Response to the Observations of the Government of Hungary on the Admissibility and Merits of Application No. 70945/11 introduced by Magyar Kereszteny Mennonita Egyhaz and Jeremias IZSAK-BACS and 8 other applications

Introduction

In response to the Written Observations submitted by the High Contracting Party and transmitted to the Applicants on1 March 2013, and in light of both the Constitutional Court decision of 26 February 2013[1]and the proposed Amended Church Act of April 2013[2], the applicants herein submit their Written Observations.

Article 9: Freedom of Thought, Conscience and Religion

At the heart of the Applicant's claim lie the fundamental protections inherent in Article 9. Freedom of thought, conscience and religion is a fundamental right protected by several seminal international human rights treaties.[3] The European Court of Human Rights has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.[4] Article 9 has taken the position of a substantive right under the European Convention.[5]

The United Nations Human Rights Committee has rightfully stated that freedom of thought, conscience and religion is a "profound" and "far reaching" right of a "fundamental character"; one which state parties may not suspend or derogate from even in times of public emergency pursuant to Article 4.2 of the ICCPR.[6]

This Court, in *Hasan and Chaush* correctly held:

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[1] 6/2013. (III. 1.) AB határozat.

[2] T/10750.

[3] *See e.g.*: *European Convention of Human Rights*, Article 9; *International Covenant on Civil and Political Rights*, Article 18; and *Universal Declaration of Human Rights*, Article 18;

[4] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.

[5] *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; *Otto-Preminger-Institut*, *op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749.

[6] HRC, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion* (1993) [1], available at http://www2.ohchr.org/english/bodies/hrc/comments.htm.

> The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention,[7]

Because of both the sacred value associated with Article 9 and the secular guarantees that stem from the Convention, a high level of defense must be offered to religious organizations such as those of the applicants. According to this Court's jurisprudence, religious groups and churches enjoy certain protections under the ECHR[8]:

(i) the right to form a legal entity is one of the most important aspects of the right to freedom association, without which the right would be deprived of any meaning;[9]

(ii) protection of religious associations is vital to democratic and pluralistic society;[10]

(iii) the state must be neutral and impartial in adopting and implementing laws governing religious associations;[11]

(iv) believers should be allowed to associate freely in pursuit of their religious objective, without arbitrary state intervention;[12]

(v) only where religious associations pose realistic, imminent threats to public order and safety or other enumerated grounds for limiting freedom of religion may states permissibly interfere with the acquisition of legal entity status;[13] and

(vi) discriminatory denial of legal entity status is impermissible.[14]

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[7] ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 62.

[8] For more information see Durham, W.C. *Facilitating Freedom of Religion or Belief through Religious Association Laws*. In: Tore, L., Durham, W.C., Tahzib-Lie, B.G.(eds.). *Facilitating Freedom of Religion or Belief: A Deskbook.* Leiden (Netherlands), 2004, p. 321-405.

[9] See ECHR, *Sidiropoulos v. Greece*, 10 July 1998, no. 26695/95, para. 40.

[10] See ECHR, *Hasan and Chaush v. Bulgaria*, 26 October 2000, no. 30985/96, para. 62.

[11] See ECHR, *Metropolitan Church of Besarabia v. Moldova*, 13 December 2001, no. 45701/99, para. 116.

[12] See ECHR, *Hasan and Chaush v. Bulgaria*, para. 62, *Metropolitan Church of Besarabia v. Moldova*, para. 118.

[13] See ECHR, *Metropolitan Church of Besarabia v. Moldova*, para. 125.

Church Autonomy

Article 9 of the Convention stands alone in that it is the only fundamental right which recognizes the relationship between the individual and the transcendent. It therefore protects the most profound and deeply held conscience and faith based beliefs. Taking into consideration the spiritual mission and relationship of the church to its members and to culture at large, this Court has built up strong jurisprudence to insulate churches from inappropriate or undue state interference.

One key obligation for each Contracting Party is to maintain a strict sense of neutrality towards churches and religious denominations. Applicants submit that the Hungarian government has failed in this obligation in several areas relating to how it defines what a top-tier church is and what its aims should be. Section 6 paragraph 1 of the Religious Freedom Law provides an indirect definition of religion. If the belief of an applying religious group does not meet the criteria (worldview directed towards the transcendental; faith-based principles directed to the existence as a whole etc.), the group will not be considered to be performing religious activities, which is a reason for denial of registration (Law, sec. 16, para. 1). The subjective definition of religion is obligation laden with values which can only be exclusively defined by the State. The jurisprudence of this Court however requires that inferences or judgments regarding the content or validity of a religion are in violation of the Convention.

In *Metropolitan Church of Bessarabia and Others v. Moldova*, it was held that: "a State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on

[14] See ECHR, *Koppi v. Austria*, 10 December 2009, no. 33001/03; ECHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, 31 July 2008, no. 40825/98; ECHR, *Verein der Freunde der Christengemeinschaft and Others v. Austria*, 26 February 2009, no. 76581/01.

the State's part to assess the legitimacy of religious beliefs, and requires that conflicting groups tolerate each other…"[15]

The European Court of Human Rights has further defined Article 9 to require states to restrain themselves from interfering with church autonomy or the right to manifest religious beliefs: "[F]acts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention."[16] The denial of the applicant's application to re-register at their previous status clearly is based on such illicit value judgments and such run afoul of the Court's well-establish position on church autonomy.

As established above, the existing jurisprudence of the European Court of Human Rights with regards to interference with the internal workings of the church has been clear and unwavering. Recently, in the Case of *Holy Synod of the Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* the Court reaffirmed that the autonomous existence of religious communities is indispensible for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[17] The Court correctly posited that were church autonomy not protected by Article 9 of the Convention, then all other aspects of an individual's freedom of religion would become vulnerable.[18]

This could not be truer than with the churches in the instant application. The applicant churches were known to the State through the previous registration scheme and had existed in a manner beyond reproach. Their demotion to a lower status, and all of the losses in legal rights

[15] ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Appl. no. 45701/99., § 123.

[16] ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 78.

[17] ECHR, Case of *Holy Synod of the Bulgarian Orthodox Church and Others (Metropolitan Inokentiy) v. Bulgaria*, application nos. 412/03 and 35677/04, judgment of 22 January 2009, § 103.

[18] *Id.*

and benefits associated with that, have directly interfered with the internal workings of their churches and threaten the very existence of these churches.

3 Prong Analysis: Article 9 and 11

Under the Convention, for an interference with the right of thought, conscience and religion to be lawful, it must meet three criteria: (1) the interference in question must be prescribed by law; (2) it must pursue a legitimate aim; and (3) it must be necessary in a democratic society.

(a) Prescribed by law

In order to be prescribed by law, provisions of the domestic law must be precise enough and reasonably foreseeable enough to foresee the consequences which one's actions may entail. The law should also provide adequate safeguards against arbitrary interference with respective substantive rights.[19] It is only thus, when the four elements of precision, access, clarity and forseeability are met that the law will be deemed to meet the criteria of prescription by law.[20]

Interference with the internal workings of a religious organization or community will not be considered prescribed by law if it is arbitrary and based "on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and forseeability."[21]

The Amended Church Act of Hungary fails to be prescribed by law on two fundamental points. First, the state has without justification provided top-tier Church status to a number of churches (enumerated in the annex to the law), many of whom would not otherwise have met the

[19] ECHR, *Huvig v. France*, Judgment of 24 April 1990, Series A no. 176-B § 27; *Kruslin v. France*, Judgment of 24 April 1990, Series A no. 176-A § 36.
[20] ECHR, 26 April 1991, *Ezelin v. France*, series A, No. 152, § 56.
[21] ECHR, *Hasan & Chaush*, *op. cit.*, § 86.

criteria of being registered at this level. At the same time, the applicants, and many other churches, were not extended this privilege.

In *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, this Court stated:

> *"[I]f a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner."*[22]

The Court provided similar reasoning in *Koppi v. Austria*.[23] Demand for non-discriminatory treatment is also strengthened by the confessional neutrality of the state. The European Court's jurisprudence places a high regard on the *"State's duty of neutrality and impartiality"*.[24] By placing a number of similarly situated churches in the annex of the law, their placement in the annex not being based on objective criteria but rather on unfettered discretion on the part of the Hungarian government, while denying the same status to the applicants is *de facto* discrimination and a blatant violation of the Convention.

Second, the definition of religion proposed by the Amended Act fails to meet Convention standards of clarity and precision. A strong objection to this definition of religion is that it is overly-narrow. As written, it may prevent the registration of "non-structured faiths that focus on the spiritual and not the material world".[25]

Religion should be understood in a broad sense. The UN Human Rights Committee when explaining art. 18 of the International Covenant on Civil and Political Rights stated:

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[22] ECHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, para. 92.
[23] ECHR, *Koppi v. Austria*, 10 December 2009, no. 33001/03, para. 33.
[24] ECHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, 22 January 2009, no. 412/03, 35677/04, para. 120.
[25] *Hungary. Legislative Analysis of Final Religion Law.* The Institute on Religion and Public Policy. http://religionandpolicy.org/cms/index.php?option=com_content&task=view&id=7083&Itemid=327

> "The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions."[26]

The amended Church Act also runs afoul of Convention requirements by stating that churches must act in pursuance and in solidarity with State aims. Such a definition has a two-fold result: (a) The overly broad definition of what may constitute a legitimate aim of the state lacks any sense of forseeability and is overly vague.[27] Precisely stated, under the current definition a legitimate aim could mean anything the State wishes it to mean. (b) To promulgate into the law that churches must pursue aims of the state is clear violation of church autonomy and the principles of separation of church and state.[28]

(b) Legitimate Aim

In order for an interference with religious liberty and conscience not to be violative of the Convention, it must also pursue a legitimate aim. The Court notes that under Articles 9 § 2 of the Convention exceptions to freedom of religion and association must be narrowly interpreted, such that their enumeration is strictly exhaustive and their definition is necessarily restrictive.[29] Article 9 § 2 limits the legitimate aims pursued by the State in interference of Article 9 rights to public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Pursuant to the protections afforded by the Convention, even where interference with freedom of thought, conscience and religion does pursue a legitimate

[26] Human Rights Committee General Comment 22 (1993) on ICCPR art. 18, 20 July 1993, 48th Sess., para. 2.

[27] ECHR, 26 April 1991, *Ezelin v. France*, series A, No. 152, § 56.

[28] *See e.g.:* ECHR, Case of *Holy Synod of the Bulgarian Orthodox Church and Others (Metropolitan Inokentiy) v. Bulgaria*, application nos. 412/03 and 35677/04, judgment of 22 January 2009, § 103.

[29] See: *mutatis mutandis*, ECHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 38.

aim, where application of the interference is discriminatory in nature, then a violation of the Convention occurs.

First, and most obvious to our analysis, the Amended Church Act (T/10750) lists national security interests among the enumerated aims for restricting freedom of thought, conscience and religion. As this is not one of the specifically promulgated aims within Article 9 § 2 of the Convention, it immediately violates the rights of the applicant churches.

Furthermore, legitimate aims must be genuine and not used for purposes of effectuating discriminatory treatment among similarly situated churches. Different treatment is discriminatory, for the purposes of Article 14, if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized".[30] The aims of the Church Act are therefore delegitimized based on two facts. First, as discussed above, the existence of the Annex listing similarly situated churches to the applicants and exempting them for re-registration, is in blatant violation of Article 14 taken either in conjunction with Article 9 or Article 11. Second, the means by which the aims of the Church Act are pursued, lack proportionality and unduly interfere with the free exercise of the applicant churches. Let us turn to these elements in regard to whether the interferences inherent in the Church Act are necessary in a democratic society.

(c) Necessary in a democratic society

Any interference with the right to thought, conscience and religion and the right of religious association must be necessary in a democratic society. The European institutions have

[30] ECHR, *Case of Kosteski v. The Former Yugoslavia Republic of Macedonia*, application no. 55170/00, judgment of 13 April 2006, § 44. See also: ECHR, *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and ECHR, *Camp and Bourimi v. the Netherlands*, application no. 28369/95, judgment of 3 October 2000, § 37.

stated that the typical features of a democratic society are pluralism, tolerance and broadmindedness.[31] For such an interference to be necessary in a democratic society it must meet a pressing social need whilst at the same time remaining proportionate to the legitimate aim pursued.[32] The Court defines proportionality as being the achievement of a fair balance between various conflicting interests.[33] Any interference with freedom of thought, conscience and religion must be based on just reasons which are both relevant and sufficient.[34] This need must of course be concrete.[35]

Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable".[36] In the specific case of freedom of religion, the Court's task in order to determine the margin of appreciation in each case is to take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.[37] The restrictions imposed on freedom to manifest all of the rights inherent in freedom of religion call for very strict scrutiny by the Court.[38] In the exercise of its supervisory function the Court must consider the basis of the interference complained of with regard to the case as a whole.[39]

(i) Minimum Duration Requirement

[31] ECHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq*.
[32] ECHR, *Case of the Sunday Times v. United Kingdom*, app. no. 6538/74, at § 63 *et seq*. (Eur. Ct. H.R. Apr. 26, 1979).
[33] ECHR, 7 December 1976, *Handyside v. the United Kingdom*, Series A No. 24, § 49; ECHR, 22 October 1981, *Dudgeon v. the United Kingdom*, Series A No. 45, § 60.
[34] ECHR, 22 October 1981, *Dudgeon v. the United Kingdom*, Series A No. 45, § 51*ff*.
[35] *See*: *Article 9 of the European Convention of Human Rights: Freedom of Thought, Conscience and Religion*, Human Rights Files, No. 20, Council of Europe Publishing, 2005. p. 47.
[36] ECHR, *Case of Svyato-Mykhaylivska Parafiya v. Ukraine*, application no. 77703/01, judgment of 14 June 2007, § 116.
[37] ECHR, 25 May 1993, *Kokkinakis v. Greece*, *op. cit*., § 31; 13 December 2001, *Metropolitan Church of Besarabia and Others v. Moldova*, *op. cit.*, § 119.
[38] ECHR, 26 September 1996, *Manoussakis v. Greece*, *op. cit.*, § 44.
[39] ECHR, *Kokkinakis v. Greece*., *op. cit.*, § 47.

One of the more contentious elements of the Church act is that re-registration will be denied if the "organization previously registered as a church" does not fulfill the minimum duration requirement (20 years of existence). This may involve a large number of churches.

Such a requirement will interfere with the rights of Churches under article 9 and article 11 of the Convention that were already registered because it threatens their legal status. As such, this requirement must be considered in the light of whether it is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Applicants emphatically state that such a requirement is inappropriate because the organization will have already achieved the status of a registered Church once this requirement is implemented. The church was already examined by the state and the state provided the registration and the legal status of registered Church. The church is already familiar to the state, so no duration requirement is necessary. This situation would be similar to the situation in case *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*:

> "But [the waiting period] hardly appears justified in respect of religious groups with a long-standing existence internationally which are also long established in the country and therefore familiar to the competent authorities […].In respect of such a religious group, the authorities should be able to verify whether it fulfills the requirements of the relevant legislation within a considerably shorter period."[40]

(ii) Minimum Numbers Requirment

Under the Church Act, the minimum membership requirement has increased ten times without justification. Re-registration will be denied if the "organization previously registered as a church" (sec. 36 para. 1 of the Law) does not fulfill the new minimum membership requirements.

[40] ECHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, para. 97 – 98.

Clearly, this constitutes interference with rights guaranteed by Article 9 and Article 11 of the Convention. Again, it must be considered whether this interference is necessary in a democratic society and in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The applicants reasoning on this issue is similar to the issue of the minimum duration requirement. In particular, the religious group has already obtained a legal status as a registered Church. The purpose of re-registration is the elimination of organizations not pursuing religious aims. However, the minimum membership number bears no logical relationship to this purpose. As such, this condition for re-registration cannot be considered as necessary within the meaning of article 9 paragraph 2 of the Convention.

(iii) Effective Mode of Appeal

The "right to court" consists of three elements: (a) there must be a tribunal established by law; (b) the tribunal must have sufficiently broad jurisdiction to determine all aspects of the dispute; (c) the person (i.e. legal entity) involved must have access to the tribunal to have their dispute fairly adjudicated.[41]

The Contracting Parties do have a right, within their margin of appreciation, to limit access to courts under certain circumstance.[42] However, under no circumstances may this right be used to "injure the substance of the right."[43] Any limitations placed on access to court are

[41] Eur. Court H.R., *Golder* judgment of 21 February 1975, Series A No. 18, p. 18, § 36, *Deweer* judgment of 27 February 1980, Series A No. 35, pp. 24-25, §§48-49.

[42] See e.g. Eur. Court H.R., *Ashingdane* judgment of 28 May 1985, Series A No. 93, p. 24, §§111-113 [placing limitations on access to court by people of unsound mind]; Eur. Court H. R., *Monnell and Morris* judgment of 2 March 1987, Series A No. 115, p. 23, § 59 [measures to deter unmeritorious criminal appeals were recognized as pursuing a legitimate aim in the proper administration of justice].

[43] Eur. Court H.R., *Golder* judgment of 21 February 1975, Series A No. 18, p. 18, §§ 36-38.

under the supervisory authority of the Convention organs. Furthermore, any limitation on the right to access must have a legitimate aim and must be reasonably proportionate to that aim.[44]

It is clear from the Amended Church Act, to be imminently adopted by the Hungarian Parliament, that recourse to the Constitutional Court as a remedy does not fulfill the second element of the "right to court". The Constitutional Court does not have powers of specific performance or powers in equity. The role of the Hungarian Constitutional Court is to answer questions as to the legality of acts under the Hungarian Constitution. The inability of the Constitutional Court to order registration of a church to higher tier recognition clearly establishes a breach of the Convention. This Court has held time and again that in order for a remedy to be considered available, it must be sufficiently certain, not just in theory but in practice as well.[45] The failure of having a certain remedy also will mean that there is a lack of requisite effectiveness.[46]

(iv) Legal Personality

Denial of top-tier status to previously registered churches has repercussions which will at minimum place significant obstacles to the ongoing existence of these churches and in the worst case will lead to the extinction of a number of law abiding churches. Such a serious impairment of the Article 9 rights of the applicant churches must be reviewed with the strictest scrutiny and *de minimus* allowance for margin of appreciation.

The applicants had enjoyed legal personality as a fully protected church which gave certain rights with regard to the furtherance of its religious mission including the purchasing and

[44] *Ashingane, op. cit.*, § 57.

[45] *Van Droogenbroeck Case*, Judgment of 24 June 1982, Publ. E.C.H.R., Series A, Vol. 50, p. 30; *Case of De Jong, Baljet and van der Brink*, Judgment of 22 May 1984, Publ. E.C.H.R. Series A, vol. 77, p. 19; *Cullia Case*, Judgment of 22 February 1989, Publ. E.C.H.R. Series A, vol. 167, p. 16; *Case of Vernillo v. France*, Judgment of 20 February 1991, Publ. E.C.H.R., Series A, vol. 198, p. 12.

[46] *See e.g.* Application No. 299/57, Yearbook 2, pp. 192-193 (inter-State); Application No. 434/58, Yearbook 2, p. 374; Application No. 788/60, Yearbook 4, p. 168 (inter-State; Application No. 712/60, Yearbook 4, p. 400; Application No. 5006/71, Collection 39, p. 93.

safeguarding of property or the running of educational institutions. While the amended Church Act allows second-tier entities to continue to use the name "church" this is nonetheless a hollow gesture in light of the central elements of legal personality which are lost with the change of status. A parallel can be drawn to the facts in *Canea Catholic Church v. Greece* where a Roman Catholic church, despite being similarly situated to other churches and being known to the government, was denied the same legal personality rights as other faith communities:

> It is not for the Court to rule on the question whether personality in public law or personality in private law would be more appropriate for the applicant church or to encourage it or the Greek Government to take steps to have one or the other conferred. The Court does no more than note that the applicant church, which owns its land and buildings, has been prevented from taking legal proceedings to protect them, whereas the Orthodox Church or the Jewish community can do so in order to protect their own property without any formality or required procedure.[47]

In addition to a foundational change in the nature of its legal personality, a change in church status causes other significant impairments which should not be ignored by this Court. First, according to section 31 paragraph 1 and 2 of the Church Act, the government shall review agreements concluded with churches and may conclude agreements "with those organizations which perform public tasks but according to this Act do not qualify as churches". This provision must be interpreted to mean that the government will terminate any contract with a religious group, without an obligation to conclude a new one, if the religious group does not qualify as Church and changes it status to a Religious Civil Association.[48] While recourse can be made to the Constitutional Court, this remedy is illusory as no power of specific performance lies within the authority of the Constitutional Court. Second, the applicants will have significantly less

[47] ECHR, *Canea Catholic Church v. Greece*, Reports of Judgments and Decisions (RJD) 1997, p. 2843*ff.*, § 45.

[48] *Hungary. Legislative Analysis of Final Religion Law*. The Institute on Religion and Public Policy. http://religionandpolicy.org/cms/index.php?option=com_content&task=view&id=7083&Itemid=327.

access to financial support from the Hungarian government. Clearly, when the applicants are competing for funding with other civil society institutions and not with other churches, the availability of funding will be drastically decreased. Members of these very churches will then be asked to donate portions of their tax allowances to churches other than the one to which they belong which is non-sensical. Equally important is that some of the applicants' activities previously considered as not-for-profit will now be considered as for-profit activities.[49] This places the double burden of having far less access to funding and also being subject to taxation for activities it previously concluded without a tax burden. This change in legislation would be absurd if churches whose "re-registration" was refused (e.g. on the grounds that it was not carrying out religious-spiritual activity) were continuing to operate in another legal form (Civil Association) but with the same legal status.[50]

In *Sidiropoulos v. Greece,* the Court properly reasoned:

> That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned.[51]

Furthermore, the Court has recognized the particular importance attached to Article 11 as it relates to minorities within the Contracting State. Hence, in *Gorzelik and Others v. Poland* the Court stated:

> ...freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this

[49] *Id.*
[50] *Id.*
[51] ECHR, *Sidiropoulos v. Greece* (57/1997/841/1047), 10 July 1998 at para 40.

> identity". Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.[52]

Therefore, rather than accomplishing any legitimate aim, the Church Act furthers dubious aims by stifling freedom of religious association. Indeed among the most serious victims will be minority religious groups, including those associated with ethnicity and culture of minority groups. Beyond ethnic minorities, religious minorities themselves (of which all of the applicants are representative), have been crippled as a result of the new Church Act and face imminent dissolution as a result of the legal and financial consequences of losing their status. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.[53] Far from creating a fair balance, the Church Act has solidified the dominant majority position and put minority religious groups and churches in risk of extinction.

Conclusion

Controversy over the new Church Act of Hungary has abounded since it was introduced and rushed through parliament. This criticism has not occurred in a vacuum as clear violations of the Convention are evident in both the law and procedure related to the Act. In addition to the unfettered discretion which the government exercised in selecting certain churches to the Annex of the law allowing them to forgo re-registration, to unacceptably vague language in the act, unlawful motives being posited as legitimate aims and unacceptably strict requirements for membership thresholds and duration, the Church Act has interfered with freedom of religion in Hungary in a way which is neither necessary in a democratic society nor proportionate to any legitimate aim sought. Far

[52] App. no. 44158/98, 17 February 2004 at para 93.

[53] ECHR. *Case of Leyla Sahin v.* Turkey, judgment of 10 November 2005, application no. 44774/98, Para. 108.

more narrow and proportionate means were and are available to the Hungarian government to guarantee that fraudulent associations are not being set up to enjoy church status. The fact that the applicant churches were previously vetted by the government, registered and therefore known to the state clearly makes the new registration criteria superfluous and in violation of Article 9 and 11taken in conjunction with Article 14 and Protocol 1, Article 1.