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HUNGARY'S NEW CHURCH LAW IS WORSE THAN THE FIRST[1]

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In early December 2018, the Hungarian parliament passed a series of sweeping laws with major constitutional implications. The parliamentary session itself was something of a circus. In order to pass the law, Prime Minister Viktor Orbán's government was forced to disregard rules of the chamber that would have allowed the opposition to derail the legislation with parliamentary maneuvers. In protest, the opposition sounded bullhorns in Parliament while throwing confetti, before walking out. Perhaps the most significant law was one establishing a new, parallel system of courts which critics say give Orbán complete control of the judiciary. Less noted, but also significant, was a major revision of Hungary's law on the status of churches. The Orbán regime's record on religious freedom is less than sterling, and earlier versions of its church law did not fare well in the courts.

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First, Hungary's Constitutional Court struck down significant portions of the law in 2013; next the European Court of Human Rights found the law in breach of the European Convention. The newly passed amendments to the church law, which have effectively rewritten the law in its entirety, are putatively intended to redress the human rights violations occasioned by the earlier law. Not surprisingly, however, they fail to do that. Like a television soap opera that runs for years without much happening in the plot, the history of Hungary's church law is full of dramatic episodes that never bring change. As we shall see, the new church law, rather than redress the violations of religious freedom caused by the earlier law, simply repackages them. In what follows I will (1) retrace briefly the history of the Orbán regime's church law and its impacts; (2) discuss the content and conception of the new law; and (3) identify the enormous discrepancies between the concept of the law and its applications.

1. History and Impact of the First Church Law

Prior to the electoral landslide that brought the Fidesz party to power in 2010, churches in Hungary were registered according to a 1990 law that treated all groups equally (churches being the common name in Hungarian for religious communities of any faith). The 1990 law was replaced in 2011 with a radically different law called Act CCVI of 2011. Act CCVI deregistered approximately 250 to 300 churches, while preserving the legal status of a mere fourteen churches. The Act stipulated, further, that in the future only Parliament, through a two-thirds vote, could bestow legal recognition on churches. These draconian measures provoked an international outcry, and responding to pressure, Parliament quickly expanded the list of registered churches to thirty-two. That, of course, still left hundreds of religious communities without legal status.

A year later, in what at the time appeared a consequential decision, Hungary's Constitutional Court vacated the portions of the law responsible for deregistration. The Court also expressed grave reservations about the power given to Parliament to determine church status. Lastly, the Court indicated that deregistered churches should be placed back on the registry of recognized churches by the appropriate government minister (AB decision IV/02352/2012, points 215-216). The appropriate government minister did not, however, take up the Court's suggestion. Instead, Parliament amended the constitution to allow Parliament to recognize churches. It also amended the church law to create a two-tiered system of recognition for religious communities. The top tier, "recognized" or "incorporated" churches (*bevett egyház*), enjoyed substantial rights and privileges. The bottom tier, "organizations conducting religious activity" (*vallási tevékenységet végző szervezet*), had significantly fewer rights. Indeed, they were denied aspects of the right of religious freedom.

In 2014, the European Court of Human Rights ruled in *Magyar Keresztény Mennonita Egyház and others v. Hungary,* that Hungary's church law breached the European Convention by violating the right of religious freedom. The Strasbourg court objected both to the process of recognizing churches through parliamentary vote and to the deregistration procedure. The court also singled out for censure discriminatory provisions in the law related to Hungary's church tax. In Hungary, taxpayers can donate 1% of their income tax to a Recognized Church. Deregistered churches, not being churches, have not been permitted to collect church tax. Since the church tax supports faith-related activities, permitting some religious communities to collect church tax while preventing others from doing so amounts to religious discrimination.

The severity of the European Court decision appeared to catch the Hungarians by surprise. Government legal theories notwithstanding, *Magyar Keresztény Egyház v Hungary*

made clear that a major overhaul of the church law was needed. A year later, in 2015, the government submitted a new draft law to Parliament. The bill contained a three-tiered classification system, consisting of Religious Associations (*vallási egyesület*), Listed Churches (*nyilvántartásba vett egyház*), and Registered Churches *(bejegyzett egyház*). Membership in each classification would be determined by courts according to objective criteria. At the same time, the bill included provisions for so-called cooperative agreements between the state and specially selected religious communities.

Although written with more care than the original church law, the 2015 bill would not have resolved the human right violations. By establishing three tiers registered by courts, the legislator clearly aimed to redress objections about Parliament's power to determine churches; but at the same time, the bill opened up a backdoor for "cooperative agreements" with the churches it preferred. This backdoor arrangement preserved the discriminatory features of the original law. The 2015 bill also failed to rectify the problem with the church tax, and it did not remedy the injuries caused by deregistration. Had the bill passed into law, it would have been immediately challenged in court. No opposition political party was willing to lend support, and because Fidesz no longer held a supermajority, the bill failed. After that, the government took no steps to fix the church law until it won a supermajority again in 2018. In 2017, Hungary's Constitutional Court had ruled that preventing religious associations from collecting the church tax was unconstitutional, and it directed Parliament to address the situation by the end of that year. But that ruling, like so many others, was ignored.

Meanwhile, the protracted years with no legal redress were exacting a heavy toll on Hungary's deregistered churches. "Deregistration," in fact, is a euphemism to describe what happened to them. Deregistration did not mean their names were simply removed from a registry

of official churches. Deregistration meant they were stripped of legal personality and placed in a legal no-man's land in which they had no rights. According to OSCE/ODIHR *Guidelines on the Legal Personality of Religious or Belief Communities,* deregistration is an extreme measure, to be taken only as a last resort in response to "grave and repeated violations endangering public order" (*Guidelines* 2014, paragraph 31). Hungarian deregistration was never targeted against criminal groups; it was a blanket procedure integral to the implementation of the law. Consequently, some deregistered churches were forced to shut down schools or abandon charitable work; others were evicted from rental properties after having their leases abrogated; others were harassed by the tax authority. Most egregious of all, deregistered churches were notified they would face "winding down" procedures, that is, liquidation, unless they applied for legal status as a civil association.

Confronting the existential threat of liquidation, deregistered churches made different choices. Some chose to register as civil associations, although doing so compromised their religious conscience. Most religions believe their organizational structure is theologically mandated (e.g., bishops, priests, sensei, etc.). Civil associations, however, are required to have a particular organizational structure, with an executive board, a president, and voting rights for members. Thus deregistered churches converting to civil associations were forced to adopt an organizational structure dictated by the state.

Another set of churches chose to challenge deregistration in the courts. Although their claims were vindicated by Hungary's Constitutional Court and the European Court of Human Rights, Orbán's government simply ignored the rulings. Admittedly, the religious organizations that took their case to Strasbourg received financial compensation for losses incurred by deregistration, but the cause of the injury (namely, deregistration) has never been rectified; thus

the injury continues. Moreover, the complainants at Strasbourg could only receive compensation for harms incurred up to the time of the ruling. That ruling was more than four years ago. Despite having won their day in court, a number of deregistered groups have been forced to convert to civil associations anyway.

A third group of deregistered churches refused to restructure as civil associations for reasons of religious conscience, but also lacked the resources and wherewithal to fight deregistration in court. Some unknown percentage of these churches have been forcibly liquidated. According to the US Department of State's *International Religious Freedom Reports*, 73 religious communities in Hungary were "terminated" between 2014 and 2016. The reports provide no information about the reasons for termination, and repeated inquiries by this author with the State Department have not yielded more information. One cannot assume that all 73 terminations involved forcible liquidation. Small churches may also shut down for natural reasons, like the death of a pastor. But neither should one forget that the threat of liquidation was part of the original implementation of the church law.

Some time ago I was contacted by a human rights lawyer working on an asylum case for a Hungarian refugee. The lawyer's client belonged to a religious community which, for reasons of religious conscience, had refused to restructure as a civil association. As a result, the church was deprived of its place of worship and forcibly liquidated. After verifying the truth of the story by reading the liquidation documents myself, I asked the client if I might make the story public. The client refused, citing fears of retaliation. Like much that is ugly in Hungary, the full story of the country's deregistered religious communities remains hidden from view and untold.

2. The New Church Law as a Legal Conception

The new church law introduces a four tiered classification system for religious groups: Religious Associations (*vallási egyesület*), Listed Churches (*nyilvántartásba vett egyház*), Registered Churches (*bejegyzett egyház*), and Recognized Churches (*bevett egyház*). The rationale for the tiers appears to be based on size. Only ten members are needed to register a Religious Association. Listed Churches need to have received church tax from at least 1000 individuals; Registered Churches need to have received church tax from at least 4000 people. Recognized Churches consists of Registered Churches with which the government has established "comprehensive agreements" bestowing special rights and benefits. Religious communities in the bottom three tiers are accorded a few rights they were denied before. For example, the law grants them autonomy to determine their organizational structure, a provision which, had it been in effect earlier, would probably have prevented the liquidation of numerous deregistered churches. In addition, religious communities from every tier will be allowed to collect the church tax, a clear accommodation to the European Court.

In creating a tiered system, the Hungarian law gives the appearance of being modelled on other tiered systems in Europe, perhaps those in Germany or Austria, which conform to European norms. Those norms require that the state adopt an impartial and neutral posture toward religion, but do not necessarily preclude differential treatment. According to OSCE/ODIHR *Guidelines on the Legal Personality of Religious or Belief Communities*, "The State may choose to grant certain *privileges* to religious or belief communities," provided that, "they are granted and implemented in a non-discriminatory manner," and that "there is an objective and reasonable justification for the difference in treatment." (*Guidelines* 2014, paragraphs 38, 39, 40). Thus, after a superficial read, the Hungarian church law might appear

typical for Central Europe. Closer examination reveals this is anything but the case. The different tiers in the Hungarian law disguise a thoroughly arbitrary treatment of religious communities. As compared to the old, the new law actually expands the role for government discretion in the treatment of religion. In this respect it is arguably more discriminatory than before.

The outsized space for government discretion manifests itself, first, in the manner in which religious groups acquire membership in the top tier. For the bottom three tiers membership is determined by courts in accordance with objective criteria. That might appear to address objections about the power given Parliament to assign church status. However, Parliament's power remains in relation to the top tier. Recognized Churches consists of Registered Churches that have entered into "comprehensive cooperation agreements" with the state. These "comprehensive agreements" include state subsidy for both "public interest" and "faith-based" activities, and are of unlimited duration. The decision to enter into a "comprehensive agreement" is made by the government, which must refer the "comprehensive agreement" to Parliament for a two-thirds vote, whereupon the church law is amended to include the new church among the list of Recognized Churches (2011. CCVI törvény 9/G § 3, as amended in 2018). The new law thus preserves Parliament's political prerogatives in relation to Recognized Churches, despite the fact that this top tier constitutes a constitutionally distinct class of churches with substantially greater rights and privileges than any other tier.

Second, the new law extends government's discretionary power to pick favorites into the lower tiers. The government may now also enter into "agreements" with groups in the bottom tiers. These agreements are not "comprehensive," and thus do not appear to require approval of Parliament. Nevertheless, they can include substantial state subsidies for both "public interest"

and “faith-based” activities. This means that even within a single tier the state has discretionary power to treat religious groups differently.

Such wide ranging discretionary power raises an issue. If the state can discriminate significantly among groups within a single tier, that tier would seem to lose its constitutional justification. To be justified, tiered systems must distinguish between religious communities on the basis of objective characteristics that warrant ascribing them different constitutional status. If groups within a single tier enjoy substantially different privileges, and those privileges are bestowed on the basis of objective characteristics, then the tier no longer classifies groups on the basis of their relevant features. Indeed, the tier no longer corresponds to the legal characteristics of the groups belonging to it.

To make this point clearer: Tiers are a constitutional mechanism for distributing different rights and privileges to different kinds of religious groups. In order to be constitutionally justified, those tiers must not only identify descriptive differences between groups belonging to different tiers (size, for example); they must also identify different rights and privileges enjoyed by each tier. If the rights and privileges enjoyed by the tiers are identical, then the descriptive differences between groups belonging to different tiers are constitutionally irrelevant. In other words, if the differences between tiers do not merit different rights and privileges, then the tiers themselves are not warranted.

One of the most striking features of the new Hungarian church law is that the bottom three tiers differ hardly at all in terms of rights and privileges. That raises a question about their constitutional justification. Why are there three lower tiers instead of just one? In order to be justified, the bottom three tiers must ascribe different rights and privileges.

Let us, for the moment, adopt a sympathetic approach to the church law. The strongest justification for establishing separate tiers may relate to the church tax. The new law permits religious communities in every tier to collect church tax. However, in Hungary the state contributes to the church tax by adding "supplemental" subsidy on top of donations from taxpayers. According to the law, Religious Associations (the lowest tier) will not receive this "supplemental," while all other tiers will. Since the "supplemental" attaches to the church tax, which explicitly supports religious activity, denying the "supplemental" to one class of believers is religious discrimination. Be that as it may, one might concede that this particular limitation has been written into the law to guard against financial abuse. Because establishing a Religious Association takes only ten people, a group of compatriots could plausibly "found" a religious community, donate 1% of their income tax to it, and collect state subsidy. Although denying "supplemental" to an entire tier may not be the best way to protect against this abuse, let us, for the sake of argument, concede that on this point the legislator has a legitimate intention. Even so, that intention can only justify distinguishing between Religious Associations and one other tier. A rationale for the tiers based on church tax generates two, rather than four categories. If, again for the sake of argument, we temporarily grant that the government has good reasons to create a class of Recognized Churches, that concession only get us three tiers. The distinction between Listed and Registered Churches cannot be justified on the basis of church tax "supplemental," since both Listed and Registered Churches receive the "supplemental."

Another possible rationale for the lower tiers might appeal to differences between the sorts of "agreements" the state can make with religious communities in each tier. According to the law, Religious Associations may enter into agreements for a term of up to five years; Listed Churches may enter agreements for a term up to ten years, and Registered Churches for a term

up to fifteen years. This leaves the impression that membership in a higher tier entitles a group to longer, better agreements. But the agreements described in the law need not extend the full length of the term, and, in any case, they can be renewed indefinitely. That means, in practice, that the government could make a five-year agreement with a Religious Association that renews indefinitely, while simultaneously making a three-year agreement with a Registered Church that will never renew. The character of the agreements is determined at the discretion of the government, not by membership in a tier. Hence the different tiers cannot be justified by the framework provided for church-state agreements within each tier.

The most transparent explanation for the multiple tiers, in fact, is that they express an intention to discriminate. The tiers function as a series of hurdles preventing deregistered churches from making a claim on the status of Recognized Church. Strong evidence for this interpretation is found in the law's arbitrary and inequitable transitional provisions.

3. The New Church Law as a Legal Fiction

Insofar as the purpose of the church law is to establish a rational order over Hungary's religious landscape, we should expect the religious landscape created by the law to match its conception. That is, we should expect the legal classification of religious groups to correspond to the description of the four tiers set down in the law. Nothing, however, could be further from the truth. A legal scholar studying the text of the church law without empirical knowledge of Hungarian society would learn precisely nothing about Hungary's actual religious landscape. An enormous discrepancy exists between conception and practice, a discrepancy that originates in the law's transitional provisions. The manner set forth in those provisions for implementing the new law completely ignores the law's own constitutional conception.

First, the new law repeats the deregistration procedure ruled unconstitutional by the Constitutional Court. The Court, remember, vacated the portions of the original church law that had deregistered churches. The new law, however, includes a transitional provision stipulating that the churches identified in the vacated portion of the original law shall be classified as Religious Associations (2011. CCVI törvény 33/A § 2, as amended in 2018). This amounts to a second deregistration, in brazen disregard of the Constitutional Court.

Even if, in a willing suspension of disbelief, someone watching this legal theater should pretend that deregistration becomes constitutional on the second try, that person would still need to explain why all the deregistered churches have been placed in the bottom tier when many of them meet the criteria for Listed or Registered Churches. According to the law, every deregistered church seeking to move into a higher tier must apply for admission starting out as a Religious Association. That might not seem overly problematic, given that admission into the next two tiers is determined by courts on the basis of objective criteria. Except that those "objective criteria" include several unfulfillable conditions that render advancement into the higher tiers nigh impossible.

To understand this requires working through a number of perplexing conditions for membership into the middle tiers. To become a Listed Church a religious community must have been operating in Hungary for at least five years or be affiliated with an international religious organization operating for 100 years. In addition, the religious association *must have received church tax from at least 1000 individuals in three preceding years* (2011. CCVI törvény 9/D § 1a, as amended in 2018). This latter condition, however, cannot be met by any deregistered church, because all deregistered churches have been prevented from collecting church tax since 2011 – the ruling of the Constitutional Court, notwithstanding. A similar condition applies to

religious communities seeking to become Registered Churches, which need to have *received church tax from at least 4000 individuals in the previous five years* (2011. CCVI törvény 9/E § 1a, as amended in 2018). In short, to move out of the bottom tier into which they have been placed by deregistration, deregistered churches must meet conditions they cannot meet because they have been deregistered.

If meeting this incoherent condition should prove too burdensome, the law does provide deregistered churches another avenue for advancing into the middle tiers. If a deregistered church officially declares that it will not accept financial support, "from budgetary sub-systems, EU funds or programs financed on the basis of international agreements, whether in the context of tender or not, for the purposes of its faith-based activities or public interest activities, and special decisions," it need not certify receipt of church tax (2011. CCVI törvény 9/D. § 2c, and 9/E. § 2c). In plain English, provided a deregistered church meets the conditions of size and duration of operation, it can move into the higher tiers immediately if only it *abjures every conceivable means of financial support*.

This highly perplexing condition is also thoroughly discriminatory. To require religious groups to forgo economic privileges in order to receive specific legal status violates international norms for religious freedom. According to OSCE/ODIHR guidelines, "measures discriminating against [non-traditional religions and nonbelievers], such as measures restricting eligibility for government service or according economic privileges to members of the state religion or predominant religion...are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection." (*Guidelines* 2014, paragraph 41).

Why would a law intended to correct violations of the European Convention include a new, arguably more egregious, violation of that very same Convention? The explanation for this "perplexing condition" supplied by the Hungarian government clearly dissembles:

> the legislator specifies additional rules applicable to religious communities with a legal personality that do not wish to receive aid for their faith-based activities or public purpose activities from budgetary sub-systems, EU funds or from programs financed pursuant to an international agreement, whether in the context of a tender or not, on the basis of a special decision. These communities are eligible to be classified under a higher category based on the certified number of their members – a thousand members in the case of Listed and ten thousand members in the case of Registered Churches - instead of certifying donations from personal income tax. This allows religious communities that do not wish to cooperate with the state the option of obtaining church status. (*Indokolás* submtted with the draft law in November 2018).

According to the government, the "perplexing condition" allows Religious Associations that "do not wish" to receive financial support to move into a higher tier. However, nothing about membership in the higher tiers requires churches to receive financial support. The only reason these groups need to demonstrate they have received financial support in the past is because the government established this as a condition (in the form of the church tax) for movement into the upper tiers. First the church law establishes a condition for entrance into the upper tiers that cannot be met (receipt of the church tax), but, second, the law exempts deregistered churches from the first condition provided they forswear all sources of financial support. Contrary to what the government avers, the "perplexing condition" does not create an opportunity for religious groups that do "not wish" to receive financial support to move into the upper tiers; it *requires* religious groups to renounce financial support in order to move into the upper tiers. Indeed, to move into a higher tier on the terms of the "perplexing condition," a religious community would need to renounce even manna from heaven.

This combination of conditions is simply too Kafkaesque to be sustained by any authentic legal rationale. The most plausible explanation for the "perplexing condition" is that it was

written exclusively with the aim of preventing Gábor Iványi's church from acquiring status as a Registered Church. The Orbán regime is well known for passing legislation directed against specific groups. It passed "Lex CEU," for example, to drive the CEU out of Hungary, and passed "Lex NGO" to restrict the activities of NGO's. In the same way, provisions in the church law are clearly directed against Gábor Iványi's church, fully meriting the sobriquet Lex Iványi.

Iványi established a reputation as a dissident back in the communist period. Today he is one of Viktor Orbán's most prominent critics. His church, the Hungarian Evangelical Fellowship, operates numerous schools for Roma and disabled children throughout the country, and also maintains homeless shelters. Hungarian Evangelical Fellowship also appears to be the only deregistered church in Hungary capable of meeting the conditions required of a Registered Church. It has been operating in Hungary for more than 20 years, and demonstrated a membership of 10,000 as recently as 2013. However, since it has been prevented from collecting church tax for more than five years, it cannot certify tax donations. Thus to acquire status as a Registered Church, Hungarian Evangelical Fellowship would need to renounce all financial support. But, of course, no human organization, not even a church, can operate without financial support. A law that demands such from religious groups is blatantly cynical and unjust.

Furthermore, while the transitional provisions impose impossible burdens on deregistered churches, they exempt currently Recognized Churches from any transitional burdens at all. Recognized Churches simply carry their current legal status over into the new law. This is so even though a majority of Recognized Churches do not appear to meet the conditions necessary to acquire status as a Registered Church. According to data provided by the state tax authority, only thirteen of thirty-two Recognized Churches received church tax from more than 4000 people in 2016 (*NÁV kimutatás a 2016. adóévi szja 1%-ának*). Based on the conditions

enumerated in the new law, they would not qualify as Registered Churches unless they can demonstrate 10,000 members. Yet if they do have 10,000 members, why were they not asked to renounce all means of financial support before advancing to the highest tier?

As if this grossly inconsistent application of the law were not enough, the transitional provisions include at least one more whopper. They grant the rights and privileges of a Recognized Church to the Sovereign Military Order of Malta (2011. CCVI törvény 38/A, as amended in 2018). The justification for this stunning provision is completely unclear. Presumably as a Roman Catholic organization, the Order of Malta can receive state subsidies through its affiliation with the Catholic Church. The transitional provision suggests, however, that the state will henceforth treat the Order of Malta as an entity with independent legal personality, as, in effect, a new Recognized Church. Yet because the Order of Malta received this elevated status through a transitional provision, it was exempted from the conditions laid down in the law for advancing through the tiers. One possible explanation for this exemption might be that, because of the Lex Iványi provision, the Order of Malta would not have been able to move through the tiers successfully. The new church law thus needed a Lex Malta provision to exempt the Order of Malta from the Lex Iványi provision.

Conclusion

To sum up the obvious, Hungary's new church law treats religious communities in a completely arbitrary manner by assigning rights and privileges on the basis of state discretion. The transitional provisions reproduce the legal situation created by the first law, and hence repeat rather than correct the human rights violations identified by the European Court of Human Rights. Churches deregistered in 2012 will be treated as Religious Associations, regardless of

their objective characteristics, while churches which kept their legal status in 2012 will continue on as Recognized Churches, regardless of their objective characteristics. The middle tiers enumerated in the law will be empty, and the actual classification of churches in Hungary will bear no resemblance to the legal conception set forth in the law. The church law itself describes a land of make believe, one that disguises the government's enormously arbitrary treatment of religious groups. Like its predecessor, the new church law will certainly be challenged in the courts, and one easily imagines it will again be found to violate the right of religious freedom. Much less clear, however, is whether any of this matters. The Orbán regime has been flaunting European norms and the rule of law for close to a decade. Those in Hungary bearing the brunt of the regime's oppressive tactics may soon lose their war of attrition.

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