

11-1-1996

The First Five-Year Span (1989-1994): Law and Religion in Post-Communist Hungary

Helen E. Hartnell

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Helen E. Hartnell, *The First Five-Year Span (1989-1994): Law and Religion in Post-Communist Hungary*, 1996 BYU L. Rev. 731 (1996).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1996/iss4/3>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The First Five-Year Span (1989-1994): Law and Religion in Post-Communist Hungary

*Helen E. Hartnell**

I. INTRODUCTION

The legal status of religion in Hungary was transformed during the first post-Communist era from 1989 to 1994. This article examines the situation in Hungary at the end of that era, when Hungary was on the verge of changing from a conservative to a new socialist government—a time of transition within transition. By scrutinizing this suspended moment before the pendulum's weight dropped back from one extreme position and started its swing in the opposite direction, we can easily appreciate the vast distance travelled from Communist-era atheist rule. This exercise further enables us to establish a benchmark against which later developments under Gyula Horn's socialist government can be measured.

Only passing conclusions can sensibly be drawn in the context of a society still undergoing an encompassing transformation. Yet it is clear that the first post-Communist government in Hungary embraced Locke's notion that religious tolerance can have a positive, stabilizing effect on society.¹ Indeed, the conservative Antall government unambiguously asserted that churches should help the state to shoulder the burden of reestablishing

* Associate Professor of Law, Central European University, Legal Studies Department, Budapest, Hungary. This article is based on a paper given in July 1994 at the International Association of Religious Freedom Conference on Religion and Human Rights in Europe, held in Cluj, Romania. I am grateful to W. Cole Durham, Jr., Maryellen Fullerton, Kim Lane Scheppelle, and Keith Werhan for their comments on earlier drafts of this paper, and to Amir Abdi and Viktor Nyiri for their valuable research assistance.

1. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (James H. Tully ed., 1983). For an in-depth analysis of the social and political aspects of religion in Hungary, see Péter Paczolay, *The Role of Religion in Reconstructing Politics in Hungary* (1994) (unpublished manuscript on file with author); see also FRIEDRICH HAINBUCH, *KIRCHE UND STAAT IN UNGARN NACH DEM ZWEITEN WELTKRIEG* [CHURCH AND STATE IN HUNGARY AFTER WORLD WAR II] (1982) (historical analysis of church-state relations in Hungary during the Communist era).

civil society in Hungary. From the perspective of the churches, the exhilaration of freedom was accompanied by weighty responsibility, as well as by enormous practical difficulties.

The goals of this article are to examine the most significant developments in Hungary during the 1989-1994 period and to situate them in the larger context of international human-rights law. After briefly setting forth an analytical framework for religious liberty and the separation of church and state, this article describes and analyzes the pertinent Hungarian laws and court decisions, and concludes that despite significant improvement in religion's legal status, its actual situation is precarious.

II. ANALYTICAL FRAMEWORK FOR RELIGIOUS LIBERTY AND THE SEPARATION OF CHURCH AND STATE

Legal scholars generally understand religious liberty to encompass both individual and collective (i.e., group) rights against the state, and to encompass internal processes of thought and conscience as well as the exercise or external manifestation of belief or disbelief.² It is also widely accepted that faith *vel non*

2. These aspects of religious liberty are clearly reflected in the nearly identical provisions found in leading international human-rights treaties. The *Universal Declaration of Human Rights*, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., pt. 1, art. 18, U.N. Doc. A/810 (1948), provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 9(1), 213 U.N.T.S. 221 [hereinafter European Convention], provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

The International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 18, S. TREATY DOC. NO. 2, 95th Cong. 1st Sess. (1977), 999 U.N.T.S. 171 [hereinafter International Covenant], provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

belongs to the *domaine privé* and is absolute, but that the state may impose some limits when "religious belief is manifested by word or act."³ Further, the state may only limit religious liberty by means of neutral, secular laws that are necessary in a democratic society to protect public order, health, morals, safety, or the rights of third parties.⁴

While civil libertarians throughout the world share similar views on many fundamental aspects of religious freedom, one key distinction must be highlighted. The First Amendment to the U.S. Constitution⁵ is framed solely in terms of a *limit* on the government's power to affect religion, whereas the formulations found, for example, in international and in Hungarian law impose some *obligation* on government to promote or protect thought, conscience, or religion. This difference between "negative" and "positive" rights⁶ points to an important difference in attitude towards the role of the state in religious life. Stated

3. See, e.g., Imre Takács, *On the Legal Regulation of the Freedom of Conscience and Religion*, in HUMAN RIGHTS IN TODAY'S HUNGARY 133, 136 (M. Katona Soltész ed., 1990). This Hungarian author explains that manifestation brings religious belief "into communication with the law and order of the state. So the external exercise of religion must also remain within the limits of the law and order as every manifestation of the individual freedom in general." *Id.* (quoting MÓRIC TOMSCÁNYI, *MAGYARORSZÁG KOZJOGA* [PUBLIC LAW OF HUNGARY] 193 (1940)).

4. See, e.g., European Convention, *supra* note 2, art. 9(2) ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."); International Covenant, *supra* note 2, art. 18(3) ("Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."). *But cf.* *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 885 (1990) (holding that neutral laws do not raise free exercise problems and thus, under U.S. law, there is no need to show that the restrictions are necessary).

5. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The U.S. Supreme Court has held that these First Amendment prohibitions also apply to the States. The Free Exercise and Establishment Clauses of the First Amendment, like other "fundamental rights" protected by the Bill of Rights, are deemed to be "incorporated" into the "liberty" protected by the Fourteenth Amendment, which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

6. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

simply, Americans typically expect the state to refrain from interfering in religious life, whereas others expect the state to enable it.⁷

This oversimplified explanation of the difference between negative and positive rights can facilitate our understanding of more subtle and complex differences in attitude towards the proper degree of separation or, conversely, the acceptable degree of identification ("establishment") between church and state. The starting point for analysis of church-state separation is to recognize that both the Hungarian⁸ and the United States Constitutions expressly address the issue, while the international human-rights instruments fail to mention it. This incongruity compels an interrogation of the role of church-state separation, and its relationship to the exercise of religious liberty.

Comparative studies suggest the existence of an inverse relationship between the degree of church-state *identification* and the degree of tolerance for religious liberty.⁹ The extreme positions of complete church-state identification (i.e., a theocracy or established church) and complete dis-identification (i.e., hostility towards and persecution of religion) usually correlate with a low tolerance for free exercise of religion, whereas more moderate degrees of church-state identification tend to correlate with higher tolerance. Within this moderate zone of tolerance, numerous types of church-state relationships can be identified, includ-

7. It goes without saying that some Americans do not adhere to the traditional "negative rights" position and want the government to provide support for religion.

8. A MAGYAR KOZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 60(3) (Hung.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 1995) ("In the Republic of Hungary the church functions in separation from the State."); see also Act IV of 1990, Törvény a lelkiismereti és a vallásszabadságról, valamint az egyházakról [Act on Religion, Freedom of Conscience, and Churches] § 15(1), available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h1,1990,4+-m1>> (visited Nov. 27, 1996) ("The Church functions separated [sic] from the state in Hungary.") (unofficial translation on file with author).

9. The framework presented here is imperfectly based on W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (Johan D. Van der Vyver & John Witte, Jr. eds., 1996). See also Paczolay, *supra* note 1, at 2 (emphasizing correctly that "there are more or less clear standards of constitutionalism in general, for the relation of church and state does not exist a 'Western' model, but countries differ in their solutions.")

ing endorsement,¹⁰ cooperation,¹¹ accommodation,¹² and separation.¹³ The choice among these various options does not necessarily affect the degree of protection actually accorded to the exercise of religious liberty. Thus, if one were principally concerned with promoting free exercise, it would be possible to choose from a range of degrees of church-state separation.¹⁴

However, it is not enough to view the church-state separation as merely a technique for ensuring—or even as a precondition to—religious liberty. Indeed, the relationship between church and state is an issue of independent significance, inasmuch as it represents a choice between competing values that carries with it enormous practical consequences. The precise nature and intensity of the church-state relationship reflect profound choices about the allocation of public resources and the nature of civic life. U.S. citizens, for example, tend to be committed (at least rhetorically) to church-state separation, although there has been some movement towards accommodation. In Hungary, on the other hand, the system is a cooperationist one, with some accommodationist undertones, confounded by occasional separationist rhetoric. Still, one can discern common ground, despite these subtle differences between American and Hungarian attitudes towards separation.¹⁵

10. Some states acknowledge the special role played by a particular church, without going so far as to designate it the official church of the country.

11. In the cooperation model, there is no established or endorsed church, but the state cooperates closely with churches in various ways, such as by financing religious activities or by collecting contributions on behalf of the church (e.g., the German *Kirchensteuer*).

12. The accommodation model is characterized by the state's "benevolent neutrality" toward religion—including a policy of providing exceptions to generally applicable laws that burden some because of their religious beliefs (e.g., conscientious objectors)—but there is no direct state funding of religion.

13. The separationist model tends to produce more rigid separation between public and religious life. In a strict separationist system, there would be no direct or indirect state funding for religious activities, no religious exceptions from generally applicable laws, no religious teaching in public schools, and no religious symbols in public.

14. See, e.g., Durham, *supra* note 9, at 19-25; see also STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 1996).

15. For example, one might expect some American separationists to support the position of the Catholic bishops in Hungary who, in response to pre-election criticism that the priests were violating church-state separation by speaking about political parties from the pulpit, issued a communiqué firmly rejecting attempts to push the church behind walls, even though others (e.g., Bruce Ackerman) might be expected to adhere to a stricter belief that religious premises should not be brought into the public

Each society must therefore determine both the optimal level of protection to be accorded to free exercise of religion, and the optimal degree of separation between church and state. Yet these challenges pale in comparison to the task of resolving the tension between the fundamental rights of religious liberty and of equality.¹⁶ Tension is created when any special action or rule designed to promote or protect religious liberty simultaneously discriminates against nonreligious individuals or groups. The difficult task facing legislators and courts is ascertaining the proper balance between these occasionally incompatible rights.

III. LEGAL DEVELOPMENTS IN HUNGARY PERTAINING TO RELIGION

Hungarian legal developments pertaining to religion during the 1989-1994 period fell within the mainstream of the theoretical framework that pervades international human-rights discourse. This claim of normalcy, however, must be made within the peculiar framework of post-Communist transition and must be qualified by warnings pertaining to certain proposed legislative changes.

A. *Constitutional Framework*

The October 23, 1989 amendment to the 1949 constitution of the Republic of Hungary provides the domestic constitutional framework for analyzing the legal status of religion in Hungary.¹⁷ This so-called amendment—which actually amounted to a total revision of the former constitution—is based on the principle of rule of law, including the protection of fundamental

arena. See also I.R.C. § 501(c)(3) (1994) (providing that an American church can lose its tax-exempt status if it endorses particular candidates or if a substantial proportion of its activities are devoted to lobbying).

16. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 70/A(1) (Hung.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 8 (“The Republic of Hungary shall guarantee for everyone in its territory all human and civil rights without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); see also Act IV of 1990, Törvény a lelkiismereti és a vallásszabadságról, valamint az egyházakról [Act on Religion, Freedom of Conscience, and Churches] § 3(1), available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h1,1990,4+-m1>> (visited Nov. 27, 1996) (providing that “[n]obody shall be at any disadvantage nor shall have any advantage for his/her religion or conviction”) (unofficial translation on file with author).

17. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] (Hung.).

rights.¹⁸ According to Article 8 of the 1989 constitution, a fundamental right cannot be abridged, not even by an act of Parliament. The key provision defining fundamental religious rights is Article 60, which provides:

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

(2) This right includes the free choice or acceptance of religion or any other conviction according to one's conscience, and the liberty to express, or refuse to express, to exercise or teach one's religion and conviction through the performance of religious acts and rites, either individually or together with others, either publicly or in a closed circle.

(3) In the Republic of Hungary the church functions in separation from the State.¹⁹

In addition to this broad constitutional provision, Hungary has undertaken similar and occasionally even more extensive obligations under various international human-rights treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁰ and the International Covenant on Civil and Political Rights.²¹ Hungary has also signed

18. See András Sajó, *Reading the Invisible Constitution: Judicial Review in Hungary*, 15 OXFORD J. LEGAL STUD. 253, 254 (1995).

19. A MAGYAR KOZTARSASAG ALKOTMANYA [Constitution] (Hung.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 8.

20. European Convention, *supra* note 2. The Convention entered into effect in Hungary pursuant to Act XXXI of 1993, Törvény az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről, available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h1,1993,31+-m1>> (visited Nov. 27, 1996).

21. *Supra* note 2. The International Covenant entered into effect in Hungary pursuant to Law-Decree No. 8 of April 22, 1976. Torvényerejű rendelet az Egyesült Nemzetek Közgyűlése XXI. ülészakán, 1966. december 16-án elfogadott Polgári és Politikai Jogok Nemzetközi Egyezségokmánya kihirdetéséről, available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h2,1976,8+-m1>> (visited Nov. 27, 1996). The International Covenant provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of

the Universal Declaration of Human Rights²² and the Helsinki Accord,²³ adopted by the Conference on Security and Co-operation in Europe.

B. *Laws Passed by the Hungarian Parliament*

In the period after 1989, the Hungarian Parliament passed two major laws on religion, which are examined below, as well as numerous other laws affecting religion, some of which are briefly mentioned in the following discussion.

1. *Act IV of 1990 (Act on Religion, Freedom of Conscience, and Churches)*

Act IV of 1990²⁴ swept away the network of laws that previously governed religion, and implemented Article 60 of the 1989 constitution. This law contains everything from detailed provisions governing the content of religious liberty²⁵ to itemized reg-

others.

4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

International Covenant, *supra* note 2, art. 18.

22. *Supra* note 2, art. 18 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.")

23. Conference on Security and Co-operation in Europe: Final Act (Helsinki Accord), Aug. 1, 1975, 43 DEPT ST. BULL. 323 (1975) (entered into effect in Hungary in 1981). Article VII guarantees respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, while Article VIII guarantees equal rights and self-determination of peoples.

24. Act IV of 1990, Törvény a lelkiismereti és a vallásszabadságról, valamint az egyházakról [Act on Religion, Freedom of Conscience, and Churches], *available at* <<http://www.spiderweb.hu/cgi-bin/frxs?h1,1990,4+m1>> (visited Nov. 27, 1996) (unofficial translation on file with author). This Act was passed by the old Parliament which still had a Communist majority. The new Parliament was seated after the free elections in March and April 1990. The ensuing conservative government was composed of the Hungarian Democratic Forum, the Independent Smallholders' Party, and the Christian Democrats, all of which emphasized the importance of restoring Christian values. Paczolay, *supra* note 1, at 8.

25. For example, Chapter One (§§ 1-8) of Act IV of 1990 covers the right of freedom of conscience and religion. In addition to provisions declaring the freedom of conscience and religion to be a "fundamental liberty," § 1, and elaborating a definition of this freedom, § 2, it clearly states that parents (or guardians) have the right to make decisions concerning the moral and religious education of minor children, § 5. Chapter One also ensures that persons at "social, [health care], or child- or youth-

ulations governing the church-state relationship.²⁶ Section 8 sets forth the right of persons to create autonomous churches, while section 16 expressly prohibits the state from setting up an organ or body to guide or supervise them.²⁷ Results of a 1993 survey released by the Prime Minister's Office showed the religious demography of Hungary as: 70% Catholic, 20% Calvinist, 5% Lutheran, and 5% other.²⁸

Act IV of 1990 lays down the procedure for registering churches in Hungary, which is necessary if a church wants to become a legal entity, to own property, and to be eligible for tax-exempt status. The procedure simply requires that a church having at least 100 members adopt organizational rules, bylaws, and statutes, and elect leaders.²⁹ Once this has been accomplished, the person authorized to represent the church must present the required documents to the appropriate local court.³⁰ The only reason the court may give for refusing to register a church is failure to comply with the procedural requirements set forth in sections 8, 9, and 10.³¹ The law imposes no substantive limitation,

welfare institutions and . . . confined in penitentiary establishments," § 6, as well as persons "doing . . . military service," § 7, shall have the right to exercise this freedom. Section 3 further mandates that:

(1) Nobody shall be at any disadvantage nor shall have any advantage for his/her religion or conviction, or for enouncing or exercising them.

(2) No particulars related to the religious or other conviction shall be entered in any state (governmental) register.

Act IV of 1990 § 3.

26. Chapter Two of Act IV of 1990 contains provisions on registration of churches, §§ 9-13; federations of churches, § 14; the interrelationship between church and state, §§ 15-16; cultural, social, and [health care] activities of the churches, § 17; finances of the churches, §§ 18-19; and striking churches off the register, §§ 20-21.

27. Act IV of 1990, § 8(1) ("Persons following identical articles of faith shall have the right to create autonomous religio[us] communities, denominations, churches . . . with the view of exercising their religion."); *id.* § 16(1) ("No organ or body for guiding or supervising the Churches shall be set up by the State.").

Church affairs are overseen by the Department of Church Relations (*Egyházi Kapcsolatok Főosztály*) within the Ministry of Culture and Education. The Communist-era State Office for Church Affairs was disbanded in 1989.

28. This same survey suggested that there had been "little change" over the past decade in the religious composition of the population.

29. Act IV of 1990, § 9(1).

30. *Id.* § 10.

31. *Id.* § 11 ("The notification aimed at registering can be refused if it is not in conformity with the provisions of Section 8 or the founders did not comply with the requirements provided in Sections 9 and 10.").

other than the requirement in section 8 that the church's activity not violate the constitution or any other law.³²

Once registered, a church may engage in various ecclesiastical activities,³³ may raise money for its support, and may even engage in business activities.³⁴ Section 19 guarantees state financial support for designated church activities and permits churches to apply for government subsidization of other activities, including (but not expressly limited to) the "operation of . . . educational, social, [health care], sporting, child- and youth-welfare institutions."³⁵

Fifty-four churches had been registered in Hungary as of mid-1994. Of these, only thirty-two were allotted a share of the 4.4 billion HUF budgeted by the state to support church activities in Hungary in 1994.³⁶ The remaining twenty-two churches either did not apply for financial support or applied but were turned down.³⁷

32. *Id.* § 8(2) ("A church may be founded with the view of performing any religious activity not in contradiction with the Constitution and not prohibited by law.")

33. *See, e.g., id.* § 17 (permitting churches to engage in "any educational, cultural, social, [health care], sporting, or child- and youth-welfare activities not exclusively reserved by law for the State," and to offer religious education in public schools).

34. *Id.* § 18:

(1) The assets of an ecclesiastic legal entity can be formed, first of all, at [sic] donations and other contributions granted by natural persons, bodies corporate, organizations not qualifying as bodies corporate, as well as fees for ecclesiastical services. Any ecclesiastic legal entity shall be entitled to collect donations in compliance with the bye-laws [sic] and rules of the Church without possessing a particular permission.

(2) With the view of providing for the financial conditions necessary for implementing its aims, the ecclesiastic legal entity shall have the right to carry on economic-entrepreneurial activities, to float an enterprise in conformity with the rules on social organizations (Civil Code, Sections 70 to 73), as well as to set up, or participate in, an economic association.

(3) The ecclesiastic legal entity shall not be considered as carrying on economic-entrepreneurial activities, if it

- a) operates cultural, educational, social, [health care] or child- and youth-welfare institutions,
- b) produces and disposes of publications and devotional objects required for religious life,
- c) partially exploits buildings utilized for ecclesiastical purposes,
- d) keeps a cemetery.

35. *Id.* § 19(1).

36. In special cases, the amount of support received was nominal. For example, the Hare Krishna Society was slated to receive 1,000 HUF (worth about \$10.00) under the 1994 budget.

37. The three churches which requested but were denied support were the

Legislation proposed in 1993 would have changed the registration requirements and required all churches to re-register.³⁸ The purpose of this proposal was to curb evangelism and the activities of so-called "destructive" sects. Despite the absence of formal investigations, the Parliament considered allegations that certain "destructive" organizations (i.e., the Jehovah's Witnesses, the Church of Scientology, the Unification Church, and the Hare Krishna Society) were breaking up families and posing the danger of "Americanization" to Hungarian society. The proposed changes would have significantly tightened the registration process by requiring an applicant church which had not been in Hungary for over 100 years to provide a list containing the names of 10,000 members, and to submit its articles of faith or tenets of belief. Further, the proposed law would have required a determination whether the applicant church's activities and beliefs were consistent with "generally accepted morals."

The proposed legislation was vigorously debated but was not enacted into law prior to the 1994 election.³⁹ Had the proposed legislation been enacted, it would arguably have constituted a violation of Hungary's obligations under Article 18 of the International Covenant on Civil and Political Rights⁴⁰ and under Principle 16c of the Vienna Concluding Document.⁴¹ The proposal to re-register churches under more stringent criteria is not being

Jehovah's Witnesses, the Church of Scientology, and the Unification Church.

38. See generally W. Cole Durham, Jr., *Against De-Registration of Religious Organizations* (1993) (unpublished manuscript on file with author) (discussing the proposed legislation and its potential impact).

39. Speidl, the sponsor of the bill, argued that members of Parliament were qualified to ascertain those "traditional norms that have formed over centuries" and that are "unambiguous to everyone." The Catholic Church argued that public morality is generally interpreted as the public opinion on morals, that this public opinion is basically determined by the Catholic Church in Europe, and that groups violating this order of values do not meet the requirements of public morality. Mészáros, the leader of the opposition to the proposal, considered the proposed standard too subjective and capable of abuse, and argued that the requirement to submit a list of the names of 10,000 church members would seriously endanger the right to privacy.

40. *Supra* note 2, art. 18; see also *General Comment No. 22*, U.N. GAOR, Hum. Rts. Comm., 48th Sess., 1247th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) (discussing Article 18 of the International Covenant).

41. Conference on Security and Co-operation in Europe: Concluding Document from the Vienna Meeting, Jan. 17, 1989, princ. 16c, 28 I.L.M. 527, 534 (requiring signatories to "grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries.")

actively pursued as of mid-1996, but the underlying debate could well resurface in the future.⁴²

On a theoretical level, the antisect sentiment that partially drove the proposal to de- and then re-register churches in Hungary derives a part of its strength from the government's obligation to subsidize the activities of registered churches. In other words, the cooperationism embedded in Act IV of 1990 provides an incentive for the state to limit the religious liberty of small groups who are competing for scarce financial resources.⁴³ Thus, cooperationism can force the question of the desirable balance between tolerance for religious liberty and the degree of church-state separation.⁴⁴

2. *Act XXXII of 1991 (Act on Settling the Ownership Status of Former Church Properties)*

The second major enactment by the Hungarian Parliament pertaining to religion was Act XXXII of 1991 which settled the ownership status of former church properties.⁴⁵ Although the technical problems of restitution of former church property are beyond the scope of this article, one cannot begin to comprehend the post-Communist status of religion in Hungary without considering some material aspects of the broader questions of resti-

42. However, it bears mentioning that it was the cooperation between the Hungarian Socialist Party (MSZP) and the Free Democrats (SZDSZ)—opposition parties prior to the 1994 election, but partners in the governing coalition since then—that defeated the proposed re-registration legislation.

43. This is generally true even though it is legally possible for a church to be registered in Hungary, and thus enjoy the full measure of religious liberty, but to refrain from applying to receive financial support from the state.

44. Developments in the Czech Republic, where members of the clergy were paid as state employees under Communism, reveal similar tensions arising out of cooperationism. In 1994, the 15 religious denominations recognized by the government claimed to support church-state separation in principle, but feared that they could not survive without state financial support. Since 1989, when churches gained the right to operate without Czech funding, a number of smaller denominations (e.g., Baptists, Mormons, and Jehovah's Witnesses) broke away from the state support system. Catholics, Jews, and the major Protestant denominations continued to accept state salaries, while other groups (e.g., Anglicans) were too small to qualify for state stipends. See Maggie L. Lawson, *State No Longer Offers Churches Daily Bread*, BUDAPEST SUN, Apr. 7, 1994, at 8.

45. Act XXXII of 1991, *Törvény a volt egyházi ingatlanok tulajdoni helyzetének rendezéséről* [Act on Settling the Ownership Status of Former Church Properties], available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h1,1991,32+-m1>> (visited Nov. 27, 1996).

tution and compensation. Act IV of 1990 provided the framework of religious life in the new Hungary, but Act XXXII of 1991 gave it substance.

Historically, Hungarian churches played an important role in education, health care, and other charitable activities, in addition to their central role in religious life. The churches, particularly the larger ones, could support these activities by relying on their extensive property holdings.⁴⁶ Most of this property was lost, however, through land reforms and, after 1948, nationalizations.

Although preliminary agreement to return nationalized property to the churches was reached in late 1990, the churches were not included in the first restitution law (January 1991), which only applied to "natural" persons. By July 1991, however, Parliament had passed Act XXXII of 1991, which permitted churches to reclaim *some* of their former properties for designated purposes. It would be a mistake to characterize this law as providing full reprivatization of former church property. In fact, the law is not designed to "mechanically restore the state of affairs that prevailed before 1948."⁴⁷ Under Act XXXII of 1991, churches can recover buildings and real estate they owned prior to 1948,⁴⁸ but cannot recover the assets, businesses, or farmland that previously generated income to support their activities.

In addition to limiting the nature of the property that churches can recover, Act XXXII of 1991 also limits the purposes

46. Prior to nationalization and forced takeover, the churches owned an estimated 40,000 properties in Hungary. PUBLIC RELATIONS OFFICE OF THE PRIME MINISTER'S OFFICE, *FACTS AND FIGURES ABOUT THE TRANSFER OF CHURCH PROPERTIES 7* (1993) [hereinafter *FACTS AND FIGURES*].

47. *Id.* at 1.

48. As of 1993, 13 churches had filed claims for the return of nearly 6200 properties: 3120 Catholic, 2423 Calvinist, 450 Lutheran, and 170 other. *Id.* at 7. By May 1994, three hospitals had been returned to church management, but even after these transfers, less than one percent of Hungarian hospitals belonged to churches. The situation of schools is discussed separately in Part III.C.2, *infra*.

As of mid-1996, approximately 3000 property claims had been settled. Claims worth approximately 200 billion HUF (\$1.35 billion) are still outstanding. Michael J. Jordan, *Now-Secular Hungarians Reluctant to Return Schools to Church*, *CHRISTIAN SCI. MONITOR*, Sept. 9, 1996, at 7. Public support for returning church properties has diminished in the face of ongoing economic hardship in Hungary. By way of compromise, church leaders have agreed to extend the restitution period from ten to twenty years. In addition, approximately one-half of the outstanding claims are expected to be paid in cash rather than in kind. *Id.*

for which they may reclaim their former property. The churches may only recover property

for religious life, the operation of orders of monks, communities of deacons and deaconesses, for teaching, educational, health and social purposes, and for performing activities related to child, youth protection and culture to an extent and at a pace that the particular church which has put in the claim is indeed capable of fulfilling, as well as ensuring that the church can continue to maintain the property.⁴⁹

In other words, the government's justification for returning church property was not so much to redress past wrongs as to "support the creation of new systems to meet the genuine social needs in the spheres of religious life, education and culture."⁵⁰ The Hungarian state views religious institutions as potential partners in transition that can "meet their useful and noble calling"⁵¹ by performing "many . . . long-forgotten tasks."⁵²

The key to enabling churches to play their envisaged role in transforming Hungarian society is for the state to guarantee the material and financial conditions needed to support the churches' activities. Act XXXII of 1991 is based explicitly on the principle of functionality: Former church property will be returned if and insofar as it is necessary to ensure the churches' operational ability in the designated sectors.⁵³ Yet the narrowness of this restitutionary principle, together with the state's focus on the limited "load-bearing potential of the churches,"⁵⁴

49. FACTS AND FIGURES, *supra* note 46, at 2.

50. *Id.* at 1. It is useful here to compare restitution of church property with the compensation scheme established by Act XXIV of 1992, which requires the Hungarian state to return Jewish property seized in the 1940s (i.e., mainly gold, jewelry, and other possessions). The purpose was to redress past wrongs, but an incidental effect was to "make Jewish life flourish" in Hungary. Because of the practical problems of finding heirs and identifying the exact nature and value of property seized, Jewish groups urged the state to pay the amount of losses (estimated on the basis of archival and statistical data) into a Jewish reconstruction fund to be used to build hospitals, public centers, and schools. See Decision 16/1993 (III.12.) AB, Alkotmánybíróság [Constitutional Law Court] (Hung.) (considering whether Act XXIV of 1992 is compatible with Act XXV of 1946 and the Paris Peace Treaty).

51. FACTS AND FIGURES, *supra* note 46, at 1.

52. Foreword to *id.* at ii.

53. The law makes it clear that "[t]he operational ability of the churches can be ensured through the return of the original property as well as by transferring a property in exchange for the original, or through indemnification in cash." *Id.* at 2.

54. *Id.*

significantly limits the ultimate ability of churches to fulfill this role. Thus under the "new type of relationship . . . between the church and the state . . . the government ensures full independence for the churches, and commensurate with its potential, contributes to maintaining their operational ability."⁵⁵

Not only is state "cooperation . . . still indispensable in assisting the churches [to] perform their tasks,"⁵⁶ but it is likely to remain so. By returning only that property which is directly needed for church activities, and not all former property, the state is proposing a cooperationist model of church-state relationship that, as a practical matter, cannot easily evolve into either an accommodationist or a true separationist one. This point brings us back to the unanswered, perhaps unanswerable question: What is the optimal form of church-state relationship for a transition society such as Hungary?

C. *Decisions of the Hungarian Constitutional Court*

The Hungarian Constitutional Court has been very active in extending protection to fundamental rights since its inception in 1989.⁵⁷ Its decisions on religion fit within this trend. When examining these decisions on religious liberty, it is especially interesting to observe how the court deals with the difficult issues of defining the proper church-state relationship and resolving the tension between the rights of religious liberty and equality.

The two major decisions involve education, although each raises fundamentally different questions.⁵⁸ The first decision,

55. *Foreword to id.* at i-ii.

56. *Foreword to id.* at ii; see also Paczolay, *supra* note 1, at 6 ("The realization of freedom of religion requires under the specific circumstances in post-Communist countries financial aid by the state, restitution of confiscated church property, etc. Both restitution and the distribution of state financing among the churches create [a] lot of conflicts.").

57. The Hungarian Constitutional Court, which was established by the 1989 constitution, views itself as the "depository of the 'Rechtsstaat' Revolution. The Court should unconditionally guarantee that legislation and the Constitution are harmonious in the process of a peaceful transformation which was initiated by a Constitution based on the rule of law." Decision 11/1992 (III.5.) AB, Alkotmánybíróság [Constitutional Law Court] Magyar Közlöny (Hungarian Gazette) No. 23/1992 (Hung.), *translated in Sajó, supra* note 18, at 257.

58. See Sajó, *supra* note 18, at 259-61. Before 1945, churches played a considerable role in teaching and education in Hungary. In 1938, more than 60% of pupils pursued their studies in elementary schools maintained by churches, and the number of church-run schools exceeded that of state and village schools. More than

4/1993, involved a challenge to Act XXXII of 1991, while the second one, 18/1994, involved a challenge to Act LXXIX of 1993 on public education. Two minor decisions raise questions of discrimination and will be discussed in Part IV.C below.⁵⁹

1. Decision 4/1993

In Decision 4/1993,⁶⁰ the court reviewed challenges to Act XXXII of 1991, including a claim that this law violated Article 60 of the 1989 constitution. More precisely, the claim was that restitution of former church property which was being used for educational purposes violated the constitutional right to freedom of conscience and religion because it failed to guarantee that there would be an ideologically neutral school in every residential settlement. The court decided that Act XXXII of 1991 was *not* unconstitutional for its failure to guarantee a neutral public school⁶¹ in every settlement, provided that whenever the state returns school property back to church ownership, it must also protect the rights of those who do not wish to attend (or to have their children attend) a confessional school.⁶² In legal terms, the court required the state to guarantee such persons a "real alternative" by making it possible to attend a neutral public school without suffering any disproportionate inconvenience or burden.

one-third of students pursuing secondary school studies attended schools of some denomination. The churches also operated faculties of law, teacher training colleges, and theological universities. By way of contrast, in 1989 there were no church or denominational kindergartens or primary schools, and the colleges of theology did not belong to the higher educational institutions recognized by the state. There were, however, 3600 students who attended 11 church-run secondary schools. FACTS AND FIGURES, *supra* note 46, at 9-10.

By mid-1994, the following schools were in church hands: 32 kindergartens, 78 elementary schools, 3 special education schools, 47 secondary schools, 7 *Fachmittelschulen*, 6 *Berufsschulen*, 5 schools for national minorities, and 29 institutions of higher education. See 1992/93 & 1993/94.évi oktatási intézmények száma ill.tanulói létszáma [Report by Department of Church Relations on 1992-93 and 1993-94 Academic Years] (on file with author).

59. See text accompanying notes 94-96.

60. Decision 4/1993 (II.12.) AB, Alkotmánybíróság [Constitutional Law Court], Magyar Közlöny (Hungarian Gazette) No. 15/1993 (Hung.), available at <<http://www.spiderweb.hu/cgi-bin/jrns?-h3,1993,4+-m1>> (visited Nov. 27, 1996).

61. The technical Hungarian term is *semleges iskola*.

62. The technical Hungarian term is *elkötelezett iskola*.

2. *Decision 18/1994*

In Decision 18/1994,⁶³ the Court reviewed a challenge to section 81(1)(a) and section 125 of Act LXXIX of 1993 on public education.⁶⁴ Section 81(1)(a) is a rather confusing provision, which states in essence that there is no obligation for nongovernmental or nonmunicipal (i.e., nonpublic) entities, such as churches, to maintain neutral (i.e., nonconfessional) schools. This negative formulation should also be understood to mean that confessional educational institutions may be established or maintained *only* by nonpublic sponsors such as churches. The challengers claimed that this provision was unconstitutional because it prevented governmental or municipal entities from establishing or maintaining confessional schools. The court disagreed, and ruled that the neutral public education system established by section 81 was compatible with the constitution. Thus, Decision 18/1994 stands for the proposition that the state may not establish or maintain confessional schools, whereas Decision 4/1993 held that the state is not obliged to establish such schools, even though it must make it legally possible for confessional schools to exist.

IV. LIBERTY, SEPARATION, AND EQUALITY

The Hungarian Constitutional Court's analysis in Decisions 4/1993 and 18/1994 involves three issues. The following discussion of these two cases examines these issues in increasing order of difficulty: first, religious freedom; second, church-state separation; and third, equality.

A. *Religious Liberty*

The least controversial aspect of Decisions 4/1993 and 18/1994 is their analysis of the meaning of religious liberty. This is not because the issue is inherently uncontroversial, but rather because the questions presented in these cases did not turn on this issue. Thus, the court's pronouncements may be regarded as

63. Decision 18/1994 (III.31.) AB, Alkotmánybíróság [Constitutional Law Court] (Hung.), available at <<http://www.spiderweb.hu/cgi-bin/jrxs?h3,1994,18+-m1>> (visited Nov. 27, 1996).

64. Act LXXIX of 1993, Törvény a közoktatásról [Act on Public Education], available at <<http://www.spiderweb.hu/cgi-bin/jrxs?h1,1993,79+-m1>> (visited Nov. 27, 1996).

fundamental policy statements which indicate its views on the subject but which have little immediate significance.

In Decision 4/1993, the court sought to ascertain the nature of religious freedom by examining its relationship with other fundamental rights and by inquiring into the permissible limits on such civil rights. In the court's view, the most fundamental right is the right to human dignity, which includes the right to life and legal capacity, in addition to the general personality right to free assertion of oneself. Personality is "untouchable" by law; the court argued that "law can only aid autonomy by guaranteeing external conditions."⁶⁵ The freedom of action derived from fundamental personality rights carries even greater weight, according to the court, when the action stems from conscience or from religious belief, which is the "essence of personality."⁶⁶

The court asserted that the right to practice religion is the most important of the rights embodied in Article 60,⁶⁷ because this aspect of religious liberty is most closely related to freedom of expression, the "mother right" which occupies a distinguished place in the hierarchy of fundamental rights.⁶⁸ The court noted that it is possible for law to limit the *practice* of religion—in contrast to internal beliefs or thoughts—just as the state can regulate speech and other forms of expression.⁶⁹

In Decision 4/1993 the Constitutional Court did not define the permissible restraints on the practice of religion, although it did announce two key principles. First, the court mentioned that any law limiting religious liberty must be interpreted restrictively.⁷⁰ Second, it emphasized that the state must take a neutral stance when circumscribing the practice of religion.⁷¹ In this context, "neutrality" means that any restriction must be limited

65. Decision 4/1993 (II.12.) AB, unofficial trans. at 3 (on file with author).

66. *Id.* at 4.

67. A MAGYAR KOZTARSASAO ALKOTMANYA [Constitution] art. 60 (Hung.).

68. Decision 4/1993 (II.12.) AB, unofficial trans. at 4. One might well take issue with this ranking: The fact that speech (and religious practice) can be the subject of state regulation, whereas the right of thought or conscience cannot, suggests that it is the latter (and not the former) which occupies the higher rank among fundamental liberties.

69. *Id.*

70. *Id.*

71. *Id.* at 1.

to the external manifestation and may not consider the content (i.e., the value or veracity) of the thought or belief.⁷²

B. Church-State Separation

In Decision 4/1993, the court also relied heavily on the concept of "neutrality" in its discussion of church-state separation, but it used the term in a way which could be described as "very benevolent neutrality" in the accommodationist sense. The court repeatedly emphasized that the state must be neutral in matters of religious belief and other matters of conscience, and bases this conclusion on Article 60(3) of the constitution, which provides that "the church functions in separation from the State."⁷³ The court went on to explain at length what it meant by "neutrality" in this context.

The starting point for understanding the Constitutional Court's position on church-state separation is its clear statement in Decision 4/1993 that the state may not (1) institutionally link with any church or churches; (2) subscribe to any of the churches' teachings; or (3) interfere with the internal affairs of the churches or take a stand in questions concerning truths in belief.⁷⁴ From these parameters of separation, the court concluded that the state must "treat all Churches equally" as required by Article 70/A of the constitution.⁷⁵ However, it went on to add that neutrality is only required with regard to the religious beliefs and practices of a church.⁷⁶ Thus, the principle that all laws must be equally applied is limited. Indeed, the court's interpretation permits lawmakers to take into account the different characteristics of churches—notably "their history and their role in Hungarian society"—when drafting legislation.⁷⁷ Unfortunately, the court did not provide any further indication of how it would apply such different characteristics or why they are justified. It is, however, apparent that this limitation on the principle of neu-

72. *Id.* at 4.

73. A MAGYAR KOZTARSASAG ALKOTMANYA [Constitution] art. 60(3) (Hung.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 8. Péter Paczolay notes that the "liberal constitutional doctrine of the separation of state and church had no traditional roots in Hungary." Paczolay, *supra* note 1, at 12.

74. Decision 4/1993 (II.12.) AB, unofficial trans. at 4.

75. *Id.*; see *supra* note 16.

76. Decision 4/1993 (II.12.) AB, unofficial trans. at 5.

77. *Id.*

trality is designed to accord to the Catholic church the position of "first among equals."

Decision 4/1993 contains an eloquent statement of the Hungarian Constitutional Court's accommodationist view of church-state separation, according to which the state's role is to provide a neutral legal system within which both religion and irreligion may exist. Thus, the requirement of neutrality (or separation) does not mean that the state must be indifferent to religion.⁷⁸ On the contrary, the court suggested that the state would violate its obligation if it did not make it possible for everyone to make a conscious choice between religion and irreligion.⁷⁹ In a classic statement of a positive right, the court explained that the state's obligation to respect and protect fundamental rights does not merely require the state to refrain from violating civil rights, but also requires the state to provide the conditions necessary to enable the exercise of religious liberty. Thus, the proper relationship between church and state is one where

[t]he state is obligated to guarantee a large scope for the expression, teaching, and following of religious belief, for the operation of Churches, as well as for being able to refuse a religion, and for being able to be silent about one's religious belief; a scope where different conceptions can form freely, and through which it is possible to form one's personal belief.⁸⁰

Neutrality, in other words, does not mean inactivity, nor does it require the state to neglect religion. Thus, "the defense of a fundamental right is not a simple passive protection."⁸¹

In concluding its general discussion of church-state separation, the court emphasized that the relationship between church and state is a function of each country's history.⁸² In defense of the extensive degree of church-state entanglement in areas such as education, health care and charity, the court referred to the historical role of the churches in these fields, and argued that separation and cooperation are not contradictory. The court treated the constitutionally-mandated separation as a strict ideal which cannot be readily achieved in practice, and accepted

78. *Id.*

79. *Id.*

80. *Id.* at 6.

81. Paczolay, *supra* note 1, at 12.

82. Decision 4/1993 (II.12.) AB, unofficial trans. at 5.

cooperation and accommodation as unavoidable during the period of transition.⁸³ Yet the court never undertook to examine the separationist ideal itself.

The court's pronouncements regarding obligatory school education, which was at issue in both Decisions 4/1993 and 18/1994, further illustrate both its understanding of religious liberty as a positive right and its willingness to tolerate deviations from the ideal of separation embodied in the constitution during transition. Both the constitution and Act IV of 1990 guarantee parents the right to educate their children in matters of religion. The critical question is thus how to effectuate this right.

Recall that in Decisions 14/1993 and 18/1994, the Hungarian Constitutional Court explained that the state must establish the legal framework within which both confessional and neutral (i.e., nonreligious) schools can exist.⁸⁴ Further, the court laid down the rule that the state is neither permitted nor required to establish or maintain confessional (i.e., non-neutral or religious) schools. According to the court, all public (i.e., state-maintained) schools must be neutral.⁸⁵ In this context, "neutral" means that schools cannot be committed to any religion or ideology. Instead, schools must enable each student to make a "free and well-founded choice" by providing "religious and ideological information that is objective, critical and pluralistic."⁸⁶ This accommodationist view of public education flows from the positive nature of religious liberty in Hungary: The state uses the public school system to lay the foundation for, indeed to enable the exercise of religious liberty, in a manner that would be vigorously challenged in a separationist system such as the United States.

The Hungarian state does not stop at accommodation, however; it also provides a high degree of cooperation in the realm of

83. See Sajó, *supra* note 18, at 257-58 (observing that "the Court has repeatedly declared that constitutionalism has to be interpreted under the 'unique and special circumstances of regime transformation'" and noting the Court's use of "historical exceptionality" . . . to justify what the judges felt would otherwise be a departure from strict constitutionalism, namely, when confiscated property was partly returned to the Church, and the Church was granted support from the budget, despite the fact that the Church is independent of the State under the Constitution").

84. Act LXXIX of 1993 § 125 obliges the state to enact a legal framework for the establishment and maintenance of confessional schools (as well as nonreligious ones) within five years, and states that the legal conditions governing both types of schools must be the same.

85. Decision 4/1993 (II.12.) AB, unofficial trans. at 8.

86. *Id.*

mandatory education, despite the basic principles of church-state separation and neutrality. Two examples stand out. First, in the context of restitution of former church-owned school property, section 125 of Act LXXIX of 1993 provides that the state will maintain existing confessional schools which have not yet been returned to church ownership *qua* non-neutral institutions for a five-year period. This means that the state will be operating and fully supporting confessional schools for up to five years. This extraordinary situation was challenged in Decision 18/1994, but upheld by the court, which held that it would be unreasonable to close down existing confessional schools just because the restitution process could not be completed right away. Here again, the court explicitly recognized separation as the ultimate goal, but accepted an extraordinarily high degree of cooperation as a provisional solution. Second, Act IV of 1990 requires the state to support confessional schools insofar as they have undertaken tasks belonging to the state.⁸⁷ Thus, the legal framework for education by the churches foresees permanent subsidization by the state to a "normatively defined extent."⁸⁸

In the area of mandatory education, then, the exceptional circumstances of transition are deemed to justify a very high degree of church-state cooperation in Hungary. Even after the transition period, however, it appears that the Hungarian state⁸⁹ will provide ongoing financial support to confessional schools, in addition to hospitals and other charitable institutions operated by the churches.

C. Equality

The problem of equality or nondiscrimination in the context of religion refers largely to the tension between the state's obligation to permit the exercise of religious liberty, on the one hand, and its obligation of separation or neutrality, on the other. In other words, any state act that specifically permits or protects religious liberty may simultaneously privilege religion over irre-

87. Act IV of 1990, Törvény a lelkiismereti és a vallásszabadságról, valamint az egyházakról [Act on Religion, Freedom of Conscience, and Churches] § 19(1), available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h1,1990,4+-m1>> (visited Nov. 27, 1996) (unofficial translation on file with author). This requirement also applies to health, sport, welfare, and other charitable institutions operated by churches in Hungary.

88. *Id.*

89. If not the central, then the local government.

ligion. The Hungarian Constitutional Court recognized this tension clearly in Decision 4/1993, in which it stated that church-state separation does not "influence . . . the obligation of the state to . . . guarantee positive and negative freedom of religion without discrimination. Positive and negative freedom of religion are equal: [T]he state cannot take any of them as the basic case and say that the other is [the] exception."⁹⁰

Despite this rhetoric, however, the position of the Hungarian state, as detailed in the earlier discussion of religious liberty and church-state separation, can hardly be described as indifferent to religion. By devoting significant state resources to churches, the Hungarian state is clearly favoring religion over irreligion.

Yet the paradox of transition is that such support is necessary, much like "affirmative action" programs to assist disadvantaged minority groups in the United States and India are necessary for the beneficiaries to overcome past disadvantage and become equal enough to survive in a truly neutral environment. Equality, like church-state separation, thus proves to be an ideal that can only be achieved by administering limited doses of its opposite. With regard to both separation and equality, the court has elevated the need for remedial measures over rhetoric. Equality rhetoric is particularly susceptible to misuse, since it can be invoked so easily in many different contexts.

On the whole, the Hungarian Constitutional Court has been sensitive to discrimination issues arising during transition. It held in Decision 21/1990⁹¹ that it was impermissible, in principle, for the state to discriminate between former owners of land and former owners of other types of assets in the context of privatization, as well as to discriminate between former property owners and other individuals who did not previously own property. In practice, however, the court has permitted positive discrimination in favor of former property owners, so long as procedural fairness is ensured and the preferential treatment yields a more favorable total social result than equal treatment would yield.

The court's willingness to tolerate positive discrimination is even more apparent in Decision 4/1993. There, Act XXXII of

90. Decision 4/1993 (II.12.) AB, unofficial trans. at 5.

91. Decision 21/1990 (X.4.) AB, Alkotmánybíróság [Constitutional Law Court] (Hung.), available at <<http://www.spiderweb.hu/cgi-bin/jrxs?h3,1990,21+-m1>> (visited Nov. 27, 1996).

1991 was challenged on the ground that it discriminates against churches having no former properties, as well as against nonreligious groups⁹² whose former properties had not been returned by the state. The court agreed with the challengers that it is unconstitutional to compensate churches for property loss when other groups are denied such compensation. However, it held lawful the restitution of former church properties based on the principle of functionality, since restitution is necessary in order to guarantee a fundamental right—religious liberty—as well as to effectuate the separation of church and state.⁹³

The matter of discrimination was also raised in three other cases. In the first case, Decision 8/1993,⁹⁴ the Constitutional Court rejected a claim that Act IV of 1990 was discriminatory because its registration provisions require at least 100 members to found a church. According to the court, the fact that smaller groups are not able to register does not affect the most important practices of a religious community (i.e., worship, education, and the provision of various social services). However, the court did not address the question whether the inability of such smaller religious communities to own property or to be eligible for tax-exempt status would constitute discrimination.

The second case, Decision 10/1993,⁹⁵ involved a challenge to the state's failure to make the most important Jewish holidays—like the most important Christian holidays—work-free days. The Constitutional Court held that this was not discriminatory, since the main Christian holidays are secularized and have a general social character. In other words, Easter and Christmas are not work-free days solely “because of their religious content but because of economic considerations and because they comply with the expectations of society.”⁹⁶

92. Examples mentioned by the court include political parties, business organizations, labor unions, and bar associations.

93. Decision 4/1993 (II.12.) AB, unofficial trans. at 17.

94. Decision 8/1993 (II.27.) AB, Alkotmánybíróság [Constitutional Law Court], *Magyar Közlöny* (Hungarian Gazette) No. 22/1993, discussed in Paczolay, *supra* note 1, at 16-17, and available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h3,1993,8+-m1>> (visited Nov. 27, 1996).

95. Decision 10/1993 (II.27.) AB, Alkotmánybíróság [Constitutional Law Court], *Magyar Közlöny* (Hungarian Gazette) No. 22/1993, discussed in Paczolay, *supra* note 1, at 17, and available at <<http://www.spiderweb.hu/cgi-bin/jrxs?-h3,1993,10+-m1>> (visited Nov. 27, 1996).

96. Paczolay, *supra* note 1, at 17.

Finally, in Decision 18/1994, the challengers argued that Act LXXIX of 1993 on public education discriminates against governmental and municipal entities because it prevents them from establishing or maintaining confessional schools. The Constitutional Court, perhaps wisely, refused to analyze this rather perverse question.

These few pronouncements on equality demonstrate that the Hungarian Constitutional Court has resolved the tension between equality and rights in favor of the latter. At the same time, however, it appears that the court has established a special role for religion and might not be willing to extend its generous reasoning to other rights.

V. CONCLUSION

Many uncertainties accompanied the mid-1994 change in government in Hungary, among them the role of religion. Outside Central Europe, an assessment of the first five-year post-Communist period would probably celebrate the great improvements in Hungarian church-state relations since 1989. In Hungary, however, where the order of the day is still survival, a more modest assessment is warranted. Although the legal structures are in place, the material conditions for the churches' survival are not yet assured. Jesus is said to have fed a multitude with seven loaves of bread and a few fishes. It remains to be seen how well churches in post-Communist society can do with only half a loaf. Still, half a loaf is better than none.

