2002/11/27 - PL. ÚS 6/02: RELIGIOUS FREEDOM

HEADNOTES

The Czech Republic is founded on the principle of a secular state. Under Art. 2 para. 1 of the Charter, the state is founded on democratic values and "may not be bound either by an exclusive ideology or by a particular religious faith." Thus, it is Republic must accept and tolerate religious pluralism, meaning that, above all, it must not discriminate against, or, on the contrary, give unjustified advantage to, any particular religious faith. It also follows from the cited article that the state must be separate from specific religions.

The principle of religious pluralism and tolerance is also implemented in Art. 15 para. 1 and in Art. 16 of the Charter. Art. 15 para. 1 of the Charter provides that freedom of thought, conscience and religious faith is guaranteed, and that everyone has the right to change his religion or faith or to be non-denominational. Under Art. 16 of the Charter, everyone has the right to freely manifest his religion or faith, either alone or in community with others, in private or in public, through worship, teaching, practice or observance (para. 1). Churches and religious societies govern their own affairs; in particular they establish their own governing bodies, ordain their clergy, and found religious orders and other church institutions independently of state authorities (para. 2). The exercise of these rights may be limited by law, in the case of a measure which is necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others (para. 4). As the Constitutional Court has already stated in the past, unlike the freedom of conscience and religious faith, for the restriction of which the Charter does not expressly provide any possible conditions, the freedom to practice a religion or faith can be limited by statute for the reasons cited. However, this means the ability to limit the exercise of these rights, not of their regulation by the state (decision of 8 October 1998 file no. IV. ÚS 171/97, the Constitutional Court: Collection of Decisions, vol. 12, p. 457 et seq).
It is evident from this that religious freedom can fundamentally be defined primarily as a forum internum (Art. 15 para. 1 of the Charter), i.e. as the freedom of everyone to profess a particular religion or faith, in which third parties, and in particular the state power can not interfere. This is a status negativus, or libertatis (G. Jellinek), a typical delineation of the area of an individual's liberty in which the state power may not enter. However, at the same time it is evident that limiting religious freedom to a forum internum is insufficient, because the very defining element of freedom of religion is the right of everyone to externally express his religion, naturally while observing the limiting safeguards provided in Art. 16 para. 4 of the Charter.

The foregoing also directly gives rise to the principle of autonomy of churches and religious societies, consisting primarily of the rule that the state may not interfere in the activities of churches and religious societies, and if the activities of churches are limited to internal affairs (in particular organizational division), in principle it is not possible to review these measures before state courts (The German Constitutional Court has ruled analogously, BVerfGE 18/385).

Finally, the Constitutional Court states that religious freedom is not guaranteed only at the level of domestic law (that is, primarily the cited provisions of the Charter), but also enjoys international law protection (e.g. Art. 18 the Covenant and Art. 9 of the Convention). In this regard, the Constitutional Court emphasizes that the Czech Republic is, under Art. 1 para. 1 of the Constitution, a democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and the citizen. In this case, the cited principle indicates, above all, that the Constitutional Court must take as its starting point the domestic or international law framework which provides the higher standard of protection for fundamental rights and freedoms. If, in this case, the domestic framework contained in the Charter provides greater protection of rights than is provided by the cited provisions of international treaties, for that reason alone it must be applied first.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court decided, in the matter of a petition from a group of 21 senators to annul Act no. 3/2002 Coll., on Freedom of Religion and the Status of Churches and Religious Societies and Amending Certain Acts (the Act on Churches and Religious Societies), or to annul certain provisions of that Act, as follows:

I. The provision of § 6 para. 2, § 21 para. 1 let. b), § 27 para. 5, second sentence in the part "and the profit earned may be used only to meet the aims of the activities of a church or religious society" and § 28 para. 5 of Act no. 3/2002 Coll., on Freedom of Religion and the Status of Churches and Religious Societies and Amending Certain Acts (the Act on Churches and Religious Societies), are annulled as of the day this finding is promulgated in the Collection of Laws.

II. The other parts of the petition are denied.

REASONING

On 13 February 2002 the Constitutional Court received a petition from a group of 21 senators of the Senate of the Parliament of the Czech Republic to annul Act no. 3/2002

Coll., on Freedom of Religion and the Status of Churches and Religious Societies and Amending Certain Acts (the Act on Churches and Religious Societies) - ("Act no. 3/2002 Coll."). If the Constitutional Court does not grant this petition, the group of senators proposes the annulment of certain provisions of Act no. 3/2002 Coll., either § 6 para. 1 a nd2, § 11, § 16, § 20, § 21, § 22 para. 1 let. d), § 26, § 27 para. 4 and 5, § 28 para. 4 and 5 and § 29 in the part "and the Register of religious legal entities" ("wider annulment"), or – as the case may be, without postponing the executability of the annulment verdict - § 6 para. 1, § 6 para. 2 in the part "for purposes of organization, profession and propagation of religious faith as legal entities," § 11 para. 1 let. b) and c), § 16 para. 2 to 5, § 20 para.1 let. f), § 21 para. 1 let. a) and b), § 22 para. 1 let. d), § 26 para. 1 let. b) to d), § 26 para. 2, 4 and 5, § 27 para. 4 and 5, § 28 para. 4 and 5 and § 29 in the part "and the Register of religious legal entities" ("narrower annulment"). The petitioners believe that the contested Act as a whole, or its individual provisions, as cited, are inconsistent with Art. 4 para. 4, Art. 15 a Art. 16 of the Charter of Fundamental Rights and Freedoms (the "Charter"), Art. 18 of the International Covenant on Civil and Political Rights (the "Covenant"), Art. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") and Art. 1 of the Constitution of the Czech Republic (the "Constitution").

The petitioners first point to the fact that, compared to the existing legal framework, Act no. 3/2002 Coll. lowers the standard for protection of religious freedom and brings excessive state authority into citizens' private sphere. When the draft act was being prepared a number of reservations arose on the part of political and church entities, and the passage of the act in the legislative process did not go smoothly, as it was rejected by the Senate, and after being passed again by the Chamber of Deputies it was returned to the Chamber by the president of the republic. In § 4 para. 3 the contested Act inaccurately paraphrases Art. 16 para. 1 of the Charter, also gives a reference to the Charter in a footnote, and provides no vacatio legis, although it considerably changes the obligations and authorization of the state administration, as well as the legal status of a number of entities. Moreover, this change breaks legal continuity, which could have unfavorable consequences for these entities.

The petitioners base their petition on the fact that, under Art. 15 and 16 of the Charter, the state can not limit freedom of religion or interfere in it if the exercise of that freedom does not endanger the rights of others, but must only protect it, which is a typical example of the concept of status negativus , where the state need not aid the exercise of these rights by positive activity, but may not interfere in it. It follows from this that the state basically may place legal demands on churches or religious societies (further also referred to only as "churches") only if the churches or religious societies are, at the same time, receiving something from the state. However, the contested Act is not fully based on this concept, because it does not respect the independent position of churches, which is different from that of other legal entities in private law, in view of historical reasons and the society-wide significance of churches and religious societies, whose activities can not be reduced to actions related to the professing of a particular faith, because these institutions also fill a number of other roles, which are inalienable and irreplaceable from the viewpoint of the state and the society, even that part of society which is not part of them. Therefore, according to the petitioners, the state should grant churches and religious societies a certain privileged status, which, however, it does not do; on the

contrary, it disadvantages them compared to other legal entities. The effective activities of churches and religious societies requires various organizational forms, which the concept of informal associations professing a common faith does not supply. In the petitioners' opinion, these institutions should have the right to create various organizations with status as a legal person, as indicated by Art. 16 para. 2 of the Charter, under which churches and religious societies can found church institutions, which are granted legal personality status by religious law, according to its own rules, and not according to the rules specified by the state. The state can not specify when a church acquires legal personality status or which religious institutions can have legal person status granted to them by church and religious societies and which ones can not. However, § 6 para. 1 of Act no. 3/2002 Coll. expressly states that religious legal entities become legal entities by registration under this Act (or analogously under § 28 of Act no. 3/2002 Coll. through the legal fiction that they were registered). Even if we speak of record-keeping of these legal entities, in fact they are being registered, as a register of religious legal entities is being established. According to the petitioners, it is certainly not permissible for the state to be able to remove legal person status from these legal entities, as is made possible by § 26 para. 2 of Act no. 3/2002 Coll. Likewise, one can not agree that our state would have the authority to grant legal person status to churches duly formed abroad, because that framework is much stricter than the framework for the conduct of business by foreign entrepreneurs in the Czech Republic. This leads to a violation of Art. 16 para. 2 of the Charter, because the act makes the creation of religious legal entities subject to a decision by a state body, that is, it limits freedom of religion far beyond the constitutionally permitted framework.

The group of Senators argues further that it is evident from the wording and purpose of Art. 16 of the Charter that the freedom of churches and religious societies to create religious institutions can not be reduced only to founding institutions which do not have legal person status, but applies to institutions endowed with the capacity for legal acts, which arises from the mission of these institutions, whose significance can not be compared to that of ordinary private law associations. In view of this fact, it is puzzling to compare Act no. 3/2002 Coll. with Act no. 83/1990 Coll., on Association of Citizens, as amended by later regulations, which permits civic associations – unlike churches and religious societies – to found "organizational units" as subsidiary legal entities which have their own legal person status, even though it is dependent on the legal existence of the association. Although Art. 16 para. 4 of the Charter makes it possible to restrict churches and religious societies in the creation of religious institutions, Act no. 3/2002 Coll. does not observe the constitutional safeguards provided in that article, because if the legal creation of religious institutions were not subject to record keeping (registration), this could not endanger the protection of public safety and order, the health and morals or the rights and freedoms of others. For that reason the contested framework is a violation of the ban on arbitrariness on the part of state power. It does not observe the principle of the state exercising self-restraint in interfering in the freedom of religion, under which, when fundamental rights and freedoms are limited, their essence and significance must be preserved and limitations may not be misused for purposes other than those for which they were provided (Art. 4 para. 4 of the Charter).

The petitioners also contest § 6 para. 2 of Act no. 3/2002 Coll., which restricts churches and religious societies to establish religious legal entities only for purposes of organization, profession and propagation of religious faith, because this framework does not take into account a whole series of activities, such as charitable, humanitarian, health, and other activities which these legal entities have heretofore performed. Limiting the scope of their activities basically excludes churches from society. The group of senators also considers unconstitutional the legal framework contained in § 26 para. 4 of Act no. 3/2002 Coll., under which the obligations of a "religious legal entity" are to be guaranteed by the church or religious society which proposed its entry in the records, because it markedly disadvantages the creation of these entities in comparison to the founding legal entities under the Commercial Code, as well as the founding of civic associations' derivative legal entities.

The petitioners also point to § 27 para. 4 and 5 of Act no. 3/2002 Coll., which restricts the autonomy of churches and religious societies guaranteed by Art. 16 para. 2 of the Charter. In addition, this provision is internally inconsistent, because under § 27 para. 5 of Act no. 3/2002 Coll. churches and religious societies may conduct business, but at the same time this provision limits the conduct of business, because it provides that the profits earned may only be used to fulfill the aims of the activities of a churches or religious society. All depreciated investment assets can be acquired only from the profits of the legal entity, and in order for a church to be able to acquire assets for the conduct of business, it must acquire them from its profits. Thus, it can not continue to conduct business and acquire production materials, when it is forced to use all its profits to fulfill its aims and not for the further conduct of business.

Finally, the group of senators also considers unconstitutional the legal framework of § 11 of Act no. 3/2002 Coll., which makes the recognition of a church or religious society's authorization to exercise special rights subject to the requirement that it must duly fulfill its obligations toward the state and third parties and publish annual reports, which de facto introduces state supervision of the private financing of churches and religious societies, including at a time when they are not receiving any state contributions. Concerning § 21 para. 1 let. a) a b) of Act no. 3/2002 Coll., which specifies the conditions for annulling this authorization if churches in a serious manner or repeatedly violate their obligations toward the state or other parties or if they do not publish an annual report every year, the petitioners consider that regulation to be a violation of the principle of proportionality, because, although the state may restrict the financing of churches and religious societies for financial debts, it can not forbid the exercise of other rights (e.g. to teach religion or conclude marriages) or annul their legal person status. In addition, the cited regulation creates an opportunity for arbitrariness in the decision making of the relevant body, because to open proceedings in these matters it is sufficient for an administrative body to claim that some obligations exist, without them being, for example, recognized with legal effect by a court. This regulation discriminates against churches and religious societies compared to business entities and civic associations. This also applies to § 22 para. 1 let. d) of Act no. 3/2002 Coll., under which the ministry shall open proceedings to annul registration if, for a period of more than 2 years, governing bodies were not established, or their term of office ended and new ones were not established, because the Commercial and Civil Codes do not establish any penalties for such violations. For these reasons, the group of senators proposes annulment of the entire Act no. 3/2002

Coll., in view of its overall concept, which limits rights guaranteed by supra-statutory norms and reduces the standard of protection of religious freedom compared to the previous framework. If the Constitutional Court does not grant this petition, the group of senators proposes annulment of the incriminated provisions of Act no.3/2002 Coll.

II.

The Constitutional Court found that the submitted petition meets all legal procedural requirements and prerequisites, and nothing prevents it from discussing and deciding the matter. Therefore, under § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, ("Act no. 182/1993 Coll.") it called on the parties to the proceedings – the Chamber of Deputies and the Senate of the Parliament of the Czech Republic – to submit position statements concerning the petition.

The Constitutional Court also requested a position statement from the Ministry of Culture.

The Constitutional Court also requested a position statement from the Ecumenical Council of Churches in the Czech Republic and a position statement from the Czech Conference of Bishops.

III.

The Constitutional Court first, in accordance with § 68 para. 2 of Act no. 182/1993 Coll., considered whether the act which the petitioners claim to be unconstitutional, or individual provisions of which they claim to be unconstitutional, was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

….

The Act no. 3/2002 Coll. was passed and issued in a constitutionally prescribed manner and within the bounds of constitutionally provided jurisdiction, and that the quorums prescribed in Art. 39 para. 1 and 2 of the Constitution were observed.

IV.

In evaluating the petition from the group of senators, the Constitutional Court feels a need to speak first – on a general level, at least briefly – concerning the individual constitutional principles of religious freedom in the constitutional order of the Czech Republic. In this regard it starts with the following facts.

The Czech Republic is founded on the principle of a secular state. Under Art. 2 para. 1 of the Charter, the state is founded on democratic values and "may not be bound either by an exclusive ideology or by a particular religious faith." Thus, it is evident that the Czech Republic must accept and tolerate religious pluralism, meaning that, above all, it must not discriminate against, or, on the contrary, give unjustified advantage to, any particular

religious faith. It also follows from the cited article that the state must be separate from specific religions.

The principle of religious pluralism and tolerance is also implemented in Art. 15 para. 1 and in Art. 16 of the Charter. Art. 15 para. 1 of the Charter provides that freedom of thought, conscience and religious faith is guaranteed, and that everyone has the right to change his religion or faith or to be non-denominational. Under Art. 16 of the Charter, everyone has the right to freely manifest his religion or faith, either alone or in community with others, in private or in public, through worship, teaching, practice or observance (para. 1). Churches and religious societies govern their own affairs; in particular they establish their own governing bodies, ordain their clergy, and found religious orders and other church institutions independently of state authorities (para. 2). The exercise of these rights may be limited by law, in the case of a measure which is necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others (para. 4). As the Constitutional Court has already stated in the past, unlike the freedom of conscience and religious faith, for the restriction of which the Charter does not expressly provide any possible conditions, the freedom to practice a religion or faith can be limited by statute for the reasons cited. However, this means the ability to limit the exercise of these rights, not of their regulation by the state (decision of 8 October 1998 file no. IV. ÚS 171/97, the Constitutional Court: Collection of Decisions, vol. 12, p. 457 et seq).

It is evident from this that religious freedom can fundamentally be defined primarily as a forum internum (Art. 15 para. 1 of the Charter), i.e. as the freedom of everyone to profess a particular religion or faith, in which third parties, and in particular the state power can not interfere. This is a status negativus, or libertatis (G. Jellinek), a typical delineation of the area of an individual's liberty in which the state power may not enter. However, at the same time it is evident that limiting religious freedom to a forum internum is insufficient, because the very defining element of freedom of religion is the right of everyone to externally express his religion, naturally while observing the limiting safeguards provided in Art. 16 para. 4 of the Charter.

The foregoing also directly gives rise to the principle of autonomy of churches and religious societies, consisting primarily of the rule that the state may not interfere in the activities of churches and religious societies, and if the activities of churches are limited to internal affairs (in particular organizational division), in principle it is not possible to review these measures before state courts (The German Constitutional Court has ruled analogously, BVerfGE 18/385).

Finally, the Constitutional Court states that religious freedom is not guaranteed only at the level of domestic law (that is, primarily the cited provisions of the Charter), but also enjoys international law protection (e.g. Art. 18 the Covenant and Art. 9 of the Convention). In this regard, the Constitutional Court emphasizes that the Czech Republic is, under Art. 1 para. 1 of the Constitution, a democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and the citizen. In this case, the cited principle indicates, above all, that the Constitutional Court must take as its starting point the domestic or international law framework which provides the higher standard of protection for fundamental rights and freedoms. If, in this case, the domestic framework contained in the Charter provides greater protection of rights than is provided

by the cited provisions of international treaties, for that reason alone it must be applied first.

V.

Concerning the petition to annul the entire Act no. 3/2002 Coll., the Constitutional Court states that even the petitioners themselves basically do not present relevant arguments for a justified presumption that the entire act is unconstitutional. If the petitioners state – only generally –that the contested act provides a lower standard of human rights compared to Act no. 308/1991 Coll., parts of which it repealed, and find unconstitutionality just in that fact, the Constitutional Court has no choice but to point to its settled case law, under which the annulment of a contested statute does not revive a previous statute which it repealed or amended (finding of 12 February 2002 file no. Pl. ÚS 21/01, promulgated on 11 March 2002 under no. 95/2002 Coll.). Even if the Constitutional Court agreed with the presented opinion of the petitioners and (only) for that reason annulled Act no. 3/2002 Coll., this would not revive Act no. 308/1991 Coll., and there would merely be an objective need to pass a completely new law governing the subject matter of churches. Moreover, it must be pointed out that the reason for annulling a legal regulation can not be merely comparison of it with the previous legal framework, as the petitioners indicate, but solely finding that it is inconsistent with the constitutional order of the Czech Republic.

For these reasons, the Constitutional Court states that it did not find the petition – not justified in more detail – to annul the entire Act no. 3/2002 Coll. to be justified and therefore further considered only the petition to annul individual provisions of Act no.3/2002 Coll. or the petition to annul certain parts of them. In doing so, it also considered in each case those provisions whose content was directly interrelated.

VI.

The question of registration of churches, religious societies, and record keeping of religious legal entities:

The text of the contested provisions:

§ 6 para. 1, 2:

Registered churches and religious societies

(1) A church or religious society becomes a legal entity by registration (a “registered church or religious society”) under this Act, unless this Act specifies otherwise. (2) A registered church or religious society may propose for recording a body of a church or religious society or a religious order or other religious institution founded within a church

or religious society under its internal regulations for purposes of organization, profession and propagation of religious faith as a legal entity under this Act (a “religious legal entity”).

§ 16:

Recording of religious legal entities

(1) An application to record a body of a registered church or religious society or a religious order or other religious institution as a legal entity shall be filed by the body of the church or religious society designated thereto in the founding document submitted under § 10 para. 3.
(2) An application to record a legal entity under para. 1 must contain a) a document about its founding by the appropriate body of the registered church or religious society according to its founding document, b) delineation of its activities and its by-laws, if they exist, c) its name, which must be different from the name of any legal entity which is already conducting activities in the Czech Republic or which already applied to be recorded, d) its registered address in the Czech Republic, e) identification of its statutory body in the Czech Republic, f) personal data of the members of its statutory body.
(3) A registered church or religious society shall file an application under para. 1 within 10 days from the day the religious legal entity is founded. The Ministry shall record the religious legal entity by an entry in the Register of religious legal entities within 5 business days from the day the application is delivered. The record shall be made by entry as of the day the entity was founded within the registered church or religious society.
(4) If a registered church or religious society does not meet the deadline provided in para. 3, the record shall be made by entry as of the day the application is delivered to the Ministry under para. 1.
(5) If the application under para. 1 does not contain all the requirements under para. 2, the Ministry, shall, no later than 10 business days after the application is delivered, call on the body of the registered church or religious society authorized to file it to complete the application or remove inadequacies, to do so within a period of 30 days, and shall inform it that if this deadline is not met, proceedings on the application will be stopped.

§ 20:
Register of religious legal entities
(1) The following information and changes to it are entered in the Register of Religious Legal Entities: a) the name of the religious legal entity, with the record date and number, b) the legal entity’s registered address in the Czech Republic, c) identification of the religious legal entity’s statutory body, d) personal information of the members of the religious legal entity’s statutory body, e) the identification number of the religious legal entity, f) cancellation of the record of the religious legal entity, entry into liquidation and personal data of the liquidator, declaration of bankruptcy and personal data of the bankruptcy administrator, denial of a filing for bankruptcy due to a lack of assets and opening of proceedings on settlement, with the date and number of the decision on these facts, g) identifying data of the legal successor of the religious legal entity, if it is wound up with a legal successor, h) the termination of the religious legal entity.
(2) The Register of Religious Legal Entities includes a collection of documents containing documents submitted in the application to record the religious legal entity and in

applications to change the record.
(3) Data under paragraph 1 let. d) and changes to it shall be, on the basis of an application from a registered church or religious society, replaced by identification of the body of the church or religious society which maintains this data and changes to it and which is required, for the record keeping of this part of the Register of Religious Legal Entities, to appropriately observe § 17.

§ 22 para. 1 let. d):
Canceling the registration of a church or religious society or a union of churches or religious societies
(1) The Ministry shall open proceedings to cancel the registration of a church or religious society or proceedings to cancel the registration of a union of churches or religious societies
….
d) if, for a period of more than 2 years, the bodies of the registered church or religious society or the statutory bodies of a union of churches or religious societies were not established, or the term of office of the existing bodies and statutory bodies ended more than 2 years previously and new ones were not established.

§ 26:
Cancellation of a record of a religious legal entity and its termination

(1) The Ministry shall cancel the record of a religious legal entity a) at the application of the registered church or religious society within 5 business days from the day the application is delivered, b) on its own initiative, if it determines that the religious legal entity is acting inconsistently with the delineation of its jurisdiction in the application for recording under § 15 para. 4 or inconsistently with legal regulations, and if the appropriate body of the registered church or religious society does not correct this after being called upon to do so by the Ministry, as of the day the decision to terminate the record went into legal effect, c) on its own initiative, if the registration of the church or religious society, which applied to record the religious legal entity terminates, as of the day the decision to cancel the registration of the church or religious society under § 24 para. 3 goes into legal effect d) if bankruptcy proceedings were filed against the religious legal entity, by cancellation of the bankruptcy because the distribution resolution was fulfilled or by cancellation of the bankruptcy because of insufficient assets to cover the bankruptcy expenses, or by rejection of the filing for bankruptcy due to insufficient assets.
(2) A religious legal entity ceases to exist upon deletion from the records in the Register of Religious Legal Entities.
(3) The termination of a religious legal entity is preceded by it being cancelled with liquidation, or cancelled without liquidation, if its assets and obligations are transferred to a church or religious society or another religious legal entity thereof.
(4) If, during liquidation of a religious legal entity, its assets are insufficient to cover its obligations, the church or religious society, which proposed it for recording shall guarantee these obligations.
(5) If a religious legal entity is terminated without liquidation, and if a bankruptcy filing is not made against it, the date of its cancellation shall be the date of its deletion from Register of Religious Legal Entities.

§ 28 para. 4 and 5:

(4) Registered churches or religious societies under paragraph 1 are required, within 1 year after this Act goes into effect, to provide the Ministry completed data under this Act for purposes of their registration or recording. If a registered church or religious society does not complete this data, the Ministry shall call upon it to complete the data by a deadline of at least 30 days from the day the call is delivered. If a registered church or religious society does not complete the data by that deadline, the Ministry may, depending on the nature of the incomplete data, open proceedings to cancel its registration.

(5) A registered church or religious society is required to complete, within 1 year from the day this Act goes into effect, data on recorded religious legal entities under this Act by the body designated thereto in its founding document. If the data on the religious legal entity are not completed by that deadline, the Ministry shall call upon the registered church or religious society to complete the data by a deadline of at least 30 days from the day the call is delivered. If a registered church or religious society does not complete the data by the specified deadline, the Ministry may, depending on the nature of the incomplete data, cancel the record of the religious legal entity. For religious legal entities which have been in existence for more than 50 years the document on founding under § 16 para. 2 let. a) of this Act can be replaced by a sworn statement from the church or religious society.

The words “and the Register of Religious Legal Entities” in § 29:

Authorizing provision

The Ministry shall specify by decree the details and conditions for maintaining the Register of Registered Churches and Religious societies, the Register of Unions of Registered Churches and Religious Societies and the Register of Religious Legal Entities and models of all extracts of registration or records under this Act.

The Constitutional Court states that the essence of the cited provisions of Act no. 3/2002 Coll. is (I.) establishing the principle, that the legal creation of a church or religious society takes place at the moment of registration, which is done by the relevant ministry. The same body is also authorized to cancel a registration. (II.) A registered church or religious society can be proposed to the ministry for recording by a religious legal entity, and the act regulates in detail the requirements of such a record, defines the Register of Legal Entities and also regulates the cancellation of the record of a legal entity and its termination.

On the question of registration of a church or religious society, the Constitutional Court states the following (re I.):

1. Under § 6 para. 1 of Act no. 3/2002 Coll., a church or religious society becomes a legal entity upon registration under this Act, unless the Act provides otherwise. This means that the text of Act no. 3/2002 Coll., which is a component of domestic law, positively governs the creation of legal person status of the cited religious society, and thus that the legal creation of these entities is derived from registration performed by the Ministry. Therefore, an individual legal act, the registration, has constitutive effects, and basically represents the state's acceptance in relation to the creation of a particular association.

2. In this regard the Constitutional Court could not overlook the framework contained in the repealed Act no. 308/1991 Coll., to which the petitioners also expressly refer. Under § 4 para. 2 of that Act, it was provided that "a Church or religious society functions in the Czech and Slovak Federative Republic on the basis of registration." The previous legal framework was based on the fact that churches or religious societies could legally exist independently of its their acceptance by the state power, nonetheless, if they wanted to legally function in the state, registration was required. The state did not recognize churches or religious societies other than registered ones (§ 4 para. 4 of Act no.308/1991 Coll.).

3. It is evident that the formulation used in § 6 para. 1 of Act no. 3/2002 Coll. is considerably different from the previous regulation. Whereas Act no. 308/1991 Coll. regulated the process of registration of churches and religious societies expressly only for purposes of their function in the domestic environments, and did so primarily because of the need for legal certainty for third parties, at first glance the text of the new statutory framework aspires to the registration of these legal entities having constitutive effects, i.e. it evokes the impression that a domestic administrative act leads to the legal creation of churches or religious societies, that is, their general legal capacity. However, it must be added that such an approach would clearly not correspond with the nature of a number of churches and religious societies, whose legal existence often arises not from state law but from canon law (or international law) and the state power therefore can not have ambitions to regulate these institutions by law (including constituting them), but only to limit their activities in cases enumerated in Art. 16 para. 4 of the Charter.

4. The Constitutional Court also points out that relations between the Catholic Church (the Holy See) and individual states are traditionally governed by international agreements (concordats). These agreements primarily regulate the organization of religious institutions within a given state. It is evident that the legal person status of the Catholic Church is undisputed and the domestic legal order can not in any way interfere in it or cast it in doubt. Confirmation of this is, for example, the text of Art. 1 of the draft Agreement between the Czech Republic and the Holy See on the regulation of mutual relations, under which the named parties recognize each other's international law legal personality and consider each other independent entities under international law, and agree to fully respect this status.

5. In a number of its previous decisions the Constitutional Court emphasized the fact that it gives preference to the principle of constitutionally consistent interpretation of legal regulations over annulment of them. In this case it is evident that the legislature, through the differing formulation of the cited provision – compared to the previous § 4 para. 2 of

Act no. 308/1991 Coll. – created a somewhat unclear legal situation, which does not fully correspond to, for example, the requirements imposed on the creation of laws by the European Court for Human Rights, which consist of observing the conditions for a statute of accessibility, understandability, and foreseeability of its consequences. Thus, only a norm formulated sufficiently precisely that it makes it possible for a citizen to adjust his actions accordingly (Hashman and Harrup v. United Kingdom, Reports of Judgments and Decisions, European Court of Human Rights no. 1/2000, p. 46) can be considered a "statute." However, the Constitutional Court believes that the inconsistency of § 6 para. 1 of Act no. 3/2002 Coll. with the cited constitutional safeguards, claimed by the petitioners, can be overcome by a constitutionally consistent interpretation, and that therefore it is not necessary to annul it.

6. Therefore, in this regard the Constitutional Court states that § 6 para. 1 of Act no. 3/2002 Coll. can not affect the legal person status of churches under religious legal regulations or international law, rather it only sets certain conditions for recognizing their legal personhood, also ensuring a minimum of protection for other parties to private law property relationships. Thus, a constitutionally consistent interpretation of § 6 para. 1 of Act no. 3/2002 Coll. is primarily such that this provision can not be used to cast any doubt on the already existing general legal person status of churches and religious societies and their rights to existence independently of acceptance by a state (the Czech Republic). The function of registering them is thus the same as in the case of the regulation contained in Act no. 308/1991 Coll., which, however, reflected this fact, in its chosen wording, substantially more accurately – that is, only setting conditions for the functioning and legally relevant activities of churches and religious societies in the Czech Republic, not the creation of their general legal capacity.

7. The Constitutional Court further states that, similarly to the foregoing, the cancellation of registration of a church or religious society (or cancellation of registration of a union of churches and religious societies), contained in § 22 para. 1 let. d) and § 28 para. 4 of Act no. 3/2002 Coll. must also be interpreted consistently with the Constitution. Insofar as the Constitutional Court concluded that the state is authorized to set conditions for the functioning and legally relevant activities of churches and religious societies in the Czech Republic and formally express these conditions in the institution of registration, it is also necessary to respect the state's right to set conditions for removing the opportunity for this legally relevant functioning by a church or religious society in the Czech Republic if these conditions are violated.

8. Therefore, the Constitutional Court concluded that § 6 para. 1, § 22 para. 1 let. d) and § 28 para. 4 of Act no. 3/2002 Coll. are not inconsistent with Art. 16 para. 2, 4 of the Charter, and therefore it denied the petition to annul them.

On the question of the recording of religious legal entities, the Constitutional Court states the following:

1. The Constitutional Court states, first of all, that Art. 16 para. 2 of the Charter regulates the right of churches and religious societies to manage their affairs, in particular to establish their bodies, ordain their clergy and found religious orders and other religious institutions independently of state bodies. This is thus a fundamental right enjoyed by

churches or religious societies as particular legal entities (see, e.g. decision of the Constitutional Court of the CR file no. IV. ÚS 171/97, Collection of Decisions, vol. 12, p. 468, and similarly decision of the Constitutional Court of the SR of 10 October 1995 file no. II. ÚS 128/95, Collection of Decisions of the Constitutional Court of the Slovak Republic 1995, Košice, 1996, p. 322 et seq). The content of this right is the right to autonomy, that is the right to be independent of the state in the management of one's affairs. The guarantee of freedom to organize and manage one's own affairs is a necessary prerequisite for freedom of religious life and the functioning of a church, which requires, for the preservation of its tasks, freedom to establish its organization, promulgate norms and manage itself (see, e.g., finding of the German Constitutional Court, BVerfGE 70/138). The position of specialized literature also takes as its starting point the premise that Art. 16 para. 2 of the Charter does not rule out, and presumes, that external state review will be exercised for the preservation of laws in these special associations "to protect the values cited in para. 4 of the article. However, this statutory regulation of the relationship of the state to these associations would not be able to limit the independence of churches and religious societies concerning the founding of their bodies and other questions of internal life" (V. Pavlíček et al.: The Constitution and the Constitutional Order of the Czech Republic, part 2 – Rights and Freedoms, Linde, 1996, p. 154).

2. The Ministry of Culture, in its position statement concerning the petition states – in this regard –that it is necessary to differentiate the various areas of the functioning of churches and religious societies and that this legal framework must be differentiated from the individual rights and freedoms of citizens, because "the legal regulation of churches and religious societies is not intended to regulate the individual rights of citizens or of each person in the area of faith and religious affiliation." The Ministry of Culture is also of the opinion that the petitioners incorrectly and self-servingly mix the concepts "church institution" and "religious legal entity," as the contested Act respects the right of churches and religious societies to found church institutions without legal person status but a broad interpretation of the Charter to include autonomous founding of religious legal entities allegedly "violates the constitutional principle of state sovereignty."

3. Therefore, a disputed question in this case is evaluation of whether creating religious legal entities can be subjected to Art. 16 para. 2 of the Charter or not. In other words, whether founding religious orders and other religious institutions can be understood either restrictively, in the sense that this constitutionally guaranteed right applies only to internal church institutions which do not have individual legal person status, or whether, on the contrary – in the broad sense – this provision also applies to institutions with their own legal person status.

4. The German Constitutional Court, for example, accepted that "the concept of the Catholic Church includes the practice of religion not only in the area of faith and services, but also freedom to develop and function in the world, which corresponds to its religious tasks. These include especially charitable functions. Active love of one's neighbors is an essential task for Christians, and is understood by Christian churches as a basic function. It includes not only hospital care provided by the church, but is generally, according to the basic religious requirements, oriented toward providing for needy people, including raising and educating them" (BVerfGE 70/138 57/220). In this regard it is also appropriate to point to Art. 10 of the draft Agreement between the Czech Republic and the Holy See Governing

Their Relations (note, in particular the Minister of Culture, in his position statement on the petition, points to this Agreement), under which the Catholic Church founds, in accordance with its own regulations, legal entities for the organization and profession of the Catholic faith "and for its functioning, in particular in the areas of education, health care, and social and charitable care." This means that the draft of the agreement unambiguously accepts that the (Catholic) church is entitled to found religious legal entities and respects their functioning not only in the area of professing a faith, but also in other areas, which are an inseparable and indispensable component of every active church or religious society.

5. Thus, if § 6 para. 2 of Act no. 3/2002 Coll. limits the right of a church or religious society to propose a religious legal entity for recording only "for purposes of organization, profession, and propagation of religious faith," this restrictively defined concept is in evident conflict with the very aim and purpose of churches and religious societies and testifies to a fundamental failure to understand them, as their activities are naturally not reduced only to presentation of religious faith, but through their external activities, exceeding the mere practice of religion, they radiate into the entire society and are also a necessary prerequisite for the functioning of a civil society. This limitation is evidently inconsistent with Art. 16 para. 2 of the Charter, as that article guarantees the right of churches and religious societies to found religious orders and other church institutions independently of state bodies, while § 6 para. 2 (like the related provision, § 28 para. 5) makes the creation of religious legal entities subject to a recording performed by the Ministry.

6. It is evident that the limiting of the legal creation of religious legal entities arising from the cited provisions also does not correspond with the reasons for which it is possible to limit the exercise of these rights, enumerated and positively enshrined in v Art. 16 para. 4 of the Charter. These limitations, which in view of their nature must be interpreted restrictively, may arise only in the case of "measures necessary in a democratic society to protect public safety and order, health and morals, or the rights and freedoms of others." Applying an argument a contrario, it is evident that the statutorily provided limitation of a fundamental right enshrined in Art. 16 para. 2 of the Charter by the specified condition of recording religious legal entities by the Ministry does not fall under any of the cited constitutional safeguards, and therefore, for that reason as well, this is an unconstitutional limitation which does not respect the autonomy of churches and religious societies and the plurality of their activities. In any case, as is also indicated by the settled case law of the European Court for Human Rights, to limit a fundamental right, three basic conditions must be met: the limitation must be set by statute, must be aimed at a legitimate goal, and must be necessary in a democratic society. However, in the adjudicated matter it is evident that only the first of these conditions has been met, and state interference in the founding of religious legal entities can not be described as aiming at a legitimate goal, nor as a measure which is necessary in a democratic society.

7. The Constitutional Court also states that according to the wording of the cited provisions the legal creation of religious legal entities is tied to recording and not to registration. Thus, from a theoretical law standpoint, the creation of religious legal

entities should be given a substantially "looser regime" than other legal entities recognized by Czech law. Recording, by its nature (in contrast to registration), is not a constitutive, but merely a declarative legal act. Therefore, an "already established institution" can be proposed for recording, and the effects of the record are, as a matter of principle, dated retroactively, i.e. to the day of founding of the religious legal entity by a registered church or religious society, and not only to the day of recording. However, from a factual viewpoint and the viewpoint of application, one can not overlook the fact that there is no marked difference between recording and registration, as it is regulated in the contested Act, as the Act provides clear conditions for the recording application, and if they are not fulfilled – which the Ministry is authorized to evaluate – recording will not be performed (read: this religious institution will not be created), and the Ministry is also authorized, in enumerated cases, to cancel the record of a religious legal entity if, for example, it determines that the religious legal entity is acting inconsistently with the definition of its jurisdiction or in (unspecified) conflict with legal regulations.

8. In the legal environment of the Czech Republic, the Constitutional Court also could not overlook the fact that the right to associate in churches and religious societies is a special form of the exercise of freedom of association. It is true that "ordinary" associations have, under Act no. 83/1990 Coll., the right to establish organizational units as subsidiary legal entities, derived from the association as a whole and having legal person status (see, e.g. I. Telec, Spolkové právo, C.H. Beck, 1998, p. 148 et seq), and in order to establish these legal entities in principle it is sufficient to have in the by-laws a regulation which permits it. Thus, the creation of these subsidiary legal entities is not subject to acceptance on the part of the state. It is worth pointing out the manner of legal coming into existence of a union organization or an employers' organization, which takes place ex lege on the day after an application for recording is delivered to the Ministry (§ 9a para. 1 of Act no. 83/1990 Coll.). From this comparative domestic law viewpoint as well, the statutory requirement for recording religious legal entities is unjustified. In other words, as churches or religious societies are, in their significance, non-fungible with ordinary associations, and if ordinary associations can establish legal entities without state interference, a statutory limitation on the creation of religious legal entities through recording by a state body is not justified.

9. The arguments of the Ministry of Culture that the autonomous founding of religious legal entities violates the constitutional principle of state sovereignty must be rejected, for the reason that the concept of a democratic state governed by the rule of law is closely connected with the idea of a liberal state which tolerates a plurality of social phenomena and institutions. Therefore, the principle of state sovereignty can not be understood in a manner so broad that even the very legal existence of any legal entities derived from a legal fact other than the express acceptance by the state power would necessarily be inconsistent with it. The idea of a liberal state governed by the rule of law is based on the premise that the state is to limit its own interference and influence only to such cases where it is necessary and where it unambiguously corresponds with the public interest. An overactive state influence and arbitrary regulation of social phenomena is clearly inconsistent with this concept. Moreover, in the case of churches and religious societies it must be taken into account that they are often historic institutions, existing continuously under various forms of government and in various state frameworks. Therefore, the state should approach these institutions, representing the exercise of religious freedom,

especially sensitively, and should very carefully weigh its restrictive principles, and limit them to truly justified cases.

10. On the basis of the foregoing, the Constitutional Court concluded – guided by the principle of self restraint and minimization of interference – that § 6 para. 2 and § 28 para. 5 of Act no. 3/2002 Coll. are unconstitutional. In the Constitutional Court's opinion, these provisions directly give rise to subjecting the legal coming into existence of religious legal entities to a state decision, i.e. de facto registration of them, even though in the Act it is formally described as recording. However, because the Constitutional Court did not find convincing reasons for casting doubt on the principle itself of recording these entities (in the true sense, not in disguised registration, as it is in the context of the annulled § 6 para. 2 of the Act), and it believes that recording is appropriate, in particular in terms of fulfilling an information function and the function of protecting the rights of third parties, it denied the petition to annul § 16, § 20, § 26 and to annul the cited words in § 29 of Act no. 3/2002 Coll. In the situation where the Constitutional Court annuls § 6 para. 2 of the act as unconstitutional, the cited provisions can be interpreted and applied in a constitutionally consistent manner, so that annulling them is not necessary. These provisions regulate the content requirements of an application for recording (§ 16), the register of religious legal entities (§ 20, § 29), cancellation of a record of a religious legal entity and its termination (§ 26), and in the Constitutional Court's opinion they can be interpreted, with the annulment of § 6 para. 2 and § 28 para. 5 of Act no. 3/2002 Coll. so that they do not condition the legal coming into existence and termination of religious legal entities on a constitutive legal act by a state body, but so that the recording is only of a declarative nature and performs the specified functions of providing information and protecting the rights of third parties.

11. For all the cited reasons the Constitutional Court states that § 6 para. 2 and § 28 para. 5 of Act no. 3/2002 Coll. are inconsistent with Art. 16 para. 2 and para. 4 of the Charter and, for that reason, annuls them. The petition to annul § 16, § 20, § 26 and to annul the cited words in § 29 of Act no. 3/2002 Coll. is denied.

VII.

Authorization to exercise special rights:

The text of the contested provisions:

§ 11:

Application for assignment of authorization to exercise special rights
(1) An application for assignment of authorization to exercise special rights may be submitted by a registered church or religious society, which a) has been registered under this Act for at least 10 years without interruption as of the day the application is submitted b) published annual reports on its activities for the calendar year every year for 10 years before submitting the application, c) is duly fulfilling its obligations toward the state and third parties,

(2) An application for assignment of authorization to exercise special rights is filed by a body of the registered church or religious society.
(3) An application for assignment of authorization to exercise special rights may be filed either for the exercise of all special rights under § 7 para. 1 or only for the exercise of special rights under § 7 para. 1 let. a) to e).
(4) An application for assignment of authorization to exercise special rights under § 7 para. 1 let. a) to e) must contain a) original signatures of as many of the Czech Republic or foreigners with permanent residence in the Czech Republic who are of age and claim membership of this church or religious society, as amount to 0.1 percent of the residents of the Czech Republic according to the last census, giving their individual data according to this Act and giving identical text on each signature page, which gives the full name of the church or religious society which is collecting signatures for purposes of its registration, and from which it is evident that the signature page is signed only by a person claiming membership of this church or religious society, b) a declaration that its previous activities as a legal entity under this Act are not inconsistent with the conditions provided by this Act and that they meet the conditions in paragraph1 let. c), c) texts of annual reports under paragraph 1 let. b) and closing accounting statements for the period of 10 years preceding the filing of the application.
(5) An application for assignment of authorization to exercise special rights under § 7 para. 1 must contain the requirements under paragraph 4 and also a document confirming that the clergy's duty of confidentiality in connection with the secrecy of the confessional or in connection with the exercise of a right analogous to confession has been a traditional component of the teaching of the church or religious society for at least 50 years.

§ 21:
Cancellation of authorization to exercise special rights

(1) The Ministry shall open proceedings to cancel authorization to exercise special rights a) if a registered church or religious society in a serious manner or repeatedly violates its obligations toward the state or third parties, b) if a registered church or religious society does not publish an annual report under § 7 para. 3 every year, or c) on the basis of a request from a state administration body under its jurisdiction given by a special legal regulation, which documents the serious or repeated violation of obligations for the functioning of the registered church or religious society under a special legal regulation or agreement with that state administration body.
(2) The Ministry shall stop proceedings to cancel the authorization to exercise special rights of a registered church or religious society under paragraph 1 if the grounds for the proceedings ceases to exist or if the registered church or religious society documents in writing that, through a procedure proposed by it, the grounds for opening proceedings will be removed in agreement with persons who were affected by the conduct which led to opening proceedings to cancel authorization to exercise special rights.
(3) The Ministry's decision to cancel the authorization to exercise special rights of a registered church or religious society applies to all special rights under § 7 para. 1.
(4) The Ministry's decision to cancel the authorization to exercise special rights of a registered church or religious society, which has gone into legal effect, shall be sent by the Ministry for information to the Ministry of the Interior.

1. The Constitutional Court states that the essence of the contested provisions is the statutorily provided manner of assigning and canceling the authorization of a registered church or religious society to exercise special rights. The list of special rights is legally defined in § 7 para. 1 of Act no. 3/2002 Coll., and it includes the right to teach religion in state schools, to authorize persons to perform clerical services in the armed forces and in facilities where persons are being held, serving prison sentences, or serving sentences of protective treatment or protective upbringing, to be financed under a special regulation, to perform rites in which religious marriages are entered into, to found parochial schools and to preserve the duty of confidentiality of the clergy in connection with the secrecy of the confessional. 2. The Constitutional Court takes as its starting point the fact that the essence of religious freedom is ensuring the opportunity of everyone to freely express his religion without state interference. At the same time, however, the state, thoroughly separated from churches and religious societies, can not be obligated to actively assist in the activities of individual churches and religious societies (similarly, see the decision of 10 April 1998, file no. II. ÚS 227/97, the Constitutional Court: Collection of Decisions, vol. 10, p. 447 et seq). If the legislature provides that the state will assist the activities of religious entities, that is its own decision, and therefore only the state is competent to set conditions which these entities must fulfill in order to be entitled to the state's cooperation. The constitutional maxim for setting these conditions is ruling out arbitrary discrimination. 3. It is evident from the nature of the special rights that these are cases where the state permits entitled churches or religious societies to have "above standard" claims for a particular performance, i.e. that these are cases of an active and positive approach by the state. Such positive performance is, e.g. access to state financing, the right to teach in state schools, the right to found parochial schools, and so on. Therefore, it is also evident that the state is also fundamentally entitled to set conditions under which individual entities will have access to this performance. The Constitutional Court's task is not to evaluate the suitability or usefulness of these conditions, but only their constitutionality. In this case, that means that the Constitutional Court had to consider only whether any of the statutorily provided conditions exhibits features of arbitrariness and discrimination. 4. However, in that regard the Constitutional Court did not find characteristics of unconstitutionality in the contested § 11 and § 21 of Act no. 3/2002 Coll. 5. However, the Constitutional Court believes that § 21 para. 1 let. b) of Act no. 3/2002 Coll. does exhibit clear elements of unconstitutionality. Its essence is the Ministry's ability to cancel authorization to exercise special rights, if a registered church or religious society does not annually publish an annual report under § 7 para. 3 of Act no. 3/2002 Coll. The Act provides this ability in a blanket manner, that is, the contested provision permits, e.g. removing the right of a church or religious society to teach religion in state schools, conclude church marriages or preserve the clergy's duty of confidentiality only on the grounds that the registered church or religious society does not publish an annual report every year. In the Constitutional Court's opinion, this framework clearly does not observe the principle of proportionality, under which a statutory framework would consistently preserve a balanced relationship between the violation of a right on the part of a church or religious society, on the one hand, and the penalty imposed by the state, on the other hand. In this case, however, this proportionality is not preserved, because error by churches or religious societies in an area of an exclusively informative obligation is followed by a penalty which, by its nature, falls into the area of religious activity. The

Constitutional Court points out that it already presented arguments based on similar principles in the matter under file no. Pl. ÚS 26/94 (the Constitutional Court: Collection of Decisions, vol. 4, p. 113 et seq), and therefore, for the sake of brevity, it refers commensurately to those arguments, despite the fact that that finding concerned a case of a different special form of a private law corporation – political parties and movements. 6. Therefore, the Constitutional Court annuls § 21 para. 1 let. b) of Act no. 3/2002 Coll., as unconstitutional, due to inconsistency with Art. 16 of the Charter.

VIII.

Income of churches and religious societies:

The text of the contested provisions:

§ 27 para. 4 and 5:

(4) The income of a church or religious society consists of, in particular, a) contributions from natural persons and legal entities, b) income from the sale and rent of personal property, real estate and intangible property of churches and religious societies, c) interest on deposits, d) gifts and inheritance, e) collections and contributions from a part of revenues under a special act, f) loans and credits, g) income from business or other income-producing activity, h) subsidies.

(5) The subject of business or other income-producing activity must be defined in the founding document of a registered church or religious society. The business and other income-producing activity of a church or religious society may only be a supplemental income earning activity, and the profits achieved may be used only to meet the goals of the activities of the church or religious society.

The content of the contested provision is a list of the incomes of churches and religious societies (para. 4) and definition of the subject of business activity of a church or religious society and the manner of using the profits achieved (para. 5).

1. The Constitutional Court states, first of all, that even the petitioners themselves did not in any way explain where they see the unconstitutionality of a list of incomes of churches and religious societies in § 27 para. 4 of Act no. 3/2002 Coll. Because this list is given in a demonstrative, not enumerative, manner (cf. the words “in particular”), the Constitutional Court states that this definition fundamentally corresponds to the private law essence of churches and religious societies and, although it can be considered redundant to a certain extent, one can not find in that fact features of unconstitutionality (superfluum non nocet).

2. Therefore, the Constitutional Court itself also found no reason to believe that the cited provision is unconstitutional, and denied the petition to annul it, as being groundless.

3. Concerning the petition to annul § 27 para. 5 of Act no. 3/2002 Coll., the Constitutional Court states that the first sentence of this provision, under which the subject of business activity and other income-producing activity of a church or religious society must be defined in its founding document, gives no reason for presumptions of its unconstitutionality. In its essence, this is only an information obligation of a church or religious society, which is legitimized by the interests of other parties to private law relationships, and can not therefore be interpreted as an impermissible limitation on the autonomy of churches and religious societies. In any case, even the petitioners themselves do not make any such claim. Therefore, this part of the petition is also denied as being groundless.

4. Under the second sentence of the cited provision, business and other income-producing activity of a church or religious society can be only supplemental income-producing activity, and the profits achieved may be used "only to meet the goals of the activities of the church or religious society." Concerning this the Constitutional Court states that churches or religious societies are – as a special form of the exercise of the freedom of association – private law corporations which can basically do everything that is not expressly forbidden by law (Art. 2 para. 3 of the Charter, Art. 2 para. 4 of the Constitution). In accordance with Art. 16 para. 4 of the Charter, the exercise of these rights can be limited only in cases which are necessary and are defined by the Charter. However, in this case the act provides that a church or religious society may use the profits achieved from business and other income-producing activity only to meet its goals. However, Act no. 3/2002 Coll. defines these goals, in § 3 let. a), under which the purpose of a church or religious society is "professing a certain religious faith, whether publicly or privately, and in particular the related association, religious services, teaching and clerical services." Thus, it is apparent that the contested provision makes it impossible for churches or religious societies to use the profits achieved in a manner other than as legally defined. This provision is also inconsistent with Art. 11 para. 1 of the Charter.

5. However, in the Constitutional Court's opinion, this limitation clearly does not correspond with the purpose and mission of churches and religious societies. As stated elsewhere in this finding, the task of these entities can not, under any circumstances, be reduced to the mere profession of a particular religious faith – as the contested provision de facto says – but their role in society is considerably wider and also consists of radiating religious values externally, not only through religious activities but also, e.g. charitable, humanitarian and general educational activities. Therefore, limiting churches and religious societies to freely making use of their legally obtained income only in the area of professing religious faith is arbitrary interference on the part of the state in the private law essence of these entities, and this interference is clearly not legitimized by any relevant public interest; similar arguments, although in relation to the conduct of business by political parties and not churches or religious societies, was used by the Constitutional Court in the matter under file no. Pl. ÚS 26/94 (finding of 18 October 1995, Collection of Decisions of the Constitutional Court of the CR, vol.4 p. 129 et seq). Therefore

inconsistency of this provision arises with Art. 4 para. 4 of the Charter, under which, when applying provisions on the limits of fundamental rights and freedoms, their substance and purpose must be preserved, and such limitations may not be used for purposes other than those for which they were provided. 6. Therefore the Constitutional Court annuls the second part of the sentence of § 27 para. 5 of Act no. 3/2002 Coll. due to its inconsistency with Art. 4 para. 4 of the Charter in connection with Art. 16 para. 2 a Art. 11 para. 1 of the Charter, as unconstitutional.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 27 November 2002

Dissenting Opinion

of judges JUDr. P. H. and JUDr. J. M. to the reasoning of Constitutional Court finding file no. Pl. ÚS 6/02, on the constitutionality of Act no. 3/2002 Coll., on Freedom of Religion and the Status of Churches and Religious Societies and Amending Certain Acts

We can not accept generally those parts of the finding's reasoning which apply to provisions which the petitioners sought to have annulled, although the Constitutional Court denied that part of the petition. It stated that they are not inconsistent with the constitutional order. In several cases of this kind the reasoning of the finding presents arguments of such kind and composition that as a whole it does sufficiently express the fact that the judges agreed that the cited provisions are consistent with the constitutional order, but, on the contrary, casts doubt on their verdict and makes it less convincing.

This general comment must be applied first of all to the key provision of § 6 para. 1 of Act no. 3/2002 Coll. (the "Act"), under which a church or religious society "becomes a legal entity upon registration under this Act." The finding's reasoning claims that this provision creates a "somewhat unclear legal situation," which does not fully correspond to the requirements of the European Court for Human Rights for a statute's understandability and foreseeability. In this regard, the finding's reasoning also concludes that § 6 para. 1 of the Act "at first glance" aspires to "the registration of these legal entities having constitutive effects, i.e. it evokes the impression that a domestic administrative act leads to the legal creation of churches or religious societies, that is, their general legal capacity." That, of course, according to the finding's reasoning, would clearly not correspond with the nature of a number of churches and religious societies, whose legal existence often arises not from state law but from canon law (or international law) and the state power therefore can not have ambitions to regulate these institutions by law." Despite this strong criticism, the text of § 6 para. 1 of the act the reasoning, basically without substantive arguments, reaches the conclusion that the petition to annul it is not justified, because its

shortcomings can be overcome in a "constitutionally consistent manner." Thus, the reasoning's arguments are unbalanced, unconvincing, but also imprecise.

To the claim in the reasoning that the text of § 6 para. 1 of the Act creates an unclear legal situation, we object that the rule in it is quite clear: a church (religious society) becomes a "legal entity" by registration, so that without the registration it is not a legal entity. § 28 para. 1 adds, in a transitional provision, that "churches or religious societies which performed their activities as registered by law as of the day this act goes into effect are considered to be registered under this Act." Thus, we consider the criticism concerning an unclear legal situation to be unjustified.

The finding's reasoning also criticizes the possible aspiration of § 6 para. 1 aimed at giving the act of registration constitutive effects, whereas with a "number" of churches and religious societies their legal existence arises from other normative legal systems and the state power thus can not constitute their "general legal capacity." As a representative of this "number" of churches it cites the Catholic Church (the Holy See).

The end of the 18th and the course of the 19th centuries brought the overcoming of legal particularism in European history. The passage of new democratic constitutions was, among other things, tied to the constituting of a secular state, a change in the source of the legitimacy of power, and thus, in its consequences, also with the secularization of the state and the separation of church and state.

The basic purpose of law in a democratic state governed by the rule of law is to guarantee freedom and internal peace. A conceptual prerequisite of the legal framework of rights and obligations is their connection to legal entities. There are no rights without rights-holding subjects; authorizations without subjects are contradictio in adiecto.

The cultural development of Europe and the corresponding development of democratic constitutional law thought, as a consequence of the secularization of the state, does not mean abandoning the historic tradition of values, and in that framework religious values as well. However, it means that these no longer institutionally exist alongside, or inside, a democratically legitimized state power, but inside a whole, constitutionally defined and guaranteed system of values. Only from this viewpoint would it be possible to evaluate the constitutional admissibility of defining the legal person status of churches and religious societies.

The state power may effective regulate the behavior of persons only by using one of the internationally legal grounds, in particular territorial or personal grounds (on the basis of citizenship). In contrast, it can not aspire to regulate the behavior of persons to which its jurisdiction does not reach. In accordance with this, Act no. 3/2002 Coll. regulates only the behavior of those (components of) churches and religious societies which are subject to the jurisdiction of the Czech Republic. In that sense the act of registration is undoubtedly constitutive, as in grants them the status of a legal entity within the reach of the jurisdiction of the Czech state.

Of course, the finding's reasoning insists that in the case of a "number" of churches their legal person status is established by church regulations or other legal systems, and the Czech state then can no longer create such legal person status, but only respect it. The fundamental question arises which norm of which legal system orders the Czech Republic

to respect the legal person status of a church or religious society which was constituted by another norm creator. Church regulations can not be such a system, because a church (religious society) is not a source of sovereign power which could compete with the power of a state which exercise "complete and exclusive" sovereignty in its own territory. Nor can it be the legal order of another state, because that is prevented by the relationships of sovereign equality between states and the principle under which, in the event of jurisdictional conflict between several states, the will of the state which can apply territorial grounds shall predominate as a matter of principle. Therefore, the CR is not required to recognize such status of a church subject to its jurisdiction as was granted to that church by the legal order of a different state. That obligation could be created for it only by a contractual agreement with that other state. Nor does an obligation to recognize the pre-existing legal person status of churches (religious societies) arise to the CR from international law. It is not imposed on it by any norm of general international law (on the contrary, the practice of states eloquently testifies to the absence of such a norm), nor by any international agreements, including universal or European covenants on human rights. Finally, an obligation to recognize the pre-existing status of a "legal entity" also does not arise to bodies of public power either from the Charter or from the Constitution (Art. 16 para. 2 of the Charter regulates the circumstances of creation of institutions within churches, and thus in the adjudicated Act applies not to the institution of registering churches, but to the institution of recording religious legal entities).

Under these circumstances, the Czech Republic, in setting conditions for allocating the status of a legal entity to churches or religious societies, has at its disposal a considerable degree of discretion. The principles of a democratic state governed by the rule of law indicate that it may not arbitrarily prevent churches from entering the public life of the state and that it must guarantee to all churches equal conditions for acquiring the status of a legal entity. If the Chamber of Deputies states that the reason for requiring registration of churches is "to guarantee a minimum of protection to other parties in private law relationships," this is beyond any doubt a legitimate aim of regulation. An application for registration is to contain conditions which are provided by § 10 of the Act and which the Constitutional Court did not in any way cast doubt upon in terms of constitutionality. The institution of registration of churches is thus a constitutionally indisputable expression of the legislature's discretion.

The finding's reasoning clearly begins with the premise that the concept of registration as a constitutive act of state power is inapplicable to the Catholic Church in view of the international legal subject status of the Holy See. From that, it then unjustifiably concludes that the "constitutive" concept is inapplicable to all churches (religious societies). In fact, the Catholic Church, in relation to other churches, is a complete exception, which, therefore, can not serve as a model for general legal regulation. Therefore, Act no. 3/2002 Coll. also could not rationally reject the constitutive effects of registration (i.e. the creation of a legal entity) only for the reason that one of the churches (the Catholic) derives its status from the international legal subject status of the Holy See and accordingly from canon law. The Catholic religion is the only one which simultaneously aspires to universality and functions under the head of the spiritual government of the Holy See, unconnected with the secular government of any state. Therefore, the question of international legal person status is posed exclusively with the Holy See (L. Le Fur: Nástin mezinárodního práva veřejného. Orbis, Praha, 1935, p. 150-

151). In contrast with the claim of the finding's reasoning, in fact, no "number" of other churches exists whose position in the question of legal person status would be comparable with the Holy See.

The Holy See has a status comparable to that of a state, although it is not a state. The CR recognizes its legal person status under international law, although it has not yet concluded with it the international agreement which is being prepared (not an "inter-state" agreement, as the Czech Conference of Bishops erroneously claims in its position statement). The CR recognized the Holy See through the existence of diplomatic relations (between Czechoslovakia and the Holy See) until 1950, their renewal in April 1990, and their continuation until the present. In the absence of an international agreement between the CR and the Holy See, one can not rule out the existence of bilateral customary norms which arose hitherto in their mutual practice (the violation of this practice in totalitarian Czechoslovakia need not be considered an obstacle which would make the settling of any customary rules impossible). If such customary rules existed, the CR would have to respect obligations arising from them as an international obligation (see Art. 1 para. 2 of the Constitution). Of course, seeking such possible rules goes beyond the framework of the finding and its reasoning.

The international legal personhood of the Holy See is a substantial distinguishing element of the Catholic Church compared to other churches. Therefore, the question arises, whether and to what extend the general rules in Act no. 3/2002 Coll. should be applied to the Catholic Church. Differences in religions are not grounds for different treatment in terms of fundamental rights and freedoms (Art. 3 para. 1 of the Charter). However, equality is not an absolute category. Different treatment is admissible, if it is based on objective and reasonable grounds. The fact that the Holy See is a subject of international law, which the CR has recognized, is undoubtedly an "objective" reason for different treatment of the Catholic Church in various issues regulated by Act no. 3/2002 Coll. This is also testified to by, e.g., § 106 para. 2 of the Constitution of the CSR of 1920, which permitted deviations from the principle of equality "if they are permitted by international law." In other words, if the Agreement between the CR and the Holy See on the Regulation of Their Relations is concluded, this international law instrument can, in relation to the Catholic Church, regulate various issues regulated generally in Act no. 3/2002 Coll. in a manner which is different from the Act. With the application of Art. 10 of the Constitution as amended by constitutional Act no. 395/2001 Coll., a special contractual legal framework is applied, not the general statutory one (lex specialis).

"Reasonableness," and especially "commensurateness" of deviations from the principle of equality in relation to the Catholic Church are concepts which have a constitutional dimension. Evaluating them is, among other things, up to the Parliament of the CR, which gives approves international agreements under Art. 49 of the Constitution, and, finally, up to the Constitutional Court, if it were to receive a petition to evaluate the consistency of the Agreement between the CR and the Holy see with the constitutional order under Art. 87 para. 2 of the Constitution.

Under § 6 para. 2 of the Act on Churches and Religious societies (the "Act"), annulled by the Constitutional Court's finding, churches and religious societies may, if registered, found a religious legal entity "for purposes of organization, profession and propagation of religious faith." The transitional provision of § 28 para. 5 of the Act provides conditions

under which a registered church, after the Act goes into effect, is required to complete information about legal entities founded by it and already recorded, in accordance with the particulars required by Act no. 3/2002 Coll.

The majority vote considers the ratio decidendi of annulling these provisions to be the right of churches and religious societies to found religious orders and other religious institutions independently of state bodies (Art. 16 para. 2 of the Charter). These provisions, according to this vote, do not distinguish between registration and recording of legal entities, and are therefore limiting to a church or religious society in the aggregate: "In the Constitutional Court's opinion, these provisions directly give rise to subjecting the legal coming into existence of religious legal entities to a state decision, i.e. de facto registration of them, even though in the Act it is formally described as recording." However, in relation to the petition to annul § 16, § 20, § 26 and § 29 of Act no. 3/2002 Coll., the finding's reasoning states that "recording is appropriate, in particular in terms of fulfilling an information function and the function of protecting the rights of third parties," and that after the annulment of § 6 para. 2 and § 28 para. 5 of the Act, § 16, § 20, § 26 and § 29 "do not condition the legal coming into existence and termination of religious legal entities on a constitutive legal act by a state body, but the recording is only of a declarative nature and performs the specified functions of providing information and protecting the rights of third parties."

In relation to § 6 para. 2 of the Act the majority vote ignores the most significant grounds for annulment; as a result, the majority vote could thereby establish an even higher degree of uncertainty for churches or religious societies concerning legal entities founded by them.

The purpose of § 6 para. 2 of the Act is to define the purposes for which a church or religious society is authorized, under Act no. 3/2002 Coll., to found legal entities. If this goal is limited to "organization, profession, and propagation of religious faith" and does not contain related activities that are charitable, cultural, social care and so on, such a definition must be considered inconsistent with Art. 16 para. 2 of the Charter. The interpretation of the purposes arising from Art. 16 para. 2 of the Charter is given by the conceptual connection of organization, profession, and propagation of religious faith with a cultural, charitable and social role, as has developed in the European cultural tradition, and therefore also arises from a comparative legal viewpoint. Therefore, we do not consider the decisive reason of this opinion in relation to k § 6 para. 2 of Act no. 3/2002 Coll. to be the inadmissibility of what the majority vote claims to be "subjecting the legal coming into existence of religious legal entities to a state decision," but the limitation of purposes for founding religious legal entities.

The majority vote establishes legal uncertainty insofar as by deleting § 6 para. 2 of the Act without requiring it to be replaced by a new wording which would define goals in a manner consistent with Article 16 para. 2 of the Charter, the definition of purposes, the consequence is lack of interpretive clarity in defining the activities of a religious legal entity under § 16 para. 2 let. b) of the Act, with the risk of a restrictive interpretation, and thus also the risk of a penalty under § 16 para. 5 of the Act.

Analogous arguments also apply to the evaluation of constitutionality of § 28 para. 5 of the Act. If the majority vote justifies its annulment by the impermissibility of state interference in the authorization of churches and religious societies to found religious legal entities, a consequence of this legal opinion would be, in our opinion, legal inequality with regard to the requirements of recording religious legal entities established after the Act goes into effect and those which were established previously. Without anything further, one can not see in the legislative requirement for creating uniform records any grounds for inconsistency between the statutory provision at hand and the constitutional order. However, the disproportionately short deadline for meeting the requirements contained in that provision, can be seen as such grounds, particularly with churches with a large number of religious legal entities, as can the penalty, disproportionate to the gravity of possible unlawful conduct, consisting of not submitting all the particulars required for recording of religious legal entities. In our opinion, only the potential degree of this disproportion in the deadline and penalty are grounds for inconsistency of § 28 para. 5 of the Act with Art. 16 para. 2 of the Charter.

As the Constitutional Court expressed a different ratio decidendi in this matter, the authors of this separate vote are making use of this dissenting opinion only to the finding's reasoning, as they share the opinion of the majority vote in the matter itself.

Brno, 29 November 2002