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The Role of Religion in the Illiberal Hungarian Constitutional System

This chapter on the role of religion in contemporary Hungary deals with the practice of religious freedom in the new Hungarian constitutional order. After evaluating changes to legislation governing the freedom of religion since 2010 in comparison to the situation after the democratic transition of 1989–90, I discuss the possibilities of religious freedom in different models of state-church relationships. The main research question is whether the separation of church and state, formally maintained since Hungary's backslide to an illiberal constitutional system, can still guarantee secularism and autonomy for churches.

Freedom of Religion before and after 1989

In 1568, the Hungarian National Assembly at Torda (in present-day Romania) was the first to announce religious tolerance in Europe. By 1848 Hungarian revolutionary legislation declared the equality of all accepted religions, although the emancipation of Jews did not occur until 1867.a This period was characterized by cautious efforts to secularize and legislation proclaiming religious freedom for all but restricting the right of public worship to officially acknowledged communities, either incorporated or recognized. According to Act XLIII/1895, representatives from "incorporated" denominations were allowed to hold seats in the upper house of parliament, while non-recognized religious communities were only able to practice their religion under police surveillance.

This development towards religious freedom and equality in the late nineteenth century was disrupted by the first widespread cataclysm of the twentieth century. The post-First World War regime of governor Horthy, which called itself a "Christian course," led campaigns against unregistered small churches (sects in their terminology) and deprived Hungarian Jews of their rights, even ahead of Nazi Germany. Right after the Second World War and before the Communist takeover, "incorporated" churches lost their privileges when all religions were granted equal status, which basically amounted to the status previously enjoyed by "recognized" churches. But religious freedom became a dead issue in the 1949 Communist Constitution: religious orders were banned, the property of religious communities was confiscated to an overwhelming degree, numerous religious leaders were arrested and sentenced, and the separation of state and church was compromised altogether. Although state pressure began to relax to some extent from the 1960s, the general rules and practices of the regime did not change until the late 1980s. In 1964, the Holy See and Hungary signed a document that acknowledged the competence of the Holy See to appoint bishops, under the condition of the oath of clergy to the Constitution.

The 1989 democratic transition ended the communist regimes' antireligious atheist state model and introduced a liberal democratic constitutional system, which provided religious freedom and separation of state

and church. This legal regime on freedom of religion and church-state relations was governed by Article 60 of the 1989 Constitution and Act No. IV of 1990 on Freedom of Conscience and Religion, and Churches. Article 60 of the Constitution of the Republic of Hungary read:

> (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.

Furthermore, Article 8 of the same legislation, which required a two-thirds majority vote, declared 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."

Neutrality could be seen as the most important principle governing the state in regard to religious communities as well as to other ideologies. The state shall have no ideology. However, as the Constitutional Court stated: "from the right to freedom of religion, follows the State's duty to ensure the possibility of free formation of personal convictions."[1] Neutrality meant, 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 indicated that the underlying doctrine behind the principle of separation (which was explicitly stated in the Constitution) was the neutrality of the state. 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."[2] Separation was defined by the Constitutional Court as respect of the autonomy of churches: "the State must not interfere with the internal workings of any church."[3] It also was understood as a 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."[4]

Under the 1990 law, a minimum of 100 persons were required to request the registration of a church from a court of law so long as they presented a charter of operations with a self-governing organizational structure and a declaration that the founders intended to pursue a religious activity (Article 8(1) and Article 9). The registry of churches was kept at the Metropolitan Court in Budapest. Registration was granted as a matter

[1] Decision 4/1993.
[2] See B. Schanda, "Church Autonomy and Religious Liberty – National Report on Hungary." In: G. Robbers (ed.), *Church Autonomy: A Comparative Survey*, Frankfurt am Main: Peter Lang, 2001.
[3] Decision 4/1993.
[4] Article 15 (2) of Act No. IV of 1990.

of formal compliance with the language of the 1990 statute, with no further in-depth inquiry. The 1990 law did not distinguish among various types of religious organizations; registration under the law meant that all religious communities received the same status. It was estimated and commonly accepted in the parliamentary debate on the new legal regime that approximately 350 churches were registered under the 1990 law.

In this liberal democratic system with constitutional guarantees of religious autonomy, Hungarian society, even in comparison with other East Central European countries,[5] remained mainly secular: the proportion of churchgoers is under 15 percent, and the vast majority of citizens favor the strict separation of church and state, while opinion polls concerning restitution, funding, and so on rather show ignorance in these complex matters.[6] Even when comparing Hungary to the rest of Europe, it belongs to the least religious countries.[7] Hungary – both regarding religious beliefs and religious self-characterization – is at 23rd place out of 31 European countries, regarding church membership at 24th to 25th place, regarding the percentage of monthly church attendance at the 21st–22nd (tied with Ukraine in these previous catagories), and regarding daily prayer or several times a week in 18th place.[8] The 2011 census was a great disappointment for the Catholic Church, which lost 1.2 million people in a decade.[9] In 2013 Hungary was in 11th place on the international atheism list, meaning that 23 percent of the population considered him/herself as atheist ("I don't believe in God and I never have.").[10]

After 1990 there were two, mostly failed attempts to deviate from the liberal democratic course. The first was a consequence of the main churches' attack against some small registered churches that were gaining more and more influence. In the so-called "sect debate" a draft parliamentary resolution deprived four small churches of their budgetary support. (The attempt to ban these churches and to amend the law in order to force all registered churches to restart a new registration process finally failed.[11]) The second attempt in 2000–2001 during the term of the first Orbán government tried to supplement the legal requirements of registration with the submission of the religious doctrines that then would be deliberated by the authorities. Another draft modification of the act would have allowed them to alter the general rule of church equality by law.[12] These amendments failed due to the lack of a two-third majority of the governing parties.

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[5] Among the Visegrád countries only the Czech Republic can be characterized as more secular than Hungary. See World Values Survey, Fifth (2005–8) and Sixth Waves (2010–2014), International Social Science Programme Data, 2003 and 2008.

[6] See M. Tomka and P. Zulehner, *Religion in den Reformlaendern Ost(Mittel) Europas*, Ostfildern 1999.

[7] M. Tomka, Hagyományos (vallási) értékek a modern társadalomban. Available online: www.edu-online.eu/hu/letoltes.php?fid=tartalomsor/485

[8] See European Values Study, EVS 1999.

[9] Available online: http://hungarianspectrum.org/2017/12/27/they-dont-see-eye-to-eye-pope-francis-and-the-hungarian-bishops/

[10] T. W. Smith, Beliefs about God across Time and Countries, NORC/University of Chicago, April 18, 2012, Updated February 12, 2013 Report for ISSP and GESIS GSS Cross-National Report No. 32. Available online: http://gss.norc.org/Documents/reports/cross-national-reports/Godissp.pdf

[11] About the 'Sect-Debate' see J. Kis, "Erkölcs, hit, tolerancia" [Moral, belief, tolerance], *Kritika*, 1994/2.

[12] About the 2000–2001 draft amendments, see J. Kis, "Egyház, állam, társadalom" [Religion, state, society], *Világosság*, 2001/6.

Restricted Religious Rights after 2010

1. Constitutional Changes

The new constitution, entitled the Fundamental Law of Hungary, which was passed by parliament on April 18, 2011, shows the role of religion in national legitimation by characterizing the nation not only as the community of ethnic Hungarians but also as a Christian community, narrowing even the range of people who can recognize themselves as belonging. The preamble to the Fundamental Law, which is compulsory to take into consideration when interpreting the main text (see paragraph (3) article R), commits itself to a branch of Christianity, the Hungarian Roman Catholic tradition. According to the text of the preamble, "We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe," the members of the Hungarian nation recognize Christianity's "role in preserving nationhood," and honors the fact that the Holy Crown "embodies" the constitutional continuity of Hungary's statehood. Besides the sacral symbols, this choice of ideology is reflected – *inter alia* – in the Fundamental Law's concept of community and its preferred family model (paragraph 1–9 of section L) and its provision regarding the protection of embryonic and fetal life from the moment of conception (section II).

The preamble, while giving preference to the thousand-year-old Christian tradition, states, that "we value the various religious traditions of our county." The choice of words indicates a model of tolerance in which various worldviews do not have equal status, although following them is not impeded by prohibition or persecution. It is, however, significant that the declared tolerance only extends to particular "religious traditions," especially Christian and mostly Catholic ones, but does not apply to more recently established branches of religion or to those that are new to Hungary or to non-religious convictions of conscience. Clearly, the religious turn in Hungary started way before the refugee crisis of 2015, with the introduction of a System of National Cooperation (SNC), the multi-confessional setup of which gave space to Protestantism as well as Catholicism.[13]

The refugee crisis of 2015 demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe's "Christian civilization" against an "Islamic invasion." At the beginning of the crisis prime minister Viktor Orbán claimed that "Christian culture is the unifying force of the nation [… and] Hungary will either be Christian or not at all."[14] In another speech held in early September Orbán went further by stating that: "The Christian-national idea and mentality will regain its dominance not just in Hungary but in the whole of Europe." This new era should follow "the age of liberal blah-blah," because the origin of

[13] Protestantism is represented in the Orbán government by Zoltán Balog, a Calvinist pastor who was minister of human resources from 2012–2018.

[14] Orbán's speech in Debrecen on May 18, 2015. Available online: http://index.hu/belfold/2015/05/18/orban_magyarorszag_kereszteny_lesz_vagy_nem_lesz/#

mass migration and the consequent refugee crisis is "the crisis of liberal identity": "For years we have told them that 'the world is a global village' [...] we have talked about universal human rights to which everybody is entitled. We forced our ideology on them: freedom is the most important thing, we said. We bombed the hell out of those who didn't accept our ideology [...] We created the Internet, we declared the freedom of information, and we told them that every human being should have access to it. We sent them our soap operas. They watch what we do [...] We sent our TV stars into their homes [...] they now think that our virtual space is also their space and that in this virtual space everybody can meet anybody else. [...] These people, partly because of our culture lent to them or forced upon them, are no longer tied to their own land and to their past."[15]

On December 23, 2017 in an address on the subject of "the great holy day of our Lord Jesus Christ" and to protect his anti-migrant policy, Orbán went so far as to rewrite the Bible and falsify the words of Jesus: "According to the Gospel of Mark, Jesus's second commandment is 'You shall love your neighbour as yourself.' Recently one has frequently heard this commandment of Christ in Europe. They reproach us for not wanting, nay, not allowing, millions from other continents to settle in Europe despite our Christian faith. But they forget about the second half of that commandment, although the commandment has two parts: we must love both our neighbors and ourselves."[16] As György Gábor, philosopher of religion points out, Jesus does not command anyone to love himself; he simply states the degree of love that one ought to extend to one's neighbor.[17] The extremely conservative Hungarian Catholic as well as the Reformed Church echoed the government's antagonism towards refugees. Péter Erdő, archbishop of Esztergom-Budapest and primate of the Catholic Church in Hungary, in opposing the guidance of the Pope, shamefully described helping refugees as "people-trafficking."[18] László Károly Bikádi, a Reformed minister of the small town of Hajmáskér, said the following about refugees in a sermon: "They come like ants. They move into our houses. What happens with mice, voles, and other creatures of the field? They come and beset us […] we shouldn't make the mistake of throwing out our values just because people arrived among us who don't consider us their brethren."[19]

But should the alleged defense of Christianity from "Muslim hordes" be taken seriously? In a speech on July 26, 2012 Orbán explains why authoritarianism is needed to treat Hungarians: "*Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way* [GH: other than compulsion or force]."[20] In Hungary the unusual extent of religious plurality in early modern history is due to the territorial division of the country as well as to the bloody conflicts of the Reformation. Until after the First World War and the beginning of the Horthy era, no church could fully identify itself with the Hungarian nation.

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[15] Speech in Kötcse on September 5, 2015. Available online: http://vastagbor.atlatszo.hu/author/zero/

[16] V. Orbán, "Meg kell védenünk a keresztény kulturát" [We have to protect Christian culture], *Magyar Idők,* December 23, 2017.

[17] Available online: http://hungarianspectrum.org/2017/12/26/viktor-orban-rewrites-the-bible-and-falsifies-the-words-of-jesus/

[18] Available online: http://hungarianfreepress.com/2016/08/17/migrant-crisis-and-the-shameful-silence-of-cardinal-peter-erdo/

[19] Available online: http://nol.hu/belfold/hajmasker-lelkesz-reformatus-menekultek-video-1631467

[20] See B. Szabó, "Félázsiai származékoknál, mint mi, csak így megy" [With a half-Asian lot such as ours, there is no other way], *Népszabadság*, July 27, 2012. The metaphor of Hungary's ill-fate stemmed from her inability to choose between Asia and Western Europe goes back to Endre Ady, one of the greatest Hungarian poets of the early twentieth century, as well as to Imre Kertész, a Nobel laureate in literature. See I. Kertész, "La Hongrie est une fatalité," *Le Monde,* February 10, 2012.

Although the Catholic Church dominated the Protestants, both numerically and politically, the Catholic Church played a minor historical role in preserving national consciousness, so that Catholicism never became equated with Hungarian patriotism. The Hungarian independentist, national tradition as well as the nineteenth century national revival has strong Protestant, anti-Habsburg components. Even though the Roman Catholic Church in Hungary was very anti-communist immediately after 1945,[21] under communism they served neither as a symbol of national independence nor as a source of protection for the opposition as in Poland.[22]

In other words, Christianity and religion in general serve as reference point that Orbán's right-wing populism uses instrumentally. Fidesz originally was a liberal party with a militantly anti-clerical view in the early 1990s, but by the mid-1990s, when it shifted to conservative values, it turned to an openly positive stance towards religion. Indeed, religion was never understood as significant part of its identity, and rather played a purely instrumental role in Fidesz's political strategy, even after they joined Europe's largest center-right party, , the European People's Party (EPP), in the European Parliament.[23] Thanks to Orban's personal conversion to Protestantism and his opening to majority Catholic symbolism after 1998, Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with pagan traditions. This refers to the idea of "two Hungarys": a Western Christian and an Eastern pagan or tribal one.[24] Orbán once voiced his conviction that the mythical Turul bird, a symbol of ancient Hungarians, is the image into which Hungarians are born, their "symbol of national identity of living."[25] This means that Fidesz interprets such pre-Christianity within the framework of nationalism; this ethno-nationalism provides a sufficient basis for political identification as a type of surrogate religion and is also suitable for winning extreme right-wing voters. In this respect Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the national religion (*nemzetvallás*) played a crucial role, which was also an attempt to overwrite the Catholic-Protestant divide. Another proof of Christianity being instrumental for Orbán is the fact that when he listed the illiberal regimes he admires – like China, Russia, Singapore, and Turkey – all of them non-Christian or Orthodox.

The latest change of the Fundamental Law regarding Christianty was the Seventh Amendment adopted on 20 June 2018, which reads: "The protection of Hungary's self-identity and its Christian culture is the duty of all state organizations."

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[21] See the fate of József Mindszenty, archbishop and primate, who refused to permit the Roman Catholic schools of Hungary to be secularized, which prompted the communist government to arrest him in 1948 and convict him in 1949 on charges of treason.

[22] A. Grzymala-Busse, "Whither Eastern Europe? Changing Political Science Perspectives on the Region. Studying Religion and Politics in East Central Europe." University of Michigan, December 5, 2013. Available online: http://users.clas.ufl.edu/bernhard/whitherpapers/Florida%20workshop%20ECE.pdf

[23] Only 22 percent of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitely non-religious. Political Capital Institute's research, Budapest, 2012.

[24] See Zoltán Ádám and András Bozóki, "The God of Hungarians." Religion and Rights Wing Populism in Hungary, Manuscript, 2015. File from the authors.

[25] "Minden magyar a turulba születik," [All Hungarians are Born into the Turul], *Népszabadság*, September 29, 2012.

The purpose of the proposed provision was questioned at the preparatory meeting of the judicial committee by members of opposition parties. The only explanation MPs of the governing Fidesz party, who initiated the new text were able to provide was a paraphrase of an alleged sentence by Robert Schuman, founding father of the European Union: "Without Christian culture there is neither Europe nor Hungary." The major points of the recent constitutional amendment, namely the criminalization of any civil assistance to refugees and the declaration of homelessness as an unlawful behaviour are deeply contradictory to the very idea of Christian culture. (Most probably the same intention to legitimate his anti-European idea lead Prime Minister Orbán recently to reframe his concept of 'illiberal democracy' as a fulfilment of 'Christian democracy.') But this reasoning does not reveal the compensatory message sent to the European People's Party, the party family of Fidesz in the European Parliament, and to its most powerful member, the German CDU-CSU: even if we may have strange views on European values, but we are good Christians, like you are. Besides the political message of the amendment towards Europe, there will be clear internal constitutional law consequences of the new provision, as it can be used as a basis of reference to annul any legal norm allegedly violating Christian culture, a tool that can be useful for the packed Constitutional Court or any court in Hungary.

B) Statutory Limitations and Case Law

Before January 1, 2012, when the new constitution became law, the Hungarian Parliament prepared a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. One of these cardinal laws was the law on the status of churches, passed on December 30, 2011, according to which the power to designate legally recognized churches is vested in the parliament itself.[26] The law listed 14 legally recognized churches: nine of them are Christian and three are Jewish. In February 2012, most probably in response to international pressure, particularly to an intervention of the U.S., the parliament recognized an additional 13 groups, including Muslims, Buddhists, and smaller Christian groups, thereby raising the number of recognized churches

[26] The first version of this law was passed by parliament on July 12, 2011 as Act C of 2011 on the Right to Freedom of Conscience and Religion, and on Churches, Religions and Religious Communities. The Constitutional Court received several petitions requesting that the Act should be declared null and void in its entirety on formal grounds and due to its unconstitutional content. The applicants argued that Act C discriminated against smaller churches and that the "inferior religious status" of "de-registered" religious organizations violated the right to religious freedom. The Constitutional Court in its Decision 161/2011. AB annulled the law for procedural reasons, without reviewing the content of it, pointing specifically to the legislative process itself, where several major amendments were put forward prior to the final vote, against House Rules, leaving no time for any parliamentary debate. Ten days after the Court's decision on December 30, 2011, a proviso was inserted into the First Amendment to the Fundamental Law to the effect that parliament, in a cardinal Act, determines "recognized churches" and the normative conditions for recognizing further religious organizations. Under this provision, a cardinal Act may require a religious organization to operate for a certain period of time before being acknowledged as a church. The cardinal Act may also specify a certain membership, and require that historical traditions be taken into account, as well as the acceptance of the religious organization within society. Then, on December 30, 2011, parliament passed the Act on Churches, with virtually the same content as before.

to 27.[27] The law required all other previously registered churches (more than 200 religious organizations in total) to either re-register under considerably more demanding new criteria or continue to operate as religious associations without the legal benefits offered to recognized churches (like tax exemptions and the ability to operate state-subsidized religious schools). After this new law went into effect, only the mentioned 27 of the deregistered churches have been able to re-register, so the vast majority of previously registered churches have been deprived of their status as legal entities. Because registration requires an internal democratic decision-making structure and transparent finances, the majority of previously registered churches were unable to continue to operate with any legal recognition under the new regime, either because they did not elect their religious leaders or because anonymous giving constituted part of their financing. Non-traditional and non-mainstream religious communities – which had not faced legal obstacles between 1989 and 2011 – were facing increasing hardships and discrimination as a result.

Seventeen religious communities that previously had operated as churches but had lost their status due to the new act, submitted constitutional complaints to the Constitutional Court. The applicants requested a review of the act on both procedural and substantive grounds. The procedural complaints mainly concerned the violation of the rule of law, the procedural rules of legislation, and the obligation to effectively consult other religious organizations. As regards the substantive complaints, the applicants' main concern was the prerogative of parliament to decide over the legal status of churches by a two-thirds majority. The applicants contended that the legal provisions regulating the recognition of churches were contrary to the principle of separation of power, to the right to fair procedure, and to the right to legal remedy. The provision, without consideration for the constitutional principle of separation of powers, allowed parliament to decide by itself on church status recognition without the right to appeal.

In February 2013, just before it was finally packed by the governing parties,[28] the Constitutional Court in Decision 6/2013 AB declared that, as a constitutional requirement, the State must ensure that religious communities get special status as "religions" based upon objective and reasonable criteria, and in harmony with the right to freedom of religion and the requirement of fair procedure. Furthermore, legal remedy against decisions on the special status must be ensured. However, it pointed out that it is not a constitutional requirement that every Church has the same rights or that the State cooperates with all the Churches to the same extent. Existing differences between religious communities could be considered by the legislator in accordance with the Fundamental Law, provided they are neither based on discrimination nor the result of discriminatory practice. The Court ruled that all religious associations have an equal right to apply for recognition by means of

[27] The appendix to Act CCVI of 2011 lists a total of 27 churches. The Buddhist and Muslim "churches" are umbrella organizations for distinct religious communities. If we count those individual communities separately, there are 32 recognized churches. See D. Baer, "Testimony Concerning the Condition of Religious Freedom in Hungary," submitted to the U.S. Commission on Security and Cooperation in Europe (the Helsinki Commission). In D. Baer, *Essays in Defense of Religious Freedom,* Wesley, Budapest, 2014. 163.
[28] In April 2013 eight out of 15 judges were elected by the governing parties without any consent by opposition parties. For more about the process of packing the Court, see G. Halmai, "In memoriam magyar alkotmánybíráskodás" [In Memoriam Hungarian Constitutional Review]. Fundamentum, 2014/1–2. 36–64.

procedure that follows due process and ensures the right of effective remedy. Since the provisions for recognition set forth in the religious law had failed to do this, the Court restored the legal status of the deregistered churches.

In response to this decision, the Fourth Amendment to the Fundamental Law in April 2013 elevated the annulled provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review. Even though the Constitutional Court argued that the registration of churches by parliament does not provide a fair procedure for the applicants, this procedure became part of the constitution.

Due to huge international criticism against the Fourth Amendment the government again made cosmetic concessions. The Fifth Amendment to the Fundamental Law passed in September 2013 explicitly granted the authority to parliament to select religious communities for "cooperation" with the state in the service of "public interest activities". An amendment to the Church law adopted also in September created a two-tiered classification consisting of "religious communities" and "incorporated churches."

The proof that these amendments did not really change the status of Hungarian churches is that the European Court of Human Rights (ECtHR) continued its procedure based on earlier complaints of nine religious communities and individuals. The Strasbourg Court, in its judgment of April 8, 2014 in the case of *Magyar Keresztény Mennonita Egyház* [Hungarian Christian Mennonite Church] *and Others v. Hungary,*[29] also found that Hungary's unconstitutional church law violated Article 9 on the right of religious freedom of the European Convention of Human Rights. Hungary appealed the decision. The Grand Chamber rejected that appeal, so on September 9, 2014 the decision became final and binding. Concerning Hungary's repeated assertions of the "state's broad discretionary power" to choose among religious communities to cooperate with, the ECtHR argued: "In its choice of partners for outsourcing public-interest tasks the State cannot discriminate among religious communities. The neutrality of the State requires that, in case the State chooses to co-operate with religious communities, the choice of partners be based on ascertainable criteria for example, as to their material capacities."[30] And despite the newly introduced second tier, the Court argued that:

> […] under the legislation in force, certain religious activities performed by churches are not available to the religious associations, which for the Court has a bearing on the latter's rights to collective freedom of religion […] In particular, only incorporated churches are entitled to the one per cent of the personal income tax earmarked by believers and the corresponding State subsidy. These sums are intended to support faith-related activities. For this reason, the Court finds that such differentiation does not satisfy the requirements of State neutrality and is devoid of objective grounds for the differential treatment. Such

[29] Application Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12
[30] *Ibid.* 109.

discrimination imposes a burden on believers of small religious communities without an objective and justifiable reason.[31]

In an early reaction to the decision, the state secretary of the Ministry of Justice pointed out that Hungary has no obligation to adhere to ECtHR rulings.[32] After the ECtHR judgment the already packed Hungarian Constitutional Court decided several cases against the government. These cases were initiated by either deregistered churches or by judges, who had to take into account whether the law was unconstitutional or was in contradiction with international treaties signed by Hungary and who turned to the Court. These petitions were submitted because the Church Law of 2011 ruled that more than 200 deregistered churches would lose their church status, and unless they were to apply for registration as private law associations within 30 days, they will be cease to exist altogether. Religious groups previously registered as churches either not acknowledging the right of parliament to terminate their status or being aware of the decision of the Constitutional Court which annulled these provisions of the law, did not ask for registration or missed the deadline. After the Fourth Amendment to the Fundamental Law in 2013, ordinary courts were forced to decide on the forced liquidation and termination of churches, even as associations. In a series of decisions the Constitutional Court ruled that, due to its Decision 6/2013 as well as the ECtHR judgment in the case of *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, these judgments of the courts were not applicable, and the Constitutional Court also extended the deadline for application for the status of association.[33] In one particular case, besides the unconstitutionality of such court decisions, it also declared that they contradicted Hungary's international treaty obligations, and therefore it called upon parliament to resolve this contradiction by October 15, 2015.[34]

As a reaction to the ECtHR judgment, in December 2015 the government submitted a fifth amendment to the Church Law. The amended law planned to replace the two-tiered system of classification for religious communities with a three-tiered system, consisting of "religious associations," "registered churches," and "certified churches." Future classification within the categories would be determined by a court. Additionally, the draft law allowed the state to enter into "cooperative agreements" with individual religious communities on a discretionary basis, in order to subsidize public interest activities performed by those religious communities.

The amendment would have marked a significant improvement over earlier versions of the Church Law in that it provided explicit rights and protections for religious communities classified in the lower tiers. It also would have curtailed the role of parliament in allocating legal recognition to religious groups. According to the draft law, all groups previously recognized as "incorporated churches" (previously the highest tier) were to be automatically recognized as "certified churches" after the amendments went into effect. This meant that "incorporated churches" would have been exempted from applying at the court while religious associations

[31] *Ibid.* 112.
[32] Available online: http://www.vg.hu/kozelet/jog/itt-a-kormany-valasza-a-strasbourgi-iteletre-425267
[33] See Decisions 27/2014, 35/2014, 15/2015, 3144/2015.
[34] Decision 23/2015.

would be required to do so. Groups belonging to the lowest tier, that is, "religious associations," would not be allowed to collect from the basket of the voluntary one-percent church tax declaration that can be made when filing personal income tax in Hungary and which directly supports the religious activities of religious communities. Such discriminatory rules would be in explicit contradiction with the ECtHR judgement, as the entire "amendment fails to address the most serious violations of the right of religious freedom identified by the Court," because "transitional provisions with the proposed amendments would perpetuate, rather than correct the earlier violations of the ECtHR and discretionary powers afforded the state would continue the arbitrary recognition procedure criticized by both the ECtHR and the Venice Commission."[35]

Even this moderate amendment – according to which religious communities, with the exception of the "incorporated churches," still would not enjoy full religious freedom – was not enacted by the governing majority. Denied equality under the law and subject to opaque regulations, deregistered religious communities, similar to NGOs unpopular in the eyes of the government, would be subject to arbitrary and expensive audits, hindered or prevented from raising money, attacked in the government-controlled media, and harassed by local officials.

During the debate of the bill in September 2015 the government ignored all suggestions from opposition parties and NGOs that intended to improve it, and in December the bill was introduced unaltered to parliament and failed to secure the necessary two-third majority vote in parliament to pass.[36] Since failing to pass the bill, the government has not taken any further steps to amend its church law nor has it taken steps to address the ongoing violations of the right of religious freedom identified by the ECtHR. Many deregistered religious communities in Hungary currently exist in a legal no man's land, recognized neither as churches nor as religious associations. As entities without a clear legal status they are unable to collect the one-percent voluntary church tax, their clergy are denied tax exemptions given to legally recognized churches, and their ability to maintain schools and enter into contracts is severely impaired.[37]

Based on Decision 6/2013 AB, one of the deregistered churches, in a constitutional complaint procedure, asked the Constitutional Court to restore its status as "ecclesiastical maintainer" of its retirement home in order to receive state funding for the services provided. The religious community challenged the final judgment of the Supreme Court, which rejected the request, because the petitioner was not listed in the church registry of the ministry. The petition referred to the reasoning of the Constitutional Court's decision, according to which the illegally deregistered communities have not lost their status as churches, and claimed the infringement of both

[35] See the recommendations of the Forum for Religious Freedom regarding the draft amendment: *Hungary: Amended Church Law Remains at Variance with OSCE Standards and the European Convention on Human Rights*, OSCE Human Dimension Implementation Meeting, Warsaw, September 30, 2015.

[36] Due to by-elections in early 2015, Fidesz lost its two-thirds majority by two votes.

[37] The Forum for Religious Freedom (FOREF Europe), in its recommendation dated September 27, 2016, urged the government of Hungary to address the current violations of religious freedom occurring in Hungary without delay, to restore the original legal status of religious groups illegally stripped of legal personality in 2011, and to amend the law on the legal status of churches to accord with Helsinki standards, the European Convention on Human Rights, and the ruling of the European Court of Human Rights. Available online: http://www.osce.org/odihr/268711?download=true

freedom of religion and prohibition of discrimination of the Fundamental Law. The Constitutional Court in its decision of December 20, 2017 stated that the judgment of the Supreme Court is not unconstitutional.[38] However, the Court investigated *ex officio* whether the infringement of rights have been caused by the omissions of the legal regulation. The Court ruled that even though the decision on a church's status is bound to conditions set in the Fundamental Law, which means that it cannot be considered as a subjective right of the religious community to be registered, but the procedure on which the decision is based must meet the requirement of fairness. I other words, the case must be addressed within a reasonable time, and a remedy must be provided against the decision. The Court called upon parliament to enact a law by March 31, 2018 guaranteeing a meaningful decision within the set deadline of 60 days, and if failing to do so, then providing an effective remedy for the applicant religious community. In other words, the Constitutional Court obliged the legislature to provide a constitutionally acceptable procedure to decide on the registration of churches but rejected the complaint of a deregistered church based on a four-year-old decision of the same Constitutional Court.

In another case a petitioner, who wanted to offer his one-percent voluntary church tax to one of the deregistered churches, submitted a constitutional complaint asking the Constitutional Court to annul those ordinary court decisions, which rejected his request, because the religious organization did not have the necessary technical number for being subject of the law. The Constitutional Court in its decision of July 18, 2017 declared that the decisions of both the tax authority and the ordinary courts were lawful, hence the constitutional complaint was rejected.[39] It is worth to note here that the duty of the Constitutional Court is not merely reviewing the lawfulness but also the constitutionality of the administrative and/or court decisions. However, the Court *ex officio* investigated again whether the law fulfills the requirement of non-discrimination and found that the discrimination among religious communities as subjects of the one-percent tax cannot constitutionally be justified. Hence, the Court obliged parliament to change the law accordingly by December 31, 2017. The legislature failed to fulfill its obligation by the deadline. Here again, the Constitutional Court chose the easier way to deal only with the norm, without providing legal remedy for the complainant.

Models of State-religion Relations and Liberal Democracy

This change in the status of religious freedom in the Hungarian system of "illiberal democracy" after 2010 raises a question: what kind of state-religion relationship and religious systems are compatible with liberal democracy, and what are not?

In his famous book, *The Clash of Civilizations and the Remaking of World Order,* Samuel Huntington says that the key characteristic of Western culture has been the separation of church and state, something that he

[38] Decision 36/2017 AB.
[39] Decision 17/2017 AB.

sees as foreign to the world's other major religious systems: "In Islam, God is Caesar; in [Confucianism] Caesar is God; in Orthodoxy, God is Caesar's junior partner."[40] Later in the book he argues regarding Islam, Confucianism, and post-communist Europe: "The underlying problem for the West is not Islamic fundamentalism. It is Islam […] Confucian heritage, with its emphasis on authority, order, hierarchy, and supremacy of the collectivity over the individual, creates obstacles to democratization […] the central dividing line [...] is now the line separating the people of Western Christianity, on the one hand, from Muslim and Orthodox peoples on the other."[41] His concluding question and answer is "Where does Europe end? Where Western Christianity ends and Islam and Orthodoxy begin."[42]

Alfred Stepan argued against Huntington that the greatest obstacle to liberal democracy, for instance, in Turkey or Egypt is posed not by Islam but by military and intelligence organizations unaccountable to democratic authority. Both countries are more restrictive of freedom of religious expression within civil society and of freedom of organization within political society than that of any longstanding Western liberal democracy. On the other hand, the governing position of the Muslim Brotherhood in Egypt and Erdogan's anti-Atatürk governance had and still represents a different structure in these countries. Russian Orthodoxy means that the church is not a relatively autonomous part of civil society because there is a high degree of subordination to secular power. But this does not exclude that a specific religious tradition actually reinforces an instrumentalist use of power. Stepan also claims that "separation of church and state" and "secularism" are not intrinsic parts of the core definition of Western liberal democracy but the minimal boundaries of freedom of action that must be crafted for political institutions vis-à-vis religious authorities, and for religious individuals and groups vis-à-vis political institutions, what he calls "twin tolerations."[43] By "twin tolerations" Stepan means that (a) religious institutions should not have constitutionally privileged prerogatives that allow them to mandate public policy to democratically elected governments, and (b) at the same time, individuals and religious communities, consistent with our institutional definition of democracy, must have complete freedom to worship privately. In other words, the one toleration obliges the state to protect and "tolerate" the freedom of religious institutions to operate in civil society, while the other requires that the religious communities "tolerate" each other by not deploying constitutional privileges or state power to squelch their competitors. Stepan adds to this concept that this institutional approach to liberal democracy necessarily implies that no group in civil society – including religious groups – *a priori* can be prohibited from forming a political party.

Let us first see how West European democracies have met the requirements of "twin toleration." Some EU Member States – Denmark, Finland, Greece, and the United Kingdom (in England and Scotland) – have

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[40] S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York: Simon and Schuster, 1996. p. 70.
[41] *Ibid.* p. 28.
[42] *Ibid.* p. 158.
[43] See A. Stepan, "The 'Twin Tolerations.'" In L. Diamond, M. F. Plattner, and Ph. J. Costopoulos (eds.), *World Religions and Democracy*, Johns Hopkins University Press, 2005. The essay originally appeared in the October 2000 issue of the *Journal of Democracy*, and a much longer and more extensively footnoted version appeared in Stepan's book *Arguing Comparative Politics* (2001).

established churches. Norway and Iceland, although not in the EU, are two other European democracies with an established church. (Only Sweden disestablished the Lutheran church in 2000.) Although Germany does not have an established church, Protestantism and Catholicism are recognized as official religions, and the majority of citizens pay state-collected church tax. The two European countries with "hostile" separations of church and state used to be France and Turkey, but the current Turkish situation fits here less and less. This means that three distinct models of state-religion relations can be differentiated in contemporary Europe: those with an established church, the militantly secular, and a mixed model with a dominant but civil church. These are described by Silvio Ferrari through one country in each model: English multiculturalism, French secularism, and Catholic civil religion in Italy.[44] (Maybe the Dutch model can be considered as a fourth, where not even actual Calvinist believers are officially members of the Calvinist Church, and then there exists a symbolically subordinate but more organized and more numerous Catholic Church.) Ferrari concludes that there are sharp distinctions between the religious freedom of individuals, which all European states protect, and the status of religious communities and institutions, which are subject to restrictions. In another work speaking of Europe, Ferrari claims that it is necessary to go beyond the traditional classification of church-state relations, and look at the common principles that are the basis of the European model of state-religion relations.[45] But the lesson from the European picture is that liberal democracies are compatible both with established churches and with unfriendly separation of church and state approaches as well. Therefore, the concept of secularism and the separation of state and religion has a place in the Western European liberal democracy only in the context of Stepan's "twin tolerations." This means that we have to leave room for democratic bargaining and the non-liberal public argument within religious communities that it sometimes requires.

Conclusions

It is not easy to characterize the relations between the state and religion in Hungary using Hirschl's models. It is certainly not theocratic constitutionalism and also not a religious establishment approach, which exist in some of Europe's most liberal and progressive polities, such as Denmark, Finland, Iceland, and Norway, having a formal, mainly ceremonial designation of a certain religion as the "state religion," or even in Germany, where the institutional apparatus of the Evangelical, Catholic, and Jewish religious communities are designated as public corporations and therefore qualify for state support from a German church tax.[46] Hungary's unique system is perhaps the closest to a more *de facto* scenario than a *de jure* model, where formal separation of church and state, as well as religious freedom more generally, is constitutionally guaranteed, but where

[44] See S. Ferrari, "Models of State-Religion Relations in Western Europe." In A. D. Hertzke (ed.), *The Future of Religious Freedom. Global Challenges*, Oxford University Press, 2014.
[45] S. Ferrari, "The Legal Dimension." in B. Marechal, S. Allievi, F. Dasseto, J. Nielsen (eds.), *Muslims in an Enlarged Europe*, Leiden-Boston, 2003.
[46] See Hirschl, 29.

emerging patterns of politically systemized hegemony of the Catholic Church and religion-centric morality is present in the constitutional arena. This illiberal approach of state-religion relationship is similar to the approach in Ireland. The preamble of the new Hungarian Fundamental Law, entitled National Avowal states: "We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love." According to Article L of the Fundamental Law: "(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival."

The Fundamental Law's conception of marriage – which, incidentally, follows the definition serving as the basis for the Constitutional Court's Decision 154/2009 (XII. 17.) AB on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards faithfulness, procreation, and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural-law principles, protects those of the people's interests that not everyone attributes themselves to, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family, a modern, living Constitution, especially a new Fundamental Law, should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality.

With the constitutional ban on same-sex marriage, the Constitution-maker has ruled out the future ability of the Hungarian legislature to follow a global trend, to make the institution of marriage available to same-sex couples. In keeping with this, Article XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian Constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life – based on sexual orientation alone. This solution runs counter not only to the European Union's Charter of Fundamental Rights and the case law of the European Court of Justice (for the latest example, see judgment C–147/08 in the case of *Jürgen Römer v. Freie und Hansestadt Hamburg*), but also counter to the provisions of Hungary's still effective Act CXXV of 2003 on the Promotion of Equal Treatment and Equal Opportunities.

While a complete neutrality of the constitutional text is almost impossible, these provisions challenge the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values – as the preamble words it: "the form in which we want to live" – and they are capable of ostracizing them from the political community. Even though the Constitutional Court at the end of 2012 annulled the very definition of the family in the law on the protection of families as too exclusive, due to the Fourth Amendment in 2013 the Fundamental Law now defines marriage and the relationship between parents and children as the basis of family relationships, never mentioning extramarital relations and parenting.

Constitutions in the modern world often have a great deal to say about religious liberty. Liberal constitutions require freedom of religious belief and propitious conditions for collective worship. Illiberal constitutions often intermingle religion and state authority to the point where an official religion dries out its contenders or where religious doctrine had direct legal status. Some illiberal constitutions ban any religious influence on political life. In this paper I tried to catalogue the different sorts of constitutional orders and provide a theoretical account of their differences, before focusing on the Hungarian constitutional approach. The growing importance of religion in national legitimation in Hungary was one of the reasons that this – one of the world's newest constitutions – has taken an illiberal path.

One of the lessons to be learned from the Hungarian case study is that different constitutional models of state-religion relationships alone do not indicate the very status of religious rights in a polity. Even a theocratic model – as the one in Egypt under Mubarak with a relatively liberal jurisprudence of the Supreme Constitutional Court – can provide more religious freedom than a formal separationist approach such as the current Hungarian one. As the European Court of Human Rights stated in the case of *Magyar Keresztény Mennonita Egyház and Others*, Hungary violated the principle of state neutrality in the official justification of its laws silencing people with deeply held religious beliefs.[47] The political aspirations for more illiberalism after a liberal democratic period seemed to be the decisive element to find similarly restrictive measures for freedom of religion. Through the use of "abusive constitutional" tools,[48] a new Fundamental Law and its constitutional amendments to the illiberal constitutional model also became undemocratic,[49] which enforces conservative social and cultural norms not necessarily shared by the majority.

References

[47] See a similar definition of state neutrality by J. Kis, "State Neutrality." In M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, OUP, 2012. 318–334.

[48] The category of "abusive constitutionalism" was introduced by David Landau using the cases of Colombia, Venezuela, and Hungary. See D. Landau, Abusive Constitutionalism." 47 *UC Davis Law Review*, 2013. 189–260.

[49] As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in Hungary, but democracy itself. Hence, instead of calling them "illiberal democracies" we should describe them as illiberal and "undemocratic" regimes. See J.-W. Müller, The Problem With "Illiberal Democracy" 2016.