Decision 23/2015 (VII. 7.) AB

On the conflict with an international treaty and the disapplication in pending proceedings of certain provisions of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, and of Government Decree 295/2013 (VII. 29.) Korm on the Recognition of Churches and on the Specific Rules for the Legal Status and Functioning of Ecclesiastical Legal Persons

In the matter of a judicial initiative seeking a finding of unconstitutionality of a legal act by non-conformity with the Fundamental Law, with the dissenting opinions by *dr. István Balsai, dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. László Salamon, dr. Mária Szívós* and *dr. András Varga Zs.*, the Constitutional Court, sitting as the full court, has rendered the following

decision:

1. The Constitutional Court finds that Section 14 (c) (ca) and (cb) and Section 14/A (1) to (3) of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, as well as Section 1 (c) and (d), and Section 3 (1) (ac) and (b) (ba) to (bc) of Government Decree 295/2013 (VII. 29.) Korm on the Recognition of Churches and on the Specific Rules for the Legal Status and Functioning of Ecclesiastical Legal Persons are in conflict with an international treaty; therefore, the Constitutional Court hereby called upon the National Assembly and the Government to take the measures necessary to resolve such conflict until 15 October 2015.

2. The Constitutional Court further finds that Section 14 (c) (ca) and (cb) and Section 14/A (1) to (3) of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, as well as Section 1 (c) and (d), and Section 3 (1) (ac) and (b) (ba) to (bc) of Government Decree 295/2013 (VII. 29.) Korm on the Recognition of Churches and on the Specific Rules for the Legal Status and Functioning of Ecclesiastical Legal Persons shall be disapplied in Case No 2.K.30.398/2014 pending before Budapest-Capital Administrative and Labour Court.

3. The Constitutional Court hereby rejects the judicial initiative seeking a finding of conflict with the Fundamental Law and an international treaty of Section 14 (g) to (i), Section 14/C, Section 14/D and Sections 15 to 16 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities.

The Constitutional shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. In the action brought before Budapest-Capital Administrative and Labour Court Case No 2.K.30.398/2014 by the claimant Budapest Autonomous Congregation Christian Association (hereinafter referred to as the "Claimant") against the defendant Minister for Human Capacities instituted in respect of the judicial review of a public administrative decision in an ecclesiastical matter, by simultaneously ordering a stay in the proceedings pending before the court, the presiding judge, on the basis of Section 25 of Act CLI of 2011on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), petitioned the Constitutional Court concerning for a specific norm control procedure seeking primarily retroactive annulment of Section 14 (c) (ca) and (cb) and Section 14/A (1) to (3) of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (hereinafter referred to as the "Act on Churches"), as well as Section 1 (c) and (d), and Section 3 (1) (ac) and (b) (ba) to (bc) of Government Decree 295/2013 (VII. 29.) Korm on the Recognition of Churches and on the Specific Rules for the Legal Status and Functioning of Ecclesiastical Legal Persons (hereinafter referred to as the "Government Decree").

[2] In the alternative, the petitioner also requested the Constitutional Court to order that the contested provisions be disapplied generally in all pending cases and, in the second alternative, the petitioner sought an order that the Constitutional Court declare the contested provisions inapplicable in the individual case.

[3] As alleged by the referring judge in his petition, the contested legislative provisions are contrary to Article 9 and Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter referred to as the "Convention"), and infringe Article B (1), Article Q (2), Article VII (1), Article VIII (2), Article XV (2) and Article XXIV (1) of the Fundamental Law.

[4] 2. The background to the case concerns the fact that the Claimant had been operating as a registered church under Act IV of 1990 on Freedom of Conscience and Religion and on Churches (hereinafter referred to as the "Religious Freedom Act") since 19 November 1998, but after the entry into force of the Act on Churches its application for recognition as a church was rejected by the National Assembly in Parliamentary Resolution 8/2012 (II. 29.) OGY (hereinafter referred to as the "Parliamentary Resolution").

[5] The Claimant then filed a constitutional complaint, which the Constitutional Court found to be well-founded and found, even as far as the Claimant was concerned, that "since the Constitutional Court in the present case [...] declared the annulment and / or inapplicability of the provisions contrary to the Fundamental Law with retroactive effect, contrary to the general rule, the Parliamentary Resolution and the directly effective Section 34 (4) of the Act on Churches cannot have any legal effect, the churches listed in the Annex to the Parliamentary Resolution have not lost their church status on the basis of such provisions, and their conversion into religious associations cannot be compelled." {Decision 6/2013 (III. 1.) AB (hereinafter referred to as the "2013 Court Decision"), Reasoning [215]}.

Section 33 (1) of the Act on Churches inserted by Act CXXXIII of 2013 on the Amendment of Certain Acts of the National Assembly Regarding the Status and Operation of Religious Communities in Connection with the Fourth Amendment to the Fundamental Law states that "a religious community in respect of which Section 34 (1), (2) and (4) of this Act, in force from 1 January 2012 until 31 August 2012, is not applicable pursuant to Constitutional Court Decision 6/2013 (III. 1.) AB, may initiate the recognition as a church within a preclusive limitation period of 30 days from the entry into force of this provision in the procedure pursuant to Section 14/B and Section 14/C hereof." On that basis, on 2 October 2013, the Claimant applied to the Minister for Human Capacities for recognition as an established church. By decision, the Minister rejected the Claimant's initiative on the ground that the Claimant had failed to demonstrate that it fulfilled the conditions laid down in Section 14 (c) of the Act on Churches and Section 1 (g) of the Government Decree. The Claimant brought an action for judicial review of the public administrative decision of the Minister.

[7] 3. In 2012, the Claimant also filed an application with the European Court of Human Rights (hereinafter referred to as "ECtHR"). In its Judgement of 8 April 2014 in Magyar Keresztény Mennonita Egyház and others v. Hungary Application Nos 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12 (hereinafter referred to as the "ECtHR Judgement"), the ECtHR found a violation of freedom of association (Article 11) protected by the Convention in conjunction with the right to freedom of religion (Article 9) also in relation to the Claimant.

[8] The ECtHR found that several issues relating to the application of Article 41 (Just satisfaction) of the Convention could not yet be decided and it was in this spirit that it reserved such issues and called upon the Government of Hungary and the applicants to notify the ECtHR of any agreement they might have reached within six months of the judgement becoming final. The ECtHR dismissed the Government's application to refer the case to the Grand Chamber of the ECtHR and the judgement became final on 9 September 2014.

[9] 4. In the view of the judge presiding over the case and who had brought the action before the Constitutional Court, Section 14 (c) (ca) and (cb) of the Act on Churches is contrary to the Convention because the State confers different advantages on religious communities in respect of different statuses and selects partners from among religious communities for the performance of its public tasks in such a manner that, in accordance with the judgement of the ECtHR, it imposes discriminatory conditions for obtaining that status, in breach of the requirements of neutrality and impartiality. The provision is also contrary to the Fundamental Law, as it does not meet the requirements of objectivity and reasonableness, and therefore infringes the right to a fair trial and freedom of religion, as well as the requirement of non-discrimination; it is also discriminatory in that the churches recognised ex lege by the National Assembly did not have to initiate proceedings and justify the condition laid down in Section 14 (c) of the Act on Churches. In the light of the context of the provisions of the Act on Churches cited, the judge held that Section 14/A of the Act on Churches and the provisions of the Government Decree at issue were contrary to the Convention and the Fundamental Law.

[10] The petitioner alleges that Section 14 (g) to (i), Section 14/C, Section 14/D (2) and Sections 15 to 16 of the Act on Churches are contrary to an international treaty because, in

accordance with the judgement of the ECtHR, the recognition of churches may take place under the Act on Churches in force in a system which, by its very nature, disregards the requirement of neutrality and entails a risk of arbitrariness (influenced by politics). In its view, these provisions are contrary to Article C, Article Q (2), Article VII (1), Article VIII (2), Article XV (2) and Article XXIV (1) of the Fundamental Law: The conferral of the power to decide on recognition on the legislative power is in itself a matter of concern; and the criteria for recognition are highly abstract, objective and reasonable criteria for compliance with them are not contained in the Act on Churches; therefore, the possibility of recognition determined by political considerations cannot be excluded. In relation to this part of the petition, the petitioning judge observes that, although he is not seeking review of the provisions of the legislation expressly referred to in the decision under review in the present case pending before him, he is seeking annulment of all the provisions of the Act on Churches which, as a consequence of the judgement of the ECtHR, are incompatible with international law, or, in the light of the 2013 Court Decision, the Fundamental Law, since, first, they also relate to the recognition procedure and, second, a restrictive interpretation of them would jeopardise the completion of the recognition proceedings within a reasonable time, the protection of the rights of subjects and the adjudication of the Claimant's rights in the proceedings on the merits.

[11] 5. The Constitutional Court has obtained the opinion of the Minister for Human Capacities.

II

[12] 1. The provisions of the Constitution relevant in respect of the petition are as follows:

“Article B (1) Hungary shall be an independent, democratic State governed by the rule of law.”

“Article Q [...] (2) In order to comply with her obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.”

“Article VII (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one’s religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practice or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life.

(2) People sharing the same principles of faith may, for the practice of their religion, establish religious communities operating in the organisational form specified in a cardinal Act.

(3) The State and religious communities shall operate separately. Religious communities shall be autonomous.

(4) The State and religious communities may cooperate to achieve community objectives. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established

churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community objectives.

(5) The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches, shall be laid down in a cardinal Act.

"Article VIII [...] (2) Everyone shall have the right to establish and join organisations.

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

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

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

[13] 2. The provisions of the Convention relevant in respect of the petition are as follows:

"Article 9 Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

"Article 11 Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[14] 3. The contested provisions of the Act on Churches read as follows:

"Section 14 An organisation engaged in religious activities shall be recognised as a church by the National Assembly if,

[...]

(c) for a minimum period of

(ca) one hundred years, such organisation has been operating internationally, or

(cb) twenty years, such organisation has been operating in an organised form as a religious community in Hungary and has a membership of 0.1 per cent of the population of Hungary, [...]

(g) its teaching and activities do not violate the right to physical and psychological well-being, the protection of life and human dignity,

(h) the organisation carrying out religious activities has not, in the course of its activities, been exposed to a risk to national security; and

(i) its intention to cooperate in the pursuit of community objectives and its capacity to maintain such cooperation in the long term is demonstrated in particular by its statutes, the number of its members, its activities in the areas referred to in Section 9 (1) prior to the initiative and the accessibility of such activities to a larger section of the population.

Section 14/A (1) International operation within the meaning of Section 14 (c) (ca) shall be established on the basis of

(a) a certificate issued by churches having church status in at least two countries and professing the same beliefs, (b) a certificate of membership of the association issued by an association of churches, member churches, operating in at least two countries and professing the same beliefs, or

(c) a certificate issued by a universal church which brings together particular churches in at least two countries.

(2) The operation pursuant to Section 14 (c) (cb) shall include the operation of a church registered prior to the entry into force of this Act as a church under Act IV of 1990 on Freedom of Conscience and Religion and on Churches and the operation as an organisation engaged in religious activities as its core purpose in the period between 1 January 2012, the the entry into force and Section 33 (3) of Act CXXXIII of 2013 on the Amendment of Certain Acts of the National Assembly Regarding the Status and Operation of Religious Communities in Connection with the Fourth Amendment to the Fundamental Law.

(3) The number of members pursuant to Section 14 (c) (cb) shall be determined on the basis of the latest data on the population of Hungary published by the Central Statistical Office prior to the submission of the initiative."

"Section 14/C (1) The Committee shall, on the basis of the Minister's notification pursuant to Section 14/B (4), submit to the National Assembly a draft Act on the recognition of an organisation engaged in religious activity as a church, and, if the conditions set out in Section 14 (g) to (i) are not met, a parliamentary resolution proposal in connection with the draft Act. The Committee shall submit the draft Act or the parliamentary resolution proposal within 60 days of the Minister's notification under Section 14/B (4).

(2) In the proceedings of the committee, the hearing of the religious activity organisation in a public committee sitting shall be mandatory.

(3) The National Assembly shall, in the course of the deliberations on the draft Act, on the basis of its assessment of the existence of the conditions set out in Section 14 (g) to (i), decide within 60 days of the submission of the draft Act on the recognition of the organisation engaged in religious activities as a church for the purposes of cooperation with the organisation engaged in religious activities for the purposes of the community, by adopting the draft Act.

(4) If the National Assembly declines to support the recognition of an organisation engaged in religious activities as a church and does not adopt the draft Act, it shall decide within the time limit specified in Subsection (3) whether to adopt the resolution. The parliamentary resolution shall state which of the conditions set out in Section 14 (g) to (i) are not fulfilled and the reasons for which the National Assembly has determined that they are not fulfilled.

(5) Within one year of the publication of the parliamentary resolution, no renewed initiative for the recognition of an organisation engaged in religious activities as a church may be launched.

Section 14/D (1) An organisation engaged in religious activities may apply for judicial review of the Minister's decision under Section 14/B (2) on the basis of the rules on the review of public administrative decisions.

(2) An organisation engaged in religious activities may apply to the Constitutional Court for a review of a decision of the National Assembly in accordance with the procedure laid down in the Constitutional Court Act.

Section 15 An organisation engaged in religious activities shall be deemed to be an established church as of the date of entry into force of the amendment to this Act on the inclusion of the established church concerned.

Section 16 (1) The Minister shall register an established church within 30 days of the entry into force of the amendment to this Act relating to the inclusion of that established church.

(2) The Minister shall register an internal ecclesiastical legal person on the application of the representative of the entire or the supreme body of the established church. The legal personality of an unregistered internal ecclesiastical legal person shall be certified by a representative of the entire or supreme body of the registered church or of the immediate superior ecclesiastical body of the internal ecclesiastical legal person concerned, who shall be notified to the Minister or by an officer authorised to do so by the internal rules of the established church."

[15] 4. The impugned provision of the Government Decree read as follows:

"Section 1 The following shall be attached by the organisation engaged in religious activities to the initiative pursuant to Section 14/B (1) of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (hereinafter referred to as the "Act on Churches"):

[...]

(c) a document proving that the number of members of the organisation engaged in religious activities meets the condition set out in Section 14 (c) (cb) of the Act on Churches,

(d) the certificate specified in Section 14/A (1) of the Act on Churches.

"Section 3 (1) The seconded expert shall give an opinion as to whether

(a) the organisation engaged in religious activities

[...]

(ac) has been operating in an organised form as a religious community in Hungary for twenty years,

(b) the organisation issuing the certificate specified in Section 14/A (1) of the Act on Churches

(ba) has the status of a church in at least two countries and professes the same beliefs as the organisation engaged in religious activities,

(bb) is an association of churches or member churches in at least two countries and professes the same beliefs, of which the organisation engaged in religious activities is a verifiable member at the time the certificate is issued,

(bc) as a universal church, it brings together particular churches in at least two countries and the religious organisation is also a particular church."

III

[16] The judicial initiative is, in part, well-founded.

[17] 1. The Constitutional Court first of all reviewed whether the judicial initiative met the statutory conditions.

[18] The Constitutional Court interpreted in detail the wording of the clause in Section 25 (1) of the Constitutional Court Act reading "in the course of the adjudication of an individual case pending before [the judge], a legal rule shall be applied which..." in Decision 3192/2014 (VII. 15.) AB as follows: "The determination of the applicable law is a matter for the general court, meaning the judge presiding in the specific case, and the Constitutional Court generally refrains from interfering with this discretion. Indeed, it is incumbent upon and within the competence of the judge to decide on the basis of which law and specific provisions thereunder, or the application thereof, to rule on the action brought (the charge brought). Nevertheless, the Constitutional Court, in the context of fulfilling its constitutional function, has a duty under the Fundamental Law and the Constitutional Court Act to ascertain whether the legal conditions for a judicial initiative are complied with and, in the event of their manifest absence, to reject the initiative. [...]

The Constitutional Court shall not disregard the verification of the formal and substantive conditions laid down by law. Having regard to the above, a judicial initiative shall only comply

with the requirements of Section 25 (1) of the Constitutional Act and the requirement of being explicit under Section 52 (1b) of the Constitutional Act if the judge sets out the grounds for the alleged infringement of the Fundamental Law in relation to the provisions being contested and if the judge also states in his or her petition the specific relationship between the provisions sought to be annulled and the pending judicial proceedings. The "individual or specific" nature of the judicial initiative as a review of a rule (posterior norm control or review) is somewhat more restricted than that of an abstract ex post review, in that the judge bringing the petition may only call into question the actual rule of law applied in the case and must furnish detailed reasons for the need to apply such rule in the case under review. This is the only means of ensuring the individual (specific) nature of the initiative.

Pursuant to Section 52 (4) of the Constitutional Court Act, the petitioner must prove that the conditions for a constitutional court procedure are fulfilled. Consequently, if the judge who initiates the procedure does not even claim that the challenged norm should be applied in the case, or does not point out the connection between the norm that is considered unconstitutional and the individual case in such a manner that the Constitutional Court can clearly establish such connection from the content of the petition, no constitutional court procedure may be conducted.

In addition to the foregoing, the Constitutional Court also considers it necessary to point out the following in connection with the interpretation of Section 25 (1) of the Constitutional Court Act. The legislator has provided the possibility for the judge to challenge the applicable rule in order to prevent the court from being forced to make its decision by applying a rule that is contrary to the Fundamental Law. It is in this spirit that any provision of substantive law on which the decision on the merits of an individual case before the court depends may be the subject of a judicial initiative, but it is also possible to challenge procedural rules which, although not directly forming the basis of the court's decision to close the case, if applied, have a substantial effect on the procedural position of the parties." {Decision 3192/2014 (VII. 15.) AB, Reasoning [14] to [18]}

[19] The Constitutional Court is convinced that the above observations are also applicable to the interpretation of the second sentence of Section 32 (2) of the Constitutional Court Act which relates the right of petition to the competence defined in Article 24 (2) (f) of the Fundamental Law. Under that provision, judges shall, in addition to ordering a stay of court proceedings, "initiate proceedings before the Constitutional Court if, in the course of the adjudication of an individual case pending before them, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty."

[...]

Article Q (2) [...] of the Fundamental Law guarantees the consistency of international law and Hungarian law, in comparison with a similar provision of the previous Constitution, specifically reading "in order to comply with [Hungary's] obligations under international law". [...] This provision is validated by the Constitutional Court's competence under Article 24 (2) (f) of the Fundamental Law, which provides that the Constitutional Court investigates the conflict of laws

with international treaties (and the Court may annul a law or legislative provision which is in conflict with an international treaty)." {The 2013 Court Decision, Reasoning [106] and [108]}

[20] The possibility of challenging the applicable norm is provided for the judge in Section 32 (2) of the Constitutional Court Act, which is worded in a similar fashion to Section 25 (1) thereof, in order to prevent the court from being constrained to render its decision by applying a norm that is contrary to an international treaty. Where a judge finds that the law applicable in the proceedings pending before him is contrary to an international treaty, in the absence of the authority to dispense with the application of a rule contrary to an international treaty, that judge is bound, under Section 32 (2) of the Constitutional Court Act, to initiate proceedings before the Constitutional Court.

[21] In accordance with Section 52 (4) of the Constitutional Court Act, the petitioner must prove that the conditions for a Constitutional Court procedure are fulfilled. Consequently, if the judge who initiates the procedure does not even claim that the challenged norm should be applied in the case, or does not point out the connection between the norm that is considered to be in conflict with an international treaty and the individual case in such a manner that the Constitutional Court can clearly establish such connection from the content of the petition, no constitutional court procedure may be conducted.

[22] In the present case, the judge expressly sought a review by the Constitutional Court not only of the legal provisions referred to in the ministerial decision to be reviewed in the case before him, but also of other substantive and procedural provisions relating to the recognition of the Claimant as a church, which concern the procedure by the National Assembly, the Constitutional Court or the Minister, for registration to be carried out following recognition as a church. These provisions, although they may be applicable to the Claimant's "case" in the broad sense and may therefore affect the Claimant's rights, do not constitute a provision of law applicable to the individual case pending before the judge who brought the Constitutional Court procedure. Therefore, for the reasons set out above, the petition submitted in connection with Section 14 (g) to (i), Section 14/C, Section 14/D (2) and Sections 15 to 16 of the Act on Churches does not satisfy the conditions for an individual (specific) review petition for norm control laid down in Section 25 (1) and Section 32 (2) of the Constitutional Court Act. For all these considerations presented above, the Constitutional Court rejected the judicial initiative on the basis of Section 64 (b) of the Constitutional Court Act.

[23] The petitioner claimed, with regard to the provisions designated as contrary to the Fundamental Law and an international treaty, that they were applicable in the context of the decision to be taken in the specific proceedings, only in relation to Section 14 (c) (ca) and (cb), Section 14/A (1) to (3) of the Act on Churches, as well as Section 1 (c) and (d), Section 3 (1) (ac) and (b) (ba) to (bc) of the Government Decree. There is therefore no impediment to the disposal of the petition in this respect.

[24] 2. In view of the fact that the court based its petition to a significant extent on the findings of the ECtHR judgement and that, pursuant to Article Q (2) of the Fundamental Law, the Constitutional Court would also assess the conformity of the challenged legislation with the Fundamental Law in the light of Hungary's international legal obligations, in particular the

decisions of the ECtHR relevant to the subject matter of the case at issue, the Constitutional Court first considered the petition alleging infringement of an international treaty.

[25] Since the ECtHR does not specifically review the conformity of specific provisions of law with the Convention, but whether a High Contracting Party (a State signatory to the Convention) has, overall (by its legislation or its application of the law), violated a right conferred upon the applicant by the Convention or its protocols, the Constitutional Court therefore proceeded to determine the extent to which the violation of the Convention established in the ECtHR judgement was connected with the rules at issue in the present case.

[26] 2.1 The ECtHR has held that the matter falls within the scope of Article 9 and Article 11 of the Convention even where the subject matter of the case is not the applicants' legal capacity but the recognition of the applicants as a church with appropriate privileges, because this also affects *ratione materiae* the autonomous functioning of the applicant religious communities and thus the collective exercise of religion (*see* ECtHR judgement, paragraph 55).

[27] If the State voluntarily decides to grant religious organisations the entitlement to State subsidies or privileges in the field of taxation, it is bound to act in accordance with the principle of neutrality when granting, or reducing or withdrawing, such entitlements, and cannot act in a discriminatory manner, since these rights also fall within the scope of Article 9 and Article 11 of the Convention in a wider ambit (ECtHR judgement, paragraph 107).

[28] A similar requirement applies where the State outsources public-interest tasks for religious organisations; the State must base its choice of partners for cooperation on criteria that can be established with certainty (such as the financial capacity of the parties concerned). Distinctions made by the State with regard to recognition, partnerships and subsidies must not produce a situation in which the adherents of a religious community feel like second-class citizens, for religious reasons, on account of the State's less favourable stance towards their community (ECtHR judgement, paragraph 109).

[29] The ECtHR has recognised the freedom afforded to States in regulating their relations with churches, including the freedom to alter by means of legislative measures the privileges granted to religious organisations, but this freedom cannot extend so far as to encroach upon the neutrality and impartiality required of the State in this field (ECtHR judgement, paragraph 111).

[30] 2.2 As regards the Hungarian regulation, no indication was found by the ECtHR that would lead to the assumption that the applicant would be prevented from exercising their religion in a form that ensures their formal autonomy vis-à-vis the State. Nonetheless, the ECtHR also found that the established churches (incorporated Churches in the choice of terminology applied by the ECtHR) in the Hungarian law enjoyed preferential treatment, especially with respect to taxation State subsidies; furthermore, certain activities carried out by churches were unavailable to religious communities, which had an impact on the collective freedom of religion, and the form of an established church provides help for such religious communities to attain their objectives in securing considerable advantages for them (ECtHR judgement, paragraphs 110 and 112).

[31] In its assessment of the specific case, the ECtHR noted that it is possible that the religious communities in the case did not meet the combined requirements imposed by the legislature, namely the minimum number of members and the duration of their existence. Nevertheless, the ECtHR held that these conditions placed the applicants, some of which were new and some of which were small, at a disadvantage, contrary to the requirements of neutrality and impartiality (ECtHR judgement, paragraph 111).

[32] As regards the question of the duration of existence, the ECtHR accepted that the imposition of a reasonable duration might be necessary in the case of newly founded and unknown religious groups; however, the Court found it difficult to justify, as the authorities must now be aware, the imposition of a reasonable duration in the case of religious groups founded after the end of the communist regime in Hungary, when the exercise of faith was no longer hindered but the requirement of existence laid down in the Act on Churches had not yet been met. In this connection, the ECtHR noted the position taken by the Venice Commission, according to which the requirement of at least 100 years of international existence and at least 20 years of Hungarian existence was excessive, even in the light of the privileges granted to churches, and hardly compatible with Articles 9 and 14 of the Convention (ECtHR judgement, paragraphs 111 and 40; *see* also Opinion of the Venice Commission on Act CCVI of 2011 on Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, CDL-AD(2012)004, 19 March 2012, para. 64).

[33] The condition concerning the minimum number of members could, according to the cited opinion of the Venice Commission, become an impediment for small religious groups seeking recognition, above all those which, for theological reasons, are not organised as an extended church but in separate congregations. Some of these congregations also face difficulties in obtaining the 1,000 signatures required by the Act on Churches prior to the Amendment Act on Churches came into force, and may therefore be forced to merge in order to reach the minimum number of members required by law, despite their better intentions, such as differences of belief. The Venice Commission nevertheless remarked that the registration of a religious group (as a legal person) was not dependent upon the requirement under scrutiny, its purpose being merely to benefit from the additional protection afforded by the Act on Churches, and that in this respect the minimum number of 1,000 signatures was not excessive in relation to a population of 10 million, and that in its view it did not infringe Article 9 of the Convention. (*See* Opinion, paragraphs 52 and 55)

[34] In comparison, the ECtHR judgement was delivered following the entry into force of the Amendment Act on Churches, when the requirement of 1,000 signatures had already been replaced by the requirement of "[a] membership of 0.1 per cent of the population of Hungary". The ECtHR took into account the fact that established churches enjoy a number of privileges that are unique to them, including the explicit mention of the percentage of personal income tax donated by the faithful and the related State subsidy, the amount of which is intended to support faith-related activities. In this regulatory context, the ECtHR has held that the differentiation between established (incorporated) churches and religious communities which do not qualify as such fails to satisfy the requirement of State neutrality and is devoid of

objective grounds and such discrimination imposes a burden on believers of smaller religious communities without any objective and justifiable reason (ECtHR judgement, paragraph 112).

[35] 3. On the basis of the above findings of the ECtHR judgement, the Constitutional Court has reached the following conclusions.

[36] 3.1 According to the ECtHR judgement, the conditions imposed by Section 14(c) (ca) and (cb) of the Act on Churches on recognition as a church, and thus specifically also on the additional entitlements and privileges of established churches, namely the percentage of personal income tax which may be specifically offered to churches and the associated State subsidy, are incompatible with Article 9 and Article 14 of the Convention and the consequent requirements of neutrality and impartiality. Therefore, the Constitutional Court held that Section 14 (c) (ca) and (cb) of the Act on Churches is contrary to an international treaty, as stated in the judgement of the ECtHR.

[37] Given that Section 14/A (1) to (3) of the Act on Churches and Section 1 (c) and (d), Section 3 (1) (ac) and (b) (ba) to (bc) of the Government Decree restate the conditions laid down in Section 14 (c) (ca) and (cb) of the Act on Churches and, as stated above, which are contrary to an international treaty, and contains detailed rules for their application, the Constitutional Court held that those provisions are also contrary to an international treaty, in accordance with the judgement of the ECtHR.

[38] 3.2 Having found that the provisions of the legislation under consideration were incompatible with an international treaty, the Constitutional Court, on the basis of the relevant provisions of the Fundamental Law and the Constitutional Act and its previous case law interpreting them, decided on the legal consequences of its decision as follows.

[39] Pursuant to Article Q(2) of the Fundamental Law, in order to comply with her obligations under international law, provides that Hungary shall ensure that Hungarian law be in conformity with international law. In line with the explanatory memorandum submitted by the author of the draft proposer in support of Article Q, "[t]his provision is linked to the requirement of international law that a breach of international legal obligations cannot be justified by reference to domestic legal provisions. The specific ways of achieving consistency [...] are not set out in detail in the Fundamental Law, but the Constitutional Court's powers to assess the conflict of laws with international treaties also include the task of achieving consistency".

[40] Article 24 (2) (f) confers on the Constitutional Court the power to review the conflict of laws with an international treaty; and Article 24 (3) (c) allows the Constitutional Court to annul a law or provision of law which is contrary to an international treaty, within the limits of its powers under Article 24 (2) (f). Under paragraph (3), the Constitutional Court may also impose (additional) legal consequences specified in a cardinal Act. The explanatory memorandum submitted by the author of the draft proposal to Article 24, in line with the explanatory memorandum to Article Q, stresses that "[t]he Constitutional Court's task, as laid down in the Fundamental Law, is also to ensure that there is no legislation in the legal system that is contrary to Hungary's international obligations".

[41] The Fundamental Law therefore explicitly assigns to the Constitutional Court the task of ensuring that, in the event of domestic legislation contrary to an international treaty, in order to fulfil Hungary's obligations under international law, it should review the legislation and, if necessary, annul the legislative provision or establish other legal consequences laid down in a cardinal Act in order to resolve the conflict.

[42] The legal consequences that can be established in relation to legislation that is in conflict with an international treaty are detailed in the Constitutional Court Act. Pursuant to Section 42 (1) of the Constitutional Court Act, if the Constitutional Court finds that a legislative act is contrary to an international treaty which cannot be contrary to the legislative act promulgating the international treaty on the basis of the Fundamental Law, it shall annul the legislative act contrary to the international treaty in whole or in part. Pursuant to Subsection (2), if the Constitutional Court finds that a legislative act is contrary to an international treaty with which the legislative act promulgating the international treaty cannot be contrary under the Fundamental Law, it shall, in order to resolve the conflict, call upon the Government or the legislature, after considering the circumstances and setting a time limit, to take the necessary measures to resolve the conflict within the time limit set. Section 42 of the Constitutional Court Act does not expressly provide for the legal consequence to be applied in a special, intermediate case where the legislation promulgating the international treaty and the legislation which is in conflict with the international treaty are at the same level of legal source. The Constitutional Court was therefore required to assess, on the basis of a combined interpretation of the Constitutional Act and the Fundamental Law, what legal consequence it could apply in such a case in relation to the legislation which is contrary to the international treaty.

[43] Article 24 (3) (c) of the Fundamental Law does not necessarily require the annulment of a provision of law which is contrary to an international treaty. Section 42 (2) of the Constitutional Court Act provides for a case in which annulment is not possible, but the Government or the legislature must be called upon to take the necessary measures to resolve the conflict. Article 24 (3) (c) of the Fundamental Law, however, allows the Constitutional Court to annul a law or legislative provision which is contrary to an international treaty, irrespective of the law in question; the Constitutional Court is therefore entitled to do so in any case where the Constitutional Court Act does not expressly exclude it. Consequently, the Constitutional Court may apply the legal consequence of annulment even if the legislation promulgating the international treaty and the legislation which is contrary to the international treaty are at the same level of source of law; however, unlike in the case provided for in Section 42 (1) of the Constitutional Court Act, this is not an obligation but only a possibility. The final clause of Article 24 (3) of the Fundamental Law also allows the Constitutional Court to lay down a legal consequence in a cardinal Act in relation to the review of the conflict with an international treaty. Section 39 (3) of the Constitutional Court Act states that "[t]he Constitutional Court shall establish itself the applicable legal consequences within the framework of the Fundamental Law and of this Act". In the interpretation given by the Constitutional Court, this means that if no legal consequence is expressly assigned to a finding made in a procedure within its competence, the Constitutional Court may, taking into account its remit and its specific competence, consider which of the legal consequences provided for by the Constitutional

Court Act and not excluded in the given case under the Fundamental Law or the Constitutional Court Act it will apply. On the basis of the aforementioned arguments, where the legislation promulgating the international treaty and the legislation at issue which is contrary to the international treaty are at the same level of source of law, the Constitutional Court may impose any legal consequence provided for in the Constitutional Court Act which is consistent with its task of ensuring the consistency of international law and domestic law; it may thus decide, on the basis of its assessment of the circumstances of the case, either to annul the legislative provision or to call upon the Government or the legislature to do so.

[44] A similar case was addressed by Decision 6/2014 (II. 26.) AB (hereinafter referred to as the "2014 Court Decision"), in which the Constitutional Court found that Section 10 of Act XC of 2010 on the Enactment and Amendment of Certain Economic and Financial Acts, which provided for a 98% special tax on certain severance payments, was in breach of Article 1 of the First Additional Protocol to the Convention. The decision pointed out that, in the case in point, "the law promulgating the international treaty and the law under review are both Acts of the National Assembly, and in this case the Constitutional Court Act does not expressly state what legal consequence the Constitutional Court must apply" {Reasoning [26]}. In order to determine the legal consequence in the case at hand, the Constitutional Court recalled Decision 7/2005 (III. 31.) AB, which stated: "The performance of the international law obligation (the performance of the duty of legislation when necessary) is a duty resulting from Article 2 (1) of the Constitution enshrining the rule of law including the *bona fide* performance of international law obligations, as well as of Article 7 (1) of the Constitution requiring the consistency of international law and domestic law, and this duty emerges as soon as the international treaty becomes binding on Hungary (under international law) (AB, ABH 1993, 83, 85–87). The Constitutional Court has interpreted the relevant provisions of the Fundamental Law in a similar vein: "[a] breach of an obligation undertaken in an international treaty is therefore contrary not only to Article Q (2) of the Fundamental Law, but also to Article B (1), which guarantees the rule of law. Bearing in mind that a legislative act may not be contrary to the Fundamental Law [Article T (3) of the Fundamental Law], a domestic legislative act which is contrary to international law should, as a general rule, be annulled by the Constitutional Court on the grounds of a breach of Article Q (2) or Article B (1). An exception to this general rule is made, in accordance with the provision of Article 24 (3) (c) of the Fundamental Law, by Section 42 (2) of the Constitutional Court in the case where the Constitutional Court finds that a legislative act is in conflict with an international treaty, with which the legislative act promulgating the international treaty cannot be in conflict under the Fundamental Law." The Constitutional Court subsequently considered whether the case in point fell within the exceptional circumstances and, taking into account the circumstances of the case, the legal consequence of ensuring that the legislation at issue was in conformity with the Convention, it drew the conclusion that the sanction should be imposed: "[t]hat is not the case in the present case. In the present case, it would be possible to bring domestic law into conformity with international law by annulling the challenged provisions." {the 2014 Court Decision, Reasoning [30] to [32]}

[45] In the present case, the Constitutional Court has, as in the previous case, considered the relationship between the law promulgating the international treaty and the law containing the

provision which is contrary to the international treaty, and the possibilities of bringing domestic law into conformity with international law.

[46] The Convention was promulgated by Act XXXI of 1993. The provisions of the Act on Churches under review were adopted by the National Assembly as provisions of a cardinal Act and their content can also be classified as cardinal [*cf.* "the conditions of cooperation", Article VII (5) of the Fundamental Law].

[47] Pursuant to Article T (4) of the Fundamental Law, a cardinal Act is an Act which requires the votes of two-thirds of the Members of the National Assembly present in order to be adopted and amended. The Fundamental Law does not expressly state that an Act adopted by a simple majority of more than half of the Members of the National Assembly present may not be contrary to a cardinal Act, but the case law of the Constitutional Court has protected the rules contained in cardinal Acts against substantive overriding adopted by a simple majority. In its Decision 16/2015 (VI. 5.) AB on the *ex ante* review of the constitutionality of the amendment of the rules related to the management of State-owned land assets, the Constitutional Court held that it is contrary to the Fundamental Law if if it is aimed at amending a provision of law which is cardinal in terms of its content, adopted by a simple majority, and which would have required a qualified majority for its adoption. The reasoning took over the interpretation of the Constitutional Court's Decision 1/1999 (II. 24.) AB on the protection of Acts passed by a two-thirds majority, which states that "a direct (substantive) amendment of a Acts passed by a two-thirds majority cannot be constitutionally circumvented by amending another independent Act, which may be adopted by a simple majority, or by creating a new Act, which is close to the scope of the Acts passed by a two-thirds majority and may be partially identical to it. This could lead to a situation in which, despite the Acts passed by a two-thirds majority being formally left intact, the Act on fundamental rights or the Act on fundamental institutions would lose its constitutionally decisive significance in comparison with the amended or newly created Acts, which are formally subject to a simple majority." [Decision 16/2015 (VI. 5.) AB, Reasoning [30] to [32]; ABH 1999, 25, 40- 41} By analogy with the above reasoning, if a new international treaty promulgated in an Act passed by the National Assembly by a simple majority would result in the circumvention or override of the content of an earlier cardinal rule of law, the Constitutional Court would be justified in acting under Section 42 (2) of the Constitutional Court Act instead of annulling it, in order to protect the cardinal Act. However, in the present case, the Act promulgating the Convention predates the provisions of the Act on Churches under scrutiny, and therefore, in the light of the above considerations, Section 42 (2) of the Constitutional Court Act is not applicable.

[48] Having conducted an analysis of the relationship between the two pieces of legislation, the Constitutional Court also considered the applicability of the legal consequences contained in Section 42 of the Constitutional Court Act from the perspective of the possibilities of establishing the conformity of domestic law with international law. The ECtHR judgement found no objective justification for the conditions laid down in the current Act on Churches concerning the duration of the operation of a religious organisation seeking recognition as an established church (20 years or 100 years) and the minimum number of members (0.1% of the population) in the given regulatory context, specifically with regard to the additional rights

granted to established churches, by expressly referring to the percentage of personal income tax that may be donated by the faithful and the related State subsidy. It is therefore not excluded that the same conditions in respect of certain other privileges granted to established churches are not considered by the ECtHR to be excessive. Consequently, the conflict with international law could, in principle, be remedied in several ways: either by changing the conditions for recognition under scrutiny in the present case or by making certain additional rights or privileges accorded to established churches available to organisations engaged in religious activities under less restrictive conditions than those under scrutiny. It does not follow from the reasoning of the judgement of the ECtHR that the conditions laid down in Section 14 (c) of the Act on Churches would remain contrary to the Convention even if the regulatory environment were amended, or that consistency between domestic law and international law could be achieved only by annulling them.

[49] Having carefully taken all this into account, the Constitutional Court decided that, instead of annulling the provisions of the Act on Churches under review, it should call upon the National Assembly to take the necessary measures to resolve the conflict by 15 October 2015, to amend the conditions for the recognition of established churches [in particular, the provisions Section 14 (c) (ca) and (cb) and Section 14/A (1) to (3) of the Act on Churches] and bring the additional rights and privileges granted to established churches in comparison with organisations engaged in religious activities into line with the international legal requirements arising from the Convention on the basis of the ECtHR judgement. Given that the contested provisions of the Government Decree concern the implementation of the provisions of the Act on Churches under discussion, and that their conflict with an international treaty is ancillary to the latter, the Constitutional Court extended the call to the Government with regard to them, with the same time limit.

[50] The petitioning judge also sought a declaration of disapplication of the contested provisions, in addition to a declaration that they were contrary to an international treaty.

[51] Pursuant to Section 45(4) of the Constitutional Court Act, "[t]he Constitutional Court may depart from Subsections (1), (2) and (3) when deciding on [...] the inapplicability of the annulled legal regulation in general, or in specific cases, if this is justified by the protection of the Fundamental Law, by the interest of legal certainty or by a particularly important interest of the entity initiating the procedure." Subsection (2), which may apply to a finding of an infringement of the Fundamental Law or of an international treaty, provides that "[w]here the Constitutional Court annuls a legal regulation applied in a specific case at judicial initiative [...], the annulled legal regulation shall not be applied in the case that gives rise to the procedure of the Constitutional Court." The Constitutional Court Act links the automatic imposition of an individual prohibition of application relating to a legislative provision [Section 45 (2)] and the specific definition of an individual or general prohibition of application [Section 45 (4)] to the annulment of the legislative act in a textual manner. In addition, the Constitutional Court also took into account the circumstance that Section 41 (3) of the Constitutional Court Act also expressly allows the Constitutional Court to declare a repealed law to be contrary to the Fundamental Law, "should the given legal regulation still be applicable in a specific case". This provision only makes sense if the Constitutional Court can declare that a statutory provision

may not be applied in cases where there is no room for annulment (a statute that has been repealed but is still applicable in a specific case cannot be annulled). On the basis of the express condition laid down in Section 41 (3) of the Constitutional Court Act, the purpose of the provision is precisely that "should the given legal regulation still be applicable in a specific case", the Constitutional Court may, by declaring a prohibition on its application, eliminate the infringement even if annulment is not possible. From the foregoing it follows that, despite the more restrictive wording of Section 45 (4) of the Constitutional Court Act, it is not excluded that the Constitutional Court may in special cases declare a prohibition on the application of a provision of law without annulling it.

[52] The Constitutional Court acted in accordance with this interpretation in 2014 Court Decision, where it prohibited the application of a statutory provision that was contrary to an international treaty but had not been annulled: "It follows from Article Q (2) of the Fundamental Law, *inter alia*, that ensuring the consistency of international law and Hungarian law is not only a legislative task, but also an obligation of all State bodies when they have to interpret legislation. This means that the applicable law must be interpreted in the light of and in accordance with international law. In the present case, the rule at issue is one which has been declared contrary to an international treaty by an international court [...].

The combined interpretation of Section 42 (1) of the Constitutional Court Act, which provides for mandatory annulment, and Section 45 (4) of the Constitutional Court Act, which provides for a prohibition of application, does not conflict with the obligation to ensure consistency between international law and Hungarian law where the Constitutional Court orders a prohibition of application of a rule contrary to an international convention in pending court proceedings. Failing that, the courts of Hungary would be forced to apply a rule contrary to an international convention." {the 2014 Court Decision, Reasoning [39] to [40]}

[53] In view of the above, in order to protect Article Q of the Fundamental Law, the Constitutional Court ordered a prohibition of application on the basis of Section 45 (2) and (4) of the Constitutional Court Act in Case No 2.K.30.398/2014 pending before Budapest-Capital Administrative and Labour Court. {*cf.* the 2014 Court Decision, Reasoning [41] and [42]}

[54] The petitioner did not provide detailed reasons for his request for a general prohibition of application. The Constitutional Court is not formally aware of any other similar court cases currently pending and has therefore refrained from imposing a general prohibition of application; it will decide on the possibility of a general prohibition of application in any subsequent similar cases giving rise to its procedure on an individual basis.

[55] 3.3 Since the Constitutional Court has found that all the legislative provisions which were the subject of the substantive review were contrary to an international treaty, it has not conducted any further inquiry into the unconstitutionality by reason of the conflict with the Fundamental Law of the same provisions.

[56] 3.4 The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 30 June 2015

Dr. Barnabás Lenkovics, sgd., Chief Justice of the Constitutional Court

Dr. István Balsai, sgd., Justice of the Constitutional Court

Dr. Ágnes Czine, sgd., Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, sgd., Justice of the Constitutional Court

Dr. Imre Juhász, sgd., Justice of the Constitutional Court

Dr. Barnabás Lenkovics, sgd., Chief Justice of the Constitutional Court, on behalf of *dr. László Kiss*, prevented from signing

Dr. Miklós Lévay, sgd., Justice of the Constitutional Court

Dr. Béla Pokol, sgd., Justice of the Constitutional Court

Dr. László Salamon, sgd., Justice of the Constitutional Court

Dr. István Stumpf, sgd., Justice of the Constitutional Court, Rapporteur-Justice, delivering the opinion of the Court

Dr. Tamás Sulyok, sgd., Justice of the Constitutional Court

Dr. Péter Szalay, sgd., Justice of the Constitutional Court

Dr. Mária Szívós, sgd., Justice of the Constitutional Court

Dr. András Varga Zs., sgd., Justice of the Constitutional Court