DECISION 8 OF 1993: 27 FEBRUARY 1993

ON THE MINIMUM NUMBER OF MEMBERS

FOR THE REGISTRATION OF A CHURCH

The petitioner sought determination of the constitutionality of s. 9(1)(a) of Act IV of 1990 on the Freedom of Conscience and Religion and on the Churches ("the Act").

The petitioner submitted that under s. 9(1)(a) the condition for registration of a Church, namely it was to be founded by at least 100 natural persons, was contrary to the Constitution, Art. 60(2) guaranteeing the common (communal) exercise of religion and Art. 60(3) declaring the separation of Church and State. The latter could not inquire into the Church's membership nor create special conditions for obtaining legal personality. Because of the condition, then, religious communities of less than 100 members could not benefit from communal exercise and were permanently at a disadvantage as regards the large, registered Churches.

Held, refusing the petition:

(1) The requirement of 100 natural persons as a condition precedent for registration as a Church did not violate the right to common exercise of religion of those religious communities the number of whose founding members was below that legal threshold. The freedom of common or communal exercise of religion under Art. 60(2) was owed to everyone without consideration of whether or not its exercise occurred within legally-regulated frameworks and of

the organisational form in which it functioned. Since the rights of communal exercise could be practised not just by members of a Church but by everyone wanting to participate in a religious community, s. 9(1)(1) was constitutional. Further the Act gives rise neither to any discrimination in legal regulation between organisational forms nor to any impediment to the exercise of religion for everyone. Indeed it was left to the discretion of the religious community concerned to choose which legal organisational form by which it gained legal status. Any religious community could thus take the legal form of a Church, formerly characterized by its historic establishment for the communal exercise of religion, provided it satisfied the requirement of 100 members (page 00, line 00 - page 00, line 00).

(2) Moreover the requirement did not violate the principle of the separation of Church and State. The separation declared in Art. 60(3), being part of the right to freedom of religion, could not be narrowed down to provisions of the Act relating to religious communities functioning as Churches. The State could not intervene in such a way as to touch the specific religious character or independence of religious communities apart from regulating the organisational form in which such communities were to function. Moreover, except for the larger organisational autonomy granted to the Churches, the Act did not guarantee additional rights which other religious communities could not enjoy. Considering the activities defined in s. 17(1) of the Act were not reserved exclusively for the State but could be achieved by anyone including, *inter alia*, religious communities which did not function as Churches, the normative grant for such activities did not therefore depend on such community's quality of being a Church (page 00, lines 00-00; page 00, lines 00-00).

(3) The only differences which arose between Churches and other religious communities was the former's larger internal autonomy and their right to optional religious instruction in State schools under s. 17(2) of the Act. The larger organisational autonomy of the "Church" as regulated by the Act accorded, in historical perspective, with the State's separation from the "historical" Churches and its relation to them. The prescription in the Act was intended to follow the traditional description of Churches with a large membership while, at the same time, accepting smaller religious communities as Churches. Further the State under s. 9(1)(d) had to rely on the community's own interpretation in that it really exercised religion. The State could bind the right to religious instruction in State schools to the laying down of relevant religious doctrines. However the State had only the requirement of minimal social acceptance to guarantee such right. Consequently there was no arbitrary discrimination in the fact that only Churches of at least 100 members had the right to such provision of religious instruction (page 00, line 00 - page 00, line 00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

On the basis of the petition seeking an *ex post facto* constitutional review of a statute, the Constitutional Court has made the following

DECISION.

The Constitutional Court rejects the petition seeking a declaration of unconstitutionality of s. 9(1)(a) of Act IV of 1990 on the Freedom of Conscience and Religion and on the Churches.

The Constitutional Court publishes its Decision in the *Hungarian Official Gazette*.

REASONING

According to s. 9(1)(a) of Act IV of 1990 on the Freedom of Conscience and Religion and on the Churches (hereinafter referred to as "the Act on Religion") one requirement for registering a church is that "the church is founded by at least one hundred natural persons."

According to the petition, this requirement is contrary to Art. 60(2) of the Constitution securing the collective exercise of religion, as well as contrary to the principle of separation of state and church declared by para. (3) thereof. This is so, according to the petition, as the examination of the membership size of a church may not be left to the State; the State may not impose special conditions for the acquisition of legal personality. Because of this condition members of religious communities numbering fewer than one hundred may not take advantage of the means secured by the Act on Religion for the collective exercise of religion and they are always disadvantaged relative to the large registered churches.

II

On the basis of Art. 60(2) of the Constitution, the right to freedom of thought, conscience and religion entails that "one may, individually or collectively, publicly or privately, declare, exercise, teach or decline to announce one's religion or conviction." This provision -- on account

of the exercise of freedom of religion being "public" and "collective" -- also embraces the freedom of religious association and assembly, which, in any event, is guaranteed by Arts. 62 (on the right of assembly) and 63(1) (on the right of association) of the Constitution.

1. The freedom of collective exercise of religion -- or "communal" to use the terminology of the Act on Religion -- is not tied to any organizational form. The right to exercise one's religion with others, secured by Art. 60(2) of the Constitution, is conferred upon everyone without regard of the organizational form it manifests and, indeed, without regard whether the collective exercise of religion proceeds within or without a legally regulated organizational framework. The freedom of exercise of religion, on the individual or collective level, may not constitutionally be made conditional on membership in a religious organization or upon the organizational form of a religious community.

The Act on Religion complies with this requirement. In accordance with the fundamental constitutional rights of freedom of conscience and religion, the rights defined in Chapter I of the Act on Religion are conferred upon everyone. Contrary to the assertion made by the petition, the rights to the communal exercise of religion, specially highlighted in ss. 6 and 7, are not limited to members of certain churches but may be exercised by all who wish to participate in a religious community. These regulations of the Act on Religion are also in harmony with the Ministry of Justice Decree 8/1990 (IV. 27) IM on the Exercise of Religion by Detainees, para. 14 of which states that in applying the Decree the term "church" is to be interpreted to include religious denominations as well as religious communities. Likewise, the right to refuse military service for reasons of conscience is not made conditional on belonging to a certain church.

It is not a constitutional question that large memberships and distinguished histories of churches, their organizational structure and their co-operation with the State in many areas

facilitates the exercise of religion for their members where this requires the assistance of other (often state) institutions, such as in health-care or penal institutions.

Giving effect to the right of exercise of religion may be harder or easier in practice depending on the nature of legal form a given religious community adopts, or whether it chooses to assume a legal form at all. But the existing practical differences in giving effect to the right of the freedom of religion remain within constitutionally permissible bounds as long as they do not arise from discriminatory legal regulations or do not lead to the prevention of anyone's exercise of his or her religion.

2. It is the State who determines what legal personality, and under what conditions, may be created for natural persons; the Constitution imposes neither duties nor limitations upon the State in this regard.

Act II of 1989 on the Right of Association (hereinafter referred to as "the Association Act") introduced, based upon the right of association, the "societal organization," the basic type of organization with legal personality whose regulation -- with some exceptions -- also extends to political parties and trade unions. But it does not follow from the uniform regulation by existing law that every "societal organization," or other organization based on the right of association or other constitutional right, may not be constitutionally regulated in a different manner. A constitutional question would arise only if the legislature were to provide the opportunity to become a legal person or the establishment of a given organizational form to some among several comparable organizations, while arbitrarily excluding others, or would render their ability to acquire legal status disproportionately difficult.

The requirements for transforming into legal persons organizations established on the basis of the right of association or other constitutional rights may be regulated by the state in a

divergent manner in accordance with the particular characteristics of the given organization or community.

Religious communities may take advantage at their discretion of any of the legal organizational forms compatible with their activities, but they are not obliged to do so. The religious community acquires a legal position determined by its chosen legal organizational form; it may give effect to characteristics stemming from the nature of the religious community within this framework, that is, it may not invoke the right of freedom of religion to gain exemption from the peremptory norms of general domestic legal rules (*jus cogens*), nor can it enjoy additional rights.

There is no legal regulation which discriminates against religious communities in comparison with other organizations in becoming legal persons.

3. "Church," according to the law in force, is that organizational form which recognizes the historically created particularities of the collective exercise of religion and makes possible their incorporation into the legal order while retaining these particularities.

According to s. 8 of the Act on Religion followers of the same religious faith may create for the exercise of their religion self-governing (municipal) religious communities, religious denominations or churches (hereinafter "the church"). A church may be founded for the exercise of every such religious activity which is not contrary to the Constitution and does not violate the law.

Religious communities may also take advantage of this legal institution at their free will. However, for the acquisition of the legal status of "church" the Act on Religion imposes the requirement that -- in contrast with the societal organization requiring ten members -- the church must have at least one hundred natural founding members.

In the Constitutional Court's view this requirement does not violate the right to collective exercise of religion of those religious communities which fail to attain the required number of founding numbers.

(a) The organizational consequences of the separation of church and state regulated by ss. 15 and 16 of the Act on Religion address only those religious communities which operate as churches according to s. 8. However, the separation -- which is part of the right of freedom of religion -- declared by Art. 60(3) of the Constitution cannot be limited to the aforementioned regulations of the Act on Religion. It is not only the church but also any religious community with which the State may not institutionally unite, with the teaching of no religion may the State identify itself, and the State may not take a position on the question of religious truths. Intervention into the autonomy of the religious communities of the type which affects their particularly religious characteristics is not constitutionally possible irrespective of the organizational form within which they may operate.

(b) The Act on Religion does not secure the churches such additional rights -- apart from the greater organizational autonomy -- which are not enjoyed by other religious communities as well.

According to s. 17(1) of the Act on Religion the church in its legal capacity may provide all those nurturing and educational, cultural, health, sport and children and youth advocacy activities which are not exclusively reserved by law for the State. Within this framework the church in its legal capacity may establish and maintain an institution.

But the activities defined in s. 17(1) which are not exclusively reserved for the State may be undertaken by anyone, by religious communities not operating as a church as well, provided that they fulfil the prescribed requirements.

Thus, contrary to the assertion of the petition, the Act on Religion does not bring about any legal distinction among the religious communities in educational, social and other activities. The Constitutional Court notes that there is no substantial difference in the regulation of societal organizations and the church either; and, furthermore, that the provision of normative support of educational, social and other activities is dependent on the nature of the actual activity and not the type of church.

(c) A real difference between churches and other religious organizations exists insofar that the churches enjoy a greater internal autonomy and that s. 17(2) enables churches with legal capacity to exercise the right of optional religious instruction in state schools.

The Association Act prescribes a democratic minimum in the organizational order of every societal organization (the supreme organ must be an elected committee, its convocation and jurisdiction is mandatorily regulated by ss. 11 and 12 of the Association Act). In contrast, the organizational structure of the churches is left entirely to their charters, with only the management and representative committee securing integration into the legal order required to be "elected": s. 9, Act on Religion. The terminology citing the association right and "election" do not, however, apply to the "historical" and "legally recognized churches, organizations registered as religious orders," whose registration took place officially. (s. 22, Act on Religion). With these, not even the registered membership was examined. The churches' greater autonomy is also realized by the fact that although the prosecutor's office exercises legal supervision over the societal organizations -- with the exception of the political parties -- and while the judiciary may intervene in the functioning of an organizations so as to ensure its lawful operation, (ss. 14-16 of the Act on Religion), such supervision and intervention does not apply to the churches. The State may not bring about an organ specifically for the supervision of the churches (s. 16(1), Act on Religion)

and state compulsion may not be applied to give effect to the churches' internal laws and regulations (s. 15(2), Act on Religion).

Separation of church and state does not mean that the particular features of churches may not be taken into consideration by the State and that the State must regulate the legal status of the "church" in an identical manner with those of other societal organizations. The State does not have such an obligation of uniformity in legal regulation even with respect to societal organizations; there would be no legal impediments to create organizational forms which diverge from the "societal organizations" outlined by the Association Act. The State is not obliged to create a particular organizational form for religious organizations, nor is the State restricted in the particular form or forms it may bring about. Thus, the State -- provided that it does not violate the freedom of religion, and the right of the collective exercise of religion subsumed in the former -- determines the requirements and legal status of the founding of a "church" as it sees fit. As expounded in paragraphs a) and b) above, the right of exercise of religion of any religious community remains not violated even if it fails, or does not wish, to acquire the legal status of a "church".

The greater organizational autonomy afforded to the "church" by the Act on Religion is in harmony with the separation of state and church, albeit it does not necessarily follow from the latter. It reflects the fact, however, that the historical process of separation primarily involved the separation of the State and the "historical" churches and their relationship. With the requirement of at least one hundred persons for the foundation of a church, the Act on Religion sought to give equal recognition to the traditional, large membership based and smaller religious communities. No constitutional objection may be raised against this regulation.

Because of the separation of state and church, the issue whether a religion is being truly practised must be left by the State for the religious community's own interpretation (s. 9(1)(d), Act on Religion). The State may condition the right of religious instruction in state schools upon the developmental stage of religious doctrines. The State has no other tool to secure this end than to demand their minimal societal acceptance. This is why it is not an arbitrary distinction that this particular form of religious instruction is reserved only for churches with at least one hundred members.

4. Based on the foregoing, s. 9(1)(a) of the Act on Religion, according to which one requirement of registering a church is that it be founded by at least one hundred natural persons, does not violate the right of collective exercise of religion of those religious communities which fail to attain that number, nor does this violate the separation of state and church. Accordingly, the Constitutional Court rejects the petition.