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**“The Prohibition of Discrimination by the Constitutional
Court of Hungary”**

**by
Mr Péter PAZCZOLAY
(Substitute Member, Hungary)**

ON THE HUNGARIAN CONSTITUTIONAL COURT

Certainly the most unexpected new feature of the democratic constitutional system in Hungary proved to be the outstanding importance of the Constitutional Court. The Constitutional Court and the idea of judicial review itself were unknown in the Hungarian constitutional tradition. The historical unwritten constitution also excluded the principle of the supremacy of a written constitution. The Constitutional Court as a completely new institution in the constitutional history of Hungary, commenced its function in January, 1990. It is considered to be a safeguard of human rights and an institutional guarantee of the separation of powers. The most important areas of the Court's jurisdiction are the judicial review of acts and other sub-legislative legal rules, the review of unconstitutional omissions by the legislature, and the so-called constitutional complaint (for the violation of one's constitutional rights as a result of the application of an unconstitutional law) which may be initiated by anybody. The decision of the Constitutional Court is final and without appeal, binding on everybody. If the Court finds a legal norm unconstitutional, it declares it wholly or partly null and void. It has eleven members, all of them elected by the (one-chamber) Parliament.

EQUAL PROTECTION: LEGAL BACKGROUND

International Instruments

European Convention of Human Rights

Article 14 - Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

International Covenant on Civil and Political Rights:

Article 2 (1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Hungarian Regulation

Article 70/A. of the **Constitution** of Hungary:

- (1) The Republic of Hungary shall ensure the human and civil rights for all persons on its territory without any discrimination, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, financial situation, birth or any other grounds whatsoever.
- (2) Any kind of discrimination described in Paragraph (1) shall be strictly penalized by the law.

- (3) The Republic of Hungary shall promote the equality of rights for everyone through measures aimed at eliminating the inequality in opportunity.

As one can see the first paragraph is a compilation of the related provisions of two international documents (the text of the provision was drafted in 1989 during the National Round-table Talks).

What is remarkable that the Hungarian Constitution does not contain a general provision on equality (like “all persons are equal before the law” as in the Covenant, or “All persons shall be equal before the law” German *Grundgesetz* Art 3, Constitution of Poland, Art 32). Secondly, it is strange that Hungary, although being so sensitive for minority issues, has omitted the reference to “association with a national minority” (which is expressed in the Constitution of Bosnia and Herzegovina, similarly adopting the text of the Convention).¹

On constitutional level, further provisions provide for the equality in different areas, like Article 66 ensuring the equality of men and women in respect of all rights, or Article 70/B on the right to equal enumeration for equal work. These two provisions just give concrete meaning to the general non-discrimination rule in two specific areas.

On legislative level recently, in December 2003, the Parliament has passed a law on equal treatment and on the furtherance of equality of opportunity (Act 125 of 2003). Formerly, in 2000, the Constitutional Court stated that it was not contrary to the Constitution that Parliament failed to pass a specific anti-discrimination law. It does not follow from the Constitution that the legislature should enact an integral and extensive Act on non-discrimination.² The Court, by examining existing legal norms on discrimination held that the requirement to make a specific anti-discrimination law did not directly follow from the Constitution.

Independently from the general anti-discrimination law, in the Hungarian legal system there are several legal provisions which prohibit discrimination. There are norms against discrimination in the Civil Code. According to Article 8.2 of the Civil Code legal capacity shall be equal regardless of age, sex, race, ethnic background, or religious affiliation. Moreover, under Article 76 of the Civil Code, discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honour, integrity, or human dignity of private persons shall be deemed as violations of inherent rights.

The Criminal Code also contains provisions which penalise discrimination. For example, there is a rule making criminal offences against members of national, ethnic, racial or religious groups among a crime against humanity. Under this section, a person who assaults somebody because he belongs or is believed to belong to a national, ethnic, racial or religious group, or coerces him with violence or menace into doing or not doing or into enduring something, commits an offence and shall be punished with imprisonment of up to five years.

Article 5 of the Labour Code declares the prohibition of negative discrimination as a basic principle. Accordingly, it is forbidden to discriminate among employees on the basis of their sex, age, nationality, race, origin, religion, political beliefs, membership in an organisation representing their interests or involvement in any related activities, as well as any other factor unrelated to their employment. However, at the same time discriminatory treatment arising unequivocally from the type or the nature of the work shall not be considered negative discrimination.

¹ Article 2.4 Non-Discrimination:

“The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

² 45/2000. (XII. 8.) AB határozat CODICES HUN 2000-003-008

Conceptual Problems

In approaching the question of prohibition of discrimination, and the respective legal regulations, one has to differentiate among the following aspects:

1. Equality, basically meaning formal equality that is equal treatment of equal cases.
2. Non-discrimination: a prohibition of discrimination on different grounds.
3. Reverse or positive discrimination, or more correctly preferential treatment (difference in treatment to eliminate inequality). This can be formulated also as substantive equality: unequal treatment of unequal cases in proportion to their inequality.

A violation of the principle of equality and non-discrimination occurs if there is

- a) differential treatment of
- b) equal cases without there being
- c) an objective and reasonable justification, or if
- d) proportionality between the aims and the means is lacking.³

Article 14 of the Convention

The above-quoted article of the Convention prohibiting discrimination, as it is well-known, “has no independent existence, in the sense that ... it relates solely to rights and freedoms set forth in the Convention”.⁴ This accessory protection is different from that of the other international document such as the United Nations covenants, or several national constitutions that contain a general equality clause. Article 14 refers only to discrimination in relation to the rights and freedoms protected in other articles of the Convention. Nevertheless, its applicability “is not limited to cases in which there is an accompanying violation of another Article”.⁵ Van Dijk and van Hoof conclude “that Article 14 contains an autonomous, though complimentary guarantee in relation to the rights and freedoms protected in Section I.”⁶

Whether a differential treatment is acceptable under the Convention or it leads to a prohibited discrimination, is adjudicated by European Court of Human Rights using the following tests:

- a) the proportionality test (reasonable proportionality between the means employed and the aim sought to be realized)
- b) the comparability test (referring to analogous situations, like in *Van der Musselle*, and *Johnston*)
- c) the justification test (need of objective and reasonable justification, or legitimate aim, see *Belgian Linguistic Case*, or *Dudgeon*).

INTERPRETATION OF THE NON-DISCRIMINATION CLAUSE

Equality and human dignity

³ P. Van Dijk – G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1990, 539.

⁴ Appl. 4045/69, *X v. FRG*

⁵ *Belgian Linguistic Case* (Commission Report)

⁶ Van Dijk – van Hoof, *op. cit.* 537.

The understanding of the equality clause and the non-discrimination principle is the interpretation of the Hungarian Constitutional Court is closely connected to the principle of human dignity. In a certain sense equality is derived from human dignity. It is formulated in Article 54 (1) of the Constitution: "In the Republic of Hungary every human being has the inherent right to life and to human dignity, of which no one can be arbitrarily deprived."

Human dignity plays a central role in the jurisprudence of the Constitutional Court. In the opinion of some authors the principle of human dignity substitutes the kind of general equality principle that is to be found in the German Basic Law, stating that "All people are equal before the law". Instead, the right to human dignity is considered to be a "mother right" in two senses: first, the majority of fundamental rights can be derived from it; secondly, a series of rights that are not enumerated in the Constitution can be drawn from it. The Hungarian Constitutional Court already in its early decisions (delivered in 1990) created a close tie between equality and human dignity.⁷ Persons should be treated by equal dignity that means that equal protection in this broader sense means the "equal right to human dignity". The Court, by referring to the "equal right to human dignity" set up a procedural scrutiny for equal protection.

"The prohibition of discrimination means that all people must be treated as equal (as persons with equal dignity) by law. That means that the fundamental right to human dignity may not be impaired, and the criteria of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests."⁸

Thus, the Court transformed the requirement for equality into the requirement that all persons be treated with equal dignity. The language of the Court's argument is clearly related to Ronald Dworkin's explanation of affirmative action cases. Dworkin differentiates between two different sorts of rights. The first is *the right to equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden. The second is *the right to treatment as an equal*, which is the right to be treated with the same respect as anyone else.⁹ The Court combined the right to be treated with the same respect and the concept of human dignity, thus transforming the Dworkin's conception into the right to an equal dignity.

General principle of equality

As we have seen above, the Hungarian Constitution does not contain an explicitly formulated provision on equality in general. However, the Constitutional Court considers the principle of prohibition of discrimination as a general principle of equality. The Court often refers the constitutional requirement of "equality of rights".

"The meaning of equality of rights is that the state as public power and as legislator is obliged to guarantee equal treatment for every person residing on its territory. In this context it cannot differentiate among them on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, financial situation, birth or any other grounds whatsoever."¹⁰

Three observations can be made:

- the Court derived from the principle of prohibition of discrimination a general principle of equality,

⁷ The Constitutional Court regards the right to human dignity as another phrase for a "general right to personhood." In modern constitutions and in the practice of constitutional courts, the general right to personhood encompasses various aspects, such as the right to free personal development, the right to free self-determination, general freedom of action or the right to privacy. The general right to personhood is a "mother right" - *i.e.*, a foundational fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete, named fundamental rights are applicable for a particular set of facts.

⁸ 9/1990. (IV. 25.) AB határozat

⁹ Ronald Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977, 227.

¹⁰ 61/1992. (XI. 20.) AB határozat

- it rephrased as the principle of “equality of rights”,
- it related not only to Hungarian citizens but to every person residing on the territory of Hungary.

The scope of the principle of equality

The primary scope of the principle of the prohibition of discrimination is related to fundamental rights. What is the situation if the violation of the principle occurs not in relation of a fundamental right but in regard to rights that are not considered fundamental rights? The Hungarian Constitutional Court as soon as in 1992 extended the principle of non-discrimination to the entire legal system, including those rights that are not fundamental rights. The gate, through which the principle was extended to the entire legal system, was again human dignity. In the case of not fundamental rights the unconstitutional discrimination can be stated if the differentiated regulation violates the right to human dignity.¹¹

The Court makes a clear distinction between the two cases. It applies different tests for the two groups of rights (necessity/proportionality test, and rationality test, respectively, *see later*).

In 1990 the prime minister asked the Court whether it constitutes discrimination according to Article 70/A of the Constitution for compensation procedures to provide for certain people's former property to be re-privatized (i.e. returned in kind), while other people's property would not be returned to them. The petition explained the compensation policy of the Government: it considered privatization to be the basic goal of the transformation of the property system. The general principle of privatization was to sell state property to new owners in exchange for payment, while giving former owners, whose property was expropriated during the Communist regime, partial compensation. The settlement of land ownership would have been an exception to these principles either returning the original, confiscated piece of land in kind or offering another land of the same value in exchange.

The question raised in the Government's petition was whether it constitutes discrimination among the former owners if the kind of property (the basic distinction being between land and other kinds of property) determines whether the property was given back.

The Court analyzed the first question under the General Equal Protection Clause of the Constitution [section (1) of Article 70/A]. This was not the first case when the Court had to face the problem of equal protection. In the earlier cases the Court argued in favour of the constitutionality of reverse discrimination. The Constitution itself allows the positive or reverse discrimination aimed at eliminating inequalities of opportunity.

The Court then examined whether the discrimination among former owners and non-owners was in conformity with the Constitution. The argument followed the line designated by the above-mentioned former decision, namely applying the right to equal dignity test.

“The constitutionality of the discrimination depends on whether the discrimination between owners and non-owners is realized in a procedure where the interests of former owners and non-owners have been weighed with the same degree of prudence and impartiality.”¹²

The justification for discrimination within the group of former owners would be the purpose of achieving a more complete social equality, for the Constitution permits positive discrimination only in order to promote the attainment of equality.

The ruling of the Court pointed out that there are at least two instances of unconstitutional discrimination in the Government's program: first, the discrimination among the former owners and non-owners in the process of privatization, and second, the discrimination among the former owners according to the type of the property. The position of the Constitutional Court was that "in this particular case differentiating on the basis of the type of the property becomes

¹¹ 61/1992. (XI. 20.) AB határozat

discrimination against persons since it relates to the acquisition of property". The Court concluded its interpretation of Article 70/A of the Constitution that

“it is a discrimination against persons if certain persons' former property is re-privatized, while other persons' property is not returned to their possession, therefore, the Constitutional Court proclaimed this discrimination unconstitutional.”¹³

Comparability test:

It is based on the requirement of defining a homogeneous group – the rights and obligations of the same subjects (group of persons)¹⁴ must fulfil the equality principle.

Good examples of how to draw homogenous groups were the cases on compensation for past injustices.

Decision 1/1995 On Compensation For Past Injustices I:

The petitioners sought constitutional review of Act XXXII of 1992 which regulated the question of compensation for those wrongfully deprived of their life and liberty due to political reasons.

The purpose of the Act was to compensate not for property losses or material damage (as had been the aim of previous compensation statutes) but rather for personal injury and loss of life which had occurred under different political regimes. Broadly speaking, the fascist regime perpetrated such violations on the ground of racism and nationalism while the subsequent communist regime followed mostly ideological and political motives.

The provisions concerning deportation were declared unconstitutional. During the Second World War, „deportation” had meant far more than deprivation of liberty. It had amounted to expulsion from the country by force when Hungarian authorities, on racial, religious or political grounds, handed their own citizens to authorities of foreign powers which had them carried off to concentration camps. Leaving these historical circumstances out of consideration violated the constitutional requirement of treating everybody with equal dignity. Deported people formed a clearly defined, specific group that the legislature was bound to respect. The provisions whereby deportation to Germany or to the Soviet Union were to be regarded as a mere deprivation of liberty, were unconstitutional.

It was similarly arbitrary and thus unconstitutional to discriminate between people compelled to undergo forced labour who had served in either combat or non-combat forces, because those belonging to non-combat forces were made to live in closed camps and were thus deprived of their liberty.

The Constitutional Court declared unconstitutional and annulled some specific provisions of the law. The law originally considered deportation as a mere form of deprivation of liberty. According to the Court, deportation during the Second World War meant far more, being an expulsion from the country by force, when Hungarian authorities, on racial, religious or political grounds, handed their own citizens to foreign authorities, who carried them off to concentration camps. Leaving these historical circumstances out of consideration violates the constitutional requirement of treating everybody with equal dignity. Deported people form a clearly defined specific group that the legislature has to respect. Therefore, the provisions whereby deportation to Germany and to the Soviet Union were regarded as mere deprivation of liberty were declared unconstitutional.

Another provision of the law differentiated between people compelled to undergo forced labour service - a form of unarmed military service for those pursued by the regime during the Second World War. The criterion for the difference in treatment was whether the forced labour camps belonged to combat force units or not. The Constitutional Court held arbitrary, and thus

¹² 21/1990. (X. 4.) AB határozat. This decision is to be discussed as case study.

¹³ 21/1990. (X. 4.) AB határozat

¹⁴ 32/1991. (VI. 6.) AB határozat

unconstitutional, the discrimination between those who had served in combat and in non-combat forces, because those belonging to non-combat forces were compelled to live in closed camps and were deprived of their liberty.

Decision 22/1996: On compensation for past injustices II

It was unconstitutional if the amount of compensation for those deprived of their life is substantially unequal for different groups of people. The legislature had redressed its former mistake by creating a new group of persons entitled to compensation, specifically those deported to Germany or to the Soviet Union. However, the bill had established substantially different standards for similar grievances, viz. the loss of life. Loss of life was so serious a grievance that it absorbed all previous injustices. It would be arbitrary and at the same time would violate human dignity to differentiate among the diverse ways of losing life.

„The question whether discrimination remained within constitutional limits may only be examined in the objective and subjective context of the current rules because the same criterion - e.g., "landowner" - may constitute discrimination, depending on the context. Equality shall exist in reference to the essential element of a given state of facts. If, however, a different rule applies to a group within a given regulatory scheme, this will be in conflict with the ban on discrimination, unless there is sufficient constitutional justification for the difference. By assignment of state property into private ownership, the State fulfils the duty to create a socially-aware market economy, set forth as an aim in the preamble to the Constitution. However, as an owner, the State acts freely in deciding how to support private property, even when it comes to assigning its own property.”¹⁵

In the *Conscientious Objectors Case* the Court relied on the Constitution to give an extended interpretation to a provision of the Law on Defense. The provision in question exempted from military service priests and certain performing artists (musicians and dancers). The Court found the exemption of priests justified because it serves the constitutional purpose of the exercise of freedom of religion. In the case of artists the Court emphasised the necessity of the continuous exercise of certain performing arts. The Act listed those three specific art schools, the graduates of which were entitled to exemption from military service. The Court interpreted this provision widely by extending the exemption to graduates of all equivalent (e.g. foreign) art schools. It is not unconstitutional discrimination that women are not subjects of universal conscription.¹⁶

In the case on Same Sex Partnerships the Court stated that not allowing marriage between persons of the same sex does not amount to negative discrimination on the basis of sex. However, the enduring union of two persons may realise such values that it can claim legal acknowledgement irrespective of the sex of those living together. Therefore, the fact that respective legal regulations acknowledge only those partnerships outside marriage where a man and a woman live together in the same household and form an emotional and economic union, is contrary to the Constitution.

The legally effective notion of partners in a domestic partnership is defined by the Civil Code. The constitutionality of this cannot be determined on its own, but depends on whether the distribution of rights and duties among those who are in the same situation is done in a manner that respects the right to equal human dignity, that is, permitting equal treatment of persons and evaluating their points of view with like circumspection, attention, impartiality and fairness. The legislator can create a situation that is in harmony with the Constitution while leaving untouched the legal notion of domestic partnership that is in effect now.¹⁷

¹⁵ 21/1990. (X. 4.) AB határozat

¹⁶ 46/1994. (X. 21.) AB határozat, CODICES HUN 1994-3-015

¹⁷ 14/1995. (III. 13.) AB határozat CODICES HUN 1995-1-002

Justification tests

As mentioned above the Constitutional Court applies two different though not independent tests.

1. When fundamental rights are effected the **necessity/proportionality test** is generally applied for adjudicating the constitutionality of restrictions on fundamental rights. According to the jurisprudence of the Constitutional Court that state can legitimately restrict a fundamental right only for the protection or realization of another fundamental right or liberty, or when the protection of a constitutional value cannot be achieved in other way (necessity). The constitutionality of the restriction requires reasonable proportionality between the aim sought to be realized and the violation of the fundamental right caused by the applied means.

2. In case of other rights the **arbitrariness or rationality test** is applied. In this case a discrimination is unconstitutional:

- when the violation is related to a fundamental right, at least with the right to human dignity
- the differentiation is arbitrary, that means it is lacking an objective and rational justification.¹⁸

Equal treatment has to relate to the essential factual elements of the regulatory concept. Then, it is necessary, and enough, to prove the constitutional basis of the distinction. Arbitrariness is in conflict with legal certainty, consequently with rule of law. Similarly, if the discrimination is arbitrary, then it violates equal treatment, because in such cases the viewpoints of affected persons were not considered with equal care and fairness. Thus arbitrary discrimination violates the right to human dignity.¹⁹

In a case the petitioner sought to challenge the constitutionality of Article 203 of the Criminal Code. According to Article 203.1 of the Criminal Code, all sexual intercourse between persons who are direct descendants or ascendants related by blood (e.g. parents and children) is a crime. Article 203.3 provides that "normal" heterosexual intercourse and "unnatural" homosexual intercourse between siblings are misdemeanours. "Unnatural" heterosexual intercourse between siblings is not mentioned in this provision.

The petitioner argued that this provision as a whole violated Article 70/A of the Constitution which prohibits discrimination. The Court found the petition to be partially founded.

In its reasoning, the Court stated that the provision according to which all sexual intercourse between direct descendants or ascendants related by blood was a crime did not infringe the constitutional principle of the prohibition of discrimination, since, according to Articles 15 and 16 of the Constitution, the state shall protect the institutions of marriage and the family and make special efforts to ensure a secure subsistence, education and upbringing for young people and protect their interests. However, it held that Article 203.3 of the Criminal Code was unconstitutional since it differentiated arbitrarily between "unnatural" sexual intercourse between siblings of the same sex and siblings of different sexes.

Since under Article 70/A of the Constitution, discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever is prohibited, Article 203.3 of the Criminal Code is unconstitutional.²⁰

In another case the Constitutional Court held that heterosexual and homosexual orientations equally belong to the essence of human dignity and, therefore, exceptional justification is required for them to be separated from one another and for the unequal treatment of the dignity of the

¹⁸ 35/1994. (VI. 24.) AB határozat

¹⁹ László SÓLYOM and Georg BRUNNER, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*. Ann Arbor: The University of Michigan Press, 2000, 45.

²⁰ 20/1999. (VI. 25.) AB határozat

persons in question. Such justification is, for example, the differentiation of homosexual orientation in the case of the right to marry.

The possible differences in heterosexual and homosexual development are undoubtedly strengthened by a social environment showing a lack of understanding or rejection of a relationship. Differences can be pointed out in the personal development of teenage boys and girls, too. Historically these differences led to - among others - different treatment in criminal law of the sexual relationship between men and women in most European countries.

According to the Constitutional Court, these differences do not, however, constitute a reasonable and objective justification for the state to define protected age differently.²¹

Preferential treatment

Prohibition of discrimination does not mean that all differentiation is prohibited.

Positive or reverse discrimination by the Constitutional Court is considered a task of the state, and it cannot be the base of subjective rights. The limits of preferential treatment are the equal dignity of persons, and the realization of fundamental rights.

In its decision 9/1990 (IV.25) AB the Constitutional Court has interpreted the prohibition of discrimination contained in Art. 70/A(1) of the Constitution. It established among other principles, that

“the ban on discrimination does not mean that any discrimination, including even discrimination intended to achieve a greater social equality, is forbidden. The ban on 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.”

In the quoted decision, the Constitutional Court also expressed its view that

“The right to equal personal dignity may occasionally result in another right - *i.e.*, assets and choices must be distributed (even qualitatively) equally to everyone. If, however, a social purpose not in conflict with the Constitution, or a constitutional right may only be achieved if equality in the narrower sense is not met, then such a positive discrimination shall not be declared unconstitutional. The limitation upon positive discrimination is either the ban on discrimination against equal dignity in the broader sense of the word, or the protection of the fundamental rights which are positively expressed in the Constitution. Social equality as a purpose or as a social interest may take precedence over individual interests but not, however, over the constitutional rights of the individual.”²²

In the already quoted decision on compensation the Court elaborated its doctrine on positive discrimination.

“The constitutionality of the discrimination depends on whether the discrimination between owners and non-owners is realized in a procedure where the interests of former owners and non-owners have been weighed with the same degree of prudence and impartiality. In the review of such a possibility, former owners just like non-owners have the right to equal treatment and to have their interests judged with the same degree of attention and fairness, rather than a right to a share in the state property. Without this, the discrimination violates the Constitution. [...]

Even if the above considerations are flawless, the discrimination is only unconstitutional if the gratuitous property acquisition, granted to former owners, and property acquisition by others in exchange for payment, ultimately fails to establish equality between the private owner participants in the market economy to be developed. If it can be proved that with the preferential treatment of former owners, the distribution of state property will yield a more favourable overall social result than equal treatment would, and if it follows inexorably from the facts that another

²¹ 37/2002 (IX. 4.) AB határozat

²² 9/1990. (IV. 25.) AB határozat

non-discriminatory procedure against the non-owners would be far from this result, then non-owners could not claim their rights ensured by Art. 70/A of the Constitution were violated. The criterion of discrimination - *i.e.*, the former ownership situation - would not be unconstitutional if it logically followed from the above arguments.

While proving whether discrimination against certain persons or groups is a condition for achieving a more complete social equality, the Constitutional Court may not accept arguments concerning a preferred group which are not valid solely as related to this group (*e.g.* the establishment of entrepreneurial economy, the remedying of injustice). On the other hand, to prove equal treatment, it is necessary to give a complete account of the interests of both the preferred and discriminated groups together with the method of evaluation.”²³

In another case the Court held that it is not unconstitutional if the State regulates the financial assistance given to private schools differently from the contributions made to state and church schools. Furthermore, the Court declared that it was not unconstitutional if in addition to the compulsory budgetary contribution the State provided schools owned by the church with additional financial assistance, as these schools assume duties which would otherwise be carried out by the State. This positive discrimination (affirmative action) was needed, held the Court, in the interest of the realisation of Article 60 of the Constitution, namely to ensure freedom of religion.²⁴

This is how unequal treatment of unequal cases in proportion to their inequality is applied.

²³ 21/1990. (X. 4.) AB határozat

²⁴ 1042/B/1997. AB határozat

CASE STUDIES

<u>Case number and subject</u>	<u>criteria of distinction</u>
21/1990. AB On Compensation for Expropriated Property	- property ownership
14/1995. AB Same Sex Partnerships	- gender
21/1996. AB On Homosexual-Oriented Associations	- gender
1/1995. AB On Compensation for Past Injustices	- loss of life and liberty