Judit Tóth

Is it possible to regulate citizenship by referendum?

The resolution of the Constitutional Court dated March 1, 2004[1] opened up the way to collecting signatures and then to a definitive referendum to be held at a later date regarding the preferential acquiring of Hungarian citizenship. It was followed by the actual collection of signatures and finally Parliament decided upon the referendum itself. And the President of the Republic - since the earlier resolution of the Constitutional Court on the merits was maintained - set the date of the referendum for December 5, 2004. The survey below was prepared not on the basis of the result of the referendum[2] and far earlier in time too, but definitely independently of it. For it is edifying to investigate the argumentation making the referendum possible, on the other hand, in the second half of the present chapter, to see what Parliament can do with the heap of problems placed before it.

On the decision of the Constitutional Court

Two main questions are waiting to be answered in respect to the judgement: on the basis of what constitutional arguments was the resolution born, can a logical system and building on earlier resolutions be discovered in the judgement, to what extent is Parliament ready to make a legal regulation regarding a preferential granting of citizenship to Hungarians living outside the borders of the country.

Prior to giving an answer to the first question, it is necessary to indicate that a parallel opinion[3] (judge Mihály Bihari) and a separate opinion (that of judge István Kukorelli and, in agreement with it, of judge András Holló) are connected to the resolution as well. Thus there was no consent either in the field of argumentation or in respect to the final conclusion among all the members of the Court, while the presenting judge dealt with a problem of such nature perhaps for the first time.

1 Resolution of the Constitutional Court 770/H/2003 (March 1, 2004)

2 The majority of participating voters rejected the preferential granting of the Hungarian citizenship but result was not obligatory for the parliament due to the level below threshold of participation. Rate of supporters among voters was significant.

3 Although the Act XXXII of 1989 on Constitutional Court contains no references on opinion of each judge, the parallel and separate opinion have been published together with the mainstream decision. The first means a different explanation, reason, comment of the judgement in concern. The separate opinion represents the refused version of the judgement.

On the sheet of collecting signatures of the World Federation of Hungarians[4], approved by the National Election Commission,[5] there is a question which divides Hungarian society too, namely: "Do you want Parliament to prepare an act on the granting of Hungarian citizenship, by preferential naturalisation, - at their request - to those persons who declare themselves to be of ethnic Hungarian, who do not live in Hungary, who are not Hungarian citizens, who verify their Hungarian ethnic origin with "Hungarian certificates" in accordance with Art.19 of Act LXII of 2001 or in other ways defined in the act to be created?" This question was approved as constitutional by the resolution of the Constitutional Court after thinking about it for approximately five months, rejecting the objections to the decision of the National Election Commission.

The question related to the referendum has three components:

● To force Parliament to engage in legislation. On the one hand, it would provide for the granting of Hungarian citizenship which, for the time being, may only be the amendment of Act LV of 1993 on the Hungarian Citizenship, with a two-third majority of the votes in accordance with Art. 69 of the Constitution. On the other hand, it involves the creation of an act which verifies eligibility to the preferential treatment (its ways, documentary or other forms, perhaps requesting witnesses, filling out language tests, etc.). So this is what constitutes the freedom of the legislator: if he so desires, he only refers to an existing item in the amendment of the Act on citizenship, accepting the Hungarian Certificate introduced in Act LXII of 2001 on Benefits for Ethnic Hungarians living in Neighbouring States. In this way, the objective scope of this Act on preferences is widened, in retrospect, because it will be possible to use the Certificate[6] in another legal relationship too. The other option of the legislator is to enable Parliament to separately regulate the way of verification in a new act, which does not seem to be a realistic alternative because it is not possible to provide for (the process of) naturalisation in two acts even with the purpose of avoiding the compulsion of consent. The most logical solution is to simultaneously amend the Act on preferences and the Act on citizenship, mutually referring to each other.

[4] In order to maintain a formal dialogue with Hungarian Diaspora all over the world it was established during the state-party period and this sleeping NGO has become a radical but marginal political actor since 1990. Due to certain cleavages in the right side parties the WFH has been transformed a meeting point of rightist second-hand political actors.

[5] Resolution of the National Election Commission (116 of 2003, 18 September) published in the Hungarian Official Gazette September 23, 2003.

[6] Up to the end of 2004 the number of issued Certificates was 800 000 from the ethnic communities of about 3-4 millions. See in László Szarka: A magyar kedvezménytörvény identitáspolitikai céljai (The Policy of Ethnic Identity by the Act on Benefits) In: Ami összeköt? Státustörvények közel s távol. (Is There a Legal Bondage in Near and Far?) Edited by Halász – Mjlényi – Szarka, Gondolat 2004., 123-133.

● The widening of the scope of cases of obtaining citizenship by way of naturalisation means an amendment in merit of the Act on Hungarian citizenship. Accordingly, the legal basis of obtaining citizenship will be naturalisation, supplemented by a new case, but the legislator may not choose from the existing legal basis (obtaining citizenship by descent, fact of family law, presumption, declaration, re-naturalisation), moreover, he may not create a new legal basis for the Hungarians living outside the borders of the country, either.

● Granting the conditions of new eligibility for preferential naturalisation, from which legislation may not deviate. In this way, at his request, it is necessary to ensure the legislative opportunity of obtaining citizenship for the foreigner, declaring himself to be of ethnic Hungarian and living abroad, if he verifies his ethnic origin. The question does not go as far as to make it expressly compulsory to grant citizenship in such cases, although the imperative statement in the Hungarian wording of the question ("should be granted citizenship") hides this interpretation too, especially if those giving their signatures are not familiar with the regulation of citizenship.

Those raising objections requested the decision of the National Election Commission to be made null and void and the instruction of the body to initiate a new procedure for the following reasons:

● In the wake of a successful and valid referendum, an Act must be created which is to clash with international obligations undertaken.

● The act to be created would violate the prohibition of discrimination included in Art. 70/A of the Constitution because it differentiates in respect to fundamental rights amongst the applicants for citizenship without any reasonable justification and thereby violates the right to human dignity as well.

● The issue does not belong to the competence of Parliament.

● The wording of the question is not unequivocal and it requires an expert knowledge of the law which cannot be expected from the voting citizens.

What did the resolution of the Constitutional Court refer to when rejecting the complaint, i.e. what were its arguments relating the constitutionality of the question and were all the relevant elements of the subjects concerned in the resolution taken into account? In the following we shall investigate the above questions.

a) On our international obligations

Under the Art.7 of the Constitution, Hungary is obligated to apply the generally recognised rules of international law. They include the case law, within the framework of which no rules have been created, according to which a state may not define in a sovereign manner whom it considers as own citizen. At the same

time, this sovereignty is not unlimited because the precondition of the recognition of citizenship in international relations is the requirement of a genuine, close relationship between the citizen and his state. The principle of effective contact was worded by the judgement of the International Court of Justice (United Nations Organisation) based on international case law.[7] Although the regulation of citizenship and its application are issues falling within the jurisdiction of the state, a state may not refer to the necessity of its rules laid down in this way to be recognised by another state, unless the aforementioned close, real relationship and legal bondage fail to exist, which includes the protection of a citizen by its own state against another state. By the way, the principle of effective contact in itself does not exclude multiple citizenship, but the establishment and maintenance of a close and real relationship, on account of the economic, family, social and cultural attachments of the individual, hardly make it possible to frequently and unequivocally identify the simultaneous existence of equally intensive relationships with several societies, states. According to the argumentation of the Constitutional Court, the issuance of the "Hungarian Certificate" - which, by the way, is just one possible way of verification of the closeness of the relationship, because the legislator may choose other ways as well - is bound to conditions. "Such conditions are the knowledge of the language and inclusion in registration as a person of Hungarian nationality or participation in communities in which the feelings of Hungarian ethnicity are manifested. Those characteristics express a closer attachment to Hungary." Thus we meet the requirement of effective link, the actual relationship between the state and its citizen, elaborated on in the mentioned ICJ case. If that were so, the ethnic principle would be a legal fact laying down the basis for the bondage of citizenship in respect to all countries and the ICJ would not have taken so much trouble to outline what is a genuine relationship, why it must be examined on an individual basis, why it may not be verified with one single document. For living, staying on the territory of the country, paying taxes, working and living with the family, as well as social adjustment together determine the intensity, closeness of the relationship. Is it a formal matter, who speaks a language at what level, whether someone is member of a non-governmental organisation as a sympathiser or as an integral part of his personality, or what data are included in the records of an NGO regarding his ethnicity which he declared for a completely different purpose? In actual fact, with all that the Constitutional Court wished to answer the question whether resettlement, living on the territory of the country, applied as the main rule in the majority of the states, can be disregarded as factors necessary for establishing a bondage of citizenship or not. According to the

[7] Liechtenstein v Guatemala, 1955 WL 1 (ICJ)

answer of the body, yes, although the objective definition of the ethnic principle is hardly possible, thus it wishes to substitute the real character of the relationship with formal criteria, as the explanation of a single paragraph. This argumentation is rather dangerous because it might capsize the traditional order, principles of the regulation of citizenship applied so far, moreover, it jeopardises the respect of the citizenship obtained in this way by other states in international relations.

The European Convention on Nationality[8] is an international obligation undertaken by Hungary. The resolution makes no reference to the Convention being the basis for the separation of neutral citizenship from the ethnic principle. In the application of the Convention, citizenship is "a legal bondage between a person and a state, and it does not refer to the ethnic origin of the person" (Article 2/a). It is formally followed by the Act on Hungarian Citizenship[9], because it speaks about the persons of ethnic Hungarian only among the preferences, although all statistics of home affairs prove that preferential naturalisation has become the main rule since almost the full circle of the cases refer to Hungarians living outside the borders of the country, and the basic, non-preferential case of naturalisation occurs as an exception[10].The resolution of the Constitutional Court fails to deal with the distribution, quantitative proportions of the cases of citizenship, whether the main rule and the exception may be maintained logically, it exclusively reacts to the complainant's objections concerning Article 5., built upon ethnic preference and prohibiting discrimination. However, that formalism undermines the obligation of the bona fide manifestation, observance of the international obligations undertaken. For domestic regulation was not reviewed from this point of view either at the time of the ratification of the Convention or when the act on preferences was endorsed, and now the Constitutional Court failed to point out this contradiction as well.

The Peace Treaty of June 4, 1920[11] terminated the citizenship of the one-time Hungarian citizens by their inclusion in the jurisdiction of the succession state

[8] Published by Act III of 2002, to which Hungary added a declaration on procedural issues (Articles 11-12, Articles 22-23, which is a reservation in merit), the provisions discussed in the resolution are to be applied in their fullness.

[9] Judit Tóth: A diaszpóra a jogszabályok tükrében /The Diaspora in the Mirror of Legal Regulations/, Regio, 3-4, 46-92 (1999)

[10] According to the data of the National Statistical Office, moreover the Immigration and Citizenship Office of the Ministry for the Interior, for example, in 2003 89,8 % of the applicants for naturalisation came from three neighbouring countries (Romania, the Ukraine, Serbia-Montenegro), while equally high was the percentage of the citizens of those three countries among the persons possessing permits of immigration and permits to settle down, representing the conditions of naturalisation. on December 31, 2003, 80.9 % of the applicants had immigration permits and 84.9 % of them possessed permits to settle down in Hungary. (Oltalomkeresők, 2004/2-3)

[11] Published in Act XXXIII of 1921

unless they exercised their right to opt out. The person submitting the complaint makes a faulty reference to a collective reinstatement of the Hungarian citizenship of the persons concerned or their descendants since it is included in the question of the referendum that Hungarian citizenship would be granted to them at their request. The Peace Treaty is remarkable from the point of view of essentially excluding multiple citizenship and connecting Hungarian citizenship following the ethnic principle (too) to the right to option as well as moving into the kin-state. On the other hand, even in the case of a declaration of option it does not automatically ensure "the final recognition of the maintenance or the obtaining" of Hungarian citizenship for the fact of opting "only results in the maintenance or the obtaining of Hungarian citizenship if the Hungarian Royal Ministry of the Interior establishes that the conditions of the option exist".[12]

The resolution does not discuss the question whether it is possible to deviate from the Act on citizenship in bilateral international agreements. For if multiple citizenship becomes a mass phenomenon, it urgently raises the necessity of creating specific rules in all cases in which multiple citizenship has un undesirable, unintended influence, and especially if the obtaining of another citizenship of the person in question concerns different prohibitions (e.g. he loses his citizenship in accordance with his place of residence if he obtains a new citizenship by application). Since multiple citizenship would not be associated with moving here, it is necessary to establish specific provisions relating to the enforcement of provisions which govern personal status in international private law (e.g. the law of the state of place of residence, registration will be the personal law and not merely the law of the state of citizenship), perhaps to make an agreement on the specific order of double taxation, military service (which may also not adjust automatically to the reporting of the place of residence). Since universal national or multilateral international rules have not been created in respect to multiple citizenship, and the agreement of the European Council quoted above does not make it compulsory to preserve the original citizenship in case of the obtaining of a new citizenship by application either[13], moreover, the states of persons of ethnic Hungarian are not necessarily parties to it, the amendment of the Act on citizenship raised in the question may not be applied in itself, at least not without the violation of the rule of law.

[12] The execution of Articles 61-66 under the title VII of the Peace Treaty were served by 6.500. of 1921 Decree of the Hungarian Royal Ministry, 12 §

[13] The Convention contains a minimal rule relating to multiple citizenship which, however, is obligatory for the participating states. Accordingly, it is obligatory to preserve the (multiple) citizenship of the person who obtains ex lege citizenship by birth (because he acquired citizenship from parents of different citizenships under the principle of descent) or by marriage (Article 14), moreover it is obligatory to preserve the original citizenship of the person who wishes to obtain his second citizenship by naturalisation in case waving or terminating the original one is not possible or it would be unreasonable (Article 16). In other cases, the own regulations of the participating states are not bound.

It is related to the above: there are no universal regulations as to how the political rights of multiple citizens can be exercised. It is an internal affair of sovereignty and attachment to the political community about which it can only be said in general terms that exercising political rights is bound to the state of the customary place of residence in accordance with the internal law of most of the countries. On the other hand, it is indifferent to the given state whether its citizen exercises his political rights in yet another state as well (suffrage of persons living abroad). The national regulation of the customary place of residence defines the applicable law not only in the field of the civil status but, indirectly, the enforceability of other rights of internal law constituting a part of the legal standing of citizenship as well. (For instance, national law makes the extradition of double citizens possible, if they have their permanent place of residence abroad, on the basis of Act XXXVIII of 1996.) Multiple citizenship may, at the same time, furnish a basis for the expulsion of a person to the country of which he is citizen, although otherwise he has no contact with that country at all, except if a state is party to the Convention on Human Rights of the Council of Europe (right to family life and privacy, Art.8) and Protocol 4 which prohibits states from expelling their own citizens from their territory (Article 3), although, as a result of expulsion, they could live in another country by way of their multiple citizenship[4]. Diplomatic, consular protection may not be provided to the multiple citizen against the authorities of the country of which he is citizen, unless it is permitted by a specific rule of international law, customary law. Consequently, the survey of the related legal material would also be unavoidable, although there is not a single reference to that in the resolution.

The resolution also failed to deal with the issue of EC law hampering the free flow of legislation dictated by the people. For preferential naturalisation will surely be applicable to the EU citizens as well, and by obtaining Hungarian citizenship, the rules of the citizenship of the EU are to be applied to the new citizens too. The former raises the question whether an EU citizen will need Hungarian citizenship but the consideration of that would only be possible in individual cases as is envisaged by the legal regulation recommended. EC law, for example, prohibits double voting in electing the members of the European Parliament but, for lack of uniform rules of procedure, it is dependent upon the

[4] Act XXXI of 1993 published the ECHR and the eight supplementary protocols belonging to it. The United Kingdom is not party to the quoted Protocol, thus if expelled the parent having to right of supervision of a child possessing double citizenship. The European Commission on Human Rights qualified the complaint as inadmissible, saying that in this way the child follows the parent expelled into his own country, thus Article 8 of the ECHR was not violated (Jaramillo v. U.K. 24865/94, Sorabjee v. U.K. 25297/94). It is a different issue that in an indirect manner the expulsion of the own citizen (a British child who may not remain without parental supervision thus follows this parent) will probably violate the international customary law, representing exile.

given member state whether it observes that rule or formulates specific rules in respect to multiple citizens[15]. On the other hand, the enforcement of EU citizenship may not be blocked by a regulation in the member states which differentiates according to which state the multiple citizen is attached more closely to (e.g. in accordance with the latest place of residence), and in case it perceives in it an attachment to a third state, it will not apply the rules of EU citizenship.[16] All is to be mentioned because in accordance with Art 2 (2) of the Act on citizenship, if someone is the citizen of another state too (whether an EU Member State or a third state, makes no difference), then, from the point of view of Hungarian law, - and EC law is part of applicable law in Hungary too - he must be considered as a Hungarian citizen, unless the law provides differently. Independently of the referendum too, that provision would need greater precision since the possible deviation from the law may not run counter to the requirement of constitutionality, human rights and EC norms. At the same time, if the number of cases of multiple citizenship increases, it is justified to call the attention to the necessity of specific regulation. For example, Act CXIII of 2003 on the Election of the Members of the European Parliament says nothing at all about specific rules to be followed when including multiple citizens in the voting list for the election. Thus Hungary too will increase the number of voters in several places, except those having no place of residence in Hungary at all, which, however, may become more possible following the obtaining of citizenship, especially because the place of residence is not used in the rules of suffrage in the sense of the Act on citizenship[17] but as a far simpler case of registration (reporting of home address).

Taking the above points into account, it is not completely understandable how the resolution came to the conclusion that the referendum fails to concern international obligations in force. The resolution of the Constitutional Court referred to, 62 of 1997, 5 December expressly excludes the referendum from the circle of instruments authorised to further formulate the already existing internation-

[15] Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangement for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, Council Directive 93/109/EC Article 1 (2), Communication from the Commission on the application of Directive 93/109/EC to the June 1999 elections to the European Parliament. COM (2000) 843 final (accordingly, during the latest elections one and a half million EU citizens voted several times), Act concerning the elections for the representatives of the Assembly by direct universal suffrage (Official Journal, L 278, 08/10/1976), Article 8.

[16] The Micheletti case (Case C-369/90, judgement of 7 July 1992).

[17] In accordance with Art. 23 (1) of the Act on Citizenship, those persons are residents in Hungary who have an permanent residence permit (immigration permit/a permit to settle down in Hungary), or have been recognised as refugees, or are as EU citizens have EEA residence permit to stay in Hungary.

al law obligations in force, in accordance with Art. 28/C.(5) of the Constitution. Further formulation may not be excluded in the sense of the compulsion of creating multi-level, internal and external norms in the wake of the referendum.

b) Discrimination and human dignity

The proposal refers to a successful referendum - by such an obvious expression of ethnic preference - being contrary to Art. 5. (1) of the European Convention on Nationality which prohibits differentiation in cases of citizenship or a practice which qualifies as discrimination based on national, ethnic origin.

When judging it, the yardstick of the European Court of Human Rights is to be applied, developed in the course of the application of the ECHR (1950). Although the rights included in the European Convention on Nationality do not figure in the ECHR, its aspects of lawful differentiation are to be applied on the basis of Protocol No.12. Interestingly enough, the resolution fails to touch upon it, whereas the Protocol on the prohibition of discrimination in regulation and the procedures of the authorities has already been signed by Hungary'[9].

At the same time the resolution points out that the commentary, prepared for the European Convention, does not exclude or consider unlawful the provision of preferences, on an objective basis, exceptional compared to the main rule, of narrow interpretation (knowledge of the language of the state, descent from identified persons, birth and stay on the territory of the state, family law relations, statelessness, shorter period of stay for the EU citizen) in citizenship law. In his separate opinion, István Kukorelli also points out that objective legal facts may be accepted according to the commentary too, the tolerable national laws building upon them as well. However, in the European practice "the legal title of naturalisation bound to making a declaration included in the question would be a preference granted on a subjective basis hardly known before". The ethnic preference in the Hungarian regulation is objective to the effect that it grants Hungarian citizenship to the person declaring himself to be of ethnic Hungarian, living here, after a shorter period of waiting, if one of his ancestors was a Hungarian citizen (Art. 4 § (3) of the Act on Citizenship). It is, after all, an objective legal fact. However, the planned amendment would be content with the applicant declaring himself to be of ethnic Hungarian and verifying it somehow. Therefore objectivity is at best restricted to the verification only, but because ethnicity may not be defined in an objective manner, it may only be verified in a relative manner.

[9] Government resolution 2253 of2000, 31 October on the participation in the Ministerial Conference held on the occasion of the 50th Anniversary of the endorsement of the ECHR dated November 4, 1950 in Rome, and of the signing of supplementary Protocol 12th of the Convention.

In vain does the resolution refer to the Act on preferences and its opinion related to the European Commission for Democracy through Law of the Council of Europe (Venice Commission) because it was not made with reference to cases of citizenship. Thus it would be misleading to provide a long description of how Act LXII of 2001 was amended by Act LVII of 2003 on the basis of the guidelines of the Venice Commission, because it identified the solutions of unilateral regulation within the framework of the manifestation of minority identity, preliminarily cultural rights.[19] Since the Act on preferences "exceeded in several of its elements the customs established in international law, as well as the frameworks of international agreements to which Hungary is also party," and, therefore too, it had an unfavourable international reception, in view of all that, "it became necessary to bring the legal regulation in harmony with the requirements of international law and practice" within the framework of minority identity, making a decent living on the homeland, cultural objectives, i.e. minority protection.[20] Those objectives are perfectly met by declaration about Hungarian ethnicity, speaking Hungarian at a certain level, membership in a Hungarian non-governmental organisation or religious community. That will not be objective from the point of view of eligibility for Hungarian citizenship if Hungarian Certificate is issued by a Hungarian authority or because there is a photograph in it.[21] Perhaps that is felt by the presenting judge because he all of a sudden brings up discrimination on an ethnic basis and its justifiability to verify the closeness of the relationships between the applicant and Hungary. He comes to the conclusion that, if the Act on preferences meets the provisions of the Venice Commission, and the European Convention on Nationality makes it possible to provide preferences on an ethnic basis, by the combination of the two, further preferences in naturalisation will be met by no obstacles in the regulation of citizenship in the future, either from the methodological point of view or that of international law. That approach combines different legal relationships but at least provides equal treatment to legal facts of different levels of objectivity.

[19] Judit Tóth: A státustörvényről - A Velencei Bizottság véleménye a magyar jog tükrében /On Status Act - In the Mirror of the Venice Commission and Hungaria Law/. In: A státustörvény - Előzmények és következmények /Status Act - Antecedents and Consequences/. Ed. by Zoltán KÁNTOR. Teleki László Intézet /Teleki László Institute/. Budapest, 2002, 57-69. László Sólyom: What did the Venice Commission Actually Say? In: The Hungarian Status Law: Nation Building and/or Minority Protection, Edited by Kántor – Majtényi et.al. Slavic Research Centre, Hokkaido University, Sapporo, 2004., 365-370.

[20] General Comment of the Parliament to the Act LVII of 2003.

[21] Art 19, amended by Act LVII. of 2003 stipulates the conditions of the issuance of the Certificate, including the foreign representations' participation in collecting the applications and the declarations.

A further argument of the Constitutional Court for meeting the international expectations is that the amendment of the Act on citizenship by Act XXXII of 2001 also refers to the European Convention on Nationality in its explanation. It is a pity that they failed to read the text of the amending act because it contains no reference to ethnic preferences at all and it makes more accurate the substantive and procedural rules of citizenship only and expressly on the basis of objective viewpoints.

In his parallel opinion, Mihály Bihari takes the starting point on a purely normative basis that it is necessary to differentiate between the main rule and the specific rule. If, compared to the main rule, the specific rule contains aggravation on an ethnic (or other) basis, then it is discrimination, while preference on an ethnic (or other) basis does not violate the prohibition of discrimination if it is not arbitrary. Since no-one would touch the main rule, and it is not ethnic-based, the specific rule of preferences, which is ethnic-based, does not violate Article 5 of the European Convention on Nationality. If in the wake of the referendum a further preference is born, also on an ethnic basis, while leaving the main rule unchanged in the Act on Hungarian citizenship, it will not violate the provision included in Article 5, either. That is clear speech, but the only thing we do not know is what makes something a main rule, i.e. nominally, or as a result of its practical role, weight as well. The question is whether the basic case of naturalisation, named as the main rule, applied almost exceptionally, (e.g. the examination on the basic knowledge of constitutionality is to be taken in Hungarian which is a very serious burden to persons whose mother tongue is not Hungarian, thus the ethnic basis is manifested in a hidden manner too) may remain the main rule merely on the basis of formal consent, if it occurs in the overwhelming majority of the cases called specific (whose scope is to be widened further)? Where is the borderline of arbitrariness drawn? May the necessity of preferences be justified by historical circumstances and the high number of applicants, etc. and therefore it is reasonable?

The domestic yardstick of the constitutionality of discrimination had to be taken into account too since the referendum may project the creation of an act which means an unjustified differentiation, namely amongst the ethnic Hungarian foreigners. For the regulation in force includes the case of naturalisation which makes it possible to acquire citizenship for those possessing Hungarian citizen ancestors at one time, declaring themselves to be of ethnic Hungarian, following a year of having permanent residence permit as waiting time (Art. 4 § (3) of the Act on Citizenship). By leaving this rule untouched, the foreigners declaring themselves to be of ethnic Hungarian, may acquire citizenship with any ancestors, moreover without any time to wait, what is more, without a place of residence or stay in Hungary. That represents at least two types of advantage for those having a Hungarian

So the conclusion of the Constitutional Court is that there is no discrimination on the basis of the Act on preferences and the preferences in naturalisation built upon it, and there has been no violation of human dignity from the point of view of the persons not belonging to the Hungarian minorities. In the course of the examination, it failed to combine the prohibition of preferences on an ethnic basis (which may not be objectively defined and justified, becoming a mass phenomenon and a main rule), included in Article 5 of the European Convention on Nationality mentioned above, with the differences made in respect to the foreigners being ethnic Hungarian.

c) The wording of the question

In accordance with the earlier resolutions of the Constitutional Court, the question posed for referendum is acceptable if it is grammatically unequivocal, easy to undersand, and the whole of the question is not disturbed by technical terms, the question may be answered with yes or no, and the task of the legislator is unequivocal.[24]

In Resolution[25] of 2001, 29 November it is worded more elegantly in the separate opinion of Mihály Bihari, asking why the responsibility of the National Election Commission and the Constitutional Court is great. The Act on referendum25 fails to touch upon the characteristics of the requirement of unequivocalness of the question intended to be included in the referendum. Thus it can only be elaborated by the practice of those two bodies and the final word is left to the Constitutional Court serving as a forum of legal remedies. According to the separate opinion, the criteria of unequivocalness are as follows:

1. Unequivocalness and the identificability of the legal institution for the voting citizen taking a stand relating to the support of the initiative of the referendum.

2. The unequivocalness of the question intended for the referendum from the point of view of grammar, correctness of the language and logic, as well as the understandability of the question for the general public.

3. The unequivocalness of the decision alternative(s).

4. Unequivocalness for the legislator.

5. Furthermore, there may be requirements to be defined on the basis of other approaches.

In the given case - in spite of the technical terms - the Constitutional Court declared the question worded to be suitable for inclusion in the referendum, in

[24] In respect to the referendum, the Constitutional Court considered this constitutional requirement important: "The question posed for the referendum is to be worded in a way that on that basis all the citizens should be able to reply unequivocally." (Resolution 1 of 1990, 12 February)

[25] Act III of 1998 on national referendum and people initiative

Certificate within the group of foreign persons of ethnic Hungarians. That discrimination has no reasonable justification. The value judgement also expresses the "second rate character" of the Hungarian across the borders of the country who has received permanent residence permit, settle down in Hungary, that is "betrayed, left his land of birth", perhaps he was expelled from Hungary on account of having violated the regulations because such persons are excluded from the circle of those eligible for the Hungarian Certificate[22]. Such an open doubt of belonging to the nation in itself gives rise to grave concerns on account of the additional legal consequences, i.e. because of the combination of policing and the support of cultural heritage. Why is the person who was not caught engaged in illegal labour in Hungary "more of a Hungarian" than the one who was put on the list of undesirable aliens as a result of staying longer in the country than permitted? That is now further aggravated by widening the disadvantage concerning the acquiring of citizenship, violating human dignity. Unfortunately, the Constitutional Court related the ethnic preference only to the applicants of non-Hungarian foreigners for naturalisation (the applicants of non-Hungarian foreigners representing a small group in the practice), and considered it proven on the basis of international examples that there are preferential rules in a number of countries all over the world, moreover, that specifically ethnic preference exists on the basis of the Framework Convention of the Council of Europe serving the protection of national minorities. It is not understandable why this (or other minority protection) document was referred to since the protection of minorities is the obligation of the territorial states, while granting citizenship is a legal action which concerns foreigners, and thereby, presumably, the non-discriminative character of the support rendered in accordance with the Act on preferences was intended to be justified.[23] The Framework Convention does not have one single provision concerning the granting of citizenship and this has no connection with the Court's statement, according to which "it does not qualify as discrimination if a part of the population fails to be the recipient of preferences granted to the members of a group defined on an ethnic basis."

22 In accordance with the amended Art. 21 (3) of Act LXII of 2001, the Certificate is to be withdrawn from the person having received a permanent residence permit (to settle down), or has, perhaps, been recognised by the Hungarian authorities as a refugee, on the other hand, in accordance with Art. 19 certificates may not be given to persons expelled or under the prohibition of entering the country, and such persons may not keep their Certificates either.

23 Act XXXIV of 1999 on the publication of the Framework Agreement of the Council of Europe on the Protection of National Minorities dated February 1, 1995 in Strasbourg. In accordance with its Article 17 The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage." And Article 18 "The Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned."

view of the whole of it, furthermore, because from it Parliament may understand that it must adopt rules relating to preferential naturalisation which "may build upon the control of a closer bondage to Hungary, the conditions defined for the granting of the 'Hungarian Certificate' or identify other ways as well." The explanation fails to touch upon the aspects of grammar, correctness of the language and logic, and it only refers to unequivocalness for the voting citizens to the extent that the technical terms represent no obstacles (for instance, meaning of naturalisation, the title of Act LXII of 2001 is covered by a beneficial haziness, the preconditions of the Hungarian certificate, preferential naturalisation are obviously known to everyone). And as for the legislator, he should solve as best he can the tasks to be conferred upon him by the definitive referendum, after all "the question does not restrict Parliament in defining new preferences in the new regulation to be created, compared to the present conditions of naturalisation, either".

Of course, questions are not able to prevent anything, at most they may confuse the expert because they hide the following choices in them:

- in the Act on citizenship, the existing rules of naturalisation are to be touched or not,
- the close relationship of the ethnic Hungarian foreigners is to be declared by leaving the Act on preferences unchanged or just by referring to the existence of the Certificate included in it, or the objective scope of the Act on preferences should be simultaneously extended (since the certificate would be applicable in a new legal relationship too), or
- a completely new Act should be created relating to the declaration, verification of the relationship and, obviously, Hungarian ethnicity.

In accordance with the separate opinion of István Kukorelli, the Constitutional Court identifies the understandability, constitutionality of the question to be included in the referendum by "translating the question and making an effort to place it in the constitutional system". For, in accordance with the resolution, "the planned new case of acquiring citizenship by naturalisation included in the question" is built upon the Act on preferences and the Act on citizenship, however, according to István Kukorelli,

"that does not follow from the concrete question." It appears that the requirements of referendum by the earlier resolutions were not taken into account in a narrowing sense, but, on the contrary, in a wide and generous manner, moreover "explaining into" the question.

d) The competence of Parliament and the consequences of legislation

Referendum[26], as the direct instrument of exercising democracy, is one of the

[26] Art.28/B-C-D-E of the Constitution refers on referendum and plebiscite (people initiative) and their place in the constitutional structure inserted into rules on the Parliament.

forms of the manifestation of the sovereignty of the people, and its case to be ordered in an obligatory manner enjoys priority compared to the referendum which may be ordered on the basis of considerations, equally containing the elements of exercising power through a representation of the people and directly.[27] Furthermore, the successful decisive referendum takes the right to make decisions away from legislation, which is obligated to adopt the amendment, regulation concerned, although István Kukorelli himself points out in his separate opinion[28] that neither the decisions made by the referendum nor the acts passed by Parliament, i.e. the normative decision pointing to the future, are impossible to change. That system of relationships and the legal consequences mentioned above raise the issue even more resolutely that, for the sake of the rule of law, legal stability, the question of the referendum, i.e. the exercising of the basic right to referendum, should be made subject to a preliminary institutional examination of constitutionality. What follows from that is that the question of the referendum is to be placed in the whole of the basic right and the constitutional system, not merely on the basis of the provisions relating to the prohibited objects, cases of referenda, included in the Constitution, the act on referendum. In that context, the Constitutional Court did not deal with the real stake of the referendum:

● Naturalisation as a legal title to acquiring citizenship is built upon the permission to immigrate (settle down), a legal institution included in the scope of alien control (consistently since 1993, earlier too as a main rule).[29] It amalgamates social, economic, national security, public order and cultural preconditions, and its basis is that the foreigner is staying in Hungary, creating an existence, and his way of life can be controlled. That would be changed fundamentally by the solution recommended in the referendum since the controllability mentioned above, the way of life in Hungary as well as the chance to fit in would all be terminated. Thus it would be necessary, for methodological reasons too, to change the regulation of alien control (settling down), together with legal standing of long-term migrants, too (e.g. their employment, schooling, social benefits, establishing own businesses), modified dozens of acts. For the rights ensured in the Act on preferences and the rights offered to foreigners - not in a human but an autonomous manner - are to be adjusted to each other.

[27] Resolution of the Constitutional Court 52 of 1997, 14 October

[28] Resolution of the Constitutional Court 50 of 2001, 22 November

[29] Act LXXXVI of 1993 on foreigners' entry, stay and immigration to Hungary, then Act XXXIX. of 2001 on foreigners' entry and stay in Hungary. That is not changed by the fact if the foreign person in question came into the country as asylum seeker, basically entails the procedure of an alien control authority and it is built upon staying here and being scrutinised (see Law-decree 19 of 1989, Decree of the Council of Ministers 101 of 1989, 30 September, to be replaced by Act CXXXIX of 1997).

● The main rule of naturalisation (apart from the exemption granted to children) includes a genuine link to Hungary through a legitimate way of life here, built upon the procedure of alien control, a stable existence in Hungary, the examination in citizenship and transformation into citizen not violating the interests of the state (Art.4 §(1) of the Act on Citizenship). In a simpler manner, the effective relationship is borrowed from international law. The specific rule granting preference only reduces (terminates?) the length of the stay in Hungary from among the requirements listed above, leaving the rest of the conditions untouched: if one of the ancestors of the applicant was a Hungarian citizen and he declares himself to be of ethnic Hungarian. The regulation to be created following the referendum would drop two requirements from the main rule in the interest of the applicants enjoying preference: preliminary stay and any kind of life- style in Hungary, while the Hungarian citizenship of the one-time ancestor is no requirement either, because it is sufficient to confess (verify) Hungarian ethnicity. What points of orientation will the authorities have in terms of naturalisation not violating the interests of the state? Will it be possible to take the examination in citizenship knowledge at embassies too?

As a result of the imprecision of the question, the other version is that all the requirements are left out of the main rule of naturalisation (because only a reference is made to the confession and verification of ethnicity in the question). That is such a new concept which may not even be considered naturalisation since it crushes the main rule to pieces and only borrows the word "naturalisation" phonetically to acquire citizenship.

● Amendment is made even more difficult by the fact that, in accordance with the rules of the Act on alien control and the Act on citizenship entered into force following Hungary's accession to the European Union, the EU citizens do not need a permanent residence permit (permission to immigrate, settle down here) for naturalisation, an EEA residence permit is sufficient for that (Art. 23 (1) of the Act on Citizenship). That does not ruin the main rule but it only alleviates it to the extent that this permission may be obtained following a shorter stay here and on the basis of a simpler procedure. But the question does not exclude from preferential naturalisation the EU citizens either, including the ethnic Hungarians in Slovakia, Slovenia, who may receive Hungarian Certificates in case it does not violate EC law[30].

30 New Art. 1 of Act LXII of 2001: the scope of the Act extends to persons not being Hungarian citizens, declaring themselves to be of ethnic Hungarian, having a place of residence in the Republic of Croatia, Romania, Serbia and Montenegro, the Republic of Slovakia or the Ukraine (hereafter: neighbouring state). At the same time, Art. 27 (2) : The provisions of this Act are to be applied in harmony with the achievements of the acquis in the EU, following from the coming into force of the Act publishing the Accession Treaty.

● It may seem to be a minor issue but the majority of the rules listed above (citizenship, alien control, travelling abroad on account of the obtaining of passport obviously following closely the acquiring of citizenship) may be amended by qualified majority in the Parliament. Therefore the compulsion of legislation exists even though no consent is reached.

● The Act on preferences may not remain unchanged either since Parliament, in the wake of the referendum, would use the Hungarian Certificate for a new purpose, not planned originally. The declared objectives of the Act on preferences are remaining on the land of birth and the preservation of identity as well as of the citizenship of the territorial state. In accordance with the resolution of the Constitutional Court, the Hungarian Certificate represents a closer relationship which would include the application for, and the acquiring of, citizenship as well, and thus it is a moral command at most and not a legal issue that the citizens - in the name of legal equality, i.e. irrespective of whether they have another citizenship, and under what title they acquired Hungarian citizenship - should enforce it, move freely, move around at their will or just stay in homeland. In this way, citizenship to be called to life by the referendum is to fill the Act on preferences, the rights to be enjoyed with the Hungarian Certificate, or the special status of ethnic Hungarian, with new contents.

● The international reception of Act LXII of 2001 has clearly demonstrated[3] that there would be need for a thorough harmonisation of views with the neighbouring countries in order to preserve the objectives of the bilateral agreements concluded already (new ways of co-operation as a result of the application of the friendship agreements and the Act on preferences), should we introduce unilateral regulations in respect to the highly sensitive issues of acquiring preferential citizenship concerning sovereignty.

● On the other hand, the concept of looking upon Hungarian citizenship as a public law, ethnically neutral bondage - which is, of course, not identical with the way politics and publicity evaluate citizenship - will not remain unchanged either. Although establishing a place of residence (home address) is the precondition of the enforcement of a number of rights, certain inconsistency can be found in the regulations even today, and in case there is a sudden increase in the number of Hungarian citizens as well as multiple citizens living abroad, that process may strengthen, waving the obligation of staying in Hungary in respect to exercising increasingly more social, cultural or just economic rights. That may also have an impact on the planning of the budget as well, unless, as Jürgen

[3] Zoltán Kántor (Ed.): A státustörvény - Előzmények és következmények /Status Act - Antecedents and Consequences/. Teleki László Intézet /Teleki László Institute/, Budapest, 2002

Habermas put it, it is blocked by "welfare shovinism".[32] On the other hand, in accordance with the wording of István Kukorelli, who has already pointed it out elsewhere too, Art. 6 (3) of the Constitution may have normative consequences[33], although "those initiating the referendum intend to bind the institution of citizenship not to the country (the state, the territory of the state) but to the nation. Without doubting the nobility of their intention, this concept raises serious problems of constitutional law nature."

All in all, the Constitutional Court should have refused the initiative of the referendum on account of its unconstitutional nature, since it ruins Hungary's meeting its international obligations, the question fails to meet the requirement of unequivocalness, it concerns fundamentally the regulation and legal status of citizenship, as well as burdens the legislative power with tasks almost impossible to solve.

What is the opinion about citizenship in Parliament?

Playing with the idea that, following a successful referendum, the task of legislation is placed on the table of Parliament: what chances would Hungarians living outside the borders of Hungary have to acquire preferential citizenship or, perhaps, some other legal status? Since 1990, in the debates in Parliament, in respect to a number of topics, very different from each other, as well as on the basis of attempts at regulation, the public law relationship of the Hungarians beyond the borders, the members of the Diaspora, has cropped up, related to the visions of the Members of Parliament about the characteristics of citizenship in general terms. For the investigation, the Parliamentary Diary has been surveyed up to the end of 2004. Obviously, only the most characteristic features could be selected, and, for reasons of space, the long debates over the Homeland Fund and Programme[34] were not made the subject of the investigation, they have been left untouched for a topic of another analysis.

[32] Zoltán Fábián - Endre Sík - Judit Tóth: Unióra várva - előítélet, xenofóbia és európai integráció /Waiting for the Union - Prejudice, Xenophobia and European Integration/. In: Migráció és Európai Unió /Migration and European Union/. (Ed. by Éva Lukács - Miklós Király) AduPrint, Budapest, 2001, 395-412.

[33] István Kukorelli: "A felelősség klauzula" /Alkotmány 6. §. (3)/ értelmezési lehetőségei /The Interpretation Possibilities of the "Responsibility Clause" (6. §. (3) of the Constitution)/. In: Schengen (A magyar-magyar kapcsolatok az uniós vízumrendszer árnyékában) /Schengen (Hungarian-Hungarian Relationships in the Shadow of the Hungarian Visa System)/, Ed. by Judit Tóth. Kisebbségkutatás könyvek /Minority Research Books/. Lucidus, Budapest, 2000, 175-180.

[34] Parliamentary proposal for resolution regarding the national membership of the Hungarians beyond the borders and the establishment of the programme package "Homeland", Bill No. T/12725 on the Birth of Place Fund (www.mkogy.hu/iromanyok)

a) The reinstatement of Hungarian citizenship as a kind of historic compensation

Two acts were born on the termination of the force of resolutions depriving of Hungarian citizenship in 1990. Those having lost their public law relationship with the state since 1947 in this way - including those requesting their dismissal from abroad, on account of the prohibitions of double citizenship too - could regain their citizenship by declaration. In the first step, within a certain deadline, then without any deadline the application for regaining citizenship.[35] There are two examples for approaching the topic. In the debate on the Programme of the first democratically elected government, the rehabilitation of those having been deprived of their citizenship was urged, ensuring the reinstatement of citizenship for the deceased as well since "in certain countries the creation of double citizenship leads to a disadvantageous situation"[36]. A decade later, in an interpellation of a sharp tone, one government MP posed the question why those concerned did not get back Hungarian citizenship in retroactive manner, for the period of the resolution of the deprivation. In accordance with the professional argumentation: the unpredictability of the impact of citizenship on family law, asset law and inheritance law would cause such legal uncertainty which contradicts both "ex officio procedure" and the retroactive force.[37]

b) Revocation, termination of agreements excluding double citizenship

In the new, democratically elected Parliament, it was raised in the course of the debate on the Government Programme that the legal obstacles hindering the acquiring of Hungarian citizenship should be eliminated[38]. By the way, it took several years to accomplish that. In its explanation the government referred to the fact that, especially on account of the mass immigration, escape, the persons of Hungarian nationality, settling over, numbering tens of thousands, "had the natural demand and intention to obtain Hungarian citizenship". For "Hungarian law has, traditionally, in view of the significant emigration of all time, tolerated double, multiple citizenship", and this development was hindered by the joint policy of the former socialist countries.[39] Therefore the revocation of

[35] Act XXVII of 1990 on the termination of the force of resolutions depriving of Hungarian citizenship and Act XXXII of 1990 providing for its amendment, as well as Act XXXII of 2001.

[36] Országgyűlési Napló (hereinafter: ON) /Parliamentary Diary), May 15, 1990. László Salamon (representing the Commission of Constitutional Affairs)

[37] ON, Interpellation of Sándor Lezsák (MDF) and reply by Secretary of State of the Ministry of the Interiour Károly Kontrát (February 1, 2000)

[38] ON, Address of MP Zoltán Hajdú (May 23, 1990.)

[39] ON, Address of State Secretary of the Ministry of the Interiour István Morvay in his exposé terminating the force of the Law-decree publishing the Romanian and Bulgarian agreements (February 25, 1992.)

the agreements at the same time demonstrated breaking with the socialist legal past, first with Romania, later on with Bulgaria, Poland and Mongolia.

c) The regulation of (acquiring) citizenship

1. Definition of naturalisation, repatriation

In the new Act on citizenship passed in 1993, and then in the debate on its amendment, one of the main topics was the settlement of the relationship of the Hungarians living abroad with the homeland with legal means, and the other main topic was to make stricter the conditions of naturalisation. The latter intention was stronger and became the main rule, although the exceptional preferences were kept on being emphasized. "The more stringent rules do not concern our fellow countrymen of Hungarian origin, and in case of those having returned to the homeland, as well as their descendents, and integrating in is not a long process."[40] For citizenship is the natural claim of the ethnic Hungarians, while taking the initiative is the moral obligation of the state. So that builds upon the nature law approach to citizenship, being born into the ethnic group constituting its basis, "to give preferences to those belonging to the nation", "those living on the annexed territory", while making the conditions stricter for others. That principle is followed by repatriation (in the first version of the text, for those across the borders, following the criticism of the text, for former Hungarian citizens only), the rehabilitation of one-time citizens, acquiring citizenship by declaration, the termination of agreements excluding double citizenship, too.[41] There is need for a compromise of enclosure in the national state and integration, but that would require a vision formulated jointly regarding the content of the legal relationship of citizenship. For obtaining, preserving and terminating citizenship may be adjusted to that too. There is danger that the past one and a half decades were not sufficient for that, there is a lack of agreement between staying on the land of birth (across the border) and preferential naturalisation in Hungary, moreover, the establishment of nationality, ethnic origin is cumbersome in practice, its legal wording is impossible substantially. International law does not recognise counterevidence, only the declaration of the person concerned.[42] Of course, if the law is a symbolic act, it is not disturbing that immigration policy is not clarified, and its only certain element is that the minorities should stay on their birth of land but "those persons of ethnic Hungarian who have been living and working here for years should be granted Hungarian citi-

[40] ON, Exposé of State Secretary of the Minsitry of the Interiour Fabián Józsa in the debate on the Act on Citizenship (March 2, 1993)

[41] ON, Address of MP Ibolya Dávid, address of István Bőrocz in the debate on the Act on Citizenship (March 2, 1993.)

[42] ON, Addresses of MPs Pál Vastagh, Ferenc Kőszeg (March 2, May 4, 1993.)

zenship in a preferential manner".[43] The opinions of all the contributors were unanimous, and the recommendations of compromise of the three parties led to the result that the preferences may only concern the persons of ethnic Hungarian having moved here and living here for at least one year, while the reinstatement of the one-time citizenship of emigrants living abroad in only possible with individual, rehabilitation purpose, from the time of application.

2. Hungarian citizenship which may be inherited without restrictions

Citizenship by way of descent creates a chain connecting, obviously in an invisible manner, millions of Hungarians living all over the world. The seriousness of citizenship, the reality of the connection has been questioned on several occasions. For example, it has been suggested that "there should be a transitory, five-year period for the dormant Hungarian citizens to make this latent state active" (e.g. registration at embassies), and only following that should their citizenship be recognised.[44]Rather than unlimited inheritability on the base of ius sanguinis, preferential naturalisation could be the solution for the descendents of persons of ethnic Hungarian, because genuine link means not merely an emotional or declared relationship but an actual connection as well.[45] The rule might, perhaps, come into force in 2010 in order to enable everyone to prepare for appearing personally at the embassy at least once every eight years to have the validity their passports extended because why should anyone need citizenship if they speak no Hungarian, do not demand it, moreover are not even aware of being Hungarian citizens! Following that, only preferential naturalisation would be available to those people. As a final result, "the principle of blood relation makes Hungarian citizenship more valuable and saves us from abuses as well".[46] Parallel to that, it would be necessary to think over which rights based on citizenship require modification because a contradiction has been created between unlimited inheritability and the system of the rights of citizenship, mainly because there are no records of latent Hungarian nationals and there is a lack of calculations for the budget relating to the benefits available to them[47].

3. Double citizenship and international agreements

The MPs look upon the toleration of multiple citizenship as a kind of counterblow, defence against historical injustices, together with the unlimited inheritance of citizenship, without restrictions of administration or any restrictions

[43] ON. Address of MP István Hegedűs (March 2, 1993.)
[44] ON. Address of MP István Hegedűs (March 2, 1993.)
[45] ON. Address of MP István Szigethy (April 6, 1993.)
[46] ON. Address of MP Zsuzsa Szelényi (May 4, 1993.)
[47] ON. Address of MP István Szigethy (May 5, 1993.)

whatsoever. Parliament refused to deviate - in view of the sovereignty of the other country - from that unlimited tolerance and unrestricted inheritability even in bilateral agreements, in a certain circle, and to create different internal rules as well. National law considers multiple citizens as Hungarian citizens only and we do not care it causes problems to anyone, even though it gives rise to international complications.[48] On the other hand, multiple citizens of multiple bondage, especially those coming here or settling over from emigration, are suspicious as well. It has been raised on several occasions that "multiple bondage might cause disturbances in the work of MPs", thus it should be made compulsory for MPs to report all their citizenships to the Speaker of Parliament. However, that motion was not included in the list of subjects to be decided upon, but it was a narrow escape.[49] Others would only make it a condition to wave the other citizenship in respect to the more significant public law posts (president of the republic, prime minister, heads of the army)[50].

4. The procedure of citizenship

Strangely enough, the specificities of the procedure of naturalisation and aspects of equity were placed in the centre of attention not by an oppositionist MP or the Minister of Social Affairs or the Minister of the Interior but by the State Secretary of the Ministry of Finance. In his view, many people, being in a light financial situation, gave up on obtaining Hungarian citizenship thus the duty of ten thousand HUF (50□) needs to be reduced to zero.[51] Obviously, it increases the feeling of a "donation" in the eyes of the applicants while they are objecting to the slowness and the bureaucratic nature of the procedure and complaining about the lack of positive discrimination in respect to the Hungarians living outside the borders of the country.[52] At the same time, the MPs demand a thoroughgoing procedure and a careful screening of security, policing and public security since - after all - the matter at hand is a serious one: citizenship.[53]

[48] ON. Addresses of MPs István Mészáros, István Hegedüs, István Szigethy (March 2, April 6, May 5, 1993.)

[49] Submitted by dr. György Tímár under Bill No. T/2129., with which he intended to amend Act LV of 1990 on the legal standing of MPs, its inclusion in the list of topics to be debated upon was supported by 138 MPs, objected to by 73 MPs and 67 MPs abstained. ON (April 6, 1996.)

[50] ON. Address of MP Tamás Sepsey in the debate on the principles of regulation of the Constitution (June 19, 1996.)

[51] ON. Address of State Secretary Tibor Pongrácz in the debate on the Act on Duties (September 21. 1992.)

[52] ON. Interpellation of MP András Rapcsák to the Minister for the Interior (February 25, 1997.)

[53] ON. Address before the agenda by MP Edit Rózsa (February 7. 1994.)

5. Independent motions of MPs on the regulation of citizenship

Several motions of MPs aiming at the obvious connection of citizenship and the case of the Hungarians over the borders may be cited as examples. In one of them, the amendment of the Constitution was proposed by an oppositionist MP in order to make Art.6 (3) unequivocal from the point of view of norms, by changing one single word. Accordingly, the Republic of Hungary does not "feel" but "does undertake" responsibility for the lot of the Hungarians living across the borders of the country and promote the fostering of their relationship with Hungary. "Under the auspices of national solidarity, responsibility is to be undertaken and not to be felt. At the same time, there is a great and symbolic, but from the practical point of view, an important difference between feeling responsibility and undertaking responsibility. [...] if the Republic of Hungary, a member of the EU, (having created the Act on preferences and having taken a number of measures in a similar spirit) really takes seriously responsibility for the communities of ethnic Hungarians, disrupted from the mother country and trapped outside its borders" The appointed Parliamentary Commission has adjourned the debate on including the topic in the list of decision-making.[14] Further than that did the motion get, according to which the rules of preferential naturalisation in the Act on Citizenship - Art.4 (3) - should be transformed so that the applicants, declaring themselves of ethnic Hungarian, having ancestors who at one time used to be Hungarian citizens, at their request, would be exempted from the obligations of preliminary stay in Hungary, as well as having a place of residence and the means to make a living here. The idea hiding behind it is identical with the concept submitted to the referendum, still Parliament - following the debate - failed to include it in the list of subjects to be discussed on. What the MPs putting forward the proposal referred to was that it was necessary to reduce the disadvantages caused by Hungary's accession to the EU and by meeting the requirements of Schengen regime in the field of keeping contacts with the kin-state. In the wake of the amendment, a very high number of Hungarians over the borders would have double citizenship which is a question of internal, sovereign regulation, especially in our region where the majority of the people belong to ethnic community which is not identical with their attachment in accordance with their citizenship. Since, according to the persons putting forward the motion, the maintenance of citizenship must be respected, the neighbours cannot do anything, they may not take away the already existing citizenship of the Hungarians on account of their obtaining a new citizenship. Granting preferences is not discriminating since all nations apply preferences on ethnic, cultural, as well as language grounds. And the status of citizenship is not degraded since the principle of politi-

[14] Motion No. T/1463 Of MP of dr. Miklós Csapody (November 18, 2002.), a decision on its adjournment was made by the Commission of Constitutional Affairs on December 5, 2002.

cal, social rights differentiates citizens in the field of eligibility on the basis of residing in Hungary.[55] The persons submitting the proposal thought especially about the Hungarians living in Serbia and the Ukraine, entering Hungary on a visa, serving the national interests, and only instead of meeting the international expectations. In accordance with their standpoint, it does not disturb the EU, for lack of a local residence, the new double citizens do not burden the social expenditure, and it does not increase migration since they do not wish to change its rules. The liberals hold the view that double citizenship is not a good solution, while the socialists believe that the proposal may be a good starting point for an inter-party reconciliation. The result of the voting indicated[56] that it is not so much the professional arguments but the attachment of the contesting political parties that influences the decisions of the legislators.

The most recent motion tabled by an independent MP[57] suggested the amendment of the Act on citizenship in a manner that it should not only preserve "the moral weight of Hungarian citizenship", but serve, at the same time, the continuity of the right to citizenship and historic reparations. To further ease the process of naturalisation, the MP suggested that it should suffice for the applicant to declare himself to be an ethnic Hungarian and "undertake community with the Hungarian nation in the declaration as well as bring his children up in the Hungarian spirit". The applicant, meeting the condition which does not allow counter-evidence but builds on the concept of moral and cultural nation, would not take an examination in citizenship since he would not join the political nation. The abolition of the requirement of staying in Hungary for at least one year (in possession a permanent residence permit and settle down, constituting its basis)[58] stems from the generally accepted objective of national strategy, according to which the parts of the nation, forced to live outside the borders of the country as a result of the outcome of the two World Wars, are assisted by the Hungarian government, in harmony with its constitutional obligation, in making a decent living in their place of birth", by way of Hungarian citizenship. For

[55] Motion of the MPs of Hungarian Democratic Forum, No. T/5645, submitted on September 30, 2003.

[56] The opinion of those submitting the proposal was summarised by Károly Herényi, and MPs István Szent-Iványi and Csaba Tabajdi reacted to it. In the voting its inclusion in the list of topics to be debated upon was supported by 176 MPs, opposed by 26 MPs, and 168 MPs abstained (ON, November 3, 2003)

[57] Motion No. T/13449 of independent MP Attila Korómi on the amendment of Act LV of 1993 on Hungarian Citizenship (December 15, 2004.)

[58] Although the motion would not terminate the force of the permit to immigrate/settle down necessary for the application for naturalisation, perhaps because of not being thoroughly familiar with the regulation (interpreting rule of the Act on Citizenship), it seems from the explanation that it would make it possible for Hungarians to acquire preferential citizenship without settling over.

the sake of a faster procedure, the status offices established for Hungarian Certificates, would receive the applications, forward them, and thus they would be submitted to the President of the Republic by the Minister for the Interior within three months at the most. The motion, containing significant changes from the point of view of the conditions and procedure of naturalisation, was also rejected by Parliament.

d) The enhancement of the value of Hungarian citizenship, the preservation of its role

An objective, a political programme issue frequently voiced in Parliament is the strengthening of the weight, character and role of Hungarian citizenship, especially with an increase in the hidden, tacit fears from European integration. The policy of staying on the land of birth (across the borders) is perfectly served by the very low number and strongly controlled procedures of naturalisation[59] - in Belgium, of similar dimensions compared to Hungary - five times more persons are annually granted citizenship with the process of naturalisation than in Hungary. In the meantime, an increase in the other data of migration indicates that public administration is unable to keep the process under control in spite of the continuous changes in the rules, their being made stricter. Consequently, a significant contribution to the enhanced value of citizenship is made by the aggravation of all the other legal possibilities, the uncertainty and high transaction costs of staying in Hungary as a foreigner.

1. The characteristics of citizenship

Citizenship as the measure of national commitment was raised in several parliamentary debates. Let us quote here just one as an example. The governments of varying composition are the targets of debates from time to time. Speaking about the Government Programme of 1994, a government MP emphasized that the programme represented a compromise within and outside the borders, indicating that "being a Hungarian is not a question of Hungarian citizenship", and that the left was also sensitive to the major issues of the nation (building). Therefore he called upon the people to take action in the interests of the Hungarians living outside the borders of the country.[60] On the other hand, "the voluntary extension of the rights" to foreigners, related to suffrage,

[59] In accordance with the data of the Immigration and Citizenship Office for the Ministry for the Interiour, between 2000 and 2004 the annual average figure of the applications for naturalisation, repatriation was 4675, while that of the applications for the statement of citizenship was 4609. That means the average of 5722 naturalised persons per year, which is rather low. 90 % of those persons are Hungarians beyond the borders, i.e. foreigners of preferential treatment.

[60] ON, Address of MP József Annus (July 14, 1994.)

constituting the core of citizenship, has also been a part of the events occurring in the recent past: Parliament agreed without a meaningful objection that "foreign citizens settling down in Hungary permanently" - since the majority of them are also Hungarians, although they do not have their citizenship yet - could also participate in the election of the representatives of local governments and mayors. "It is a pioneering provision"- which the minister did not wish to destroy with statistical figures in his exposé[61]. "It is unique in Europe" said an enthusiastic government MP, hoping that the Hungarian legislator would be appreciated, moreover that "it would give credit to the active minority protection policy too" radiating to the neighbouring state[62].

2. Suffrage of citizens living, staying abroad

The suffrage of nationals living abroad was equally included in the debates on citizenship, suffrage and the amendment of the Constitution. "In Europe the main rule is that one may vote in accordance with one's place of residence, i.e. living in one's home. It is necessary to furnish an opportunity to participate to those having a close bondage to the country, no matter how much it might cost."[63] That means not only a painfully long reconciliation of the creation of the technical rules necessary but also that suffrage may only concern those having a permanent place of residence in Hungary, if they are abroad at the time of the voting on account of their work, studies or other reasons. In accordance with the other view, that is a right of citizenship and no matter how many latent, dormant citizens there are in the world, it is necessary to ensure suffrage to them in spite of the expenditure which cannot be planned beforehand. It would mean a compromise if those living abroad were included in the list of names and that would, at the same time, prove the closeness of their relationship too,[64] and those who have no place of residence here could only vote for the party list, i.e. not for individual MPs.[65]

3. The inclusion of those living abroad in compensation

It is a non-traditional element of the status of citizenship but it has been brought to the surface by the legal development in the past decade that the state should grant compensation, ex gratia, at least partially, for the harms caused by the war, dicta-

[61] Exposé of Minister for the Interior Balázs Horváth in the debate on the act on the election of local government representatives and majors (ON June 24, 1990.)

[62] ON, Address of MP József Borócz in the debate (July 24, 1990.)

[63] ON, Address of MP István Szigethy in the debate on the amendment of the Constitution (October 18, 1993.)

[64] ON, Address of MP Fábián Józsa in the debate on the amendment of the Constitution (October 18, 1993.)

[65] ON, Address of MP István Balsai in the debate on the principles of regulation of the Constitution (May 23, 1996.)

torship and the party state in an illegal manner, looking upon the obligation of the state to protect its citizens as a kind of contractual relationship. However, in the meantime the citizen had become an emigrant, a refugee or a dead man. So what is more important: citizenship which lays the basis for the claim for protection (compensation) or the grievance suffered, independently of the legal standing of today? Both arguments were put forward in the debate on the (first) Act on compensation. Finally, the first one became the winner and it became the main rule that citizenship is the basic requirement in eligibility for compensation although "compensation is the downgrading of citizenship", and only those living in Hungary permanently (in a community of people with the same fate) should be eligible for it.[66]

4. The maintenance of certain professions, public law posts specifically for Hungarian citizens

Acts which maintain jobs for Hungarian citizens only were unanimously endorsed or at least supported in the previous decade. We are not talking about political posts but the activities of lawyers ("they are connected to the Hungarian legal profession", a permanent place of residence should be the condition of membership of the chamber),[67] which will only be alleviated much later unless an international agreement or the "EU agreement" provides differently,[68] activities of physicians[69], university education except for universities belonging to churches ("there are no such restrictions in other counties, let us not demonstrate a bad example in this respect")[70]. Hungarian citizenship is a condition in the case of membership in the chamber of veterinarians too although some have brought up the option of a contract of association as well.[71]

5. The different legal status of persons living abroad

In the summer of 1996, Parliament failed to endorse, for lack of five votes, the compromise resolution, put together with great pain, on the regulation principles of the new Constitution. Thus the debate continued in autumn and resulted in Parliamentary Resolution 119 of 1996, 21 December on the Regulatory Principles of the Constitution of the Republic of Hungary. It contains the following: "In respect to the rights of the Hungarian citizens living abroad, the Constitution should include

[66] ON, Address of MP József Faddi (March 4, 1991.), the result of the voting (April 23. 1991.)

[67] Exposé of Minister of Justice István Balsai in the debate on the Bill on Lawyers (ON. April 9. 1991.)

[68] ON, Debate on the act on lawyers (February 28, 1998.)

[69] ON, Address of MP Károly Mezey in the debate on the Act on the Hungarian Medical Chamber (April 19, 1993.)

[70] ON, Motion of Sándor Tóth and Szilárd Sasvári in the debate on the act on higher education (June 8, 1993.)

[71] ON, October 2, 1995.

a prescription, according to which certain rights and obligations of Hungarian citizens having settled down abroad may be defined by the law differently from those living in Hungary - e.g. political and social rights or military obligations -, but there should be no difference made in respect to who has, and who does not have, another citizenship in addition to Hungarian. In the case of multiple citizenship, election for, or appointment to, certain offices may be limited by the Constitution or the law."

6. Arable land ownership

The survey of the characteristics of citizenship is going to be closed with a topic which does not discuss the cause of the Hungarians beyond the borders of the country. It is conspicuous that in any debate relating to foreigners, the picture of the greedy, speculating foreigner came into the picture instead of the Hungarians across the borders: primarily on account of the enticingly cheap prices of the houses in Hungary, Hungarian land has had to be protected from the greedy foreigners for about a decade or so. It was mainly political, rather than economic arguments that clashed when reacting to the accession to the EU, OECD and NATO membership as well as the consequences of liberalisation. The fact that all that may promote the questions of labour surplus, seasonal employment, joint farming, did not come into the fore even in the debates about ordering the referendum in 1997. Promoting "the hindering of speculation against the Hungarian national assets, as well as the keeping of the national Hungarian arable land property in national ownership", the motion of one of the MPs did not intend to offer the possibility to foreign legal entities to purchase arable land even following our accession to the European Union. He proposed that Parliament should call upon the Government: "To establish a standpoint relating to the purchasing of arable land within the chapter on The free movement of capital which, beyond the seven-year prohibition of buying land prescribed in the (Accession) Agreement, provides further possibilities for the Government to enforce national interests relating to the arable land property". Furthermore, "in the accession negotiations it should represent the standpoint, according to which, following our accession to the European Union, the sever-year period of time of derogation could be extended by another three years in case, following the seventh year, there is a significant difference between the domestic and foreign land prices, however, it should refrain from the amendment of the Agreement in a way which would make it possible for foreign persons to purchase arable land earlier than the seven years stipulated in the Agreement, contrary to the national interests."[72]

[72] Motion No. H/86 of MPs of the government, Sándor Farkas and Richárd Hörcsik (FIDESZ) (May 20, 2002.)

e) Alien control regulation and immigration

Alien policing rules and naturalisation did not represent a case of one element being built upon the other for the MPs, they failed to recognise that from the regulations in force. Since the majority of the immigrants are of ethnic Hungarian, just like in the case of naturalisation, preferences are to be granted to them.[73] Therefore the main rule was established in the field of alien control too (the preconditions for foreigners of being non-Hungarian origin are three years of legal stay here, the guarantee of making a living, social adjustment, meeting the requirements of public order and public health) and preferential possibility, i.e. a shorter period of stay for those of ethnic Hungarian residing in Hungary.[74] That was to the great pleasure of the overwhelming majority of the applicants, even though in parallel the earlier rules became far stricter in the field of immigration.[75] The MP condemning the constitutional process of a pact directly proposed a referendum: the people should decide whether they wish to make immigration and the obtaining of Hungarian citizenship more strict than before or not. The objective is not that the Hungarians in the annexed territories should migrate![76] That strict approach in alien control, the permanent residence permit to settle down, preferential but difficult to obtain, at the same time legitimise the policy of "making a decent living on the land of birth" of the past one and a half decades.

f) The alternative legal standing: the Act on preferences?

The debate on preferential, fast naturalisation or pinning down those across the borders in their land of birth - by making immigration, employment, naturalisation more difficult - was intended to be resolved with a new solution beginning from 1996. The responsibility for the Hungarians beyond the borders should imbibe the whole Constitution (e.g. the national colours should be defined in addition to the state banner), Hungarian citizenship should be available as a subjective right,[77] and "there should be certain rights for those of ethnic

[73] For example, address of MP Tivadar Horváth in the debate on the act on the entry and stay of foreigners (April 20, 1993.)

[74] The expression of permit to settle down and the legal institution replacing it were introduced by Act LXXXVI of 1993, then from 2002 we returned to the permit to settle down included in Act CXXXIX of 2001. The former is issued by the police, the latter is issued by the (regional) bodies of the Immigration and Citizenship Office, but their common feature is that it is a case of alien control and not of standard public administration.

[75] Judit Tóth: Who are the Desirable Immigrants in Hungary under the Newly Adopted Laws? (in. Refugees and Migrants: Hungary at a Crossroads - Yearbook of the Research Group on the International Migration, the Inst.for Political Science of HAS). Eds: Fullerton-Sik-Tóth, Budapest, (1995) pp.57-68

[76] ON, Address of MP Izabella B. Király before the agenda (June 28, 1993.)

[77] Addresses of MPs Géza Jeszenszky and István Balsai in the debate on the Regulatory Principles of the Constitution (ON, May 23, 1996.)

Hungarian origin as an independent category". So that would come into existence "as a third category in addition to citizenship and human rights". So "the Constitution should be the Constitution of the whole Hungarian nation, settling at last the cause of those beyond the borders"[78].The new category, the "Hungarian status" ensures a great number of preferences, however, in all its versions the act treated those across the borders as foreigners, containing no preferences whatsoever in the field of citizenship, alien control.[79] Whereas it was the task of Standing Hungarian Conference to elaborate the "specific public law status", and on the occasion of the accession we had to review our citizenship and visa control policy as well[80] in order to counterbalance the partial integration of the nation and transform the nation of fractions into a contractual nation at last.[81]

All in all, only few MPs have a clear understanding of the difference between minority protection, migrants' rights, the right to asylum to be granted to persecuted persons and citizenship. They look upon citizenship primarily as a bondage that may be inherited to an unlimited extent, that may be granted, which is of national, ethnic, language, cultural nature - i.e. a symbolic attachment. At the same time, it is a mixed picture since there were MPs - true, representing a minority amongst those making interventions - who considered citizenship as the vehicle of concrete rights and obligations, who laid naturalisation on objective facts of the law, who proposed a meaningful regulation in the face of the lack of the unlimited inheritability of citizenship, i.e. effective contacts, moreover, who urged the reconsideration of the legal consequences of double citizenship. It seems that the question posed in the title can be answered, on the basis of the votes and the regulation, as follows: mass, ex lege naturalisation has no chance, independently of the party combinations in power, while the debates throw light upon a diversity of opinions which do not necessarily follow attachment to a given party.

We may also come to the conclusion that in the use of words in Parliament aliens represent a source of danger of investors, speculative guys, colonisers from the point of view of alien policing, while foreigners - if they are ethnic Hungarians - are not looked upon as aliens, moreover, as members of the nation, they are considered as kin-fellows, mainly symbolically, and, as a result of their minority attach-

[78] ON, Address of MP József Torgyán in the debate on the principles of regulation of the Constitution (May 23, 1996.)

[79] Judit Tóth: Státusmagyarság /Status Hungarians/. Mozgó Világ /Moving World/, 2001/4:12-19

[80] Judit Tóth: Connections of Kin-minorities to the Kin-state in the Extended Schengen Zone. European Journal of Migration and Law, 5:201-227, 2003, Kluwer Law International

[81] Report on the execution of the political tasks relating to the Hungarians beyond the borders, with special regard to the recommendations of Standing Hungarian Conference. Debate on the resolution of Parliament (ON, March 8, 2000.)

ment, they may expect to enjoy the rights of guests (for a short period of time) if they are refugees. That is supported by the low level of appearance of EU citizenship in the debates, although in the past ten years a significant part of the work related to legislation was made up by the preparation for the accession, the harmonisation of laws. Did they fail to notice that we were jointly facing the experience of double "citizenship" (citizenship of a Member State being the precondition of EU citizenship)? This legal institution was born in Maastricht in order to strengthen European identity, political attachment, and came to be filled with legal elements only gradually. The Treaty of Amsterdam and the European Constitution also qualified it as being of supplementary nature, not intending to eliminate national citizenship, merely desiring to extend it with specific rights, the rights to take possession of the Community space. That legal fact failed to mould domestic thinking, and it is no wonder that it did not find its way into the fundamental act even once as a result of the waves of amendment of the Constitution.[82] We were content with the application of the expression of "citizen of any Member State of the European Union" in all the domestic legal regulations, and the MPs do not speak about EU citizenship, instead they only speak about obstacles in travelling, separating walls brought about by the enlargement of the Union.

The ambivalence and uncertainty in Parliament related to the characteristics of citizenship are simultaneously reflected in the Parliamentary Resolution 119 of 1996, 21 December, which points out that "The Constitution regulates citizenship, the ways of the acquiring and the termination of citizenship in accordance with the Constitution. Citizenship is acquired by birth by the individual, one of whose parents is a Hungarian citizen, or who is born on the territory of Hungary and whose parents are stateless or unknown. When acquiring citizenship by way of naturalisation, more favourable conditions are to be granted to those applicants who are of Hungarian origin."

That dichotomy partly explains why the cause of Hungarian citizenship (symbolic or real) could get as far as the referendum in December 2004. However, granting citizenship cannot be decided upon with the instruments of direct democracy, such an approach goes hand in hand with legal and political uncertainty[83] both within and outside the borders. It is an example of internal uncertainty and ambivalence that the government entrusted a politician with the preparation of the amendment for preferential naturalisation and immigration within the comprehensive concept of national responsibility, while the Ministry of Justice was given the task to elaborate the provi-

[82] Judit Tóth: Státusjogok /Status Rights/. Kisebbségkutatás Könyvek /Minority Research Books/. Lucidus, Budapest, 2004.

[83] Judit Tóth: Kettős Állampolgárságol népszavazással? /Double Citizenship by Referendum?/ Fundamentum, 2004:2., 80-87.

sions related to kin-minority bondage, visa and specific passport "by eliminating the unnecessary discomfort or humiliating situations for the ethnic Hungarians outside the borders of the country", in view of international and EC law.[84]

Rule of law versus democracy?

The second resolution of the Constitutional Court rejected the complaint submitted on account of the resolution of Parliament regarding the referendum.[85] According to the members of the Constitutional Court, since in the meantime the amendments of the Act on the Procedure of the General Elections came into being, there are no legal obstacles to the Hungarian citizens staying abroad exercising their suffrage and the question posed meets the legal requirements. Different arguments were put forward by judge Mihály Bihari, László Kiss, while judge István Kukorelli, and András Holló joining him, worded a counter-opinion. On the one hand, they objected to the Constitutional Court's taking sides from occasion to occasion, and it was strongly attached to the elements of the complaint submitted, whereas the investigation of the Constitutional Court is not some kind of a judicial forum in which the applicant's request plays the role of orientation. On this occasion, too, judge Kukorelli consistently opposed the earlier decision of the Constitutional Court since it had qualified the question relating to the referendum as constitutional, whereas in that form it should not be permitted to be the subject of the referendum. Why? Because the regulation proposed in the referendum would not respect the prohibition of discrimination as defined in the European Convention of 1997, as well as of preferences granted on an ethnic basis, in the acquiring of citizenship. On the other hand, the existence of a genuine relationship between the citizen and the state is not proven by the declaration on ethnic attachment. Belonging to the nation and belonging to the state are not identical, furthermore he points to the inconsistencies of the decision of the Constitutional Court regarding the other questions of the referendum.

The situation which results in the clash of direct democracy and the rule of law, legal security by ordering a referendum, is not unique. For instance, the Swiss Supreme Court had to face a similar question[86].The complainant commenced a lawsuit because his application for preferential naturalisation had been rejected at a local referendum. The inclusion of the local parliament in the procedure of naturali-

[84] Avarkeszi a kormánymegbízott - Nem kell törvényt módosítani a kedvezményes honosításhoz? /Avarkeszi is Government Commissioner - Is it not Necessary to Amend the Law for Preferential Naturalisation?/ Népszabadság, January 13, 2005.

[85] Resolution of the Constitutional Court 109 of 2004, 27 October

[86] Felix Uhlmann. Switzerland: Naturalization process presents conflict between democracy and the rule of law. International Journal of Constitutional Law, Oxford University Press, 2004: 4, 716-722.

sation is an old-established solution in Switzerland, a state famous for its referenda. The foreigner had a Swiss spouse, so he applied for preferential naturalisation (that is possible in Hungarian law too, following three years of marriage). In many settlements naturalisation is a mere formality of administration but in a few local governments the custom of the local body of representatives or the local citizens voting as a first step about supporting the naturalisation of the applicant, has been preserved. In Emmen 23 applications had to be decided upon and on March 12, 2000. The Italian applicants were accepted in the voting but the applications of those coming from former Yugoslavia, of the Turks, as well as of a Polish, a Dutch and a Hungarian family were rejected. The appeal to the cantonian authorities was unsuccessful, if vain did they state that the rejection had been made on a purely ethnic basis and there had been formal errors in the referendum. In another case, the Swiss People's Party appealed to the Supreme Court to change the decision of the parliament of the city of Zürich. With a two-third majority of the votes, it annulled the initiative of the Party to hold a referendum about deciding on the applications of citizenship. The Party argued that the local parliament had violated the exercising of political rights since deciding upon naturalisation with a referendum is completely lawful. In both cases[9] the Supreme Court decided to the benefit of the persons applying for naturalisation, i.e. overrode the will of the local citizens of Emmen and maintained the annulment of the initiative of the People's Party. In accordance with the standpoint of the Court, the main question was that the referendum (or other manifestations of direct democracy) failed to be associated with any argumentation that could be legally justified. The argumentation of the voters was completely artificial, built upon journalistic terms, Party opinions and the presumptions of the public instead of legal arguments, following the completion of the referenda. At the same time, they did not have a close relationship with the obligation to explain of the authorities making decisions, so the other side also failed to come up with reasonable justifications in order to ensure an argumentation and reliability in harmony with legal security. In accordance with the stance of the body, naturalisation is a state (public administration) action which concerns the legal standing of the individual and it cannot be squeezed into any framework related to politics or elections since it is an action of the application of the law, consequently it is obligated to meet the requirements of the rule of law. And that requirement cannot be emptied and filled in completely with the free discretion of the authorities, an arbitrary action of the state. Although no-one has a subjective right to Swiss citizenship, in its judgement the prohibition of discrimination and arbitrary procedure is to be adhered to. The local voting citizens are also subject to the Swiss Constitution and the applicable law so their authorisation does not allow them a completely sovereign decision

[9] BGE 129/217, BGE 129/232.

making. Since the local bodies failed to meet their obligation to explain their decisions with well-founded, justifiable reasons when legal remedies were sought for, the Supreme Court came to the conclusion that naturalisation by referendum was unconstitutional. Thus the fundamental right of the rule of law to remedies and a fair procedure (included amongst the procedural guarantees of the European Convention on Nationality, i.e. an international obligation undertaken) clashed with the character of direct democracy necessarily limited to yes-or-no, without any explanation or justification. Naturally, in our case the ethnic Hungarians beyond the borders do not appeal as concrete complainants to the legal thinking of the Hungarian voting citizens but a decision had to be made about changing the rules. Still it is edifying that the rule of law may be eroded even by direct democracy, though, perhaps, unintentionally.

Conclusions

The referendum in 2004 serving the emphasis of the symbolic character of citizenship concretely transforms the territorial principle of citizenship into an ethnic one, with a reference to a decision about granting citizenship to be made by the people. That entails legal and political uncertainty but within, and outside, the borders. There is need for a strong middle class to establish a picture of the future, a strategy for the Hungarians beyond the borders but today the level of desires and dreams encompasses survival only, and there is no real strategic thinking.[88] Under such circumstances the leaders of the public life of the kin-state have a far greater responsibility since "the three levels of the picture of the future and the impoverishment of the Hungarians living in rural areas simultaneously carry the potentials of the entrapment of minority society and of provoking hysteria amongst its members with symbolic means. Who would not want Hungarian citizenship? Who would not desire autonomy? Who would not like to get rid of the burden of learning and using the majority language and habitual world? It is the great responsibility of the political class in Hungary to determine what it wishes to do with that system of desires. For with that, it is not only possible to get hold of sympathisers, voters by way of resettlement, as well as counter-votes by evoking fears from migration, but also to perpetrate the instability of Hungarian minority societies by way of debates within minority public life."[89]

[88] Hungary and the Hungarian Minorities (Trends in the Past and Our Time) Edited by László Szarka. Atlantic Studies on Society in Change No.122, 2004 Columbia University Press

[89] Nándor Bárdi: Tény és való - A budapesti kormányzatok és a határon túli magyarság kapcsolattörténete /Facts and Reality - The System of Relationships between the Kin-state and Kin-minority beyond the Borders/. Kalligram, Bratislava, 2004. 257.