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## Unequal Protection: Historical Churches and Roma People in the Hungarian Constitutional Jurisprudence

**Abstract.** Treating people as equals is one of the main aims of constitutional democracies. Numerous examples prove the adverse effects if a state violates the equality principles relating to ethnic minorities and religious groups. Here is a lesson from Hungary. The Hungarian Constitutional Court (hereinafter: HCC) is not engaged in adjudicating concrete ‘cases and controversies’, but seemingly reviews the constitutionality of laws. The Constitution lays down the fundamental tenets relating to religious groups, churches, ethnic minorities and the principles of equality in general. Thus, the question is how the problems of religions and minorities are reflected in the constitutional case-law.

The main theses of this article are following. First, based on historical facts the HCC provides preferential treatment for so-called historical churches. Second, in cases involving Roma the HCC does not consider the historical facts and social reality thus, the discrimination of Roma does not appear in the jurisprudence. Third, the unequal protection of churches and Roma by the state results in advantages being provided where the constitutional reasons of preferential treatment are absent while the state remains inactive where the promotion of the principles of equality would be most necessary.

**Keywords:** constitutional interpretation, freedom of religion, equality principle, indirect discrimination, Roma people

### Introduction

Hungary has been a constitutional democracy for twenty years. The republic created by the constitutional amendments of 1989 is based upon the acknowledgment of fundamental rights and the rule of law. Hungarian democracy is characterized by the main institutions of constitutionalism: a parliamentary system, a President of the Republic with constrained powers, ombudsmen who guard fundamental rights and the HCC, which reviews the laws for their constitutionality.

Like in other Eastern European countries, the Hungarian form of the judicial protection of the constitution is closer the centralized German model than to the diffuse U. S. judicial review. By that I mean that the HCC is institutionally separated from the ordinary court system and has unique, *erga omnes* constitutional interpretative authority. At the same time, the HCC is more separated from the ordinary judiciary than the German Federal Constitutional Court. The latter may review any governmental action, including judicial decision, administrative decree and legislative act in a constitutional complaint proceeding.<sup>1</sup> The former may only review those individual complaints that state the judicial application of an unconstitutional law in the course of the proceeding. Thus, in Hungary, in a concrete

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<sup>1</sup> Kommers, D. P.: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, 2nd ed. 1997, 15.

controversy ending in a judicial decision, only the law applied can be reviewed, not the decision itself. If the HCC concludes that an unconstitutional law has been applied then the procedure may be re-opened. If only the application of the law was unconstitutional in the concrete case then the HCC is powerless. Consequently, Hungarian constitutional review is incomplete. There is no legal remedy in cases where fundamental rights are violated as a result of judicial application and interpretation of the law.<sup>2</sup>

The deficiency of constitutional complaint is not counterbalanced by the abstract nature of constitutional review. Anyone is entitled to bring an action without limitation; there are no deadlines to be observed, nor is the applicant required to show any impact or other legally protected interest (*actio popularis*).<sup>3</sup> The adverse effect of this procedure is that it seems as if Constitutional Court judges appear to be confronting norms with norms. If the lower norm (statute or other law) contradicts the higher norm (the Constitution), the HCC annuls the former. It is up to the discretion of the judges to what extent they present the encroachments of rights and social problems in the course of any constitutional review that is separated from concrete controversies.<sup>4</sup>

But can judges hide behind the articles of law? Law is not exhausted by any catalogue of rules and principles, but an interpretive concept influencing the everyday life of the members of the political community.<sup>5</sup> Law and, especially, constitutional law is a practice of the political community in which the HCC is merely a co-actor, not the only one. Legal authorities vested with interpretive authority (the President of the Republic, ordinary courts, ombudsmen etc.), the petitioners and other legal subjects' not authoritative legal interpretation also form a part of the constitutional interpretation practice.

Thus, the interpreters of the Constitution are participants in a communal practice. The way they examine the text of the Constitution is not independent from space and time, but they possess culturally and historically predetermined pieces of knowledge and premises ("pre-judice").<sup>6</sup> In the course of deciding cases these preconceptions enter into dialogue with the text of the norms. We can say that interpretation is embedded in the everyday life of the political community. On the one hand, it is so because the social environment provides the preconditions of interpretation. On the other hand, interpretation shapes the communal practice. Therefore, the appropriateness of constitutional interpretation depends whether it is in accord with the facts of the political community. And it also depends on what practical

<sup>2</sup> Hence, Georg Brunner's conclusion is well founded: 'The arrangement for a constitutional complaint constitutes the most unsuccessful provision of the Constitutional Court Act.' Brunner, G.: Structure and Proceedings of the Hungarian Constitutional Judiciary. In: Sólyom, L.–Brunner, G.: *Constitutional Judiciary in a New Democracy: the Hungarian Constitutional Court*. Michigan, 2000, 84.

<sup>3</sup> *Ibid.* 81.

<sup>4</sup> The names of the petitioners and the content of the petitions are exceptionally made known to the public. In 2009 the European Court of Human Rights held that there had been a violation of Article 10 of the Convention (freedom of expression and freedom of information), because the Constitutional Court had denied the Hungarian Civil Liberties Union the right to release an MP's petition for abstract review. The MP's petition requested the constitutional review of some recent amendments to the Criminal Code which concerned certain drug-related offenses. See *Társaság a Szabadságjogokért versus Hungary*, App. no. 37374/05., Judgment of 14 April 2009.

<sup>5</sup> Here I follow Dworkin's conception of law as integrity. See Dworkin, R.: *Law's Empire*. Oxford, 1998, 226, 410–413.

<sup>6</sup> Here I refer to Gadamer's hermeneutic conception. See Gadamer, Hans-G.: *Truth and Method*. New York, 1975.

consequences the interpretation have, i.e. how it forms the relations of the political community.

In this analysis I show that experiences drawn from social reality inevitably emerge in the course of the abstract interpretation of the Constitution. The words of Constitution are inseparable from those societal phenomena to which the words refer. Symbolically speaking, the understanding of constitutional rules does not take place in an interpretation laboratory of a scientific institute, but departs from communal practice and in the end contributes to the formation of that communal practice.

I show through the example of two groups how the social environment and constitutional interpretation interacts. One of them is the societal and constitutional perception of various religious groups; the other is that of the Roma as an ethnic minority group. My thesis is that the Hungarian constitutional jurisprudence treats these two social categories differently. It refers to historical and cultural facts in order to safeguard the privileges of churches, especially, historical churches. However, the social problems of Roma that also have historical and cultural roots are disregarded. This double standard in the twenty-year Hungarian practice has resulted in providing preferential treatment for historical churches. Conversely, the HCC's jurisprudence does not react to racial discrimination against Roma people.

### **Constitutional Principles**

The Hungarian Constitution lays down the fundamental tenets relating to churches, ethnic minorities and the principles of equality in general. Since the text comes from 1989 and its models were international human rights instruments and the more recent Western constitutions, it was written in the language of modern constitutionalism.

The Free Exercise Clause of the Constitution reads: 'In the Republic of Hungary everybody has the right to freedom of thought, conscience and religion.' (Article 60 para. 1.) According to the Separation Principle of the Constitution: 'the church shall operate in separation from the state'. (Article 60 para. 3.)

The Constitution forbids discrimination based upon specific traits. 'The Republic of Hungary shall ensure the human rights and civil rights for all persons on its territory without any kind of discrimination, such as on the basis of race, color, gender, language, religion, political and other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.' (Article 70/A para 1.) Besides the antidiscrimination principle, the Constitution also provides for the principle of preferential treatment: 'The Republic of Hungary shall promote equality of rights for everyone through measures aimed at eliminating the inequality of opportunity.' (Article 70/A para 3.) Moreover, the Constitution explicitly protects minorities: 'The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people' and 'The Republic of Hungary shall provide for the protection of national and ethnic minorities.' (Article 68 paras 1 and 3.)

So, according to the written text of the Constitution, the state is separated from the church; national and ethnic minorities enjoy special protection and it is forbidden to discriminate on the basis of suspect classification such as religion, race, color and ethnic origin. Since the Constitution was written in the language of abstract principles it does not refer explicitly to individual churches<sup>7</sup> or minorities, among them the most populous, the Roma.

<sup>7</sup> Moreover the text of the Constitution refers to 'the church' as if there were only one.

The HCC in its first landmark decisions established that liberty rights, including the right to free exercise of religion and equality emanate from the notion of human dignity. In 1993 the HCC clarified all the relevant notions concerning personal freedom of religion.<sup>8</sup> ‘The individual freedom of conscience and religion acknowledges that the person’s conviction, and, within this, in a given case, religion, is a part of human dignity, so their freedom is a pre-condition for the free development of personality.’<sup>9</sup>

The requirement of the separation of state and churches and of religious neutrality of the state was also declared in that decision. ‘From the principle of separation it follows that the state must not be institutionally attached to churches or any one church; that the state must not identify itself with the teachings of any church; and that the state must not interfere with the internal working of any church, and especially must not take a stance in matters of religious truths. From this (as well as from Article 70/A of the Constitution) it follows that the state must treat churches equally.’<sup>10</sup>

The general principle of equality also reflects the idea of human dignity. ‘The prohibition of discrimination means all people must be treated as equal (as persons with equal dignity) by law – i.e. the fundamental right to human dignity may not be impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests.’<sup>11</sup>

The HCC connected the requirement of preferential treatment, the so-called ‘positive discrimination’ to this principle. ‘The right to equal personal dignity may occasionally result in entitlements according to which goods and opportunities must be distributed (even qualitatively) equally to everyone. If, however, a social purpose (...) may only be achieved if equality in the narrower sense cannot be realized, then such a positive discrimination shall not be declared unconstitutional. The limitation upon positive discrimination is either the prohibition of discrimination in its broader meaning, i.e. concerning equal dignity, or the protection of the fundamental rights which are positively expressed in the Constitution.’<sup>12</sup>

With a bit of exaggeration we could say that the HCC reads the Hungarian Constitution with the help of the theories of Rawls and Dworkin. The principles of justice are echoed in giving priority to each person’s equal right to basic liberties, including liberty of conscience compatible with the similar liberty of others. The relationship between basic liberties and equality of opportunity has been also read through the lens of Rawls.<sup>13</sup> In addition, the HCC’s concept concerning the neutrality of the state originates from the notion of equal liberty of conscience.<sup>14</sup> Similarly, the Hungarian constitutional

<sup>8</sup> Decision 4/1993. (II. 12.), ABH 1993, 48. The original versions of the decisions are available at <http://www.mkab.hu/hu/frisshat.htm>. Some important decisions are in English at <http://www.mkab.hu/en/enpage3.htm>.

<sup>9</sup> Decision 4/1993. (II. 12.), ABH 1993, 48, 52.

<sup>10</sup> Decision 4/1993. (II. 12.), ABH 1993, 48, 52.

<sup>11</sup> Decision 9/1990. (IV. 25.), ABH 1990, 46, 48.

<sup>12</sup> Decision 9/1990. (IV. 25.), ABH 1990, 48–49.

<sup>13</sup> Rawls, J.: *A Theory of Justice*. Cambridge (Mass.), 1971, 60–61.

<sup>14</sup> *Ibid.* 205–211.

concept of equal human dignity and the treatment as an equal are derived from the Dworkinian egalitarian point of view.<sup>15</sup>

Below I briefly show how the HCC applies these abstract constitutional principles in cases affecting religious groups and Roma people.

### Historical Privileges

In the above-mentioned landmark freedom of religion decision, the petitioners simply challenged the constitutionality of an act that provided for returning real estates to certain churches that had been their owners before the communist nationalization.

Besides the neutrality principle, the HCC also emphasized that a number of tasks formerly carried out by the churches (e.g. school education, taking care of the sick, or charity) have become the duties of the state while the churches have also maintained their activity in these domains. This is why 'from the separation principle it does not follow that the state should endorse the negative right to freedom of religion, let alone religious indifference. Nor does the separation of church and state mean that the state must disregard the special characteristics of religion and church in its legislation.' And, also, 'treating the churches equally does not exclude taking the actual social roles of the individual churches into account.'<sup>16</sup>

Hence, according to the interpretation of the HCC, on the one hand formal equality followed from fundamental principles of the Constitution; on the other hand it became possible to treat those churches preferably that had been operating for a long period of time. In the concrete case this resulted in the fact that within the scheme of reprivatization only historical churches were returned their church-related real estates in the course of property compensation. Other institutions were given only partial compensation for their nationalized real estates.

Based upon this precedent the HCC handed down two important decisions in 1993 that pointed in different directions. In one of the decisions the HCC dealt with the conflict between legal rules mirroring religious obligations and alternative social customs. The leaders of the Jewish religious community complained that under the Labor Code one could not work on Sunday in exchange for a different day off. The petitioners requested that Saturday should also count as a work free day. They also considered it discriminatory that only Christian holidays (Easter and Christmas) were recognized by the state as non-working days.<sup>17</sup>

Although the decision anachronistically distinguishes between countries within the 'Jewish-Christian tradition' and 'Islamic countries', the reasoning was not centered on religious grounds. First, the HCC declared that the State 'may not favor any of the religions in an exceptionally exclusive treatment' and 'may not hinder any [...] members of religion in their free exercise of their faith'. Second, the HCC based its decision on the assumption that the greatest holidays of the Christian religions have a secularized and general social character. They are 'red-letter' days not because of their religious content but because of

<sup>15</sup> Dworkin, R.: *Taking Rights Seriously*. Cambridge (Mass.), 1977, 227. László Sólyom, the first president of the HCC acknowledged that Dworkin's conception was imported. Sólyom, L.: The Hungarian Constitutional Court and the Social Change. *Yale Journal of International Law*, 19 (1994) 1, 222, 229.

<sup>16</sup> Decision 4/1993. (II. 12.), ABH 1993, 48, 53.

<sup>17</sup> Decision 10/1993. (II. 27.), ABH 1993, 105.

economic considerations and compliance with the expectations of society. ‘The religious and secular elements are strongly mixed in these holidays. (...) Most of the citizens like to spend these days—without identifying themselves with their religious content—with their families, following tradition or with resting. No similar societal traditions are attached to the two biggest Jewish feasts (Ros Hasana and Yom Kippur). In the course of determining holidays as non-working days the legislator was led by traditions and expectations and not by securing preferential treatment for one of the churches.’<sup>18</sup> Based on these considerations, the HCC upheld the validity of the law. Declaring Easter Monday, Christmas Day and Sunday non-working days were declared constitutional.<sup>19</sup>

So this decision did not provide preferential treatment to religions and churches. The constitutional reasoning was tailored to profane traditions, popular customs and to the majority conception of holidays that form the communal practice. Thus, here customs appear in a *weak* sense. The traditional regulation can be upheld since no evidence appeared that would point towards changing the practice. A legislative and social practice that has religious origins but can be justified on a secular ground does not violate the principle of equal dignity.<sup>20</sup>

The decision on the statutory preconditions of founding churches pointed in a different direction. A petitioner challenged the statute that required a church to have at least one hundred members in order to be registered with and recognized by the state as discriminatory. The HCC, in rejecting the claim, emphasized that this objective distinction had no influence on the most important functions of the religious communities – worship, education, and social services. According to the decision, communal exercise of religion can be carried out without church status. Moreover, the HCC’s reasoning distinguished not only between churches and religious organizations without church status, but also among churches themselves. ‘It is not a constitutional problem that historical churches with large membership through their organization and their co-operation with the State in many areas facilitate the exercise of religion for their members where the assistance of other (often state) institutions is required, such as in health-care or penitentiaries.’<sup>21</sup>

There is a fundamental difference between the two cases’ practical perspective. Specifically, the judgment on Saturday and holiday work avoided discriminating between religions, since it attributes secular reason for the law. At the same time, the judgment on church status explicitly and purposively provided preferential treatment for historical churches vis-à-vis other churches, religious groups and communities.<sup>22</sup>

<sup>18</sup> Decision 10/1993. (II. 27.), ABH 1993, 105, 106–107.

<sup>19</sup> For more on the early freedom of religion case-law in Hungary see Paczolay, P.: The Role of Religion in Reconstructing Politics in Hungary. *Cardozo Journal of International and Comparative Law*, 4 (1996) 2, 261. Paczolay argues that the HCC tried to hold a central position between conservative and liberal attacks.

<sup>20</sup> Contrary to this, tradition in the *strong* sense means that tradition is an unconditionally obligatory norm. This type of traditionalism supports maintaining the tradition even if it violates the principles of equality.

<sup>21</sup> Decision 8/1993. (II. 27.), ABH 1993, 99, 100.

<sup>22</sup> András Sajó raises the question why the need arises from time to time from the state’s side to act against small churches. He argues that the modern Hungarian Constitution provides for the separation of the state and church, however, this decision treats other countries’ (e.g. Austria, Germany) century-old compromises as models. Sajó, A.: A „kisegyház” mint alkotmányjogi képtelenség (“The Small church” as Constitutional Nonsense). *Fundamentum* (1999) 2, 87, 96.

This latter decision became the precedent in the Hungarian case-law. In 1995 the HCC examined the constitutionality of the governmental decree concerning army chaplain service. The decree provides for the free exercise of religion and spiritual care only for members of the four 'historical churches' (Catholic, Calvinist, Lutheran, Jewish). The army chaplain service is operated with the participation of only these churches upon the governmental agreement concluded with them. The HCC came to the conclusion that the privileges of historical churches in the governmental decree are not unconstitutional, but 'refer to the real historical role and social significance of such churches.' Proving their real social significance, the decision's reasoning applied statistical argument. A survey conducted in the Armed Forces showed that only 'the believers of the four churches could be measured at a percental rate'. (The statistics did not show the degree of exercise of religion, but only the formal affiliation with churches.) Besides the data, the HCC tried to give other reasons in order to justify unequal treatment among churches. According to the reasoning, believers of other religions may individually exercise their faith in the Army; moreover, if the law in question were changed, other churches could be included in the army chaplain service. I think with such reasoning one could justify the establishment of a state-church.<sup>23</sup>

There was no empirical examination conducted in other cases relating to the significant social role of historical churches. It was sufficient to refer to the 1993 and 1995 precedents in order to justify and extend privileges. Thus, numerous cases shutting up the communist past and laying the foundations for the future ended with an exceptionally (mostly from a financial perspective) favorable outcome for historic churches. As I have already mentioned, within the scheme of reprivatization only historical churches were returned their church-related real estates in the course of property compensation. Following this, the HCC declared it constitutional that churches are exempted from the general statutory ban on acquiring soil.<sup>24</sup> The HCC upheld that obligatory lustration extends, besides state leaders and professional politicians, to persons who carry out 'public opinion forming tasks'. However, contrary to journalists, for example, a decision exempted church leaders from lustration.<sup>25</sup> Practicing clergymen did not have to serve mandatory military service because this so-called 'positive discrimination' ensured the believers' free exercise of religion.<sup>26</sup> Since 1997, in order to fulfill their role emanating from the free exercise of religion, 'positive discrimination' has to be secured for church-run schools and kindergartens as compared with public education institutions run by foundations or associations. According to the decision, only church-run schools have the right to the auxiliary subsidy above the normative state allowance.<sup>27</sup> In 2007 this preferential financial treatment extended to the social, child-protective and welfare activities of the churches in contrast with those humanist

<sup>23</sup> Decision 970/B/1994, ABH 1995, 739, 743. Many criticized this decision. According to János Kis, this judgment would hardly survive the test either of the separation principle or that of the religious neutrality of the state and of the abolition of religious discrimination. Kis, J.: *Constitutional Democracy*. Central European University Press, 2003, 282.

<sup>24</sup> Decision 4/1993. (II. 12.), ABH 1993, 48, 63, 68. Decision 35/1994. (VI. 24.), ABH 1994, 197, 204.

<sup>25</sup> Decision 31/2003. (VI. 4.), ABH 2003, 352, 367. This decision overruled a former one that stated: certain organization of churches and their representatives 'surely take part in forming the public opinion'. Decision 60/1994. (XII. 24.), ABH 1994, 342, 358.

<sup>26</sup> Decision 46/1994. (X. 21.), ABH 1994, 260, 272. Mandatory military service ceased to exist in 2005 by constitutional amendment.

<sup>27</sup> Decision 22/1997. (IV. 25.), ABH 1997, 107, 116.

institutions that are not affiliated with churches.<sup>28</sup> As a result, for example, church-run schools receive more extended state subsidies than not-for-profit schools operated by the Waldorf Foundation. In 2008 the judges, by referring to the Concordat concluded between the Republic of Hungary and the Vatican, demanded that Catholic schools and public education institutions run by the state or municipalities be financed to exactly the same degree.<sup>29</sup>

This inventory shows how far the principle of state neutrality as it appears in the text of the Constitution got in cases interpreting the role of churches. As a matter of fact, we can see an argumentative procedure that shares a common starting- and ending point: the practice of the political community. From the perspective of constitutional interpretation the judges accepted the premise that historical churches have notable social weight, and that they have an outstanding role in the field of spiritual care and, also socially and culturally. At the same time, with their decisions they influenced the communal practice in a way that churches, and especially historical churches, were granted exceptionally favorable conditions for their spiritual and other activities.

The principles of the Constitution demand the separation of church and state and the equal treatment of religious communities. At the same time, the interpretative practice strengthened the old privileges of historical churches. According to the above reasoning these favors do not violate the principle of equal dignity and equal treatment. Moreover, the exceptional treatment of practicing clergymen and financing church-run public education institutions falls within the ambit of constitutionally justifiable preferential treatment.<sup>30</sup>

### **The Hidden Roma Reality**

Now I turn from the category of religious groups to the Roma as an ethnic group. It is well known that in Hungary many hundred thousands of Roma live who have to face social difficulties, prejudice and segregation.<sup>31</sup> Similarly to the historic and social role of churches, this could not be seen in the text of the Constitution. However, if one wants to be informed by the constitutional case-law, it is easy to overlook the fact that a part of the citizens is Roma. This is so since the HCC has not openly addressed the problems affecting Roma. From the first decade of constitutional review it can be reconstructed from one of the decisions regarding compensation that, during the Second World War, similarly to Jews, Roma were also deported.<sup>32</sup> Apart from this there are two procedural orders that can be found in the case-law.

In one of the cases the petitioner argued that in the course of employment she found herself in an unfavorable situation due to the fact that her name refers to her mother's Roma origin. The President of the HCC dismissed her petition on procedural grounds since she did not question a specific legal rule, but only the application of a legal provision in a

<sup>28</sup> Decision 225/B/2000, ABH 2007, 1241.

<sup>29</sup> Decision 99/2008. (VII. 3.), ABH 2008, 844.

<sup>30</sup> Kriszta Kovács argues that the HCC uses the concept of preferential treatment in the wrong way and for the wrong purpose. Kovács, K.: *Think Positive, Preferential Treatment in Hungary. Fundamentum* (2008) 5, 46.

<sup>31</sup> See, for example, the European Commission against Racism and Intolerance's latest report on Hungary. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-Country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf>

<sup>32</sup> Decision 1/1995. (II. 8.), ABH 1995, 31, 35.

concrete case. According to the procedural order that dismissed the claim, the law on changing the names 'has no relevant constitutional relationship with the right to work non-discrimination clauses' of the Constitution.<sup>33</sup> Thus, the discriminative nature behind the facially neutral and generally applicable law could not be unveiled.

In the other case, a non-governmental organization protecting minorities, the Otherness Foundation challenged a local government resolution. Its first point provided: the local representative body 'with respect to the future decides that it declares those people *persona non grata* who do not fit in the life of the community, violating and endangering the public security and in the future, with all legal instruments it will make every effort to make these persons to leave the town.' The second point of the contested resolution empowered the notary to examine whether 'there are legal means to prevent' people who behave as outlined earlier 'from moving into the town'. The third point was a similar request also addressed to the notary. According to the HCC, the last two points of the resolution were not normative but individual decisions that 'did not refer to an unconstitutional procedure' and thus the judges had no competence to review them. As to the first point of the local governmental resolution, the judges concluded that it had neither individual, nor normative nature: 'it expresses intent' and 'general will' to solve local social problems and it counts as 'the autonomous and democratic administration of local public affairs'.<sup>34</sup> This decision is similar to the former in declining to decide on the merit of the case based on the fact that challenged provisions do not function as norms. At the same time, the HCC's decision indirectly legitimizes local governmental aspirations with hidden or indirect racism.

In the second decade of constitutional review the number of petitions relating to the discrimination of Roma has risen. At the beginning of the year 2000, two decisions were rendered in significant cases. Mainly non-governmental organizations protecting the human rights of Roma objected that laws did not provide adequate guaranties and did not secure proper procedures 'to cope with discrimination in the Hungarian society and in state institutions.' At that time Hungarian statute law did not demand equal treatment from private organizations acting in the public sphere. There was no efficient legal protection against indirect discrimination, and the conditions for proving discrimination were very difficult to meet. It was therefore almost hopeless to act against racial discrimination in the everyday life.

The decision of the HCC gives a long list of enacted laws against discrimination and concludes that it is not unconstitutional that 'there is no a comprehensive Act dealing with antidiscrimination issues'. Although 'it is conceivable that the fragmented legislation does not provide for certain types of discrimination', the judges had failed to examine these cases.<sup>35</sup> Thus the Parliament finally acknowledged Hungary's obligations concerning the approximation of Hungarian to European law and passed the Act on Equal Treatment and Promotion of Equal Opportunities.

The other case was the overture of the housing decisions. The Parliamentary Ombudsmen for Civil Rights and for the Rights of National and Ethnic Minorities jointly initiated a constitutional interpretation regarding to social problems. To put it simply, as a result of an inadequate institutional system, the homeless freeze to death on the streets of big cities in winter; the so-called 'arbitrary squatters' who are Roma families are moved out

<sup>33</sup> Order 924/I/1996, ABH 1997, 973.

<sup>34</sup> Order 949/B/1997, ABH 1998, 1265.

<sup>35</sup> Decision 45/2000. (XII. 8.), ABH 2000, 344, 347.

by municipalities so that they become hopelessly homeless.<sup>36</sup> According to the judges of the HCC, concrete rights, among them, the right to housing, cannot be derived from Article 70/E of the Constitution that provides for the right to social security. However, the state, in order to protect human life and dignity, 'is obliged to take care of the fundamental conditions of human existence—in the case of homelessness the state is liable to provide for housing if the situation directly endangers human life'.<sup>37</sup> Notwithstanding the petitions, the judges did not deal with the conflict between local governments and arbitrary squatters, who are mainly Roma.

Almost at the same time Parliament declared arbitrary squatting a misdemeanor and facilitated the vacation of arbitrarily squatted flats. The statutory amendments triggered many constitutional petitions, in which non-governmental organizations formulated the view that the new situation 'raises the danger of discrimination on ethnic grounds'. The decision of the HCC replied to this argument by pointing out that 'the situation of all arbitrary squatters is considered equally, independently of his or her ethnic origin'. By referring to their earlier decision, the judges declared: 'the state is obliged to secure the housing of evicted arbitrary squatters if their lives are directly endangered'.<sup>38</sup> The judges, however, refrained from examining the actual situation of Roma. So, based on this reasoning, one could not tell us whether squatting problems are caused by alternative squatters known from Western metropolitan environments or whether they can be attributed to the fact that, similarly to South American *favela*, the number of slums in the country has increased.

The Act and the assenting HCC decision encouraged many local governments. Local government decrees proliferated according to which those who had been formerly arbitrary, *mala fide* or squatters without legal title could not participate in the bid for social rental flats. Here it is important to note that according to former judicial precedents such local governmental decrees were unconstitutional on formal grounds since they contradicted the Act on Flat Rentals. For example, one of the Metropolitan's local governmental (Óbuda-Békásmegyer) decrees was annulled for this reason in 2005.<sup>39</sup>

Nevertheless, there was a radical shift in newer cases. By examining the rules of two big towns, Miskolc and Debrecen, the judges concluded that due to the amendment of statutory regulation the local governments may enact such decrees. That is to say, they may exclude arbitrary squatters and squatters without legal title from competition for social rental flats.<sup>40</sup> At the same time, two important dissenting opinions were handed down. According to one of dissenting opinions, the regulation is discriminative since 'it excludes those people from taking part in the competition (mainly unemployed, unskilled people with their large families) who due to their financial and social situation are coerced to commit unlawful acts and who would otherwise mainly resort to social rental flats'.<sup>41</sup> The other HCC judge also underlined that the only reason for exclusion is a misdemeanor motivated by hardship, while other unlawful acts (e.g. failure to pay local taxes) and even committing grave crimes do not pose an obstacle to bidding for social rental flats.<sup>42</sup> I think

<sup>36</sup> Of course, there are Roma among the homeless and not all squatters are Roma.

<sup>37</sup> Decision 42/2000. (XI. 8.), ABH 2000, 329.

<sup>38</sup> Decision 71/2002. (XII. 17.), ABH 2002, 425, 431.

<sup>39</sup> In this case the petitioner also argued that that regulation discriminates against the Roma population. Decision 4/2005. (II. 25.), ABH 2005, 613.

<sup>40</sup> Decision 1074/B/2004, ABH 2006, 1669. Decision 1075/B/2004, ABH 2006, 1686.

<sup>41</sup> Judge Bihari's dissenting opinion, Decision 1074/B/2004, ABH 2006, 1669, 1681.

<sup>42</sup> Judge Bragyova's dissenting opinion, Decision 1074/B/2004, ABH 2006, 1669, 1683.

these two dissenting opinions came closest to the core of the problem, but the taboo was not broken. For two decades the problems relating to the exclusion and discrimination of Roma has remained hidden.<sup>43</sup>

### Playing with Time

I hope in the former two chapters I have managed to prove the role the facts of the political community play. The reasoning is supported by historical references and empirical data when a conclusion preferring traditional churches is required. In Roma cases, however, the reasoning of the judgments does not reflect social reality. At the same time, we can see that discriminative practice behind the norms can be demonstrated. In order to ultimately support this thesis let me recall two cases that, due to their temporal coincidence, make it possible to compare the preferences of the judges. One of them is the constitutional review of the Act on Registered Partnership. The other is related to local government decrees regulating the social allowances of Roma living in deep poverty.

In the last days of 2007 the Hungarian Parliament enacted the Act on Registered Partnership. The HCC formerly on many occasions declared homosexual marriage to be contrary to the Constitution. ‘The Constitutional Court points out that both in our culture and law the institution of marriage is traditionally a union of a man and a woman. This union typically is aimed at giving birth to common children and bringing them up in the family, in addition to being the framework for the mutual taking of care and assistance of the partners. (...) The institution of marriage is constitutionally protected by the state also with respect to the fact that it promotes the establishment of families with common children.’<sup>44</sup>

This conventionalist interpretation followed the conception of historical churches, namely, the text of the Constitution only provides that ‘[t]he Republic of Hungary shall protect the institutions of marriage and the family’. (Article 15.) Thus, the majority of the legislative branch took only very cautious steps towards the equal status of homosexuals. According to the new statute, property and personal rights were attached to registration, but there was no possibility to use the other’s name nor for adoption. Besides this, the new rules also enabled heterosexuals to establish registered partnership status. In this way legislators aimed to create the legal framework for partnerships outside of marriage. In this manner they also tried to decrease the legal segregation of homosexuals.

At the time of passing the Act on Registered Partnership, an anti-Roma local governmental movement was initiated. The essence of the Monok-model (named after the first municipality to introduce such measures) is that those receiving social allowances were obliged by local governmental decree to carry out public-interest work, or allowances were

<sup>43</sup> Reproductive rights-related issues, including the decision on sterilization, are noteworthy. The reasoning of the decision is very abstract: ‘cases in several European countries and the United States also prove that despite of the regulation based on voluntariness and non-discrimination, numerous abuses may occur in practice’. Decision 43/2005. (XI. 14.), ABH 2005, 535, 540. In reality, similarly to the Slovak and Czech cases, Hungarian Roma women are among the victims. For example, the Committee on the Elimination of Discrimination against Woman held that the State had violated a Hungarian Roma woman’s fundamental rights by performing the sterilization surgery without obtaining her informed consent. (CEDAW/C/36/D/4/2004.) See also *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*. Center for Reproductive Rights, 2003.

<sup>44</sup> Decision 14/1995. (III. 13.), ABH 1995, 82, 83.

directly revoked from those who were entitled to them. Via these regulations local governments who aimed to displace members of the Roma minority were even willing to violate the Social Act and the Act on Child Protection. In this way, the increasing ill will connected to the economic and political crisis was aimed at the most defenseless minority. They did not receive a proper job and pay—only an allowance. The fact that they performed work publicly (e.g. collecting garbage) did not improve their situation on the labor market; it rather increased prejudices towards them.

Subsequently the Parliament passed the Act establishing the equal status of homosexuals, having considered the changing habits of young heterosexual couples. At the same time, many local governments passed decrees so as to deprive Roma of the material resources of the community and to displace them from settlements. Both legal changes stimulated serious debates and challenged before the HCC. The Act on Registered Partnership was primarily objected by historical churches in the public sphere and immediately several petitions were sent to the HCC. The decrees on the allowances were questioned at the HCC by the Roma Civil Rights Foundation and a Head of Public Administration Office (that supervise the legality of local government decrees). In the former case the regulation to be contrasted with the Constitution has not been declared unconstitutional in any comparable countries. The latter case included norms that were passed explicitly and knowingly with the intention of constitutional violation by local governments.

Now the question is when the HCC rendered decisions and what the court said. The judgment on the Act on Registered Partnerships was passed before the given statute had come into force. The decision declared the whole regulation unconstitutional, and thus it did not come into effect.<sup>45</sup> The statute promoting equality was found to be unconstitutional due to the conventional conception of marriage.<sup>46</sup> In terms of heterosexuals the judges did not accept that the statute does not separate adequately the status of registered partnership from the institution of marriage. Adoption, the right to use the other's name, the waiting period before registration and other differences were proved to be unsatisfactory in protecting the so-called 'essential content' of marriage.<sup>47</sup>

<sup>45</sup> Decision 154/2008. (XII. 17.), ABH 2008, 1203.

<sup>46</sup> The decision refers to the judgment of the German Federal Constitutional Court several times. BVerfG, 1 BvF 1/01, 1 BvF 2/01 vom 17.7.2002. However, the HCC's reasoning is rather similar to the rejected objections of the German petitioners. The German petitioners also tried to prevent the act from coming into force, but the decision was published only after the act had become effective. According to the German petitioners, the act empties the institution of marriage. Contrary to this, the rules formulated in the *ratio decidendi* of the decision provide that the constitutional protection of marriage 'does not hinder the legislator in establishing such rights and obligations for the partnership of homosexuals as are identical or very similar to it'. According to the reasoning, 'the conception of the special protection of marriage which points to the apprehension of such partnerships in their difference to marriage and vesting less rights in them cannot be justified'. (Para 98.) Consequently, the German decision did not provide for the discrimination of registered partners, but approved the act that aimed at equaling the status of homosexuals.

<sup>47</sup> Apart from Hungary, no other state has sought to exclude heterosexuals on constitutional grounds from living in a registered partnership that is more or less similar to marriage. In some places there is a possibility for the registered cohabitation of heterosexuals (e.g. Belgium, the Netherlands, Luxemburg, France, New Zealand, Québec in Canada, Catalonia in Spain etc.). In those countries in which this option is only open to homosexuals besides marriage or as an alternative to it, it is not for constitutional reasons that cohabitation of heterosexuals remains unregistered (e.g. in common law).

As to homosexual couples the judgment implicitly established the category of *separate and unequal*. Even though the decision theoretically acknowledged that the registered partnership of homosexuals is not unconstitutional, it did not approve the reviewed regulation.<sup>48</sup> Apart from the fact that homosexual couples may not get married, when it comes to regulating their registered partnership ‘the differences flowing from the nature’ of such relationships and marriage must be maintained. This means that in the Hungarian constitutional practice the reasons for equal treatment must be shown, not that there is a compelling interest in unequal treatment.<sup>49</sup>

In the meantime, no decision declaring unconstitutionality has been rendered in the local government cases that further dampened the prospects of Roma.<sup>50</sup> Procrastination resulted in the fact that rather than the unconstitutional local government decrees being modified according to the statutes, Parliament had begun to modify the statutes at the expense of people living in deep poverty.<sup>51</sup> I think it can be inferred from these two cases that choosing the time of interpretation and decision-making also shows the preferences of a court.

### Conclusions

The Constitution consists of abstract principles. It separates the state from churches (that have equal status) and it protects ethnic minorities. The judges interpret the abstract norms of the Constitution and laws. However, the words of the Constitution refer to a concrete political community. Adjudication is a form of decision-making on common, public issues. Therefore, constitutional review is closely connected to the practices of the political community.

This is proven by Hungarian case-law relating to historical churches and Roma. The presented cases serve as an example that constitutional law is an interpretative concept. Authoritative constitutional interpretation is triggered by the interpretative initiatives of citizens, not-for-profit organizations, ombudsmen etc. The decisions of the HCC influence the operation of the legislation and other institutions and, accordingly, form the practices of the political community.

<sup>48</sup> After the HCC’s ruling, the Parliament passed an altered version of the Act on Registered Partnership. As a result registered same sex partnership has become a legal option in Hungary.

<sup>49</sup> The ECtHR protects homosexual relationships according to Article 8 of the Convention. The state has to prove that the statutory regulation adversely affecting homosexual partners compared with heterosexuals serves a legitimate aim and is justifiable. For example *Karner v. Austria*, App. no. 40016/08., Judgment of 24 July 2003. The family concept of the Convention does not only protect relationships based on marriages; thus the state may not regulate what type of relationship couples adopting a child choose. *Emonet and Others v. Switzerland*, App. no. 39051/03., Judgment of 13 December 2007.

<sup>50</sup> The HCC annulled two local government decrees in the summer of 2009. Both of them made it possible to revoke child-protection allowances if the child does not go to school. Decision 79/2009. (VII. 10.); Decision 80/2009. (VII. 10.). The reason of annulment was that the decrees were contrary to statutory regulation. There was no reference to the Roma minority in the decisions.

<sup>51</sup> Parliament supported the government’s ‘Road to Work’ program that tried to take the wind out of the sails of racist local governmental aspirations. However, by this time many local governments had moved ahead and introduced a so-called ‘social card’ that limited the utilization of financial allowances.

The choices of the interpreters determine to what extent social reality appears in judgments and to what conclusions it contributes. In the case of army chaplain service we can find the example that judges were oriented in social facts with the help of statistics. The constitutional privileges of historical churches were based on their conventional social role. When changing societal experiences were confronted with the conventions, like the frequency of going to church, the habits of getting married and family relations then the conventions were held to be stronger than reality.

In the practice of other institutions, empirical surveys are an effective method of mapping indirect discrimination and racism.<sup>52</sup> The Hungarian jurisprudence did not resort to such tools, however. Thus, while historical churches became constitutional categories, Roma do not even appear in the decisions.

The different approach to churches and Roma can be traced back to a mistaken conception of equality. The concept “eliminating the inequality of opportunity” in Article 70/A para. 3 of the Constitution explicitly refers to social situations. The text cannot be interpreted without their evaluative analysis. The HCC described the preferential treatment of historical churches as positive discrimination without shedding light on their adverse situation. At the same time, in Roma cases the features of indirect discrimination and preferential treatment were not put forward.

There is a significant distance between the principles and the case-law.<sup>53</sup> The reason is that there is a lack of adequate reflection on social reality. In the case of historical churches the judges apply the concept of preferential treatment, but it is not clear what type of inequality can be found at the starting point. In contrast, in the case of Roma all empirical analysis forewarns of the extraordinary social consequences arising from inequality. In relation to Roma, there is evidently a need for special legislation, since the root of the problems and the nature of hardship is different from other ethnic minorities. Moreover, the situation is becoming more serious. Verbal and physical assaults against Roma are increasing and certain public figures use anti-Roma speech. In line with these trends, indirect discrimination has not decreased, but rather increased in laws and in deciding individual cases. The Hungarian constitutional institutions not only remain color-blind, but simply blind and mute.<sup>54</sup>

<sup>52</sup> For example in Strasbourg in relation to the school segregation of Roma. The ECtHR sums up the earlier practice of applying statistical evidence: *D. H. and Others v. The Czech Republic*, App. no. 57325/00., Judgment of 13 November 2007. para 137, 188. See also Goldston, J. A.: Kelet-európai próbaképek a faji diszkrimináció ellen (Eastern European Test Cases against Racial Discrimination). *Fundamentum* (1997) 2, 130.

<sup>53</sup> Kriszta Kovács shows that the HCC has never declared unconstitutionality based upon suspect classification. It found, for example, in the legal system gender-based discrimination affecting mostly men. Kovács, K.: Think Positive, Preferential Treatment in Hungary. *Fundamentum* (2008) 5, 46, 48.

<sup>54</sup> Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights, visited Hungary in October 2009, and ‘expressed to the authorities his grave concern about the observed rise of extremism, intolerance and racist manifestations that have targeted, in particular, members of the Roma minority population. Of special concern have been the public use of anti-Roma hate speech by certain public figures and the lack of strong condemnation of and effective measures against a reoccurrence of such incidents.’ [Press Release - 762(2009)].