Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF CLAUSE 7 OF PART 1 OF ARTICLE 39 LAW OF THE REPUBLIC OF ARMENIA ON SERVICE IN POLICE IN THE PART OF PROHIBITION OF A POLICE OFFICER TO BELONG TO A RELIGIOUS ORGANIZATION WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE ADMINISTRATIVE COURT OF THE REPUBLIC OF ARMENIA

Yerevan February 18, 2020

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan (Rapporteur), A. Petrosyan,

with the participation of (in the framework of the written procedure)**:**

the applicant: Administrative Court of the Republic of Armenia,

the respondent: K. Movsisyan, official representative of the RA National Assembly, Head of the Legal Support and Service Division of the RA National Assembly Staff,

pursuant to clause 1 of article 168, part 4 of article 169 of the Constitution, as well as articles 22 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of clause 7 of part 1 of article 39 Law of the Republic of Armenia on Service in Police in the part of prohibition of a police officer to belong to a religious organization with the Constitution of the Republic of Armenia on the basis of the application of the Administrative Court of the Republic of Armenia.

The Law of the Republic of Armenia on Service in Police (hereinafter – the Law) was adopted by the National Assembly on 3 July 2002, signed by the President of the Republic on 30 July 2002 and entered into force on 1 January 2003.

Clause 7 of part 1 of article 39 Law, titled: “Restrictions with respect to police officers”, stipulates:

"1. Police officer shall not have the right to:

…

7) to be a member of a party, socio-political, public organization (with the exception of a scientific, cultural, sports, organization of hunters, veterans and other similar organizations united by common interests), including a member of a religious, trade union organization; to use his official position in the interests of parties, public including religious associations, to preach an attitude towards them, and also to carry out other political or religious activities in the performance of his official duties.

The case was initiated on the basis of the application of the Administrative Court of the Republic of Armenia submitted to the Constitutional Court on 19 August 2019, which included the decision of the same Court on "Terminating the case proceedings" on the case VD/11599/05/18 of 15 August 2019.

Having examined the application, the written explanation of the respondent, having analyzed the provisions of the Law, the legislation of the Republic of Armenia and other relevant acts, as well as other documents of the case, the Constitutional Court **FOUND:**

1. Applicants' arguments

Referring to articles 41, 78 and 79 of the Constitution and to the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, as well as the case-law of the European Court of Human Rights (ECHR), having analyzed the legal regulation stipulated by the challenged norms of the Law and comparing it with other norms of the legislation of the Republic of Armenia, the applicant considers that the term "member of a religious organization" prescribed in the challenged norm does not meet the requirement of legal certainty and "gives rise to misunderstanding and different interpretations". According to the applicant, the term "member of a religious organization" is not established by the Law, and it is not clear what manifestation of an active or passive action of a person can lead to being considered a member of a religious organization, and the concept of "joining" a religious organization is not established. Consequently, there are no predefined boundaries within which a person should behave and "a legal norm prohibiting membership in a religious organization cannot be considered as a norm with a certain abstract content, which should be interpreted and applied in practice sufficiently clear". The applicant also considers that the prohibition on

"membership in a religious organization" does not provide predictability and certainty for a person and an unbiased observer. The application raises the question whether participation by a person once or several times in an event organized by a religious organization is considered to be membership, and whether the essence of the event organized by a religious organization, the purpose of the person's participation, the form of manifestation of participation, periodicity and other objective or subjective circumstances is significant.

The applicant concludes that the restriction of fundamental rights prescribed in the Law is not lawful, "there is a differentiation in relation to persons of a similar category, it does not have objective justification, and it is not necessary in a democratic society", as well as it contradicts the principle of proportionality of restrictions on fundamental rights and freedoms, therefore, "contradicts the principle of freedom of religion guaranteed by the Constitution, the restriction is not proportionate and it is inconsistent with the requirements of the universal principle of legal certainty (res judicata)".

2. Respondent's arguments

According to the respondent, the challenged provision complies with the requirements of the Constitution. In particular, referring to a number of international treaties and the principles enshrined therein, referring to the practice of the ECHR, as well as to constitutional norms regarding freedom of thought, conscience and religion, the respondent considers that "freedom of religion is not an absolute right", and "in certain circumstances the state may interfere in the practice of a particular religion, restricting the right to freedom of religion".

According to the respondent, the challenged legal regulation of the Law "does not contain ambiguity and is formulated sufficiently clear", since it directly prohibits the membership of police officers in any religious organization, it is conditional on ensuring public safety and follows "from the public interest and the need to establish universal justice, including security".

The respondent notes that police officers, voluntarily entering the service, are aware of the possibility of restricting the right to freedom of religion. This restriction pursues a legitimate aim and is necessary for the police officers to properly fulfill their duties in a democratic society, as "the policeman's membership in a religious organization may cause an objective and impartial observer to doubt his fairness".

3. Circumstances to be ascertained within the framework of the case

When assessing the constitutionality of the norms challenged in the framework of the present case, the Constitutional Court considers it necessary to establish whether the absolute prohibition prescribed in the challenged legal regulation corresponds, in particular, to the grounds for restricting freedom of expression of religion and freedom of association.

Based on the foregoing, the Constitutional Court assesses the constitutionality of the challenged provision from the viewpoint of part 2 of article 17, articles 41 and 45 of the Constitution.

4. Legal assessments of the Constitutional Court

4.1. According to part 1 of article 41 of the Constitution, everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to change one's religion or beliefs and the freedom, either alone or in community with others in public or in private, to manifest religion or belief in preaching, church ceremonies, other rituals of worship or in other forms.

Part 2 of the same article stipulates the permissible restrictions on freedom of religion. According to this, only expression of freedom of religion may be restricted only by law with the aim of protecting state security, the public order, health and morals, or the fundamental rights and freedoms of others.

Freedom of thought, conscience, religion is also guaranteed by a number of international legal acts (Universal Declaration of Human Rights (article 18), Convention for the Protection of Human Rights and Fundamental Freedoms (article 9), International Covenant on Civil and Political Rights (article 18), Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief (article 6), Convention for the Protection of the Rights of National Minorities (article 8), etc.).

The guarantee of effective mechanisms for the implementation of this freedom by law is not only of legal importance, but also an important precondition for the establishment and development of a democratic, legal and social state.

At the same time, the Constitution and the aforementioned international legal acts, guaranteeing freedom of thought, conscience and religion, fundamentally oblige public authorities to ensure the realization of this right within the framework of such legal preconditions, according to which public authority should not interfere with the exercise of these freedoms, as well as should establish effective legal and other mechanisms to protect these freedoms from any unlawful interference.

The Constitutional Court states that the challenged legal provision concerns the restriction of expression not only of freedom of religion, but also the restriction of freedom of association prescribed in article 45 of the Constitution, since it prohibits a police officer from joining any religious organization, which is a type of association. Moreover, the constitutional grounds for restricting freedom of association are identical with the grounds for restricting freedom of religion (part 3 of article 45 of the Constitution).

The Constitutional Court also considers it necessary to emphasize that, in contrast to the fundamental right to create and join parties, as a type of association (article 46 of the Constitution), which is limited to the entities directly prescribed in the constitution (judges, prosecutors and investigators), or other entities are mentioned in the Constitution for which restrictions on this right may be established by law (employees of the armed forces, national security bodies, police and other militarized bodies), the Constitution does not stipulate any special restriction of entities for membership in a religious organization.

The ECHR practice is also consonant with this conceptual solution. So, according to the ECHR, the intensity of court control depends on the type of association, the nature of the activity and the place it occupies in a democratic society. Given that political parties and non-political associations are not equally important for democracy, only in the first case the need for restrictions on the creation of associations should be subject to the most stringent control (Vona v. Hungary, app. 35943/10, Judgment 09/07/2013, § 58; Les Authentiks and Supras Auteuil 91 v. France, nos. 4696/11 et 4703/11, §§ 74, 84, 27 October 2016).

As regards freedom of association for police officers, the ECHR noted that the duty of their neutrality and restraint is extremely important, since in a democratic society their role is to assist the government in the exercise of its functions (Trade Union of the Police in the Slovak Republic and Others v. Slovakia, app. 11828/08, Judgment 25/09/2012, § 57). Further, the ECHR expressed the position that it is legitimate to demand that police officers be impartial in expressing their standpoint, that the public retain confidence in them (ibid. §§ 67-70).

Thus, the Constitutional Court states that joining religious organizations as a form of expression of freedom of religion and at the same time as a way of exercising freedom of association does not depend on the fact of serving in any militarized institution, including the police. Consequently, only the fact of serving in the police cannot be a basis for a prohibition on joining a religious organization, and for such a prohibition more serious prerequisites are necessary - at least one

of the prerequisites specified in part 2 of article 41 and part 3 of article 45 of the Constitution and its superiority over freedom of religion and freedom of association of the police officer.

The Constitutional Court again considers it necessary to refer to the fact that the Constitution provided for police officers, including employees of other militarized bodies, the legal possibility of restriction by law, but did not provide for such a possibility of restricting other fundamental rights or freedoms of police officers and officers of other militarized institutions.

A systematic analysis of the mentioned provisions of the Constitution indicates that the founder of the Constitution has envisaged differentiated grounds for ensuring political neutrality by setting at the level of the Constitution a direct prohibition on creating a party and joining it for judges, prosecutors and investigators, and for officers of militarized institutions, including police officers, allowed the legislator to establish restrictions on the basis of composition of entities. Consequently, if the founder of the Constitution had the need to directly restrict freedom of joining a religious or other association for officers of militarized institutions, the founder of the Constitution would also address this issue, allowing the legislator to provide restrictions on this basis for at least such entities.

The Constitutional Court considers that the fact that the founder of the Constitution did not stipulate restrictions on the expression of freedom of religion and freedom of association by the status of any entity or the features of his service, directly states that the founder of the Constitution did not distinguish between legal entities for freedom of religion and the right to join a religious association with respect to their status and the circumstance or peculiarities of being in public service. Consequently, the political neutrality of police officers can be ensured through the establishment of restrictions of varying intensity by law, while the absence of a direct prohibition on the officers of this group in the text of the Constitution means that the restrictions do not have to be formulated by choosing the most stringent measure - the choice of prohibition, and religious neutrality should be ensured if there are prerequisites for the legal prescription of the general restrictions on freedom of expression of religion and on membership to a religious association.

Thus, the Constitutional Court considers that the constitutionality of the prohibition of police officers joining any religious organization should be assessed from the perspective of the restrictions common to all, as prescribed in part 2 of article 41 and part 3 of article 45 of the Constitution.

4.2. Having regard to the questions posed by the applicant from the perspective of disclosing the constitutional content of freedom of thought, conscience and religion, the Constitutional Court considers it necessary to note that this right includes:

1) The freedom of a person to have conviction, in particular, a religious conviction, which **is an absolute right** guaranteed by the Constitution and is not subject to any restrictions;

2) freedom of expression, manifestation of religious beliefs, in contrast to the freedom to have such, **is not absolute and may be restricted by law** on the grounds prescribed in part 2 of article 41 of the Constitution.

In case the **freedom to have religious beliefs** is a manifestation of the right to choose religious beliefs, as well as to freedom of expression, the **freedom of expression of such beliefs** is manifested in the form of freedom of creating religious associations with others, joining a religious association and undertaking activities within their framework consonant with own religious belief (preaching).

Comparative analysis of the challenged norm of the Law and the content of other legislative regulations interrelated with the latter shows that the law provides for restrictions on the expression of freedom of religion in a number of other fields of public service. In particular, the Law on the Performance of Military Service (clause 3 of part 3 of article 1), the Law on Service in National Security Bodies (clause 8 of part 1 of article 43), the Law on Correctional Service (clause 7 of part 1 of article 37), the Law on the Rescue Service (clause "g" of part 1 of article 39), and the Law on the Judicial Acts Compulsory Enforcement Service (clause 7 of part 1 of article 30) prescribe restrictions **on the basis of membership** in religious organizations for the officers of the mentioned spheres, based on the peculiarities of the tasks assigned to these public service bodies. That is, **membership in a religious organization** (joining a religious organization), according to the above-mentioned regulations, is incompatible with the relevant public service and is the basis for exemption from service of the certain public servant.

The Constitutional Court considers it necessary to address the issue of disclosing the legal content of the term "member" (membership) in order to establish:

1) The essence of the status of a person due to membership in a particular religious organization;

2) the presence of an alleged causal relationship between membership in a religious organization, on the one hand, and, due to this, the behavior of a person, on the other hand, from the perspective of the possibility of a legal assessment of the actions of a person as a member of a religious organization and, at the same time, a public servant.

The study of articles 5 (clause "e"), 6, 7 (clauses "c" and "d"), 18 and 19 of the Law on Freedom of Conscience and Religious Organizations shows that:

1) The term “member” of a religious organization **does not have institutional significance due to a certain status of a person**, and therefore the content of the intra-organizational rights and obligations of a person as a member of this organization can be completely different and cannot be uniform, therefore, not the membership to any religious organization can be the basis for restricting the expression of freedom of religion, but other expression of freedom of religion, which is incompatible with the requirement of manifestation of religious, theological neutrality in relation to others and to public authority;

2) The term “member” of a religious organization mostly **pursues the goal of defining the organizational and legal type** of the given organization **as a religious one, and its state registration as a legal entity**.

Thus, the Constitutional Court states that according to the logic of legislative regulation, the term “member” of a religious organization does not have such a legal content and meaning, which **in itself would serve as a basis for qualifying the activities of a religiously convicted public servant-person incompatible in the given sphere of public service**.

4.3. The Constitutional Court considers it necessary to state that **not the freedom to have convictions may be the basis for restricting (prohibiting) freedom of religion, but the freedom of expression of religious beliefs**, if this restriction is due to the need to protect state security, public order, health and morality, or the fundamental rights and freedoms of others. As already noted, similar restrictions are also provided for restricting freedom of association.

Therefore, prior to assessing the proportionality of restrictions on freedom of expression of religion, the subject of the assessment of the Constitutional Court is primarily to check whether there are grounds for such restrictions.

In the framework of the this case, comparing the sole grounds for restricting the expression of freedom of religion and freedom of association, respectively prescribed in part 2 of article 41 and part 3 of article 45 of the Constitution, the Constitutional Court considers that the membership of a police officer in a religious organization in itself cannot be related to the protection of public order, health and morals or the fundamental rights and freedoms of others.

As for state security, such membership may be problematic, firstly, in terms of such religious organizations, whose activities, in accordance with part 4 of article 45 of the Constitution, are suspended or prohibited by a court decision in cases and in the procedure prescribed by law.

Membership of a police officer can be problematic from the perspective of state security also in the case of membership in such religious organizations that are created illegally.

In addition, membership in religious organizations that, by virtue of membership, establish statutory or current duties for their members that are initially incompatible with the duties of a police officer or with the interests of the service, which may violate the religious, theological neutrality of the police officer, may in such cases lead to a restriction of the right to admission to the police profession. The given legal position also applies to other spheres of public service, as well as to work in the framework of private legal relations.

In other cases, membership in a religious organization cannot be restricted; moreover, it cannot be a priori prohibited, i.e. by law, only due to the peculiarities of the type of public service.

At the same time, any public servant, by virtue of article 17 of the Constitution, is obliged to observe religious, theological neutrality **in the performance of his official functions** in a secular state, which is the Republic of Armenia; therefore, the prescription of such a legislative requirement in itself will be lawful. As a private person, public servant shall have the right to express freedom of religion on an equal basis with all other persons. Consequently, specific violations of the requirement of religious and theological neutrality are already considered circumstances in law enforcement practice.

The Constitutional Court considers that in law enforcement practice, the circumstance of the requirement of compliance of religious and theological neutrality of a police officer or other public servant is subject to due assessment from the perspective of the specific manifestation (manifestations) of the exercise of this freedom, and taking of actions by the mentioned officer aimed at expressing this freedom, which may serve as a legitimate basis for the application of measures of responsibility in relation to the mentioned public servant on the basis of incompatibility.

Consequently, in addition to the aforementioned exceptional cases, when the fact of membership indicates the impossibility of observing religious and theological neutrality or the most likely violation, only the actual conduct of a police officer can serve as a basis for assessing his compatibility with occupancy.

Stating that according to clause 7 of part 1 of article 39 of the Law, a police officer shall not have the right "... to use his official position in the interests of ... religious associations, to preach an attitude towards them, and also to carry out ... religious activities in the performance of his official duties", the Constitutional Court notes that such a restriction prescribed in the Law is lawful, and a

police officer is not entitled to assume such duties because of joining a religious organization, which may contradict his official duties, and retaining in such cases membership in a religious organization may become incompatible with public service.

In case the mentioned restriction is not enough to ensure the religious and theological neutrality of a police officer, the legislator is entitled to choose other legislative solutions based on the legal positions expressed in this Decision.

Based on the review of the case and governed by clause 1 of article 168, part 4 of article 169, and article 170 of the Constitution, as well as articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare clause 7 of part 1 of article 39 Law of the Republic of Armenia on Service in Police contradicting article 41 and article 45 of the Constitution and void, in the part of the provision of an absolute prohibition on joining any religious organization by a police officer, unconditional with certain conduct for membership.

2. Pursuant to part 2 of article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

February 18, 2020
DCC -1506