



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF KÁROLY NAGY v. HUNGARY

(Application no. 56665/09)

JUDGMENT

STRASBOURG

14 September 2017

This judgment is final but it may be subject to editorial revision.

In the case of Károly Nagy v. Hungary,

The European Court of Human Rights (Grand Chamber), sitting as a Grand Chamber composed of:

Angelika Nußberger, *President*,
Linos-Alexandre Sicilianos,
Luis López Guerra,
András Sajó,
Nona Tsotsoria,
Vincent A. De Gaetano,
Julia Laffranque,
Paulo Pinto de Albuquerque,
André Potocki,
Aleš Pejchal,
Krzysztof Wojtyczek,
Valeriu Griţco,
Iulia Motoc,
Síofra O’Leary,
Carlo Ranzoni,
Georges Ravarani,
Tim Eicke, *judges*,

and Françoise Elens-Passos, *Deputy Registrar*,

Having deliberated in private on 12 October and 7 December 2016 and 31 May 2017,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 56665/09) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr Károly Nagy (“the applicant”), on 19 October 2009.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by their Agent, Mr Z. Tallódi.

3. The applicant alleged that there had been a violation of his right under Article 6 § 1, taken alone and in conjunction with Article 14, on account of the Hungarian courts’ refusal to deal with a pecuniary claim stemming from his service as a pastor of the Reformed Church of Hungary.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 December 2015, a Chamber of that Section composed of Guido Raimondi, President, András Sajó, Nebojša Vučinić, Helen Keller, Paul Lemmens, Egidijus Kūris and Jon Fridrik

Kjølbros, judges, and also of Stanley Naismith, Section Registrar, declared the application admissible regarding the complaint under Article 6 § 1 of the Convention in so far as it concerned the civil proceedings leading to the decision of the Supreme Court of 28 May 2009 and the remainder of the application inadmissible, and held, by four votes to three, that there had been no violation of Article 6. The joint partly concurring and partly dissenting opinion of Judges Raimondi, Keller and Kjølbros, as well as the joint dissenting opinion of Judges Sajó, Vučinić and Kūris, were annexed to the judgment. On 9 December 2015 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 2 May 2016 the panel of the Grand Chamber granted that request.

5. The composition of the Grand Chamber was decided in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Angelika Nußberger replaced Luis López Guerra as President of the Grand Chamber. The latter judge and Andras Sajó, whose terms of office expired in the course of the proceedings, continued to deal with the case (Article 23 § 3 of the Convention and Rule 23 § 4). André Potocki, substitute judge, replaced Marko Bošnjak, who was unable to take part in the further consideration of the case (Rule 24 § 3).

6. The applicant and the Government each filed further written observations (Rule 59 § 1). In addition, third-party comments were received from the Alliance Defending Freedom, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 October 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr Z. TALLÓDI,
Ms M. WELLER,

*Agent,
Co-Agent;*

(b) *for the applicant*

Mr A. CECH,
Ms M. NAGY,
Mr B. VÁRHALMY,

*Counsel,
Advisers.*

The Court heard addresses by Mr Cech and Mr Tallódi and their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1951 and lives in Gödöllő.

9. In 1991 the applicant took up the position of pastor in the Reformed Church of Hungary (*Magyar Református Egyház*). His rights and obligations, together with his remuneration, were set out in an appointment letter issued by the Presbytery of the Reformed Parish of Gödöllő on 14 December 2003 (the “Letter of Appointment”). The relevant part of the Letter of Appointment reads as follows:

“I. Obligations of the pastor:

The tasks defined by ecclesiastical laws and legal provisions, in particular those laid down in Statute no. II of 1994 on pastors and pastoral service and the code of conduct of the Cis-Danubian Ecclesiastical Region; the pastor is expected to perform the aforementioned tasks in the spirit of his oath and to the best of his abilities.

In addition, as required by the special needs of his ecclesiastical community, the pastor’s responsibilities include the following: exercising the rights and obligations of management, as detailed in the Hungarian Reformed Church’s Statute 1995/I on Public Education ...”

10. In June 2005 disciplinary proceedings were instituted against the applicant for statements he had made in a local newspaper. At the same time the first-instance ecclesiastical court suspended the applicant’s service with immediate effect pending a decision on the merits in the disciplinary proceedings. He received a letter stating that, under section 82 (1) of Statute no. I of 2000 on the jurisdiction of the Reformed Church of Hungary, during his suspension he was entitled to 50% of his service allowance.

11. The applicant claimed that, following his suspension, he had sent letters to the head of the congregation and to the competent bishop claiming payment of his overdue services allowances, but to no avail.

12. On 27 September 2005 the first-instance ecclesiastical court concluded that the applicant had committed disciplinary offences and removed him from service. On appeal, on 28 March 2006, the second-instance ecclesiastical court upheld that decision.

13. On 26 June 2006 the applicant took his case to the Pest County Labour Court, seeking payment of 50% of his service allowance and other benefits to which, in his view, he should have been entitled during the period of his suspension. Arguing that his suspension had reached its statutory maximum duration on 21 October 2005, he also sought the payment of the entire service allowance from that date until the termination of his service, that is, on 30 April 2006. He argued in substance that his ecclesiastical service was analogous to employment.

14. On 22 December 2006 the Labour Court discontinued the proceedings pursuant to Article 157 (a) in conjunction with Article 130 (1) (f) of the Code of Civil Procedure, holding that the applicant's claim could not be enforced before domestic courts ("*a felperes kereseti kérelmében foglaltak bírói úton nem érvényesíthető igények*"). Under section 2 (3) of Statute no. I of 2000 on the jurisdiction of the Reformed Church of Hungary, a pastor's service with the Church was regulated by ecclesiastical law, whereas a layman's employment with the Church was governed by the State labour law. Accordingly, since the dispute before it concerned the applicant's service as a pastor, the provisions of the Labour Code were not applicable in the case. This decision was upheld on appeal. The applicant did not apply for review to the Supreme Court.

15. On 10 September 2007 the applicant lodged a civil action against the Reformed Church of Hungary with the Pest Central District Court, the relevant parts of which read as follows:

"The Plaintiff's service remuneration, as described in his Letter of Appointment, was In addition, the Plaintiff was also eligible to an age bonus equal to The Plaintiff was also involved in teaching for which he received ... per month.

On 23 June 2005 the Respondent suspended the Plaintiff as a pastor and reinstated him to the service roster, which meant he was exempt from all duties until further notice. The Respondent has paid the Plaintiff's pastoral allowance until 30 June 2005 and his salary as a teacher until 1 May 2006. In view of the above, the Respondent has caused damage to the Plaintiff by not paying his dues according to their standing legal agreement.

Plaintiff's claims are as follows:

I. For the period between 1 July 2005 and 21 October 2005, a monthly amount of ...

II. For the period between 22 October 2005 and 30 April 2006, an amount of

III. For the period between 1 May 2005 and 30 April 2006 (12 months) the unpaid teaching fees ...

Furthermore I submit that the Plaintiff considered the legal basis of the above dues ... as employment and went to the Labour Court to have them reimbursed. In view of the fact that the Pest County Regional Court's final decision ... upheld the ruling of the first-instance Labour Court which, for its part, stated that my involvement with the Respondent did not qualify as employment, I, the Plaintiff, hereby seek reimbursement of my loss before the Pest Central District Court."

16. On 11 December 2007 the respondent Church filed a defence, inviting the court to dismiss the applicant's claim.

17. On 15 December 2007 the applicant filed another submission with the first-instance court, further elaborating on his claim. The relevant parts of that submission read as follows:

"The Plaintiff's pastoral service was constituted ... on the basis of election by the Reformed Parish of Gödöllő and confirmed by the dean of the ecclesiastical district

as well as the bishop of the ecclesiastical region. Its terms were laid down in the Letter of Appointment ... which remained in force during the period indicated in the case.

The pastoral service was carried out by the Plaintiff in person. Its content and accomplishment has not been in dispute between the parties. The Plaintiff's pastoral activities were manifold. In particular, he was responsible for the community services of the Parish – e.g. preaching, handling the sacraments, outreach, evangelisation, maintaining the bond between the Parish and the Church and various related tasks of pastoring, teaching and administration, which included the tutoring of his assistant and deputy pastor. The Plaintiff as pastor, together with the caretaker, represented the Parish and had numerous other administrative tasks as well. As part of his pastoral duties, the Plaintiff was also obliged to take part in management and teaching.

Neither the establishment of the pastoral service relationship nor the substance of the resulting mutual obligations was the subject of any dispute between the parties involved.

As to the legal classification of the pastoral service relationship itself ... we hold that the Plaintiff's activity is best characterised as agency because its content and nature correspond to the factual elements of an obligation of means necessitating personal involvement. For the above reason, we consider that the relevant rules are those of the Civil Code on agency contracts ...

Despite the fact that the Respondent's dean – the Plaintiff's immediate superior – had already confirmed in writing the legal basis and the amount of the fees due for the period of suspension, in its correspondence dated 22 June 2005 ..., these were, in fact, paid only partially. Namely, the pastoral cash allowance was paid only up until 30 June 2005 and the fee due for religious teaching only up until 30 April 2005.”

18. The applicant based his claim in the first place on Articles 277 (1) and 478 (1) of the Civil Code (as in force at the material time) seeking payment of overdue fees stemming from an agency contract he believed he had with the Church. He maintained that for the period from 22 October 2005, when the suspension allegedly became unlawful, until the date of termination of his appointment, he was entitled to a fee for his services, which corresponded to the service allowance set out in his Letter of Appointment. He thus sought enforcement of the agency contract. Alternatively, he based his claim on Articles 318 (1) and 339 (1) of the Civil Code, which provided for damages for breach of the agency contract he had allegedly entered into with the respondent Church.

19. On 2 January 2008 the Pest Central District Court dismissed the applicant's claim, holding as follows:

“An agency contract, according to the particulars of Act IV of 1959 on the Civil Code ... is a mutual legal transaction (Article 474). Such transactions are regarded by the Civil Code as contracts of material exchange, as the Civil Code, in accordance with Article 1 (1), typically regulates pecuniary rights.

Contracts, by definition, are between parties with common material interests: they need whatever value the other has to offer. The goal of the contract is to obtain such value from each other.

Pursuant to Article 201 (1) of the Civil Code, mutual property services are contracts for valuable consideration – with the notable exception of gratuitous two-party transactions in which one party provides a material service whereas the other is not obliged to do so. The alleged agency contract between the Plaintiff and the Respondent might be gratuitous if the agent receives no payment from the principal. Except that there was no statement from the Plaintiff to that effect. Quite the contrary: he filed the lawsuit with the clear intention of obtaining material gain from the Respondent. Thus it can be said that the Plaintiff based his claim on a non-gratuitous agency contract, as provided for in Article 478 (1) of the Civil Code.

In view of the above, this required the Plaintiff to provide some sort of material service, interest or condition in return, something with clearly defined market value. The pastoral service provided by the Plaintiff (according to exhibit no. 3, it also involved preaching, handling the sacraments, outreach, evangelisation and various related tasks of pastoring, teaching etc.), however, does not qualify as material service. It is, for all intents and purposes, religious activity.

If the undertaking of mutually agreed conduct is not gratuitous, and the conduct of one of the parties has no material value, then, according to the rules of the Civil Code, there can be no civil-law contract for valuable consideration.

Agency contracts, like all contracts, are based on mutual agreement: one party makes a formal proposal containing all the key elements of the deal to another, which, in turn, issues a statement of acceptance – see Article 205 (1) and (2), and Articles 211, 213 and 214 of the Civil Code. The parties involved are free to negotiate terms on the basis of legal parity.

The documents submitted show that the Plaintiff's appointment was an ecclesiastical process, the terms of his service were set out in a Letter of Appointment ... formulated by the Presbytery of his Parish. The Respondent and its officials exercised various rights *vis-à-vis* the Plaintiff (suspension, reprimand by the ecclesiastical court, relocation to service roster, demotion, etc.). Within the meaning of the Civil Code, the parties did not negotiate the details of the service, and the Plaintiff became a pastor by appointment, not as a result of a binding agreement. Due to the lack of legal parity between the Plaintiff and the Respondent, the Plaintiff did not enter as a civil-law party into a legal relationship with another civil-law party.

The lack of binding agreement means that the Plaintiff's primary claim – with reference to Articles 277 and 478 of the Civil Code – is insufficient to support his case.

Pursuant to Article 318 of the Civil Code, the rules of tort liability are applicable to liability for breach of contract. Once again, the lack of binding agreement means there was no breach of contract nor any material damage involved. In view of this, the Plaintiff's secondary claim is also unfounded.

The acknowledgment of debt, by legislative nature and in practice, is a contractual institution which allows one party to affirm its financial obligation towards another. Statements stemming from relationships beyond the control of civil legislation are, for that very reason, neither valid nor binding pursuant to Article 242 of the Civil Code. The letter submitted by the Plaintiff (illegible reference number) as acknowledgement of debt is, in this context, rather irrelevant: the sender does not legally represent the Respondent, which might not endorse, or even share, his opinion.

The documents and statements presented by the Plaintiff were sufficient for a review of the case. As the claim was unfounded, the amount at issue was not determined. The hearings of the bishop ... and dean ... were also deemed unnecessary as their opinions feature prominently in the documents and cover all necessary aspects.”

20. On 27 January 2008 the applicant filed an appeal against the first-instance judgment. On 12 October 2008 the respondent Church filed pleadings in reply, requesting the court to dismiss the applicant’s claim.

21. On 17 October 2008 the Budapest Regional Court dismissed the applicant’s appeal and upheld the first-instance decision with the following reasoning:

“The first-instance court established the facts correctly and the second-instance court agrees with its decision, but differs in its legal reasoning:

Section 13 of Act IV of 1990 provides that the Church and – in accordance with its Constitution – its self-governing bodies are independent legal entities. Pursuant to section 14(2) of the Respondent’s own Statute no. II of 1994 on the Constitution and Government of the Church, a parish is such a legal entity. Section 29 of the same Statute defines the Letter of Appointment as the service contract of Church officials.

The Plaintiff’s Letter of Appointment, detailing his pastoral duties and allowances, was issued on 14 December 2003 by the Reformed Parish of Gödöllő. It proves that a legal relationship was established between the Plaintiff and the Parish of Gödöllő, an independent legal entity.

In its pleadings ..., the Respondent referred to section 13 of Act IV of 1990 and Article 14 (2) of its own Statute II of 1994, thus confirming that the Parish of Gödöllő ... is an independent legal entity within the Hungarian Reformed Church.

In view of the above, the second-instance court came to the conclusion that the Plaintiff’s claim was unfounded *vis-à-vis* the Respondent, the Reformed Church of Hungary.”

22. On 2 June 2009 the applicant lodged a petition for review with the Supreme Court, in which he stated as follows:

“...The Budapest Regional Court held that, based on the Letter of Appointment, the Plaintiff’s legal relationship was with the Reformed Parish of Gödöllő. But, as indicated by us several times, the Letter of Appointment does not mention the lectures on ecclesiastical history the Plaintiff has been giving in a Foundation School. The fees for these lectures were paid by the Respondent to the Plaintiff directly. Our motions to take evidence were dismissed because of the decision of the first-instance court, which the Budapest Regional Court overruled – but it is the lack of this very evidence that caused the second-instance court to disregard the difference between the nature and the remuneration of the above-mentioned activities.

Pursuant to Articles 200 (1), 198 (1) and 474 of the Civil Code, a legal relationship – namely agency – is established when one party (the agent) is obliged to provide quality service and the other (the principal) is obliged to pay for the said service in accordance with the agreement. As far as teaching is concerned, the Respondent was the sole principal. The Reformed Parish of Gödöllő had nothing to do with that – which is evident from the fact that the fee was determined according to State standards ...

The decisions of the courts are, first of all, only partially compliant with Article 221 of the Civil Code, which lays down the requirement of full justification, and secondly, constitute an infringement of multiple provisions of the Civil Code, namely Articles 200 (1), 198 (1), and much of the content of Article 474. Due to the dismissal of our motions to take evidence, the contradictory decisions of the courts are not based on the true nature of the material service exchanged between the parties, and regard pastoral service and teaching in a Foundation School as one and the same, despite the fact that these activities greatly differ from each other in both nature and practice of execution ...”

23. The respondent Church replied to this petition in a submission dated 28 March 2009.

24. On 28 May 2009 the Supreme Court discontinued the proceedings, finding as follows:

“The Plaintiff commenced his action specifically in order to claim fees arising from his contractual relationship with the Gödöllő Parish, as contained in his Letter of Appointment. He did not make any reference to a contract between him and the Gödöllő Parish to provide teaching of church history, nor did he claim any fee in connection with such a contract. He submitted a claim regarding such a contract for the first time in his petition for review [to the Supreme Court]. Consequently, the fact that the lower courts did not analyse that contractual relationship between the parties and did not take evidence regarding that issue cannot be considered an omission on their part ...

In order to determine the rules applicable to the agreement in question and to the implementation of the rights and obligations arising from it, it is necessary to have regard to the very purpose of the agreement underlying the Plaintiff’s actual claim as well as the elements thereof defining the parties’ rights and obligations. The first-instance court rightly stated in its assessment that the agreement serving as the basis of the applicant’s claim was not an agency contract under civil law or concluded by and between parties enjoying personal autonomy in the marketing of [goods and services]. The Plaintiff was appointed as a pastor in an ecclesiastical procedure, and the obligations of the Respondent were defined in an appointment letter issued by the assembly of presbyters. The parties established between themselves a pastoral service relationship, governed by ecclesiastical law.

Under section 15 (1) of Act no. IV of 1990 on Freedom of Conscience and Religion and on Churches, the Church is separate from the State. Under sub-section (2), no State coercion can be used to enforce the internal laws and regulations of Churches.

Relying on the above provisions, the applicant can make a claim under the ecclesiastical law before the relevant bodies of the Reformed Church. The fact that the agreement entered into under ecclesiastical law resembles a contractual agreement under the Civil Code does not entail State jurisdiction or the enforceability of the claim in a judicial procedure within the meaning of Article 7 of the Civil Code. (In the particular case, the basic elements of an agency contract and the execution of such a contract could not be established either.)

The Labour Court reached the same conclusion in the earlier proceedings when assessing the claim under State labour law and dismissing its enforcement in judicial proceedings.

The first-instance court was right to point out that as the impugned agreement lacked a civil-law legal basis, the court could not examine the applicant’s secondary

claim (compensation for breach of contract). On the basis of the above reasoning, there were no grounds to adjudicate on his claim on the merits.

The Supreme Court accordingly quashes the final judgment, including the first-instance judgment, and discontinues the proceedings under Articles 130 (1) (f) and 157 (a) of the Code of Civil Procedure ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Hungarian State law

1. *The Constitution*

25. The relevant provisions of the Constitution of Hungary (Act no. XX of 1949), as in force at the material time, read as follows:

Article 57

“(1) In the Republic of Hungary everyone is equal before the law and has the right to have accusations brought against him, together with his rights and duties in legal proceedings, determined in a fair, public trial by an independent and impartial court established by law.”

Article 60

“(1) In the Republic of Hungary everyone has the right to freedom of thought, freedom of conscience and freedom of religion.

(2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other manner, either individually or in a group.

(3) The Church and the State shall operate in separation in the Republic of Hungary.”

Article 70/B

“(1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.

(2) Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.

(3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.”

2. *The Civil Code*

26. The relevant provisions of the Civil Code (Act no. IV of 1959), as in force at the material time, read as follows:

Article 7 (1)

“Each and every government agency shall be obliged to protect the rights provided for by law. Unless otherwise stipulated by law, these rights shall be enforced in a court of law.”

Article 200 (1)

“The parties to a contract are free to define the content of their contract, and they shall be entitled, upon mutual consent, to deviate from the provisions pertaining to contracts if such deviation is not prohibited by legal regulation.”

Article 204 (1)

“The following claims may not be enforced in a court of law:

(a) claims originating from gambling or betting, unless the gambling or betting operation has been authorised by the State;

(b) claims originating from a loan promised or granted expressly for the purposes of gambling or betting;

(c) claims that may not be enforced through a State agency by virtue of statute.”

Article 205

“(1) Contracts are entered into upon the mutual and congruent expression of the parties’ intent.

(2) It is fundamental to the validity of a contract that an agreement is reached by the parties concerning all essential issues as well as those deemed essential by either of the parties. The parties need not agree on issues that are regulated by statutory provisions.”

Article 339 (1)

“A person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation.”

Article 474

“(1) Agency contracts are concluded to oblige an agent to carry out the matters entrusted to him.

(2) An agent must fulfil the principal’s instructions and represent his interests regarding the authority conferred upon him.”

Article 478 (1)

“The principal shall pay an appropriate fee, unless the circumstances, or the relationship between the parties suggest that the agent has assumed the agency without any consideration.”

3. Code of Civil Procedure

27. The relevant provisions of the Code of Civil Procedure (Act no. III of 1952), as in force at the material time, read as follows:

Article 121 (1)

“An action shall be initiated by lodging a statement of claim; the statement of claim shall indicate:

- (a) the court of competent jurisdiction;
- (b) the names and addresses of the parties and their counsel, and their status in the action;
- (c) the cause of action, including a description of the circumstances invoked as the basis of the claim and a description of the evidence supporting the claim;
- (d) the grounds for competence and jurisdiction of the court;
- (e) a plea for a court decision (pleading); ...”

Article 130 (1)

“(1) The court shall reject a claim without issuing a summons [that is, without an examination on the merits] ... if it can be established that ...:

- (f) the plaintiff’s claim is premature or cannot be enforced before the [domestic] courts... (“*a felperes követelése...bírói úton nem érvényesíthető*”)

Article 157

“The court shall discontinue the examination of the case:

- (a) should the claim already have been dismissed, without a summons being issued, pursuant to section 130 (1), points (a) to (h) ...”

4. *Act no. IV of 1990 on the Freedom of Conscience and Religion and on Churches (“the 1990 Church Act”)*

28. Section 15 of the above Act reads as follows:

- “(1) In the Republic of Hungary the Church and the State are separate.
- (2) No State coercion can be used for enforcing the internal laws and rules of the Church.”

5. *Constitutional Court’s decision no. 32/2003. (VI. 4.) AB*

29. In its decision no. 32/2003, the Constitutional Court examined the issue of access to a court of persons in the service of religious entities. The relevant parts of that decision read as follows:

“1.1. The complainant was in the service of the Reformed Church of Hungary ... as professor On 14 April 1995 the complainant agreed, by taking note of the students’ motion, upon the proposal of the bishop of the Church, to retire under certain conditions. Thereafter he requested disciplinary proceedings against himself and challenged the legal statement he had made about his retirement. In its decision ... the presidency of the Synod Court of the Church reprimanded him in writing and established that no evidence capable of serving as a ground for revoking or challenging his legal statement existed. The Synod Court found his damages claim likewise ill-founded. The complainant’s complaint against this decision was dismissed by the presidency of the Synod Court, save for the written reprimand.

1.2. The complainant filed an action for damages with the Debrecen District Court against the ... Reformed Church District ... and the University ... The plaintiff-complainant requested the District Court to establish that the agreement he had entered into with the Church District's bishop on his retirement, under the conditions specified by him, had validly come into existence but due to the respondent's breach of contract had not been performed. He also requested the District Court to establish the respondent's liability for damages ...

... the Hajdú-Bihar County Regional Court ...discontinued the proceedings, and referred the case to the Synod Court. In the reasoning ... the Regional Court established that under section 9 (1) of Church Act No II of 1994 on the Constitution and Government of the Church ... and section 49 of Church Statute no. VI of 1967 on church legislation (*az egyházi törvénykezésről szóló 1967. évi VI. egyházi törvénycikk*), the plaintiff's claims fell within the competence of the Synod Court.

1.4. ... the Synod Court, having proceeded in the case upon referral, established its lack of competence and referred the case back to the [State court] ... the Synod Court held that section 9 (1) of the Church Constitution was not a procedural but a substantive provision which meant that in cases concerning the service relationship of certified pastors employed by the Church, the substantive "laws" to be applied by any proceeding court were the internal rules of the Church.

Under section 1 of the Statute on church legislation, the Church extends its judicial jurisdiction to disciplinary and administrative matters assigned to court competence by a law of the Church. More specific powers are contained in the Statute on church legislation: in sections 43 and 44 for disciplinary cases and in section 49 for the administrative cases enumerated therein. According to the Synod Court, the complainant's action did not concern a disciplinary case but could also not be categorised under any of administrative cases listed in the practically exhaustive list (in section 49); consequently ecclesiastical courts did not only lack competence but also lacked 'jurisdiction' to proceed

In accordance with section 60 (3) of the Constitution, the principle of separation of Church and State prohibits State interference with religious issues and the internal affairs of churches. Compliance with church rules governing internal church relationships between churches and their members may be enforced by the churches or their authorised organs in proceedings determined by the churches.

Based on State laws and the separately operating church rules, it cannot be excluded that two distinct rule systems may regulate similar legal relationships. Between a church and its members there may exist relationships governed by internal ecclesiastical rules, in the enforcement of which no public authority may be involved. Between the same parties there may, however, also exist legal relationships defined and governed by State laws, including the relevant remedies available. Rights and obligations stemming from legal relationships based on State laws may be enforced by State coercion.

The fundamental rights and obligations guaranteed by the Constitution constitute limits to the laws of the State. In accordance with its objective institution-protection obligation, the State 'shapes the statutory and organisational conditions necessary for the realisation of the rights by having due regard both to its tasks related to the other fundamental rights and to its other constitutional tasks; provides for a prevalence of the various rights that is the most favourable to the whole [legal] order, and thereby promotes the harmony of the fundamental rights.' ... The State must respect the autonomy of churches and church organs. However, in acknowledging the autonomy of churches, regard must be had to the other

fundamental rights and obligations as well. Therefore the right to church autonomy, included in the principle of separation of Church and State under section 60(3) of the Constitution, must be interpreted in the context of the other fundamental rights that are secured under the Constitution to natural persons

In accordance with the fundamental right of access to a court, a person in the service of a church has [just as much as any other citizen] a constitutional right to turn to a State court in order to have his legal dispute concerning his employment determined, where his employment is based on State laws.

The State organs must determine under the Constitution and the laws specified in the Act on Church Legislation whether an issue having arisen from a given legal relationship falls within the competence of a State authority or court. Hence, they must determine under State laws whether in a given case a legal relationship governed by State law exists between the parties. If the answer is in the affirmative, they must determine the appropriate procedure to be followed. Where, however, a State authority or court establishes on the basis of the State laws the lack of its competence, the State authority or court must not decide, by applying the ecclesiastical rules, which church and under what procedure should determine the given dispute; that is, a State authority or court may not interpret or apply the ecclesiastical rules. Administration of justice by the State, however, must not result in the depletion of church autonomy.

5. As to the application of section 15 (1) and (2) of Act no. IV of 1990 on the Freedom of Conscience and Religion and on Churches, in the operative part of its decision the Constitutional Court has laid down a constitutional requirement. The requirement has been set forth with a view to ensuring that in the application of the laws the principle of separation of Church and State be observed with constitutional content, without allowing for exceptions. Therefore no appeal to the State's religious neutrality may result in the violation of the constitutional right of the right of access to a court. Under a joint interpretation of the principle of the separation of Church and State and of the right of access to a court, State courts are obliged to determine the merits of legal disputes relating to State law-governed rights and obligations of persons in the service of a church; in such determinations, however, church autonomy shall be respected by the judicial authorities.

6.1. In the operative part of its decision, the Constitutional Court has established constitutional requirements for the application of sub-sections (1) and (2) of section 15 of Act no. IV of 1990 on the Freedom of Conscience and Religion and on Churches. The constitutional requirement was established in order to ensure that the principle of separation of Church and State be enforced by jurisprudence, without exception, with a constitutional content. Accordingly, reliance on the principle of separation of Church and State cannot result in the infringement of the constitutional right of access to a court. Reading the principle of separation of Church and State together with the right of access to a court, State courts are obliged to determine on the merits any legal dispute concerning the rights and duties, stemming from State law, of a person in ecclesiastical service, while respecting also the church's autonomy ...”

6 Supreme Court's guiding resolution no. BH 2004.5.180

30. In its above-mentioned guiding resolution, the Supreme Court held that proceedings involving claims for personality rights lodged with the civil courts could not be discontinued on the basis of Articles 130 (1) f and

157 (a) of the Code of Civil Procedure, even if the alleged damage was caused by a church official in the course of his ecclesiastical activity. In particular, it held:

“... The claim outlined in the Plaintiff’s brief is based on Article 75 of the Civil Code, as opposed to the internal regulations of the Church; it is not subject to Article 204 and there is no law to exclude it from enforcement by a civil court for any special reason.

Article 15 (2) of Act no. IV of 1990 on Freedom of Conscience, Religion and Churches, as referred to by the binding decision, excludes only State coercion in the context of enforcing internal laws and procedures. The Plaintiff’s claim concerned his personality rights, not the enforcement of those internal laws and procedures – thus the second-instance court was wrong to discontinue the proceedings based on the lack of legal avenue [for enforcement]...”

B. Ecclesiastical law of the Reformed Church of Hungary

31. The following statutes are internal rules adopted by the Reformed Church of Hungary and as such do not form part of Hungarian State law.

1. Statute no. II of 1994 on the Constitution and Government of the Reformed Church of Hungary

32. The relevant provisions of Church Statute no. II of 1994 read as follows:

Section 9

“(1) Ecclesiastical law shall apply to service relationships and liability of pastors in ecclesiastical service and of other persons in service of a pastoral nature (ecclesiastical persons), while State law shall apply to employment relationships of all other persons employed by the Church.

(2) The Church shall be liable according to the general rules of tort liability for any damage caused unlawfully to its members or office-holders.

(3) Members and office-holders of the Church shall be liable for any damage caused to the Church unlawfully in the course of exercising their rights and duties.

(4) Tort liability of the employees of the Church as well as liability for damage caused by the Church to its employees shall be governed by the current State legislation in force.”

Section 29

“(1) Ministers and other pastors ... shall be granted regular allowances as recorded in a letter of appointment, endorsed by the diocese. The said letter corresponds to the service agreement of the ecclesiastical office-holders.”

2. *Statute no. I of 2000 on the Jurisdiction of the Reformed Church of Hungary*

33. The relevant provisions of Church Statute no. I of 2000, as in force at the material time, read as follows:

Section 34

“(1) Legal disputes concerning the election and appointment of Church officers, their remuneration, retirement or transfer, the enforcement of material obligations and the management of disputes between parishes, Church organisations and their institutions, shall fall within the remit of the Church court of competent jurisdiction, with regard to the interpretation and application of legal regulations.

(2) The diocesan court having jurisdiction for the seat of the parish shall decide, in the public interest of the Church, on the termination of the service of an elected, autonomous, congregational clergyman ...”

Section 35

“(1) Preparatory proceedings may be started before the Church court spontaneously or on the basis of a complaint by a complainant.

(2) Any report or complaint made to any Church organ or authority that is actionable in court shall be transferred to the presidency of the Church court of competent jurisdiction, within eight days, and the complainant shall be informed thereof.

(3) The presidency of the Church court of competent jurisdiction shall examine the complaint within eight days.”

Section 77

“(1) Enforcement shall proceed on the basis of the final and binding court decision. ...”

Section 79

“The presidium of the court of first instance sitting in the case shall ensure enforcement.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained that the domestic courts’ refusal to decide a pecuniary claim stemming from his service as a pastor had violated his right of access to a court as provided for in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Scope of the case before the Grand Chamber

35. At the public hearing before the Grand Chamber, the applicant stated that he had entered into a separate contract with the Reformed Church of Hungary for the teaching of church history. It had been an oral agreement with the director of the Calvinist Lyceum of Gödöllő to teach church history for four hours per week, an activity which had not formed part of his pastoral relationship. In support of his statement, the applicant submitted a number of notarially certified testimonies by former members of the presbytery of his former church. Given that the school where he taught had been financed by the State, in the applicant's view this second contract was undisputedly of a civil nature. Moreover, the applicant submitted that he had referred to this second contract concerning his teaching activities several times in the domestic courts: first in the labour-law proceedings, and subsequently in his civil-law claim and in the petition for review to the Supreme Court.

36. The Government disputed the applicant's submissions in this respect. He had submitted claims in the first-instance civil courts for fees related to his pastoral and teaching activities only under his Letter of Appointment as a pastor. His reference to a separate contract for teaching church history had been made for the first time in his petition for review to the Supreme Court. In its decision, the Supreme Court had examined the applicant's statement that he had a separate contract for teaching with the respondent Reformed Church but found that no claims under such a contract had been properly raised in the course of the proceedings before the lower courts.

37. The Government maintained that, although the applicant had raised claims for teaching fees before the first-instance court, he had not specified that the legal basis for those claims was a separate contract, distinct from his Letter of Appointment. The domestic courts could thus not have treated these claims as anything other than based on the Letter of Appointment on which the applicant relied, because he not only omitted to mention this second contract, but also stated that he had had a duty to organise and perform teaching activities in the framework of his pastoral service. Finally, the Supreme Court's decision had no *res judicata* effect on the merits of the claims not raised properly before the first-instance court and the applicant therefore could and should have raised those claims in the domestic courts before turning to an international tribunal as required by the principle of subsidiarity underlying the Convention.

38. The Court observes that the applicant indeed mentioned his teaching activities as early as in the proceedings before the first-instance court. However, he submitted the various claims he had against the respondent Church on one sole legal basis, namely his Letter of Appointment issued by the presbyters on 14 December 2003 (see paragraph 9 above). For instance,

he stated in his civil action lodged with the first-instance court that “the [applicant’s] pastoral activities were manifold. In particular, he was responsible for... teaching...” and “as part of his pastoral duties, the [applicant] was also obliged to take part in ... teaching” (see paragraph 17 above). The applicant did not mention any other contract, oral or written, in support of his pecuniary claims before the first-instance court.

39. It further transpires from the documents available that the applicant mentioned a separate oral agreement for the teaching of church history only in his petition for review to the Supreme Court (see paragraph 22 above). In reply to his submissions in that connection, the Supreme Court held that the applicant had failed to properly raise his claim related to a separate teaching contract before the first-instance court (see paragraph 24 above). The Government submitted that the Supreme Court’s conclusion did not preclude the applicant from instituting fresh civil proceedings against the respondent Church on the basis of such a second agreement, if he believed that the State courts would have been in a position to decide his claims in that respect.

40. As regards the proceedings before the Court, in his application form the applicant did not mention a separate (oral) agreement solely for the teaching of church history, nor did he adduce any evidence in this connection throughout the Chamber proceedings. Indeed, no mention of such a second agreement was made in his observations before the Chamber, in his request for referral to the Grand Chamber or in his written observations before the Grand Chamber.

41. As stated above, the applicant mentioned the existence of a separate agreement for the teaching of church history in his oral submissions before the Grand Chamber on 12 October 2016 and, following a specific question from the Court, submitted witness testimonies in support of his teaching activities in the Calvinist Lyceum of Gödöllő.

42. However, the Court reiterates its established case-law to the effect that all complaints intended to be made at the international level should have been aired before the appropriate domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). In view of the above conclusion by the Supreme Court that the applicant had not raised the issue of a second contract before the first-instance court in line with the procedural requirements of Hungarian law, the Court is satisfied that the applicant has failed to properly exhaust available domestic remedies in this connection.

43. In view of the foregoing, as well as the fact that the case before the Grand Chamber is the application as it has been declared admissible by the Chamber (see, among many other authorities, *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 43, ECHR 2016, and *Blokhin v. Russia* [GC], no. 47152/06, § 91, ECHR 2016), the Court will proceed to examine the

applicant's submissions relating solely to his pastoral service under the Letter of Appointment.

B. The Chamber judgment

44. In its judgment of 1 December 2015, the Chamber first of all examined the applicability of Article 6 to the facts of the applicant's case and concluded in the affirmative.

45. The Chamber observed that civil actions to obtain enforcement of contractual obligations or to obtain redress for damage sustained on account of a breach of contract were ubiquitous in many systems of civil law and that, in the instant case, the dispute related to the applicability of the provisions relied on by the applicant to his relationship with the Reformed Church.

46. Further, the Chamber did not consider that the Constitutional Court's 2003 decision (see paragraph 29 above) concerned a situation sufficiently similar to that of the applicant. In the absence of any previous court decision indicating whether or not the provisions on contractual obligations and liability were applicable to a pastor's ecclesiastical service, the Chamber considered that the domestic courts were called upon to decide in the applicant's case whether his service agreement with the Reformed Church fell within existing categories of contracts and whether any damage allegedly caused by the non-payment of his service allowance fell within the scope of application of the Civil Code.

47. Consequently, the Chamber considered that, at the outset of the proceedings, the applicant had, at least on arguable grounds, a claim under domestic law and that there was a genuine and serious dispute over the existence of the rights asserted by him. The subsequent Supreme Court judgment could not have retrospectively rendered the applicant's claim unarguable. Finally, being purely pecuniary, the applicant's claim was undisputedly civil in nature.

48. As to the merits of the applicant's complaint, the Chamber found no violation of Article 6 § 1 on the grounds that the Supreme Court's decision concerned the interpretation and application of domestic law, which had been neither arbitrary nor manifestly unreasonable.

C. The parties' submissions before the Grand Chamber as to the applicability of Article 6 § 1

1. The Government

49. The Government argued that the applicant's claim had not been recognised under State law as an enforceable right, but remained in the sphere of natural obligations defined under Article 204 (1) of the Civil

Code, *inter alia*, as claims that could not be enforced through a State agency by virtue of law. Indeed, pecuniary claims based on internal laws and rules of churches were not enforceable by State organs pursuant to section 15(2) of the 1990 Church Act (see paragraph 28 above).

50. The Government explained that natural obligations were unenforceable for reasons of general policy, which in the concrete case concerned the need to protect the constitutional principle of secularity of the State and the autonomy of churches. Article 6 could not be interpreted as compelling States to recognise such natural obligations as legally binding.

51. Moreover, while it was true that the applicant's claim was of a purely pecuniary nature, it could not be severed from its legal basis in ecclesiastical law. Under domestic civil law, as interpreted by the domestic courts, agency contracts required from both parties the provision of a service having a certain pecuniary value. However, the activities performed by the applicant as pastor did not amount to the provision of services of pecuniary value, that is, those that could be sold on a (secular) market of goods and services, but corresponded to ecclesiastical service. Consequently, the domestic courts concluded that the relationship between the applicant and the Church could not be interpreted as being akin to an agency contract. In the absence of a civil-law contract between them, no damage from breach of contract could occur either, which is why the domestic courts had not addressed that issue.

52. Moreover, Article 7 of the Civil Code provided for the protection of statutory rights and could not be interpreted as a basis for claiming rights not guaranteed by State law. The Constitutional Court, in its 2003 decision, also concluded that the right of access to a court was only applicable to rights and obligations stemming from State law (see paragraph 29 above).

53. The applicant's arguments concerning tax law were irrelevant and could not serve to establish a basis in substantive law for claims of income from ecclesiastic service. First of all, taxation was a legal relationship between the State and an individual governed by State law. Secondly, what was taxable under domestic law was not claimed income, but actually received income.

54. In the Government's opinion, it was clear from the foregoing that the applicant's claim had no legal basis in domestic substantive law. Moreover, the State had no obligation under international law to enforce rules of ecclesiastical law.

55. The Government raised two further inadmissibility objections, arguing that the complaint was incompatible *ratione personae* with the provisions of the Convention and that the applicant had failed to properly exhaust available domestic remedies.

2. The applicant

56. The applicant argued that his case concerned a dispute over a civil right which was recognised under domestic law. Firstly, the nature of the relationship on which he had based his claim – that is, a pecuniary relationship between a citizen and a religious community – was acknowledged as being a civil right under domestic law. He emphasised in this respect that ecclesiastical law recognised the applicability of State law to tort liability between the Church and its members. He also stressed that the respondent Church never relied on its exclusive competence in the matter.

57. Further, his service allowance was taxable as income deriving from employment within the meaning of the applicable legislation. The State could thus not, on the one hand, disregard the pecuniary nature of such an allowance, while at the same time imposing legal obligations (taxes) on it.

58. In the applicant’s view, he had two distinct legal relationships with the Reformed Church; one of ecclesiastic nature involving his pastoral service and the other primarily pecuniary, relating to his pastoral remuneration. The latter was unrelated to church autonomy and concerned a purely pecuniary claim of a private-law nature. State courts should therefore have determined his claim instead of refusing to deal with it.

3. Third-party observations

59. Given the fundamental nature of Article 9 of the Convention, the centrality of “church autonomy” within the Article 9 protection and the State’s duty of neutrality towards religious institutions, the organisation Alliance Defending Freedom submitted that member States should defer to churches in matters of ecclesiastical disputes. While this might, on rare occasions, have an impact on other Convention rights, to conclude otherwise would most likely place other Convention rights above the right to freedom of religion, as well as position the Court as the ultimate arbiter of religious disputes.

D. The Grand Chamber’s assessment

1. General principles

60. The Court has reiterated time and again that for Article 6 § 1 in its “civil” limb to be applicable, there must be a dispute over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being

sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 71, 29 November 2016; *Baka v. Hungary* [GC], no. 20261/12, § 100, 23 June 2016; and *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, § 42, ECHR 2015).

61. Article 6 § 1 does not guarantee any particular content for civil “rights and obligations” in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X, and *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012). Moreover, as can be seen from the Court’s well-established case-law, it is necessary to maintain a distinction between procedural and substantive elements: fine as that distinction may be in a particular set of national legal provisions, it remains determinative of the applicability and, as appropriate, the scope of the guarantees of Article 6 of the Convention, which can, in principle, have no application to substantive limitations on a right existing under domestic law (see *Lupeni Greek Catholic Parish and Others*, cited above, § 100).

62. In order to decide whether the “right” in question really has a basis in domestic law, the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see, as a recent authority, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 97, 21 June 2016). The Court recalls that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. The Court’s role is limited to verifying whether the effects of such interpretation are compatible with the Convention. That being so, save in the event of evident arbitrariness, it is not for the Court to question the interpretation of the domestic law by the national courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 49-50, 20 October 2011). Thus, where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction [of access to a court], on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law and by finding, contrary to their view, that there was arguably a right recognised by domestic law (see *Roche*, cited above, § 120).

63. Finally, it is the right as asserted by the claimant in the domestic proceedings that must be taken into account in order to assess whether Article 6 § 1 is applicable (see *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 120, ECHR 2013 (extracts)). Where there is a genuine and serious dispute about the existence of the right

asserted by the claimant under domestic law, the domestic courts' decision that there is no such right does not remove, retrospectively, the arguability of the claim (see *Z and Others v. the United Kingdom*[GC], no. 29392/95, § 89, ECHR 2001-V).

2. *Application of these principles to the present case*

64. The Court considers that the first question to be answered in the present case is whether the applicant had a “right” which could, at least on arguable grounds, be said to be recognised under domestic law.

65. In assessing this question, the Court must take as a starting point the provisions of the domestic law and their interpretation by the domestic courts (see *Roche*, cited above, § 120).

66. As regards domestic law, it is undisputed that, in accordance with section 15 (2) of the 1990 Church Act, claims involving internal laws and regulations of a church could not be enforced by State organs (see paragraph 28 above). It is further uncontested that, should domestic courts establish that an ongoing dispute concerns an ecclesiastical claim unenforceable by domestic organs, they must terminate the proceedings pursuant to Article 130 (1) f of the Code of Civil Procedure (see paragraph 27 above). The main question that arose before the domestic courts therefore revolved around the exact nature of the applicant's relationship with the Reformed Church.

67. In its decision of 2003 (see paragraph 29 above), the Hungarian Constitutional Court had clarified the position of clergy in relation to their ecclesiastical service, in the sense that claims based on ecclesiastical law could not be enforced by domestic courts. In that decision, the Constitutional Court had explained that relationships between churches and their pastors might, on the one hand, be governed by ecclesiastical law, in the enforcement of which no public authority could be involved. On the other hand, where legal relationships between a church and its members are governed by State law, the Constitutional Court held that:

“Under a joint interpretation of the principle of the separation of Church and State and of the right of access to a court, State courts are obliged to determine the merits of legal disputes relating to rights and obligations of persons in the service of a church governed by State law; in such determinations, however, church autonomy shall be respected by the judicial authorities.”

68. The Court notes in this connection that the applicant's ecclesiastical service was based on his Letter of Appointment, issued by the parish presbyters assigning him to the position of pastor of the Reformed Church of Hungary (see paragraph 9 above). Pursuant to the text of that letter, the applicant was to perform “tasks defined by ecclesiastical laws and legal provisions, in particular those laid down in Statute no. II of 1994 on pastors and pastoral service and the [relevant] code of conduct”. In that connection, the Court observes that section 9 of Statute no. II of 1994 on the

Constitution and Government of the Reformed Church of Hungary provides that ecclesiastical law was to be applicable with regard to service relationships of pastors and other persons in service of a pastoral nature (see paragraph 32 above). Furthermore, section 34 of Statute no. I of 2000 on the jurisdiction of the Reformed Church of Hungary provides that legal disputes in the sphere of, *inter alia*, appointment, remuneration and retirement of pastors fall within the jurisdiction of the ecclesiastical courts (see paragraph 33 above).

69. However, instead of turning to the ecclesiastical courts with his pecuniary claims, once he was dismissed from pastoral service, the applicant first instituted labour proceedings, claiming that his relationship with the Reformed Church was akin to employment (see paragraph 13 above). The labour court discontinued the proceedings, holding that the applicant's claim could not be enforced before domestic courts (see paragraph 14 above). The applicant did not apply for review to the Supreme Court, but rather turned to the civil courts and claimed that his relationship with the Reformed Church in fact constituted an agency contract within the meaning of the Civil Code (see paragraphs 15-18 above). It is only this last set of proceedings that has been declared admissible by the Chamber and that, therefore, falls to be examined by the Grand Chamber (see paragraph 43 above).

70. In examining the applicant's case, the first-instance civil court concluded, in accordance with the provisions of the domestic law, that the applicant's relationship with the respondent Church could not be equated with an agency contract as defined by the Civil Code, because it lacked important characteristics of such contracts, and in particular the applicant's ecclesiastical services had no market value (see paragraph 19 above). This view was confirmed by the Supreme Court, which noted that the applicant's claim had been ecclesiastical rather than civil in nature and hence not enforceable before the national courts. Therefore, in line with the provisions of the domestic law, it found no grounds to adjudicate the claim on the merits and discontinued the proceedings (see paragraphs 24 and 66 above). None of the domestic courts accepted the applicant's argument that his pastoral service was to be regarded separately from his pastoral remuneration (see paragraph 58 above).

71. Before the Court, the applicant claimed that at the outset of his proceedings he had had a right under domestic law that was sufficiently recognised such as to engage Article 6 of the Convention. Such a claim involves an assessment by the Court of the content of Hungarian law and, if applicable, an assessment reaching a different conclusion from that reached by the Hungarian courts. The Court reiterates in this context that such an exercise would only be called upon should the conclusions of the domestic courts be found arbitrary or manifestly unreasonable (see paragraph 62 above).

72. The Court notes that in the applicant's case all national courts – i.e. the labour court, the civil court and the Supreme Court – after a detailed examination of the issue of the State courts' jurisdiction and the right of access to a court of persons in ecclesiastical service, discontinued the proceedings holding that the applicant's claim could not be enforced before national courts since his pastoral service and the Letter of Appointment which it was based on had been governed by ecclesiastical rather than the State law (see paragraphs 14 and 24 above). The Court furthermore notes that these findings are in line with the principles set by the Constitutional Court in its decision of 2003 (see paragraphs 29 and 67 above).

73. The Court is not convinced by the applicant's assertion that the domestic courts' finding of an ecclesiastical relationship in his case had ultimately been annulled by the Supreme Court. On the contrary, the Supreme Court confirmed that the applicant's relationship with the respondent Church had been of an ecclesiastical nature before terminating the proceedings before State courts (see paragraph 70 above). The applicant's argument relying on taxation of his pastoral remuneration is not convincing either, since the autonomy of tax law may allow State authorities to levy tax also on income which does not stem from private-law relations governed by State law. Finally, the fact that the Reformed Church of Hungary had not relied on its exclusive competence in the matter is of no relevance since it is the task of State courts – and not of ecclesiastical authorities – to determine the scope of their jurisdiction.

74. Moreover, the Court is satisfied that section 15 (2) of the 1990 Church Act was limited to issues involving “internal laws and rules of the church” (see paragraph 28 above) and did not provide churches or their officials with unfettered immunity against any and all civil claims. To the contrary, as demonstrated by the example of the Supreme Court's guiding judgment (referred to by the Government, see paragraph 30 above), other claims, such as those involving the protection of personality rights, could be lodged against church officials since they did not concern “internal laws and rules of a church” within the meaning of Article 15 (2) of the 1990 Church Act.

75. However, the applicant's claim did not involve such a statutory right. Instead, it concerned an assertion that a pecuniary claim stemming from his ecclesiastical service, governed by ecclesiastical law, was actually to be regarded as falling under the civil law. Having carefully considered the nature of his claim, the domestic courts, in as far as they deal with the substance of the matter, unanimously held, in accordance with the provisions of domestic law, that this was not the case.

76. Given the overall legal and jurisprudential framework existing in Hungary at the material time when the applicant lodged his civil claim, the domestic courts' conclusion that the applicant's pastoral service had been

governed by ecclesiastical law and their decision to discontinue the proceedings cannot be deemed arbitrary or manifestly unreasonable.

77. Consequently, having regard to the nature of the applicant's complaint, the basis for his service as a pastor and the domestic law as interpreted by the domestic courts both prior to the applicant's dispute and during the proceedings instituted by him, the Court cannot but conclude that the applicant had no "right" which could be said, at least on arguable grounds, to be recognised under domestic law. To conclude otherwise would result in the creation by the Court, by way of interpretation of Article 6 § 1, of a substantive right which had no legal basis in the respondent State.

78. The Court therefore considers that Article 6 does not apply to the facts of the present case. Consequently, the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

FOR THESE REASONS, THE COURT

Holds, by ten votes to seven, that the application is inadmissible.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 14 September 2017.

Françoise Elens-Passos
Registrar

Angelika Nußberger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Dissenting opinion of Judge Sicilianos;
- (b) Joint dissenting opinion of Judges Sajó, López Guerra, Tsotsoria et Laffranque;
- (c) Dissenting opinion of Judge Pinto de Albuquerque ;
- (d) Dissenting opinion of Judge Pejchal.

A.N.R.
F.E.P.

DISSENTING OPINION OF JUDGE SICILIANOS

(Translation)

I. Applicability of Article 6 and merits of the case

1. With regret I am unable to follow the majority's approach according to which Article 6 is not applicable in the present case. It is clear, however, that my position concerning the applicability of Article 6 does not prejudice the merits of the case that was brought before the Grand Chamber, namely the question whether or not the right of access to a court had been upheld. Even though the applicability and the merits may appear to be connected in the factual and legal context of the present case, they are nevertheless conceptually different. The question of applicability is a preliminary question which goes to the admissibility of the application *ratione materiae*. It is one thing to say that Article 6 of the Convention is applicable and that the application is therefore admissible *ratione materiae*; it is quite another to find that the restrictions imposed by Hungarian law, as interpreted by the national courts, did not pursue a legitimate aim or that they were disproportionate to the aim pursued to the point of undermining the very essence of the right of access to a court (see, for the general principles on access to a court, among many other authorities, *Baka v. Hungary* [GC], no. 20261/12, § 120, ECHR 2016).

2. In other words, an analysis of the question of the applicability of Article 6 should not encroach upon the merits of the case. In my view, and with all due respect to the majority, the judgment does not succeed in distinguishing with sufficient clarity between the admissibility and the merits. A number of paragraphs in the judgment go beyond the question of the applicability of Article 6 as such and deal in reality with the merits of the dispute, that is to say the scope of the right of access to a court in the circumstances of the case and whether or not the restrictions on that right under Hungarian law were justified. This would seem to be the result of the restrictive approach to the "arguable" nature of the "right" relied upon by the applicant under domestic law.

II. Scope of disagreement: meaning of "arguable" in relation to applicability of Article 6

3. As is pertinently recalled in paragraph 60 of the judgment, "[t]he Court has reiterated time and again that for Article 6 § 1 in its 'civil' limb to be applicable, there must be a dispute over a 'right' which can be said, *at least on arguable grounds*, to be recognised under domestic law, irrespective of whether that right is protected under the Convention"

(emphasis added). The Court goes on to explain that it “may not create by way of interpretation of Article 6 § 1 a substantive right which has *no* legal basis in the State concerned” (paragraph 61, emphasis added; see *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012, and the other reference cited).

4. The choice of the terms “arguable” and “no” clearly suggest, in my view, that the Court is not called upon to judge at this stage – for a preliminary decision on the applicability of Article 6 – whether the right in question is actually recognised in domestic law with near absolute certainty. The test proposed in the Court’s traditional case-law, as referred to in the present judgment, implies a *prima facie* scrutiny. The Court simply needs to ensure that it does not apply Article 6 – and that it does not therefore engage in an examination of the guarantees secured thereby – in respect of an alleged right that has no legal basis in domestic law, and that the applicant has submitted tenable arguments as to the existence and exercise of such right. As was indeed found in this connection in the case of *Neves e Silva v. Portugal* (27 April 1989, § 37, Series A no. 153-A), “[t]he Court must ascertain whether the applicant’s arguments were sufficiently tenable and not whether they were well-founded in terms of the Portuguese legislation”. To my knowledge, this methodological approach has never since been called into question by the Court.

III. The term “arguable” and Article 13 of the Convention

5. It is noteworthy, moreover, that a similar approach has been followed systematically by the Court under Article 13 of the Convention as regards the right to an effective remedy. As recently reiterated by the Grand Chamber, “Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as ‘arguable’ in terms of the Convention (see, for example, *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 54, Series A no. 131)” (see *De Tommaso v. Italy* [GC], no. 43395/09, § 180, ECHR 2017). It is true that the “arguable” nature of the grievance referred to above must exist in relation to the Convention rather than to domestic law. Nevertheless, the terminology being the same in both situations, the methodology used for deciding whether a complaint was “arguable” should be similar. When looked at under Article 13 of the Convention, the arguable nature of a complaint does not necessarily require an in-depth analysis by the Court, but rather a *prima facie* examination to ascertain that the applicant’s complaint based on a substantive Convention right is sufficiently tenable.

6. By way of confirmation, reference can even be made to those cases where the Court finds that there has been no violation of the substantive

right concerned but, in the absence of an effective remedy, it nevertheless finds a violation of Article 13 of the Convention. One example of this can be found in the recent case of *D.M. v. Greece* (no. 44559/15, 16 February 2017), which concerned the conditions of the applicant's detention and the question whether there were remedies in Greece by which to complain of those conditions. In that case the Court noted in particular as follows (*ibid.*, § 43, emphasis added):

“The Court reiterates that the existence of an actual breach of another provision is not a prerequisite for the application of Article 13 (*Sergey Denisov v. Russia*, no. 21566/13, § 88, 8 October 2015, and the references therein). In the present case, even though the Court has finally found no violation of Article 3 of the Convention (see paragraph 40 above), *it has not taken the view that the applicant's complaint in this connection was prima facie unarguable* (see paragraphs 31 et seq. above). ... It thus finds that the applicant raised an arguable complaint for the purposes of Article 13 of the Convention.”

Having thus asserted that Article 13 was applicable in that case, the Court then found “that there [had] been a violation of Article 13 taken together with Article 3 of the Convention” (*ibid.*, § 46).

7. The sentence in the above-cited passage which is of particular interest is the following: “[the Court] has not taken the view that the applicant's complaint ... was *prima facie* unarguable”. This sentence could not be clearer in showing that the pertinent test involves *prima facie* scrutiny and the double negative used here suggests that it is simply necessary to ensure that the applicant has submitted a sufficiently tenable complaint rather than a fanciful one.

IV. Harmonious interpretation, the object and purpose of the Convention

8. As recently pointed out by the Grand Chamber, “the Convention must ... be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X, and *Rantsev*, cited above, § 274)” (*Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 120, ECHR 2016). Based on this general principle of interpretation, it should be understood, I believe, that the term “arguable” has the same meaning in relation to the two provisions in question, Article 6 and Article 13 of the Convention, especially as those provisions are inter-related, pursuing as they do the same purpose – the possibility for individuals to benefit from effective remedies in order to exercise their rights – and as Article 6 is often seen as *lex specialis* in relation to Article 13 of the Convention.

9. It must thus be admitted, as a result of a harmonious interpretation of the Convention, that the term “arguable” involves *prima facie* scrutiny by the Court, with the simple purpose of ensuring that the applicant’s arguments are sufficiently tenable. In other words, to ascertain whether the applicant’s position or complaint is “arguable” – whether in the light of domestic law or under the Convention – the Court does not need to engage in an in-depth examination or to adjudicate on the merits with any finality. Such an approach would go beyond the scrutiny implied by the concept of “arguable” complaint or argument. It would have the practical consequence of reducing the scope of Articles 6 and 13 of the Convention. Closer analysis indeed reveals that the more demanding one is in terms of what is “arguable”, the more one limits the scope of the right to a fair hearing (or that of the right to an effective remedy).

10. My approach – which seeks to avoid excessively limiting the scope of the above-mentioned provisions – seems to be consistent with the object and purpose of the Convention, and more particularly those of Article 6, which are the focus of interest in the present case. It will be recalled that, since the celebrated case of *Delcourt*, the Court has on many occasions emphasised that “[i]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and the purpose of that provision” (*Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11).

V. *Application to the present case*

11. In the present case, the applicant submitted that his case concerned a dispute over a civil right recognised under domestic law. He argued firstly that the nature of the relationship on which he had based his claim – which according to him was a pecuniary relationship between a citizen and a religious community – was acknowledged as creating civil rights under Hungarian law, pointing out that ecclesiastical law recognised the applicability of State law to tort liability between the Church and its clergy. He also stressed that the respondent Church had never relied on exclusive competence in such matters. He then argued – without being contradicted by the Government on this point – that under the applicable legislation his service allowance was taxable as income deriving from employment. In the applicant’s view, the State could thus not, on the one hand, disregard the pecuniary nature of that allowance and, on the other, consider that it gave rise to legal obligations (taxes). He explained that he actually had two distinct legal relationships with the Reformed Church: one of an ecclesiastical nature relating to his pastoral service as such, and the other of an essentially pecuniary nature in respect of his pastoral remuneration. In

his submission, the latter relationship was unrelated to church autonomy and concerned a purely pecuniary claim of a private-law nature. The State courts should therefore have determined his claim instead of refusing to deal with it (paragraphs 56-58 of the judgment).

12. More specifically, based on Articles 277 (1) and 478 (1) of the Civil Code (as in force at the time), the applicant had primarily sought, before the State courts, payment of overdue fees stemming from an agency contract he believed he had with the Church. He maintained that for the period from 22 October 2005, when his suspension allegedly became unlawful, until the date of termination of his appointment, he had been entitled to a fee for his services, which corresponded to the service allowance set out in his Letter of Appointment. He thus sought enforcement of the agency contract. Alternatively, he based his claim on Articles 318 (1) and 339 (1) of the Civil Code, which provided for damages for non-performance of an agency contract. In his view the respondent Church was thus in breach of its contractual obligations (paragraph 18 of the judgment).

13. In its decision no. 32/2003, the Constitutional Court had examined the issue of access to a court for persons in the service of religious entities. It had found in particular as follows (passages cited in paragraph 29 of the judgment):

“Based on State laws and the separately operating church rules, it cannot be excluded that two distinct rule systems may regulate similar legal relationships. Between a church and its members there may exist relationships governed by internal ecclesiastical rules, in the enforcement of which no public authority may be involved. Between the same parties there may, however, also exist legal relationships defined and governed by State laws, including the relevant remedies available. Rights and obligations stemming from legal relationships based on State laws may be enforced by State coercion.

... The State must respect the autonomy of churches and church organs. However, in acknowledging the autonomy of churches, regard must be had to the other fundamental rights and obligations as well. Therefore the right to church autonomy, included in the principle of separation of Church and State under section 60(3) of the Constitution, must be interpreted in the context of the other fundamental rights that are secured under the Constitution to natural persons

In accordance with the fundamental right of access to a court, a person in the service of a church has [just as much as any other citizen] a constitutional right to turn to a State court in order to have his legal dispute concerning his employment determined, where his employment is based on State laws. ...

... Accordingly, reliance on the principle of separation of Church and State cannot result in the infringement of the constitutional right of access to a court. Reading the principle of separation of Church and State together with the right of access to a court, State courts are obliged to determine on the merits any legal dispute concerning the rights and duties, stemming from State law, of a person in ecclesiastical service, while respecting also the church’s autonomy ...”

14. The above-cited passages of that major decision of the Hungarian Constitutional Court show the conceptual and legal difficulties which obtain when any attempt is made to draw a bright line between the application of ordinary law and that of ecclesiastical law. At the same time they highlight the need to ensure the upholding, in a balanced manner, of the principle of the separation of Church and State, on the one hand, and the constitutional right of access to a court for persons in the service of a church, on the other. Reliance on the former, says the Constitutional Court, cannot result in a breach of the latter. To be sure, those judicious considerations give rise, in each individual case, to an extremely delicate balancing exercise in legal terms, with significant repercussions on the operation of the rule of law, or more generally on the structure of the State itself and the limit to its regulatory power.

VI. Conclusion

15. Under those circumstances, to say that the applicant's position was not even "arguable" and that it did not therefore present a sufficient degree of seriousness appears excessive. Such an assessment, in my view, oversteps the bounds of the *prima facie* scrutiny that the Court should exercise when examining the applicability of Article 6 of the Convention and encroaches upon the merits of the dispute. For all these reasons, I am of the opinion that Article 6 should have been declared applicable in the present case.

JOINT DISSENTING OPINION OF JUDGES SAJÓ, LÓPEZ GUERRA, TSOTSORIA AND LAFFRANQUE

In the present case the majority have concluded that the applicant pastor's pecuniary claims, which were indirectly related to his ecclesiastical service, did not constitute a civil right under domestic law. Given the absence of a civil right, the majority asserted that there could be no issue of access to justice. We respectfully dissent. Such an understanding of the case-law not only encourages domestic arbitrariness, but may also deprive many people who enter into ecclesiastical service of the protection of due process. Ultimately, this judgment risks endorsing the position that all appointments and service agreements formed with religious institutions that are subject to internal rules fall outside the jurisdiction of the State. Consequently, such agreements are rendered unreviewable and any rights are unenforceable under domestic law.

I.

The applicant is a former pastor of the Reformed (Calvinist) Church of Hungary. His remuneration was set out in an appointment letter issued by the parish presbyters. He was removed from service, as a disciplinary measure, for stating in a local newspaper that State subsidies had been paid unlawfully to a Calvinist boarding school. Even prior to his removal, the applicant had been suspended from service pending a decision on the merits, for a maximum of sixty days, and he had been informed that he was entitled to only one half of his service allowance during his period of suspension. In his civil claim, the applicant requested, among other things, the full service allowance accruing during his period of suspension, as well as the salary due to him for his activities as a teacher of religion in a school.

As to the applicant's *second* claim (salary arrears for activities as a teacher) the Supreme Court concluded that the applicant "did not make any reference to a contract between him and the Gödöllő Parish to provide teaching of church history, nor did he claim any fee about such a contract. He submitted a claim regarding such a contract for the first time in his petition for review [to the Supreme Court]" (see paragraph 24).

To our regret we beg to disagree. The present judgment reproduces the information that the said claim was consistently advanced at each and every stage of the domestic litigation. As the Court itself notes, the applicant had already claimed teaching fees in the domestic proceedings (see for example

paragraph 15¹) and referred to the agreement itself before the Supreme Court (see paragraph 39). The domestic courts failed to consider this claim; consequently they did not take a position on the existence of a civil right under domestic law. This failure, alone, amounts to a denial of access to justice.

As to the *first* claim (service allowance for the period of suspension), the Court has accepted that Article 6 § 1 is not applicable in the absence of an arguable civil claim because the domestic courts have held that no civil right can be enforced if no civil right exists under domestic law. The domestic courts concluded that the service relationship, being ecclesiastical, was not an enforceable right, therefore “they discontinued the proceedings holding that the applicant’s claim could not be enforced before national courts since his pastoral service had been governed by ecclesiastical rather than the State law” (see paragraph 72).

However, this formalistic approach neglects to properly examine the fact that the applicant had an arguable pecuniary claim under domestic civil law.

According to this Court’s case-law, Article 6 § 1 applies to disputes (*contentions*) concerning civil “rights” which can be said, at least on arguable grounds, to be recognised under domestic law, whether or not they are also protected by the Convention (see, in particular, *Editions Périscope v. France*, 26 March 1992, § 35, Series A no. 234-B, and *Zander v. Sweden*, 25 November 1993, § 22, Series A no. 279-B). The dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question (see *Vilho Eskelinen v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II, and *Sabeh El Leil v. France* [GC], no. 34869/05, § 40, 29 June 2011). According to the Oxford Dictionary “arguable” means (1) able to be argued or asserted; (2) open to disagreement. The claim made by the applicant satisfies this definition.

Contrary to the stance of the present judgment, the position of domestic law cannot be considered absolutely decisive. As the Court found in *Roche v. the United Kingdom* ([GC], no. 32555/96, § 120, ECHR 2005-X, emphasis added):

“In assessing therefore whether there is a civil ‘right’ and in determining the substantive or procedural characterisation to be given to the impugned restriction, the *starting-point* must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 19, § 49). Where, moreover,

¹ Paragraph 15 of the judgment: “III. For the period between 1 May 2005 and 30 April 2006 (12 months) the unpaid teaching fees ...”.

the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.”

Once again, the interpretation of the domestic law is only a starting point and it does not rule out the existence of a civil right in domestic law. As will be shown, there are strong reasons for the Court to depart from the analysis of the domestic superior court, given its arbitrary nature, in the present case.

As held by the Hungarian Constitutional Court, where there is a relationship under State law, then State law will apply. This principle cannot be undone merely by the recognition of a parallel ecclesiastical relationship. While the Court today emphasises that it may not create a substantive right that has no legal basis in the State concerned, it seems to forget that there was a dispute over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, namely the claim to an agency contract. This claim was not given any due consideration by the domestic courts, which were of the view that such review was automatically precluded due to the ecclesiastical nature of the applicant’s relationship with the Church².

To accept, at face value, the conclusions of the domestic authorities under the pretext that the domestic law is to be determined by national authorities, begs the fundamental question of the case. The Constitutional Court has clearly required domestic courts to review to what extent a legal relationship with a religious body (such as a church) can be a relationship that is governed by State law (see paragraph 29):

“In accordance with the fundamental right of access to a court, a person in the service of a church has [just as much as any other citizen] a constitutional right to turn to a State court in order to have his legal dispute concerning his employment determined, where his employment is based on State laws.

² It is to be noted that the Church has adopted an inconsistent position with regard to the nature of pecuniary claims. It asserts that the pecuniary claims made against the pastor, including back payments for the use of a service apartment, are of a ‘secular nature’. In the case of non-payment, the Church would sue the pastor under civil law in a [State] court under the Civil Procedure Act (see Annex V, applicant’s observations). In the proceedings for damages for the non-observance of the agency contract, the defendant Church requested that the claim be rejected and claimed that another body of the Church could be sued. Moreover, the Church presented a counterclaim to offset the use of the apartment (this matter is neither specified in the judgment of the court of first instance nor in the plaintiff’s pleadings before the court of first instance).

The State organs must determine under the Constitution and the laws specified in the Act on Church Legislation whether an issue having arisen from a given legal relationship falls within the competence of a State authority or court. Hence, they must determine under State laws whether in a given case a legal relationship governed by State law exists between the parties.”

Contrary to the Supreme Court, the Constitutional Court did not preclude the applicability of State law simply because of the presence of ecclesiastical law; it did so expressly in view of Article 6 § 1 of the Convention, because rights holders cannot be deprived of access to justice.

Nevertheless, the domestic courts failed to carry out a meritorious analysis of the civil claim as required by the Constitutional Court, “since [the applicant’s] pastoral service had been governed by ecclesiastical rather than the State law”. The Supreme Court brushed aside the fundamental question in the present case. Reflecting on the civil law nature of the service relationship, the Supreme Court held that the service rendered was not material in nature and concluded that the Civil Code (and its rules on agency) was not applicable. This was so, because where service has been deemed to be spiritual and not material, only ecclesiastical law then applies. What is governed by ecclesiastical law is spiritual (non-pecuniary) and the Civil Code does not apply. This circular reasoning precludes the independent analysis under State law simply on the basis that ecclesiastical law was present. However, according to the Constitutional Court, the appropriate question is not whether the relationship is under the exclusive jurisdiction of ecclesiastical law (which also happens to be a procedural bar according to *Roche*, cited above, and does not preclude the application of Article 6), but what its status is under State law, which requires an express statutory provision to make a claim non-enforceable. This is the requirement of Article 7 and (in particular) Article 204 1 (c) of the Civil Code. Section 15 (2) of the Church Act states only: “No State coercion can be used for enforcing the internal laws and rules of the Church”. It is true that the rules on compensation during a period of suspension are determined by the internal regulations of the Church. However, the ruling of the Constitutional Court clearly indicates that this does not decisively preclude the application of the Civil Code where a civil-law agreement exists.

Because the applicant’s appointment was held to be spiritual and described in an agreement as being subject to ecclesiastical law, it was held by the Supreme Court that the compensation for the period of suspension was not applicable. Needless to say, at the stage of the suspension, in the disciplinary proceedings, there was no issue regarding whether the service should be defined as material or spiritual; there was only a promise of pecuniary remuneration and demand. To argue that there is no civil legal

relationship in view of Article 204 (1) (c) (as the Hungarian Supreme Court has argued) begs the fundamental question at stake. For the Supreme Court the claim is not enforceable (i.e. it recognises that there is a claim under the Civil Code) because it is ecclesiastical. This implies that for the Supreme Court an ecclesiastical agreement is *ab ovo* non-enforceable, although according to Article 204 (1) (c), a claim is unenforceable only by virtue of an Act of Parliament. An “Act” of the Reformed Church of Hungary is not an Act of Parliament.

II.

This judgment sits uncomfortably with the principles and level of protection developed by the Court in the context of access to justice.

The Court has accepted (see *Vilho Eskelinen*, cited above, §§ 59-61) that “there should ... be convincing reasons for excluding any category of applicant from the protection of Article 6 § 1 ...” and that, “where the applicants, had, according to the national legislation, the right to have their claims for allowances examined by a tribunal”, some ground related to the “effective functioning of the State or any other public necessity” has to be advanced “which might require the removal of Convention protection against unfair or lengthy proceedings”. It has thus held that “[i]f a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply”.

Moreover, the Court has refused to maintain absolute parliamentary immunity or endorse unlimited diplomatic immunity (see *Čudak v. Lithuania* [GC], no. 15869/02, ECHR 2010, and *Sabeh El Leil*, cited above). It is odd that when the autonomy of the Church is engaged, the Court tends to *extend* immunity. This is done under the guise of finding that Article 6 § 1 is not applicable because no civil right is at issue here.

III.

The consequences of the present judgment are troubling not only because it adopts a narrow perspective to determine what counts as a substantive civil right for Article 6 § 1 purposes. The logic of this judgment is that where a Church (related or unrelated to specific doctrinal dictates) decides to create ecclesiastical jurisdiction, the State gives up its own, as if the Church were the sovereign power to determine who has jurisdiction in the State (once again, this is *not* what the Constitutional Court ruled, but it is what this Court seems to endorse today). The consequences for the protection of rights of the individual are troubling.

There can be no doubt that by taking up his appointment with the Church, the applicant agreed to be loyal to the institution. However, one cannot interpret his signature on his service letter as a personal and unequivocal undertaking not to institute, under any conditions, civil actions against the Church. Neither can one say that just because a standard ecclesiastical agreement was involved, every element of the relationship is automatically governed by ecclesiastical rules, and therefore beyond the reach of State jurisdiction.

We find that the concerns voiced in the dissent to the Chamber judgment have become even more timely: “The finding in this case naturally and legitimately prompts questions as to what other rights of (former) clergymen set out in ecclesiastic documents could be sacrificed to absolutist church autonomy, as perceived by the majority. Would such rights include pension rights? Other social security rights? Health insurance rights?” (Chamber judgment, Joint Dissenting Opinion of Judges Sajó, Vučinić and Kūris, § 30).

It goes without saying that the Convention requires respect for freedom of religion and that freedom results in the duty to respect church autonomy. It would be unacceptable, as the Constitutional Court and Supreme Court rightly concluded, to allow State authorities to enforce the internal rules of a church. But this does not mean that where a religious organisation declares a matter “internal”, such organisations can unilaterally deprive the affected party of State jurisdiction if that relationship is secular. The present case does not concern the appropriateness of the religious teachings of the applicant (not an issue in the present case), nor the appropriateness of his criticism of ecclesiastical authorities on a matter unrelated to religious teachings (which was the basis of the disciplinary proceedings). Church autonomy may require judicial respect for religious doctrine, according to which a priest or pastor provides a non-secular service³. But this was not argued by the defendant at all and the claim concerned a secular relationship related to the disciplinary procedure.

While the autonomy of religious organisations is to be respected, as the case-law indicates this does not grant immunity to such organisations. As stated in *Fernandez Martinez v. Spain* ([GC], no. 56030/07, ECHR 2014 (extracts)), it must be shown that the risk to church autonomy is real and substantial, but that is certainly not the case here⁴.

³ According to the teaching of some churches, priestly service is *sacerdotium*; in other words the priest serves God, and his sacrament-related activities cannot be seen as regulated by contract between humans.

⁴ *Fernandez Martinez v. Spain*, cited above, § 132:

This judgment acquiesces in the creation of a dual legal system wherein elementary State sovereignty is denied and the State legal system with its rights-protective remedies remains out of reach to some legal disputes. The consequence is that the State abandons its duty to provide due judicial protection to many of its citizens.

“Limits to the autonomy

132. [A] mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members’ rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community’s autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake (see, *mutatis mutandis*, *Sindicatul “Păstorul cel Bun”*, cited above, § 159).”

Property rights deserve a level of protection comparable to that of private life and the protection cannot be made subject to circular procedural obstacles.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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I. Introduction (§§ 1-4)

1. I cannot subscribe to this uninspiring judgment. The Grand Chamber of the European Court of Human Rights (“the Court”) had two possible legal avenues to deal with this case. Either to apply the basic tenets of the Court’s case-law on the right of access to a court or to review its case-law in the light of the criticism that has been levelled against it. For reasons that remain in the realm of the unknown, the majority of the Grand Chamber have chosen to pursue neither of these avenues.

2. Instead, the most difficult decisions are taken by cutting corners in order to arrive at a foregone conclusion. Firstly, the majority of the Grand Chamber disregard the crucial fact that the Supreme Court did not reject the applicant’s claim on the merits, but merely discontinued his case¹. Secondly, the majority do not address the issue of the nature of the limitation on the right of access to a court in the applicant’s case. Thirdly,

¹ I am referring to the Supreme Court decision of 28 May 2009 (“the decision”). See paragraph 24 of the judgment.

the majority do not care to determine and justify the width of the margin of appreciation in the case at hand, still less to discuss whether there is a European consensus on access to a court in pecuniary disputes concerning the clergy, assuming without discussion that the Supreme Court's decision to discontinue the case was not arbitrary. Having had the benefit of reading Judge Sajó's opinion, I must state that I share some of my learned colleague's thoughts in this respect, especially on Hungarian constitutional case-law and the incompatibility of the Supreme Court decision with that case-law.

3. Had the majority taken into account the strict procedural nature of the Supreme Court's decision of 28 May 2009 and consequently the procedural nature of the limitation on the applicant's right of access to a court, they would have had to conclude, in strict obedience to the canons of the traditional case-law, that Article 6 of the European Convention on Human Rights ("the Convention") was applicable. Subsequently, still in accordance with the logic of the Court's traditional case-law, the majority would have had to submit the said limitation to the legitimate aim and proportionality tests, taking into consideration the pertinent legal framework of the Contracting Parties on this issue, in order to determine the existence or non-existence of a European consensus on the subject and the correct width of the margin of appreciation to be afforded to the States, and consequently assess whether there had been a violation of Article 6. Since none of these questions is even enunciated, let alone answered, the aim of this opinion is precisely to answer the questions thus evaded by the majority.

4. Admittedly, owing to its particular features, the present case also provided a unique occasion for a much needed reflection on the Court's traditional case-law on the distinction between immunity from liability² and immunity from suit³ and the alleged ensuing difference of regime for the purposes of Article 6 of the Convention. In spite of the sustained criticism that the case-law has drawn for some years now, the majority of the Grand Chamber do not even consider this broader issue explicitly, assuming axiomatically the correctness of that distinction and drawing inferences for the purposes of the applicable regime. In this opinion I also seek to assess whether this traditional methodological approach makes logical sense.

² For the purposes of this opinion, immunity from liability or substantive immunity is understood as a limitation on a cause of action due to the inexistence of the claimed right in the domestic legal order.

³ For the purposes of this opinion, immunity from suit or procedural immunity is understood as an exemption from the jurisdiction of national courts. The effect of this immunity is that the suing person will be denied access to a court because his or her claim against the holder of the immunity is thus barred.

First Part (§§ 5-21)

II. The limitations of the right of access to a court (§§ 5-14)

(a) The Court's case-law principles (§§ 5-7)

5. The Court's case-law has reiterated time and again that for Article 6 § 1 of the Convention in its "civil" limb to be applicable, there must be a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious. It may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play⁴.

6. Article 6 § 1 of the Convention does not guarantee any particular content for civil "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned⁵. In order to decide whether the "right" in question really has a basis in domestic law, the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts⁶. Other criteria that the Court may consider include the "recognition of the alleged right in similar circumstances by the domestic courts or the fact that the latter examined the merits of the applicant's request"⁷. But "the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are therefore of little consequence"⁸.

⁴ See, among many other authorities, *Baka v. Hungary* [GC], no. 20261/12, § 100, ECHR 2016; *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012; and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 42, ECHR 2015.

⁵ See, for example, *James and Others v. the United Kingdom*, no. 8793/79, 21 February 1986, § 81, Series A no. 98; *Lithgow v. the United Kingdom*, no. 9006/80, 8 July 1986, § 192, Series A no. 102; *Holy Monasteries v. Greece*, no. 13092/87, 9 December 1994, § 80, Series A no. 301-A; *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005 X; and *Boulois*, cited above, § 91.

⁶ See, as a most recent authority, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 97, ECHR 2016.

⁷ *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 41, ECHR 2007-II, and *Boulois*, cited above, § 94.

⁸ *Georgiadis v. Greece*, 29 May 1997, § 30, Reports of Judgments and Decisions 1997-III.; *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009; and *J.S. and A.S. v. Poland*, no. 40732/98, § 46, 24 May 2005.

7. The Court would need strong reasons to differ from the conclusions reached by the superior national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law⁹. Nevertheless, the concept of “civil right” is autonomous in the sense that it has its own Convention meaning, regardless of how the term is understood in the domestic legal framework. In carrying out its assessment, the Court has to look beyond appearances and the language used and to concentrate on the realities of the situation¹⁰. Otherwise States would be able to circumvent Article 6 of the Convention by labelling claims in such a way as to deprive citizens of access to a judicial remedy. Furthermore, the Court has also to read the Convention, including its right to a court, in the light of present-day circumstances, and the absence of a uniform European view does not hinder its evolutive interpretation¹¹. Finally, it is the right as asserted by the claimant in the domestic proceedings that must be taken into account in order to assess whether Article 6 § 1 of the Convention is applicable¹². Where there is a genuine and serious dispute about the existence of the right asserted by the claimant under domestic law, a domestic court’s decision that there is no such right does not remove, retrospectively, the arguability of the claim¹³.

(b) On substantive limitations to the right of access to a court (§§ 8-14)

8. The right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights¹⁴. Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only¹⁵. Although the Court may not create,

⁹ *Ibid.*, § 91.

¹⁰ See *Boulois*, cited above, § 93.

¹¹ See, among other authorities, *Feldbrugge v. the Netherlands*, 29 May 1986, Series A no. 99; *Deumeland v. Germany*, 29 May 1986, Series A no. 100; and *Salesi v. Italy*, 26 February 1993, Series A no. 257-E. In fact, the absence of a uniform European view was precisely the main point made by the dissenting judges in *Feldbrugge* and in *Deumeland*. The majority considered that they were wrong and subsequent case-law confirmed the majority’s view.

¹² See *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 120, ECHR 2013 (extracts).

¹³ See *Z. and Others v. the United Kingdom* [GC], no. 29392/95, § 89, ECHR 2001 V.

¹⁴ See *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX.

¹⁵ See *Cudak v. Lithuania* [GC], no. 15869/02, § 54, ECHR 2010; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII; and *Golder v. the*

by way of interpretation of Article 6 § 1, a substantive right which has no legal basis in the State concerned¹⁶, Article 6 will nonetheless apply to disputes of a “genuine and serious nature” concerning the actual existence of the “right” as well as to the scope or manner in which it is exercised¹⁷. If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in sovereign capacity is not conclusive. In ascertaining whether a dispute concerns the determination of a civil right, only the character of the right at issue, namely its substantive content and effects, is relevant, and not its legal classification under the domestic law of the State concerned¹⁸. Therefore, the circumstance that the respondent is a public authority and the impugned act is classified under domestic law as public is not decisive of the question whether or not the dispute involves the determination of a civil right.

9. However, the Court has always found that the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations. These are permitted by implication, since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals”¹⁹. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim²⁰ and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (the *Ashingdane* test). The proportionality test also warrants an

United Kingdom, 21 February 1975, § 36, Series A no. 18. It is telling that the United Kingdom and the three dissenters in the *Golder* case argued that an extensive interpretation of Article 6 of the Convention, in the sense that it also included the right of access to a court, would impose new and therefore illegitimate obligations on the Contracting Parties.

¹⁶ See *Roche*, cited above, §§ 116-17.

¹⁷ See *Markovic and Others v. Italy* [GC], no. 1398/03, § 98, ECHR 2006 XIV with further references.

¹⁸ *König v. Germany*, no. 6223/73, 28 June 1978, §§ 89-90, Series A 27.

¹⁹ See the above-mentioned *Golder* judgment, § 38, quoting the “*Belgian Linguistic*” judgment of 23 July 1968, § 5, Series A no. 6.

²⁰ Normally, the Court finds that immunities serve legitimate aims (see on immunity of international organisations, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 61, ECHR 1999-I, and on parliamentary immunity, *A. v. the United Kingdom*, no. 35373, § 77, ECHR 2002-X). The Court’s assessment may be determined by the “unique circumstances” of the case, as in *Prince Hans-Adam II von Liechtenstein*, cited above, § 59. Sometimes the Court does not respond specifically to the submission that the immunity’s aim is illegitimate, such as in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 47, ECHR 2001 - XI, and *McElhinney v. Ireland*, no. 31253/96, 21 November 2001.

assessment of the alternative remedies in order to institute proceedings²¹. Ultimately, the non-existence of any alternative remedies will impair the essence of the right in so far as that will constitute a denial of justice²².

10. The Court's case-law distinguishes between substantive limitations and procedural bars on access to a court. This distinction has in some cases determined the applicability of Article 6²³, whereas in others it has played a role in the examination of the scope of the Article 6 guarantees²⁴. Either way, the Court has reiterated in all of these cases that Article 6 in principle has no application to cases of substantive limitations on the right existing under domestic law²⁵. This is so because the Court may not create, by way of interpretation of Article 6 § 1, a substantive right which has no legal basis in the State concerned²⁶.

11. In fact, the very first case where the Court found a violation of Article 6 on the basis of the lack of proportionality of an absolute, automatic, blanket immunity granted in the domestic law of a Contracting Party proved how legally artificial and permeable to extra-legal considerations the Court's distinction is²⁷. The British reaction to *Osman* was violently critical²⁸. Two main critiques were addressed to the Court: that it had misunderstood English law since it did not recognise the right to sue the police in negligence in respect of the investigation and suppression

²¹ Established in the leading case *Ashingdane v. the United Kingdom*, no. 8225/78, 28 May 1985, § 57, Series A no. 93, and since then followed in many others, such as *Levages Prestations Services v. France*, 23 October 1996, § 40, Reports 1996-V.; *Waite and Kennedy*, cited above, § 59; *Cudak*, cited above, § 55; and *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 139, ECHR 2013 (extracts).

²² See, among other authorities, *Waite and Kennedy*, cited above, §§ 68 and 73, and *Beer and Regan v. Germany*, no. 28934/95, §§ 58 and 63, 18 February 1999. Sometimes the Court's circumvents the question of the protection of the right's essence (see for example the approach of the *Prince Hans Adam II von Liechtenstein* judgment, which was criticised by Judge Costa, in his separate opinion, as "unorthodox and illogical").

²³ See *Roche*, cited above, § 124, and *Z. and Others*, cited above, § 100.

²⁴ See *Markovic and Others*, cited above, § 114, and *Müller v. Germany* (dec.), no. 12986/04, 6 December 2011.

²⁵ This was the Commission's position from *Agee v. the United Kingdom*, no. 7729/76, Commission decision of 17 December 1976, DR 7, p. 175, followed in *Dyer v. the United Kingdom*, no. 10475/83, Commission decision of 9 October 1984, DR 39, p. 251. According to the Commission, the immunity led to the extinction of the cause of action, even though the right claimed by the plaintiff might generally exist under domestic law.

²⁶ See *Roche*, cited above, §§ 116-17.

²⁷ See *Osman v. the United Kingdom* [GC], no.23452/94, 28 October 1998, §§ 151-152, ECHR 1998-VIII.

²⁸ See Lord Hoffman, "Human Rights and the House of Lords", MLR 1999, p. 162; Barrett, "Negligence and Discretionary Powers", *Public Law* 1999, p. 630; Weir, "Down the hill – all the way?", CLJ 1999, p. 4; Lunney, "A Tort Lawyer's View of *Osman v. the United Kingdom*", KCLJ 1999, p. 238; Gearty, "Unravelling *Osman*", MLR 2001, p. 159; Lidbetter/George, "Negligent Public Authorities and convention rights – The Legacy of *Osman*", EHRLR 2001, p. 599; and Kickman, "The 'uncertain shadow': Throwing Light on the Right to a Court under Article 6 (1) ECHR", *Public Law* 2004, p. 122.

of crime and that it had therefore created a new right to sue the police in damages at the cost of public funds, and thus the Court had overstepped its competence and disrespected the autonomy of the British Parliament. This criticism was accompanied with threats of possible withdrawal from the Strasbourg court, which was seeking to “impose a Voltairean uniformity of values upon all member states”²⁹. None of these critiques and threats is exclusive of this case, having been expressed on multiple other occasions. They evidently served one sole purpose, which was achieved two years later: *Osman* was reversed by *Z. and Others*³⁰, which referred to Lord Browne-Wilkinson’s critical remarks in *Barret v. Enfield London BC*³¹.

12. The present case proves once again that the distinction between the procedural and substantive limitations to the right of access to a court is illusory. In spite of the fact that they insisted on maintaining the distinction³², the majority of the Grand Chamber decide the case without ruling on the nature – or indeed the existence – of the limitation of the applicant’s right of access. The Court has done so in other cases³³, where it concluded that whether examining the complaint procedurally under Article 6 or substantively under Article 8 – the Court having jurisdiction to

²⁹ Lord Hoffmann, cited above, p. 164.

³⁰ *Z. and Others*, cited above, § 100 (“the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to a court of the kind contemplated in *Ashingdane*”). See, for a counter-critique of this reversal, the partly dissenting opinion of Judges Rozakis and Palm (“Under these circumstances how can we distinguish between *Osman* and the present case?”) and the partly dissenting opinion of Judge Thomassen, joined by Judges Casadevall and Kovler (“The majority’s reasons for not following the decisions in *Osman* (see paragraph 100 of the judgment) are not, to my mind, convincing. There seem to have been no striking or significant changes in the law of negligence since that case and all relevant matters concerning the content of domestic law had been brought to the attention of the Court by the parties in *Osman*. I am of the opinion that the conclusion under Article 6 in this case must be the same.”).

³¹ *Barret v. Enfield London BC* (1999) 3 WLR, p. 85.

³² See paragraph 61 of the judgment which also cites *Lupeni Greek Catholic Parish and Others*, cited above, § 100. In fact, the majority even considered this distinction to be “determinative” of the applicability of Article 6.

³³ See *Fayed v. the United Kingdom*, 21 September 1994, § 67, Series A no. 294-B; and *A*, cited above, § 65. In the latter case, the Government argued that the substantive content of the civil right to reputation in domestic law was delimited by the rules of absolute parliamentary privilege, and that a person whose reputation was damaged by a parliamentary speech therefore had no actionable claim such as to engage the procedural safeguards of Article 6 § 1 of the Convention. In the former case, since the Inspectors’ report was subject to a qualified rather than an absolute privilege, neither the Inspectors nor the Secretary of State could be successfully sued for defamation in publishing the report, except upon proof of express malice. This means that the Court equated a case of absolute privilege and a case with qualified privilege, submitting both to the legitimate aim and proportionality tests. In fact, the Court had proceeded in the same way in the leading case of *Ashingdane*, cited above, § 54.

reclassify – the same central issues of legitimate aim and proportionality would be posed. It is noteworthy, however, that in both the cases where it has done this, the Court ultimately found no breach of Article 6.

13. Furthermore, the formalistic character of the dividing line between procedural and substantive limitations of a given entitlement under domestic law has even been acknowledged by the Court itself, which admitted that “it may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy”³⁴. Such formalism of the Court’s distinction can be evidenced by an *ad absurdum* argument based on one hypothetical example: if legislation denied all black people the right to sue a certain public authority, there would be no civil right for this category of people and therefore any complaint about this legislation would fall outside the scope of Article 6 and consequently Article 14 would also not be applicable. Evidently, no State governed by the rule of law could accept such an absurd result³⁵. Consequently, the legitimate aim and proportionality tests must be applied to any limitation of the right of access to a court. As the Court itself has also admitted,

“it would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons”³⁶.

14. It can thus be concluded that the distinction between immunity from liability and immunity from suit is a logical fallacy³⁷, which aims at depriving citizens of an effective judicial remedy against wrongdoing actions and omissions of certain privileged public authorities (such as the police or the army) in the domestic legal order of some Contracting Parties no matter how great the damage caused by them might be or how easy it would have been to avoid it, the underlying utilitarian legal philosophy

³⁴ *Ibid.*, § 67.

³⁵ See, for another example, the opinion of Judge Pettiti appended to the *Ashingdane* judgment: “To take an extreme example, the driver of a coach transporting nursing assistants or patients who is responsible for a traffic accident without manifest negligence on his part would benefit from the immunity granted and the victims would not be able to bring effective proceedings in tort against the State.”

³⁶ See *Fayed*, cited above, § 65; *Al-Adsani*, cited above, § 47; *Fogarty v. the United Kingdom*, no. 37112/97, § 25, 21 November 2001; and *McElhinney*, cited above, § 24. In the latter case, the Court did not accept the Government’s plea that because of the operation of State immunity the applicant did not have a substantive right under domestic law. It noted that an action against a State is not barred *in limine*: if the respondent State chooses to waive immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right.

³⁷ It is telling that *Roche*, the leading authority of the Court’s case law in this respect, was a case decided by the smallest of majorities.

being that individuals may be sacrificed for the greater good promoted by these authorities. This is not a new matter in European legal history³⁸. In Roman times, Celso defined *actio* as *ius persecuendi in iudicio quod sibi debetur*, which grounded the further sentence that *nihil aliud est actio quam ius quod sibi debeatur, iudicio persecuendi*³⁹. From those representing the extreme privatistic doctrine, like Windscheid, who conceived individual subjective rights (*Ansprüche*) without an independent right of access to a court, to those at the opposite extreme, representing the extreme publicist doctrine, like Pekelis, who advocated that there was only a right to a judicial action and no independent individual subjective rights, and from those middle-ground scholars who like Savigny defended that the right of access to a court was dependent on the individual subjective right, to those who like Binder argued that the individual subjective right was dependent on the right to a judicial action, the long history of the European debate on the relationship between the individual subjective right and the right of access to a court should not have been ignored by this Court, which claims to be the conscience of that same Europe. A greater degree of historical awareness would not damage the judgments of the Court, especially on issues with such a pedigree. In a way Judge Zupančič reminded the Court of exactly that pedigree when he brilliantly wrote:

“a right without a remedy is a simple recommendation (‘natural obligation’). It follows that a right is doubly dependent on its concomitant remedy. If the remedy does not exist a right is not a right; if the remedy is not procedurally pursued the right will not be vindicated. The right and its remedy are not only interdependent. They are consubstantial. ... It is doubly ironic that the majority should speak of avoiding mere appearances and sticking to realities ... when the distinction the judgment is built upon is pure legal fiction. We may have muddled through another case but the underlying false premise remains. The dilemma is certain to come back. The way to address this dilemma is, obviously, to cease subscribing to the false premise.”⁴⁰

Since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective⁴¹ and this is particularly so of the right of access to the courts in view of the prominent

³⁸ It is impossible within the limits of this opinion to enter into the immense scholarly discussion on the relationship between the individual subjective right and the right of access to a court. As an introduction to this discussion, see Windscheid, *Der Actio des Römischen Civilrechts von Standpunkt des heutigen Rechts*, 1856; Vass, *Le Droit d’Agir en Justice*, 1914; Betti, “Ragione e Azione”, in *Rivista di Diritto Processuale Civile*, 1932, I; Pekelis, “Azione”, in *Nuovo Digesto Italiano*, II, 1937 (referring to 38 different concepts and attributes of *actio*); Calamandrei, “La Relatività del Concetto d’Azione”, in *RDPC*, 1939, I; Pugliese, *Actio e Diritto Subiettivo*, 1939 (referring to 14 different meanings of the word *actio*); Canelutti, “Saggio di una Teoria Integrale dell’Azione”, in *Rivista di Diritto Processuale*, 1946; and Liebman, “L’azione nella Teoria del Processo Civile”, in *Scritti Giuridici in Onore di Francesco Canelutti*, II, 1950.

³⁹ Dig. 44.7.51.

⁴⁰ See Judge Zupančič’s opinion appended to *Roche*, cited above.

⁴¹ See *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.

place held in a democratic society by the right to a fair trial⁴², it is high time for the Court to put an end to this logical fallacy.

III. The limitation of the right of access to a court in disputes concerning the clergy (§§ 15-21)

(a) The Court's limited case-law in this area (§§ 15-18)

15. The Court's case-law concerning disputes between priests and Churches under Article 6 of the Convention is rather limited. In the majority of the cases, the Court has concluded that Article 6 in its "civil" limb was not applicable, since there had been no "right" recognised, at least on arguable grounds, under domestic law. In these cases, the Court has confined itself to verifying whether the measure adopted by the ecclesiastical authorities and subject to ecclesiastical law could be amenable to judicial review by domestic courts according to the state of domestic law, and whether that position was clear and settled. In those cases in which the Court concluded that the measure was not subject to judicial review, it endorsed the domestic courts' finding that judicial review would encroach on the autonomy of the Church, irrespective of whether the claims also had a pecuniary nature (for instance the pecuniary effects triggered by the measure contested, such as dismissal or early retirement). In only one case has the Court accepted the existence of a "right" under domestic law, in the light of the limited judicial review operated by domestic courts. But even in that case the Court concluded that the limited scope of judicial review was not in breach of the right of access to a court and therefore declared the complaint inadmissible as being manifestly ill-founded.

16. In *Dudová and Duda*⁴³ the application was lodged by two former priests of the Czechoslovak Hussite Church who had applied to the courts claiming that their dismissal from service had been unlawful and seeking payment of salary arrears. The Czech courts found in their favour as regards the second point (salary arrears) but they declined jurisdiction to review the merits of the dismissal decision for which the Church held sole jurisdiction due to its autonomous status. The Court found that the proceedings brought by the applicants concerning the lawfulness of the dismissal did not concern a "right" recognised on arguable grounds under domestic law, and that Article 6 was therefore inapplicable.

In *Ahtinen*⁴⁴ the Court reached a similar conclusion as regards proceedings brought by a parish priest to contest the decision to transfer him to another parish taken by the authority of his Church. The Court had regard

⁴² See *Ait-Mouhoub v. France*, 28 October 1998, § 52, Reports 1998-VIII.

⁴³ *Dudová and Duda v. the Czech Republic* (dec.), no. 40224/98, 30 January 2001.

⁴⁴ *Ahtinen v. Finland*, no. 48907/99, 23 September 2008.

to the position of the Evangelical Lutheran Church under Finnish law and noted that the legislator had not intended to provide for any judicial determination of the merits of grievances of clergy wishing to contest a change of their place of service. It therefore concluded that there was no basis in domestic law for holding that the applicant had a “right” within the meaning of Article 6.

In *Baudler*⁴⁵ and *Reuter*⁴⁶ the Court considered that the proceedings instituted by the applicants against decisions by the Protestant Church to place them on leave of absence and, in the second case, to oblige Mr Reuter to take early retirement, had not related to a “right” recognised under German law. The Court observed that the impugned measures relating to ecclesiastical appointments had been based on the rules of the respective Churches governing the service of members of their clergy. They had therefore not been governed by the law of the State, but solely by ecclesiastical law. In line with their settled case-law, the administrative courts had ruled that the measures complained of clearly constituted an internal Church matter which was not subject to review. As regards the pecuniary claims pursued by the applicant before the administrative courts in the case of *Reuter*, these courts had considered that the automatic pecuniary effects of the impugned measures were not subject to their jurisdiction. The Court accepted the reasoning of the domestic courts without giving further consideration to the pecuniary nature of the applicant’s claims.

In *Müller*⁴⁷ the Court found Article 6 applicable to an employment dispute between clergy and a Church. Relying on new case-law of the Federal Court of Justice, the domestic courts found that they had limited powers to review the decision of the Salvation Army to dismiss the applicants. In the light of this circumstance, the Court concluded that the applicants could rely on a “right” recognised under German law, and that Article 6 of the Convention was therefore applicable. Examining whether such limited scope of the judicial review had breached Article 6, the Court noted that the limitation at issue arose out of the right to autonomy of Churches and religious societies under German constitutional law. The domestic courts had thus performed a limited review of the dismissal decision, in line with the new case-law of the Federal Court of Justice, and concluded that there were no grounds for finding the impugned decision arbitrary or contrary to public policy or morals. Accordingly, the applicants could not argue that they had been deprived of any right to a determination of their claims, and the Court declared their complaint manifestly ill-founded.

⁴⁵ *Baudler v. Germany* (dec.), no. 38254/04, 6 December 2011.

⁴⁶ *Reuter v. Germany* (dec.), no. 39775/04, 6 December 2011.

⁴⁷ *Müller*, cited above.

17. Finally, the Court has had the opportunity to deal with employment disputes between priests or other employees and Churches in the context of other Convention provisions and particularly of Articles 8 and 9. In this regard, it has developed an interesting line of case-law according to which the decision-making process concerning interferences with Article 8 rights of members of the clergy or other Church employees must provide them with the requisite protection of their interests⁴⁸. This means that the Court will have regard to the quality of the review carried out by the domestic courts when dealing with the applicant's dispute⁴⁹.

18. In the field of employment disputes between Church employees and Churches, the Court has also suggested that the Convention imposes positive obligations on Contracting States to put in place a system of (labour) courts competent to deal with employment disputes involving rights under Articles 8 and 9, a system which could at the same time take account of ecclesiastical law⁵⁰. Since these cases mainly concerned Church employees and not priests, the Court should clarify whether these principles could also be relevant for disputes exclusively involving members of clergy and their pecuniary claims.

(b) The European consensus on access to a court in pecuniary disputes concerning the clergy (§§ 19-21)

19. The Contracting Parties to the Convention have dealt differently with the question whether the domestic courts have jurisdiction to examine pecuniary claims concerning the service of current or former members of clergy, such as unpaid salary arrears. In spite of the fact that the Government invoked, before the Chamber and the Grand Chamber, the lack of a European consensus on the issue of Church-State relationships⁵¹, the majority of the Grand Chamber omit any consideration of this line of argument. On the basis of information available to the Court, a comparative examination of European legal systems clearly shows that there is a European consensus on the principle of State jurisdiction over pecuniary disputes concerning the clergy⁵².

⁴⁸ See *Fernández Martínez v. Spain* [GC], no. 56030/07, § 147, ECHR 2014 (extracts).

⁴⁹ *Ibid.*, § 148.

⁵⁰ See *Obst v. Germany*, no. 425/03, § 45, 23 September 2010; *Schiith v. Germany*, no. 1620/03, § 59, ECHR 2010; and *Siebenhaar v. Germany*, no. 18136/02, § 42, 3 February 2011.

⁵¹ See paragraph 59 of the Chamber's judgment and paragraph 38 of the Government's observations before the Grand Chamber, 20 June 2016, page 22.

⁵² These are the thirty-nine States considered in the examination: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, "the former Yugoslav Republic of Macedonia", Moldova, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San

20. Given the aim of the comparison (why compare and for what purpose?) and consequently the sources and level of comparison (what to compare and how to compare), it seems appropriate to divide all the surveyed States and jurisdictions into two categories: firstly, those in which a religious organisation enjoys a nearly complete autonomy even concerning purely pecuniary claims against it (and, consequently, State courts are not competent to hear such claims made by the clergy)⁵³, and secondly, those in which a judicial review of pecuniary matters is possible⁵⁴. The States belonging to the second category may be further subdivided into three groups: (1) States and jurisdictions where the relationship between a religious organisation and its ministers is, as such, *sui generis*, but civil

Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. Given the particular legal situation in Switzerland, where the relations between State and Church fall within the competence of individual cantons, the research specifically studies three mostly French-speaking cantons – Fribourg, Geneva and Valais – which represent three different models. This research did not directly cover lay staff employed by religious organisations; non-pecuniary matters such as nomination/hiring and dismissal/firing of the members of clergy, as well as their transfer or disciplinary measures against them, such matters usually being covered by Church autonomy; and pecuniary claims raised by members of clergy who are employed by State or local government authorities and bodies, such as teachers of religion, army chaplains, prison and hospital chaplains, etc., in which case the respondent is the relevant authority or body and not the religious organisation.

⁵³ Seven States or jurisdictions (Bosnia and Herzegovina, Lithuania, Poland, Romania, San Marino, Spain and the Swiss canton of Fribourg) recognise full autonomy of religious organisations and a completely *sui generis* nature of the relationship between the Church and its clergy. Therefore even purely pecuniary claims raised by members of clergy against their Church are outside the jurisdiction of the State courts (with the exception in the Spanish legal order of the Catholic clergy and ministers of other recognised religions who are assimilated to employees only for the purposes of social security, i.e., in terms of their integration into the general social security regime; to this extent State courts are competent).

⁵⁴ Some States can be simultaneously placed in more than one category. Besides Switzerland, where the legal regime is very different from one canton to another, four other States are in such a dual or “overlapping” position, that is: Belgium, where the ministers of the “recognised” denominations are paid by the State and are in principle governed by public law, whereas all the other denominations are governed by private law and conclude employment contracts with their clergy or ministers; France, where there is a regime of strict separation of Church and State, except in two territorial jurisdictions where the matter is governed by public law; Greece, where the clergy of the Greek Orthodox Church and the Muslim muftis in Western Thrace are considered as civil servants, while all the other religious ministers fall within the ambit of private law; and Turkey, where Sunni imams and muftis working for the Directorate of Religious Affairs are likewise civil servants, while all the other religious organisations operate in the legal form of foundations and are covered by private law. For the purposes of counting the States or jurisdictions belonging to one category or another, each of these four countries is formally counted only once; it is placed in the category corresponding to the legal regime applying to the dominant religion or the *lex generalis* (“recognised” or “official” denominations in Belgium, Greece and Turkey; most of the French metropolitan territory).

courts can still examine purely pecuniary claims⁵⁵; (2) States and jurisdictions where the relationship as such is based on or assimilated to an employment contract⁵⁶; and (3) States and jurisdictions where the relationship between a religious organisation and its ministers is governed by public law and the respective claims are heard by administrative courts⁵⁷.

21. In conclusion, in addressing the question whether State courts can hear purely pecuniary claims brought by members of the clergy or ministers against a religious organisation, a study of domestic legislation and case-law reveals considerable differences in the various solutions – not only between different States but even within some of them. Only in seven jurisdictions out of the thirty-nine surveyed States do courts not have jurisdiction to examine such claims. In all the others, there is a possibility of judicial review, but in a different way and with a different intensity. In fifteen jurisdictions there is a *sui generis* regime concerning the appointment or the removal of religious ministers, but the domestic courts are nevertheless competent to hear pecuniary claims. In seven jurisdictions the clergy is employed on the basis of regular employment contracts (which means that State courts are competent), and in nine jurisdictions the matter is governed by public law (which means, in most cases, that the administrative courts are competent). Finally, if the domestic courts are competent to examine

⁵⁵ In fifteen States (Austria, Croatia, the Czech Republic, Estonia, France, Italy, Latvia, Moldova, the Netherlands, Portugal, Serbia, Slovakia, Slovenia, Ukraine and the United Kingdom) the relationship between a Church and its minister is, as a rule, not considered as employment but as a *sui generis* regime. It means that State courts are not competent to examine such issues as appointment/hiring, dismissal/firing, or internal discipline of the clergy. On the other hand, State courts are normally competent to hear purely pecuniary claims such as salary arrears. In some cases State law permits, but does not require, an employment contract between the Church and its clergy; the matter falls within the jurisdiction of State courts only if such a contract has been concluded.

⁵⁶ In seven States or jurisdictions (Armenia, Azerbaijan, Bulgaria, the “former Yugoslav Republic of Macedonia”, Russia, Sweden, as well as the Swiss canton of Geneva), the clergy is employed on the basis of regular employment contracts, mostly because the law requires such contracts. The case of Bulgaria is somewhat particular since the Supreme Court of Cassation has declared, in general terms, that there was an employment relationship with the members of clergy even in the absence of a formal employment contract; this was done against the wishes of the Bulgarian Orthodox Church, which continues to consider its relations with its clergy as a *sui generis* link. Finally, Belgium and Turkey can also be added to this category in so far as minority religious communities (“non-recognised” denominations in Belgium, non-Muslims and non-Sunni Muslims in Turkey) are concerned.

⁵⁷ In nine States or jurisdictions (Belgium, Denmark, Finland, Germany, Greece, Luxembourg, Norway, Turkey and the Swiss canton of Valais) the pecuniary and similar relations between the dominant religious organisations and their clergy are, from the point of view of the State, governed by public law. In most cases the relevant litigation can be brought before the administrative courts; in some States, however, the courts of general jurisdiction are competent. France also belongs to this category in respect of two particular territorial jurisdictions: Haut-Rhin/Bas-Rhin/Moselle and French Guiana.

such claims, their judgments are enforced according to the general rules on enforcement, just like any other judgment.

Second Part (§§ 22-43)

IV. The applicability of Article 6 to pecuniary disputes concerning the clergy (§§ 22-29)

(a) The shortcomings of the majority’s reasoning (§§ 22-26)

22. In the instant case, the applicant brought a claim against the Hungarian Calvinist Church, demanding fulfilment of what he considered to be a contractual obligation under the civil law. Relying on Articles 277 and 478 of the old Civil Code⁵⁸, which regulated agency contracts, the applicant complained about the respondent Church’s failure to pay him his service allowance. In support of his claim that the fees in question should be considered civil in nature, the applicant submitted an opinion of the relevant tax authority which confirmed that remuneration received as a result of ecclesiastical service was to be treated as income deriving from employment. Before the Court, the applicant expressly claimed that there had been a procedural limitation of his right, whereas the Government contested that fact. The respondent Government cited Constitutional Court judgment no. 32/2003⁵⁹ concerning a claim for damages brought by a Calvinist pastor and the non-applicability of labour-law provisions to that case.

23. The majority of the Grand Chamber carefully avoid the issue of the nature of the limitation of the applicant’s right of access to the court. Nothing is said about the nature of the Supreme Court’s decision of 28 May 2009. While it is true that the lower courts examined whether or not the applicant’s contract with the Church could be interpreted as an agency contract within the meaning of the old Civil Code, the same cannot be said of the Supreme Court, which decided the applicant’s case in the last instance. Agreeing with the lower courts’ conclusion, the Supreme Court nonetheless did not reject the applicant’s claim on its merits. A judgment on the merits would have resulted, according to the Court’s above-mentioned case-law, in a substantive limitation of the right of access to a court, in principle not susceptible to the Court’s scrutiny. Instead, the Supreme Court discontinued the proceedings on the basis of a lack of jurisdiction, which is

⁵⁸ See paragraph 17 of the Chamber’s judgment.

⁵⁹ See paragraph 29 of the judgment.

a procedural decision granting the respondent Church *de facto* immunity from pecuniary claims brought by its former pastor⁶⁰.

The reason for the Grand Chamber's omission is now obvious. Dealing with the thorny issue of the nature of the Supreme Court's decision to discontinue the case and with the concomitant subject of the nature of the limitation to the right of access to a court would have led the majority into more troubled waters. The circumvention of these issues allows the majority to arrive easily at the foregone conclusion that the applicant's claim did not pertain to a civil right. In fact, the majority assume from the very start of their reasoning that the applicant ought to have presented his claim before the ecclesiastical courts, as is clear from the language of the opening paragraph 69 of the Grand Chamber's reasoning. Once again the fallacious nature of the Court's traditional distinction between immunities from liability and from suit is blatantly evident. *Quod erat demonstrandum*.

24. More importantly, the majority of the Grand Chamber, like the Supreme Court, misread the Constitutional Court judgment no. 32/2003, as pointed out by my learned colleague Judge Sajó, in his separate opinion. The Constitutional Court judgment required domestic courts to review to what extent a legal relationship of a "person in the service of a Church" with that Church was also governed by State law. Thus, it did not preclude that both laws, ecclesiastical and State law, could be applicable to the same legal relationship⁶¹. Additionally, the Constitutional Court was not called upon to decide, in that judgment, whether the situation such as the applicant's could be classified as an agency contract within the meaning of the old Civil Code. It was therefore on the facts of the applicant's own case that the domestic courts were called upon to decide for the first time whether or not his claim, as formulated before the domestic courts, could be considered a civil right within the meaning of the national legislation. Hence, there was at the outset of the proceedings a genuine and serious dispute over the existence of the right to which the applicant claimed to be entitled under domestic law.

25. As a matter of national constitutional law, as interpreted by judgment no. 36/2003 of the Constitutional Court, the Supreme Court was required to assess if State law was also applicable to the applicant's claim, but it did not, simply assuming that it pertained to a spiritual issue and therefore was governed only by ecclesiastical law. The Supreme Court's

⁶⁰ Had the Supreme Court determined the matters in dispute, on both the questions of fact and the questions of law put forward by the parties, and had it concurred with the lower courts, it would have upheld their judgments in a form of judgment. Instead the Supreme Court quashed the judgment appealed against and discontinued the proceedings.

⁶¹ In the words of the Constitutional Court: "The State organs must determine under the Constitution and the laws specified in the Act on Church Legislation whether an issue having arisen from a given relationship falls within the competence of a State authority or court. Hence, they must determine under State laws whether in a given case a legal relationship by State law exists between the parties".

decision that the applicant's pecuniary claim was, as an ecclesiastical matter, not amenable to review before State courts could not make the applicant's complaint retrospectively unarguable⁶². The majority of the Grand Chamber condone this assumption and, by so doing, the Supreme Court's misreading of the Constitutional Court judgment⁶³. Put differently, the majority of the Grand Chamber ignore the Court's own principle according to which Article 6 of the Convention applies irrespective of the status of the parties, the character of the legislation which governs how the dispute is to be determined or the character of the authority having jurisdiction in the matter⁶⁴.

26. It is evidently of no relevance that the majority invoke in this connection the Statutes of the Reformed Church of Hungary, such as Statute no. II of 1994 and Statute no. I of 2000⁶⁵, as if they could be a ground on which to find that the ecclesiastical agreement between the applicant and the respondent Church was not enforceable under Articles 7 and 204 § 1 (c) of the Civil Code⁶⁶. The majority do not go so far as to affirm this reading of national law categorically, but they certainly leave the impression that it is their own reading of national law, by placing the citation of the Church Statutes between their interpretation of Constitutional Court judgment no. 23/2003 in paragraph 67 of the judgment and their foregone conclusion that the applicant should have gone to the ecclesiastical courts with his pecuniary claims once he was dismissed from pastoral service, in paragraph 69. If that were the majority's reading of national law, it would contradict the letter and the spirit of these provisions, which only allow for an Act of Parliament, and not a Statute of the Church, to make a claim unenforceable.

(b) An alternative principled reasoning (§§ 27-29)

27. When establishing whether a civil right in domestic law existed on arguable grounds, the relevant question to be put by the Court is not to determine whether the limitation is substantive (absolute) or procedural (relative) in nature. As I have demonstrated above, this is not the correct question to be put. The right question is rather this one: whether the applicant would have had a cause of action but for the specific domestic limitation invoked by the respondent. Whenever the right claimed by the plaintiff might generally exist under domestic law, there will be a civil right in domestic law on arguable grounds and immunity does not necessarily lead to the extinction of the cause of action. This is the principled reasoning

⁶² See *Z. and Others*, cited above, § 89.

⁶³ See paragraphs 70 and 73 of the judgment.

⁶⁴ See *Georgiadis*, cited above, § 34; *Micallef*, cited above, § 74; and *J.S. and A.S.*, cited above, § 46.

⁶⁵ See paragraph 68 of the judgment.

⁶⁶ See paragraph 68 of the judgment.

(“at least in principle”) formulated by Judge Martens in the *Fayed* case in the following terms:

“there could be no doubt as to the applicants’ right to reputation having been damaged. Whether or not a right to reputation is enshrined in Article 8 of the Convention is immaterial, since such a right does exist, at least in principle, under all our national laws and it has not been contended that in this respect English law makes an exception by clearly and fully excluding such a right. Neither can there be doubt as to the right to reputation being a ‘civil’ right within the autonomous meaning of that notion under Article 6 para. 1. It follows that under this provision, whenever a person’s reputation has been interfered with, he or she is in principle entitled to access to a court meeting its requirements. Consequently, the question whether under English law the defence of privilege constitutes a substantive limitation on the content of the right to reputation or a procedural barrier to access to court is immaterial.”⁶⁷

Accordingly, Article 6 applies to all rights that are generally recognised in the domestic legal order.

Having established that such general right existed, the conflict between the specific invoked domestic immunity and the right of access to a court will no longer be an issue of applicability of Article 6, but a question to be submitted to the legitimate aim and proportionality tests.

28. Applying Judge Martens’ principled “but for” test to the facts of the present case provides a clear answer to the problem of the applicability of Article 6 of the Convention. The applicant’s pecuniary claim was based on service allowances for the period of suspension and arrears of remuneration for his activities as a teacher and thus on rights which are generally recognised in the Hungarian legal order as enforceable before State courts⁶⁸. Since the applicant had a claim based on rights that are generally recognised in the domestic legal order, he would have had a cause of action but for the specific domestic limitation invoked by the respondent Church. The fact that the applicant’s monthly service remuneration paid by the respondent Church was officially to be considered as income deriving from employment within the meaning of sections 24 to 27 of the Personal Income Tax Act is evidently an additional, strong indication that the applicant’s claim related to generally recognised rights in domestic law⁶⁹. Hence, he had a “right” for the purposes of Article 6 of the Convention.

⁶⁷ See Judge Martens’ opinion appended to *Fayed*, cited above.

⁶⁸ This is accepted by the Government themselves in their observations before the Grand Chamber, cited above, page 29 (reply to question 2): “In theory, Churches and their priests are not prevented by Hungarian law from concluding employment or civil law contracts for performing pastoral duties, however the validity of that contract would be dependent upon the mutual consent of the parties and the nature of the pastor’s obligations, especially their conformity with State law. Then all aspects of their service relationship would be governed by State law (labour law or civil law, depending on the contract concluded by the parties with mutual consent) and State courts would have jurisdiction to determine any ensuing legal dispute between the parties.”

⁶⁹ Thus, the majority’s argument based on the “autonomy of tax law” (see paragraph 73 of the judgment) simply misses the point.

29. As regards whether the right as asserted by the applicant can be regarded as “civil” in nature, it should be noted that merely showing that a dispute is “pecuniary” is not in itself sufficient to attract the applicability of Article 6 § 1 under its “civil” head⁷⁰, but disputes related to purely economic rights such as the payment of salary are found to be of a civil nature⁷¹. However, given that this very point was at the heart of the dispute in the applicant’s case, for the same reasons as above, it can be assumed that at the outset of his proceedings, the applicant had an arguable claim that his claim was “civil” in nature. Accordingly, Article 6 is applicable to the applicant’s action against the Calvinist Church.

V. The application of Article 6 in the present case (§§ 30-43)

(a) The State’s margin of appreciation (§§ 30-32)

30. Having established that Article 6 of the Convention applies in the present case, the legitimacy of the aim and the proportionality of the specific invoked domestic immunity must be tested. Whether the invoked immunity serves a legitimate aim must be assessed in general terms. When assessing whether the granting of the alleged immunity is a proportionate interference with the applicant’s right of access to a court, the facts of the case must be brought into play. That is why “the broader the immunity, the more compelling must be its justification”⁷². While States have a certain margin of appreciation in determining the proportionality of the immunity, the width of this margin should take into consideration the existence or non-existence of a European consensus on the specific domestic immunity invoked by the defendant⁷³.

31. The Court has previously held that, given the wide variety of constitutional models governing relations between States and religious denominations in Europe, the States should in principle be granted a wide

⁷⁰ See *Ferrazzini v. Italy* [GC], no. 44759/98, § 25, ECHR 2001 VII.

⁷¹ This has been the Court’s case-law since *Nicodemo v. Italy*, no. 25839794, § 18, 2 September 1997.

⁷² *Kart v. Turkey* [GC], no. 8917/05, § 83, ECHR 2009, and *A.*, cited above, § 78.

⁷³ If the majority of the Grand Chamber wanted to maintain the logically flawed distinction between substantive and procedural immunities, as is clear from paragraph 61 of the judgment, the present case would have in any event to be examined on the assumption that there has been a procedural restriction of the applicant’s right of access to a court and therefore that it should be scrutinised, firstly, whether the limitation pursued a legitimate aim and, secondly, whether it was proportionate to that aim. Before embarking on the proportionality analysis, it is important to establish the breadth of the margin of appreciation of the State in the present case. Here again the majority have nothing to offer but a deafening silence.

margin of appreciation in this sphere⁷⁴. According to comparative-law data mentioned above, there are equally considerable differences between the member States in the various solutions adopted in the area of regulating the clergy's access to State courts. Nonetheless, a clear majority of Council of Europe member States allow for some sort of judicial review in matters concerning pecuniary claims of the clergy, although in different ways and to varying extents. More specifically, fifteen jurisdictions adopt a *sui generis* regime as regards the appointment or removal of religious ministers, but the State courts are nonetheless to some extent competent to hear pecuniary claims. In a further seven jurisdictions, clergy are employed on the basis of regular employment contracts and in another nine jurisdictions the matter is governed by public law.

32. To sum up, only seven out of the surveyed thirty-nine member States completely exclude any jurisdiction of State courts to examine pecuniary claims of the clergy. In these circumstances, the margin of appreciation should accordingly be restricted in the present case.

(b) The legitimate aim and proportionality tests (§§ 33-43)

33. The Government submitted that the legitimate aim for the restriction of the applicant's access to a court was the constitutional principle of separation of Church and State, which required the latter not to interfere with the internal affairs of the former. In the Government's view, freedom of religion and Church autonomy prohibited the State authorities from assessing the legitimacy of ecclesiastical law, and they could not be expected to enforce such laws. In any event, the Government also argued that Article 9 of the Convention required the State to refrain from interfering with the service relationship between a Church and its priests, because "[i]n terms of proportionality of a non-interference, the government submit that individual pecuniary interests cannot prevail over the general interests of the religious community (Church autonomy) or the community in general (principle of secularity)"⁷⁵. The applicant disagreed with the Government's assertion in this respect, claiming that purely pecuniary disputes did not concern Church autonomy as they did not have an impact on the practice of religion, nor did they affect the organisation of the Church.

34. Depending on the legal order of a particular country, religious organisations enjoy a wider or narrower scope of autonomy necessary for their proper functioning. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection afforded by another

⁷⁴ See *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 171, ECHR 2013 (extracts).

⁷⁵ See paragraph 45 of the Government's observations, cited above, page 26.

Convention provision, namely Article 9 of the Convention⁷⁶. Therefore, Church autonomy can be accepted as a legitimate aim pursued by the limitation of the applicant's right of access to a court⁷⁷.

35. It is necessary next to examine whether reliance on Church autonomy in the particular circumstances could have justified the State courts' refusal to hear the applicant's case. The Court has previously found that respect for autonomy of religious communities precluded any discretionary power on the part of the State (a) to determine whether religious beliefs or the means used to express such beliefs were legitimate⁷⁸, (b) to oblige a religious community to admit or exclude an individual or to entrust someone with a particular religious duty⁷⁹, or (c) to act as an arbiter between religious communities⁸⁰. This does not mean that the Court has accepted unfettered immunity from State jurisdiction of religious communities functioning within its territory.

36. In Hungary the relationship between the State and religious communities at the material time was regulated by the 1990 Church Act, which very generally provided that "no State coercion may be applied in order to enforce the internal laws and regulations of Churches". The interpretation of the constitutional principle of separation of Church and State is to be found in the Constitutional Court's judgment no. 32/2003 (VI. 4.) AB referred to by both the Government and the applicant. The Constitutional Court held that State courts were obliged to determine the merits of legal disputes relating to the rights and obligations governed by State law of persons in the service of a Church, while respecting Church autonomy. However, in doing so the Constitutional Court did not seek to balance the constitutionally-guaranteed right of access to a court of those individuals, like the applicant, whose ecclesiastical service was not based on State law but who nonetheless had a civil claim against a Church, with that Church's right to autonomy. In fact, the Constitutional Court left such weighing exercise to the "State organs", in other words, the ordinary courts and ultimately to the Supreme Court⁸¹.

37. Against this background, the Hungarian courts in the applicant's case were called upon to carefully weigh his individual interests against a threat to Church autonomy posed by his pecuniary claim, taking into

⁷⁶ See *Fernández Martínez*, cited above, § 127.

⁷⁷ See *Müller*, cited above.

⁷⁸ See *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, §§ 62 and 78, ECHR 2000 XI.

⁷⁹ See *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, § 146, 14 June 2007.

⁸⁰ See *Sindicatul "Păstorul cel Bun"*, cited above, § 165.

⁸¹ See the Constitutional Court judgment no. 32/2003: "The fundamental right of access to court ... does not carry with it an unrestricted right to file a court action. any limitations must be indispensable and proportionate to the aims pursued ... The State organs ... must determine under the State laws whether in a particular case a legal relationship governed by State law exists between the parties and if the answer is in the affirmative, they must determine the appropriate procedure to follow."

account all the circumstances⁸². Just as the Court has held in the context of a conflict between other rights – namely Articles 8 and 11 of the Convention⁸³ – and the right to Church autonomy under Article 9, a mere assumption that there is an actual or potential threat to the autonomy of a religious community as soon as that community is a respondent in a case before the civil courts should, in my view, not be sufficient to render any interference with an individual's rights compatible with the requirements of the Convention. The domestic courts, including the Supreme Court, would also need to show, in the light of the circumstances of the individual case, that the alleged risk to Church autonomy was real and substantial and that the impugned restriction of the individual's right of access to a court did not go beyond what was necessary to eliminate that risk and did not serve any other purpose unrelated to the exercise of the religious community's autonomy⁸⁴. In other words, the national courts were under an obligation to conduct an in-depth examination of the circumstances of the case and a thorough balancing exercise between the various interests at stake⁸⁵.

38. As regards the actual risk for the respondent Church's autonomy in the present case, it must be noted that what was at stake in the applicant's case was not the continuation of his ecclesiastical service, a matter which would undoubtedly affect the internal functioning of a Church⁸⁶. Unlike in previous cases of clergy examined by the Court, the applicant in the present case solely sought to recover unpaid service allowances to which he believed he was entitled during his suspension. This matter can hardly be said to affect the autonomy of the Hungarian Calvinist Church⁸⁷.

39. In any event, the Supreme Court failed altogether to assess the question whether or not the applicant's claim posed any real and substantial threat to the respondent Church's autonomy as explained above. Instead, it concluded on formal grounds that, since no State coercion could be used to enforce the internal laws and regulations of Churches, the applicant's claim fell outside the jurisdiction of the State courts. By doing so, the Supreme Court granted the respondent Church *de facto* immunity in a whole range of pecuniary claims lodged by its clergy, which might not necessarily be proportionate in relation to the individual's right of access to a court.

40. The above fact was explicitly recognised by the Government in their observations, where they compared immunity of Churches to the immunity afforded to international organisations⁸⁸. As the Court has previously held,

⁸² See, *mutatis mutandis*, *Z. and Others*, cited above, § 99.

⁸³ See *Fernández Martínez*, cited above, § 132 and *Sindicatul "Păstorul cel Bun"*, cited above, § 159.

⁸⁴ See, *mutatis mutandis*, *Sindicatul "Păstorul cel Bun"*, cited above, § 159.

⁸⁵ See *Schiith v. Germany*, no. 1620/03, § 59, ECHR 2010.

⁸⁶ As concluded by domestic courts and accepted by the Court for instance in *Reuter v. Germany* and *Baudler v. Germany*, both cited above.

⁸⁷ See my opinion in *Krupko and Others v. Russia*, no. 26587/07, 26 June 2014.

⁸⁸ See paragraph 36 of the Government's observations, cited above, page 21.

the attribution of privileges and immunities to international organisations is an essential means of ensuring their proper functioning, free from unilateral interference by individual governments⁸⁹. Both religious communities and international organisations have one common trait, namely that the Court has acknowledged that there may be implications as to the protection of fundamental rights even in cases where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute certain competences to these organisations and accord them immunities⁹⁰. Immunity of international organisations may serve as a proportionate restriction of the right of access to a court if there are alternative remedies within the organisation to pursue a claim and provided these remedies are adequate, namely that the dispute can be solved by an alternative court, composed of independent, legally qualified members, in a fair manner. The same should necessarily hold true for religious communities operating within a certain country. *A fortiori*, a material factor in determining whether granting the Calvinist Church immunity from Hungarian jurisdiction in a pecuniary matter such as the applicant's was proportionate under Article 6 would be whether the applicant had available to him alternative means of effectively protecting his rights⁹¹.

41. The Court has never dealt with the issue of ecclesiastical courts or the qualities that such tribunals would need to possess in order to be recognised as an alternative avenue of redress for an individual's civil claim. However, it has examined several situations which might serve as inspiration for the current circumstances. For instance, the Court recognised that the duty of adjudicating disciplinary offences was in many member States conferred on jurisdictional organs of professional associations. Although the Court found that conferring powers in this manner did not in itself infringe the Convention, it held that the Convention nonetheless called at least for one of the following two systems: either the jurisdictional organs themselves must comply with the requirements of Article 6 § 1, or they must be subject to subsequent control by a judicial body having full jurisdiction and providing Article 6 § 1 safeguards⁹². The Court has applied an analogous principle in cases of arbitration imposed by law, which also requires an alternative dispute resolution forum offering Article 6

⁸⁹ See, in particular, *Waite and Kennedy*, cited above, § 63.

⁹⁰ See *Stichting Mothers of Srebrenica and Others v. the Netherlands*, cited above, § 139.

⁹¹ See, *mutatis mutandis*, *Waite and Kennedy*, cited above, § 68. In this respect, I note that the Supreme Court itself expressly referred to the possibility of the applicant raising his claim before the ecclesiastical court.

⁹² See, for instance, *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58, and *Gautrin and Others v. France*, 20 May 1998, § 57, Reports 1998 III.

procedural safeguards⁹³. The same standard should be applied *mutatis mutandis* to ecclesiastical courts.

42. In this connection, the applicant raised a legitimate question related to the impartiality of the ecclesiastical tribunal which would be competent to hear his case. Pursuant to the relevant provisions of Statute no. I of 2000 on the jurisdiction of the Hungarian Calvinist Church, the dean of the North Pest Diocese – who had previously instituted disciplinary proceedings against the applicant – along with the curator would be competent to decide whether to institute any sort of proceedings based on the applicant's pecuniary claim or to reject it as unfounded. Furthermore, even if proceedings were ultimately instituted, the dean and the curator of the North Pest Diocese would decide on the composition of the tribunal charged with deciding the merits of the applicant's claim. This would undoubtedly call into question the compatibility of the ecclesiastical tribunal with the impartiality requirement guaranteed under Article 6.

43. Furthermore, couched in terms of a non-exhaustion argument, the Government further claimed that the applicant could have argued before the Hungarian State courts the non-contractual tort liability of the respondent Church or any other claim that did not involve the pre-existence of a contract. Yet the Government have failed to show that such a reformulated claim would have any prospects of success. Quite contradictorily, the Government also claimed in the present case that the rights of the clergy were converted into mere promises, otherwise Church autonomy itself might be under a serious risk⁹⁴. In a State that is neutral *vis-à-vis* religion, the worst possible way to protect Church autonomy is by depriving priests and pastors, imams and rabbis of the protection of the law. Their human dignity as individuals is not suspended when they enter religious life. The notion of Church autonomy cannot be used as a trump card against all other competing claims, otherwise the human dignity of those serving the Church would be at stake.

VI. Conclusion (§ 44)

44. In view of the foregoing, the applicant did not have an alternative judicial avenue through which to resolve his case. In fact, in a situation where the domestic courts declined competence to decide his pecuniary claim stemming from ecclesiastical service without adequately weighing his right of access to a court against the potential risk to the autonomy of the respondent Church – and thus removing from State jurisdiction a whole range of civil claims by the clergy – the Hungarian authorities effectively

⁹³ The analogy with arbitration cases was raised in paragraphs 32 and 33 of the Government's observations, cited above, pages 19 and 20. See, for a comprehensive statement of principles, *Suda v. the Czech Republic*, no. 1643/06, § 49, 28 October 2010.

⁹⁴ See page 29 of the Government's observations, cited above.

left the applicant without the possibility of having his claim submitted to a judge for adjudication, in a manner which was at odds with the rule of law in a democratic society and with the basic principle underlying Article 6 § 1 of the Convention. Such a state of affairs can be said to have impaired the very essence of the applicant's right to a court in breach of Article 6 of the Convention.

DISSENTING OPINION OF JUDGE PEJCHAL

When reading the present judgment, which was voted for by the majority of judges in the Grand Chamber, utterly fundamental questions spring importunately to mind. Is it possible and at the same time humanly acceptable within the simplest conception of humanity to adopt such a decision? In other words, is it possible that a citizen of a member State of the Council of Europe can find himself outside the jurisdiction of the member State (and thereby outside the jurisdiction of the Convention) as regards litigation pertaining to the sole income received by him and his family, that situation being due only to the fact that the opposite party in the lawsuit is a church? A church registered by that State, that is, a church which is obliged to abide by the law of that State, failing which its registration would be refused by the State. Is such a judgment bearable and thus acceptable not only for the applicant but also for the church as the other party to the dispute? At the same time, is it bearable and thus acceptable for the community of free citizens who make up the Hungarian state? Does this judgment really have its place in contemporary European civilisation?

Can the answer be: yes, the majority of judges are wrong? Is that not merely a display of my pride and incomprehension, taking into account the incontestable cognisance of the fact that my colleagues approached the case as always in an absolutely conscientious and responsible way? Being aware of one's own responsibility and conscientiousness, there is no other way but to disagree and to take a divergent stand.

There are cases before this Court which cannot be rejected only with reference to the case-law, although such a method seems to be correct in a large majority of cases. That is, with reference to already existing interpretation of the Convention and its Protocols in cases similar to, but never entirely the same as, the instant case. This is one of those exceptional cases which require consideration solely by virtue of the text of the Convention interpreted in the most restrained way.

Why was the Convention adopted? First and foremost because the High Contracting Parties

“...reaffirm their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.”

And for those reasons:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The story of the applicant is quite simple. For many years he lived in a small Hungarian town in which he, as a pastor, performed duties for his church, which provided him with remuneration. The contract which he

entered into with the church guaranteed him not only income but also accommodation in a house with a garden where he lived with his family. The church considered the applicant as their employee and he believed the same. After all, he could not have believed otherwise, for the church stated, and still states, on their official website (<http://www.reformatus.hu/english>), that “[t]he Reformed Church in Hungary has 7,500 employees, of which 1,550 are ministers”.

One day the applicant came into conflict with his church, which took disciplinary action against him. For several months he was not able to perform his pastoral duties in full and, pursuant to church regulations, he was entitled only to one half of his regular income. Humbly accepting the punishment, the applicant and his family were ready to tighten their belts for some time. But he did not receive anything else from his church.

The applicant turned with trust to the State of which he was a citizen seeking help in resolving his problem through a court of law. He expected the court to aspire to a settlement between him and the church or, failing that, to give a ruling on their dispute. His trust was justified. He knew that the Hungarian Constitution read as follows:

“In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him/her, as well as his/her rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.”

And he also knew that it provided for the following:

“(1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.

(2) Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.

(3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.”

He even had knowledge of this provision:

“(1) In the Republic of Hungary everyone has the right to freedom of thought, freedom of conscience and freedom of religion.

(2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.

(3) The church and the State shall operate in separation in the Republic of Hungary.”

The applicant duly paid all income taxes to the State in respect of the salary he received from the church.

The applicant could have been aware of the fact that in Hungary the State and the church are separated under the Constitution, but he could as well logically have held the opinion that he himself was not the church. He, as a

church employee, was actually in conflict with the church. Who else other than an independent and impartial court, to which everyone has a right to turn pursuant to the Constitution, could find a solution to a dispute for a Hungarian citizen? But the Hungarian courts refused to deal with the applicant's case, for it allegedly did not fall within their jurisdiction. This is the whole story. From the point of view of the Convention, there is nothing else to be stated.

It remains to be recalled that the general rule of interpretation of international treaties, which is provided for in the Vienna Convention on the Law of Treaties, in Article 31 §1, reads as follows:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Is it really possible to find an interpretation of the Convention, within the meaning of the Vienna Convention on the Law of Treaties, which would not enable the applicant to claim a violation of Article 6 § 1 of the Convention?

Is it really possible to find an interpretation of the Convention, within the meaning of the Vienna Convention on the Law of Treaties, which would duly justify an alleged violation of the right to freedom of thought, conscience and religion (Article 9 of the Convention) of an unspecified person, the violation being constituted by the fact that the applicant's dispute with the church concerning an exclusively financial matter would be dealt with by a court within the meaning of Article 6 § 1 of the Convention? How could one even prove the existence of the freedom of thought, conscience and religion of a legal person such as a church?

Is it really possible to find such an interpretation of the Convention, within the meaning of the Vienna Convention on the Law of Treaties, in a case where the European Court of Human Rights as well as the national courts of a member State, which is a democratic State governed by the rule of law, pay no attention to a dispute concerning the basic means of subsistence of the applicant and his family? Is it really possible to interpret the separation of the church and the State in such a way and to leave aside a decent citizen of a democratic State governed by the rule of law?

All these questions have already been answered in detail in the past.

By John Rawls in his *Theory of Justice*:

“Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The

only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.”

By Friedrich August von Hayek in his *Law, Legislation and Liberty*:

“Such states as ‘ownership’ have no significance except through the rules of conduct which refer to them; leave out those rules of just conduct which refer to ownership, and nothing remains of it.”

By Herbert Lionel Adolphus Hart in his *The Concept of Law*:

“It may be said that the distinction between a good legal system which conforms at certain points to morality and justice, and a legal system which does not, is a fallacious one, because a minimum of justice is necessarily realized whenever human behaviour is controlled by general rules publicly announced and judicially applied. Indeed we have already pointed out, in analysing the idea of justice, that its simplest form (justice in the application of the law) consists in no more than taking seriously the notion that what is to be applied to a multiplicity of different persons in the same general rule, undeflected by prejudice, interest, or caprice.”

In view of the aforementioned, it is hard to agree with the opinion of the majority that in the applicant’s case the member State did not breach Article 6 § 1 of the Convention, as the reverse is an absolutely irrefutable fact. This statement is, at the same time, a manifestation of the deepest humbleness *vis-à-vis* the existing system of international law and the constitutional order of Hungary within the spontaneous order of free citizens.