

From Uneasy Compromises to Democratic Partnership

The Prospects of Central European Constitutionalism

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Abstract

The Central European constitutional democracies were created by the political and constitutional transition of 1989. However, twenty years later, in the light of anti-democratic, authoritarian and intolerant tendencies, it is far from clear whether the negotiated revolution is a story of success or failure. This paper first outlines the constitutional background of revolutionary transition. It shows that the achieved structures and rules do not prevent political communities from realizing the full promise of democracy. Second, this analysis attempts to explore how the century-old historical circumstances, the social environment, and the commonly failed practice of constitutional institutions interact. This section focuses on the constitutional features of presidential aspirations, the privileges of churches and certain ethnic tensions. Finally, the paper argues that the chances of success of liberal democracies depend significantly on extraconstitutional factors. It seems that Hungary is in a more depressing and dangerous period of its history than for example Poland.

Keywords: Central Europe, parliamentarism, freedom of religion, Roma people, discrimination.

A. The Promise of Democracy

A quarter-century ago the Central European countries, the former Czechoslovakia, Hungary and Poland, were Communist regimes that could be characterized by a single-party system (Hungary) or a dominant-party system (Czechoslovakia and Poland) without the possibility of competitive elections. The common feature of these states, like any other Communist countries, was chronic shortage:¹ an economy of shortage instead of a market economy, a budget deficit instead of a balanced budget, and the lack of democratic institutions rather than a constitutional democracy. Although constitutions formally declared fundamental rights, these

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1 J. Kornai, *Economics of Shortage*, 1980 Amsterdam, New York, North-Holland.

were not legally enforceable. The constitutional structures of these states were not based upon the principles of separation of powers and the rule of law. Moreover, the states did not ensure the independence of the judiciary or the press. And, of course, non-governmental organizations were forced by the repressive regimes to work underground.

Today, the Central European countries, the so-called Visegrád Group,² belong to the class of constitutional democracies. This term refers to a set of political institutions and practices:³ notably, members of the legislature are selected through periodically held free elections. The vast majority of the nation's adult population has the right to vote regardless of race, gender or property ownership. The states' constitutions contain enforceable legal provisions rather than a collection of mere good wishes. The purpose of constitutions is seen as limiting the authority of state power. Each of these constitutions recognizes and protects judicial independence, freedom of the press and the right to establish civil associations. There are constitutional courts – or in Poland, a Tribunal – which safeguard the observance of constitutional regulations and strike down unconstitutional laws.⁴ Judicial protection of the constitution in all countries is closer to the centralized German model than to the diffuse US judicial review.

The historical turning point for the transformation from authoritarian regime to democracy was the autumn of 1989. Timothy Garton Ash described the events with the expression 'refolution', combining the terms for reform and revolution.⁵ Other authors label the developments as 'coordinated transition',⁶ or 'negotiated revolution'.⁷ Moreover, the dissolution of the federal state of Czechoslovakia and the establishment of the Czech Republic and the Slovak Republic, which took place in 1993, is often mentioned as 'Velvet Divorce', a reference to the term 'Velvet Revolution' that was used internationally to describe the 1989

2 The Visegrád Group consists of the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic. The name comes from the Northern Hungarian town of Visegrád, which hosted the royal summit of the Central European emperors in the fourteenth century. The group was established during a meeting of the President of Czechoslovakia, Václav Havel, the Prime Minister of Hungary, József Antall, and the President of Poland, Lech Wałęsa, which was held in Visegrád in 1991. The main reasons for the cooperation stem not only from the geographical closeness of these countries but also from their common interests in the future development of Central Europe within the EU and the transatlantic relations.

3 J. Kis, *Constitutional Democracy*, Budapest, New York, Central European University Press 2003, p. ix, xiv.

4 From a theoretical and critical point of view see W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*, Springer 2005. See also, H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago, London, University of Chicago Press 2000; R. Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*, Budapest, New York, Central European University Press 2002.

5 T. Garton Ash, 'Refolution, the Springtime of Two Nations', *The New York Review of Books*, 15 July 1989, Vol. 36, No. 10. T. Garton Ash, 'Revolution in Hungary and Poland', *The New York Review of Books*, 17 August 1989, Vol. 36, No. 13.

6 J. Kis, 'Between Reform and Revolution', *East European Politics and Society*, spring, 1998, p. 300-383.

7 R.L. Tókécs, *Hungary's Negotiated Revolution: Economic Reform, Social Change and Political Succession, 1957-1990*, Cambridge, Cambridge University Press 1996.

revolution⁸ (the Slovaks used the term ‘Gentle Revolution’). These classifications all express that the Central European single-party systems did not collapse due to a classical revolution, but through negotiations and compromises between the old regime and the democratic opposition. However, the political transition did result in revolutionary changes in the political and constitutional system and did so without a revolution as such.⁹

In his new evaluation, Ash presupposes that the peaceful, negotiated regime changes in Central Europe together with unification of Germany and disintegration of the Soviet Union established a new model of non-violent revolution. The ideal type of classical revolution is “violent, utopian, professedly class-based, and characterized by a progressive radicalization, culminating in terror”. “The 1989 ideal type, by contrast, is non-violent, anti-utopian, based not on a single class but on broad social coalitions, and characterized by the application of mass social pressure – ‘people power’ – to bring the current power holders to negotiate. It culminates not in terror but in compromise. If the totem of 1789-type revolution is the guillotine, then that of 1989 is the round table.”¹⁰

Without doubt, the negotiation was a process led not by the common interests of the parties, but by a clash of values and interests, in which both parties, the Communists and the Democratic movements, were compelled to make compromises. We can say that the demand to reach compromises is one of the underlying characteristics of peaceful transitions. A well-known example is that in the first Polish elections 65% of the parliamentary seats were secured by the Communists, and the position of President of the Republic was also shaped to suit their expectations. Due to the rapidly changing political environment, the Hungarian opposition was forced to make much smaller compromises. In order to incorporate those modern constitutional principles and rules into the Constitution that were strongly favoured by the opposition, it was impossible to exclude the representatives of the old regime from political power and economic advantages. Moreover, not only pragmatic motives but also principled reasons underlay the absence of mass revenges. That is to say the legal guarantees of the new constitutional democracies were extended to everyone, irrespective of which side they had taken. The Hungarian Constitutional Court called this ‘a revolution under the rule of law’.¹¹

8 But see the birth of the Czech Constitution from a critical point of view. P. Gumplova, ‘Democracy and the Politics in Extraordinary: The Constitutional Making in Czechoslovakia’, 1992, <www.newschool.edu/uploadedFiles/NSSR/Departments_and_Faculty/Political_Science/Recent_Placements/Gumplova-Democracy_Extraordinary.pdf>.

9 János Kis characterizes the coordinated transition as an interruption of legitimacy, but continuity of legality. Kis (1998), p. 317. See also, from the critical point of view of democratic theory, A. Arato, ‘Dilemmas Arising from the Power to Create Constitutions in Eastern Europe’, in M. Rosenfeld (Ed.), *Constitutionalism, Difference, Identity, and Legitimacy*, Durham, Duke University Press 1994, pp. 165-194.

10 T. Garton Ash, ‘Velvet Revolution: The Prospects’, *The New York Review of Books*, 3 December 2009, Vol. 56, No. 19.

11 Decision 11/1992. See L. Sólyom & G. Brunner (Eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, Ann Arbor The University of Michigan Press 2000, p. 214.

Consequently, the new democracies faced a double, seemingly paradoxical task: they had to explore the legal and moral difference between the old and the new regime, and make clear beyond doubt that they did not place the representatives of the old regime at a legal disadvantage unacceptable in a state under the rule of law. It is striking that after the transition the Central European countries faced the same legal and political questions, applied similar constitutional principles and rules, and operated identical procedures. Although the solutions were sometimes different, the procedures dealing with the Communist heritage were basically determined by Parliaments and Constitutional Courts reacting to each other's activity, occasionally fighting with each other. The most significant issues include the rehabilitation and compensation of the victims of the Communist regimes' punitive measures, the restitution of the unjustly nationalized properties, the use of retroactive sanctions of criminal justice, and the disclosure of the secret services' files.

In this respect the transition in Central Europe seems to be finished. The uneasy compromises with members of the *ancien régime* were an intrinsic, unavoidable part of the negotiated revolution. The non-violent but drastic change created political and legal institutions akin to those already existing in the established liberal democracies. In comparison with the speedy political transformation, the texts of the constitutions were changed progressively. In the aftermath of the Polish Round Table Agreement, the old constitution was amended in April 1989, and the first democratic parliament then reshaped the relations between the legislative and executive branches of the state ('Small Constitution'). The reformed constitution was finally replaced in 1997 by a completely new constitution for Poland. The constitution of Czechoslovakia was also amended several times between 1989 and 1992. The most important of these is the incorporation of the Charter of Fundamental Rights and Basic Freedoms in 1991. After the dissolution of the federal state, the Czech Republic and the Slovak Republic adopted a new constitution in 1992. However, the Fundamental Rights Charter remained a part of both constitutional systems. In the Czech Republic the separate document has the same legal rank as the constitution. In Slovakia the basic provisions of the Charter were integrated directly into the constitution. By contrast, Hungary is the only nation that did not adopt an entirely new constitution after the fall of Communism. Similar to the other countries in the region, the 1989-1990 amendments of the old text created the legal frameworks of the new constitutional democracy. Since the transition, the Constitution has been amended several times, including the modification that empowered Hungary to join the European Union.

Since the models of the reshaped Central European constitutions were international human rights instruments, as well as the more recent Western constitutions, they were written in the language of modern constitutionalism. As regards the constitutional principles, the institutional architecture and the language of the constitutional reasoning, each Central European country belongs to the community of modern liberal democracies. (This is why Ash calls the Central European revolutions non-utopian.)

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Nevertheless, I share the view that law in a constitutional democracy is an interpretive concept influencing the everyday life of the members of the political community, rather than a catalogue of rules.¹² Law and, especially constitutional law, is a practice of the political community. The Constitutional Court, other legal authorities (the Parliament, the President of the Republic, ordinary courts, ombudspersons etc.), petitioners and others are participants in that common practice. The way a constitutional court examines the text of a constitution depends on place and time. The justices possess culturally and historically predetermined pieces of knowledge and premises ('pre-judices').¹³ In the course of deciding cases these preconceptions enter into dialogue with the norms. Thus interpretation is embedded in the everyday life of the political community. On the one hand, it is so because the social environment provides the preconditions of interpretation; on the other, interpretation shapes communal practice.

In the following analysis I show, via Central European examples, how the century-old historical circumstances, the social environment, and the commonly failed practice of the constitutional institutions interact. The words of the Constitution are inseparable from the social context to which those words refer.

B. Universal Principles and Local Peculiarities

Universal values and principles are the foundations of constitutional democracies. Individual rights and political equality are worthy of being pursued worldwide. In the modern era, the constitutional institutions of democracy enjoy widespread acceptance. Since their peaceful transition, Central European countries have been ensuring liberty, equality and collective self-government much more than before. This means a transition from an authoritarian to a democratic regime, from dominance of communist ideology to a pluralistic society. However, universal values and principles conflict with particular interests, nationalist aspirations and theoretical conceptions of political realism. I focus here particularly on the constitutional issues of presidential ambitions, the privileges of churches and ethnic discrimination because these issues may represent well the common constitutional difficulties and prosperities of the Visegrád countries.

I. Presidential Ambitions

It is generally believed that a constitutional democracy may take various, equally reputable institutional forms. It may be a monarchy, such as Japan and Spain, or a republic like France. It may have a presidential (United States) or a parliamentary system (United Kingdom). It may be a federal (Germany) or a unitary state (South Africa). Nonetheless, some theorists argue that presidential systems have difficulties sustaining democratic practices. We might say that under a range of cultural and social conditions, a parliamentary regime is better than a presidential

12 Here I follow Dworkin's conception of law as integrity. R. Dworkin, *Law's Empire*, Hart Publishing, Oxford 1998, pp. 226, 410-413.

13 Here I refer to Gadamer's hermeneutic conception. H.-G. Gadamer, *Truth and Method*, Seabury Press, New York 1975.

one. Depending on political traditions and culture, the electoral system and the prerogatives of the other branches of the state, presidentialism might slip into authoritarianism.¹⁴

The new Central European democracies followed Western European solutions in establishing adapted parliamentary systems instead of importing a US presidential architecture.¹⁵ In this respect, the Hungarian Constitution copies the German Chancellor-led system with a weak president elected by the parliamentary representatives. The Czech and the Slovak Constitutions determine similarly that the Prime Minister heads the executive and the Cabinet is the supreme body of that branch.¹⁶ The Polish Constitution embodies, to some extent, a different system, whereby the popularly elected President and the Government jointly head the executive branch.

In spite of this, several scope-of-authority controversies reveal a characteristic uncertainty that occurs in Central European parliamentary systems. The President is frequently in political conflict with the Prime Minister. Formal power and actual power may differ: the President may expand his authority as 'the guardian of the Constitution'. Vindicating real power as the head of state and the depository of national sovereignty sometimes leads to theatrical struggles.¹⁷

In the early years of new democracies, serious conflicts emerged between presidents and prime ministers over appointment-related issues. The first President of Hungary disputed with the Prime Minister over the competences of the President as commander-in-chief of the armed forces. The Constitutional Court interpreted the president's power restrictively, defining that the constitution clearly provided a pure parliamentary system and the Government was the sole executive branch.¹⁸ When the Hungarian President refused to sign the dismissal of the chairman of National Television initiated by the Prime Minister, the Constitutional Court tailored the President's right of refusal to appoint extremely narrowly. According to its reasoning, the President of the Republic "stands outside the executive power" and "no construction may be derived from the Constitution according to which the Government and the President of the Republic jointly head the executive branch, making consensus-based decisions in a mutually limiting and counterbalancing manner".¹⁹ During a similar so-called media war, Polish President Walesa dismissed the chairman of the Committee for the Supervision over Radio and Television. The ombudsman challenged his decision. The Constitutional Tribunal ruled that the President could not dismiss the chairman, except for a judicially established violation of law.²⁰ The Slovak Prime Min-

14 S.M. Lipset & J.M. Lakin, *The Democratic Century*, University of Oklahoma Press 2004, pp. 38-48.

15 L. Garlicki, 'Democracy and International Influences', in G. Nolte (Ed.), *European and U.S. Constitutionalism*, Cambridge University Press, Cambridge 2005, p. 264.

16 Following a constitutional change in 1999, the Slovak president was no longer elected by the parliament, instead by popular vote. However the Slovak Republic didn't change to presidentialism.

17 N. Dorsen, M. Rosenfeld, A. Sajó, S. Baer, *Comparative Constitutionalism, Cases and Materials*, St. Paul, Thomson-West, 2003, p. 269.

18 Decision 48/1991. See Sólyom & Brunner (2000), p. 159.

19 Decision 36/1992. See Dorsen, Rosenfeld, Sajó, Baer (2003), p. 268.

20 Decision 7/1994. See Dorsen, Rosenfeld, Sajó, Baer (2003), p. 271.

ister Mečiar asked President Kováč to discharge the foreign minister. Kováč refused and asked the Constitutional Court whether he was required by the Constitution to obey the Prime Minister's request. The Court ruled in its highly criticized decision that the President was not obliged to comply with the Prime Minister's request only to consider it.²¹

In recent years 'chair wars' between prime ministers and presidents have been commonplace. The most decisive issues have been the following: who represents the country abroad and who represents the country's position in the European Union. In the past three years – following the short co-government of the Kaczyński twins²² – Polish President Lech Kaczyński and Prime Minister Donald Tusk engaged in endless contention over the competences. It seems that the Czech President, Vaclav Klaus also wants to represent the state's authority in several subject matters. It is noteworthy that the Czech and Polish Presidents were the last two obstacles standing in the way of the EU Lisbon Treaty. Kaczyński signed the reform treaty into law only after Poland had won a United Kingdom-style opt-out from the Charter of Fundamental Rights by a protocol to the treaty.²³ Klaus also insisted such a preference and demanded an exemption to prevent German families expelled after the Second World War from lodging property claims with the European Court of Justice. Eventually, EU leaders promised to amend the protocol so that it would apply to the Czech Republic, and subsequently the Czech Constitutional Court raised no objections, so Klaus also signed the treaty.²⁴

At the same time, it can be seen that these kinds of debate often result in correct conclusions. The Czech and the Polish Prime Ministers frequently refrain from any attempt to bypass the President, so as to avoid a constitutional crisis. In addition, these conflicts make it clear that in a parliamentary system it is the prime minister and the cabinet that define the state's position in EU and foreign-related matters. This means that the president could present the state's position at the international level only when authorized to do so by the prime minister and according to the cabinet and parliament's instructions. This solution comes from the text of the Czech and the Slovak Constitution, and, interestingly, Polish political and constitutional practice is moving toward this direction, too. (The Constitution of Poland does not contain this modification, because in 2009 the parties were not able to reach a consensus on this matter.)

However, it seems to me that Hungary is the only one country among the members of the Visegrád Group, which is moving in the opposite direction. László Sólyom, the President of the Republic did not intend to award the former Prime

21 Resolution 39/93 (2 June 2 1992). See Schwartz (2000), p. 202.

22 From July 2006 to November 2007 President Lech Kaczyński's identical twin brother, Jarosław Kaczyński served as Prime Minister.

23 Art. 1(1) of the protocol precludes both the domestic courts in Poland and the United Kingdom, and the EU courts from finding that "laws, regulations or administrative provisions, practices or action" in the countries to which it applies are inconsistent with the Charter. Art. 1(2) says that the Title IV of the Charter, which contains economic and social right does not create judicially enforceable rights.

24 The protocol Klaus requested has no direct connection with the claims of the expelled Germans.

Minister on the recommendation of the current head of the Government in 2007. Therefore the President filed a petition with the Constitutional Court seeking the abstract interpretation of the Constitution. In his opinion “the moral integrity of the Head of State may be jeopardized if he is not given true discretionary powers in making a decision under his powers following from the Constitution”. The President was convinced that his decision on recommendation for an award was a purely moral issue and represents solely a value judgment. Thus, the President might assert the constitutional values in accordance with his own moral integrity. In its decision the Constitutional Court ruled: “the President of the Republic has actual discretionary powers in conferring orders and awards... In case of a recommendation for an award that violates the constitutional values of the Republic of Hungary, it is the right of the President not to sign the recommendation, refusing to confer the award. Therefore, the refusal to confer an award... protects in this case the constitutional values of the Republic of Hungary.”²⁵

As a result of the decision the President refused to confer the award on the former Prime Minister because the latter had not changed his views on the 1956 revolution, in which he had fought against the rebels. Simultaneously the President was about to widen his competencies. The head of the state began to represent an alternative government program: he launched his own foreign policy, engaged in conflicts with neighbouring countries, and strongly criticized the Government’s economic policy. Last year the President *de facto* jeopardized the legislature by persistently returning Acts to Parliament for reconsideration and proposing preliminary norm control at the Constitutional Court. Currently, such authoritarian aspirations enjoy remarkable popularity in Hungary. It is widely believed that a strong statesman can be a better lawmaker than the disgraceful Parliament, and this national leader should be the guardian of the Constitution instead of the unfamiliar Constitutional Court.²⁶

Of course, this brief survey of the features of parliamentary systems and authoritarian aspirations in Central Europe is by no means exhaustive. Moreover, executive-legislative relations are more complex than a simple choice between a presidential and a parliamentary system.²⁷ Two conclusions, however, seem clear. First, when president and prime minister jointly head the executive branch, their decision-making in a mutually limiting and counterbalancing manner might jeopardize the functioning government.²⁸ Second, when a populist leader gains concentrated power, this might endanger the values and principles of constitutional democracy and tend to authoritarianism. In spite of the achievements of the first democratically elected, charismatic presidents, such as Havel and Wałęsa, dignified heads of the state with effective power may imperil democracy. Just like the

25 Decision 47/2007.

26 President Sólyom also had conflicts with the subsequent government. This is why he was not re-elected by the new parliamentary majority. The current prime minister has the ambition to be ‘the leader of the nation’. It seems likely that the Constitution will be reshaped soon in accordance with these anti-parliamentarian aspirations.

27 M.S. Shugart, ‘Of Presidents and Parliaments’, *East European Constitutional Review*, Vol. 2, No. 1, p. 30.

28 This is also the case in Romania and Ukraine.

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lessons learnt from the region's earlier history, these recent examples also illustrate that under Central European societal circumstances a parliamentary regime could be better than a presidential one.

II. Church Privileges

The future of the European political communities depends to a great extent on their ability to cope with religious challenges. Simply put, one of the two difficulties is to find the proper place for Christian values within secularized constitutional democracies. Some strongly warn about the growing influence of religious fundamentalism and suggest an exclusion of the non-secular considerations from the public discourse.²⁹ The other challenge Europe is facing now is how to effectively ensure equal rights and social cohesion for Muslim communities and individuals. As a result of terror attacks in some metropolises and the long-standing economic crisis, a worrying anti-Muslim trend has been developing in Western European countries.

Since the number of Muslims is much lower in Central Europe than in the West, the issue of the Christian values and a secular state plays a greater role in the constitutional jurisprudence of the Visegrád countries. Examining closely only the text of the constitutions, we may assume that with the exception of Poland, the various religious organizations have equal status and people with different beliefs or conscience are treated as equals. Below, I demonstrate that the way judges apply the constitution does not depend on the text but rather on culturally and historically predetermined premises. In spite of the textual differences, the Hungarian and the Polish constitutional case law is similarly pro-Church and in some ways intolerant.

According to Wojciech Sadurski, the Polish Constitutional Tribunal is "the author of surely the most outrageously partisan and illiberal decisions of any constitutional court in the region".³⁰ The most infamous example is the 1997 decision concerning abortion. The Tribunal – by striking down a pro-choice statute – reintroduced a quasi-absolute ban on the abortion issue. With this craven decision the Tribunal surrendered to the Church.³¹ It is noteworthy that the 'Small Constitution' did not specifically include a right to life. The abortion ban and the rights of foetuses therefore were deduced from the abstract constitutional declaration that Poland is a democratic state under the rule of law.

The 1997 constitution seemingly advanced the interests of the Catholic Church. The preamble refers to a "culture rooted in the Christian heritage of the Nation". In Article 18, marriage, as the union of a man and a woman, is granted

29 See for example the dispute between A. Sajó and L. Zucca on the growing claims of religions and the position of the secular state. A. Sajó, 'Preliminaries to a Concept of Constitutional Secularism', *International Journal of Constitutional Law*, Vol. 6, No. 3-4, pp. 605-629. L. Zucca, 'The Crisis of the Secular State – A Reply to Professor Sajó', *International Journal of Constitutional Law*, Vol. 7, No. 3, pp. 494-514. A. Sajó, 'The Crisis That Was Not There: Notes on a Reply', *International Journal of Constitutional Law*, Vol. 7, No. 3, pp. 515-528.

30 See W. Sadurski's Book Review on H. Schwarz's *The Struggle for Constitutional Justice in Post-Communist Europe*. *International Journal of Constitutional Law*, Vol. 1, No. 1 (2003), p. 162.

31 Schwartz (2000), p. 69.

the protection of the state. According to Article 25, the relations between Poland and the Catholic Church shall be determined by international treaty concluded with the Holy See. Under Article 53, religious education and religious upbringing are protected. However, according to the preamble, “we the people” are “[b]oth those who believe in God as the source of truth, justice, good and beauty, [a]s well as those not sharing such faith but respecting those universal values as arising from other sources”. The preamble also declares that believers and non-believers are “equal in rights”. Article 53 guarantees freedom of conscience to everyone. Article 25 provides further protection, that public officials “shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life”. What is more, the relationship between the state and the churches shall be based not only “on the principle of cooperation”, but also “on the principle of respect for their autonomy and the mutual independence of each in its own sphere”. Thus, despite the reference to God and conventional morality, the constitution has not created a Catholic Poland as an alternative to a secular state.

Considering only the text of the constitution, Hungary can be classified as an ideal example of the secular constitutional democracy. The Free Exercise Clause reads: “In the Republic of Hungary everybody has the right to freedom of thought, conscience and religion.” According to the Separation Principle “the church shall operate in separation from the state”. In contrast to the Polish constitution, this text does not refer to the Christian heritage or a treaty with the Holy See. Instead of state-church cooperation, it asserts only a strong separation principle.³²

Despite these different constitutional guarantees, however, the Hungarian Constitutional Court often follows the ideas of historical churches by its conventionalist interpretation.³³ Although the abortion case struck down the quite liberal decree only on formal grounds (basic rights shall be regulated by an Act of Parliament), the reasoning emphasized that the legislature might extend the right to life and dignity to the foetus. In such a case, the abortion would be possible only if it was required to save the mother’s life. “The nature of such an extension (...) is comparable only to the abolition of slavery, but it surpasses even that event in significance.”³⁴

In the Hungarian case law not only is homosexual marriage declared to be contrary to the Constitution, but the Court also hindered the introduction of the registered partnership of homosexual as well as heterosexual couples. Mainly historical churches objected the 2008 Act on Registered Partnership. The judgment

32 Moreover, the historical circumstances are also different. While a great many people in the Polish Church made enormous contributions to the victory of democracy in Poland, the Hungarian churches remained inactive during the transition. See, for example, A. Michnik, ‘The Clean Conscience Trap’, *East European Constitutional Review*, Vol. 7, No. 2, pp. 67-74.

33 For a detailed analysis of the following case-list see G.A. Tóth, ‘Unequal Protection: Historical Churches and Roma People in the Hungarian Constitutional Jurisprudence’, *Acta Juridica Hungarica*, Vol. 51, No. 2 (2010), pp. 122-135.

34 It was not the Constitutional Court but the Parliament that reintroduced a quite pro-choice regulation. For the Decision 64/1991 see Sólyom & Brunner (2000) p. 178.

that accepted the churches' conventional approach was passed before the given statute had come into force.³⁵

According to the Court, "treating the churches equally does not exclude taking the actual social roles of the individual churches into account". The judgment on church status explicitly provided preferential treatment for historical churches vis-à-vis other religious communities.³⁶ Based upon this consideration, the Court found a decree on army chaplain service providing for the free exercise of religion and spiritual care only for members of the four historical churches (Catholic, Calvinist, Lutheran, Jewish) to be constitutional.³⁷

Numerous cases ended with an exceptionally favourable financial outcome for historical churches. The Court declared it constitutional that churches are exempted from the general statutory ban on acquiring soil. Since 1997, 'positive discrimination' has to be secured for church-run schools as compared with public education institutions run by foundations or associations. According to this decision, only church-run schools have the right to the auxiliary subsidy above the normative state allowance. In 2007 this preferential financial treatment was extended to the social and welfare activities of the churches, in contrast to those humanist institutions that are not affiliated with churches. In 2008 the judges, by referring to the Treaty concluded between the Republic of Hungary and the Holy See, demanded that Catholic schools and public education institutions run by the state or municipalities be financed to exactly the same degree.

The above-mentioned cases illustrate that the interpretative practice of state-church cooperation strengthened the old privileges of historical churches. Moreover, by using the concept in the wrong way, the exceptional treatment falls within the ambit of constitutionally justifiable preferential treatment. From the

35 Decision 154/2008. In terms of heterosexuals the judges found it unacceptable that the statute did not separate adequately the status of registered partnership from the institution of marriage. As for homosexual couples, the judgment implicitly established the category of *separate and unequal*. Even though the decision theoretically acknowledged that the registered partnership of homosexuals is not unconstitutional, it did not uphold the reviewed regulation. Apart from the fact that homosexual couples may not get married, when it comes to regulating their registered partnership "the differences flowing from the nature" of such relationships and marriage must be maintained. This means that in Hungarian constitutional practice the reasons for equal treatment must be shown, not that there is a compelling interest in unequal treatment. After the ruling the Parliament passed a restricted version of the Act on Registered Partnership. As a result registered same-sex partnership has become a legal option in Hungary. The Court upheld it in its Decision 32/2010.

36 In the Czech Republic a 2002 Act created a two-tiered system of registration for religious organizations. To register at the first tier, a church must have at least 300 adult members residing in the country. In order to register at the second tier, the church must have existed for at least 10 years and must have a membership equal at least 0.1% of the population. Second-tier registration entitles the church to a share of state funding as well as allowing the clergies to perform an officially recognized marriage ceremony and serve as an army-chaplain. Muslims have not been granted these privileges. See P. Pajas, 'The Impact of the New Czech Law on Churches', *The International Journal of Non-for-Profit Law*, Vol. 6, Issue 1. <www.icnl.org/knowledge/ijnl/vol6iss1/special_6.htm>.

37 According to Kis, this judgment would hardly survive the test either of the separation principle or that of the religious neutrality of the state and of the abolition of religious discrimination. Kis (2003), p. 282.

perspective of constitutional interpretation, the judges accepted the premise that historical churches have notable social weight, and that they have an outstanding role in the field of spiritual care, and also socially and culturally. At the same time, through their decisions they influenced communal practice in such a way that historical churches were granted exceptionally favourable conditions for their spiritual and other activities. This type of traditionalism supports maintaining tradition even if it violates the principle of equality.

III. Ethnic Discrimination

One of the most difficult issues of constitutional theory and practice concerns the equal protection of ethnic minorities. Political and constitutional debates regarding the rights of old and new minorities are a familiar feature of Western democracies. Old minorities are long settled within a particular territory and not those people but the state borders have moved. Conversely, new minorities, who face a more unfavourable social and legal environment, are immigrants, asylum seekers and guest workers.

The countries of Visegrád Group are not the preferred destinations of immigrants. However, a number of conflicts involving old minorities have emerged in the last two decades. Although ethnic violence did not undermine the transition to a constitutional democracy, nationalist tendencies and ethnic exclusions cause serious tensions among the population. In place of a comprehensive examination I describe just the tip of the iceberg.

More than ten million Roma people live in the European Union. No ethnic group in Europe suffers more social exclusion, worse discrimination and greater poverty. Roma are divided into a number of distinct populations; the largest and still growing part of them live in Central and Eastern Europe. By 2030, 16% of Slovakia's under-eighteens will be Roma, according to a study by the Open Society Foundation Bratislava. The European Commission estimates that by 2040, 40% of the new entrants into Hungary's labour market will be Roma. The political and social conditions for Roma are worsening in Central Europe: the past years have seen an expansion in racist attacks of families, with homes set on fire as well as forced evictions and the building of walls around settlements.

However, for the most part, national authorities have felt little compulsion to help this most marginalized group. What is more, the new Hungarian Government – copying the Italian administration – proclaimed Roma to have become a national law and order problem. As a consequence, they are the target not only of increasing public hostility but also of special police measures and discriminatory criminal sanctions. In some countries, policies even add to discrimination and segregation: despite decades of calls for change, Roma children are still being segregated in schools and often placed in 'special schools' with sub-standard education.

Direct or indirect discrimination against ethnic minorities is evidently a constitutional issue. The Constitutions of the Central European countries ensure the fundamental rights for all persons on their territory without discrimination on the basis of race, colour, national or social origins. In accordance with this, national statutory laws prohibit discrimination in such areas as employment,

housing, voting rights, education, and access to public facilities. Furthermore, all Constitutions explicitly protect ethnic minorities. (Besides the antidiscrimination principle, the Hungarian Constitution also provides for the principle of preferential treatment.) It is a common feature of the basic texts that the equality principle derives from the constitutional value of human dignity. The Hungarian Constitutional Court echoed the Dworkinian conception:

The prohibition of discrimination means all people must be treated as equal (as persons with equal dignity) by law – i.e., the fundamental right to human dignity may not be impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests.³⁸

Constitutions contain principles and general rules of institutions and human rights. Of course, Roma as an ethnic group cannot be seen in the text. But the question arises whether the courts or other authorities can apply the constitutions independently from the historical background and the community practice. Could the courts fulfil their task by examining nothing but the text and an individual complaint? According to some Constitutional Courts, the answer is yes. In the light of the leading case of the European Court of Human Rights, the answer is no.

In the case of *D.H. and Others v. the Czech Republic*³⁹ eighteen Czech nationals of Roma origin alleged that, as a result of their ethnic origin, they were assigned to special primary schools for children with learning difficulties. They argued that the placement in special schools amounted to a general practice that had resulted in segregation and racial discrimination through the coexistence of two educational systems, namely special schools for the Roma and ordinary schools for the majority of the population. Previously the Czech Constitutional Court dismissed the applicants' appeal partly on the ground that "there was nothing in the material before it to show that the relevant statutory provisions had been interpreted or applied unconstitutionally" and partly on the ground that it was not the Constitutional Court's role "to assess the overall social context".⁴⁰

In contrast, the Grand Chamber of European Court of Human Rights examined the empirical basis for and the historical background of the segregated school-system. It observed, for example, that the European Commission against Racism and Intolerance had noted that the channelling of Roma children into special schools for the mentally retarded was reportedly often 'quasi-automatic'. According to data collected from several independent bodies more than half of all Roma children in the Czech Republic – and specifically in the hometown of the applicants – attended special schools.⁴¹ This evidence proved to be sufficiently

38 Decision 9/1990. See Sólyom & Brunner (2000), p. 111.

39 *D.H. and Others v. the Czech Republic*, Judgment of 13 November 2007.

40 Decision I. US 297/99.

41 In 1999, 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. See *D.H. and Others v. the Czech Republic*, para 190.

reliable and significant to give rise to a strong presumption of indirect discrimination. In these circumstances the Court was not satisfied that the difference in treatment between Roma and non-Roma children was objectively and reasonably justified. As a consequence the Court held that the applicants as members of that community had necessarily suffered the same discriminatory treatment.⁴²

In the case of *D.H. and Others v. the Czech Republic* the Court graciously noted that the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children and, unlike some countries, it has sought to tackle the problem.⁴³ The jurisdiction of the Czech Constitutional Court is certainly not exceptional.⁴⁴ It is well known that in Hungary many hundred thousands of Roma face social difficulties, prejudice and segregation.⁴⁵ However, if one wants to be informed by the constitutional case law, it is easy to overlook the fact that a part of the citizens is Roma.⁴⁶ This is so since the Hungarian Constitutional Court has not openly addressed the problems affecting Roma. From the first decade of constitutional review, it can be reconstructed from one of the decisions regarding compensation that, during the Second World War, similar to Jews, Roma were also deported. Apart from this, the court never referred to the Roma in an explicit manner. Here are some examples of the case law: the judges upheld a local government decree declaring those Roma people who do not fit into the life of the community *persona non grata*; they concluded that it was not unconstitutional that Hungarian law did not demand equal treatment from private organizations acting in the public sphere; they did not deal with the unfair treatment of Roma squatters, in spite of the joint motion of the Parliamentary Ombudspersons for Civil Rights and for the Rights of National and Ethnic Minorities; they refrained from reflecting social reality when examining the anti-Roma local governmental resolutions revoking social allowances; they referred to US governmental abuses rather than Hungarian (or Czech or Slovak) malpractice in

42 Previously a Chamber of the Court composed of seven judges held that there had been no violation of the Convention. M. Goodwin, 'D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe', *German Law Journal*, Vol. 7, No. 4, pp. 421-431.

43 But see J. Siklova & M. Mikusakova, 'Denying Citizenship to the Czech Roma', *East European Constitutional Review*, Vol. 7, No. 2, pp. 58-64.

44 See also the case of *Oršuš and Others v. Croatia*, Judgment of 16 March 2010, which upheld the precedent of the *D.H. and Others v. the Czech Republic*. The Constitutional Court of Croatia had dismissed the applicants' constitutional complaint on similar grounds as the Czech court. Subsequently the Government of the Slovak (!) Republic intervened as a third party in the European Court of Human Rights' proceedings. It referred to the margin of appreciation afforded to the states in the sphere of education and stressed that the states should not be prohibited from setting up separate classes at different types of school for children with difficulties, or from implementing special educational programs to respond to special needs.

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

46 For detailed analysis of the following case-list see G.A. Tóth (2010), pp. 122-135.

connection with coercive sterilization.⁴⁷ In sum, the taboo in Roma cases has not been broken yet. For two decades the problems relating to the exclusion and discrimination of Roma have remained hidden.⁴⁸

Due to lack of space, I cannot deal with other constitutional aspects of Central European ethnic tensions. In general, the stronger a nation-building policy is, the more the Roma people suffer from discrimination. For example, the current legislative and governmental measures driven by nationalism in Hungary and Slovakia sometimes go hand-in-hand with anti-Roma actions. Recently the Hungarian parliamentary majority has reshaped the citizenship law, which represents an old-fashioned nation-state policy based upon language, culture and ethnicity rather than equality of all citizens, regardless of ethnicity.⁴⁹

While, on the one hand, Central European Constitutions affirm the principle of non-discrimination and contain specific clauses for minority protection, on the other hand, the constitutional culture tends to provide room only for those who belong to the ethnic majority.

C. Conclusions

For two decades the Central European countries have been part of the group of constitutional democracies. In spite of uneasy political compromises, the coordinated transition resulted in revolutionary outcomes. Since international human rights instruments and Western constitutions influenced the texts of the constitutions, the reshaped constitutional systems do not hinder political communities from realizing the full promise of democracy. In this respect the transition is unquestionably a success.

From Poland to Hungary, every Visegrád country established its own parliamentary system. They created judicial institutions, in the form of constitutional

47 Decision 43/2005. In reality, like in the Slovak and Czech cases, Hungarian Roma women are among the victims. For example, the Committee on the Elimination of Discrimination against Woman held that the state had violated a Roma woman's fundamental rights by performing the sterilization surgery without obtaining her informed consent. (CEDAW/C/36/D/4/2004.) A 2005 report by the Czech ombudsman identified dozens of cases of coercive sterilization between 1979 and 2001. See also, 'Body and Soul, Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia' (Center for Reproductive Rights, 2003).

48 Kriszta Kovács shows that the Hungarian Constitutional Court has never declared unconstitutionality based upon suspect classification. It found, for example, that the victims of gender-based discrimination are mostly men. K. Kovács, 'Think Positive, Preferential Treatment in Hungary', *Fundamentum, Human Rights Quarterly*, 5 (2008), pp. 46, 48.

49 Hungary passed a law this year granting dual citizenship to Hungarians living abroad. Citizenship will be awarded to those who can prove their knowledge of the Hungarian language and claim Hungarian ancestry. The new bill has inflamed tensions with Slovakia, home of 500,000 ethnic Hungarians who comprise more than 10% of the country's population. The Slovak Parliament immediately passed a law in order to pose an obstacle the dual citizenship. Previously, the Hungarian Constitutional Court ruled that it would not violate the non-discrimination clause of the Constitution or any international legal obligations if Parliament passed a law offering preferential naturalization that granted Hungarian citizenship – on request – to persons who claim Hungarian ethnicity but do not reside in Hungary. Decision 5/2004.

courts, in order to enforce the principles and rights recognized by the constitutions. Numerous examples demonstrate that neither the parliaments nor the courts have been able to retain the last word as to constitutional adjudication. The meaning of the constitution is constructed through an institutional dialogue between elected officials and judges.

The achievement of these relatively new constitutional democracies depends significantly on extra textual factors, notably political and interpretive practices. The record of constitutional courts and other actors in defence of constitutional values is far from unambiguously positive. This paper has focused particularly on the constitutional issues of presidential aspirations, church privileges, and ethnic discrimination. Of course, any selection of examples intended to illustrate a broader phenomenon is inevitably somewhat arbitrary. The differences among these countries certainly should not be ignored. Yet some concluding remarks seem in order.

The words of a constitution are connected to an existing political community. The scope-of-authority conflicts between Central European presidents and prime ministers represent an uncertainty in constitutional interpretation not necessarily inherent in the written regulations. The constitutional status of a president can be changed without amending the constitution. As the recent controversies show, the main political actors, first and foremost the presidents, often misinterpret their competences.

Constitutional design and case law are part of a larger social and political process. The choices of the interpreters determine to what extent social reality appears in judgments and to what conclusions it contributes. The privileges of historical churches are not based on the text of the constitutions so much as the churches' hypothetical social role. When changing societal experiences conflict with the conventions, then the conventions are sometimes held to be stronger than reality. An empirical survey could be an effective method of mapping indirect discrimination and racism. However, while historical churches have become constitutional categories, Roma barely appear in the decisions. Besides adequate reflection on the social reality, the constitutional interpretation also requires moral evaluation. In the case of historical churches, the judges apply the concept of preferential treatment, but it is not clear what type of inequality can be found at the starting point. In contrast, in the case of Roma numerous studies forewarn of the extraordinary social consequences arising from inequality.

According to the partnership view of democracy, people are full partners in a collective political enterprise, so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interest of each citizen.⁵⁰ As a consequence, authoritarianism, prevailing ideology, historical privileges, and nationalism endanger democracy. In this respect, Hungary is currently in a depressing and dangerous period of its history. An empowered national leader seems to be an attractive constitutional alternative to the endless parliamentary debates. Paraphrasing the words of the Polish preamble, we can

50 R. Dworkin, *Justice in Robes*, Cambridge, Mass., London, The Belknap Press of Harvard University Press 2006, pp. 134, 139.

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say that reference to God as the source of truth and justice in Hungary is more common than reference to those universal values as arising from other sources. These tendencies go hand-in-hand with a nation-state policy based upon national language, culture and ethnicity.

It is noteworthy that all Central European countries except for Hungary adopted a new constitution after the regime change. All of them preserved the values and institutions that had been established between 1989 and 1992.⁵¹ The most recent Hungarian Government – having the required two-thirds parliamentary majority – has already announced that it will provide a new constitution for the country. In contrast to the other countries, the clear and present aim of the prospective Hungarian Founding Fathers is to repeal the 1989 established constitutional principles and institutions.

The future of Central European constitutional democracies relies not only on the actions of people in the countries concerned but also on the commitment of Western societies. In the long run, the Visegrád countries are not able to ignore the achievements of the modern constitutionalism. This is why so important even from Eastern point of view that Western democracies are able to cope with the unpopularity of representative bodies, to find the proper place of religious values within secularized democracies, and to ensure equal protection of law to ethnic minorities.

51 The current Polish preamble expresses that in 1989 the Homeland recovered and regained the possibility of a sovereign and democratic determination of its fate.