



Pázmány Law Working Papers
2025/5

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Oath and freedom of conscience

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<http://jak.ppke.hu>

<http://www.plwp.eu/>

ISSN: 2062-9648

Oath and freedom of conscience

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1. Freedom of conscience

The concept of conscience is not legally defined,¹ so it can be problematic to determine at which point the right to conscience is violated.

Freedom of thought and conscience are inviolable for the law; their external manifestation may be regulated by law, with possible restrictions on freedom of expression.² Freedom of conscience is an institution even more elusive to the legislatures than freedom of thought.

According to the Fundamental Law of Hungary

“(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, practise 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.”³

We can clearly see the emphasis on the religious elements in the legislation, but it would be important to examine what is meant by the concept and content of freedom of conscience.

The Act on the right to freedom of conscience and religion reaffirms what is enshrined in the Fundamental Law, but does not discuss how conscience can be interpreted in law.⁴ Freedom of conscience is mentioned another time in the Fundamental Law, where it declares that military service may be refused on grounds of conscience.⁵ The Act on National Defence and the Hungarian Defence Forces stipulates that “an application for permission to perform unarmed military service shall be rejected if the circumstances indicate that the invocation of conscientious objection is unfounded.”⁶ The Act also states that “any ground relating to a fundamental religious, moral or other conviction which defines the applicant's personality shall be considered a ground of conscience.”⁷ This suggests that conscientious objection is not limited to religious persons, the emphasis is rather on the beliefs that define the person. Given that conscientious objection cannot be established by objective criteria, unarmed military service is granted on a case-by-case basis.⁸ The beliefs defining the persons are not being defined in the Act. It can be concluded that freedom of conscience is in some cases a sufficient reason for a person to refuse armed service. However, it is important to consider whether in other, less serious situations – such as taking an oath - the State may use coercion in relation to the conscience of citizens.

2. The nature of the oath

¹ SCHANDA Balázs – BALOGH Zsolt: Alapjogok (szerk.): Alkotmányjog – Alapjogok. Harmadik kiadás. Budapest, Pázmány Press. 2019S .

² SCHANDA– BALOGH op. cit. 156.

³ The Fundamental Law of Hungary Article VII.

⁴ Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities

⁵ The Fundamental Law of Hungary Article XXXI. (3)

⁶ Act CXL of 2021 on National Defence and the Hungarian Defence Forces – section 27. § 43 (2)

⁷ Act CXL of 2021 on National Defence and the Hungarian Defence Forces– section 27

<https://net.jogtar.hu/jogszabaly?docid=A2100140.TV&searchUrl=/gyorskereso?keyword%3Dlelkiismeret>

⁸ Act CXL of 2021 on National Defence and the Hungarian Defence Forces Section 27

The oath is an institution with an inherently religious content, defined by the Hungarian Catholic Encyclopaedia as the calling of God and His name as a witness to the truth, a religious act.⁹ The Hungarian Explanatory Dictionary also states that an oath is a religious act and defines it as a solemn declaration or promise invoking God as a witness.¹⁰ The dictionary further states that the oath is also accepted as evidence in legal proceedings. Thus an oath creates a bond between the human and the divine whereby the oath-taker can be held accountable by the witnesses. The oath has been used in a solemn form from the very beginning of the Hungarian legal heritage. The oath-taker made his or her statement in some customary, repeatable, symbolic way that the community could understand.¹¹ Throughout history, two types of oaths have been the most widely used, the affirmative and the promissory.¹² The former was typically used in court proceedings, while the latter was used at inaugurations, as part of a solemn ceremony.

Oaths, like all legal acts, can be right if they are based on human nature and reason as true sources of law, rooted in the creative will of God.¹³ It is, therefore, necessary to examine whether in the public law of secular Hungary today the oath has a role beyond mere formality, whether we can attribute legal binding force to an institution that is originally linked to the transcendent in a proper way.

In addition to the religious element, an important factor is that an oath can only fulfil its function if the person taking it does so voluntarily and according to their conscience. Originally the state has sought to compel those involved in criminal proceedings to act according to their conscience and tell the truth, by "fearing God more than the prosecution."¹⁴ By its very nature, an involuntary oath that is against the oath-taker's conscience cannot fulfil its function.

3. Oaths in the current Hungarian legal system

In the Hungarian legal system, a public official may be obliged to take an oath as a condition for holding a position or office. The Fundamental Law declares the necessity for the taking of an oath in two occasions. It requires members of the Government and the elected President of Hungary to take an oath before the National Assembly during the inauguration.¹⁵¹⁶ In addition to these examples, many other public offices also require the taking of an oath. In many cases, the oath is also required for positions of less importance in public law. Since the oath is a religious institution in origin and religiosity is a feature of the state that can determine the inner beliefs of individuals, it is important to examine whether an oath still has a religious character today. In the case of a strictly religious institution, an atheist could not be obliged to take the oath without violating his or her freedom of conscience.

In relation to the similar regulation of the previous Constitution, the Constitutional Court explained that the oath does not have a religious character.¹⁷ By mentioning it in the

⁹ RÁCZ András – PÁSZTOR Miklós (szerk.): Magyar Katolikus Lexikon.

<http://lexikon.katolikus.hu/E/esk%C3%BC.html>

¹⁰ PUSZTAI Ferenc (főszerk.): *Magyar Értelmező Kéziszótár*. második kötet. Budapest, Akadémiai Kiadó, 2008. 325.

¹¹ MARÓTI Gábor: Az eskü vallás- és jogtörténeti kérdései In: TAKÁCS Péter (szerk.): *A jog megjelenítése, épített környezete és szimbólumai* Budapest, Gondolat Kiadó. 2020. 739.

¹² MARÓTI op. cit 739.

¹³ WOLFGANG Waldstein: *A szívébe írva – Természetjog, mint az emberi társadalom alapja*. Budapest, Szent István Társulat, 2015. 13.

¹⁴ SCHANDA (2006) op. cit.. 153.

¹⁵ The Fundamental Law of Hungary, The State. Article 16 (9)

¹⁶ The Fundamental Law of Hungary, The State. Article 11 (6)

¹⁷ 47/2009. (IV. 21.) Hungarian Constitutional Court decision

Constitution the traditional nature of the oath as a value was emphasised and in parallel, by that regulation the state tried to distance the legal order from the transcendent world. In order to avoid the violation of conscience caused by any religious oaths, the legislatures also allowed the taking of a non-religious oath called “fogadalom” instead of the traditional religious oath called “eskü” when state offices were inaugurated.

For instance, the Citizenship Act allows for the taking of a religious citizenship oath as well as a non-religious one.¹⁸ The Citizenship Act provides for a separate text for the oath of religious people and non-religious people. The religious oath-taker uses the word "esküzöm" instead of "fogadom", and the text of the oath differs in that the religious one adds a religious formula to the end that has been added to oaths over the centuries, the prayer "so help me God". Legislators generally provide for an obligation to take an oath without any religious reference, while the Act on the Oaths of Public Officials refers to both the religious and non-religious oaths by the same “eskü” phrase which has a religious, immanent meaning.

4. Oaths and international conventions

Article 9 of the European Convention on Human Rights states that everyone has the right to freedom of thought, conscience and religion, including the right to manifest his or her beliefs.¹⁹ The Convention stipulates that freedom of expression of religion or belief may be subject only to such restrictions as are in accordance with the law and are necessary in a democratic society in the interests of public safety, public order, public health, morals or for the protection of the rights of others.

Similarly, Article 18. of the Universal Declaration of Human Rights states that everyone has the right to freedom of thought, conscience, and religion. This right includes the freedom to change one's religion or belief, and the freedom to manifest one's religion or belief through teaching, practice, and observance, either individually or in a community, and in public or private.²⁰

In order to examine whether international conventions assess the oath as an expression of religious practice or belief and whether it may infringe religious freedom, it is necessary to examine international case law.

The issue was addressed in the *Buscarini vs San Marino* case.²¹ The applicants, Cristoforo Buscarini, Emilio Della Balda, and Dario Manzaroli, were San Marino citizens. They were elected members of the Parliament of San Marino and took an oath of office in writing without referencing the Bible, contrary to Article 55 of the Electoral Law. On July 26, 1993, Parliament compelled them to retake their oaths, this time referencing the Bible, under penalty of losing their mandates. Although they complied, the applicants alleged that this requirement violated their right to freedom of thought, conscience, and religion under Article 9 of the European Convention on Human Rights (ECHR). In October 1993, Law No. 115 allowed parliamentarians to choose between the traditional oath on the Bible or a secular alternative using the phrase “on my honour.” However, this option was not extended to other public officials.

The applicants submitted their complaint to the European Commission of Human Rights on November 17, 1993. After declaring the application admissible, the Commission issued a report on December 2, 1997, finding unanimously that Article 9 had been violated.

¹⁸ Act LV of 1993 on Hungarian Citizenship § 6.

¹⁹ European Convention on Human Rights - Article 9

²⁰ The Universal Declaration of Human Right – Article 18

²¹ *Buscarini and others v. San Marino*, No. 24645/94, ECtHR (Grand Chamber), 18 February 1999

In another case²² the European Court of Human Rights also ruled that there had been violations of Article 9 of the European Convention on Human Rights. The applicant, Theodoros Alexandridis, a Greek lawyer, was compelled to disclose that he was not an Orthodox Christian to make a solemn declaration instead of taking a religious oath when sworn in as a lawyer in 2005. The Court found that this requirement infringed his right to avoid revealing his religious beliefs.

It can be concluded that the right to freedom of conscience and religion and its protection includes not only positive but also negative aspects. It means that an obligatory religious oath is not the only possible issue. Citizens are entitled to protection against being compelled to disclose their religious beliefs while also being ensured the right to practice their religion freely.

5. Oath vs. freedom of conscience?

The oath was intended to confirm the binding force of a promise and the truth of a claim, in a solemn manner accompanied by a sacral ceremony that has survived in modern constitutional states. In modern democracies, however, these acts are not intended to express sacrality but loyalty to the state and respect for constitutional order. Thus, the pledge of allegiance reflects constitutional objectives, and the solemn declaration of the pledge does not restrict freedom of conscience and religion, since it is the right of the individual to express their conscience and religious beliefs publicly. It is the State's obligation to create the necessary neutral legal framework, which is fulfilled by making the pledge optional. No one can be obliged to make a statement contrary to their conscience, so an alternative regulation precisely allows everyone to act in accordance with their ideological convictions. International jurisprudence tends to follow this approach as the above cases show. The ECtHR established that no one should be compelled to take a religious oath against their will and that an alternative must be provided to citizens.

The state has a right to expect loyalty in filling certain positions. The oath is a means of ensuring such loyalty, so that the former, religious oath can only have transcendent content at the level of the individual, and that inner content is irrelevant to the state. It is within the power of the state to make the taking of an oath for certain positions subject to the state's authority, but this does not infringe on the freedom of conscience of citizens, who can take a non-religious oath or refrain from taking an oath. An oath may still be binding someone religiously in a subjective way, but that is not relevant from the point of view of the State. From the State's perspective, an oath taken with a transcendent content is equivalent to a non-religious oath, since the State, in its religious neutrality, cannot make a value judgment. The oaths used today may also naturally bind religious people more strongly on a subjective level, even if there is no real difference of legal relevance under the legislation. The conscientious and emotional attachment to the oath, may, in some cases, have a stronger binding effect on a religious person than on a non-religious person.²³

6. Conclusion

To conclude, for the contemporary State, oaths may have a role in legal systems and may be required by them, but only if they do not entail a religious character from the state's point of view, or if they do, they should be optional. Due to the religious neutrality of the state, the

²² Alexandridis v. Greece, No. 19516/06, ECtHR (First Section), 21 February 2008

²³ 4/1993. (II.12.) AB határozat

taking of an oath must be strictly religiously neutral or must ensure that citizens can take a non-religious oath equivalent to a religious oath which is equally binding from the state's point of view. Accordingly, a citizen may choose to take an oath in a form which is in accordance with their conscience or they may refrain from taking it if they accept the consequences. The right to freedom of conscience is therefore violated if a person is obliged to take an oath in a form that is contrary to their inner convictions and is not entitled to choose or to refuse to take an oath.