his opinion, is based on a verifiable and objective factor (having permanent residence) laid down in article XXIII paragraph (4) of the Fundamental Law. This rule expresses the requirement of effectivity, that is, among members of the homogenous group a distinction may be made based on the intensity of relationship with the state. In the case of voters having

permanent residence the relationship is more direct and stronger, which follows from prolonged habitation. This may be considered as objective and reasonable grounds for a differentiation in the procedural rule governing the exercise of the right to vote.

(C3-V) The provision on postal voting – which is a technical rule promoting the exercise of a fundamental right – cannot be examined in isolation, without considering the regulatory context. This is a rule, which seemingly benefits voters without Hungarian residence, but the fact must also be considered that in their case this is paired with a restriction of their fundamental right (the absence of its completeness).

(C3-VI) Justice Sulyok examined the possible existence of unconstitutional legislative omission both in respect of the subjective and the objective (institutional) side of the right to vote. The restriction of a fundamental right may be examined from the subjective aspect, which, in the case of the right to vote comprises the right to cast ballot, which, he argues, is unaffected in this case, therefore not restricted, but complete (owing to the two ballots). Consequently, in his view, Article I paragraph (3) of the Fundamental Law in relation with the right to vote as a fundamental right does not apply.

(C3-VII) He argues that the law the petitioner feels is lacking is a procedural (technical) rule on a possible (but not exclusive) method of voting, which facilitates the exercise of the fundamental right. It is the obligation of the State to adopt rules that ensure the exercise of the fundamental right. He holds that on the objective (institution-protective) side unconstitutionality may be established, in case the law enacted renders the exercise of the petitioner's fundamental right impossible or 'illusory', meaning that the exercise of the same from abroad would not be guaranteed. Moreover, he argues that the law did not render the exercise of the petitioner's right disproportionately difficult, which is evidenced by the fact that the petitioner subsequently stated that she would not return to her occupation abroad, but would exercise her right to vote in Hungary.

(C3-VIII) Where the subjective side and substantive content of the fundamental right are unaffected, the distinction made in the law governing the method of voting between the members of a homogenous group may be evaluated on the basis of article XV paragraph (1) of the Fundamental Law. In the course of such evaluation, under the case law of the Constitutional Court, the starting point is the requirement of treating persons with equal dignity. If during their stay abroad everybody can vote from abroad, then, he argues, the requirement of treating persons with equal dignity is fulfilled. According to the petitioner, the law on the method of voting should be provided in the same way to all citizens staying abroad at the date of the elections. This, however, according to the judge would mean that the legislator could not distinguish based on the principle of effectivity and on other aspects mentioned in the decision of ECtHR. The Hungarian residence could be a constitutionally justified restriction with respect to the fundamental substance of the fundamental right (the completeness of right to vote), but with respect to a procedural rule, which according to the petitioner belongs to the fundamental substance of the same fundamental right, it is an unjustified distinction (discriminative, unconstitutional),

and that would inevitably lead to a self-contradiction. 'The question arises how the said objective condition may be constitutional and unconstitutional at the same time. If the constitutionally protected substance of the fundamental right is not extended to the challenged procedural rule, then it is questionable what could be a substantive limitwith regard to the fundamental right, why cannot be with respect to the procedural rule reasonable motive for the distinction.'

(C4) Mária Szívós in her concurring opinion – which was seconded by István Balsai, Imre Juhász and with reservations by András Varga Zs. – agreed with the substance of the majority opinion, nevertheless, in her opinion, the motion should have been rejected without examining it on its merits, because the petitioner was not concerned by the legislation.

(C4-I) The petitioner's personal concern is based on the alleged fact that during the general elections in 2014 she would be staying in Great-Britain for the purposes of employment. In Justice Szívós' opinion, the documents provided by the petitioner to the Constitutional Court do not suffice to verify this fact.

(C4-II) The judge argues that the petitioner's amendment of the constitutional complaint, in which she states that on the day of the elections she will be in Hungary clearly shows that on the one hand she is not concerned directly by the contested rule, and on the other hand that the specific violation of the fundamental right had not occurred to date of submitting the motion.

(C4-III) Under the case law of the Constitutional Court personal concern is required for the admissibility of a motion submitted under article 26 paragraph (2) ACC, namely, that the law contested by the petitioner must contain provisions affecting directly, factually and actually the petitioner's person, or her specific legal relationship, consequently violating the petitioner's fundamental rights. In her opinion, establishing the petitioner's personal concern in the case at hand would be problematic, since article 266 paragraph (2) Ep. contains a provision applicable to voters without Hungarian residence, the petitioner, however, has Hungarian residence.

(D1) Ágnes Czine argues in her dissenting opinion that the Constitutional Court should have established *ex officio* unconstitutionality by omission.

(D1-I) She argues that it follows from the case law of the Constitutional Court that every question related to elections, which affect the possibility to actually exercise the right to vote, inevitably pertains to the essential substance of the fundamental right. For this reason, the violation of the non-discrimination principle should have not been examined in light of the rational basis test, but according to the necessity and proportionality test.

(D1-II) She agreed that citizens staying abroad constitute a homogenous group, and she does not see any compelling reason for restricting the fundamental right. The legislator, when amending the law, did not establish the necessity of amendment with any

factual data when – shortly after passing the law – withdrew the possibility of postal voting from citizens having Hungarian residence.

(D1-III) She holds that from residence no clear-cut conclusion may be drawn as to the intensity of the relationship with the State. It is particularly so, if the citizen would like to exercise her right in the European Union, in this case the distinction is contrary to certain fundamental freedoms qualifying as basic principles of integration.

(D1-IV) She agrees that the Court has taken into consideration the relevant decision of the ECtHR, from which it indeed follows that States are not obliged to afford the possibility of the exercise of the right to vote to citizens staying abroad, but if they do, they need to ensure it without discrimination. Since she is of the view that the human right and fundamental right substance of the right to vote differ, different standards follow from article 14 of the European Convention of Human Rights (ECHR) and article 3 of the First Protocol and from article XV paragraph (2) and article XXIII of the Fundamental Law. Therefore, the Constitutional Court could have established the unconstitutionality of the contested provision even if the ECtHR would not have found Hungary in violation of the Convention.

(D2) According to Miklós Lévay's dissenting opinion, unconstitutionality by omission should have been established. If the majority accepted that the petitioner did not state the unconstitutionality of the challenged part of the law, then it should have rejected the motion without examining its merits. The power to establish unconstitutionality by omission is a 'positive concept' insofar as the Constitutional Court does not have the option to establish that the unconstitutional situation did not occur. It causes unpredictability that the Court chose this solution regardless. With respect to the establishment of unconstitutionality by omission he shares the view put forward by Ágnes Czine.

(D3-I) István Stumpf in his dissenting opinion –points 1, 3, and 4 of which were seconded by Béla Pokol – holds it against the Court that the principle 'in dubio pro libertate' that was elaborated in the case law of the Court was ignored, that is, if there is doubt as to the lawfulness of the restriction of rights the Court must promote the protection of the right.

(D3-II) The Court should have established that the contested law made an inadequate distinction between voters staying abroad on the day of elections. The decision was based on a false conclusion. Article XXIII paragraph (4) is not a requirement but a possibility, in addition the intensity of the relationship with the State calls for a stronger protection of the right of those having residence and not the other way around. Reference to the principle of effectivity cannot be construed to the detriment of citizens with Hungarian residence in any aspect, including the method of voting.

(D3-III) The provision on the exercise of the right to vote is not merely a technical rule but it is through this that the legislator guarantees the right to vote, therefore, it is a restriction of a fundamental right if a given method of voting is not afforded to a certain

group of voters. Therefore, the necessity-proportionality test should have been applied, which the Court failed to carry out.

(D3-IV) Affording different methods of voting to a certain part of the voters may affect the participation of the said group of voters, therefore, if the proportion of party preferences differs among the groups, then the democratic will-formation process will be distorted. This bears the risk of purposeful political influence of the results of the elections.

(D3-V) Furthermore, the way the Court carried out the chosen test was wrong since no justification for the disadvantageous treatment was found, not that any other rule could compensate for the disadvantage. The assumption is, that the lack of postal voting is compensated for by the availability of more votes.

(D3-VI) He also disagrees with the assumption, that the Constitutional Court may declare that no unconstitutionality by omission exists, i.e. that 'the Court did not see sufficient reasons for the establishment of it.' The Court does not have the power to establish that an instance of legislative omission did not occur – with this, it would indeed be bringing back its independent competence to establish unconstitutionality by omission through the back door, a competence that had been repealed by the ACC.

(D3-VII) As a consequence, the Court should have established unconstitutionality.

(D4) Péter Szalay in his dissenting opinion agreed with István Stumpf's dissenting opinion, adding that the Constitutional Court should have established that the provision makes an undue distinction regarding the right to vote, and that the provision on the exercise of the right to vote is not merely a technical rule, therefore the constitutional standard on the restriction of fundamental rights should have been applied.

24.3 Operative Part and ratio decidendi

In the operative part of the decision, the Court rejected the motion for the annulment of the wording 'having Hungarian residence' in article 266 paragraph 2 Ep. The ratio decidendi of the decision may be formulated as follows: the fact that the legislation governing elections does not provide the possibility of postal voting to voters having Hungarian residence, as opposed to those without Hungarian residence, is not a violation of the right to vote (Article XXIII of Fundamental Law) or the prohibition of discrimination (Article XV of Fundamental Law) through legislative omission.

24.4 Critical Review of the Reasoning

24.4.1 Admissibility

Ad (I) The judges of the Constitutional Court did not essentially dispute that the constitutional complaint fulfilled the formal and substantive criteria and that it, with the exception of an additional – but not negligible – aspect, contains the necessary parts of a motion. Mária Szívós in her concurring opinion criticized that the documents submitted by the petitioner to the Constitutional Court do not sufficiently verify that at the date of the general elections in 2014 she was going to be in Great Britain. Examining and evaluating the particular documents is beyond the scope of our analysis, but it should be noted that under article 52 paragraph (6) ACC all documents that substantiate the contents of the petition must be submitted to the Constitutional Court as attachments to the petition. Should the petitioner fail to supplement the motion – following an unsuccessful call by the Court – the motion is to be rejected without examining the merits. If, therefore, the criticism of the concurring opinion concerning these factual questions is right, then the motion should have been rejected and examination on the merits should have not been carried out.

Ad (II-1) The Constitutional Court in its decision no. 33/2012. (VII. 17.) accepted two tests for assessing personal concern in case of constitutional complaints under article 26 paragraph (2) ACC. As a general rule concern is established if 'the law deemed unconstitutional by the petitioner has a provision affecting directly, factually and actually the petitioner's person or particular legal relationship, and as a consequence, the petitioner's fundamental rights are violated' {Decision of Constitutional Court no. 33/2012. (VII. 17.) Reasons [61]}. In addition, however, 'personal concern may also be established in the case, where no conduct to apply or to enforce the law has been carried out yet, but as a result of the operation of law, a legal situation arose, where the asserted violation will inevitably occur in a directly foreseeable period of time.' {Decision of Constitutional Court no. 33/2012. (VII. 17.) Reasoning [66]}

In her concurring opinion Mária Szívós refers to the first test (actual violation of right), and formulates the critique that based on that test the violation of the petitioner's fundamental right had not occurred at time of the submitting, ignoring the fact that the majority reasoning established the personal concern based on the second test (foreseeable violation of right). As a consequence, it remains unclear whether she considers that the test of foreseeable violation of a right is not applicable, or as a result of the application of test she would have qualified the petitioner to be not concerned by the provision.

In relation to this concurring opinion the theoretical question also arises: where the test of foreseeable violation of a right is applied, at what point does personal concern have to occur: at the date of submitting the motion or – if the Court does not decide until that

date – at the date of violation of the right? With other words, the question is, when applied to our case: does personal concern cease to exist with the fact that the petitioner returned to Hungary? In our opinion if the Constitutional Court holds the direct motion based on article 26 paragraph (2) admissible under the test of foreseeable violation of a right, then, in order to prevent a similar violation of rights for the future and to thus objectively protect the constitutional order, the motion could be examined even if in the meantime the personal concern – and accordingly the petitioner's subjective aim to achieve the protection of her rights – had ceased to exist.[3] In our case the personal concern of the petitioner prevails without having ceased afterwards either. She saw the violation of her rights – and we can agree with her in this respect – not in the fact that there is no way for her to exercise her right to vote, but in the fact that since she must travel in order to vote either to a diplomatic mission or to Hungary, she can only exercise her right to vote by taking on additional burdens, hardships and expenses in comparison with voters who are in a similar situation but have the possibility of postal voting.

Mária Szívós' concurring opinion disputed the petitioner's personal concern based on the argument that article 266 paragraph (2) contains provisions regarding voters without Hungarian residence, while the petitioner herself has Hungarian residence. The Constitutional Court, however, established personal concern based on a different logic – and in our view correctly – in its decision no. 3142/2015. (VII. 24.).[4] If we accepted the arguments of the concurring opinion, it would lead to the absurd situation that no provision may be challenged with reference to discrimination, if it is not formulated in a way that it expressly contains a disadvantageous (negative) provision regarding the person concerned, but it is formulated in a way that the scope of its provision with positive substance is *ab initio* not extended to the persons concerned.[5]

We see it as a positive development that the Constitutional Court applied the test of foreseeable violation to assess personal concern in relation to the right to vote. It is a characteristic of voting rights that violation cannot be repaired subsequently, because the will of the individual is not sufficient to exercise this right. Indeed, it may only be enforced through the participation of the state manifested in a relevant legal provision, therefore the conditions of the exercise of the right to vote must be provided for by the state. It is the prerequisite for the exercise of this subjective right that the state, complying

3 On the double function of constitutional complaint see Decision of Constitutional Court no. 3367/2012. (XII. 15.).

4 In this case the petitioner – who owned real estate in the territory of the town of Solymár, but did not have registered residence there – challenged a regulation of a municipality decree under Article XV of the Fundamental Law. According to the municipality decree, those persons are exempted from paying property tax, who have registered residence in the territory of municipality on the first day of the tax year. Her claim therefore derived just from the fact that she was not involved in the scope of the exemption rule (as she did not live in the town). The Constitutional Court accepted the petitioner's personal concern (and so decided the case on the merits).

5 The difference is primarily a question of codification.

with its obligation of institution-protection, ensure the conditions of the exercise of the right to vote {Decision of Constitutional Court no. 1/2013. (I. 7.) Reasoning [54]}.

The right to vote may be exercised only at certain intervals, therefore, if the citizen for some reason could not participate at the elections she may participate again only in four-five years. It may help in this situation if the state bodies protecting fundamental rights perceive their competence extensively regarding the right to vote, providing the opportunity to petition the protection of the fundamental right before the election event. In this way, the voter does not need to wait until suffering the actual violation of the fundamental right, but may address the body protecting the fundamental right beforehand, and if the complaint is successful, she may exercise her right to vote in the forthcoming elections.[6]

The positive finding described above may be seen in a different light if we take into count that although the motion was submitted in October 2013, the Court announced its decision only in April 2016, two years after the general elections in 2014 took place. Thus, even if the Court would have allowed the motion, due to the time lapsed neither the petitioner nor anyone else in a similar situation could have voted via postal voting in the general elections in 2014.

The conduct of the Constitutional Court was lawful, as article 233 Ve. prescribes procedural deadlines of 3 plus 3 work days only in cases where the constitutional complaint is submitted against a judicial decision reviewing the decision of an electoral body. As such, the strict deadline it is not applicable to the 'direct complaint' foreseen under article 26 paragraph 2 of ACC. In spite of this fact, however, we think that the Court would have better fulfilled its role regarding the subjective and objective protection of fundamental rights, if it had taken into consideration the fact that the exercise of right to vote is time sensitive (that is, the violation of right may not be subsequently remedied) and that an annulment decision would have affected election results as well as the legitimacy of the elected parliament. Therefore, it would have been reasonable to decide upon the motion within a short period of time. It is questionable nevertheless that in case of establishing unconstitutionality, at least how long before the next elections should have the decision been made in order to enable both the legislature and the administration to provide for the conditions of postal voting in respect of every citizen staying abroad. The head of the NEO in her answer to the request of the Constitutional Court adopted a conclusion on 19 February 2014, stating that should legal amendments take place at that point of the electoral proceedings (or later), then there would not be sufficient time for the practical implementation of the new provisions. This would have meant that the election of the members of the parliament in 2014 [April or May] could not have been lawfully held.

6 Bodnár, Eszter: A választójog alapjogi tartalma és korlátai. (Budapest, HVG Orac, 2014) 343.

Ad (II-2) The majority reasoning does not mention this aspect, but it is worth mentioning that decision no. 3048/2014. (III. 13.) also established the conclusion, that there was no judicial review in respect of the application of said law (ABH 2014, 1447.). In that case the petitioner submitted a claim via electronic account regarding the central electoral register in order to be enrolled to the register of postal voters. The NEO rejected the claim with reference to the fact that the petitioner has a Hungarian address. The petitioner appealed to the Metropolitan Court, which appeal was rejected as well.[7] The petitioner in her complaint under article 26 paragraph (1) ACC requested the constitutional review of article 266 paragraph (2), the Constitutional Court, however, rejected the motion without examining its merits as it was established that the challenged provision had not been applied to the case of the petitioner.[8]

Ad (II-3) In the framework of assessing compliance with article 29 ACC the majority reasoning took into account that, with regard to the matter of fundamental constitutional relevance, the petitioner referred to the fact that besides her person, the question affects many hundreds of thousand voters who are in a similar situation. We also hold that the question is of fundamental constitutional importance, the previous case law of the Constitutional Court, however, had not taken into consideration the number of persons affected (which, of course, gives further prominence to an already relevant constitutional question). It would have been better to put emphasis on the fact – which also underlay the motion– that the question is in direct connection with the right to vote, thus with the voters' participation in the decision-making by the public authority, furthermore with the constitution of the representative body, which forms the basis of its legitimacy. All of the above constitute the foundations for the democratic operation of the state. On a critical note, it is worth mentioning that the Constitutional Court accepted the petitioner's statement regarding the number of persons concerned ('many hundred thousand') without either the petitioner or the Constitutional Court having made an effort to substantiate this fact in any way.

Ad (III) It is clearly follows from the majority reasoning that the admissibility of the motion was decided by the panel of the Constitutional Court, but there is no reference as to why the case was brought before the plenary session. Namely, rejecting a petition is not part of the exclusive competence of the plenary session.[9] Subject to the decision of the president of the Constitutional Court (at his request or at the request of certain number of judges) the case comes before the plenary session in case 'a decision of the plenary session is required by the social or constitutional importance or complexity of the case, to uphold the uniformity of constitutional jurisprudence or for other important reasons' [article 49 paragraph 6 ACC]. It is not clear from the text of the decision that the case had come before the plenary session for any of the reasons mentioned above.

7 Decision of Metropolitan Court of Budapest no. I.Kpkf.670.120/2014/2.

8 See also Decision of Constitutional Court no. 3048/2014. (III. 13.) Reasoning [2], [15].

9 See also article 50 para. (2) of ACC; (2) paragraph of Operational Rules.

24.4.2 On the Merits

Ad (I) The arguments of the majority reasoning for rejecting the constitutional complaint are not sufficiently persuasive.

On the one hand the majority reasoning deemed that the petitioner, as to the substance of the petition, contested the unconstitutional omission of the legislator. In our view Miklós Lévay's dissenting opinion points out correctly that if the majority had accepted that the petitioner had not stated the unconstitutionality of the contested part of law, then it should have rejected the motion without examining its merits (as unconstitutionality by omission may only be established in *ex officio* procedure).[10]

Furthermore, it is questionable that the majority had sufficient reasons for coming to the conclusion that the motion in its substance is a claim aiming for the establishment of omission. Namely, if the motion involves a statement on discrimination, then – with respect to the nature of the problem at issue – it may be reminiscent of a reference to omission, as the petitioner in the given case complains that a certain rule is not applicable to her that in her opinion should, and this presupposes a lack of regulation. These kinds of motions on discrimination, however, can be distinguished from motions stating omissions. On the one hand, motions establishing omission may object to the lack of legislation with certain substance, while in case of motions stating discrimination only provisions determining persons covered by the norm may be involved. That is, the petitioner complains that a certain rule, which is applicable to others, is incorrectly not extended to her: this is the whole point of discrimination by legislation. On the other hand, while discrimination, if not always, but will typically be eliminated with the annulment of the contested provision of law, this is not even theoretically possible in case of legislative omission. Namely, in the latter case unconstitutionality is not caused by the existence of a norm with a disadvantageous substance, but by the fact that a certain positive norm is missing.

The abovementioned logic related to motions stating discriminations was adopted by the Constitutional Court in its decision no. 3142/2015. (VII. 24.), a decision delineated above when elaborating on the critique of admissibility. The Constitutional Court admitted the connection between the violation and the contested provision of law and decided upon the merits as the petitioner alleged discrimination expressly because the provision was not applicable to her.

The other two arguments for rejection brought up by the majority reasoning, i.e. that the annulment would not make postal voting possible with regard to voters with Hungarian residence, but it would take away the possibility of those without Hungarian residence, are in our view not sufficiently established.

10 See also Decision of Constitutional Court no. 3382/2012. (XII. 30.) Reasoning [30].

On the one hand, in case the contested parts of the provision's text had been annulled the text remaining in force[11] would have enabled all citizens to enrol to the register of postal voting irrespective of their residence.

On the other hand, the fact that the annulment of the contested part of the norm may not wholly repair the violation alleged in the motion does not mean that there is no connection between the violation and the contested provision. Therefore, such an argument may not be a sufficient reason for rejection. Firstly, it is exactly for these situations that the Constitutional Court has been provided with the procedural instrument that it may also examine and annul any provision in close substantive connection with the contested provision [article 24 paragraph (4) of the Fundamental Law]. The Constitutional Court failed to assess thoroughly the question whether by expanding the examination the alleged constitutional problem could have been repaired or not. Secondly, it occurs frequently that as a result of the annulment of a certain provision by the Constitutional Court, the amendment of provisions within the act affected or in another instrument of law, formally or substantively in (not necessarily close) connection with the annulled law becomes necessary. In such cases beside the annulment the Constitutional Court does not normally also establish unconstitutionality by omission. Instead, the legislator, owing to the obligation of the state to protect fundamental rights and resulting from the requirement of legal certainty forming part of rule of law, carries out its legislative task that had become necessary due to the decision of Constitutional Court. And it does this, without a specific call from the Court to enact legislation.

Ad (II) In most part the majority reasoning of the decision rejecting the constitutional complaint aimed to substantiate not the rejection, but the reasons for the Court not to establish unconstitutionality by omission.

Most judges formulating a dissenting opinion explicitly or indirectly disagreed already with this procedure itself. According to Miklós Lévay's dissenting opinion the competence for establishing unconstitutionality by omission is a 'positive concept', the Constitutional Court does not have the power to establish that the situation of unconstitutionality by omission had *not* occurred. István Stumpf was of a similar opinion, pointing out that this statement may not be made by the Constitutional Court for since the ACC came into force in 2012 the Court has no independent competence to establish unconstitutionally by omission. The Court, however, by declaring the absence of omission essentially used an *ex officio* procedural instrument as if it was an independent competence.

The abovementioned critical observations in our view are not without substance. Under the former ACC, the procedure aiming for the establishment 'termination of uncon-

11 In case of the annulment of the part 'with no Hungarian residence' in article 266 para. (2) Ep. The following text would have remained in force: 'Section 266, paragraph (2) The National Election Office shall enrol into the register of postal voters all voters listed in the central electoral register based on a request submitted no later than the fifteenth day before the day of voting. The National Election Office shall indicate in the central electoral register that the voter had been entered into the register of postal voters.'

stitutionality by omission' could be initiated by anyone (besides ex officio initiation) and the Constitutional Court had to decide whether the legislator had omitted its task to legislate in conformity with the constitution.[12] In procedures initiated upon petition well-foundedness obviously had to be decided by the Constitutional Court, therefore in certain cases it could establish the absence of unconstitutionality by omission, which resulted in rejecting the merits of the motion; and if it allowed the motion then it called upon the body in omission indicating also a deadline to take the necessary legislative steps.[13] The ACC in force, however, does not contain such independent competence. To call upon the body in omission to carry out its legislative duty is regulated in ACC under title 'Legal consequences of decisions of the Constitutional Court.' This consequence may be applied only ex officio, in cases where 'while carrying out its competences, the Constitutional Court establishes unconstitutionality by omission on the side of the legislator.' The function of this procedural possibility foreseen in the ACC in force may be described as follows: should the Constitutional Court, while examining the compliance of any law with the Fundamental Law comes to the conclusion that an unconstitutional situation prevails, which however is not caused by the challenged provision of law or decision of court, but the absence of legislation, then, since in such cases the application of the consequences of annulment does not arise, there should be a procedural instrument to indirectly eliminate the violation of a right (or other manifestation of unconstitutionality).

Ad (III) The decision sums up correctly the case law on the right to vote. It also notes correctly that procedural rules on postal voting or on its absence do not restrict the right to vote, but much rather the exercise of the same. The conclusion, however, that this is not a restriction of a fundamental right is in our view incorrect, not unlike the finding that the test is to be applied is not the necessity-proportionality test, since it does not bar the voter from voting, but merely lays down the conditions for voting.

In its decision on voter registration the Constitutional Court shed light for the first time on the difference between the restriction of the subjective aspect of the right to vote and the restriction of its exercise, qualifying provisions prescribing registration to the central electoral register as belonging to the latter category.[14]

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12 The text of the norm mentioned explicitly only one kind of occurrence of omission, this was, however, expanded by the case law. See Csink, Loránt – Paczolay, Péter: 'A törvényhozói mulasztás problémái az alkotmánybíráskodásban.' in Szabó Imre (szerk.): Ius et legitimatio. Tanulmányok Szilbereky Jeno 90. születésnapja tiszteletére (Szeged, Pólay Elemér Alapítvány 2008) 185-198.

13 Section 1, point e); Section 21 para. (4), Section 49 of Act XXXII. of 1989 on the Constitutional Court. In such cases, however, the Constitutional Court decided upon the motion establishing unconstitutionality by omission obviously and expressly in the operative part. For example: 'The Constitutional Court rejects the motion on the establishment of unconstitutionality by omission related to the asset declaration of members of parliament' See: Decision of the Constitutional Court no. 1397/B/1990. ABH 1991, 587.

14 Tangentially this differentiation showed up earlier in case law of the Constitutional Court: Decision of Constitutional Court no. 298/B/1994., ABH 1994, 696, 698-700; but for a more detailed example see: Decision of Constitutional Court no. 1/2013. (I. 7.) (specifically: Reasoning [55]–[66]).

Under restricting the subjective aspect of the right to vote we mean the case where the individual has no right to vote, because she does not meet the positive criteria for the right to vote (for example she is still a minor), or for some reason she is excluded from the right (for example she has been barred from public affairs). Restriction of the subjective aspect of the right to vote in fact means exclusion from the subject of the fundamental right, as in these cases the restriction is complete, the right to vote cannot be quasi or partly withdrawn.

Restricting the exercise of the right to vote is a more complex question. Namely, in this case the individual formally has the right to vote, since she meets all the positive criteria and is not excluded from the same, but she can nevertheless not exercise her right to vote or it is restricted for some reason. Consequently, the voter cannot vote or run as a candidate in the same way, at the same place, at the same time, under the same conditions as she could without the restrictions. The most direct restrictions occur during the electoral procedure: for example only those may exercise their right to vote who are in the register, who show up in the polling-station, who identify themselves, and so on. Likewise, to be eligible, the prospective candidate for example has to collect signatures, provide certain personal data, get registered.

This distinction was followed by the Court in the analysed decision as well. Unlike what was concluded in the decision, this difference is only significant in respect of the rank of the restrictive provision in the hierarchy of laws. The Fundamental Law enumerates the restrictions of the right to vote exhaustively: the right to vote is conditional upon a certain age and citizenship or link to the state, and exclusion from it is allowed only in case of committing a crime or judicial decision due to mental state.[15] These restrictions may not be broadened by law, or lower level measures as it was concluded by the Constitutional Court in its decision on the restriction of the eligibility of representatives of social security self-governments [Decision of Constitutional Court no. 16/1994. (III. 25.), ABH 1994, 79, 82.]

There is no objection, however, if an act sets out requirements regarding the exercise of the right to vote, as these are not restrictions of right to vote but solely of its exercise. These restrictions laid down in legal acts must be in compliance with the provisions of the Fundamental Law on the restriction of fundamental rights, as they essentially restrict the fundamental right itself, by restricting its exercise.[16] This approach was followed by the decision on electoral registration, when the Constitutional Court examined a procedural rule on the

15 The only exception is that the right to vote or its completeness may be subject to Hungarian residence if a cardinal law provides so under article XXIII para. (4) of the Fundamental Law.

16 In the international law even this distinction between the restriction of the right to vote and the exercise of the right to vote is irrelevant for there the level of legislation does not play a role, the restriction must be justifiable irrespective of the fact that it was determined in the constitution or at level of an act. For example, the ECtHR judged against Hungary for the restriction of the right to vote on the constitutional level in the Alajos Kiss case because of the general exclusion of persons under guardianship from the right to vote. Alajos Kiss v. Hungary, Judgment of 20 May 2010, no. 38832/06.

restriction of the exercise of the right to vote based on article I paragraph (3) of the Fundamental Law: the general rule governing the restriction of fundamental rights. Consequently, the finding of the decision establishing that in this case there is no restriction of fundamental right and the necessity-proportionality test should not be applied, is incorrect.

Ad (IV) Based on the above, we do not agree with the conclusion of the decision that the concern related to a fundamental right may not be established. Hence, we are of the view that the application of the rational basis test was misguided. But even if we accepted this preconception to be correct, the application of the rational basis test is not without problems in the decision.

We agree with the premise that voters staying abroad constitute when it comes to the method of voting a homogenous group. It is irrelevant with regard to the exercise of the right to vote whether they have Hungarian residence as they are in the same position in the sense that they are staying abroad on the day of election, therefore the exercise of the right to vote may not be provided for them in the traditional way, that is at a polling-station in Hungary.

Members of a homogenous group may only be treated differently, if it is reasonable. The decision brings up two arguments in close interconnection: the principle of effectivity and the compensation for substantive disadvantages.

The Hungarian legislator by adopting the Fundamental law created the possibility for Hungarian citizens living abroad to have suffrage. In case of the election of the members of parliament the relevant cardinal law did not prescribe that the right to vote be subject to residence, therefore every Hungarian citizen of adult age, even without Hungarian residence has the right to vote.

By international comparison we see that Hungary with this decision chose a more frequently used political community model instead of the former solution.[17] Namely, it is rare that the definition of political community is defined as the people living within its boundaries, for the purposes of habitation, as it was defined by the previous Hungarian constitution. In most countries the political community is defined as the community of citizens, irrespective of their residence.

Nevertheless, providing that the right to vote is subject to residence is also an accepted method in documents of international law and practice, which, in connection with the right to vote, recognize the principle of effectivity.

Although article 21 of the Universal Declaration of Human Rights on participation in public affairs does not distinguish among individuals based on their citizenship, the provision evidently presupposes a certain organic relationship between the individual and the given state, which relationship may be citizenship or residence.[18] If voting is subject to local residence, then this criteria needs to be reasonable according to the UN's Human

17 Models of political communities are presented in details by Halász, Iván: *Állampolgárság, migráció és integráció* (Budapest, MTA Jogtudományi Intézet, 2009) 21-48.

18 Compendium of International Standards for Elections (London–Brussels: NEEDS-European Commission n. d.) 18.

Rights Committee.[19] Opinion no. 190/2002 of the Venice Commission also considers this to be acceptable provided that the right to vote is subject to residence, suffrage and eligibility is granted to those living abroad as well.[20]

The ECtHR does not consider the provision under which the right to vote is subject to residence to be unreasonable or arbitrary per se.[21] This requirement may be justified with the assumption that citizens without residence are influenced less directly and continuously by the daily problems of the country and also have less information about these problems. It may be also justified reasoning that it is inappropriate and maybe not even desirable (in some cases impossible) that candidates present their programme to those living abroad; that citizens with residence may have bigger influence on the selection of candidates and on forming the programme; and that there is a correlation between one's right to vote in elections and being directly affected by acts of the political bodies so elected.[22] Provisions making the right to vote subject to residence serve the purpose that those should participate in the elections who have a close connection with the given state, and whose life is truly influenced by the decisions of the elected institutions, therefore it may be considered as a legitimate aim.[23]

There is therefore a possibility to make residence a condition of the right to vote in order to give effect to the principle of effectivity. Nevertheless, the state may also grant the right to vote to citizens not having a residence.

A question that is harder to answer is the following: in case the right to vote is actually provided, how much weight should reasonably be afforded to voters without residence.

The legislator chose the option that the right to vote of voters living outside Hungary is not complete: they do not cast two ballots in the elections; they may not vote for single-member constituency candidates, only to party lists. This is enabled by article XXIII paragraph (4) of Fundamental Law, which allows derogation from the requirement of equality with the provision that a cardinal act may make the right to vote or its completeness conditional upon residence in Hungary.

The ECtHR also held that differentiation in the substance of votes was compatible with the Convention, when in a Turkish case it accepted the regulation under which citizens living abroad for more than six months can vote only for party lists, not to single-member constituency candidates. The Court held that it is a legitimate aim for

19 General Comment No. 25. (Participation in Public Affairs and the Right to Vote), 12 July 1996, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 11.

20 Opinion no. 190/2002. point I.1.1. c).

21 *Hilbe v. Liechtenstein*, Judgment of 7 September 1999, no. 31981/96.

22 *Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, Decisions and Reports 90-A.

23 Article 56 of European Convention of Human Rights: Any State may declare that the Convention shall extend to all or any of the territories for whose international relations it is responsible. The provisions of the Convention shall be applied in such territories with due regard, however, to local requirements. *Py v. France*, Judgment of 11 January 2005, no. 66289/01.

restricting fundamental rights to reduce the influence of citizens residing abroad on parliamentary elections.[24]

Under the principle of effectivity it is justifiable therefore to reduce the influence of citizens living abroad. However, regarding the legislation at hand we may draw opposite conclusions as the Constitutional Court did based on the principle of effectivity the more advantageous conditions for exercising the right to vote are to be provided to the group with the closer relationship, i.e. having Hungarian residence. In the case at hand, the legislator, by providing a procedural advantage (the possibility of postal voting) to citizens living abroad, on the other hand disadvantages citizens with a closer relationship with the state.

We further disagree with the conclusion that differences in the number of ballots could be connected to and compensated by a procedural advantage.

On the one hand, based on the above, it follows from the principle of effectivity that in the case of citizens without residence and consequently, with less influence it may be reasonable to reduce their influence on the election results. This would allow for a reduction of the number or weight of such votes, or for providing that the exercise of their right to vote may be subject to other conditions (e.g. registration). Consequently, there is no need for compensation, in our case it is justifiable and constitutionally permissible if they only have one vote in the parliamentary elections.

But even if it were otherwise, this type of compensation would still be unacceptable. Distinction in respect of the possibility of exercising rights or in respect ofa legal situation may not be conceived on the whole, through a 'result-oriented approach.' This would lead to the absurd conclusion that even serious discriminations could be acceptable if the given group was advantaged at some part (e.g. women would earn less for the same job but could work more flexibly). Moreover, the treatment of the two conditions as a whole is questionable as one is applicable to the substance and completeness of the right to vote and the other to the method exercising the right to vote, therefore they are two different conditions, which cannot be linked.

Ad (V) It is not clear what the Court's attitude is towards the decision of the ECtHR. According to the decision the Court 'notes' that the ECtHR did not find the motion with the same subject to be admissible, but does not further elaborate on what follows from this with regard to the decision of the Court. Of course, the Court does not build its decision on that of the ECtHR, but could reinforce its argumentation with it, but any further analysis is missing. Only judge Tamás Sulyok's concurring opinion raises the question of the relationship of the two levels of fundamental rights protection, therefore we shall respond it in substance when discussing that part.

Ad (VI) The Constitutional Court delineates at the end of its decision that the legislator still has the possibility to amend the legislation and to grant the possibility of postal

24 *Oran v. Turkey*, Judgment of 15 April 2014, no. 2881/07, 37920/07.

voting to every citizen staying abroad. This 'good advice' addressed to the legislator is not unprecedented,[25] it is, however, uncharacteristic regarding the function of the Constitutional Court. As it was expressed by the Court in its 1991 decision, it is not an advisor to the Parliament but adjudicates on the result of legislation [Decision of Constitutional Court no. 16/1991. (IV. 20.) An advisory role would be incompatible with the position of the Constitutional Court in the constitutional order of the separate branches of power.[26]

The advice given to the legislator is also problematic in its substance, as it contradicts the argumentation of the decision: up to this point the Court argues that it is acceptable to compensate citizens without residence with a procedural rule for their disadvantage suffered in the number of votes. If the legislator can terminate the difference in treatment and this is in compliance with the constitution, then in fact no such compensation is needed. In this case, therefore, the compensation argument as a reasonable justification for differentiating among the group of voters is flawed.

24.4.3 Concurring and Dissenting Opinions

Ad (C1) For the reasons delineated at the critical review of the majority reasoning we cannot agree with that part of Egon Dienes-Ohm's concurring opinion which claims that since the difference in treatment relates merely to a procedural rule it cannot in itself be contrary to Article XV and XXIII of the Fundamental Law.

Furthermore, it is not completely clear, why he does not see citizens staying abroad on the day of elections as a homogenous group. Why is it 'obvious' that those who have Hungarian residence vote in Hungary? Namely, this is not a logical implication of the fact that they may vote for candidates in single-member constituencies, a reason quoted by judge Dienes-Ohm. If his concurring opinion is to be interpreted in a way that the necessary conditions and guarantees of the election may only be ensured domestically, which would exclude case of postal voting, then he should argue against this method of voting in general, something he however doesn't do. Moreover, while he categorizes diplomatic missions as part of the territory of Hungary, in case of diplomatic missions no argument was accepted that they could not be reached under the same conditions by citizens staying abroad.

The function of the reference to the National Avowal is unclear, because on the one hand the opinion does not refer to article D) of the Fundamental Law on Hungarians living abroad at the same time, which is the provision of the same principle that has normative force, on the other hand because it is not clear what is implied precisely by

25 For example, at the end of the reasoning of Decision of Constitutional Court no. 100/2007. (XII. 6.) the Court discusses what further questions need to be re-regulated related to the referendum procedure.

26 Sólyom, László: *Az alkotmánybíráskodás kezdetei Magyarországon.* (Budapest, Osiris, 2001) 301.

this provision.[27] We may interpret this argument in a way that it considers granting the possibility of postal voting an advantageous rule, which in fact promotes national unity. Were we to accept this hypothesis, the only consequence that would follow is that in respect of the constitutional aim it would be a step-back to terminate the possibility of postal voting. Discrimination of certain groups of Hungarians staying abroad related to political participatory rights could hardly justified be with this constitutional provision. For one, it may not be stated with certainty that 'Hungarians living abroad' could not be at the same time citizens 'with Hungarian residence'.[28] Second, from the promotion of the political participation of Hungarians living abroad it does not follow logically that from among members 'of the single Hungarian nation' a group of citizens staying abroad during the elections could be removed and disadvantaged compared to another part of the group on the basis of residence, which is an irrelevant aspect with respect to the method of voting.

Ad (C2-I) László Salamon's main reason for rejecting the motion is to prevent electoral malfeasances and to guarantee fair elections. The concurring opinion, quoting the arguments of the head of NEO details a method of electoral fraud comprising vote-buying. To prevent this he considers it reasonable to exclude from the possibility of postal voting those voters who have Hungarian residence.

The thorough examination is merited here, since under earlier case law of the Constitutional Court, which in our view must still be upheld, in order to protect fair elections, the adoption and enforcement of safeguard provisions complying with the requirement of rule of law, and excluding the possibility of malfeasances are necessary. These may in certain cases serve as grounds for introducing restrictions on the exercise of voting.[29] The document of the Venice Commission entitled 'Code of Good Practice in Electoral Matters' explicitly deals with the question of the relationship between postal voting and the fairness of elections. According to this, in case certain safety measures are taken, postal voting can be applied in case of patients, imprisoned, persons with reduced mobility, and voters staying abroad, to the extent that it does not run the risk of fraud or intimidation.[30]

As the concurring opinion also admits, the method of electoral fraud delineated in it 'may not be excluded in case of voters living abroad, but in practice owing to the smaller

27 Under the National Avowal: 'We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century.' Under article D) of the Fundamental Law: 'Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, shall facilitate the survival and development of their communities, shall support their efforts to preserve their Hungarian identity, the effective use of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.'

28 The Fundamental Law uses both terms. The terminology in one case ('with residence') seems to amount to a legal category, in the other case ('living') it is rathera factual category.

29 See also: Decisions of Constitutional Court no. 298/B/1994., ABH 1994, 696; and no. 338/B/2002. ABH 2003, 1504.

30 Opinion of Venice Commission no. 190/2002. points 38-39.

number of voters and their geographic distribution it constitutes a significantly lesser danger to fair elections.' We think that the argument above on the elimination of electoral malfeasance is not sufficiently convincing for more reasons, which derives partly from the fact that it implicitly draws a parallel between voters without Hungarian residence (which is a legal category) and voters living abroad (which is a factual category). Meanwhile, in reality the voter with *de iure* Hungarian residence can be *de facto* living abroad as evidenced by the petitioner's example. With respect to voters in the same situation e.g. living permanently in Western Europe or working or living in the United States like her, it may be just as stated that in the case of members of this group, due to their 'smaller number and geographic distribution' there is a slighter chance of electoral malfeasance than in respect of voters living in the neighbouring countries. On the other hand, a voter without *de iure* Hungarian residence can *de facto* live – or, at the time of elections, stay in Hungary. The Act conceives of this possibility as well, as the voting postal package cannot be sent only to a foreign address, but the voter may request that she receive the postal package personally at a (domestic) seat of single-member constituency or at any other town designated by the minister [article 277 paragraph (2) points a) and b) Ep.]. Similarly, the voter casting postal ballot may not only post her ballot abroad, as under the law the envelope containing the ballot may be posted free of charge, and the envelope containing the ballot may be submitted to any (domestic) election office of single-member constituency during the time of voting in Hungary [Article 279 paragraph (2) point c); article 280 paragraph (1) Ep.].

Based on the above, the possibility exists that a voter without Hungarian residence may request that the voting postal package be sent to her foreign address (or may even pick it up personally in Hungary), she may fill it in according to the vote buyer's will in return for payment and may hand it to her, and the vote buyer may post the envelope (either from abroad or from Hungary). The concurring opinion does not bring up any argument which proves that the risk of electoral malfeasance would be lower among this group of voters. In the absence of arguments, based on sheer logic one can only state that if the possibility of postal voting is provided to a lesser number of voters, then proportionally less voters are exposed to possible attempts at electoral malfeasance, and consequently the actual number of electoral malfeasances may be even lower. Therefore, reducing the number of voters entitled to postal voting will logically and predictably reduce the number of electoral malfeasances. Reducing the number of electoral malfeasances is in our view a constitutionally acceptable aim. However, it does not establish the distinction regarding the method of voting within the homogenous group of voters, who stay abroad at the time of the elections. The concurring opinion fails to examine what procedural rules could guarantee the aim, which rules would reduce the chances of malfeasances and through this their proportion uniformly, instead of establishing the distinction on the legal question of residence in Hungary.

It is to be noted that neither the majority opinion, nor any other concurring opinion referred to the aspect of preventing electoral malfeasances as a reason for rejecting the motion, and this part of the concurring opinion was not seconded by András Varga Zs. either. Moreover, according to the majority opinion, the legislator may grant the possibility of postal voting to all citizens staying abroad, 'insofar the technical and security conditions are given' (Reasoning [56]). From all of this we may conclude that other members of the Constitutional Court did not consider the argument put forward by the head of NEO and the minister regarding the electoral malfeasances to be sufficiently convincing, at least in the sense that they theoretically believe that with appropriate legislation the electoral fraud described may be prevented.

Ad (C2-II) As we indicated at the critical review of the majority decision, we do not agree with the conclusion that subjecting the exercise of the right to vote to certain requirements would not be considered as the restriction of the right to vote. The contested provision indeed fails to directly narrow down the group of subjects, and as such does not exclude anyone from the right to vote. However, the exercise of the right to vote may be restricted by any condition, and as such it qualifies as restriction of a fundamental right. The decision of the Constitutional Court on electoral registration may serve as a guideline in this respect [Decision of Constitutional Court no. 1/2013. (I. 7.)].

Ad (C3) Tamás Sulyok in his concurring opinion in part rephrased but in substance repeated many arguments of the majority decision. We dealt with these arguments and expressed our views when assessing the majority argument on the merits. In the following we cover only those arguments of the concurring opinion, which compared to the majority reasoning were substantially new or were described in more detail.

We agree that the Constitutional Court must to take into consideration the case law of the ECtHR. The Court has followed this principle since the beginning of its operation,[31] and this case law was reinforced after the Fundamental Law entered into force.[32] This means, that if in respect of certain fundamental rights the constitution formulates the substance of the fundamental right similar to a certain international convention (for example the International Covenant on Civil and Political Rights and the European Convention of Human Rights) the level of protection afforded to those fundamental rights can under no circumstances be lower than the level of international protection of fundamental rights (typically the one fleshed out by the European Court of Human Rights) {Decision of Constitutional Court no. 32/2012. (VII. 4.) Reasoning [41]}. The case law of Strasburg and the ECHR defines the minimum level of protection of fundamental rights,

31 Kovács, Kriszta: 'Az Emberi jogok európai egyezménye és az uniós jog szerepe az alapjogi ítélkezésben' in Somody Bernadette (szerk.): Alapjogi bíráskodás – alapjogok az ítélkezésben (Budapest: L'Harmattan 2013) 153-155., See also: Blutman, László – Csatlós, Erzsébet – Schiffer, Imola: A nemzetközi jog hatása a magyar joggyakorlatra (Budapest: HVG-ORAC 2014).

32 For the review of case law see: Kovács, Péter: Az Emberi Jogok Európai Bírósága ítéletére való hivatkozás újabb formulái és technikái a magyar Alkotmánybíróság, valamint néhány más európai alkotmánybíróság mai gyakorlatában. AlkotmánybíróságiSzemle 2013/2. 73-85.

which must be ensured by all signatory states. Domestic law, however, may establish different, higher standards of protection of human rights {Decision of Constitutional Court no. 4/2013. (II. 21.), Reasoning [19]}. In case a domestic law has the same substance as any right laid down in the ECHR or its protocol, or serves the fulfilment of the obligation to ensure this right, it follows from Article Q) of the Fundamental Law that the Constitutional Court must refrain from such interpretation, which inevitably implies the violation of an international obligation and a series of negative rulings against Hungary before the ECtHR {Decision of Constitutional Court no. 36/2013. (XII. 5.) Reasoning [28]}.

Therefore the protection ensured regarding the right to vote cannot be of lower level than the level of the international protection of rights. There is no reason, however, why the domestic protection of rights should not be of higher level, moreover, we think that it is adequate with respect to the right to vote, as a conclusion from what follows.

If we analyse the case law of ECtHR on the right to vote, it turns out because of the subject of the procedure, the Court's activity has different levels. The ECtHR went furthest in the protecting the right to vote when the case concerned the right to vote and to stand as a candidate, thus, it was directly about safeguarding the right to vote. The ECtHR rendered forward-looking decisions, which expanded the scope of people holding the right to vote, for example in cases concerning the imprisoned or citizens under guardianship.[33] The ECtHR was showed more restraint where the subject matter of the case was the electoral system or one of its institutions. In these cases, it usually respects the differences prevailing between the member states and recognises the states' wide margin of appreciation to choose their electoral system.[34] Regarding the third group of cases related to procedural aspects, the ECtHR establishes a violation of law only when a particularly grave procedural violation occurs, for example in the course of counting votes, or determining the results.[35]

The reason for this differentiation is primarily that the right to free elections is closely related to the exercise of power. Therefore, protecting the same is a more sensitive issue froma political point of view, especially if rights of a bigger group are involved and the restriction of their right to vote affects the results of the elections.[36] In these cases the ECtHR is much more cautious, and this sensitivity in approach is evidenced by the pro-

33 For example: Hirst v. United Kingdom (no. 2) [GC], no. 74025/01, § 82, ECtHR 2005-IX.; Frodl v. Austria, Judgment of 8 April, no. 20201/04.; Scoppola v. Italy (no. 3.), Judgment of 22 May 2012, no. 126/05.; *Alajos Kiss v. Hungary*, Judgment of 20 May 2010, no. 38832/06.

34 For example: Yumak and Sadak v. Turkey [GC], Judgment of 8 July 2008, no. 10226/03.; *Liberal Party, Mrs R. and Mr P. v. the United Kingdom*, no. 8765/79, DR 21, 211.; Saccomanno and Others v. Italy, Decision of 22 June 2004, no. 36719/97.; *Bompard v. France*, Decision of 4 April 2006, no. 44081/02.

35 For example: *Kovach v. Ukraine*, Judgment of 7 February 2008, no. 39424/02.; *Namat Aliyev v. Azerbaijan*, Judgment of 8 April 2010, no. 18705/06.; *Karimov v. Azerbaijan*, Judgment of 25 September 2014, no. 12535/06.; Petkov and others v. Bulgaria, Judgment of 11 June 2009, no. 77568/01.

36 See for example: *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, ECtHR 2012.; *Py v. France*, Judgment of 11 January 2005, no. 66289/01.; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, ECtHR 2008.

portion of electoral cases that landed before the Grand Chamber.[37] Generally the ECtHR's political sensitivity does not figure in the text of decisions, however there are some instances in which the dissenting opinions write that the court considered political arguments as well.[38]

The ECtHR developed several methods and tests to reduce political risk in these cases. It examines whether a European consensus on the given subject matter exists (which is quite rare in case of electoral systems and procedures), and if this is not the case, it emphasizes that the characteristics of the state, its historical evolution and political ideologies have to be taken into consideration. Accordingly, what may acceptable in light of the political evolution of one state may not be acceptable in another, and the other way around.[39] Moreover, article 3 of the first protocol of the ECHR formulates the right to free elections as an obligation of the states, not as an individual right. From this, according to the ECtHR, it follows that this right may be restricted to a larger extent than other political rights and that states have wider margin of appreciation.[40] The argument of wide margin of appreciation is very frequently used by the ECtHR in electoral matters. This illustrates well the subsidiary role the ECtHR plays in the system of fundamental rights protection, namely, that it is first and foremost the member states who are responsible for the protection of fundamental rights.[41]

Therefore, the ECtHR as an international court of human rights does not and cannot provide full protection of the right to vote, this is primarily the task of domestic courts, indeed, in certain cases the task of constitutional courts. Hence, we may agree with Tamás Sulyok's concurring opinion in that the case law of Strasbourg is of orientational character, but we think that it would have been necessary and appropriate for the Constitutional Court to have ensured a higher level of protection of fundamental rights.

The concurring opinion adopted without critical review the conclusion of the ECtHR's decision, that pecuniary disadvantages incurred for lack of postal voting (such as those one affecting the working time, travelling to a diplomatic mission or to Hungary, and additional expenses for travelling and the lost time) are not to be considered disproportionate in light of the fact, that the fundamental right is complete (they may cast two ballots).

It is prudent to note here what specific circumstances the petitioner presented to substantiate her constitutional complaint. She stated that she resides 1400 kilometres from Hungary and 137 kilometres from the diplomatic mission of Hungary. Travel to the diplomatic mission and back would take more than five hours and would cost 25000

37 See for the details: <www.echr.coe.int/Documents/Overview_19592014_ENG.pdf>.

38 See for example: *Hirst v. United Kingdom* (no. 2) [GC], no. 74025/01, ECtHR 2005- IX, Joint dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Iebens, § 5.

39 *Zdanoka v. Latvia* [GC], no. 58278/00, § 115, ECtHR 2006-IV.

40 David J. Harris – Michael O'Boyle – Edward P. Bates – Carla M. Buckley: Law of the European Convention on Human Rights (Oxford: Oxford University Press 2009) 714.

41 Harris et al. (40. fn.) 13.

HUF (approx. 80 Euros). By comparison, voters, who are in a situation comparable to hers, meaning they are staying abroad but do not have Hungarian residence, may exercise their right to vote without the abovementioned burdens, hardships and costs, using the institution of postal voting (Reasoning [4]).

As we detailed above, it is an a priori incorrect conception that the lack of postal voting could be compensated by the (theoretical) possibility of casting two ballots. This would be tantamount to state that the 'proportionality' of additional burdens following from the lack of postal voting could theoretically be compared to the number of votes. We are of the view that the additional burdens presented by the petitioner are of such weight that it renders – compared to the possibility of postal voting – the exercise of the fundamental right of the petitioner and of voters in a similar situation significantly difficult. In our example the petitioner was in fact put into a situation as if no polling station had been constituted in Kalocsa, a town 137 kilometres from Budapest and she would have had travel to Budapest to cast ballots, while other had the possibility to vote locally or via postal voting.

We disagree with the conclusion that article XXIII paragraph (4), under which a cardinal law may provide that the completeness of the right to vote is subject to residence, may be taken as a basis for argumentation.

We accept that the notion of completeness may include procedure, that is, it is not necessary to provide the same conditions to voters without Hungarian residence, as it follows from the principle of effectivity that they may have less influence on the results of elections than voters living in Hungary. This means that the legislator could even tie the voting of citizens without residence conditional to quite serious procedural conditions (to the extent it does not render their right to vote meaningless). Under no circumstances may this distinction take an opposite direction, namely, more advantageous conditions cannot be provided to voters with a looser connection, i.e. voters without residence, since this would contradict the principle of effectivity.

Lastly, as pointed out by István Stumpf in his dissenting opinion, the provision of the Fundamental Law is only a possibility not an obligation imposed on the legislator, therefore no mandatory distinction may be derived from it.

Ad (C4) As Mária Szívós' concurring opinion disputed solely the petitioner's personal concern, we assessed this issue at the critical review on the reasoning surrounding admissibility.[42] Here we deal only with one question: why has she, together with István Balsai and Imre Juhász, who seconded her concurring opinion, voted for the rejection of the merits, if she held that it would be appropriate to reject the petition without examining its merits.[43] The answer could hypothetically be (since what exactly took place is not re-

42 See (P4-I); ad Admissibility (I), (P4-II) and (P4-III); ad Admissibility (II-1).

43 András Varga Zs. also seconded but with the note that 'the Constitutional Court decided on the matter of admissibility discretionally and there were also significant argument for rejection without examining the merits.' Therefore we do not put him into this group.

vealed in the majority or from the concurring opinion) that in this case, at the plenary session no majority was formed beside any direction of decision. In the current case from the thirteen constitutional court judges participating in the decision-making five judges would have supported establishing unconstitutionality, another five would have rejected the motion on its merits, and three judges would have rejected the motion without examining its merits. In a situation like this a compromise may be needed to make the Constitutional Court capable of taking a decision [see article 48 paragraph (5) ACC]. In our view, a solution acceptable from the point of view of procedural law is that those judges pushing for rejection without examining the merits, who did not participate in the decision on admissibility or voted negatively, subsequently accepted the majority decision on admissibility as a starting point and at the final decision voted on the merits of the motion.

Ad (D1) Ágnes Czine's dissenting opinion is logically structured, and it is a clear reasoning, we essentially agree with its conclusions.

We only dispute the relevance of the argumentation regarding European integration. On the one hand, EU law, with due consideration to the respect for the sovereignty of the member states, does not affect parliamentary elections. On the other hand, the two kinds of elections partly regulated by EU law, namely the election of members to the European Parliament and local municipality elections, do not contribute towards strengthening the EU citizen's relationship with her country of citizenship. Instead, these rules create the option for non-citizens to exercise their right to vote in their country of residence (article 22 TEU). Therefore, this argument in no way substantiates the decision recommended in the dissenting opinion.

Moreover, we may argue with the terminology used. We are of the view that it is an unfortunate solution to give the term 'essential substance' a meaning where the procedural provisions governing the exercise of the right to vote are covered by the substance of the right to vote as a fundamental right. This term is reserved under article I paragraph (3) of the Fundamental Law, and here it is used clearly with another meaning. Likewise, the terminology is not clear in the sentence 'the fundamental legal and human rights substance of the right to vote differs.' This is probably a reference made to the international and domestic levels of fundamental rights protection, with which we may agree in essence. Our view in this respect isdetailed at the discussion of Tamás Sulyok's concurring opinion.

Ad (D2) Based on the above, we agree with Miklós Lévay's dissenting opinion regarding the interpretation of the competence for establishing unconstitutionality by omission.

Ad (D3) As it is clear from the critical review of the majority decision, we essentially agree with the conclusions of István Stumpf's dissenting opinion, that is, what occurred was a restriction of a fundamental right and the necessity-proportionality test should have been applied. The application of the reasonability test is incorrect, disadvantages

incurred from substantive law may not be compensated for by procedural law, and the Court should have not established that there is no legislative omission.

It is a further positive aspect of the dissenting opinion that it points out the effect of the distinction on the democratic will-formation process. Namely, the right to vote has two aspects: it is not only a fundamental right, but an instrument for participating in power and this latter aspect is closely connected to the characteristics of the democratic exercise of powers.[44] Therefore, when assessing cases related to the right to vote it is not only the individual fundamental right that should be taken into consideration, but also the question how a provision restricting a fundamental right 'adds up', that is, what are its effects on the institution of elections in general. Although the dissenting opinion only alludes to it, it may be clearly confirmed from the data of the 2014 elections that, assuming that political distribution of voters casting ballot at a diplomatic mission is the same as domestic voters, there may be indeed differences in party preferences between the two groups, i.e. between voters with and without Hungarian residence.[45]

As far as the dissenting opinion is concerned, we are only sceptical of the demand for the application of the principle '*in dubio pro libertate*.' Namely this principle, as it is clear from the cited decisions, had been applied expressly in connection with the assessment of the restriction of a political freedom, the right to peaceful assembly. The dissenting opinion fails to detail how this principle may be applied to a right of political participation, where the state has no primary obligation to refrain, indeed, the exercise of this right may not be conceived without the state providing for the necessary conditions through the design and operation of the electoral system {Decision of Constitutional Court no. 1/2013. (I. 7.) Reasoning [57]}.

Ad (D4) Péter Szalay's dissenting opinion is in essence substantially the same as István Stumpf's dissenting opinion, with slight shifts of emphasis, therefore we agree with it as well.

24.5 Relevance of the Case

The case drew significant attention in the press. Those press organs, which went beyond a mere description of the decision typically expressed disappointment and essentially interpreted the decision in a way that 'citizens outside the borders', 'Transylvanian Hungarians' and people with 'dual citizenship' could vote via post, yet 'Hungarians in England' could not.

It follows from our detailed critical response to the majority reasoning on the merits that we do not consider the arguments put forward for substantiating the decision, or the ratio decidendi, for that matter, to be individually or as a whole sufficiently convincing

44 For the details see: Bodnár, Eszter: *A választójog alapjogi tartalma és korlátai* (Budapest: HVG-ORAC 2014).

45 While among citizens with Hungarian residence the governing party-alliance gained 44,55 percent, among the postal voters this proportion was 95,49 percent. Source: <www.valasztas.hu//hu/ogyv2014/861/861_0_index.html>.

from an academic point of view. The theoretical question marks regarding the persuasive force of the decision, without disputing its final (*ultima ratio*) and generally binding (*erga omnes*) nature,[46] lead to a negative outcome. From a social and public life point of view we find that the decision cannot satisfactorily fulfil its function in deciding a case of such constitutional gravity and related to the very foundation of the democratic operation of the state. Namely, until the current regulation regarding the scope of postal voting does not gain stronger scholarly justification, or, until the regulation is not corrected by expanding its scope, serious criticism may be voiced in respect of the electoral procedure, and concomitantly, the adequacy of the whole process of democratic will-formation. All this could then negatively influence the legitimacy of the parliaments to be elected later on.

Besides the main subject of the decision, the majority opinion (and the proceedings of the Constitutional Court) had raised questions regarding the right to vote and the methodology of the Constitutional Court. These should be reviewed by the Court, otherwise on the long run we may experience a step-back in the level of protection of the right to vote and other fundamental rights.

Procedural observations:

On the one hand, it may even render protection from provisions of discriminatory scope impossible, if a motion claiming discrimination is qualified by the Constitutional Court as a motion claiming unconstitutionality by omission, and the Court rejects it with reference to lack of connection, instead of examining the merits of discrimination.

On the other hand, despite the fact that unconstitutionality by omission is no longer regulated in the new ACC as an independent competence, neither the petitioner nor the Constitutional Court could fully adapt to the new role of this procedural instrument, and though in form the Court did not apply it unlawfully, in substance it treated it according to the former ACC. Firstly, the petitioner sought in her motion that the Constitutional Court contemplate the ex officio establishment of unconstitutionality by omission. Secondly, the Constitutional Court took this so seriously, that compared to the primary claim it gave this question much more attention and as a result of the examination, albeit not rejecting it in the operative part, in the reasoning it held that there was no omission. The procedure establishing the constitutional completeness of the legislation does not fit with the provisions of the new ACC, moreover, it may distract attention from the primary subject of constitutional assessment (from the contested provision of law). Therefore it should be avoided even if it may be connected to the motion of the petitioner.

Observations related to the right to vote:

The fact that Constitutional Court wholly qualifies determining of the conditions of the concrete method of exercising the right to vote and its details to form part of the margin of appreciation enjoyed by the legislator results in lowering the standards of protection forthe right to vote. Meanwhile, this does not follow from the provisions of the Fundamental Law

46 See: article 39, para. (1)-(2) of ACC.

on the right to vote nor from the constitutional standards of election. When the Court assess discrimination in the procedural rules of the right to vote and applies only the rational basis test instead of applying article I paragraph (3) of the Fundamental Law on the restriction of fundamental rights, standards of protection are further lowered.

On the other hand, there is an important lesson of this case with respect to the right to vote and to the constitutionality of the electoral system. Considering the current regulatory framework – for reasons, which may not be attributed to it –the Constitutional Court may get into a difficult situation. This may happen if between the arrival of a certain motion – contesting a certain provision of electoral procedure – and the prescribed time of elections only limited time is available. Therefore, in case of a well-founded motion it may happen that a decision establishing unconstitutionality may well endanger the lawful arrangement of elections in the case when annulment would require correcting the remaining procedural provisions and this cannot be done owing to the short time available preceding the elections. If, however, as a consequence the Court delays its decision, then the elections are held (in a latent way) under unconstitutional rules, which may lead to contesting the legitimacy of election results. In our view it is preferable to avoid both cases. In order to achieve this the Constitutional Court, examining the petitioner's personal concern related to the right to vote may continue to apply the test of foreseeable violation, and decide these cases with due consideration to their urgency with shorter deadline. As a result, the review of electoral procedural rules could potentially be carried out before the time of the elections. Meanwhile, the Constitutional Court should consider, whether a constitutional standard could be determined under which significant rules of the electoral procedure shall not be changed within a certain period of time (for example within one year) before the elections.[47] Such a rule would enforce the requirements of the rule of law and democracy related to electoral systems. This two-sided solution would ensure that elections be held under rules that had been examined by the Constitutional Court beforehand; while electoral bodies, candidates and voters, after legislative corrections demanded by the decision had been taken, would have sufficient time to prepare for the electoral procedure.[48]

47 This standard has been so far emphasized by the Constitutional Court and the Venice Commission primarily in connection with the substantive regulations of the electoral system. See: Opinion of Venice Commission no. 190/2002 points 63-66; Decision of Constitutional Court no. 22/2005. (VI. 17.). István Stumpf's concurring opinion with respect to the above concluded that the requirement of stability of legislation on electoral system may be derived from the Fundamental Law, and may be examined by the Court in case of a proper motion. See. Reasoning [65]-[69].

48 It would be theoretically sounder and would provide stronger guarantees in practice if the Fundamental Law itself determined time limit regarding the amendment of substantial provisions governing elections, and besides it would ensure expressly the possibility of initiating preliminary norm control. See also: Opinion of Venice Commission no. 190/2002 point 66; István Stumpf's concurring opinion Decision of Constitutional Court no. 26/2014. (VII. 23.) Reasoning [69].