DECISION No. 3

Sofia, 23 February 2017

The Constitutional Court: Boris Velchev, Chairman; and members: Tsanka Tsankova, Stefka Stoeva, Rumen Nenkov, Keti Markova, Georgi Angelov, Grozdan Iliev, Mariana Karagiozova-Finkova, Konstantin Penchev, Philip Dimitrov, Tanya Raykovska; and with secretary record-keeper Mariana Georgieva on 23 February 2017 heard in camera Constitutional Case No. 11/2016 that was reported by Justice Grozdan Iliev.

The proceedings conform to Art. 149, para 1, subpara 2 of the Constitution of the Republic of Bulgaria.

The case was filed by the Ombudsman of the Republic of Bulgaria in keeping with Art. 150, para 1 of the Constitution who challenged the constitutionality of Art. 242a (New – DV, No. 39/2016, effective 26.05.2016) of the Election Code (EC) (promulgated, DV, No. 19/05.03.2014, last amended, DV, No. 97/06.12.2016), with respect to the consequences of the non-exercise of the right to vote.

The Ombudsman insisted that Art. 242a EC conflicts with the underlying precept of Art. 4 of the Constitution that proclaims that the principle of the state committed to the rule of law and also with the principle of the equality of citizens before the law (Art. 6, para 2), with the principle of universal, equal and direct suffrage (Art. 10) and with the constitutional provision of Art. 42, paras 1 and 2 concerning the eligibility to be a voter, and the organization and the procedure for the holding of elections.

The Ombudsman referred to Art. 10 and Art. 42 of the Constitution to maintain that suffrage is a subjective right of political nature, inasmuch as its exercise involves the constitution and the composition of the institutions of statehood, the vote in national and local referendums, the operation of the State machinery and the materialization of the principle of political pluralism. Considering that the Ombudsman believed that since the existing Constitution does not define suffrage as the synergy of a subjective right and public function, it does not make it legally binding to exercise it as a fundamental political right. The Lawmaker did it with Art. 3, para 1, second sentence EC. The Ombudsman maintained that the Constitution provides for no penalty for voters who have chosen not to go to the polling stations and thus made the conclusion of noncompliance with the Constitution of Art. 242a, para 1 EC in the part that arranges their removal from the electoral rolls and thus conflicts with Art. 10 and Art. 42 of the Constitution.

The Ombudsman explicated the incongruence of the provision challenged with the principle of the state committed to the law (Art. 4 of the Constitution), making reference to Art. 242a, para 1 EC that gives legislating authority to the Central Election Commission (CEC) by mandating it to decide on the conditions and procedure of entering the names of persons who did not exercise their right to vote in the list of removed persons.

Art. 242a, para 6 EC enumerates several categories of Bulgarian nationals to whom Paragraph 1 (about the removal from the electoral roll) shall not apply. The Ombudsman maintained that the codification of an exemption to be enjoyed by a certain number of voters who will not be removed from the electoral rolls regardless of the reasons that prevented them from voting is noncompliant with Art. 6, para 2 of the Constitution reading that all citizens shall be equal before the law.

A Constitutional Court's Resolution of 29 July 2016 admitted the hearing of the case upon its merits and established the interested parties (institutions concerned) in the proceedings, viz. the National Assembly, the President of the Republic, the Council of Ministers, the Minister of Justice, the Supreme Court of Cassation, the Supreme Administrative Court, the Prosecutor General, the Supreme Bar Council and the Central Election Commission.

Invited to submit an opinion in writing were: the *Civil Initiative for Free and Democratic Elections, the Bulgarian Association for Fair Elections and Civil Rights, the Bulgarian Helsinki Committee, the Union of Jurists in Bulgaria, the Association for European Integration and Human Rights, the Institute of Modern Politics and the Bulgarian Lawyers for Human Rights Foundation.*

Acting in conformance with Art. 20a, para 3 of the Rules on the Organization and Activities of the Constitutional Court (ROACC), the Court asked to get legal opinion in writing on the matter of the case from Prof. Dr Emiliya Drumeva, Prof. Dr Snezhana Nacheva, Prof. Dr Georgi Bliznashki, Prof. Dr Pencho Penev and Prof. Dr Plamen Kirov.

On behalf of the institutions concerned opinions in writing were submitted by the Prosecutor General, the Supreme Bar Council, and the Union of Jurists in Bulgaria, the Bulgarian Helsinki Committee and *the Bulgarian Lawyers for Human Rights Foundation.*

The opinions that the institutions and organizations concerned submitted fully supported the Ombudsman's challenge.

They argued that Art. 242a EC should be declared unconstitutional on grounds of noncompliance with the Constitution-proclaimed principles of the state committed to the rule of law (Art. 4); of the equality of all citizens before the law (Art. 6, para 2) and of the supremacy of the Constitution which shall be overriding any other law (Art. 5, para 1).

It was noted that the change of Art. 3 EC changed the philosophy of the legislation on the rights of citizens to elect the institutions of statehood. Suffrage was reworded as discharge of civic duty and voting was made compulsory. It was maintained that the legislative concept cannot be seen as having been inspired by Arts. 10 and 42 of the Constitution. Following the amendment to the Election Code the Bulgarian citizens are no longer free to choose to vote because voting was made compulsory. It was maintained that the negative legal implications arising from the failure to discharge this duty and for not voting in two successive elections of one the same type where the voters are to be removed from the electoral roll for the next elections and entered in the list of removed persons (Art. 242a, para 1 EC), curtail the right to vote while Art. 42, para 1 makes no provision to that effect. It was pointed out that while the text provides for the legal possibility to enter a voter's name in the electoral roll, with regard to the time limit for response it is not bound up with the other EC provisions and incongruence constitutes a further curtailment to the voter, on the one hand, and on the other hand, breeds inequality between the different groups of voters in the exercise of their right to vote. The procedure to be followed to prove compelling reasons that have prevented a voter from voting in two successive elections (Art. 242a, para 4 and para 5) does not conform to the existing legislation about the safekeeping of official documents that the voter must present and whose kind and origin are not fully defined. This puts up difficulties that might be impossible to cope with and thus divest of voting rights, the latter being a consequence that the Constitution precludes.

Also it was maintained the codification of guarantees against a possible refusal of the competent authority under Art. 23, para 1 EC, given the short time frames and complicated procedure of complaint handling and resolution, breed further impediments and would discourage rather than encourage the

individuals who may be willing to exercise the active right to vote to take appropriate action to surmount the administrative barriers in order to gain entry into the electoral rolls.

There was full agreement with the Ombudsman's reasons to insist that the provision challenged is unconstitutional in the part that mandates the CEC to define the conditions for removal from the electoral roll and entry in the list of removed persons as per Art. 242a, para 1 EC for thus a law-enforcing agency, as the CEC is, is assigned lawmaking functions.

The position of the Bulgarian Lawyers for Human Rights Foundation maintained that the restrictions that Art. 242a EC enforces on active voting right are disproportionate to the Lawmaker's declared legitimate goals to boost the voter turnout and to crack down on the "vote buying" and to give greater legitimacy to the elected institutions of statehood and to encourage willing voters to apply for registration in order to purge the electoral rolls of "phantoms". The Foundation's position disagreed with the legitimacy of the goals set, in view of the availability of other tools and authorities in charge: for example, the updating of the population registers, respectively of the electoral rolls is an activity that is carried out by the authorities under Art. 23, para 1 EC and by the divisions of Directorate General of Civil Registration and Administrative Services (DG GRAO) at the Ministry of Regional Development and Public Works. In the opinion of the Bulgarian Helsinki Committee (BHC) in addition to Art. 4, Art. 6, Art. 10 and Art. 42 of the Constitution the provision challenged is noncompliant with international law. Reference is made to the jurisprudence of the European Court of Human Rights to prove noncompliance with Art. 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF), Art. 2 and Art. 25 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 29 of the Convention on the Rights of People with Disabilities (CRPD). Criticism was levied at the legitimate goals that the text challenged pursues and the means to achieve them. Emphasis was placed on the out-of-proportion methods and ways and means employed to achieve them remembering that some other methods and ways and means are available to the State. In the particular case the freedom of judgment of the State concerning the choice of ways and means brought to the violation of Art. 3 of Protocol 1 to the CPHRFF providing for "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". The Foundation maintained in its position that the codification of curtailment of universal suffrage is likely to exclude sizeable groups of citizens from real participation in the country's political life and in particular in the constitution of the institutions of statehood and in government and this is a right that both, the Convention and the Constitution guarantee. The Foundation insisted that in this way suffrage will become a privilege and thus violate Art. 25 of the ICCPR that guarantees that every citizen of full age shall have the right to vote and shall have it without any distinction as to political or other opinion, social origin or property. The enforcement of the provisions challenged eliminates from voting the poor and the socially excluded. The group comprises, in addition, citizens whose reluctance to vote is an expression of their political or other opinion.

The position maintained that the provisions challenged collide with Art. 29 of the CRPD as they pertain only to persons with permanent disabilities, visually impaired persons or persons with ambulant difficulties who will be excluded from the lists of persons removed while all other citizens with disabilities, the socially excluded or the outcasts who may have an inherent difficulty to exercise their right to vote are left out and unproportionately affected. This part violates Art. 14 of the CPHRFF for the discrimination against people in analogous circumstances.

The Prosecutor General maintained that the provision challenged runs against Art. 25 of the ICCPR and believes that Art. 4 of the Constitution should be added to the argumentation arising from Art. 149, para 1, subpara 2 of the Constitution.

From among the experts who are an authority on constitutional law in Bulgaria opinion in writing was contributed by Prof. Dr Emiliya Drumeva, Prof. Dr Pencho Penev and Prof. Dr Plamen Kirov.

Prof. Dr Pencho Penev and Prof. Dr Plamen Kirov found the Ombudsman's challenge of the constitutionality of Art. 242a EC tenable.

In his opinion in writing Prof. Dr Plamen Kirov explained his reasons for finding the provision challenged unconstitutional, being in contravention of Art. 4 and Art. 5 of the Constitution. He explained that the existing Constitution (Art. 42, para 1) treats suffrage as a fundamental civil right which is not made contingent upon the compulsion to vote. Chapter Two of the Constitution that is about the fundamental rights and obligations of citizens from the perspective of the Constitution contains no provision to make it binding on citizens to exercise their right to vote. This was done by the National Assembly that by Art. 3, para 1, second sentence EC and the compulsion extends to a sanction as per Art. 242a EC to be imposed on non-abiding citizens. In this way by means of a law, in breach of the procedure under Chapter Nine and in violation of Art. 5, para 1 of the Constitution, the Lawmaker supplemented the constitutional provision of Art. 42, para 1 with the codification of a new Constitution-assigned obligation. Prof. Dr Plamen Kirov insisted that neglect for the procedure of amending and supplementing the Constitution conflicts, inter alia, with the principle of the state committed to the rule of law as proclaimed by Art. 4 of the Constitution.

Prof. Dr Plamen Kirov presented a well-argued position to prove that the removal of voters who have not voted in two successive elections of one and the same type from the electoral rolls and their entry in the list of removed persons shall have to be seen as a legal penalty for failure to fulfill the obligation to vote. With that in mind he noted that the noncompliance of the text challenged with the principle of universal suffrage (Art. 10 of the Constitution) that makes it imperative to all franchised people as of the Election Day to have their names entered in the electoral rolls. It is a duty of the State bodies that are in charge of the organization and the holding of the elections, the compilation of the electoral rolls and their update because of which the disenfranchisement of the individuals who did not vote in the hypothesis of Art. 242a, para 1 EC should be seen as a juridical measure – a penalty for the non-exercise of a Constitution-proclaimed political right. The juridical nature of this measure stands out against the requirement under Art. 242a, para 4 EC that compelling reasons should have prevented the citizen from voting so without a valid excuse the citizen shall be removed from the electoral roll and shall be entered in the list of removed persons. Since the removal from the electoral rolls is a legal penalty sanction, then the obligation to vote should not be considered a moral duty, hence the conclusion that a legally binding obligation is put in place and that any failure to fulfill it entails legal penalty. Prof. Dr Plamen Kirov refers to Constitutional Court Decision No. 11/2010 on Constitutional Case No. 13/2010 to maintain that the curtailment of voting rights shall not be arranged by a law remembering that the Constitution does not provide for such an alternative. The text of Art. 42, para 2 of the Constitution reading that the organization and procedure for the holding of elections and referendums shall be established by a law that is passed by the National Assembly does not extend to the codification of reasons on the grounds of which the right to vote may be curtailed. Hence the conclusion that this aspect of Art. 242a EC is dissonant with Art. 4, para 1 of the Constitution, viz. the principle of the state committed to the rule of law.

The position explicates the reasons for seeing Art. 242a EC as noncompliant with Art. 6, para 2 of the Constitution inasmuch as does not treat indiscriminately citizens who enjoy identical rights, the right to elect, in this particular case, by differencing between a) voters who will be tacitly registered and b) voters who will be moved to the lists of removed persons (Art. 242a, para 1 EC) and who will have to lodge an application and follow a law-established procedure in order to be excluded from the list of removed persons and re-entered in the electoral roll. Moreover, if the voter fails to lodge an application in writing within the time limit as set by the provision challenged, that voter will be disenfranchised forever and thus denied the exercise of a fundamental Constitution-proclaimed political right. Arguments were adduced of noncompliance with Art. 6, para 2 of the Constitution of Art. 242a, para 6 EC inasmuch as the text grants a privilege on a category of voters over other voters by pointing out a category of persons for whom the right to vote is a right indeed and never an obligation whereas the law makes it binding on all other citizens to exercise it: this is discriminatory treatment of citizens with respect to the exercise of their fundamental rights.

It was maintained that Art. 242a, para 4 and para 5 EC contains unconstitutional provisions which are seen as indefinite for the compelling reasons and circumstances and the procedure and the ways and means to prove their validity are imprecise and incomplete and thus would lead to different interpretations by the local administrations in the enforcement of the Code and in the long run, to discretion-based disenfranchisement of Bulgarian citizens.

Reasons were stated to support the perception of Art. 242a, para 1 EC as unconstitutional for it gives the CEC the power, if it wills, to determine under what circumstances voters are to be removed from the electoral rolls and entered in the list of removed persons and this is a delegated legislating power. The existing Constitution contains no provision that enables the National Assembly to pass a law by which it delegates legislating power to an authority other than itself. The National Assembly's permission to delegate legislating power to the CEC does not fit into the imperative of the state committed to the rule of law.

Arguments were presented for the noncompliance of Art. 242a EC with Art. 57 of the Constitution which guarantees the irrevocability of the fundamental civil rights and freedoms by the Lawmaker's strict prohibition against revocation, curtailment or frustration of the exercise of the Constitution-proclaimed rights and freedoms.

In his opinion in writing Prof. Dr Pencho Penev put emphasis on: 1. the legal arrangement of the right to elect as a "pure right", i.e. a right that is not coupled with a reciprocal obligation; and 2. the legal aspect of a fundamental right which shall be irrevocable, as per Art. 57, para 1 of the Constitution. Premising on that he maintained that only a Grand National Assembly in the hypothesis of Art. 158, item 4 of the Constitution shall have the power to revoke fundamental rights. Next, irrevocability presupposes inadmissibility for Constitution-granted fundamental rights to be further coupled with Constitution-enforced obligations or burdened additionally in the process of exercise. It is inadmissible to establish constitutional or legal procedures that, from time to time or all the time, impede the exercise of a fundamental right, the voting right included. Prof. Dr Pencho Penev presented arguments to show that from the perspective of the implications as outlined of the irrevocability of the right to vote as a fundamental right, what is observed is complete inconsistency of Art. 242a EC in the part that provides for sanctions on persons who have not exercised the right to vote in two successive elections and for a burdensome procedure to redeem the right. Thus a law is made the tool to redefine a Constitution-granted right as a Constitution-assigned obligation whose unfulfilment, as a consequence, disenfranchises the individual in the next elections. The position presented reasons for declaring unconstitutional that part of the provision challenged where through legal delegation the CEC was assigned to legislate on the conditions and procedure of the removal of persons who did not vote from the electoral rolls and enter them in the list of removed persons.

In her written comments Prof. Dr Emiliya Drumeva presented her reasons whereby the text challenged was not unconstitutional. She maintained that the challenged measure of Art. 242a EC has a limited scope in that it concerns the right to elect local and national authorities while the consequences ensuing from not voting are not valid for all Bulgarian nationals who enjoy voting rights since several categories of Bulgarian nationals, including those who had compelling reasons for not voting are exempted from the negative implications. She thought that the notion "compelling reasons" is a well-established legal standard whose substance the CEC should define in the application process.

Prof. Dr Emiliya Drumeva insisted that the Ombudsman did not follow a consistent line of reasoning as she did not contest Art. 3, para 1 EC reading that voting shall be compulsory and shall represent a discharge of the voter's civic duty; instead the Ombudsman confined to Art. 242a EC that treats the consequences of not voting. In the opinion of Prof. Dr Emiliya Drumeva the inconsistency referred to is intended to perpetuate the obligation (the compulsion) and to levy no sanctions for unfulfilment, the consequence being that the obligation becomes devoid of meaning and incompatible with the principle of the state committed to the rule of law. She referred to theory (Jellinek and S. Kirov) to maintain that suffrage should be perceived as public function despite the fact that the Constitution does not term it "duty". Premising on that she maintained that the exercise of the right to vote is vitally important for the foundations and the function of the democratic state and therefore it should be guaranteed and the measure codified in Art. 242a EC constitutes such a guarantee.

Prof. Dr Emiliya Drumeva maintained that the codification of the measure ensures the compulsory vote, respectively the casting vote as the voters are not under an obligation to tick a nominee or a ticket on the ballot paper just as they are free to strike them off. Given the fact that the obligation to vote covers only the casting of the ballot and that the registration in the electoral rolls is based on a formulaic statement, the measure that the text challenged provides for is seen as lenient and effective and congruent with principle of proportionality. Hence the conclusion that the legal formula of compulsory voting and the implications therein concerning the non-exercise of the right to vote (Art. 242a EC) is not unconstitutional. She did not share the view of the noncompliance with the Constitution of Art. 242a, para 1 EC in the part that delegates to the CEC the power to determine the conditions and procedure for the removal from the electoral roll and entry in the list of removed persons for this is seen as a function appropriate to the CEC, like the activities as enumerated in Art. 57 EC. The article referred to provides for similar powers, i.e. activities that are routinely carried out such as the establishment of the terms and procedure for participation of observers, machine voting, conduct of the election campaign, etc. subject to CEC statutory decisions.

The Constitutional Court members discussed the reasons and considerations presented in the challenge and the positions submitted by the institution concerned and the opinions in writing received and to rule took into consideration the following matters:

The Ombudsman's competence is limited to the avenue to approach the Constitutional Court with a challenge of the constitutionality of a piece of legislation (Art. 150, para 3 of the Constitution) as the case is; however, the Ombudsman shall not rule on compatibility under Art. 149, para 1, subpara 4 of the Constitution. Hence, the reasons in the positions and opinions in writing that were submitted on the incompatibility of the text challenged with international treaties whereto Bulgaria is a party are not to be discussed upon their merits in these proceedings – an argument that Art. 19, para 1, subpara 7 or the Ombudsman also invites. Resolution No. 8/02.12.2010 on Constitutional Case No. 14/2010 is in the same vein.

The challenged Art. 242a EC functionally related to Art. 3, para 2, second sentence EC reading that voting shall be compulsory, shall be performed by the voter in person, and shall represent a discharge of the voter's civic duty. The texts of Art. 242a EC show the implications of unfulfilment of the right to vote by the right holder. Further, the texts provide for the procedure of verification and sanction in the event of unfulfilment of the obligation to vote and their substance can be made clear only if analyzed from the perspective of unfulfilment of the obligation that they are to enable, following the imperative of the law.

The existing Constitution proclaims suffrage a political civil right and a fundamental individual right that derives directly from popular sovereignty. Suffrage is the basic tool to enable democratic government to materialize as the exercise of the right to vote constitutes the major structures of statehood and exerts political control over their operation. The principles on which this fundamental right is based are spelled out in Art. 10 of the Constitution – universal, equal and direct suffrage by secret ballot. These principles are always manifest in an intricate interplay. The manifestation (materialization) of any of them makes sure that the other principles will materialize. The codification of restrictions or disregard for even one of these principles degrades suffrage to a mere declaration. What is more, the consideration of suffrage detached from the other Constitution-proclaimed political rights like freedom of thought, freedom of religion, freedom of speech and freedom of expression would lead to the negative outcome. The close link of suffrage with the above-enumerated political rights makes it necessary to stick to the requirement of freedom of elections.

Like any personal right the right to vote stands for the freedom of choice which a law-guaranteed option to vote or not to vote. The exercise of the right to choose necessarily includes the freedom to decide who/what to choose and the freedom to express the choice. In this context it should be underlined that the freedom of choice rests on the freedom of thought and the freedom of belief that are inviolable, as per Art. 37, para 1 of the Constitution. Moreover, Art. 38 of the Constitution guarantees that no one shall be persecuted or restricted in his/her rights because of his/her views, be they philosophical, religious or political.

Art. 242a EC is incompatible with the Constitution concept of the substance of suffrage in a context with the other political rights. The article quoted deprives citizens of the freedom to choose to engage in or disengage from political life. Non-exercise of the right to vote is subjected to coercion that Art. 242a, para 1 EC provides for: Any persons, who have not exercised the right thereof to vote in two successive elections of one and the same type without a valid excuse, shall be removed from the electoral roll for the next elections and shall be entered in the list of removed persons. The legal implications of not voting of the text challenged cannot be seen as encouragement of an incentive to vote.

The removal from the electoral roll and the entry in the list of removed persons of the individuals who have not exercised their voting right is a juristic sanction as it aggravates their situation from a legal perspective that under certain conditions may lead to a situation where exercise will be impossible altogether. These are cases where a citizen who did not vote in two successive elections cannot give compelling reasons for not voting. By virtue of Art. 242a, para 1 EC such a citizen will be deprived of the opportunity to exercise his/her voting right as he/she stays on the list of removed persons. That is why the negative implications that the text provides cannot be reduced to moral censure for the unfulfilment of an obligation. The implications are essentially a legal sanction for the non-exercise of the right to vote by casting a ballot, as through a legal process they restrict political freedom as a Constitution-established immanent part of the right to vote.

In principle the exercise of the right to vote is an expression and demonstration of free will and freedom to choose a course of conduct. This is incompatible with the coercion on voters to express their views, political views included, under threat of sanction and in no way gives greater legitimacy to the State institution elected. Today, when society perceives itself as democratic and free, it is unacceptable to compel citizens, under threat of a sanction codified in Art. 242a, para 1 EC, to express their personal position, whatever their political beliefs may be, in a choice into which they are forced and which is not their own. This codified approach does not give greater legitimacy to the State institutions thus elected whereas the election process is transformed into collection of data that, conforming to the recognized legal frame, are mechanically/technically counted as valid or invalid ballots. This degrades the purpose of suffrage and the raison d'être of freedom that the Constitution guarantees as a supreme value (Preamble, second paragraph).

The State, being the guarantor of the Constitution-proclaimed civil rights is under the obligation to ensure conditions for the free and smooth exercise throughout of each Bulgarian citizen's right to vote. This proceeds from the Preamble to the Constitution (third paragraph) where the right, dignity and security of the individual are proclaimed a supreme principle.

In view of the above-stated considerations the Constitutional Court found unconstitutional the sanction that Art. 242a EC provides for to penalize for non-exercise of the right to vote, because of incongruence with the Preamble, the second and third paragraph, and with Art. 37, para 1 and Art. 38 of the Constitution.

Given the exceptional importance of the right to vote as a tool to bring citizens into the government of the State and for the exercise of political control over the institutions of statehood that are constituted by a process of elections, this right is proclaimed to be a fundamental right and according to Art. 57, para 1 of the Constitution shall be an irrevocable right. This right derives directly from the Constitution which is the supreme law and from the direct application of its provisions (Art. 5, paras 1 and 2). The Constitution safeguard of the irrevocability of the right to vote precludes its linkage to obligations that derive from the Constitution or against the codification of procedure-related obstacles that make the exercise of this right difficult or altogether impossible, as suggested by the legal implications of Art. 242a EC. Further, there exists no text in the Constitution to permit to curtail the right to vote by a subsequent legislative act. The Constitutional Court's jurisprudence is along these lines with Decision No. 11/05.10.2010 on Constitutional Case No. 13/2010 that rules that only reasons of constitutional nature can justify the curtailment of Constitution-proclaimed civil rights. In this particular case there exist no reasons to call for the exception that Art. 57, para 3 of the Constitution provides for, viz. the curtailment of some rights following declaration of war, martial law or state of emergency. The codification in Art. 242a, para 2 ff. EC of further requirements concerning the exercise of the right to vote is counterproductive, being dissonant with Art. 57, para 1 of the Constitution.

The explanation attached to the bill sets out the goals pursued for the sake of which the text here challenged was codified, makes it clear that the Lawmaker sought to push up the voter turnout and to crack down on the "vote buying". However, the sanction of Art. 242a EC excludes the alternative of abstention (vote absenteeism) which is intrinsic to voting right, hence the goal declared is illegitimate. The codification of the sanction was the Lawmaker's attempt to solve the problem of the democratic legitimacy of the system of government but does not solve the essential problem of electoral absenteeism that is behind the voters' unwillingness to go to the polling stations. This problem involves values rather than the organization and procedure of voting and lies entirely within the competence of the Legislature and pertains to the ability of rightful voters to create public good in conditions where the modern society's values undergo a change. Therefore, the solution to the problem of absenteeism cannot be sought in the compulsion to resort to in order to make voters go to the polling stations under threat of sanction for non-exercise of voting rights. The removal from the electoral rolls as codified in Art. 242a EC of individuals who did not vote and the difficulties to cope with in order to subsequently move the non-voters from the list of removed persons back to the electoral rolls further complicates the problem of the low voter turnout and thus does not contribute to the achievement of the goal as declared in the Election Code.

The codification of active registration to purge the electoral rolls from "phantoms" likewise shows the disproportional form of the tool used, at least because the update of the electoral roll, as part of the organization of elections, is a responsibility of the relevant authorities, including the update of the registers of births, marriages and deaths. The principle of universal suffrage presupposes that all citizens who are eligible to vote are tacitly registered as of the Election Day and their names are entered in the election rolls. The institutions in charge of the organization and the holding of the elections must compile the electoral rolls and enter valid data about all citizens who are eligible to vote and thus exercise a Constitution-proclaimed right. Therefore, the text challenged is unconstitutional as it seeks to address an administration-related problem through curtailment of voting rights but imposes upon the voters a duty which is not theirs – the duty to resolve it.

The crackdown on vote buying as an accompanying objective of Art. 242a EC is a declaration of intention and thus disables a reasoned assessment of the proportionality of the tool employed.

Art. 42, para 1 of the Constitution thoroughly spells out the factors of eligibility: Every citizens above the age of 18, with the exception of those placed under judicial interdiction or serving a prison sentence, shall be eligible to vote. The Constitution does not provide for any other restrictions vis-à-vis the eligibility. Any citizen of legal age and mental capacity must have his/her name entered in an electoral roll. Entry in the electoral roll does not give rise to suffrage which exists ex constitutione; the entry gives legitimacy to the citizen in a voter role and is a condition sine qua non for the citizen to be able to exercise the right to vote. A citizen will be unable to exercise the right to vote unless his/her name is entered into the electoral roll. The challenged Art. 242a EC provides

for legal implications of non-exercise of the right to vote without a valid excuse in two successive elections of one and the same type, the consequence being removal from the electoral roll for the next elections and entry in the list of removed persons. A voter is stripped of the right to vote as long as his/her name is in the negative list – the list of removed persons. Such legal arrangements constitute an impediment that, given the following provisions of Art. 242a EC might turn out to be insurmountable and lead to the actual disenfranchisement of a significant fraction of the electorate. If, in abidance by Art. 242a, para 2 ff. EC, the citizen fails to file an application and to present a document to prove that compelling reasons have prevented him/her from voting, that citizen will be denied to vote and to exercise the right in the future. The enumerated negative implications are unsound, from the perspective of the Constitution, so the Constitutional Court found the text challenged to be consistent with Art. 42, para 1 of the Constitution. Moreover, the impediment under Art. 242a, para 1 EC that makes up the sanction and that involves removal from the electoral rolls of voters and the great difficulties that a voter will face to have his/her name re-entered in the electoral roll makes it impossible for a great part of voters to exercise their right to vote, hence the conclusion of noncompliance also with Art. 10 of the Constitution on grounds of breach of the principle of universal suffrage.

The challenged Art. 242a EC conflicts also with the Constitution-proclaimed principle of the state committed to the rule of law (Art. 4, para 1).

Art. 4, para 1 of the Constitution reads that the Republic of Bulgaria shall be a law-governed state. It shall be governed by the Constitution and the laws of the country. The Constitutional Court has solid jurisprudence on the essentials of the state committed to the rule of law, accepting in the material sense it is a state of justice and in the formal sense it is a state of legal certainty where the substance of the legal order is clearly and unambiguously defined. The lawfulness of the government of the State is a Constitution-set requirement which makes it predictable and that is a factor for legal certainty. Legal certainty and stability are characteristics of the state committed to the rule of law that requires long-term and coherent legal regulation of relations within society. Decision No. 1/2005 on Constitutional Case No. 8/2004, Decision No. 7/2005 on Constitutional Case No. 1/2005, etc. are along these lines. A manifestation of lawfulness in a state committed to the rule of law is abidance by the Constitution which shall be the supreme law, and no other law shall contravene it. A state is termed a state committed to the rule of law when it is governed in abidance by the Constitution and the laws while the laws shall be clear, precise and consistent with the Constitution (Decision No. 5/2002 on Constitutional Case No. 5/2002; Decision No. 8/2012 on Constitutional Case No. 16/2011). The newly codified Art. 242a EC does not fit into the criteria that are the essential characteristics of a state committed to the rule of law.

What is observed is a legal insufficiency vis-à-vis the reasons to enter the names of people who did not go to the polling stations in a list of removed persons. On the one hand, the rationale under Art. 38 EC is supported by the negative legal implications arising from Art. 42, para 1 EC and disabling the active voting right, whereas Art. 242a, para 1 EC is the codification of a completely new reason for entry in the list of removed persons. However, Art. 38 EC does not mention the reason arising from Art. 242a EC and that will make difficult the law enforcement as it is not clear whether the Lawmaker had in mind one list of removed persons or a second list, in addition to that under Art. 38 EC in view of the provision of Art. 242a EC, whereby the text challenged was not included in the grounds under Art. 38 EC.

Rather than establishing separate procedures to verify the reasons for exclusion from the list of removed persons, which procedures will contain safeguards, inter alia, against any refusal by the competent authority to exclude from the list of removed persons, the Lawmaker referred to proceedings under Art. 23, Art. 33, Art. 39 and Art. 40 EC that work under completely different assumptions of exclusion from the list of removed persons and re-entry in the electoral rolls. The need of autonomous rules of procedure was more than pressing since the contested text of Art. 242a EC provides for proofs to be given to prove that compelling reasons have prevented from voting more than twice. Such rules of procedure are needed also for the appeal against the refusal of the competent State authority to exclude from the list of removed persons – for example, against refusals to exclude from the list of removed persons on the Election Day.

Moreover, the provisions of Art. 242a, paras 4 and 5 EC are indefinite and incomplete regarding both, the possible valid excuse and the presentation of proofs to that effect. This vagueness and the notion of a "relevant document" where the meaning of either word is to be guessed allow discretion of judgment by the municipal administrations when these have to decide whether it will be appropriate or inappropriate to proceed with exclusion from the lists of removed persons and re-entry in the electoral rolls. The provision challenged does not answer the question whether the reason given for not voting is valid in the hypothesis of conscious abstention from voting as a free choice and its free expression that is guaranteed by Arts. 37 and 38 EC. For instance will the conscientious objectors to voting because of religious beliefs fit into the group of "other compelling reasons", and if this logic is to apply, will it be enough just to mention such reasons? Or does the law require that they be proved? Will such reasons be counted as invalid and subject to the sanctions that Art. 242a EC provide for? In the last hypothesis the noncompliance with Art. 37, para 1 of the Constitution that reads that choice of religious views shall be inviolable will be inevitable. The vague scope and meaning of Art. 242a, para 4 and para 5 EC preclude their one-way application and this is again a departure from the required legal certainty as a criterion of the state committed to the rule of law. In the long run the outcome is curtailment of the right to vote.

The Constitutional Court found the challenge tenable in the part that maintains that Art. 242a, para 1 EC is noncompliant with the Constitution, the reason being the inappropriate delegation of legislating authority to the CEC to determine the conditions and procedure to impose sanctions on citizens who did not exercise their right to vote.

By Art. 42, para 1 the fathers of the Constitution set the conditions (positive and negative legal factors) to be eligible to vote. Another text of the same "competence" does not provide for legal regulation of the factors that franchise or disenfranchise. A prerogative of this kind is not to be deduced from Art. 42, para 2 of the Constitution reading that the organization and procedure for the holding of elections and referendums shall be established by a law. What is meant is an activity that is administration and organization of the election process so as to ensure all aspects of free and unhindered exercise of the right to vote by each citizens and to preclude limitations (other than those that are set at constitutional level) on the exercise of the right. The removal of individuals from the electoral rolls and their entry in the lists of removed persons plus the subsequent imposition of procedures to be followed in order to prove that compelling reasons have prevented them from voting constitutes an infringement on universal suffrage.

Art. 242a, para 1 EC is unconstitutional as being inconsistent with Art. 10 and Art. 42, para 2 of the Constitution because of the legal delegation that is extended to the CEC whereby the Commission shall be free to decide on the conditions and procedure of the imposition of sanction on individuals who have not exercised their right to vote.

The Central Election Commission is a State authority that has been established by a law and with powers that are confined to the requirement that it ensure the free expression of the will of the electorate and the true and accurate ascertainment of the expression thereof, the recognition of the electorate's message and its official communication to the public. The legal delegation by virtue of which the CRC is mandated to determine the conditions and procedure of removal from the electoral rolls of citizens who did not vote and their entry in the list of removed persons leads to unconstitutional curtailment of their voting rights. This legal delegation is not to be deduced from Art. 57 EC which provides in detail for the CEC's prerogatives. The detected inconsistencies with the principle of the state committed to the rule of law and with Art. 5. para 1 of the Constitution which reads that the Constitution shall be the supreme law, and no other law shall contravene it invite the conclusion of noncompliance with the Constitution of the text challenged in the part that vests the CEC with the prerogatives to impose sanctions on persons who did not vote.

Art. 242a, paras 1-5 EC conflicts with the principle of the equality of citizens before the law as it makes it binding on the citizens referred to in paragraph 1 to take action on their own in order to have their names re-entered in the electoral roll and in addition, to prove that they have had compelling reasons that prevented them from voting and discriminates against those that are enumerated in Art. 242a, para 6 EC on whom no sanction shall be imposed for not voting while the central government grants on them the privilege to be tacitly re-entered in the electoral rolls though the reasons for their absence on the Election Day may be equally invalid. The approach taken by the legislating authority, that of unequal treatment of Bulgarian citizens with respect to their Constitution-recognized fundamental rights makes unconstitutional Art. 242a, para 6 EC which is noncompliant with Art. 6, para 2 of the Constitution.

The Constitutional Court agreed that Art. 242a of the Election Code that provides for sanctions in the event of failure to exercise the right to vote is noncompliant with the Preamble to the Constitution and with the Constitution texts in Art. 4, Art. 5, para 1, Art. 6, para 2, Art. 10, Art. 37, para 1, Art. 38, Art. 42 and Art. 57 and for this reason must be declared unconstitutional.

Actuated by the stated considerations and on the strength of Art. 149, para 1, subpara 2 of the Constitution read in combination with Art. 151, para 1 of the Constitution and Art. 22, para 1 of the Constitutional Court Act, the Constitutional Court

R U L E D :

The Constitutional Court declares unconstitutional Art. 242a (New – DV, No. 39/2016, effective 26.05.2016) of the Election Code (promulgated, DV, No. 19/05.03.2014, last amended, DV, No. 97/06.12.2016).