CONSTITUTIONAL COURT
1/2013. (I. 7.) AB on the unconstitutionality of certain provisions of Act on Election Procedure

On the basis of a motion submitted by the President of the Republic aimed at the preliminary review of an Act of Parliament adopted but not yet promulgated, regarding the compatibility of the Act with the Fundamental Law, the Constitutional Court – with concurring reasoning by dr. Péter Kovács, Judge of the Constitutional Court, and dissenting opinions by dr. István Balsai, dr. Egon Dienes-Oehm, dr. Barnabás Lenkovics, dr. Béla Pokol and dr. Mária Szívós, Judges of the Constitutional Court – has adopted the following

decision:

1. The Constitutional Court holds that Section 82 para. (2), Section 88 para. (1), Section 92 and Section 106 of the Act adopted by the Parliament on the session of 26 November 2012 on the Election Procedure are contrary to the Fundamental Law.

2. The Constitutional Court holds that Section 151 of the Act adopted by the Parliament on the session of 26 November 2012 on the Election Procedure is contrary to the Fundamental Law.

3. The Constitutional Court holds that Section 152 para. (5) of the Act adopted by the Parliament on the session of 26 November 2012 on the Election Procedure is contrary to the Fundamental Law.

4. The Constitutional Court holds that Section 154 para. (1) of the Act adopted by the Parliament on the session of 26 November 2012 on the Election Procedure is contrary to the Fundamental Law.

5. The Constitutional Court holds that Section 353 para. (4) of the Act adopted by the Parliament on the session of 26 November 2012 on the Election Procedure is contrary to the Fundamental Law.

The Constitutional Court publishes this decision in the Hungarian Official Gazette.

Reasoning

I

The Parliament adopted the Act on the Election Procedure (hereinafter: "Act") at its session of 26 November 2012 on the basis of the draft Act No. T/8405.

On 1 December 2012, the Speaker of the Parliament sent the Act to the President of the Republic for signing and ordering its promulgation. The President of the Republic turned – within the time specified for this purpose – to the Constitutional Court on the basis of Article 6 para. (4) of the Fundamental Law. Based on Section 23 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), he initiated the preliminary review of Section 88, Section 92, Section 151, Section 152 para. (5), Section 154 para. (1) and Section 353 para. (4) of the Act not yet promulgated, with regard to their compatibility with the Fundamental Law. The President of the Republic expressly requested to extend the Constitutional Court's review of the provisions' compatibility with the Fundamental Law – on the basis of Article 52 para. (3) of ACC – to other provisions as well, the content of which is closely connected to the provisions concerned. The President of the Republic also asked the Constitutional Court to establish, on the basis of Article 46 para. (3), with regard to the Act, the constitutional requirements that enforce the provisions of the Fundamental Law.

First the President of the Republic challenged two provisions of the Act, in the field of the central register of names. In connection with Section 88 of the Act, he held it as a disproportionate restriction of the right guaranteed in Article XXIII of the Fundamental Law, that constituents having an address in Hungary are bound to their address in the respect of tallying in the register of names. In the opinion of the President of the Republic, narrowing down the possibility of voluntary registration is unjustified in view of the Fundamental Law and it is in particular disadvantageous for some groups of voters (e.g. commuters or citizens who take a temporary job abroad, but who have a registered place of residence in Hungary). As far as Section 92 of the Act is concerned, the petitioner held it as an unjustified discrimination contrary to Article XV para. (2) of the Fundamental Law that in comparison with the citizens living in Hungary, the constituents living in Hungary without an address may not request registration personally, but they have the option to register in mail, which is not allowed for the former ones. Based on all the above, the President of the Republic requested the establishment of Sections 88 and 92 of the Act as being contrary to the Fundamental Law, and with regard to these provisions, he expressly asked the Constitutional Court to perform the review by taking account of Section 52 para. (3) of ACC.

The President of the Republic also initiated the preliminary review of some provisions related to the election campaign, concerning their compatibility with the Fundamental Law. The President of the Republic holds that Section 151 and Section 152 para. (5) of the Act are contrary to the freedom of expression and the freedom of the press guaranteed in Article IX of the Fundamental Law. In his opinion, Section 151 of the Act, allowing the dissemination of political advertisements only for public service media providers, and Section 151 para. (3), prohibiting the dissemination of a political advertisement even by public service media providers in the 48 hours preceding the voting, are restrictions contrary to the Fundamental Law. Similarly, he holds that Section 152 para. (5) of the Act, prohibiting the cinemas to show political advertisements in the whole campaign period is contrary to the Fundamental Law. In addition, he claims that Section 154 para. (1) of the Act, prohibiting the publication of the results of opinion polls connected to the elections on the last six days of the campaign period – including the day of the voting until the closing of ballots are violating the freedom of press and the freedom of expression. Concerning the last claim, the President of the Republic made a reference to Decision 6/2007. (II. 27.) AB of the Constitutional Court, to support his arguments.

Finally, the President of the Republic also initiated the preliminary review of Section 353 para. (4) of the Act, concerning its compatibility with the Fundamental Law. In this context, he referred to Article 23 paras (3)–(5) of the transitional provisions of the Fundamental Law of Hungary (31 December 2011) (hereinafter: TPFL) that are applicable without any temporal limitation and without any further transitional regulations. However, Section 353 para. (4) of the Act does not allow the application of the system created by TPFL in the period preceding the first general elections following the taking force of the Act. Thus, in the opinion of the President of the Republic, there is a contradiction between TPFL and Section 353 para. (4) of the Act, and therefore the latter is contrary to Article B) para. (1) of the Fundamental Law.

The President of the Republic sent to the Constitutional Court – annexed to his petition aimed at the preliminary constitutional review – the comments that had been attached to the Act and sent to the President of the Republic by the Democratic Coalition, the parties "Jobbik" and "Lehet Más a Politika" and by the Hungarian Socialist Party.

II

In the respect of the motion submitted by the President of the Republic, the Constitutional Court took note of the following provisions:

1. The provisions of the Fundamental Law:

"Article B)

(1) Hungary shall be an independent, democratic State under the rule of law."

“Article I

(1) The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.

(2) Hungary shall recognise the fundamental individual and collective rights of Man.

(3) The rules relating to fundamental rights and obligations shall be laid down in Acts. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.

“Article IX

(1) Everyone shall have the right to freely express their opinion.

(2) Hungary shall recognise and protect the freedom and pluralism of the press, and ensure the conditions for freedom of information necessary for the formation of democratic public opinion.

(3) The detailed rules relating to the freedom of the press and to the organ supervising media services, press products and the info-communications market shall be laid down in a cardinal Act.”

“Article XV

(1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee the fundamental rights to everyone without any discrimination, in particular on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.”

“Article XXIII

(1) Every adult Hungarian citizen shall have the right to vote and to stand as a candidate in elections of Members of Parliament, local government representatives and mayors, and of Members of the European Parliament.

(2) Every adult citizen of another Member State of the European Union who is a resident of Hungary shall have the right to vote and to stand as a candidate in elections of local government representatives and mayors, and of Members of the European Parliament.

(3) Every adult person recognized as a refugee, immigrant or resident in Hungary shall have the right to vote in elections of local government representatives and mayors.

(4) A cardinal Act may subject the right to vote or its completeness to residence in Hungary, and it may prescribe additional criteria for eligibility to stand as a candidate in elections.

(5) In elections of local government representatives and mayors voters may vote in the locality of their residence or their registered place of stay. Voters may exercise their right to vote in the locality of their residence or their registered place of stay.

(6) Those disenfranchised by a court for a criminal offence or for limited mental capacity shall not have the right to vote and to stand as a candidate in elections. Citizens of other Member States of the European Union who are residing in the territory of Hungary shall not have the right to stand as a candidate in elections if – pursuant to a legal regulation, judicial or other official decision of their State of citizenship – they have been excluded from the exercise of this right in their country.

(7) Everyone who has the right to vote in elections of Members of Parliament shall have the right to participate in national referenda. Everyone who has the right to vote in elections of local government representatives and mayors shall have the right to participate in local referenda.

(8) Every Hungarian citizen shall have the right to hold public office according their suitability, qualifications and professional competence. Public offices that shall not be held by members or officers of political parties shall be specified in an Act.”

2. The provisions of the Act are as follows:

“Section 82 para. (1) The central registry of names is an electronic registry maintained by the National Election Office.

(2) The central registry of names shall contain the data of the citizens who have the right to vote and of the citizens who do not have the right to vote due to the lack of adult age, but who are older than the age of 17 (in this chapter hereinafter together: “constituent”), recorded in the central registry of names upon their request.”

“Section 88 para. (1) Constituents having an address in Hungary may request the recording in the registry of names at the notary competent in accordance with the constituent’s address, or, in the case under Section 89 para. (2), with their place of residence

a) personally,

b) through the electronic gateway.

(2) Constituents living abroad and not having an address in Hungary may request the recording in the registry of names at the National Election Office

a) by mail,

b) through the electronic gateway.”

“Section 92 The provisions on constituents living abroad and not having an address in Hungary shall be applicable to the request for recording, and the recording, in the registry of names in the case of constituents living in Hungary, but not having an address here.”

“Section 106 para. (1) At the elections, the registry of names in the voting circles shall contain the names of the constituents who are recorded in the central registry of names on the basis of their request submitted not later that on the fifteenth day preceding the day of the voting.

(2) At the elections set on a day following the 1 January of the year of the elections under Section 85 para. (1), the registry of names in the voting circles shall contain the names of the constituents who are recorded in the new central registry of names on the basis of their request submitted not later that on the fifteenth day preceding the day of the voting.”

“Section 151 para. (1) In the campaign period, political advertisement can only be disseminated in the public service media, on the same conditions for the nominating organisations setting a national list in the election of the members of the Parliament, and the nominating organisations setting a list in the election of the members of the European Parliament. It is prohibited to attach any opinion or an evaluating comment to political advertisements.

(2) The public service media provider may not ask and may not accept any consideration for disseminating a political advertisement.

(3) In 48 hours before the election, political advertisements cannot be disseminated by the public service media.

(4) After registering all the lists under para. (1), the public service media providers shall disseminate the political advertisements of the nominating organisations in the length and the occasions specified by the National Election Committee. The broadcasting time available for the above purpose – the maximum duration of which shall be 600 minutes, or 300 minutes in the case of the election of the members of the European Parliament – shall be distributed evenly between the media providers and between the nominating organisations. If the national list was set up by two or more parties according to Section 8 para. (2) of the Act CCIII of 2011 on the election of the members of the Parliament or Section 5 para. (1) of the Act CXIII of 2003 on the election of the members of the European Parliament, the above obligation of dissemination shall only be applicable with regard to the joint party-list and not for the separate parties.

(5) The ordering party of a political advertisement to be aired in the audiovisual media service shall provide for subtitling the advertisement or supplying it with sign language interpretation.

(6) The provisions of the Act on the media activities shall otherwise be applicable to the dissemination of political advertisements.

(7) With the exception of the media service specified in para. (1), it shall be prohibited in the campaign period to diseminate any political advertisement or political announcement in any other media service, the internet websites, and teletext services of the providers.

"Section 152 para. (5) It shall be prohibited to show political advertisements in the campaign period in the cinemas."

"Section 154 para. (1) The publication of the results of opinion polls connected to the elections are prohibited on the last six days of the campaign period – including the day of the voting until the closing of ballots."

"Section 353 para. (4) The provisions of Chapter IV of the Act C of 1997 on the election procedure shall be applicable on the implementation of the recording in the registry of names under Section 23 para. (3) of the transitional provisions of the Fundamental Law, in any election preceding the first general election of the members of the Parliament after this Act has taken force."

III.

The petition is well-founded.

The President of the Republic challenged in his petition certain provisions of the Act, regarding the recording in the central registry of names, and he also requested – on the basis of Article 52 para. (3) of ACC – the review of the regulations closely connected to the provisions concerned, with regard to their compatibility with the Fundamental Law. First of all, the President of the Republic initiated the review of the restriction of the right to vote guaranteed in Article XXIII of the Fundamental Law. With reference to the criteria of the constitutionality of restricting the fundamental right, the President of the Republic stated that he had not examined the necessity of restricting the right to vote as the foundations of the restriction can be found in TPFL [Article 23 paras (3)–(5)]. This is why the petition only raised the question of the proportionality of the restriction in the context of the detailed regulations challenged.

The Constitutional Court annulled, in the Decision 45/2012. (XII. 29.) AB adopted after the filing of the petition, – with a retroactive effect as from 9 November 2012 – Article 23 paras (3)–(5) of TPFL, referred to in the petition. In the present procedure it was not necessary to request the President of the Republic to amend his petition for the following reasons. According to Section 53 para. (6) of ACC, the President of the Republic may not withdraw the petition aimed at the preliminary review of compatibility with the Fundamental Law (thus he may not even narrow down the scope of the request). On the basis of Section 52 para. (3), the Constitutional Court shall review *ex officio* – and not only upon the motion of the President of the Republic – other provisions of the legal regulation substantially and closely connected to the provisions specified in the petition, and indeed, the Constitutional Court is obliged to do so for the purpose of protecting the Fundamental Law with due regard to the principle of legal certainty. On the other hand, had the Constitutional Court requested the President of the Republic for the amendment of the petition, it would not have been able to comply with the rule found in Article 6 para. (6) of the Fundamental Law requiring the Constitutional Court to judge out of order, in not more than 30 days, upon a petition on the preliminary review on the compatibility with the Fundamental Law.

According to Article I para. (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the

extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right. Although the petition of the President of the Republic was expressly aimed only at the review of the proportionality of restricting the right to vote – due to narrowing down in an unjustified way the possibility of voluntary registration –, the Constitutional Court held that it was unavoidable to review the compatibility of the regulation with Article XXIII of the Fundamental Law, including its necessity. On the one hand, reviewing the justification of registration upon request is a preliminary question of examining whether it was justified to narrow down by way of specific regulations the possibility of registration upon request; and on the other hand, reviewing the proportionality of restricting a right has to be performed if the restriction of the right has a constitutional purpose (necessity), based on the results of this test.

With regard to the above, the main question examined by the Constitutional Court on the basis of the petition was requiring the registration in a central registry of names established by the Act as a precondition of exercising one's right to vote, and, as a related issue, the necessity of requesting the registration in the registry of names.

1. According to Section 82 para. (1) of the Act, the central registry of names is an electronic registry maintained by the National Election Office. The Act regulates the central registry of names as the fundament of exercising the right to vote. In line with Annex 2 item *g)* of the Act, the central registry of names contains "the specification in which election and in which constituency has the constituent the right to vote, and in which election can they be elected". Also the register of names in the voting circles shall be prepared on the basis of the constituents' data found in the central registry of names, as regulated in Section 105 of the Act.

According to Section 82 para. (2) of the Act, the central registry of names shall contain the data of the citizens who have the right to vote and of the citizens who do not have the right to vote due to the lack of adult age, but who are older than the age of 17, recorded in the central registry of names upon their request. Section 88 of the Act regulates that registration in the central registry of names can be requested, submitting such a request is not obligatory, and the Act does not provide any sanction on failing to do so.

2. The scope of the persons having the right to vote, referred to in Section 82 para. (2) of the Act, is specified in the Fundamental Law itself, in Article XXIII paras (1)–(3), as follows:

According to Article XXIII para. (1) of the Fundamental Law, every adult Hungarian citizen shall have the right to vote and to stand as a candidate in elections of Members of Parliament, local government representatives and mayors, and of Members of the European Parliament.

In addition to that, on the basis of Article XXIII para. (2) of the Fundamental Law, every adult citizen of another Member State of the European Union who is a resident of Hungary shall have the right to vote and to stand as a candidate in elections of local government representatives and mayors, and of Members of the European Parliament.

And finally, under Article XXIII para. (3) of the Fundamental Law, every adult person recognized as a refugee, immigrant or resident in Hungary shall have the right to vote in elections of local government representatives and mayors.

Accordingly, the Fundamental Law grants the right to vote as a fundamental right of all adult citizens of Hungary. The Fundamental Law also grants the right to vote to every adult citizen of another Member State of the European Union who is a resident of Hungary in elections of local government representatives and mayors, and of Members of the European Parliament. Finally, according to the Fundamental Law, every adult person recognized as a refugee, immigrant or resident in Hungary shall have the right to vote in elections of local government representatives and mayors.

In contrast with the above provisions of the Fundamental Law, there are several provisions in the Act requiring the request of registration in the central registry of names as a precondition of exercising one's right to vote. Thus the Act is setting an extra statutory condition for exercising the right to vote granted as a fundamental right in Article XXIII of the Fundamental Law.

3. In reviewing the compatibility of the Act with the Fundamental Law, the Constitutional Court took due account of the foreign examples related to registrations with the active contribution of the constituents. In this context, prior to the review of the provisions on the merits, the Constitutional Court held it important to lay down the following.

3.1. According to Article 24 para. (1) of the Fundamental Law, the Constitutional Court is the principal organ for the protection of the Fundamental Law; in most of its scopes of competences the Constitutional Court would review the compatibility with the Fundamental Law [Article 24 para. (2) items a)–e)].

3.2. According to Article Q) para. (3) of the Fundamental Law, Hungary shall accept the generally recognised rules of international law. The first part of Article 7 para. (1) of the previous Constitution contained a rule with the same essential content, and the Constitutional Court attributed special importance to it, with consequences on the interpretation of the law as well:

"The first sentence of Article 7 para. (1) of the Constitution, according to which the legal system of the Republic of Hungary accepts the generally recognized rules of international law, states that the generally recognized rules are part of Hungarian law, even without separate (further) measure of transformation. An act of general transformation – one without a definition or enumeration of those rules – was performed by the Constitution itself. According to it, the generally recognized rules of international law are not part of the Constitution but they are assumed obligations. The fact that the assumption and transformation is contained in the Constitution does not affect the hierarchical relationship of the Constitution, international and domestic law. […] Article 7 para. (1) of the Constitution also means that by the Constitution's order, the Republic of Hungary participates in the community of nations; this participation, therefore, is a constitutional command for domestic law. It follows therefrom that the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect". [Decision 23/1993 (X. 13.) AB, ABH 1993, 323, 327]

3.3. According to Article Q) para. (2) of the Fundamental Law, in order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law. This provision, similarly to the regulation found in the previous Constitution, "in order to comply with its obligations under international law" grants that Hungarian law be in conformity with international law.

As already established by the Constitutional Court on the basis of the previous Constitution: »The second sentence of Article 7 para. (1) – the harmonization of the assumed international obligations and domestic law – applies to every "assumed" international obligation, including the generally recognized rules. In addition, the harmony must be achieved for the whole of the domestic law, the Constitution included. Thus, Article 7 para. (1) of the Constitution requires the harmony of the Constitution, the obligations derived from international law – assumed directly under the Constitution or undertaken in treaties – as well as domestic law; in ensuring their harmonization attention must be paid to their particular characteristics.« [Decision 53/1993 (X. 13.) AB, ABH 1993, 323, 327]

The Constitutional Court's competence of examining the collision of legal norms with international treaties specified in Article 24 para. (2) item *f)* of the Fundamental Law serves the purpose of enforcing this provision (it may annul the legal norm or the provision colliding with an international treaty).

3.4. In the course of its practice, the Constitutional Court has performed international legal comparison several times, i.e. it examined the regulations in force in the European or other countries in the fields concerned [c.p. Decision 13/2000. (V. 12.) AB on the symbols of the State, Decision 57/2001. (XII. 5.) AB on the right of reply, Decision 22/2003. (IV. 28.) AB on euthanasia, Decision 50/2003. (XI. 5.) AB on investigative committees, Decision 6/2007. (II. 27.) AB on the questions

related to the prohibition of the publication of opinion poll results, Decision 20/2007. (III. 29.) AB on the radio and TV broadcasting of the sessions of the Parliament, Decision 53/2009. (V. 6.) AB on domestic violence and restraining order]. In the comparisons, the Constitutional Court has usually reviewed the justification of introducing the specific legal institutions, seeking the common elements and the contrasts; it has often concluded that the regulations concerning the same content are very diverse, not only with respect to the overseas countries and the European States, but also within Europe.

The constitutionality of a specific legal institution in another country depends on the constitution of the given state, the fitting into the legal system, and on the historical and political background. Therefore, the Constitutional Court – though acknowledging that taking into account foreign experiences may help to evaluate certain regulatory solutions – does not consider the example of any foreign country in itself as a determining factor with regard to the review of constitutionality (compliance with the Fundamental Law).

In one of its early decisions, the Constitutional Court established the following: "the position formed in the petitions, stating that the applied solution is unique in the international practice, does not refer to the international (inter-state) practice, but to the foreign practice, and as such it is irrelevant in the context of Article 7 para. (1) of the Constitution [,] so the unconstitutionality cannot be established on this basis either". [Decision 32/1991 (VI. 6.) AB, ABH 1992, 146, 159] Taking the above aspects into account, one may also establish that: the mere fact that a legal institution or a regulatory solution exists in one or more foreign countries (even in democratic European ones) does not have a decisive force with regard to establishing its compliance with the Fundamental Law, thus it cannot be the sufficient justification of restricting a right granted in the Fundamental Law.

With due account to the above, the Constitutional Court judged upon the compliance of the challenged regulation with the Fundamental Law on the basis of the provisions of the Fundamental Law, the Constitutional Court's established practice with regard to these, in line with the petition, by taking into account the obligations of Hungary under the international law.

3.5. According to Article 3 of the Amending Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: "European Convention on Human Rights"), with regard to the right to free elections "the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

3.5.1. The consulting body of the Council of Europe in the field of constitutional law, the Venice Commission (full name: European Commission for Democracy through Law) issued a document under the title *Code of Good Practice in Electoral Matters* [Opinion no. 190/2002, Strasbourg, 23 May 2003, CDL-AD(2002)23rev] summarising the principles of the European election systems, and forming related guidelines and recommendations.

According to this document, in practice, electoral registers are often discovered to be inaccurate, which leads to disputes. Lack of experience on the part of the authorities, population shifts and the fact that few citizens bother to check the electoral registers when they are presented for inspection make it difficult to compile these registers. Regarding the criteria of reliable registers, the Commission lists – among others – that there must be permanent electoral registers, and that the registers must be updated regularly. According to the document, there must be regular updates, at least once a year, so that local authorities get into the habit of performing the various tasks involved in updating at the same time every year; it is also recommended that where registration of voters is not automatic, a fairly long time period must be allowed for such registration. Thus the Commission, along with acknowledging the *ex officio* registration, does not exclude the possibility of the institution of registration upon request, but it does not set further detailed criteria regarding the regulatory environment and the circumstances in which the application of the latter solution can be justified or held acceptable.

3.5.2. According to the electronic search engine (HUDOC) of the judicial practice of the European Court of Human Rights (hereinafter: "Court"), 82 cases out of the 15 thousand judgements on the merit were connected to Article 3 of the Amending Protocol to the European Convention on Human Rights. Some of the complaints were related to active suffrage, but most of them concerned exercising the passive right to vote. In assessing the complaints, the European Court of Human Rights (hereinafter: "Court") used a well-elaborated set of criteria, applied in almost all the election cases in the past years.

3.5.3. The Court has dealt in several judgements with the obligation of the State to guarantee the conditions for exercising the right to vote, and in this context it established that:

„They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary. [see: *Mathieu-Mohin and Clerfayt*, ca., 52. §, *Gitonas and others v. Greece*, 1 July 1997, 39. §, (...) *Yumak and Sadak v. Turkey*, 8 July 2008, (...) 109. §]" (*Orujov v. Azerbaijan*, 26 July 2011, 41.§, Appl. no. 4508/06)

The Court also pointed out the State's obligation to protect the institution: »It should be noted as well that the primary obligation in the field of Protocol 1 Article 3 is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections. (*Mathieu Mohin and Clerfayt*, ca., 50. §) In this respect the Court also takes account of the fact that the "active" aspect of the right to vote, i.e. the right granted in Protocol 1 Article 3 is not a kind of privilege. In the 21st century, in a democratic State, the presumption should support to extend this right to the widest scope possible. [*Hirst* (no. 2), ca., 59. §]« (*Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012, 67. §, Appl. no. 42202/07)

"Accordingly, the exclusion from the right to vote of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see *Ždanoka*, ca., 105. §). The Court held that a minimum age or the criteria of residence as connected to the right to vote are in principle compatible with Protocol 1 Article 3. [see *Hirst* (no. 2), ca., 62. §; *Hilbe v. Liechtenstein* (…)] It has acknowledged that any general, automatic and indiscriminate departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates [see *Hirst* (no. 2), loc. cit.]" (*Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012, 68. §, Appl. no. 42202/07)

The Court established as a requirement concerning the election regulations created by the state: „Any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure." [*Hirst v. United Kingdom* (No. 2.), 6 October 2005, 62. §, Appl. no. 74025/01]

3.5.4. With regard to the question of the registration of voters, also examined in the present case, the guiding judgement of the Court is the judgement of 8 October 2008 in the case of the *Georgian Labour Party v. Georgia* (*Georgian Labour Party v. Georgia*, 8 October 2008, Appl. no. 9103/04). As the background of the case, the Court has taken into account that on the parliamentary elections held on 2 November 2003, Georgia did not have a single central electoral register, and the registers used in the specific constituencies contained significant errors and anomalies (*Georgian Labour Party v. Georgia*, 8 October 2008, 49. §, Appl. no. 9103/04). This offered a chance for several election frauds that finally led to a revolution in the country after the elections. The Supreme Court of Georgia partly annulled the result of the elections of 2 November 2003 because of the frauds, therefore the parliamentary elections had to be repeated, and it was finally held on 28 March 2004. The judgement of the Court – basically – reviewed the registration system formed for the purpose of the repeated elections.

The Court had to answer the question, among others, whether – taking into account all circumstances of the case – the active system of electoral registration applied in Georgia was compatible with Protocol 1 Article 3 of the European Convention on Human Rights. In this respect the Court recalled that features that would be unacceptable in the context of one system may be justified in the context of another (*Georgian Labour Party v. Georgia*, 8 October 2008, 89. §, Appl. no. 9103/04). The Court also established that it would indeed be preferable to maintain the stability of electoral law, and the Fundamental electoral rules, such as those concerning voter registration, should not normally be amended too often and especially on the eve of an election, otherwise the State risks undermining respect for and confidence in the existence of the guarantees of a free election (*Georgian Labour Party v. Georgia*, 8 October 2008, 88. §, Appl. no. 9103/04).

The Court did not establish any breach of rights in the case concerned (*Georgian Labour Party v. Georgia*, 8 October 2008, 92. §, Appl. no. 9103/04), which is justified with the particular circumstances of the case, as according to the judgement, all electoral regulations should be basically seen in the light of the political development of the country concerned. The Court evaluated as such a particular feature that one of the main reasons for the failure of the previous parliamentary election was the absence of accurate electoral rolls (*Georgian Labour Party v. Georgia*, 8 October 2008, 85. §, Appl. no. 9103/04). The Court also noted that earlier there was no central electoral register, and the available local lists were inaccurate (*Georgian Labour Party v. Georgia*, 8 October 2008, 85. §, Appl. no. 9103/04). The Court acknowledged that the active registration system improved the previous situation and it eliminated many errors (*Georgian Labour Party v. Georgia*, 8 October 2008, 86. §, Appl. no. 9103/04). The Court also acknowledged that the regulation allowed voters to register even on election day (*Georgian Labour Party v. Georgia*, 8 October 2008, 86. §, Appl. no. 9103/04). It was also important that the Georgian authorities implemented the recommendations of international organisations (*Georgian Labour Party v. Georgia*, 8 October 2008, 87. §, Appl. no. 9103/04). The Court noted that it would have been an excessive and impracticable burden to expect from the authorities an ideal solution to the problem given the time constraints (actually four months) (*Georgian Labour Party v. Georgia*, 8 October 2008, 87. §, Appl. no. 9103/04).

Based on the above, one may conclude that in general, in accordance with the Amending Protocol 1 Article 3 of the European Convention on Human Rights, linking the exercising of the right to vote to an active registration would restrict the right to free elections. Such a restriction can only be justified for the purpose of reaching a legitimate aim. Only a justification of due weight can legitimize the restriction. If there is a functioning and operational electoral register – taking into account that general suffrage is not a privilege any more, and it should be granted to the widest possible scope of electors –, there is no legitimate justification of due weight for the introduction of an active registration.

The Constitutional Court considered all the above factors when it examined the question whether the legal institution of the request of registration in the electoral register, as regulated in the Act, restricts the right to vote in compliance with the Fundamental Law. Nevertheless, the Constitutional Court judged upon this issue within the scope of the petition aimed at the preliminary review of compatibility with the Fundamental Law.

4. The Constitutional Court examined the right to vote in several earlier decisions.

The Constitutional Court established in its Decision 22/2012. (VI. 11.) AB how it can apply in the new cases the arguments connected to the questions of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law was put into force. According to the decision, the Constitutional Court's statements made on the fundamental values, human rights and freedoms and on the constitutional institutions that have not been changed fundamentally by the Fundamental Law, remain valid. As established in the decision, when the contents of the provisions of the previous Constitution and of the Fundamental Law are the same, the reasoning is required for not taking into account the legal principles presented in the former decisions of the Constitutional Court, and not in the case of applying them.

The right to vote was enshrined as a fundamental right also in Article 70 of the previous Constitution, similarly acknowledging the right to vote of those who have suffrage under Article XXIII of the Fundamental Law. The contents of Article 70 of the Constitution was similar to that of the Fundamental Law also with regard to restricting the right to vote; neither did the Constitution contain any requirement about linking the right to vote to submitting a request for registration in the central electoral register. At the same time, with respect to Hungarian citizens, the Fundamental Law does not prescribe Hungarian domicile as a precondition of the right to vote, thus granting the right to vote to a group of Hungarian citizens who did not have suffrage before. It does not change, however, the feature that with regard to the vast majority of constituents, concerning the questions of constitutional law to be judged upon herein, the contents of the regulations on the right to vote is the same both in Article XXIII of the Fundamental Law and in Article 70 of the Constitution, therefore the Constitutional Court's interpretation of the law as contained in its previous decisions is to be followed in the course of reviewing the present case, too.

5.1. The Constitutional Court first examined the contents of the right to vote as expressed in the Fundamental Law.

According to Article B) para. (1) of the Fundamental Law, Hungary shall be an independent, democratic State under the rule of law. As stated in Article B par. (3), the source of public power shall be the people, who shall exercise their power through their representatives elected according to paragraph (4), or – exceptionally – in a direct way. Based on the principle of popular sovereignty, after the adoption of the constitution, the people can enforce their right to exercise public authority within the limits of the constitution. According to the Fundamental Law, people are not only the source of public power, but after constituting it, people take part in exercising public power on the basis of Article B) para. (4). The Constitutional Court established that voting citizens can only have an influence on the composition of the supreme body of State power and popular representation by exercising their active voting rights every four years. Therefore, "any restriction on the equality or generality of this right can only be accepted as constitutional on the basis of a significant reason of principle." [Decision 6/1991. (II. 28.) AB, ABH 1991, 19, 20.]

The right to vote is guaranteed in Article XXIII of the Fundamental Law. The election rules that can be found here are the concrete forms of realising the principle of popular sovereignty and the requirement of democracy. Consequently restricting the indirect exercising of the power by the people, i.e. the right to vote, at the same time means a restriction upon the principles of democracy and popular sovereignty granted in Article B). "A stable, lawful and predictably operating election system is an indispensable precondition of a political system based on the principle of democracy." Articulating the electors' will through elections "constitutes, legalizes and legitimizes" the representative bodies exercising public power." [Decision 39/2002. (IX. 25.) AB, ABH 2002, 273, 279]

As stressed by the Constitutional Court in its established practice, "the right to vote is a fundamental right that is aimed at ensuring the participation of citizens in the exercise of State power and the enforcement of which requires the State to secure the conditions of its exercise; the manner, rules and guarantees of its exercise are to be determined in a legal regulation, more specifically in an Act of Parliament in line with Article 8 para. (2) of the Constitution." [Decision 63/B/1995 AB, ABH 1996, 509, 516] Consequently, the right to vote is a fundamental right that can only be enforced through the State's contribution manifested in the relevant regulation, i.e. the conditions of exercising it shall be granted by the State. In this respect the right to vote is a fundamental right having a twofold function; on the side of the electors it embodies participation in public affairs and the indirect form of making decisions under public authority, and on the other hand it is used as a tool of establishing and legitimizing the representative body.

The subjective side of the right to vote is suffrage, as the political fundamental right of the citizen. Suffrage is a fundamental right acknowledged in the Fundamental Law, guaranteeing the enforcement of the principle of popular sovereignty. The subjective side of suffrage basically contains the freedom

of the electors to decide whether they exercise their right to vote or not, and on whom they cast their votes.

The State must be active in granting the exercising of the right to vote. The right to vote has a side of institutional protection where the State must create and enforce the regulations allowing and facilitating the exercising the right to vote. It follows form the State's obligation of protecting the institution that it may not hinder the exercising of the right to vote, in a manner restricting participation at the elections contrary to the Fundamental Law. Thus the enforceability of the right to vote as a subjective right depends on the precondition of the State guaranteeing its exercise and providing adequate guarantees to it.

Within the limits of the subjective side of the right to vote and the State's obligation of institutional protection to guarantee it, the Constitutional Court elaborated the following practice about the concrete regulation of the election system. According to Decision 63/B/1995. AB of the Constitutional Court, "the Parliament has a wide scale of discretion in establishing the system of election and the rules of procedure of the election. The legislator is free to define the constituency systems and the rules pertaining to the nomination of candidates, voting and the obtainment of mandates. The Parliament may exercise this freedom of discretion in establishing the rules of election only within the constitutional limits, and it is required to adopt rules that do not violate the provisions of the Constitution and do not unconstitutionally restrict any fundamental right regulated in the Constitution." (ABH 1996, 509, 513)

Based on the above, it follows from the practice of the Constitutional Court that the right to vote plays an important role in enforcing an effectively functioning democracy. General and equal suffrage must be fully secured in order to guarantee the unquestionable legitimacy of the elected (legislative) power and the decisions (Acts) adopted by it. Although the State enjoys a wide scale of discretion regarding the adoption of concrete regulations, the conditions of exercising the right to vote may not hinder the free expression of the people's will, and they may not hamper the freedom of determination manifested in the right to vote. A single election rule or a specific legal institution of election law can rarely be regarded as one restricting the freedom of elections. The totality of the election rules should meet the requirement of facilitating – above all – the free expression of the electors' opinion.

5.2. The Constitutional Court then continued with overviewing the conditions and the requirements of restricting the right to vote.

Along with guaranteeing the right to vote, the Fundamental Law itself contains a narrow scope of exclusion criteria. According to Article XXIII para. (6), those disenfranchised by a court for a criminal offence or for limited mental capacity shall not have the right to vote and stand as a candidate in elections. Moreover, citizens of other Member States of the European Union who are residing in the territory of Hungary shall not have the right to stand as a candidate in elections if – pursuant to a rule of law, judicial or other official decision of their State of citizenship – they have been excluded from the exercise of this right in their country. Under Article XXIII para. (4) of the Fundamental Law, a cardinal Act may subject the right to vote or its completeness to residence in Hungary, and it may prescribe additional criteria for eligibility to stand as a candidate in elections. The Fundamental Law allows for the exclusion of the right to vote only in the above cases. There are no other provisions in the Fundamental Law on otherwise limiting the exercise of the right to vote, for example by requesting the registration in the central registry of names.

In the Constitutional Court's practice, the rules on exclusion from the right to vote must be based on the suffrage clause of the Constitution. Just as in the case of Article 70 of the former Constitution, the text of Article XXIII of the Fundamental Law supports the interpretation that the scope of the conditions on the right to vote specified here form a closed system. Accordingly, exclusion from the right to vote would only be possible in the cases expressly mentioned in Article XXIII. The Constitutional Court followed this principle when it established the unconstitutionality of any legislative provision, other than Article 70, setting a cause of exclusion from the passive right to be elected. In the Decision 16/1994 (III. 25.) AB, the Constitutional Court expressly declared that "it does

not see a constitutional possibility for setting by the Act a cause of exclusion from the passive right to be elected, other than the relevant provisions of the Constitution". At the same time, it established that the extra cause of exclusion contained in the Act, in addition to the conditions necessary for the right to vote, would raise a new condition for the passive right to vote in a constitutionally not justifiable manner. (ABH 1994, 79, 82) This position of the Constitutional Court was reinforced in its Decision 339/B/1994 AB (ABH 1994, 707, 710).

The text of paragraph (4) also reinforces the closed nature of the causes of exclusion under Article XXIII of the Fundamental Law, requiring a Hungarian domicile for full active right to vote. Enumerating the exclusion from the right to vote among the provisions of the Fundamental Law guarantees that such a limitation of the right to vote can only take place in the possession of the power to adopt or amend the Fundamental Law, by way of consensus, included among the rules on election law.

Therefore, in the opinion of the Constitutional Court, the constitutional requirement about the closedness of the causes of exclusion from the right to vote is to be followed both on the basis of the Fundamental Law and on the former practice of the Constitutional Court. At the same time, the Constitutional Court points out that the concrete method and the detailed regulations on exercising the right to vote are to be regulated in an Act of Parliament, on the basis of Article XXIII of the Fundamental Law and Article I para. (3) to be followed about restricting the fundamental right.

6.1. As recalled by the Constitutional Court in the Decision 63/B/1995. AB, the Parliament shall secure the participation in exercising State power, and accordingly it shall elaborate the order and the guarantees of exercising the right to vote. The provisions on the restriction of fundamental rights shall also be applicable to such (e.g. administrative) rules, containing conditions not affecting the essence of the right to vote. In line with the foregoing, Decision 16/1994. (III. 25.) AB states that "the essential content (…) of the active and passive right to vote may not be restricted in an Act of Parliament." (ABH 1994, 79, 81) It means that an Act of Parliament can set conditions upon, or restrict, the exercising of the right to vote, in compliance with the constitutional regulations on restricting fundamental rights. For example, the Constitutional Court judged upon the necessity and the proportionality of such a condition of procedural nature in the case about certificates issued in between the two election rounds [Decision 298/B/1994. AB, ABH 1994, 696, 699].

Thus, according to Article I para. (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right. Therefore the Constitutional Court continued the review on the basis of the petition by examining whether the Act would restrict the right to vote under Article XXIII in a manner contrary to Article I para. (3) of the Fundamental Law, when it requires a request for registration in the central registry of names as a condition of exercising the right to vote.

The Act rules on the central registry of names – and the request for registration therein – in the framework of regulating the election procedure, and it specifies the filing of such a request as a precondition, in the absence of which the right to vote may not be exercised. This way, on the basis of the Act, the request for registration in the central registry of names is considered as a restriction on exercising a fundamental right that can be done in accordance with Article I para. (3) of the Fundamental Law. Consequently, the Constitutional Court had to examine if there is a fundamental right or constitutional value the protection of which makes it absolutely necessary to file a request – as regulated in the Act – for registration in the central registry of names.

6.2. The Act introduces an active method of election registration, making the exercising one's right to vote conditional upon filing a request for registration in the electoral register, such request to be submitted personally at the notary, by mail in a specific scope, or through the electronic gateway. However, in the case of Hungarian citizens having a domicile in Hungary – as explained below – there is no constitutionally justifiable reason for excluding from the exercising of the right to vote those who

have not asked for registration in the electoral register. One may establish, also from the text of the Act itself, that even without individual requests, the State can obtain the data necessary for compiling the central register of names about the Hungarian citizens having a domicile in Hungary.

According to Section 90 para. (1) of the Act, the request for registration in the central registry of names shall basically contain the elector's name, their mother's name and their personal identifier. These are all personal data that can be found in the registry of the citizens' data and address, under Section 11 para. (1) of the Act LXVI of 1992 on the registration of the personal data and the address of citizens (hereinafter: APD).

The central registry of names is established on the basis of the request filed with the content specified in Section 90 para. (1) of the Act, and it would finally form the basis for setting up, by the National Election Office, the register of names in the voting circles, and this way for exercising the right to vote. According to Section 105 and Annex 3 of the Act, the register of names in the voting circles would indeed include not only the electors' data contained in the central registry of names, but also other personal data (e.g. address) that can only be accessed by the National Election Office from the registry containing the citizens' personal data and address. Thus, in the course of compiling the register of names in the voting circles, the National Election Office has to use – with regard to the electors contained in the registry – the registry containing the citizens' personal data and address that also contains – with regard to a significant share of the electors – the data included in the request for registration in the central registry of names, on the basis of Section 11 para. (1) of APD, as explained above. Taking into account the fact that the registry, containing the citizens' personal data and address, has to be used in the course of compiling the register of names in the voting circles necessary for exercising the right to vote, and – with regard to the vast majority of electors – the central registry of names specified in the Act only contains data that can also be obtained from the first registry, the request for registration in the central registry of names cannot be regarded as an absolutely necessary restriction with regard to all electors.

The Act itself considers the registries on the disposal of the State as tools that allow the smooth and transparent implementation of the elections. According to Article 91 para. (1) of the Act, the data of the request for registration in the electoral register have to be set against the data found in the registry, containing the citizens' personal data and address, or – in the case of applicants having no personal identifier – the data in the document certifying their Hungarian citizenship. In line with Section 126 para. (1) of the Act, the candidate can be proposed by an elector who has the right to vote at the elections in the constituency, without regard to being registered or not in the central registry of names. This argument is supported by the provision found in Section 130 item *b)* of the Act, specifying that the recommendation is valid if the data of the recommending elector shown on the recommending sheet are completely identical with the data contained in the registry, containing the citizens' personal data and address. Obviously, according to the regulation, there must be a registry of electors, not based upon individual requests. In addition to the central registry of names, based on registration upon request, another register is made on the electros entitled to be registered in the central registry of names (to be used among others in the course of setting up the voting circles, according to Sections 77 and 80 of the Act), in order to enable the National Election Office to inform the entitled persons on the conditions of exercising their rights and on the method of registration (Section 86 of the Act).

In the course of the constitutional review, a question emerged about the potential need for requiring the request for registration as a condition of exercising the right to vote for the purpose of facilitating the equality of the right to vote – although it is not referred to in the reasoning of the Act. It follows from the Constitutional Court's Decision 22/2005. (VI. 17.) AB on the constitutional review of the old election law and its implementing regulation, that the determination of the territory of individual constituencies and the number of electors in the specific constituencies is related to the enforcement of the right to vote, in particular with the principle of equal right to vote. The distribution of individual constituencies among the counties and the description of the areas of the specific constituencies have a fundamental effect on the weight of the votes for individual candidates. The Constitutional Court established as a constitutional requirement that in the individual constituencies the numbers of persons

with a right to vote must be as close to one another as possible, and that differences are only allowed on the basis of due constitutional grounds (ABH 2005, 246, 254). In the present case, facilitating the equality of the weight of the votes that could be cast on individual candidates is raised in the context of voting by Hungarian citizens who have their domicile in Hungary according to the registry of personal data and addresses, but reside abroad in the long run because of employment or studies. The electors belonging to this group – with due account to the fact that with regard to many of them the Hungarian authorities are not informed about their residing abroad – are to be counted into the individual constituency where their Hungarian address is, in view of the proportionate establishment of individual constituencies (Section 4 of the Act on the elections); at the same time, one can't exclude the possibility that their rate of participation at the election will be significantly lower than that of the electors who are in Hungary on the voting day – although the Act offers them the possibility to vote on the embassies or by mail. It may result – in particular when the number of affected electors is hundreds of thousands on national scale – in significant deviations in the specific constituencies between the number of potential electors and of those who would most probably exercise their right, that might lead to bigger inequalities regarding the actual weight of the votes cast on the individual candidates by the electors living in different individual constituencies. In this respect, the Constitutional Court points out the following: on the one hand, according to the Act on the elections, the proportionality of individual constituencies has to be made on the basis of the number of persons with a right to vote on the election day of the *previous* general election of the members of the Parliament, and not in view of the persons inscribed for the given elections [Section 4 para. (8)]. On the other hand, it would not be possible to lawfully determine the proportionality of the constituencies on the basis of the number of persons inscribed for the actual elections since: the Act on the elections establishes that the borders of the constituencies are not allowed to be changed between the first day of the year preceding the general election of the members of the Parliament and the day of the election of the general election of the members of the Parliament, accordingly, in the case of the actual elections, the period for changing the borders of the constituencies would already be closed by the time of commencing the registration period according to the Act. Based on the foregoing, the Constitutional Court established that requiring a request for registration as a condition of exercising the right to vote according to the Act, did not serve the purpose of facilitating the actual equality of the right to vote – either with regard to its aim or its results – thus it may not be used as a constitutional ground for the restriction under review.

On the basis of the freedom of the right to vote, the Constitutional Court established that Section 82 para. (3) of the Act was contrary to Article XXIII of the Fundamental Law. According to this regulation, the central registry of names, designed to guarantee the exercising of the right to vote, does not contain the data of all the electors whose right to vote could be established from the registry, but only of those who were registered in the central registry of names upon their request. The Constitutional Court also established that the Act restricted the right to vote under Article XXIII in a manner contrary to Article I para. (3) of the Fundamental Law, when it required a request for registration in the central registry of names as a condition of exercising the right to vote, although filing this request is not absolutely necessary in the case of all electors for the purpose of exercising their right to vote. In view of the above, the Constitutional Court established that Section 106 paras (1) and (2) of the Act are contrary to the Fundamental Law.

In the course of adopting this decision, the Constitutional Court took into account the regulations, on the procedural conditions of exercising the right to vote, developed – in compliance both with the previous Constitution and the Fundamental Law – (and being still in force) in the period before the planned date of the Act taking force. Ever since the free parliamentary elections in 1990 the electors living in Hungary have had the possibility of exercising their right to vote without an obligation of registration. This manner of exercising the right to vote has become a constant element of the election procedure. If – in Hungary in the past – there had been no registry of personal data and addresses similar to the present one, and therefore the exercising of the right to vote could only have been possible on the basis of advance voluntary registration, then the constitutionality of the regulations found in the Act could be evaluated differently even in the case of the subsequent introduction of the

registry of personal data and addresses (i.e. the consequent elimination of the need for registration). However, it is not possible to decrease without justification the partial rights developed in the area of exercising the right to vote, and they could only be restricted in compliance with the Fundamental Law, in line with Article I para. (3). On the basis of the Fundamental Law, the State's intention to facilitate the responsible and conscious behaviour of the citizens cannot, in itself, be a legitimate justification of due weight for the restriction of rights, therefore it may not serve as a ground for restricting the right to vote.

In accordance with the above, the Constitutional Court established that Section 82 para. (2) and Section 106 of the Act were contrary to the Fundamental Law, as these provisions render in general the exercising of the right to vote conditional upon the registration in the electoral register on the basis of one's request. In the course of eliminating the regulations found to be contrary to the Fundamental Law, it shall be the duty of the legislation, resulting from the Constitutional Court's decision, to eliminate all further provisions of the Act that make – in a constitutionally not justifiable manner – the exercising of the right to vote, similarly to Section 82 para. (2) and Section 106, conditional upon registration in the electoral register on the basis of one's request.

7. In the above, the Constitutional Court established that requiring registration in the central registry of names as a condition of exercising one's right to vote was contrary to the Fundamental Law. However, the constitutional review was not extended to setting up the central registry of names by the Act and the possibility of registration therein. This way, the Constitutional Court's decision does not affect the institution of the central registry of names; in fact, it makes the following comments about it:

While, according to the Constitution the Hungarian citizens having a *domicile* in Hungary had the right to vote, Article XXIII of the Fundamental Law does not specify the domicile as a general condition of the right to vote in the case of Hungarian citizens (it is a requirement only in the case of the adult citizens of other Member States of the European Union), making it possible for a cardinal Act to require domicile in Hungary as condition of the right to vote or of the completeness of the right to vote. This way, in principle, the Fundamental Law widens the personal scope of those having the right to vote; it opens up this political fundamental right for the group of citizens who had not taken part in constituting the bodies of representation in the past. The election regulations found in Section 12 of the Act CCIII of 2011 on the election of the members of the Parliament (hereinafter: AEP), taking effect on 1 January 2012, differentiate between the electors who have domicile in Hungary and the ones who don't, but the latter ones also have a right to vote limited to voting on party lists (but not on a candidate in an individual constituency). According to the election procedure in force, the head of the local election office shall compile the registry of the citizens having the right to vote on the basis of the data of the persons having a registered address in the registry of personal data and addresses (and the registry of adult citizens not having a right to vote) [Section 12, Section 149 item *q)*]. Consequently, the changes affecting the scope of the persons having a right to vote justify the amendment of the rules on the electoral register, as the register currently maintained *ex officio* on the basis of the registry of names and addresses would not contain all groups of the electors.

For a specific part of the electors, the possibility of filing a request for registration in the central registry of names (Section 87 of the Act) would indeed enable them to exercise, or facilitate, their right to vote, i.e. it is a precondition of exercising the right to vote. The possibility of filing a request for registration in the central registry of names, as an element of the new election procedure rules, enable adult Hungarian citizens not having a domicile in Hungary (e.g. those who live abroad, or who live in a rented apartment without registration, etc.) to exercise their right to vote granted in Article XXIII para. (1) of the Fundamental Law. Similarly, registration can enable the national minorities living in Hungary to exercise their right granted in Article XXIX para. (2) of the Fundamental Law, and to set up a minority representation in the Parliament in the manner specified in AEP. In certain cases – within the framework of the Act – a relevant special request can grant the actual exercising of the right to vote for those who wish to file a request for voting assistance.

8. The Constitutional Court also recalls that although the central registry of names basically contains the data found in the requests of the requesting electors, but the data of central registry of names are to be updated on a continuous basis, according to Section 84 para. (1) of the Act, independently from the requests. According to the above provision, data of central registry of names are to be updated to follow the changes occurred in the citizens' personal data and addresses, in the registry of citizens without a right to vote, and in the registers of the voting circles and the constituencies. This way the registry of names in the voting circle necessary for exercising the right to vote shall be based not only on the register compiled from the accumulated data of the electors' requests, but on a registry updated obligatorily by the National Election Office in accordance with Section 84 para. (1) of the Act.

In his petition, the President of the Republic quoted the report No. AJB-267/2012 by the Commissioner for Fundamental Rights, establishing, among others, that "the register of addresses is practically unsuitable for providing true information on the citizens' domicile and place of residence". The Commissioner for Fundamental Rights established this in connection with the fact that "on 4 March 2011 the registry contained 19763 citizens as persons without a registered domicile, only having a place of residence. At the same time, the citizens hold 32677 valid address certificates without any specified address. The report of the Commissioner for Fundamental Rights highlighted that this situation developed as a result of an unlawful practice. In order to remedy the explored mistreatments affecting fundamental rights, the Commissioner for Fundamental Rights requested the minister for public administration and justice to review the system of regulating the registration of addresses and to take measures for a comprehensive amendment of it. As the central electoral register is predominantly based on this registry, in accordance with the above, remedying the problem explored by the Commissioner for Fundamental Rights falls into the scope of the State's obligations of protecting the institutions connected to the right to vote. The mere introduction of the request for registration in the central registry of names could not remedy the given problem, as, according to Section 94 of the Act, this request does not contain the address, therefore the address – more specifically, in line with Annex 2 item *c)* of the Act, the domicile or the place of residence – is entered into the central register from the above mentioned registries and not from the request.

The Constitutional Court has already established above that the State has to grant to all persons, having a right to vote, the enforcement of the freedom of determination manifested in the right to vote, as a part of the State's obligation of institutional protection. The aim of the registry containing the citizens' personal data and addresses – with regard to the provisions reviewed by the Constitutional Court – is basically nothing else, but enabling or facilitating the exercising of the right to vote. Consequently, the solid operation of the registry containing the citizens' personal data and addresses serves the exercising of the right granted in Article XXIII of the Fundamental Law, and not the other way round. Therefore, endeavouring to the improvement of the registry may not be a legitimate justification for restricting the right to vote, as – in line with the foregoing – the sound operation of the registry itself is a precondition of exercising the right to vote. [This is to be secured among others by Section 26 para. (1) of APD, requiring that "citizens who live in the territory of Hungary and fall under the scope of this Act shall report the address of their domicile or place of residence at the notary of the municipal local government, in three working days upon moving in or out". As stated in Section 26 para. (2) of APD: "The citizen specified in para. (1) shall report the fact of leaving the territory of Hungary with the intention of settling down abroad, or residing abroad for more than three months, at the competent notary of the municipal local government where the citizen is domiciled or at the consular officer."]

Taking into account the fact that exercising the right to vote is based on the central registry of names updated obligatorily, the National Election Office would act by restricting the right to vote guaranteed in Article XXIII of the Fundamental Law, as a fundamental right, if, in the course of updating the register it would leave out from the register the data of those persons, having the right to vote, who can be found in the registry containing the citizens personal data and addresses, but missed the opportunity of requesting registration in the register. Therefore the Constitutional Court exercised its right under Section 46 para. (3) of ACC, according to which "in its proceedings conducted in the exercise of its

competences, may establish in its decision those constitutional requirements which originate from the regulation of the Fundamental Law and which enforce the constitutional requirements of the Fundamental Law with which the application of the examined legal regulation or the legal regulation applicable in court proceedings must comply". The Constitutional Court established the following: it is a constitutional requirement following from Article XXIII of the Fundamental Law that the rules of the election procedure should facilitate the exercising of the right to vote. As a related constitutional requirement, the necessary data of all persons, having a right to vote according to the registry maintained by the State, shall be entered into the central registry of names, thus granting the equal exercising of the right to vote for all persons having suffrage.

9. Consequently the Constitutional Court established that provisions of the Act that require in general a request for registration in the central registry of names as a condition of exercising the right to vote are contrary to the Fundamental Law. Therefore the Constitutional Court continued with reviewing Sections 88 and 92 of the Act on the basis of the petition, by taking into account the foregoing.

9.1. In connection with Section 88 of the Act, the President of the Republic held it as a disproportionate restriction of the right guaranteed in Article XXIII of the Fundamental Law, that constituents having an address in Hungary are bound to their address in the respect of tallying in the register of names. In the opinion of the President of the Republic, the concerned manner of narrowing down the possibility of voluntary registration is unjustified in view of the Fundamental Law and it is in particular disadvantageous for some groups of voters (e.g. commuters or citizens who take a temporary job abroad, but who have a registered place of residence in Hungary).

Consequently the Constitutional Court established that it is contrary to the Fundamental Law that the Act requires in general a request for registration in the central registry of names, as a condition of exercising the right to vote. Thus in the case of electors having a Hungarian address, filing the request according to their addresses is not any more a general precondition of exercising the right to vote. At the same time, there will remain a specific scope of persons with regard to whom it will be necessary, for exercising the right to vote, to request registration in the registry of names [e.g. according to Section 94 para. (1) items *a)–b)* of the Act, on the basis of belonging to an ethnic minority, or in the case of filing a request for voting assistance]. The Constitutional Court, therefore, examined in line with the petition whether, in the case of electors having a Hungarian address, the submission of the request according to the address would result in an unnecessary or disproportionate restriction of the fundamental right enshrined in Article XXIII of the Fundamental Law.

With regard to the electors requesting registration in line with Section 94 para. (1) items *a)–b)* of the Act, there is a legitimate justification for the legislator to require the filing of a request due to the special need. [As specifically pointed out by the Constitutional Court in the Decision 168/B/2006. AB, "persons belonging to an ethnic minority can freely decide on their own if they wish to take part on the given elections of (…) minority representatives, but if they do so, they have to make a declaration about belonging to a given minority, as without making this – in the lack of an authentic register – they can't be entered in the register of minority electors." (ABH 2007, 1955, 1966)]

Nevertheless, Section 88 para. (1) of the Act is considered as a disproportionate restriction of the right granted in Article XXIII of the Fundamental Law, as it requires the submission of the request at the notary competent according to the address of the elector. As it has been explained above, Article XXIII of the Fundamental Law does not specify domicile as a general condition of the right to vote in the case of Hungarian citizens. Under Article XXIII para. (4) of the Fundamental Law, a cardinal Act may subject the right to vote or its completeness to residence in Hungary. However, the term residence used in Article XXIII para. (4) of the Fundamental Law, is a wider concept than the term address used by the Act. According to Section 3 item 5 of the Act, a Hungarian address is: "the address of the registered domicile; in the case of a person having a registered domicile neither in Hungary, nor abroad, it is the address of the registered place of residence in Hungary". Thus, according to the Act, electors having both a registered domicile and a registered place of residence can only file the request

at the notary competent in accordance with the domicile that can be a disproportionate burden for them as a precondition of exercising their right to vote. In view of the above, the Constitutional Court established that Section 88 para. (1) of the Act is contrary to the Fundamental Law.

9.2. As far as Section 92 of the Act is concerned, the President of the Republic held it as an unjustified discrimination contrary to Article XV para. (2) of the Fundamental Law that in comparison with the citizens living in Hungary, the constituents living in Hungary without an address may not request registration personally, but they have the option to register in mail, which is not allowed for the former ones. As the Constitutional Court established that it was contrary to the Fundamental Law that the Act required in general a request for registration in the central registry of names, as a condition of exercising the right to vote, the examined manner of filing the request can obviously be regarded as discriminative concerning the exercising of the right to vote, if the given elector would not be entered automatically into the central registry of names without a request, on the basis of the registry containing the personal data and addresses of the citizens. In this case, the different regulations on securing the request for registration in the central registry of names for the electors living in Hungary without an address and the electors having a Hungarian address should be examined as a discrimination affecting the right to vote as a fundamental right.

As explained by the Constitutional Court in the Decision 42/2012. (VI. 20.) AB:

"Article XV of the Fundamental Law contains both the general rule of equality [paragraph (1)], as well as the equality of fundamental rights and the prohibition of discrimination [paragraph (2)]. The Constitution did not expressly contain a general rule of equality; this rule, which is indispensable in constitutional democracies, was, in the Constitutional Court's practice, deducted from the joint interpretation of Article 70/A para. (1) of the Constitution and Article 54 para. (1) of the Constitution. [Decision 21/1990. (X. 4.) AB, ABH 1990, 73.] The Constitutional Court argued that the right to human dignity enshrined in Article 54 para. (1) of the Constitution – as one of the most fundamental ones of the fundamental rights under Article 70/A para. (1) – includes necessarily the requirement of equal treatment with regard to all norms of the legal system.

The contents of Article XV para. (2) of the Fundamental Law is the same as that of Article 70/A para. (1) of the Constitution; the Fundamental Law also contains Article II the content of which is the same as that of Article 54 para. (1) of the Constitution with respect to human dignity. Connecting the two can still be accepted, since the requirement of general equality follows from the human dignity entitling all humans; however, connecting them is not necessary in every case as the Fundamental Law has a separate rule granting equality before the law. Nevertheless, the essential content of equality before the law has not been changed: it is the equal dignity of all humans – in accordance with the established practice of the Constitutional Court. The human dignity clause of the Fundamental Law excludes any different interpretation of equality before the law, and the specification of the contents of equality remained in the clause.

Consequently, on the basis of the Fundamental Law, the link between human dignity (Article II of the Fundamental Law) and equality (Article XV of the Fundamental Law) has been kept, despite of the fact that the general equality rule missing from the Constitution, and elaborated in the Constitutional Court's practice referred to above, can now be found as stated expressly in Article XV para. (1) of the Fundamental Law.

Thus the general equality rule can be based on Article VX para. (1) of the Fundamental Law. This is a dogmatic simplification, while a necessary link is maintained – as explained above – between equal dignity (Articles I and II of the Fundamental Law) and equality before the law, as the final fundament of equality is equal human dignity.

Therefore in the dogmatics of the application of the general equality rule – e.g. in the examination of forming groups – there is no need for changes, as explained above, and the Constitutional Court's established practice is to be followed in the future, too. {Reasoning [22]–[26]}

In accordance with the Constitutional Court's established practice on equality, when different rules apply to a specific homogeneous group within a given regulatory scheme, this will be in conflict with

the prohibition of discrimination, unless there is a reasonable constitutional justification of sufficient weight for the differentiation, i.e. it is not arbitrary [e.g. Decision 21/1990. (X. 4.) AB, ABH 1990, 73.]. However, according to the Constitutional Court's established practice, a negative discrimination contrary to Article 70/A of the Constitution cannot be established when the legal regulation provides different rules on subjects having different characteristics, as the unconstitutional discrimination is only possible in a comparable personal scope – with members belonging to the same group. "There is a negative discrimination when – with regard to an essential element of the regulation – the treatment of the subjects differs concerning the determination of their rights and obligations. No negative discrimination can be verified if the legal regulation contains different provisions on a different subjective scope of persons." [Decision 8/2000. (III. 31.) AB, ABH 2000, 56, 59]

In the present case the Constitutional Court established that there is no justification to exclude, by the Act, the possibility of personal registration by electors living in Hungary without an address, as compared with electors having a Hungarian address. Section 91 para. (2) of the Act itself contains a possibility that offers a basis for personal registration even if someone's personal identity can be verified beyond doubt, but other data found in their request are uncertain. Taking this into account, it is an unjustified restriction not to grant the possibility of personal registration, similarly to Section 91 para. (2) of the Act, for the electors living in Hungary and not having an address. Accordingly the Constitutional Court established that Section 92 of the Act contains a negative discrimination by excluding the possibility of personally requesting the registration in the central registry of names for the electors living in Hungary and not having an address, as they belong to a comparable scope of persons. In this respect, Section 92 para. (3) of the Act is contrary to Article XV para. (2) of the Fundamental Law in the context of Article XXIII. At the same time, the Constitutional Court established that no negative discrimination can be established on the basis of Article XV para. (2) of the Fundamental Law due to providing the possibility of registration in mail by Section 92 of the Act, with regard to the affected persons, i.e. the electors living in Hungary without having an address.

10. The Constitutional Court adopted the present decision with due account to the European Convention on Human Rights and the connected judicial practice. At he same time, however, the Constitutional Court did not consider it necessary to perform an examination of collision with an international treaty, as in the present case it could adopt a plain decision on the basis of the Fundamental Law.

IV

The President of the Republic considered that certain provisions of the Act regulating the participation of mass media in the election campaign were contrary to the Fundamental Law. According to the petition, Section 151 of the Act regulating the dissemination of political advertisements in the media services and Section 152 para. (5) of the Act prohibiting the showing of political advertisements in the cinemas are contrary to Article IX of the Fundamental Law guaranteeing the freedom of expression and the freedom of the press.

1. The Constitutional Court first examined the complaints related to Section 151 of the Act. According to Section 151 para. (1) of the Act, in the campaign period, political advertisements can only be disseminated in the public service media. The provision prohibits this type of political communication in any other media service – including non-public televisions and radios – that would result in eliminating the possibility of political advertising in the very forms of media that reach the widest scope of layers in the society. Therefore the prohibition is a significant restriction of expressing political opinion in the course of the election campaign. The Constitutional Court has already pointed out in the course of examining the rules on political advertising in the media regulations previously in force, that "the media has a particularly important role in influencing the opinion of the public, and it is of prominent importance that in the period of election campaigns the right to the freedom of expression

and the right to have information on data of public interest should be enforced in the framework of broadcasting." [Decision 60/2003. (XI. 26.) AB, ABH 2003, 620, 621] In the present case as well, the Constitutional Court reviewed the constitutionality of the restriction by taking into account the above aspects.

1.1. According to the Act CLXXXV of 2010 on media services and mass communication, a political advertisement is any programme promoting or advocating support for a party, political movement, or the Government, or promoting the name, objectives, activities, slogan, or emblem of such entities. Most typically, political advertising predominantly affects the expression of opinion by the parties and organisations nominating candidates to run on the elections. The freedom of expression by political parties has a particular weight in this scope due to the fact that it is the constitutional duty of the parties to contribute to forming and manifesting the people's will. The Constitutional Court explained when it interpreted the similar provision of the former Constitution that "the parties' role played in forming the people's will includes the communication and the promotion of this activity by way of public advertisements." [Decision 44/2008. (IV. 17.) AB, ABH 2008, 459, 463] At the same time, the Constitutional Court underlined that restricting the publication of political advertisements affects the freedom of expression not only of the parties but of all persons and organisations. The discussions about public affairs take place not only with the participation of the parties, as Article IX of the Fundamental Law guarantees for everyone the right of the free expression of one's political opinion that can also be manifested in making public political advertisements. Additionally, the relevant provision of the Act also affects the freedom of non-public media services by way of introducing a new restriction on editing media content in the field of political communications. Finally, the Constitutional Court notes that the question of publishing political advertisements is connected to the fundamental right of the freedom of information, and in particular to the electors' right to be informed. Although the political advertisements' primary aim is to influence the electors' will, they also play a role in informing the constituents about the candidates' names, aims, activities, slogans and emblems. Accordingly, Section 151 of the Act affects comprehensively the freedom of expression and the freedom of the press granted in Article IX of the Fundamental Law.

1.2. The Constitutional Court then examined whether the restriction of political advertising published in media services has been restricted for the purpose of allowing the exercise of another fundamental right or protecting a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued. The Constitutional Court has already explained in its decisions interpreting the freedom of the press that – with regard to the predominant social effect and manipulating power of the media services – special obligations can be imposed on the functioning of media services. [see summarised in: Decision 165/2011. (XII. 20.) AB, ABH 2011, 478, 505–509] Regarding the election campaign, the Constitutional Court has acknowledged in its established practice specific reasons that may (also) restrict the functioning of the media.

Examining the rules on election silence, it pointed out in the Decision 39/2002. (IX. 25.) AB that restricting the campaign activity actually serves the purpose of the free articulation of the voters' will and this way the establishment of the representative body on the basis of free will, necessitated by the right to vote as a fundamental right and the requirement of the rule of law. (ABH 2002, 273, 279) However, in the present case, the Constitutional Court took due account of the fact that the Act had eliminated the institution of election silence and campaign activities can also be performed on the voting day. It follows, among others, from Section 147 of the Act, regulating that election campaign activities can also be performed on the voting day, and the prohibition only applies to the public grounds located in an area within 150 meters from the entrance of the voting premises. According to Section 148 paras (1) and (2) of the Act, posters and flyers can be prepared and put out all through the campaign period including the voting day. In line with Section 153 of the Act, a direct political campaign can be performed even on the voting day. Section 149 para. (1) of the Act allows the holding of election gatherings all through the campaign period, with the exception of the election day. The

Constitutional Court established on the basis of the above that the Act generally allows the performing of campaign activities without a temporal restriction, and the only restrictions found in the Act pertain to the voting day itself.

As recalled by the Constitutional Court, the predominant influencing power of the media services may justify imposing by the legislation certain extra obligations – with due respect to the equal opportunities of the running political parties – even if the campaign activities are not restricted in general. However, with regard to the aim of allowing the free formation and the expression of the voters' will, it is gravely disproportionate to ban political advertisements on the wide scale as specified in Section 151 para. (1) of the Act, especially when the legislator has significantly eliminated the restrictions applicable to the campaign activities. With regard to the diverse relations between political advertisements, the freedom of expression and the freedom of the press, such advertisements cannot be constitutionally prohibited, as found in the Act under review, even outside the scope of the public service media.

As pointed out by the Constitutional Court in another of its earlier decisions, "in the interest of providing balanced information, the legislator may – within the limits of the Constitution – set restrictions and conditions on disseminating political advertisements". [Decision 27/2008. AB, ABH 2008, 289, 295] However the Constitutional Court established that Section 151 para. (1) of the Act does not serve the purpose of providing balanced information, indeed its result is to the contrary. The provision prohibits the publication of political advertisements that not only influence the voters' will, but also inform them, with regard to the media type that can reach the widest scope of electors.

Taking account of the content of the petition the Constitutional Court also established that decreasing the costs of the campaign may not serve as a justification for the regulation under review. On the one hand, this limitation in itself is not directly related to the costs of the campaign, in particular as the Act does not regulate the cost-decreasing application of other tools of the campaign. On the other hand, even if it would have been the aim of the legislator, there are other instruments of decreasing the campaign costs that restrict to less extent the freedom of expression and the freedom of the press.

With account to all the above, the Constitutional Court established that prohibiting in the election campaign the dissemination of political advertisements in the media services was contrary to the Fundamental Law.

1.3. The President of the Republic challenged in his petition in particular Section 151 para. (3) of the Act as well. According to this provision, in 48 hours before the election, political advertisements cannot be disseminated by the public service media. As explained in the foregoing by the Constitutional Court, the predominant influencing power of the media services may justify imposing by the legislation certain extra obligations, even if the campaign activities are not restricted in general. Consequently, a quasi election silence obligation can be imposed on the participation of media service providers in the election campaign, even if the legislator abolishes the legal institution of general election silence. In this case, however, special attention should be paid to the proportionality of the restriction.

The Constitutional Court established in the respect of Section 151 para. (3) of the Act, that it was not a disproportionate restriction in itself if the broadcasting of political advertisements was fully prohibited in the media services within 48 hours prior to the elections. Such a restriction can be justified with the aim of the uninfluenced expression of the voters' will. Nevertheless, as the Constitutional Court established that the most important rule on the publication of political advertisements – the prohibition affecting non-public media services – was contrary to the Fundamental Law, Section 151 para. (3) of the Act is also in conflict with the Fundamental Law due to the close connections of the provisions' contents.

2. The Constitutional Court then examined Section 152 para. (5) of the Act, prohibiting the cinemas to show political advertisements in the campaign period. The Constitutional Court established that in the case of the cinemas there aren't any special reasons that might justify the particular restrictions

applicable in the case of media services. Therefore, in this case, – taking into account in particular that the legislator abolishes the general restriction on campaign activities – there is no constitutional justification for the ban on political advertisements. Thus Section 152 para. (5) of the Act is unconstitutional.

V

The President of the Republic referred in his petition to the fact that in the Decision 6/2007. AB the Constitutional Court has already examined Section 8 para. (1) of the Act C of 1997 on the election procedure (hereinafter: AEP) that contained a provision similar to that of found in Section 154 para. (1) of the Act. The Constitutional Court established in the decision that this provision of AEP was in conflict with the freedom of expression guaranteed in Article 61 para. (1) of the Constitution. The Constitutional Court gave the following reasoning to its decision:

»The opinion poll mainly served the purpose of providing information in order to support the well founded participation of the individual in the political processes. The Ministerial Committee of the Council of Europe adopted a recommendation on 9 September 1999 on the measures concerning media coverage of election campaigns [Recommendation No. R (99) 15] in connection with Section 10 of the Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols. Part III of the recommendation – that analysed this issue in the aspect of the freedom of communication by the written and the electronic media – deals separately with communication in the interest of the candidates (dissemination of partisan electoral messages), and the publication of opinion poll results. The Committee stressed that in the case of forbidding or restricting the publication of opinion polls on the voting day or a certain period of days before the election, such a restriction should comply with Article 10 of the Convention and they should be in line with the requirements developed by the Strasbourg Court. At the time of disseminating the results of opinion polls, the public shall be informed on who ordered the poll, who, when and with what methodology performed the poll, how many people were covered by it, what is the error margin resulting from the size of the sample; however, all the other issues are to be settled by media self-regulation.

(…)

In this regard the Constitutional Court first established that the ban on publishing opinion-poll results as contained in Section 8 para. (1) of AEP is indeed restricting the freedom of expression and the freedom of the press. The provision would prevent both the written and the electronic press of disclosing the results of the polls within eight days prior to the election. In addition, restricting the disclosing of the results of the opinion-polls is closely related to the fundamental right to the freedom of information – which is indispensable for the development of the democratic public opinion –, in particular the electors' right to get informed, similarly affecting Article 61 paras (1) and (2) of the Constitution. In the respect of evaluating the constitutionality of restricting a fundamental right – i.e. the injury of Article 8 para. (2) of the Constitution – the Constitutional Court explained in its Decision 22/1992. (IV. 10.) AB: "According to the standing practice of the Constitutional Court, the restriction of a fundamental right is only constitutional if it does not affect the untouchable essence of the fundamental right, if it is unavoidable, i.e. it is the result of a forcing cause, and if the weight of the restriction is not disproportionate to the desired objective. As it has been pointed out in the Decision 30/1992. (V. 26.) AB: The State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is

unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective." (ABH 1992, 167, 171) Thus the Constitutional Court had to examine whether the prohibition found in Section 8 para. (1) of AEP was a necessary and proportionate restriction of the fundamental rights, such as the freedom of expression and the freedom of the press.

The aim of restricting the disclosing of opinion-poll results – that might cause the necessity of the restriction – is connected to the undisturbed implementation of the elections. However, it is a constitutional question whether the given aim – to secure the undisturbed expression of the voters' will – could only be reached this way, by imposing such a restriction on the fundamental freedom of expression and the freedom of the press. As established in the Constitutional Court's Decision 30/1992. (V. 26.) AB quoted above: "It is an important question regarding all constitutional fundamental rights whether or not they may be restricted and limited, and if so, on what terms, furthermore, on the basis of what criteria priority is to be determined in the case of their collision. As far as the freedom of expression, including the freedom of the press, is concerned, this issue is of primary importance as such freedoms are among the fundamental values of a pluralistic and democratic society. Therefore, the freedom of expression has a special place among constitutional fundamental rights…" (ABH 1992, 167, 170–171.)

(…)

The Constitutional Court holds that restricting the freedom of expression, the freedom of the press and the freedom of information in the manner specified in Section 8 para. (1) of AEP cannot be constitutionally accepted, even if one admits that the opinion-poll results have an influence on the voters' behaviour. Although the undisturbed implementation of the elections is a legitimate – constitutionally acceptable – aim for holding the restriction to be necessary, but the prohibition of 8 days contained in Section 8 para. (1) of AEP is disproportionate with the desired objective, i.e. the legitimate interest in having undisturbed elections. This aim can also be reached without restricting the freedom of expression and the freedom of the press for the duration specified in Section 8 para. (1) of AEP. Consequently the disproportionate nature of restricting the fundamental right can be established. (…) In other words, it is the expression of an individual opinion, the manifestation of public opinion formed by its own rules and, in correlation to the aforesaid, the opportunity of forming an individual opinion built upon as broad information as possible that is protected by the Constitution. [Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 179.]

(…)

With due account to all the above, the Constitutional Court established that the restriction of eight days contained in Section 8 para. (1) of AEP does restrict, not unnecessarily but disproportionately, the freedom of the press, thus violating Article 8 para. (2) and Article 61 paras (1) and (2) of the Constitution. Therefore the Constitutional Court annulled this provision.« [Decision 6/2007. (II. 27.) AB, ABH 2007, 135, 139–142.]

The Act contains a regulation similar to Section 8 para. (1) of AEP. The difference is that now the disclosure of the opinion-poll results connected to the elections is prohibited not on the last eight days but on the last six days of the campaign period. Another difference is that after the annulment of Section 8 para. (1) of AEP – due to the AEP's regulation on election silence – the prohibition of disclosing opinion-poll results connected to the elections remained in force for the period of the election silence.

Just as the Constitution, the Fundamental Law guarantees the freedom of expression. Accordingly in the present case the Constitutional Court had to examine – with account to Decision 6/2007. (II. 27.) AB – whether the prohibition of six days, as contained in Section 154 para. (1) of the Act, was proportionate with the desired objective, i.e. the legitimate interest in having undisturbed elections. The Constitutional Court took into consideration that it has already established in the Decision 6/2007. (II. 27.) AB the following: "The restriction of the freedom of expression and the freedom of the press to any extent other than the election silence – if it is necessary and proportionate on the basis of the Constitutional Court's decision [Decision 39/2002. (IX. 25.) AB, ABH 2002, 273, 279] in the interest of the protection of the right to vote and on the basis of the requirement of a democratic State under the

rule of law – cannot be constitutionally justified." (ABH 2007, 135, 141) With due account to the above, the Constitutional Court established that the restriction of six days contained in Section 154 para. (1) of the Act restricts the freedom of expression and the freedom of the press not unnecessarily but disproportionately, thus violating Article I para. (3) and Article IX of the Fundamental Law.

VI

Finally, the President of the Republic also initiated the preliminary review of Section 353 para. (4) of the Act, concerning its compatibility with the Fundamental Law. He requested it by taking into consideration that this provision of the Act regulates the registration differently than Article 23 paras (3)–(5) of TPFL.

In its decision 45/2012 (XII. 29.) AB, taken after the filing of the present petition, the Constitutional Court annulled Article 23 paras (3)–(5) as from 9 November 2012. This way, obviously, derogating from the petition, the conflict between Section 353 para. (4) of the Act and Article 23 paras (3)–(5) of TPFL cannot be established any more. At the same time, on the basis of the petition, the Constitutional Court performed – even after the annulment of Article 23 paras (3)–(5) of TPFL – the preliminary review of the compliance between Section 353 para. (4) of the Act and Article B) para. (1) of the Fundamental Law.

Section 353 para. (4) of the Act contains the provisions applicable to the "registry of names under Section 23 para. (3)" of TPFL, for the period between taking force of the Act and first subsequent general election of the members of the Parliament. Due to the annulment of Article 23 paras (3)–(5) of TPFL as from 9 November 2012, Section 353 para. (4) of the Act becomes inapplicable; instead of it, obviously, the provisions found in Section 353 para. (1) of the Act shall be applicable until the first general elections of the members of the Parliament. Accordingly, the Constitutional Court established that Section 353 para. (4) of the Act, being inapplicable due to referring to an annulled provision was contrary to the Fundamental Law in view of the principle of legal certainty.

The Constitutional Court ordered the publication of this Decision in the Hungarian Official Gazette in view of the establishing that it is contrary to the Fundamental Law.

Budapest, 4 January 2013

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[A concurring reasoning by Dr. Péter Kovács, Judge of the Constitutional Court, and dissenting opinions by Dr. István Balsai, Dr. Egon Dienes-Oehm, Dr. Barnabás Lenkovics, Dr. Béla Pokol, and by Dr. Mária Szívós Judges of the Constitutional Court have been attached to the decision.]