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Church-State Relations in the Czech Republic: Past Turmoil and Present Transformation*

I. INTRODUCTION

The Czech lands¹ have traditionally occupied an unusual place in European history, particularly European religious history.² The site of the earliest European wars over religion and the first European governmental attempt to resolve the question

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1. The Czech Republic has only existed since 1993, but the Czech lands have been a separate geopolitical entity since the ninth century. Bohemia is the Latin name of the western half of the Czech Republic, but is sometimes used to refer to all of the Czech lands. Czechoslovakia, a composite state of the Czechs and the Slovaks, was created out of the Austro-Hungarian Empire after World War I and existed from 1918-93. Church-state relations in Slovakia have traditionally differed considerably from those in the Czech lands, so this Comment will not address Slovak church-state relations, even during the periods of Czech and Slovak unity in a Czechoslovak state.

2. For a good general history of the Czech lands, see *HANDBUCH DER GESCHICHTE DER BÖHMISCHEN LÄNDER* (Karl Bosl ed., 1967) or *IVAN RADA ET AL., DEJINY ZEMĚ KORUNY ČESKÉ* (1993). The most comprehensive bibliography of Bohemia before 1948, covering works from 1850-1975, is *BIBLIOGRAPHIE ZUR GESCHICHTE UND LANDESKUNDE DER BÖHMISCHEN LÄNDER VON DEN ANFÄNGEN BIS 1948* (Heinrich Jilek ed., 1988). Note especially the section on religion and church history, 2 *id.* at 311-88, and the section on law, *id.* at 1-64. Other helpful bibliographies include DAVID SHORT, *CZECHOSLOVAKIA: A BIBLIOGRAPHIC GUIDE* (1967). The only bibliography devoted to church-state issues in Eastern Europe is PAUL MOJZES, *CHURCH AND STATE IN POSTWAR EASTERN EUROPE: A BIBLIOGRAPHICAL SURVEY* (1987).

For a good general background history of Czech church-state relations, see 1 BOHUMIL J. FREI, *STAAT UND KIRCHE IN DER TSCHECHOSLOWAKEI 1948-1968*, at 1-112 (1989) (discussing church-state relations from the origins of the Czech lands to 1948), Hans Lemberg, *Die Kirche in unserem Jahrhundert 1918-1973*, in *BOHEMIA SACRA: DAS CHRISTENTUM IN BÖHMEN 973-1973*, at 26-32 (Ferdinand Seibt ed., 1974) (hereinafter *BOHEMIA SACRA*), and JAROSLAV KADLEC, *PŘEHLED CÍRKEVNÍCH ČESKÝCH DĚJIN* (1987) (providing Czech church-state history from the origins of a Czech state through the period between World Wars I and II). For a history of the Catholic Church in Czechoslovakia, see LUDVÍK NĚMEC, *CHURCH AND STATE IN CZECHOSLOVAKIA HISTORICALLY, JURIDICALLY, AND THEOLOGICALLY DOCUMENTED* (1955).

of freedom of religion arising from the Reformation,³ the Czech Republic has recently entered the limelight as the country with the most peaceful transition from a Communist regime. This transition, however, has raised historically unresolved questions about church-state relations, questions which are only now being officially addressed through draft legislation on churches and religious organizations.⁴

Part II provides further background to this draft legislation, highlighting some of the key events in the pre-Communist, Communist, and post-Communist eras which have contributed to current dilemmas. Part III delineates the major provisions of the draft legislation, such as its definition of and requirements for a church, its proposed replacement of direct financing of churches, and its proposals on church-state cooperation in the public sphere. Part IV critiques the proposal and provides suggestions and comparisons with other church-state systems. Finally, Part V summarizes the significance of the proposal and comments on the likelihood of its passage.

II. BACKGROUND

A. *Pre-Communist Era*

1. *Church-state relations before the First Republic (800-1918)*

The Czech lands are located geographically in the center of Europe and have traditionally been the crossroads for eastern and western European ideas and religions.⁵ In the ninth century, representatives of both Roman and Byzantine Catholicism gained footholds in the Czech lands.⁶ Roman Catholicism,

3. "Religious tolerance in Europe [was] first implemented in Bohemia." Alfred Eckert, *Die Bedeutung des Toleranzpatentes Kaiser Joseph II. für die Protestanten in Böhmen*, in *IM ZEICHEN DER TOLERANZ* 511, 518 (Peter F. Barton ed., 1981) (summarizing Ferdinand Seibt, *Toleranzproblem im alten böhmischen Staat*, 16 *BOHEMIA-JAHRBUCH* 39 (1975)). Unless noted otherwise, all translations are the author's.

See also *infra* notes 9-11 and accompanying text.

4. Draft Principles of the New Law on Churches (April 1996), translated *infra* appendix (original on file with author) [hereinafter Draft Law].

5. See, e.g., *DIE BÖHMISCHEN LÄNDER ZWISCHEN OST UND WEST* (Ferdinand Seibt ed., 1983).

6. See MARVIN KANTOR, *THE ORIGINS OF CHRISTIANITY IN BOHEMIA: SOURCES AND COMMENTARY* (1990); AUGUST NÄEGLE, *EINFÜHRUNG DES CHRISTENTUMS IN BOHMEN* (*KIRCHENGESCHICHTE BOHMENS* vol. 1, 1915); 1 RADA ET AL., *supra* note 2, at 27-31.

however, became the predominant religion until Jan Hus and the Reformation.⁷ Jan Hus's reformist ideas and his subsequent death at the stake in 1415⁸ led to the creation of several Protestant groups and the Hussite Wars (1419-36), the first wars in the Protestant-Catholic conflict. After the Hussites defeated six crusades of Catholics, the Council of Basel began to negotiate with Hussite leaders in 1431.⁹ These negotiations led to the Compacts of Prague, drafted in 1433 and signed in 1436.¹⁰ Although the Compacts did not fully grant any of the Hussites' demands and were later denounced by the Pope, they did at least provide for adults to choose between traditional Catholicism and Hussitism and were a first attempt to resolve the Protestant-Catholic divide in Europe and establish religious tolerance.¹¹

The destruction of prominent Protestant churches and the exile of their leaders at the decisive Battle of White Mountain in 1620¹² and throughout the Thirty Years' War (1614-48), along with the Habsburg-supported Counter-Reformation, led to the harsh re-Catholicization of the Czech lands in the late seventeenth century.¹³ Before the Battle of White Mountain, approximately 85 to 90% of the population of the Czech lands were not Catholic,¹⁴ but under the new policy of *cuius regio, eius religio*, the country was quickly and effectively reconverted to Catholicism.¹⁵ These centuries of religious turmoil and

7. For a discussion of how this developed in the tenth century, see Karl Bosl, *Herzog, König und Bischof im 10. Jahrhundert*, in *BOHEMIA SACRA*, *supra* note 2, at 269-94.

8. For a biography of Jan Hus, see MATTHEW SPINKA, *JOHN HUS* (1968).

9. See *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES* 106, 107 (Sidney Z. Ehler & John B. Morrall trans. & eds., 1954) [hereinafter *CHURCH AND STATE THROUGH THE CENTURIES*] for a translation of the Compacts of Prague.

10. 1 RADA ET AL., *supra* note 2, at 176.

11. *Id.*; see also *CHURCH AND STATE THROUGH THE CENTURIES*, *supra* note 9, at 107-08.

12. Eckert, *supra* note 3, at 518-27, summarizes the scholarly debate on the degree of tolerance afforded Protestants from the Basel Compacts to 1650. For details of the growth of Protestantism from 1517 to the Battle of White Mountain in 1620, see FRANTIŠEK X. KRYŠTOFEK, *PROTESTANTSTVÍ V ČECHÁCH AŽ DO BITVY BĚLOHORSKÉ 1517-1620* (1906).

13. For more details on the re-Catholicization of Bohemia, see TOMÁŠ V. BÍLEK, *REFORMACE KATOLICKÁ* (1892).

14. 1 RADA ET AL., *supra* note 2, at 285.

15. *Id.* at 285-88; *cf. infra* note 33 and accompanying text (noting that 96.1% of

destruction have been cited as the explanation for the high percentage of atheists and degree of apathy about religion in the Czech lands during the nineteenth and twentieth centuries.¹⁶

Since the Counter-Reformation, the Roman Catholic Church has consistently retained its position as the largest church in the Czech lands. Despite its nominal strength, however, it gradually came under the control of the state through most of the eighteenth and nineteenth centuries. Charles VI, for example, forbade the church in 1723 from obtaining any more real property, and Maria Theresa created an administration to supervise church property, convents, and monasteries.¹⁷ As part of his secularization and liberalization program, the Enlightenment Habsburg monarch Joseph I dissolved over half of all convents and monasteries, reducing the Catholic Church's land holdings to approximately 5% of the lands of the current Czech Republic.¹⁸ Out of the proceeds, he created land religious funds, which were supposed to be given to the clergy to replace tithes.¹⁹ Despite his general anticlericalism, Joseph I did allow Lutheran, Calvinist, and Orthodox believers the right to worship privately under the 1781 Tolerance Patent.²⁰

the population was Catholic by 1890).

16. See, e.g., CAROL S. LEFF, NATIONAL CONFLICT IN CZECHOSLOVAKIA: THE MAKING AND REMAKING OF A STATE, 1918-1987, at 20-21 (1988) (describing the Czech lands in the early twentieth century as having "a strong anticlerical tradition with nationalist roots; reformation leader Jan Hus was a national hero and martyr, and Czechs viewed the thorough and often ruthless counter reformation as alien-inspired. Even nominal Catholics . . . continued, not unjustifiably, to view the Roman Catholic hierarchy as a tool of Habsburg hegemony and grew steadily more secular in outlook"); PEDRO RAMET, CROSS AND COMMISSAR: THE POLITICS OF RELIGION IN EASTERN EUROPE AND THE USSR 73-74, 79 (1987) (claiming that the Hussite Reformation and the re-Catholicization of the Czech lands were the "[t]wo developments [that] ensured the disassociation of Catholicism and Czech national feeling"; describing the legacy of the Counter-Reformation as "[churches'] estrangement from the people, anticlericalism, and confessional weakness").

17. JIRÍ R. TRETERA, CÍRKEVNÍ PRÁVO 210 (1993). This administration was originally called the *Consensus in publico-ecclesiasticis*, but was changed into the *Geistliche Hofkommission* in 1782. Helmut Witetschek, *Absolutismus und Josephinismus*, in *BOHEMIA SACRA*, *supra* note 2, at 323, 325.

18. TRETERA, *supra* note 17, at 210. This resulted in the closing of 5 monasteries and 12 convents in Bohemia and 34 monasteries and 4 convents in Moravia. Witetschek, *supra* note 17, at 327.

19. See TRETERA, *supra* note 17, at 210.

20. Witetschek, *supra* note 17, at 328. One year later, 28 Protestant congregations were established in Bohemia and 25 in Moravia. *Id.* See generally ZEICHEN DER TOLERANZ, *supra* note 3. For a comparison and presentation of the original texts of the Tolerance Patent, see Peter F. Barton, "Das" Toleranzpatent von

Direct state control over the Catholic Church continued until 1874, when state controls over church finances were abolished and the separate legal existence of the church was established.²¹ Because the state no longer directly supported the church and church finances were insufficient to support its needs, a church tax (*kostelní konkurence*) was introduced, which local parishes collected directly.²² Since the wealth of individual parishes greatly differed, the state gave an additional contribution (*kongrua*) to equalize the support.²³ The 1874 law granted an official character to church representatives, who were also given additional responsibilities and privileges by virtue of their official status.²⁴ The church maintained autonomy in theological and doctrinal questions, but the state retained a veto right over the appointment of church officials.²⁵

The Protestant Patent of 1861 equalized the legal status of Protestant, Orthodox, and Jewish groups, all of which began to keep official records and receive smaller state financial contributions (*dotace*).²⁶ This system, subsequently expanded by the Communists, provided the basis for the existing church financing system, which the current draft legislation would fundamentally alter.²⁷ Like the 1874 law on the separate legal existence of the Catholic Church, the Protestant Patent of 1861 required that various levels and types of church officials must have approval from the state.²⁸

Close church-state relations, while raising some criticism around the turn of the century by those who advocated a "free

1781: *Edition der wichtigsten Fassungen, in ZEICHEN DER TOLERANZ, supra note 3, at 152.*

21. See TRETERA, *supra* note 17, at 210.

22. *Id.*

23. *Id.*

24. See BARBARA SCHMID-EGGER, *KLERUS UND POLITIK IN BOHMEN UM 1900*, at 17 (1974).

25. *Id.*

26. See TRETERA, *supra* note 17, at 211. This privilege was subsequently extended to other churches, including the current Unity of the Brethren (*Jednota bratrská*), Church of the Brethren (*Církev bratrská*), Unified Baptist Brethren (*Bratrská jednota baptistů*), and the Old Catholic Church (*Církev starokatolická*). These churches, however, did not generally receive financial support. *Id.*

The specific record-keeping responsibilities are described in SCHMID-EGGER, *supra* note 24, at 125.

27. See *infra* part III.B.

28. See SCHMID-EGGER, *supra* note 24, at 19.

church in a free state,²⁹ were generally favored by Catholics and officially recognized Protestant groups.³⁰ Unrecognized Protestant groups considered their independence from the state as adding to their spiritual freedom.³¹ Despite the general support recognized churches expressed for the close church-state relationship, their lower clergy often felt abused as servants of the state.³²

At the close of the Habsburg rule of the Czech lands, church-state relations and the inhabitants' religious composition reflected the strong influence of the Habsburg monarchy. As a result of the Counter-Reformation promulgated by the Catholic Habsburgs, Catholics formed 96.1% of the population of the Czech lands in 1890.³³ Although some Protestant churches were recognized, the Catholic Church clearly had a favored position.³⁴ All officially recognized churches, however, were still financially dependent on the state and had to gain state approval for church appointments.³⁵

2. Church-state relations in the First Republic (1918-48)

After World War I, a democratic Czechoslovakia was created out of Austria-Hungary. The close relations that churches, particularly the Catholic Church, had enjoyed with the Austrian state now worked to their disadvantage. Independence from Austria brought a strong antichurch and anti-Catholic reaction, which led to the formation of a Czechoslovak Church by part of the Czech Catholic clergy,³⁶ the removal of crosses from school

29. See *id.* at 117.

30. *Id.* at 115-16.

31. *Id.* at 116.

32. *Id.* at 130.

33. *Id.* at 16 (quoting KÖNIGLICHE UND KAISERLICHE STATISTISCHE ZENTRAKKOMMISSION, ÖSTERREICHISCHES STATISTISCHES JAHRBUCH FÜR DIE IM REICHSRATE VERTRETENEN KÖNIGREICHE UND LÄNDER 17 (1893)). The same figures for 1910 report 95.7% of the population as Catholic. *Id.* at 22 n.1.

The two largest Protestant groups together formed 2.2% of the population in 1890 and 2.61% in 1910. *Id.* at 19, 23 n.27. Jews were 1.6% of the population in 1890 and 1.27% in 1910. *Id.* at 20-21.

For a regional breakdown of the 1910 census, see LEFF, *supra* note 16, at 21.

34. See *supra* notes 22-26 and accompanying text.

35. See *supra* notes 23, 25, 28 and accompanying text.

36. For more details on the early growth of the Czechoslovak Church, see Mirek Podivinský, *Kirche, Staat und Religiöses Leben der Tschechen in der Ersten Republik*, in KULTUR UND GESELLSCHAFT IN DER ERSTEN TSCHECHOSLOWAKISCHEN REPUBLIK 227,

walls, and calls for a wider separation between church and state.³⁷ The most dramatic demonstration against Austro-Catholicism was the toppling of the statue of Mary in the Prague Old Town Square a few days after the Czechoslovak state's declaration of independence in November 1918. This statue was believed to have been erected to honor the Austrian victory in the Battle of White Mountain and was seen as a symbol of the Counter-Reformation and over 300 years of Austro-Catholicism.³⁸ After the creation of Czechoslovakia in 1918, approximately 1.5 million Czech and Slovak members left the Catholic Church, dropping the percentage of Catholics in the Czech lands from 96% to 71%.³⁹

The push to further separate church and state was also clearly expressed through official channels. The first outline of the new Czechoslovak state's ideology, the Washington Declaration of 1918, briefly mentioned a separation of church and state.⁴⁰ The first president of Czechoslovakia, T.G. Masaryk, spoke to the Czechoslovak National Assembly at the first anniversary of Czechoslovakia's independence, calling for a separation of church and state on the model of the United States and other democratic states, which would free the country from the authority of the church established by Austria.⁴¹ Official land

237-38 (Karl Bosl & Ferdinand Seibt eds., 1982).

37. See Karel Skalický, *The Vicissitudes of the Catholic Church in Czechoslovakia, 1918 to 1988*, in *CZECHOSLOVAKIA: CROSSROADS AND CRUISES, 1918-88*, at 297-98, 300-02 (Norman Stone & Eduard Strouhal eds., 1989); see also THOMAS G. MASARYK, *THE MAKING OF A STATE: MEMORIES AND OBSERVATIONS 1914-1918*, at 438 (1927) ("To 'de-Austrianize' ourselves means, first of all, to separate the Church from the State.").

38. See Podivinský, *supra* note 36, at 229. Podivinský notes, however, that the statue was not built to honor the Austrian victory at White Mountain, as was popularly supposed, but was built 30 years later to memorialize the successful defense of Prague against the Swedes. *Id.* at 230.

39. See Helmut Slapnicka, *Die Kirchen in der Ersten Republik*, in *BOHEMIA SACRA*, *supra* note 2, at 333. For details on the losses of the Catholic Church and the contrast between the 1910 and 1921 census figures on religious membership in various churches, see MASARYK, *supra* note 37, at 439-41.

40. See Slapnicka, *supra* note 39, at 333; see also Podivinský, *supra* note 36, at 232.

41. See Slapnicka, *supra* note 39, at 334; see also, e.g., MASARYK, *supra* note 37, at 438 (expressing Masaryk's personal views on the need to separate church and state); 1 THOMAS G. MASARYK, *CESTA DEMOCRACIE 206-08* (1934) (Masaryk's official addresses and writings) (responding in 1919 to an open letter calling for closer ties between church and state; citing the United States as a model of separation); 1 *id.* at 208-13 (memorandum for principles of the separation of church and state; rejecting the French and Portuguese models; recommending parts of the American and Brazilian models);

reforms of 1919 took lands from the Catholic Church, reducing their holdings to two percent of the current Czech Republic.⁴²

Despite the general anticlerical feeling and Masaryk's own desire to separate church and state, actual separation proved politically impossible to enact. In 1919, the government proposed a separation of church and state in section 121 of a draft constitution;⁴³ the final draft of the constitution, however, did not contain any section on the separation of church and state.⁴⁴

Instead of requiring a separation of church and state, section 121 of the new Czechoslovak constitution⁴⁵ became one of the provisions guaranteeing the freedom of religion. Section 121 protected the freedom of religion and belief; sections 122 and 123 protected the freedom to worship; section 124 proclaimed all religious organizations equal before the law.⁴⁶ These sections did not create any new rights; rather, they were taken word-for-word from the Austrian constitution.⁴⁷ The new constitution specifically left open the possibility of future legislation separating church and state.⁴⁸ The government indeed continued to pursue the separation of church and state, unsuccessfully proposing separation the following year and thereafter forming a separation committee.⁴⁹

2 *id.* at 212 (mentioning the need for a separation of church and state in Masaryk's 1922 New Year's address).

Although he used the United States as a model of a country with separation of church and state, Masaryk's understanding of separation was not a pure imitation of the U.S. system. For example, he proposed state contributions for the support of clergy. See 1 *id.* at 211.

42. TRETERA, *supra* note 17, at 211. See also 1 FREI, *supra* note 2, at 196 (citing zákon č. 215/1919 Sbírka zákonů [Sb.]).

43. See Podivinský, *supra* note 36, at 235; Slapnicka, *supra* note 39, at 335.

44. Podivinský, *supra* note 36, at 236; Slapnicka, *supra* note 39, at 336.

45. For a comparison of the character and value of the guarantees of the constitutions of 1925, 1948, and 1960, see Vratislav Bušek, *The Czechoslovak Constitutions of 1920, 1948 and 1960*, in *THE CZECHOSLOVAK CONTRIBUTION TO WORLD CULTURE* 396, 396-404 (Miloslav Rechcigl, Jr. ed., 1964).

46. See Slapnicka, *supra* note 39, at 336. Section 124 was originally intended to eliminate the difference between officially recognized churches and those not officially recognized, but this failed to happen in practice. See *id.* at 337.

47. *Id.* (citing STAATSGRUNDGESETZ ÜBER DIE ALLOEMEINEN RECHTE DER STAATSBÜRGER [Federal "Bill of Rights"] [StGG] art. 14 (Aus.)).

48. See *id.* at 336.

49. See *id.* at 336-37. The proposal for separation of church and state was the first introduced into the constitutionally elected parliament. See Podivinský, *supra* note 36, at 236.

Over time, the support for separation diminished⁵⁰—in 1925 the government officially supported the celebration of the 510th anniversary of Jan Hus's martyrdom and in 1929 it honored the millennium of St. Wenceslas.⁵¹ In addition, state financial support of registered churches was increased in 1926.⁵²

The Czech government, seeking to normalize relations with the Roman Catholic Church, signed a *modus vivendi* with the Papal seat in 1928.⁵³ This did nothing to resolve the economic questions, but provided a precursor to Communist control over clergy. The *modus vivendi*, *inter alia*, stated that bishops and clergy in the military had to promise not to act against the integrity of the republic and the inviolability of its borders.⁵⁴ Before appointing Czech clergy, the Papacy had to submit their names to the Czechoslovak government to see if it had any "objections of a political nature."⁵⁵ Although "objections of a political nature" was narrowly defined,⁵⁶ this right of approval continued established precedent⁵⁷ for later Communist legislation giving the government the right to object to the appointment of clergy on political grounds.⁵⁸ The democratic First Republic came to an end with the incorporation of the

50. This shift in sentiment can also be noted in the increase in the percentage of reported Catholics from 1921 to 1930 from 71% to 76.85%. See I. GADOUREK, *THE POLITICAL CONTROL OF CZECHOSLOVAKIA* 125 (1953) (quoting the 1930 census results from *STATISTICKÁ PŘÍRUČKA REPUBLIKY ČESKOSLOVENSKÉ* 22 (1948)); *supra* note 39 and accompanying text (citing the 1921 census results). For a breakdown of the 1930 census by region, see Bohumil Černý, *Die Kirche im Protektorat 1939-1945*, in *BOHEMIA SACRA*, *supra* note 2, at 345-46.

51. Černý, *supra* note 50, at 343-44; Skalický, *supra* note 37, at 302-04.

52. Zákon č. 144/1926 Sb.; zákon č. 122/1926 Sb. These statutes raised the *kongrua* for the Catholic Church to a level several times above its previous level and raised the *dotace* for the non-Catholic churches proportionally. TRETERA, *supra* note 17, at 211.

53. Slapnicka, *supra* note 39, at 342-43 (noting also that the Czechoslovak government rejected the form of a concordat to avoid granting a unique privilege to the Catholic Church); TRETERA, *supra* note 17, at 212.

54. Tretera explains that this was prompted by fear of Hungarian irredentists. TRETERA, *supra* note 17, at 212.

55. *Id.*

56. *Id.*

57. See *supra* text accompanying notes 25, 28.

58. Zákon č. 218/1949 Sb. § 7 ("(1) Spiritual (preaching, etc.) activity in churches and religious societies may be performed only by persons who have for it the consent of the state, and who take the oath. The contents of the oath will be disclosed by a government decree. (2) Every appointment (election) of these persons requires the previous consent of the state."), translated in ROBERT TOBIAS, *COMMUNIST-CHRISTIAN ENCOUNTER IN EAST EUROPE* 519 (1956).

Czech lands into the Third Reich as a protectorate and the creation of an independent Slovak state.⁵⁹

B. The Communist Era (1948-1989)

1. Basic laws and strategy

After the Second World War, the provisional government's "Program of Košice" guaranteed freedom of religion and conscience to all citizens.⁶⁰ After the rise of the Communist party to power in Czechoslovakia,⁶¹ however, the independence of churches, like all other civic organizations, came under fire.⁶² The new Communist government began by banning the most popular Catholic periodicals and closing some Catholic schools in February 1948.⁶³ The June 1948 constitution nominally guaranteed freedom of conscience, freedom of public and private profession, equality of religious denominations, liberty to act in accordance with one's religious denomination consistent with public order and liberty, and promised that no one should be prejudiced because of their religious beliefs; however, it contained some important limitations.⁶⁴ Religious beliefs could not be a ground for a citizen "to refuse to fulfil the civil duties laid upon him by law," citizens could be punished for "misusing"

59. For additional detail on church-state relations during this period, see Černý, *supra* note 50. 1 FREI, *supra* note 2, at 197, provides information on additional confiscation of church property during this period.

60. See TOBIAS, *supra* note 58, at 490.

61. The Communists won 38% of the vote in 1946 and formed a coalition government. In February 1948, the Communists staged a coup; in response, the aging and sick president Beneš, who had been one of the founders of the First Republic, allowed the Communists to form a new government under Gottwald. See 2 RADA ET AL., *supra* note 2, at 254-64.

62. There were some clashes between church and state under the coalition government, however, particularly in Slovakia. See *id.* at 491-92; RAMET, *supra* note 16, at 76.

For a summary of the various non-Catholic churches and religious organizations in existence at the time of the February coup, see 1 FREI, *supra* note 2, at 121-23.

63. See 1 FREI, *supra* note 2, at 115.

64. See TOBIAS, *supra* note 58, at 516 (providing a translation of the 1948 constitution).

the right to act in accordance with one's denomination,⁶⁵ and all schools were nationalized.⁶⁶

These limitations reveal the seeds of the Czech Communist strategy to break down the strength of organized religion. Legal restrictions on the behavior of clergy were used to discredit the local hierarchy and break down the unity of churches. Just as schools were nationalized under the 1948 constitution, all church lands were later statutorily nationalized and clergy became state officials. In addition, the authority of the Vatican was attacked as a foreign element and the State Office for Church Affairs supervised and controlled the churches at central and local levels.⁶⁷

2. *Nationalization and economic control*

Through several increasingly drastic land reforms, Czechoslovakia nationalized church property from 1945 to 1949.⁶⁸ The Catholic Church lost most of its land holdings under the law 46/1948 and lost all of its hundreds of hospitals and charitable institutions under 185/1948.⁶⁹ Unlike previous land reforms which redistributed property, including church property, to other private owners, the Communist measures nationalized

65. This threat was backed up by zákon č. 46/1948 Sb. § 28 ("Whosoever uses his religious or any other position for affecting the political development in a manner not compatible with the Constitution of the Republic, will be punished with imprisonment for from 1 to 12 months—if there are not reasons for even a more severe punishment."), translated in TOBIAS, *supra* note 58, at 517.

66. TOBIAS, *supra* note 58, at 515-16. For details on the process of nationalization of religious schools from 1948-49, see 1 FREI, *supra* note 2, at 277-83.

67. Zákon č. 217/1949 Sb. created the State Office for Church Affairs (Státní úřad pro věci církevní). This law is translated in TOBIAS, *supra* note 58, at 517-18.

For further discussion of the Communist tactics, see CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 9, at 612-17, GADOUREK, *supra* note 50, at 125-32, and TOBIAS, *supra* note 58, at 516 (translating an internal Communist memorandum on methods of attacking churches).

68. See 1 FREI, *supra* note 2, at 199-200 (citing especially zákon č. 142/1947 Sb. and zákon č. 46/1948 Sb.).

69. *Id.* at 200-03. Frei estimates that after the 1945 land reforms, the Catholic Church had 410,000 hectares, or 3% of the country's total land, and that only 10,000 hectares remained after the Communist land reforms. *Id.* at 201-02. For a review of the effect of land reforms in the First Republic and during World War II, see *id.* at 201. Vaško reviews the Catholic Church's opposition to the land reforms in VÁCLAV VAŠKO, 2 NEUMIČENÁ: KRONIKA KATOLICKÉ CÍRKVE V ČESKOSLOVENSKU PO DRUHÉ SVĚTOVÉ VÁLCE 17-19 (1990).

property from individuals, churches, and other organizations in an attempt to make them dependent on the state.⁷⁰

By 1948, churches were financially dependent on the contributions of their members and governmental support. Governmental support, however, only covered one quarter of the Catholic Church's expenditures in 1948.⁷¹ Contributions from members, however, fully compensated for the revenues lost from the nationalization of property and the suspension of part of the state support.⁷² Noting this, the state issued a limited ban on church collection of funds in early 1949 and a total ban in May 1949 in an attempt to retain control over churches.⁷³

The question of state funding was resolved in October 1949 by the watershed law 218/1949 which gave direct state financial support to all registered churches.⁷⁴ For theological, financial, practical, and historical reasons, the Catholic Church and others tolerated the state's "friendly understanding" in which they would receive state support but would grant the government additional controls.⁷⁵ Statute 218/1949 provided for state funding of the salary and benefits of the clergy⁷⁶ and the regular expenditures of churches.⁷⁷ Unlike the old system of *kongrua* and

70. See 1 FREI, *supra* note 2, at 198.

71. *Id.* at 206. At this time, many speculated that all state support of churches would shortly be cut off in a separation of church and state. *Id.*

72. *Id.*

73. *Id.* at 207 (citing the Czech interior minister's decree No. 260/20-3-5/5-1949-VB/32 (May 9, 1949)).

74. See "O hospodářském zabezpečení církví a náboženských společností státem" ["On the economic security of churches and religious organizations by the state"], zákon č. 218/1949 Sb., translated in CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 9, at 615-17 and TOBIAS, *supra* note 58, at 518-20. Notes and other documents from the committee that drafted the law and orchestrated its passage are contained in 1 CÍRKEVNÍ KOMISE ÚV KSČ 1949-1951, at 241-62 (1994) [hereinafter CÍRKEVNÍ KOMISE].

Zákon č. 218/1949 Sb. was one of three sets of "Church Laws" passed at the same time: zákon č. 217/1949 Sb. created the State Office for Church Affairs, see *supra* note 67 and accompanying text, and zákony č. 219/1949 - 223/1949 Sb. regulated the economic affairs of the Roman Catholic Church, the Czechoslovak Church, the Orthodox Church, and Jewish groups.

75. See 1 FREI, *supra* note 2, at 541. Vaško, however, notes that the government did not discuss this bill with the Catholic Church, but only with the schismatic "Catholic Action" group. See VAŠKO, *supra* note 69, at 101. For translation of statements of Roman Catholic clergy against a draft of 218/1949, see TOBIAS, *supra* note 58, at 520-22. These statements, however, only opposed the additional governmental controls on appointment of clergy, not the additional state financial support. *Id.* at 521.

76. See zákon č. 218/1949 Sb. §§ 1, 3, 4, 6.

77. See *id.* § 8.

dotace,⁷⁸ however, government support under 218/1949 was not distinguished by type of church.⁷⁹ The state estimated that such financial support would cost it 270 million crowns yearly.⁸⁰

In addition to increasing and regulating government support, 218/1949 also deprived churches of an important part of their internal autonomy. Despite governmental assurances that 218/1949 was implementing the guarantees of the 1948 constitution and respected freedom of religion,⁸¹ section 7 of 218/1949 stipulated that prior state approval of all individual clergy members would be required. Without such approval, the newly appointed member of the clergy would lose his ability to represent his church.⁸² Although the clergy technically remained employees of their church,⁸³ they were required to meet all the conditions for candidates for state office.⁸⁴ Section 13 provided for a fine of up to 100,000 crowns and possible imprisonment for those disobeying 218/1949.⁸⁵ Finally, 218/1949 cemented churches' financial dependence on the state by eliminating all their other customary or traditional sources of support "with the exception of such obligations of the members of the Churches and religious bodies as result from their statutes approved by the State."⁸⁶

78. See *supra* notes 23, 26 and accompanying text.

79. See CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 9, at 615 ("The State grants . . . salaries to clergymen of churches and religious societies who function, with the consent of the state as parish leaders in church administration, or in institutions for the education of the clergy." (quoting zákon č. 218/1949 Sb. § 1)). The introductory notes for zákon č. 218/1949 stressed that this eliminated the differences in social positions among clergy of various churches and between Catholic priests from rich and poor dioceses. See Zpráva k zákonům o Státním úřadu pro věci církevní a o hospodářském zabezpečení církví a náboženských společností státem, in 1 CÍRKEVNÍ KOMISE, *supra* note 74, at 249.

80. See 1 CÍRKEVNÍ KOMISE, *supra* note 74, at 252.

81. See *id.* at 247, 251. "The State has only one requirement: loyalty of the clergy, which is a requirement and a duty which is required of every citizen." *Id.* at 251.

82. See zákon č. 218/1949 Sb. § 7.

83. See *id.* § 1; 1 CÍRKEVNÍ KOMISE, *supra* note 74, at 252.

84. See zákon č. 218/1949 Sb. § 2.

85. *Id.* § 13. In 1950, a subsequent law provided for terms of imprisonment from one to five years for "misuse of religious function." See TOBIAS, *supra* note 58, at 523 (providing translation of the law).

86. Zákon č. 218/1949 Sb. § 11, translated in CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 9, at 617. For a discussion of the system of *patronát* which 218/1949 discontinued, see VASKO, *supra* note 69, at 105-06.

3. 1949-1989

These basic laws enacted during the period from 1948 to 1968 form the legal backdrop to the repression of churches and religious citizens during this period. Czechoslovakia, under General Secretary Klement Gottwald, strictly followed the Stalinist model of limiting churches' activities.⁸⁷ The government particularly targeted the Catholic Church and small minority religions. One commentator noted, "That tactic makes sense in view of the far more powerfully entrenched Roman Catholicism with strong ties to the Vatican and the Western links of the small 'sects' over against which the other churches seemed more closely loyal to Czechoslovakia, i.e. more flexibly contextualized within the society that the Communist Party was trying to dominate."⁸⁸ The State Office for Church Affairs, headed by Karel Hruza, implemented the repressive regulations by nationalizing church property, censoring religious publications, placing over 2,000 priests in labor camps, and closing the majority of monastic orders.⁸⁹

In 1960, a new Czechoslovak constitution was created, but this did not change the position of the churches. Article 32 granted freedom of confession and the right of a citizen "to practise his religious beliefs in so far as this does not contravene the law. . . . Religious faith or conviction shall not constitute grounds for anyone to refuse to fulfil the civic duties laid upon him by law."⁹⁰ Article 16 also required that "[t]he entire cultural policy of Czechoslovakia . . . be directed in the spirit of the scientific world outlook, Marxism-Leninism."⁹¹

The first signs of relief for the churches came in the Prague Spring of 1968. Under General Secretary Dubček, the government attempted to implement "socialism with a human face."⁹² This liberalization program included a relaxation on controls over churches.⁹³ The repressive head of the State Office

87. See PAUL MOJZES, RELIGIOUS LIBERTY IN EASTERN EUROPE AND THE USSR 163 (1992).

88. *Id.*

89. See *id.* at 165-68.

90. Ústavní zákon č. 100/1960 Sb. art. 32, translated in THE CONSTITUTION OF THE CZECHOSLOVAK SOCIALIST REPUBLIC 30 (1964) [hereinafter THE CONSTITUTION].

91. *Id.* art. 16, translated in THE CONSTITUTION, *supra* note 90, at 23.

92. See 2 RADA ET AL., *supra* note 2, at 280-89.

93. See VLADIMIR V. KUSIN, POLITICAL GROUPING IN THE CZECHOSLOVAK REFORM

for Religious Affairs, Karel Hruza, was replaced by "the liberal Dr. Erika Kadlecová."⁹⁴ Although the government did not enforce repressive legislation and released imprisoned clergy, none of the offending legislation was actually repealed or amended. Thus, after the Warsaw Pact tanks crushed the Prague Spring and Dubček was replaced, the period of "normalization" included re-enforcement of repressive laws.⁹⁵ Karel Hruza was reappointed as head of the State Office for Religious Affairs and led the elimination of religious freedoms and repression of those who continued to criticize government religious policies.⁹⁶ This renewed persecution of churches led to the formation of a highly developed "underground church."⁹⁷

This continued repression, along with the entry into effect of the Helsinki human rights accords in Czechoslovakia on March 23, 1976,⁹⁸ led to the first major attack on the government repression ten years after Prague Spring. Charter 77, a samizdat document signed by intellectuals and human rights activists, documented and condemned governmental violations of the Helsinki accords.⁹⁹ Charter 77 signatories included seventeen Protestant ministers and three members of the Catholic clergy, all of whom were subsequently deprived of their license to preach.¹⁰⁰ The Charter 77 group, spearheaded by playwright Václav Havel, continued to secretly distribute information and documents. On January 1, 1977, for example, the Charter 77 group distributed an excerpt from a document signed by three hundred people:

MOVEMENT 194-210 (1972). Although the reform movement clearly affected churches, it has been argued that church leaders were not heavily involved in the movement. See *id.*

94. MOJZES, *supra* note 87, at 173.

95. See 2 RADA ET AL., *supra* note 2, at 287-93.

96. See MOJZES, *supra* note 87, at 174-76.

97. See NIELS NIELSEN, REVOLUTIONS IN EASTERN EUROPE: THE RELIGIOUS ROOTS 96 (1991); see also Lubomir Hájek, *The Two Faces of the Church in Czechoslovakia, in CHURCHES IN SOCIALIST SOCIETIES OF EASTERN EUROPE 74-77* (Norbert Greinacher & Virgil Elizondo eds., 1982). Nielsen argues that the "underground church" was more highly developed in Czechoslovakia than in any other of the Eastern European countries. NIELSEN, *supra*, at 96.

98. See MOJZES, *supra* note 87, at 176.

99. See, e.g., 2 RADA ET AL., *supra* note 2, at 303-04.

100. See NIELSEN, *supra* note 97, at 93; Jakub S. Trojan, *Churches in the Gentle Revolution in Czechoslovakia*, OCCASIONAL PAPERS ON RELIGION E. EUR., Oct. 1990, at 1, 4.

Freedom of thought, conscience, and religious conviction, emphatically guaranteed by Article 18 of the International Covenant on Civil and Political Rights which had been signed by Czechoslovakia in 1968 and is systematically curtailed by despotic arbitrariness; by restrictions imposed on the activities of clergymen, who are under constant threat of revocation or loss of the state permission to perform their functions; by reprisals affecting the livelihood and other[] aspects of life of those persons who express their religious convictions by word or deed; by suppression of religious instructions in schools, etc.¹⁰¹

Over the years, Charter 77, along with some religious individuals and groups, continued to document and protest violations of international agreements and religious freedoms, without immediate positive results.¹⁰² Unlike other Eastern European countries, "in Czechoslovakia it seemed that the state only strengthened its resolve to continue its rigid antireligious policy with practically no concessions."¹⁰³

C. *The Post-Communist Era (1989-present)*

In November 1989, the Communist regime was toppled in a bloodless "Velvet Revolution." Václav Havel, the major spokesman for the Charter 77 human rights movement, was elected president of Czechoslovakia in December 1989.¹⁰⁴ Although some church activists were involved in the revolution, such as Cardinal Tomášek,¹⁰⁵ who sent a message of encouragement to demonstrating students in Wenceslas Square, and Václav Malý, a disenfranchised priest who was one of the leaders during the demonstrations,¹⁰⁶ organized churches and the underground church were not nearly as involved in the revolution as they were in Poland or East Germany.¹⁰⁷

Even after the fall of the Communist government, the legacy of forty years of Communist rule presents serious problems for

101. MOJZES, *supra* note 87, at 176.

102. *See id.* at 177-83; NIELSEN, *supra* note 97, at 92.

103. MOJZES, *supra* note 87, at 183.

104. *See, e.g.,* 2 RADA ET AL., *supra* note 2, at 309-17.

105. *See* NIELSEN, *supra* note 97, at 85-86.

106. *Id.* at 87.

107. *See id.* at 101; *see also* Trojan, *supra* note 100 (explaining the weaknesses of the church).

churches. In the 1991 census, the recorded number of those in a democratic Czechoslovakia without a confession rose for the first time above those belonging to the Roman Catholic Church.¹⁰⁸ The general de-Christianization and the diminution in the size of the religious orders were some of the major reasons cited by theologian and professor Josef Zvěřina to support the argument that more time is required for reconstruction.¹⁰⁹ Even with the remaining problems, however, great progress has been made in restoring religious liberty.

1. Framework documents in restoring religious liberty

After the "Velvet Revolution" of 1989, the democratic government drafted a new constitution and passed legislation returning many basic rights and freedoms to churches and citizens. The 1991 constitution of Czechoslovakia¹¹⁰ adopted a Charter of Fundamental Rights and Freedoms, which in 1993 was also incorporated into the constitution of the newly formed Czech Republic.¹¹¹ The Charter first provided for the nonidentification of church and state: "[t]he State is founded on democratic values and must not be tied either to an exclusive

108. See ALES GERLOCH ET AL., *ÚSTAVNÍ SYSTÉM ČESKÉ REPUBLIKY* 186 (1994). The 1991 Czechoslovak census results for religion reported the following amounts of members and population percentages:

Religion	Members	Percent of Population
Without confession	4,087,625	39.7%
Roman Catholic	4,038,720	39.2%
Uncertain	1,670,847	16.2%
Czech Brethren	191,001	1.9%
Czechoslovak Hussite	172,614	1.7%
Other	52,935	0.5%
Silesian Evangelical (Augsburg Confession)	48,969	0.5%
Orthodox	19,369	0.2%
Greek Catholic	8,774	0.1%
Reform Christianity	4,604	0.0%
Slovak Evangelical (Augsburg Confession)	3,273	0.0%

Id. Compare to the 1921 census results, *supra* text accompanying note 39.

109. See NIELSEN, *supra* note 97, at 97-98.

110. Ústavní zákon č. 23/1991 Sb.

111. Ústavní zákon č. 2/1993 Sb.

ideology or to a particular religion."¹¹² So far this is the only legislation in the Czech Republic that has attempted to describe the relationship between church and state.

The constitution and other legislation, however, have more clearly spelled out the basic freedom of worship. Section 7 of 218/1949, which required prior state approval of clerical appointments,¹¹³ was eliminated in 1990.¹¹⁴ The 1991 constitution guaranteed "fundamental human rights . . . without distinction to . . . belief [or] religion."¹¹⁵ Specifically, article 15 guarantees "[f]reedom of thought, conscience and religious confession," as well as the right to change one's religion or be without a religious confession.¹¹⁶ The most detailed provision regarding religious belief and worship is article 16:

(1) Everybody has the right to profess freely his religion or faith either alone or jointly with others, privately or in public, through religious service, instruction[,] religious acts, or religious ritual.

(2) Churches and religious societies administer their own affairs, in particular appoint their organs and their spiritual leaders, and establish religious orders and other church institutions, independently from organs of the State.

(3) The law establishes the conditions of religious instruction at state schools.

(4) The exercise of these rights may be limited by law if they concern measures in a democratic society which are essential for the protection of public security and order, health and morality, or the rights and freedoms of others.¹¹⁷

These rights were reiterated and implemented through more concrete legislation in statute 308/1991.¹¹⁸ The general

112. *Id.* čl. 2.1, translated in 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 152 (Albert P. Blaustein & Gisbert H. Flanz eds., 1993) [hereinafter CONSTITUTIONS OF THE WORLD].

113. *See supra* note 81 and accompanying text.

114. Ústavní zákon č. 16/1990 Sb.

115. Ústavní zákon č. 2/1993 Sb. čl. 3.1, translated in 5 CONSTITUTIONS OF THE WORLD, *supra* note 112, at 153.

116. *Id.* čl. 15.1, translated in 5 CONSTITUTIONS OF THE WORLD, *supra* note 112, at 156.

117. *Id.* čl. 16, translated in 5 CONSTITUTIONS OF THE WORLD, *supra* note 112, at 157.

118. "O svobodě náboženské víry a postavení církví a náboženských společností"

provisions of 308/1991¹¹⁹ include reiteration of the constitutional guarantees as well as provision for the right to freely spread one's religious faith and protection from being forced to profess a religious faith or be without a confession.¹²⁰ The more specific provisions of 308/1991 provide a definition of a church or religious organization,¹²¹ require all churches and religious organizations to be registered,¹²² list privileges of registered churches and their clergy,¹²³ and set forth the requirements for registration.¹²⁴

Churches and religious organizations are defined as "voluntary associations of people of the same religious faith, in an organization with its own structure, organs, internal regulations and ceremonies."¹²⁵ The provisions of 308/1991 give churches autonomy in their internal affairs and the right to fulfil their missions through, inter alia, freely determining their teachings and internal regulations, teaching religion, printing and distributing publications, running social services, sending representatives abroad, and receiving representatives from abroad.¹²⁶ These rights, however, may not violate the constitution, nor "threaten the safety of citizens and the public order, the health and morals or the rights and freedoms of others, the independence and territorial integrity of the state."¹²⁷ Under 308/1991, authorized representatives of churches have right of entry into hospitals, prisons, military barracks, and other social institutions.¹²⁸

["On the Freedom of Religious Faith and the Position of Churches and Religious Organizations"], zákon č. 308/1991 Sb.

119. *Id.* §§ 1-3.

120. *Id.* § 1(2)-(3).

121. *Id.* § 4(1).

122. *Id.* § 4(2), (4).

123. *Id.* §§ 5(2)-9.

124. *Id.* §§ 10-21. Statute 308/1991 also eliminated the State Office for Church Affairs, see *supra* note 67 and accompanying text, and provided a "grandfathering-in" clause for churches registered at the time of its passage. Zákon č. 308/1991 Sb. §§ 22, 24. At the time of the passage of statute 308/1991 Sb., 19 churches were legally recognized in the Czech Republic. See Příloha k zákonu č. 308/1991 Sb. [appendix to 308/1991].

125. Zákon č. 308/1991 Sb. § 4(1).

126. *Id.* §§ 5(2), 6.

127. *Id.* § 6(2).

128. *Id.* § 9(1). This right, however, can be limited by other generally binding laws. *Id.* § 9.2.

For a church or religious organization to be registered under 308/1991, a three-member preparatory group must prepare a proposal, which must contain basic information on the church and the names, addresses, and signatures of 10,000 members of the age of majority with permanent residence in the Czech Republic or 500 such members if the church is a member of the World Council of Churches.¹²⁹ The registering organ, currently the Department of Churches, examines the proposal and ensures that the "establishment and activity of the church are not in opposition to [318/1991] and other laws, the safety of citizens and public order," that "health and morals, humane principles and tolerance" are protected, and that there are no threats to the rights of other legal entities and citizens.¹³⁰ The law of 308/1991 establishes a basic framework for church activity in the post-Communist Czech Republic on the basis of constitutional guarantees, but leaves unresolved several important questions.

2. *Legally unresolved questions and problems*

The first legally unresolved question concerns the relationship between churches and the state. The constitution only requires that the state not exclusively identify with one particular religion or ideology,¹³¹ but does not specify how closely the state should or should not cooperate with or support churches. Opinions on this question vary widely, even within government,¹³² but most church and state officials agree on some form of separation of church and state and an end to direct support of churches.¹³³ The most problematic issue of this

129. See *id.* §§ 11-13; zákon české národní rady č. 161/1992 Sb. § 1 (providing the exact amounts of members required for registration).

130. Zákon č. 308/1991 Sb. § 15.

131. See *supra* note 112 and accompanying text.

132. "The head of the Ministry of Culture's Department of Churches, Pavel Zeman, said the opinions of the various ministers debating the matter range from favoring complete separation of church and state to favoring the same level of supervision as there was under communism." Alena Zivnostkova, *State Hopes to End Its Control — And Funding — Of Religion*, PRAGUE POST, June 21, 1995, available in LEXIS, Europe Library, Czecho File.

133. See, e.g., *Zásady zákon o postavení církví a náboženských společností* [Introductory Notes, Principles of the Law on the Position of Churches and Religious Societies] (May 1995) [hereinafter 1995 Draft] (on file with author); Petr Bakovský, *Církevní restituce zůstávají otázkou*, HOSPODÁRSKÉ NOVINY, Aug. 4, 1995, at 7 ("Churches are currently financed with the help of grants from the state budget. This condition is primarily a legacy of the recent past and neither churches nor the state

possible separation is the economic effect this would have on churches.¹³⁴ Currently, the economic provisions of 218/1949¹³⁵ are still in effect,¹³⁶ which provides for direct state support of all registered churches. In 1995, this support equaled about 400 million crowns (\$15.4 million) yearly and was divided among fifteen of the registered churches as needed to pay the salaries of their clergy.¹³⁷ If the system of direct support is to be changed or eliminated, the question of the exact form of possible indirect support or tax benefits still remains.

An additional question is the return of church property nationalized by the Communist government. In 1990 and 1991, buildings used for worship purposes were returned to churches, congregations, and religious orders.¹³⁸ The current owners of schools and charitable organizations which previously belonged to churches must return these buildings to the churches within the next ten years, providing time for the current owners to find new locations.¹³⁹ The law on land privatization blocked the sale of property which had been taken from churches, comprising about 4% of the Czech Republic's state-owned land fund and

are satisfied with it."); Jaroslav Huk, *Na formě asignací ministerstvo kultury netrvá, ale považuje ji za nejvhodnější*, DENNÍ TELEGRAF, Aug. 3, 1995, at 2 (claiming that both church and state leaders support indirect funding of churches); *Ministers Reject Draft Basics of Church Bill*, CTK National News Wire, June 5, 1995, available in LEXIS, Europe Library, CTK File (stating that government ministers rejected the draft bill because it "does not correspond to the intention to separate the church from the state") [hereinafter *Ministers Reject Draft*]; Bohumil Petínka, *Církevní zákon: čtyřikrát a dost*, LIDOVÉ NOVINY, June 8, 1995, at 5 ("The largest churches agree with the proposed separation.").

134. See, e.g., *Ministers Reject Draft*, *supra* note 133 ("[Finance Minister Ivan] Kořánek said he viewed the question of whether or not the state would participate in the financing of churches after their mutual separation as a key problem.").

135. See *supra* notes 74-75 and accompanying text.

136. The value of the salaries of the clergy as established in 1949, however, has decreased considerably over the years. In 1993 and 1995 the salaries were therefore increased. See *nářízení č. 86/1993 Sb.*, *č. 273/1995 Sb.*

137. See *Zivnustkova*, *supra* note 132. The other six registered denominations chose not to accept state funding. *Id.* The Department of Churches gave an estimate of 377.4 million crowns to churches for the past year. See *Draft Law*, *infra* appendix part V.

The support funds are first used to cover the salaries of all clergy members according to a pay scale set by the state. The remainder is then distributed among the churches according to their size. Letter from Dr. Pavel Zeman, Director, Department of Churches, to author (Apr. 10, 1996) (on file with author).

138. See *zákoay č. 298/1990, 338/1991 Sb.* These were primarily, however, just monasteries and convents. Letter from Dr. Pavel Zeman to author, *supra* note 137.

139. See *zákon č. 338/1991 Sb.*

3.8% of the state-owned forests.¹⁴⁰ Churches claim that the return of their property is essential in order for them to become financially independent,¹⁴¹ but public opinion is opposed to restitution, particularly of forests, fields, and industries.¹⁴²

In response to concerns about church-state relations, the financing of churches, and the return of property, the Czech Republic's Department of Churches has drafted a proposed law on the position of churches and religious organizations. This draft law focuses primarily on the issues of church-state relations and the financing of churches, but would also replace 308/1991 by providing a new definition of churches and new registration requirements.

III. THE DRAFT LAW ON THE POSITION OF CHURCHES AND RELIGIOUS ORGANIZATIONS

Upon the request of the Czech Council of Ministers, the Department of Churches first drafted a law governing churches and religious organizations in February 1995.¹⁴³ By September

140. See *Separation Without Property?* - "Cesky Denik," CTK National News Wire, Nov. 15, 1994, available in LEXIS, Europe Library, CTK File (quoting an article in the newspaper *Cesky denik*). Bakovský points out that the Catholic Church, with the possible exception of communal orders, is not particularly interested in the fields, since agriculture currently is not profitable. Additionally, the Catholic Church is only interested in the restitution of 300 of the 5,892 buildings they claim were seized by the Communists. See Bakovský, *supra* note 133.

141. See *Separation Without Property?* - "Cesky Denik," *supra* note 140 (quoting Archbishop Vlk as saying: "We want to be independent and we want to create this independence from our own sources. And it is property which belongs to the church that is one of these sources.").

142. See Bakovský, *supra* note 133. A survey done by the Institute for Public Opinion reported 44% of respondents in favor of the return of some buildings to churches, over 50% opposed to the return of forests and fields, and 62% against the restitution of industries. *Id.*

143. In July 1994, Premier Václav Klaus asked Minister of Culture Pavel Tigrid to draft a proposal for resolving church-state relations. *Tigrid to Put Forward Church-State Proposal by Mid-September*, CTK National News Wire, July 11, 1994, available in LEXIS, Europe Library, CTK File.

The first draft was presented to representatives of registered churches on September 9, 1994 and was finalized in February 1995. *Church Representatives Accept Draft on Relationship with State*, CTK National News Wire, Sept. 9, 1994, available in LEXIS, Europe Library, CTK File; Letter from Dr. Pavel Zeman to author, *supra* note 137.

A second draft, prepared in May 1995, was based on the principles in the "Proposal for the Transformation of the Relation Between the State and Church and Religious Organizations" (passed by the Council of Ministers on July 11, 1994, and Feb. 2, 1995). See 1995 Draft, *supra* note 133; see also Letter from Dr. Pavel Zeman to author, *supra*

1996, however, the Department of Churches had prepared four documents for government and parliamentary approval, none of which had been passed. The most recent draft, *Draft Principles of the New Law on Churches* ("draft law"), was produced in April 1996.¹⁴⁴ These drafts reflect the Council's concerns about the definition and role of churches and particularly the method of indirect financing.¹⁴⁵ The drafts propose to further separate church and state and to end direct financing of churches. The current draft, along with previous proposals, represents a major change from previously enacted church-state legislation in the Czech Republic,¹⁴⁶ particularly in its definition of a church,¹⁴⁷ its system of church financing¹⁴⁸ and church cooperation with the state in the public sphere,¹⁴⁹ and its freeze on the disposition of previously church-owned property.¹⁵⁰ Many of these key areas have variant proposals in the current draft, reflecting the uncertain parliamentary mandate.¹⁵¹ In general, the current draft refers to past Czech law and is an attempt to "conceptually unify[] church-state regulations through connections with the constitutionally based principles of church-state relations."¹⁵² This Comment first summarizes the various proposals and then analyzes them in a comparative framework.

note 137.

In August 1995, the Department of Churches drafted "Principles Resolving Church-State Relations in the Czech Republic," a series of basic principles designed to be voted on by parliament to indicate parliamentary authority. *Principy řešení vztahu státu a církví v České republice* [Principles Resolving Church-State Relations in the Czech Republic] (Aug. 1995) (on file with author) [hereinafter *Principles Resolving Church-State Relations*].

144. Draft Law, *infra* appendix.

145. For a discussion of some of the disagreements within the Council of Ministers, see Pečinka, *supra* note 133, and Zivnustkova, *supra* note 132.

146. See generally Draft Law, *infra* appendix part I. "With regard to the aforementioned insufficiencies of church-state legal regulations, the Proposer proposes to eliminate these norms and replace them with a law which will arise completely from constitutionally based principles of religious freedom and the mutual independence of the state and churches." Draft Law, *infra* appendix part I. For a listing of the legislation that the draft law supersedes, see Draft Law, *infra* appendix part II, § 7.

147. See *infra* part III.A.

148. See *infra* part III.B.

149. See *infra* part III.C.

150. See *infra* part III.D.

151. See Draft Law, *infra* appendix part I ("It was necessary to formulate this draft in several alternatives because the government has not yet acted on and approved a conceptual framework of new church-state regulations.").

152. Draft Law, *infra* appendix part II.

*A. Definition and Registration of Churches and
Religious Organizations*

Since the draft law and the constitution grant churches special benefits, the draft law distinguishes them from civic associations.¹⁵³ Section one defines a church or religious organization as “a voluntary organization of persons of the same religious faith with its own structures, internal regulations, and laws and religious ordinances, founded for the purpose of confessing and possibly spreading its faith.”¹⁵⁴ The draft law specifically excludes all organizations “in whose actions . . . economic activity . . . predominates.”¹⁵⁵ The government is given power to examine the purpose of a church during and at any time after registration.¹⁵⁶

The definition of the term church addresses one of the most basic issues underlying the draft law.¹⁵⁷ With its purpose requirement, this definition is narrower than that of presently binding legislation¹⁵⁸ and represents a tightening of the qualitative requirements for registration.¹⁵⁹ The other heightened qualitative criteria include the formal application requirements of section 2 and the verification procedures listed in section one.¹⁶⁰ Section 1, for example, allows the government to require a church requesting registration to demonstrate fulfillment of the qualitative requirements of registration at any time.¹⁶¹

Although the draft law tightens the qualitative requirements for registration, it decreases the quantitative requirements.¹⁶² In contrast to the previous requirement of 10,000 members with permanent residence in the Czech Republic or 500 such members

153. See Draft Law, *infra* appendix part I & part II, § 2. The draft law would change current law to allow unregistered churches to have a legal existence through registering as civic associations. Draft Law, *infra* appendix part II, § 2. This is a change from previous drafts. See, e.g., 1995 Draft, *supra* note 133, §§ 1, 3 cmt.

154. Draft Law, *infra* appendix part II, § 1.

155. Draft Law, *infra* appendix part II, § 1.

156. Draft Law, *infra* appendix part II, § 1.

157. See Draft Law, *infra* appendix part II, § 1.

158. See *supra* note 125 and accompanying text.

159. See Draft Law, *infra* appendix part II, § 1.

160. Draft Law, *infra* appendix part II, §§ 1-2.

161. Draft Law, *infra* appendix part II, § 1.

162. See Draft Law, *infra* appendix part II, § 2.

for a church which is a member of the World Council of Churches,¹⁶³ the draft law only requires 300 members with permanent residence in the Czech Republic for all churches, "in order to make it comparable with the number of persons which belonged to the smaller registered churches in the Czech Republic according to the last census in the Czech Republic."¹⁶⁴ This decrease, along with the expanded definition of a church, forms a major innovation of the new draft legislation.

B. State Financial Support of Churches and Religious Organizations

A second major innovation of the draft legislation is the proposal of a range of options for indirect state support and direct tax deductions for charitable contributions to churches.¹⁶⁵ Whichever variant parliament adopts would replace the current entitlement of all registered churches to direct support established by the law 218/1949.¹⁶⁶ The major benefit to churches would be the system of tax exemptions, which would allow taxpayers to deduct a percentage of their charitable contributions to churches directly from their tax obligation.¹⁶⁷ The draft law also provides for a five-year transition period for churches currently receiving direct state financial support¹⁶⁸ and allows for churches to be included in the government's broad-based facultative aid programs.

1. Direct tax deductions

In sharp contrast to the current direct government financing of churches, the draft law seems primarily designed to encourage church self-financing through charitable contributions. The draft law encourages such contributions through allowing individuals to deduct a percentage of their charitable contributions (up to ten thousand crowns) directly from their taxes.¹⁶⁹ The draft includes variants allowing for deductions of 50, 65, or 80% of the

163. See *supra* note 129 and accompanying text.

164. See Draft Law, *infra* appendix part II, § 2.

165. See Draft Law, *infra* appendix part II, § 5.

166. See *supra* notes 74-79, 135-37, and accompanying text.

167. See Draft Law, *infra* appendix part II, § 5.

168. See Draft Law, *infra* appendix part II, § 5.

169. Draft Law, *infra* appendix part II, § 5.

charitable contributions and endorses the 65% variant.¹⁷⁰ The proposal also provides variants for the range of churches affected by this tax offset. Parliament may select the beneficiaries to be (1) all registered churches, (2) all churches registered at least ten years, or (3) all accredited churches, churches which meet a higher standard for activity in the public sphere. None of these options is endorsed by the draft law "since each of them has appropriate specialist and political arguments pro and con."¹⁷¹

The proposal for limited tax offsets arose as an appendix to the August 1995 draft, "Principles Resolving Church-State Relations in the Czech Republic."¹⁷² At that point, the main draft law focused, however, on creating a system of indirect support similar to Italy's, in which taxpayers can direct a percentage of their taxes to an approved church.¹⁷³ Unlike earlier drafts, the current draft relies primarily on encouraging individual charitable contributions to offset the withdrawal of direct state support of churches.

2. *Facultative aid*

The draft law also attempts to compensate for the withdrawal of direct funding of churches through allowing churches access to the government's facultative aid. Previously, churches were specifically excepted from the aid, which was granted to various civic associations and political parties, because churches received direct aid.¹⁷⁴ The draft law would compensate by amending the law on facultative aid to include churches.¹⁷⁵ This would be the only form of state funding available for churches which are not involved in the system of tax exemptions.¹⁷⁶

The draft law suggests that facultative aid for churches will subsidize "concrete religious-cultural projects of churches,

170. Draft Law, *infra* appendix part II, § 5.

171. Draft Law, *infra* appendix part II, § 5.

172. Principles Resolving Church-State Relations, *supra* note 143.

173. See 1995 Draft, *supra* note 133. Other forms of indirect support to churches which have been considered and rejected include a church tax, similar to that used in the Federal Republic of Germany, and a system of church vouchers. See, e.g., *Church Opposes System of Church Vouchers*, CTK National News Wire, Apr. 11, 1995, available in LEXIS, Europe Library, CTK File.

174. Draft Law, *infra* appendix part II, § 5.

175. Draft Law, *infra* appendix part II, § 5.

176. Draft Law, *infra* appendix part II, § 5.

including the construction of new religious-cultural centers, churches, and houses of prayer."¹⁷⁷ It particularly refers to subsidizing construction of churches in areas where the Communist regime did not allow for them, but also generally refers to benefits the aid may give the clergy and "social and general cultural development."¹⁷⁸

Together, facultative aid and direct tax deductions for charitable contributions would replace the current direct government aid to churches; this is one of the major changes of the draft law.

C. *The Activity of Churches in the Public Sector*

As in other areas, the draft law provides variants in its regulation of the activity of churches in the public sector, such as their ability to perform civilly binding weddings, teach religion in the state schools, and conduct religious services in prison.¹⁷⁹ It presents an initial choice between retaining the current system, in which any registered church can act in the public sector, and allowing for differentiation among churches.¹⁸⁰ The proposer recommends the latter, emphasizing that activity in the public sector is a privilege above the basic level of religious freedom and one in which the government has different levels of interest in working with different churches.¹⁸¹

Within the variant allowing for differentiation, the draft includes two more options: (1) vary the authorization of churches' participation in the public sphere according to the type of activity in subsequent departmental regulations or (2) allow a limited number of "accredited" churches to participate in the public sector. Accreditation would have an effect roughly similar to a concordat, but would be a legislative decision of the Czech

177. Draft Law, *infra* appendix part V, § 3.

178. Draft Law, *infra* appendix part V, § 3.

179. See Draft Law, *infra* appendix part II, § 4.

180. See Draft Law, *infra* appendix part II, § 4; see also zákon č. 308/1991 Sb. (allowing all registered churches participation in the public sector).

181. See Draft Law, *infra* appendix part II, § 4. In particular, the proposal mentions the "qualitatively different contribution of individual churches," the "financial claims on the state budget," the "guarantee of legal faultlessness and reliability" in the churches' actions, and the "natural differentiation of interest of the state" in favoring the use of differentiation. Draft Law, *infra* appendix part II, § 4.

government expressing interest in cooperating with a church in certain areas in the public sector.¹⁸²

The proposer recommends the second subvariant and includes a proposed regulation detailing accreditation. Under this regulation, a church may apply for accreditation ten years after registration.¹⁸³ According to the draft law, churches would have no legal right to accreditation, which would be a purely discretionary governmental decision based on such criteria as "the number of members of the church in the Czech Republic, the international importance of the church, and experiences with its activity in the public sphere."¹⁸⁴ If a church applies for and is not granted accreditation, it may not apply again for another five years.¹⁸⁵

D. Freeze on Disposition of Church Property

The ownership of property taken from churches under the Communist regime remains an extremely difficult issue in the transformation of the economic ties between the state and churches.¹⁸⁶ The new draft law notes that settling the churches' property loss is "the fundamental assumption behind eliminating statute 218/1949" but does not propose a concrete resolution to the problem.¹⁸⁷ Instead, section 6 would protect unreturned church property through imposing a freeze on its transfer.¹⁸⁸ Transfers in violation of this law would be invalidated.¹⁸⁹ Thus, while postponing a final solution until a political consensus is reached, the draft law attempts to connect the return of property with other questions of the economic transition in church-state relations.¹⁹⁰

Although the draft law does not resolve the question of the restitution of church property, if passed it would provide the major legal norms governing church-state relations in the Czech

182. See Draft Law, *infra* appendix part II, § 4.

183. See Draft Law, *infra* appendix part II, § 4.

184. Draft Law, *infra* appendix part II, § 4.

185. See Draft Law, *infra* appendix part II, § 4.

186. See *supra* note 142 and accompanying text.

187. See Draft Law, *infra* appendix part II, § 6.

188. Draft Law, *infra* appendix part II, § 6. The draft law exempts land held by "foreign states, corporations with foreign property participation, and registered churches." Draft Law, *infra* appendix part II, § 6.

189. Draft Law, *infra* appendix part II, § 6.

190. See Draft Law, *infra* appendix part II, § 6.

Republic. Particularly significant are its new definition of churches, its resolution of the economic ties between church and state through new systems of tax exemptions and facultative aid, and its variations governing church activities in the public sphere.

IV. ANALYSIS OF THE DRAFT LAW

A. *Definition and Registration of Churches*

1. *Defining churches and religious organizations*

Defining *church* or *religious organization* has proved problematic for Western scholars,¹⁹¹ but formulating some kind of definition is inevitable when additional privileges and rights are granted to churches. Whatever definition is chosen, some groups that consider themselves religious are certain to be excluded. Including the largest possible number of these without allowing for fraud has proved extremely difficult.

The current definition of a church under Czech legislation, as a "voluntary association[] of people of the same religious faith, in an organization with its own structure, organs, internal regulations and ceremonies"¹⁹² theoretically allows for potential fraud. A group of people of the "same religious faith" could voluntarily organize themselves together for business purposes, yet receive the benefits of a church. They still would have to meet the other stringent registration requirements, however, which suggests why this problem has not yet arisen. Any potential loophole, however, is explicitly closed in the new legislation, since groups "in whose actions . . . economic activity demonstrably predominates" are specifically excluded.¹⁹³ A church must be "*a voluntary organization of persons of the same religious faith with its own structures, internal regulations, and laws and religious ordinances, founded for the purpose of confessing and possibly spreading its faith.*"¹⁹⁴

This explicit prohibition on purposes other than confessing and spreading a faith is clearly designed to prevent fraud, but,

191. See, e.g., Charles M. Whelan, "Church" in the Internal Revenue Code: *The Definitional Problems*, 45 *FORDHAM L. REV.* 885 (1977); Sharon L. Worthing, "Religion" and "Religious Institutions" Under the First Amendment, 7 *PEPP. L. REV.* 313 (1980).

192. Zákon č. 308/1991 Sb. § 4.1; see *supra* note 125 and accompanying text.

193. Draft Law, *infra* appendix part II, § 1.

194. Draft Law, *infra* appendix part II, § 1.

like any definition, may exclude groups outside the traditional Catholic-Protestant spectrum. For example, the Church of Scientology has elements which may appear to others to be "economic activity" but which they would claim are necessary in "confessing and spreading" their faith.¹⁹⁵ Even more traditional-looking religious groups may be excluded under a strict reading of the draft law. Some communal orders, for example, engage in much "economic activity." The draft law seems to draw a line at organizations in which economic activity "demonstrably predominates." Although this is certainly more appropriate a standard than one excluding religious groups which engage in any economic activity, it may still be difficult to bifurcate some activities—for example, to determine the extent to which a communal order is engaged in religious activity and the extent to which it is engaged in economic activity.

In addition, there remains the basic definitional problem of whether the required founding purpose of confessing and spreading a faith is exclusive. Some religious groups are either largely founded for charitable service or have branches, such as schools, which engage primarily in charitable or educational activities. These organizations presumably have a founding purpose that is broader than "confessing and spreading their faith."¹⁹⁶ Thus, organizations with a large social welfare component might not be considered churches under the draft law if the founding purpose requirement is exclusive. To avoid this

195. See *Hernandez v. Commissioner*, 490 U.S. 680, 700-03 (1989) (holding that even though the Church of Scientology requires payment for "auditing" and "training" services because of their religious belief in the "doctrine of exchange," these payments could not be deducted from personal income taxes as charitable contributions). Justices O'Connor and Scalia dissented in this case, noting the difficulty of determining what is being received in exchange under a facially quid pro quo agreement with a charity or church and citing IRS practice of treating pew rents, building fund assessments, periodic dues to a church, and Mass stipends as charitable contributions. See *id.* at 704 (O'Connor and Scalia, JJ., dissenting).

196. United States courts and the IRS have wrestled particularly with whether church-operated schools are primarily educational or religious institutions. The IRS maintains that church-operated schools with a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students are educational, not religious, institutions. See 26 C.F.R. § 1.501(c)(3)-(d)(3)(ii) (Treasury regulation on church-operated schools). Some courts, however, have found some schools to be predominantly religious. See *Employment Div. v. Archdiocese of Portland*, 600 P.2d 926, 927-28 (Or. 1979); *City of Concord v. New Testament Baptist Church*, 382 A.2d 377, 379 (N.H. 1978); RICHARD R. HAMMAR, PASTOR, CHURCH & LAW 333 (1983).

problem, the required founding purpose of "confessing" a faith should be necessary but not exclusive.

An additional problem arises from the characterization of a church as an organization having its own "structures, internal regulations, and laws and religious ordinances."¹⁹⁷ Groups associated with Eastern religions may not have a formal internal structure, regulations, or laws. These attributes of a church or religious society are based on Western experience and do not always correspond with Eastern concepts of religious organizations. This issue has become increasingly problematic throughout a Western world faced with increasing pluralism. As of yet, this is not a serious problem in the Czech Republic, which has a highly homogenous population,¹⁹⁸ but a narrow Western definition of a religious organization remains a potential barrier to religious liberty. This could be solved by more clearly characterizing elements of structures, internal regulations, laws, and ordinances as descriptive, not prescriptive.¹⁹⁹

The proposed definition of "church," while necessarily excluding some groups, is a reasonable attempt to propose a working definition. A few areas remain to be clarified, however: its limitation on groups in which economic activity "predominates," the nonexclusivity of the purpose definition, and the descriptive nature of its list of church attributes.

2. *Registration requirements of churches and religious organizations*

Like the definition of churches, the new registration requirements are a needed improvement, but leave unresolved some religious-liberty concerns. As the draft law suggests,²⁰⁰ the current requirement of 10,000 members with permanent residence in the Czech Republic or 500 members for a church

197. Draft Law, *infra* appendix part II, § 1.

198. The reported ethnic composition of the Czech Republic as of 1995 was 94.4% Czech, 3.0% Slovak, 0.6% Polish, 0.5% German, 0.3% Gypsy, 0.2% Hungarian, and 1.0% other. *KCWD/Kaleidoscope, Czech Republic*, available in LEXIS, World Library, KCWD File.

199. This is presumably the case in the current draft, as the focus is on the founding purpose: "The Proposer proposes, in contrast to the current definition of a church, aside from making it more precise, to specifically emphasize *its founding purpose*." Draft Law, *infra* appendix part II, § 1.

200. Draft Law, *infra* appendix part I.

which is a member of the World Council of Churches²⁰¹ is discriminatory against new, small churches and against non-Christian churches.²⁰² The draft law would reduce the requirement to 300 members with permanent residence in the Czech Republic for all churches,²⁰³ which, according to the draft law, is not discriminatory, as it compares favorably with the size of the smallest previously registered churches.²⁰⁴

Without the option, included in the current proposal,²⁰⁵ to allow religious groups to gain legal entity status without registering as a church, this number limit would discriminate against small churches.²⁰⁶ Currently churches cannot exist as legal entities unless they register;²⁰⁷ it unfairly discriminates against churches to require a larger membership in churches

201. See *supra* note 129 and accompanying text.

202. Only five of the 21 currently registered churches had over 10,000 members in Czechoslovakia in 1991. See *supra* note 108. It is unclear how many of the currently registered churches would have over 10,000 members in just the Czech Republic.

203. See Draft Law, *infra* appendix part II, § 2.

204. See Draft Law, *infra* appendix part II, § 2. The total amount of members (including legal minors) of the smallest registered churches is 365 in the Religious Society of Czech Unitarians and 427 in the New Apostle Church in the Czech Republic. 1995 Draft, *supra* note 133, § 5 cmt. The draft law requires 300 members legally of age to form a church. Draft Law, *infra* appendix part II, § 2.

205. Draft Law, *infra* appendix part II, § 2.

206. Unless religious groups can gain legal entity status without registering as churches, the 300-member requirement still discriminates against small churches. In determining the numerical requirement for churches in that case, the comparable number should not be 300, the number of members of currently registered churches, but should be three, equal to the number of members required for organization as a civic association. The comments to an earlier draft law argued that because of the above-standard privileges given to churches, it is not discriminatory to require more than three members of churches. 1995 Draft, *supra* note 133, § 5. This might be a tenable proposition if churches could choose to forgo their benefits and register as civic organizations. But unless churches are allowed to gain entity status as civic associations, as the new draft provides, it is clearly discriminatory to require religious groups to have 300 or 10,000 members to legally exist while allowing other groups to exist with only three members.

207. See Draft Law, *infra* appendix part I; 1995 Draft, *supra* note 133, §§ 3, 4. The comments to the earlier draft law attempted to justify continuing this situation by pointing out that unregistered churches, while not legal entities, may factually operate on the basis of their members' rights of assembly. See *id.* § 4 cmt. This ignores the reality that without legal status an organization cannot enter into contracts to rent or purchase facilities or materials, which considerably limits the value of the right of assembly. The new draft resolves this problem by amending the law on civic associations to let religious organizations register as civic associations to obtain entity status and forgo the benefits from registering as a church. Draft Law, *infra* appendix part II, § 2.

than in other organizations in order to become a legal entity.²⁰⁸ This discrimination not only endangers the guarantees of religious liberty embedded in the Czech constitution,²⁰⁹ but also violates international agreements to which the Czech Republic is a party. For example, Principle 16.4 of the Vienna Concluding Document, to which the Czech Republic is a signatory, requires that participating states "respect the right of religious communities to establish and maintain freely accessible places of worship of assembly [and] organize themselves according to their own hierarchical and institutional structure"²¹⁰ Allowing churches to choose to register or, particularly for smaller churches, to gain entity status as merely a nonprofit organization meets the basic requirements of associational freedom.

The primary justification for the "more rigorous requirements for registration of churches" is "the potential above-standard advantages which the law guarantees registered churches."²¹¹ Depending on the variations chosen for church financial support and church activity in the public sector, however, there may be no real "above-standard advantages" guaranteed to registered churches.²¹² The only privilege certain to be given to all registered churches is the potential to compete for facultative aid. This, however, at least according to the

208. Cf. Silvio Ferrari, *The Emerging Pattern of Church and State in Western Europe: The Italian Model*, 1995 B.Y.U. L. REV. 421, 432 (explaining that in Italy religious denominations may attain limited or full legal status through four methods, only one of which requires registration as a recognized religion).

209. See *ústavní zákon 2/1993 Sb. čl. 16*, translated in 6 CONSTITUTIONS OF THE WORLD, *supra* note 112, at 157 ("Everybody has the right to profess freely his religion or faith either alone or jointly with others, privately or in public, through religious service, instruction, religious acts, or religious ritual.").

210. *Concluding Document of the Follow-up Meeting of Vienna*, in THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972-1993, at 327, 336 (Arie Bloed ed., 1993) [hereinafter THE CONFERENCE ON SECURITY AND CO-OPERATION]. Commitments to CSCE documents are not formal legal commitments which are binding as treaty obligations, but are politically binding. See Arie Bloed, *Two Decades of the CSCE Process: From Confrontation to Co-operation, An Introduction*, in THE CONFERENCE ON SECURITY AND CO-OPERATION, *supra*, at 22-25.

See also Draft Law, *infra* appendix part IV (noting that increasing associational freedom will bring the Czech Republic in line with international agreements).

211. Draft Law, *infra* appendix part II, § 2.

212. One variant of the tax exemption proposal, variant C, would grant tax exemptions only to accredited churches. Draft Law, *infra* appendix part II, § 5. Two of the three variants on church activity in the public arena likewise limit the number of participating churches. Draft Law, *infra* appendix part II, § 4.

description in the draft law, seems to be intended for the largest and most established churches,²¹³ leaving some churches without any compensating benefit for the heightened registration requirements. In considering the various options for church financial support and church activity in the public sector, then, attention should be given to the hurdle churches face in registration itself.

An additional problem with the numerical requirement is its gatekeeper function. The proposal seems to view the numerical requirement, along with the qualitative requirements, as important for the "protection from proven socially dangerous and destructive cults."²¹⁴ This assumes that religious organizations, unlike other groups, are to be presumed guilty until proven innocent. Such an assumption clearly discriminates against religion. If the underlying policy were merely to protect against dangerous groups, then all groups should be subject to similar restrictions. Surely, political and military groups are at least as likely to be "dangerous and destructive" as churches. Requiring extensive registration and heightened membership only of churches seems unnecessarily discriminatory.

Even as a gatekeeper, the numerical requirement is imprecise and ineffective.²¹⁵ The introduction to the draft law phrases the problem with unduly high numerical requirements thus: "Our state established this practically unreachable requirement for obtaining legal status of a church for previously unregistered religious organizations with smaller numbers of members in the Czech Republic, [regardless of] whether they be world religions such as Anglicanism, Buddhism, or Islam."²¹⁶ This cogent point about world religions, however, is not directly addressed, even in the admirable reduction of the numerical requirement. A more precise gatekeeper function, if perceived as

213. See *supra* notes 177, 178.

214. Draft Law, *infra* appendix part II, § 2.

215. In addition, the requirement of 300 members is still high by European Community standards, see 1995 Draft, *supra* note 133, § 5 cmt., and was considerably lower in earlier drafts. The January 19, 1994 draft, for example, raised the requirement from 10 members of legal age to 50 members of legal age upon the request of the Ministry of Finance, the Ministry of the Interior, the Supreme Court, and several churches. See *Návrh zásad zákona o postávení církví a náboženských společností* [Principles of a Law on the Position of Churches and Religious Organizations] pt. IV, § 2 (Jan. 19, 1994) (commentary on principle 5) (on file with author).

216. See Draft Law, *infra* appendix part I.

necessary, could be served by allowing smaller numbers of members in churches which are world religions (defined, for example, by their presence in a certain number of countries or historical presence in one country) and in those churches which have a longer history in the Czech Republic. Otherwise Anglican, Buddhist, or Islamic groups with under 300 members in the Czech Republic will be unable to register, despite the encouraging tone of the introduction.

Despite its flaws, the numerical reduction from 10,000 to 300 members represents significant progress for increasing the reality of religious freedom, as does allowing religious organizations to gain legal entity status without registering as churches. However, the gatekeeping function of registration, while itself questionable, could be better served by allowing numerical reductions for world religions or churches with a historical presence in the Czech Republic. In any case, the hurdle created by registration will only be justified if the variants for tax exemptions and/or activity in the public sector that provide benefits for all registered churches are selected.

B. State Financial Support of Churches and Religious Organizations

The draft law's proposed elimination of churches' direct economic dependence on the state is a major change which would benefit both churches and the state. Churches would be freed from excessive government interference and control, while the state would benefit by reducing its financial obligations.²¹⁷ The draft law's alternative to direct, entitled state support—allowing tax deductions for charitable contributions—retains maximum church independence. The proposed variants, however, allow for the possibility of unreasonable discrimination. Thus, while certainly a vast improvement from the past direct economic support of churches, the draft law's alternative financing system contains some weaknesses. The project-based direct state financial support, or facultative aid, provision seems unclearly drafted and likely only to benefit the largest previously established churches.

217. See Draft Law, *infra* appendix part V.

1. *Elimination of 218/1949 and direct financing of religious activities*

The heart of the draft law is its elimination of 218/1949, the law which provided for direct state support of the religious activities of churches.²¹⁸ As the commentary to the draft law explains, this provision conflicts with the constitutional requirements of a secular state.²¹⁹ The elimination of direct support would also further freedom of religion, in reducing government regulation and intrusion into internal church structuring and financing decisions.²²⁰ The principle of disfavoring direct government support of churches has been well established not only in the United States, but also in countries which are based on a more cooperationist model. Although many European countries give incentives for charitable contributions and allow for taxpayers to choose to channel funds to churches through the government, the trend is clearly moving away from direct state support of ecclesiastical activities.²²¹ This does not

218. For a discussion of zákon č. 218/1949 Sb., see *supra* notes 74.

219. See *supra* note 112.

220. See Draft Law, *infra* appendix part I; see also *Aguilar v. Felton*, 473 U.S. 402 (1985) (striking down direct funding of remedial courses and guidance in parochial schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But see *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (allowing students to publish an avowedly Christian journal with public university funds); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that providing direct state funding for interpreter for deaf high school student attending parochial school did not offend the Establishment Clause).

In Greece, one of the few European countries which still retains direct support of church ecclesiastical functions, direct support has been opposed by, *inter alia*, church leaders, because "it is absolutely against the Holy Canons, it has communicated to the clergy the mentality of State employees, it has changed the Orthodox Church in Greece into a State agency, and last the number of qualified people attracted to the clergy for a financially secure future has remained very low." Charalambos K. Papastathis, *State Financial Support for the Church in Greece*, in *CHURCH AND STATE IN EUROPE: STATE FINANCIAL SUPPORT; RELIGION AND THE SCHOOL* 1, 18 (1989) [hereinafter *CHURCH AND STATE IN EUROPE*]. Similar concerns about direct funding were voiced in the Czech lands over a century ago. See *supra* text accompanying note 32.

221. Italy, for example, allows taxpayers both to deduct donations to certain churches from their taxable income and to designate a portion of their taxes to be given to a particular church. See Ferrari, *supra* note 208, at 435. Spain has also moved from a system of direct financing of the Catholic Church's ecclesiastical activities to a system of taxpayer-designated payments, similar to Italy's. See Isidoro M. Sanchez, *The Financing of Religious Confessions in Spanish Law*, in *CHURCH AND STATE IN EUROPE*, *supra* note 220, at 19, 31-33 (1989). Even the German *Kirchensteuer* is not technically a government tax and subsidy, but is a system of self-financing administered through the state. See Alexander Hollerbach, *Finances and Assets of the Churches: Survey on*

preclude, of course, direct state support for nonreligious church activities, in which churches compete against other providers of social benefits and programs for funds. In eliminating direct support of clergy salaries, the draft law moves the Czech Republic in line with its own constitution and with international experience.

As in many other countries, the direct financing system in the Czech Republic was designed to recompense churches for property taken by the state.²²² Removing the direct support without returning all the lands would unfairly disadvantage churches. For this reason, as well as out of a general policy to benefit nonprofit charitable organizations, cooperationist and noncooperationist governments alike provide some form of tax relief or indirect financial benefits to churches.²²³

2. Proposed system of tax offsets

The draft law not only eliminates direct aid, but also seeks to improve churches' ability to support themselves. This provision should be particularly important for churches, given the history of repression through banning independent church collection of funds.²²⁴ The draft law provides a limited tax offset for charitable contributions to churches, with variant proposals for the number of churches affected.²²⁵ This approach, unlike that of earlier drafts, focuses on minimizing government involvement and encouraging charitable contributions,²²⁶ which should be

the Legal Situation in the Federal Republic of Germany, in CHURCH AND STATE IN EUROPE, supra note 220, at 57, 63-64. The only direct subsidies German churches receive are for religious education, social work, and preservation of historical monuments. Id. at 62. Great Britain, with two established churches, also does not provide direct financing of church ecclesiastical expenses. See David McClean, State Financial Support for the Church: The United Kingdom, in CHURCH AND STATE IN EUROPE, supra note 220, at 77, 79-80.

222. See Sanchez, *supra* note 221, at 21 (noting that most explain state support in Spain as "a compensation to the Catholic Church for the expropriation of its assets"); Papastathis, *supra* note 220, at 18 (stating that the traditional reason for state aid "was that a large part of Church property had been transferred to the State," but further finding that this argument is "obsolete, because the expropriated Church property has been paid off long ago by the State subventions").

223. See, e.g., I.R.C. §§ 170, 501(c)(3) (West Supp. 1996) (allowing tax exemptions for churches and personal income tax deductions for contributions to churches). See generally CHURCH AND STATE IN EUROPE, *supra* note 220.

224. See *supra* text accompanying notes 73 and 86.

225. See Draft Law, *infra* appendix part II, § 5.

226. See *supra* note 173.

preferable from both the standpoint of the churches and the government. It capitalizes on the benefits of autonomy derived from eliminating direct subsidies and adds the benefit of being able to use a preexisting tax system.²²⁷

The proposal would allow taxpayers to deduct 50, 65, or 80% of the value of their charitable contributions to churches, up to 10,000 crowns, directly from their tax obligation.²²⁸ The range of churches for which contributions would be deductible would be either (1) all registered churches; (2) all registered churches ten years after their registration; or (3) only accredited churches.²²⁹

Of these three options, the first is preferable from an international human-rights standpoint because it does not make unreasonable distinctions between religious groups. While tax offsets are not required for free exercise of religion,²³⁰ if the government chooses to take a more accommodationist or cooperative approach and allow tax deductions, it should not discriminate unreasonably among churches. Such unreasonable discrimination, particularly if the number of churches were limited, would possibly violate the constitutional requirement that the Czech Republic "not be tied either to an exclusive ideology or to a particular religion."²³¹

The draft law does not endorse any of the options, citing the argument of equal access for the first two options and the "above-standard nature of these exemptions and the appropriateness of special guarantees against their abuse" in support of the third.²³² The latter argument, however, overlooks the fact that registration itself is a high hurdle for churches. The high numerical requirements, the submission of a detailed

227. This system would also include those churches which object to direct state subsidy of or involvement in ecclesiastical functions. See *supra* note 137; cf. Ferrari, *supra* note 208, at 436 (listing churches which refuse to participate in the Italian system of distribution of tax monies).

228. See Draft Law, *infra* appendix part II, § 5.

229. Draft Law, *infra* appendix part II, § 5.

230. See *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (holding that tax exemption is a privilege, not a right). *But cf. Waltz v. Tax Comm'n*, 397 U.S. 664 (1970) (describing the traditional exemption of churches from taxes). See generally D. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* (1977); Boris I. Bittker, *Churches, Taxes, and the Constitution*, 78 *YALE L.J.* 1285 (1969).

231. Ústavní zákon č. 2/1993 čl. 2.1, translated in 5 *CONSTITUTIONS OF THE WORLD*, *supra* note 112.

232. See Draft Law, *infra* appendix part II, § 5.

application, and the possibility of a church losing its registration should easily guard against abuse and reflect the "above-standard" nature of these exemptions. The tax offsets would use the current system; adding more churches to the list of those eligible would neither complicate the process nor create de minimis problems.²³³ Similarly, there is no administrative or logical reason why churches should be required to wait ten years before their members should be allowed to deduct their charitable contributions—this is merely discrimination against new churches.²³⁴

Thus, the system of tax offsets is a useful proposal designed to accommodate churches' financial needs without imposing on their autonomy or creating unnecessary entanglement. To avoid unreasonable discrimination among churches which have already jumped procedural hurdles, however, this system of tax offsets should be extended to all registered churches upon registration.

3. *Facultative aid*

Under the draft law, project-based facultative aid will be the only form of direct support given to churches.²³⁵ The draft law provides only a very sketchy outline of how extensive this support would be or which churches would benefit by it. The only example given of a benefitted project is that given in an earlier draft: "the building of new buildings, particularly religious

233. The United States system, for example, which allows deductions to taxable income for charitable contributions, allows exemption to numerous churches. See I.R.C. §§ 170, 501(c)(3) (West Supp. 1996) (detailing the requirements for charitable contributions to be deductible); Rec. Proc. 82-39, 1982-27 I.R.B. 18 (listing organizations which have filed an exemption application and are presumptively qualified). Churches do not even have to file an exemption application to be exempt. See I.R.C. § 508(c) (1994).

234. Cases of fraud can be resolved on an individual basis when the tax exemptions are claimed instead of forcing the churches to wait ten years to receive any tax benefits. See HAMMAR, *supra* note 196, at 346 ("Contributions made to an organization [which does not have preauthorized tax-exempt status] may be questioned by the IRS, in which case the contributor would have to substantiate the deductibility of his contribution by demonstrating that the donee met the requirements [of being a tax-exempt organization] and was exempt from notice requirements [i.e., was a church or nonprofit organization with gross receipts of normally not more than \$5000].").

235. See Draft Law, *infra* appendix part II, § 5(d). This type of support is to be distinguished from state support for churches' nonreligious activities, which is "assumed on the level of other nonstate nonprofit entities offering similar services." Principles Resolving Church-State Relations, *supra* note 143, § 4 cmt. (objectives presented by the government July 12, 1995); see 1995 Draft, *supra* note 133, § 2 ("Introductory Notes").

ones.²³⁶ The reasoning for this kind of support, again according to an earlier draft, is that "under totalitarianism the building of churches and synagogues was forbidden as a practical matter."²³⁷ This example seems to suggest that "facultative aid" is primarily designed to benefit those churches which were harmed by the effects of the Communist regime.

While this is an understandable and perhaps important form of restitution for past government wrongs, it is misleading for the draft law to consider the opportunity to receive facultative aid an "above-standard advantage" which justifies requiring registration of churches.²³⁸ Neither the purpose nor the intended recipients of facultative aid are clear from the draft law. If the only example provided is any indication, however, the draft law's explanation and justification of facultative aid is misleading.

In summary, although the draft law does not address churches' tax-exempt status,²³⁹ it does provide for tax offsets for charitable contributions to churches and for facultative aid. Tax offsets are an ideal way to create an accommodationist or cooperationist regime without excessive entanglement or limits on the autonomy of churches. This benefit, however, should be given to all registered churches instead of just a select few. Facultative aid, while nominally an above-standard advantage available to all registered churches, seems likely only to benefit the largest and most established.

C. *The Activity of Churches in the Public Sector*

All European cooperationist states allow churches specific opportunities to cooperate with the state in the public sector. Often some or all of these privileges are afforded to only a limited number of churches. Unlike the legal norms in Italy and Spain, the draft law does not propose regulating these privileges through concordats.²⁴⁰ Concordats, as international treaties, lock in the rights of the churches and thus might be preferred by

236. 1995 Draft, *supra* note 133.

237. *Id.*

238. Draft Law, *infra* appendix part I.

239. This omission well deserves reexamination, as tax exemption has proven the least entangling method of indirect state support to churches. See *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970).

240. See Ferrari, *supra* note 208, at 426-31 (Italy); Gloria M. Morán, *The Spanish System of Church and State*, 1995 B.Y.U. L. REV 535, 541, 544.

churches over legislative action, which can be changed unilaterally.²⁴¹

The Czech Republic's draft law provision on cooperation with the state²⁴² seeks to regulate activity "in areas which cannot be considered standard 'entitled' parts of fundamental religious freedom."²⁴³ Specifically enumerated areas include "(a) the performance of church marriages with civil law effect, (b) the teaching of religion at state schools, (c) religious services in prisons [and] perhaps in other state establishments (e.g., state hospitals)."²⁴⁴ The proposal then presents three variant answers to the question of which churches should be allowed to participate in public sector activities: grant privileges to all registered churches, differentiate according to the type of activity through departmental regulations, or introduce a system of accreditation in which only a few churches could have the right to participate in any activity in the public sphere.²⁴⁵

I. Accreditation

Of these three options, accreditation seems most problematic. Some of the activities in the public sphere, such as civilly binding religious marriages and religious services in prisons, have constitutional implications. The Czech constitution guarantees a citizen "the right to profess freely his religion or faith either alone or jointly with others, privately or in public, through religious service, instruction, religious acts, or religious ritual."²⁴⁶ These rights may be limited by law, but only "if they concern measures in a democratic society which are essential for the protection of public security and order, health and morality, or the rights and freedoms of others."²⁴⁷ A church marriage is a

241. Cf. Draft Law, *infra* appendix part II, § 2 ("If the registered church should prove clearly to be in violation of this law or the conditions of registration, the ministry may on the basis of external prompting or even without such may propose the abrogation of the registration of the appropriate church to a court . . .").

242. For a discussion of the provisions of the draft law dealing with churches' cooperation with the state, see *supra* notes 188-94 and accompanying text.

243. See Draft Law, *infra* appendix part II, § 4.

244. Draft Law, *infra* appendix part II, § 4 (emphasis omitted) (alteration in translation).

245. See Draft Law, *infra* appendix part II, § 4.

246. Ústavní zákon 2/1993 čl. 16.1, translated in 5 CONSTITUTIONS OF THE WORLD, *supra* note 112, at 157).

247. *Id.* čl. 16.4.

"religious ritual" and religious services in the prisons and the army clearly fall under the protection of professing one's religion through "religious service."²⁴⁸ Thus, these activities come under the basic constitutional protections²⁴⁹ that this provision of the draft law seeks to avoid infringing on.²⁵⁰ Unless restrictions on marriage and religious services in prisons and the army fall under the constitutional exception for "measures in a democratic society which are essential for the protection of public security and order, health and morality, or the rights and freedoms of others,"²⁵¹ they may not be implemented. Since adopting the principle of accreditation would limit the civil validity of church marriages and the right to hold religious services in prisons and the military to a few accredited churches, this variant appears to contradict the constitution. Multitiered systems have been criticized elsewhere; Silvio Ferrari explains: "Different legal rules cannot be tolerated, however, if the legal recognition of one group infringes, even if indirectly, on the fundamental rights which must be assured to every group and to every individual regardless of their religion."²⁵²

In addition, the inherently arbitrary nature of accreditation²⁵³ could lead to its abuse.²⁵⁴ Indeed, given the

248. *Id.* čl. 16.1.

249. A contrary argument about marriages can be made that while marriage rituals are constitutionally protected, there is no constitutional guarantee that these marriages will have civil validity. Nevertheless, requiring a civil marriage in addition to a church marriage seems to unfairly disadvantage believers and contradict the constitutional provision that "[n]obody may be caused detriment to his rights because he asserts his fundamental rights and freedoms." *Id.* čl. 3.3, translated in CONSTITUTIONS OF THE WORLD, *supra* note 112, at 153; cf. Ferrari, *supra* note 208 (noting that the prohibition of religious marriages without a previous civil marriage contradicts the basic European model of cooperationism and internal autonomy of churches).

250. See *supra* note 243 and accompanying text.

251. Ústavní zákon č. 2/1993 čl. 16.4, translated in CONSTITUTIONS OF THE WORLD, *supra* note 112, at 157.

252. Ferrari, *supra* note 208, at 437.

253. See Draft Law, *infra* appendix part II, § 4 ("The decisions on concrete churches or unions of churches shall be made arbitrarily by proposal of the ministry of culture to the government. There shall be no legal right to accreditation and it therefore shall not be connected to an administrative regulation.")

254. See Ferrari, *supra* note 208, at 433 (In Italian law, "[r]eligious communities do not have an inherent right to conclude an agreement with the government; the government has discretionary powers to determine whether it will enter into an agreement with a given religious group, or even open negotiations with a group seeking such an agreement. There is no barrier to guard against the government

anticlerical history of the Czech Republic²⁵⁵ and the current unwillingness of Parliament to deal with church-state issues,²⁵⁶ it is possible that no churches would gain accreditation. In any case, a system of accreditation would narrowly limit the range of churches able to act in the public sphere, even in such basic constitutionally guaranteed areas as marriage and church services in the military.

2. Differentiation through departmental regulations

Although all the areas in the public sphere mentioned in the draft law are areas where some degree of governmental cooperation is required for churches to function, the amount of cooperation required and corresponding costs to the state could potentially vary greatly. This variety of costs would seem to suggest introducing a system based on differentiation of churches through departmental regulations.

Cooperation with the state in teaching religion in state schools would most clearly seem to demand special regulation. This instruction is constitutionally mandated, but also constitutionally allowed to be limited by law: "The law establishes the conditions of religious instruction at state schools."²⁵⁷ Because of the high costs to the state and the need for coordination in hiring and scheduling, teaching religion in state schools is perhaps the prototype of an area in which express cooperation with the state and higher requirements of participating churches are valuable. For example, many European countries, but not all, subsidize religious education in public schools conducted by some churches.²⁵⁸

improperly using its discretionary powers to grant preference to a denomination for political reasons. . . . *The lack of a definite procedure and the imbalance of power, however, invites abuse on the part of the government.*" (emphasis added)).

255. See *supra* note 16 and accompanying text; *infra* note 266 and accompanying text.

256. See *supra* note 151 and accompanying text.

257. Ústavní zákon č. 2/1993 čl. 16.3, translated in 5 CONSTITUTIONS OF THE WORLD, *supra* note 112, at 157.

258. See, e.g., Tamás Földesi, *The Main Problems of Religious Freedom in Eastern Europe*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 243, 258-59 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). Földesi argues that there are two main models of religious freedom in Europe. The first model was "developed in Germany," where "support for the church also includes compulsory religious education in state schools" and "[r]eligious teachers are members of the state school staff." The second model, argues Földesi, is illustrated by Hungary, where

Other areas, with lower administrative costs and coordination needs, perhaps do not need the high requirements stipulated in the draft law. Performing church marriages with civil legal validity and organizing religious services in prisons and the army would seem to fall in this category.

While this attempt to distinguish the requirements for churches according to the nature of the activity may be reasonable, it is not clear what the practical effect of the variant would be. Leaving a determination of religious liberty to the discretion of various administrative departments seems an unlikely method to ensure religious freedom. Without more specific guidance, departments may be tempted to reduce their own work and not attempt to cooperate with any churches at all.

3. *Allowing all registered churches access to the public sector*

The final proposed variant would allow for all registered churches to participate in the public sector. This would continue the current practice.²⁵⁹ This is preferable from a human-rights standpoint because it allows the broadest possible range of churches to enjoy what can largely be seen as basic, constitutionally guaranteed rights. This variant would also give substance to the claim that high registration requirements are necessary because of the above-standard privileges granted to churches.²⁶⁰ Current practice suggests that this variant is entirely feasible and would not pose any undue burdens on the state.

Under this variant, the complications engendered by teaching religion in state schools, mandated by the constitution, could be resolved several ways. The constitution does not mandate that religious teachers be paid by the state; attendance at religious education could be voluntary and the teachers paid by their individual denominations. Another alternative would be to deal with this complex issue locally or in a separate piece of

"[r]eligious education is not compulsory Religious teachers are not members of state school staffs. Prayer in the school is not permitted." *Id.*

259. See *supra* text accompanying note 128 for a discussion of zákon č. 308/1991 Sb, which grants these privileges to all registered churches. See also Draft Law, *infra* appendix part II, § 4 ("Var. A: retain the current situation, i.e., continue to automatically infer a claim for activity in the public sector from the fact of registration").

260. See Draft Law, *infra* appendix part I.

legislation, where more attention could be focused on the best system for religious education in public schools.

Although it might not resolve all the issues involved in teaching religion at state schools, the variant allowing all registered churches access to the public sector has advantages in providing equal access and guaranteeing that religion will have a voice in the public sector. In the other options, the potential remains that none or very few religions will ever be allowed access to the public sector, including areas where accommodation is of little cost to the state and can be considered a basic freedom.

D. Freeze on Disposition of Church Property

The draft law avoids attempting to resolve the divisive issue of unreturned church property.²⁶¹ In this manner, the draft law avoids diverting attention from other basic yet controversial legal norms governing church-state relations. At the same time, a decision on the restitution of unreturned church property affects the economic status of the larger, traditional churches, particularly the Catholic Church, and is therefore connected to the economic provisions of the draft law.²⁶² The draft law instead forces Parliament to eventually resolve this problem by freezing the disposition of unreturned property and invalidating any illegal transfers.²⁶³ This restraint on alienation will likely reduce the value of the unreturned church lands, creating increased pressure on Parliament to act in this contentious and politically unpopular area.

V. CONCLUSION

If enacted, the draft law on the position of churches and religious organizations would replace the major church-state norms in the Czech Republic. In so doing, it eliminates the direct economic support mandated to churches under the Communist

261. See Draft Law, *infra* appendix part II, § 6. For a discussion of the draft law section freezing the disposition of unreturned church property, see *supra* notes 186-90 and accompanying text. Conflicting public and church opinion on the return of property is discussed in *supra* notes 138-42 and accompanying text.

262. See Draft Law, *infra* appendix part II, § 6.

263. See Draft Law, *infra* appendix part II, § 6.

regime.²⁶⁴ This system of state direct financial support and control of churches, however, like many of the current church-state problems, existed in some form even before the Communists.²⁶⁵ A major problem for both churches and church-state legislation is the Czech tradition of atheism and anticlericalism, dating back to the time of the Counter-Reformation.²⁶⁶ This sentiment led to attempts to remove direct state control of churches in the First Republic,²⁶⁷ which the current draft law would finally complete, particularly in the economic sphere. Public opinion, however, has so far effectively blocked a resolution of the corollary question of church property restitution.²⁶⁸ Fear of a negative public reaction will likely also impede the passage of the draft law, or at least further postpone any action on it.²⁶⁹

The draft law, however, is a vital piece of legislation. Major provisions include a narrower definition of church;²⁷⁰ a reduction in the number of members required for registration from 10,000 or 500 to 300;²⁷¹ a system of tax offsets for charitable contributions to religious organizations;²⁷² a variety of options, including a new system of "accreditation," for church cooperation with the state in activities in the public sphere;²⁷³ and a freeze on the disposition of unreturned church property.²⁷⁴ All of these proposals represent a significant increase in sophistication and together would create a church-state system that more closely approximates the Western European model of cooperationism.

However, to ensure adherence to the Czech constitution and to avoid unnecessary discrimination against newer, smaller

264. See *supra* notes 74, 165-68 and accompanying text.

265. See *supra* notes 21-23, 26 and accompanying text.

266. See *supra* note 16 and accompanying text. The 1995 figures on Czech religious composition further demonstrate the lasting hold of atheism: 39.8% Atheist, 39.2% Roman Catholic, 4.6% Protestant; 3.0% Orthodox; and 13.4% Other. See *KCWD/Kaleidoscope, Czech Republic*, available in LEXIS, World Library, KCWD File.

The Czech Republic is currently one of the three most atheistic countries in the post-Communist world. Interview with Dr. Pavel Zeman, Director, Department of Churches, in Prague, Czech Republic (Aug. 1, 1995) (tape on file with author).

267. See *supra* notes 36-44 and accompanying text.

268. See *supra* note 142 and accompanying text.

269. Interview with Dr. Pavel Zeman, *supra* note 266.

270. See *supra* text accompanying notes 142-59.

271. See *supra* text accompanying notes 162-64.

272. See *supra* text accompanying notes 165-87.

273. See *supra* text accompanying notes 188-94.

274. See *supra* text accompanying notes 138-42.

churches, the draft law needs some additional changes. This Comment proposes such changes as modifications to the definition of church;²⁷⁵ further reducing the amount of members required for registration;²⁷⁶ clarifying the purpose of direct, project-based facultative aid;²⁷⁷ selection of the option granting all registered churches tax offsets;²⁷⁸ and either continuing to allow all churches activity in the public sphere or specifically differentiating among the requirements for cooperation with the state in various areas of the public sphere.²⁷⁹

Despite its flaws, the draft law's significance lies in the fact that, if passed, it would be the first legislation removing churches from the direct economic control of the state in the history of the Czech lands. The democratic First Republic's failure in this regard was exploited by the Communist regime.²⁸⁰ The passage of such legislation now would be a landmark event, ensuring greater religious liberty in the future of the Czech Republic.

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275. *See supra* part IV.A.1.

276. *See supra* part IV.A.2.

277. *See supra* part IV.B.1.

278. *See supra* text accompanying note 239.

279. *See supra* part IV.C.

280. *Compare supra* text accompanying notes 25-28 with *supra* text accompanying notes 74-79.

APPENDIX

DRAFT PRINCIPLES OF THE NEW LAW ON CHURCHES (APRIL 1996)

I. ANALYSIS OF THE CURRENT LEGAL REGULATIONS

Current legal regulations concerning the position of churches and religious organizations (hereinafter "churches") and their relationships with the state depend primarily on the constitutional *Charter of Fundamental Rights and Freedoms* and then especially on two key laws—statute 218/1949, "On the financial support of churches and religious organizations," and statute 308/1991, "On religious freedom and the position of churches and religious organizations." These laws arise from diametrically opposed conceptions of church-state relations and the position of churches in society. The first of these is especially difficult to reconcile with currently binding constitutional regulations which establish that the state shall not be tied to religious confessions and that churches are autonomous and independent of the state.¹ Overall, church-state laws are now incoherent and inorganic. In addition, both of the aforementioned basic laws create serious problems in the interpretation and application of some of their provisions.

Statute 218/1949 is a typical relic of the Communist era. It arises from an understanding of churches as materially dependent on state support. Through its commitment to support the religious activities of churches, which was supposed to compensate them [churches] for their previously held real estate, the state took upon itself the responsibility for ensuring their existence and, at the same time, tied them closely to itself. This situation, which is clearly the exact opposite of the proclaimed separationist model, lasts to this day, excepting its two amendments [enacted] after 1989. While the first amendment eliminated the expressly repressive requirement of a state agreement for the performance of religious activities and of the supervision of church property, the 1992 amendment very

1. Ústavní zákon č. 2/1993 Sb. art. 2, para. 16 (*Charter of Fundamental Rights and Freedoms*).

unfortunately increased the claim on state aid for all current and future registered churches. Connected with the law is a regulation, anachronistic for its time, increasing the pay scales of the clergy, i.e., employees of formally state-recognized, completely independent subjects.²

The Proposer considers the aforementioned binding regulation on the economic relationships of churches and the state as fundamentally inappropriate. It is in conflict with the requirements of the previously cited constitutional provisions, i.e., it conserves a relationship of direct economic dependence of churches on the state and supports an undesirable involvement of the state administration both in the yearly approval of church budgets and in the problematic division of state aid. By far the greatest part of the total amount of aid divided yearly from the state budget to cover the state's commitments under law number 218/1949 must be used to cover the salaries of clergy, which, of course, are set by the churches completely independently and without any regard to, e.g., the number of their members. The binding law provides absolutely no motivation for financial self-sufficiency and initiative.

Statute 308/1991 was drafted with the goal of changing the conditions of or the activity of churches in a free society, being tied to the Charter.³ The basic problem is the question of its conceptual reconciliation with the still-existing regulation on the economic support of churches by the state. The registration of churches itself, i.e., the decision by a state organ through which churches gain legal existence as a legal person *sui generis*, according to the current regulation, forms the basis, automatically and without differentiation, not only of their claim to aid for the religious activities of the church from the state budget, but at the same time forms the basis of their claim for their activities in the public sector.⁴ The effort to limit the effects on the state budget arising from this [registration] led to the requirement of an extremely high amount of people belonging to the church, which is established as a requirement of application for registration under statute 161/1992, "On the registration of

2. See nařízení č. 86/1993, as amended by nařízení č. 273/1995.

3. Ústavní zákon č. 2/1993 Sb. (Charter of Fundamental Rights and Freedoms) (translator's note).

4. See *infra* appendix part II § 4.

churches and religious societies." This amount is 10,000 adult persons with permanent residence in the Czech Republic, or 500 persons if the applicant [church] is a member of the World Council of Churches. Our state established this practically unreachable requirement for obtaining legal status of a church for previously unregistered religious organizations with smaller numbers of members in the Czech Republic, [regardless of] whether they be world religions such as Anglicanism, Buddhism, or Islam. The second variation for fulfilling the numerical requirement, similarly practically inappropriate, presents clear discrimination against non-Christian religions. For unregistered religious organizations, which, aside from this numerical requirement, would fulfill without any problems all the requirements of the law for registration as a church, the current problem is even more urgent, because our legal system does not allow them the possibility of gaining legal existence according to other regulations. The statute on the organizations of citizens expressly excludes, with sanctions, the possibility of their registration as citizens' associations. The possibility of their involvement in our legal system and thus also fulfilling constitutionally guaranteed freedom of association for their members is thus made much more difficult even in comparison with the requirements for the registration of political parties.

In the case of the desired liberalization of the quantitative requirements of registration, it is essential to make the qualitative criteria more specific. To this end, the Proposer considers the essential insufficiencies to be, above all, in the currently used legislative technical definitions of a church. These [definitions] should clearly distinguish this specific category of legal person from other subjects, proportionately in the case of above-standard advantages. The application in practice has so far shown that several regulations of the law are formed so unclearly and fragmentarily that they allow for various interpretations in very serious questions. This primarily involves the regulation of the legal position of those groups (in this draft "organizational units") of a church which have legal existence and of the regulations covering their filing. The law is also lacking a regulation of the legal status of unions of churches.

With regard to the aforementioned insufficiencies of church-state legal regulations, the Proposer proposes to eliminate these norms and replace them with a law which will arise completely

from constitutionally based principles of religious freedom and the mutual independence of the state and churches. This law should also clearly delineate the areas of the public sector, where the activity of churches arises from the intersection of their interests and the state's interests, and should govern the requirements of this activity.

It was necessary to formulate this draft in several alternatives because the government has not yet acted on and approved a conceptual framework of new church-state regulations. In places, detailed specifications follow the clarification of the basis of several key provisions, through the mutual interconnectedness of the regulations and the compatibility of proposed variants, and thus should prepare a consistent basis for a paragraphed draft.

II. PURPOSE AND MAIN CONTENT OF THE DRAFT

The purpose and main content of the draft is in:

- conceptually unifying church-state regulations through connections with the constitutionally based principles of church-state relations;
- making the requirements for involving churches in the state's legal system and their activity in the public sphere more precise; and
- fundamentally transforming the system of the economic support of churches.

The basic structure of the contents of the draft is:

1. Legislative definition of a church;
2. Registration of churches and unions of churches;
3. Recording of churches as legal persons;
4. Activity of churches in the public sector;
5. Transformation of the system of aid into a system of indirect economic support;
6. Measures for the protection of unreturned church property; and
7. Superseded legislation.

DRAFT PRINCIPLES:

1. Legislative Definition of a Church

The definition of the term church serves to legislatively and technically distinguish churches from other organizational legal forms of legal entities, regulated by other laws, such as citizens associations. The substance of the term church is basically a qualitative requirement of registration according to this law, from which flows a certain legal regime, perhaps administrative.⁵

The Proposer proposes, in contrast to the current definition of a church, aside from making it more precise, to specifically emphasize *its founding purpose*. The proposal understands a church to be *a voluntary organization of persons of the same religious faith with its own structures, internal regulations, and laws and religious ordinances, founded for the purpose of confessing and possibly spreading its faith*. The basic founding purpose of a church can perhaps be clarified through a negative definition, analogous to the dictum of the law on income, in that a church cannot be an organization of persons, although they formally declare themselves a church, in whose actions, however, economic activity demonstrably predominates.

The purpose of founding a church as a basic criterium of registration will be examined not only at registration, but will also be examined any time after registration. If the relevant proofs are convincing that the activity of the church does not reflect the given purpose, this will be a reason for commencing the abrogation of their registration.

2. Registration of Churches and Unions of Churches

The regulation on registration makes the conditions for gaining legal status of a church more precise. The goal is to eliminate some ambiguities of the current legal regulations and at the same time allow smaller-numbered religious organizations to gain the legal status of a church. The basic postulate is that through registration under this law, a church becomes a legal entity in the administrative law, if the church is not one which has been receiving funds under earlier laws. Thus, churches

5. See *infra* appendix part II, §§ 4-5.

become legal entities in accordance with the general regulation in regulation section 19, paragraph 2 of the civil code. For churches which will not be registered according to this law (either from their own choice or by reason of rejection, or possibly abrogation of registration), this reality in itself does not mean a ban on their activities, only that they do not have—just as now—legal existence as an independent legal entity.

Requirements of a proposal for registration:

- (a) A proposal for registration must be presented by the preparatory council of the church, which is formed by at least ten adult citizens of the Czech Republic with permanent residence in the Czech Republic, in which their personal data and signatures must be officially notarized.
- (b) A proposal for registration must contain the name and headquarters of the church in the Czech Republic and a binding proclamation that the church will be tolerant of other registered churches and of persons without confession.
- (c) A proposal must present the signatures and personal data of at least 300 adult persons with permanent residence in the Czech Republic [and] which belong to the church requesting registration.
- (d) The basic charter of the church must be attached to the proposal, e.g., [church] regulations, statutes, etc., containing, in addition to the precise typical facts required in previous regulations, also accurate data on the internal organizational structure of the church, particularly the types of organizational units of the church with legal existence, with a listing of their legislative organs and the means of organization, and data on the methods of resolving internal church disputes over the legitimate representatives of the church outside of the church.

The proposal is presented to the registering organ, which currently is the Ministry of Culture ("the Ministry"). [Continued] registration remains dependent on [submitting] any changes to the basic document, with the exception of changes of their [churches'] contact address. Changes in the proposal for registration are presented by the legislative organ of the church.

In the sphere of the establishment of quantitative requirements for the registration of churches, the law fundamentally reduces the previous inappropriately high amount needed for application in order to make it comparable with the number of persons which belonged to the smaller registered churches in the Czech Republic according to the last census in the Czech Republic. At the same time, the amount [of members required] clearly differs from the number of persons which can form a civic association (three persons including at least one adult).

Considerably more rigorous requirements for registration of churches are based on the potential above-standard advantages which the law guarantees registered churches. For this purpose the establishment of stricter requirements of the formation of the preparatory council of the church and of checking the personal data of its members is also taken into account.

As long as it [this law] should finally resolve the current problem of limitation, which our administrative law has factually placed on the associations of individuals for religious expression, and at the same time reserve the legal category of a "church" only for a religious organization which fulfills the listed stricter criteria, the Proposer recommends in connection with the new law on churches an appropriate amendment of the law on the association of citizens. There is no reason to discriminate against a religious organization of the character of a church that does not fulfill the criteria for registration, particularly the proposed higher numerical requirement, in the ability to register and thus gain legal existence as a citizens' association. This [legal existence] would, of course, be without the legal results connected to the registration of a church.

As far as the domestic limitation of churches and their organizational units is concerned, it is understood that this law, for its purposes, is primarily concerned with an entity which has its headquarters in the Czech Republic and whose representatives as decision-making organs of the appropriate

legal entities also have their headquarters in our territories. In this sense, the supranational character of some churches or church organizations is irrelevant from the point of view of the binding law of the state.

The primary requirement for judging a proposal for registration is the churches' basic document. On the basis of the proposed data the registering organ judges whether [the proposed organization] involves a church within the meaning of the law and whether the intended activity is opposed to our legal system. Particularly in the case of more complexly structured churches, it is fundamentally important to clearly define legal entities forming an essential part of churches whose internal church regulations admit independent legal existence in accordance with the constitutionally based autonomy of churches. These are, e.g., in the Roman Catholic Church, societies of a consecrated life and societies of an apostolic life (in the broad sense of the term "monasteries and congregations"), particularly their structures in the Czech Republic. On the basis of previous practical experience, the Proposer sees the necessity of establishing, as an element of the basic documents, the required regulation of internal church disputes over the legitimacy to represent the church externally.

The regulation on registration is drafted specially in relationship with the administrative system, which regulations it uses subsidiarily. The regulations are invoked the day the ministry receives a proposal which fulfills all of the elements required by law. To cover the possibility of an independent refusal of the registering organ to commence the proceedings, the Proposer proposes to anchor into the new law the possibility for the preparatory council to claim at a regional court that the application for registration has no deficiencies. Analogous to the registration of political parties, in these cases the proceedings would be commenced by acquisition of a legal judicial decision.

On the basis of the presented proposal, the ministry examines if the qualitative and quantitative criteria for registration have been fulfilled and if the founding and activity of the church are not in contradiction with the constitution of the state and other generally binding legal regulations and if they do not threaten the rights of other legal entities and citizens. For the examination of these realities, the ministry may require information, standpoints, or legal decisions of other state organs,

[including] perhaps expert opinions. This should particularly ensure protection from proven socially dangerous and destructive cults.

If no legal barriers to registration are found, the ministry announces the decision that the church is registered. In the interest of guaranteeing maximum objectivity, unauthorized decisions of state administrative organs are contestable through approved means, which are determined by the supreme court according to appropriate regulations of the civil code.

Churches which were registered according to previous legislation before the day of effect of the new law shall be considered registered according to this law. A list of them shall be included in its [the law's] appendix.

If the registered church should prove clearly to be in violation of this law or the conditions of registration, the ministry may on the basis of external prompting or even without such propose the abrogation of the registration of the appropriate church to a court, which will decide according to the merits and in the case of the abrogation of registration shall designate a current liquidator of the remnants of the property, if no method of liquidation was presented in the basic document of the church. The decision of abrogation of political parties and even citizens associations is analogous.

As opposed to current legal regulations, the Proposer proposes to also explicitly resolve the question of the legal existence and legal status of *unions of churches*, which have their headquarters in the Czech Republic (e.g., the Ecumenical Council of Churches). For their registration, the analogous registrations applying to churches are valid with reasonable simplification. For this reason only registered churches may be members of unions.

3. *Recording of Churches as Legal Entities*

The Ministry shall conduct a *registry of church legal entities*, in which shall be recorded:

- (a) registered churches and unions; and
- (b) organizational units of registered churches with their headquarters in the Czech Republic, which [units] have legal existence according to the basic document of the church.

All who demonstrate legal interest may examine the registry.

Organizational units of registered churches, established in accordance with their internal regulations, which have legal existence according to those internal regulations and have their headquarters in the Czech Republic, become a legal entity from the moment of their establishment on the basis of the internal regulation of the registered church. In this way, the question of the specific forms of legal persons is resolved, especially in relation to the general regulation section 19, paragraph 2 of the civil code, in the valid legal regulation of statute 308/1991, arising from the principle of church autonomy in the sense of article 16, paragraph 2 of the Declaration of Fundamental Rights and Freedoms. In the case that the organizational unit was established before the registration of the church, it becomes a legal entity the day the legal authorities determine registration.

The proposal introduces the term "organizational unit of a church" to clearly distinguish these integral parts of the structure of churches from other subjects possibly established by churches, which may gain legal existence on the basis of other laws. This refers to legal persons, in the form of, e.g., a citizens' association, foundation, socially beneficial society or business society, which, without regard to their establishment by a church, arise under the legal system of the Czech Republic through the law prescribing registration or constitutive entry into the appropriate register through which they receive the appropriate legal status.

The entry of organizational units into *the registry of church legal entities* does not have constitutive effect, but only declares for the sphere of external legal relations the reality that the subject listed in the registry is a legal entity recognized by the legal system of the state. In this sense the registry fulfills an evidentiary and informative function. For facilitating examinations of it [the register], the principle of publicity with the requirement of demonstrated legal interest holds. The current registry of legal persons according to statute 308/1991 shall become the proposed registry to be conducted according to this law from the day of effect of the proposed law; the data from the registry need not be demonstrated again.

4. *Activity of Churches in the Public Sector*

The public sector is understood, in this connection, to be, above all, the area in which registered churches may act according to the explicit provisions of valid regulations:

- (a) *the performance of church marriages with civil law effect,*
- (b) *the teaching of religion at state schools, and*
- (c) *religious services in prisons [and] perhaps in other state establishments (e.g., state hospitals).*

On their face, the current legal regulations enable all registered churches without distinction to act in the listed areas, which are without a doubt the subject of the legitimate interest of the state. The state thus withdraws any possibility of examining the undisputedly qualitatively different contribution of individual churches in areas which cannot be considered standard "entitled" parts of fundamental religious freedom. This is also for the reason that they also present certain financial claims on the state budget (the payment of religion teachers in schools) or require the guarantee of legal faultlessness and reliability (church marriages). Therefore, even in democratic states a certain form of differentiation of the activity of churches in these areas is completely common. In the proposed liberalization of registration, there exist these *alternative solutions*:

- Var. A:* retain the current situation, i.e., continue to automatically infer a claim for activity in the public sector from the fact of registration; or
- Var. B:* enable the state to differentiate among registered churches:
 - Var. B1:* limit the churches allowed to act in the public sector according to the type of activity through appropriate departmental regulations, or
 - Var. B2:* introduce the institution of unentitled *accreditation* for activity in the public sector. The decisions on concrete churches or unions of churches shall be made arbitrarily by proposal of the ministry of culture to the government. There shall be no legal right to accreditation and it therefore shall not be connected to an administrative regulation.

The Proposer recommends, in connection with the new solution of registration guaranteeing standard religious freedom, to express the natural differentiation of interest of the state in Variant B2, for which is recommended the following regulation:

A church may request accreditation from the government of the Czech Republic ten years after registration. A union of churches may also request the accreditation of its member churches together, as long as all member churches fulfill the listed condition. This condition does not affect a church *ex lege* receiving [aid].

The church shall present a request for accreditation to the ministry, which shall request the opinions of appropriate ministries, other accredited churches and perhaps other institutions with regard to it [the applicant church]. As a basis for the proposal for accreditation, such additional criteria as the number of members of the church in the Czech Republic, the international importance of the church, and experiences with its activity in the public sphere shall be taken into account. On the basis of these several factors, the ministry shall prepare a proposal for accreditation, which shall be presented for governmental approval. The government shall decide on it through a declaration. If the proposal for accreditation shall be approved, the Minister of Culture shall notify the church. In the case that the government decides not to approve the proposal, the church may repeat a proposal for accreditation at the earliest five years from that decision.

For unusually serious reasons, the government may, at the proposal of the ministry, abrogate accreditation, [e.g.,] if the church changes its character and activity to the degree that the church shall no longer offer the state the guarantee of serious and lasting cooperation in areas which accreditation affects. Accreditation may also be abrogated also upon the request of the accredited church. The proposal for abrogation of accreditation shall be prepared by the ministry by its own or by external motivation and shall be presented to the government in an analogous form to the proposal for accreditation. Accreditation shall be legally dissolved with the abrogation of a church's registration. An announcement of the accreditation of a church or its abrogation or dissolution shall be proclaimed in the *Sbírka zákonů* [official collection of laws and government declarations].

5. *Transformation of the Grant System into a System of Indirect Economic Support of Churches*

The transformation of the financial support of churches is an essential part of the systematic process of transforming church-state relations into conceptual unity with the constitutional regulation which assumes a clear separation of both spheres. The Proposer proposes to realize the transformation through the following four contemporaneous, mutually beneficial steps:

- (a) *Eliminate the current system of financial guarantees of churches by the state.* This means abandoning the principally unacceptable surviving concept of the responsibility of the state for the material guarantee of the religious activities of registered churches, expressed as a legal claim on direct grants from the state budget. This is legislatively expressed in the proposal as the elimination of the statute 218/1949.⁶
- (b) *Introduce the possibility of indirect support of churches in a system of special tax exemptions.* This offers tax offsets in connection with the current system of sponsoring for gifts of natural persons [i.e., deducting charitable contributions], which are offered for the financing of some of the registered churches. In addition to the present possibility to deduct these gifts from one's taxable income is added the following possibility of further tax exemptions:

A personal income tax taxpayer may deduct from his tax assessment up to ten thousand crowns representing:

Var. A: 50% of the value of their contributions,

Var. B: 65% of the value of their contributions, or

Var. C: 80% of the value of their contributions.

From the point of view of the effect on the state budget,⁷ in comparison with the reasonable effect for a church receiving the contributions, the Proposer prefers Variant B.

To limit the abuse of this instrument, a taxpayer would be required to provide evidence of the contribution through a standard document recognized by financial offices for the deduction of charitable contributions. [This would be] the

6. See *infra* appendix part II, § 7.

7. See *infra* appendix part V, § 2.

document from the recipients of the contributions and would designate the payee and the purpose of the contribution and donor. The ministry would yearly offer the Ministry of Finance or the appropriate financial office a current list of church legal entities which could be payees of the contributions, if the range of payees is not limited by the headquarters of the appropriate churches.

The Proposer offers for consideration *variants of the range of registered churches which could be benefited from these increased contributions*. The exemptions shall apply to:

- Var. A:* all registered churches from the year following their registration,
- Var. B:* all registered churches ten years after their registration (as long as this does not refer to a church currently receiving [aid]), or
- Var. C:* only accredited churches (see point 4 in Variant B2).

The Proposer intends not to prefer any of the listed variants, since each of them has appropriate specialist and political arguments pro and con. For the entitled drafted exemption in Variants A and B this particularly concerns the requirements of equal access, [whereas] the arbitrary judgment on which accreditation is based is supported by the above-standard nature of these exemptions and the appropriateness of special guarantees against their abuse.

This step will be legislatively resolved through the contemporaneous amendment of the law on income taxes and perhaps other appropriate regulations.

- (c) *Offer all churches currently receiving aid a yearly linear reduction of aid after five years*. This temporary aid will arise from the level of the valorized level of aid of the preceding year. It will make possible the essential adaptation of churches to a new system of financing and will present a certain guarantee of the function of the new system, which will be selected after the end of this transition period through the ministry in cooperation with the Ministry of Finance, with possible proposals for its correction.

This step will be legislatively resolved in the transition provisions of the law.

(d) *Include churches among legal entities which may, according to the budget rules, be offered facultative aid.* Churches have previously been granted aid obligatorily from the state budget as established by law.⁸ In the new system of financing it would be displaced without reason from the possibility of receiving facultative aid, which can be received under current budget rules not only by citizens associations or political parties, which have been guaranteed aid by law, but also by natural persons who, [e.g.,] raise bees or keep breeding animals.

This step would be legislatively resolved through contemporaneous amendment of the budget laws.

6. *Measures for the Protection of Unreturned Property of Churches*

Real and personal property, which was the property of churches or their organizational units before February 25, 1948, and was taken by the state or other legal entities between February 25, 1948, and January 1, 1990, and has not yet been returned to its original owners, may not, until the passage of a law on this property, be transferred to the ownership of other persons, used as security, or encumbered. This does not affect items which are held by foreign states, corporations with foreign property participation, and registered churches.

If this provision affects the validity of a legal regulation, the legal regulation shall be considered valid if he who is affected by this regulation contests the invalidity of the legal regulation in the period established by law.

This transitional provision is connected with the regulation "blocking paragraphs" (particularly section 29 of the law on the land). It would take effect only in the case that up to the time of passage of this law the problem of property equalization has not been solved. Sanctions for violating the law would be the relative invalidity of the legal act, through which would be created sufficient space, e.g., for the resolution of cases where the original church property was gained by other persons and possibly passed on by them and where the churches would not have interest in this property.

8. Zákon č. 576/1990 Sb. § 5 para. 1(f) (as amended).

The resolution of the question of property taken from churches in the totalitarian period is, next to the creation of a new system of indirect support, the fundamental assumption behind eliminating statute 218/1949, which is a typical product of the totalitarian period. As is clear from its provisions, sections 11, 14, and 15, that law was based on a system of direct state aid which was to compensate for the liquidation of a whole spectrum of [alternative] sources through which churches were financed up to that point.

7. Elimination of Regulations

The Proposer proposes eliminating the following church-state norms:

- (1) the statute 218/1949, "On the economic support of churches and religious societies by the state," in the version of statutes 16/1990 and 522/1992;
- (2) the statute 308/1991, "On the freedom of religious faith and the position of churches and religious organizations";
- (3) the statute of the Czech National Council 161/1992, "On the registration of churches and religious organizations";
- (4) the governmental regulation 86/1993, "On the personal benefits offered to clergy of churches and religious organizations";
- (5) the government regulation of the Czech Socialist Republic 36/1971, which eliminated several government regulations governing the financial support of churches and religious organizations by the state;
- (6) the proclamation 571/1990, "On the salaries of teachers of religions," in the version of later regulations; and
- (7) the statement of the Ministry of Culture and Information of the Czech Socialist Republic on July 27, 1967, number 8333/67 - V/2, on the amendment of salary conditions for workers in churches, religious organizations, other church organizations, and in theological schools, in the version of the

later statements of the Ministry of Culture of the Czech Socialist Republic.

III. FUNDAMENTAL LEGAL MEANS FOR IMPLEMENTATION
OF THE DRAFT

1. The proposed law on the position of churches and religious organizations
 - (a) establishes the authority of the Ministry of Culture as a central organ of the state administration for church and religious organization affairs, the registration of churches, and the conducting of a registry of church legal persons; and
 - (b) in the case of the acceptance of the appropriate variations, the authority of the government is established to confer accreditation for the activity of churches in certain areas of the public sphere. In this case it would be necessary to amend the law and also the appropriate legal norms which regulate the tax arena ([i.e.,] the law on the family, the law on churches, the law on incarceration).
2. A part of the law shall be the amendment of the law on income tax and the budget rules, and possibly other appropriate regulations, which shall project the new system of indirect support of churches into concrete regulations.
3. A part of the law shall be the amendment of the civil court law which shall amend the regulation on determining that the proposal for registration has no flaws (the law may be resolved through expanding section 9, paragraph 2 o.s.f. and minor amendment of section 200h o.s.ř.).
4. In the case of the acceptance of the amendment of the law on citizens' associations as recommended by the Proposer, the Ministry of the Interior shall prepare a proposal of the appropriate amendment projecting these changes into a version of a new law on associations. A variant of this resolution is included in this amendment into the proposed law.

IV. EVALUATION OF THE CONSISTENCY OF THE PROPOSED
REGULATION WITH INTERNATIONAL COMMITMENTS, INCLUDING
CONSISTENCY WITH THE LAW OF THE EUROPEAN COMMUNITY

1. The proposed regulation resolves, inter alia, the current problem of the factual limitation on the associational aspect of religious freedom through making it possible for smaller religious organizations to be established in the Czech Republic as legal entities. This doubtless clearly contributes to a more perfect fulfilling of the international commitments of our state in the area of religious freedom and freedom of association, which arise from the European Convention on the Protection of Human Rights and Basic Freedoms, from the International Pact on Civil and Political Rights, as well as from other international documents relevant for interpretational aspects of religious freedom (e.g., the concluding documents of the CSCE from Madrid and Vienna).⁹

The intentions of the recommended proclamation of the European parliaments from December 14, 1995, with regard to the return of Jewish property in central and eastern Europe is worked into a part of the proposed regulation, which affects the protection of previously unreturned property of churches.

2. There does not exist with respect to the unique specifics and distinct conditions of the evolution in the individual states of the European Union a unity of communitarian regulation of church-state problems. The legislation of the Czech Republic therefore need not approach this area with any a priori requirements of compatibility. The proposal is however drafted in order to reflect the main currents of nonidentification models of the relationship as has historically developed up to the current forms in democratic, confessionally neutral countries. This type of relationship

9. *Concluding Document of the Follow-up Meeting of Vienna*, in THE CONFERENCE OF SECURITY AND CO-OPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972-1993, at 327, 336 (Arie Bloed ed., 1993); *Concluding Document of the Follow-up Meeting of Madrid*, in THE CONFERENCE OF SECURITY AND CO-OPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972-1993, *supra*, at 257 (translator's note).

means that the state does not identify with any exclusive religion or preferred state church. At the same time, however, it assumes and implements as a practical matter certain cooperative relationships on the basis of mutual independence and the clear distinction (i.e., "separation") of secular and church spheres.

V. FINANCIAL-ECONOMIC ANALYSIS OF THE PROPOSED REGULATION

The effect of the proposed draft on the state budget may be distinguished as the following:

1. *Effect of eliminating current aid.* The total aid offered for religious activity of churches from the Ministry budget this year equals 580.77 million crowns. During the proposed five-year transition period this aid will be linearly reduced. Beginning the second year after the law takes effect, it will be yearly reduced by one-fifth, which shall arise from the level of the valorized aid of the previous year. After five years this shall equal a savings to the state budget of roughly 580 million crowns adjusted according to the rate of inflation.
2. *The effect of introducing the proposed tax exemptions.* This will lead on the one hand to a certain growth in costs in connection with the organizational and technical implementation of the new system (introduction and maintenance) [and] on the other hand to the limitation of budget income flowing from the personal income tax.

The costs of technical and organizational implementation would, according to the estimate of the Proposer, not likely exceed the amount of *ten million crowns*. The greater portion would clearly be the appropriate programming and equipping of financial offices. It will be possible to conduct a more detailed accounting after the detailed working out of the practical functioning of the new tax instrument. Nevertheless, even at this point it is clear that it will be organically connected to the functioning system of charitable contribution deductions, with which financial offices already have many years of experience in working with tax returns.

Limitations on the state budget will be dependent:

- (a) on the choice of the concrete variant establishing the percentage of contributions deductible from taxes, and
- (b) on the choice of the concrete variant of the range of churches for whose benefit the exemption will be implemented.

In the calculation of the effect, the Proposer estimates based on the data of the number of members of individual churches which could take part in this system of contributions. In a system based on the marked participation of the donor (as opposed to a system of tax assignation) it is possible to count on a considerably smaller range of involved taxpayers. The data on potential participating donors is based on the individual qualified estimates of churches and their corrections with the data on the number of members which belonged to individual churches in the 1991 census. The Proposer in any case counts on the necessity of research by an expert firm which would precede the establishment of parameters of the new instrument. The basic postulate in the resolution preference of the appropriate variants was to equalize the negative effect on the state budget from these exemptions after the transition period, at least in a prognosis, with the savings from the elimination of obligatory aid. To meet this requirement, the Proposer prefers Variant B.

In the case of complete involvement of all active members of churches who pay income taxes, the individual variants would present the following yearly effect on the state budget:

- Var. A* (50% tax exemption): 454 million crowns,
- Var. B* (65% tax exemption): 560 million crowns, or
- Var. C* (80% tax exemption): 665 million crowns.

All of the presented variants contained a wider range after the liberalization of registration, in contrast to the current number of registered churches. The membership base of newly registered churches is estimated at a total of approximately 5,000 members. In the case of accepting several variants limiting the range of churches benefited by the tax exemption, the effect would be reduced from 12-18 million crowns.

3. *The effect of introducing facultative aid.* The Proposer considers the new expenses from this title to be *maximally*

ten to twenty million crowns yearly. Through facultative expenses the state could individually support concrete religious-cultural projects of churches, including the construction of new religious-cultural centers, churches, and houses of prayer. This purpose-designated aid would be for the benefit of the clergy, but also for social and general cultural development, particularly in areas where the former regime programmatically did not allow for the construction of sacred buildings (e.g., in housing projects) and where the current means of churches for their construction are completely insufficient.

4. *The effect on increased administrative demands of the registering administration.* The new regulation, in considerably liberalizing the numerical requirement and at the same time tightening the qualitative criteria, will mean markedly higher demands on the registering organ for the administrative guarantee of registration. At the same time, through gradually eliminating obligatory aid, it will be limited and, after the end of the transition period, the previous quantitative and qualitative demanding economic agenda of the appropriate ministry will practically disappear. The Proposer therefore considers that the proposed changes will be covered through the transfer of the freed-up personal and technical capacities without requiring their increase and will thus be without negative effect on the state budget.