

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a judicial initiative seeking posterior examination of the unconstitutionality of a statute – with a dissenting opinion by *dr. Péter Kovács*, judge of the Constitutional Court, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that Section 8 para. (1) of Act C of 1997 on the Election Procedure is unconstitutional and, therefore, annuls it as of the publication date of this Decision.

2. The Constitutional Court terminates the procedure seeking establishment of the unconstitutionality and annulment of Section 40 para. (2) and Section 41 of Act C of 1997 on the Election Procedure.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

The petitioner has initiated the constitutionality review of Section 8 para. (1), Section 40 para. (2) and Section 41 of Act C of 1997 on the Election Procedure (hereinafter: the AEP). The provisions specified by the petitioner affect both the prohibition to disclose public opinion poll results before the voting and the definition of the ‘election campaign silence period’ (including the violation of same). In the petitioner’s opinion, the challenged provisions violate the freedom of expression and the freedom of the press and thus Article 61 paras (1) and (2) of the Constitution, and also Article 8 para. (2) on the restriction of fundamental rights. The petitioner has explained that there is no pressing need to justify a restriction of the freedom of expression and the freedom of the press through the prohibition of disclosing public opinion poll results and the institution of the election campaign silence period.

Furthermore, as explained by the petitioner, “Presuming that any campaigning during the campaign silence period would profoundly influence the preferences of the voter violates the contents of Article

71 para. (1) of the Constitution, granting universal and equal suffrage and prescribing a secret ballot". The petitioner has argued that the fairness of elections is sufficiently safeguarded by the provisions of the Criminal Code regarding election fraud. Therefore, the regulations of the AEP on the prohibition of disclosing public opinion polls and on prescribing an election campaign silence period are redundant.

Also, the petitioner has referred to the contradiction between Article 7 para. (1) of the Constitution, since in the petitioner's opinion Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter: the Convention) is also violated, while Article 2 para. (1) of the Constitution may have been infringed as well.

Based on the above, the petitioner has requested establishment of the unconstitutionality and annulment of Section 8 para. (1), Section 40 para. (2) and Section 41 of Act C of 1997 on the Election Procedure.

## II

1. The cited provisions of the Constitution are as follows:

"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law.

(...)

Article 7 para. (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.

(...)

Article 8 para. (1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.

(...)

Article 61 para. (1) In the Republic of Hungary everyone has the right to freely express his/her opinion, and furthermore to access and distribute information of public interest.

(2) The Republic of Hungary recognizes and respects the freedom of the press.

(...)

Article 71 para. (1) Members of Parliament, Members of the European Parliament, members of representative bodies of local governments, Mayors and the Mayor of the Capital are elected by direct, secret ballot by voting citizens, based on universal and equal suffrage.”

2. According to the affected regulations of the AEP:

“Section 8 para. (1) From the eighth day prior to voting to the termination of voting, the results of public opinion polls regarding the elections may not be published.

(...)

Section 40 para. (1) The election campaign shall last from the call for the election to 12:00 AM of the day prior to voting.

(2) From 12:00 AM on the day prior to voting to the termination of voting it is prohibited to run any election campaign (campaign silence period).

(...)

Section 41 Any influencing of the will of the voters, including but not limited to services provided free of charge for voters by the candidate or the nominating organization (for example organized transportation to the polling station; supplying food and drinks), distributing party badges, flags, party symbols, tokens containing the candidate's photograph or name, placement of election posters (hereinafter referred to as "posters") and providing information in electronic or other form suitable for influencing the voters' will shall be deemed infringement of the campaign silence period.

### III

The petition is, in part, well-founded.

1. The Constitutional Court already passed a decision on the constitutionality of Section 40 paras (1) and (2) as well as Section 41 of the AEP in its Decision 39/2002 (IX. 25.) AB (hereinafter: the CCD). (ABH 2002, 273) In the CCD, one of the findings of the Court is that “Article 10 of the Convention and Article 19 of the International Covenant on Civil and Political Rights (hereinafter: the Covenant) do not prescribe it directly that fundamental rights may be restricted due to elections. However, both Article 10 para. 2 of the Convention and Article 19 para. 3 of the Covenant provide that the right of expression may be subject to restrictions by Acts of Parliament for the protection of the rights of others. The legal institution of the campaign silence period specified under Section 40 paras (1) and (2) of the AEP is

such a restriction, since it temporarily limits the exercise of the freedom of expression and the freedom of the press.

The right to vote is a fundamental right guaranteed under Article 70 para. (1) of the Constitution. Under Article 2 para. (1) of the Constitution, the Republic of Hungary is an independent democratic state under the rule of law. An indispensable prerequisite of a democratic political system is an established electoral system that operates in a legal and reliable manner. This is because the general elections *set up* the supreme body of state power in the Republic of Hungary and they make it *legal* and *legitimate*.

Electoral systems may include campaign silence periods. The campaign silence periods guarantee the undisturbed expression of the voters' will. The undisturbed expression of the voters' will guarantees that the supreme body of state power is built on the free will of the people, and in this way the democratic rule of law in Hungary is secured as well. The protection of suffrage and the requirement of the democratic rule of law may necessitate the introduction of campaign silence periods and the restriction of the freedom of expression and the freedom of the press through such periods.

Due to the relative briefness of the campaign silence period as regulated by the challenged provisions, the 86-hour silence period only applies to a negligible part of the campaign that lasts at least 84 days. The shortness and general applicability of the campaign silence period and the fact that it extends only to the day preceding election days make the restriction proportional with regard to the objective.

Therefore, the Constitutional Court has established that Section 40 paras (1) and (2) as well as Section 41 of the AEP do not contravene Article 8 paras (1) and (2) of the Constitution. The campaign period as a legal institution does not restrict the essence of a fundamental right. The freedom of expression and the freedom of the press guaranteed in Article 61 paras (1) and (2) of the Constitution are only restricted to the necessary extent in order to hold the elections in an undisturbed manner." (ABH 2002, 273, 279)

Based on the foregoing, the Constitutional Court has established that it already passed a decision regarding the petition to find Section 40 paras (1) and (2) as well as Section 41 of the AEP unconstitutional. Section 31 item *c*) in Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof defines the concept of *res iudicata* in the Constitutional Court procedure. According to this provision, the Constitutional Court terminates the procedure if the petition is aimed at the review of a statute (statutory provision) identical with a statute already judged by the Constitutional Court, and the petitioner requests establishment of unconstitutionality with reference to the same Article or

constitutional principle (value) of the Constitution, including the same constitutional connection (*'res iudicata'*)". (ABH 2003, 2076)

Therefore, the Constitutional Court has terminated the procedure seeking establishment of the unconstitutionality and annulment of Section 40 para. (2) and Section 41 of the AEP.

2. The CCD did not evaluate the prohibition on publishing public opinion poll results in addition to the constitutionality review of the campaign silence period regulations, and therefore the Constitutional Court has conducted the procedure in its merits regarding Section 8 para. (1) of the AEP.

2.1. The Constitutional Court holds that the campaign and the public opinion polls have different functions. Whereas the campaign is specifically aimed at shaping the will of the voters (influencing their preferences), the disclosure of public opinion polls has no such function. Public opinion polls are mainly for the purpose of providing information and to help the individual participate in political processes in an informed manner. On 9 September 1999 the Council of Europe Committee of Ministers adopted a recommendation [Recommendation R (99) 15] on measures concerning media coverage of election campaigns under Article 10 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 (the latter promulgated by Act XXXI of 1993). Section III of the Recommendation (which discusses the issue from the aspect of the information freedom granted for both the print and the electronic media) handles the dissemination of partisan electoral messages and the publication of public opinion polls separately. The Commission argued that any restriction or prohibition on the publication of opinion polls on voting day or a number of days before the election should comply with Article 10 of the Convention and the corresponding requirements set by the European Court of Human Rights. When disseminating the results of opinion polls, it should be provided that the public is informed on who commissioned and paid for the poll, on the organization conducting the poll and the methodology employed, on the sample and margin of error of the poll, and on the date and/or period when the poll was conducted, while all other matters should be decided by the media themselves.

The regulations in foreign countries similar to the ones examined in the present decision on the prohibition to disclose public opinion polls are quite varied. No similar prohibition is applied in, for instance, Austria, Germany or the United Kingdom. In addition to certain Western European countries (such as France, Italy or Spain) several Central and Eastern European Countries have adopted prohibitions on the publication of projected election results to complement their existing regulations on campaign silence periods. For example the Polish Act on General Elections prohibits the disclosure of

any opinion polls on voter preferences and projected election results in the period of campaign silence (Section 86 of the Polish Act on General Elections). In case of the Russian presidential and lower house elections, it is forbidden to publish opinion polls from the third day before the election until the election is closed. In case of the general elections in Bulgaria, no opinion poll result may be disclosed from 24 hours before the election day until the closing of the election. [Act on the Election of the State Duma, Section 55 para. (3); Act on the Election of the President of the Russian Federation, Section 46 para. (3); the Bulgarian Act on General Elections, Section 59 para. (2)].

2.2. In the present case the Constitutional Court is required to examine a violation of fundamental rights: the petitioner has claimed that the fundamental rights listed in Article 61 paras (1) and (2), that is, the freedom of expression and the freedom of the press are restricted. Regarding this, the Constitutional Court has established as a first step that the prohibition of publishing opinion poll results as defined by Section 8 para. (1) of the AEP does restrict the freedom of expression and the freedom of the press. As a result of the restriction, both the print and the electronic media have lost the possibility of publishing opinion poll results in the eight days preceding election days. What is more, the limitation on disclosing public opinion polls is closely related to the freedom of information (especially the right to information for the voters) that is indispensable for the development of a democratic public opinion. These rights affect Article 61 paras (1) and (2) of the Constitution. With regard to the constitutionality of restricting fundamental rights (that is, violating Article 8 para. (2) of the Constitution), the Constitutional Court has declared in its Decision 22/1992 (IV. 10.) AB that “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 (that is, the reason is pressing), and if the weight of the restriction is not disproportionate to the desired objective”. As pointed out in Decision 30/1992 (V. 26.) AB, “The State may only use the tool of restricting a fundamental right if it is the sole 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) The

Constitutional Court is therefore required to examine whether the prohibition under Section 8 para. (1) of the AEP may be regarded as a necessary and proportionate manner of restricting the freedom of expression and the freedom of the press.

The purpose of prohibiting the disclosure of public opinion polls is connected to the undisturbed running of the elections, and this may result in necessary restrictions. However, it is an issue of constitutionality whether the given purpose (providing an undisturbed opportunity for the voters to express their will) may only be achieved by restricting the freedom of expression and the freedom of the press. In Decision 30/1992 (V. 26.) AB quoted above, the Constitutional Court established the following: "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)

In its Decision 338/B/2002 AB regarding the review of Section 89 of the AEP, the Constitutional Court already discussed the issue whether the disclosure of public opinion polls may influence the fairness of elections by encouraging the voters to vote at places other than their home constituency. According to this decision, "The Constitutional Court emphasizes that from the aspect of suffrage there is a significant difference between the actual results of the first round and the results of the opinion polls. The access to opinion poll results is not a constitutional reason to exclude the possibility to vote with a certificate at a place other than the home constituency of the citizen, since if the legislator were allowed to prohibit voting in another constituency due to this reason, it would be regarded as a disproportionate (and therefore unconstitutional) restriction of suffrage. However, when actual results (of the first round) are disclosed, the legislator excludes the possibility of voting with a certificate away from the home constituency in order to secure the fairness of elections and this provision does not restrict the essence of the right to vote." (ABH 2003, 1504, 1507-1508)

The Constitutional Court regards this decision as guiding in the present case, too, since the Court has separated public opinion poll results and actual election results when evaluating the constitutionality of the fundamental right restriction. The Constitutional Court holds that the restriction of the freedom of expression and the freedom of the press as defined in Section 8 para. (1) of the AEP is unacceptable from the aspect of constitutionality even if we recognize that public opinion poll results do have an effect on the voters' conduct. Although the undisturbed management of the elections is a legitimate objective for restricting fundamental rights, the eight-day prohibition specified in Section 8 para. (1) of the AEP is disproportionate to the objective to be achieved, that is, the undisturbed management of the elections. This objective may be accomplished without restricting the freedom of expression and the freedom of the press to the extent defined in Section 8 para. (1) of the AEP. Therefore, the restriction of fundamental rights may be deemed disproportional. This is because a restriction of the freedom of the press and the freedom of expression in a way more severe than under the campaign silence period is not constitutional; the restriction of the campaign silence period is necessary and proportional for the protection of the right to vote and due to the requirement of the democratic rule of law. "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]

Based on all of the above, the Constitutional Court has established that the eight-day prohibition stipulated under Section 8 para. (1) of the AEP necessarily restricts the freedom of expression and the press, but the restriction is disproportionate, and, as a result, it violates Article 8 para. (2) as well as Article 61 paras (1) and (2) of the Constitution. Therefore, the Constitutional Court annuls the provision concerned. As a consequence of the decision, the prohibition on publishing opinion polls will be governed by the regulations applicable to the campaign silence period (Sections 40 and 41 of the AEP). Pursuant to Section 41 of the AEP, any influencing of the will of the voters shall be deemed infringement of the campaign silence period, especially "providing information in electronic or other form suitable for influencing the voters' will".

2.3. The petitioner has also initiated the constitutionality review of the provisions with regard to other constitutional prohibitions. According to the standing practice of the Constitutional Court, if it has established the unconstitutionality of the given provision of the Constitution, the Constitutional Court will not perform any further review of unconstitutionality with regard to other constitutional provisions referred to in the petitions. [Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision



16/2000 (V. 24.) AB, ABH 2000, 425, 429; Decision 56/2001 (XI. 29.) AB, ABH 2001, 478, 482; Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 213; Decision 4/2004 (II. 20.) AB, ABH 2004, 66, 72; Decision 9/2005 (III. 31.) AB, ABH 2005, 627, 636]

The publication of this Decision in the Hungarian Gazette is based on Section 41 of Act XXXII of 1989.

Budapest, 26 February 2007

*Dr. Mihály Bihari*

President of the Constitutional Court

*Dr. Elemér Balogh*

Judge of the Constitutional Court

*Dr. András Bragyova*

Judge of the Constitutional Court

*Dr. Mihály Bihari*

President of the Constitutional Court

on behalf of

*Dr. Árpád Erdei*

Judge of the Constitutional Court,

prevented from signing

*Dr. Attila Harmathy*

Judge of the Constitutional Court

*Dr. András Holló*

Judge of the Constitutional Court, Rapporteur

*Dr. László Kiss*

Judge of the Constitutional Court

*Dr. Péter Kovács*

Judge of the Constitutional Court

*Dr. Péter Paczolay*

Judge of the Constitutional Court

Dissenting opinion by *Dr. Péter Kovács*, Judge of the Constitutional Court

I do not agree with point 1 of the holdings in the Decision and the reasoning thereof. I hereby summarize my dissenting opinion as follows:

1. Public opinion polls are a peculiar institution of our times. I do not doubt their scientific foundation and professional criteria and I find it perfectly natural that between elections and in the campaign itself public opinion polls have a major role. This way, voters may learn the support the parties have at a national or local level at a given time and may decide to keep their party preferences or choose to back the closest political inclination if their primary choice has no real chances. They may even switch basic preferences as a result of a campaign event. The public opinion polls are practical for the candidates and the political parties as well (including the types that are disclosed to the public and also the ones only disclosed to the entity ordering the survey). The polls can affect the forming of campaign strategy; they may result in changing the tactical elements during the campaign and in taking measures in the interest of election victory. Disclosing public opinion poll may both activate and mobilize voters but it may also make them overconfident.

However, the results of the public opinion polls are communicated to the voters by the media, and in several countries one may experience the phenomenon that certain media workers do not analyze the polls in an unbiased manner, "*sine ira et studio*" (without anger or zeal), but they seem to be trying to shape public opinion themselves. One method for this is the repetition of negative connotations, which produces a fall in the approval rating of the affected person or party. In this case the explanations for the decrease and the extent of such fall and looking for its real and presumed reason may generate further decrease. In such an environment, even *lege artis* (genuine and reliable) public opinion polls become a means of achieving political goals instead of providing fair standards and objective information.

The parties and campaign strategists in modern parliamentary democracies take these phenomena into account, including the method of improving their own image by applying certain techniques and discrediting their opponents. Therefore, the designers of election strategies and tactics use public opinion polls in this manner and they rely on the opportunities available through both the unbiased part of the media and the media with political party inclinations.

2. Throughout Europe, there are examples of stricter and more lenient legal regulations, and we can also see that while in some countries the legal background is soft, the mass media institutions are forced to adopt an equally elaborate self-regulation. The majority Decision details the shorter silence periods, but it should be added to gain a complete picture that in Italy a 15-day and in Poland a 12-day silence period is applicable, while in Portugal a 30-day silence period was in effect until 2000.

There is, however, a more noteworthy tendency showing that if there are new norms of a different nature replacing the statutory silence period, at least a similar level of barriers are prescribed. For example in Portugal, the material must be deposited at a government authority in advance and the data evidencing that the professional criteria may only be disclosed in the same format by those institutions that have been permitted in advance. Even in countries where the media or the agencies accept self-regulation, restrictive solutions are not unheard of. For instance, it is well known that in England the internal regulations of the BBC describe the stylistic elements of the moderator's neutral function to be complied with when announcing opinion poll results in extreme details. Also, the regulations provide that (if necessary) the internal audit of the BBC should be consulted in advance. In Belgium, the RTBF prepared a similarly detailed election code of conduct for the 2003 elections and had its employees comply with these. These regulations provided that no public opinion polls may be disclosed on election days and the day before. In 2001 in Cyprus, the MEGA declared that it would only order two public opinion polls, it would only analyze these and that it would terminate all election programmes on the second day before election day. Apparently, where government regulations are not detailed and stringent, self-regulation will prevail in an accurate and efficient manner. (cf. the findings of a study on the practice in Europe within the framework of an EU project: *Christophoros Christophorou: Media and Elections: Case Studies, The European Institute for Media – Dusseldorf, Paris 2005*).

The French solution is different because the Constitutional Court there serves as an election tribunal, especially in checking compliance with the upper limit of election spending per candidate. In case the limit is broken, the Constitutional Court may even withdraw mandate as a sanction. From these aspects the *Conseil Constitutionnel* discussed the issue of public opinion polls in campaign periods and pointed out the significance of whether these polls only measure the voter turnout and party preferences at a national level or whether they are personalized. The Court has also stressed the importance of whether the polls are independent from the candidate and the candidate does not use the results in the campaign or the results are used by the candidate for campaign purposes. Also, it is a different case if the polls are ordered by the party or the supporters of the candidate. These four variations need to be handled differently with regard to whether they should be included in campaign costs. (Décision n° 91-1141/1142/1143/1144 du 31 juillet 1991, 13-14. § and Décision n° 93-1328/1487 du 9 décembre 1993, 19. §)

3. Although in international practice there is no general norm that would bind every State in the world and there are no common rules even in Europe, it is apparent that the different European

organizations regard the relationships of public opinion polls, media and silence periods as complex problems.

The majority Decision quotes Recommendation R (99)15 of the Council of Europe Committee of Ministers on the media coverage of election campaigns. From the Recommendation, the majority Decision cites that it is vital to publish the items of the opinion polls that prove that the polls are professionally reliable. It also cites the principle that "all other matters (...) should be decided by the media themselves."

The main message of the Recommendation reflected in several provisions is that "*fair, balanced and impartial*" media coverage should be formed through government regulations supplemented by self-regulation by the media. The Recommendation stresses that the State must take measures to restore the balance if necessary. Regarding this matter, the Recommendation suggests that the States should consider prohibiting the dissemination of messages on behalf of the candidates on the day *preceding* the voting. Regarding this issue, the recommendation also advises that States should consider the possibility of prohibiting the dissemination of exit poll results until all polling stations have closed. This Recommendation, I believe, encourages careful restrictions instead of liberalization, especially considering whether appropriate guarantees have been provided through the principles of impartiality and balanced information on the one hand and state/legal and self-regulations on the other.

The Council of Europe *Commission for Democracy through Law (Venice Commission)* has passed several additional decisions on these issues. The code of good practice in electoral matters adopted by the commission is regarded by the Constitutional Court as an authoritative document in Decision 22/2005 (VI. 17.) AB. (ABH 2005, 246, 251-252) Such decisions include the document entitled *Guidelines on Media Analysis during Election Observation Mission*, CDL-AD(2005)032. A recent report adopted in 2006 entitled *Report on Electoral Law and Electoral Administration in Europe* [CDL-AD(2006)018] suggests an even more cautious approach. "Since election-related opinion polls may have an effect on the vote itself, the publication and broadcasting coverage of opinions polls results should be regulated, providing, for example, that the source and other relevant information are included. Usually it is also forbidden to publish the results of opinion polls and projections immediately before and on election day (before the closure of the polling stations). If not already provided for, the introduction of such a deadline is generally welcomed. (As for Georgia see CDL-AD(2004)005, § 43) However, in some cases – like Moldova (10 days) and Ukraine (15 days) – the time restrictions are excessive. It was recommended that the period be reduced to a more reasonable duration there. (CDL-AD(2004)027, § 32; CDL-AD(2006)002, § 68)" Based on the observation made by the Venice

Commission, Georgia prohibited the publication of opinion poll results in the 48 hours preceding elections.

It is worth mentioning that although the report specifies concrete problems regarding Hungary, it does not cite the length of the period in which no opinion polls may be published as an issue. Instead, regarding the 2002 general elections it quotes the criticism that the National Election Committee lacked power regarding the decisions of local election committees and this solution, the Commission believes, led to incoherency and possible manipulation. (CDL-AD(2006)018, § 31)

The majority Decision incorporates the reference of the Committee of Ministers Recommendation 99(15) to the practice of the European Court of Human Rights in this issue.

It is, however, important to note that the European Court of Human Rights has referred to the code of the Venice Commission and considered it authoritative in the evaluation of certain technicalities of elections (*Melnichenko v. Ukraine* judgement, 19 October 2004, para. 57). Acting under the same principle and recognizing that the States have large elbowroom regarding the concrete solution, the European Court of Human Rights has observed in connection with the relationship of the freedom of the press and the election campaign the following: "Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the free expression of the opinion of the people in the choice of the legislature" (*Bowman v. the United Kingdom* judgement, 19 February 1998, § 43). These findings support the notion that the European Court of Human Rights considers the principles applicable in election campaigns as *lex specialis* (overruling the general rules), and therefore it does not automatically apply the general rules governing the freedom of expression and its own practice.

4. On the basis of the above, I believe that the period affected by the present Decision does not exceed the limits of proportionality with regard to the European election practice as well. Based on the European legal instruments quoted above (noting, of course, that they are recommendations and therefore not binding) I personally cannot come to the conclusion that the public opinion polls may be treated in a uniform manner regardless of their nature and the prohibition of their publication should be equivalent to the election campaign silence period in all cases.

Therefore, I believe that – due to these observations – the petition should have been rejected by the Constitutional Court in the first section of the Decision

Budapest, 26 February 2007

Constitutional Court file number: 363/B/2003

Published in the Official Gazette (*Magyar Közlöny*) MK 2007/22