International Journal of Sociology, vol. 26, no. 4, Winter 1996–97, pp. 48–65.

ISSN 0020–7659/1997 $9.50 + 0.00.

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The Invisible Constitution

The Construction of Constitutional Reality in Hungary

ABSTRACT: *The paper gives a preliminary analysis of the construction of Hungarian constitutional reality by employing the social constructionist frame of the sociology of knowledge. The practice of the Hungarian Constitutional Court is examined as the main locus of this social construction. In particular, the analysis focuses on some of the concrete interpretive techniques developed by the Court. These techniques contribute to the overall coherence of the body of constitutional law that the Court has been writing since 1990. In contemplating the hermeneutic situation of constitutional adjudication, the paper argues that the freedom the Court judges exercise in this process is a hermeneutically bounded one, confined by a variety of factors, including the self-imposed techniques that are analyzed in the paper.*

The subject of my discussion is the practice of constitutional adjudication at the Hungarian Constitutional Court. A genuinely new phenomenon, created in the very last days of the ancien régime, the Constitutional Court has played a significant role in the establishment and the consolidation of the constitutional rule-of-law state in Hungary. The Hungarian Court is modeled after the continental, Kelsenian concept of constitutional adjudication, a type that raises special problems of constitutional interpretation in that texts (of specific legal regulations) are here compared with texts (of certain provisions of the Constitution), whereas the U.S. Supreme Court addresses the entirety of a specific case or controversy.

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An earlier version of this paper was presented at the Joint Meetings of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, Glasgow, July 1996.

The introduction of the institution of constitutional adjudication into the Hungarian legal system has constituted a major change: the "theoretization" of the legal system means that "all that used to be theory in the legal system before its constitutional adjudication phase, almost unnoticeably—literally almost from one day to the next—can become part of legal dogmatics; that is, part of the positive law."[1] As a result of the interpretive practice of the Hungarian Constitutional Court, an impressive body of constitutional law cases and a rather well-defined standard of constitutionality has been constructed in the six years of the Court's operation:[2] the "invisible constitution," as it has been called by the president of the Court, Judge Sólyom.[3]

The Construction of Constitutional Reality

The predominantly interpretive nature of the practice of the Hungarian Constitutional Court raises the exciting issue of how constitutional knowledge as a social phenomenon is possible—that is, we have taken a general interest in the *construction of constitutional reality*. Our thinking has been informed by the now-classic treatise of the social constructionist sociology of knowledge—Peter Berger and Thomas Luckmann, *The Social Construction of Reality*[4]—and by the works of their intellectual ancestor Alfred Schütz and the phenomenological tradition. Although all these thinkers to a large extent emphasized the importance of studying the "structure of the common-sense world of everyday life,"[5] they themselves have dwelt rather extensively on subjects of—let me use this expression—specialized discourses;[6] therefore we see no injustice in applying their intellectual tools to the analysis of the highly particular domain of constitutional adjudication.

Within this general approach, an investigation into the phenomenologically understood "systems of relevance" pertinent to the practice of constitutional adjudication seems to be indispensable, but at the same time, it is an endeavor that we can undertake here only to the extent of touching the surface of the problem. Certainly a core issue in the system of relevance of constitutional adjudication is the *community of*

the legal profession and *jurisprudence* as such. I will discuss these two later, but let me move on to another component: the *practice of other constitutional courts*. Since the Hungarian Constitutional Court emerged as one of the most important results of the National Roundtable meetings in 1989, and since it has no real precedent in Hungarian legal history, even at its formation international, but more particularly European, standards were extensively considered, and the Court, as noted above, was established according to the Kelsenian European model. Throughout judges' comments on the operation of their court one encounters references to the practice of other constitutional courts: "[the Hungarian Constitutional Court] with its interpretive activity mediates the content of fundamental rights developed and practiced in the democracies of the world"; "from time to time the American doctrine of compelling state interest and the German doctrine of proportionality appear in the practice of the Constitutional Court";[7] and "the institution of the 'living law' is obviously received form Italy."[8] Furthermore, just recently Judge Sólyom has mentioned a related but somewhat more abstract point of reference, one, however, that is undoubtedly being constructed in the Europe of today: "a common European constitutional culture, a common 'language'; that is, methods and measures." He also said: "[a]ll European Constitutional Courts are part of the development of a common constitutional language, or at least of its grammar."[9] In this context, one must mention another component of paramount importance in the system of relevance pertinent to Hungarian constitutional adjudication: the role of *the practice of international courts*. "[W]e do our best to take into consideration comparable judgments by the U.S. Supreme Court, by the major European constitutional courts, and, increasingly, various international courts."[10]

The comprehension of the construction of constitutional knowledge also necessitates that we closely examine the highly abstract nature of constitutional review, and that we analyze the concrete interpretive tasks and processes involved in constitutional adjudication. Most importantly, we have to consider what we call the *hermeneutical situation of constitutional court judges*. We hope that our discussion will show that the notion of the "invisible constitution" is closely intertwined with the hermeneutical nature of the whole enterprise of constitutional adjudication.

A general inquiry into the hermeneutical situation of constitutional court judges is most fruitful if we take into consideration Hans-Georg Gadamer's hermeneutical treatment of text-related human communication, understanding, and activity.[11] Gadamer's general approach highlights the dialogical structure of language,[12] which he regards as most tightly interwoven with human thinking of all kinds.[13] In this context, then, law as an inherently textual phenomenon serves as a field of demonstration in which the intellectual tradition of hermeneutical inquiry is exemplified by jurisprudence. Especially Gadamer's major treatise, *Truth and Method*, discusses the "exemplary significance of legal hermeneutics," but Gadamer argues in almost all his writings that a legal text—the "life of a law"—is a refined model of the general "constitution of 'texts,' "[14] through which we can grasp the core hermeneutical phenomenon: the interwoven nature of the interpretation, understanding, and application of any text.[15]

Constitutional court judges are confronted with two rather different types of texts: the highly abstract, vague, and often ambiguous formulations in the constitution,[16] on the one hand; and the usually more precise, lengthier, and more specific wording of regular legal norms, on the other. The hermeneutically challenging task, then, is that here the judge must not "simply" make a legal text concrete, but collate (at least) two texts and determine whether there is a conflict between them.

Gadamer accounts for the handling of legal texts as follows: "[F]rom the outset the written formulation must take into account the interpretive free space that arises for the 'reader' of the text who has to employ this space. . . . There remains a free space of meaningful concretization, a concretization that has to carry out the interpretation for the purpose of practical application. . . . Legal decisions, precedents, or the prevailing administration of the law therefore always have a creative legal function."[17] This general understanding of the process of legal hermeneutics is not completely sufficient when we consider the hermeneutical situation of confronting a *constitutional provision*. One way to work through this problem is to consider a given text as opening up an especially wide "interpretive free space"—and to try not to be frightened of the extent to which we must be "creative" in our endeavors. At the same time, this wide interpretive space seems excessively difficult to employ. What is its context? "To understand is to grasp the relevant context that determines the possible parameters of the sentence or expression."[18] The relevant context for the constitutional provision, in processing a particular case, is primarily determined by the challenged

legal regulation; it is obvious from this alone that judges are allowed a rather loose hand in constitutional interpretation, but we maintain that even this interpretation is not a detached one. It is, above all, the context of the challenged regulation that allows for bringing into play prevailing legal concepts, notions, and principles, which are inevitably part of the ultimately unitary ideal of constitutionality. The context in turn strictly circumscribes the apparently excessive creative potential and theorizing tendencies in judges, since a concrete answer must be given: is the challenged norm constitutional or unconstitutional?

The hermeneutical task of constitutional court judges seems to be further complicated by the question: What does the *challenged regulation* mean? There seems to be no concrete hermeneutical situation for its interpretation and application, no concrete context that would provide some determination for the hermeneutical task. Judges thus come very close to what, according to Gadamer, the Italian jurisprudent Betti saw as the situation of the legal historian: "The jurist understands the meaning of the law from the present case and for the sake of this present case. As against this, the legal historian has no case from which to start, but he seeks to determine the meaning of a law by considering constructively *the whole range of its application.*"[19] Thus it seems as if constitutional court judges, within the (hermeneutically) so exemplary field of law, are required to do the apparently impossible: "rigidly separate cognitive from practical concerns," by attempting to soften the "linkage of understanding and praxis."[20] It is especially illuminating to realize that such a separation is improbable even in the field of constitutional adjudication, where the pressure for abstract interpretation is indeed present, and it is very enlightening to understand that the hermeneutical practice in which constitutional court judges are involved is one of a *special kind of "practical exegesis."*[21]

In the course of the Court's interpretive activity, certain well-defined modes of argument, techniques of interpretation, and, in general, standard ways of presentation have been developed. The process by which these have emerged has necessarily involved much self-reference, and this has in turn greatly contributed to the level of coherence characteristic of the Court's work. This coherence, manifest in the body of court decisions, must have been a determining factor in shaping outsiders' perceptions of court activity—including extensive popular support and respect for the Court (a quite exceptional achievement on the Hungarian sociopolitical scene), together with a comparable respect among

almost all political actors, which is detectable in the high level of compliance with the Court's decisions even in situations of profound disagreement with those decisions in specific cases. Taking outsiders' perceptions into consideration is, of course, of paramount importance for a comprehensive understanding of the construction of constitutional reality. Our contribution here includes an examination of some of the central constitutive elements in writing a coherent body of constitutional law—all of which leads us to phrase our questions in a slightly different way and to dispute Professor Roger Cotterrell's conclusion that "legal practices gain power, influence and authority to the extent that they appear to be expressions or applications of a unified, autonomous body of knowledge or doctrine."[22] That is, we are concerned with those aspects of "empirical legal theory"[23] that focus on investigating the "development and organization of doctrine,"[24] thereby highlighting the nature of "law as both a form of intellectual practice and social phenomenon."[25]

In what follows, we examine some of the most concrete techniques—as a basic means of building up a coherent system of doctrine—applied in the body of texts written by the Court, which in turn constitute the primary texture of the constitutional reality under construction in present-day Hungary.

Building the Invisible Constitution: Interpretive Techniques in Hungarian Constitutional Adjudication, 1990–1995

We have seen that in the hermeneutical situation of constitutional court judges the central task is always the collation of (at least) two norms, and we have been arguing that the process of their interpretation was tightly interwoven, since to some extent they mutually determine the relevant contexts for their respective "practical exegesis." Nevertheless, some interpretive techniques belong to one interpretive process, and some techniques belong to the other. By using the term "technique" we do not imply that the processes to which this term refers are on the same theoretical level in constitutional adjudication or that they fulfill the same hermeneutical function. The point is that these "techniques" have all been constitutive in the Court's interpretive practice, and as such have contributed to the coherence of the intellectual endeavour of constitutional adjudication.

First of all, I will examine a technique that the Court has developed in order to deal with the task of interpreting challenged regular legal norms. The concept of the "living law" originates with the Italian Constitutional Court, as mentioned above, and is one of the hermeneutically most attractive methods theoretically developed by the Court.

The Court's first and major "living law" case (Decision 57/1991) in part also concerns the competencies of the Court: in this decision the Constitutional Court actually annulled a ruling of the Supreme Court, declaring that it was within its competency to do so, according to the Act on the Constitutional Court (Article 48, Law XXXII of 1989), which addresses the institution of constitutional complaint. Citizens can file a constitutional complaint with the Court after they have gone through all the levels of the judicial hierarchy, if they feel that in that process their constitutional rights have been violated by the application of an unconstitutional regulation. To ensure a real legal remedy, the Constitutional Court decided not only to nullify the norm it had found unconstitutional (on grounds that concern the issue of "living law," which I shall discuss shortly), but also to nullify the judicial ruling that applied the norm in question. The Court has apparently abandoned this practice, which it exercised in only a few other cases.[26]

This specific case concerned a child whose right to ascertain his biological origins was violated, according to the Court, by the particular interpretation and application of a legal regulation according to which the officially assigned guardian of a "completely incapable" person has unconditional authorization to initiate legal proceedings to ascertain the biological origins of the "completely incapable person" in question. All minors had been assigned to the category of "completely incapable," which deprived them of their right to ascertain their biological origins within one year of their coming of age. During the proceeding of the Constitutional Court it was discovered that this was the interpretive and applicative practice of all courts (since they followed the interpretation of the Supreme Court). Therefore the Constitutional Court ruled:

> If judicial practice and the generally accepted legal interpretation uniformly apply the text of the norm with only one particular meaning—from among its several possible meanings—the Constitutional Court has to review the text of the norm with this meaning and content from the point of view of constitutionality. That is, if this norm content, which prevails in practice, can be ascertained, the constitutional review must begin with the fact that the content and meaning of the legal regulation is that attributed to it by the permanent and unitary practice of legal application. [Decision 57/1991 (XI.8) AB][27]
>
> The Constitutional Court has to collate the content of the provisions of the Constitution and the constitutional principles not with the text of the norm itself but with the prevailing, operative, and realized norm; that is, the "living law." [Decision 57/1991 (XI.8) AB]

Another case that involved the issue of "living law" concerned appointments by the minister of justice to judicial county organizational positions (Decision 38/1993). Here, consideration for the living law was not directly part of the interpretive techniques applied in the decision but rather a part of the argument that provided for the possibility of explicating further aspects of this technique: "In the course of the constitutional review, the interpretation of the legal regulation that is unitarily followed in legal practice—that is, the norm content prevailing in the 'living law'—cannot be disregarded. If a legal regulation is operative that has an unconstitutional content, it is inevitably necessary to state the unconstitutionality and to apply its legal consequences" [Decision 38/1993 (VI.11) AB].

Now let me turn to the techniques developed for the systematic interpretation of constitutional provisions. I will analyze two tests, both of which have played a prominent role in the interpretive practice of the Hungarian Constitutional Court: the test on fundamental right restriction and the test on discrimination.

The test on fundamental right restriction is, for the most part, the "operationalization" of a specific constitutional provision. According to Article 8(2) of the Constitution, "in the Hungarian Republic fundamental rights and duties shall be regulated in laws which, however, cannot restrict the essential content of a fundamental right." The Court has developed its test in the course of deciding a number of cases: in Decision 8/1991 the Court found it unconstitutional that the certificate voters had to present if they wanted to vote at a polling station other than the one in their own constituency had to be obtained in person from the local government of the voter's permanent residence. This amounted, according to the Court, to a "restriction on the exercise of the right to vote, therefore a disproportionate restriction on the essential

content [of the right to vote] without a compelling cause." Furthermore, the decision generally states that "the Constitutional Court regards as unconstitutional a restriction on fundamental rights guaranteed in the Constitution that is without a compelling cause and is disproportionate with regard to the desired goal" [Decision 8/1991 (III.5) AB].

In Decision 51/1991 the Court had to consider the constitutional limits on restricting army personnel from exercising their right of assembly. They found the complete ban on forming "organizations with political or other purpose" to constitute an unconstitutional restriction which "cannot be justified either by its proportionality with regard to the desired goal or by its inevitability, and [which] therefore violates the essential content of the fundamental right" [Decision 51/1991 (X.19) AB].

One of the Court's most important decisions, the death penalty case, was also partly based on applying this, at the time only emerging, test: "the regulations on the death penalty—depriving one of life and human dignity—not only restrict the essential content of the right to life and human dignity, but also allow the complete and irreparable cancellation of life and human dignity and the right guaranteeing it" [Decision 23/1990 (X.31) AB].

In sum, the constitutional restriction of a fundamental right has to (1) have a compelling cause (like the protection of another fundamental right or another constitutional aim), (2) have an aim proportionate to the restriction applied, (3) be suitable for attaining the aim, and (4) be the most lenient means possible.[28]

The test on discrimination, explicating Article 70/A(1) of the Constitution, was already present almost in its entirety in one of the Court's first decisions (Decision 9/1990). The case involved whether a provision in the personal income tax law (Law XLV of 1989) regulating the reduction of the taxable income of parents with many children constituted an unconstitutional discrimination among children according to the number of siblings they have and whether the siblings are alive and live with their parents. The Court found that the income tax law did not unconstitutionally discriminate among children and furthermore ruled: "The prohibition of discrimination does not mean that all differentiation[29] is prohibited, even one that in the final analysis is aimed at greater social equality. The prohibition of discrimination means that the law has to treat everybody as equal (as persons of equal dignity): that is, the fundamental right of human dignity cannot be violated; and

the principles for distributing entitlements and benefits have to be determined with equal respect and consideration, taking into equal consideration individual viewpoints" [Decision 9/1990 (IV.25) AB].

Another formulation of these two aspects of the discrimination test is given in a dismissal case in which the Court rejected petitions stating that the personal income tax law (Law XC of 1991) discriminated among debtors according to the identity of their creditors, because the portion of the credit that banks canceled for their debtors—provided that they repaid well before the deadline—did not increase the debtors' taxable income, a benefit that did not apply to other debtors with credit from sources other than banks. Even before its statement of dismissal, the decision says: "The Constitutional Court states that the prohibition formulated in Art. 70/A(1) of the Constitution—if the differentiation violates the right to human dignity—extends throughout the legal system" [Decision 61/1992 (XI.20) AB]. Later, in explaining the reasoning behind the decision, this sentence is completed as follows:

> including the rights which are not classed among the human rights and the fundamental constitutional rights. The equality of rights does not indicate the equality of natural persons from extralegal viewpoints. A person as a member of society can be and in fact is different from other people according to his or her occupation, education, financial circumstances, and so on. It is the right—but at the same time in a certain sphere also the duty—of the state to consider in the course of legislation genuine differences among people. Art. 70/A(1) of the Constitution does not prohibit all kinds of differentiation—such a general prohibition would be incompatible with the designation of the law—only the differentiation that leads to the violation of the right to human dignity. [Decision 61/1992 (XI.20) AB]

The first compensation case was the major decision in which the Court elaborated on the discrimination test. The case was initiated by the prime minister, who asked for an interpretation of the antidiscrimination clause: "[T]he Constitutional Court interprets Art. 70/A of the Constitution—with regard to Art. 9 and Art. 13, Sec. 1, of the Constitution—that it counts as the discrimination of persons as defined in Art. 70/A of the Constitution if, in the absence of a constitutional reason, property once owned by certain persons—differentiated by type of property—is reprivatized, while that of others is not. Such discrimination is unconstitutional" [Decision 21/1990 (X.4) AB Resolution].

Let me quote two sections of the decision which, according to the president of the Court, Judge Sólyom,[30] set several criteria of the discrimination test for the future:

> The question of whether the differentiation stays within constitutional limits can be examined only in the objective and subjective context of the prevailing regulation, since the same criterion—for instance, "landowner"—can be qualified as discriminatory depending on the context. Equality must serve as the essential element of the given state of affairs. If, within a certain concept of regulation, a different regulation applies to a certain group, this violates the prohibition of discrimination unless the differentiation has constitutional grounds of proper weight.
>
> If the state, in the course of transforming state property into private property, differentiates between former owners and nonowners and treats them differently as regards the conditions for acquiring property, and, moreover, further differentiates within the group of former owners, it does not violate Art.70/A of the Constitution only if its reasons meet the conditions of permissible positive discrimination.
>
> The condition of the constitutionality of differentiation is the certainty that the differentiation between owners and nonowners arises from a procedure in which the viewpoints of owners and nonowners have been pondered with equal consideration and impartiality. Former owners, just like nonowners, apparently have a right not to a share in state property, but to be treated, in the regulation of such a possibility, as equal and to have each of their viewpoints evaluated with equal consideration and equity. Without this, the discrimination is unconstitutional.
>
> Even if the above examination is accurate, the differentiation is not unconstitutional only if the property acquisition—without charge for former owners, and in return for some equivalent sum for the others—in the final analysis establishes the equality of private owners of the market economy under development. If it can be argued that by benefiting former owners the overall social result of the dismantling of state property will be more favorable than equal treatment, and if it unambiguously follows from the facts that a procedure of not discriminating against nonowners would not even approximate this result, then nonowners cannot claim that their right guaranteed in Art. 70/A of the Constitution has been violated.
>
> The criterion of differentiation—former ownership—would not be unconstitutional if it causally followed from the above arguments.
>
> The same examination has to be conducted with regard to whether it conflicts Art. 70/A of the Constitution that there is differentiation among former owners by type of property—that is, if only land property is to be reprivatized. [Decision 21/1990 (X.4) AB]

On the requirements with regard to positive discrimination, the Court said in Decision 9/1990:

> [F]rom the right to equal human dignity it may sometimes follow that there is a right to have goods and opportunities distributed (in terms of quantity as well) equally. But if a social aim—not in conflict with the Constitution—or constitutional right can be enforced only in a way that does not realize this narrower sense of equality, then this kind of positive discrimination cannot be declared unconstitutional. The limit of positive discrimination is the prohibition of discrimination in the wider sense; that is, the prohibition of differentiation with regard to equal dignity and the fundamental rights positively stated in the Constitution. Although social equality as an aim, as a social interest, can take precedence over individual interests, it can never come before the constitutional rights of the individual. [Decision 9/1990 (IV.25) AB]

Part of the major church compensation case (Decision 4/1993) added a new aspect to the discrimination test:

> Unconstitutional discrimination can be raised only with regard to comparably entitled or obligated people. To claim discrimination between churches falling under Law XXXII of 1991 [on the settlement of property claims on former church estates] and other organizations that previously suffered property losses (e.g. lawyers' chambers, parties), and furthermore discrimination between churches and private persons, as the petitions do, is a mistake from the beginning. . . .
>
> The . . . Law addresses not primarily the property right but rather the state's violation of the right to practice one's religion. The churches benefited by the . . . Law cannot be compared to any nonprofit legal entity but only to legal entities of comparable function, role, size, and autonomy, the property of which is likewise tightly interwoven with the implementation of some fundamental right. [Decision 4/1993 (II.12) AB]

The test on discrimination can thus be summarized as follows: (1) regulations in the law have to treat everybody as equals, that is, as persons of equal human dignity, which means that equal respect and consideration must be given in the course of differentiation and individual viewpoints given equal consideration and equity; (2) any differentiation has to have constitutional grounds; (3) within a certain concept of regulation, a certain group can be regulated differently only if this

counts as permissible positive discrimination; (4) the limit of positive discrimination is the prohibition of differentiation with regard to equal human dignity and the fundamental rights positively stated in the Constitution; (5) differentiation is constitutional only if it promotes overall social equality more than equal treatment does; and (6) the test can be applied only if the regulation of the law concerns persons with comparable entitlements or obligations.

These "figures of reasoning,"[31] developed for different hermeneutical challenges, serve the coherence of the intellectual endeavour of constitutional adjudication by actually becoming part of constitutional law as semantic rules belonging to the sphere of legal dogmatics.[32] At the same time, they do not solve future problems of similar hermeneutical construction, since the decision as to whether a given context is adequate for their application does not form part of either technique; that is, they are not self-executing tools of intellectual practice, although when judges find them relevant and apply them, they make life significantly easier for the Court. More importantly, though, these techniques are also the most important means by which the reasoning of the Court is "made acceptable to the constitutional community" by making "the procedures of reasoning . . . publicly comprehensible and debatable."[33]

One should, however, note here that—although the public can and does debate the decisions, or more precisely, certain arguments in certain decisions of the Constitutional Court, which in itself forms a crucial aspect of the construction of constitutional reality —these decisions are nevertheless issued with *erga omnes* [applicable to all] effect. This being the case, several questions arise as to the nature of the role of constitutional courts in the construction of constitutional reality.

Hermeneutically Restrained Freedom in Constitutional Adjudication

We have not really entered here the debates on either the role of constitutional adjudication in different political systems or on constitutional interpretation revolving around the positions of interpretivism—also known as and basically identical with originalism, intentionalism (original intent), and textualism—versus noninterpretivism[34] (the ideal of the "living constitution"[35]). Nevertheless, even a treatment like ours—analytical, on the one hand, and empirical, on the other, and aimed inter alia at explicating the hermeneutical processes involved in constitutional adjudication—makes it clear that the "intentionalist" line

of argument is to be rejected for its fundamental hermeneutical blindness and its entirely misconceived view concerning the nature of language in general and the constitution of texts in particular.

There is, however, a particular issue that frequently comes up in both types of debates: how much interpretive freedom are judges given? That is, is constitutional adjudication a matter of judges' arbitrarily imposing their views on the political community in their decisions, and if so, to what extent? This issue is central to any inquiry into constitutional reality.

Fred Dallmayr formulates the position of alarmed critics of the whole business of constitutional adjudication as follows: "[A]n inescapably human and political factor seems to enter the law or legal practice in a manner jeopardizing a central theme . . . of Western political thought. . . . [T]he rule of law is in danger of collapsing into the very 'government by men' that it was originally meant to forestall. . . . Does law here not become a captive or instrument of arbitrary caprice, of the whim of particular interpreters?"[36] These arguments are accompanied by further accusations that the Constitutional and Supreme Courts make politics and create a situation of government by the judiciary.

Although there are some grounds for the charge that courts make politics, as we have shown above, this inevitably follows from their task of protecting the Constitution by striking down unconstitutional legislation and thereby accomplishing "negative legislation"—to use Kelsen's term. Apparently, this does place the Court on the rather perplexing border of law and politics, but it is already of hermeneutical importance to demonstrate just how restricted the judges' interpretive playing field is. Although there clearly are cases in which several interpretations are offered for a particular provision, nevertheless only a limited number of these are allowed by the text—and, indeed, it is the judges' task to apply one of these to the context of the challenged regulation. The notion of "text" refers here not merely to the sentences that constitute the constitutional provision submitted for interpretation but also to the whole of the text in question: the entirety of the document which in fact prescribes the overall interpretive framework.[37] The interpretive techniques discussed earlier also belong here: these are self-imposed procedures which, on the one hand, make life easier by making certain cases to some extent routine; on the other hand, they are the primary means by which the requirement of coherence is to be fulfilled. Other restrictions evidently derive from the "everyday"

professional context of constitutional court judges: the legal profession. "[T]he judge's choice is constrained by a set of rules (or norms, standards, guides, etc.) that are authorized by the professional community of which the judge is part (and that define and constitute that community)."[38] Gadamer accounts for these limits thus: "[T]he creative supplementing of the law that is involved is a task that is reserved to the judge, but he is subject to the law in the same way as every other member of the community. It is part of the idea of a legal order that the judge's judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. Anyone who has immersed himself in the particular situation is capable of undertaking this just weighing-up."[39] Furthermore, he takes this constraint to be characteristic of the hermeneutic enterprise in general: "[W]hat is truly common to all forms of hermeneutics [is] the fact that the sense to be understood finds its concrete and perfect form only in interpretation, but that this interpretive work is wholly committed to the meaning of the text. Neither jurist nor theologian regards the work of application as making free with the text."[40]

Thus the freedom judges exercise in the matters discussed here is a *well-bounded freedom*. Is there any other kind?

In conclusion, another hermeneutically important point is that the task "reserved" to the judge is to be understood as both the *right* and the *duty* to carry out interpretive work; the latter is important because, without interpretation and application in due time, constitutional provisions have no meaning and consequently no effect on the legal system. That is, if Hungary is to be a constitutional rule-of-law state, then apparently we cannot do without an invisible constitution, the result of the permanent interpretation and application of the Constitution.

From this perspective it becomes apparent how careful one should be in endorsing the much-celebrated saying already mentioned above: "*a government of law and not of men.*"[41] We can only note a point that, based on the discussion above, may seem to be a triviality: of course, the kind of states discussed here are always *governments of men*—people who govern precisely through and by the law. People give life to the law in their interpretive and applicative activity, and the text of the law in turn bounds them in a domain of highly restricted possible meanings within a wider context of "shared meanings and a shared public space."[42]

Notes

1. Bragyova, *Az alkotmánybíráskodás elmélete*, p. 16.
2. *Az Alkotmánybíróság határozatai, 1990–1994,* and *Magyar Közlöny*, 1995.
3. According to Sólyom, "the ideal would be, if the Constitutional Court, with its opinions always expounded as concrete questions, would build the content of abstract constitutional rights into its 'invisible constitution' " in "Ellenőrzött rendszerváltás," p. 372; also cf. "Az Alkotmánybíróság önértelmezése," p. 274.
4. Berger and Luckmann, *The Social Construction of Reality*.
5. Berger and Luckmann, *Social Construction*, p. 27.
6. See, e.g., Berger, *The Social Reality of Religion: The Sacred Canopy*—admittedly direct applications of their sociology of knowledge to the domain of religion. Alfred Schütz, for his part, has written extensively on the construction of scientific knowledge.
7. Sólyom, "Ellenőrzött," pp. 368 and 374.
8. Sólyom, "Az Alkotmánybíróság hatáskörének sajátossága," p. 41.
9. Sólyom, "On the Cooperation of Constitutional Courts: Introduction to the Tenth Conference of the European Constitutional Courts," pp. 4 and 21.
10. Opening talk by Judge Sólyom at the Conference on Constitutionalism, in *Constitutionalism in East Central Europe*, p. 50.
11. Our discussion is based on the following works: *Truth and Method*; "Text and Interpretation," in *Dialogue and Deconstruction, A szép aktualitása (The Timeliness of the Beautiful)*; and "Hermeneutika," in *Filozófiai hermeneutika (Philosophical Hermeneutics)*.
12. Gadamer, "Text and Interpretation," p. 26.
13. Ibid., pp. 27–29.
14. Ibid., p. 35.
15. Gadamer, *Truth and Method*, pp. 274–75, 284.
16. "The Constitutional Court never deduced anything from an 'invisible constitution'; it has always interpreted one of the regulations of the law [of the Constitution]. It [the Constitution] needs interpretation because it regulates individual questions only *on the level of fundamental principles*. The Constitutional Court, however, is creating not a new Constitution but constitutional law. It issues compulsory interpretations that everyone must observe. It is this that the other power branches find difficult to accept, since hitherto there was not such control." Sólyom, "Minden cél . . .," p. 7 (emphasis mine).
17. Gadamer, "Text and Interpretation," pp. 35–36.
18. David Couzens Hoy's reading of Gadamer's hermeneutical theory: "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," *Southern California Law Review* 58 (1985):138.
19. Gadamer, *Truth and Method*, p. 290 (emphasis mine).
20. Dallmayr, "Hermeneutics and the Rule of Law," pp. 13–14.
21. The term is borrowed from Dallmayr, "Hermeneutics."
22. Cotterrell, *Law's Community*, p. 95.
23. See Professor Cotterrell's programmatic concept on defining a program of study for the sociology of law: "the prospect of a theoretical understanding of law as a social institution, professional practice, and intellectual discipline." Ibid., p. 58.

24. Ibid., p. 38.
25. Ibid., p. 42.
26. Sólyom, "Az Alkotmánybíróság hatáskörének sajátossága," pp. 34–35.
27. All translations of the decisions are mine.
28. Halmai and Paczolay, "Az Alkotmánybíróság," p. 34.
29. A note on terminology: the original Hungarian texts of decisions, and legal discourse in general, alternately use the terms "diszkrimináció" and "megkülönböztetés," which literally mean discrimination and differentiation. To invoke the concept of negative discrimination, the term "hátrányos megkülönböztetés" is used—in rough translation, disadvantageous differentiation. Positive discrimination, in contrast, has only one denotation: "pozitív diszkrimináció"—to make things easier.
30. "[T]he conditions of positive discrimination are elaborated in detail in the decision, [which is] an abstract wording that appears to be final and which the Constitutional Court will apply as a stable formula in the future. This test might be applied by legislation—instead of a preliminary norm control." Sólyom, "Ellenõrzött . . . ," p. 371.
31. Bragyova, *Az alkotmánybíráskodás*, p. 174.
32. Cf. ibid., chapter 4 ("Constitutional Adjudication and Legal Reasoning"), especially pp. 168–91, also note 30.
33. Ibid., pp. 175–76.
34. Standard American treatments, especially, employ this framework in describing or entering the debate on constitutional interpretation. See, e.g., *Modern Constitutional Theory*, ed. Aleinikoff and Garvey, where the section on interpretation is structured exactly according to this division.
35. Paczolay, "Alkotmánybíráskodás," in *Alkotmánybíráskodás*, p. 30.
36. Dallmayr, "Hermeneutics," p. 16.
37. Hoy, "Intentions and the Law: Defending Hermeneutics," in *Legal Hermeneutics*, p. 179.
38. Fiss, "Conventionalism," *Southern California Law Review* 58 (1985):183.
39. Gadamer, *Truth and Method*, p. 294.
40. Ibid., p. 297.
41. A history of the concept is outlined in Dallmayr, "Hermeneutics," pp. 4–9.
42. Ibid., p. 18.

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