

Decision 17/2017 (VII. 18.) AB

On a finding of unconstitutionality by omission manifested in non-conformity with the Fundamental Law concerning Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction; as well as the dismissal of a constitutional complaint

In the matter of a constitutional complaint, with the concurring reasonings by Justices *dr. Béla Pokol* and *dr. István Stumpf* and the dissenting opinion by Justice *dr. László Salamon*, the Constitutional Court, sitting as the full court, has rendered the following

decision:

1. Acting of its own motion, the Constitutional Court holds that the National Assembly has induced unconstitutionality by omission manifested in non-conformity with the Fundamental Law in contravention of Article XV (2) of the Fundamental Law by failing to secure in Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction for taxpayers to choose as beneficiary in their statement of instruction from the pool of all religious communities. Therefore, the Constitutional Court hereby requests the National Assembly to meet its legislative duty by 31 December 2017.
2. The Constitutional Court hereby dismisses the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Judgement No Kfv.V.35.189/2016/6 of the Curia, Judgement No 16.K.30.508/2015/8 of Budapest-Capital Administrative and Labour Court, as well as Second-instance Decision No NAV 2928175453 and First-instance Decision No NAV 4104699933 of the National Tax and Customs Authority.
3. The Constitutional shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The petitioner, in a constitutional complaint submitted on the basis of Article 24 (2) (d) of the Fundamental Law and Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), sought a finding by the Constitutional Court of unconstitutionality by conflict with the Fundamental Law and annulment of Judgement No Kfv.V.35.189/2016/6 of the Curia, Judgement No 16.K.30.508/2015/8 of Budapest-Capital Administrative and Labour Court, as well as Second-instance Decision No NAV 2928175453 and First-instance Decision No NAV 4104699933 of the National Tax and Customs Authority (hereinafter referred to as the "National Tax Authority"),

since the above-cited Judgements and Decisions, as alleged in the petition, run counter to Article VII (1) and Article XV (1) and (2) of the Fundamental Law.

[2] 2.1 As contended in the facts of the case underlying the constitutional complaint, the petitioner provided by instructing the National Tax Authority to transfer to the organisations identified by the petitioner 1% of the petitioner's already paid personal income tax for the tax year of 2012. In carefully considering the petitioner's application, however, the National Tax Authority determined in its first-instance decision of 22 November 2013 that the petitioner's instruction pertinent to the donation of 1% of the petitioner's personal income tax (being one of the two instances where such 1% percent of the personal income tax could be donated) was invalid in the light of the requirements prescribed in Section 5/A (1) of Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction, as amended (hereinafter referred to as the "Tax Donation Act"). The National Tax Authority relied in the statement of grounds of its decision upon the submission by the petitioner in his application of a statement form not containing sufficient data susceptible to identifying the beneficiary; therefore, the National Tax Authority was unable to ascertain for which civil society organisation and / or established church or priority budget allocation the donation of the tax amount had been made.

[3] Subsequently, the petitioner lodged an appeal against the first-instance decision rendered by the National Tax Authority, requesting alteration thereof. In its decision, the second-instance forum of the National Tax Authority upheld the first-instance decision of 28 February 2014. In the statement of grounds of the second-instance decision, the National Tax Authority established that, pursuant to Section 4/A of the Tax Donation Act in force at the time of providing the statement, only a church, religious denomination or religious community (hereinafter referred to as a "church") recognised in 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"), could be selected as a beneficiary of the donated tax amount, provided that such churches have already been associated by the National Tax Authority with a technical code. Any church applying for a beneficiary status could only obtain such status in the year following a the issuance of such technical code. Subsequently, as of 1 August 2013, the normative text of the Tax Donation Act was amended, with the result that only an established church could be regarded as a beneficiary. The petitioner had included the non-valid technical code in his statement, resulting in the invalidity of such statement.

[4] 2.2 As a consequence of the foregoing, the petitioner brought an action for judicial review of a public administrative decision challenging the decision of the National Tax Authority acting as the second-instance forum. Budapest-Capital Administrative and Labour Court seised of the matter dismissed the action. The court recorded in the facts of the case that the petitioner (the claimant in the court proceedings) had designated the Sim Salom Progressive Jewish Community (as an organisation engaged religious activities within the meaning of the Act on Churches and hereinafter referred to as the "Community") as beneficiary. Until 29 February 2012, the Community had been operating as a church in Hungary and had been assigned a technical code. However, as of 1 January 2012, the Community no longer had such

technical code, following Parliamentary Resolution 8/2012 (II. 29.) OGY, which was adopted on the basis of the Act on Churches in force as of 1 January 2012, in which the National Assembly rejected the Community's application for church status. Under the Act on Churches, as of 1 January 2012, the Community only qualified as an association—an organisation engaged in religious activities.

[5] In its judgement, the court held that the provision of 1% of personal income tax is invalid if the statement of instruction does not contain a tax number or a technical code. In its judgement, the court held that the religious community designated by the petitioner (the claimant in the proceedings) did not have a technical code for 2013, since its previous technical code had been cancelled by operation of law on 20 May 2012, following the entry into force of the Act on Churches. Under the Act on Churches, no new technical code can be issued to an organisation unless it is recognised as a church by the National Assembly after the termination of its technical code. The court also clarified in its decision that the National Tax Authority (being the defendant in the proceedings) is only required under the Tax Donation Act to investigate whether the beneficiary has a technical code, but not to find out the reason for not having a technical code.

[6] The petitioner also referred to the fact that, in his view, following the Constitutional Court's Decision 6/2013 (III. 1.) AB, in which the Constitutional Court annulled the provision of the Act on Churches which had led to the loss of the church status of the Community, the latter had regained its church status during the period challenged in the petitioner's constitutional complaint. In this context, the court held that the Constitutional Court's Decision entitles the aggrieved Community to seek redress for the harm suffered, but that the National Tax Authority may only take into account the data contained in the register; therefore, the Constitutional Court's Decision does not affect the fact that the Community did not have a technical code during the period concerned.

[7] 2.3 The petitioner submitted a request for review to the Curia challenging the judgement of Budapest-Capital Administrative and Labour Court which upheld the final judgement.

[8] 2.4 Subsequently, the petitioner brought the case before the Constitutional Court. In its petition, the petitioner stated that, in his view, the Curia and the court acting prior to its proceedings, as well as the National Tax Authority, had disregarded the Constitutional Court's Decision 6/2013 (III. 1.) AB and the relevant decision of the European Court of Human Rights (hereinafter referred to as the "ECtHR"), and had failed to take into account that the legal status of the Community had been settled as a result of these decisions. The petitioner specifically pointed out that the above Decision of the Constitutional Court did not give rise to the problem identified in his constitutional complaint because of the provision of the Act on Churches, but because the National Tax Authority and the courts did not reflect on this change and held his statement invalid on the grounds that the Community did not have a technical code. In his petition, the petitioner stressed that, in his opinion, the wording of the Act on Churches following the Constitutional Court's Decision also creates a discriminatory situation, as it does not allow all taxpayers to donate 1% of their personal income tax to a church of which they are a member or even a senior official.

The petitioner takes the view that, as a corollary to the Decision adopted by the Constitutional Court, not only the legal status of the petitioner's church has been restored, but its previous prerogatives should also have been restored. In other words, the authorities should have been able to perceive that the restoration of the status would also result in the restoration of the technical code.

[10] In the light of the above, the petitioner considers that the judgements of the courts and the decisions of the National Tax Authority impugned in his constitutional complaint are contrary to Article VII (1) and Article XV (1) and (2) of the Fundamental Law.

II

[11] 1. The rules of the Fundamental Law invoked in the petition read as follows:

"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."

"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."

[12] 2. The relevant provisions of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities read as follows:

"Section 6 (1) A religious community shall be defined as a church recognised by the National Assembly and an organisation engaged in religious activities. A church recognised by the National Assembly shall be an established church.

(2) A religious community shall be established and shall function primarily for the purpose of religious activity."

[13] 3. The normative text in force of Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction reads as follows:

"Section 4/A (1) In addition to Section 4 (1), the following shall also be recognized as beneficiaries:

(a) established churches, not including the internal ecclesiastical legal person of such churches, in accordance with Subsection (2) hereof;

(b) the objective specified in the Act on the Central Budget pertaining to the year to which the private individual's statement of instruction relates, with the special appropriation chapter vested with competence also indicated.

(2) Upon the request of an established church the tax authority shall issue a technical code. The established church shall be recognised as a beneficiary in the year that follows the year when the technical code was issued.

(3) The tax authority shall issue a technical code *ex officio* to the beneficiaries described in Subsection (1) (b).

(4) The director of the tax authority shall publish the technical code of the beneficiaries referred to in Subsection (1) above in the Hungarian Official Gazette by the last day of the year preceding the year when the statement of instruction is filed.

(5) With the exception of data comprising a part of another register pursuant to the relevant legislation, the director of the tax authority shall maintain a publicly authentic official register as regards the data defined in Subsection (4).

"Section 5/A (3) The provisions set out in Subsection (2) shall not apply where the validity of the private individual's statement of instruction, for reasons attributed to the private individual, cannot be determined, in particular the amount of tax paid, by 15 November of the year when the statement of instruction is made. The tax authority shall notify the donating private individual thereof electronically, or by way of post in the absence of a digital gateway, by 30 November of the year to which the private individual's statement of instruction pertains. As regards validity, the tax authority shall adopt a decision before the last day of the year following the year when the statement of instruction was made. If the private individual cannot be identified or the tax amount cannot be determined by the last day of the year following the year when the statement of instruction was made, the tax authority shall adopt a decision on the invalidity of the statement of instruction, and the bank transfer shall not be effected. If the private individual can be identified, he or she shall be notified of the decision within thirty days of the day when such decision was rendered, not later than until the last day of the year following the year when the statement of instruction was made. The bank transfer may be carried out if the statement is declared valid by the tax authority, or by the body of the second instance, where applicable, under the relevant circumstances of both the private individual making statement of instruction and the beneficiary.

"Section 8/A (7) The technical code of the organisation shall terminate on 1 January 2012, and the technical code of the church referred to in Section 34 (2) of the Act on Churches, in effect on 1 January 2012, shall terminate on 20 May 2012, if the National Assembly declines to recognise the said church under Section 34 (2) of the Act on Churches, in effect on 1 January 2012. A terminated technical code may be restored only if the organisation is recognised by the National Assembly as a church after the technical code has been terminated."

III

[14] The petitioner submitted his constitutional complaint pursuant to Section 27 of Constitutional Court Act, under which persons or organisations affected in an individual case may submit a constitutional complaint to the Constitutional Court against a judicial decision contrary to the Fundamental Law, if the decision adopted on the merits of the case or another decision terminating the judicial proceedings violates the petitioner's right granted in the

Fundamental Law and the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her.

[15] Pursuant to Section 56 (1) of the Constitutional Court Act, the Constitutional Court shall decide on the admission of the constitutional complaint in a panel as specified in its Rules of Procedure. However, Section 31 (6) of the Rules of Procedure allows the Justice-Rapporteur delivering the opinion of the Court to submit a draft containing the decision on the merits of the complaint to the panel instead of a decision on the admission of the complaint. Pursuant to Section 56 (2) of the Constitutional Court Act, the Constitutional Court has the discretion to consider the substantive criteria for the admissibility of a constitutional complaint provided for by law, in particular the relevance of the complaint with regard to concernment under Section 27, the exhaustion of remedies and the criteria under Sections 29 to 31.

[16] The Constitutional Court found that the complainant had submitted his petition within the time limit set out in Section 30 (1) of the Constitutional Court Act. The petitioner's concernment is clearly present, as he participated in the proceedings as the claimant. The petitioner has exhausted the remedies available to him. It yields further that the complaint complies with the statutory requirement, on the explicit request, laid down in Section 52 (1b) of the Constitutional Court Act. The petition indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [Section 51 (1) and Section 52 (1b) (a) of the Constitutional Court Act]; the procedure of the Constitutional Court was requested in the competence laid down in Section 27 of the Constitutional Court Act. The complainant also indicated the court judgements and the official decisions to be reviewed by the Constitutional Court [Section 52 (1b) (c) of the Constitutional Court Act], as well as the violated provisions of the Fundamental Law [Section 52 (1b) (d) of the Constitutional Court Act]. The complainant gave the grounds for initiating the Constitutional Court procedure, explained the essence of the violation of the rights enshrined in the Fundamental Law and invoked in the petition [Section 52(1b) (b) of the Constitutional Court Act], and also explained why the court judgements were contrary to the provisions of the Fundamental Law invoked by the complainant [Section 52 (1b) (e) of the Constitutional Court Act]. The complainant formulated an explicit request seeking annulment of the contested court judgements and official decisions [Section 52 (1b) (f) of the Constitutional Court Act].

[17] Section 29 of the Constitutional Court Act provides that the Constitutional Court shall admit a constitutional complaint in the event of an infringement of the Fundamental Law having a substantial impact on the merits of the judicial decision or in the event of a constitutional law issue of fundamental importance. In his constitutional complaint, the petitioner complained that in the challenged judgements, neither the courts nor the National Tax Authority took into account the Constitutional Court's Decision 6/2013 (III. 1.) AB and the relevant decision by the ECtHR, nor did they automatically restore the former status of the Community. In view of these facts, the Constitutional Court considered it a constitutional law issue of fundamental importance whether the procedure of the courts and that of the National Tax Authority violated the rights of the complainant declared in Article VII (1) and Article XV (1) and (2) of the Fundamental Law.

[18] The constitutional complaint is unfounded.

[19] 1. The petitioner maintains that the judgements delivered by the courts and the decisions taken by the National Tax Authority are contrary to the Fundamental Law because they violate Article VII (1) and Article XV (1) and (2) of the Fundamental Law, since the courts and the National Tax Authority did not take into account the religious community he is in charge of as a beneficiary of the 1% personal income tax, thereby disregarding the Constitutional Court's Decision 6/2013 (III. 1.) AB and the relevant judgement of the ECtHR.

[20] 2. First and foremost, the Constitutional Court considered it important to present an overview of the relevant elements of its practice in the context of the petition.

[21] 2.1 The right to freedom of thought, conscience and religion is recognised in Article VII(1) of the Fundamental Law: '[e]veryone 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.'

Article VII (1) of the Fundamental Law defines the right to freedom of thought, conscience and religion in the same terms as Article 60 (1) to (2) of the Constitution, but in a manner that expands the provisions of the Constitution in more detail. In accordance with the case law established by the Constitutional Court, if a fundamental principle or fundamental right regulated by the Constitution is regulated by the Fundamental Law in the same wording or with the same content, and there has been no fundamental change in other circumstances that would justify an interpretation of the content of the provision in question that differs from the previous one, the Constitutional Court continues to uphold its practice regarding the content of the provision in question (*cf.* Decision 34/2012 (VII. 17.) AB, Reasoning [33]; Decision 35/2012 (VII. 17.) AB, Reasoning [25]; Decision 3301/2012 (XI. 12.) AB, Reasoning [20]). This finding is reinforced by the fact that the Constitutional Court has reaffirmed its existing case law on the exercise of the right to freedom of conscience and religion in individual and collective form under the Constitution in several decisions adopted following the entry into force of the Fundamental Law. In the present case, the Constitutional Court considers it important to highlight and reaffirm the following fundamental premise: "[t]he 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" (Decision 27/2014 (VII. 23.) AB, Reasoning [39]).

[23] In its Decision 27/2014 (VII. 23.) AB, the panel stated that "[t]he 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". The right to freedom of conscience and freedom of religion, which is also specifically mentioned, recognises that conscience and, within it, religion, where appropriate, are part of the human person and that their freedom is a condition for the exercise of the right to the free development of the personality. Human personality itself is inviolable in the eyes of the law (this is expressed by the inalienable nature of the right to human life and dignity), and the law can only help to secure autonomy by providing external conditions. Therefore, it follows from the right to freedom of thought, conscience and religious belief (conviction) per se, that is, if the right to practise religion is not taken into account, that the State is under an obligation not to judge the truthfulness of religious belief or conviction {Decision 27/2014 (VII. 23.) AB, Reasoning [40] to [42]}.

[24] In the case of the individual and collective exercise of the right to freedom of religion, the State is therefore, as in the case of classical freedoms in general, above all obliged to adopt a negative attitude, to abstain, that is, not to restrict the rights of individuals. However, the neutrality of the State in relation to the right to freedom of religion does not amount to inaction. On the one hand, the State must ensure the free flow of communication; this obligation also derives from the right to freedom of thought and expression. On the other hand, it must also ensure, where appropriate, that other fundamental rights are protected in the face of freedom of religion. Finally, positive regulation of the right to freedom of religion itself may also be necessary [Decision 35/2014 (XII. 18.) AB and Decision 27/2014 (VII. 23.) AB].

[25] 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 27/2014 (VII. 23.) AB, Reasoning [38]}. 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 Act on Churches institutionalises two forms of organisation for religious activity as religious communities: the organisation engaged in religious activity (religious association) is a readily available formal framework for communal practice of religion, while the established church cooperates with the State in a manner prioritised by the Fundamental Law, on the basis of a special decision of the National Assembly.

[26] In this context, prime importance should be attached to the fact that 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) {see Decision 27/2014 (VII. 23.) AB, Reasoning [48]}.

[27] 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. 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] {see Decision 27/2014 (VII. 23.) AB, Reasoning [54]}.

[28] Article 60 (3) of the former Constitution had specified that in the Republic of Hungary the church operates separately from the State; in comparison, the original text of Article VII (2) of the Fundamental Law is more detailed and clearer on the relationship between the State and the churches: "[t]he State and churches shall operate separately. Churches shall be autonomous. In the interest of community objectives, the State shall cooperate with the churches."

[29] The Constitutional Court points out that, in several cases, in framing the Fundamental Law, the Constitutional Court made explicit in the text of the Fundamental Law the practice of the Constitutional Court based on the text of the previous Constitution, in such a sense that the Constitutional Court, having selected and applied one of several possible constitutional interpretations, adjusted the text of the Fundamental Law thereto, reaffirming that the interpretation applied was an appropriate and timeless interpretation of the constitutional normative content.

[30] 2.2 Article XV (2) of the Fundamental Law provides that "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." In line with the practice of the Constitutional Court on equality, different regulation for a given homogeneous group within the same regulatory concept is contrary to the prohibition of discrimination, unless the difference has a reasonable constitutional justification of sufficient weight, in other words, it is not arbitrary {Decision 7/2015 (III. 19.) AB, Reasoning [56], Decision 33/2014 (XI. 7.) AB,

Reasoning [52]]. Pursuant to the consistent case law of the Constitutional Court, no unconstitutional discrimination shall be established where the law provides for different rules concerning the scope of subjects having different characteristics as an unconstitutional discrimination is only possible with regard to a comparable scope of persons who belong to the same group. "Discrimination occurs when, in relation to an essential element of the regulation, the assessment of the subjects and the definition of their rights and obligations are not given on an equal footing. However, there can be no question of discrimination if the legislation lays down different provisions for different subjects." {Decision 26/2013 (X. 4.) AB, Reasoning [183], Decision 1/2013 (I. 7.) AB, Reasoning [89]}.

[31] 3. Having reviewed its previous case law, the Constitutional Court went on to consider whether the impugned judicial decision contravened Article VII (1) and Article XV (1) and (2) of the Fundamental Law. Above all, the Constitutional Court found that, under the current provisions of the Act on Churches and the Tax Donation Act, the Community cannot be considered an established church [even in spite of the Constitutional Court's Decision 6/2013 (III. 1.) AB] and, since the Community does not have a technical code, it is not eligible for the 1% personal income tax as a beneficiary under Section 4/A of the Tax Donation Act.

[32] 3.1 In the context of the preceding considerations, particular importance should be placed on the fact that the first sentence of Section 4/A (2) of the current Tax Donation Act states that "[u]pon the request of an established church the tax authority shall issue a technical code". It can be clearly ascertained from the petition that the Community led by the complainant not only lost its church status after the entry into force of the Act on Churches on 1 January 2012, but also its technical code on 20 May 2012 pursuant to Section 8/A (7) of the Tax Donation Act. Section 8/A (7) of the referenced Tax Donation Act also states, in accordance with the first sentence of Section 4/A (2) of the Tax Donation Act, that the terminated technical code may be reissued only to an organisation which has been recognised as a church by the National Assembly after the termination of the technical code, and only if the church expressly so requests. It is however evident from the petition that the Community failed to initiate the reissuance of the technical code even after the above decision of the Constitutional Court.

[33] 3.2 It is also important to underscore that Article VII (1) of the Fundamental Law cannot be directly brought into line with the matter of support for churches, since this provision of the Fundamental Law declares the right to freedom of thought, conscience and religion. In his constitutional complaint, even the petitioner did not allege that the National Tax Authority or the courts had curtailed his right to freedom of thought, conscience and religion—in his complaint, he only complained that he had not been able to donate 1% of his personal income tax to the religious Community. Thus, no prejudice to Article VII (1) of the Fundamental Law can be identified in respect of the actions of the National Tax Authority or the courts.

[34] 3.3 In his complaint, the petitioner alleged that the National Tax Authority and the courts had unjustifiably differentiated between the Community and the established churches, thereby infringing his right declared in Article XV (1) and (2) of the Fundamental Law. Against this background, it must be emphasised that the judgements and decisions contested in the constitutional complaint were adopted by the courts concerned and the National Tax Authority in compliance with the legislation in force. The Community was not included in the scope of

the beneficiaries of the 1% personal income tax under the rules in force. Thus, it is the result of the legislator's own decision that established churches and the Community as an organisation engaged in religious activities do not form a homogeneous group under the current Tax Donation Act (a consequence of the provisions of the Act on Churches). Yet, the prohibition of discrimination (in the present case on the basis of religion) laid down in Article XV (2) of the Fundamental Law can only be interpreted in the case of persons belonging to the same homogeneous group. In the present case, the grouping was carried out by the legislature itself when it created the group of established churches in the Act on Churches and allowed only those churches to become beneficiaries in the Tax Donation Act. However, one can also conclude that the proceedings taken by the National Tax Authority and the courts as challenged in the constitutional complaint under Section 27 of the Constitutional Court Act were not discriminatory *per se*, since it was not the National Tax Authority or the courts that made an unjustified distinction between the Community and the established churches (and therefore considered the donation of 1% of the complainant's personal income tax to the Community to be invalid), but that they only took their decision within the framework of the law. Thus, Article XV (1) and (2) of the Fundamental Law was not compromised in the application of the law in respect of the petitioner, since, under the legislation in force, established churches and other organisations engaged in religious activities (such as the Community) do not form a homogeneous group, and the differentiation made by the National Tax Authority and the courts cannot be considered unconstitutional amounting to a violation of the Fundamental Law.

[35] 3.4 On the basis of the above, it can therefore be concluded that both the National Tax Authority and the courts acted in compliance with the applicable legislation and that the complainant's rights under the Fundamental Law were not undermined by the actions of these bodies. In other words, it can be stated that the infringement of fundamental rights alleged by the petitioner in his constitutional complaint cannot be associated with the activities and proceedings of either the courts or the National Tax Authority. Therefore, the Constitutional Court dismissed the petition based on Section 27 of the Constitutional Court Act.

V

[36] 1. In his constitutional complaint, the petitioner emphasised that he did not consider the rules of the Tax Donation Act and the Act on Churches to be contrary to the Fundamental Law, but the decisions of the courts and those of the National Tax Authority. In this context, however, the Constitutional Court observed that the constitutional problem complained of by the petitioner is caused by the provisions of the Tax Donation Act, namely the absence of a technical code and the exclusion of the Community from the scope of beneficiaries eligible for the 1% personal income tax on account of its legal status.

[37] In this connection, it is important to note that Section 46 (1) of the Constitutional Court Act authorises the Constitutional Court that if the Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the legislator that results in violating the Fundamental Law, it shall call upon the body that committed the omission to perform its task as legislator and set a time limit therefor. Under Section 46 (2) (c) of the Constitutional Court Act, the omission of the legislator's tasks may also be established when

the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete.

[38] 2. In the context of the preceding considerations, the Constitutional Court first addressed the issue of whether the prohibition of discrimination based on religious convictions could be infringed by the legislature's granting only to members of certain religious communities the possibility of donating 1% of their personal income tax to a religious community of their choice.

[39] 2.1 First of all, it is important to underline that the Fundamental Law recognises freedom of thought, conscience and religion for all without discrimination. Freedom of religion and religious tolerance are part of the Hungarian constitutional tradition, in particular equality of rights between religions, meaning equality of rights for citizens of different religions, which has been a historic achievement of our historical constitution since the 19th century. However, the fundamental right to freedom of religion does not imply a right to State support. Article VII (3) of the Fundamental Law also provides that religious communities shall operate separately from the State. The Fundamental Law offers the possibility of cooperation between religious communities and the State. However, the National Assembly takes the decision on such cooperation, namely in the Act on Churches as a cardinal Act, and it is also the National Assembly that grants specific rights to established churches within the framework of such cooperation. Nonetheless, freedom of thought, conscience and religion does not extend to activities that are incompatible with the values and fundamental rights enshrined in the Fundamental Law. The activities of such groups shall not be supported by the State.

[40] 2.2 It should also be made clear that the actual situation of religious communities varies, which is not a question of constitutionality—for example, the willingness of members of different communities to donate may even vary. In addition, the legal situation of religious communities within the meaning of the Fundamental Law is also different. Accordingly, the conditions for practising religion may differ from one religious community to the next. Various religious communities, including established churches and organisations carrying out religious activities, may enjoy different rights, and the legislator may also regulate the benefits and supports they receive in different forms. However, as regards the right to the free practice of religion, no distinction may be applied between members of differing religious communities, with the conspicuous exceptions set out above: The adherents to any religious communities are all entitled to the right of freedom of religion.

[41] Direct State support provided to the activities engaged in with a view to the expression of faith of religious communities has been superseded for two decades by support based on the individual income taxpayers' statements of instruction of donation. The purpose of the support granted on the basis of the donation of a certain part of personal income tax is not to support public tasks assumed by the State in the framework of cooperation between the State and the churches, but to provide support for the religious activities undertaken by religious communities [Section 23 (1) of the Act on Churches]. This regime has been rendered deeply entrenched in Hungary over the past two decades and, in addition to supporting civil society organisations, has become an dominant element of civic participation in relation to religious communities. However, while in the case of the "civic" donation of 1%, the taxpayer can easily find an organisation worthy of support in place of the one which might be excluded from the

scope of beneficiaries, it is not viable for an adherent to a religious community to support another religious community due to the exclusive nature of religious convictions.

[42] 2.3 In the light of the above, it can be concluded that there is no reason to discriminate by allowing members of established churches, if they pay personal income tax, to donate 1% of their income tax to their church, while members of organisations engaged in religious activities cannot do so. In this respect, established churches and organisations engaged in religious activities form a homogeneous group. However, the basis for grouping under this hypothesis lies not in the similarity between organisations engaged in religious activities and established churches on the basis of their religious function, but in the sum total of religious followers, being designated as taxpayers for the purposes of the Tax Donation Act, accompanied by the identical nature of their individual rights. Under Article VII of the Fundamental Law, the right to freely choose one's convictions, which is at the very core of the right to freedom of religion, is a right conferred upon all persons. Thus, religious followers form a homogeneous group with regard to their rights deriving from freedom of religion (regardless of which religion they follow). However, the existing legislation in force only allows members of certain religious communities to support their community with a certain proportion of their taxes, while excluding members of other communities to do so. Therefore, for the purposes of the analysis based on Article XV of the Fundamental Law, the followers of each religion (in the present case, as taxpayers) must also be considered as a homogeneous group. In the case at issue, the legislature does not therefore recognise actual differences between different religious communities, but makes (unjustified) distinctions between members of different religious communities. While the former distinction may be justified by differences between religious communities, the distinction between persons cannot be considered as such, in other words it is necessarily unreasonable and unjustified. The Constitutional Court remarks that this Decision does not affect the additional support provided for in Section 4 (2) to (4) of Act CXXIV of 1997 on the Financial Conditions for Church Activities in the Exercise of Faith and for Public Purposes, nor other support and benefits granted to established churches. It does not follow from the Fundamental Law that the support of established churches and religious associations should be regulated under the same terms, but no unjustified distinction can be made from the point of view of the individual as a religious follower and taxpayer.

[43] 3. On the basis of the foregoing considerations, the Constitutional Court, acting of its own motion, held that the legislature's failure to secure in the Tax Donation Act that taxpayers could choose from among all religious communities as beneficiaries as designated in their statements of instruction to that effect constituted an infringement of the Fundamental Law manifested in the form of an omission in breach of Article XV (2) of the Fundamental Law. Therefore, the Constitutional Court hereby requests the National Assembly to meet its legislative duty by 31 December 2017.

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

Budapest, 11 July 2017

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

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

Dr. Ágnes Czine sgd., Justice of the
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Dr. Egon Dienes-Oehm, sgd., Justice of the
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Dr. Béla Pokol, sgd., Justice of the
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Dr. László Salamon, sgd., Justice of the
Constitutional Court

Dr. Balázs Schanda, sgd., Justice of the
Constitutional Court delivering the opinion
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István Stumpf sgd., Justice of the
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Dr. Marcel Szabó, sgd., Justice of the
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Dr. Péter Szalay, sgd., Justice of the
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Dr. Mária Szívós, sgd., Justice of the
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Dr. András Varga Zs., sgd., Justice of the
Constitutional Court