

Decision 3/2022 (III. 18.) AB

on rejecting the petition aimed at establishing a conflict with the Fundamental Law and annulling the ruling No. Knk.IV.40645/2021/19 of the Curia

In the subject-matter of a constitutional complaint, the panel of the Constitutional Court has adopted the following

decision:

The Constitutional Court rejects the petition aimed at establishing a conflict with the Fundamental Law and annulling the ruling No. Knk.IV.40645/2021/19 of the Curia.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1 The petitioner (represented by Dr. Katinka Nehéz-Posony, attorney-at-law) filed a constitutional complaint pursuant to section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC). The petitioner requested the Constitutional Court to declare that the ruling No. Knk.IV.40645/2021/19 of the Curia violated the Fundamental Law and to annul it, because the judicial decision violated the right to a referendum guaranteed by Article XXIII (7) of the Fundamental Law.

[2] On 21 July 2021, the Government submitted initiatives for a national referendum to the National Election Committee (hereinafter: NEC). On 30 July 2021, the NEC validated the referendum on the question "Do you support the promotion of sex reassignment treatments for under-age children?" by its resolution No. 15/2021. On the basis of the Act CCXXXVIII of 2013 on Initiating a Referendum, the European Citizens' Initiative and the Referendum Procedure (hereinafter: "Referendum Act"), the Curia issued on 8 November 2021 the ruling – challenged by the petition – on the application for review filed with the Curia against the NEC's decision. On 29 November 2021, the Chairman of the Committee on Justice of the National Assembly submitted a proposal for exceptional procedure, on the basis of which the National Assembly, by the Resolution of the Parliament No. 32/2021 (XI.30.) ordered the issue to be put to a referendum on 30 November 2021. The President of the Republic, by the Resolution No. 8/2022 (I.11), set the date for the national referendum, which included the question that is the subject of the contested resolution.

[3] 2 In his constitutional complaint, the petitioner complains about the judicial restriction of the right to a referendum, because in his view the decision of the Curia

violates the enforcement of the same validation conditions of the Fundamental Law applicable for all parties initiating a referendum. According to the petition, the infringement of the Fundamental Law by the court decision is primarily manifested in the principle of the decision of the Curia, according to which: "The public law consequences based on the Fundamental Law of the initiative of a referendum by voters and a referendum initiated by the President of the Republic and the Government are different, and therefore the assessment of their conditions is also different." (Curia ruling [70]) According to the petitioner, the judicial decision makes an arbitrary distinction between referendum initiatives made by voters and initiatives by those who hold public power, thereby violating the petitioner's fundamental right to a referendum and also contradicting Article B (4) of the Fundamental Law and the case-law of the Constitutional Court.

[4] According to the ruling of the Curia, "while the conditions laid down in Article 8 (2) and (3) of the Fundamental Law must be examined in the course of the validation of the question proposed for referendum in the case of every initiative, the scope of the examination is not necessarily the same. In the case of a voter initiative, it must examine with exhaustive thoroughness the conditions laid down by the Fundamental Law and the statutory conditions, including the possibility of forced legislation leading to an impossible result, in order to ensure that the Parliament is not forced to legislate contrary to the Fundamental Law in the case of a successful referendum." (Curia ruling [32]) According to the Curia, in this case, "the NEC deciding on the validation of the question to be put to referendum and the Curia reviewing the decision must also carry out the legal balancing as the Fundamental Law prevents the National Assembly from carrying it out in this case" (Curia ruling [32]). According to the Curia, unlike in the above case, "the situation is different in the case of a referendum initiated by the President of the Republic and the Government. In such a case, there is no need for the NEC and the Curia to carry out the deliberations instead of the National Assembly, since the National Assembly itself may do so under Article 8 (1) of the Fundamental Law. Thus, in the case of a referendum initiated by the President of the Republic and the Government, it is sufficient, in the course of the validation and its review, to block initiatives which are manifestly and directly contrary to the Fundamental Law, including the manifest and total withdrawal of the essential content of the fundamental rights guaranteed by the Fundamental Law, but there is no need for the NEC or the Curia to consider the legislative consequences of the outcome of the referendum." (Curia ruling [33])

[5] According to the petitioner, the question of fundamental constitutional significance is whether the principle of the Curia's decision "exempts" the public authority-holding initiators specified by the Fundamental Law from the obligation to examine the statutory and constitutional requirements set as conditions for validation. The petition

referred to the previous decisions of the Constitutional Court on referendums. In its Decision 31/2013 (X.28.) AB, the Constitutional Court defined the right to initiate a referendum as a subjective right (Reasoning [29]). The Constitutional Court also stated that "Article XXIII (7) of the Fundamental Law grants voters the right to initiate, support (including the right to sign and collect signatures) and participate in a national referendum as a subjective right" {Decision 31/2013. (X.28.) AB, Reasoning [30]}.

[6] According to the petitioner, two relevant requirements derive from the right to initiate a referendum in the present case. First, that the right to initiate a referendum includes the requirement that the validation procedure fulfils its constitutional function. In the petitioner's view, 'a lawful and constitutional validation procedure is the fulfilment of the State's objective duty to protect institutions. The validation procedure is an element of constitutional significance of initiating a referendum, in which the constitutionality of the referendum initiative is also subject to scrutiny. If the validation procedure – and its review – does not fulfil its constitutional function, the right to a constitutional referendum and the right of citizens to participate in it will be nullified." (Petition, page 6) If the procedure of the Curia does not ensure this, it violates the right to initiate a referendum, because a referendum can be ordered the result of which cannot be constitutionally implemented.

[7] On the other hand, "the right of voters to initiate a referendum must be protected in comparison with other forms of direct democracy, and the protection must ensure that the voter has a real say in the making of public decisions, regardless of the identity of the initiator." (Petition, page 6). The institutions of direct democracy are not on an equal footing, an aspect which must be taken into account by the bodies involved in the validation procedure and its review, because if the ranking of the initiatives made by those who exercise public authority and the voters' initiatives is altered by these decisions, "this would entail the elimination of the right of the voters to initiate a referendum". The petition referred to the fact that "the right to a referendum allows the participant to take part in, determine or actively contribute to the most important decisions taken by the State at central and local level {Decision 52/1997. (X.14.) AB, Reasoning IV.} The right to a referendum is infringed by any interpretation of the law which, in the case of any type of referendum, leads to a situation where this requirement cannot be realised." (Petition, page 7)

[8] The petitioner – referring to the case-law of the Constitutional Court developed prior to the Fundamental Law and confirmed under the force of the Fundamental Law – cites the statement that the direct exercise of power is fully realised by a compulsory referendum as "the compulsory referendum, which is the only pure form of the direct exercise of power, precedes the referendum mixed with the exercise of representative power, which is dependent on the acts of the Parliament. It is unconstitutional if the Parliament changes this order of precedence, and decides to yield precedence to an

optional referendum against a compulsory one.” {Decision 52/1997 (X.14.) AB, paragraph IV (d)} Article 8 (1) of the Fundamental Law makes a distinction concerning the initiator of the referendum only according to whether the Parliament is obliged to order the referendum or not. The Fundamental Law and the legislation governing the referendum procedure do not distinguish between the conditions to be met by the question submitted to the referendum, therefore, according to the petitioner, neither the NEC nor the Curia may make a distinction based on the person of the initiator in the validation procedure. According to the petitioner, this arbitrary distinction is capable of reversing the constitutional hierarchy between compulsory and optional referendums, because it has exempted referendum initiatives that are dependent on a decision of the National Assembly from the requirements for validation.

[9] In relation to the contested ruling of the Curia, this means that the Curia did not, even in its own view, carry out an exhaustive examination of whether the Government's initiative met the relevant requirements under the Fundamental Law and the statutory requirements. In the event of a valid and successful referendum, the Parliament may thus be forced to legislate contrary to the Fundamental Law, which, according to the petitioner, is conceptually unintelligible. The content of the contested ruling is in principle capable of subsequently empowering the law-maker with a different degree of discretion in the case of an optional referendum.

[10] According to the petitioner, the Curia misinterprets the discretionary power granted to the National Assembly in connection with ordering an optional referendum under the Fundamental Law by performing the validation function; the Curia “cannot delegate its statutory power (the power of review in connection with the validation) to the National Assembly, this way extending its existing discretionary power. The power of validation and the discretionary power differ in substance. While the validation procedure examines the fulfilment of statutory conditions (a technical legal procedure), the discretionary procedure is a political power with a flexible framework for Parliament. When the National Assembly decides to order a referendum, it does not act as a kind of »second level of validation«, but makes a political decision, and the Curia has no power to impose on itself a competence contrary to the Fundamental Law.” (Petition, page 11) In the context of the validation of the questions, the petitioner argues that the conformity with the Fundamental Law and the Referendum Act of the law to be created on the basis of a valid and successful referendum decision on the question asked must be assessed. The relevance of the person who initiated the referendum lies in the fact that the National Assembly is either obliged to order the referendum or may consider it. In the petitioner's view, the interpretation of the law by the Curia constitutes a restriction of the right to initiate a referendum to an extent which does not satisfy the requirements of the necessity-proportionality test laid down in Article 1 (3) of the Fundamental Law. According to the petition, there is no necessity

for the restriction either, because there is no other fundamental right or constitutional value which could constitutionally justify the restriction. Even if there were, it would be disproportionate, because the right of initiative in a referendum would be nullified, i.e. completely withdrawn, and the proportionality of the restriction could not be justified.

[11] The petition refers to the fact that, based on the essence of the decision of the Curia, “the reason why the referendum initiated by the Government should not be subjected to such a strict constitutionality test is that the Parliament will enact the law to be passed within the constitutional framework and with a content in accordance with the international treaties in force, i.e. it will consider its content during the legislative process. However, in essence, the Curia has said that the National Assembly is not in fact bound by the result of the referendum and it does not matter what legislative obligation arises from the question.”

(Petition, page 13) This interpretation leads to the result that, according to the interpretation of the law by the Curia, the National Assembly can disconnect itself from the result of the referendum in the course of the actual legislative process, which violates the right of voters to a referendum under Article XXIII (7) of the Fundamental Law.

[12] 3 The Ministry of Justice submitted an amicus curiae brief in the case.

II

[13] The affected provisions of the Fundamental Law:

“Article XXIII (7) Everyone having the right to vote in elections of Members of the National Assembly shall have the right to participate in national referendums. Everyone having the right to vote in elections of local government representatives and mayors shall have the right to participate in local referendums.”

III

[14] According section 56 (1) of the ACC, the Constitutional Court shall first decide on the admissibility of the constitutional complaint, during which the acting panel shall examine whether the petition meets the – formal and substantive – statutory requirements for the admissibility of the constitutional complaint.

[15] The petitioner filed the constitutional complaint within the sixty-day time limit set out in section 30 (1) of the ACC. The contested decision is a ruling of the Curia adopted on the merits of the case, which cannot be challenged by ordinary legal remedy and was made in non-contentious proceedings. The applicant has the right to lodge a constitutional complaint as a petitioner, is affected as a party to the proceedings closed by the contested judicial decision, and claims that his rights guaranteed by the Fundamental Law have been infringed.

[16] The application meets the requirement of explicitness laid down in section 52 (1b) of the ACC, as it contains the statutory provision establishing the competence of the Constitutional Court to rule on the petition and the provision establishing the petitioner's entitlement to file the petition (section 27 of the ACC); the grounds for initiating the proceedings (the court's procedure and decision caused a violation of a fundamental right); the essence of the violation of the right guaranteed by the Fundamental Law; the court decision to be examined by the Constitutional Court; the provision of the Fundamental Law that is alleged to have been violated. The petition contains detailed reasons as to why, in the petitioner's view, the contested court decision is contrary to the provisions of the Fundamental Law.

[17] Section 29 of the ACC stipulates as a substantive condition for admissibility that a constitutional complaint that meets the other statutory conditions should raise a question of fundamental constitutional significance or refer to an infringement of the Fundamental Law that materially affects the judicial decision. It is for the Constitutional Court to assess whether these conditions are met. The two conditions are alternative, the existence of either of them justifies the admissibility of the complaint {Decision 3/2013. (II.14.) AB, Reasoning [30]; and Decision 34/2013. (XI.22.) AB, Reasoning [18]}.

[18] In the opinion of the Constitutional Court, the petitioner's arguments raise a question of fundamental constitutional importance, because the Constitutional Court has not previously examined whether the relationship between the validation of the referendum and the person who initiated the referendum has an impact on the right to a referendum.

[19] On the basis of the above, the Constitutional Court examined the merits of the constitutional complaint, applying section 31 (6) of the Rules of Procedure, without conducting the admission procedure.

IV

[20] The constitutional complaint is unfounded according to the following.

[21] 1 First of all, the Constitutional Court states that the decision of the Curia on the validation of a referendum question is reviewed only exceptionally, in the case of a violation of fundamental rights, and only from a constitutional point of view. In the present case, that exception is based on the alleged breach of fundamental rights. Pursuant to Article 24 (1) of the Fundamental Law, the Constitutional Court is the supreme body for the protection of the Fundamental Law, which also applies to the present constitutional complaint proceedings {cp. Decision 28/2015. (IX.25.) AB, Reasoning [28]; Decision 33/2021. (XII.22.) AB, Reasoning [22]}.

In his constitutional complaint, the petitioner claimed that, according to the principle set out in the contested ruling of the Curia, as the public law consequences based on the Fundamental Law of a referendum initiative put forward by the voters and a referendum initiated by the President of the Republic and the Government are different, therefore the examination of their conditions is also different. In the test of legislative clarity, there is no need for the legislative consequences of the outcome of the referendum to be considered by the validating bodies. This infringes the right to a referendum, because validation does not fulfil its constitutional function, and the order of precedence of the forms of direct exercise of power between the referendums to be initiated by the voters and the Government or the President of the Republic is upset.

[23] 2 With regard to the arguments put forward in connection with the validation of the referendum question, the Constitutional Court establishes the following. According to Article B (3) and (4) of the Constitution, the source of public authority is the people, who exercise it through their elected representatives, or – exceptionally – directly. Consequently, as a general rule, popular sovereignty is manifested through the National Assembly, but the exercise of democratic power also implies that the voters may participate directly, by means of a referendum, in the deciding on the most important matters affecting the future of the country {cp. Decision 33/2021. (XII. 22.) AB, Reasoning [23]}.

[24] Article 8 of the Fundamental Law distinguishes between two types of direct exercise of power: on the one hand, a referendum which is compulsory on the initiative of two hundred thousand voters and ordered by the Parliament, and on the other hand, a (so-called optional) referendum which is not compulsory on the initiative of the President of the Republic, the Government or one hundred thousand voters. In the latter case, the direct exercise of power is conditional, because holding the referendum cannot be enforced: it is at the discretion of Parliament whether or not to order a referendum. According to the Constitutional Court's Decision 33/2021 (XII.22.) AB, "the primary purpose of a referendum is to determine the obligation of the Parliament to legislate or to abstain from legislation with a specific content, but in the case of an optional referendum, it is at the discretion of the Parliament whether to order the referendum, which cannot be enforced in any form. If the National Assembly orders a

referendum, the decision taken in a valid and successful referendum is binding on the National Assembly, and its power is therefore also limited by this form of direct exercise of power.” (Reasoning [24])

[25] 2.1 The institution of the national referendum fulfils its function in accordance with the Fundamental Law if it serves the purpose of deciding in the matter of a question that is suitable to achieve the purpose of the referendum: the direct exercise of power by the voters on the subject-matter of the referendum. In other words, it is a referendum question that does not imply a clear legislative obligation or an abstention from legislation with a specific content; or a national referendum question that is contrary to the prohibition laid down in Article 8 (3) of the Fundamental Law, that is inherently contrary to the Fundamental Law and is constitutionally incompatible with the legal institution of the referendum, or that is aimed at an improper application of the referendum. Only a referendum procedure that can ensure these requirements in order to enable voters to exercise their power directly is in conformity with the Fundamental Law.

[26] In the present case, the procedure for the validation of the referendum question at issue fulfils that function. It follows from the foregoing that the validation of referendum questions is a constitutional guarantee which, irrespective of the initiator and the type of national referendum procedure, must be capable of allowing only referendum questions that enable voters to exercise their right to a referendum. The Constitutional Court notes that the validation of a referendum question is not influenced by the identity of the initiator, and therefore it cannot be inferred that the requirements for the validation of national referendum questions are different. The purpose of the referendum is to explore the views of the voters on specific referendum questions. Only a legal institution and an interpretation of the law that ensure that a national referendum may be ordered only on a question which is suitable for achieving the objective of the referendum are in line compliance with Article XXIII (7) of the Fundamental Law. Whether or not a referendum question is such a question must necessarily be determined by the legal mechanism prior to ordering the holding of the referendum, otherwise the right of voters to a referendum, as guaranteed by the Fundamental Law, may be infringed. This phase is independent of whether or not a referendum is ordered and, if not, for what reason it is not called. It is for the Parliament to order the holding of the referendum, and the Fundamental Law makes a distinction between whether the Parliament has discretion to order a referendum. However, this discretion is not a decision to be made in the scope of the validation, and cannot be considered a legal discretion that results in the legal compliance of the question put to a referendum. The decision to call an optional referendum is a choice to be made by the Parliament between direct and indirect means of exercising power on the issue in question.

[27] 2.2 From another perspective, the validation of a referendum question is a legal issue, in which the NEC, the Curia and, in the case of a fundamental rights violation, the Constitutional Court have competence. If the test of legislative clarity is left out of the legal chain (from a procedural forum), the right of voters to a referendum, guaranteed by the Fundamental Law, may be violated. There is no body having the competence to validate a referendum question in legal and, ultimately, in constitutional terms. If, as the Curia held, the National Assembly were to carry out the examination of legislative clarity, this would also essentially rule out the Constitutional Court's procedure. In fact, the procedure under section 33 of the ACC is available against the decision of the National Assembly ordering a referendum, but the validation of the referendum question is not the subject-matter of the procedure. In the procedure under section 33 of the ACC, the Constitutional Court may only conduct a constitutional review of the merits of the referendum question in a restricted time and content: "(a) it is possible only in the event of changes occurred in the period between the validation of the signature-collection sheet and the ordering of the referendum, and (b) only if there has been a material change in circumstances which could not be taken into account by the National Election Committee or the Curia in the decision on the validation of the question or the request for review against it, and (c) an additional material condition is that this change in circumstances is one that could have had a material effect on the decision." {Decision 12/2016. (VI.22.) AB, Reasoning [30]; Decision 1/2022. (I.7.) AB, Reasoning [25]} Thus, the application of the principle put forward by the Curia may lead to an omission contrary to the Fundamental Law in terms of the legal and constitutional guarantees of examining legislative clarity – which is a legal condition for the validation of the referendum question; this conclusion may be reached not only in the absence of legislative clarity, but also in the absence of other legal conditions examined in the context of the validation of the referendum.

[28] The Constitutional Court observes, in relation to optional referendums, that in the case of a national referendum initiated by the voters, it is not possible to determine, at the time of the validation, whether a referendum will be optional or compulsory. The information whether the initiator of the referendum succeeds in obtaining the consent of at least 200,000 voters with the validated question (compulsory referendum), or whether the support does not reach this level but exceeds 100,000 votes (optional referendum), or whether the referendum question does not reach the level that the National Assembly would even consider calling a referendum, is not available during the validation process. The extent to which voter consent has been obtained to support the referendum question is determined after the referendum question has been validated. Therefore, a possible different validation standard for an optional referendum, due to the fact that the National Assembly may still consider ordering a referendum, may constitute a violation of the right to a referendum if the support for

the validated referendum question is such that the National Assembly is obliged to order holding the referendum.

[29] 3 With regard to the upsetting of the order of precedence between the various forms of the direct exercise of power, the Constitutional Court refers to the fact that Article 8 (1) of the Fundamental Law defines the conditions under which the various means of the direct exercise of power may be applied. The validation of referendum questions is, as stated above, a guarantee element which is independent of the person who initiated the referendum and which imposes the same requirement on all questions submitted to a referendum. Contrary to the arguments put forward by the petitioner, the Constitutional Court states that the validation of referendum questions is a general legal institution independent of the forms of national referendums, thus the statement of principle in the decision of the Curia does not change the order of precedence established by the Fundamental Law. The order of precedence between the different forms of referendum is a different matter, which is laid down in Article 8 (1) of the Fundamental Law itself. The Constitutional Court finds that, on the basis of the arguments set out in the petition, there is no substantive connection between the principle set out in the contested decision of the Curia and the order of precedence alleged in the petition.

[30] 4 According to the petitioner's position, the contested decision of the Curia is contrary to the Fundamental Law because, based on the principle established in the ruling, during the validation, the Curia "did not, even in its own view, carry out an exhaustive examination" of the requirements under the Fundamental Law and the Referendum Act. The Constitutional Court refers to the fact that the decision of the Curia on the validation of the referendum question, as a judicial decision, may be challenged by a constitutional complaint under Article 24 (2) (d) of the Fundamental Law and section 27 of the ACC, but "the constitutional complaint must refer to the violation of a right guaranteed by the Fundamental Law (e.g. the right to a fair trial, the right to participate in the referendum)." {Ruling 3195/2014. AB, Reasoning [21]; Decision 28/2015. (IX.24.) AB, Reasoning [18]}.

[31] The Constitutional Court establishes that the petitioner only claimed that the Curia had applied the relevant principle in the case concerned, but failed to prove that it had caused a concrete injury of rights in connection with the validation of the referendum question. The petition contains arguments about the differences in certain elements of the validation, but the petition fails to specifically indicate which element of the legal analysis was missing in relation to the validation of the referendum question, or which part of the analysis deviated from the requirements previously developed by the Constitutional Court and further detailed by the Curia. However, the decision of the Curia in relation to the validation is not found to be contrary to the Fundamental Law: the Curia examined that it does not conflict with the scope prohibited by the

Fundamental Law (Article 8(3) of the Fundamental Law, Curia ruling [57] to [67]), whether the referendum question falls within the duties and powers of the National Assembly (Curia ruling [34] to [36]), the clarity of the referendum question: the clarity concerning the voters (Curia ruling [38] to [40]), the subject of the question in the context of the requirement of the question to be legally interpretable and precise in its definition (Curia ruling [41] to [44], [49] to [53]) and concerning the types of activities used in the question (Curia ruling [44] to [48]), and also the clarity of the legislation, with reference to the relevant case-law of the Constitutional Court and the Curia (Curia ruling [54] to [56]). The Constitutional Court concludes that, on these grounds, the alleged violation of the Fundamental Law by the ruling of the Curia is unfounded.

[32] On the basis of the above, the Constitutional Court – acting in a panel pursuant to section 50(1) of the ACC – dismissed the constitutional complaint as set out in the holdings of the decision.

[33] 5 In accordance with the second sentence of section 44 (1) of the ACC, the Constitutional Court orders the publication of this decision in the Hungarian Official Gazette.

Budapest, 22 February 2022.

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Ágnes Czine* unable
to sign

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Attila Horváth*
unable to sign

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of Justice *dr. Imre Juhász* unable
to sign

Dr. Miklós Juhász head of the panel,
Justice of the Constitutional Court on
behalf of rapporteur Justice *dr. Tamás
Sulyok* unable to sign