Aiming for State Neutrality in Matters of Religion: The Hungarian Record

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According to Article 60(3) of the Hungarian Constitution "church and the State shall operate in separation in the Republic of Hungary." Still, the story of freedom of religion in Hungary, at least when told by lawyers, is an account of government assistance supporting religious activities, more precisely, churches. The gravity of the role of the state in matters of religion is striking, especially when compared with other civil and political rights: e.g. freedom of expression. Accounts on free speech in Hungary are about the scope of constitutional protection ensuring the uninhibited exercise of an individual liberty without governmental interference. In contrast, religious exercise is often presented as a right which is exercised predominantly via churches heavily supported by the state. This imbalance in scholarly representations mirrors trends traceable in the jurisprudence of the Hungarian Constitutional Court on freedom of religion.[1] Such an active involvement of the state in and around religious and church activities seems at least dubious, may one take the constitutionally mandated separation of church and state seriously.

Excellent accounts of the developments in Hungarian church-state relations, describing the numerous forms of state assistance and funding made available to churches, and to a lesser extent other religious communities, are also available in English.[2] Therefore, instead of offering a systemic account of various governmental measures promoting freedom of religion, and churches, this article hopes to elucidate at least some of the

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1. LÁSZLÓ SÓLYOM, AZ ALKOTMÁNYBÍRÁSKODÁS KEZDETEI MAGYARORSZÁGON [THE BEGINNINGS OF CONSTITUTIONAL REVIEW IN HUNGARY] 498-503 (Osiris 2001) (former Chief Justice Sólyom acknowledging this trend and explaining that the Constitutional Court was prompted in this direction by petitions which sought to protect the constitutional position of churches, and not of religious organizations).

2. *See*, *e.g.*, Zsolt Enyedi, *The Contested Politics of Positive State Neutrality in Hungary*, 26 (1) W. EUR. POL. 157-176 (2003); Helen Hartnell, *The First Five-Year Span (1989-1994): Law and Religion in Post-Communist Hungary*, 1996 BYU L. REV. 731 (1996); Balázs Schanda, *Freedom of Religion and Minority Religions in Hungary*, 12 (4) SOC. JUST. RES. 297 (1999) [hereinafter Schanda, *Minority Religions*]; Balázs Schanda, *Church and State in Hungary,* 121-140, *in* LAW AND RELIGION IN POST-COMMUNIST EUROPE (Silvio Ferrari & W. Cole Duham eds., 2003); Balázs Schanda, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Hungary*, 19 EMORY INT'L L. REV. 889 (2005) [hereinafter Schanda, *Permissible Scope*].

constitutional paradoxes of 'active state neutrality';[3] i.e., state assistance to churches under a Constitution which calls for freedom of religion and separation of church and state.

The first part of the article offers a glance on matters of freedom of religion and the position of religious organizations at the moment of transition to democracy. This is followed by a concise overview of the Hungarian Constitutional Court's jurisprudence outlining the scope of constitutionally protected religious freedom and the principles of church – state relations in the second part. Here the article explains how 'active state neutrality' is translated into (often discretionary) government funding for religious activities, and how it often results in unequal treatment of religious organizations. Informed by these lessons, the last part of this article provides a critical account of jurisprudence in matters which are interlinked with religious exercise, like the role of state courts in and around ecclesiastical disputes, or the relevance of considerations about religious freedoms in custody decisions in family court or in hate speech jurisprudence.

As already this brief description suggests, the analysis draws primarily on examples from Hungarian jurisprudence; at times presenting Hungarian court decisions in a broader, comparative perspective. Following this approach the article demonstrates how discretionary decisions of the government in allocating funding to churches are matched by often unpredictable judicial decisions in matters affecting religious freedoms. This unpredictability presents a constitutional problem not only because it undermines legal certainty, but also because it hints at a lack of clear principles which would keep the state away from matters of religious belief and exercise.

1 - THE BEGINNINGS OF FREEDOM OF RELIGION IN AN EMERGING DEMOCRACY

The constitutional overhaul of 1989 inserted the following provision in the Constitution's Chapter XII on Fundamental Rights and Duties:

> Article 60
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> (1) In the Republic of Hungary everyone has the right to freedom of thought, freedom of conscience and freedom of religion.
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> (2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.

3. *See* Enyedi, *supra* note 2, at 161 (stating the terms).

> (3) The church and the State shall operate in separation in the Republic of Hungary.
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> (4) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the freedom of belief and religion.[4]

Entrenching the promises of this constitutional provision the first act of parliament was an attempt at a comprehensive regulation of freedom of religion and religious associations and was passed by the outgoing Communist parliament, before the first democratic elections.[5] This act made possible the registration of churches.[6] Under the act churches may perform any religious activity which does not violate the Constitution or is not otherwise illegal.[7]

When reading about these, undoubtedly significant and positive legal and constitutional developments, it is important to keep in mind that the seeds of the current protection of freedom of religion in Hungary were planted in 1989 at a time of transition to democracy. Explaining the position of the emerging democracies and of the churches in this context Giovanni Barberini notes that during Communism while some churches cooperated with the regime to a certain degree, other churches were clearly in opposition.[8] Furthermore, in many countries the reactions of the newly emerging democratic states towards churches were characterized by deep-seated bureaucratic instincts of preserved administrative structures. The logic of governmental administration mandates regulation and registration of religious entities, and is – in general – not hospitable towards new denominations.[9] When reading these rules "[o]ne can underscore the contrast between the declared will to guarantee by all means the exercise of religious freedom and the tendency to not give up forms of control aimed at safeguarding the interests of the state and aimed at providing the assurance that churches align themselves in the legal 'democratic' order."[10] Even a

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4. The full text of the Hungarian Constitution (Act No. 20 of 1949) is available in English at http://www.mkab.hu/en/enpage5.htm (Last visited: April 20, 2006). All references are to this version. Unless indicated otherwise, all translations from the Hungarian are mine.

5. Act No. 4 of 1990 on Freedom of Conscience, Religion and Churches. An English translation of the act along with other acts of parliament regulation church-state relations, and also translations of concordats (agreements between the Hungarian state and various churches), *in* LEGISLATION ON CHURCH-STATE RELATIONS IN HUNGARY (Balázs Schanda ed., Ministry of Cultural Heritage 2002).

6. Act No. 4 of 1990, *supra* note 5, arts. 9-13.

7. *Id.* at art. 8(2).

8. Giovanni Barberini, *Religious Freedom in the Process of Democratization of Central and Eastern European States*, 7-21, *in* LAW AND RELIGION IN POST-COMMUNIST EUROPE 10-11 (Silvio Ferrari & W. Cole Duham eds., 2003). On the Hungarian context *see also* Enyedi, *supra* note 2, at 160.

9. Barberini, *supra* note 8, at 12.

10. *Id.*

brief look at the early Hungarian events allows one to note that the Hungarian constitutional and legal developments do not seem to constitute an exception.

Furthermore, when looking at the early years of transition to democracy it is fair to say, that issues of freedom of religion did not receive as much attention as political liberties. At the time churches operating in Hungary played a modest role in creating the institutional framework of the post-Communist state. Indeed, when Hungarian developments on freedom of religion are under review, as Hungarian constitutionalist and now constitutional justice Péter Paczolay has pointed out, one has to take into account what he calls a 'peculiar time-paradox:' while after WWII many European democracy's churches redefined their social role and teachings, in the Communist hemisphere churches and their followers existed within the confines of state-mandated atheism.[11] Transition to democracy throughout the post-Communist region brought a unique opportunity for the large, old churches to reinvent themselves - and a number of so-called 'new religions' or 'sects' to co-exists with, a real problem in countries which are not used to religious pluralism and toleration.[12]

In search of their space and mission amongst the often rather elastic realities of transition to democracy, Zsolt Enyedi and Joan O'Mahony explain that churches in Eastern Europe came to play a special role in the public space:

> [Churches] were rarely instrumental in shaping the institutional design of the new regimes the churches gained political significance. Their oppression under communism granted them considerable moral capital, and the dominant churches were obvious allies in the attempts of the new political elites to redefine their national identity, and to accumulate legitimacy behind the new governments. Consequently, churches had access to political elites, a degree of influence on their decisions, and were able to speak with some authority in the early public debates on the post-communist future.[13]

These political, constitutional and legal developments are best understood when situated in their broader societal setting. When talking about freedom of religion in Hungary, it is important to note that while over fifteen years after the turmoil of transition, this ethnically almost

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11. Péter Paczolay, *The Role of Religion in Reconstructing Politics in Hungary,* 4 CARDOZO J. INT'L AND COMP. L. 261, 264-265 (1996). *See* Leslie Laszlo, *The Catholic Church in Hungary*, *in* CATHOLICISM AND POLITICS IN COMMUNIST SOCIETIES 156-180 (Pedro Ramet ed., Duke Univ. Press 1990) (accounting the history of the Catholic church under the Communist era).

12. Barberini, *supra* note 8, at 21.

13. Zsolt Enyedi & Joan O'Mahony, *Churches and Consolidation of Democratic Culture: Difference and Convergence in the Czech Republic and Hungary*, 11(4) DEMOCRATIZATION 171-91 (2004).

homogeneous polity is enriched by a plethora of religious movements and organizations (churches being only one legally recognized form of religious community), the Hungarian population, as a whole, is not deeply religious.

Strict enforcement of data protection regulations impedes the collection of official statistics on matters of conscience. The 2001 national census contained an optional question on religious affiliation, and ninety percent of the population provided a response. According to the census results, fifty-five percent of the country's citizens are Roman Catholic, fifteen percent are members of the Reformed Church, three percent are members of the Lutheran Church, and less than one percent are followers of Judaism. These four faiths comprise the country's so-called 'historic' religions. Three percent of respondents identified themselves as Greek Catholics, and fifteen percent of respondents declared no religious affiliation. The remaining percentage of the population is divided between a number of other denominations. The largest among these is the Congregation of Faith, a Hungarian evangelical Christian movement. Other denominations include a broad range of Christian groups, including five Orthodox denominations. In addition, there are seven Buddhist denominations and three Islamic communities. The courts have registered 144 religious groups.[14]

It is against this background and in this broader setting where the political branches, the Constitutional Court and ordinary courts under the direction of the Supreme Court[15] are supposed to operate without intruding upon the religious freedoms of the members of the polity.

2 - FROM FREE EXERCISE TO PROMOTING PREFERRED CHURCHES: NEUTRALITY? ACCOMMODATION? COOOPERATION?

As Balázs Schanda, an internationally acknowledged expert of Hungarian freedom of religion issues, observed recently, in Hungary "[s]o far there have been no major cases where the breach of the free manifestation of religion or belief occurred."[16] Following up on this point in practice one may find that the problem of the Islamic veil resulting in

14. U.S. Bureau of Democracy, Human Rights, and Labor International: Religious Freedom Report 2004, *available at* http://www.state.gov/g/drl/rls/irf/2004/35459.htm (Last visited: April 20, 2006). *See*, *e.g.*, Schanda, *Minority Religions*, *supra* note 2, at 298-301 (giving data and trends from earlier years).

15. In order to fully grasp the impact of the jurisprudence of the two highest courts in Hungary, it is crucial to note that the Hungarian Constitutional Court is not part of the ordinary judiciary and is not a regular court of law. The apex court of the ordinary judiciary is the Supreme Court which is in effect a regular court of appeal, without the power of granting leave. Neither the Constitutional Court, nor the Supreme Court follows a doctrine of precedent. While the decisions of the Constitutional Court are reported in their full text in the Hungarian Official Journal and in the Bulletin of the Constitutional Court, the decisions of the Supreme Court are reported in the form of case summaries in a monthly selection prepared by the Supreme Court.

16. Schanda, *Permissible Scope, supra* note 2, at 896.

constitutional and ordinary litigation throughout Europe has not occurred in Hungary. Also, while Jehovah's Witnesses have been disadvantaged for decades, they do not face persecution and may proselytize without state interference.[17] At another place Schanda remarked that indeed free exercise cases appearing before the European Court of Human Rights ("ECHR") could not have happened in Hungary, for those disputes involved challenges against such legal prohibitions limiting religious exercise which do not exist under Hungarian law.[18]

It is in the midst of such a peaceful setting that the Hungarian Constitutional Court developed its jurisprudence on freedom of religion. Unlike many other rights provisions in the Hungarian Constitution, Article 60 on the freedom of religion is relatively detailed, giving a fair impression on what is meant to belong within the constitutional framework of religious freedom.[19] The Hungarian Constitutional Court took the lead in interpreting the contents and confines of the constitutional protection of freedom of religion in Hungary. While the Hungarian Constitutional Court has always been eager to consult foreign and international human rights jurisprudence in order to inform its own construction of the Constitution's basic rights provisions, in the domain of freedom of religion constitutional justices were predominantly influenced by the jurisprudence of the German Constitutional Court. In comparison, the influence of the jurisprudence of the ECHR is relatively modest on Hungarian freedom of religion jurisprudence.

In the lead decision[20] exposing for the first time its understanding of freedom of religion the Constitutional Court presented freedom of religion

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17. Nazarens and Adventist - small and at the time new religious movements in Hungary - reached an agreement with the Communist government to allow their members non-armed service in the military. Jehovah's Witnesses were not part of such a deal, as a result typically facing thirty-six months in prison for refusing military service. *See* Miklós Tomka, *Vallás és közélet 1989-ben [Religion and public affairs in 1989]* 108-115, *in* MAGYARORSZÁG POLITIKAI ÉVKÖNYVE 1990 [THE POLITICAL YEARBOOK OF HUNGARY 1990] 109-10 (Sándor Kurtán, Péter Sándor & László Vass eds., Aula - OMIKK 1990). Jehovah's Witnesses who refused to accept alternative military service as a matter of conscientious objection faced suspended prison sentences even in the early 1990's. *See* BH. 1992.367 and BH. 1992.681.

18. Balázs Schanda, *Religious Freedom Issues in Hungary*, 2002 B.Y.U. L. REV. 405, 406 (2002).

19. The article covers matters of freedom of religion and does not discuss constitutional jurisprudence concerning freedom of conscience. The leading case defining freedom of conscience is 64/1991(XII. 17.) AB decision on abortion.

20. 4/1993 (II. 12.) AB decision, *available in English in* LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, THE HUNGARIAN CONSTITUTIONAL COURT 246-66 (Univ. of Michigan Press 2000). References below are to this translation.

in strong connection with the right to human dignity[21] and also explained religious liberty as an aspect of the "fundamental right to communication."[22] Thereafter, the Constitutional Court continued with explaining the constitutional implications of the separation of church and state, and its understanding of state neutrality.

> From the principle of separation it follows that the State must not be institutionally attached to the churches or any one church; that the State must not identify itself with the teachings of any church; and that the State must not interfere with the internal workings of any church, and especially must not take a stance in matters of religious truths. From this . . . it also follows that the State must treat churches equally. . . .
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> The separation of church and State, however, does not affect the duty of the State to provide both positive and negative freedom of religion without discrimination. . . . From the neutrality of the State it does not follow that the State should endorse the negative right to freedom of religion, let alone religious indifference. . . .
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> The State's neutrality in connection with the right to freedom of religion does not mean inactivity. It is the State's obligation to ensure a field for manifesting, teaching and following in life one's religious convictions for the operation of churches as well as for rejecting religion or keeping silent on it.[23]

2.1 – What follows from 'active state neutrality'?

As was already mentioned, the Hungarian Constitution clearly calls for the separation of church and state.[24] The Constitutional Court, however, has knowingly avoided construing this provision in such a manner as the prohibition of establishment in the First Amendment of the U.S. Constitution.[25] Instead, in the instant case this rationale was used to justify the government's decision to return to churches such pieces of real property that were nationalized from the churches without compensation between

21. *Cf.* The German Constitutional Court's approach in the Blood Transfusion case (32 BVerfGE 98), *in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 450 (Duke University Press 2d ed. 1997).

22. The Constitutional Court first characterized freedom of religion as an aspect of the freedom of communication in 30/1992 (V. 26.) AB decision. For a criticism of this construction see GÁBOR HALMAI, A VÉLEMÉNYSZABADSÁG HATÁRAI [THE LIMITS OF FREEDOM OF OPINION] 111-14 (Atlantisz 1996).

23. 4/1993 (II. 12.) AB decision, *supra* note 20, at 252-54. *Cf.* Classroom Crucifix II case (93 BVerfGE 1), *in* KOMMERS, THE CONSTITUTITONAL JURISPRUDENCE, *supra* note 21, at 473-74.

24. A MAGYAR KOZTARSASAG ALKOTMANYA art. 60(3).

25. *See* SÓLYOM, *supra* note 1, at 491.

1948 and 1953.[26] Under the act, only such buildings were returned which served one of the following purposes: religious services, house monasteries, education, health care and social welfare, or cultural aims.[27] In this case the Constitutional Court further said that the gesture of returning formerly church-owned property to its previous owner is not simply a remedy for past injustices, but is best seen as the government's fulfillment of its duty to provide for the material conditions of the free exercise of religion.[28] Thus, the understanding of state neutrality as presented by the Hungarian Constitutional Court allows for massive state support of a wide range of activities performed by religious organizations, among them churches in particular.

In the instant case the major issue was public funding of education institutions operated by churches. The need for state funds supplied to church-operated schools was derived not solely from the duty of the state to promote religious activities, but also the duty of the state to ensure that parents have access to the type of education they would choose for their children (Article 67(2), Hungarian Constitution). From this strong foundation it was not difficult for the Constitutional Court to rule that church-operated educational institutions are entitled to supplementary grants to the extent and in proportion they perform public service tasks otherwise undertaken by the central or the local government.[29] Note that commentators carefully distinguish state funding of churches on the one hand from state funding of educational institutions operated by churches on the other.[30] After all, when churches perform public service tasks, they undertake obligations which the state has defined before as worthy of public funding. In this respect former Chief Justice László Sólyom noted carefully, that the public service justification might become problematic in the case of funding church-operated institutions of higher education.[31]

Separation of church and state as understood by the Hungarian Constitutional Court does not prohibit direct funding paid to churches, funding for public service tasks provided by churches, and such less direct forms of funding as redirected taxes.[32] Some of these funds and benefits are

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26. This certainly meant that churches which did not operate in Hungary when the nationalizations were performed did not receive buildings under the scheme.

27. Act No. 32 of 1991 (settling the legal status of former church property, art. 2(2)).

28. 4/1993 (II. 12.) AB decision, *supra* note 20, at 261.

29. 22/1997 (IV. 25.) AB decision. In this case the Constitutional Court did not invalidate the challenged legal norms, but rather appended a condition of constitution conform interpretation to it.

30. *See*, *e.g.*, Gábor Schweitzer, *A világnézeti semlegesség ára [The price of religious neutrality]*, *in* 1997/2 FUNDAMENTUM 76-80, at 78.

31. SÓLYOM, *supra* note 1, at 501 n.158 (adding that the Constitutional Court did not raise this issue in its decisions).

32. Since most English language accounts on state and church relations in Hungary provide a detailed description of various forms of state assistance the present article will not cover them in detail. For guidance see sources listed *supra* note 2.

provided to particular churches on the basis of bilateral agreements entered into between the state and a church, while other sources of government assistance are simple discretionary grants. As Zsolt Enyedi explains the system of state support depends to a significant extent on the individual bargaining capacities of various churches under a particular Cabinet.[33] The spirit and framework of such informal negotiations explains at least in part why the system of state assistance made up of predominantly discretionary grants has not been challenged before the Constitutional Court so far. The Constitutional Court's jurisprudence on discrimination between various religious organizations might provide further insight.

2.2 – Distinctions between churches and religious organizations: where history grants permission

The consequences of this positive or active understanding of state neutrality in matters of religion are far reaching. In the leading cases concerning freedom of religion discussed above the Hungarian Constitutional Court also had to expose its understanding of equality of religions, after all parliament excluded those churches from the distribution scheme the property of which was not nationalized between 1948 and 1953. In response to the discrimination claim the Constitutional Court said that the measure which did supply all churches with some form of property, but expressly benefited those churches which used to own property in 1948 was not discriminatory, as it treated different kinds of churches differently. In its subsequent decisions concerning legal norms where the government distinguished between various types of churches the Constitutional Court followed the same line of argument.

When petitioners challenged the statutory condition on the registration of churches which requires at least 100 believers to establish a church,[34] constitutional justices said that it is a matter of historic practicality that older churches will find it easier to cooperate with the state, yet, this fact of life does not give rise to a constitutional problem. With a slightly euphemistic expression the 100-member minimum might be translated as an indicator of a "minimal social acceptance."[35] While serving as proof of minimal social acceptance might be one of the threshold's functions, note that in its jurisprudence on church registration the Hungarian Supreme Court made clear that the 100 signatures shall be collected on the same day, at the same meeting where the decision to found a church is made.[36]

33. Enyedi, *supra* note 2, at 167.

34. 8/1993 (II. 27.) AB decision. The requirement is set forth in Act No. 4 of 1990, *supra* note 5, art. 9(1)(a).

35. Schanda, *Permissible Scope*, *supra* note 2, at 899.

36. In the case the Supreme Court rejected rosters of supporters which were dated on two consecutive days. *See* BH. 1994.696.

In the case concerning the threshold for registration the Constitutional Court was eager to emphasize that lack of registration shall not prevent communities of believers from practicing their religion. It has been pointed out early on, however, that in Hungary the distinction between churches and other religious organizations is not merely a legal nicety. Churches enjoy numerous benefits under the law including legal personality. Churches also benefited from tax exemptions which are not available to religious organizations that are not registered as churches. The Constitutional Court was apparently not sensitive to such practicalities attached to operating a religious organization on a daily basis.

True, the Hungarian rules of registering churches are not particularly stringent, even with the 100-person threshold in effect. Unlike elsewhere, in Hungary the Church of Scientology gained recognition as a registered church without difficulties.[37] Also, according to Schanda, an unexpectedly high number of churches were registered under the act, noting that in some cases the religious nature of the organization registered is at least doubtful and at least some of these entities are commercial ventures.[38] Nonetheless, refusals of registration are not completely unprecedented. While in most cases courts refuse registration on formal grounds, in one reported case the Supreme Court agreed with refusing registration to an allegedly religious organization which sought to promote the superiority of the Hungarian race.[39]

The impact of the Constitutional Court's approach, which refused to acknowledge the constitutional issue presented by a statutory distinction between organizations of believers, and even between churches became even more apparent in a subsequent case where petitioners challenged the Cabinet decree on the Army Chaplaincy. The decree requires the chaplains to come from four specified denominations (Roman Catholic, Reformed, Evangelical and Jewish).[40] The preamble of the Cabinet decree explains that the Chaplaincy was established in this particular manner upon agreements concluded by the government and these "historic churches."[41] In this case, the Constitutional Court upheld the scheme introduced by the Cabinet.[42] The justices were satisfied with seeing that the establishment of the Chaplaincy was preceded by a voluntary opinion poll in the armed

37. According to Chief Justice Sólyom this fact also shows how easy it is to meet the registration criteria contained in the law. *See* SÓLYOM, *supra* note 1, at 502 n.160.

38. Schanda, *Minority Religions*, *supra* note 2, at 302.

39. EBH. 1999.159. Petitioners Viktor Sárosi and Albert Szabó, sought to register the Sun-cross - Disciples of God Religious Community [Napkereszt - Isten Tanítványai Vallási Közösség]. The organization did not intend to determine the beliefs of its members, the task of the members was meant to be the study of Hungarian history and the service of the Hungarian race. The court of first instance found that the aims of the organization were racist and were not religious in nature.

40. 61/1994 (IV. 20.) Korm. decree, art. 2(2).

41. Term quoted from the preamble of the decree.

42. 970/B/1994 AB decision, February 20, 1995.

forces concerning religious affiliation. The Constitutional Court was not bothered by the reference to "historic churches" in the decree either; remarking that the phrase stands for the historical record proper. According to the Constitutional Court the singling out of these particular denominations does not constitute unconstitutional discrimination or any other violation of freedom of religion. In the aftermath of the decision, a Chaplaincy for prisons was established along similar lines.[43] It is not much consolation, if any, that in youth disciplinary facilities minors shall have access to support and guidance of a representative of any religion of their choice, and communication with such a religious advisor shall be unsupervised.[44]

The problem of clear discrimination aside,[45] note that the distinction between historic churches and small churches or sects is not simply symbolic at times where newly emerging religious organizations were treated with suspicion even in high political circles. For instance, in 1993 Parliament's Committee on Human Rights, Minorities and Religion refused to allocate church-funding to four churches (i.e. the Society of Krishna Consciousness, Jehovah's Witnesses, Unifying Church and the Church of Scientology) because they were considered destructive (or subversive) sects.[46] The affected churches sought relief against this measure and the denigrating term used in relation to them in both ordinary courts and the Constitutional Court to no avail. In a brief order the Constitutional Court refused to deal with the petition for formal reasons. The constitutional justices said that the Constitutional Court does not have jurisdiction over an individual decision which does not constitute a legal norm, nor can it review the official reasons of a parliamentary decision.[47] In addition, one church sued the parliamentary committee for non-pecuniary damages in a civil procedure before the ordinary courts. The Supreme Court dismissed this suit, finding that the claim was filed against the parliamentary committee, when rather the Parliament would have been a proper respondent.[48] Having reached this conclusion, the Supreme Court did not consider on the merits the finding of the lower court submitting that the parliamentary committee exercised its freedom of expression in a

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43. 13/2000 (VII. 14.) IM decree.

44. 30/1997 (X. 11.) NM decree, art. 24(1)-(2) (providing that minors may exercise their religion within the house rules of the institution. The institution shall not keep any record of the minors' religious beliefs and shall not provide information to others).

45. *See* András Sajó, *A 'kisegyház' mint alkotmányjogi képtelenség, ['Small church' as constitutional non-sense]*, *in* 1999/2 FUNDAMENTUM 87-98 (showing the discriminatory impact of the distinction between historic churches and small churches).

46. *See* Enyedi, *supra* note 2, at 162.

47. 439/B/1993 AB order of December 14, 1993 (concerning the use of the term in the reasons attached to the parliamentary decision).

48. BH. 1997.276.

constitutional manner, and that classifying the plaintiff as a 'destructive sect' was covered by parliamentary privilege.

The Constitutional Court explained the constitutional significance of the history of religion in a neutral fashion in a case in which petitioners of Jewish faith challenged the provisions of the Labor Code prescribing the official days of rest.[49] Petitioners submitted that while Hungarian official holidays include such Christian festivals as Christmas, Easter or Pentecost, even the most central holidays of the Jewish faith are not official holidays. Petitioners claimed this regulation is discriminatory and prevents them from the proper exercise of freedom of religion. The Constitutional Court rejected the petition, finding that the roster of official holidays matches societal practices on days of rest, and does not have a religious connotation anymore. Jewish holidays are not included among national holidays because they are not part of a wider national tradition. In the Hungarian literature, this decision is usually explained by way of an analogy recalling the U.S. Supreme Court's decision on Sunday laws in *McGowan v. Maryland*.[50] While Sunday closing laws had adverse economic effects on business-owners, the schedule of national holidays following 'traditional' holidays might have even deeper adverse effects in multi-cultural and multi-ethnic societies. Consider the problem courts might face when determining parental visitation rights between Muslim and a Christian parents, telling the Christian parent that Easter or Pentecost is just a long weekend which the child might as well spend with her father according to an otherwise acceptable, regular bi-weekly schedule.[51]

The above cases clearly demonstrate that the Hungarian Constitutional Court applies the requirement of equal treatment of religious organizations with a unique spin informed by the lessons of history as construed by the constitutional justices. Indeed, in one major case where the Constitutional Court did apply the requirement of equal treatment in a facially neutral fashion constitutional justices exempted pastors of all religions from mandatory military service.[52] The Constitutional Court emphasized that such an exemption could not be solely justified on the ground that in the past priests used to enjoy such a privilege. Under the Constitution, positive discrimination of this kind might be justified, for the exemption of religious leaders promotes the exercise of freedom of religion in their communities and churches. Note, however, that the practical impact of this exemption is significantly diminished today due to the abolition of mandatory military service in Hungary.

Note that references to the past as well as to some churches' historical contributions are a shared trait of all cases where the Constitutional Court

49. 10/1993 (II. 27.) AB decision.
50. 366 U.S. 420 (1961).
51. *See* BH. 2004.184.
52. 46/1994 (X. 21.) AB decision.

countersigned the more advantageous position of "historic churches" over the others. This preferential treatment is not confined to issues in freedom of religion. In a more recent decision which concerned the legal regulation of names of married women, the Constitutional Court consulted the leaders of three historic churches on their practices of registering freshly married women's names, only to find that churches fully observed state law in this respect.[53] Such a courteous gesture appears at best unnecessary, may one be reminded that since 1948 the registry function of churches was overtaken by the state. Nonetheless, this gesture tellingly illustrates the intellectual reflexes of constitutional justices even in matters where freedom of religion is not at stake directly.

3 – IS STATE NEUTRALITY POSSIBLE BEYOND STATE ASSISTANCE PROMOTING FREEDOM OF RELIGION?

Many examples could be brought to illustrate instances where in matters of religion state neutrality was observed or -to the contrary- violated. Any selection of cases could be justified along high principles and the same collection could be challenged as arbitrary, depending on ones' judgment and intellectual predisposition. The examples below are offered to demonstrate how far considerations of neutrality would take government actors, and will also offer insight into the justifications replacing a neutral stance.

3.1 - Avoiding potential state interference with internal church matters: the outlines of church autonomy

Ordinary courts and the Constitutional Court appear keen on preserving strict separation of church and state when asked to interfere in internal church affairs and matters of church law. As it was also highlighted by the Constitutional Court in a different setting, it follows from the separation of church and state that the state should respect the autonomy of churches.[54] As the ECHR explained in *Hasan and Chaush v. Bulgaria,*

> [w]here the organization of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified state interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a

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53. 58/2001 (XII. 7.) AB decision.

54. *See* Ronald Minnerath, *The Right to Autonomy in Religious Affairs*, *in* FACILITATING FREEDOM OF RELIGION OR BELIEF, A DESKBOOK 291-319 (Tore Lindholm, W. Cole Durham & Bahia G. Tahzib-Lie eds., Brill 2004) (providing an excellent comparative account on church autonomy).

> democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[55]

Although, a church as a legal entity comes to fore via state registration,[56] the law imposed relatively few criteria concerning the internal organization of church structures. Accordingly, under Hungarian law, churches shall be organized in self-governing format;[57] and for the purposes of registration shall provide their bylaws and the name(s) of their legal representative(s).[58] In excess of these conditions, Hungarian law does not include further requirements regarding the internal structures of churches. Certainly, religious organizations not seeking recognition and registration as churches under Hungarian law do not have to meet even these requirements; lack of registration is not a bar to the performance of religious practices.

In the course of even such a minimal invasive registration process, however, state courts might end up in a position where they need to inquire into the inner structures of a religious organization. As examples from Hungarian[59] and also from ECHR jurisprudence[60] indicate state courts have to ascertain whether registration of a religious entity is sought by persons who are entitled to represent the church before state authorities.

A potentially invasive judicial inquiry at the initial registration into the internal operations of a religious organization yields a status under Hungarian law, which shields the inner operations of churches from state interference to a considerable degree. Under Hungarian law, even registered churches are exempt from certain legal regulations which would apply to the internal affairs of secular organizations. For instance, the internal records of churches are expressly exempt from the requirements of the data protection law.[61] This exemption is all the more noteworthy as records of personal data collected by churches are most likely to contain sensitive data (i.e., religious affiliation). This exemption for churches from rules applicable to data-holders matches the requirements of the act on freedom of conscience, religion and churches according to which the state

55. Hasan and Chaush v. Bulgaria, Application No. 30985/96, para. 62 (26 October 2000).

56. Act No. 4 of 1990, art. 13(1).

57. *Id.* art. 8(1).

58. *Id.* art. 10(2).

59. BH. 1996.58; BH. 1996.282; BH. 1997.367 (holding that the court before which the registration of a church is sought ex officio has to examine the credentials of the applicant).

60. *See* Minnerath, *The Right to Autonomy, supra* note 54, at 311-14 (providing an assessment of ECHR jurisprudence).

61. Act No. 63 of 1992 on the Protection of Personal Data and Access to Public Information art. 30(b). Data on religious affiliation/belief are considered sensitive data under the act (art. 2 (2)) and as such fall under more stringent requirements of protection when it comes to their collection, storage, processing or transfer.

should not keep records on religious affiliation.[62] Churches are also exempt from the requirements of the act on freedom of assembly in respect of their services, events and processions.[63]

As an important safeguard of church autonomy, according to the act on freedom of conscience and religion, state coercion (i.e. government power) cannot be used to enforce the internal laws of a church.[64] The Constitutional Court interpreted this statutory provision in a case[65] when a petitioner filing an individual constitutional complaint argued that denying access to state courts against the decisions of church courts violates the constitutional right of access to court.[66] The constitutional complaint arose from lengthy litigation surrounding petitioner's retirement from chairing a department at the Academy of Theology of the Reformed Church. Petitioner challenged without success his own statement on retirement in the course of a disciplinary procedure conducted by the Synodial Court of the Reformed Church. Subsequently, petitioner sued the Reformed Church for damages in state court without success and also started proceedings in a labor court. The lower courts and the Supreme Court refused to decide on the merits of these cases with reference to the statutory bar on state courts from enforcing church law. In this case, the Constitutional Court emphasized that due to the Constitution's stipulation of separation of church and state (Article 60(3)) the state should respect the autonomy of churches. The right to access the court as defined in the Constitution is available to churches and to persons in the service of the church to the extent they seek the enforcement of state law in state courts.[67]

In this decision, however, the Constitutional Court did not decide whether the jurisdiction of state courts or the Constitutional Court extends to such cases where petitioners claim that the decision of a church authority violated their basic constitutional rights (other than the right of access to court) or other legal rights. This issue has practical significance in light of the fact that the Hungarian Supreme Court repeatedly ruled on the application of the bar on state courts in enforcing church law in cases where the lines did not appear this clear.

In one case, ordinary courts were approached by a parish of the Catholic Church seeking the eviction of a retired priest from a house which was owned by the Catholic Church. In its decision, in an extraordinary

62. Act No. 4 of 1990, *supra* note 5, art. 3(2).

63. Act No. 3 of 1989 on Freedom of Assembly, art. 3 (b).

64. Act No. 4 of 1990, *supra* note 5, art. 15(2) ("State coercion cannot be used to enforce the internal laws and regulations of the church.").

65. 32/2003 (VI. 4.) AB decision.

66. A MAGYAR KOZTARSASAG ALKOTMANYA, art. 57.

67. Act No. 4 of 1990, art. 15(2) (attaching this latter requirement as a condition of constitutional application to art. 15(2) of the act on freedom of conscience, religion and churches). *See also* 768/D/2002 AB (reaffirming this holding, handed down on September 9, 2003).

review procedure, the Supreme Court said that the statutory provision which prevents state courts from enforcing church law means that state coercion should not be applied in internal matters of the church. A property dispute under the Hungarian Civil Code, however, is not an internal matter of the Catholic Church, but an issue which might be entertained by Hungarian state courts without interfering with church autonomy.[68]

In another case recently before the Supreme Court a plaintiff challenged the allegedly illegal decision of an ecclesiastical court, claiming that it violated her reputation, right to work and freedom of expression.[69] The trial court, and on appeal the appellate court, dismissed the case for lack of jurisdiction. The courts made with reference to the act on freedom of conscience, religion and churches providing that state coercion should not be used to enforce the laws of the church. The Supreme Court, upon a petition for extraordinary review, found that petitioner in this case did not request the enforcement of church law against the church. Instead, as the Supreme Court pointed out, petitioner's claim was submitted under state law, requesting the protection of reputation. Therefore, this case illustrates that state courts are supposed to enforce not church law but state law - a task for which they do have jurisdiction.

Drawing the line between matters of state law and church law in disputes brought to state courts might become increasingly complicated, in part due to Hungary's membership in the European Union. True, the Declaration No. 11 on the Status of Churches and Non-confessional Organizations Annexed to the Final Act of the Treaty of Amsterdam states that the "Union will respect and does not prejudice the status under national law of churches and religious associations or communities in the Member States."[70] Nonetheless, state courts do face the task of applying such rules on equal protection and non-discrimination which bring exemptions awarded to churches into question. While the restricted availability of exemptions applicable to religious employment might be troubling for some,[71] recent litigation under the new Hungarian act on equal treatment and the promotion of equal opportunity[72] implementing numerous EU directives on equal treatment and equal opportunity[73] indicates that court

68. EBH. 2002.757. The Supreme Court mentioned the requirement of preserving church autonomy without referring to the Constitution.

69. BH. 2004.180.

70. Official Journal C 340 of 10 November 1997.

71. *See* Council Directive 2000/78/EC of November 27, 2000 (noting that this problem is not unaccounted for and establishing a general framework for equal treatment in employment and occupation at paragraph 24 makes it possible for member states to establish occupational requirements fitting the special employment needs of religious organizations). *See also* art. (4)(2) (describing that member States, however, are prevented from introducing new exceptions for religious employment).

72. Act No. 125 of 2003.

73. Art. 67 of the bill lists in particular Council Directive 76/207/EEC of February 9, 1976 on the implementation of the principle of equal treatment for men and women as

interference with the autonomy of religious institutions in order to enforce state legislation is becoming a problem in reality. This is so despite the fact that churches when acting in performance of religious activities are expressly exempted from the act and its requirements of equal treatment.[74]

It was under this act on equal treatment that a student of the 'Károli Gáspár' Reformed (Protestant) University challenged his dismissal from the theological faculty of the school due to his homosexuality. In addition, the Protestant University expressed in a statement the view that homosexuals were unacceptable as pastors or teachers of religion. 'Háttér', an NGO protecting the rights of LGBT people challenged the statement of the Protestant University in court under the act on equal treatment.[75] The act expressly prohibits discrimination on grounds of sexual orientation,[76] and it clearly does apply to institutions of higher education.[77] Háttér decided to sue the Károli University for its statement because Háttér was convinced, *inter alia*, that such a statement clearly directed at and disadvantaging homosexuals was unacceptable from an institution of higher education which receives government funding for its operation.[78]

The Metropolitan Court, acting as the trial court, found that the act on equal treatment was not applicable in the case[79] and held that when issuing its statement concerning homosexuality Károli University exercised its freedom of expression protected under the Hungarian Constitution. The appellate court accepted the freedom of expression argument of the trial

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regards to access to employment, vocational training and promotion, and working conditions, as amended by Council Directive 2002/73/EC; Council Directive 79/7/EEC of December 19, 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 86/378/EEC of July 24, 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 86/613/ EEC of December 11, 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; Council Directive 97/80/EC of December, 15 1997 on the burden of proof in cases of discrimination based on sex, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation.

74. Act No. 125 of 2003, art. 6 (1)(g).

75. The dismissed student instituted proceedings concerning student status which was separate from the suit brought against the Protestant University by the NGO Háttér. The student status of the dismissed student was restored by the Metropolitan Court before the NGO challenged the Protestant University's statement in court. The standing of the NGO was based on art. 19(1)(c) of Act No. 125 of 2003, which grants public interests standing to NGOs if a dispersed injury affects a larger group of persons.

76. Act No. 125 of 2003, art. 8(m).

77. Act No. 125 of 2003, art. 4(g).

78. The complete file of the procedure brought by Háttér is available in Hungarian at http://www.hatter.hu/karoli.htm (Last visited: April 20, 2006).

79. The Metropolitan Court also said that the exemption of the act on equal treatment shielding the religious activities of churches was irrelevant in the case.

court. Furthermore, the appellate court added that the statement was issued by Károli University in exercise of its religious capacities, and as such was exempted from the review power of the court under the act on equal treatment. As a further premise of its argument the appellate court stated that students on the theological faculty take an oath to respect the dogmas of the Church and its regulations.[80] In conclusion, the appellate court did not find the statement made by Károli University concerning homosexuals illegal. The Supreme Court sustained the decision of the appellate court.

Although in this case the courts did not find illegal the statements of Károli University denigrating homosexuals, it became clear that state courts are not barred from entertaining claims on the merits which challenge the legality of the internal actions of a church-run university. In this case, it was decisive that the statements issued by Károli University singled out the sexual orientation of past or present teachers of religion, and did not apply at large to all students enrolled in the university. The narrowness of this holding is therefore important to keep in mind; despite the fact that Hungarian courts were not sensitive at all to the argument that a church-operated university submits itself to certain lay rules when it accepts state funding for its operation as an institution of higher education.

3.2 - Can courts stay neutral when matters of religious belief or religious sentiments are at stake?

The reactions of ordinary courts in matters of religion may be tested in almost all settings of private life which might be exposed in courts, and internal affairs of families divided by religious conflicts require special care and sensitivity. The Hungarian Constitution does not only provide for free exercise, and call for separation of church and state, but also guarantees the rights of parents to guide the development of their children.[81]

Many of the tasks and duties of the state in family conflicts are specified in family law. In order to preserve the neutrality of the state in conflicts over religion within a family, the act on family law provides that parents exercising parental rights jointly may refer their conflicts to the guardianship agency, with the exception of conflicts concerning matters of religion and conscience.[82]

The Supreme Court also emphasized the importance of state neutrality in religious conflicts of families in a case where an employee of the city's family protection service challenged her dismissal from city employment due to her religious beliefs.[83] The Supreme Court did not take this case as a

80. The English translation of the decision of the appellate court is available at http://www.hatter.hu/karoliitelet2_eng.htm (Last visited: April 20, 2006).

81. Act No. 20 of 1949, art. 67(2).

82. Act No. 4 of 1952 on Family Law, art. 73(1).

83. BH. 1998.398.

claim of discrimination. Petitioner was dismissed from the family protection service after she tried repeatedly to convert a child to her own religion and also to convince the child under her care to convert her parents. According to the Supreme Court, spreading religious beliefs is incompatible with employment in a public family protection service, as it violates the requirement of neutrality.[84] The Supreme Court found it particularly problematic that the behavior of the petitioner furthered the already existing religious conflict in the family, and agreed with petitioner's dismissal from public service at the city's family protection unit. The decision of the Supreme Court, however, does not apply to public service positions across the board.

In recent years courts have decided several custodial disputes where one divorced parent was seeking custody of its child and was looking to remove the child from the household of a religiously devout parent (typically a Jehovah's Witness). According to the consistent practice of the Supreme Court, religious beliefs of parents shall not influence courts in custody disputes following divorce and parental rights. This position is in accordance with the jurisprudence of the ECHR, as enshrined by the decision in *Hoffmann v. Austria.*[85] In *Hoffmann,* the ECHR made it clear that in a dispute about parental rights the religious convictions of parents cannot be assessed by the national courts in a discriminatory fashion, i.e. to the detriment of one parent or to the benefit of the other.[86]

In one case the Supreme Court had the opportunity to decide on a challenge seeking the reversal of an agreement on custody in three months after it was reached.[87] Based upon the agreement challenged by the father, the mother, who became a Jehovah's Witness about a year before the divorce, was to have custody of the couple's two children. The father claimed that the children were unkempt and tired due to staying up late at night as a result of the mother's schedule. The trial court was willing to grant custody to the father, noting also for the father's benefit, that the mother was not willing to agree to a blood-transfusion for the children, should that ever become necessary. Under Hungarian family law a court may only alter an agreement on custody of the children within two years after it was entered, if the alteration serves the interests of the child or if the agreement seriously violates the interest of one party due to changed

84. In so finding the Supreme Court did not refer to the Constitution.

85. Hoffmann v. Austria, 255-C Eur. Ct. H.R. (ser. A) (1993). The *Hoffmann* case was a custody dispute between two formerly Roman Catholic parents, which arose when the mother became a Jehovah's Witness.

86. *Id.* at 50. The Court said that the "difference in treatment is discriminatory in the absence of an "objective and reasonable justification,' that is, if it is not justified by a 'legitimate aim' and if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realized.'"

87. BH. 1998.132.

circumstances.[88] When applying this provision to the case the Supreme Court considered not only the Constitution's provisions on freedom of religion, but also Article 8 of the European Convention of Human Rights on the right to privacy as applied by the ECHR in *Hoffmann*. Thereupon, the Hungarian Supreme Court refused to alter the agreement reached by the parents, thus preserving the mother's custodial rights.

In a more recent decision on parental custody in a situation of religious disagreement between parents, *Palau-Martinez v. France*,[89] the ECHR indicated clearly that in a custody dispute between parents of differing religious convictions national courts are not supposed to replace detailed judicial assessment of the circumstances of a family with generalizations about the requirements of the religions involved.

> [T]he absence of any direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life . . . [The national court] did not consider it necessary to grant the applicant's request for a social inquiry report, a common practice in child custody cases; such an inquiry would no doubt have provided tangible information on the children's lives with each of their parents and made it possible to ascertain the impact, if any, of their mother's religious practice on their lives and upbringing during the years following their father's departure when they had lived with her. Accordingly, the [ECHR] considers that the [national court] ruled in *abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests.[90]

Note that the Hungarian Supreme Court directed lower courts to follow a similar approach in a case preceding the ECHR's decision in *Palau-Martinez*.[91] In the Hungarian case a divorced father was challenging the custodial rights of the mother, a Jehovah's Witness. The Supreme Court reaffirmed its previous position, invoking the constitutional protection of freedom of religion, submitting that religious differences between parents in custodial disputes shall not be considered to the detriment of either party. Thereafter, however, the Supreme Court instructed the trial court to take into account a wide range of evidence concerning the behavior and actions of the mother and of the father, and experts' opinions on the psychological evaluation of the child and her parents – factors which should prompt trial courts to get a comprehensive assessment of the custody dispute, reaching beyond the religious disagreement between the parents.

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88. Act No. 4 of 1952 on Family Law, art. 18(3).
89. Palau-Martinez v. France, 2003-XIII Eur. Ct. H.R. (2003).
90. *Id.* at 333-34.
91. BH. 2001.479.

As the short account of the Hungarian Supreme Court's decisions shows, in Hungary ordinary courts maintain exemplary neutrality in religious affairs of troubled families. The jurisprudence of the Hungarian Supreme Court in the field is in line with the position of the ECHR. What makes this correspondence interesting from a comparative constitutional perspective is the difference in reference-points in the jurisprudence of the two courts. It is important to see that the decisions of the ECHR were based not on the European Convention's freedom of religion provision (Article 9), but were decided as privacy (Article 8) and discrimination (Article 14) cases.[92] In contrast, in cases where the Hungarian Supreme Court offered reasons for its decisions other than the ones based on statutory interpretation, the Supreme Court referred to the constitutional protection of freedom of religion. These decisions of the Hungarian Supreme Court suggest that it is very well possible under Hungarian law to pursue a path of neutrality in matters of religion, which is different from the concept of 'active neutrality' preferred by the Hungarian Constitutional Court.

The record of judicial neutrality towards religious affairs, however, becomes more complex, should one inquire into the jurisprudence of the Hungarian Supreme Court in free speech cases. There one might find that ordinary courts are willing to consider religious sensitivities in certain contexts in the domain of free speech while remaining neutral (or insensitive) towards similar concerns in others. This phenomenon remains disturbing, even if one might find supporting ECHR jurisprudence for all propositions advanced by ordinary courts in the Hungarian cases.

Unlike in numerous European democracies, in Hungary blasphemy is not a crime. The lack of such criminal prohibition, however, does not prevent ordinary courts from protecting people's alleged religious sentiments. In 1997 RTL Klub, a commercial television channel used the image of a yawning or sneezing Pope John Paul II on giant posters promoting the channel's news show.[93] The consumer protection agency, in an ex officio proceeding imposed a fine on the television channel under the act on commercial advertising for violating personality rights.[94] The television channel contested the ex officio proceedings and the resulting fine claiming, *inter alia*, that under the Hungarian Civil Code,[95] personality rights may only be enforced in person.

In a judicial review proceeding affirming the agency's decision the court of second instance noted on appeal that the posters violated not only the personality rights of the Pope, but also the "religious sensitivities of all good-natured and religious men." Therefore, when acting ex officio, the

92. *See* PAUL M. TAYLOR, FREEDOM OF RELIGION, U.N. AND EUROPEAN HUMAN RIGHTS LAW IN PRACTICE 269 (Cambridge Univ. Press 2005) (noting that no similar decision has been reached on grounds of a substantive article alone, without reference to discrimination).

93. BH. 2003.348.

94. Act No. 58 of 1997, art.4 (a).

95. Act No. 4 of 1959, PTK.

agency represented public sentiment. In an extraordinary review procedure the Supreme Court sustained the agency's decision saying that the agency was not protecting personality rights but acted as a regulator of the advertising sector. The Supreme Court mentioned in particular that the appellate court assessed properly the need to act ex officio in order to protect people's religious sentiments.

In the case the agency and the courts were not sensitive to issues in protecting freedom of expression and commercial speech. While the decision of the Supreme Court raised numerous constitutional concerns, -- probably intuitively -- the Supreme Court followed a path which is likely to be acceptable also for the ECHR, in the light of its decision in the *Otto-Preminger Institute v. Austria* case. In that case, the ECHR said that:

> a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others. The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.[96]

The Court confirmed that:

> it is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.[97]

Interestingly, the Hungarian courts are much less sensitive to the religious feelings of the members of the polity in cases which involve strong anti-Semitic statements.[98] The confines of the present article do not allow for a detailed exposition of Hungarian constitutional and judicial jurisprudence on matters of hate speech. Suffice it to say that ordinary courts and also the Constitutional Court tend to be reluctant to curb freedom of expression via imposing criminal sanctions.

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96. Otto-Preminger-Institute v. Austria, 295-A Eur. Ct. H.R. (ser. A), at 14 (1994) (quoting Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A), at 17 (1993)).

97. *Otto-Preminger-Institute*, *supra* note 96, at 19.

98. The article will not cover Hungarian hate speech jurisprudence in detail.

The Criminal Code's group libel provision bans as a felony "provocation of hatred before a large audience against the Hungarian nation or any national, ethnic, racial or religious group or other groups of society is punishable with up to three years of imprisonment."[99] On its face this provision seems to be capable of screening racial slurs and anti-Semitic insults which find their way to the Hungarian public discourse. Important lessons follow, however, from a recent hate speech case which prompted considerable public attention. The case arose from a statement by a then-MP of the rightist Hungarian Truth and Life Party (who is also a Protestant minister) who called for the "exclusion of Galician vagrants" in a rightist newspaper. Overturning the lower court's assessment, the appellate court found that the defendant's statement urging to "exclude them, or they will exclude you" did not reflect a clear intent to call for violence.[100] In support of its position on the requirement of instant violence the appellate court relied on the Supreme Court's decision of 1997 establishing the "active violence" criterion. The acquittal received highly critical responses in the mainstream press. As a reaction, the Chief Justice of the Supreme Court issued a statement calling for the President, the Cabinet and Parliament to protect the independence of the judiciary from statements infringing upon the constitutional rights of the judiciary.[101]

The above decision of ordinary courts is best explained in the light of the Hungarian Constitutional Court's longstanding jurisprudence concerning the unconstitutionality of criminal prohibition of hate speech. Since 1992 it has been the Constitutional Court's firm position to limit the criminal prohibition of hate speech to those utterances that present a 'clear and present danger' of disrupting public peace.[102] The most recent round of Hungarian developments is marked by a unanimous Constitutional Court[103] invalidating the government's latest attempt to expand the prohibition of hate speech in the Criminal Code.[104] The Constitutional Court reaffirmed

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99. Article 269 of the Criminal Code, as amended by Article 5 of Act No. 17 of 1996 and revised by 12/1999 (V. 21.) AB decision. The title of Article 269 (the name of the crime) itself stayed to be "incitement to hatred," yet the activity prohibited was defined as "provocation to hatred." Since the Constitutional Court's decision centered around contrasting "provocation" [*uszítás*] and "incitement" [*izgatás*] these terms were preserved throughout the discussion of the case.

100. Judgment of November 6, 2003. Available in Hungarian at http://www.itelotabla.hu/dok1.htm (last visited: October 10, 2004).

101. *See Gyűlöletbeszéd: törvény es mozgalom [Hate speech: a statute and a movement]*, MAGYAR HIRLAP (Nov. 12, 2003) (Hung.) (giving a comprehensive summary of views and the full text the Chief Justice's statement).

102. 30/1992 (V. 26.) AB decision. (The judgment does contain the phrase 'clear and present danger' in English at ABH 1992, 167, 178-79.)

103. 18/2004 (V. 25.) AB decision. (Justice Kukorelli wrote for a unanimous Constitutional Court.)

104. Criminal Code Act No. 4 of 1978, BTK.

the premises of its previous decisions on hate speech and group libel[105] and also referred to the European Court Human Right's position in the *Handyside,*[106] *Jersild*[107] and *Zana*[108] cases. At the same time, the Constitutional Court acknowledged that international obligations clearly call for limitations of freedom of expression. The Constitutional Court emphasized that limitations imposed on freedom of speech in compliance with international obligations shall live up to the Hungarian Constitution's standard of speech protection and shall comply with the requirements of the necessity-proportionality test applied by the Constitutional Court to test the constitutionality of rights limitations.

The Constitutional Court emphasized that the criminal prohibition of hate speech is considered constitutional only to the extent the utterance is of such intensity that it presents a 'clear and present danger' of disturbing public peace. The Constitutional Court said that the criminal prohibition of hate speech shall not be motivated by outlawing unjust, disturbing or shocking opinions.[109] While in the case of 'provocation of hatred' such danger of violence was sensed by the Court, constitutional justices were of the view that the newly adopted criminal prohibition of 'incitement to hatred' would make the criminal prohibition over inclusive, thus decreasing the level of constitutional protection afforded to free speech. In reaching this conclusion the Constitutional Court did not contest the justice minister's submission on the inconsistency traceable in the hate speech jurisprudence of ordinary courts. The Constitutional Court also found that the second phrase, which was introduced to prohibit 'incitement to violence' criminalizes such behavior that does not disrupt public peace or restrict rights of others, thus, this crime amounts to an unconstitutional limitation of freedom of expression.

In its hate speech decisions, the Hungarian Constitutional Court repeatedly referred to the 'clear and present danger' standard familiar from U.S. constitutional jurisprudence. As defined in *Brandenburg*[110] this standard distinguishes constitutionally protected exercise of free speech from incitement to violence undeserving constitutional protection. As the majority of the United States Supreme Court said:

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105. *See* 30/1992 (V. 26.) AB decision; 36/1994 (VI. 24.) AB decision; 18/2000 (VI. 6.) AB decision.

106. Handyside v. Case, 24 Eur. Ct. H.R. (ser. A) (1976).

107. Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1995).

108. Zana v. Turkey, 1997-VII Eur. Ct. H.R. 2533 (1997).

109. *Cf*. The words of the European Court of Human Rights finding in *Handyside* that freedom of expression:

> is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.' *Handyside*, 24 Eur. Ct. H.R. (ser. A) (1976).

110. Brandenburg v. Ohio, 395 U.S. 444 (1969).

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[111]

Note, however, that in the United States, the clear and present danger standard applies only to such utterances that are otherwise worthy of constitutional protect, but not to such expressions that that fall short of First Amendment protection, such as hate speech amounting to "fighting words."[112] The plurality opinion in *Virginia v. Black*, the recent Virginia cross burning case, fits neatly within this paradigm. As Justice O'Connor for the plurality put it: "while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful."[113] The Virginia prohibition of cross burning was found to be constitutional as the constitutional protection of freedom of speech does not extend to intimidation of the kind proscribed by the statute.[114]

As the above account suggests, in Hungary principles of free speech jurisprudence were derived from lessons of foreign and international jurisprudence, premised on (somewhat idealistic) judicial visions of a robust public discourse. In over a decade this public discourse has become truly functional, yet it does not match completely the ideal picture sketched by the Constitutional Court. Discrepancies between vision and reality are signaled by not only the frequent acts of hate speech which trigger acquittals in ordinary courts, but also by Parliament's returning to the Constitutional Court with variations on essentially the same hate speech provision. While sticking to its position developed in 1992 the Hungarian Constitutional Court at no point considered seriously the fear and

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111. *Id.* at 447. (In this case, concurring justices Black and Douglas rejected the application of the 'clear and present danger' standard.)

112. Beauharnais v. Illinois, 343 U.S. 250 (1952). Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1536 (2003). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Cohen v. California, 403 U.S. 15 (1971); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Virginia v. Black, 538 U.S. 343 (2003).

113. Virginia v. Black, 538 U.S. 343, 357 (2003).

114. *Id.* at 363.

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. . . . Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.

The justices disagreed about the constitutionality of the second part of the Virginia criminal provision, which reads: "Any such burning of a cross shall be prima facie evidence of intent to intimidate a person or group of persons."

intimidation openly anti-semitic utterances might trigger in certain circles of the Hungarian polity. One may argue that such, at least partly religious, sentiments should not become the guide of a secular constitutional court in deciding the constitutionality of the criminal prohibition of hate speech. Nonetheless, it is worth considering the lack of such a reference in the Constitutional Court's hate speech jurisprudence in light of the Supreme Court's willingness to accord respect to religious sentiments.

It is well taken, that the free speech cases in which arguments concerning religious sentiments were considered by Hungarian courts were definitely different to the extent the case concerning the image of Pope John Paul II reached the courts upon a request for judicial review for administrative action, while the hate speech cases are criminal cases. Yet, despite such legal differences the courts' consideration of the people's religious sentiments appears to indicate that in these cases the judicial protection of Catholic sentiments could be legitimately contrasted with lack of judicial sensitivity towards disruption caused by anti-semitic speech. Note that nothing in the decision of the Supreme Court or the Constitutional Court is meant to suggest that this effect is the outcome of a conscious judicial strategy. Yet, this observation might lead one to conclude that the high Hungarian judicial fora easily became intellectual prisoners of their own understanding of the history of churches and religious traditions prevailing in Hungary. This conclusion reached concerning cases of significant public attention is all the more interesting, should one recall that ordinary courts managed to sustain a very strong record of 'passive' neutrality in low-profile cases involving employment or family disputes.

CONCLUSION

The European Court of Human Rights summarized its jurisprudence on the function of state regulation in matters of religion in the following terms:

> in exercising its regulatory power in this sphere, and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[115]

115. Metropolitan Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. at X (intenal quotations omitted).

As the cases discussed in this article illustrate, Hungary is barely the land of grave or persistent violations of freedom of religion. Indeed, most disruptions in free exercise of religion are caused by unpredictable state action undertaken in the name of promoting religious freedom in a neutral state, which does not manage to treat all religions as equals. Such discriminatory treatment does not always result from the state's or the courts' conscious attempts to privilege certain religions or suppress others. Instead, as the above analysis shows, judicial intervention in matters of religion is often dictated by instincts and reflexes which reside beyond doubt until questioned by outsiders. The differences in the perspective of ordinary courts and the Constitutional Court are often telling and should become central in a domestic learning process. After all, with Hungary being a happy land free of major violations of freedom of religion, the remaining problems are often of a nature that fall with the national government's margin of appreciation.