DECISION 4 OF 1993: 12 FEBRUARY 1993

ON THE RESTITUTION OF CHURCH PROPERTY

The petitioners sought constitutional review of Act XXXII of 1991 on the Settlement of the Property Status of the Former Real Estate of Churches (hereinafter "the Act").

The Act, passed by a simple majority of votes, aimed at providing a partial remedy for the very serious injustices experienced by the Churches during secularization and at ensuring the necessary objective material conditions for their operation. Sections 1 and 2 permitted delivery up of real estate which served certain church activities before secularization, *e.g.* under s. 2(2) religious life, operation of a religious order, education, health and social care, youth and child welfare, and cultural purposes. According to s. 15, the government and the interested church might conclude an agreement in order to create sufficient material conditions for church activities which were useful for society and provided for a partial compensation for church-owned property confiscated after 1 January 1948 (with the exception of property returned under ss. 1 and 2). The amount to be used as compensation was to be fixed annually by the State Budget.

The petitioner submitted, *inter alia*, that the Act was contrary to the Constitution: (a) Art. 60, because it did not guarantee the existence of a non-ideological (neutral public or state) school in each settlement; (b) Art. 60(4), because it was not passed by the votes of two-thirds of the MPs present. The need for such a qualified majority referred to the freedom of conscience and religion as a legislative subject including regulation connected with institutions of religious freedom. Since the Act rectified the financial conditions fundamentally of the institutional framework of religious freedom and thereby determined it for the future, it required a two-thirds

majority to be passed; and (c) Art. 70/A, since it drew a distinction between the compensated churches and the other churches, and other organizations having suffered similar property loss. Moreover the way the Act reprivatised the assets of the Churches was also unconstitutional.

Held, granting the petition only in part:

(1) The State was to remain neutral in cases concerning the right to freedom of conscience and religion, from which right it was required to guarantee the possibility of the free formation of individual belief [free expression of personal convictions]. Article 60 guaranteed freedom of conscience and religion which former comprehended the freedom of personal convictions; freedom of worship including the negative freedom of religion being the right not to express any conviction; and the right to religious association and assembly. On the one hand, religion was part of the right to human dignity so that the guarantee of its freedom ensured free expression of a human being's personality which itself could not be limited by law. Thus from the right to religion, the State had a duty to abstain from interference in its exercise. On the other hand, there was also a close relationship between the right to worship and freedom of speech. Since the manifestation of this freedom was the exercise of religion or worship, any laws limiting such freedom had to be interpreted restrictively as with those in respect of free speech. The State was to protect the freedom of conscience and religion without considering its value or its content (thus the right could only have external limits) and it was from such position that the State drew its neutrality, as underlined by Art. 60(3) (page 00, lines 00-00; page 00, line 00 - page 00, line 00).

(2) From a reading of Arts. 60(3) and 70/A, the State was not to favour any church or to influence its internal workings, particularly in matters of faith. Rather it was required to treat all

churches equally and to provide everyone with the possibility of freedom of conscience. However, the separation of Church from State did not mean that the State ought to ignore the characteristics of religion and church in its legislation: for instance, it could take into consideration churches and religious communities in relation to their historical and social roles which were different from those associations, unions and clubs, the establishment of which was governed by Arts. 3, 63 and 70/C. Such roles included education, health care and assistance of the poor, once exclusively church duties but which also became state ones at the time of secularization. Further the neutral state legal system ensured that religious communities could freely use the legal form of "church" as defined by the State's legal rules. Provided the community fulfilled such rules, it would obtain its legal status through the legal institution chosen by itself and could enforce its special characteristics within this sphere, and so be received in a particular manner into the legal system in a way provided by the State. Its neutrality in connection with the right to freedom of religion therefore did not mean inactivity. In fact the State was bound to ensure the circumstances under which different ideas could occur and develop and to enable the free formation of personal convictions (page 00, line 00 - page 00, line 00; page 00, lines 00-00).

(3) A neutral public/state school could not be bound to any religion or ideology but had to provide a broad, balanced and objective education of ideological ideas, offering the possibility of a free and well-founded choice. Where a school was sponsored by the State or local government but in which religious education was permitted then such a school had to be considered a "committed" school like other church schools, otherwise the requirement of religious neutrality would not have any sense. In the exercise of the freedom of religion, parents had the right to send

their children to church schools and not to be forced to send them to others contrary to their convictions. In acting according to their conscience, it was not unconstitutional for such persons to be constrained to make a sacrifice albeit a proportionate one. Thus while the State was to ensure the legal possibility for establishing church schools, it was not obliged to establish them. Where, however, the church or parents established or ran committed schools, the State was required to support them to the extent of their undertaking the State's programmes in them (page 00, line 00 - page 00, line 00).

(4) Consequently the Act did not infringe the various principles derived from the freedom of conscience and religion in Art. 60. Moreover it provided sufficient guarantees in the transfer of erstwhile state school buildings to the church, for the protection of the rights of parents and children rejecting church school. The State was bound to take positive action during such transfer to render possible, for those not wishing to go to church schools, attendance at neutral state schools without discrimination or imposition of a disproportionate burden. Consequently whereas the State and local government were not obliged to establish a church school for those choosing it, they were required to make a neutral school available where demanded even in cases where the number of pupils was low (page 00, line 00 - page 00, line 00).

(5) The Act involved detailed regulation of various matters and did not involve the direction and defence of the right to freedom of conscience and religion: its passing by a simple majority in Parliament was therefore in accordance with Art. 60(4). The constitutional requirement of a two-thirds majority of MPs present to pass an Act on fundamental rights referred to freedom of religion, rights of ethnic and national minorities, and of nationality. The current

emphasis on the two-thirds majority revealed the political importance of such rights when broad consensus was needed to amend them in the Constitution. The fundamental right was not a legislative subject in every detail: an Act, even if a qualified voting one, was needed only to define the content of the fundamental right, its substantial guarantees and its direct and significant restriction. Such an Act would therefore determine the direction and protection of such right, directly executing a specific constitutional role: lawful regulation of a fundamental right with its particular, detailed rules therefore required only a simple majority. Moreover the predominance and defence of fundamental rights would be restricted unjustifiably if every change and improvement, or partial guarantee which did not determine the regulatory concept, were attached to a two-thirds majority (page 00, lines 00-00; page 00, line 00 - page 00, line 00).

(6) There was no unconstitutional discrimination between the churches and other legal entities on the basis of ss. 1 and 2 of the Act. The aim of the Act and the nature of the return of real estate differed fundamentally from the concept of the partial compensation for losses wrongfully caused to the property of citizens. This derived from the difference between the function of the property of individuals and legal entities pursuing commercial activity or representing certain interests and the functions of church property as listed in s. 2(2). However the historical social role of the churches and the inseparability of their operation from the right to freedom of religion offered a satisfactory basis for the classification of churches as being among organisations maintained by the State: in other words it was the State's constitutional duty not only to privatise part of its property but also to create and support public bodies and provide the assets necessary for such organisations to strengthen their autonomy and to enable them to fulfil their tasks. Nevertheless in the broad group of comparable organizations, the supply of property

was at different stages and provided such supply was in conformity with the function of the organisation, it was not arbitrary. Further it was logical that churches which either were not operating at the relevant time or had suffered no loss remained unentitled. The present transfer was of real property previously used by the entitled churches for implementation of their right to exercise freedom of religion and which could now be reclaimed for the same purpose in conformity with the churches' real needs (page 00, line 00 - page 00, line 00; page 00, lines 00-00).

(7) Section 15 of the Act was unconstitutional. The rule contained therein supported the activities of churches generally and was not bound to those specified under ss. 1 and 2. Its legal title was the "partial compensation" of the properties which were confiscated: other provisions of the Act redressed the damage caused by deprivation of the material conditions for the real exercise of religion on the ground of the principle of functionality. After such functional rehabilitation, no further differentiation between the churches was necessary for the freedom of religion and thus the possibility of state support for the material independence of churches could not constitutionally be limited to those which lost their assets after 1948. The characteristics of churches justified the transfer of benefits to them on the functionality principle which differed from compensation given to remedy only damage to property. Additional property to guarantee uninterrupted operation could only be provided as compensation if the system for the supply of property and support for churches and other autonomous public bodies had already been formed. Further, compensation did not mean unreasoned discrimination in such a system compared to other benefits supplied to other bodies in which there was a public interest during the course of their becoming autonomous. Accordingly, in the absence of the conditions necessary for

supporting positive discrimination, s. 15 remained contrary to the Constitution (page 00, line 00 - page 00, line 00; page 00, lines 00-00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

On the basis of submissions for the repeal of certain laws and for the subsequent declaration of enacted laws as unconstitutional, the Constitutional Court - with the separate opinion of Schmidt, J. regarding Point I of Part B of the Decision and with the dissenting opinion of Vörös, J. to Point 2 of Parts B and C; further with the concurring opinion of Herczegh, J. regarding Point I.20 of Part A - made the following

DECISION.

A

1. The State should remain in a neutral position in cases of conscience and religion. From the right to freedom of religion, the State is obliged to ensure the possibility of free formation of individual belief [expression of personal convictions].

To separate the church from the State does not mean that the State should leave the characteristics of church and religion out of consideration.

2. A state school is not bound to any religion. The State should ensure legal possibilities for establishing church schools but the State itself is not obliged to establish them. Where the State

transfers school buildings to church property, for those not wanting to attend church schools, it must make it possible to attend state schools without any discrimination.

3. The Constitutional Court rejects the submissions which say that Act XXXII of 1991 on the Property Situation of former Church Real Estate would breach Art. 60 of the Constitution, by saying that the return of ownership of school buildings to the churches does not guarantee a free choice of schools which freedom is based on religious rights and rights of conscience.

B

1. The Constitutional Court sets down [points to] the fact that where the Constitution ordains the presence of two-thirds of the current Members of Parliament for the passing of an Act on fundamental rights, the requirement of qualified majority does not refer to the lawful regulation of a fundamental right but only to an Act which directly executes a specific constitutional rule.

The statute determines the direction and defence of fundamental rights. The requirement of a two-thirds qualified majority to refuse a statute on fundamental rights does not preclude particular rules from being determined by simple majority laws.

2. There was no need for the votes of two-thirds of the current Members of Parliament present at the passing of Act XXXII of 1991 on the Property Situation of Former Church Real Estate. The Constitutional Court rejected those submissions which stated that the Act was contrary to Art. 60(4) of the Constitution because of the absence of a two-thirds majority.

C

1. The Constitutional Court accepts the submission that s. 15 of Act XXXII of 1991 on the Property Situation of Former Church Real Estate is contrary to the Constitution and hereby repeals it. Section 15 of this Act will expire on the day when this Decision is published in the *Hungarian Official Gazette*.

2. The Constitutional Court rejects the further submissions that the following provisions are contrary to the Constitution: s. 1(2) and (4); s. 2(2)(a), (e); s. 12(2); s. 13; s. 16(5); s. 17(2); s. 22.

The decision of the Constitutional Court will be published in the *Hungarian Official Gazette*.

REASONING

For the examination of the whole and of some provisions of Act XXXII of 1991, some submissions were made to discover whether the Act was contrary to the Constitution. The judges of the Constitutional Court made their decision on the general submissions about the Act separate from those submissions made in relation to particular provisions.

A

I

According to the submissions the Etv is contrary to Art. 60 of the Constitution because it does not have a guarantee to have non-ideological schools in each settlement.

1. Article 60(1) of the Constitution guarantees the right to freedom of thought, conscience and religion for everybody. Paragraph 2 lays down the traditional meaning of freedom of religion extending it to freedom of conscience. It is the following: freedom of personal convictions;

freedom of worship including the negative freedom of religion, namely the right to disregard the expression of conviction; and finally contains - but not as a special rule but through the liberty of collectively and publicly exercised freedom of worship - the right to religious association and assembly.

The freedom of worship is the most important of the three rights (the traditional freedom of worship) and stands closer to other rights and liberties while on the other hand it fits into the fundamental rights of expression. The law can ensure it in the most complex way: and it is also the basis of the other components of the freedom of religion. For example the freedom of faith (thoughts and beliefs) is represented through expression in the Constitution when it declares the meaning of freedom of religion with the freedom of choosing and accepting a religion. On the other hand the freedom of worship does not only mean liturgical actions and teachings but more.

The element of freedom of religion that legally everybody is allowed to follow his own convictions should be considered differently to the classical "religious acts and rites" related to freedom of speech. But the realization of freedom of conscience in social life is also a symbolic expression having the same characteristics as expressed freedoms. To clarify the meaning of freedom of religion, we should study its relation to other basic laws with special regard to the limits of civil rights and the objective defence of institutions. Article 60(1) of the Constitution declares the freedom of thought, conscience and religion. From para. (2) on, the Constitution does not contain any provisions as to freedom of thought but lays down the meaning of freedom of conscience and religion.

The manifestation of thought - according to the Constitutional Court - belongs to Art. 61 on the freedom of speech. Article 60 is a special rule facing the general Art. 61, as the freedom of conscience and religion is a special field of freedom of speech.

That is why the decision does not consider the freedom of thought any further but the freedom of religion; its statements on the other hand also refer to personal convictions unless they do not exceptionally indicate any difference.

a. *The freedom of religion and the right to human dignity*

The Constitutional Court lays down two aspects of the right to human dignity. On one hand the right to human dignity - together with the right to life and legal capacity - is considered as a right determining legal status (See *Dec. 64 of 1991 (XII.17) AB* (MK 1991/139)). On the other hand the constant practice of the Constitutional Court - from *Dec. 8 of 1990 (IV.25.) AB* (MK 1990/35) onwards - takes the right which covers the right to free personal expression. The Constitutional Court interpreted the freedom of conscience in *Dec. 64 of 1991 (XII.17) AB* as a right to personal integrity. (The State cannot force anybody to come into conflict with himself because something is incompatible with one of his important beliefs which determines his personality).

The freedom of conscience and religion acknowledges [a person's] conviction and within this, in a certain sense, religion is part of human dignity, so their freedom guarantees the success of the free expression of personality.

Personality itself for law is untouchable (this is expressed by the unlimited right to life and human dignity (the law can only help to ensure this autonomy while ensuring the external conditions. From the concept that the right to freedom of conscience and religion itself - if we do not consider the right to free exercise of religion - the State`s duty is not to judge the truthfulness of religious faith and beliefs. The Constitution - because of historical reasons - only makes a

direct declaration with regard to the freedom of conscience (Art. 70/G(2)) but the Constitutional Court`s opinion is that the obligation to abstain is a duty of the State drawn from the concept of the freedom of religion.

The close relation between the freedom of religion and freedom of human dignity should also be considered when we are talking about either worship or acting according to one's convictions. It gives emphasis to the freedom of action based on general personal rights if the action arises from the religious and conscientious convictions which touch the person`s nature. (This is acknowledged by the right to conscientious objection to military service).

b. *The right to freedom of religion and freedom of speech*

The stressed defence of the freedom of religion also derives from the close relationship between the right to worship and freedom of speech.

Dec. 30 of 1992 (V.26) AB (MK 1992/53) places the freedom of thought and religion among the fundamental rights. The seminal one of these rights, the freedom of speech - in the Constitutional Court`s opinion - takes a special place in the hierarchy of fundamental rights. The Decision mentioned above said that "those laws that limit the freedom of speech should be interpreted restrictively."

This also refers to laws limiting the freedom of religion. The laws can only influence the freedom of thought and religion if the thought or belief manifests itself.

This manifestation is the exercise of religion. The State can defend the "free choice and acceptance of religion or beliefs" (Constitution, Art. 60(1), first indent) through ensuring the free flow of ideas. On the one hand the nature of the freedom of thought, conscience and religion, and

on the other hand through the possibilities of the right; the competence of the State can only be for the formation of convictions and be a limitation to the significant process of communication. [The competence of the State can only subsist to ensure the formation of convictions and only amount to a limitation on the the significant processes of communication, through, on the one hand, the nature of the freedom of thought, conscience and religion and, on the other hand, through the possibilities offered by the right.] Further from this position of the State comes its neutrality. According to *Dec. 30 of 1992 (V.26) AB* (MK 1992/53) the freedom of speech protects the opinion without considering its value or its content.

The Constitution guarantees the freedom of expression - for the individual or for public proceedings - and does not refer for its content to the basic right of freedom of speech. This statement is also valid for the freedom of religion. It can only have external limits.

c. *The separation of Church and State*

"The neutrality of the State is guaranteed by Art. 60(3) of the Constitution which says: the church operates separately from the State in the Republic of Hungary." One derives from this fact that the State must not regularly join with any churches and subscribe to any ideas of any church, furthermore that the State does not bring to bear its influence upon the internal problems of churches and especially cannot make statements on questions relating to faith. From all this and from Art. 70/A of the Constitution comes the fact that the State should treat churches equally. The State must not take up positions on questions, *e.g.* on what makes a religion a religion, and can only make appropriate general rules about religions and churches which can be used equally in respect of all churches and religions; so that they can fit into the neutral legal system, the State

should leave it to self-interpretation by the churches. Thus the only limits on freedom of religion can be non-religious, non-specific but [and?] general and effective for similar situations arising from any other circumstances. It can provide through this separation the most complete form of freedom of religion. The separation of the church from the State does not have any influence on that obligation of the State that it has to ensure (Constitution, Art. 60) the positive and negative forms of freedom of religion without making any differentiation. The positive and negative freedom of religion is equal: the State must not consider one as a basis and the other as an exception. The negative freedom of religion and reducing the support of religious indifference does not emerge from the fact that the State itself is neutral.

The State violates its obligation deriving from the right to freedom of religion if it does not provide everybody with the possibility of freedom of conscience.

The separation of church from State does not mean either that the State should not consider the characteristics of religion and church in its legislation. The only prohibition of limitation on the freedom of religion in the Constitution refers exclusively to religious conviction and the exercise of religion. There is no limit on the legislator to consider the characteristics of churches in his legislation about the freedom of religion. The church is not the same for religious and for state law. The neutral State must not follow different churches' differing ideas. But it can consider religious communities and churches in relation to their historical and social roles which are different from those communities, unions, clubs (that can be established) which establishment is based on Arts. 3, 63 and 70/C of the Constitution.

Besides the organizations that can be established on the basis of the right to public assembly, the Constitution ensures that the religious communities can freely use the legal form of "church" as defined by legal rules. The State considers the churches' characteristics with this legal

institution and makes possible their special reception into the legal system. The religious community obtains its legal status through the legal institution chosen by itself and can enforce its special characteristics within this ambit. The method, consistency and stringency of separation of church and State is formed by the historical traditions of each country. The meaning of Art. 60(3) of the Constitution cannot be separated from the churches' role in history (including secularization) and from their real work nowadays; not to speak of the changes in society. A general symptom is that several formerly church duties - like schooling, health service, helping the poor - became duties of the State but churches also retained these functions. In these fields the separation is not contrary to such co-operation even where the separation is regulated under strict guarantees.

(d) Dealing equally with the churches does not preclude the consideration of a real social role. The State`s duty is to have respect for and defend fundamental rights (Constitution, Art. 8(1)) in accordance with the freedom of religion which does not only mean to abstain from violating personal rights but also to protect the conditions needed for the success of freedom of religion: defending values and all possible situations in life which are related to freedom of religion independent of personal demands (*Dec. 64 of 1991 (XII.17) AB* (MK 1991/139)).

The State`s neutrality in connection with the right to freedom of religion does not mean inactivity. The State`s obligation is to ensure a field, wherein the declaration of religious convictions, its teaching and following in life, the work of churches as well as the denial of religion may subsist - and [as well as] to ensure situations under which different ideas can occur and develop and enable the free formation of personal convictions. On the one hand the State should ensure this process of expression which actually comes from the right to freedom of thought and public speech. On the other hand it should concern itself with the defence of other

fundamental rights against the freedom of religion. Finally there could be a need for the positive regulation of the right to freedom of religion. The State should make a regulated compromise where the state structure creates such a situation in which the religious and non-religious limits are mutually exclusive. Such a „situation" for example would be ideological education under compulsory school education. [The State should make a regulated compromise where the State structure creates such a situation in which the religious and non-religious limits are mutually exclusive. Such a "situation" for example would be ideological education under compulsory school education.

2. *The success of freedom of religion in compulsory school education*

(a) After the proclamation of the Constitution the Parliament - in execution of Art. 60 - passed Act IV of 1990 on the Freedom of Conscience and Religion, and of the Churches.

Section 5 of this Act states that the parent or guardian has the right to decide the religious and moral education of a minor and to safeguard it satisfactorily.

According to s. 17, the legal entity of a church can manage such educational functions that the law does not secure absolutely to the State. The church can maintain institutions in this field. In state educational institutions the church can teach religion as a subject. These orders fulfil Art. 60 of the Constitution but are insufficient as regards the obligations of the State according to the freedom of religion.

Hungary bears more obligations under international agreements. According to art. 18(4) of the International Covenant on Civil and Political Rights, in the Covenant the signatory States

undertake to respect the right of parents and legal guardians to ensure their minors` religious and moral education in compliance with their convictions.

According to the art. 2, the signatory States undertake to guarantee the legislative and other rules which are needed for the success of rights under the Agreement.

On 20 November 1989 in New York, a Convention was concluded on the rights of the child (promulgated by Act LXIV of 1991) which declared the child`s right to freedom of thought and religion and acknowledged the parents` right to direct the enforcement of his right according to his maturity (art. 14).

(b) The State should form, in the field of objective defence of institutions, the legal and institutional conditions needed for the realization of fundamental rights so that duties arising from other basic rules and constitutional requirements could be considered (*Dec. 64 of 1991 (XII.17)* AB: MK 1991/139).

So the conditions for success of freedom of religion should be harmonized with those fundamental rights which should also come across in educational affairs. The State should set up free and compulsory primary schools (Art. 70/F) and the parents and guardians are obliged to safeguard their infants' education (Art. 70/J).

The parents have the right to choose their children's education (Art. 67(2)). The State should respect and promote the freedom to education and academic freedom (Art. 70/G). Public schools and church schools are used to differentiate between the types of schools as Act IV of 1990 provides. Public schools are general educational institutions sponsored by the State which are distinguished by the definition in s. 17(2) of Act IV of 1990 from those educational functions that are provided by churches. In the present situation the public and church schools' constitutionally desirable institutional separation did not permeate everywhere. The provisional solutions could

mean further steps towards total institutional separation. The decision differentiates between public and church schools according to the different constitutional requirements deriving from the concept of freedom of religion. The difference between public and church schools is that - even if both should give an objective knowledge in a tolerant way and respecting the freedom of conscience of the pupils - church schools identify themselves with the teaching of a given religion while public schools cannot do this, they cannot make statements about the truthfulness of religious teachings, that is, they shall remain neutral. [to pupils - one must consider that while church schools are combined with religious dogmas, public schools cannot do this, cannot make statements about the truthfulness of religious dogmas. Thus they ought to remain in a neutral position.] From the point of view of differentiating between the division of tasks between the state and local governments, in one way, it is not important whether a church school is sponsored by a church or somebody else. Consequently a school is also not a "public school" where it is sponsored by the State or by the local government but in which the State has allowed religious education; if religious education is only conducted in some classes, the requirement of religious neutrality of public schools does not have any sense. According to the decision, the theses about church schools relate to all schools in which any kind of religious education is carried out. In the decision these are called "committed schools" to differentiate them from neutral public schools. The State should be neutral in religious questions. That is why public schools should stay neutral. The State realizes through these public schools which are open to all children the right to education and culture and ensures the conditions for compulsory schooling. The neutrality requires the State to make plans for tuition, school organization and its control so that they give knowledge objectively, critically, and in a pluralistic way. Public schools are not allowed to educate children contrary to their parents' convictions (see European Human Rights Court`s

decision in *Kjeldsen, Busk Madsen and Pedersen,* ECtHR, Judgment of 7 December 1976, Series A, no. 23).

These conditions are suitable in relation to public schools for those requirements which are laid down for National Public Television and Radio by the Constitutional Court to achieve the aim of effectiveness for the freedom of opinion.

According to the institutional forms of this concept, the ideas are constitutional only if they can guarantee the articulation in society of existing opinions (*Dec. 37 of 1992 (VI.10) AB* (MK 1992/59)). The criteria are also valid for public schools. A neutral public school cannot be committed to any religion or ideology but should offer a possibility of a free and well-founded choice. The widely, fully-balanced, objective education of ideological ideas should be realized in the whole of education. In case of objective education, the State must not force any teacher to keep his opinion. To have neutral public schools the State still has not fully solved the problem which is to safeguard the conditions for the successful exercise of the freedom of religion. Parents have the right to send their children to church schools and have the right not to be forced to send them to others which are contrary to their convictions. Children under their parents' control have the same right.

The State cannot refuse the legal possibility of establishing church or atheist schools, it should frame a law to satisfy these needs. The State is not obliged to establish non-neutral schools. If the church or parents establish or run committed schools, the State should support them in proportion to their undertaking the State's programmes at these institutions. Further the State cannot withhold such support if it maintains another institution very similar in its ideas to the non-supported one: there would thus no constitutional reason for making such a difference.

Even if the parent does not have the right for that the State should open a school ideologically requested by the parent, one has the protective right not to be forced to have one`s child attend a school contrary to one`s religious or ideological convictions. Likewise the Constitutional Court stated in connection with the freedom of conscience, the State must refrain not only from a compulsion like this but also within reasonable bounds it must render an alternative attitude possible. It is not unconstitutional if - for the sake of the latter - those who would like to act according to their conscience are constrained to make a sacrifice, which is not a disproportionate one (*Dec. 64 of 1991 (XII.17) AB* (MK 1991/139)).

The alternative to all types of devoted schools which satisfies the freedom of conscience, is the neutral state school. Attending neutral school with whatsoever conviction means much less of a burden on one's conscience (if it is a burden at all) than going to a differently, moreover contrarily, devoted one. Hence for those who would not like to attend a school devoted in one given way, the State must not only grant the legal possibility to behave in conformity with their conscience but must effectively render possible the establishment of a neutral school.

(c) Does the Etv thereby infringe these principles - or is it an unconstitutional omission that it does not guarantee a neutral state school in each settlement?

In the sense of the foregoing, for those who do not wish to attend church school, the State, there also, where it transfers the building of the erstwhile state school (or the bigger share of schools) to church property

- must grant a real alternative by making possible attendance at a neutral school,

- the attendance at this neutral school must not entail a disproportionate burden.

The State must not fulfill this duty in a way that offends the freedom of religion of those who choose church school. Since the principle of functionality forms the basis of the transfer of real

property to the church, the building itself satisfies the current claim to worship; in this paricular type of case, chuch shools in the main take the place of state schools. [Since the transfer of the real properties for the church is based on the principle of functionality, the building satisfies the real claim to worship; in the particular case mostly church schools succeed to state schools.] It is not the legal prohibition of transferring church property and by this the restriction of one`s fundamental right to which religious education is the constitutional solution but the positive action of the State in order to guarantee the freedom of conscience and religion for parents and children who reject church school. (Restrictions on rights would only be acceptable if they were unavoidable for the success of either the positive or the negative freedom of religion. Nevertheless the State is always capable of making a neutral school available where demanded.)

Handing over the building of the erstwhile state school to the church for the purpose of schooling does not mean legally the abolition of the neutral state school. According to s. 100(2) of Act XX of 1991 (on Municipal Authority), the local government can abolish, or reorganize its institutions which provide obligatory duties if they take charge henceforth of the given activity or service at the same level. Under s. 2(1) of the Etv, transfer of real property still happens to the necessary degree and in time for the church's actual [current?] activity, while taking into consideration the indispensable objective conditions and the monetary cover alloted from the budget for state and municipal tasks.

Both legal orders guarantee that in consequence of the grant of real property, the municipal duty should not be infringed. Nevertheless the Constitutional Court points out that the function-preservation cannot be manifested by the school`s operating from then on as a church school. The school cannot operate in a neutral and in a religious spirit at the same time; since ideological education belongs to the substance of both types of school - of each school. Therefore in the

school-case, beyond the above-quoted legal conditions for conveying the ownership, dispositions which give the right to compensation and to land offered in exchange are also guarantees for the continued operation of the neutral state schools. The state and the local government are equally responsible to take charge of schooling children who choose a neutral state school as if they were obliged to do so without the transmission of real property, even in cases where the number of students is low.

The thing - that for those choosing church school, the State is not obliged to establish or operate a school, whereas for those rejecting church school, it is required to make a state school - does not fully satisfy the requirement that from those choosing the neutral one a lesser sacrifice can be expected. Attending a neutral school in itself cannot mean a disproportionate burden either. Only on the basis of the circumstances of the concrete case can it be decided what can be considered as a disproportionate burden.

The Etv in the sphere of its subject provides sufficient guarantees for that transferring real properties for the church - if the Act is observed - should not infringe the right to freedom of religion and freedom of conscience of parents and children rejecting church school. Therefore the Constitutional Court rejects the submission directed to establish the Etv`s unconstitutionality on that basis.

B

II

The submissions claim that the Etv is contrary to Art. 60(4) of the Constitution for it was not passed by the votes of two thirds of the Members of Parliament present. In the opinion of the

applicants the two-thirds majority is not concerned with the Act called "on Freedom of Conscience and Religion, and on the Churches" but refers to freedom of conscience and religion as a legislative subject which includes regulation in connection with the institutions of religious freedom. Since the Etv "straightens out the financial conditions of the institutional framework of religious freedom fundamentally and determining it for future decades", its passing would have required a two-thirds majority.

1. The text of the Constitution set out in Act XXXI of 1989 introduced the concept of a "constitutional act." In the sense of Art. 24(3) of the Constitution coming into force on 23 October 1989, for making certain decisions stated in the Constitution, changing the Constitution, besides creating constitutional acts, the votes of two thirds of the Members of Parliament are needed. According to Art. 8(2), rules concerning fundamental rights and obligations can be settled exclusively by a constitutional act. As it appears from the wording of the norm current at that time, considering the formal conditions for passing these acts, there was no difference between the Constitution and the constitutional act. Moreover, as for the content, according to the preamble to the Act XXXI of 1989 "constitutional acts together with the Constitution form the highest level of substantive rules in public law." The Constitutional act serves to "relieve" the Constitution by not burdening it with detail-regulations that are important from the point of view of constitutional law. In *Dec. 4 of 1990 (III.4) AB* (MK 1990/19), in accordance with the philosophy of the then-existing Constitution, the Constitutional Court declared that the demand for regulation in a constitutional act succeeds regardless, whatever character of rule which is said concerns fundamental rights and obligations. According to the "direction" or "character" of these rules, one must not make any difference between regulation in an "ordinary" or in a constitutional act; the latter is obligatory in each case. In June 1990, however, by Act XL of 1990 amending the

Constitution, the situation fundamentally changed. The category of constitutional act was discontinued. According to the new, currently prevailing Art. 8(2) of the Constitution, statutes settle the rules concerning fundamental rights and obligations. The exclusivity of regulating fundamental rights and obligations by qualified majority acts also ceased. Since that time, individual fundamental rights can be regulated in statutes passed by a simple majority. However, this new rule in many of the cases concerning fundamental rights replaced the one which had made possible the regulation thereof solely in a constitutional act; thus the votes of two thirds of the Members of Parliament present are now needed to pass a statute on rights, obligations or institutions provided for in the given Article of the Constitution.

The prevailing system theoretically differs from the previous one which comprehended constitutional acts. The constitutional acts referred to every fundamental right, as well as to any regulation of them, with the obligation of exclusivity. The Constitution and constitutional acts on the one hand and acts passable by simple majority on the other hand, created a clear hierarchical order in content and in form. However, since the current Constitution stated a two-thirds majority for laws enacted on individual fundamental rights, several different orders of importance can be settled among the fundamental constitutional rights, which do not overlap each other. Among the qualified statutes, the most important fundamental rights do not appear: the basic guarantees of the right to life and human dignity, nor of legal capacity, neither to personal freedom and safety - with the deprivation of freedom among them. The right to trial before a court, as well as right to a remedy are missing from them; the basic guarantees in criminal law are likewise missing: the presumption of innocence, the right to defence, further the right to property ownership is not among them. Hence all these rights can be regulated by simple majority.

The two-thirds majority concerns only three of the rights (freedom of religion, rights of national and ethnic minorities, and nationality - Arts. 60, 68 and 69 - distinguished by special guarantees in Art. 8(4) of the Constitution (with their excercise being incapable of restriction even in case of emergency), while for most laws a simple majority is sufficient (Arts. 54-56, Art. 59(2)-(4), Art. 66, Art. 67, Art. 70/E). The present stress on the two-thirds majority does not establish a theoretically-based hierarchy among rights; it only reveals their political importance for the political powers in agreeing to amend the Constitution.

Because of the theoretical change outlined above, the standpoint of the Constitutional Court in *Dec. 4 of 1990 (III.4) AB* (MK 1990/19) and *Dec. 5 of 1990 (IV.9) AB* (MK 1990/32) in connection with constitutional acts is not applicable to laws that require a two-thirds majority under the current Constitution.

2. According to Art. 60(4) of the Constitution, "[in order] to pass an Act on the Freedom of Conscience and Religion, the votes of two thirds of the Members of Parliament present shall be required." The Constitution`s terminology is identical in each "two-thirds" rule, namely that it requires a qualified majority for the law in respect of the fundamental right or institution in question. This phrasing substantially differs from the text of Art. 8(2) of the Constitution, according to which "statute states the fundamental rights and obligations." So by grammatical interpretation, one cannot arrive at the conclusion that "the rules about freedom of religion" are established in a two-thirds majority act, namely freedom of religion as a legislative subject can be only regulated by qualified majority.

Naturally, the Parliament itself decides on what to enact in a law. Thus the constitutional question can only be in which subject the Constitution requires laws and laws passed by a qualified majority.

According to *Dec. 64 of 1991 (XII.17) AB* (MK 1991/139) of the Constitutional Court, the fundamental right is not a legislative subject in its every detail. The Constitutional Court established that -

> not all kinds of connections with a fundamental right require regulation at the level of a law. The definition of the content of some fundamental law and the statement of substantial guarantees can only happen in a statute; moreover a statute is needed for the direct and substantial restriction of a fundamental right. Nevertheless in the case of an indirect and distant relation, the executive order is also sufficient. If it were not like this, everything should be regulated by statute.

The Constitutional Court drew the inference from this, that "it can be settled only in connection with the concrete regulation, whether - depending on the intensity of the relationship with the fundamental right - it is necessary to put it into a statute or not."

Obviously, the two-thirds statute cannot be obligatorily bound to more than the law in general, namely to the content of the affected fundamental right, its substantial guarantees and its direct and significant restriction. The question remains whether in the case of these rights, everything should be regulated in a qualified statute, where otherwise the Constitution requires an ordinary level law. In individual cases, the Constitution declares not only that the statute about the fundamental right in question must be passed by the votes of two-thirds of the Members of Parliament present but it also specifies in particular single topics connected to the said fundamental right, on which a two-thirds statute must be enacted. So according to Art. 61(3), the Act on the Freedom of the Press must be enacted by qualified majority. Yet para. (4) stipulates four subjects in the sphere of public communications, which also demand a two-thirds act. A similar technical solution can be found among two-thirds prescriptions affecting state organization, the "Act on the Duties of the Armed Forces and on the Detailed Regulation Concerning Them," likewise the "Act on the Police and on the Detailed Regulation Concerning

National Security Activity" are two-thirds acts (Art. 40/A). In the same way, a two-thirds majority is needed for passing the law about the right to public assembly (Art. 63). Finally Art. 40/B(4) separately provides that the activity of members in political parties being on the actual payroll of the armed forces and the police can be restricted only by statute passed with a qualified majority.

If that part of the regulation about the said fundamental rights which concerns legislation were the subject of a two-thirds statute, [its complexity,?] there would be no point in raising the aforementioned partial topics to a qualified level. For example the freedom of the press relates not only to the printed press but also to the radio and television. There can be no doubt about the fact that organizational guarantees belong to the "substantial guarantees" which must be regulated by statute (at least in a law passed by simple majority) with respect to the whole press but from these only those mentioned in para. (4) obligatorily belong to a two-thirds act. Even if two-thirds of the "detailed regulations" of the armed forces would really cover each question of detail belonging to the sphere of the Act, the Constitution should not impose a separate duty that two-thirds majority is necessary for their restriction - although party political activity on the professional payroll ought to be regulated in a statute. Likewise two-thirds majority ought not to be imposed on this regulation if the two-thirds character of the Act on the Operation of Political Parties or the two-thirds character of the Act on the Right to Public Assembly would comprise all the rules demanding the level of a law, which concern the right to public meeting.

Hence from the text and the structure of the Constitution, it does not follow that only two-thirds laws could dispose of all aspects of the fundamental rights, that for the acts made on them the Constitution ordains a qualified majority.

The examination of the function of the qualified majority does not support this view. Both the absolute demand for a constitutional act for each regulation relating to the fundamental right

and the current, unprecedented number even in international comparison of acts passed with qualified majority were rooted in the peculiar political circumstances surrounding the change of the regime. The current Constitution expresses the aim that the regulation of certain basic institutions and certain - mainly political - fundamental rights should happen with a broad consensus. This aim is attained if - in conformity with the text of the Constitution - the act made upon the said basic institution and fundamental right is passed with a two-thirds majority. However that sort of interpretation would be contrary to the substance of parliamentarianism as it would exclude the simple majority from that - outside the conceptional questions relating to two-thirds acts - it could order in accordance with its political conceptions relating the fundamental rights in question: to regulate their execution, to build further guarantees, to adjust their validity to the given conditions by its own concepts. The predominance and defence of the fundamental rights would suffer an unjustifiable restriction by the Constitution, based on parliamentary principles, if every change and improvement, or partial guarantee which does not determine the regulatory concept, were attached to a two-thirds majority. For the way provided for extending the guarantees can be contrary to the political interest of the minority and to its view based upon the right in question. The Constitutional Court recalls that the Court even in its practice to date, considered determinative the functioning ability of the parliamentary system, and within this, the maintenance of the decision-making ability of the Parliament and stable and effective government (*Dec. 3 of 1991 (II.7) AB* (MK 1991/13)). In connection with the content of the Act on Local Government and the restriction of basic municipal rights, the practice of the Constitutional Court has been strengthened in the way that it distinguishes between the rules concerning a two-thirds act, determinative of the direction of the regulation, and the detailed rules that are not contrary to them, and it demands a qualified majority only for the former (see under Point IV).

Finally the question is not solved if Parliament decides separately in each case on what to include in a two-thirds act. In other words, if it were resolved with a simple majority, those who think that a two-thirds act should be passed, would ask for the Constitutional Court`s interpretation; if this decision needed a two-thirds quota, in case of argument it could not come through. Parliamentary groups have already asked the Constitutional Court in a number of submissions to interpret the Constitution from the respect as to whether each legal regulation about the fundamental right in question or only the act thereon needs a two-thirds majority; in addition numerous submissions have claimed the unconstitutionality of some of the laws on the basis that the law in question should have been passed with a qualified majority.

The Parliament can decide these arguments by amendment of the Constitution. The other choice is the interpretation of the Constitution binding on everybody, which is within the jurisdiction of the Constitutional Court. The Constitutional Court interpreted in its decision that "among the regulations on fundamental rights and obligations," by what features can those be distinguished which need to be laid down in an act in accordance with Art. 8(2) of the Constitution (*Dec. 64 of 1991 (XII.17) AB* (MK 1991/139)). There is a necessity and a possibility for a similar interpretation to separate the regulations defined in qualified acts and those passed with a simple majority.

On the basis of the aforesaid the Constitutional Court held that the pre-requisites for a qualified act do not exist for each legal regulation concerning the fundamental right in question. Among the rules referring to fundamental rights, there are ones which concern two-thirds acts and there are others belonging to laws passed with simple majority; these two groups can be demarcated by features of substance.

The sphere of acts which should be passed with a qualified majority cannot fully be defined through formal, procedural features.

The Constitution distinguishes two-thirds laws from other acts referring to fundamental rights only from a procedural point of view, by the qualified majority necessary for their enactment; in the hierarchy of the sources of law, the qualified act is not superior to the other acts; though the honoured procedure is a constitutional claim to amend these acts. The procedural standpoint interpretation adequate to this can determine the formal features of the sphere of qualified acts, such as that the statute in question must be passed as the direct execution of the given constitutional provision and there must also be reference to the provision of the Constitution upon which it is made, even in its title. It can mean resolution in respect of those constitutional rights where Parliament has passed the two-thirds act, in other words it agreed upon its content. According to the interpretation of the Constitutional Court, the legislature has thereby also decided which ones had to be passed with a qualified majority, from the orders concerning the given fundamental rights. Here there is a place for further interpretation exclusively on that question, whether the later act referring to the particular fundamental right passed by a simple majority amends the two-thirds act about the fundamental right, in other words whether it does circumvent the procedural conditions necessary for that. However, in order to decide this - if only the amendment is obviously needed - the feature of substance is needed, which distinguishes the sphere of two-thirds acts and simple majority acts. The same substantial feature is needed for that since before making the two-thirds statute, it could be decided whether the order referring to the given fundamental right could have been made in a simple majority act.

Considering that in the system of the current Constitution the circle of the two-thirds acts cannot be traced back to a theoretical basis; that these statutes do not take a marked place in the

hierarchy of the sources of law but according to the Constitution each law is equal - passable by whatever quota; moreover that the function of laws passed by a two-thirds majority must be interpreted by placing them within the whole parliamentary system, according to the Constitutional Court`s interpretation, the constitutional purpose of laws passed by a two-thirds majority then manifests itself if it raises the content claim in connection with these laws that they define the direction of the regulation of the said fundamental right. It must be judged separately in the case of every single fundamental right whether some act establishes the direction and defence of the fundamental right or it contains such rules on details that do not define it.

On the basis of all the above the Constitutional Court found that there, where the Constitution ordains the votes of two-thirds of the Members of Parliament present, the obligation for a qualified majority act does not concern any legal regulation of the fundamental right in question but only the act made in the direct execution of the constitutional order. This act defines the direction of enforcement and protection of the fundamental right in question.

The rule about a qualified majority act on some fundamental right does not exclude the fact that the particular rules necessary for validating the said fundamental right, can be established in an act by a simple majority. According to the prescription of the Constitution, an act passed by a qualified majority cannot be amended by an act accepted by simple majority.

Among the rules concerning fundamental rights and obligations - under Art. 8(2) of the Constitution - an act must lay down the definition of the content of the fundamental right, its essential guarantees and the direct and significant restriction of the fundamental right.

3. Parliament passed the Act on the Freedom of Conscience and Religion, and on the Churches defined in Art. 60(4) of the Constitution, with the prescribed two-thirds majority: that is Act IV of 1990. For the constitutional establishment of the Etv, a simple majority was also

sufficient. Although the regulation concerns only single churches, for one reason because it regulates significant safeguards for the freedom of worship, on the other hand because it touches the proprietary right of the local government and speaks about expropriation, too, it needs to be at the level of a law. The rules of the Etv are not contrary to the concept laid in Act IV of 1990 on the Freedom of Conscience and Religion, and on the Churches. For this reason the Constitutional Court rejected the submission directed at establishing the act`s unconstitutionality on the basis of the absence of a two-thirds majority.

III

According to the submissions the Etv is contrary to Art. 70/A of the Constitution since on the one hand it draws a distinction between the compensated churches and the other churches, and other organizations having suffered similar property loss. Further the way the Etv reprivatizes the assets of the churches is contrary to the Constitution.

1. The Preamble of the Etv describes the two aims of the Act: "partial remedy of the very serious injustices" and "assuring the necessary objective material conditions for the operation of the churches." The Act itself serves both aims. The proportion between the two aims and the way of their realization however are very different in the Act. Therefore, when judging the case, a differentiation between the delivery up of real estate according to ss. 1 and 2 of the Act and the partial compensation according to s. 15.

2. According to ss. 1 and 2 of the Etv the real estate also served the aims described in s. 2(2) before secularization. The real estate is necessary to meet the same aims. The real estate becomes

church property and, in the use of the church to the necessary degree and at the necessary time, for the real activity of the church.

The notion of discrimination contrary to the Constitution can only be raised between comparable parties having rights or duties.

The notion of discrimination as between the churches and other organizations falling within the law which have suffered losses concerning their properties (*e.g.* lawyers associations, political parties) and discrimination between churches and individuals is mistaken from the outset.

The aim of the Act and the character of the return of real estate basically differ from the concept for the "partial compensation for the wrongfully caused losses to the property of citizens." This derives automatically from the difference between the function of the property of individuals and legal entities pursuing commercial activity and the function of church property, especially property described in s. 2 of Etv. The property of the church can be given back for the following purposes: religious life, operation of a religious order, education, health and social care, youth and child welfare, cultural purposes. The Etv first sets aright the damage caused by the State concerning the constitutional right for the exercise of religion and not the damage caused in respect of the right to property.

The churches favoured in the Etv cannot be compared with any, non-business orientated legal entity. Comparison can only be drawn between these churches and legal entities having a similar function, role, size and autonomy to those of the churches, furthermore having property closely bound to the exercise of any basic right. The churches are organized for the exercise of religion and not for the conduct of limited activities or representation of certain interests like business organizations, associations, political parties or trade unions are.

On the other hand every aspect of the life and the personality of the believer is influenced and determined by the religion. The freedom of religion and its operative capacity are inseparable. Albeit the local governments are of a different character, they can be compared to the churches by reason of the claim to general regulation and their autonomy as against the State. Further it is a common characteristic that the local government is also inseparable from a basic right, from the right to exercise self-determination by the citizen (Constitution, Art. 42). The number of comparable organizations can however be widened but then the purposes of public-orientated organizations become more and more particular and these organizations are not the only one or necessary means of realization of a certain basic right (*e.g.* social security provided by local governments, or the Hungarian Academy of Sciences). By widening the circle, more and more differences may seem to be constitutional. Since the churches cannot exercise executive power their comparison with local governments must only be limited to the aforementioned aspects, in other respects they show more similarities to other public-orientated organizations.

The State exercising its duties described in the Constitution not only privatises part of state property but creates and supports public bodies and provides the assets necessary for those organizations to strengthen their autonomy, further to enable them to fulfill their tasks.

The historical social role of the churches - especially the "historical churches" mentioned in the Etv - the inseparability of religion and churches and, consequently, the inseparability of the right to freedom of religion and the operation of the churches offers a satisfactory basis for the classification of churches as being among the maintained organizations. The Constitutional Court emphasizes that the supply of property for public bodies has only a partial contact with the compensation law. Compensation of those organizations happens by different means in conformity with the issues which characterize them.

The supply of properties to the local governments happened at the time of their election or is still in process while the Etv will be executed within 10 years as regards the churches.

In the wide group of comparable organizations the supply of properties has already happened in some cases (political parties) or they are in process (trade unions) or are under preparation (social security agencies). Since these organizations are not automatically entitled to property, to draw a distinction between them arbitrarily would be contrary to the Constitution [*Dec. 16 of 1991 (IV.20) AB* (MK 1991/42)]. There is however no ground for establishing such arbitrariness if the supply of property is in conformity with the functions of the organization.

Relying upon these findings the Constitutional Court did not point out any unconstitutional discrimination between the churches and other legal entities in ss. 1 and 2 of Etv.

There is a rational reason for the fact that the Act does not provide for the supply of real estate to churches which had not been operating at the time of the confiscation or which had not suffered this kind of loss.

The present transfer comprises real estate which was earlier used by the entitled churches for implementation of their right to exercise freedom of religion and now they can claim those properties back for the same purpose in conformity with their real needs.

The general question of state support for churches differs from the special problem enacted in this Act: here it is not the righting of damage caused by the State to property rights but the way in which the right to exercise religion is regulated.

3. According to s. 15 of Etv, the Government and the church having an interest may conclude an agreement in order to create sufficient material conditions for church activities which are useful for society and would provide for a partial compensation for church-owned real estate which was confiscated after 1 January 1948 (with the exception of the property returned by the

Etv). The amount which can be used for compensation is established annually by Parliament in the Budget.

Hence this rule supports the operation of the churches generally.

This rule however supports the activities of the churches in question generally and is not, like the benefits under ss. 1 and 2, bound to the needs of the churches' specified activity. Its legal title is the "partial compensation" of the properties which were confiscated. However the two aspects of this benefit and the method of its distribution gives rise to different problems concerning discrimination.

Respecting only that aspect of s. 15 which opens up a possibility of state support for the material independence of churches, there is no constitutional ground to limit this action only to those churches which lost their assets after 1948. Other provisions of the Etv redress the damage caused by deprivation of the material conditions for the real exercise of religion on the ground of the principle of functionality.

After this happened, the positive discrimination according to s. 15 cannot be supported by the previous property situation, regarding state support of newly-defined claims accompanying the development of church life or occassional state allocations serving the economic independence of the churches, in general.

After the functional rehabilitation, no further differentiation between the churches is necessary for the freedom of religion.

Respecting s. 15 as a rule of compensation there would be a rational reason for the compensation limited only to churches from the group of legal entities and other organizations which suffered similar property losses. The characteristics of churches justify the transfer of benefits to the churches within the ambit of the Etv on the functionality principle - as it was

explained in Point 2. This however differs from compensation given to remedy only damage caused to property. The constitutionality of the differentiation between those who received compensation referring to the whole group of subjects having suffered property losses, can only be judged as being restricted to the violation of ownership rights and adjusted to the regulatory concept of the Compensation Acts.

In this issue the conditions for positive discrimination, as determined by the Constitutional Court in its previous decisions, are still missing (see *Dec. 21 of 1990 (X.4) AB:* MK 1990/98).

The occasional state allocations which are made possible in s. 15 of Etv are not inevitably, theoretically contrary to the Constitution; however in the present situation of compensation and support and the provision to organizations, having a public purpose, of real and personal property, it is lacking in constitutional justification.

In the aspect under examination the churches are similar to those organizations having a public purpose, the operation of which could be solved independently of the State, out of public interest (see Point 2 above). These organizations cannot be separated from the State without putting aright their financial background although the separation is to be desired through the execution of constitutional rights simultaneously with the protection of the financial bases. The positive discrimination and the priority in the course of return in ss. 1 and 2 of Etv can be constitutionally reasoned on the basis of functionality, considering the high priority of freedom of religion and the obligation to separate State and church. Additional property to ensure uninterrupted operation can only be furnished as compensation if the system for the property supply and support for churches and other autonomous public bodies has already been formed, and compensation does not mean unreasoned discrimination in this system in comparison with

other benefits supplied to other institutions having a public interest during the course of their becoming autonomous.

IV

According to further submissions the restraint on alienation and encumbrance in ss. 1(4) and 12 of Etv and the limitation of changing the state property into the property of local governments are contrary to Arts. 44/A, 44/C and 12(2) of the Constitution because of the restriction on local government property and the absence of the two-thirds majority required therefor.

One of the submissions suggests that the "possibility of property deprivation" from local governments is unconstitutional because of the absence of the two-thirds ratio.

1. The submissions indicate that the substantive violation of property rights of local governments is in the prohibition on alienation and encumbrance.

Real estate which is state or local government property comes within the remit of Etv (s. 1 of Etv, s. 17(1) on expropriation of Etv) is also effective in respect of property under other owners. According to the Act, the restraint on alienation and encumbrance of properties which would be transferred into church ownership cannot be avoided for the purpose of execution of the Act. This restriction remains valid for a maximum of 10 years from the year of the submission of the first register. This will not be prolonged by claims submitted later. Section 12(4) enforces the elimination of the restraint on alienation and encumbrance if it does not serve the preservation of the real estate for the church even if it has occurred through the mistake of the church itself. Section 12(5) also makes it possible in other cases.

In conformity with the practice of the Constitutional Court, started by *Dec. 7 of 1991 (II.18) AB* (MK 1991/22), the temporary restriction of the owner's right of disposal is, as long as the aims of the Act render it unavoidable, constitutional.

Since the deadline in the Etv cannot be prolonged and it is bound to the aims of the Act which sanctions its compulsory extinction, the restraint on alienation and encumbrance criticized by the authors of the submissions is not contrary either to the Articles of the Constitution safeguarding property nor to s. 12(2) enforcing state respect for local government property.

2. The formal unconstitutionality of the restraint on local government property is a problem separate from its essential constitutionality. The submissions suggest that the Etv enables the establishment of the restraint on alienation and encumbrance and deprivation of local government property which is unconstitutional because it failed to secure a two-thirds majority.

By virtue of Art. 44/C of the Constitution, the fundamental rights of local governments can be limited in Acts passed by a two-thirds majority of Members of Parliament present.

The fundamental rights of local governments are defined in Art. 44/A. According to 44/A(1)(b) the local council exercises ownership rights over local authority property, independently manages local government revenue and may start ventures on its own responsibility. By virtue of Art. 12(2), the State respects the assets and property of local governments. By virtue of Art. 9(1), public and private property receives equal consideration and protection under the law.

(a) The requirement of qualified majorities is to be interpreted for the "passing of the Act on Local Government" and for the limitation of fundamental rights of local autonomy as for other acts governing elementary rights or institutions which are to be passed by two-thirds majority according to the Constitution.

The "restriction of an elementary right" is not a parliamentary object requiring a two-thirds majority in regard to fundamental rights of local autonomy. Therefore it cannot be compared to those parliamentary subjects regulating elementary rights requiring a two-thirds majority as defined in the Constitution. In other words the same rule applies to acts requiring a two-thirds majority which regulate fundamental rights or other such constituted objects: the restraint of fundamental rights can only happen by a two-thirds majority if the rights are regulated by an act passed by a two-thirds majority. This derives from the fact that an act requiring a simple majority cannot modify another act requiring a two-thirds majority by passing a provision contrary thereto. So in this respect the second sentence of Art. 44/C of the Constitution is an explanatory rule: the act which is contrary to the Act on Local Government, which restricts fundamental rights, compared to the Act on Local Government, must be passed by qualified majority.

The interpretation which requires an act passed by a two-thirds majority would only be appropriate if every act relating to those elementary rights were to be passed by a qualified majority. The Constitutional Court however does not follow the interpretation according to which the fundamental right itself is subject to qualified majority legislation, to wit everything derived from it can only be regulated in this way. On the contrary: the Constitutional Court has set forth however its opinion in the decisions about local government rights pursuant to which not every right of local government comes within the ambit of the two-thirds majority Act on Local Government, furthermore that not every restriction on fundamental rights requires a qualified majority (see Points (b) and (c) hereafter). According to the definition, the possibility is excluded of a simple majority act governing an elementary right of local government, in a limited sense, can only be modified by qualified majority is excluded.

In accordance with this, the permanent practice of the Constitutional Court harmonizes the requirements of legal regulation and procedural requirements restraining a specific right. Rights of jurisdiction and other local government rights are regulated by simple majority - being acts which can be limited by simple majority - whereas a two-thirds majority is necessary for restraint of fundamental rights specified in the Constitution or in acts passed by a two-thirds majority.

The Constitutional Court has already devoted several of its decisions to the questions relating to the fundamental rights and property of local government. While the Constitutional Court has always discussed with a specific right from the aspect of and in the context of a specific problem, its opinion became more and more complex. The circumstances of the present decision require that it is justified in surveying the problem of two-thirds majority acts in regard to the fundamental rights of local governments. The possibility of restrictions on local government property must be examined on the one hand in the context of qualified majority and on the other in the context of equal consideration and protection of property.

(b) The Constitutional Court has always interpreted the requirement for qualified majority to pass the Act on Local Government as referring to the Act bearing a similar title which was passed in direct execution of Art. 44/C of the Constitution. This is Act LXV of 1990 on Local Government (Ötv).

In conformity with the practice of the Constitutional Court, Art. 43(2) of the Constitution declares that local government rights and obligations are subject to simple majority voting legislation.

Moreover if the rights are not fundamental rights the question of a two-thirds majority is not even raised (See *e.g., Dec. 37 of 1991 (Vll.27) AB* (MK 1991/70); *Dec. 47 of 1991 (IX.24) AB* (MK 1991/102); *Dec. 1274/8/1991 AB* (ABH 1992, 488) and *Dec. 1792/8/1991 AB* (ABH 1992,

528)). In *Dec. 1586/8/1990/5 AB* (ABH 1991, 608), the Constitutional Court explained for the first time that Art. 44/C of the Constitution did not exclude the fact that a simple majority act would contain further substantive rules relating to institutions of the Ötv. Hence an act passed by simple majority could also include rules about local governments, its rights and obligations.

One Decision of the Constitutional Court after another has distinguished the fundamental rights of local governments from their other rights, treating these fundamental rights in different respects. The executive rights do not belong to the group of fundamental rights therefore these can be regulated by an act passed by simple majority. (See the Decisions mentioned above).

(c) According to the meaning, the requirement for a two-thirds majority for the "restriction of the fundamental municipal rights" cannot relate to each act the application of which results in any kind of limitation on those rights. Rights apply by mutually restricting each other. The Constitution does not provide an exceptional position for local governments and their fundamental rights in this context. The fundamental municipal rights are privileged only in as much as those that are stipulated by the Constitution and the modification or narrowing of this group of rights would require modification of the Constitution. Along with this, the local governments are interconnected with the legal system, they are bound and limited by acts binding on everyone.

The Constitution expresses the same in further ways. According to Art. 44/A(2) the by-laws passed by a local council must not be in conflict with legal provisions of a higher level. The Court prescribes, when listing more fundamental rights, that the local council is to exercise those rights within the limits of the law. (Art. 44/A(1)(d) and (e) of the Constitution)

The fundamental right to an adequate revenue of its own and the right for state support described in Point (c) is bound to "duties as laid down in the law." The right described in Point

(a) can also be exercised within "the limits of the law": decisions of the local government passed within their competence of regulation and administration may be reviewed only if there is a question of their legitimacy.

Independently of any reference of the Constitutional Court, the application of any fundamental municipal right cannot be imagined without this restriction. For example, ownership rights or the right to start ventures on its own responsibility (Constitution, Art. 44(1)(1)(b)) can only be executed by local governments within the limits of the Civil Code and other laws on ventures. Section 1 of the Ötv. expresses the same by saying that the fundamental rights can only be exercised within the "limits of the law." This condition is repeated in the Ötv relating to each of the fundamental constitutional rights explained in the Act.

According to the Constitutional Court this condition is a guarantee as well ensuring that no other law but an act can restrict local autonomy. Relating to restrictions prescribed by acts valid for everyone, general acts, there is no question: simple majority acts can contain these restrictions although in certain cases they can limit the fundamental rights of local governments. In other words: the fundamental rights of local governments must be interpreted within the limits of general acts.

In conformity with the practice of the Constitutional Court, the requirement of a two-thirds majority does not apply to acts prescribing fundamental municipal rights, if those acts affect rights which can only be exercised "within the framework of the law" according to Art. 44/A of the Constitution. As a consequence of this there is no need for a two-thirds majority for acts which are passed on the basis of the Act on Local Governments (*e.g.* Act on Local Taxation, on the Jurisdiction of Local Government: see *Dec. 67 of 1991 (X11.21)*AB (MK 1991/142); *Dec. 63 of 1991 (Xl.30) AB* (MK 1991/132); *Dec. 324/8/1991 AB* (ABH 1992, 464); and *Dec. 58/8/1992*

AB (ABH 1992, 574) concerning domestic trade, official prices, and the formation of the structure of local government).

(d) The practice of the Constitutional Court explained above interpreted the content of the fundamental local municipal rights as rules which contain legal stipulations determining the enforcement and direction (concept) of the protection of fundamental rights.

The Constitutional Court interpreted the fundamental rights in Art. 44/A of the Constitution as sets of jurisdictions which are essential for the autonomy of the local governments, especially for their independence from the Government.

The Constitutional Court has decided on the grounds of characteristics of specific cases whether the certain fundamental right of the local government is suffers a conceptual harm caused by the real restrictive effect of different acts.

The fundamental right concerning the property of local government must also be interpreted in conformity therewith. According to the Art. 44/A(1)(b) of the Constitution the local representative body exercises ownership rights in regard to local authority property, independently budgets the revenue of the local government and may start ventures on its own responsibility.

This fundamental right ensures the ownership position and by this the autonomy of the local governments with regard to the fact that the property of local governments was created by the Constitution and the Ötv at the time of the formation of local governments instead of the (state property) trustee rights of the former councils. The Ötv. expresses this fundamental right very clearly: "The local government freely possesses its local government property within the limits of the law" (s. 1(6)(b)). This new situation interprets the stipulation of Art. 12(2) of the Constitution: "The State respects the assets and property of local governments." The fundamental right

therefore ensures full rights of ownership but does not provide favoured protection for local government property. It cannot even do so because that would be contrary to the stipulation of Art. 9(1) of the Constitution, which stipulates equal consideration and protection under the law for each type of property. So by a correct interpretation the restriction of the fundamental right is applied when it is aimed at the position of the local government as owner. Therefore no two-thirds majority is required for partial legislative restrictions which effect the other owners or the property of the local government but do not limit the autonomy of the local government as owner.

The Decision of the Constitutional Court on the property of local governments is in conformity with the fact that the Constitutional Court did not consider the restrictive character of certain rules which implement the fundamental right as injurious to fundamental rights, further did not consider those share-rights as part of the fundamental right.

The Constitutional Court has continously excluded from the protection concerning the fundamental rights to property of local governments those claims which contested how and to what extent local governments acquire property from state property (*Dec. 28 of 1991 (VI.3) AB* (MK 1991/59), *Dec. 1582/B/1990 AB* (ABH 1991, 605) and *Dec. 2100/B/1991 AB* (ABH 1992, 554)). As it is stated in the reasoning to *Dec. 1582/B/1991 AB*, the Constitution provides local governments with the right to ownership of property as concerns already-acquired property. The first decision [*Dec. 28 of 1991 (Vl.3) AB*] concerning local governments reasons similarly in that respect. Yet the aforementioned decision required a two-thirds majority for the limitation of already-acquired property of local governments without analysing either the nature of fundamental rights of local governments or the prohibition of discrimination concerning any form of property as contained in Art. 9 of the Constitution. *Dec.324/B/1991 AB* (ABH 1992, 464) - in accordance with the developed constitutional interpretation of fundamental rights of local

governments - views Art. 44/A of the Constitution in connection with Arts. 9 and 10 and states that the Constitution "provides to local governments equal autonomy as concerns the practice of ownership, and provides equal constitutional protection as to any other type of owner and economic unit." The Decision does not require the Act to be passed with a two-thirds majority as concerns the fixing of the maximum fee for water supply and drainage - in accordance with the aforementioned practice.

The Constitutional Court declares that the Etv (Act on the Property Situation of Former Church Real Estate) contains no restrictions concerning the proprietary rights of local governments. The effect of Etv nevertheless covers real estate which are owned - among others - by local governments. The Etv is neither related in general to property of local governments nor restricts in general the right of disposal of the local council, yet it contains - as it follows unavoidably from the aim of the Act - limitations on every person who is owner of the formerly nationalised property of churches.

The Etv is in fact an act that facilitates expropriation of real estate that is owned by private persons or local governments. Expropriation is a process which is strictly limited by constitutional guarantees. This process - as it is similar in the case of other rules containing restrictions on property - may be regulated by an act passed by a simple majority. *Dec. 16 of 1991 (IV.20) AB* (MK 1991/42) on expropriation declares that "expropriation as set forth by Art. 13(2) of the Constitution transfers property as a rule into public property; it may however be transferred exceptionally into private property to serve exclusively the public interest."

Sections 9 and 10 of the Etv contains the rules on how rules of indemnification in case of expropriation shall be applied. Indemnification for expropriation of real estate of local governments therefore meets the constitutional requirements. Expropriation is ordered by law.

Public interest here means the restoration of the operability of churches, which meaning is inseparable from the guarantees of freedom of religion as it is stated in Point A of the Decision. Hence Etv as a matter of substance does not infringe Art. 12 of the Constitution which prescribes respect concerning property of local governments. As to the form, Etv does not contravene Art. 44/C of the Constitution since it does not restrict the fundamental right contained in Art. 44/A of the Constitution but it qualifies as a general act on expropriation.

V

The applicant pleads that s. 13 of the Etv provides a judicial remedy only in case of infringement of a statute. If the decision formally meets the legal requirements but damages the legal interests of the local government, there is no room for a judicial remedy. Etv furthermore expressly excludes legal remedies related to the entering of lists of claims for real estate properties. All the aforementioned infringe Art. 57(5) of the Constitution.

1. Section 13(1)-(3) provides a judicial remedy against the decisions of the Minister of Culture and Public Education taken under the Etv. The Minister may take such a decision under ss. 9 and 10 of the Etv. A decision based on s. 9 orders the expropriation (withdrawal) of ownership of a real estate and the transfer of the ownership to a church, and also regulates the indemnification of the former owner. A decision under s. 12 orders to be entered in the Land Register a prohibition on alienation and encumbrance, or orders that the claimed real estate is excluded from the ambit of the Etv.

Article 57(5) of the Constitution provides that a legal remedy, as provided by law, is available against decisions of the courts, of administrative or other authorities if this decision is to

the prejudice of the right or legal interest of a person. According to Art. 50(2) of the Constitution legality of decisions of the public administration is to be judged by a court.

The right to address the court in case of a decision of a public administrative authority fulfils the constitutional requirements that flow from Art. 57(5) and from Art. 50(2) of the Constitution.

According to s. 64 of the Act on Public Administrative Procedure (Act IV of 1957; hereinafter referred to as the "Ae") no appeal lies if a minister acted at first instance. If appeal is excluded, judicial review may take place as a judicial remedy [s. 72(1) and (2) of Ae]. According to Art. 50(2) of the Constitution, judicial review of a public administrative authority decision includes only review of the legality and not expediency of the act.

Therefore s. 13 of Etv is not unconstitutional - in accordance with s. 72(1) of Ae - when it provides that judicial review of a decision of a minister is allowed only when the legality of the decision is doubted. This also means that if damage to the legal interest of a local government is a consequence of unlawfulness, the provision of the Etv provides a legal remedy which meets constitutional requirements [Art. 57(5) of the Constitution].

2. Section 13(4) of Etv provides a legal remedy within the framework of the public administrative procedure if the decision of a minister deviates from the decision of Government or if it is not taken within the prescribed time limit.

3. The right to a legal remedy, however, may not be related to the decision of the conciliation (mutual agreement) committee. The committees draw up the list of real estate proposed to be transferred. Those (Government, churches, local governments) directly affected participate in drawing up the list but the committees also take account of the opinion of other interested parties. This procedure is not a state administrative procedure but a specific conciliation (mutual agreement process) the rules of which are contained in the Etv.

The Constitution requires the opportunity of a legal remedy only against a decision of a court, of a public administrative authority or in case of a decision taken by another authority. Conciliation (mutual agreement) committees are not authorities. As they are not authorities, their decisions are not the authority decisions as contained in Art. 57 of the Constitution. Absence of a legal remedy against these decisions is not unconstitutional.

Unconstitutionality may neither be established from the point of view that, materially, decisions of the committee - as regards their effect - have the consequences of an authority decision, or that absence of a judicial remedy would exclude a challenge regarding contest by former owners. The Constitutional Court in *Dec. 5 of 1992 (I.30) AB* (MK 1992/11) interpreted the constitutional content of the right to a legal remedy and stated that the Constitution requires it unconditionally only in case of a decision on the merits. The committees take decisions on the registration of real estates (s. 6) but this is only a proposal from which the Government may differ when it makes the proposal final (s. 7). Since the decision of the committee is not a decision on the merits, a legal remedy against it is not compulsory under the Constitution. As regards injury to the right to ownership it may emerge from the decision of the committee if it suggests that a claim not being based on the Act should be fulfilled. A judicial remedy on the aforementioned is provided explicitly by the Etv at a later stage of the process.

VI

One of the applicants pleads that s. 1(2) of the Etv provides as follows: "both property of a foundation endowed for the purpose of a church and former usage of land of a church based on feudal rights provided by a suzerain (overlord) shall be respected as property of the church."

According to the applicant these objects never formed part of church property therefore they cannot be respected as such. The Etv therefore infringes Art. 13 of the Constitution.

The contested provision does not infringe Art. 13 of the Constitution. It may be added that the extension of the definition of property of the church is justified within the logic of the Act (though it has no constitutional importance) since buildings (church and parsonage) on the land furnished by the suzerain (overlord) were given and used unquestionably for the purpose of religious life. In these cases upholding the ownership of local governments would be equal to promoting a discredited and nowadays unreasonable historical practice. In fact, upholding the ownership of local governments over buildings for the purpose of religious life would itself constitute an unconstitutional situation since it would be contrary to the constitutional principle of separation of State and church.

VII

The applicant challenges s. 2(2)(a) and (b) of the Etv on the ground that the Act does not provide an enumeration on the purpose and designation of the real estates to be given to the churches but it merely describes its purpose generally in religious life and promotion of culture with an exemplification. This is contrary to legal certainty as provided by Art. 2(1) of the Constitution.

In the disputed question the legal rule declares only religious life and promotion of culture as the purpose; and the following exemplification in parentheses merely informs, without making an attempt to enumerate every case. The contested method therefore leads not to uncertainty rather it promotes interpretation of the Act.

VIII

Sections 17(2) and 22 of the Etv were contested with reference to Art. 13(2) of the Constitution on the ground that these Articles of the Etv render church interest equal to public interest in order to facilitate expropriation of real estates with the aim of giving it to the church.

The contested provision contains an exceptional rule in contrast to the applicant's interpretation. On the basis of equity in case of special consideration it makes it possible to regain real estate by way of expropriation if the real estate is of irreplaceable importance to the church, where ownership of the said real estate has already shifted from State to local government. The special function of church (as detailed above) justifies that church interest in exceptional cases be deemed equal to public interest. All the more so, since the regaining of ownership of irreplaceable real estates is obviously a condition for the operation of the church. The prevalence of the public interest is also guaranteed by the fact that a church may only forward a request on expropriation. Thereafter the Government takes the final decision, and orders the expropriation. The Constitutional Court therefore dismissed the application.

SCHMIDT, J., dissenting: I agree with all the fundamental statements of the decision of the Constitutional Court taken under the application for subsequent constitutional examination of Act XXXII of 1991 on the Property Situation of Former Church Real Estate.

I agree with, *inter alia*, the statements contained in the decision and on the reasons which declare that wherever the Constitution requires a two-thirds majority of Members of Parliament present in order to approve a bill, it is not concerned with regulation on any social relations in

connection with fundamental rights. According to that I also agree that as well as acts requiring a qualified majority, the underlying social relationship may also be regulated by acts approved by simple majority.

My opinion dissents from the opinion expressed by the majority decision as concerns the demarcation of the field of regulation of acts requiring a qualified majority and acts requiring a simple majority under the Constitution.

1. The claim for so-called two-thirds majority acts was guaranteed in Hungary by the peculiarities of the political transformation. The point under the circumstances of the peaceful transformation was that the political opposition had to gain a more decisive (public) legal role compared to its weight in the Parliament. This compromise was also accepted during the roundtable negotiations by the political forces at that time. The Constitution requires a two-thirds majority in approximately 30 legislative subjects.

2. The legislation of two-thirds majority formed in this way, led to significant public legal deadlock - independently of the fact of whether the two-thirds concerned the whole body of Members of Parliament or only the members present. The importance of this constitutional construct today is that a government-coalition not having at its disposal a two-thirds majority or above, is forced to compromise with the opposition in most important legislative matters, without which it is unable to govern. In case the political battle intensifies between government and opposition, *i.e.* they become unable to reach a compromise (*e.g.*, in the case of the Act on Mass Media), this constitutional construct may become the source of ungovernability of the country.

On the one hand there is a historical reason for creating two-thirds majority legislation, on the other hand today it facilitates stable government neither politically nor legally. It is not easy to find a solution to the problem. Under these circumstances political forces in the government want

to reduce [limit?] the extent of legislative subjects that require a two-thirds majority or tries to reduce them by way of interpretation of the Constitution. The opposition on the other hand wants to maintain, even strengthen still the two-thirds majority legislation in order to protect its position. This political deadlock resulting from two-thirds majority legislation endangers even future drafting on the Constitution. A public legal solution may well be created by a new Constitution abolishing the two-thirds majority legislation and simultaneously embodying the most important guarantees in the Constitution - which also means they would become rules of a two-thirds majority. As concerns fundamental rights this could mean that the Constitution would not only declare these rights, as it is the case today, but would also contain the most important guarantees.

3. The Constitutional Court was set up to protect the Constitution. In case of such political and public legal disputes, there is a burden on the Constitutional Court since on the one hand it shall ensure that the political system remains stable, and on the other hand it must comply with the provisions of the Constitution, *i.e.* it shall protect decisions to be passed with a two-thirds majority.

4. Chapter XII of the Constitution on "Fundamental rights and obligations" requires two-thirds majority voting in 11 cases. Nearly all of them - as it is stated in the reasoning - are in the field of civil liberties. In one of these cases - related to mass media - the Constitution provides rules on the content of an Act which is to be passed by two-thirds majority. In all other cases it merely states that any Act governing the related civil liberties shall be passed by a two-thirds majority of the Members of Parliament present.

5. The regulation shows that Parliament was given broad discretionary powers so as to decide the issue as to what extent it should regulate the related legislative subject with a two-thirds

majority and to what extent with a simple majority. It follows that it would be equally constitutional if the Act on Freedom of Conscience and Religion and on the Churches contained a single section only, and also when all social relations related to freedom of religion were regulated by an act passed with a two-thirds majority.

6. If this discretion of the Parliament was limited by the Constitutional Court, *i.e.* it would regulate the extent of matters subject to two-thirds majority than it would exceed its powers since it is to be regulated by the Constitution. That would also be so if it merely defined the contents of acts to be passed with a two-thirds majority in general principles (such as "direct execution," "concept of enforcement and protection of fundamental rights" *etc.*). The Constitution however - except for its provisions on freedom of the press concerning the Acts on Mass Media - contains no such rules and further such rules may also not be deduced from the Constitution by way of interpretation. Such general principles may only be drawn up by way of logical reasoning and, according to my opinion, the Constitutional Court has no power to do that.

7. Such extension of reasoning would lead to a decision by the Constitutional Court on political issues that are in fact beyond its competence. The reasoning put it correctly that such an interpretation would mean that all disputes between the government coalition and the opposition related to two-thirds majority would unavoidably reach the Constitutional Court since such a decision would transform political debates under the interpretation of the Constitutional Court into public legal issues.

8. I agree on the standpoint of the Decision which states that the enactment of the Etv did not require a two-thirds majority of the Members of Parliament present since it is not contrary to the fundamental rules on freedom of religion. According to my opinion, with that standpoint the Constitutional Court provided an answer to the applications and it was not unavoidably necessary

to extend the applications so much as to the interpretation of the constitutional provisions concerning legislative subjects requiring two-thirds majority voting.

9. Being aware of the fact that the decision judged the applications in the abovementioned extensive way, I am of the opinion that formulation of a further requirement should be necessary in the part of the decision concerning the two-thirds majority acts.

An act of simple majority may only be passed in the field of constitutionally two-thirds majority acts if a compromise has already been reached in the passing of the two-thirds majority act, *i.e.* if the Act concerning the related fundamental rights has already been passed with a two-thirds majority by the Parliament. As the Constitution gave a dicretionary power regarding the content of two-thirds majority acts, without the abovementioned rule the constitutional provision on two-thirds majority acts could practically be terminated by simple majority. And that would still be unconstitutional.

VÖRÖS, J., dissenting: With agreement on the concurring opinion of Herczegh, J., I further my dissenting opinion as follows:

1. The legal institution of two-thirds majority acts is - according to international experiences - an exceptional phenomenon of constitutional law, justified by special circumstances. Special features of the transformation of the political system - based on practical political points instead of a theoretical basis justified the inclusion of two-thirds majority acts in the Constitution. The absence of a theoretical basis, however, does not allow the Constitutional Court - as it is stated by the decision - to neglect the classification of the problems on a theoretical basis created by the two-thirds majority Acts - with the limitation of the analysis, according to the underlying case, to the regulation by acts of fundamental rights. The mere circumstance that in the issue of two-thirds

majority acts political viewpoints played a decisive role, does not in itself undervalue the binding force of the given constitutional provision: the Constitutional Court is equally bound by them as by other provisions of the Constitution. The requirement of a two-thirds majority does not create an order between fundamental rights, it merely refers to the political consensus-sensitivity of the particular legislative subject, simultaneously it attaches procedural consequences to the political importance of the legislative subjects under consideration.

The issue that the Parliament regulates (as a legislative subject) is a category of substantive law; and the issue of how this subject shall be regulated (*e.g.* with a two-thirds majority vote) is a category of procedural law. This difference should be marked very sharply in order to make it clear: regulation of the right to ownership may equally take place by either simple or qualified majority voting. Regulation of the right to ownership therefore does not require automatically a simple or a qualified majority voting since it is not a category of substantive law, but one of legislative procedural law. As regards regulation of the right to ownership, *e.g.*, from the point of view of substantive law, one may require - since it is a fundamental right - that regulation took place at a statutory level. (From the point of view of procedural law it depends on what legislative procedure the Constitution sets down for the given situation, *i.e.* for the question, "How?") As regards two-thirds majority acts, two unacceptably formal approaches may be conceived.

1.1 According to the first approach this constitutional obligation is set out merely for the first act of legislation in the given legislative matter: if the first act regulating the question is passed, thereafter acts passed with a simple majority may also regulate the same matter. In this case, the provision of the Constitution could easily have been avoided by a later act regulating crucial matters in the given legislative subject.

According to the second approach all matters related to the matter to be ruled by a two-thirds majority vote, even with the weakest connection to it, shall be constitutionally passed with a two-thirds majority vote.

According to that, however, legislation would soon become crippled, since the system of law is a system where every legislative matter may well be connected to one of the subjects to be regulated by two-thirds majority votes.

1.2 The question is therefore as follows: what is the aim of legal policy with the two-thirds majority rule related to certain legislative subjects; secondly: how widely shall the requirement of two-thirds majority votes be interpreted in order to fulfill that aim.

(a) The aim of legal policy is undisputedly that the most important matters - regarded as such by the political forces agreed on in the amendment of the Constitution - connected to the transformation of the political system, may only be regulated by a great (qualified) majority of the Parliament.

In another aspect, a question remains whether the issues raised are of a doctrinally predominant quality. Yet, regarding an analysis of constitutional compatibility, the decision on that point is irrelevant in light of the Parliament's prior decision which requires a two-thirds majority of votes in favour of the regulation of the subject-matter; and further, as the rules concerned are not of a substantive but of a formal-procedural tenor, the Parliament's decision cannot be overriden by the Constitutional Court. Therefore, it is to be taken *ad factum* that although the Constitution does not set out any manifest hierarchy among fundamental rights, a certain hierarchy still prevails as a result of the consequences deriving from the procedural rules of the legislation thereon (positive law approach). The disregard of a procedural rule of legislation formally conflicts with the Constitution, which, regarding the Constitutional Court's authority to

declare null and void any legal norm whereby the process of legislation is constitutionally sanctioned.

(b) Considering the substance of different Acts as per above, it is safe to say that the effects of the two-thirds majority rule cannot be confined to the first Act bearing a title referring to the subject-matter. According to a principle, generally accepted by several branches of law, statements are to be construed according to their substance rather than to their names. Within an analysis for constitutional compatibility, constitutional law may formulate the same principle by making judgements of a particular Act following its substance rather than the title it bears. Accordingly, it is of no effect to an Act's compatibility with the Constitution should it be entitled as referring to sales tax while containing provisions on homicide at the same time: in an analysis, the judgement on the Act's compatibility is neatly declared on the basis of its meaning in criminal law instead of its references to taxation.

The scope of the two-thirds majority rule, which requires the former ratio of votes in favour of the motion on the particular subject matter, is not limited to a single enactment concerning the subject matter by Parliament. In case Parliament passes any further Act in line with the particular subject matter's already-existing regulations, the two-thirds majority rule always applies to its procedure, regardless of the title the Act bears or the main scope of its provisions whatsoever.

(c) The two-thirds majority, as a procedural rule of legislation is therefore to be widely interpreted. The total absence of any narrowing of the rule's effects, justified by the aim of legal policy, however, would exceed the aforementioned aim and would, in the end, block the process of legislation. The narrowing, essentially, is a limitation of the requirement of the two-thirds majority which, as a result, does not extend to all details of the subject matter's legislation but to an extent necessary to achieve the aim of legal policy. This comes about provided that an act

setting the guidelines for the regulation of the subject matter's most important issues is passed by a qualified majority. The guidelines for the regulation may be - in the author's opinion - defined on the basis of *Dec. 64 of 1991 (XII.17) AB* (MK 1991/139).

According to the Decision, issues of the subject matter which concern the given institution's substance, guarantees of its operation and enforcement fall, in particular, within the scope of the two-thirds majority requirement. It follows that any direct and important limitation of the institution's substance, guarantees of its operation and enforcement may only be passed by the same majority of votes.

The above criteria are, in the author's view, clear enough to prevent that either another enactment under a different title but substantially on the same subject matter circumvents the two-thirds majority as a constitutional requirement of legislation; or, due to the absence of any justified narrowing, the requirement becomes unlimited. Neither could the latter be reconciled with the concept of parliamentary democracy's system of majority representation, set out in the Constitution. These criteria also ensure that the shift from majority rule to "consensual" decision-making in the legislation, which is already an exceptional process of legislation in the Constitution, become an exception as to the substance.

(d) It may also be questionned whether the two-thirds majority as a procedural rule of legislation applies to any specific issue. If the answer is "Yes," the compliance with the rule may be verified case by case.

2. In the Constitutional Court's permanent ruling the right to hold property (Art. 13(1)) is a fundamental constitutional right which is, however, subject to limitations (*Dec. 21 of 1990 (X.4) AB* (MK 1990/98); *Dec. 7 of 1991 (11.28) AB* (MK 1991/22); *Dec. 16 of 1991 (IV.20) AB* (MK 1991/42); *Dec. 28 of 1991 (Vl.3) AB* (MK 1991/59)). On the other hand, in the Court's practice

until recently there has been no imperative necessity for a comprehensive and detailed analysis comparing the substance of the right to property in constitutional and in civil law. Considering the issues of expropriation and limitation of holding property, raised as the subject of several parliamentary motions, the analysis of constitutional compatibility of Act XXXII of 1991 on the Property Situation of Former Church Real Estate (Etv) requires a clear statement on the abovementioned relation beyond previous decisions of the Constitutional Court.

2.1 The right to property has a triple constitutional meaning, this fundamental right has three aspects: the defence of the owner's title; the defence against expropriation of civil property; and, finally, the defence against limitation of the latter. The constitutional defence of the right to property, as a fundamental constitutional right, is substantiated by these three aspects together.

(a) On the basis of the constitutional defence thereof, the defence of the owner's title prevents any natural or legal person to be incapacitated as regards the right to property. Therefore, the owner's title is an aspect of capacity, defined for the purposes of the right to property. The statutory restriction of the capacity of natural persons, being in effect from the end of the seventies until the end of the eighties, which allowed natural persons to hold not more than one residential and one holiday home was a serious violation of the capacity of the right to property (should the regulation still be in effect, it would be declared as incompatible with the Constitution). A violation of the right to property was declared by the Constitutional Court in case of another regulation which barred natural persons from becoming the owners in civil law of high performance copying machines (*Dec. 19 of 1991 (IV.23) AB* (MK 1991/43)).

The defence of the owner's title, as an aspect of capacity is unconditional and absolute; no fundamental constitutional right can be imagined which - being enforced - would justify the limitation of the capacity to acquire property. A restriction of this aspect of capacity may arise

solely from a certain quality attached to the object (*e.g.* explosives). Such restrictions, however, do not qualify as a limitation as to the capacity to acquire property, as an aspect of capacity: they do not concern the person but the object, or more precisely, its negotiable status.

(b) The second aspect of the fundamental constitutional right to hold property is the defence against the expropriation of property under civil law. The Constitution excludes the expropriation of property regulated under civil law as it is considered as a fundamental institution of democratic society and the social market economy.

The unquestionability of property, its sacrosanct position is ideosyncratic with and characteristic of this society and its economy, in brief it is a *conditio sine qua non*. The democratic society and the social market economy is what it is due to the unquestionability of property. However, expropriation in the public law sense exists in the Constitution which manifests itself in institutions such as compulsory purchase on the one hand and as forfeiture as a criminal sanction (Art. 57(4)) on the other, notwithstanding that expropriation of property is prohibited. However, as compulsory purchase is regulated under public law and forfeiture falls under criminal law, they do not come within the scope of Art. 13 of the Constitution, as being of no relevance within the defence of the right to property. This is the reason why the Constitution contains two separate Articles on the two institutions (*i.e.* defences as to the right to property under civil law and compulsory purchase) which differ as to their purpose, nature and substance.

In summary: Art. 13(1) of the Constitution provides an unconditional and absolute defence against expropriation of property.

The Constitutional Court has accepted on one occasion only - due to the particular historical circumstances of the transformation of the social and economic sytem - and within the constitutional duty of denationalisation that liabilities of the previous process of nationalisation

be distributed between those who gratuitously received the aforesaid assets by the laws governing the transformation (*Dec. 16 of 1991 (lV.20) AB* (MK 1991/42); *Dec. 28 of 1991 (Vl.3) AB* (MK 1991/59)). "As soon as the process of transformation is completed, the new property enjoys a full defence, *i.e.* there is no constitutional way to redistribute *ex post facto* or with a retrospective effect the liabilities of transformation" (*Dec. 16 of 1991 (lV.20) AB*).

Accordingly, within its analysis of constitutional compatibility, the Constitutional Court declared incompatible with the Constitution the provisions of the first Act on Compensation, passed by the Parliament but not yet promulgated, which required local governments to accept compensation notes in settlement of municipal apartments previously held by the State. The Constitutional Court underlined that liabilities arising from the previous process of nationalisation may be distributed only in the course of the assets' transfer to the local governments, *i.e.* before the transmission of the property takes place. The local governments' subsequent gratuitous acquisition gives them no right to acquire property free of charges; however, any encumbrance, imposed on the basis of gratuitous acquisition of municipal apartments, acquired before the Compensation Act's coming into force and previously held by the State, would conflict with the Constitution. The Constitutional Court stressed that the incompatibility may only arise in the case of a completed acquisition, *i.e.* the property may be encumbranced on the basis of gratuitous acquisition before transmission takes place. The property, which the acquirers receive, will be encumbered by compensational and other charges arising from the fact that it was previously owned by the State. This view, taken by the Constitutional Court, is a consequence of the principle declared by *Dec. 16 of 1991 (lV.20) AB* which states that the newly-acquired property enjoys full protection.

The right of option over land held by agricultural co-operatives was held compatible with the Constitution on the same the basis by the Constitutional Court with the further qualifications:

- the right of option is permitted as a unique product of the special historical circumstances arising from the economic tranformation and the denationalisation of assets previously held by the State;

- it is only the burden arising from the previous process of nationalisation that may be distributed among those persons, exclusively, who acquire assets previously held by the State.

In summary, the second aspect of the constitutional right to hold property: the general defence against expropriation of property under civil law is not weakened by the aforesaid exception which is temporally singular and in the ways of its exercise strictly conditional. The distribution of liabilities among the persons who previously gratuitously acquired property cannot be quoted as authority once the transfer of properties, previously owned by the State, is completed. This argument is further strengthened by the fact that the Constitutional Court qualified both the right of option and the local governments' obligation to accept compensation notes as not expropriation but as a limitation of and charge over property under civil law. The same principle, consequently, applies to an eventual expropriation of newly-acquired property. Once the transformation of the property structure is completed, the strictly-worded requirements of the Constitutional Court exclude any further expropriation from taking place, burdening the new owners.

Article 13(1) of the Constitution, therefore, prohibits that property under civil law - even as tiny and worthless as a pin - may be illegitimally expropriated by force of law.

(c) The third aspect of the constitutional right to own property is the defence against limitation of civil law property. This defence according to the permanent ruling of the

Constitutional Court is conditional and relative. The conditions were once again defined in the decisions on the limitation of substantial parts of fundamental rights (see first in *Dec. 7 of 1991 (II.28) AB* (MK 1991/22), Part IV). According to the findings of the Constitutional Court, limitations by which the fundamental constitutional right is desired to be enforced must be necessary and proportional.

2.2 The title to own property is fundamental to the other two aspects of the constitutional right to property: the latter would not exist in the absence of the former. However, this is not the full scope of the right to own property. If it were to be otherwise, the constitutional right to property would not be anything else other than a requirement to avoid infringement of the theoretical declaration of capacity to acquire property. Any other regulation concerning property rights on individual subjects of property, *i.e.* objects, would be subject to an expropriation without limitation by another law. There would be no constitutional obstacle for a new general programme of nationalisation, governed by statute, concerning property of apartments under civil law, for instance. A nationalisation, as such, does not deny the title to the right to property; the party adversely affected may later purchase another apartment (provided he has sufficient moneys and another apartment to buy).

The constitutional right to property is considered complete provided that the rule of the triple defences as to the capacity to acquire property and against expropriation and limitation of the same prevail. The reduction of any of the three defences regarding property rights would not only curtail the real substance of this fundamental constitutional right but it would fail to provide defence for a fundamental, characteristic institution of the political and economic system which are, respectively, founded on the democratic society and the social market economy. The absence

of the triple defences would, therefore, render parliamentary democracy and the social market economy non existent.

The Act on the Property Situation of Former Church Real Estate ("Etv") provides for the transfer of municipal properties to beneficiary churches and a restraint on alienation and encumbrance of (other) municipal properties, which are limitations on the right to own property. The second limitation may be declared compatible with the Constitution provided it is conditional. The first limitation, subject to the way of transfer of the property, may qualify as expropriation of the right to property under civil law, either as an aspect of the constitutional right to own property or as compulsory purchase regulated by public law (excluding, obviously, forfeiture). (The first out of these two qualifications is excluded by Art. 13(1) of the Constitution and the Constitutional Court's Decisions on compensation, *i.e.* the encumbrance of gratuitously acquired property.)

2.3.1 Although expropriation of property under civil law is generally excluded, a reference must be made to the fact that local governments are not subjects of private law but of public law. A statute may say that a task previously fulfilled by the local governments is to be carried on by the State. In this case the local government cannot refer to an infringement of the constitutional right to own property as only that part of its assets become state owned which serve to fulfill the task which is decided to be carried on by the State. The fact that local governments are subjects of public law differentiate (in this case: weaken) their property's defence against expropriation or even limitation, compared to the defences of private property. The importance of expropriation (limitation) is reflected in its effect on the local government's autonomy.

Municipal property is broken down into groups of assets differing as to their purpose. As regards property acquired by the local government's revenue, the local government is a subject of

the private law by virtue of the explicit provision of the Constitution (Art. 44/A(1)) and, accordingly, the right to own property enjoys an unconditional and absolute defence. For the purposes of a property right over the assets which serve the local governments' basic tasks, as per s. 79 of Act LXV of 1990 on Local Government, the local government is a subject of public law. However, expropriation of the assets which serve the local governments' basic tasks would definitely undermine the idea of municipal autonomy unless they enjoyed the same unconditional and absolute defences as to owning property as the subjects of private law. The fact that the prescribed transfer of the owner's rights over assets belonging to the third group (*i.e.* assets for purposes of municipal public services, is always in line with regulations of the municipal scheme of authority) makes their defences relative. As the purpose of these assets is to secure the material conditions for the fulfilment of tasks deriving from such authority, an unconditional and absolute defence as in the previous groups of assets is not justified. In the given case no infringement may arise as to the property right of the local government under civil law; it is only property rights that go hand in hand with authority (function).

2.3.2 The transmission of property (transfer of property) codified by the Etv does not concern Constitution Art. 13(1) on the defence of civil law property but para. (2) on expropriation in the public law tenor. This view is evidenced by substanstive provisions (ss. 17(2) and 22) as well as by procedural ones (ss. 9(2) and 10(1)). Expropriation within the scope of compulsory purchase, which may derive either from discretion of authority or from the provision of statute (*Dec. 16 of 1991 (IV.20) AB* (MK 1991/42), Part III(3)), causes "the property generally to become public property. The property may exceptionally be transferred to private persons on condition that it will serve public interest." The compatibility with the Constitution must be declared on the basis of conformity of the Etv's substantive provisions on the shift of property rights in the

administrative and public law tenor with the requirements laid down in Art. 13(2) of the Constitution. In brief, it is not the constitutional aspect of the (as to its nature) private law defence of the fundamental constitutional right to property but the compulsory purchase, as an institution of public law, with which one is concerned. Therefore the procedural requirement (the two-thirds majority) is out of question. Application of Art. 44/C of the Constitution is also irrelevant as the Constitution does not require a two-thirds majority of votes in favour of a compulsory purchase.

2.3.3 The compulsory purchase codified by the Etv is exceptional in the sense that it transfers the assets required for the operation of churches, the indispensable material condition to exercise the fundamental right of freedom of religion, by a single decision. The State thereby fulfills a constitutional obligation. It follows that the material conditions are generally set by the Act and no eventual compulsory purchase - set out by general provisions of a later statute - shall be declared compatible with the Constitution except for individual cases where compulsory purchase takes place by an individual decision of the relevant authority.

The fact that compulsory purchase may take place in the public interest solely derives from the State's obligation to provide the necessary conditions for the freedom of religion with the limitation that the constitutional framework of compulsory purchase is set by its temporally singular quality.

2.4 As the imposition of the restraint on alienation and encumbrance on municipal property is a straight limitation of property under civil law, the (conditional and relative) defence set out by Art. 13(1) of the Constitution is to be taken into consideration within an analysis as to its compatibility in the substantive sense. The limitation is, without doubt, unavoidable and necessary, as it concerns the otherwise impossible enforcement of another fundamental right; at the same time it is still proportional.

At the same time, no doubt may arise as to the necessity of an analysis of constitutional compatibility as to the fulfilment of procedural rules of enactment besides the substantive aspects (necessity and proportionality of limitations), ante; the limitation on the right to own property is within the scope of the defence of the same as set out in Art. 13(1) by the Constitution. On the basis of Art. 44/C of the Constitution, the Etv's provisions imposing a restraint on alienation and encumbrance would doubtlessly have required the two-thirds of votes of the Members of Parliament being present. This requirement is justified as the enactment concerns an Act which sets the guidelines for the regulation of the subject matter's most important, substantive, issues. This regulation is indispensable in the sense that in its absence the effect of the institution (here: the local governments' right to own property) cannot be guaranteed. A reference must be made here to the Constitutional Court's ruling which considered as a substantive limitation on the right to property, i.e. the right to dispose of property, as a fundamental constitutional right, that the transactions of certain real estates are bound to authorization. The Court also stressed that the restraint on alienation is an even more obvious limitation as to the substance of the right to dispose of property (*Dec. 7 of 1991 (III.28) AB* (MK 1991/22), Part IV.3).

Therefore, s. 12 of the Etv contradicts the Constitution; its declaration to be null and void *ex nunc* by the Constitutional Court, which is empowered by s. 43(1),(2) of Act XXXII of 1989 on the Constitutional Court("ABtv") to do so, seems justified on the basis that the section was not passed by a two-thirds majority. An extraordinary annulment with retrospective effect, as per s. 43(4) of the ABtv is, however, not justified as the prescribed conditions are not met. Attention has to be paid to the fact that an appeal could brought in court against the administrative decision which imposed restraint on alienation and encumbrance. As the decisions were issued as early as

spring 1992, the "interests of upmost importance" (s.43(4) of the ABtv) of the parties, affected in respect of the legal relations concerned, were manifested during the court appeals.

It is expressly inadvisable to apply s. 43(4) of the ABtv to this set of circumstances as any interference in already settled legal relations is disruptive in respect of legal certainty.

3. Legislation on compensation has come a long way since the enactment of the first Act on Compensation (Act XXV of 1991). Its scope has widened by the subsequent enactments (first covering damages to property and later intangible (personal) claims) both in respect of the persons concerned and the losses to be compensated. The Etv, which indisputedly includes "compensatory" elements, extends Act XXV of 1991 in respect of the persons concerned; after Act XXXIII of 1991 on the Compensation of Local Governments, this was the second piece of legislation which awarded damages in compensation for loss of property suffered by legal persons.

By *Dec. 28 of 1991 (Vl.3) AB* (MK 1991/59), Point C, the Constitutional Court declared as compatible with the Constitution the fact that the compensation of persons who suffered loss of property occurs through a series of statutes. In my dissenting opinion attached thereto, I found it necessary to settle by way of legislation the compensation of loss of property suffered by legal persons.

The Etv makes some progress in this sense. The constitutional compatibility of the multi-phase legislation on the compensation of loss of property suffered by legal persons may be judged only after the termination of the legislative process in conformity with Point C/2 of *Dec. 28 of 1991 (Vl.3) AB.*

HERCZEGH, J., concurring: In accordance with the operative part of the present Decision, I find necessary to state the following in addition to Point A/2(b) of the reasoning:

Both "state" and "church" schools are bound to a factual and tolerant transfer of knowledge which respects the pupils' freedom of conscience. The larger part of the knowledge taught there lacks any religious content or even any religious reference. Therefore schools run by the church cannot identify themselves entirely with the doctrines of a particular religion. Statements of the truth of religious doctrines may and has to take place within a framework of religious studies which may be organised as an extracurricular activity. Schools run by the church do not differ from those run by the State in terms of the knowledge taught or in the methods of education; the difference between the two is that the latter establishes its education on its particular ethical religious scale of values; it is exercised in a manner which prevents it from becoming a burden or, respectively, a conflict of conscience being neither for students observing other religions nor for those not observing any religion. Ethical religious education is, essentially, a transfer of the scale of values and the human (social) behaviour deriving from the doctrines of the particular religion; the reason for and the extent of such schools' "commitment." A sharp distinction between the two types of schools is not justified by historical experiences. At the same time, the right to enjoy freedom of religion or another professed conscience and the right to education establish themselves, as fundamental constitutional rights, sufficiently for the necessity of the creation of a pluralist school structure, *i.e.* a structure comprising schools run by the State, the church and others, which may provide services upon the request and the choice of the parties concerned.