Decision 27/2014 (VII. 23.) AB

On the disapplication in pending proceedings of Section 34 (1) found contrary to the Fundamental Law and effective between 1 January 2012 and 31 August 2012 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities

In the matter of judicial initiatives, with the dissenting opinions by Justices Dr. István Balsai, Dr. Béla Pokol , Dr. László Salamon and Dr. Mária Szívós, the Constitutional Court, sitting as the Full Court, has delivered the following

decision:

1. The Constitutional Court holds that Section 34 (1) found contrary to the Fundamental Law and effective between 1 January 2012 and 31 August 2012 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities shall not apply in the case No 4.Pk.60.601/2012.

2. The Constitutional Court finds as a constitutional requirement arising from Article VII and Article XV of the Fundamental Law the following: Should the Constitutional Court, in the wake of Decision 6/2013 (III. 1.) AB, order disapplication of certain provisions held contrary to the Fundamental Law as contained in Section 33 (1) of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, as established by Section 17 of Act CXXXIII of 2013 on the Amendment of Certain Acts of the National Assembly Regarding the Status and Operation of Religious Communities in Connection with the Fourth Amendment to the Fundamental Law, the time limit prescribed for the initiation of the recognition as a church in relation to a religious community shall be deemed to run from the publication of the decision by the Constitutional Court establishing a prohibition of application.

3. The Constitutional Court hereby terminates its procedure in the matter of a petition seeking disapplication in pending proceedings of Section 34 (1) found contrary to the Fundamental Law and effective between 1 January 2012 and 31 August 2012 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. On the basis of Section 25 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the Assistant Judge acting under the jurisdiction of Budapest-Capital Regional Court invoked the procedure of the Constitutional Court in the petitions received by the Constitutional Court on 31 May 2013, in Order No 14.Pk.60.601/2012/6-II and Order No 14.Pk.60.299/2012/11-II, simultaneously with ordering a stay in the proceedings pending before the Assistant Judge concerning the registration as associations of organisations formerly operating as churches.

[2] In the Orders brought by him, the petitioner sought disapplication in the specific case pending before him of Section 34 (1) as effective between 1 January 2012 and 31 August 2012 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (hereinafter referred to as the "Act on Churches").

[3] The court raised the point that the Constitutional Court had ruled in its Decision 6/2013 (III. 1.) AB (hereinafter referred to as the "2013 Court Decision") that the legislative provision concerned was contrary to the Fundamental Law on the ground of infringement of Article B (1), Article VII, Article XXIV, Article XV and Article XXVIII of the Fundamental Law and had therefore, in point 4 of the operative part of the Constitutional Court Decision, ruled that it was inapplicable from the date of entry into force in relation to the organisations which had lodged the constitutional complaint referred to therein and as admitted. However, no constitutional complaint has been lodged by the organisations concerned in the cases pending before the court.

[4] 1.1 The organisation registered as a church in Case No 14.Pk.60.601/2012 did not apply for re-recognition as a church until 20 December 2011 and was therefore considered to be an association by operation of law pursuant to Section 34 (1) of the Act on Churches.

[5] The organisation registered as a church in Case No 14.Pk.60.299/2012 submitted an application for re-recognition as a church by 20 December 2011, which was, however, dismissed by the National Assembly by Parliamentary Resolution 8/2012 (II. 29.) OGY (hereinafter referred to as the "Parliamentary Resolution"), and therefore on 1 March 2012 it was classified as an association by operation of law pursuant to Section 34 (4) of the Act on Churches.

[6] Both churches, which were *ex lege* classified as associations, instituted proceedings to amend registration in accordance with the rules applicable to associations, but while the proceedings were pending, both of them, after the 2013 Court Decision had been rendered, requested the court seised of the matter to petition the Constitutional Court to disapply Section 34 (1), (2) and (4) of the Act on Churches in their cases.

[7] The court granted the requests in part and referred the case to the Constitutional Court in respect of Section 34 (1) of the Act on Churches.

[8] 1.2 The petitioner Assistant Judge based his procedural entitlement, in addition to Section 25 of the Constitutional Court Act, on Section 1 (b) of the said Act, as well as on Section 2, Section 5 (1) and (2) of Act CLXXXI of 2011 on the Court Register of Civil Society

Organisations and the Related Procedural Rules (hereinafter referred to as the "Civil Society Act") and Section 11 (1) of Act III of 1952 on the Code of Civil Procedure. Pursuant to Section 1(b) of the Constitutional Court Act, an assistant judge shall also be considered to be a judge for the purposes of the Constitutional Court Act if the law provides that an assistant judge may act in the capacity of a single judge.

[9] By virtue of Section 5 (2) of the Civil Society Act, the assistant judge may act in the first instance as an independent signatory with the right to sign independently and may deliver a decision on the merits in non-litigious civil proceedings governed by the Act.

[10] 2.1 On the basis of Section 58 (2) of the Constitutional Court Act, the Constitutional Court ordered the consolidation of the cases at issue in the present case.

[11] 2.2 In the course of its procedure, the Constitutional Court noted that Act CXXXIII of 2013 on the Amendment of the Acts on the Legal Status and Operation of Religious Communities in Connection with the Fourth Amendment to the Fundamental Law (hereinafter referred to as the "Amendment Act on Churches") amended the provisions of the Act on Churches effective as of 1 August 2013 and 1 September 2013, including several transitional provisions of the Act relating to pending cases.

In view of this, on the basis of Section 58 (1) of the Constitutional Court Act, the Constitutional Court issued an order requiring the petitioning court to remedy the deficiencies as to whether it considered that Section 34 (1) of the Act on Churches in force between 1 January 2012 and 31 August 2012 continued to be applicable in the cases subject of its petitions.

[13] In its reply to the notice of deficiency, the petitioner "maintained his petition" in Case No 14.Pk.60.601/2012, in that it considered the relevant provision of the Act on Churches to be still applicable.

[14] However, as regards Case No 14.Pk.60.299/2012, the petitioner stated that he would "withdraw his petition" and continues the court proceedings, since, as a result of Section 33 of the Act on Churches currently in force, Section 34 (1) of the Act on Churches, which had been in force before 31 August 2012, no longer applied to the organisation concerned, and therefore there was no need to maintain the petition for lack of reason.

[15] 2.3 Pursuant to Section 57 (2) of the Constitutional Court Act, the Constitutional Court called upon the organisation concerned in case No 14.Pk.60.601/2012 to state whether its particularly important interest justifies disapplication of the challenged provision of the Act on Churches. in the petitioner's case pending before the court.

[16] In its reply, the organisation concerned stated that it had a particularly important interest in disapplying the contested provision. In support of its claim, it submitted that the Constitutional Court had ruled in the 2013 Court Decision that the legislative provision concerned was unconstitutional by non-conformity with the fundamental Law on the grounds of infringement of Article VII, Article XXIV, Article XV and Article XXVIII of the Fundamental Law, on the basis of which, in its view, the entity concerned had not lost its ecclesiastical status and should have it restored.

II

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

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

"Article I (3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary and proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

(4) Fundamental rights and obligations which, by their nature, do not only apply to man shall be guaranteed also for legal entities established by an Act."

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

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

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

(4) The State and religious communities may cooperate to achieve community objectives. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community objectives.

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

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

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

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

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

[18] 2. The relevant transitional provision of the Act on Churches currently in force reads as follows:

"Section 34 (1) With the exception of the churches specified in the Annex and the churches referred to in Subsection (2) and their autonomous organisations established for religious purposes, all organisations registered under Act IV of 1990 on Freedom of Conscience and Religion and on Churches and their autonomous organisations established for religious purposes (hereinafter together referred to as "organisations") shall be deemed to be associations as from 1 January 2012."

[19] 3. The relevant transitional provision of the Act on Churches currently in force reads as follows:

"Section 33 (1) A religious community in respect of which Section 34 (1), (2) and (4) of this Act, in force from 1 January 2012 until 31 August 2012, is not applicable pursuant to Constitutional Court Decision 6/2013 (III. 1.) AB, may initiate the recognition as a church within a preclusive limitation period of 30 days from the entry into force of this provision in the procedure pursuant to Section 14/B and Section 14/C hereof.

III

[20] The petition is well-founded.

[21] 1. In accordance with Section 25 (1) of the Constitutional Court Act, where a judge, in the course of the adjudication of an individual case pending before him, is required to apply a rule of law which has already been found by the Constitutional Court to be contrary to the Fundamental Law, he shall apply to the Constitutional Court seeking disapplication of the rule of law which is contrary to the Fundamental Law.

[22] Based on the above provision, the judge may, where the context so admits, only initiate the disapplication of a provision which is to be applied in the specific case {*see* Decision 28/2013 (X. 9.) AB, Reasoning [33]}.

[23] Nonetheless, the Constitutional Court emphasises that, on the basis of judicial independence, it is for the judge to decide what the applicable law is in a particular case {*see* Decision 28/2013 (X. 9.) AB, Reasoning [28] and [33]}; it is in this spirit that the Constitutional Court does not, as a rule, review in its procedure whether the impugned provision of law should (continue to) be applied in the judicial proceedings at issue, but acts on the basis of the findings contained in the judicial initiative submitted or in the addendum thereto.

[24] The court which initiated the procedure before the Constitutional Court in Case No 14.Pk.60.601/2012 considered Section 34 (1) of the Act on Churches in force before 31 August 2012 to continue to apply in its proceedings and therefore maintained its petition for its disapplication.

[25] 2. In its assessment of the petition seeking to disapply the legislation at issue, the Constitutional Court considered, firstly, the grounds on which the Constitutional Court found the contested provision of the legislation to be contrary to the Fundamental Law in the 2013 Court Decision, secondly, the criteria on the basis of which it held that the legislation was to be disapplied in specific cases, and thirdly, the other criteria to be considered in the present case in assessing the petition.

[26] 2.1 In the 2013 Court Decision, the Constitutional Court held that Section 34 (1) of the Act on Churches, in force between 1 January 2012 and 31 August 2012, was in conflict with the Fundamental Law on the ground that the provision infringed the right to freedom of religion as guaranteed in Article VII of the Fundamental Law and, in this context, the requirement of legal certainty under Article B (1) {the 2013 Court Decision Reasoning [224]}. The unconstitutionality by non-conformity with the fundamental Law was justified in the 2013 Court Decision on the following grounds:

"Section 34 (1) of the Act on Churches, in force from 1 January 2012 until 31 August 2012, classified churches registered under the Religious Freedom Act and their independent organisations established for religious purposes as associations by operation of law. However, the provision also defined as an exception to the scope of reclassification, in addition to the churches defined in the Annex to the Act on Churches, the churches which had submitted an application to the Minister with regard to the rules of the Act on recognition as a church before the expiry of the First Act on Churches. Sections 35 to 36 of the First Act on Churches provided for the entry into force of the Act and the submission of applications for recognition (continued operation) of religious communities as churches. However, the Constitutional Court, in its Decision 164/2011 (XII. 20.) AB, which found the First Act on Churches unconstitutional on the grounds of invalidity under public law, found a violation of legal certainty with regard to these provisions due the principle on the clarity of norms being absent: »the regulatory situation is that the provisions of the Act do not make it unequivocal from which date organisations registered as churches before 1 January 2012 are obliged or entitled to register as churches, and from which date set as the final time limit they are obliged or entitled to do so, or to apply for registration under a special Act, presumably the one on associations, failure to do so will result in the dissolution of the church without a legal successor, and what the future legal position of the organisation will be in the event of a refusal by the National Assembly to recognise it as a church, taking into account the fact that the definition of religious activity [Section 6 of the Act on Churches], and the recognition and registration procedure, which neither includes procedural time limits nor an express obligation to make a decision, precludes any appeal against the decision and also involves consideration by the National Assembly, is in any case uncertain, and the fact that the question of legal status or dissolution may also affect the operation of church-run institutions with a public mission, results in a violation of the right to freedom of conscience and religion due to the lack of clarity of the norms.«

The First Act on Churches ceased to be in force on 20 December 2011, but the Act on Churches was promulgated only thereafter, on 31 December 2011, and entered into force on 1 January 2012. Churches which had not previously applied for recognition as a church on the basis of legal rules found by the Constitutional Court to be contrary to legal certainty, were no

longer able to apply for recognition as a church under the Act on Churches after the Act on Churches was promulgated, in order to avoid being downgraded to the status of an association and losing their ecclesiastical status." {The 2013 Court Decision, Reasoning [222] and [223])

[27] 2.2 In the 2013 Court Decision, the Constitutional Court found Section 34 (1) of the Act on Churches in force from 1 January 2012 to 31 August 2012 to be retroactively inapplicable in respect of the complainants concerned in the cases under scrutiny. In determining the legal consequence, the Constitutional Court, in the exercise of its discretion under Section 45 (4) of the Act, took into account the particularly important interest of the petitioners initiating the procedure {the 2013 Court Decision, Reasoning [224]}. In declaring Section 34 (1) inapplicable only in relation to the organisations which had lodged a constitutional complaint with the Constitutional Court, the 2013 Court Decision took into account the fact that some organisations would probably not have applied for church registration even if they had followed the correct procedure and had complied with the time limit, because their primary interest was not to try to maintain their church status but to transform themselves into an association as soon as possible and to ensure their succession.

[28] 2.3 In considering the petition seeking to disapply the legislation contrary to the Fundamental Law, the Constitutional Court noted that, although the provision at issue in the petition had already been held to be in breach of the Fundamental Law in the 2013 Court Decision, both Article VII of the Fundamental Law and the legislation in the Act on Churches, in particular the part relating to organisations engaged in religious activities, had been significantly amended since then. In that context, the legislation which previously distinguished between churches and associations engaged in religious activities as their core purpose now specifically mentions, as two types of religious community, established churches and organisations engaged in religious activities, which have a different legal status not only in name but also in the content of the legislation applicable to them.

[29] 2.3.1 The Constitutional Court has reviewed, without claiming to be exhaustive, the similarities and significant differences in the legal status of religious organisations and established churches in the legislation in force compared to those scrutinised in the 2013 Court Decision.

[30] Both types of religious communities are entitled to: operate according to their own internal rules, ordinances and rituals [Section 19 (1) of the Act on Churches]; may use the designation of 'church' [Section 7]; the State shall not operate or establish a body for their direction or supervision [Section 8 (1)]; no State compulsion shall be used to enforce a decision taken on the basis of its internal rules, no State authority shall review, amend or overrule such decision, and no State body has material competence to adjudicate disputes arising from internal legal relations not regulated by law [Section 8 (2)]; may collect donations [Section 19/A (2)]; church persons and members of religious organisations performing religious services are not obliged to disclose to the State authority information concerning the right of personality which they become aware of in the course of their religious service [Section 13 (2) and Section 13/A (2)]; the religious community may receive financial support [Section 19/A (3)]; may also carry out activities serving community objectives as defined in the Act on Churches and not exclusively provided by the State (institutions) [Section 19 (2)]; the Government may conclude an

agreement with the religious community to ensure its operation if the conditions laid down in the Act on Churches have been met [Section 9 (1)].

[31] An organisation engaged in religious activities is subject to the rules applicable to associations, but has greater freedom of internal organisation than an association: Its articles of association may determine, in derogation from the rules applicable to associations, the manner in which membership is created and membership rights are exercised, as well as the scope, duties and competences of persons in a legal relationship with the religious organisation who are authorised to take and control internal decisions concerning the operation of the religious organisation and to manage and represent it [Section 9/A (2) and Section 9/B 4) of the Act on Churches].

[32] An ecclesiastical legal person (the established church and its internal ecclesiastical legal person) is conferred the following additional entitlements: Its income for purposes of expression of faith and the use thereof shall not be controlled by a State body [Section 23 (1) of the Act on Churches]; it may provide services as a camp chaplain, prison chaplain, hospital chaplain or other pastoral services [Section 24]; it may organise religious education in (educational) institutions run by the State and by (local or ethnic minority) self-governments [Section 21 (1)]; the material conditions for the latter shall be provided by the institution and the costs shall be provided by the State [Section 21 (2) and (3)]; it may benefit from tax relief and other benefits equivalent to tax relief [Section 20 (3)]; and it is entitled to the same level of funding for the activities serving community objectives it carries out, as defined in the Act on Churches, as State or local government institutions carrying out similar activities [Section 20 (1)]. Pursuant to Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction, an individual may allocate one per cent of the tax paid to a religious organisation as a donation to the non-governmental organisation, while a registered church may be the beneficiary of the additional one per cent [Section 1 (4), Section 4, Section 4/A and Section 8/A]. An ecclesiastical legal person may grant to a church person or to another individual receiving a regular monthly remuneration for the performance of an activity for the ecclesiastical legal person, property provided directly or indirectly by an individual for a church ceremony or church service (this includes in particular collection box money, church membership fees or donations) free of personal income tax; also exempt from income tax is a grant from the central budget to such persons of an income allowance or equivalent entitlement [Act CXVII of 1995 on Personal Income Tax, Annex 1, point 4.8] The Church Financing Act specifies that an established church shall receive a financial support similar to that provided by the State for the preservation, renovation and enrichment of its real estate used for serving community objectives and other real estate owned by it, for the preservation, renovation and enrichment of religious and cultural heritage values, monuments and works of art, and for the operation of its archives, library and museum, in the amount specified in the Central Budget Act [Section 7 (1) of Act CXXIV of 1997 on the Financial Conditions for Church Activities in the Exercise of Faith and for Public Purposes].

[33] 2.3.2 In the light of the above, the Constitutional Court finds that the legislation in force continues to confer on the status of established church a number of additional entitlements compared to that of an organisation engaged in religious activities, but that there have been

changes in several aspects of the legislation which were considered essential in the 2013 Court Decision.

[34] 3. In the light of the above, the Constitutional Court has, on the one hand, interpreted the relevant provisions of Article VII of the Fundamental Law and, on the other hand, verified whether the infringement of the Fundamental Law established in the 2013 Court Decision in connection with Article B and Article VII of the Fundamental Law still exists in this regulatory context.

[35] 3.1 Article VII (1) of the Fundamental Law recognises the right to freedom of thought, conscience and religion as unchanged since the entry into force of the Fundamental Law, but paragraphs (2) to (5) contain more extensive provisions for religious communities and churches. For that reason, the Constitutional Court, while adhering to its established case law on the right to freedom of religion for individuals and communities, has reinterpreted and upheld its prior case law on the exercise of freedom of religion in a collective, institutionalised form and the conduct of the State in this regard, in the context of the parts of the case which are relevant to the decision of the present case, as follows.

[36] At the time of the 2013 Court Decision was adopted, Article VII (2) of the Fundamental Law provided as follows: "In Hungary the State and churches shall be separated. Churches shall be autonomous. In the interest of community objectives, the State shall cooperate with the churches".

[37] Article VII (2) of the Fundamental Law now in force provides that "[p]eople sharing the same principles of faith may, for the practice of their religion, establish religious communities operating in the organisational form specified in a cardinal Act." On the basis of paragraph (3), "the State and religious communities shall operate separately. Religious communities shall be autonomous". Paragraph (4) provides for the act of cooperation as follows: "The State and religious communities may cooperate to achieve community objectives. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community goals." The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches, shall, in accordance with paragraph (5), be laid down in a cardinal Act.

[38] 3.1.1 "The freedom of collective (communal) religious practice is not bound to any form of organisation. The right to practise religion in community with others, as guaranteed by Article VII of the Fundamental Law, is granted to everyone, regardless of whether or not such community practice takes place within, or without, a legally regulated organisational framework or of the form of organisation. Neither individual nor communal freedom of practising a religion can be made constitutionally dependent on membership of a religious organisation or on the form of organisation of the religious community {Decision 8/1993 (II. 27.) AB, ABH 1993, 99, 100] However, the socially established typical institution of the practice of faith, of the expression of faith in general, is the institutionalised church

(religious community). Therefore, freedom of religion and its exercise in an institutionalised form in the community constitutes a special area of the right to freedom of religion." {The 2013 Court Decision, Reasoning [126]}

[39] The possibility for religious communities to operate in a specific legal form, separated from the State and as autonomous entities, is, in line with the case law of the Constitutional Court, not a condition for the exercise of the right to freedom of religion, but an integral part of it: Religious communities are not organised for the purpose of a particular activity or the representation of particular interests, as is the case with companies, associations, political parties or trade unions, but for the exercise of religion; religion, on the other hand, affects and defines the whole personality of the believer and all aspects of his or her life. The ability of religious communities to function is inseparable from the guarantee of freedom of religion {*cf*. Decision 4/1993 (II. 12.) AB, ABH 1991, 48, 65}. {*cf*. the 2013 Court Decision, Reasoning [136]}.

[40] "The church is not the same for a given religion and State law. A neutral State cannot follow the church conceptions of different religions." [*cf*. Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 53] However, the State may be mindful of all the respects in which religious communities and churches in general differ from social organisations, associations and interest groups which may be established under the Fundamental Law (Article VIII), in terms of their history and their social role {the 2013 Court Decision, Reasoning [134]}. Article VII of the Fundamental Law uses the term "religious community" in the sense of a religious group (community) recognised in a specific legal form as compared with the form of organisation normally available under the freedom of association. Consistent with the earlier relevant case law of the Constitutional Court, but now in an explicit manner, Article VII (2) ensures that, in addition to the forms of organisation which may be established under the right of association, persons who share the same beliefs may, for the purpose of practising their religion, freely choose to take the legal form defined by State law as a "religious community". It is through this legal instrument that the State takes account of the specific nature of religious groups and allows them to be integrated into the legal order in their specific capacity. A religious group acquires the legal status corresponding to the legal form of organisation it has elected; it may assert its specific characteristics as a religious group within this framework {*see* Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 53; the 2013 Court Decision, Reasoning [134]}.

[41] 3.1.2 The principle of the separate functioning ("separate existence") of the State and religious communities is formulated in the Fundamental Law in connection with freedom of religion, which, in addition to being a fundamental principle of the functioning of the secularised State, is also a guarantee of religious freedom (*cf*. the 2013 Court Decision, Reasoning [131]}.

[42] It follows from the principle of the separate functioning and autonomy of religious communities that the State may not establish institutional links with religious communities or with any religious community; that the State does not identify itself with the doctrine of any religious community; and that the State may not interfere with the internal affairs of religious communities and, in particular, may not take a position on matters of religious truth. It follows from all this, and from Article XV of the Fundamental Law, that the State must treat religious communities as equals. Since the State cannot take a position on the very content of what

constitutes a religion, it can only establish abstract rules on religion and religious communities, applicable to all religions or religious communities, which would enable them to be integrated into a neutral legal order, and must rely on the self-interpretation of religions and religious communities on matters of substance. Freedom of religion can therefore only be subject to non-religious limits, and may have limits which are not specific to any one person or any other motivation, but which also apply to similar actions. It is precisely through a neutral and general legal framework that the separate functioning of the State and religious communities ensures the fullest possible freedom of religion {*see* Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 52; the 2013 Court Decision, Reasoning [142]}.

[43] The Fundamental Law expressly states that "religious communities shall be autonomous", and the Constitutional Court therefore finds that the National Assembly must lay down rules for the operation of religious communities which provide them with a specific legal form and greater freedom of internal organisation and regulation than other democratically structured social organisations (*cf*. the 2013 Court Decision, Reasoning [137]). (*cf*. the 2013 Court Cf Decision, Reasoning [137])

[44] Nevertheless, the Constitutional Court stresses that the State may not be institutionally associated not only with religious communities, but with any religion or religious group, may not identify itself with the teachings of any religion, and may not take a position on the question of religious truths. No constitutional interference with the autonomy of religious communities, irrespective of the organisational form in which they operate, is possible in relation to their specifically religious character. {*cf.* Decision 8/1993 (II. 27.) AB, ABH 1993, 99, 102; the 2013 Court Decision, Reasoning [149]}

[45] 3.1.3 The rules governing religious communities, in particular their form of organisation, are laid down by a cardinal Act pursuant to Article VII (2) and (5).

[46] The State may regulate the conditions under which organisations and communities established under the right to freedom of religion may become legal persons in accordance with the specific nature of the organisation or community concerned. (*cf.* the 2013 Court Decision, Reasoning [146])

[47] For a religious group, the status of "religious community", even if it does not confer any additional rights other than greater freedom of internal organisation and regulation than those of other social organisations, is an essential entitlement closely linked to the right to freedom of religion. Therefore, the State's decision to grant religious community status cannot be arbitrary, and the procedure on which it is based must comply with the requirements of the right to a fair trial: the matter must be handled impartially, fairly and within a reasonable time, the decision must be duly reasoned [Article XXIV (1) of the Fundamental Law]; and there must be a right of legal redress against the decision [Article XXVIII (7) of the Fundamental Law]. The fairness of the procedure in relation to the decision on the status of a religious community is also particularly important in order to avoid any doubt that the State has acted in accordance with the principle of ideological neutrality without discriminating against the religious community concerned [Article XV (2) of the Fundamental Law] (*cf.* the 2013 Court Decision, Reasoning [147])

[48] 3.1.4 The State has a wide margin of appreciation in the field of material and financial support, privileges and exemptions (hereinafter jointly referred to as "material support") to religious communities, especially in view of the fact that, pursuant to Article N of the Fundamental Law, Hungary applies the principle of balanced, transparent and sustainable budget management (for which the National Assembly and the Government are primarily responsible). Nevertheless, the Constitutional Court lays great emphasis on the fact that in determining the rules for such material support, the State is bound to pay assiduous attention to the specific characteristics of the right to freedom of religion and to the fact that a religious community should not be placed in an unduly disadvantaged position vis-à-vis other religious communities or other organisations in a comparable situation [Article VII and Article XV of the Fundamental Law]. {*cf*. the 2013 Court Decision, Reasoning [153]}.

[49] The State and religious communities have a legal relationship that is specific to the historical circumstances of each country. The Constitutional Court has already stated, in applying Article 60 (3) of the Constitution, that its meaning today "cannot be separated from the role of the churches in Hungarian history (including the course of secularisation), from their present-day actual operation, or from the ongoing social transformation. It is a common phenomenon that many, once church tasks, for example, schooling, nursing and helping the poor, became the duty of the state, but the churches also maintained this activity. In these areas, separation is not incompatible with cooperation, even if it is fortified with rigorous guarantees. Treating churches as equals does not preclude consideration of the actual social role of individual churches, either. [Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 53]

The Constitutional Court's earlier interpretation of the relationship between the State and religious communities was upheld by the Fundamental Law when it expressly stated that, in addition to the separation of functions, "the State and religious communities may cooperate to achieve community objectives." (*cf*. the 2013 Court Decision, Reasoning [151])

[51] The State has a relatively free margin of appreciation in defining community objectives within the framework of the Fundamental Law; it is not generally obliged to contribute to the attainment of the objectives set by a religious community if it does not otherwise assume a State function in relation to the activity. (*cf*. the 2013 Court Decision, Reasoning [152])

[52] "The State's obligation to respect and protect fundamental rights [Article I (1) of the Fundamental Law] in relation to religious freedom does not stop at refraining from infringing individual rights, but must also secure the conditions necessary for the exercise of religious freedom, that is, the protection of the values and life situations associated with religious freedom, irrespective of individual needs [cf. Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302; Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 53-54]". Therefore, the cooperation of the State with religious communities in the interests of community objectives is not only an option but also an obligation in areas closely linked to the exercise of religious freedom and, in this context, to other fundamental rights [in particular, Article XVI (2) of the Fundamental Law provides that parents have the right to choose the education to be given to their children]. (*cf*. the 2013 Court Decision, Reasoning [154])

[53] The Fundamental Law provides that "[t]he religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community objectives"; and "the conditions of cooperation [...] shall be laid down in a cardinal Act" [Article VII (4) and (5) of the Fundamental Law].

[54] No constitutional requirement exists that all religious communities should enjoy de facto equal rights, nor that the State should de facto cooperate with all established churches to the same extent. Practical differences in the exercise of the right to religious freedom remain within constitutional bounds as long as they do not arise from discriminatory legislation or are not the result of discriminatory practice. Whether it is a question of the State's assumption of community responsibilities, the provision of material support to religious communities or mandatory community cooperation between the State and established churches, the ideological neutrality of the State, as confirmed in the preamble to the Act on Churches, must prevail in all three scenarios. (*cf.* the 2013 Court Decision, Reasoning [155]) In connection with the decision on additional entitlements beyond the ones granted to all religious communities, as well as the decision on cooperation for community objectives and on the status of established churches, it is particularly important that there should be no doubt as to whether the State acted in accordance with the principle of ideological neutrality without discriminating against the religious community concerned [Article XV (2) of the Fundamental Law].

[55] In the light of the considerations set out above, the State may therefore also lay down criteria for the acquisition of entitlements available to religious communities and for cooperation with them in order to achieve community objectives. However, as a substantive guarantee of neutrality and of a prohibition of invidious discrimination following from Article VII and Article XV of the Fundamental Law, such criteria must be objective and reasonable, and must be adapted to the specific nature of the right in question and of the community objectives to which the cooperation relates, and to the right to religious freedom in relation to those objectives.

[56] The Constitutional Court also points out that, even in the case of a definition of substantive criteria for recognition which is in conformity with the Fundamental Law, it would raise an issue of constitutionality if the legislature were to grant a particular right or form of organisation to some comparable organisations, while arbitrarily excluding others or making it disproportionately difficult for them to obtain it {*cf.* Decision 8/1993 (II. 27.) AB, ABH 1993, 99, 101; the 2013 Court Decision, Reasoning [132]}. It follows that the State's decision on the acquisition of additional entitlements or its decision to grant established church status cannot be arbitrary, and that procedural guarantees are necessary in addition to substantive guarantees: The procedure on which it is based must comply with the requirements of the right to a fair trial: The matter must be handled impartially, fairly and within a reasonable time, the decision must be duly reasoned [Article XXIV (1) of the Fundamental Law]; and there must be a right of legal redress against the decision [Article XXVIII (7) of the Fundamental Law].

[57] 3.1.5 The status of an organisation as a religious community or established church does not constitute an "acquired right" protected by the Fundamental Law in the sense that it cannot

be reviewed and, where appropriate, withdrawn if it is subsequently confirmed that the conditions for its use were not met. (*cf.* the 2013 Court Decision, Reasoning [181])

[58] The State may, as explained before and within the framework of the Fundamental Law, determine and thus change the conditions for the use of a particular form of organisation and material support, for cooperation in the pursuit of particular community objectives and for the exercise of other rights.

[59] Where the criteria are changed, it is left to the discretion of the legislature to choose the regulatory solution to be adopted in relation to the determination of the entitlements of each of the organisations concerned: Generally speaking, it makes the submission of an application and proof of compliance with the statutory criteria compulsory, or it provides (offers the competent bodies the possibility) to initiate review procedures *ex officio*. Several regulatory solutions may be in line with the Fundamental Law, but the Constitutional Court underlines that, as in the case of the procedure for obtaining the status or entitlements, or in the context of the procedure of reviewing such entitlements, it is a requirement of following from Article VII and Article XV of the Fundamental Law, as explained earlier in this Decision, to have clear and predictable rules, sufficient time for preparation, fair trial and possibility of redress, in accordance with Article B, Article XXIV and Article XXVIII of the Fundamental Law respectively.

[60] 3.2 In the light of the above, the Constitutional Court came to the following conclusion in relation to Section 34 (1) of the Act on Churches in force between 1 January 2012 and 31 August 2012.

[61] The Constitutional Court finds, in the light of the considerations set out in point III.2.3.1 (Reasoning [26]) of this Decision, that the legislation in force confers on established churches additional entitlements compared to organisations engaged in religious activities which substantially facilitate and benefit the religious functioning and the financial support for its operation and thus the right of the religious communities concerned to practise their religion.

[62] Based on the transitional provisions of the First Act on Churches, religious communities registered as churches in 2011 could potentially avoid conversion into associations if they took the initiative to "submit an application seeking church registration to the National Assembly" to the Minister by 31 December 2011 or "if the authorised representative of the organisation declares its intention to further pursue its activities as continued operation" by 31 December 2011 [*see* Section 36 (1) and (3) of the First Act on Churches]. However, in the light of the Constitutional Court's decision declaring the First Act on Churches invalid under public law, the National Assembly repealed the First Act on Churches on 20 December 2011 and the new Act on Churches was only promulgated on 31 December 2011. Subsequently, the new Act on Churches no longer provided for the possibility of submitting such an application or declaration in such a fashion as to at least associate it with the possibility of continued operation as a church, since it provided that only the status of the churches which had "submitted an application to the Minister with regard to the rules of [the First Act on Churches] on recognition as a church" remained pending until the decision of the National Assembly. On 20 December 2011, the remaining former churches had their time limit for submitting an application shortened to eleven days, virtually unexpectedly; at that time, there was no Act in

force which would have provided what they were required to do to potentially retain their status beyond 1 January 2012, and they lost their status *ex lege* immediately on 1 January 2012 under the new Act on Churches, taking the status of religious associations on that date.

[63] The aforementioned category of religious associations is subject to the transitional provisions as contained in Section 34 and Section 37 (2) of the current Act on Churches. On the basis of these provisions, a religious association is the general legal successor of a church registered under Act IV of 1990 on Freedom of Conscience and Religion and on Churches (hereinafter referred to as the "Religious Freedom Act") as of 1 January 2012 and is considered to be an organisation engaged in religious activities as of 31 August 2013 (from the entry into force of the Amendment Act on Churches), and its proceedings to amend registration, which is still pending at that time, must be completed in accordance with the rules applicable to associations, with the exceptions set out in the Act on Churches. The transitional rules of the Act on Churches in force therefore do not make it possible for the organisations concerned, including the religious community which is the subject of the court proceedings at issue in the present case, to halt or reverse the adverse change in legal status.

[64] The Constitutional Court considers that legal certainty and, in that connection, the right to freedom of religion are also undermined by legislation which reclassified previously registered churches, which have additional entitlements compared to organisations engaged in religious activities, as organisations engaged in religious activities, without affording the persons concerned the opportunity to apply within a foreseeable time limit for recognition as a church on the basis of predictable procedural rules which comply with the requirement of the clarity of norms, thereby avoiding, if they meet the substantive conditions for recognition, the temporary loss of their church status or the conversion to a status which is less favourable than the status of established churches which is in principle available.

[65] The constitutionality of Section 34 (1) of the Act on Churches in force between 1 January 2012 and 31 August 2012 is therefore, in the constitutional context in which the 2013 Court Decision found it, still valid at the time of the consideration of this petition for disapplication of the above rule, in view of the provisions of the Fundamental Law in force and the regulatory environment in place.

[66] 3.3 The Constitutional Court established in the 2013 Court Decision that the same provision was inapplicable to the complainants in the cases under scrutiny; the Court considered it to be of particular interest to the persons initiating the proceedings that, on the one hand, the change in legal status had in itself resulted in an abstract violation of rights and, on the other hand, the fact that the persons concerned had initiated the proceedings made it likely that they had suffered a particular and tangible violation of rights and interests.

[67] In considering a request to disapply a statutory provision, the Constitutional Court must take into account the criteria laid down in Section 45 (4) of the Constitutional Court Act, including "the particularly important interest of the party initiating the procedure". In the present case, however, the disapplication of Section 34 (1) of the Act on Churches as in force between 1 January 2012 and 31 August 2012 was not requested by the organisation concerned in a constitutional complaint, but by the court hearing the individual case in the context of a

judicial initiative. In a constitutional court procedure instituted by means of a judicial initiative, the "particularly important interest of the party initiating the procedure" cannot be considered in the same manner as in the case of a constitutional complaint. In the latter case, the person who initiates the procedure is identical to the person whose rights or interests have been harmed; in the former case, the judge who initiates the procedure and the person whose rights or interests have been harmed by the application of the rule of law contrary to the Fundamental Law, in the course of the judicial procedure, are separated from one another. In contrast to the filing of a constitutional complaint, pursuant to Section 25 of the Constitutional Court Act, the judicial initiative is not conditional upon the prejudice to the rights guaranteed by the Fundamental Law of the person or organisation concerned by the court proceedings, and the judge may also apply to the Constitutional Court for a decision on the conflict of the legal provision he or she applies with any provision of the Fundamental Law, without any specific prejudice to the interests of the parties. If a judge requests disapplication of a rule of law the unconstitutionality by non-conformity with the Fundamental Law of which has already been established by the Constitutional Court, the Constitutional Court may also grant the request on the basis of the other criterion of "protection of the Fundamental Law", as defined in Section 45 (4) of the Constitutional Court Act, in order to prevent the rule contrary to the Fundamental Law from being applied in the legal order and to enable the judge to decide the case pending before him by applying the legal provisions in conformity with the Fundamental Law. In such a case, the interests of the person or organisation concerned by the judicial proceedings should be taken into account to the extent necessary to avoid a situation in which the Constitutional Court, on the basis of an abstract aspect of the protection of the right guaranteed by the Fundamental Law, upholds the court's initiative, but this causes (further) damage to the interests of the person concerned, contrary to his or her will, instead of actually remedying the damage to the right. Therefore, in the circumstances of the case, it may be appropriate for the Constitutional Court to invite the person concerned to make a statement, if necessary.

[68] In response to the Constitutional Court's request, the organisation concerned in Case 14.Pk.60.601/2012 stated that it had a particularly important interest in disapplying the contested provision.

[69] In the light of the preceding considerations, in accordance with the provisions of the operative part, the Constitutional Court, in the exercise of its discretion under Section 45 (4) of the Constitutional Court Act, found that the contested provision in Case 14.Pk.60.601/2012 was inapplicable.

[70] 4. The Constitutional Court noted in the course of its consideration of the petition that, under the current wording of Section 33 (1) of the Amendment Act on Churches, a religious community to which Section 34 (1), (2) and (4) of the Act on Churches, in force from 1 January 2012 until 31 August 2012, is not applicable under the 2013 Court Decision, may initiate the recognition as a church within a preclusive time limit of 30 days from the entry into force of the provision.

[71] Pursuant to Section 33 (3) of the Act on Churches, the church status of such organisations remains in force until the failure to submit an initiative within the time limit or until a new

negative decision (and until a legal remedy is considered), only after which the religious community in question is considered to be an organisation engaged in religious activities.

[72] The transitional provision of the Act on Churches in force thus provides for new proceedings and a new decision on recognition as a church in respect of the organisations concerning which the Constitutional Court has found an infringement of the Fundamental Law or has imposed a prohibition of application in the 2013 Court Decision. The obvious purpose of the provision is to provide a remedy for organisations that have been forced to convert to a more disadvantageous legal status without due assessment on the basis of rules that are contrary to the Fundamental Law. The transitional provisions of the Act on Churches do not, however, contain a special rule providing for a new procedure and a new decision on recognition as a church for religious communities which, although they have been transformed into associations on the basis of legal provisions declared unconstitutional in in the 2013 Court Decision, but in the case of which, like the organisation concerned in the present case, the Constitutional Court declares the inapplicability of the legal provision causing the violation of the law in a new decision issued after the 2013 Court Decision.

[73] Under Article XV of the Fundamental Law, everyone is equal before the law; Hungary guarantees fundamental rights to everyone without any discrimination, including specifically mentioned discrimination based on religion or other status. Religious communities classified as associations pursuant to Section 34 (1), (2) and (4) of the Act on Churches in force from 1 January 2012 until 31 August 2012, which is contrary to the Fundamental Law, constitute a comparable group in terms of the justification for providing a remedy for the loss of their legal status, irrespective of whether the Constitutional Court in their case has declared, in the 2013 Court Decision or subsequently declares, the inapplicability of the provision contrary to the Fundamental Law; the latter circumstance is not a reasonable justification for the distinction, nor, presumably, is it its purpose, since, by referring to the 2013 Court Decision, the Amendment Act on Churches covered the entire scope of the matter then concerned, since from the publication of the 2013 Court Decision until the adoption of the Amendment Act on Churches, the Constitutional Court did not declare a new prohibition on the application of the law on the subject matter. However, a rigorous grammatical interpretation of Section 33 (1) of the Act on Churches would result in an unjustified, and in terms of the above-mentioned considerations, disadvantageous distinction between religious groups in comparable situations in terms of access to legal redress for violations of rights caused by the same provisions that are contrary to the Fundamental Law. An interpretation of Section 33 (1) of the Act on Churches which, with a similar time limit, provides for the possibility of initiating legal remedies for all organisations in respect of which the Constitutional Court, either in the 2013 Court Decision or in a subsequent decision, has ruled out the applicability of a provision declared in conflict with the Fundamental Law in the 2013 Court Decision is consistent with the purpose of that provision and with Article XV of the Fundamental Law. It is in this spirit that the Constitutional Court has determined a constitutional requirement as set out in the operative part of this Decision.

[74] 5. In the context of the constitutional requirement set out in the operative part of the decision, the Constitutional Court notes the following.

[75] The Decision in the present case serves to ensure equal treatment, as in line with the legal consequence applied in connection with six particular organisations mentioned in point 4 of the operative part of the 2013 Court Decision, for all churches registered under the Religious Freedom Act which were classified as associations pursuant to Section 34 (1), (2) and (4) of the Act on Churches in force from 1 January 2012 until 31 August 2012, as declared incompatible with the Fundamental Law, and in respect of which proceedings for registration as associations have been initiated. However, the Constitutional Court emphasises that Section 33 (1) of the Act on Churches, as established by Section 17 of Act CXXXIII of 2013 on the Amendment of the Acts on the Legal Status and Operation of Religious Communities in Connection with the Fourth Amendment to the Fundamental Law, and the organisation concerned by this Decision, in order to be recognised as an established church under the current Act on Churches, it must initiate a new procedure in accordance with Section 33 (1) of the current Act on Churches and the constitutional requirement set out in this Decision.

[76] 6. With regard to Case No 14.Pk.60.299/2012, the petitioning judge stated that he "withdraws his petition" and continues the court proceedings.

[77] Pursuant to Section 53 (6) of the Constitutional Court Act, a petition submitted to the Constitutional Court, with the exception of a constitutional complaint, may not be withdrawn. The general court seised of the matter justified withdrawal of the petition as a result of Section 33 of the Act on Churches currently in force, Section 34 (1) of the Act on Churches, which had been in force before 31 August 2012, no longer applied to the organisation concerned, and therefore there was no need to maintain the petition for lack of reason.

[78] Pursuant to Section 59 of the Constitutional Court Act, the Constitutional Court may, exceptionally, terminate pending procedure before it in cases that have become manifestly devoid of purpose, as determined in its Rules of Procedure.

[79] If, in the opinion of the court initiating the Constitutional Court proceedings, a provision of law which was considered applicable in the individual case at the time of the submission of the petition is no longer applicable in the course of the consideration of the petition, in particular because of a change in the law which has occurred in the meantime, the circumstance giving rise to the continuation of the Constitutional Court procedure no longer exists, the petition becomes devoid of purpose [*see* Section 67 (2) (e) of the Rules of Procedure] and is therefore deemed to be causeless.

[80] In view of the findings set out above, the Constitutional Court terminated the procedure with regard to Case No 14.Pk.60.299/2012.

[81] 7. The publication of the decision in the Hungarian Official Gazette is based on Section 44 (1) of the Constitutional Act, which was decided by the Constitutional Court in view of the determination of the constitutional requirement.

Budapest, 21 July 2014

Dr. Péter Paczolay, sgd., Chief Justice of the Constitutional Court

Dr. Elemér Balogh, sgd., Justice of the Constitutional Court

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

Dr. András Bragyova, sgd., Justice of the Constitutional Court

Dr. Péter Paczolay, sgd., Chief Justice of the Constitutional Court, on behalf of *dr. Egon Dienes-Oehm*, Justice of the Constitutional Court, prevented from signing

Dr. Péter Paczolay, sgd., Chief Justice of the Constitutional Court on behalf of dr. *Imre Juhász*, Justice of the Constitutional Court, prevented from signing

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

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

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

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

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

László Salamon, sgd., Justice of the Constitutional Court

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

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

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