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THE IMPORTANCE OF REASONING IN THE FINANCING OF CHURCHES FROM PUBLIC FUNDS OR THE CASE OF THE HUNGARIAN EVANGELICAL FELLOWSHIP WITH THE LEGISLATOR (2011-2019)[1]

[AZ INDOKOLÁS JELENTŐSÉGE AZ EGYHÁZAK KÖZPÉNZEKBŐLI FINANSZÍROZÁSÁBAN, AVAGY A MAGYARORSZÁGI EVANGÉLIUMI TESTVÉRKÖZÖSSÉG ESETE A JOGALKOTÓVAL (2011-2019)]

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Abstract. The following analysis is about a unique, out-dragged, henceforth unsolved legal bargaining between small churches and the parliament in Hungary. Is the majority principle based on firm enough grounds so that to differentiate among religions? Why should the ruling majority be required to take into consideration religious groups that are marginal, or that they dislike, on an equality basis while distributing public funds?

This paper suggests that the conceptual critique of the new deliberately differentiating, illiberal Church law of 2011 is that it allows unhinged exclusive and arbitrary decision-making for the legislation. Although majority principle should be the essence of democracy, its unconstrained version creates such anomalies in the democratic institutions which could well be survived but would alter the system into a non-democratic regime. First generation fundamental rights are therefore to be protected not by the democratic institutions even in a democracy but by the rule of law (liberalism).

Keywords: liberal democracy v. illiberal democracy, freedom of religion, neutrality of state, secularization, public funding of churches, acquired rights

Introduction

The following analysis was inspired, among others, by the newest Church law[2] amendment coming into force on 15 April 2019 in Hungary. This amendment (Church Law 13[3]) is the outcome of an out-dragged, still unsolved legal bargaining triggered by the then new Church law in 2011 having replaced the old Church law from 1990[4]. The Church law in force in 2011 listed only 14 of the previously almost 150 churches as church, religious denomination and religious community recognized by the Parliament. Only the institutions on the list included in the appendix could thenceforth be called churches automatically, *ex lege*, denying the status of a church to the other institutions right away. On that day started the legal debate on the legal status of small churches such as the

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Hungarian Evangelical Fellowship too (Magyarországi Evangéliumi Testvérközösség, MET). In fact, it all started long before with the passing of the first new Church law in 2011 that was however nullified within half a year[5].

In contrast to the initial list of churches, the new Church law (Amendment 13), entering into force on 15 April 2019, has a longer though still random list of 27 churches in the Appendix and rewrites the disputed legislative places altogether by introducing a four stage church founding system (Article 9/A-9/G). It also terminates all applications for registrations, cases, suits in progress and court orders (Article 37 para 1). Thus, again it automatically, *ex lege,* relocates the once-but-no-longer-churches to the register of associations and civil organisations through the courts. So the parliament clearly overrules the courts in religious freedom cases. Hence majority principle overrides rule of law notion. The question is whether this is the end of the debate.

This paper is a story of a case worth studying to better understand the threats to the first-generation fundamental rights. In the heatwave of fear on the earth because of the migration this article shows an even bigger in-doors threat: the story of the actual dismantling of a rule of law system with the implementation of the majority principle (Nussbaum, 2012).

In the following I will recapitulate the major points of this debate so that I could add some comments to the legal reasonings applied therein.

The legal debate of MET directly with the courts and more directly than indirectly with the legislator, of course, briefly between 2011-2019 (Henrard, 2016)

from 13 July 1990	The court of Szabolcs-Szatmár-Bereg county registers the MET as church adhering to the new Act No IV of 1990 on freedom of conscience and religion (in Hungarian abbreviation: Lvt) right at the beginning of the system change
11 July 2011	The new Church law takes effect, (Church law 1), which strips the MET from its church status by - among others - not including it on the list in the appendix. Later with the effect of 20 December 2011, the Constitutional Court nullifies the Church law 1 on the grounds of public law invalidity.
from 1 January 2012	The new Church law (Church law 2) is effective which states in Article 34 para (2) that the applications based on the nullified Church law 1 already submitted to the minister will be decided upon in the Parliament until 20 February 2012. There is no possibility for appeals.
29 February 2012	The Parliament rejects the appeal of MET (and the other almost 100 churches on the list) in the 8/2012. (II. 29.) parliamentary resolution

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3 September 2012	After the rejection the Tribunal of Nyíregyháza orders that the MET be taken into the court register as an association with its main objective of religious activity (11.Pk.60.077/1990/118. sz. végzés). Meanwhile it orders that all previous data of the church be deleted from the register. The MET appeals.
11 December 2012	The Regional Court of Appeal in Debrecen rejects both the appeal and the application (Pkf.II.20.774/2012/2. sz. végzés)
1 March 2013	The MET regains its church status with retroactive effect of 1 march 2012 because on 1 march 2013 the Constitutional Court declares the Art 34. Para. 2 and 4 of the Church law 2 effective from 1 January 2012 to 31 August 2012 to be unconstitutional and thus inapplicable from the moment they took effect (6/2013. ABH). The reason is that no legal effect can be disclosed to the Church law 2 Art 34. Para. 4 because the parliamentary resolution was passed with unconstitutional instructions therefore the churches named in the parliamentary resolution did not lose their church status thus their *ex lege* transformation into religious associations cannot be enforced (6/2013 ABH Reasoning [215]). The Constitutional Court (CC) further confirms that despite of their not being deprived of their church status, because of the retroactive effect of the CC decision, these churches still must submit their data to the minister and the minister must register them as it is written in the Church law 2. Articles 17-18 (6/2013. ABH, [215]).
4 March 2013	The MET submits its application to the minister in which it requests its registration in the church register.
1 April 2013	The 4th amendment of the Hungarian Constitution (Basic Law) takes effect (25 March 2013). Its Article VII para 2 introduces the notion of the "organizations doing religious activity": it states: "The Parliament can recognize in a cardinal law certain organizations doing religious activity with which the government will work together for the sake of community goals". The paragraph also allows for constitutional complaint against the provisions of the cardinal law that recognizes the religious communities. The new para 4 of Article VII however delegates power to the legislation so that to create further conditions for recognition. It stipulates that a prolonged operation and public support may be prescribed as condition for recognition of any religious organization. This rids the Constitutional Court's decision of March of cause and subject, because the new constitutional amendment establishes a new procedural system in the Constitution. Before, the law only knew one organizational status and it was the "church", in relation to the freedom of religion, now it allows for differentiating between religious communities.
17 April 2013	The minister notifies the MET in a letter that it cannot be registered as church (17480-4/2013/EKEF. sz. levél)

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30 April 2013	The MET submits a complaint to the Metropolitan Administrative and Labour Court to render this letter -as administrative decision- ineffective
12 July 2013	Meanwhile the appeal of 3 September 2012 in relation with the Tribunal of Nyíregyháza ordered the MET to register as an organization doing religious activity and delete its previous data was rendered ineffective by the Regional Court of Appeal in Debrecen and stopped the registration procedure (Pkf.II.20.405/2013/2. sz. végzés). One could say that until this point there was no constitutive change in the church status of the MET.
1 August 2013	The Act No CXXXIII of 2013 (Church law 7) takes effect and modifies the Church Law 2 with the effect of 1 August and 1 September and introduces the notion of the established church under special regulation which has a different legal status than before. Art 6 para 1: "A religious community is an organization doing religious activity that is recognized by the Parliament. A church recognized by the parliament is an established church". The official reasoning states the objective of the law as being "in accordance with the ruling of the Constitutional Court and with regards to the 4th amendment of the Constitution, it defines the subjective and objective framework of religious activity, redefines the recognition procedure and settles the legal status of the religious communities affected by the ruling of the Constitutional Court". The Church Law 7 establishes new transitional provisions in the Articles 34-37 to sort out the legal status of the organizations affected by the Constitutional Court decision. The definition in Church law 7 Art 34 para 1 stating that the associations doing religious activity are now defined as organizations doing religious activity does not affect the MET because the Constitutional Court decision of 6/2013 ABH ruled that it doesn't apply to it. The minister publishes on the ministry's online website a list of churches that were registered by the old Church law of 1990 and can apply to be recognized as an established church [Church law 7 Art. 37 para 1 and Art. 33 para 1 and 2]. The Minister will decide on the existence of certain conditions for recognition under the law, which are subject to judicial review [Church law 7 Art. 14/B. para 1-2., and Art. 14/D para 1].
1 October 2013	The 5th amendment of the Constitution takes effect (26 September 2013) which, just like Church law 7, introduces the general notion of "religious community" and defines "established church" as a subtype of that. (The other named type in the Church law 7 - the organization doing religious activity - does not appear in the Constitution). With the exception of its para 1, the entirety of Article VII of the Constitution was renewed and it abolishes the appeal by constitutional complaint of the negative decision of the Parliament and the constitutional review of the decision. Moreover, it elevates to constitutional level the provision of the Church law 7 stating that by the positive decision of the parliament the state can give particular entitlements (for

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	helping achieving social/public goals) thus the state can differentiate. Still the Church law 7 and the referenced rules of the Act on Constitutional Court aren't in accordance with the new constitutional status established with the 5th amendment to the Constitution (Basic Law) (Constitutional Court decision [73]).
7 February 2014	The Tribunal of Nyíregyháza issues an extract of the effective data of the MET which lists it - as per the old Church law of 1990 as a registered - church.
10 February 2014	The MET starts the procedure to be recognized as it stated in the Church law 7 and the minister finds that the MET meets with the conditions stated in the Church law Art. 14 a)-f) and forwards his decision to the Parliament's Committee on religious affairs for the next step in the recognition procedure (719-11/2014/EKF. sz. határozat) Meanwhile the Metropolitan Administrative and Labour Court repeals the no. 17480-4/2013/EKEF resolution of the Minister (which said that the MET cannot be registered) and a new procedure must be started in its 2.K.31.968/2013/7. ruling on 19 February 2014. It is about the letter of the Minister which counts as a resolution and which is not in accordance with the Constitutional Court's ruling, stating that "the registration of organizations as churches others than the ones on the appendix list is not excluded". The question is whether the changed legal environment (because of the Church law modifications) is to be kept in regard in this new procedure.
7 May 2014	The Curia of Hungary (*Kúria*) analyses the status of the MET in its ruling Kfv.II.37.124/2014/6 and states, that "the plaintiff was right to refer to the Constitutional Court decision (ABH 6/2013, 215, 217) which marked that the churches in the parliamentary resolution (where the plaintiff was on the 41st place) did not lose their church status and thus they cannot be forced to be converted into associations" (reasoning [41]).
29 May 2014	In its ruling, 23.Pk.60.077/1991/167. resolution, the Tribunal of Nyíregyháza refuses to issue the registration extract to the MET because they find either that the MET is not an established church as per the Church law as amended or because the MET withdrew its application to be registered as such. (To be noted: later this Tribunal says the same on 13 February 2015, 23.Pk.60.077/1991/169. resolution).

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11 July 2014	The Committee of Judiciary Affairs of the Parliament discusses the T/794. bill as per the Church law 7 which contains among others the registration of the MET on the list of established churches of the Parliament. The debate is to determine whether the MET complies with the Art. 14 g)-i) of the Church law 7 and whether the Parliament wishes to collaborate with the organization doing religious activity to achieve public goals and whether the organization doing religious activity is capable of collaborating to achieve public goals as stated in para 4 of Article VII in the Constitution. The Committee declared that "the requirements of collaboration are not met". The Parliament however did not decide on the acceptance of the bill or the resolution proposal.
9 September 2014	The European Court of Human Rights in Strasbourg (ECHR) decides that because of the complete abrupt termination of the applicants' church status and the establishment of a politically dependent procedure (of which existence is questionable in the first place) and because of the differentiation of the applicants from the established churches not only in the collaboration but also in the privileges regarding religious activities, the authorities ignored the neutrality standards owed toward the applicants. The ECHR also criticized the lack of a compelling societal need behind the challenged legislation. [ECHR 115.] On these grounds Article 11 was violated since it needs to be read together with Article 9.
13 February 2015	In its 23.Pk.60.077/1991/169. Resolution the Tribunal of Nyíregyháza repeats its standpoint.
29 December 2017	The Constitutional Court determines unconstitutionality in omission with regard to the Parliament's fault at not delivering the necessary procedure for Church law 7 Article 14/C on time. The Constitutional Court therefore sets a new deadline to the Parliament until 31 March 2018 (36/2017. ABH).
31 March 2018	The Constitutional Court sets a new deadline to the Parliament until 31 December 2018 (3310/2018. ABH).
1 January 2019	Meanwhile the 7th amendment of the Constitution takes effect on 1 January 2019 (Article 28) which, when interpreting the law, elevates to constitutional level the consideration of the laws preamble and official reasonings.

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15 April 2019	The new Church law 13 rewrites the disputed legislative provisions altogether by introducing a four-steps church founding system (Articles 9/A-9/G) and terminates all applications for registrations, cases, suits in progress and court orders (Article 37 para 1). Thus, again it automatically, *ex lege,* relocates the once-but-no-longer-churches to the register of associations and civil organisations through the courts. According to Article 37 para 1: "As this amendment takes effect the following will cease to exist: • Ongoing procedures to recognize organizations doing religious activity as churches that are in the Parliament, • Ongoing procedures to register organizations doing religious activity in court, • Ongoing administrative procedures started by Article 14/B para 2 of 1 august 2013, • Ongoing procedures to register as church as ruled by the Constitutional Court in 6/2013. (III. 1.) AB decision • The termination procedures of religious communities as stated in Art 33 para 3 of Church law 13, 14 April 2019 and Art 33 para 5 of Church law 7, 1 September 2013."

Justice István Stumpf of the Constitutional Court, in his writing for the (marginal) majority at the end of 2018, declares that the legal status of the MET is mixed in the judicial system: in a sense its church status is recognized in multiple cases, but they just cannot be fit into the system implemented by the Church law (3310/2018 ABH). In the meantime the Constitutional Court is also divided, since a small minority would even deny the standing of the MET in these lawsuits, like Egon Dienes-Oehm, who expressly confirms, that the fathers of the Basic Law (the Constitution) wanted to keep the right to decide on church recognition within the framework of the political – legislative – branch of the powers. Although this notion was adapted in the 5th amendment of the Basic Law, it was nevertheless contrary to what the legislators had previously had in the texts related to these churches following the 4th amendment to the Constitution (Church law 1, and Constitutional Court law)[6].

Clearly, the Basic Law changed conceptually twice in Article VII due to the 4th and the 5th amendments in April and September of 2013 respectively. But the Church law itself was also redrafted 13 times. In addition, it had to be harmonized by the legislation with 11 decisions of the Constitutional Court, which are in fact only this many because the motions were consolidated.

In this further analysis I would structure my reflexions around 3 topics: i) the problem of definitions and the reasoning of the law, ii) the fundamental right and the state, or the

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secularization and the concept of a neutral state, and finally iii) the financing of churches from public funds.

The importance of reasoning

The problem of definition and the reasoning of the law

Eventually, the Church law is not fundamentally about the freedom of conscience and religion. In the official justification[7] the main reason to the drafting of a new Church law is that in the old one of 1990 the generous conditions of the founding of a church gives grounds to the abuse of this basic right. And this literally means the misuse of budgetary money and state aid. Thus the official justification confirms that the goal of the new Church law is the restriction of church founding and the motivation is the termination of the "unlawful" draining of state aid money.

The legislator filters and abolishes the majority of churches. Instead of utilizing criminal law and letting the Penal Code take action against the perpetrator, the legislator, in a preventive fashion, abolishes the non-recognized and non-historical churches in general. These so-called small churches, that are completely arbitrarily put on that list, can be ancient beliefs (shamanism, witches), neo-protestants, Jewish, Muslims, religions of the Far East or modern esoteric religions. This differentiation is of course grounded in history which favours mostly the most popular church, the Catholic Church (Fazekas, 2008).

Already the first, rapidly nullified Church law 1 wasn't about the freedom of conscience and religion but about the church-founding and about the specifics of state aids. Indeed, the introductory sections and provisions repeated the words of the Basic Law not giving any new or extra to the scope of these fundamental rights, but introducing a definition of the religious activity. That would be the legal definition of religion which was missing in the old Church law of 1990. In this regard the Church law 2 didn't change anything, the same definition was therein as in Church law 1[8].

It's not customary to give a legal definition of religion in the statutes themselves. It is normally the realm of the scholarly debates, the legal literature or judicial practice, because it is either going to be naturally exclusive (unitary definition) or overbroad, encompassing everything and thus becoming completely meaningless (pluralist definition). On one end of the scale, not all religions centers around the supernatural (see deism or hinduism) and on the other end, even the existence of the belief is questionable (see the problem of atheism: Is atheism a religion?). Thus we could say that a legal definition is to be avoided because it is going to be either too strict or uninterpretable. So it gives grounds to either a too strict or a too lenient interpretation[9].

Notwithstanding, the real problem isn't the legal definition in the new Church law or its general justifications but its so-called admissibility of the content examination and the examination of the seriousness of conviction. Because the justification states that the old

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Church law of 1990 was too generous, too liberal with "the registration of not in fact religious organizations as churches". Without questioning the problem of importance and effectivity of the actions against fraud, the content of and strength of the belief or the seriousness of conviction cannot be examined without other factual elements. That would indeed violate this most classic political freedom, because it would allow to differentiate between citizens based on the quality of their faith. Of course, there are such political systems that allow this, but these systems are not democratic or liberal[10]. Also, in this regard there is a unified practice in the liberal democracies, in all cases of the member states of the EU and of the USA. But also the case law of the ECHR is in line with these ideas.

However, fraud can be discerned from the behaviour and circumstances of the particular actor, and it does need to be established. But there is a *caveat* here too: "Men can believe in anything that they cannot prove"(US v. Ballard, 1944, J Jackson)[11]. Moreover, what is especially lifelike, experiential conviction for some can be utterly incomprehensible and messy for others. And so the problem of delimitation arises: How much scepticism and doubt can belief encompass? And who can judge it? Can it be checked if a self-proclaimed healer sustains his actions with real data (time, place, name of the sick person)? (Yes). Can it be checked by the police? (The minority thinks yes)[12].

But what does "false" teaching even mean? The Swedish church of Kopimism[13] exists, existed, to make an action of copyright pirating and servant copying unquestionable. Also they created one of the most coherent belief-system of the essence of the universe: the copying. However the Flying Spaghetti Monster did not get permission in the USA to found a church, because the judge thought it to be more similar to a parody than an actual belief (Plaintiff, 2016).

Hence, it is no wonder that while analysing the contested sections of the Church law in its ruling, the ECHR awarded the decision to the plaintiff applying the stricter test of necessity and proportionality[14].

It would seem clear that the creation of the legal definition of religion is impossible. Because what would be the definitive elements? The thinking about fate or destiny, the perception of beyond time or the consequences of out-of-time, the tech reality of the afterlife, the meditation, the requirements of moral ideas? At the same time, if there is no such definition, on what bases can the rules of exceptions be judged non-arbitrarily? To what standards or measures could the tax benefits, the school financing or the property support be compared and justified?

And the Hungarian legislation is visibly battling these problems throughout the entirety of the debate. If there is not - cannot be - a definition in the statute, the revulsion of the state towards peripheral religions and its endeavour to eliminate them legitimately, becomes impossible. This way the delicate balance of sharing the burden of proof between believers and non-believers capsizes. That is, the delicate balance[15] between the secular

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goals and the rights of the believers falls over. Because in a liberal rule of law state, (liberal) Rechtsstaat, any legislation affecting religious freedom must have legitimate secular goals and cannot elevate one from among the others.

The fundamental right and the state, or the secularization and the concept of a neutral state

Why shouldn't the legislator be allowed to support certain churches and not others? In other words, why couldn't the Church law become a *political* question as suggested by the narrow minority of the Constitutional Court, and let the Parliament decide in the matter? (see the argument of Judge Dienes-Oehm above (36/2017 ABH and 3110/2018 ABH [83]).

Why would it be necessary for the liberal (rule of law) arguments to be more binding, more conclusive than the democratic arguments. Undoubtedly, the basis of the critique against the new Church law is not that it oppresses other religions. Moreover, in this regard not even the limited religion definition causes any problem, because at its core, in a legal system based on the free market, it's the private property that ensures the freedom of religion, as long as it is everyone's internal affair. And as per the analysis of the Constitutional Court of article M of the Basic law, Hungary is a country of free market (1769/2013 ABH).

Why would it be a necessary consequence of this that the freedom of conscience and religion incorporate the *freedom of religious practices*? Why couldn't the democratic majority say, that they themselves could decide on these matters simply because this is what the majority principle is about. Speaking about a matter of principle here, I would refrain from citing the obvious counterargument that such a decision can be quite whimsical and would thus create legal uncertainty: what is popular today may not qualify as such tomorrow. Since only majority-based decisions have such *differentia specifica* as consequence, to change law even overnight in the parliament regardless to certain deliberations. The (liberal) notion of legal certainty was specifically created to prevent this kind of arbitrariness. And so this circle ends. It's not a coincidence that the exclusivity of the majority principle or to put it pejoratively, the tyranny of the majority is what motivated the establishment of the rule of law (liberal) institutions, the checks and balances.

The new original Church law of 2011 ordered every church that existed after the socialism, since the change of the system in 1989, to change their form into an association, except for 14 which had nothing in common except for their being one of the 14 churches on the list. The other more than 100 churches that were left out, had to re-register as association in a really short – though undetermined – period of time in order to be legally able to request their registration as church again to be decided upon, in less than 60 days by the Parliament. Those who didn't comply faced to cease to exist for lack of legal successor. Undoubtedly, the legal debates caused many modifications to the Church law. Some were to make the transformation easier in a sense, that it allowed for the "new

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associations" to use the word "church" and even customized a special association form for churches (Art. 7) but none of the above amendments changed the fact that the small churches were deprived of their rights abruptly. Nor was this the intention of the legislator. Given that they admittedly operate by the majority principle and think their original decision to be legitimate and working in a legalistic fashion, they only cared for that the law be correct to the letter. That's why there were multiple casual amendments to the Constitution itself in a manner that the legislator simply copied the challenged provisions that were declared unconstitutional by the Constitutional Court and inserted them into the Constitution.

But no version of these legislative clauses could fix the problem that the Church law deprived **a)** arbitrarily differentiating, **b)** existing churches of their legal status and ordered them to go through a re-registration process of questionable outcome by the power of the law, automatically. Hence, with the exception of the 14 churches recognized by the parliament, which were automatically registered, as per Art 7 para 4 of Church law 1-2, all the other churches ceased to be churches. The justification of the law states specifically that from that point forward the parliament was entitled to recognize churches.

Accordingly, could it be argued, that this sort of measures cannot be trusted to and decided by the majority principle because the requirements of the principle of secularization stand on firmer theoretical grounds? And so, should the existence of a so-called neutral state be protected, that stands equally apart from every religion and church, and moreover that ensures the freedom of non-religiousness too? And even more so, if the greatest critique of the secularized state is that it is not in fact neutral but supports the atheists, the non-believers[16].

Moreover, only a few European countries and EU members have a specifically secularized system. Countries having an officially recognized church are the UK, and the Scandinavian states (Denmark, Finland, Island, Sweden the latter of those separated the church and the state legally only in 2000) and we cannot speak of democratic deficit in these instances. Greece is in the process of separating the Orthodox Church from the state. There are hybrid, not-unified systems in place in Germany, Switzerland, Belgium and the Netherlands. In Germany there is no official religion, and in its so-called coordination model it provides for the right of assembly and every recognized church is a public body as set already in the Weimar Constitution[17]. For the most part the Central-European countries such as the Czech Republic and now Hungary, belong in this intermediate model.

The critique of the secularized state that it is not neutral but equally prejudiced towards every religion thus supportive towards the non-believers is obviously convincing and that is therefore not what I argue against (Beiner, 2012). The stance for a liberal and neutral state is based on practical historical arguments. Historically where there is tolerance (of

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religion) there are fewer wars (of religion). Tolerance is of course not without cost, it is no panaceum, but it works. The law can either aid it or harm it but fundamentally it is the cultural, historic traditions that are determinative (Stepan, 2010).

In the western liberal constitutional democracies, the theoretical starting point is the complete secularization even though the two historical model (the American and the French) exist in this moment in countless variations. Moreover, the model of established churches can be acceptable on the other end of the spectrum. These models in themselves do not confirm nor guarantee the existence or non-existence of the modern constitutional democracy. It is possible in every model for the state and the church (religion) to stand equally apart from each other, equally tolerating each other. In all systems of established churches, recognized churches, separated churches or in the mixed systems. Thus the litmus test is the so-called twin-tolerance the ensuring of the mutual room of manoeuvre. That's how the Turkish system of Kemal based on the French system allows for a serious influence of the state meanwhile the UK with a model of an established (not secularized) church is especially tolerant[18].

It could be said that it is not the law but the political-moral-philosophical-cultural conception is what really counts. In other words, the problem is not whether the parliament decides on these matters but that the majority principle is not, exclusively and in itself, capable of treating individuals who wish to exercise their freedom of conscience and religion on an equal footing. Because, among others, the parliament doesn't see individuals but voters.

The original Church law 1 was found unconstitutional for its failure of having been passed in due course by the representatives. The judges of the Constitutional Court objected especially to the exclusion and impossibility of intelligent debate over common affairs. The deliberation is the duty of the parliament, as an institution, so every representative, no matter whether they belong to the majority or the minority, has equal rights in this debate and all of them are supposed to act in the interest of the community (Justice Bragyova 6/2013. ABH). Since this notion really is utopian, it is essential that in a state where the classical – first-generation – freedoms are important, like in a rule of law system, the majority principle cannot work exclusively. Therefore, a liberal state is not *per definicionem* secularized, but it respects the twin-tolerance in a cultural or legal way.

After all of this the question occurs whether illiberal democracy is even possible or could it be called simply a non-pluralist democracy. As a matter of fact, where there is fundamental political freedom pluralism follows as a necessity. So it is dubious whether a non-pluralist democracy is fathomable at all, because if the first generation fundamental rights of all are not respected, it results in the inequality of individuals in this regard. And this begs the next question, whether there even is democracy conceivable where the individuals are not equal in regard of these fundamental political freedoms. To highlight, these fundamental rights are the freedom of conscience and religion, the right of assembly

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and association, the freedom of expression and the right to vote. Moreover, the freedom of conscience and religion is not only a first-generation fundamental freedom but the ground on which the whole constitutional system is built (Annicchino, 2016).

Therefore, by definition, a democracy must be liberal and pluralist. And a liberal state is necessarily secularized and cannot support exclusively or dominantly a single ideal/theory/concept in the name of the public good.

Naturally this concept of neutrality is debated and can, without a doubt, lead to the expansion of individualism. A typically Rawlsian political liberal answer to this liberal paradox is that neutrality is rather a goal in itself. The liberal state cannot support any overall dominant concept of good, be it moral, philosophical or religious not even one that expressly fits the values of a liberal state. Since, if the pluralism of – rational – theories stands, then the governmental support of any value-system will upset this balance on which the democratic system is based. In contrast with non-democratic, non-liberal regimes, in liberal states there exists a common, independent concept of truth that is capable of mediating between the state coercion and the religious ideas. In other words, the possibility of telling the truth as competing items helps to maintain consensus[19].

As a consequence, therefore the conceptual critique of the new Church law of 2011 is that it allows *exclusive and arbitrary* decision-making for the legislation. Although seemingly this should be the essence of democracy, nevertheless it creates such anomalies in the democratic institutions that it could well survive but would alter the system into a non-democratic regime.

Hence these considerations render the official reasoning of the Church law of 2011 unacceptable, for it both justifies the examination of the content and the examination of the seriousness of one's conviction and repeals acquired rights without due regard to the circumstances. In addition, the new 7th amendment to the Basic Law in 2019 elevates the legal weight of the official reasoning of a statute in case of interpretations or ranking the interpretations.

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The financing of churches from public funds

In spite of all this, why should the ruling majority take into consideration religious groups that they don't like (but whose existence aren't unconstitutional) or that are marginal on an equality basis while distributing public funds? Why can't the majority decide on a political basis which is a church and which is not? In other words, is there a problem with the new Church law of 2011 from this public financing perspective? For it isn't about the freedom of conscience and religion but especially about the founding and funding of churches.

As a matter of fact, the point in the critiques is not the public funding (of course in the long run it is) but rather the arbitrariness. That is why the MET has always sued for the deprivation of its acquired rights.

"Acquired rights" is, of course, a quite broad concept. On one end it can incorporate private property and on the other end it includes the rights granted because of political incentive like the baby bond. Nowadays we would call it the protection of legitimate expectation (Vertrauensschutz) or legitimate expectation depending on the strength of the bond between the future entitlements and the entitled (candidate). So one could speak of bought or acquired rights or "simply" of entitlements.

In a modern constitutional democracy from a constitutional or a public law standpoint, the notion of acquired rights means merely that the entitlements ensured by the state (or local authorities) are to be modified – into a negative direction – only through a meaningful hearing[20] of the affected and can only be implemented in the future. Negative modification entails either the narrowing of the scope of the entitled ones or the decreasing value of these entitlements as well as the changing of the whole system. Also the meaningful hearing sets a high bar, requiring that it is not enough to prove that the entitled had had knowledge of the modification and could have reacted to it. The meaningful attributive means that the arguments of the interested parties who have been heard, are going to be taken into consideration. Furthermore, the authorities have to prove that they have taken these arguments into consideration. If the arguments are convincing than the concept of the change of the entitlements should be modified as such, in case that they are not convincing it must be communicated and a justification has to be attached. This justification must be rational, in other words not arbitrary. There needs to be found a compelling state interest which cannot be fulfilled in any other way – less restrictive way for the affected ones (see the strict scrutiny test of necessity and proportionality as applied by the ECHR in its case of 2014 above too).

Since the acquired rights in question can directly be drawn from the freedom of conscience and religion there is a need of strict scrutiny rule of law guarantee here as well: the reasoning and the ban of retroactive effect. Surely, the subject matter of the legal debate with the MET is not that the state should be forever bound to fund and provide aid

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for the churches or any church. The budgetary rules can, of course, be modified, they are not forever. Few would argue this.

The state commits to general promises which apply to everyone. These promises embody in the bulk of laws but effectuated only via the budgetary statute. Therefore the budgetary law is the realization of the promise of the state. Since the budget is based on the actual program of the government (and that is often based on their promises during the elections) it is clear that this general promise of the state which applies to everyone is a political question. This state promise is of a public law nature, which is closely related to the political processes. From a strictly positive legal point of view, the legislator is entirely free to modify the legislation. This is inherent to governing. Therefore, the question whether there is a legal remedy for a public institution that isn't getting the appropriate funding for the performing of the activities prescribed by the law, is not interpretable. Because the general legal guaranty is only executable through the budgetary law, and the budgetary law by its legal nature is permission for the government to realize its program. Therefore, there is no legal remedy here for the institutions that are left out of the budget, the public aid or support.

Yet in the case of the problem with acquired right and retroactive effect there is a remedy.

As per the Church law 1, the churches left out of the list had had no chance to be heard neither even to be told that in a short notice – less than 60 days – they must transform into associations so that to be able to request the so lost legal status of a church to be decided by the parliament. With some differences in the various amendments, especially in the conditions of church-founding, this model has changed. In certain instances the model has been eased (Church law 7) in other instances it has been tightened (now it is the strictest), but in no way does it meet with the requirements of the general rule of law or of the neutral state principles (see ii) above).

It is however to be emphasized that this failure to be in compliance with these principles are primarily not because of the legal environment but because of the legal practice. Because **a)** it nullifies acquired rights, **b)** arbitrarily, **c)** with retroactive effect, while **d)** it justifies the examination of the seriousness of the conviction and the content of the belief, and finally because **e)** it pushes some used-to-be-churches which performed state tasks (schoolings, shelters) into actual breach of contract, thereby causing even actual damage.

Otherwise, the introduction of this state-church model would surely have passed through the constitutional filter, given that mutual tolerance practices would have prevailed. This was in fact the case of the Concordat of 1997 but ratified only 2 years after due to heavy criticism[21]. But none of the versions of the presented Church law would meet the requirements of the still good doctrine of the American *Lemon test.* Despite of its criticism[22], in connection with the freedom of operation of churches, the American case

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law is dependent on the Lemon test *(Lemon v. Kurtzman, 1971*), according to which any law affecting church activity must comply with the following requirements: i) the law must have a secularized goal, ii) its basic and primary influence cannot and should not support or obstruct any church, and iii) it should not result in any state interference with any religion / church. The practical application of this, although not easy and the US courts are fairly divided on these issues, still, one should say that a modification of the Hungarian Church law that would not have terminated the status of the churches in certain circles with immediate effect, but for example would have waited for their extinction, even if it let new churches be established according to new conditions, would not be *prima facie* unconstitutional.

Conclusion

This paper demonstrates the conflict between liberal and illiberal democracy and argues that the majority principle cannot be the standard tool in cases of protecting the first-generation fundamental rights, especially the freedom of religion.

The problem with the illiberal democracy is not that it promotes certain religious groups more than others, at the expense of others, but because of the lack of the neutrality principle, such a government may become unleashed. Truly, the mere existence of a free market can guarantee the freedom of religion, as long as it is everyone's internal affair and private property is secured. The out-door practice or the funding of a religion is however another question.

Clearly, a government has quite a broad room for manoeuvre in managing the public expenditures reflecting its own political deliberations. Yet, if public funds are to be decided and spent on majority principle so, financially at least, it could differentiate among religions. If, however, these differentiations are allowed among religions, so that the individuals are not treated equally in this sense, compelling state interests should be used as reasoning. The mere fear, or in certain cases even the fact, of abuse of public funds should not suffice as justification, since it may punish those, who would not deserve that. The Penal Code is to be applied in its stead.

That is why, majority principle is constrained by the rule of law requirements.

This paper suggests that the conceptual critique of the new deliberately differentiating, illiberal, Church law of 2011/2019 is that it allows unhinged *exclusive and arbitrary* decision-making for the legislation. Although majority principle should be the essence of democracy, its unconstrained version creates such anomalies in the democratic institutions which could well be survived but would alter the system into a non-democratic regime. First generation fundamental rights are therefore to be protected not by the democratic institutions even in a democracy but by the rule of law (liberalism).

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Absztrakt. Az elemzést többek között, a 2019. április 15-én hatályba lépő legújabb egyháztörvény (Eht1) módosítás (Eht4) illetve az addig elhúzódó, nyugvópontra még nem jutó, törvényes alkudozás inspirálta. Vajon a többségi elvre épülő jogalkotói érvek elég okot adnak-e a vallások közötti különbségtételhez? Miért kellene az uralkodó többségnek egyenlő módon figyelembe vennie marginális, vagy általa nem kedvelt vallási csoportokat a közpénzek elosztása közben? E tanulmány szerint ez az új 2011-es (módosított) egyháztörvény azért illiberális, mert szándékosan megkülönböztető, és lehetővé teszi az önkényes jogalkotói döntéshozatalt. Bár a demokrácia lényege a többségi elv kell legyen, annak korlátlan megvalósulása alapvető torzulásokat teremt a demokratikus intézményekben, amelyeket túl lehet ugyan élni. Az első generációs alapvető jogokat ezért még egy demokráciában sem a demokratikus intézmények garantálják, hanem a joguralma védi őket (liberalizmus).

APPENDIX

[1] This paper is the written version of the lecture held during the conference between 16-17 May 2019 at the John Wesley Theological University, Budapest (Konferencia Forrai Judit hetvenedik születésnapjára).

[2] The Church law is the Act No CCVI of 2011 on the *freedom of conscience and religion beside the legal status of the churches, denominations and religious communities* (Egyházi törvény "Eht" or Church law amendment No 2).

[3] Amendment No 13, the Act No CXXXII of 2018.

[4] Act No IV of 1990 *on freedom of conscience and religion* ("lelkiismereti év vallásszabadság törvény, Lvt")

[5] This Church law, as a starter, is already the 2nd version of the original Act No. C of 2011 but repealed by the parliament within 6 months after its entering into effect.

[6] See the Constitutional Court cases 36/2017 ABH and 3110/2018 ABH, [75].

[7] Official justification of the Act No CCVI of 2011: "The Act No IV of 1990 on freedom of religion and conscious passed by the parliament still in the era of the one-party regime, broadly secured the religious freedom and the establishment of the churches. Later however, it became clear that these generous conditions of the founding of the churches provide for a possibility of abuse with the fundamental right and the illicit – non faith based – use of public funds dedicated for churches".

[8] Art. 6 para 1: "Religious activity is an activity connected to such world view, which relates to transcendency, is equipped with orderly set of dogmas, the doctrines of which relate to the entirety of the reality and embraces the totality of the human personality with such special standards of behaviour which do not hurt the morality and human dignity" („A vallási tevékenység olyan világnézethez kapcsolódó tevékenység, amely természetfelettire irányul, rendszerbe foglalt hitelvekkel rendelkezik, tanai a valóság egészére irányulnak, valamint az erkölcsöt és az emberi méltóságot nem sértő sajátos magatartáskövetelményekkel az emberi személyiség egészét átfogja"). The critics of which has already been exercised in the first Constitutional Court decision (6/2013 ABH, see the opinion of Elemér Balogh). The definition has changed later on (Act No 133 of 2013) and the term "which do not hurt the morality and human dignity" is deleted from among the conditions of the standards of behaviour. The definition is shifted to the Art 7/A para 2 in the newest, 14th version (including the Church Law 1 too).

[9] Classic example of the overbroad definition is the conscientious objector in the military services (*US v. Seeger*, 1965). However this case would not fit into this definition of the recent Hungarian Church Law, since Seeger did not believe in any transcendental being but in good and virtuous, in moral values in themselves. Certainly, this raises the question of clear and distinct borderlines (see also Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet (1994): *Constitutional Law*. Little, Brown and Company. p.1465).

[10] e.g. the United Arab Emirates is fairly tolerant towards religion but discriminates on the grounds of citizenship.

[11] Justices Stone, Roberts and Frankfurter dissented: if it were shown that a defendant had asserted that he had physically shaken hands with St. Germain in San Francisco on a day named, or that by the exertion of his spiritual power he had in fact cured hundreds of persons, it would be open to the government to submit to the jury proof that he had never been in San Francisco and that no such cures had ever been effected.) Justice Jackson agrees that church leaders may be prosecuted for frauds, however… (cited in Stone et al. 1467).

[12] Stone et al p.1467.

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[13] Even the registration of this church was achieved by copying, since the Swedish court first had rejected the application, but then upon the advice of their lawyer the applicants copied the exact words of the law, thereby obtaining their license to exist.

[14] Decision of the ECHR on 9th September 2014 [115.]: "The Court concludes that, in removing the applicants' Church status altogether rather than applying less stringent measures, in establishing a politically tainted re-registration procedure whose justification as such is open to doubt and, finally, in treating the applicants differently from the incorporated Churches not only with regard to the possibilities for cooperation but also with regard to entitlement to benefits for the purposes of faith-related activities, the authorities disregarded their duty of neutrality vis-à-vis the applicant communities. These elements, taken in isolation and together, are sufficient for the Court to find that the impugned measure cannot be said to correspond to a "pressing social need". There has therefore been a violation of Article 11 of the Convention read in the light of Article 9.

[15]Freeman (1983): The Misguided search for the constitutional definitions of religion. 71 *Geo L J* 1519. (cited in Stone p.1466).

[16] Normally, it is the French secularization to be quoted here mirroring Voltaire or his personality and his animosity towards religion (*laicité*, or the freedom of state from the religion) even though this interpretation had been challenged even then, since most of the advocates of the bill were religious themselves. On the other hand the American secularization is fairly different from this already in its famous terms of standard, like "Congress shall make no law…", providing for a more restrictive state (the freedom of religion from the state). Whereas the French version allows nothing, the American draws up a non-transparent wall between the state and the religion: the faith-blindness (see *Everson v. Board of Education (1947),* Justice Hugo Black).

[17]Notwithstanding, this is not at all entirely neutral, for the small churches or the non-hierarchically organized religious communities are forced to join umbrella organizations.

[18] See Stepan, 2010

[19] Catherine Audard (2011): Rawls and Habermas on the Place of Religion in the Political Domain. In: Finlayson, G Freyenhagen F. (2011) (eds): *Habermas and Rawls Disputing the Political* London, Routledge, pp. 224-246.

[20] See e.g. Article 41 - Right to good administration in the Charter of Fundamental Rights of the EU. (2010/C 83/02).

[21] Act No LXX of 1999 on the Concordat between the Holy See and the Republic of Hungary regarding the financing of the religious and public activity of the Catholic Church in Hungary. See also the report of the Committee on the scrutiny of the results and effects of the Concordat: 2006-8. http://www.okm.gov.hu/letolt/egyhaz/vatikanijelentes06nov11.pdf

[22] lately see: *The American Legion v. American Humanist Association, 2019*