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# Altering regulations – freedom of religion in Hungary

*Regulaciones que alternan. La libertad religiosa en Hungría*

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**Abstract:** In the paper the new Hungarian constitutional regulation and related statutes on the right to conscience and religion and establishment of churches are examined and compared to the previous regulatory framework. The comparism seems necessary as in 2011 the Hungarian Parliament adopted a new Fundamental Law and new statute on these fundamental rights. Due to the changed constitutional framework concerning the establishment of churches, it seems possible that in Hungary there may be a serious deficit in promoting human rights.

**Key words:** constitutional changes, Hungary, freedom of religion, establishment of churches.

**Resumen:** El objeto del trabajo consiste en comparar la nueva regulación del derecho a la libertad religiosa en Hungría con la que existía antes. Los autores del artículo sugieren que los cambios referentes a la libertad de culto pueden suponer un atentado a la dimensión promocional de los derechos fundamentales.

**Palabras clave:** cambios constitucionales, Hungría, libertad de religión, establecimiento de iglesias.

This paper was presented on 8-9 April, 2011 at the international conference entitled “Liberties in the new Europe” organized by Facultad de C.C. Jurídicas y Sociales, Universidad Rey Juan Carlos, Madrid. The original and presented version of the paper was written when the development of the new Hungarian constitutional arrangement was still in process. When this paper is going to be published in spring 2012, we know much more about the legal development at constitutional as well as regulatory level relating the freedom of religion. As we think that is still interesting what kind of thought we have in mind around the beginning of the year of 2011, we decided not to make any changes in the original text but give just a supplementary few pages to the end of the original paper in which we can refer to the main changes.

The freedom of religion is one of the most important fundamental rights recognized at all Western human right protection regimes<sup>1</sup>. That is why it is extremely important to learn its interpretation, legal regulation and development in a state (Hungary) which intends to adopt a new constitution. In this paper we examine the main features of the constitutional regulation of the freedom of religion that a democratic *pouvoir constituant*<sup>2</sup> should adopt. A legitimacy of a constitution, which is not a dichotomy, changes from time to time<sup>3</sup>, and is influenced by several factors: a prior and a posteriori requirements, both having procedural (the most efficient consultation possible) and material content (in line with the democratic constitutional development, principles being the base of the norm-asset of the supranational and international community). That is why there should be a firm consensus what and how (in what formulation) to insert into the constitution. This is even truer in the case of fundamental rights, and in the case of the topic of our paper: freedom of religion. In this paper we give an overview on the regulation and interpretation of this human right and the present stage of the constitution-making process regarding the regulation of issues affecting this right.

## 1. THE REGULATION OF FREEDOM OF CONSCIENCE AND FREEDOM OF RELIGION

In Hungary, this human right is provided by the *Constitution* (Act XX of 1990, Article 60) and by *Act IV of 1990 on freedom of conscience and religion* (Act)<sup>4</sup>.

<sup>1</sup> In Europe, see Art 9. of the ECHR and Art 10 of the EU Charter of Fundamental Rights. Explanatory notes to the Charter declares that Art 10 is corresponding to the right recognized by the ECHR, in terms of extent and content.

<sup>2</sup> For the democratic constitution making process and legitimacy see FOSSUM, J. E.; MENÉNDEZ, A. J., "Democratic Constitution-Making Reflections on the European Experiment", available at <[www.oezp.at/pdfs/2005-3-03.pdf](http://www.oezp.at/pdfs/2005-3-03.pdf)>. (last accessed on 22.02.2011); SCHMITT, C., *Constitutional Theory*, Duke University Press, 2008, pp. 136, 138; ZELDITCH, M. Jr., "Theories of Legitimacy", in JOST, J. T.; MAJOR, B. (eds.), *The psychology of legitimacy. Emerging perspectives in ideology, justice, and intergroup relations*, Cambridge University Press, Cambridge, 2001, p. 41; FALLON, R. H., "Legitimacy and the constitution", *Harvard Law Review*, vol. 118, n° 6 (April 2005), p. 1794.

<sup>3</sup> STILLMAN, P. G., "The concept of legitimacy", *Polity*, vol. 7, n° 1 (Autumn 1974), pp. 39-45. <[www.jstor.org/stable/3234268](http://www.jstor.org/stable/3234268)> (last accessed on 22.02.2011).

<sup>4</sup> In addition to the Act referred to above, there are several other provisions related to churches. A more detailed examination of the freedom of religion, see DRINÓCZI, T.; PETRÉTEI, J., "The

Article 60 of the Constitution reads as follows:

“(1) In the Republic of Hungary everyone has the right to freedom of thought, freedom of conscience and freedom of religion.

(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) The church and the State shall operate in separation in the Republic of Hungary.

(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”.

1.1. It is established by the Hungarian Constitutional Court *that freedom of conscience and freedom of religion* are basic freedoms. One of their characteristics is that they belong specifically to the internal world of the individual (scope of protection). The Constitution gives an unusually detailed regulation in this respect<sup>5</sup>. The subject of the right is everybody (human right); the content elements are the following: free choice or acceptance (even change) of a religion or belief, publicly or privately express in any way or decline to express, teaching. It also follows that the undisturbed exercise of these rights is ensured by the Republic of Hungary. This obligation of the state is implemented by, inter alia, effective protection of other, connected fundamental rights<sup>6</sup>, the realization in practice of the separation of the church and the state that includes the ideological neutrality of the state and denominational equality.

1.2. *Church and state.* The Hungarian literature defines church as basic constitutional institution, which does not form part of the state, must not exercise

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Freedom of Religion in the Republic of Hungary”, in G. MANSSEN, B. BANASZAK (Hrsg), *Religionsfreiheit in Mittel- und Osteuropa zwischen Tradition und Europäisierung* (Peter Lang Europäischer Verlag der Wissenschaften, Frankfurt am Main 2005) pp. 143-161.

<sup>5</sup> The Constitution regulates fundamental rights laconically; the freedom of religion is regulated the more “talkative” way.

<sup>6</sup> Such as freedom of speech, press and assembly. See KAUPER, P. G., ‘*Religion and the Constitution*’ (Louisiana State University Press 1964) p. 15. We have to add to this enumeration, among others, data protection, prohibition of discrimination as well.

rights of state authority but has a specific autonomy<sup>7</sup> and a relation of partnership with the state. A church, pursuant to the law is an organizational form that takes the historically developed characteristics of public worship into consideration and makes for religious communities possible to fit in the legal order in such a special quality. Since 23 October 1989, the Republic of Hungary has been an ideologically neutral state that has a co-operative relation to churches. The state –due to its ideological neutrality– should not identify itself with the instructions of any church, should not take a stand on questions of faith and should not judge the truth content of any religious faith or belief. The neutrality of the state however must not call forth religious indifferentism, or neglect of religious views in legislation. It should endeavor to provide the possibility of making a conscious choice to everybody. The state should ensure the conditions required to the enforcement of freedom of religion that is the protection of relating values and life situations<sup>8</sup>. Expectations deriving from the ideological neutrality of the state should prevail in the requirement set before legislation; the state should exclusively set rules which can be applied on every religion and church, which are neutral and fit in the neutral legal system concerning religions and churches. In questions of content, provisions should rely on the self-interpretation of churches. On the ground of institutional separation, the state must combine neither with churches or a definite church, nor should it interfere in church matters. Pursuant to the Act, rules and laws of a church must not be enforced by state pressure, because churches operate as autonomous organizations: they must not be given the chance to apply external means in order to enforce or implement any of their provision or rule. Nevertheless, a church may obviously enforce rights specified in state law, through state force (e.g., before the court), like any other organization (e.g., against his employee). It is another guarantee that the state should not set up any organ for the supervision and inspection of churches with such authority.

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<sup>7</sup> The specific autonomy of a church according to the interpretation of the Constitutional Court will not infringe the principle of equality of denominations, since ‘Act IV of 1990 besides organizational authority does not provide extra rights which other religious communities would not possess’. Decision 8/1993 (II.27.) of the Constitutional Court. ABH 1993. 99.102. For the sharp criticism of Constitutional Court decision dealing with the issue see SAJÓ, A., “A ‘kisegyház’ mint alkotmányjogi képtelenség” [The “small Church” as an absurdity of constitutional law] *Fundamentum*, n. 2 (1999), p. 87 and foll.

<sup>8</sup> Decision 4/1993 (II.12.) Constitutional Court, ABH 1993. 48. 52-53.

The principle of denominational equality requires that the state should treat churches and denominations as equal. In the jurisprudence of the Constitutional Court, it is recognized that there are actual differences between churches, especially as far as historical churches concerned. The equal treatment of churches however on the one hand denotes the constitutional constraint of the state not to give any religion a partial treatment; on the other hand, the state must not restrict the followers of any religion –operating within constitutional frames– in the free exercise of their faith. It also denotes that equal treatment does not exclude the consideration of an actual social role. The reason for this is the general phenomena that several former duties have become state obligations and churches have also preserved this activity. In these spheres, separation is not contrary to co-operation and cannot turn into isolation. Related to Act XXXII of 1991 on the arrangement of the ownership situation of former church properties the question was raised if the remedy of grievance committed in the law of religious exercise was not unconstitutional. The Constitutional Court stated that on the ground of the Act referred to, the property being transferred to churches served church aims even before nationalization. They promoted the realization of religious exercise and now they get to be church properties according to the activity of churches, in the necessary extent and time. In relation to this, the Act states, every single church is entitled to equal rights and has equal duties, thus they are obviously equal before the law in different state procedures as well. The state may develop specific forms of co-operation with churches but it should not imply detrimental discrimination of other denominations.

1.3. *Evaluation of the present regulation.* It complies with the requirements of constitutional democracy and the demand of international treaties. The admittance and significance of this regulation is proved by the fact that a great number of churches have been established in Hungary after the transition and several monastic orders and charitable religious communities pursue even extremely significant social activities. The practical realization of the right of freedom of conscience and religion is proved by the prevalence of ideological freedom, free choice of denominations, freedom to the change of a religion, the principle of religious plurality, the right of free exercise of a religion, the free circulation of religious views and the right to education. Churches may be established and may operate freely; church autonomy and self-regulation prevail to a large extent. Churches possess legal personality and the principle of equality is also

effective. The state and the church are separated from each other; the ideologically neutral Hungarian state has a co-operative relation to churches. The issue of the restitution of Church properties has been satisfactorily agreed upon; the anti-religion and anti-church policy of the former system was remedied.

At the same time, general attention towards religious questions has not decreased, which is proved by the fact that there have been a number of proposals related to the amendment of the Act. It is reasoned by several factors, such as the following. The Act is too generous in terms of requirements for establishing churches: only 100 natural persons are required, only the statute is to be submitted to court for registration, only a declaration on the fact is required that the scopes of the new church is not contrary to the Constitution and laws. Commentators proposes the followings: raising of the number of founders, the submission and evaluation of the concepts which the church is based on, giving the competence of registration to the capital court, Supreme Court or Constitutional Court, the requirement for registration of inner organs of the church in order to gaining legal capacity, more detailed regulation for supervision of activity and functioning of churches<sup>9</sup>. In books denominations are equal, but in practice there have been attitudes of the state privileging traditional churches.

## 2. IN THE FLOW OF NEW CONSTITUTION MAKING PROCESS

2.1. As it was mentioned in the introductory part, there is a constitution making process in Hungary that started after the election in April 2010 and ends, allegedly, in April 2011. The parliamentary power that reached 2/3 majority in the election declared: the state needs a new constitution because the one in effect in the time of writing this paper is a communist one (having 1949 in its title) and it was adopted as a provisory constitution in 1989 and 1990 during the transition process by the non legitim socialist Parliament. Therefore it needs to be changed. Apart from this political appraisal there are some professional considerations as well. They are as follows: the new (modified) Constitution of Hungary was published on 23 October 1989<sup>10</sup>. According to

<sup>9</sup> ANTAL, Á., *Bölcsélet, vallás, állami egyházjog*, Dialóg Campus Kiadó, Budapest-Pécs, 2007, pp. 304-305.

<sup>10</sup> See Act XXXI of 1989 on the modification of the Constitution.

the Constitutional Court, this modification resulted in the coming into force of a practically new Constitution, that has initiated a totally different and new quality of state, law and political system by settling on the fact that ‘the Republic of Hungary is an independent and democratic constitutional state’<sup>11</sup>. Although in a formal sense –as a consequence of the characteristics of the constitutionalization of 1989– the basic law still bears the denomination of Act XX of 1949, the Constitution is the basic law of a democratic constitutional state that corresponds to the classical principles and values, having evolved through the European democratic constitutional development. Indeed, as it has already been mentioned Article 60 of the Constitution has a wording and an interpretation satisfying European standards<sup>12</sup>.

2.2. The new Constitution is planned to be adopted in 18 April 2011. In the beginning of February, 2011 there is no information about its possible content and wording. It is indeed true that the Concept of the Constitution (hereinafter Concept) was adopted by the competent parliamentary commission in autumn 2010<sup>13</sup> but it is now suggested to be regarded only as a guideline. Parliamentary parties were asked to submit their respective concepts to be negotiated in mid February 2011. Still, the final deadline for the voting of the new Constitution is 18<sup>th</sup> of April. This situation is interesting because during the process of making the Concept, a so called consultation –that was quite formal– was announced where several (social) organizations were invited by the commission<sup>14</sup> to share their opinion about the new constitution.

Regarding the freedom of religion, the Concept basically suggests the maintenance of the text inserted in Article 60 with a slight but not insignificant change: the right to change one’s religion or belief is proposed to be

<sup>11</sup> Decision 11/1992 (III.5.) of the Constitutional Court, ABH 1992, 77, 80.

<sup>12</sup> See for example the possibility of conscientious objection to military services that was introduced by Act XXXI of 1989 on the modification of the Constitution (Art. 70/H. (2) of the Constitution) and several cases of the European Court of Human Rights. Summary of the latter can be found in VAN DIJK, P.; VAN HOOF, G. J. H., “Theory and Practice of the European Convention of Human Rights” (The Hague: Kluwer Law International 1998) pp. 544-545. As for the state obligation to provide religious freedom see 7374/76, X v. Denmark, D&R 5 (1976) and see point 1.1. above. The similarity of wording and the necessity of similar interpretation can be seen when one read Art. 9. of the ECHR and Art. 60 of the Hungarian Constitution.

<sup>13</sup> After 2.5 months of working in the merit.

<sup>14</sup> Others could also share their views as well.

written into the text. As for the relationship between state and church, the Concept proposes the use of another approach: it seems to break with the idea of separation of the state and church from each other. Basically, it does not suggest any regulation of this kind, instead, it emphasizes that ‘churches and religious communities are independent’. These two wording cannot have same interpretative output. There is a danger that it might be regarded as a withdrawal from a standard developed during the 20 years of democratic constitutional development in Hungary. This opinion may be strengthened by another proposed rule: “Unless the Constitution stipulate otherwise, a fundamental right shall be subject only to such proportional limitations as are prescribed by law and requires the protection of the good reputation and that of rights and freedoms of others, national security, public order, public health, protection of morals”. It may trigger the disruption of the coherency and consistency of the Hungarian regime of fundamental rights’ protection.

Furthermore, there is an intention to canalize corporative interests, into the legislative process by establishing a second chamber. Among constitutional lawyers in Hungary there is a consensus contra this idea, but it has appeared in the Concept. The members of this chamber would be: churches having the most significant social role, minorities, public bodies, and universities, civil organizations having outstanding social role, local (county) governments, and most distinguished persons of sciences, culture and politics.

In the Concept there is no sign of having incorporated (or even considered) the practice of the Constitutional Court, there is no reference of the fate of its decision, it is uncertain whether there should be a legal continuity or not in this regard. These questions arise as the approach of the parliamentary commission was to base a short and concise constitution; this is an idea totally inconsistent with the democratic constitutional development. This short constitution would contain only the ‘most important rules’, such as: the ‘Constitutional Court for the protection of constitutional rights and promotion of the realization of the Constitution, supervises the constitutionality of laws. In case of unconstitutionality, it applies the legal consequences’<sup>15</sup>. Thus, legal consequences would be stipulated in an act approved by 2/3 majority. This

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<sup>15</sup> In several cases there is the following rule suggested: constitutional guarantees of ‘x’ fundamental right is regulated in Act approved by 2/3 majority.

approach ‘outsources’ constitutional guarantees to a regulation at lower level. This may trigger a lower standard of protection and a situation when, instead of the constitution, it is the legislative power that limits the state power, including itself.

2.3. In 14 March 2011, the draft of a new constitution was submitted to the Parliament<sup>16</sup>. As for the freedom of thought, belief and religion, the Draft echoes the suggestion of the Concept. There is a significant shift, however, in connection with the separation of the church and the state. The Draft stipulates that ‘[i]n Hungary, state and church functions separately. Churches are independent. The state for the sake of common interest cooperates with churches. Detailed rules on churches shall be regulated in cardinal laws’<sup>17</sup>. The cooperation obligation of the state stems from the actual situation and the decisions of the Constitutional Court<sup>18</sup>. These are uncontroversial developments. The freedom of religion is of ‘significance’ relating to the competence of the Constitutional Court in reviewing laws falling within the sphere of economic policy making of the governance (financial laws). The Constitutional Court has competences in this matter only if the law, *inter alia*, is in contrary to the freedom of religion. This regulation is in effect since autumn 2010; and even though the Government, in its political communication, promised to cease the restriction of the competence of the Constitutional Court in the new constitution, it did not comply with its promise.

The Draft (Article XXIX), in contrast to the present constitutional regulation (Article 70/H(2)) and the jurisprudence of the Constitutional Court, does not make it possible to opt out of military service.

### 3. CONCLUSION

We may conclude that in Hungary the freedom of religion has been well regulated at constitutional level and interpreted by the Constitutional Court; legal texts may be changed but the background ideology, that is neutrality of

<sup>16</sup> T/2627 javaslat Magyarország Alaptörvényéről [Draft T/2627 on the Fundamental Law of Hungary]

<sup>17</sup> Cardinal laws are the Hungarian tally of organic laws.

<sup>18</sup> See footnote 8.

the state and values stemming from the decisions of the Constitutional Court have to be maintained. A new constitution should create a legal environment which provides for a neutral but cooperative approach towards beliefs, religions and churches. Within limits specified by the constitution itself, lower regulation should rely on the own interpretation of religious groups and churches in material issues. The widest possible freedom of belief and religion can be sustained only this way. The current constitution making process, however, do not represent this approach. But for evaluating the new situation, we still have to wait and see until the adoption of the new text of the constitution and Act.

#### 4. SUPPLEMENTARY REMARKS MADE IN MARCH 2012

Here we summarize, chronologically, the development of the regulation of the right of thought, conscience and religion and give a brief overview about the regulatory rules on the establishment of churches and the changes in their legal status introduced by the new related statute.

4.1. The Fundamental Law of Hungary (hereinafter FL)<sup>19</sup> was adopted on 18 April 2012 and came into force by 1 January 2012, and on 31 December 2011 was supplemented by the Transitory Provisions of the Fundamental Law (hereinafter Transitory Provisions)<sup>20</sup>. They contain the basic rules on freedom

<sup>19</sup> Magyarország Alaptörvénye [The Fundamental Law of Hungary] (25 April 2011) Magyar Közlöny [Official Gazette] 2011, n° 43. 10656 (hereinafter FL).

<sup>20</sup> Magyarország Alaptörvényének átmeneti rendelkezései (2011. december 31) Magyar Közlöny 2011. évi 166. sz. 41613 [Transitory Provisions of the Fundamental Law of Hungary (31 December 2011) Official Gazette 2011 nr 166 p. 41613] The “Transitory provisions” has two main parts. The first session that is in fact a political manifesto of the majority of the Parliament is called “On the transition from communist dictatorship to democracy”. The second part contains the real Transitory provisions connected the entering into force of the Fundamental Law (e.g. when to be applied some provisions of the Fundamental Law for the first time, which provision of the Constitution, that is Act XX of 1949, is to be applied until a determined period of time) as well as other substantial rules (e.g. definition of the constitutional complaint, possibility of merging the National Bank and the Financial Supervisory Authority in which situation the President of the National Bank would be only a vice-president of the new organ). See more about it in Tímea Drinóczi: Constitutional politics in contemporary Hungary. Conference paper, Winter Trento European Seminar; The New Constitution of Hungary (2012): Constitutional identity and conditionality in question. Forthcoming.

of thought, conscience and religion and churches at constitutional level. The FL regulates these fundamental rights in the following manner.

There are some references to God and Christianity in preamble (National Avowal/Credo/Confession<sup>21</sup>) and at the end of the FL:

“God bless the Hungarians”<sup>22</sup>

“We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country”<sup>23</sup>.

“We, the Members of the Parliament elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constitutional power, hereby adopt this to be the first unified Fundamental Law of Hungary”<sup>24</sup>.

The FL in its Art R)(3) the provisions of the preamble binding as it stipulates that

The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution<sup>25</sup>.

The FL<sup>26</sup> in its part about freedoms and responsibilities declares almost the same rule as it was embodied in the Constitution that, in itself, may involve a very similar understanding as it was presented in point 1.1:

Every person shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change religion or

<sup>21</sup> It is “hitvallás” in Hungarian; this word in our language has a religious connotation.

<sup>22</sup> This is actually a citation (without, however, quotation mark) the first line of our national anthem. See I)(3) of FL The anthem of Hungary shall be the poem *Himnusz* by Ferenc Kölcsey set to music by Ferenc Erkel.

<sup>23</sup> See preamble.

<sup>24</sup> See the final lines of the FL.

<sup>25</sup> About other problems may emerge due to the regulation of R)(3) FL see CHRONOWSKI, N.; DRINÓCZI, T.; KOCSIS, M., “What questions of interpretation may be raised by the new Hungarian constitution?” available at <<http://www.internationalconstitutionallaw.net/journal/Forthcoming>>.

<sup>26</sup> See also Art XV on the prohibition of discrimination on the ground of religion and the competence of the Constitutional Court that is restricted regarding the review of financial laws unless they affect the right to freedom of thought, conscience and religion. Art 37(4) FL.

any other persuasion, and the freedom for every person to proclaim, refrain from proclaiming, profess or teach his or her religion or any other persuasion by performing religious acts, ceremonies or in any other way, whether individually or jointly with others, in the public domain or in his or her private life<sup>27</sup>.

Every Hungarian citizen shall be obliged to defend the country. If armed service is incompatible with the conscience of any person obliged to perform military service, he shall perform unarmed service<sup>28</sup>.

As for the relationship between churches and the state, the FL made some slight but important and reasonable changes.

The State and churches shall be separate. Churches shall be autonomous. The State shall cooperate with the churches for community goals.

The detailed rules for churches shall be regulated by a cardinal Act<sup>29</sup>.

As for the assessment of the new rules of the FL, a high level of protection could be foreseen<sup>30</sup> –at least until the adoption of the Transitory Provision and the related statute (see below)– but it also has to be noted that the actual meaning of these above rules are subject to the interpretation of the preamble.

4.2. Based on this framework the Parliament adopted Act C of 2011 on the freedom of conscience and religion and legal status of churches, denominations and religious communities (hereinafter Act1) on its session of 11 July 2011. Act1 was –besides being strongly criticized in the merit in the literature– annulled by the Constitutional Court due to its procedural invalidity as it was not adopted in the proper manner described by the Standing Orders of the Parliament<sup>31</sup>. Criticism appeared in the literature touch upon, *inter alia*<sup>32</sup>, the following matters<sup>33</sup>. Act1 did not mention right to thought, though

<sup>27</sup> Art VII(1) FL.

<sup>28</sup> Art 31(1) and (3) FL.

<sup>29</sup> Art VII(2)–(3) FL. Art 2(2) FL. Cardinal laws means a law adopted by 2/3 majority in the Parliament. See Art T)(4) FL.

<sup>30</sup> TAMÁS, K., “Az új egyházügyi szabályozás színe és fonákja”, *Közjogi Szemle*, 1 (2012).

<sup>31</sup> 164/2011. (XII. 20.) AB határozat, Magyar Közlöny [Official Gazette] 2011, n° 155, 38010–38031.

<sup>32</sup> In this paper it is not possible to enumerate all the justified critical views about the relevant statutes.

<sup>33</sup> See Klein, *loc. cit.* at n 31, Ádám ANTAL, A., “Vallás, vallásszabadság és egyház Magyarország Alaptörvényének, továbbá ‘A lelkiismereti- és vallásszabadság jogáról, valamint az egyházak,

it is part of Art VII(1) FL the implementation of which is the primary goal of Act1. It defines religious activity that is seen as controversial as it is the political decision-maker who decides on the concept of religious activity and this is contrary to the principle of separation of state and church and the neutrality of the state. It stipulates that since 1 January 2012 the legal status of churches changes; those churches which gained this status under Act IV of 1990 may become churches registered in the annex of Act1 (recognized churches under the Act1) or, if not registered in this manner they lose their status as a church if do not fulfill criteria established by the Act1. In this case they may function as religious associations. As it can be observed, the establishment of churches was referred to the discretionary power of the Parliament<sup>34</sup> (and as a result 14 churches became recognized churches under the Act1) that is considered to be contrary to the case law of the European Court of Human Rights<sup>35</sup> and the Constitutional Court and in general democratic constitutional principles enshrined in the Constitution still in effect in 2011 as well as the provisions of Fundamental Law.

4.3. Due to the annulment of Act1, the Parliament had to agree upon a new statute. It was done by an extraordinary session held on 21 December 2011, when Act CCVI of 2011 on the freedom of conscience and religion and legal status of churches, denominations and religious communities (hereinafter Act2) was adopted<sup>36</sup>. By that time, criticisms of Act1 were public so the Par-

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vallásfelekezetek és vallási közösségek jogállásáról' szóló 2011. évi C. törvény figyelembe vételével", in TÍMEA, D. (szerk), *Magyarország új alkotmányossága* [New constitutionalism in Hungary] (Pécs, 2011) pp 28-29, and the "Forum" session of 3 *Fundamentum* 2011 written by Schweitzer Gábor, Mink Júlia, Iványi Gábor, Szathmáry Béla, Rixer Ádám, especially at pp. 54 (Schweitzer) and 56-58 (Mink).

<sup>34</sup> This also means that it is not a court that registers churches as suggested. See point 1.2. above.

<sup>35</sup> See inter alia, *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, ECHR 2006-XI. (a state is not empowered to have discretionary power to decide the legitimacy of religious dogma), *Mitropolia Basarabiei Si Exarhatul Plaiurilor and Others v. Moldova* (dec.), no. 45701/99, 7 June 2001 (restriction of legally recognised religious communities is an interference to the right of religion of those involved), *Religionsgemeinschaft Der Zeugen Jehovas and Others v. Austria*, no. 40825/98, 31 July 2008 (there should be no discriminatory criteria applied to the process of legal recognition of religious communities, especially when a special status is involved). (Cited by Mink, *op. cit.*, n. 33).

<sup>36</sup> Magyar Közlöny [Official Gazette] 2011, n° 166, 41621-41634.

liament as a constituent power made a related provision into the Transitory Provisions raising this rule to constitutional level:

The Parliament shall determine recognized churches as well as the criteria for being recognized church in the cardinal act on the detailed regulation on churches. Cardinal act may stipulate that for being a recognized church, determined period of functioning and determined number of membership is necessary and historical traditions as well as social support may be taken into consideration in the process<sup>37</sup>.

This provision of the Transitory Provisions becomes a constitutional basis for repulse of criticism related to the recognition made by the political decision-maker. This rule, as being constitutional one, has to be interpreted jointly with Article VII of the FL, and the provisions of the related statutes cannot be challenged on the basis that they are in contrary to provisions of the FL on the separation of state and the church.

4.4. Act2 are however criticized on almost the same basis as Act 1 was; the reason is that it applies similar rules. Neither Act2 mentions right to thought, though it is part of Art VII(1) FL the implementation of which is the primary goal of Act1; it still defines religious activity<sup>38</sup> that is still to be viewed as controversial in itself. It may, however, get another interpretation and assessment due to the changed constitutional rules (see the abovementioned provisions of the Transitory Provisions).

It upholds the differentiation between registered and other churches and associations conducting religious activities. Consequently, by 1 January 2012 there are registered churches in Hungary, and they are the same as enumerated in the Annex of Act1; and there are associations that can apply to the Parliament for being registered. These associations conducting religious activities may become registered churches if they fulfill the following criteria: 1000 person so initiates by the means of popular initiative, its basic

<sup>37</sup> Art. 21 of Transitory Provisions.

<sup>38</sup> Art 6(1) Religious activity is an activity that is in connection with an ideology related to the supernatural, has systemised dogma that refers to the entire of reality and involves the whole personality of the person by particular rules of conduct not contrary to morals and human dignity.

activity is religious, it has its own religious dogma and rite, it has at least 100 years international activity or 20 years of operation in Hungary in a legally recognized way (either as an association or a church under the former Act of 1990), it has adopted its internal rules and elected its representative bodies, the representatives declare that the activities of the organization are not contrary to the Fundamental Law, other laws and do not infringe the rights and liberties of others, there has not been any homeland security risk emerged relating the association, its dogma and activities do not jeopardize the right to health, protection of life and human dignity. These criteria are examined by a parliamentary committee, but the decision about the modification of the Annex –that is the recognition and registration of the association as a church– is decided by the 2/3 majority of the Parliament. The decision itself is a discretionary power of the Parliament as among the criteria there are several subjective as well as objective ones. This subjectivity<sup>39</sup> may result in the infringement of right to religion in the future and has already had this consequence: those 14 registered churches in Annex of Act2 remain churches based on law while others have to be subject of the abovementioned assessment. This happened with another 13 churches that was registered by 1 March 2012<sup>40</sup> under the rules of Act2 with the exception that the provision on the initiation (of 1000 people) did not need to be applied under the law.

## 5. FINAL CONCLUSION

The new constitutional arrangement brought changes in the protection of fundamental rights at constitutional level as well as in the statutory regulation and practice. Provisions of Act2 seem to be contrary to human rights standards and the former decisions of the CC (see point 1.2 above), but –in a paradox way– due to the rule of the Transitory Provisions, in harmony with the Hungarian constitutional rules. These put together raises a concern about the “constitutionality” of the rules of the Transitory Provisions,

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<sup>39</sup> Even though the opinion of the president of the Academy of Science has to be asked, this opinion is not binding.

<sup>40</sup> This date is the date of the enter into force of the Act on the modification of Act2.

which, in the Hungarian constitutional doctrine is impossible. It can be concluded that there may be a serious deficit in promoting human rights in Hungary regarding the right to religion even if the FL itself stipulates in Article I: The inviolable and inalienable fundamental rights of MAN shall be respected and defended by the State as a primary obligation. Hungary shall recognize the fundamental rights which may be exercised by individuals and communities.