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## CHURCH AUTONOMY AND RELIGIOUS LIBERTY

### – NATIONAL REPORT ON HUNGARY –

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#### I.

Religious freedom issues in Hungary can be of particular interest for many reasons: Hungary has had a long tradition of religious tolerance and a relatively colorful denominational landscape. Transylvania was the first state in Europe to enact religious freedom (free exercise of religion and the freedom to preach) for the four denominations of the “three nations” of the Principality in 1568. Furthermore, the institutional framework of the freedom of religion, the relationship between State and Church is determined by history to a lower degree in the countries that have established a new constitutional order recently enabling them to find new solutions. Among the countries in Europe that used to be called “new democracies” in the early 90s, Hungary has a well established constitutional jurisdiction that has promoted the dogmatic clarity and level of sophistication of the Hungarian legal system.<sup>1</sup>

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<sup>1</sup> For a short summary in English on the cases concerning religious freedom before the Constitutional Court of Hungary see: *Schanda, B.*, Constitutional Litigation Concerning Religious Freedom in Hungary, in *Interights Bulletin* 11 (1997) 125. This sophistication was also stated by: *Wood, J.*, The Budapest International Consultation on Religious Liberty, Religious Rights, and Ethnic Identity, in *Journal of Church and State* 34 (1992) 465-473.

## II. AS TO THE ISSUES

### 1. THE FUNDAMENTAL UNDERSTANDING OF CHURCH AUTONOMY

According to section 60 of the Constitution of the Republic of Hungary:

- (1) In the Republic of Hungary everyone has the right to the freedom of thought, conscience and religion.
- (2) This right includes free choice or acceptance of religion or other conviction and the liberty to publicly or privately express or decline to express, exercise and teach such religions and convictions by the way of religious actions, rites or in any other way, either individually or in a group.
- (3) In the Republic of Hungary the Church functions in separation from the State.
- (4) The ratification of the law on the freedom of conscience and of religion requires the votes of two thirds of the MPs present.

The Act on the Freedom of Conscience and Religion, and the Churches declares in section 8 that

- (1) Those following the same religious beliefs may, for the purpose of exercising their religion, set up a religious community, religious denomination or church (hereinafter together referred to as “church”) with a self-government.

### 2. AUTONOMY (“SELF-GOVERNMENT”) IS POSITIVELY ACKNOWLEDGED BY THE LAW

Neutrality can be seen as the most important principle governing the state in regard to the religious communities as well as to other ideologies. The state shall have no ideology. However “*from the right to freedom of religion, follows the State’s duty to ensure the possibility of free formation of personal convictions*”<sup>2</sup>. Neutrality means on the one hand that the state shall not identify itself with any ideology (or religion), and, on the other hand, that it must not be institutionally attached to churches or to one single church. This indicates that the underlying doctrine behind the principle of

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<sup>2</sup> Decision No. 4/1993. (II. 12.) AB.

separation (which is explicitly stated in the Constitution) is the neutrality of the state. It is to be noted that neutrality has to be distinguished from indifference which is not meant by the Constitution – as follows from the concept of neutrality elaborated by the Constitutional Court.<sup>3</sup> Neutrality is not “laicism” (in the French sense of “laïcité”), the state may have an active role in providing an institutional legal framework as well as funds for the churches to ensure the free exercise of religion in practice. Separation (especially institutional separation), however, is stricter than in the German “coordination-model”.

Separation can be defined on the one hand by the respect of the autonomy of the churches (“*the State must not interfere with the internal workings of any church*”<sup>4</sup>), and on the other hand, with the principle stated in the act on religious freedom: “*No state pressure may be applied in the interest of enforcing the internal laws and rules of a church.*”<sup>5</sup>

It is interesting to note that the “internal law” of the churches is regarded to be law by the state, though lacking the enforcement of state authorities. State law makes a number of references to the internal laws of the churches, even reciting them. That is, the legal character of the “internal law” (like that of the canon law) is acknowledged by the State in certain cases.

The most important case of the application of the internal church law by state authorities is the acknowledgment of legal entities by the state. According to the law, if the “charter” of the church provides so, the organizational units of the church with an independent organ of representation (like institutions, parishes) are legal entities.<sup>6</sup> This means that the internal law of the religious communities determines whether legal persons acknowledged by the state come into existence or not – no further state registration of these persons is required (in the case of the Catholic Church the Code of Canon Law and the Code of Canons of the Eastern

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Act No. IV of the year 1990, § 15 (2); Note on abbreviations: Acts of Parliament are referred to as “Act No. Z of the year X”. Acts are numbered with Roman numbers, starting with I. every year. Government decrees and the decisions of the Constitutional Court have numbers (starting with 1 every year) and the day of official promulgation is shown. Acts and decrees have sections (referred to as: §), subsections (referred to with numbers: (1)) and may have points [referred to with letters: a)].

<sup>6</sup> Ibid., § 13 (2).

Churches determine which church entities have legal personality in the Hungarian legal system). If there is any doubt, the representatives of the given church can refer to their charter, and judges may need to study church codes to find out about the status of church entities in state law.

Tax laws and the law on social security use the term “ecclesiastical person”, referring to persons subject to some special regulations in these two fields. This definition is determined by internal law, that is, the internal law of the churches determines who are those people who fall under a different scheme provided by the secular state law. The same applies in the case of the law on the national defense that grants privileges to clergymen working in their profession<sup>7</sup> (they are not drafted for example). It lies in the competence of the churches to determine whom they regard as clergy. Procedural laws accept the professional codes of ethics concerning secrets (with regard of lawyers, doctors as well as clergy).<sup>8</sup> Church regulations decide what kind of secrets need special protection.

The law dealing with a compensation for those unjustly deprived of their life and liberty for political reasons uses the term “ecclesiastical person under the ban of marriage”<sup>9</sup>. The compensation for such people cannot be granted to the widow or the descendant as foreseen in the “regular” cases. Instead, the diocese of the person concerned receives the compensation. The constitutionality of this provision was challenged under the separation clause of the Constitution. The Constitutional Court refused the petition in its “seventh compensation decision”. As the Court stated *“in the case of ecclesiastical persons under the ban of marriage the persons usually given in the case of those who died having a wife and children are missing. The legislator made the diocese – with applying a legal fiction – a quasi relative. This is the reason of the compensation and not that the legislator wanted to grant compensation to the church legal entity. The basis of equal treatment in this case is that the law entitles an entity to be compensated also for the death of ecclesiastical persons killed unjustly, who did not have a wife and descendants due to their ecclesiastical vow”*. The law does not violate the constitutional declaration of the separation of church and state *“as the state*

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<sup>7</sup> Act No. XC of the year 1993 on national defense, § 103. (1); § 122. (3); § 134. (1) g).

<sup>8</sup> Act No. I of the year 1973 on criminal procedure § 66. (1) c); Act No. III of the year 1952 on civil procedure § 170. (1) c); Act No. IV of the year 1957 on the general rules of administrative procedure § 29. (3) b).

<sup>9</sup> Act No. XXXII of the year 1992 on the compensation of those illegally deprived from life and liberty for political reasons, § 2. (4).

*takes into account the independence of churches with taking their specialties into consideration where necessary and guarantees their freedom”<sup>10</sup>.*

The institutions of theological higher education as well as the degrees issued by them are acknowledged (as well as funded) without any control over the content of their educational activities. At the accreditation of such institutions the content of the subjects is not subject to the control, but has to be determined by the laws of the church concerned.<sup>11</sup> The National Accreditation Board has set framework conditions for the accreditation concerning for example the sufficient size and character of the library, the qualification of professors, number of classes etc.

This shows that the state law makes several references to the internal law (canon law) of the churches. In some cases this is made out of practical considerations, as the legislator would not be able to set up a neutral frame that would fit all communities. In other cases the principle of separation (the respect of church autonomy) sets a limit on how deep the state law can go. Consequently, the acknowledgment of the potential of the churches for making laws (internal laws) is an important sign of the acknowledgment of their autonomy.

Church autonomy can be seen as the most important difference between entities registered as churches and other legal entities registered<sup>12</sup>, like associations, political parties or trade unions. Autonomy in this stricter legal sense means that the internal actions of organizations registered as “churches” are not subject to any kind of state interference. This means that whereas a resolution of an association can be brought before court (and courts have the power of striking it down if these internal actions are unlawful or violate the charter of the association), a resolution of a bishop or a synod cannot be challenged before state courts. Churches are also not bound by the principle of democratic internal structure, while associations have to be democratic. If a church violates the law, the public prosecutor has the right to sue the church. The court has to call upon the church to restore the lawfulness of its operation. If the church does not comply with the court order it will be deleted from the register of churches. This means the loss of the status of being a “church” but there is no ban on the activities. The

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<sup>10</sup> Decision No. 1/1995. (II. 8.) AB, ABH 1995, 31, 56.

<sup>11</sup> Act No. LXXX of the year 1993 on the higher education § 114. (1).

<sup>12</sup> Decision No. 8/1993. (II. 27.) AB.

unlawful actions themselves cannot be challenged, but they may lead to the deletion of the church from the register.<sup>13</sup>

No consistent alternative approach is known to the author. Alternative ideas have not developed in an elaborated way. Some ecclesiastical scholars favor a standing in public law for the (historic or mainstream) churches (see below), while a government official recently suggested suspending the separation clause of the Constitution for the year of the Millennium (2000 being also the Millennium of the Hungarian statehood), but his idea was not given serious consideration.

### 3. MAIN FIELDS OF INTEREST

#### 3.1 RELIGIOUS TEACHINGS

Obviously, the state has no right to take a stance in matters of religious truths.

Parents have the right to choose the kind of education their children should receive.<sup>14</sup> Consistently, churches have the right to offer optional religious instruction at public schools.<sup>15</sup>

In the course of the optional religious instruction given by the churches at public schools, the teaching is determined by the churches themselves. The curricula are set by the church, the instructors are appointed by the church. The teacher of religion classes is not a member of the school staff, and no official school report is given on the participation or on the marks of the religion classes. The public school has to provide the technical facilities only (like the classroom itself). As the Constitutional Court stated in a decision, schools have no right to require a certain level of qualification for the teacher of religion classes as they are not teachers in the sense of the law and they are not employed by the school but by the church.<sup>16</sup> Consequently, churches enjoy absolute freedom in appointing the instructors. As religious instruction is not a “res mixta” but solely the competence of churches, they can decide whether they only use this channel to inform on religion or they use it as a mean of introduction into the life of the church. Church schools

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<sup>13</sup> Act No. IV of the year 1990 § 20. (2).

<sup>14</sup> Constitution § 67. (2), Act No. IV of the year 1990 § 5.

<sup>15</sup> Act No. IV of the year 1990 § 17. (2); Act No. LXXIX of the year 1993 § 4.

<sup>16</sup> Decision No. 22/1997. (IV. 25.) AB.

have the right to include religious education into their curriculum. In this case the instructor has to be qualified and there are certain rules concerning the minimum content of the instruction.

Institutions of higher theological studies are run by the churches, but to be acknowledged as institutions of higher education (entitled to give acknowledged degrees and entitled for state financial support) they need to gain state accreditation. For this purpose the content of theological subjects is not to be overviewed.

### 3.2 TRADITIONAL CHURCH OFFICES

All church offices are to be filled by the exclusive decision of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices. The government is not involved in any kind of nomination and the candidates or appointees are not communicated to the government.

An interesting and unique exemption is the military ordinariate. According to the Government Decree on the Army Chaplaincy the appointment of the army bishops, the rabbi and the pastors to the army is pursued according to the agreements concluded with the religious communities concerned.<sup>17</sup> The accord of the Holy See and the Republic of Hungary signed on the 10<sup>th</sup> of January 1994 requires the Holy See to communicate the candidate designated to become the *ordinarius militaris* and the Government has the right to raise “general objections of political nature”<sup>18</sup>. Certainly these “objections” are not legally binding, so in the legal sense it is not a kind of a veto. As the Constitutional Court stated, the Chaplaincy did not lead to an unconstitutional entanglement as it did not become an institutional part of the military but works next to it.<sup>19</sup>

No oath of any kind is required by the state from any person taking a church office.

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<sup>17</sup> Government decree No. 61/1994. (IV. 20.) Korm. § 8. (4).

<sup>18</sup> International treaty No. 1994/19. from the minister of defense.

<sup>19</sup> Decision No. 970/B/1994. AB, ABH 1995, 739.

### 3.3 OWN JURISDICTION

Under the principle of separation, churches administer the issues they regard to be within their competence independently. As a consequence of the same principle, the internal jurisdiction (like on the issues of marriage in the case of the Catholic Church) have no significance of any kind on the state whatsoever.

### 3.4 DEFINITION OF “OWN” ACTIVITIES OR MATTERS OF THE CHURCH

The churches are free to determine what they regard to be matters of their “own”. In other words, they enjoy the competence-competence. On the individual level it is to be noted that the Constitution provides for the manifestation of religion without a list of possible actions that would be permissible for expressing the belief, but states that this manifestation may happen in worship and by “other means”, too. There is absolutely no circumscription of actions that would be regarded as manifestation of a belief, as all actions may fall under this provision.

Due to the separation, it does not matter how wide the claim of a church is, as long as the activities done by the church are not illegal. As separation means that “*no state pressure can be applied in the interest of enforcing the internal laws of a church*” (Art 15), the scope of the “internal laws” is irrelevant.

According to the decree on the army chaplaincy the commanders of the Army have no right to decide on activities concerning religious life. They only have the right to make decisions on the activities of the members of the chaplaincy in order to ensure the compliance of their activities and the order of service. “Religious” and “other” activities of army chaplains are differentiated by that.<sup>20</sup>

### 3.5 LABOR LAW

As mentioned above, labor law uses the term “ecclesiastical persons” that have a special “ecclesiastical working relationship” with their respective church. Discrimination on the basis of religion is prohibited by the Labor

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<sup>20</sup> Government Decree 61/1994. (IV. 20.) Korm. § 5. (1).

Code.<sup>21</sup> Distinctions given by the nature of requirements of the job do not consider as discriminative. That is an exemption concerning the nature of work and not that of the employer. This could suggest that different standards were to be applied on teachers of church schools than on the cleaners for example. There is no court practice established yet how far can ecclesiastical employers go in requiring belief, membership or loyalty in the selection of their employees.

Concerning Sunday laws, an interesting case has been brought before the Constitutional Court by representatives of the religious Jewry in Hungary who challenged the provisions of the Labor Code<sup>22</sup>, arguing that the free exercise of their religion is not assured by the legislation to an equal extent with that of Christian religion, as the labor code determines only Christian holidays as days of rest (the 25<sup>th</sup> and the 26<sup>th</sup> of December, Easter Monday and Pentecost Monday). Furthermore, Saturdays can be designated as days of work by the Minister of Labor in order to provide “long weekends” (for example if a public holiday is on Thursday or on Tuesday the day between the holiday and the weekend is given free and a Saturday from the previous week or the following week becomes a working day instead). Sundays are not to become working days. The Constitutional Court stated that the constitutional obligations of the state prohibit the privileged treatment of one religion (for example by declaring all of its holidays as days of rest). On the other hand, the state has to ensure the free exercise of all religions. Historically, religious motives did determine the state decision in picking the holidays, however the present holidays are the ones the vast majority of the society (not only practicing Christians) celebrate. Christmas and Easter for example are closely connected to family and folklore traditions. No Jewish holiday has gained such a popular acceptance. The protection of Sunday used to have a religious background, however it has lost it by now. Sunday as a uniform day of rest is almost universal. The uniformity of this day of rest has a secular purpose.<sup>23</sup> The solution the Constitutional Court has reached in this case is similar to what the Supreme Court of the United States of America reached in the McGowan v. Maryland case: *“There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces.”* However *“[t]he present purpose and effect (...) is to provide a uniform day of rest for all citizens; the fact that this day is Sunday; a day of particular significance for dominant Christian sects, does not bar*

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<sup>21</sup> Act No. XXII of the year 1992 § 5.

<sup>22</sup> Act No. XXII of the year 1992 § 125.

<sup>23</sup> Decision No. 10/1993. (II. 27.) AB, ABH 1993, 105.

*the State from achieving its secular goals.*”<sup>24</sup> Several European jurisdictions, however, continue to regard “the protection of Sunday” as an institution that serves the free exercise of religion.<sup>25</sup>

### 3.6 SCHOOLS

Parents having the constitutional right to decide on the education of their children<sup>26</sup> also have the right to set up non-neutral schools<sup>27</sup>. As these schools take over public duties because of a decision based on a fundamental right, these institutions are entitled to the same public support as public schools. Schools can be run by any person under the Hungarian law, including certainly legal entities, inter alia churches. After public schools run by the municipalities most schools are run by churches. In Hungary all schools are bound by a national core curriculum.<sup>28</sup> This, however, opens the possibility for each school to establish its own pedagogical program. A large variety of schoolbooks is being published, that is, there are no compulsory school textbooks. Church schools are not bound by the principle of ideological neutrality. This means that such schools can identify themselves with a religion. Religious symbols are allowed on the building as well as in the classrooms. Religious instruction can be part of the curriculum and marks in religion are shown in the school report. Even “Abitur” can be made in religion. The schools are allowed to select not only their staff but also their pupils according to religious principles. It is to be noted that the state budget is granting equal funding for church schools: formally the school is maintained by the church, but the state provides the necessary funds. This is guaranteed by the law<sup>29</sup> and was reaffirmed as a principle deducted from the Constitution guaranteeing religious freedom, parental rights and non-discrimination<sup>30</sup>.

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<sup>24</sup> 366 U. S. 420 (1961).

<sup>25</sup> In the fact that a number of concordats and church-state agreements (e.g.: Germany) as well as laws on the free exercise of religion enumerate the religious holidays and ensure the protection of Sundays in the context of religious rights (e.g.: Poland).

<sup>26</sup> Constitution § 67. (2).

<sup>27</sup> Decision No. 4/1993. (II. 12.) AB; Act No. LXXIX of the year 1993 § 4.

<sup>28</sup> Government decree No. 130/1995. (X. 26.) Korm. on the promulgation of the national core curriculum.

<sup>29</sup> Act No. IV of the year 1990 § 19 (1).

<sup>30</sup> Decision No. 22/1997. (IV. 25.) AB.

### 3.7 CHARITABLE ACTIVITIES: HOSPITALS, HOMES, KINDERGARTENS ETC.

Churches as well as other legal entities can run all kinds of charitable institutions. The issues mentioned about the neutrality of the schools are also valid in respect of these institutions.

## 4. THE LIMITS OF CHURCH AUTONOMY

According to the law on religious freedom and on the churches “... the exercise of this right shall not exempt anyone from satisfying their obligations as citizens, unless an Act provides otherwise” (section 4). “Churches may be founded for the purpose of pursuing all religious activities which are not contrary to the constitution and do not conflict the law”(section 8 [2]). No religious activity whatsoever can violate the constitutional legal order. What is considered as “religious” activity is not circumscribed as the law did not dare to give a definition on religion.

According to the permanent practice of the Constitutional Court, fundamental rights can be limited only if this is inevitable to ensure an other fundamental right or constitutional interest. The limitation has to be proportionate to the goal that is intended to be achieved.<sup>31</sup> According to section 8 (2) of the Constitution the law “*must not impose any limitations on the essential contents of fundamental rights*” (Wesensgehaltsgarantie). The exercise of certain rights can be limited if a state of emergency is proclaimed, but the exercise of the freedom of religion, including the manifestation of religious beliefs is not to be restricted even under such extreme conditions. The protection of the public safety, public order, health or morals are not sufficient reasons to limit the exercise of manifesting religious beliefs or restricting other beliefs.

Limitations of the free manifestation of religion are easier to imagine as limitations of church autonomy. Some topics suggested under this title are hardly raised to be issues in the Hungarian law, while others are discussed at other points of this paper.

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<sup>31</sup> *Sólyom, L.*, Zur Geleit zu den Entscheidungen des Verfassungsgerichts der Republik Ungarn, in *Verfassungsgerichtsbarkeit in Ungarn. Analysen und Entscheidungssammlung 1990-1993*, Baden-Baden 1995, 68.

## 5. INSTITUTIONAL RANGE

### 5.1 WHICH INSTITUTIONS ARE REGARDED AS BEING “CHURCH”?

The Constitution in Article 60 makes a reference to “the church” as operating separately from the state. The language of the Constitution was slightly changed in 1989: in the four decades of communist rule the wording was: “... *the peoples’ republic separates the church form the state.*” From the language it is unclear if the reference was made to the Catholic Church having been regarded as the state church or that with “the church” all churches were meant. The language of the provision remained puzzling in this respect, but the interpretation is clear in covering all religious communities.

According to the law on the Freedom of Conscience and Religion, and on the Churches “Those following the same religious beliefs may, for the purpose of exercising their religion, set up a religious community, religious denomination or church (hereinafter together referred to as “church”) with a self-government. (...) Churches may be founded for the pursuance of all religious activities which are not contrary to the Constitution and do not violate the law”. The registration of churches is done by the county courts (similarly to the registration of associations, political parties and foundations). The requirements are highly formal: the church has to be founded by 100 private individuals, has to have a charter (containing at least the name, the seat, the organizational structure and the names of the organizational units of the church that are legal entities) and elected organs of administration and representation. The founders have to submit a declaration whereby the organization they have set up has a religious character and its activities comply with the Constitution and the law. (sections 8-9)

All churches that are registered have the same rights and the same obligations. Equality, however, is a matter of legal status not of social significance. As the Constitutional Court stated: “*Also, treating the churches equally does not exclude taking the actual social roles of the individual churches into account.*”<sup>32</sup> It does not raise a constitutional issue that more numerous faith are easier the practice (e. g. religious services are easier to access) or that the state makes distinctions between the churches according to their social significance. For example the State has set up the army

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<sup>32</sup> Decision No. 4/1993. (II. 12.) AB.

chaplaincy for four denominations after having concluded respective agreements with them, while the free exercise of religion (not only in private but also in public) in the military is ensured for every denomination. As the Constitutional Court stated in its decision, the Government had the right to single out the churches that had members in a significant number in the army<sup>33</sup> (these were: the Catholic Church, the Reformed and the Lutheran Evangelic Churches (sharing a military bishop) as well as the Federation of Jewish Communities). The scheme remained open for further churches, if they conclude an agreement with the State.

Churches do not have to have a democratic structure like it is the case with associations (church charters can be anti-democratic). The law on the churches, however, requires that the church to be registered “*has elected its organizations of administration and representation*” (section 9 (1) b). The churches that had already been operating (and recognized) before 1990 were not subjected to a new registration but their new registration was done *ex officio*. That means that these churches were not required to have “elected” representatives. In the course of this registration the “Hungarian Catholic Church” was registered – a legal entity that does not exist under canon law. The agreement on the diplomatic relations between the Holy See and Hungary signed on the 9<sup>th</sup> of February 1990 states, however, that the new law on religious freedom and the Code of Canon Law make the conditions of the Catholic Church as “fundamentally settled”. This is an example where the church and state laws are not in complete compliance, but the legal framework can be accepted by a church as it does not infringe its freedom.

It is to be noted that the practice of religion neither in private nor in public, neither alone nor with others is bound to any kind of legal status or structure. Groups registered as associations or groups not registered at all have the same right to manifest their beliefs as groups that have the legal status of a “church”.<sup>34</sup>

## 5.2 DISTINCTIONS BETWEEN THEOLOGICAL CORE INSTITUTIONS AND OTHER, NON-DIRECTLY RELATED INSTITUTIONS

There are no general positive distinctions made between theological core institutions and others that are not directly related to the core of the religion. Distinctions in concrete matters, however, are made in cases where the state

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<sup>33</sup> Decision No. 970/B/1994. AB, ABH 1995, 739.

<sup>34</sup> Decision No. 8/1993. (II. 27.) AB.

is involved in funding or has an other special legal interest (like the accreditation of institutions of higher education).

To take the institutions of higher education as an example, a clear distinction is made between the institutions and courses determined by religious beliefs and others that give secular training. The institutions of higher education of the churches provide education in theology and in other subjects “related to religious life” (like canon law). These institutions can establish non theological faculties (schools) and courses too (like the Law Faculty of the Catholic University Péter Pázmány). If they do so, than they have to comply with all the legal requirements, to be recognized by the state. At the recognition, the church requirements are to be fulfilled concerning the theological and other religion-related subjects. If the training is of secular nature, but there are subjects included that are of religious character, than concerning the latter the church requirements are applicable (e. g. law students study some canon law at the Catholic University).<sup>35</sup> Institutions may not take the religion or convictions of the candidates into consideration when selecting their students for the secular courses but they may do so in the case of the religion related training.<sup>36</sup> The autonomy of universities run by the churches is somewhat wider than that of state universities. The number of state funded study places is fixed every year by the Ministry of Education within the frames of agreements concluded with the churches.

There are also signs of differentiation between the “genuine religious” property of churches and “other” church property. According to the law on national defense the objects and rights of churches as religious denominations that are directly used for purposes of church functions and religious life are exempt from the general rule that all means that may have a role in defense have to be provided for this purpose. The scope of this exemption is decided upon the defense authorities. This distinction between the objects used directly for religious purposes and other assets is remarkable as it provides a distinction according the strength of the relation of an object to religious life. It is unclear where the distinction could be drawn, more precisely if the protection of property is qualified by the protection of religious freedom only to protect worship, or it may be interpreted in broader terms.<sup>37</sup>

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<sup>35</sup> Act No. LXXX of the year 1997 § 114-114/A.

<sup>36</sup> Act No. LXXX of the year 1993 on the higher education § 32. (4).

<sup>37</sup> Act No. CX of the year 1993 § 193. (1) d); The European Court of Human Rights

### 5.3 THE STATUS OF CHURCH HOSPITALS, SCHOOLS, ASSOCIATIONS, FOUNDATIONS, TRUSTS

Churches are free to set up institutions in all fields of social engagement. The status of church hospitals and schools will be determined by their founding charter that regulates the link between the church itself and the institution it carries.

In order to be registered as an association or a foundation the general provisions of private law are applicable also when church legal entities act as founders: there are not special “church associations”. Certainly there is a possibility to remain in the internal structure of the church (for example as a *consociatio chritifidelium* in the case of the Catholic Church), but in these cases the association or foundation will not be regarded as such by the state law and in this way will not benefit from the provisions granting various exemptions for non-profit organizations.

## 6. CONTEXTS IN PUBLIC OPINION AND CONTEMPORARY POLITICS

Religiosity in Hungary is lower than in most countries of Western Europe. The trend, however, has been a steady growth since the late 70s. Undoubtedly there is a kind of religious revival in Hungary like in most post-communist countries, that dates back to before the fall of communism. Churches were the only significant social institutions that survived communism. Religious identity is part of the personal identity with more than 95% of the population, though “churchliness” is considerably low, and the proportion of churchgoers is under 15%. The large majority of the population trusts the churches and has positive views on them (the proportion of those fearing the power of the churches is considerably low). As to the social role of the churches the society is more split. There is a large minority (significantly larger than those following religious doctrines are) that supports a stronger presence of churches in education and especially in health care and social services. These desires are based more on emotions than on personal experience or convictions as the level of knowledge about religious matters is very low. The attitude for the social mission of churches is more receptive than that for the involvement of churches in issues of public policy: in general one could say that social service is far more

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suggest a distinction possible in the protection of property of religious institutions according the closeness of property and worship in the case of *The Holy Monasteries v. Greece* of 9. Dec. 1994.

accepted than the message it is supposed to carry. The vast majority of citizens favor the strict separation of church and state; while opinion polls concerning restitution, funding etc. rather show ignorance in these complex matters.<sup>38</sup>

As churches seemed to enjoy a high level of respect, many politicians were eager to raise political capital from that. Although it turned out that the churches have very little direct influence on voters, left wing parties (like the Socialist Party that has emerged from the former communist party) liked to stress their good will towards churches while center-to-right politicians often posed as “good Christians”. The only notable political party that went on open conflict course with the traditional churches was the “Alliance of Free Democrats”, a left-wing liberal party (forming a governing coalition with the socialists between 1994 and 1998) and acting as an advocate of religious minorities. This party (having now less than 10% of seats in the Parliament) is often voicing its preference for a more laicistic interpretation of separation. The center-to-right parties regard the (traditional) churches as allies in the moral revival of the nation, while most of the political arena is receptive to the social services of churches (the right wing seeming to be more supportive concerning funding).

## 7. HISTORICAL AND CULTURAL PRECONDITIONS

Hungary is a country that has emerged to statehood by its adoption to western Christianity. Reformation reached the country when the central state power was weak and so it was highly successful in the 16<sup>th</sup> century. The Reformed (Calvinist-Presbyterian) Church became the birthplace of the national culture (Bible-translations, schools etc.). Counter-reformation achieved success, but the country has preserved a high level of denominational pluralism. The coexistence of Catholics and Protestants (mainly Calvinists who often regard themselves as the “Church of the nation”) was not always free of conflicts but it proved to be a fertilizing tension enriching the national and everyday culture. After the Turkish wars (at the end of the 17<sup>th</sup> century) ethnic Hungarians became a minority in the Kingdom of Hungary. While Serbs in the south remained Orthodox, large numbers of Romanians in Transylvania and Ruthenians in the Carpathians entered the Union with the Catholic Church, enhanced by the Habsburgs.

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<sup>38</sup> For a comparative overview of attitudes see *Tomka, M./Zulehner, P.*, Religion in den Reformländern Ost(Mittel) Europas, Ostfildern 1999.

The Jewish population had risen to over 5% by the end of the 19<sup>th</sup> century. The liberal era of the late 19<sup>th</sup> century enhanced the rapid assimilation of the Hungarian Jewry, while Jewish-Christian tensions proved to be enriching in a similar way to Catholic-Protestant tensions. This era produced the law No. XLIII of the year 1895, which proclaimed religious freedom for all, restricting, however, the right of public worship to the communities that were acknowledged. The law established a de facto two tier system of religious communities as it upheld the legal framework that had emerged during history concerning the status of the Catholic Church, the Reformed (Calvinist) and the Lutheran Churches, the Serbian Orthodoxy and the Romanian Orthodoxy, the Unitarians and the Jews (the latter just having become an “accepted” religion). The law opened up the possibility to set up “recognized” denominations. The mainstream churches remained part of the establishment (not only in the legal, but also in the social sense – e.g. the Catholic Church remained the largest landowner until 1945 and 2/3 of the elementary schools were run by churches until 1948). After the trauma of the secession of Hungary that happened after World War I. national conservative forces dominated the political and the cultural landscape cutting back some of the liberal legislation of the late 1800s. Hungary became a small country surrounded all around by the former herself – and large ethnic Hungarian minorities. The country got involved into World War II and came under German occupation on the 19<sup>th</sup> of March 1944. In the following few months the vast majority of the Hungarian Jewry – enjoying relative security until then – was deported and killed. Hungary lost ¾ of its Jewish population (due to emigration waves in 1948 and 1956 and to the assimilation, the proportion of Jews has sunk to about 1% by now). After World War II. communists came into power with Soviet assistance and eliminated the democratic structures, the human rights as well as the rule of law. Communist authorities systematically harassed clergy and believers. Religious freedom was only on the dead paper of the Constitution. The “separation” imposed was nothing else but strict state control and persecution. As the control over the churches became almost total, the open persecution got somewhat milder (“goulash communism”), but the guiding principles did not change until 1989. In the 70s and 80s churches were relatively free to worship within the very church buildings but there was no space for any kind of social action (communication, charity, organizations, institutions etc.). Hungary played a notable role in the *Ostpolitik* of the Holy See as an experimental test case; the detante between church and state did have beneficial effects, though some call the partial agreement between the

Holy See and the Peoples' Republic of Hungary of the year 1964 instead of a *modus vivendi* a *modus muriendi*.

The first three decades of communist rule brought a massive and forceful secularization of the Hungarian society. Communism has left Hungary an atomized society and a moral vacuum. Ironically, the churches – hit so hard by the regime – turned out to be the largest forces of civil society. Finding their new role in society (especially in the social communication) is a difficult process.

## 8. PRACTICAL ISSUES

### 8.1 PROPERTY ISSUES

The churches could reclaim their real estates with buildings secularized after 1948 and originally used and to be used for specified religious, educational, cultural, health care purposes in so far as these properties were – by the time of said Act coming into force – the property of the state or that of the local municipality.<sup>39</sup> Well-functioning of churches was the guiding principle of the Act. A complicated system was established to handle the claims of the single Churches, while the final decisions were to be made by the Government. According to provisions of the Act, at least one half of the claims should have been satisfied within 10 years, which puts a heavy strain on the state budget, as by virtue of another Act a certain part of the state owned property has been handed over to the municipalities. Thus, the compensation of the present users of such real estate, and the costs of the removal of these institutions must be covered by the state budget. The Act concerned has been examined in terms of constitutionality. The Constitutional Court held in its decision brought thereon the followings: partial re-privatization in favor of the Churches – and for nobody else but for the churches – is constitutional as the partial compensation for the grave injury suffered by the churches serves to restore their functionability and to establish their operational ability and to for ensure the freedom of religion.<sup>40</sup>

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<sup>39</sup> Act No. XXXII of the year 1991 on settlement of ownership in respect of the former real estate of Churches.

<sup>40</sup> Decision No. 4/1993. (II. 12.) AB, ABH 1993, 48.; *Schanda, B.*, The Relationship between State and Church in Hungary: The Financing of the Church, in *The Law of Religious Identity. Modes for Post-Communism*, A. *Sajó/S. Avineri* (Eds.), The Hague/London/Boston 1999, 175, 187; *Dobszay, J.*, Restoring Church Property

The Government has concluded an agreement with the Holy See and later with a number of other denominations on their property claims. Most of the denominations opted for a financial compensation paid every year (“Staatsleistung”) instead of getting back all the buildings they were entitled to. An other part of the buildings listed in the agreements are to be transferred to the churches until the extended deadline of 2011.

## 8.2 FUNDING OF THE CHURCHES

Since the tax year 1997, taxpayers can offer 1% of their income tax to registered churches (an other 1% can be offered to non-profit organizations). This system should replace the direct subsidies after a few years of transition. After a few experimental years the system will be reviewed. One of the weak points of the system is that – contrary to the Italian model – all taxpayers decide on the percentage of their own income tax: if the system is a personalized form of subsidizing, equality of the “votes” would be preferable. As the income tax is progressive, differences in incomes are even enlarged by the system.<sup>41</sup> The first experimental years showed that practically only the churchgoers were ready to fill in the form to direct this share of their income tax to their churches (the percentage of taxpayers who made use of this new possibility was not much higher than 10% in the first two years of the new system). Possible changes in the income tax system may undermine the system too.

From the aspect of church autonomy it is important to note that no church is obliged to accept public funds of any kind.

## 8.3 STATUS OF CHURCHES

The present system of registration of religious communities has been the target of criticism almost since the law on churches was passed in 1990. Many representatives of traditional churches felt offended having been put into the same legal category as “sects”. Some Protestant ecclesiologists claimed a status in public law for the mainstream communities<sup>42</sup> (which

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Constitutionally, in East European Constitutional Review, Spring 1998, 91.

<sup>41</sup> This has been argued unsuccessfully before the Constitutional Court: only a strong dissent shared the opinion of the author raising doubts about the constitutionality of the regulation. Decision No. 10/1998. (IV. 8.) AB.

<sup>42</sup> E.g. *Boleratzky, L.*, A magyar evangélikus egyházjog alapjai és forrásai, II. rész (The fundamentals and the sources of the Hungarian Lutheran ecclesiastical law), Budapest 1998, 381.

would hardly comply with the principle of separation as elaborated in the recent years). It is true that an unexpectedly large number of “churches” has been registered and in a number of cases the religious nature of these organizations is doubtful. (The case of Scientology is well known, but the UFO-believers and the association of witches could be mentioned too as examples for the broadness of the requirements.) Some individual members of Parliament handed in motions to change the law in 1993 and in 1998, raising the necessary minimum number of founders to 10.000 or requiring at least 100 years of presence in the country of the given faith. They would have imposed the additional requirement of submitting a creed with the registration, and that this should not violate the public order, health, morals and rights of others. These motions were not taken on the agenda of the Parliament; however, they contributed to the discussion over the status of churches. The easy accessibility of the legal entity “church” has turned to be in fact an invitation to various controversial groups and even to doubtful commercial undertakings to get this privileged status. The government that came into power in 1998 has the intention to have the law changed.

A feasible compromise on the amendment would be to exclude the possibility of registering groups of non-religious character as “churches”. If the law would provide a definition of religion and if it would define the activities that cannot be considered as religious the court practice of registration could be changed. In this case not merely formal criteria would matter but judges deciding on registration would have to decide if a group is of religious character or not.<sup>43</sup> It is to be noted that the free exercise of religion (neither in private nor in public, neither alone, nor in community with others) is not bound to any kind of legal form: unregistered groups enjoy the same freedom as registered ones.

### III. THE PRINCIPLES OF THE HUNGARIAN SYSTEM OF STATE-CHURCH RELATIONS CAN BE SUMMARIZED AS FOLLOWS:

The state should remain neutral in matters concerning ideology, there should be no official ideology, religious or secular. The state should not identify itself with any ideology. The state should not enter in institutional

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<sup>43</sup> The concept of the amendment was published: *Schanda, B.*, Szakmai koncepció a lelkiismereti és vallásszabadságról valamint az egyházakról szóló 1990. évi IV. törvény módosítására, in *Magyar Jog* 47 (2000) 1, 10-17.

entanglement with any organization that is based on a (religious – or secular) ideology. Freedom of religion and freedom from religion (positive and negative religious freedom) are equally protected – neither case should be treated as an exception.

Church and state should be separated: the religious communities should have no possibility to make use of state power. The state should respect the autonomy of the religious organizations and should not interfere with their internal affairs. The state provides an appropriate legal form for religious organizations and registers those who meet the formal criteria. The registered religious organizations have the same legal standing; there shall be no privileged or unfavored group. Different levels of accommodation are not permissible. However, the fact that there are significant differences between religious communities and the more numerous, more established religions are easier to practice, is outside of the scope of the Constitution.

The Hungarian model that emerged in the 90ies can be described as a benevolent separation well respecting the freedom of churches. The state has an active role in ensuring freedom: neutrality does not mean indifference. The state should promote the environment in which ideas and values (not to be judged by the state) can be born. The state has to keep itself out from the world of ideas and values however it should appreciate and enhance their existence (even by using public funds). It should work out legalized compromises in issues where constitutional rights and interests come into conflict. The state also protects religion from attacks of third parties.