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Hungary

Social Rights or Market Redivivus?

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1. INTRODUCTION

The fall of the Berlin Wall and the concurrent demise of many communist governments ushered in a period of frenzied constitution-making in Eastern Europe and, for the first time, the opportunity for the constitutional judicial review of human rights. While the Eastern European constitutions of the communist period had included social rights, they were rarely subject to judicial scrutiny.

The extent to which these new constitutions recognise social rights varies between the States that were formally under the influence or direct rule of the Soviet Union. As Sadurski notes, of twenty post-communist states in Eastern and Central Europe, eleven have fully-fledged catalogues of economic, social and cultural rights with the remainder recognising a more limited number of rights, and two possessing virtually none at all.[1] Equally, the degree of justiciability varies, with fourteen constitutions making no distinction between the enforceability of civil and political rights and economic, social and cultural rights.[2]

The case of Hungary represents perhaps a midway course. The Hungarian Constitution provides recognition of a number of social rights and over the past decade the Constitutional Court has attempted to develop a systematic approach to their interpretation, although not without controversy. The Court has been seen as caught between encouraging the post-communist impulse of providing the legal foundations for a market economy and paying heed to a relatively strong public consensus for continuing some version of the communist welfare state.[3] Although, the repeated characterisation of social rights as a product of communist memory in related scholarly literature rings strange in the international context where social rights are often normatively and empirically viewed as universal 'givens' and are critiqued by left and right. Its response has been largely to follow the example of the German Federal Constitutional Court, which has adopted a seemingly robust but rather circumscribed approach to social rights, except in some instances where the Court has sought to use property rights to guarantee social protections.

This chapter will briefly outline the constitutional framework for judicial protection of social rights in Hungary, the general interpretive approach adopted by the Court and its application of the constitutional rights concerning to work, social security, housing and education. The Court's application of the rights is placed in the wider economic and political context.

2. THE CONSTITUTIONAL PROTECTION OF SOCIAL RIGHTS

Social rights first appeared in the Hungarian Constitution passed by the National Assembly in 1949, drafted by the then Hungarian Workers' Party. However, following the logic and approach of

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[1] W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), p. 177.

[2] Ibid., p. 179. For example, in 1997, Latvia amended its constitution to include a wide range of economic, social and cultural rights and the provisions of international human rights treaties, and has subsequently witnessed an incipient jurisprudence.

[3] See B. Gero, *The Role of the Hungarian Constitutional Court,* Working Paper, Institute on East Central Europe, March, 1997; and Sadurski, *Rights before Courts* (n. 1 above), p. 171.

the 1936 Fundamental Law of the Soviet Union, power was strongly vested in the presidency and ministers, with the legislature and judicial bodies possessing extremely limited influence. The 1972 constitutional reforms during the 'Kádár era' slightly ameliorated this situation with a movement from totalitarianism to authoritarian dictatorship, a clearer delineation of the various branches of government and some notion of the rule of law.[4] In April 1984, a Constitutional Committee was established for the purpose of parliamentary vetting of the constitutionality of legislation, but the system was strongly criticised, not least because it denied the right of individual petition. To a certain degree, social rights were protected under the relatively socialist model of economic governance though some have argued that the measures to realise social rights were also used as tools of oppression: 'the right to work not only guaranteed employment but also allowed the regime to enforce compulsory employment for all adult males and all single females because the regime could best exercise power over the populace while they were at work'.[5]

From May 1988, a new era of constitutionalism emerged with the triumph of reformist leadership in the Hungarian Socialist Workers' Party, who called for socialist pluralism, although not political pluralism, and a program of constitutional change.[6] This was quickly followed in February 1989 with a renunciation of political monopoly by the party and, after pressure from emergent opposition parties, the holding of a national roundtable with major political stakeholders. The result was an adaptation of the old Constitution – characterised by some as a 'patchwork'[7] – and the expectation that a new constitution would be developed once a democratically elected parliament was formed. The latter expectation never materialised although further amendments to the constitution were approved by the new Parliament in 1990.

The revised constitution contains many social rights, namely the right to work, rights to trade union and other associations, including the right to strike, the right to highest attainable standard of physical and mental health, the right to social security, the right to education and rights to cultural and scientific freedoms,[8] and protection of children,[9] with the language largely reflecting that of international human rights instruments, though with some differences as will be discussed below. The constitutional chapter on human rights is headed by an article on the right to life and to human dignity, the later concept playing a very important role in Hungarian constitutional interpretation.[10] Likewise protections on equality and discrimination have played a significant role in constitutional jurisprudence; the Constitution possessing guarantees for equality between men and women in respect of all rights and the prohibition of discrimination with respect to human rights on a range of prohibited grounds.[11] The Government is also obliged to strictly penalise in law any kind of discrimination and promote 'equality of rights for everyone through measures aimed at eliminating the inequality in opportunity'.[12]

The Constitution and related statutes enable residents, public interest organisations and elected representatives to bring a wide variety of legal actions to challenge violations of social rights embedded in the Constitution. In a chapter preceding the establishment of the Government, the Constitution creates a powerful Constitutional Court with powers to review the constitutionality of laws[13] and receive constitutional complaints from *any person*.[14] While the German precedent largely influenced the creation of a supreme constitutionally focused judicial body, the nature

[4] See G. Brunner, 'Structure and Proceedings of the Hungarian Constitutional Judiciary', in L. Sólyom and G. Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press, 2000), pp. 65–102, at 67.

[5] Hungary, Country Guide, available at <http://reference.allrefer.com/country-guide-study/hungary/>.

[6] Brunner, 'Hungarian Constitutional Judiciary' (n. 4 above).

[7] For an insightful analysis, see Morten Kinander, 'The accountability function of courts in Eastern central Europe: The case of Hungary and Poland (on file with author).

[8] Articles 70/B-70/G.

[9] Article 67.

[10] Article 54. See generally, C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart, 2003).

[11] Namely, 'race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or any other grounds': Article 70/A(1).

[12] Article 70/A(2) and (3).

[13] Article 32/A(1).

[14] Article 32/A(2).

of the complaint system differs. The Hungarian Court is empowered by statute to hear complaints from any person concerned with the constitutionality of *any legal or administrative norm* without the petitioner needing to demonstrate a violation or interference with a fundamental right or other interest. This right to 'posterior review of legal norms' through popular action has spawned the largest number of cases in the Court's docket, leading the Constitutional Court and others to call for more stricter admissibility requirements in the empowering statute. Interestingly, a petitioner may also claim that there has been an unconstitutional omission to legislate by a State authority if the Constitution, statute, delegated legislation, or the annulment of a law, explicitly, or implicitly, creates a mandate for legislation.

A more circumscribed 'constitutional complaint' is also permitted, whereby other domestic remedies must be exhausted and injury demonstrated, but its usage is dwarfed by the popular actions. Brunner points out that this 'constitutional complaint' is useful in circumstances where the law or administrative norm in question has been repealed but still exerts an effect, a situation that cannot be addressed through the popular 'posterior review of legal norms'.[15] In addition, the Parliament, the President or Government may call for preventive constitutional review in certain circumstances.[16] The Parliament may request the Court to review draft Acts or parliamentary rules of procedures, with parliamentary standing committees or fifty legislators having the right to instigate the former action. The President may also demand that the Court review Acts before their promulgation and, together with the Government, ask for the constitutional assessment of international treaties before their confirmation by Parliament.

Beyond the apex court, a system of courts headed by the Supreme Court is established by the Constitution for the general administration of justice. Such courts are required to 'protect and guarantee the constitutional order, as well as the rights and lawful interests of citizens'[17] and if in a proceeding a judge is of the view that a legal provision is unconstitutional the matter must be referred to the Constitutional Court.[18]

The Constitutional Court is also required to ensure 'harmony' between Hungarian domestic and international legal obligations 'assumed' by the country. This monist-dualist hybrid creates the potential for strong synergies between the interpretations by international bodies such as the UN Committee on Economic, Social and Cultural Rights and the Court's development of Hungarian jurisprudence. But the Court has rarely looked to the international sphere for inspiration, unlike their Latvian counterparts for example,[19] tending to content themselves with comparative lessons from Europe, particularly Germany, and the United States.

3. THE APPROACH OF THE HUNGARIAN CONSTITUTIONAL COURT

While the Hungarian Constitutional Court has been eulogised or demonised as 'activist', a closer reading of its judgments reveals an inherent conservatism or minimalism in its interpretive approach to express constitutional social rights. The Court's constitutional vision of social rights is perhaps best summed up in remarks it made during a case on the right to environmental health:

> Social rights are implemented both by the formation of adequate institutions and by the rights of the individual to have access to them, which rights are to be specified by the legislature. In a few exceptional cases, however, certain social rights to be found in the Constitution have an element of subjective (justiciable) right.[20]

Social rights therefore compel the State to create the necessary legislation and structures but the Court will not inquire as to the effectiveness or reasonableness of those mechanisms or measures except in very limited cases. This includes situations in which it is questionable whether the State has ensured a minimum level of the social right, whether there has been unequal or discriminatory

[15] Brunner, 'Hungarian Constitutional Judiciary' (n. 4 above), p. 84.
[16] Ibid., pp. 78–79.
[17] Article 50(1) Constitution.
[18] Section 38(1) Constitutional Court Act. See Brunner, 'Hungarian Constitutional Judiciary' (n. 4 above), p. 82.
[19] Cf. Case No. 2000–08-0109 of the Constitutional Court of Latvia (n. 1 above).
[20] Decision 28/1994, para. 29(b).

treatment in the exercise of the right, or whether disproportionate restrictions have been placed on the right. These justiciable 'exceptions' correspond, to a certain degree, with civil and political rights, namely the right to life, right to non-discrimination and right to freedom from arbitrary action.

When faced with pressing social rights claims, the Court has instead turned to property rights (both express and implied) to protest social interests. For example, it relied on the principle of legal certainty and proprietary interest in contributions to protect changes to social insurance schemes. While this has led to close scrutiny of retrogressive measures, the Court has left itself open to the charge that it is more concerned with protecting the social rights entitlements of the middle class than the poor,[21] since the use of property rights largely favours those with greater power in the market. This is a charge it might have avoided had it been willing to use less deference in cases concerning the minimal entitlements of the poor.[22]

4. SELECTED RIGHTS

4.1 Labour Rights

In the early 1990s, the Court was offered the opportunity to outline its views on the broadly worded article 70/B that states that, 'everyone has the right to work and to freely choose his job and profession'. In a series of cases concerning restrictions on various occupations, the Court offered its views on both parts of the right with a marked preference for enforcement of the second limb.

In the case of *Freedom of Enterprise on the Licensing of Taxis*,[23] the Court was confronted with the legality of a decision by Budapest's local authority to restrict the number of taxi drivers. The decision was made in accordance with traffic and roads legislation and the Budapest authority argued that an oversupply of taxis had paradoxically not led to a competitive pricing but instead to overcharging and exploitative practices.[24] The Court struck down the provision due to its interference with the right to work. Declining to find the restriction unconstitutional on the basis of the general constitutional principles of a 'market economy' or 'freedom of competition', the Court considered that the *numerus clausus* or quota system for taxi licences interfered with the right to freely choose one's occupation. In an earlier decision the Court had already expressly found that 'The right to enterprise is one aspect of the constitutional fundamental right to choose freely one's occupation . . . The State may not prevent or make impossible the launching of an entrepreneurship'.[25]

The Court found that the measure lacked objective justification. Restrictions on entry into a certain profession would be permitted as long as they applied equally to everyone: for example, the passing of an exam or the completion of a certain course of study. Moreover, the absoluteness of the measure was considered by the Court to be extremely serious as it weighed competing policy considerations: 'In evaluating the objective restrictions, attention must also be paid to the fact that since this restriction involves the total negation of a fundamental right such an instrument must not be applied to regulate competition'.[26] The Court pointed the way to constitutionally resolving the exploitative practices within the taxi market through the use of administrative measures such as the requirement for receipts and the use of meters. Interestingly, the Court notes that the Government does not have the option of selecting a regulatory instrument with a lower cost if constitutional rights were infringed.[27]

In a later decision, the Court took a similar approach to the powers of the Hungarian Medical

[21] See A. Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court' in R. Gargarella, P. Domingo and T. Roux (eds.) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006), pp. 83–106.

[22] See discussion in sections 4.2 and 4.3 below.

[23] Decision 21/1994 (16 April 1994).

[24] See Gero, *The Role of the Hungarian Constitutional Court* (n. 3 above), p. 6 and footnote 39. The national legislation permitting such restrictions stated the reasons for the need for local government action: 'The undesired expansion of supply, the deterioration of the quality of the service, the unduly high price level for the service, the ensuing economic hardship for a large number of the entrepreneurs, the non-payment of taxes and service charges': see Decision 21/1994 (16 April 1994), V(5).

[25] Decision 54/1993 (X. 13) AB (Mk 1993/147), p. 8802.

[26] Ibid. IV(3).

[27] 'Public administration may not lighten its burdens at the expense of such a restriction of fundamental rights': ibid. V(5).

Association (HMA), striking down its power to reject properly qualified foreign doctors from registering their names in the Medical Practitioner's National Register and, together with the Minister, its unfettered discretion over their applications to join the HMA, on the basis that it interfered with the free choice of occupation. In strong language on the working rights of non-citizens, the Court stated:

> According to the Hungarian Constitution, the right to free choice of job and profession is a human right, that is, contrary to some foreign constitutions, not a citizen's right. . . . According to the practice of the Constitutional Court, the right to work . . . is violated in the most serious way if the person cannot choose a profession; those provisions which exclude the ability to choose because of objective reasons must be examined in the strictest way.[28]

The Court in Decision 32/1998, declined to find, however, certain eligibility criteria for social security benefits in violation of the right to work. Section 37/C(1) of the Welfare Act permitted local municipalities to require beneficiaries to participate in designated programmes (e.g., family support service or other institutions) corresponding to their social and mental health situation.[29] In particular, the organisations challenged the requirement that persons in need of care, who had rights under section 93 to 'personal care on a voluntary basis', were required to participate in a mental health programme. The Court demurred though that this 'cooperation obligation' could be justified on the basis that its aim was to help persons 'manage the living difficulties and mental problems that result from constant unemployment'.[30]

During the course of its seminal decision on taxi licensing, discussed above, the Court also offered some comment on the wider notion of the right to work: 'The right to work as a subjective right [justiciable right] must be distinguished from the right to work as a social right, especially the latter's institutional aspect, namely, the State's duty to engage in an appropriate employment and job-creation policy'.[31] This statement carries a clear implication that the State's duty with respect to fulfilling the right to work does not extend to a guarantee of job, but rather is an obligation of conduct by the State to take steps towards that end. As Justice Sólyom, who wrote the decision, later argued in a scholarly article, addressing both the right to employment as well as the right to equal pay (Article 70/B(2)):[32]

> With the right to work there emerged relatively few problems. The Constitutional Court soon turned the treatment of persons with equal dignity into the test of the equality principles (thus, the results oriented claims to equal payment and other issues failed) and equated the right to work with free enterprise. *It also stated on the negative side that the right to work secured no subjective right to obtain a given job.*[33]

The Court's statement also clearly suggests that this duty to create the conditions for employment may not be justiciable: a distinction is made between the subjective justiciable right and the 'social' or collective non-justiciable aspects of the right, seemingly placing positive obligations in the latter category. As will be seen below, this interpretation is largely consistent with rulings by the court on other social rights. However, the failure by the State to take positive steps towards the provision of employment or equal pay can be construed in subjective or individual terms. As the UN Committee on Economic, Social and Cultural Rights has commented, the failure to adopt a national employment policy or implement technical and vocational training programmes can have a direct impact on an individual and their right to work,[34]

[28] Decision 39/1997, para. 6.2. The judgment also places great emphasis on the lack of administrative fairness, 'Because of the unlimited discretionary power the HMA has, the judicial remedy in the case of a refusal of the request is pointless: none of the legal rules contains any aspect or measure according to which the court can review the legality of the decision'.

[29] Decision 32/1998 (VI. 25) AB.

[30] Ibid., Para. 2.

[31] Decision 21/1994 (n. 23 above), para. 3.

[32] See L. Sólyom, 'Introduction to the Decisions of the Constitutional Court', in L. Sólyom and G. Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press, 2000), pp. 1–64, at 35.

[33] Decision 54/1993 (X. 13) AB (Mk 1993/147). Emphasis added.

[34] The Committee has stated:

> Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to work.

and these issues could easily and imaginably be the subject of litigation. In Hungary, such a likelihood for justiciability is only enhanced by the availability of popular actions for abstract review and the justiciable obligation of the State to constitutionally legislate for those mandates within the Constitution. The question of the obligation to take positive measures to protect persons from interference with their right to work by private actors is also ignored in the Court's binary conception of social rights.

The Court's reticence to enlarge on the justiciable scope of the right to work is perhaps not only attributable to a need to distinguish the new market economy from the older socialist economy,[35] but is possibly also a product of German constitutional influence. The German constitution protects the right to freely choose an occupation – but not the more general right to work. The Federal Constitutional Court of Germany has strongly defended the protection of the former in a decision concerning women's entry into certain occupations, and in a *numerus clausus* case concerning restrictions on places for the study of medicine in universities. In language not dissimilar from the Hungarian taxis case, the German Court stated:

> An absolute restriction on admission to the university, however, leads to the glaring inequality that one class of applicants receives everything and the other receives nothing. . . . Because of these effects, absolute admission restrictions are undisputedly on the edge of constitutional acceptability.[36]

However, it is arguable that the Hungarian Court's comments on the wider aspects of the right to work have perhaps overlooked some of the more progressive elements of the German jurisprudence, where it has examined the positive obligations that flow from civil and political rights and its willingness to intervene to ensure that the government has taken sufficient steps where rights are manifestly violated. For example, in the *Numerus Clausus* cases it initially considered that adequate steps had been taken to provide sufficient places of study for medicine but in later cases, where more precise evidence was provided, it found that the universities had excess capacity.[37]

In addition to the right to work, issues of trade union rights have been raised before the Court. In these cases, the key issue has been the extent to which individuals are bound by the rules and decisions of the union. In Decision 8/1990, the Court struck down a provision of the Labour Code, which permitted a trade union to represent employees without representation. The petitioner raised the constitutional question in the immediate aftermath of the collapse of the communist state, arguing that the authority of the trade unions was weakened by the need for greater pluralism and representation. The Court declined to examine whether the substance of the constitutional provisions concerning trade unions – namely the duty of unions to represent employee interests[38] and their right to form organisations[39] – affected the manner in which trade unions could represent their employees. Instead, the Court examined the question from the perspective of the right to human dignity of an individual who may have a decision made on his behalf without his authorisation: 'This potential infringement upon the right to self-determination may not be

Examples include the failure to adopt or implement a national employment policy designed to ensure the right to work for everyone; insufficient expenditure or misallocation of public funds which results in the non-enjoyment of the right to work by individuals or groups, particularly the disadvantaged and marginalized; the failure to monitor the realization of the right to work at the national level, for example, by identifying right-to-work indicators and benchmarks; and the failure to implement technical and vocational training programmes.

See General Comment No. 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006), para. 36.

[35] Note the following strong language with respect to the taxi licences: 'The application of a numerus clausus is particularly impermissible for the planning of needs, for such a licensing mechanism is the hallmark of central planning and not the market economy': Decision 21/1994 (16 April 1994), IV(3).

[36] *Numerus Clausus I* case (33 BVerfGE 303).

[37] Ibid.

[38] 'Trade unions and other representative organisations shall protect and represent the interests of employees, members of co-operatives and entrepreneurs' (article 4).

[39] 'Everyone has the right to establish or join organisations together with others to protect his economic or social interests' (article 70/C(1)); and 'The right to strike may be exercised within the framework of the statute regulating such right' (article 70/C(1) A two-thirds majority of Parliament is necessary for the passage of any statute concerning the right to strike: Article 70/C(3).

eliminated even by the fact that a representation without authorisation must take into account the employee's interest, since the interests of the individual employee are only presumed by the trade union'.[40]

4.2 Social Security Rights

The Court's intervention in social security reforms in the mid-1990s is perhaps the most well-known and discussed instance of its application of constitutional rights in the socio-economic arena.

Initially, in 1990, a one-person majority of the Court signalled that it would take a fairly relaxed attitude to changes to the social security system. With premonitions of its later reasoning on the right to work, the Court demonstrated scepticism towards any results-based approach to social security opining that 'social security means neither guaranteed income, nor that the achieved living standard could deteriorate as a result of the unfavourable development of economic conditions'.[41] The Court declined to view the right to social security as containing any justiciable or 'subjective' substance, thereby reducing Article 70/E to a social goal or objective. This constitutional right nonetheless required some action, namely the organisation and operation of a 'social insurance scheme and system of welfare benefits for those not insured', but the means by which 'this goal was to be reached was not a constitutional question'.[42]

But the issue remained potent in the immediate aftermath of the early transition period, as inflation rose rapidly, eroding the value of fixed incomes such as pensions, and many pensioners fell below the poverty line. This was brought to a head in a 1993 case concerning a cap on pension levels,[43] which primarily affected those on higher pensions. The Court declined to find the measures discriminatory or otherwise unconstitutional since the primary duty on the State was simply to provide social security services (in this case pensions) and the level of pensions was always connected to the health of the economy and social security institutions.[44]

The Court's principal concern, as later expanded upon in some detail in the mid-1990s, was not so much the realisation of the right to social security but rather the guarantee of legal certainty and the protection of property rights, whether acquired through market, social security or other system.[45] But since the pension systems inherited from the socialist times were largely public-financed Pay-As-You-Go systems with weak links between contributions and benefits,[46] a majority of the Court found that no rights to legal certainty of protection of social property rights had been created through the existing pension system.[47] Moreover, the Court found that the State was not burdened with any duty to keep pensions in line with the cost of living.[48]

This interpretive approach to social security matured in the 1995 *Social Benefits* case and related decisions, even though the judgments went partly, and controversially, against the Government. While a number of institutional reforms to the social security system were introduced in the early 1990s,[49] the Government sought more radical changes in the mid-1990s on the basis that poor economic growth, high public debt, and budget and current account deficits prevented the sustenance of a system that the country had largely inherited from socialist times. The International Monetary Fund also threatened to quit the

[40] Decision 8/1990, Part III.
[41] 772/B/1990/AB:ABH 1990, p. 520 and also Decision 26/1993(IV.29)AB:ABH 1993, 196; MK 5651/1993.
[42] L. Sólyom, 'Introduction to the Decisions of the Constitutional Court' (n. 32 above), p. 36.
[43] Decision 26/1993 (IV. 29).
[44] Gero, *The Role of the Hungarian Constitutional Court* (n. 3 above), pp. 10–11.
[45] Sajó, 'Social Rights as Middle-Class Entitlements in Hungary' (n. 21 above).
[46] See K. Müller, *Privatising Old-Age Security: Latin America and Eastern Europe Compared* (Cheltenham: Edward Elgar Publishing, 2003), pp. 72–73.
[47] The Polish Tribunal took the opposite view although under slightly different circumstances: see Sajó, 'Social Rights as Middle-Class Entitlements in Hungary' (n. 21 above), p. 88 and footnote 16.
[48] Ibid.
[49] Müller notes in relation to pensions that 'Early reforms introduced some changes to the organisation, financing and eligibility of the existing retirement scheme. Pension finances were separated from the state budget and from the health fund. Social insurance was granted autonomy and, and self-government was restored' although attempts to increase the retirement age were resisted until the mid-1990s: Müller, *Privatising Old-Age Security* (n. 46 above), p. 73.

country if social benefits were not cut.[50] Finance Minister Bokros introduced a tranche of reforms to Parliament, that included tax increases,[51] a shift to a needs-based system for a range of social benefits (family allowances, maternity benefits, sickness benefits, health care), payment of university fees and an increase in the subsidised mortgage rate.[52] While most commentators see the reforms as emerging from the financial crisis,[53] Katharina Müller notes the strong ideological influence of the international financial institutions, particularly in the area of pensions, and their desire to create an Eastern European precedent for privatised social security.[54]

The introduction of the Economic Stabilisation Act[55] into Parliament, which contained the above reform measures, prompted a wave of petitions to the Court. In its seminal decision, which concerned the conversion of the previous package of universal family allowances and maternity benefits into a needs-based system,[56] the Court repeated its earlier views on the right to social security and then proceeded to fully articulate its approach, namely the principles of legal certainty and property rights. Dealing with the first element, the decision states: 'The Constitutional Court declares that the principle of legal certainty as the most substantial conceptual element of the rule of law and theoretical basis of the protection of acquired rights is of particular significance from the viewpoint of the stability of welfare systems'.[57] Any interference with legal certainty was to be evaluated according to its impact on fundamental rights, irrespective of whether a beneficiary had made contributions.[58] The Court did not examine though the impact of the retrogressive measure on the right to social security, but rather examined their implications for the implied right to legitimate expectations or acquired social benefits:

> Changing a benefit without transition or 'degrading' it from an insurance to a form of assistance also brings about an essential change in the legal position in the sense that the person concerned falls into a weaker category of protection of legitimate expectations (the protection of property ceases), and this amounts to an intervention in fundamental rights.

The Court secondly articulated that where there is an 'insurance' element in the welfare system, any change must be evaluated in the context of the right to property:

> Property is afforded a constitutional protection in its capacity as the traditional means of securing an economic basis for the autonomy of individuals. The constitutional protection must track the changing social role of property so as to fulfil the same task. . . . [T]he constitutional protection extends to rights with an economic value which today perform this former role of ownership, including public

[50] See K. Lane Scheppele, 'Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments', in A. Czarnote, Martin Krygier and Wojciech Sadurski (eds.), *Rethinking the Rule of Law after Communism* (Budapest: CEU Press, 2005), pp. 25–60, at 46.

[51] See further Gero, *The Role of the Hungarian Constitutional Court* (n. 3 above), p. 9.

[52] For discussion of the Court's judgment on interest rates for subsidised mortgages, see section 4. 3.

[53] See Gero, *The Role of the Hungarian Constitutional Court* (n. 3 above), p. 9.

[54] Müller, *Privatising Old-Age Security* (n. 46 above) outlines the World Bank's role as follows:

> While it's early advice had been limited to reforms within the existing PAYG scheme, the Bank's campaign for pension privatisation in the region started at a seminar in late 1993, where most Hungarian experts rejected the plan. After the release of the Bank's 1994 report, its pension reform recommendations to the Hungarian turned more explicit. It advocated a 'systemic change, involving splitting the current single public scheme into two mandatory pillars – a flat citizen's pension and a . . . full funded [private] second tier. It was argued that the existing public PAYG scheme was financially unviable and 'could explode' in the next decade. At the request of the Ministry of Finance, the Bank's Budapest office became directly involved in the Hungarian pension reform around 1995. World Bank experts were careful not to take an active role in public discussion. . . . Clearly, the Bank aimed at creating a precedent: 'Passage of the Hungarian pension reform by Parliament has demonstrated the political and economic feasibility of this type of reform in Central Europe'. (pp. 80–81)

[55] The full name of the law was Act XLVIII/1995 on the Amendment of Certain Laws to Promote Economic Stabilisation.

[56] This included the family allowance, the child care benefit, the child care fee, the pregnancy allowance, the maternity benefit and the child care allowance.

[57] Decision 43/1995: 30 June 1995, para. 1.

[58] Ibid. section II.

> law entitlements (for instance, to entitlement from the social insurance).[59]

This approach was partially justified on the grounds that individuals invest their income in a collective, as opposed to a private or asset-based, system, in order to allay future risks and contingencies. However, the Court acknowledged that the traditional approach to the justiciability of property rights could not be strictly applied since there was not an exact matching between contributions and benefits. The system contained no individual accounts or capitalisation; there was some element of redistribution across beneficiaries and contributors accepted some long-term risks as to payment of the benefits. The Court's answer to this dilemma was to simply focus on the proportionality analysis and determine whether the changes were justified in the public interest, but the Court noted that 'the protection of expectations and benefits is stronger depending on whether or not they are provided on the basis of financial contribution'.[60]

In accordance with the right to social security, the Court did note that social benefits may not be 'reduced below a minimal level' required for the right to social security. This appears to create a subjective or justiciable right under article 70/E, and Sadurski contends that this doctrine is contradictory since this enforceable minimum conflicts with the generally soft 'goal' approach of the Court.[61] In the context of Hungary, where social rights are expressly provided for in the Constitution, this charge is correct, but partially explainable by the Court's use of jurisprudence from countries where constitutional social rights are not explicit, and are instead derived from civil and political rights and therefore cautiously applied.

In determining whether the impact on acquired and property rights was proportional, the Court noted the difficulties the Government was facing in terms of the financing of the system, both through lack of government finances and employer contributions. Yet the Court faulted the law for failing for its non-temporal character – no transitional period was allowed. This was particularly pertinent in the case of family and maternal benefits since they 'play an important role in the long-term decisions pertaining to the livelihood of the family, as regards whether to have a child or children and their schooling and education' (part II). This reasoning was buttressed by reference to the constitutional directive principles requiring the State to support marriage and the family (articles 15 and 16), the right of mothers to receive support and protection before and after the birth of a child (article 66(2)) and the right of children to protection (article 67(1)), although the Court is quick to affirm that there is no subjective right to a family allowance of a specific type or amount.[62] The Court also recalled its decision on abortion and that 'positive counter-measures' such as social benefits were necessary in order to encourage and enable women to have children – thereby protecting both the mother's right to self-determination and the right of the foetus to life.

The result was that the Court struck down the measure as unconstitutional for lack of proportionality, although its remedy was both temporary and limited. The acquired rights were to accrue to children already born or who would be born within 300 days of the date of promulgation of the Act, of 15 June 1995. By implication, the Government was permitted to re-introduce reforms for children born later. Anticipating the charge that the burden of providing the existing system of benefits, even for a smaller-defined group of children and families, would be onerous, the Court distinguished between short- and long-term benefits. The family and maternity allowances were of a short-term nature since the existing system would quickly expire once the children identified by the Court had reached an age that no longer triggered the provision of the benefits.

This decision paved the way for a finding of unconstitutionality in relation to a range of other measures. Decision 56/1995 concerned the partial shifting of the burden of insurance for sickness benefits to the insured and employers. In particular, employers were now required to pay for significantly more days of sick leave before the social fund intervened with financial support. The Court noted that the immediate introduction of the

[59] Decision 64/1993 (XII.22): MK 1993/184 at 11078 quoted in Decision 43/1995, ibid.
[60] Decision 43/1995: 30 June 1995, section II.
[61] Sadurski, *Rights Before Courts* (n. 1 above), p. 181.
[62] '[t]he maternity benefit, the pregnancy allowance and other benefits or even the concrete regulation or extent of the family allowance cannot be directly derived from the provisions of the Constitution'. Ibid. section III.

system amounted to unwarranted interference with the legal certainty and that it violated the acquired rights of employers who had made past contributions to the fund. Decisions were also handed down on subsidised interest rates and higher education fees, which will be analysed in the following Sections of the Chapter.

Though the decision was overwhelmingly supported by the public,[63] the Hungarian Government reacted with some hostility to the decision and commentators such as András Sajó lambasted the Court, accusing it of returning to a communist vision of the welfare state and hobbling Hungary's shift to a market economy and balanced budget. In his 1996 paper, Sajó criticises the Court for going beyond the minimalist approach, outlined by the German Federal Constitutional Court, and attempting to protect all social security entitlements without regard for their level or need of residents: 'The Court's reasoning implies that, wherever there is a constitutional task for the state, legislation cannot deprive rights-holding beneficiaries of what was once promised by law'.[64] Turning to the Court's construction of social property rights, he mourns the departure from the US Court's approach of simply requiring due process in relation to the termination of benefits and the requirement that compensation be granted for interference with social benefits. The finding that the change to sickness benefits also failed to take account of the fact that the employers contribution covered other benefits, not only sick leave, and the decision on arbitrariness lacked justification according to Sajó.

But this critique involves a certain misreading of the judgment since the Court's strong emphasis was on the short-term impact of the reform, and essentially the lack of due process. The Court was particularly reticent about protecting benefits of a long-term nature and specifically declined to order that compensation be provided for interference with social property rights. (It should also be noted that the European Court of Human Rights has protected social insurance contributions as property rights and the Hungarian Court's decisions in this regard are not particularly innovative or new).[65] This more nuanced reading is borne out by the fact that in the two years following the judgment, the social security reforms were largely implemented, with even more radical changes than originally anticipated, and in 2006, Sajó acknowledged that his earlier fears of a return to communism through the courtroom were not realised.[66] Indeed, Sajó now focuses more sharply on the failure of the Court to protect the minimum levels of social security at a time when Hungary has been experiencing growing levels of poverty. He fingers the Court for supporting the political elites in paying more attention to the social rights of the middle class and not the poor. This can be particularly seen in the Court's decision to refrain from enforcing the minimum level for the protection of the right to housing in the social welfare system (see Section 4.2 below).

But the deeper and fundamental problem of the Hungarian Constitutional Court is its decision to impose an unjustified theory of justiciability on express social rights and seek to protect them in a backhanded way through implied rights and property rights. This approach can be particularly seen in a decision three years later on pension rights where the Court refused to strike down legislation that reduced the rate by which pensions were to rise *vis-à-vis* inflation on the basis that the pensioners had no vested rights in the rate of increase.[67] In a manner similar to the Inter-American Court of Human Rights,[68] the Hungarian Court, when confronted with claims of violations of the positive dimensions of social rights turns to largely civil rights (property, legal certainty) or simply dismisses the claims. When the decisions of the Court are read together, they bear out Sajó's later claim that the Courts are protecting the middle class at the expense of the poor.

Instead, the Court would do well to revisit its early decisions, declare the right to social security and other social rights justiciable and seek to build

[63] See Scheppelle, 'Democracy by Judiciary' (n. 50 above), p. 49.

[64] András Sajó, 'How the Rule of Law Killed Hungarian Welfare Reform', *East European Constitutional Review*, Winter (1996), pp. 31–41, at 39.

[65] See Chapter 20 by Clements and Simmons in this book.

[66] See Sajó, *Social Rights as Middle-Class Entitlements in Hungary* (n. 21 above), p. 105 (fn. 47).

[67] Summarised in 'Constitution Watch: Hungary', *East European Constitutional Review*, Vol. 9, Nos. 1–2 (Winter/Spring 2000), pp. 18–21, at 20–21, discussed in Sadurski, *Rights before Courts* (n. 1 above), p. 181.

[68] See Chapter 19 on Inter-American Court of Human Rights by Melish in this book.

a more coherent interpretive framework such as that developed by the UN Committee on Economic, Social and Cultural Rights. This approach, more flexible and nuanced than the communist scarecrow versions of social rights imagined by some Hungarian judges, contains four key elements with respect to positive obligations to fulfil the right: the duty to plan and take steps to establish a reasonably designed scheme, the immediate protection of the minimum level, the duty to progressively improve realisation of the right (in the case of social security, extending the levels and types of benefits) and strong justification for any deliberately retrogressive measures. Protection of acquired social insurance rights could be considered under property rights, but deliberations over the reasonableness in changes to benefits could be better analysed in the context of considering the justifications for retrogression. This does not necessarily mean a pure and strict 'ratchet' theory that prevents any reform[69] – for example the approach that was debated and rejected in Polish cases on social security reform – but a more contextual approach based on a range of reasonableness factors.[70]

Under such a framework, it is likely that the 1995 reforms would have been strongly scrutinised for similar reasons, but that the results may have been partially different. The Government may have been given more flexibility in moving to a needs-based system, but warned that progressive improvement was required as resources improved, the need to protect the minimum levels and ensure the shift to a more privatised scheme of pensions was properly regulated and did not violate the right to social security. Indeed, the claim by the Court to protect human dignity rings rather hollow.

Three years later, the Court had an opportunity to test the strength of its resolve concerning its jurisprudence that the Government must ensure a minimum level of social security. In Decision 32/1998, the petitioning organisations challenged the adequacy of unemployment benefits in the Welfare Act, which were set at a minimum of 70 per cent of the old age pension, though total income, which included all benefits, must reach 80 per cent.[71] After repeating its findings in earlier cases, the Court suspended it proceedings so that a study could be undertaken to determine whether this 80 per cent threshold could 'secure the minimum livelihood necessary for the realisation of the right to human dignity in line with the constitutional requirement specified in the holdings'.

4.3 Housing Rights

In the last two decades, the challenge of providing adequate housing has come under serious pressure. Claude Cahn writes:

> [S]ince the collapse of Communism, Hungarian authorities have significantly eroded rights associated with the right to adequate housing and policies aimed at securing adequate housing for all. For example, Hungary already has among the lowest public housing stocks in Europe and as a result of diminishing resources, local authorities have since the early 1990s been selling off what public housing stocks do exist – a fact which national lawmakers have done nothing to check. At the same time, Hungarian lawmakers have knocked out previously existing protections against forced evictions; since 2000, the notary (an assistant to the mayor) may order eviction, against which no appeals are suspensive. Previously only a court could do so and the eviction could only be implemented following final ruling. Police must implement notary-ordered evictions within eight days. Although there is a requirement to re-house evicted furniture, there is no requirement to re-house evicted persons!

[69] See Sadurski, *Rights before Courts* (n. 1 above), pp. 182–3.

[70] The judgments of the Polish Tribunal, the apex court, are perhaps interesting in this respect. Their decision to strike down legislation which restricted the pension rights of persons with disabilities is quite justifiable on traditional human and social rights grounds. The Tribunal noted the objectionability of such deprivation being borne by a particular group, and that is directly conflicted with the obligation for 'even fuller implementation' of the right to social security. Decision K. 1/88, quoted in Sadurski. On the other hand, the Tribunal was loathe to go further and develop a more principled approach to retrogression and merely stated that this obligation for progressive improvement can generally only be viewed over a long period of time: it would take several consecutive laws to violate the right. But this obviously largely removes the subject from the realm of justiciability given the difficulty of such long-range litigation.

[71] Decision 32/1998 (VI.25) AB.

> These developments, combined with rising prices in Hungary, have resulted in new armies of homeless. The Hungarian Ministry of Social Affairs estimates the homeless population to be approximately 30,000. . . . There are clear indications that practices of forced evictions and related homelessness are disproportionately falling against Hungary's Romani community.[72]

The initial foray of the Court into the area of housing concerned competing rights over 'local government apartments' or 'social tenancies'. A 1991 Act had transferred ownership of 'state-owned residential apartments' to local municipalities and the Real Estate Act established the right of tenants to purchase their apartment within a period of five years whereby the price of the apartment was not to exceed 50 per cent of market value. This provision was challenged by local municipalities who alleged that it was an unconstitutional encumbrance on their property rights. Drawing on the principles in its earlier decision on the property of cooperatives,[73] and hewing somewhat closely the position of the European Court of Human Rights, the Court noted that restrictions on property rights could be justified in the public interest, and noted the public benefits of measures for 'town planning, land reform, rent control and security of tenure'. However, the interference with the right to property had to be proportional, meaning that it should not be of an unspecified duration, there should be equal treatment and compensation may need to accompany the relevant restriction.

One might imagine that the circumstances of the case would have led to a survival of the impugned Act. Local municipalities had been given the property without payment, the Government had originally indicated that there would be an encumbrance, and the tenants were more akin to owners. 'The tenants had often lived for most of their lives in the apartments, and, as in many other formerly socialist Eastern European countries, they could not be removed from the property, they were entitled to bequeath it and rents were significantly lower than the market rate'.[74] The Court, however, considered the measure 'grave', even if anticipated by legislation, finding that municipalities were burdened by an excessive period for the right to purchase (five years) and that the loss in market value of the property must be compensated for by the State. The Court left open the possibility that tenants could be required to pay the difference, although it noted that it is not 'required that the full amount of compensation shall be paid by the tenants entitled to purchase'. Nevertheless, the resulting compensation vouchers provided to local municipalities were below the market value and the Court in Decision 28/1991 refused to condemn it, noting that the municipalities must accept the burdens that come with freely given property. The controversies over the sale of such apartments continues though and Cahn notes that:

> Due to pressure on public housing stocks, increasingly bizarre responses to this crisis are reported, such as the adoption in some

[72] C. Cahn, 'Roma rights, racial discrimination and ESC rights', *Human Rights Tribune*, Vol. 11, No. 3 (2005), available at <http://www.hri.ca/tribune/onlineissue/V11–3-2005/Roma_Rights.html>. See also the European Commission against Racism and Intolerance, *Third Report on Hungary* (Strasbourg: Council of Europe, 2004):

> As concerns housing, it seems that Roma are still disproportionately subject to forced evictions throughout Hungary. Since May of 2000, notaries of local governments are entitled to order the eviction of unlawful tenants, and any appeals launched against such orders are not suspensive. ECRI's attention has been drawn to the fact that this procedure has a particularly adverse impact upon Roma, as many of them are in a difficult social and economic situation. . . . Moreover, ECRI is very concerned at reports from several sources according to which illegal forced evictions of Roma families have been taking place, sometimes followed by immediate demolition of houses. It is also worrying to learn that in some cases when Roma wish to settle in a neighbourhood or village, they encounter fierce resistance from local authorities, often under the pressure of the local population. . . .
>
> A more general problem which affects the situation of Roma is the lack of housing allocated on a social basis in Hungary. ECRI understands that public housing is a matter for local authorities and it seems that there is an urgent need for a comprehensive national policy in social housing. ECRI is pleased to learn that the government has launched programmes to raise the number of social housing in Hungary.
>
> Roma in Hungary are in some cases confined to segregated settlements which lack the basic amenities for a decent life, with serious consequences for their health and their capacity to improve their situation in other areas.

[73] Decision 21/1990 (X. 4).

[74] See Gero, *The Role of the Hungarian Constitutional Court* (n. 3 above), p. 5.

> municipalities of auctioning off social housing to the highest bidder, to name only one example. In early 2005, the Hungarian Constitutional Court declared a number of local practices in this area unconstitutional and a review of all related local practices has been ordered, as yet without significant impact.[75]

The Court was perhaps more lenient to home owners when it could construe housing rights as property rights.[76] In its first case concerning subsidised mortgage interest rates, the Court was prepared to allow an increase in the effective interest rate from 3 to 15 per cent in light of the country's financial crisis.[77] This provided an 'exceptional circumstance' for the interference with a private contract. However, when this figure was pushed up to 25 per cent in the 1995 social reforms package, the Court baulked at this rise.[78] The Court firstly noted that the economic circumstances of the country had much improved since 1991. Some commentators criticised the Court for simply basing its judgment on the rate of inflation,[79] while Sajó notes that the interest service burden had effectively doubled due to the increase in inflation from (an admittedly low rate in) 1993 to 1995. Secondly, the Court found that the new measure was discriminatory because of the nature of the earlier 1991 reforms. These reforms had presented mortgage payers with two options: pay half of the loan immediately or submit to the new rate of 15 per cent. Those who accepted the former option were not subject to the new rate increase, while the latter group could not have reasonably expected that the rate would not change to their disadvantage.

In Decision 42/2000, the Court was directly confronted with the question of whether the right to housing, or the 'right to have a shelter', was a constitutional right. The petitioners in the case, the Ombudsmen for Civil Rights and the Ombudsmen for the Rights of National and Ethnic Minorities, argued that it formed an independent right within the broader right to social security in article 70/E and other constitutional provisions concerning protection for the family, young persons and persons in need (articles 15–17). They also asked the Court to rule on the ensuing State obligations and whether there was an unconstitutional omission by the State to legislate, on account of its failure to create an adequate regulatory and institutional system to ensure sufficient access to housing. In particular they pointed to the asymmetric legislative design of housing programmes: local municipalities were tasked with managing social housing, for example, but resources were not evenly or adequately distributed to them.

In response, the Court dismissed the claim concerning the existence of a right to housing in the Constitution. After reciting its earlier jurisprudence on the right to social security, that the State need only organise and operate a system of social security and benefits, the Court affirmed its earlier judgment that '[i]t does not follow from this provision of the Constitution that citizens would have a subjective right to state support in acquiring a flat, nor is the State obliged to secure a specific form and system of support for housing'.[80] The Court also baulked at establishing what it called 'partial rights', noting the dangers of adding 'more and more new elements of social benefits as constitutional rights'.[81] It was particularly concerned that it might reduce the liberty of the legislature to define the tools in guaranteeing social security and might violate the principle that social benefits can only be realised in accordance with 'the capacity of the national economy', since the State would be compelled to 'secure certain forms of support on a constant basis'.

The Court did affirm though, in particularly strong language, the importance of securing the minimum level of the right to social security that would guarantee human dignity. Over the objections of two judges, it opined that, in the case of homelessness, 'the State obligation to provide support shall include the provision of shelter when an emergency situation directly threatens human life'.[82] The Court quickly qualified this statement

[75] Cahn, 'Roma rights, racial discrimination and ESC rights' (n. 72 above).
[76] Indeed, in its decision on social tenancies, the Court again gave property rights a social flavour holding that the justification for protection of the right to property stemmed from its 'capacity as the traditional means of securing an economic basis for the autonomy of individual action'. This gave the Court the power to imbue other forms of social entitlements with the character of property rights. See Decision 21/1990 (X. 4), para. 1.
[77] Ibid. p. 8.
[78] Decision 66/1995 (XI. 24), ABH, 1995, 333.
[79] See Gero, *The Role of the Hungarian Constitutional Court* (n. 3 above), p. 17, f. 48.
[80] ABH 1995, 801, 803, in Decision 42/2000, Part IV.
[81] Decision 42/2000, Part V, para. 2.
[82] Ibid. Part IV.

nonetheless by noting that this was an 'extreme situation'. The Court then moved to reject the second demand of the petitioners, that there was an unconstitutional omission to legislate, seemingly on the basis that the right to housing was not a constitutional character. However, the Court briefly examined whether the current legislative framework met the general demands of article 70/E and articles 15–17. After examining the Social and Administration and Social Benefits Act and the Protection of Children and Administration of Guardianship Act, which include provision for homeless persons, social housing and some housing support for children and families, the Court simply exhorted the Government to 'endeavour to increase the level of support and to expand the scope of social benefits in line with the capacity of society' or what it also referred to as the 'prevailing capabilities of the economy'.

The decision exhibits the same problematic features of earlier decisions discussed above, and has been much criticised, even by those who lamented the Court's earlier social activism.[83] The Court shies from delving into international jurisprudence to determine the content of social right. While the Court adds a 'coda' to its decision, listing the relevant international covenants, it fails to note that an independent right to housing has been repeatedly recognised at the international level in legal treaties and declarations,[84] and derived by from meta-rights such as the right to an adequate standard of living. A 1987 UN General Assembly resolution states:

> The General Assembly reiterates the need to take, at the national and international levels, measures to promote the right of all persons to an adequate standard of living for themselves and their families, including adequate housing; and calls upon all States and international organisations concerned to pay special attention to the realization of the right to adequate housing . . .[85]

The UN Committee on Economic, Social and Cultural Rights has similarly derived the right to housing, water and food, from the right to an adequate standard of living and indicated the limits for adding any additional rights,[86] thereby allaying fears about an ever-expanding list.

The Court also fails to develop a more robust jurisprudence for evaluating whether the Government is meetings its constitutional obligations, besides simply meeting the demand of the minimum level. The Court's traditional understanding of economic and social rights comes to the fore, and it even opens with a discussion of the difference between first- and second-generation rights, and the need to allow the State adequate discretion with social rights. It fails to look to the substantial comparative and international jurisprudence that has developed more sophisticated and flexible measures to determine whether the State is reasonably taking the appropriate steps towards the progressive realisation of the right. Yet even when the Court consider the minimum level, as in this case, it refrains from actually interrogating the Government's institutional response with any degree of rigour or authority, leaving it open to the charge that it is more concerned with the rights of the middle class, not of the poor.

[83] See Sajó, 'Social Rights as Middle-Class Entitlements in Hungary' (n. 21 above), p. 105 (fn. 47).

[84] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination (1965), United Nations General Assembly resolution 42/146, 'The Realization of the Right to Adequate Housing', adopted on 7 December 1987; UN Commission on Human Settlements, Resolution 16/7, 'The realization of the human right to adequate housing', adopted on 7 May 1997, Para. 4; UN Commission on Human Settlements, resolution 14/6, 'The Human Right to Adequate Housing', adopted on 5 May 1993; Vancouver Declaration on Human Settlements (1976), adopted by the UN Conference on Human Settlements in 1976, section iii(8). For further international standards, see COHRE, *Legal Resources for Housing Rights: International and national standards* (Geneva: COHRE, 2000), available at <http://www.cohre.org/view_page.php?page>.

[85] United Nations General Assembly resolution 42/146, 'The Realization of the Right to Adequate Housing', adopted on 7 December 1987.

[86] See Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), Committee on Economic, Social and Cultural Rights, *General Comment No. 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003). For a debate on the potential for additional rights, see Malcolm Langford, 'Ambition that overleaps itself? A Response to Stephen Tully's 'Critique' of the General Comment on the Right to Water', *Netherlands Quarterly of Human Rights*, Vol. 26, No. 3 (2006), pp. 433–459, and the following replies and responses.

A fourth cluster of housing cases concern the conditions imposed by local authorities on applicants for social housing, although in these cases the Court has so far ruled on the basis of administrative law principles and not constitutional rights. In Decision 47/1996, the Court struck down a decree issued by the city of Békés that required social housing applicants to pay a deposit with their application and to have worked or resided in the city for ten years. The Court found that the decree of the municipality had exceeded its constitutional competence by going beyond the bounds of housing legislation, imposing irrelevant and unreasonable conditions, particularly since the decree 'exclude[d] the unemployed from the circle of persons who can be taken into account on the basis of social need, together with contract workers and sole traders'.[87] In Decision 20/2000, the Court found that the Municipality of Ferencváros had similarly erred by stipulating conditions that had no bearing on applicant's 'social, income and financial' situation, as required by the Housing Act.

In subsequent actions brought by the European Roma Rights Centre (ERRC) and Foundation for Romani Civil Rights, six municipalities were challenged for imposing arbitrary conditions for social housing applicants. In its submissions, the ERRC likewise cited the municipality's lack of legal competence but also claimed the rules were retroactive, vague, indirectly discriminatory towards Roma and violated the minimum level of the right to social security since it would threaten Roma and others with homelessness. Evidence was submitted on the relationship between wider discriminatory attitudes and practices, the cuts in social housing and resulting adverse impact on Roma applicants. In Decision, 4/2005, the Court considered the particular claim against the Third District of Budapest, whose decree excluded applicants that had illegally occupied a dwelling in the previous five years, or were subject to court proceedings concerning the non-payment of rent or utility costs and so forth. However, after striking down the decree on the basis that it did not relate to the applicant's 'social, income and financial' situation, it declined to examine the wider claims, in particular that the decree violated the constitutional right to equal treatment.[88] Three of the cases against the remaining municipalities are pending[89] but the law was amended in 2006 to specify that municipal rules concerning the allocation of social housing must be social in nature.[90]

Lastly, it is worth pointing to an evictions case that, even though it was not argued on constitutional rights grounds, clearly evinces the preference of the Court for property over social rights.[91] The Hungarian Human Rights Information and Documentation Centre (INDOC) requested the Court answer the question as to whether the Protection of Children Act (which largely domesticated the Convention on the Rights of the Child) prevailed over legislation permitting notary-ordered evictions without appeal. In particular, INDOK raised the issue of children who would be automatically remanded into state care if their families were evicted and made homeless. The Court, however, ruled that the requirement to evict prevailed over the best interests of the child.

4.4 Education Rights

The right to education was considered, somewhat tangentially, in the context of a challenge to the restitution of church schools.[92] The petitioners partially attacked Act XXXIII/1991 on the Settlement of Ownership of Real Estate Formerly Owned by Churches on the basis that it did not guarantee a religiously neutral and non-ideological school in each locality. This result would lead to a violation of the constitutional right to 'freedom of thought, conscience and religion' and the principle of the separation of church and State as laid down in Article 60.

The Court commenced its decision by laying down general markers on the State's responsibilities in the field of religion. The principle of separation of

[87] Quoted in European Roma Rights Centre, Motion to the Constitutional Court.

[88] Decision 4/2005, Part III, para. 2.

[89] See ERRC, *Hungarian Constitutional Court Strikes Down Discriminatory Housing Decree: Ruling Reverses Local Rules Precluding Roma from Access to Social Housing*, available at <http://www.errc.org/cikk.php?cikk=2157>.

[90] Personal communication from Claude Cahn.

[91] I am indebted to Claude Cahn for pointing out this case to me.

[92] Decision 4/1993.

church and State required the State to be neutral – remaining unattached to any church, not taking a stance on religious issues and treating all churches equally and so on – but the right to freedom of conscience and religion – 'part of human quality'[93] – required additional negative and positive duties, even if they were at times contradictory. The State must not only prevent discrimination on the basis of religion but it must 'guarantee the conditions that are necessary for the freedom of religion to prevail'.[94] Likewise the State must protect and facilitate the broader right to freedom of conscience. In the event of conflict, a compromise must be found.

In the specific context of education, the Court noted that legislation implementing article 60 of the Constitution permitted parents or guardians the right to decide on a child's moral and religious education, while article 60/F requires the State to provide 'free and compulsory' primary education, as part of the wider right to education. Applying the earlier enunciated principles, the Court held that the State must not only ensure that public schools are neutral with respect to religion but must ensure that they are available in order to enable those attending to make a 'free and well-founded' choice about matters of conviction and conscience. At the same time, the State must provide sufficient, but necessarily full support, to those parents who wished their child to have a religious education in a 'committed' school.

These two doctrines resulted in a potential clash in the context of church property restitution. Local authorities could be deprived of their institutional capacity to provide neutral schooling. The Court refused however to impugn the legislation on this basis since it specified that its provisions were not to infringe upon the responsibilities of local authorities and local authorities had the right to receive a substitute piece of land from the central Government. The inevitable question was whether the new neutral school would be an adequate substitute – issues of distance and quality come to mind. The Court indicated that attendance at a neutral school should not represent an 'undue burden' for those choosing this option but noted that resolution of this issue was best left to the merits of a particular case. Although it did note that the local government was under an obligation to provide neutral schooling 'even if the number of children is low'.[95]

5. CONCLUDING REMARKS

The Hungarian Constitutional Court has been characterised as an activist court – 'the most powerful high court in the world' – both in its treatment of civil and political rights and economic, social and cultural rights,[96] though its 'activism' has clearly faded with the government's appointment of new, mostly sympathetic, judges in 1998 and a reportedly increased centralisation of power in the Office of the Prime Minister.[97] Its willingness to intervene to protect pensioners, families, students and mortgagees amongst others from the harsher aspects of social reforms in the 1990s is indicative. Despite the criticism of some commentators that the Court was engaged in 'socialism redivivus', there is some justification for the Court's intervention, particularly as unnecessary short-term harm would be caused due to the legitimate expectations that had been created by the existence of various social programs. It is also questionable whether Hungary needed to be the World Bank 'pilot project' for the region.

A closer look at the jurisprudence reveals though a much more complex picture and one that is representative of the region.[98] Sadurski accurately

[93] Ibid. Part I, para 1(a).
[94] Ibid. Part I, para 2(b).
[95] Ibid., Part I, para. 2(c).
[96] A. Örkény and K. Lane Scheppele, 'Rule of Law: The Complexity of Legality in Hungary', in M. Krygier and A. Czarnota (eds.), *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Aldershot: Ashgate, 1999), pp. 55–77 at 59, quoted in M. Kinander, 'The accountability function of courts in Eastern central Europe: The case of Hungary and Poland' (on file with author).
[97] See Scheppelle, 'Democracy by Judiciary' (n. 50 above), p. 53.
[98] G. Halmai also notes that this 'activism' should also be seen in the context of the Court' limited jurisdiction, it's very limited power to review and annul court decisions and consider concrete cases: 'The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian constitutional Court' in Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International, 2002), p. 209.

summarises the approach of the Court's in the region when he says:

> [I]t is significant that, when constitutional courts in the regions have had a choice between striking down a law under a general constitutional clause such as 'social justice' or 'equality' on the one hand, or under a specific social welfare right on the other, they have usually opted for the former solution. This is a symptom of a certain malaise over the direct enforcement of socio-economic rights.[99]

This preference for the use of property rights could be characterised as a form of 'market redivivus', where the Court was only prepared to protect social interests when a market rationale could be found. But the result is that the judicial social protection favours only those with strong market interests, and Andras Sajó is correct to question whether the Court has failed to give impetus to transformative welfare policies that would protect the poor.

Understanding the Court's approach is difficult. The motivation, on one hand, may be pragmatic. Civil and property rights permitted a safe way of out of the conflicting social demands of the populace and the principle of judicial restraint.[100] But it is arguable that the interpretive method is indicative of a deeper misunderstanding or even distrust of social rights themselves. This is apparent in the use of comparative jurisprudence by the Court, with a strong preference for the seminal developments in German constitutional jurisprudence of the 1970s. One possible explanation for this preference for property rights, making social rights a mere derivative of other rights, is the nature of the Hungarian transition in 1989. While social rights were part of the democratic revolutions in Latin America and South Africa, and Courts have been increasingly open to applying them judicially, the reverse was perhaps the case in Hungary's transition to democracy. Protecting social rights was a defensive gesture (ensuring that the population didn't nostalgically long for the past) as opposed to a key demand amongst the reformists.

While Sadurski suggests that the fault might lie in the social rights themselves, and that it may be preferable and logically consistent to reshape the constitutional framework and place social rights in the 'category of constitutional "targets"', the opposite conclusion should be drawn in the case of Hungary. The Court should move away from its interpretation of social rights as essentially constituting targets and instead embrace a model of reasonableness review for all the dimensions of social rights, as is increasingly being adopted by both common law and civil law countries.[101] This would require the State to justify the absence of social policy and programmes to protect the social rights of individuals and groups whose human dignity has been demeaned by their social conditions. While the result is that sometimes the right becomes simply a 'right to have a reasonable policy', a situation which Sadurski dismisses as outside the framework of human rights, the use of such an approach in practice can lead to concrete judgments and influence in the lives of individuals in both the short and long run.[102]

[99] Sadurski, *Rights Before Courts* (n. 1 above), pp. 184–5.
[100] Ibid. p. 191.

[101] See chapter 1 of this book.
[102] See S. Liebenberg, 'Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review' in J. Squires, M. Langford and B. Thiele (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre, The University of New South Wales with Centre on Housing Rights and Eviction, Distributed by UNSW Press, 2005), pp. 73–88.