47/2009. (IV. 21.) AB határozat

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a petition seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court – with a concurrent reasoning by dr. László Trócsányi, Judge of the Constitutional Court, and with dissenting opinions by *dr. Elemér Balogh* and *dr. András Bragyova*, Judges of the Constitutional Court – has adopted the following

decision:

1. The Constitutional Court holds the following: in the application of Section 12 para. (3) of the Act XXIII of 1992 on the Legal Status of Public Servants, it is a constitutional requirement based on Article 59 and 60 of the Constitution that the deed of oath should not contain any data referring to the public servant's conviction of conscience or religion.

2. The Constitutional Court rejects the petitions aimed at establishing the unconstitutionality and the annulment Section 12 and Section 13 para. (2) of Act XXIII of 1992 on the Legal Status of Public Servants.

3. The Constitutional Court terminates the procedure aimed at the posterior review of the unconstitutionality of Sections 31/A-31/F of Act XXIII of 1992 on the Legal Status of Public Servants.

4. The Constitutional Court refuses the petition aimed at establishing the unconstitutionality and the annulment Section 13 para. (1), Section 65 para. (2) item d) and Section 102 para. (8) of Act XXIII of 1992 on the Legal Status of Public Servants, and it refuses other petitions as well.

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

REASONING

I

The Constitutional Court received several petitions regarding certain provisions of the Act XXXVI of 2001 on Amending the Act XXIII of 1992 on the Legal Status of Public Servants and other Acts of Parliament (hereinafter: APSA). After receiving the petitions, the Constitutional Court separated and consolidated the petitions and certain parts of the petitions on the basis of the constitutional problems reflected in them. [Section 28 of the amended and consolidated Decision 2/2009 (I. 12.) Tü. by the Full Session on the Constitutional Court's provisional rules of procedure and on the publication thereof (ABK, 3 January 2009) (hereinafter: the CCRP).]

In the present case, the Constitutional Court passed a decision concerning the petitionary requests related to the provisions on the oath of public servants and on the preferential body of senior officials, contained in Act XXIII of 1992 on the Legal Status of Public Servants (hereinafter: APS).

One of the petitioners asked for the annulment of Section 12 of APS as established by APSA. As held by the petitioner, the provision found after the text of the oath and the provision on the written confirmation of the oath violates the freedom of thought, conviction and religion (Article 60 of the Constitution) as it forces the public servant to confess his/her conviction. The petitioner also initiated the annulment of Sections 31/A-31/F of APS. In the opinion of the petitioner, the special provisions on establishing the preferential body of senior officials, on appointing the public servants concerned and on their legal relations violate the principle of "equal compensation for equal work" [Article 70/B paras (2) and (3) of the Constitution].

A representative of one of the registered churches also submitted a petition to the Constitutional Court. The petitioner initiated the annulment of Section 12 and Section 13 para. (2) of APS on the basis of Articles 60 and 70/A of the Constitution. The petitioner complained about the lack of the option to affirm instead of taking an oath – as allowed in other statutes. According to the teachings of the church in question, as taking an oath is prohibited in the Bible, the challenged provisions make it impossible for the members of the church to enter in public service. The petitioner attached the documents made in the course of the legal debate between a member of the church and the authorities, including the legal positions of the Human Resources Management Department of the Ministry of the Interior and of the Honorary State Secretariat of Church Relations of the Office of the Prime Minister. According to the documents, the word “swear on my oath” in the text of the oath of public servants may not be replaced by the word “I affirm”, as no one can be exempted from the cogent rule and no one can be employed as a public servant without taking a proper oath.

A petitioner challenged Section 102 para. (8) of APS on the basis of the right to work [Article 70/B of the Constitution]. The petitioner in question complained about the fact that taking the oath might not be realised due to the wilful default of the public administration organ or due to another person's fault, and there are no regulations in APS to cover such cases. The petitioner holds that APSA created a legal gap, causing legal disadvantages in several cases. Therefore, on the one hand, the petitioner initiated, with regard to Section 102 para. (8) of APS, to establish that the deadline for taking the oath is not a forfeit one. On the other hand, the petitioner also initiated the annulment of the second sentence of Section 102 para. (8) with retroactive force to the date of its taking effect.

Two petitioners initiated the constitutional review of Section 12 para. (2) and Section 65 para. (2) item d) of APS. The petitioners’ reasoning included references to Article 2 para. (1), Article 4, Article 8 para. (2), Article 35 para. (1), Article 70 para. (6), Article 70/A para. (3), Article 77 para. (2) and Article 78 para. (2) of the Constitution together with many other statutory provisions. Their concerns related to the reference in the oath to the public servant’s obligation of "ethical" conduct, although no ethical code has been adopted. As a consequence, in addition to the request of annulling the challenged provisions, the petitioners made references to the deficiencies concerning the regulations on the ethics of public servants and on the professional chamber.

One of the petitioners initiated the establishment of the unconstitutionality and the annulment of Section 31/A para. (2) item a), Section 31/D paras (1)-(3), Section 31/C (1)-(2), Section 31/F para. (1) of APS on the basis of Article 2 para. (2), Article 70 para. (4), Article 70/A and Article 70/B paras (2) and (3) of the Constitution. Subsequently the petitioner withdrew the petition affecting the above provisions of APS, due to having the statute amended.

II

The relevant provisions of the Constitution related to the merits of the petitions are as follows:

“Article 59 (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and of personal data.”

“Article 60 (1) In the Republic of Hungary everyone has the right to the freedom of thought, freedom of conscience and freedom of religion.

(2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.

(3) The church and the State shall operate in separation in the Republic of Hungary.”

“Article 70/A (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion,

political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."

"Article 70/B (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.

(2) Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.

(3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out."

The provisions of APS affected by the petitions are as follows:

"Section 12 (1) The public servant shall take an oath when appointed.

(2) The text of the oath is the following:

"I ……. swear on my oath to be faithful to my mother country, the Republic of Hungary and to the people of it. I will observe the Constitution and the constitutional statutes of the country I will keep in confidence State secretes and official secrets. I will discharge my duties without fear or favour, conscientiously, honestly, faithfully to the law, accurately, ethically, paying unconditional respect to human dignity and to the best of my ability, to serve the interests my nation (and the local government of .....). I will show exemplary conduct both in my office and outside of it, and I will use all of my efforts to further the progression of the Republic of Hungary as well as the development of its intellectual and material wealth."

(According to the conviction of the person taking the oath:)

"So help me God"

(3) The public administration organ shall organise the taking of the oath prior to the appointment of the public servant. Taking the oath may take place in the presence of the person exercising the employer's rights and the colleagues. The oath shall be told orally and confirmed in writing.

Section 13 (1) If the invalidity of the appointment is established prior to taking on work, then the public servant may not take on work until the elimination of the cause of invalidity. If the cause of the invalidity comes to the knowledge of the person exercising the employer's rights after taking on the work, the public servant shall be prohibited from performing work until remedying the invalidity.

(2) Failure to take an oath is a cause of invalidity. In the absence of taking an oath the public servant may not be put into office and anyone may refer to this fact."

"Section 65/B (1) For the purpose of harmonising the interests of the public administration bodies – not including the local governments – and the public servants, and in order to settle their debates through negotiations, as well as to elaborate adequate agreements, a Council for the Reconciliation of Public Servants' Interests (hereinafter: CRPSI) is in operation with the participation of the negotiating teams of the Government and of the national employee organisations for the representation of the interests of public servants.

(2) The competence of CRPSI shall cover the issues related to the life and work conditions and the employment conditions of the public servants employed in the public administration. Connected to the above:

(…)

d) issues the rules of the Ethical Code of Public Servants together with the National Council for the Reconciliation of the Interests of the Local Governments' Public Servants."

"Section 102 (8) The public servants who are in public service at the time of this Act taking force shall take an oath in accordance with Section 12 para. (2) as specified in Section 12 of this Act, to be taken in not more than 60 days from the date of this Act taking force. In the absence of taking an oath, the public servant's legal relationship of public service shall be statutorily terminated."

III

1. The Constitutional Court first examined the complaints related to the text of the public servants' oath and its written confirmation. Some of the petitioners challenged not the mere fact of taking an oath but the text "So help me God" after the words of the oath as well as the obligation to confirm the oath in writing. However, one of the petitioners complained about the requirement of taking an oath, as according to the dogmas of his church it was prohibited to take an oath. As a consequence, according to the petition, the members of this church may not enter into public service. The petitioners initiated the establishment of the unconstitutionality and the annulment of Section 12 and Section 13 para. (2) of APS on the basis of Articles 60 and 70/A of the Constitution.

2.1. The Constitutional Court overviewed the constitutional requirements to be followed in the course of judging upon the present case. Article 60 (1) of the Constitution guarantees the right to freedom of thought, conscience and religion for everyone in the Republic of Hungary. Paragraph (2) establishes the freedom of belief (conviction) extending it to the conviction of conscience and the freedom of exercising one's religion (religious actions, rites) including the right of declining to express one's conviction.

The granting and the protection of the freedom of conscience and religion is rooted in the recognition of equal human dignity [Article 54 para. (1), Article 70/A para. (1) of the Constitution]. The Constitutional Court interprets the right to the freedom of conscience as a right to the integrity of one's personality. The State cannot compel anyone to accept a situation which sows discord within, or is irreconcilable with, those fundamental convictions which mould that person's identity [stated first in: Decision 64/1991. (XII. 17.) AB, ABH 1991, 297, 313]. The freedom of conscience and religion acknowledges that the person's conviction and within this, in a given case, religion is a part of human quality, so their freedom is a precondition for the free development of personality. Special emphasis is given to the freedom of action based on the general right of personality if the action follows from one's convictions of conscience and religion. [4/1993.(II. 12.) AB, ABH 1993, 48, 50-51].

As a consequence, the legal system may not – constitutionally – make any difference between religious and non-religious conscience. Accordingly, based on the interpretation of Article 60 of the Constitution, one may conclude that the freedom of thought, conscience and religion means in the broadest sense the free choice of one's conviction together with freely expressing and exercising it in any other way. [Decision 225/B/2000 AB, ABH 2007, 1241, 1251]

The Constitutional Court established, on the basis of Article 54 para. (1) and Article 60 para. (3), the requirement towards the State to be neutral in the questions of religion and other questions connected to conviction of conscience. The negative side of this requirement is prohibiting the State to make a judgement on the veracity of a religious belief or another conviction of conscience. The State may not form institutional ties with the churches or one of them, it may not identify with the teachings of any church and it may not take a stand in the question of dogmas of the faith. (Decision 4/1993.(II. 12.) AB, ABH 1993, 48, 52)

The positive side of the neutrality is the State's obligation to grant the possibilities for the free development of one's individual conviction. Because the State is required not to take a stance exactly in matters that make a religion to be a religion, concerning churches and religion, the State can only create an abstract legal framework that applies to every church or religion equally and helps them to fit into a neutral legal order; in matters of substance, the State has nothing to go by but the interpretations of the churches and religions themselves. It is exactly by way of a neutral and general legal framework that the separation of church and State can provide the fullest possible freedom of religion. (ABH 1993, 52)

In the course of judging upon the petition, the Constitutional Court took into account Article 70 para. (6) of the Constitution that goes as follows: "All Hungarian citizens have the right to hold public

office in accordance with their suitability, education and professional ability." This right, "to participate in public affairs and to hold public office, grants the general fundamental right to participate in exercising public authority." [Decision 39/1997.(VII. 1.) AB, ABH 1997, 263, 275; Decision 5/2006. (II 15.) AB, ABH 2006, 153, 164] In the present case the Constitutional Court underlines – in the context of Article 54 para. (1) and Article 60 of the Constitution – that all Hungarian citizens have the right to hold a public office without regard to his/her conviction of conscience or religion.

2.2. Taking an oath was originally a sacral act in the Antiquity and the Christian tradition. The person taking the oath verified or affirmed the binding force of his promise or the truthfulness of his statement by making a reference to something held sacred by him, to a deity. In the feudal hierarchy, taking an oath of loyalty was widely required, in the framework of a sacral ceremony.

The modern constitutional States have maintained the tradition that the persons who fill important public offices, act as public servants or are engaged in other activities in the public interest make a solemn declaration, a promise at the time of establishing the relevant legal relation. Article 2 Section 1 paragraph (8) of the Constitution of the United States of America provides the following regarding the President. "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - »I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.«"

Article 56 of the Federal Constitution of Germany requires the Federal President to take an "oath of office", to be concluded with the words "So help me God" or "without expressing one's religion". Article 140 of the Constitution acknowledges – among others – the validity of those provisions of the Weimar Constitution, according to which "the obtaining of public offices is independent from religious conviction" and no one shall be forced "to use a religious form of oath" (Section 136).

In Hungary, Section 6 of the Act I of 1946 provided that the President of the Republic shall "take an oath or affirm" in front of the National Assembly, declaring that he is going to be "faithful to Hungary and the Constitution of the country". The text of the oath contained the words "I swear on my oath to the living God", while the affirmation contained the words "I affirm to my honour and my consciousness"".

There are two parts in the Hungarian Constitution in force mentioning such solemn legal declarations. According to Article 29/D, the President elect of the Republic shall "take an oath at the Parliament prior to taking office". Based on Article 33 para. (5), "Subsequent to its formation, the Members of the Government shall take an oath in front of the Parliament".

2.3. According to Section 12 para. (1) of APS, all public servants shall make a declaration containing a promise of well defined text, to which the APS uses the term "oath". As regulated in Section 13 of APS, no public servant may take any office without taking an oath.

In the constitutional democracies, the solemn declarations to be made prior to taking offices aimed at exercising public authority or performing a public duty enforce the requirement of being faithful to the State and paying respect to the constitutional order. In line with the international practice of interpreting such rules, these declarations do not affect the freedom of conscience and religion. The common element of the declarations is the requirement to recognize and to protect the Constitution and the constitutional institutional system. As a consequence of the declarations, the persons acting on behalf of the State are bound to respect the institutional framework defined in the Constitution – based on the democratic decisions of the political community. It is the task of those who apply the law to unconditionally obey the statutes adopted in the constitutional order. Those who prefer other institutional frameworks may present their conviction acting within the existing institutional framework and they may act in compliance with the procedural rules to change the institutions.

[These are the principles followed for example by the Spanish and Belgian court rulings, according to which also the public servants with a republican conviction are bound to be faithful to the king. In Belgium: Court of Arbitration (*La Cour d'arbitrage*) Case 151/2002, 15 October 2002.]

In the Hungarian regulation, by saying the solemn declaration required in APS, the public servant represents the following: [I will] "be faithful to my mother country, the Republic of Hungary and to the people of it. I will observe the Constitution and the constitutional statutes of the country." Consequently, in APS, the traditional oath of loyalty presents primarily secular and constitutional objectives. [About the transition from the originally religious custom to secular practice: see Decision 10/1993. (II. 27.) AB, ABH 1993, 105, 107]

The obligation of the public officials to act in accordance with the Constitution and other statutes is a conceptual element of holding public offices on the basis of Article 70 para. (6) of the Constitution. Those who want to be public servants shall not only accept the institutional framework but they shall also act in the interest of enforcing the statutes. The solemn declaration specified in APS does not prohibit those public servants who support institutional changes to express their conviction with due respect to the legal regulations. Therefore the solemn declaration itself, containing this promise does not restrict the freedom of conscience and religion enshrined in Article 60 of the Constitution.

2.4. According to Section 12 para. (2) of APS, the text of the solemn declaration may be followed by the text "So help me God" "According to the conviction of the person taking the oath".

In line with Article 60 of the Constitution, the individual may publicly express or decline to express his/her conviction of conscience and religion. On the other hand, it is the obligation of the State to set up the necessary neutral and general statutory framework, to secure the free expression of the individuals' conviction [Decision 4/1993. (II. 12.) AB, ABH 1993, 48, 50-51].

As a consequence, no one shall be forced to make a legal declaration contrary to his/her conviction and conscience. Non-religious persons may not be forced to make declarations of religious content. (As held by the European Court of Human Rights, it was against the freedom of religion to require by the law the elected officials to take an oath connected to a specific religion. In the case concerned, the oath had to be taken on the "Holy Gospels". *Buscarini and Others v. San Marino*, 18 February 1999)

Moreover, no one may be forced to express his/her conviction of conscience. Neither can religious persons be required to declare their conviction. (The provision contained in Article 136 of the Weimar Constitution forms part pf the German Constitution in force: "The authorities may only inquire about one's belonging to any religious community if rights or obligations depend on it, or it is necessary because of supplying statistical data required by the law.")

As held by the Constitutional Court, the text in APS provides a chance for the person making the declaration to select the appropriate form, which is in line with his/her conviction. In Section 12 para. (2) of APS, the term "according to the conviction" does not require the person taking the oath to express his/her conviction. It allows him to decide according to his belief whether to express or not his/her conviction. The term "So help me God" in APS is not an obligatory part of the oath's text, as it is an optional supplement to the oath; saying it or leaving it out would not affect the validity of the oath. (The Constitution does not contain the words "So help me God" used by most of the presidents elect upon inauguration in the United States.)

In the Hungarian practice, it has not become customary in the course of the ceremony to hold by the person making the declaration an object or a religious text the sanctity of which is acknowledged by him/her. If it is a part of the tradition of a democratic State, there it follows from the freedom of religion that the oath can be taken not only on the traditionally used Bible but on other objects as well (e.g. the Qur'an). (In the United States, this constitutional aspect was emphasized in the Case *ACLU of N.C. & Syidah Matteen v. State of North Carolina*)

As in APS the supplement with the religious content is not a part of the obligatory text of the oath, and it may be freely elected, no one is forced to make any declaration contrary to his/her conviction.

Moreover, the law does not force anyone to express his/her conviction of conscience or to decline the expression of it. Consequently, the Constitutional Court established that the terms “according to the conviction” and "So help me God" in Section 12 para. (2) of APS does not restrict the freedom of conscience and religion enshrined in Article 60 of the Constitution and it does not make any difference between the persons on the basis of their conviction.

2.5. According to Section 12 para. (1), the public servant’s declaration containing the promise is called an “oath”. In line with Section 12 para. (2), the person taking the oath has to say the words “I swear on my oath” to express his/her promise. One of the petitioners alleged that oath is a term connectible to a specific religion, therefore in the absence of the alternative of affirmation, the freedom of conscience and religion is not injured.

In addressing this constitutional problem, the Constitutional Court started by noting that in today's Hungarian language the words "oath" and "I swear on my oath" have become secularised terms. They have no religious content, and these words are used both by believers and non-believers in the most diverse ways. This approach is supported by the fact that the word “oath” used two times in the Constitution [Article 29/D on the oath of the President of the Republic; Article 33 para. (5) on the oath of the Members of the Government] has no religious meaning either. It follows from the principle of the State's neutrality that the text of the Constitution may not have an interpretation based on religious ground. As a consequence, the Constitution may not be interpreted to the effect that only the persons who make a solemn declaration of religious meaning by way of taking the "oath" required in the Constitution can become the President of the Republic or the Member of the Government. In one of its earlier decisions, the Constitutional Court called the taking of the oath a “solemn act” connected to the establishment of a given legal relation and closing down the preparatory process. [Decision 14/2008. (II. 26.) AB, ABK February 2008, 155, 158]. (The German Federal Constitutional Court adopted an approach similar to the position of the Constitutional Court in the present case: an oath without invoking God has no transcendent content. BVerfGE 33, 23)

At the same time, the Constitutional Court considered the fact that certain persons, communities, churches may state that the words “oath” and “to swear on one’s oath” have such a meaning that is unacceptable for them. Indeed, the church that submitted the petition made a reference to the religious content of the word “I swear on my oath”, stating that the religious community in question cannot identify with it, as they believe in another interpretation of the dogmas. (Accordingly, some of the churches believe that an oath taken in front of God is compatible with the Bible, while some churches think that all forms of oaths are prohibited by the Bible.)

The State, and the Constitutional Court, may not take a stand in the matter of the veracity of convictions of consciousness and of religious teachings [Decision 4/1993. (II. 12.) AB, ABH 1993, 48, 52]. As a consequence, it may not decide on debates between different religious interpretations. It may not define for the believers of different religions what dogmas are in compliance with the requirements of the Bible (or another religious teaching), and what the correct interpretation of the religious texts is. It is the obligation of the State not to adopt and not to apply any rule, which is only justified in the religion, or which provides for justifications of actions only for the followers of a specific religion.

The regulation examined by the Constitutional Court in the present case provides a general obligation; it has a primary secular reason and meaning. At the same time, for some people who confess a specific conviction of conscience, to comply with this neutral rule would be against their conscience: this is why they demand a special treatment. They want to say the oath of public servants without saying the word “oath” to be replaced by another word (primarily by the verb "affirm”). I.e. the constitutional question is whether a group of persons can be exempted – on the basis of concerns of conscience and religious beliefs – from a statutory rule implying the same obligations on all public servants, but imposing an extra burden on them.

The Constitutional Court elaborated in the Decision 39/2007. (VI. 20.) AB the special test of fundamental rights ("comparative load test") to be used in judging upon such conflicts. On the one hand, there is a principle of the rule of law to be taken into account, stating that everyone is obliged and entitled by the same legal order, i.e. the law pertain to everybody, and everyone must be treated by the law equally (as a person of equal dignity). On the other hand, one should not forget that diversity within the political community – the freedom and the autonomy of the individuals and their communities – is a value of constitutional democracy. Consequently, we can neither state in general that, on the basis of the freedom of conscience and cults, exemptions are to be made at all times from the general provisions of the law, nor that the rule of the legal regulations fully covers the internal life of a religious community.

Due to the different, and sometimes competing, constitutional aspects, it should always be established with regard to the constitutional question raised in the concrete case whether – on the basis of the freedom of religion – an exemption is to be made from the general laws. The decisive factor in deciding on granting the exemption is – among others – whether the demanded exemption is linked closely to a dogma or a religious liturgy; could the exceptional regulation violate the rights of others, e.g. persons outside the religious community. It means that the concrete circumstances of the case are to be examined in order to establish whether it is justified to exempt the affected persons from the general obligations and whether the State should «allow – within reasonable limits – an alternative conduct.»" [Decision ABH 2007, 464, 493, Precedents: Decision 64/1991. (XII. 17.) AB, ABH 1991, 297, 313; Decision 4/1993. (II. 12.) AB, ABH 1993, 48, 51]

The Constitutional Court examined the different possibilities. The Constitution of the United States and Act I of 1946 in Hungary use the terms "swear" and "affirm" as alternative texts. In the Hungarian law in force, a typical example of it is Section 7 para. (4) of the Act LV of 1993 on Hungarian Citizenship, making a distinction between the oath of citizenship (using the verb "swear" and the sentence "So help me God") and the affirmation of citizenship – of equal value – (with the verb "affirm" and without the sentence having religious reference). This legislative solution is similar to the one used in APS with regard to providing an optional sentence added to the oath to represent one's conviction. It is different however in the respect of containing the verb "affirm" in the variation of the text without the sentence "So help me God". (The constitutional justification of the different solutions: in the case of the citizens' oath, the State complies with the requirement of neutrality by making a formal distinction between a neutral and a religious option. APS provides a uniform neutral form and adds an option to allow for expressing one's conviction.

There are different solutions in the Hungarian law, for example the one applied in the Act XXVII of 2008 on the oath and the affirmation of certain officials under public law. Although in the title of the Act, the words "oath" and "affirmation" are distinguished, both text versions use the verb "swear". (In fact, this solution has the same output as the provisions of APS.) Contrary to that, the Act XLIII of 1996 on the service of the professional staff members of the armed organisations contains two types of procedures: according to the Act, the professional staff members of the police forces have take an oath, but the professional staff members of other policing organisations and of the civil national security services may choose from the alternative options of taking an oath or making an affirmation with the verbs "swear" and "affirm" respectively. As seen, there is no uniform practice in the Hungarian regulations.

The Constitutional Court also noted the fact that the evaluation of the verb "swear" is considered to be an important issue in the foreign practice of interpretation. According to Germany's Federal Constitutional Court, giving a testimony may be refused on the basis of the freedom of conscience if the law orders the witness to swear (schwören) and does not allow making a promise or an affirmation of equal force. (BVerfGE 33, 23, 22-23) Similarly, also the Constitutional Court of Italy allowed a witness in a civil litigation to make an affirmation instead of an oath when promising to tell the truth at the court (149/1995.) Then, in another case, it established the unconstitutionality of the proving and

decisive force (giuramento decisorio) of an oath in civil litigation in legal debates in contrast with other legal declarations (34/1996). At the same time, the decision also referred to the fact that according to the Italian Constitution it is not prohibited to take an oath, and in certain cases it is mandatory. For example – on the basis of Article 54 of the Italian Constitution – for those who fill a public office, if required in an Act of Parliament. Consequently, the Italian Constitution reflects – and the practice of interpretation takes note of – the different requirements concerning public servants and witnesses. Accordingly, the constitutional evaluation of the various solemn declarations depends primarily on the text of the Constitution, and it is also important who are the ones (witnesses in litigation, people obtaining citizenship, holders of public offices etc.) obliged to make a declaration.

Taking all the above into account, the Constitutional Court reached the following conclusion: Section 12 of APS contains a requirement, which is compliant with the wording of the Constitution and verifiable in a neutral manner. In the content of APS, there is a differentiation between oath and affirmation, by separating the "So help me God" formula from the words to be told and the public servant is free to decide whether or not to say it after the obligatory words or not. As without a reference to deity, the meaning of the verb "swear" hasn't got any implication to one's conviction, the content of the words of the oath refer to an affirmation, although it is not declared in APS to be as such. Accordingly, the State requires all public servants to say the same oath formula, which is in compliance with the wording of the Constitution and which has a neutral verification.

In the case the telling of such an affirmation, promise would raise concerns of conscience for someone, the freedom of exercising one's religion enshrined in Article 60 para. (2) of the Constitution (practising religious rites individually or in community, publicly or privately) shall not be affected. This regulation does not concern the internal life and the rites of a religious community; it relates to participation at a secular and solemn State ceremony. Holding a public office, the legal standing of a public servant implies additional obligations and responsibilities: it presupposes loyalty to the State and the constitutional order, and it requires the service of the State. First of all, taking the oath represents this additional obligation, having no reference to expressing or not one's conviction. (Similarly to taking the oath by the President of the Republic or by the Members of the Government as required in the Constitution.)

The problem of the freedom of conscience may be raised in the case of all kinds of regulations. In the course of regulating the solemn declaration of public servants, the State cannot create a provision that equally fits to everyone's conviction. The constitutional requirement to be obeyed by the legislation is to use a uniform oath with neutral wording when it requires the public servants to take an oath. This can be implemented on many ways.

There are several solutions emerged in the Hungarian law in force and in the foreign practice. As held by the Constitutional Court, with the regulations in APS, the legislation complied with the fundamental requirements resulting from Articles 60 and 70/A of the Constitution. The secular and neutral character of the chosen solution is also verified by the wording of Article 29/D and of Article 33 para. (5) of the Constitution. The securing of the coherence of the statutes and the elimination of unjustified differences is primarily the duty of the legislation. Since many solutions could be regarded constitutional, the Constitutional Court may not force the Parliament to apply a specific regulatory form in all fields

As a consequence, the Constitutional Court established that the words "oath" and "swear" in APS are not in conflict with Article 60 and Article 70/A of the Constitution.

2.6. One of the petitioners challenged Section 12 para. (3) of APS also because of requiring the written confirmation of the oath. According to the petitioner, this provision violates Article 60 para. (2) of the Constitution because of obliging the public servant to express his/her conviction of conscience and to record it in writing.

As regulated in Section 12 para. (3) of the APS: “The oath shall be told orally and confirmed in writing.” APS does not specify how to confirm it in writing. According to Section 64 para. (1) of APS, the “deed of oath” is listed among the documents related to the public service legal relation of the public servant, specifically it is part of the personal files. As regulated in Section 61 para. (1) and in Annex 3 of APS, the basic registry of public service contains the file number and the date of the deed of oath. However, APS does not contain any explicit provision on whether it is necessary or possible to indicate in the deed of oath that the person who had taken the oath used the formula of “So help me God” or not.

As a consequence, there can be four possibilities in the legal practice. 1. The public servant signs the deed of oath containing the text specified in Section 12 para. (2) of APS. In this case the document bears no reference to the option indicating the conviction of the person, only to the fact that this option was available at the time of taking the oath. 2. Two types of deeds of oath are prepared at the public administration organ, one containing the clause “So help me God” and the other one does not, and it is up to the public servant which one he/she signs. 3. The deed of oath contains the text specified in Section 12 para. (2) of APS and the public servant indicates (by underlining, deletion or otherwise) if the optional clause was said or not. 4. The deed of oath does not contain the clause in question but it leaves space for the public servant to write it on the deed before signing it. In the first case, the deed of oath in the registry does not indicate the option chosen by the public servant according to his/her conscience, conviction; in the other cases it cannot be excluded.

The Constitutional Court examined on the basis of the Constitution and of other statutes what kind of a solution could be accepted in the course of interpreting and applying APS. The examination was based on the close connection between the text “express or decline to express” one’s conviction in Article 60 para. (2) of the Constitution and the right to the protection of personal data enshrined in Article 59 para. (1) of the Constitution. Although the recording of choosing between the options offered in Section 12 para. (2) of APS does not indicate exactly the conviction of conscience of the person in question, saying the clause “So help me God” may refer to the conviction of the person taking the oath. (No registration can grasp “exactly” a person’s conviction of conscience and religion. However, the mere information regarding one’s attitude to believing in God refers to the person’s conviction.) This connection is manifested in Section 3 of the Act IV of 1990 on the freedom of conscience and religion and on churches (hereinafter: AR):

“(1) No one shall suffer any discrimination and no one may enjoy any benefit on the basis of his/her religion or conviction, and because of expressing or practising thereof.

(2) It is prohibited to record any data in a State (official) registry about one’s religious or other conviction. (…)”

According to Section 2 item 2.a) of the Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (hereinafter: the DPA), “data related to religious or other conviction" qualify as special data. Such data can only be handled on the basis of Section 3 para. (2) of DPA or upon the written consent of the affected person, or when it is based on an international treaty, or when it is ordered by an Act of Parliament for the purpose of enforcing a fundamental right granted in the Constitution, or in the interests of national security and the prevention or the prosecution of crime.

In addition, when interpreting the legal regulations, the Constitutional Court took into account the constitutional prerequisite that data handling should always be in compliance with the requirement of being bound to a specific purpose. “It means that personal data may only be processed for a clearly defined and lawful purpose. Each phase of data processing must comply with the notified and authentically recorded purpose. The purpose of data processing must be communicated to the data subject in a manner making it possible for him to assess the effect of data processing on his rights, to decide with due basis on the disclosure of data, and to exercise his rights in the case of the use of data for a purpose other than the specified one. This is why the affected person is to be notified on

changing the purpose of data processing. Data processing for a new purpose without the consent of the data subject is only lawful if it is expressly provided for in an Act of Parliament with respect to the specific data and data processor. It follows from the principle of being bound to the purpose that collecting and storing data without a specific goal, »for the purpose of storage«, i.e. for unspecified future use are unconstitutional." [First in: Decision 15/1991 (IV. 13.) AB, ABH 1991, 40, 42] This requirement is specified in Section 5 of DPA:

"(1) Personal data may only be handled for a particular purpose, exercise of rights or fulfilment of obligations. Each phase of data handling shall comply with this purpose.

(2) Only personal data indispensable and suitable for accomplishing the purpose of data handling may be handled, and only to the extent and for the time required for the accomplishment of that purpose."

In addition, as stated in Section 6 para. (2) of DPA:

"The affected person shall be informed – clearly and in details – on all facts related to handling his/her data, in particular about the purpose and the legal basis of the data handling, the identity of the person entitled to handle and process data, the duration of data handling and about the persons who may have access to the data. The information should cover the affected person's rights related to data handling as well as the possibilities of legal remedies."

Based on all the above, the Constitutional Court establishes the following: Neither APS nor any other Act of Parliament contains express provisions on the content of the data allowed to be recorded on the deed of oath. The provisions of the Acts of Parliament do not authorise the public administration organ to record whether the person taking the oath used the "So help me God" formula or not when telling the words of the oath. Consequently, with regard to public servants, there is no explicit authorisation in any Act of Parliament to record data related to their conviction. In line with that, AR explicitly prohibits the registration by the State of any data related to religious and other conviction.

Merely on the basis of Section 3 para. (2) of DPA – in the lack of an explicit provision in APS – data related to the public servant's conviction of conscience or religion could only be recorded on the deed of oath with the written consent of the public servant. However, in the examined regulatory construction, it is not up to the free choice of the public servant to decide whether the data referring to his/her conviction become part of the documentation of his/her personal files as a public servant; it is the result of how the public administration organ interprets the law and of the content of the form applied on the site. In the case of refusing to use the form supplied by the public administration organ, the legal relation of public service shall not be established. Accordingly, having the signature of the public servant on the deed of oath cannot be considered as a written consent to handle the data related to his/her conviction.

In the legal practice there could also be a theoretical chance of the public servant freely choosing, or explicitly asking for making the information on his/her conviction the part of the personal files. In the opinion of the Constitutional Court, with regard to the principles of being bound to a specific purpose and of informed consent, there is no constitutional possibility to record such data either.

The special data of the public servant can only be handled – even with his/her consent – in his/her personal files (among the documents) if the data handling is constitutionally justified. In the present case, however, there is no constitutional reason to include in the records of the public servant any data related to his/her convictions of conscience and religion. The purpose of storing the deed of oath is to verify the legal fact establishing the legal relation of public service. For this, it is unnecessary to document the choice the public servant made about opting for supplementing or not the words of the oath in line with his conviction. Merely on the basis of the freedom of conscience and religion, it is not possible to demand to make the data referring to conviction the part of the public servants' documentation.

Moreover, handling data of such content would have no future aim. In the case concerned, the recording of the data related to the conviction of conscience and religion may neither be linked to enforcing any right or obligation of the public servant, nor to a concrete purpose of public interest. As the data handling has no purpose, the public servant cannot give his/her informed consent to it.

In the elaboration of its interpretation, the Constitutional Court also took account of the requirement that the expression of one's conviction of conscience and religion (Article 60 of the Constitution) and the handling of the information related to one's conviction (Article 59 of the Constitution) must be safeguarded by special legal guarantees. Such data are listed among the sensitive data the protection of which is a paramount and justified interest of the persons. Well known historical experiences prove how important it is to prevent abuses against persons of various convictions. When assessing such cases, one must also take into consideration the fact that in practice the persons were often made subjects to legal sanctions not because of their actual conviction, but because of what was assumed about their conviction or belief (believer, member of a religious community, atheist).

The Constitutional Court holds that APS requires the taking of the oath of public servants for a constitutional purpose and in a manner consistent with the freedom of conscience. However, the regulations can't prevent completely the potential abuses in the course of applying the law. Based on Article 70 para. (6) of the Constitution, all Hungarian citizens have the right to hold a public office without regard to his or her conviction. If in the course of taking the oath "in the presence of the person exercising the employer's rights and the colleagues" [Section 12 para. (3) of APS] – because of the circumstances – one's conviction couldn't be expressed without fear or such expression declined, the result would be a situation injuring the fundamental rights. If this information was to become a part of the records kept on the public servant, the danger of injuring the fundamental rights would be raised. As stressed by the Constitutional Court, in the present case, the sensitive data are not necessary for facilitating the individual exercising of fundamental rights, for compensating unjustified disadvantages, or for the granting of benefits; the registration of such data is without any reasonable justification and – due to the several potential interpretations – it bears the risk of abuses. Accordingly, by way of interpreting Articles 59 and 60 of the Constitution and the relevant statutory regulations, the Constitutional Court established that APS may not require the handling of the data related to the conviction expressed in the course of taking the oath.

As explained by the Constitutional Court in the Decision 38/1993. (VI. 11.) AB: "In the course of the constitutional review of a statute, the Constitutional Court is to establish – by way of interpreting the Constitution – what are the constitutional requirements relevant to the subject of the statutory provision in question. The statute is constitutional if it complies with those requirements. However, in order to verify compliance, it is logically indispensable to interpret the statute concerned. The Constitutional Court shall establish either the compliance or the conflict of the Constitution and the reviewed statute interpreted with regard to each other. Establishing the constitutionality of the norm shall, at the same time, delimitate the realm of the constitutional interpretation of the norm: the norm shall be considered constitutional in all of its interpretations that comply with the constitutional requirements established in the given case. It is required by the unity of the legal system as well that a statute should be interpreted not only in itself and with regard to its functions, but also in the respect of it's compliance with the Constitution, without regard to the fact whether the statute was adopted prior to or after the Constitution." [ABH 1993, 256, 267; reinforced in: Decision 23/1995.(IV. 5.) AB, ABH 1995, 115, 121; Decision 4/1997. (I. 22.) AB, ABH 1997, 41; Decision 22/1999. (VI. 30.) AB, ABH 1999, 176, 201; in the recent practice: Decision 22/2005. (VI. 17.) AB, ABH 2005, 246; Decision 28/2005. (VII. 14.) AB, ABH 2008, 290; Decision 75/2008. (V. 29.) ABK May 2008, 715, 723]

In the present case, the Constitutional Court held that there is only one interpretation of APS in line with the Constitution and DPA: when the public servant signs the deed of oath containing the text specified in Section 12 para.(2) of APS, which does not make a reference to the choice made by the

public servant regarding his/her conviction (the content of the oath, showing the public servant's conviction), only to the fact that at the time of taking the oath the public servant had a chance to choose from such options. [This is the solution also applied by the regulation on the citizens' oath or affirmation. The sample of the minutes can be found in Annex 9 of the Government Decree 125/1993. (IX. 22.) Korm. on the implementation of the Act LV of 1993 on the Hungarian Citizenship.]

Taking all the above into account, the Constitutional Court establishes: in the application of Section 12 para. (3) of APS, it is a constitutional requirement based on Article 59 and 60 of the Constitution that the deed of oath should not contain any data referring to the public servant's conviction of conscience or religion.

At the same time, based on the above reasoning, the Constitutional Court rejected the petitions aimed at the establishment of the unconstitutionality and the annulment of Section 12 and Section 13 para. (2) of APS.

3. The Constitutional Court performed a separate examination of the petition challenging Section 102 para. (8) of APS by making a reference to the right to work [Article 70/B of the Constitution]. The petitioner alleged that as a result of the incomplete regulation (resulting in a legal gap), in certain cases, the legal relation of public servants was terminated because of the wilful omission of the head of the public administration organ or due to some else's fault. (As they could not take the public servants' oath within sixty days after the Act taking force.) Therefore the petitioner initiated the annulment with retroactive force of the second sentence of Section 102 para. (8). On the other hand, the petitioner requested to establish that the deadline for taking the oath is not a forfeit one.

According to the challenged provision of APS, the public servants who are in public service at the time of this Act taking force shall take an oath in not more than 60 days from the date of this Act taking force. In the absence of taking an oath, the public servant's legal relationship of public service shall be statutorily terminated. In the opinion of the Constitutional Court, Section 102 para. (8) of APS determined the public servant's obligation – and the legal consequence of the failure to meet the obligation – regarding the 60 days period after the Act taking force. The complaints of the petitioner (the application of the rule in concrete cases, the evaluation of the nature of the deadline and of the activity of the public administration organ) are primarily related to the judicial application of the law.

Section 1 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) lists the Constitutional Court's scopes of competence. Based on a constitutional complaint institutionalized in Section 48 of ACC, the Constitutional Court may examine whether the injury of fundamental rights was a result of the unconstitutionality of the applied statute or not. Section 49 para. (1) of ACC specifies the preconditions of filing a petition for the examination of an unconstitutional omission (causing an unconstitutional situation by failure to perform a legislative duty based on a statutory empowerment). According to the Constitutional Court, the petition submitted with regard to Section 102 para. (8) of APS could be examined in neither of the scopes of competence.

On the basis of Section 29 item b) of CCRP, the Constitutional Court refuses the petition if it is out of the Court's competence. As a consequence, the Constitutional Court refused the petition concerning Section 102 para. (8) of APS.

4. Two petitioners challenged further provisions of APS. The petitioners initiated the constitutional review of the whole of Section 13 and Section 65 para. (2) item d) of APS, with reference to several provisions of the Constitution [Article 2 para. (1), Article 4, Article 8 para. (2), Article 35 para. (1), Article 70 para. (6), Article 70/A para. (3), Article 77 para. (2) and Article 78 para. (2)] together with many other statutory provisions. Additionally, they requested the Constitutional Court in the reasoning of the petition to establish alternatively an omission of legislative duty or take a stand in

questions of legislation. In the context of the listed initiatives, the petitioners challenged the content and the deficiencies of the regulations on the ethics of public service and on the professional chamber.

As stated in Section 22 para. (2) of DPA: “The petition shall contain a definite request and the cause forming the ground thereof.” According to Section 21 para. (2) of CCRP, “the petition shall contain an indication of the statute to be reviewed, the provisions of the Constitution alleged by the petitioner to have been violated by the statute concerned, and the provisions of the ACC and other Acts of Parliament verifying the eligibility of the petitioner and the competence of the Constitutional Court.” In accordance with the practice of the Constitutional Court, it is not enough to refer to certain provisions of the Constitution: the petition shall contain a reasoning why and to what extent does the statute to be annulled violate certain provisions of the Constitution [Decision 654/H/1999. AB, ABH 2001, 1645; Decision 472/B/2000. AB, ABH 2001, 1655; Decision 494/B/2002. AB, ABH 2002, 1783]. The petitioners have not indicated – in addition to listing the Articles – which ones of the challenged provisions are contrary to the cited provisions of the Constitution and why do they hold the regulation to be unconstitutional.

The Constitutional Court's scopes of competence do not include the forming of an opinion in questions of legislation. The petitioners have not identified the legal basis and the justification on the merits of their other initiatives. In addition, the petition does not comply with the conditions – resulting from Section 49 para. (1) of ACC – necessary for examining an unconstitutional omission.

On the basis of Section 29 item b) of CCRP, the Constitutional Court refuses the petition if it is out of the Court’s competence. As a consequence – based on Section 22 (2) of ACC and Section 29 item b) of CCRP – the Constitutional Court refused the petition aimed at the establishment of the unconstitutionality and the annulment of Section 13 para. (1) and Section 65 para. (2) item d) of APS.

5. Several petitions initiated the posterior constitutional review of Sections 31/A-31/F of APS and it’s full or partial annulment.

During the Constitutional Court’s procedure, Section 50 para. (1) of the Act LXXXIII pf 2007 on amending the Act XXIII of 1992 on the Legal Status of Public Servants repealed these provisions and Section 50 para. (2) repealed the subheading “The preferential body of senior officials” preceding Section 31/A. One of the petitioners withdrew his petition filed with regard to Sections 31/A-31/F of APS – with due account to the changed legislation.

According to Section 31 item a) of CCRP, the Constitutional Court shall terminate the procedure if the statute under review is repealed after submission of the petition, thus making the petition irrelevant. In line with Section 31 item d), another cause of termination is the case when the petitioner has withdrawn his petition.

As developed in the practice of the Constitutional Court, it would only examine the unconstitutionality of a repealed statute exceptionally: in the cases of the judicial initiative under Section 38 of ACC and the constitutional complaint under Section 48 of ACC [Decision 10/1992. (II. 25.) AB, ABH 1992, 72, 76; Decision 335/B/1990. AB, ABH 1990, 261, 262]. Moreover, a procedure of posterior normative review can also be performed when the content of the new law replacing the repealed statute is the same (or essentially similar) as that of the former one. (Decision 137/B/1991 AB, ABH 1992, 456, 457; Decision 157/B/2003 AB, ABK April 2008, 602) The petitions filed in the present case are not judicial initiatives and not constitutional complaints; the statutes in force do not contain the challenged provisions.

As a consequence, on the basis of Section 31 item a) and – in the respect of the withdrawn petition – item d) of CCRP, the Constitutional Court terminated the procedure aimed at the posterior review of the unconstitutionality of Sections 31/A-31/F of APS.

The Constitutional Court ordered the publication of the decision in the Official Gazette with account to establishing a constitutional requirement and the importance in principle of the matter.

Budapest, 20 April 2009.

Dr. Péter Paczolay
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court, Rapporteur

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. Barnabás Lenkovics
Judge of the Constitutional Court

Dr. Miklós Lévay
Judge of the Constitutional Court

Dr. László Trócsányi
Judge of the Constitutional Court

Concurring reasoning by *Dr. László Trócsányi*, Judge of the Constitutional Court

I agree with the holdings of the decision, with the following amendments.

1. The nature of the “So help me God” clause:

In the Republic of Hungary, several statutes in force contain oath taking obligations. All of those Acts of Parliament – without exemption – provide a possibility for the person taking the oath to conclude the oath – in accordance with his or her conviction – by saying the clause “So help me god”. Among others, this option is available in the texts of the oaths of officials under public law elected by the Parliament, judges, prosecutors, attorneys and public servants. If the affected person wishes to say this clause – with account to his conviction – then it becomes an integral part of the oath as clause aimed at confirming the obligation undertaken by the person taking the oath. By saying the clause, the person taking the oath does not change the obligations undertaken in the oath; the clause confirms the undertaking.

The clause “So help me God” complies with the Hungarian traditions and – as the declaration of one's religious conviction – it does not restrict the realisation of the freedom of conscience and religion contained in Article 60 of the Constitution, indeed it grants the exercising of it. The statutes also allow not saying the clause of the oath if someone does not wish to do so. This is also part of the freedom of conscience and religion; in this case, the clause shall not be a part of the oath. Some people might indeed refrain from saying the clause because of their religious conviction. Accordingly, the option of not saying the clause offers a possibility not only for refraining from religion but also for exercising one’s religious conviction in a reserved manner. The “So help me God” clause stands at the end of the oath, to confirm the content of the oath, in line with the religious, esthetical or traditional conviction of the person taking the oath. Taking an oath is on the one hand an obligation related to the expression of loyalty, but on the other hand it also shows the subjective intention of the person taking the oath, as by saying the oath, he/she undertakes subjectively the obligations that come with the office to be held.

Also the statutes of other countries – similarly to Hungary – grant an option for the person taking the oath to choose between saying or not the "So help me God" clause. In the Anglo-Saxon countries, there is a distinction between the oath and the solemn affirmation: it is up to the affected person to decide which one to say. For example, in Great Britain, all persons holding the position of a judge may elect to say either the oath containing the *"So help me God"* clause or a simple affirmation. The person taking the oath may also opt for saying it with reference to the Jewish, Hindi, Muslim or Sikh religion.

It is undeniable, however, that today in Hungary the clause "So help me God" also bears a general meaning, partly secularised, and partly related to religion without any concrete conviction, thus saying or not saying this clause cannot always be linked to any articulated conviction and to the freedom of conscience and religion. As a consequence, the clause "So help me God" could also regarded as a strong symbol. Saying the clause can also be motivated on emotional or esthetical grounds. The first and the last verses of the national anthem ("*Himnusz*") contain a national prayer, a petition, but by today their content has been secularised as well. Singing or saying the national anthem cannot be connected to a religious conviction, despite of the prayer, religious petition character of the poem. Moreover, in 1989 this poem has been incorporated into public law as according to Article 75 of the Constitution: "The national anthem of the Republic of Hungary is the poem "Himnusz" by Ferenc Kölcsey, set to the music of Ferenc Erkel." The legislation adopting the Constitution considered it important to include the national anthem in the Constitution among the national symbols. Similarly, the clause "So help me God" is just a national symbol the saying of which does not have any implication to one's religious conviction.

2. The main regulations and the constitutional requirement on taking the oath:

According to Section 12 para. (3) of APS , "the public administration organ shall organise the taking of the oath prior to the appointment of the public servant. Taking the oath may take place in the presence of the person exercising the employer's rights and the colleagues. The oath shall be told orally and confirmed in writing". This regulation is only partially harmonised with other statutes requiring the preparation of a deed of oath. According to Section 43 para. (4) of the Act XCV of 2001 on the Legal Status of the Professional and Contracted Soldiers of the Hungarian Army, there is no specific deed of oath as the deed on joining the army (the contract) contains the date of taking the oath. As regulated in Section 7 para. (2) of the Act LV of 1993 on Hungarian Citizenship, the document of naturalization becomes the deed of oath, as it contains the fact and the date of taking the oath or the affirmation. According to Section 16 para. (4) of the Act XI of 1998 on Attorneys, "the Bar Association shall prepare a deed on taking the oath indicating the text of the oath as well as the date of taking the oath and commencing the activity as attorney. The deed shall be signed by the attorney and the president of the Bar Association. The deed of oath shall be retained by the Bar Association". Section 15 para. (3) of the Act LXXV of 2007 on Auditors and the Public Supervision of Auditors contains a similar regulation.

APS is unique among the statutes regulating the taking of an oath as it is the only one stressing the "confirmation of the oath in writing". As the statute does not specify the meaning of the "confirmation of the oath in writing" and also the judicial practice is diverse, it is justified to specify the constitutional requirement. Since the deed of oath signed by the public servant is included in the personal files of the public servant, a constitutional requirement can be formed on the basis of Articles 59 and 60 of the Constitution in the respect of Section 12 para. (3) of APS: the deed of oath to be signed by the public servant should contain that the person taking the oath had a chance to choose between saying or not the clause "So help me God". In accordance with Act IV of 1990 on the

freedom of conscience and religion, it is prohibited to record any data in a State (official) registry about one's religious or other conviction. As APS connected the saying or not of the clause confirming the oath to the "conviction" of the person taking the oath – in contrast with saying "So help me God" for symbolic or esthetical reasons – saying the clause or not on the basis of one's own "conviction" cannot be constitutionally recorded in writing and handled by the State, with due account to Articles 59 and 60 of the Constitution. The clause of the oath as recorded on the deed of oath and signed by the person taking the oath may only refer to the fact that the person taking the oath had a chance – at the time of saying the words of the oath – to choose between saying the clause "So help me God" or not.

Budapest, 20 April 2009.

Dr. László Trócsányi
Judge of the Constitutional Court

Dissenting opinion by *Dr. Elemér Balogh* Judge of the Constitutional Court.

1. I do not agree with point 2 of the holdings in the majority Decision. In my opinion, in the context of the decision rejecting the establishing of the unconstitutionality of the provisions regulating the oath of public servants – on the basis of the first sentence of Section 49 of ACC – the Constitutional Court should have stated ex officio the following: an unconstitutional situation caused by legislative omission has resulted from the failure of the Act XXIII of 1992 on the Legal Status of Public Servants to create an opportunity for making the affirmation necessary for the valid establishment of a public service relation in an alternative manner by using a word other than the word "oath".

One of the petitioners – of Nazarene belief – complained about the fact that in the course of taking the oath of public servants – in the absence of the opportunity of an "alternative conduct" – he could only perform the statutory obligation by saying the public servants' oath containing the word "oath", which is a forbidden word according to his beliefs.

By applying the constitutional probe of the so called "comparative load test", the majority decision concluded that the rules of APS on regulating the oath of public servants are not unconstitutional: the application of the above mentioned test shall not result in stating that it is constitutionally justified to make exemptions from the provisions on the oath as regulated in APS and equally binding all public servants, with respect to the above mentioned petitioners' conviction of conscience or religion.

I agree with the majority decision establishing that the challenged provision of APS regulating the oath of public servants is not in conflict – in itself – with the fundamental right enshrined in Article 60 para. (1) of the Constitution, but in the case concerned, I can deduct a different constitutional conclusion from the referred test with regard to the challenged statutory regulation.

2. There is the constitutional question behind the test of the so called "comparative load test" whether within the framework of a constitutional democracy could the citizens be exempted – with reference to their religious beliefs or convictions of conscience – from Acts of Parliament that impose a general obligation.

I hold it important to note that in the matter under review, the constitutional question is raised not in the respect of the necessity to grant exemption from the effect of an Act of Parliament, but the need to offer an "alternative conduct" in order to create an exemption from a statutory provision contained in an Act of Parliament of general binding force, for the purpose of the joint enforcement of the fundamental rights granted in Article 60 para. (1) and Article 70 para. (6) of the Constitution.

In fact, the case concerned is not about exempting a citizen who wants to adhere to a dogma of his denomination (i.e. the prohibition of taking an oath) from the obligation of taking the oath as the

statutory precondition – a general statutory condition binding all public servants equally – of establishing or maintaining the legal relation of public service. Providing an option of “alternative conduct” by the legislation would allow the affected citizen not to use the word “oath”, which is a forbidden word according to his beliefs in the context discussed here. He could indeed use other words that are synonyms of oath to undertake the same additional obligations and responsibilities required by the legislation in Section 12 of APS as the conditions of holding a public office, and the violation of such obligations and responsibilities would imply the same sanctions as the ones applied on the violation of the promises contained in the oath.

As established about the relevant constitutional question in the Decision 39/2007. (VI. 20.) AB (hereinafter: CCDec1), cited in the majority decision: neither can it be established in general that an exemption from the generally binding Acts of Parliament is always to be made on the basis of the freedom of conscience and religion (“freedom of religious cults”), nor can it be stated that the rule of the Acts of Parliament fully covers the internal life of the religious communities.

According to the reasoning of CCDec1, due to the different, and sometimes competing, constitutional aspects, it should always be established with regard to the constitutional question raised in the concrete case whether – on the basis of the freedom of religion – an exemption is to be made from the general laws.

The concrete circumstances (life situations) are to be examined at all times in order to establish whether it is justified to exempt the affected persons from the general obligation and whether the State is bound to offer them an "alternative conduct".

Agreeing with the reasoning of CCDec1, it is of crucial importance in answering the above question – among others – whether in the examined life situation the requested exemption (“alternative conduct”) is linked closely to a dogma or a religious rite, and whether the exceptional regulation violates the rights of others, for example the persons outside the affected religious community.

In the case under review, there is a lack of an exceptional regulation granting “alternative conduct”. There is a conflict between the cogent statutory provision of APS (an oath is to be taken in order to have the legal relationship of public service established or maintained) and the religious regulation binding the petitioner of Nazarene belief (the prohibition of uttering the word “oath”). There is no “alternative conduct" offered by the legislation in the statutory regulations to resolve the conflict. As a consequence the affected citizen is forced to choose:

- either to accept that he must take an oath in order to obtain a public office and thus he breaches the regulations of his religion (he takes the oath),
- or to obey the binding order of his religion, giving up the holding of the public office (he does not take the oath).

In my opinion, in the case under review, the lack of regulation as one of the conjunctive statutory conditions of an unconstitutional omission of legislative duty, as contained in Section 49 para. (1) of ACC, can be established beyond doubt: there is no statutory regulation allowing for an “alternative conduct” to resolve the above conflict in this life situation.

I hold that the above mentioned regulatory gap causes a conflict with the constitutional fundamental rights regulated in Article 60 para. (1) and Article 70 para. (6) of the Constitution, resulting in an unconstitutional situation.

3. The Constitutional Court established in Decision 4/1993 (II. 12.) AB (hereinafter: CCDec2) that the close relation between the freedom of religion and the fundamental right to human dignity should also be taken into account when considering the other two elements of the freedom of religion, i.e. worship or acting and living according to one's convictions.

As established by the Constitutional Court in the reasoning of CCDec2, a special emphasis is given to the freedom of action based on the general right of personality if the action follows from one’s

convictions of conscience and religion. Beyond doubt, this is the case when someone in the specific life situation wants to follow a religious rule, which is binding upon him.

The Constitutional Court confirmed in CCDec2 – by way of reference to an earlier Decision of 64/1991. (XII. 17.) AB (hereinafter: CCDec3) – that with regard to the freedom of religion, the State's obligation to respect and protect fundamental rights [Article 8 para. (1) of the Constitution] includes both refraining from violating such rights and guaranteeing the conditions necessary for their enforcement of the freedom of religion, i.e. the State also has to guarantee the conditions that are necessary for the freedom of religion to prevail, independently from the individual demands.

The Constitutional Court underlined in the reasoning of CCDec2 that the State's neutrality in connection with the right to freedom of religion does not mean inactivity. It is the State's obligation to ensure a field for expressing, teaching and following in life one's religious convictions, for the operation of churches as well as for rejecting religion or keeping silent on it. In this field the different ideas can be formed and developed and enable the free formation of personal convictions.

As explained by the Constitutional Court in CCDec3: "The legislation is not bound to establish specific guarantees for the various fields of life in order to have the freedom of conscience enforced. Through the general guarantees established in the Act IV of 1990 on the Freedom of Conscience and Religion, the legislation fulfilled its generally interpreted obligation of "implementation" related to Article 60 of the Constitution. In addition, the legislation must guarantee – in accordance with the personal and individual character of the conflict of conscience – that there are no legal obstacles of the individual exemption from the legal obligations that contravene the consciousness of the person concerned. This option is to be guaranteed in certain cases by way of an Act of Parliament, for example when the right to the freedom of conscience is invoked in contrast with a citizens' obligation defined in the Constitution, and it is justified to create a special procedure for the assessment of the conflicting constitutional right and obligation." (ABH 1991, 297, 314)

4. I can accept, on the basis of the quoted precedent decisions, the starting point of the reasoning of the majority decision: the challenged statutory provision requiring the taking of the oath of public servants is a regulation of general nature (equally applying to all public servants), which is neutral in terms of conviction and which represents the ceremonial establishment of the legal relation of public service, and not the oath taking person's conviction of religion or conscience.

However, at the same time, in my opinion, one should not forget that historically it is an institution of sacral origin, used by the State as a precondition for establishing or maintaining a secular legal relation (public office). The majority decision treats the oath applied in the challenged regulation as a secularised institution that has already lost its sacral origin, and examining it from the side of the State (the legislation), the majority decision concludes that it has no implications concerning the constitutional fundamental right enshrined in Article 60 para. (1) of the Constitution.

However, I question the approach of the Constitutional Court taking a stand about defining the sacral meaning of the act of "taking an oath" not only from the side of the State but also from an individual point of view, What I miss from the reasoning of the majority decision is in fact an examination from the individual's side and point of view: taking into account that in the given life situation the legal institution regulated by the legislation causes a conflict situation for a citizen who belongs to a denomination, which prohibits the taking of an oath, and what could be the possibilities for resolving this conflict situation, in order to save the citizen who holds a public office (or wants to exercise his right to hold one) from being forced to make a decision contrary to his conviction of consciousness that would cause the breaching of a religious order and that might as well result in expulsion from the given religious community.

The Constitutional Court interpreted the content of the right to hold a public office in several earlier decisions. It pointed out in those decisions that this is a constitutional right guaranteeing the general

fundamental right of participating in the exercise of public authority [Decision 39/1997. (VII. 1.) AB, ABH 1997, 263, 275.].

Of course, on the basis of the right to hold a public office as regulated in the Constitution, no one enjoys a constitutionally guaranteed subjective right to hold a specific public office. Based on Article 8 para. (2) of the Constitution, an Act of Parliament may regulate the right to hold a public office and it may set up statutory conditions for holding a public office (Decision 962/B/1992. AB, ABH 1995, 627, 629).

Also the citizens of Nazarene belief have the right to hold public offices [Article 70 para. (6) of the Constitution] and the State may impose certain statutory conditions – such as taking an oath – on fulfilling public offices.

However, in my opinion, it does not exempt the legislation from the obligation of taking into account the religious principles or convictions of conscience of certain groups of citizens in the course of regulating the conditions of exercising the fundamental right regulated in Article 70 para. (6) of the Constitution.

Based on the provision of Article 60 para. (1) of the Constitution, the State is required to its utmost reasonable ability to refrain from imposing a pattern of behaviour on its citizens which is in conflict with their convictions. I accept that the State may not be expected to grant in the course of the legislation full scale protection to all actions (or refraining from certain actions) and requirements resulting from all religious and other convictions of conscience in all cases (life situations) without exception. The probe of the so called "comparative load test" – whether the regulation under review passes the test or not – can only be examined on the basis of the concrete regulation.

In the case under examination, the legislation applied in the case of all citizens the same statutory preconditions for holding a public office, but it failed to note that the compliance with those conditions – in the absence of offering the possibility of an "alternative conduct" – would force a specific group of citizens (those who confess Nazarene beliefs) to choose between the above mentioned fundamental rights and to give up one of them.

Thus the constitutional problem is not the original exclusion of Nazarene citizens, without a constitutional reason, from exercising the constitutional fundamental right of holding public offices: the problem is that the legislation forces the above mentioned citizens to choose between the fundamental rights enshrined in Article 60 para. (1) and Article 70 para. (6) of the Constitution.

The State itself adopted statutory regulations in the course of which a conflict emerged between the above constitutional fundamental rights of the citizen, and the legislation did not provide the resolving of the conflict, therefore the citizen is to make a choice between the conflicting rights and to give up one of them.

The forced choosing between the above fundamental rights inevitably results in restricting one of them. However, in the present case, I do not see any other constitutional right (principle or value) or constitutional obligation either in the side of the State or of other legal subjects – outside the scope of the affected citizens – that could constitutionally justify this restriction. As a consequence, for the harmonised practising of the fundamental rights in question it would be necessary in the course of performing the solemn act, required as the condition of taking office, not only in the form of an oath to undertake loyalty to the State and to pay respect to the constitutional order, but also in an alternative form of making the same promise, as chosen by the affected persons.

In my opinion, the regulation elaborated by the legislation in the Act LV of 1993 on Hungarian Citizenship, offering for the naturalized and re-naturalized persons the options of either taking an oath of citizenship or a making an affirmation of the same force, is a good example of how to regulate the “alternative conduct” I miss from the provisions APS. If the legislation had allowed the using of the word “affirm” instead of the word “swear” – according to the choice of the person taking the oath – in the text of the oath regulated in APS, then the conflict between the above mentioned fundamental rights would have not raised at all.

5. Accordingly, I hold that in the present case, on the basis of the constitutional "comparative load test", the Constitutional Court should have established ex officio that the legislation had created an unconstitutional situation by not offering for the affected citizens an “alternative conduct” suitable for resolving the conflict of the fundamental rights emerging in the life situation under review. Therefore the Constitutional Court should have set a deadline for the legislation to elaborate a statutory regulation, which allows the affected group of the citizens to perform the conduct expected by the State in a manner being not in contrast with their conviction of conscience.

Budapest, 20 April 2009.

Dr. Elemér Balogh
Judge of the Constitutional Court

Dissenting opinion by *Dr. András Bragyova*, Judge of the Constitutional Court

I accept in the context of the majority decision the constitutional requirement specified in point 1 of the holdings of the decision (an in this sense I agree with it). However, I do not agree with the rejecting decision found in points 2 and 3 of the decision, and in this respect I also argue with the constitutional requirement: if a decision of annulment had been passed on the basis of the petitions, the constitutional requirement would not have been necessary to adopt.

1. The text of the oath of public servants as codified in 2001 in the Act XXXVI of 2001 on Amending the Act XXIII of 1992 on the Legal Status of Public Servants and certain other Acts of Parliament is unconstitutional as it contains a clause violating the freedom of conscience. By including the clause „So help me God” in the statutorily regulated text of the oath of public servants, the State violated the constitutional obligation of the neutrality of the State regarding convictions as based on Article 60, Article 54 and Article 70/A para. (1) of the Constitution, in particular the freedom of conscience and religion enshrined in Article 60 of the Constitution.
According to the majority decision, the legislation complies with the requirement of neutrality by providing that the application of the clause referring to God is conditional “according to the conviction of the person taking the oath”: the public servant may choose between God and no-God. This provision is unconstitutional as the person taking the oath is in fact obliged to make a choice between the two options and making this choice is to be expressed publicly, “in the presence of the person exercising the employer's rights and the colleagues” as regulated in the Act of Parliament. As the expressing of the choice is not voluntary, it is in conflict with the constitutional principle of the voluntary expressing of one’s conviction of religion and conscience, in other words, the freedom of conscience and religion. The obligatory exercising of any freedom would contradict the freedom itself: it is a *contradictio in adiecto.*
The provision mentioned above is in conflict with Article 60 of the Constitution for other reasons as well, since the legislation does not treat equally the believers – more specifically: those whose beliefs or other conviction allows the saying of an oath referring to God – and the people who do not wish to add such a clause to the oath, possibly because of their religious conviction. The solution employed by the Act of Parliament is based on the principle of religious tolerance: the general rule is saying the oath with the clause “so help me God” and the exemption is leaving it out. It is a clear indication by the legislation about the desirable solution – although it allows for derogation. The latter solution shows tolerance, but at the same time all other convictions are compared to the religious conviction, and the religious and non-religious consciences are not treated equally. However, by acknowledging the freedom of conscience and by declaring the neutrality of the State in matters of conscience (see in:

Decision 4/1993. (II. 12.) AB, ABH 1993, 48, 89) – the essential meaning of which is that the State may not support any conviction – such an indirect supporting of the religious conviction is prohibited by the Constitution.
It is incompatible with the freedom of conscience to have the individual's conscience taken care of by the State in the form of suggesting him or her, what the correct conviction is – as found in the text of the oath specified in the Act of the Parliament. It is for sure: if the aim was not the one described above, it would not be necessary to have any clause in the text of the oath. Indeed, there had not been such a clause included in the text until the amendment of the Act of Parliament in 2001 – but the person taking the oath had been free to add a confirming clause to the oath if he liked to do so. This obligation of the State is an absolute one as it may never take care of the individual's conscience in a paternalist manner: everyone should define his or her conviction independently. The situation is different if one's own conviction is to be manifested in acting or refusing to act (for example in refusing to serve in the army): here the State may set certain conditions and apply restrictions. However, the oath of public servants falls in the first case: saying the clause or not would not change a slightest bit of the seriousness and the legal role of the oath. The legal role of the clause is neutral: the solemnity of the oath may be influenced by many other circumstances without regard to saying the invocative clause.

2. It is unconstitutional to require the obligatory use of the performative verb of "swear" – and thus to take an oath – since making an affirmation (and using the corresponding verb of "affirm") would have the same legal and conceptual effect as "swear". Moreover, the content of the oath of public servants is much more like an affirmation than a real oath invoking the divinity.
Similarly to the oath of public servants, the oath of public office, mentioned several times in the Constitution – and regulated in a specific Act of Parliament with regard to the oath to be taken in front of the Parliament (Act XXVII of 2008 on the oath and the affirmation of certain public law officials) can be logically divided to three parts. The performative part using the verb "swear", the content of the oath (to make it clear what the oath is taken for), and finally the clause confirming the oath (invocation). The official oath is the public and solemn promise of an elected or appointed State official to discharge his/her official duties appropriately. The content of the official oath adds nothing to the duties of the public servant – its relevance is the declaration of a non-legal (conscious, moral) commitment to the legal duties of the office, in the form of a public vow. The oath of public servants is an affirmative vow: it is a solemn promise made by the person taking the oath to perform his/her obligations that exist independently from the oath.
Accordingly, the content of the oath would not be changed at all if using the verb "swear" (or the institution of the oath itself) was against the religious commitment of the person taking the oath – as in the case of one of the petitioners. In my opinion, it is a constitutional requirement to accept the taking of an official oath by using a performative verb the same as "swear" – like "affirm", "promise" or similar verbs – as one bearing the same value as an oath according to the Act of Parliament. Accordingly, requiring the public servant to take the official oath only and exclusively by using the verb "swear" violates the freedom of conscience enshrined in Article 60 of the Constitution, as it means forcing someone by the law to do an act forbidden according to his conviction of conscience (or imposing a negative legal sanction or loss of office upon obeying the prohibition). It is strange indeed, as requiring taking an official oath is only reasonable when the oath in fact represents the conviction of conscience of the person taking the oath.
Changing the performative verb and replacing it with another one of the same value would not affect the content and the role of the oath. Consequently, this case shows no similarities at all with another case examined in one of the Constitutional Court's decisions, when – in the absence of a statutorily defined oath text – a representative of the local government wanted to take an "avant-garde" oath drafted by him. [Decision 14/2008. (II. 26.) AB, ABK February 2008, 155, 159]

3. The forfeit deadline of sixty days specified for the repeated taking of the public servants' oath, contained in Section 102 para. (8) of the Act XXXVI of 2001 should have been annulled with a retroactive force. According to this provision, all public servants working in public service at the time of the Act of Parliament taking force were obliged to take within sixty days upon the Act taking effect the official oath with the new text including the invocation. Failure to do so implied the "statutory" termination of the public service relation of the public servant.
Although the petition only challenges the sixty days deadline, it was unconstitutional to require the obligatory repetition of the official oath of all the public servants, appointed at that time, who had taken an official oath before. Indeed the very existence of the sixty days deadline was unconstitutional. The repetition (more exactly: the repeated taking) of the oath of public servants can only be justified in the case of changing the essence of the State or the constitutional structure, or in the case of changing the regime. As in the period concerned (in 2001) this was not the case, there was no constitutional ground to force the appointed public servants acting in the legal relation of public service to take a repeated official oath. The petitioner refers to the violation of the right to work enshrined in Article 70/B para. (1) of the Constitution, and in the case of public servants this right is identical with the right to hold an office, to be enjoyed by all Hungarian citizens [Article 70 para. (6) of the Constitution]. The provision is unconstitutional because of binding all public servants to repeat his/her official oath is an unnecessary restriction of this constitutional right (without a constitutional reason). Accordingly, the relevant provision should have been annulled.

4. Although the present case is only about the provisions under review of APS, the same could be established about the texts of the oaths contained in the Act XXVII of 2008 on the oath and the affirmation of certain officials under public law as well as in the annex to the Act LXIV of 1994 on certain questions related to holding the mayor's office and on the remuneration of the members of local governments, despite of the fact that these Acts of Parliament allow the option of making an "affirmation".

Budapest, 20 April 2009.

Dr. András Bragyova
Judge of the Constitutional Court

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