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THINK POSITIVE*

PREFERENTIAL TREATMENT IN HUNGARY

A public debate started a few years ago in Hungary concerning the constitutionality of quotas facilitating the access of women into Parliament and state measures facilitating the access of people with disadvantageous backgrounds to higher education.[1] The vast majority of debaters have vehemently attacked the quotas.

This paper wishes to argue for the necessity of quota. It claims that under certain conditions a quota is constitutional, and it lists these conditions. The paper starts from two premises. Firstly, that the most important and inevitable virtue of a democratic government is that it treats its citizens as equal persons with dignity. For such a government te interest of each and every member of its political community is equally important. According to the second presumption, every individual is personally responsible for using efficiently the possibilities and sources given to them.[2] It is a fact that members of the political community are in different situations both in terms of their abilities and capacities, as well as their social background and economic conditions. These social and economic differences are not independent from the nature of the legal system; that is, the rules made by the legislative, and the decisions put into actions by the executive power. The ideals that constitute the essence of humanity, such as responsibility for others or assisting people in disadvantageous situations focus our attention on these differences that affect the individual's ability to exercise their rights.

The text of the Hungarian Constitution suggests that this moral principle is a constitutional one as well: it is the duty of the State to improve the social and economic position of disadvantaged groups so that their opportunities are equal. This means recognizing that we need state measures to reach or at least approach equality. The purpose of such measures is the equation of group disadvantages, that is, helping those who are through no fault of their own in a disadvantageous situation because of their membership a social group.[3] Preferential treatment,[4] including quotas, also serves this purpose. In what follows, I provide a justification for these claims.

The Constitution is based upon the citizens' equality. This is manifested directly in several constitutional provisions. Article 54 (1) guarantees the right to human dignity, 56 equal legal capacity, 57 (1) equality before the law, 66 (1) the equality of men and women in respect of all civil, political, economic, social and cultural rights. Article 70/A (1) prohibits discrimination.[5] Under Article 70/A (3) the Republic of Hungary shall promote the equality of rights for everyone through measures aimed at eliminating the inequality of opportunity. Under this provision the legislator has to create a rule which helps to improve the social position of disadvantaged groups. This help does not mean privileges, or the giving of more rights, but state intervention in order to reduce the social support of negative discrimination and the differences leading to it.[6] The purpose of this preferential treatment is to deal with one of the urgent problems of the political community.

The term "eliminating the inequality of opportunity" in Article 70/A (3) directly refers to the social context, and requires the legislator from time to time to examine and evaluate the situation of groups forming within society. Without this, it is impossible to interpret the constitutional provision.[7]

The Constitution does not give details of "measures aimed at eliminating the inequality in opportunity". Let's examine what this phrase implies. The means of preferential treatment can be of several types. They include training programmes, job advertisements, scholarships published expressedly in forums where they are most likely to be read by those concerned. The specific training of people in disadvantageous situations, for example, so

* I first examined the questions concerning quotas in my essay 'Az igazságos kvóta' [Just quota] [2006] 4 Fundamentum 5–16. Since then I have revised my opinion on several points. These changes can be traced in the present writing on the current relationship of the Hungarian Constitution and quotas. I am indebted to János Kis and Gábor Attila Tóth for their constructive remarks in finalizing the Hungarian version of this paper (forthcoming in Miskolci Jogi Szemle 2009). Opinions and errors are mine alone.

as to give them access to the job market, is also a positive measure. Affirmative actions also involve those internal regulations which demand that employers in a certain branch or company, or the entrance examiners of a university, should give a headstart to those applicants who are from a disadvantageous group, if their abilities and their aptitude are similar to those of other applicants belonging to the majority. Another measure of preferential treatment is when for example women expecting a child, persons raising their children and people with low income are given special benefits or subsistence wages.

The strongest means of preferential treatment are quotas. Result quotas set the goal to be achieved, but not the ways to do it. For example they determine the rate of representation of a target group in a given area of employment.[8] A rigid quota is primarily the self-regulation means of universities, which have to keep a certain amount of places, for example fifteen out of one hundred, for the members of a given group, and it may happen that these places are left vacant due to lack of applicants.

Quotas are the strictest measures of preferential treatment because they do not allow a departure from the numbers they prescribe. The arguments against quotas are special, so their permissibility also requires strong justification. However, if a quota proves to be constitutionally acceptable, not only softer measures, but also strict quotas may appear in the legal system.

After mapping the means of employment, we have to find an answer as to who the beneficiaries of preferential treatment may be. Article 70/A (3) of the Constitution obviously does not name those persons whose interests demand state intervention. It is the legislator's duty to recognize and from time to time to examine which social groups cannot take part equally in the life of the political community, possibly but not necessarily because of structural discrimination.

It is especially necessary to employ measures of equating opportunities, if the inefficient political power of the group has become stable, because then the group exists separated, isolated from the political community. In these cases special treatment aims to reduce the group disadvantages that are "constantly regenerated".[9] The legislator also has to decide how these measures are to be employed in the case of those who face multiple disadvantages. Within this framework, Article 70/A (3) of the Constitution enables the legislator to decide where and to what extent it wishes to employ measures of equating opportunities.[10]

CONSTITUTIONAL JURISPRUDENCE

By interpreting Article 70/A of the Constitution, the Hungarian Constitutional Court (hereinafter HCC) held that if a "social purpose not in conflict with the Constitution or a constitutional right may only be achieved if equality in the narrower sense cannot be realized, then such a positive discrimination shall not be declared unconstitutional". In the same decision the Court specified the conditions under which positive steps could be applied. "The limitation upon positive discrimination is either the prohibition of discrimination in its broader meaning, i.e., concerning equal dignity, or the protection of the fundamental rights which are positively expressed in the Constitution".[11]

The case law of the HCC following this decision has employed the term of positive discrimination in a rather haphazard way, which often appeared as a synonym for constitutionally justified negative discrimination. The main reason for this could be that in Decision No. 9/1990. (IV. 25.) the HCC examined a provision of the Act on Income Tax that granted special tax benefits to families with at least three children or to single parents with two children. This provision was not an affirmative measure; the decision, however, judged it to be so.[12] Later the HCC corrected it in its Decision No. 32/1991. (VI. 6.), which stated that Article 70/A (3) of the Constitution "is a rule helping the manifestation of equality of rights, not the requirement of measures aimed at eliminating the inequality of opportunity of people in a disadvantageous financial or economic situation". In spite of this, there are still decisions which identify justified discrimination with positive discrimination. Such a decision was the one which listed the rules of state administrative procedure concerning exemption from charges among the measures aimed at eliminating the inequality of opportunities;[13] or that which judged exceptions from the inconsistency rule of members of Parliament as positive discrimination.[14] The same is true for decisions that stated that the use of the object of ownership, its function of public service and its usefulness for the public could be a basis and a constitutionally justifiable reason for applying positive discrimination, i.e. stricter protection under criminal law.[15]

At other times positive discrimination took the form of benefiting certain persons, and was thus acceptable differentiation. For example, according to the HCC increasing lower pensions to a greater extent than others means positive discrimination.[16] In 1994 the HCC held it as positive discrimination

that only private Hungarian citizens, the Hungarian state and local governments could purchase and own arable land. Foreign individuals and corporations, together with Hungarian corporations, were excluded from doing so.[17]

The HCC found the exemption of priests from military service to be positive discrimination, since it served the constitutional purpose of the exercise of freedom of religion.[18] It also held that "the priority of restitution to churches and the affirmative discrimination in favour of them [...] based on the principle of functionality only, is justifiable under the Constitution".[19] The HCC declared it as a constitutional requirement that besides the compulsory budgetary contribution, which is the same in the case of schools owned either by the State, local government or a church, the State or the local government should provide schools owned by a church with additional financial assistance in due proportion, as these schools undertake duties which would otherwise be fulfilled by the State or the local government.[20] Later the Court did not find it unconstitutional if in addition to the compulsory budgetary contribution the State provides schools owned by a church with additional financial assistance, as these schools assume duties that would otherwise be carried out by the State. According to the Court this positive discrimination was needed to ensure freedom of religion.[21]

The Constitution itself authorizes the legislator to apply positive measures aimed at eliminating inequalities of opportunity.[22] In spite of this, the HCC has so far examined only a very few statutes the purpose of which was really the elimination of inequalities of opportunity in society.

Two examples are two decisions that examined support of people living with disabilities and the vehicular allowances of people with physical disabilities, as rules promoting the equality of opportunity of those concerned;[23] and the decision according to which the special needs of psychiatric patients justify positive discrimination.[24] Referring to 70/A (3) of the Constitution, Decision No. 1040/B/1999. of the HCC stated that Parliament can make different, more advantageous rules relating to national and ethnic parties concerning the threshold of access to Parliament. According to 66 (3) of the Constitution, separate regulations shall ensure the protection of women and youth in the workplace. This provision authorizes the legislator to make a positive discrimination rule in the sphere of employment for the protection of women and youth. According to the interpretation of the HCC, Article 66 (3) "is based on the recognition of the natural, biological and physical differences between men and women. Because of the biological capabilities of women, especially the biological and psychic dimensions of motherhood, together with the slighter physical strength of women, they react to certain environmental harms with prompter and more serious results".[25] Based upon these biological differences between the sexes the Court held it positive discrimination that women are not subjects of universal conscription.[26] On the same basis the HCC held it constitutional to define differently the period of compulsory military service and civilian service;[27] the application for advanced pension sooner for women than men;[28] and the more advantageous temporary pension regulations for women.[29]

I suggest that the latter measures for eliminating inequalities of opportunity are to be explained not necessarily with the biological differences between men and women, but with the inequalities in the social position of men and women, their double burden of family and work.[30] These are provisions that in the longer term serve the reduction of inequality, the achievement of a greater social equality between men and women.

Despite the above-mentioned incoherencies, the jurisprudence of the HCC following Decision No. 9/1990. (IV. 25.) is logical in the sense that it uses the early terms relating to positive discrimination as solid formula. This means that in the case of the steps made for the creation of the equality of opportunity, the absolute requirement of the right to be treated with the same respect as anyone else is still valid, and there is no room for positive discriminative provisions violating fundamental rights.[31] These two conditions in essence mean the same: any discrimination, be it positive or negative, is not against Article 70/A of the Constitution only if it was made respecting the equal dignity of disadvantageously affected persons.[32] Consequently, a benign quota is constitutional, if the legislative paid equal attention to the points of view of persons disadvantageously affected by the measure when creating the quota. In the following I will continue my examination on the basis of this requirement.

THE PROCESS OF CONSTITUTIONAL REVIEW

The legislator certainly did not treat persons equally, if the introduction of the quota was justified by prejudice or partiality. This happens when the legislator consciously tries to exclude a person from a community or block them from an opportunity on the ba-

sis of an essential characteristic or capacity of theirs, because the vicious aim itself does harm. The same is true if the legislator is guided by the conviction that doing harm for a (non-discriminative) purpose is acceptable, since the person can be considered inferior because of belonging to a certain group.

The quotas relating to people of Jewish origin in the last century directly aimed at the exclusion of these people from education and employment, that is, they discriminated and deprived certain members of the political community of their rights. The *numerus clausus* formula categorized people on the basis of their origin. As a result of Act XXV of 1920, the rate of Jewish students to be accepted to Hungarian universities and colleges was restricted to 6 percent. A later act concerning Jewish people, Act XV of 1938, referred to the over-representation of Jews in the economic and cultural sphere, maximizing the rate of Jewish people in economic and cultural professions in 20 percent. These quotas, though apparently employing the same method as present day quotas, cannot be considered similar to them. It is true that the *numerus clausus* rules also viewed belonging to a certain group as decisive. According to this, Jewish students could only be accepted into higher education or economic and cultural professions in restricted numbers. However, it is a crucial and decisive difference that the legislator enacting the Jewish quota rules did harm to Jewish citizens, in that it tried to exclude them from higher education and certain professions. In the case of the middle class Christians who benefited from this exclusion, there was no social disadvantage that the quota could have eliminated.

The difference between discrimination and preferential treatment is essential. The latter also categorizes people on the basis of sensitive criteria (race, sex, ethnic belonging). Under Article 70/A (1) of the Constitution the Republic of Hungary shall ensure human rights and citizens' rights for all persons on its territory without any kind of discrimination, such as on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. This clause forbids the legislator to adopt regulations in which the rules are based on the above distinction. The reason for this prohibition is that it is highly probable that such a provision differentiating among citizens by the abovementioned criteria violates the right to be treated as an equal.[33]

Affirmative action in itself does not violate this right. When introducing helping measures the legislator is not guided by vicious or prejudiced and discriminative policy, on the contrary, the State takes positive measures to promote substantive equality.[34] By substantive equality I mean that everybody has the rights and freedoms related to the human quality equally and to a full extent. When introducing positive measures, the legislator starts out from the assumption that there are groups for whom status differentiation is correlated with disadvantage.

The purpose of the means, including the quota, is to approximate the opportunities of members of the groups to those of the majority, that is, to compensate the disadvantage as long as it is there. The quota cannot stigmatize either the members of the groups benefited or disadvantaged, and it cannot be accompanied by the sense of inferiority, otherwise it is discrimination we are talking about, and not preferential treatment.

If the legislator has considered the interests of everyone equally when introducing the quota, it cannot happen that the measure violates an individual right. The closer examination of individual quotas proves that either there is no right, reference to which would exclude preferential treatment, or there is such a right, but introducing the quota does not violate it.

A common argument against quotas is that they violate the right to be treated as an equal of those not favoured by the measure.[35] This claim is not correct, as it mixes up the requirements resulting from equality. The individual has the right to be treated as an equal, but cannot wish to get an equal share of all sources, goods and opportunities with everybody at all times.[36] In relation to the competition in higher education for example, this means that the fact that the vast majority of applicants to a university or college is successful at the entrance exam does not necessarily mean that all applicants have the right to a place just because others are given places.

The following argument, that is common in US courts, can also be traced back to the misinterpretation of equality. Some argue that affirmative action programmes are unfair to innocent white males. The case law of the courts seems to accept the argument. Courts emphasize that the entrance examination procedure has to provide for the individualized consideration of all applications, during which origin and race as a factor can be taken into account as an extra aspect, but they cannot become the decisive factor in the entrance procedure.[37] In fact, however, the affirmative actions target the elimination of procedures that are favourable for white males. No one has the right to such a privilege, so its maintenance cannot be a decisive argument against the introduction of affirmative measures.[38]

Certainly, the violation of any distinct right can arise beyond the right to be treated as an equal, as a result of which rigid quota or even softer numerical goals are not applicable. In the case of fixed quotas of minority admissions, one example is the right to education. We have to understand, however, that no one has the right to be provided a higher education of a certain quality by the State. Nor does anybody have the right to insist that intelligence or previous test scores should be the exclusive criteria of admission.[39] A place at a university is not a reward for previous test scores or intelligence, nor yet for talent or diligence. The university decides about the admission of applicants with regard to the future, and it can decide which aspects and features it considers primarily, supposing they best help the fulfilment of its aims.

In the case of preferential treatment (primarily for women) in employment, the question of the violation of individual rights is also a recurrent phenomenon, but no such right can be identified on the side of the non-favoured group that would exclude quota measures. No one has the right to a particular job or a certain job interview procedure.

Courts applying community law, however, do not examine whether people not belonging to the favoured group have the right to keep everything in its state prior to the affirmative measure. They attempt to balance between the right to equal treatment and substantive equality, and they try to find out whether the measure causes an undue burden to people excluded from preferential treatment or not. According to the European Court, positive discrimination is derogation from formal equality. "[I]t must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible, with the requirements of the aim thus pursued."[40] As a result of this there is very limited room for helping women in employment. In practice the softer forms of affirmative measures are used, not quotas. A positive measure is acceptable if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situation of all candidates.[41]

The duty of the legislator is to examine which groups' preferential treatment is justified. It has to be careful not to arbitrarily choose which groups need help.[42]

I am talking about groups, not only individuals, because human nature is wont to group and categorize other people, and then to label and rank them on the basis of their belonging to a certain group. Categorizing is a natural part of human thinking, however, it is accompanied by the danger of letting negative opinions and generalizations concerning groups affect the individuals belonging (or held to belong) to the group. This in turn necessarily affects decisions about employment, services, education and other spheres of life.

Those groups can be the beneficiaries of preferential treatment the members of which have an identity that is closely related to the status and acceptance of that particular group, and the social situation of the members of which is determined by belonging to this group. Individuals become members of such a community in a way that they usually have no possibility to form the existing picture of the group in question, because it is not their activity that determines the operation of the community, as in the case of a team or association. Neither are these individuals able to "break with the particular group", for example Roma people with the gypsy community, since in the eyes of the outside world they still belong to the Roma community. Affirmative actions try to correct this phenomenon. However, when supporting groups we must face the problem that state support also covers those members of the community who are not in need of help.[43] In my opinion it is worth paying this price in order to eliminate group disadvantage. The price is not too high considering that the people who are helped by the state in spite of not being in need of it can contribute to the possibility and acceptability of the stronger presence of the minority in education and in general public life.

In the United States it is primarily black people who benefit from preferential treatment. Besides black citizens, however, women also seem to need help, especially in employment, and there have also been Bills proposing the introduction of a gay quota.[44]

The European Union, as a primarily economic community, at first turned its attention to women, who are in—historically and socially—disadvantageous positions in the labour market. Recently, however, directives and judgments call attention to people (employees) with disabilities and their families, national and ethnic minorities, and people of different sexual orientation, demanding special means for fighting their negative discrimination.[45]

In Hungary members of the Roma community—on the bases of their colour of skin and cultural marks—often face disadvantage in terms of accommodation, and access to public health servic-

es, and the segregation of Roma children at school is also getting stronger.[46] It is widely known that the number of people with disabilities employed in the public and private sphere is very low. It is also obvious how small the number of women is in Hungarian political life, and opportunities for advancement to senior leadership in some organizations have declined for women.[47] Similarly, very few steps have been taken for promoting gay rights protection.[48]

Rules prohibiting negative discrimination have proved insufficient. It is not enough for the State to sanction discriminative decisions; it has to take measures to improve the opportunities of the disadvantaged. It is essential to apply affirmative measures to help Roma people gain access to education and employment, to guarantee employment to disabled persons, to protect gay rights, and to promote the representation of women in public life.

A quota measure is constitutional if it aims to reach substantive equality, and if the legislator has surveyed properly which groups are seriously underrepresented in certain spheres of life. The range of beneficiaries for preferential treatment has to fit the range of people targeted by the reason of preferential treatment. The only question remaining is what the legitimate aim of preferential treatment may be. Is there any constitutional reason that adequately and convincingly justifies the preferential treatment of certain groups?

It is important that the employment of the quota should not be for its own sake. It would be unreasonable and unjust to try to mechanically reach the rates of a given group's numbers within society in education, employment or politics, too. This would merely mean a motivation to set further quotas (for the old, young, etc.). Quotas can only be the means of achieving a goal supported by the Constitution.

One of the most common reasons for supporting a disadvantaged group is compensatory justice.[49] The present introduction of preferential measures, however, is not justified by fifty or hundred year-old damages. If we consider the quota as a certain compensation, it may cause a problem that those who were responsible for past injustices are not affected by it any more, nor are the beneficiaries those people (or their descendants) who the injustice had been done to, that is, who would be entitled to that same compensation.[50] On the other hand, affirmative actions in education and employment typically help those who were probably the least affected by past discrimination, that is those who were capable of reaching and aspiring to higher education and important professions.[51] Any negative discrimination in the past cannot justify the employment of the quota in itself.[52]

The justification for the existence of the quota, I suggest, is the present day situation of the disadvantaged groups (distributive justice argument).[53] Discriminative practice rooted in the past is in many respects present even today. On the one hand it lives on in prejudices without any negative experiences, and stereotypes, which are handed on from parent to child regardless of their truth content. These harmful ideas that pervade the common conscience can only be overwritten by the new generation's own experience. On the other hand, the understanding of negative experiences and the cause and effect relationship of observed facts can be enhanced if the members of the different groups get to know each other and find out about each other's opportunities in education or employment. When organizing negative experiences, prejudices are at work, and therefore the person is not open to information that is against their conviction. However, personal contact can lead to reinterpretation of thoughts that were previously believed to be true, and reorganize experience.

The legitimate aim of introducing quotas is to strengthen the position of the members of disadvantaged groups, to distribute power in a more proportional way, and to protest morally against "castes".[54] When introducing an affirmative measure, the decision-maker should convey the message that for the government each and every member of the political community is equally important. Therefore, if it observes that the situation of certain groups is characterized by a recurrent social-economic disadvantage, it takes steps to approximate their opportunities to those of the majority. Such a message makes the community more accepting and understanding, and it makes executing the rule easier, since opportunities continuously change, so it is obvious that if a quota becomes unnecessary with respect to one group, it may become justified in relation to another. Preferential policy can only gain adequate social support if members of the political community can speak openly about the prejudices they live with, and about what measures are needed for them to face and reconsider their prejudices. The decision-maker also has to make it clear that helping groups fall into line, if they suffer a disadvantage because of their origin, gender, disability, sexual orientation, religion or other essential characteristic, is the interest of us all, and this help means sacrifice on our part. For example, we have to accept that from now on more people will compete for the same place at university or a good job.

Affirmative measures can aim to produce a diverse student body or working environment[55] and such a diverse student body or working environment can have many benefits. Diversity has the message that no one is excluded from the possibility of getting into a leading university or a good job. A diverse student body has an inspiring effect; students of different backgrounds and values or opinions can discuss their points of view and standpoints, which can greatly help the forming of their personality.[56] Companies that employ people with diverse backgrounds are also more successful than for example companies that employ only men or women or white people. However, success resulting from diversity in itself cannot legitimize preferential treatment. Thus, diversity cannot be the justifying principle behind preferential treatment, but it can be a help to the decision-maker to introduce measures eliminating inequality of opportunity.[57] The political community is more easily able to accept a helping measure if its declared aim is to form a diverse student body or working environment and to solve social tension, that is, a reason which relates to the whole society, not only to those who require special help.

After clearly identifying the aim, the question is whether the quota is suitable for enhancing the opportunities of people belonging to a disadvantaged group.

The effectiveness of the quota is not independent of the definition of the quota rules. When introducing the quota, the legislator has to consider the peculiarities of the target group. It has to set the rate numbers correctly, in order to enable the target group to fill the places kept for them. Another essential characteristic of the quota is that it is temporary. It should not run longer than the time required to eliminate the unjust disadvantages.

The quota rule in education is able to make university vacancies available for members of the target group. In 2006 the Serbian government launched an affirmative action programme aimed at boosting the number of Roma students at the country's universities. Over the past 13 years only 150 Serbian Roma have enrolled at the country's six universities. The number of Roma students started to rise after 2000 and by 2007 a total of 50 Roma students were enrolled within the scope of the government's programme of affirmative action.[58] Cutting an already working preferential programme, however, is likely to result in a serious drop in the number of students from the supported group at a university. This happened in California after the voters approved Proposition 209 ending the affirmative action programmes. The effect of the decision was that in 1997 the state's premier law school enrolled only one black student, in comparison to the average of twenty-four black students who had enrolled at the school in previous academic years. The same happened in Texas: Texas Law School enrolled thirty-one black students in 1996, while after the Hopwood case the school could enrol only four.[59]

Quotas helping women in employment have also been successful. In Canada women's representation in the private sector has risen enormously since the introduction of employment equity programmes for women.[60] It is also clear that in those countries where women are helped onto party lists they are running for elections in growing numbers. As a result of the French Parity Law of 2000, women's representation in municipal elections has risen to almost fifty percent.[61]

Up to this point I have been trying to prove that quotas do not constitute unjust discrimination; they do not violate individual rights, and are effective means of reaching substantive equality. If the legislator introduces them into the legal system in the right way, then the community will also recognize their necessity.

In the next section I will examine the constitutionality of those measures for eliminating the inequality of opportunity, which have been part of the Hungarian legal system for shorter or longer periods, which have reached Parliament as Bills, and which are legal regulations currently in force.

AFFIRMATIVE MEASURES IN HUNGARY

In the past two decades since the political transition the legislator has tried to introduce milder remedies and numerical goals as well as rigid quotas. It introduced the policy of automatically granting extra points in the admissions process to those who were disadvantaged. With the help of the quotas of the Act on Sports it gave access to women into sports institutions. In 2001 several Bills aimed at introducing measures of preferential treatment in relation to people of ethnic and national minorities and women.[62] Most recently another quota was proposed by Members of Parliament in order to help women get onto party lists and thereby have a greater share in politics. First I will examine the constitutionality of granting extra points in higher education, which is considered to be a milder remedy, and then I will turn my attention to rigid quotas.

1. Positive actions in admissions

One of the purposes of the Act on Higher Education was to establish equal treatment and equal opportunities in higher education. The Act authorizes the government to order preferential treatment *a)* for disadvantaged student groups; *b)* for those on unpaid leave for childcare purposes, or in receipt of pregnancy-maternity benefits, childcare allowance, child-rearing allowance or childcare benefits; *c)* for those classified as disabled applicants.[63] On the basis of a government decree, with the permission of the Minister for Education, up to December 2006 disadvantaged applicants gaining a place in an institute of higher education could take part in education (otherwise paid by the applicants) at the expense of the state. If there was no possibility for this, with the help of the mentoring programme these applicants could gain access to the state funded places, if they reached eighty percent of the points set for admission. Their number was restricted, so only three percent of the total number of students in a given department could take part in state-funded education. According to the decree, disadvantage included those applicants taken into temporary or permanent custody or state custody, and those whose parents were undereducated or lived in poor financial conditions.[64]

From 1 December 2006 the system of support was changed. Those applicants who lived in difficult financial conditions or had formerly been in state custody automatically became entitled to four, from January 2008 twenty-five extra points, with regard to their disadvantage. Further points were granted to the children of undereducated parents and children formerly in permanent custody. Any applicant with a disability or any parent raising their children at home was entitled to fifty extra points.[65]

In the view of those who oppose the rule, this is against the principle of access according to abilities and Article 70/F of the Constitution, and is not appropriate to facilitate the access of disadvantaged students to university. I argue here that both statements are wrong.

Under Article 70/F, the State shall implement right to education through the extension and general access to public education, free compulsory primary schooling, secondary and higher education being available to all persons on the basis of their ability, and furthermore through financial support for education.

The framework of the right to education was set very narrow by the case law of the HCC. The right to education "is substantiated by the state's duty to maintain its institutions, within the framework of which the state has to guarantee the organizational and legal conditions to practice it for everybody, without discrimination. The right to education, however, does not mean that the state is compelled to guarantee participation in education at all levels of it for everybody".[66] It is thus primarily a state obligation, and does not mean that on the basis of this constitutional provision anyone has a right to study in the institute of higher education they choose.[67] Under Article 70/F (2) of the Constitution, higher education has to be available for all persons on the basis of their ability.[68] The government decree made on the basis of Articles 70/A (3) and 70/F (2) of the Constitution aims at guaranteeing equal opportunities to higher education for socially-economically disadvantaged students who are of good ability. In this way when creating this rule the legislator was guided by the equal consideration of the interests of each and every person, and as a result by the recognition of the disadvantaged position of certain individuals. In principle thus, there is no problem with the rule.

In the following, however, we have to examine whether employing extra points is a suitable means to eliminate the disadvantages. We have to find out whether people admitted to high-quality universities on the basis of the preferential rules are indeed of difficult financial backgrounds and from institutions of education which are satisfied with lower results, and for this reason have difficulties in coping with the competition at the university. The starting point of this assumption is that the students admitted on the basis of preferential measures are certainly not the best in terms of their abilities.

It is well known that helping to catch up has to begin not at university, but in early childhood.[69] In order to make sure that schools do not enhance the already existing inequality of opportunity among students, we need government programmes which enhance integrated education as early as elementary school.[70] Disadvantaged students also need special attention during their secondary education. This support, however, is no substitute for helping them to be admitted to university. Candidates for university apply for admittance of their own free will, having considered all the conditions and the requirements of the university as well.

The aim of the entrance examination is to find out who has the capacities to participate in higher education. The abilities, capacities and conditions needed to pass the entrance examination can be of various types, such as home environment, or the social and financial situation of parents. Previous re-

sults at school are only one among these. Furthermore, instead of the knowledge acquired at secondary school, more and more emphasis is put on the students' ability to make their way in the university environment. For this reason it cannot simply be claimed that because of their previous, more modest results, students admitted on the basis of helping measures do not have as good abilities as their fellow students.[71] Furthermore, preferential treatment can even have a motivating effect on their results, since there is no separate evaluation system for them after admission. They have to make their way together with the others. The Act on Higher Education also expresses this: preferential treatment may not result in exemption from the fulfilment of basic academic requirements that are requisite to the granting of professional qualifications certified as Bachelor or Master degree, or the vocational qualification evidenced by the certificate of higher-level vocational training.[72]

In my view the government decree has a legitimate aim; it does not violate individual rights, and is suitable for reaching the set aim, but is not adequate. The current rule helps people living in difficult financial conditions in such a way that perhaps Roma students themselves do not come any closer to passing the university entrance exam. The regulation should have aimed to help specifically the higher education of seriously disadvantaged Roma students.[73] The legislator should have made it clear: the rule was supporting the participation of students in higher education not simply on the basis of their financial difficulties, because that would remain a matter of social policy, and would not become preferential treatment.[74] In Hungary the primary purpose of affirmative action helping the access of Roma children into university has to be the growth of the education opportunities of the permanently disadvantaged Roma minority within the political community. As a result of the measure the example of Roma students admitted to university will also have an encouraging effect on the rest of their community, so their subsequent protection of rights and interests will also be able to rely on a broader foundation.

A Roma student's experience within the Hungarian political community cannot be compared to those of the non-Roma people living in the same financial conditions. Knowing this peculiar experience is very important for example for students of social sciences, and with the same knowledge every student will find it easier to fight the stereotypes relating to Roma people.[75] Eliminating prejudices against Roma people, and the continuous easing of current social tensions would help the formation of a more just political community based on substantive equality. Moreover, the presence of students admitted with the help of quota measures would be inspiring within the student body, because it would mean an opportunity for students to encounter various standpoints and opinions.

Helping Roma students into universities has educational and social integration reasons as well. The integration of citizens within the framework of a common political culture is inevitable. A pluralistic society based on a democratic constitution guarantees cultural differentiation only under the condition of political integration.[76]

The aim of the current legal provision is not to help Roma people—and this is the inadequacy of the government decree. The suitability of the decree to meet its purpose is apparently not in question, as there is a direct relationship between the employment of the decree and the growing number of disadvantaged students being admitted to universities. However, at present the definition of disadvantaged applicants does not cover all people of Roma origin. In my opinion, in this way the decree has achieved less than it would have been able to according to Article 70/A (3) of the Constitution.

2. Gender-Conscious Remedies for Inequality

In this section I address the rigid quota measures which aim at amending the social position of women. The structural discrimination of women, primarily in the world of work and career making can be traced at several levels. The employment of women is very low, around fifty percent, and women employees can choose from a narrower range of professions and jobs than men. More than fifty per cent of graduates are women, and yet only ten percent of them work in management.[77] Thus, it seems justifiable to raise the extremely low number of women at a certain workplace or sphere of work with the help of preferential measures.[78] To this end, Germany employs quotas concerning women in public administration and at federal courts, and similarly Norway sets numerical goals in the private sphere. In Norway ten years ago a number of the places for university teachers was secured for women, while in more recent years the Public Limited Companies Act was amended in order to make the rate of women in the publicly traded companies' boards of directors forty percent. Companies that fail to conform to the numerical goal must pay fines until they comply fully with the law, otherwise they can be dissolved.[79]

A numerical goal similar to the latter was included in the Hungarian Act on Sports, however, without any sanction. On the basis of the Act valid between June 2001 and March 2004, in the decision-making, management and control board of public bodies and foundations related to sport, the rate of women should have been raised to at least ten percent by 15 November 2001, and at least to thirty-five percent by the middle of November 2006.[80] The prescription of the quota of women in sports managements is unique in the Hungarian legal system; previously there had not been any similar provision, nor has there been such a preferential measure for women since.

The quota measure met the requirements of the Hungarian Constitution. It did not restrict the possibility of the membership of any association, so it did not violate the right to association. In addition, it is not a right for anyone to be a leading official of a public body. The quota was justified by a legitimate and important aim, that is, supporting the proportionate representation of women in different sports institutions. The temporary rule made an important step forward, as it made a quota measure in employment possible. Besides this, it is an important result that women could gain access to the managing bodies of sports institutions. However, the manifestation of equal opportunity is even more important in choosing candidates for representatives of Parliament, because the duty of representatives is to make fundamental decisions relating to the political community. In the next section I will turn my attention to this phenomenon.

3. Parity Law

Several constitutional democracies set quotas to the winning places of party lists for the sake of women. In Hungary the idea of amending the Act on Elections in this way has also arisen. Two Members of Parliament proposed the amendment of the Act so that both sexes should be present in the same numbers, but with the failure of the proposal everything remained unchanged.[81]

Under Article 70/A (3) of the Constitution it is a duty of the State to eliminate inequalities of opportunity; according to Article 66 (1) the State guarantees the equality of the sexes both in terms of civil and political, and economic, social and cultural rights. In spite of this, currently in the Hungarian legal system there is no rule that would determine the rate of men and women present on the party lists entering elections.[82]

The French and Italian Constitutions expressly require equal access for men and women to mandates and chosen functions. In 1999 the French Constitutional Council declared unconstitutional the rule that provided that each list of candidates for the regional councils and the Corsican Assembly must include equal numbers of women and men. The Council emphasized that such a requirement violated the Constitution, but the constitution-making body could decide on the acceptability of positive discrimination.[83] As a result the Constitution was amended accordingly. On the basis of Article 1 statutes shall promote equal access by women and men to elective offices and positions. Article 4 states that political parties have the duty to help implement the principle set out in Article 1 as provided by statute.[84] On the basis of this authorization an Act was passed in 2000 by the French Parliament, according to which the fifty percent proportion for both men and women is valid for all proportional representation elections, and if the difference between the sexes exceeds two percent of all the candidates on the list of a given party entering the elections, the state budgetary support to the party can be reduced proportionately.[85]

Something similar happened in Italy. The Italian Constitutional Court in 1995, on the basis of the Constitution then in force, declared unconstitutional a rule stating that in the lists presented for election of provincial and municipal elections, neither sex could in principle represent more than two-thirds of the candidates.[86] The Court argued that the rule violated men's right to be elected. The Italian Constitution was consequently amended. Article 3 expressly made it the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country. Article 51 stated that all citizens of either sex are eligible for public office and for elected positions on equal terms, according to the conditions established by law. In order to do so, the Republic promotes, by specially conceived measurements, equal opportunity between women and men.[87] In 2003 the Italian Constitutional Court was of the opinion that an affirmative action helping women onto party lists was not unconstitutional, as nobody had a right to enter party lists, and the amended Italian Constitution also recognized the aim of creating substantive equality.[88]

As we can see, France and Italy decided on amending the Constitution in such a way as to ex-

press the necessity of eliminating the inequality of opportunity because of judicial practice which interpreted the principle of equality incorrectly. In other places the legislator did not need such a constitutional authorization to introduce a quota. In 2006 the Portuguese Parliament decided that both sexes should be represented in at least thirty-three percent on the party lists entering national and local elections as well as elections for the European Parliament, and every third candidate on the lists should be a representative of the other sex.[89]

In Hungary, in the two decades since the political transition, the proportion of women in political life has not grown considerably, although there are more and more highly educated and professional women. It is also obvious that the relatively low number of female representatives is not due to the aversion of citizens.[90] The number of women among candidates in individual constituencies has not considerably grown, and in those places on the party lists where there is a higher chance for winning, it is less probable that we will find female candidates.[91] This may contribute to the fact that the number of female representatives entering Parliament has hardly changed even after the fifth national elections following the transition.[92] There are only very few people who dispute that the more extensive political participation of women is a desirable goal. Opinions are more diverse, however, as regards the means of eliminating the inequalities of opportunity with which women start in the competition for candidacy.

The arguments against the quotas for women are of various types. Some recall the female representatives of the mock Parliaments prior to the transition. Those who argue with the picture of a slippery slope keep frightening us with images of a "Quota world". More challengingly, some question the efficiency of a quota. The most important argument, however, states that the quota violates a fundamental right, namely the men's right to be elected.[93] This is an argument of principle, and if proven, it can rule out the application of the quota. Let us examine it more closely.

All adult Hungarian citizens residing in the territory of the Republic of Hungary have the right to be elected and, provided that they are present in the country on the day of the election or referendum, the right to vote in Parliamentary elections.[94] Beyond the requirements the Constitution makes for the right to vote (nationality, being of age, permanent address in Hungary), no Act can require any more of an individual in order to have the right to be elected. Based upon the right to be elected, anyone can be a candidate in an individual constituency. A proposal supported by at least 750 electors is required for nomination.[95] A territorial and national list, however, may be presented by the parties, which can decide freely about the persons they put on the list.[96] This means that no one has an automatic right to be put on a party list. Neither do they have a right to the selection process on the basis of which all current parties decide about the persons they wish to put on the list, and which primarily favours to men. The debated proposal seeks to change this current procedure by recommending that a person of one sex on the nominating body' s list should always be followed by one of the other sex.[97]

The Bill would have been binding for all political parties, in that in a constitutional democracy parties operate according to the rules of democracy. The requirement of democratic organization results from Article 3 (2) of the Constitution. The organization of parties has to be suitable for their participation in the formation and expression of the will of the people.[98] For democracy to be present in the inner system and operation of parties, it naturally has to be manifested in the members' equality of rights and opportunity. This is confirmed by the Act on Equal Treatment, on the basis of which parties shall observe the principle of equal treatment in their legal relationships, and in the course of their procedures and measures.[99]

The prohibition of discrimination also in principle applies to the inner relationships of parties, however, practice seems to ignore it.[100] In Hungary, women have had the right to be elected and the right to vote since 1918, and they can exercise both rights, but in reality women start from a multiple disadvantage in the process of candidacy. Yet women do not represent some sort of a peculiar social partial interest in Parliament, but just like every Member of Parliament on the basis of Article 20 (2) of the Constitution, perform their activities in the public interest. The purpose of the quota would also not be to directly enter women into Parliament in order to represent particular "feminine" questions, but to approximate their chances to gaining access to mandates to those of men. The procedure of selection put forward in the Bill would thus have eliminated a privilege that is not in keeping with the equality of the sexes.

The Bill in question would not infringe the ideological freedom of political parties or their free expression. It would not do so with regard to feminist ideology or ultra conservative ideology. Furthermore, the Bill would not prevent the existence of parties with ideologies which go against effective

equality. It would not require that all political formations should share the values upon which the democracy of equality is based.[101] Parties would also have more opportunity to make their views against quotas public, and in turn question their justification in a parliamentary debate.

The legislative bodies of countries introducing quotas have correctly noted that women start with a disadvantage in the competition for candidacy. It is for the sake of equal opportunity that we have to intervene, and the majority of Western European parties employ policies for eliminating the inequality of opportunity. In Eastern Europe mostly socialist and social democratic parties are willing to employ quota measures. However, they set the proportion of women very low, and they do not necessarily guarantee that women should get some of the winning places in party lists.

It seems necessary for the Hungarian Parliament to follow the French, Italian and Portuguese example, and by introducing a quota help the political participation of women. It is clear that just as in so many other spheres, in the case of preferential treatment it is also the reaction of the legislature and the Constitutional Court to each other's actions that determines the outcome of the procedures. It seems that most European States notice that for the achievement of equal opportunities we need quotas, but their situation is made more difficult by the fact that the judges reviewing legal provisions tread cautiously on the path to eliminating inequality of opportunities.

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Deeply rooted social problems require creative and permanent solutions. The existence of racial prejudice and prejudice against the sexes is an ever-present problem, the solution of which is difficult not only for the individual, but also for the political community. The prohibition of discrimination cannot fight prejudices; it can only help prevent racist sentiments from being used as a justification for public decisions. This, however, will not create an accepting and colourful environment. Education, public services and employment are still spheres where the colour of a person's skin makes a difference. In public life women, people with disabilities and gay people still rarely achieve a leading role.

It is useless to try to eliminate prejudices, because this is unachievable due to human nature. It is, however, essential to make people aware of them[102] and to deal with them, as well as helping those who unjustly suffer disadvantage because of these prejudices. This latter is the aim of preferential treatment, which tries to create a more just environment by eliminating the inequality of opportunities.

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Proofread by John Harbord

NOTES

1. The website noikvota.hu contains several writings for and against quotas. Some articles and a petition to Constitutional Court have questioned the constitutionality of preferential measures employed in higher education.
2. Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press, Cambridge, Mass. 2000).
3. In what follows I will speak about the problem that in a social group not every individual can be considered disadvantaged.
4. The Hungarian Constitutional Court uses the term *positive discrimination,* in the European Union it is *positive action,* in Canadian legal literature *positive policy,* and in the United States it is called *affirmative action, preferential treatment* or *reverse discrimination*. In the present paper I am using the terms affirmative action and preferential treatment. These terms mean those measures that give an advantage to individuals on the basis of their belonging to certain national or ethnic minorities or a social group in a special situation.
5. On the difference between the constitutional equality rule and the prohibition of discrimination see András Bragyova 'Equality and Constitution. The Meaning and Application of the Constitutional Equality Rule in Gábor Halmai (ed), *The Constitution Found? The First Nine Years of the Hungarian Constitutional Review on Fundamental Rights* (INDOK, Budapest 2000) 255–288.
6. Kis János, *Vannak-e emberi jogaink?* [Do We Have Human Rights?] (Stencil, Budapest 2003) 111.
7. See Tóth Gábor Attila, *Túl a szövegen. Értekezés a magyar alkotmányról* [Beyond the Text, An Essay on the Hungarian Constitution] (Osiris, Budapest 2009 forthcoming).
8. Sections 6-11a, 20-6 of The Public Limited Companies Act 2003 in Norway has recently began enforcing a forty percent floor for both sexes on publicly traded companies' boards of directors. Section 46 of the Police (Northern Ireland) Act 2000 requires equal numbers of Catholics and Protestants to be appointed to the Police Service of Northern Ireland from a pool of qualified applicants.

9. János Kis writes that the disadvantaged position of the Roma population cannot be separated from the overt and covert discrimination of its members, and that once a group's disadvantages have been formed, they are wont to be recurrent. The aim of the special support of Roma population is to help deal with the power of prejudices and social mechanisms. Kis János, 'Liberalizmus Magyarországon – Tíz évvel a rendszerváltás után' [Liberalism in Hungary—Ten Years After the Transition] [2000] 37 Élet és Irodalom.
10. "The legal measures aiming at the elimination of the inequality of opportunities have a wide range, and the legislator can choose from the different regulations freely, with respect to the requirements of the Constitution." Decision No. 422/B/1991.
11. Decision No. 9/1990. (IV. 25.). See László Sólyom, Georg Brunner, *Constitutional Judiciary in a New Democracy, The Hungarian Constitutional Court* (Ann Arbor, The University of Michigan Press 2000) 44–45.
12. See Peter Paczolay, 'Judicial Review of the Compensation Law in Hungary' [1992] 4 Michigan Journal of International Law 806, 814.
13. Decision No. 1315/B/1995.
14. Decision No. 30/1997. (IV. 29.).
15. Decision No. 6/1992. (I. 30.), Decision No. 42/2005. (XI. 14.) In this latter case the Court followed the precedent set in 1992. The English translation of the latter available at: <http://www.mkab.hu/content/en/en3/42_2005.pdf> accessed 4 January 2009.
16. Decision No. 26/1993. (IV. 29.). The English summary of the decision see Bulletin on Constitutional Case-Law [HUN-1998-2-008], available at: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> accessed 4 January 2009.
17. Decision No. 35/1994. (VI. 24.). The English summary of the decision see Bulletin on Constitutional Case-Law, [HUN-1994-2-012].
18. Decision No. 46/1994. (X. 21.). The English summary of the decision see Bulletin on Constitutional Case-Law, [HUN-1994-3-015].
19. Decision No. 4/1993. (II. 12.); Decision No. 26/1993. (IV. 29.). See Sólyom, Brunner (n 11) 262–263; Péter Paczolay, *The Role of Religion in Reconstructing Politics in Hungary* [1996] 2 Cardozo Journal of International and Comparative Law 272.
20. Decision No. 22/1997. (IV. 25.). The English summary of the decision see Bulletin on Constitutional Case-Law, [HUN-1997-2-005].
21. Decision No. 1042/B/1997. The English summary of the decision see Bulletin on Constitutional Case-Law, [HUN-1998-3-009].
22. See Article 70/A (3).
23. Decision No. 462/B/2002., Decision No. 553/B/1994.
24. Decision No. 36/2000. (X. 27.). See András Holló, Árpád Erdei, *Selected Decisions of the Constitutional Court of Hungary (1998–2001)* (Akadémiai, Budapest 2005) 231, or see at <http://www.mkab.hu/content/en/en3/02139804.htm> accessed 4 January 2009.
25. Decision No. 7/1998. (III. 18.); Decision No. 28/2000. (IX. 8.).
26. Decision No. 46/1994. (X. 21.). The English summary of the decision see Bulletin on Constitutional Case-Law, [HUN-1994-3-015].
27. Decision No. 28/2000. (IX. 8.).
28. Decision No. 32/1997. (V. 16.).
29. Decision No. 28/2000. (IX. 8.).
30. Since 1987 the German Constitutional Court has decided that the state has a positive obligation to promote equal rights wherever there are social inequalities between men and women. BVerfGE 64, 163 (on retirement age), BVerfGE 85, 191 (on night work). See Anke J. Stock, 'Affirmative Action: A German Perspective on the Promotion of Women's Rights with Regard to Employment' in Aileen McHarg, Donald Nicolson (eds), *Debating Affirmative Action: Conceptual, Contextual, and Comparative Perspectives* (Oxford, Blackwell 2006) 59–74. The Polish Constitutional Tribunal also recognized that "where a legal differentiation of the situation of men and women is based on sufficient social arguments, in particular a tendency to eliminate the de facto inequality in the field of employment, it may be deemed justified under the principle of social justice or the principle of equal rights. That is called »leveling privileges«". K 15/97, See the English summary of the decision in Bulletin on Constitutional Case-Law, (POL-1997-3-020).
31. See Győrfi Tamás, 'A diszkrimináció tilalma: egy különleges státuszú jog' [The Prohibition of Discrimination, A Right with Special Status] [1996] 7–8 Jogtudományi Közlöny 275.
32. Eörsi Mátyás, Kis János, 'Az alkotmányellenes diszkrimináció fogalma és a kárpótlási törvény' [The Notion of Unconstitutional Discrimination and the Law on Compensation] [1991] 8 June Beszélő 19.
33. Suspect classification is permitted only if it meets a very exacting test of strict scrutiny (in the US), or proportionality (in Germany or under the EU law). The Hungarian Constitutional Court in the absence of impartial justification found unconstitutional a statute which granted the right to early retirement exclusively to female spinners, whereas male textile workers were excluded [Decision No. 7/1998. (III. 8.)]. Another statute has caused an unconstitutional situation by not allowing men to bear the family name of the wife upon marriage [Decision No. 58/2001. (XII.

7.)] The English translation of the latter available at: <http://www.mkab.hu/content/en/en3/58_2001.pdf> accessed 4 January 2009.

34. If we do not take this distinction into account properly, we disregard the difference between a „No Trespassing" sign and a welcome mat. *Adarand Constructors, Inc. v Peña* 115 S. Ct. 2097 (1995) (Stevens, J., dissenting). See also John Gardner 'Liberals and Unlawful Discrimination' [1989] 9 Oxford Journal of Legal Studies 1, 8.
35. DeFunis relied on his right to equality protected by the Equal Protection Clause when challenging the University of Washington Law School admissions procedure. *DeFunis v Odegaard* 416 U.S. 312 (1974).
36. Following Ronald Dworkin's argumentation, Decision No. 9/1990. (IV. 25.) differentiates between two different sorts of rights. The right to equal treatment, which is the right to an equal distribution of some opportunity or resource or burden, and the right to treatment as an equal, which is the right to be treated with the same respect as anyone else, not the right to receive the same distribution of some burden or benefit. See Paczolay (n 12) 814–815.
37. The US Supreme Court rejects quota system [*University of California Regents v Bakke* 438 U.S. 265 (1978)] and held unconstitutional the University's policy of automatically granting 20 points, or one-fifth of those needed for admission [*Gratz v Bollinger* 539 U.S. 244 (2003)]. However, in the Court's view, the Constitution does not prohibit an educational institution's narrowly tailored use of race as a factor in admissions decisions in order to advance a compelling state interest [*Grutter v Bollinger* 539 U.S. 306 (2003)].
38. Ronald J Fiscus, *The Constitutional Logic of Affirmative Action* (Duke University Press, Durham, London 1992) 37–50. Fiscus argues that white male workers "are not innocent; they have undue, excessive seniority, and that illegitimate seniority should not be used now to protect them from being laid off in place of blacks who should have been hired either in their places or ahead of them" (108).
39. See Ronald Dworkin, 'De Funnis v. Sweatt' in Marshall Cohen, Thomas Nagel, Thamos Scanlon (eds) *Equality and Preferential Treatment, A Philosophy & Public Affairs Reader* (Princeton University Press, Princeton 1977) 65.
40. Case C-476-99, Lommers [2002] ECR I-2891, par. 39.
41. Case C-158/97, *Georg Badeck and Others* [2000] ECR I-1875, par. 23. See Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363; Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabeth Fogelqvist* [2000] ECR I-5539; and Case C-319/03, *Serge Briesche v Ministre de l'Intérieur* [2004] ECR I-8807. The EFTA Court in its Case E-1/02. *EFTA Surveillance Authority v The Kingdom of Norway* [2003] held that Norway had failed to fulfill its obligations under the EEA Agreement by maintaining in force a rule that permits the reservation of a number of academic posts exclusively for members of the under-represented gender. See Marc De Vos, Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, available at <http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/bfe07_en.pdf > accessed 9 January 2009.
42. Fiss argues that there are natural classes, or social groups, in American society and blacks are such a group. A social group has two characteristics: 1. It is an entity; it has a distinct existence apart from its members. 2. The identity and well-being of the members of the group and the identity and well-being of the group are linked. Owen M. Fiss, 'Groups and Equal Protection Clause' in Cohen, Nagel, Scanlon (n 40) 84–155. In Hungarian legal literature János Kis is a representative of the idea that the subject of collective rights, the minority group is not created through an association, but it is simply given, and the State has to officially recognize it to make it a legal entity. Kis János, 'Túl a nemzetállamon' [Beyond the Nation State] in: Kis János, *Az állam semlegessége* [The Neutrality of the State] (Atlantisz, Budapest 1997) 159–166.
43. Such as a wealthy member of a Roma family, or a woman who has been in a leading position for a while.
44. Andrea Sheldon, 'Homosexual-quota bill gets quiet nod in Senate chamber' [1997] Insight on the <http://findarticles.com/p/articles/mi_m1571/is_n43_v13/ai_20027235> accessed 9 January 2009.
45. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin· Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Charter of Fundamental Rights of the European Union (HL C 303, 2007. 12. 14.) III.
46. Discrimination on the ground of ethnic origin is seen as the most common form in Hungary, and the majority thinks that not enough effort is made in their country to combat discrimination. 'Eurobarometer survey, Discrimination in the European Union 2008, results for Hungary' <http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf > accessed 9 January 2009.

47. Statistics about women and men in decision-making positions are available at <http://www.nokadontesho-zatalban.hu/doc/wommen2008.pdf> accessed 9 January 2009.
48. See *Europe and Central Asia: Summary of Amnesty International's Concerns in the Region,* July-December 2007 <http://thereport.amnesty.org/eng/regions/europe-and-central-asia/hungary> accessed 9 January 2009. See also András Kádár, 'Hungarian country report on measures to combat discrimination' <http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/husum07_en.pdf> accessed 9 January 2009.
49. In the seventies many argued that the society should repay the harm it caused. Judith Jarvis Thomson, 'Preferential Hiring' in Cohen, Nagel, Scanlon (n 40) 19–40. See the debate on this in Steven M. Cahn (ed), *The Affirmative Action Debate* (Routledge, New York/London 1995) Chapter II. The Court deciding the case Hopwood v. Texas [78 F.3d 932, cert. denied, 116 S. Ct. 2581 (1996)] based its argument on this premise. In 2007 the Roberts Court used the compensatory justice argument again. [*Parents Involved in Community Schools v Seattle School District No. 1,* 551 U.S. __ (2007)].
50. Robert Simon, 'Preferential Hiring: A Reply to Judith Jarvis Thomson' in Cohen, Nagel, Scanlon (n 40) 40–48.
51. Kent Greenawalt, *Discrimination and Reverse Discrimination* (Alfred A. Knopf, New York 1983) 53–54.
52. Gardner argues that positive discrimination is a compensatory technique and a redistributive technique at the same time. See Gardner (n 35) 15–16.
53. Nagel argues that if a discriminatory admissions or appointment policy is adopted to mitigate a grave social evil, and it favors a group in a particular unfortunate social position, and for this reason it shifts from a meritocratic system to the assignment of positions which is not itself required by justice, then the discriminatory practice is probably not unjust. Thomas Nagel, 'Equal Treatment and Compensatory Discrimination' in Cohen, Nagel, Scanlon (n 40) 17.
54. Fiss (n 43) 128.
55. According to the US Supreme Court, the attainment of student body diversity is a compelling state interest for purposes of equal protection analysis. See Bakke, Grutter, Gratz (n 38). However in Parents Involved, the Roberts Court emphasized that "[a]ccepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American society …" *Parents Involved* (n 50) 5. See the comment of the judgment in Ronald Dworkin, 'The Supreme Court Phalanx' [27 September 2007] The New York Review of Books.
56. See Barbara R. Bergmann, *In Defense of Affirmative Action* (Basic Books, New York 1996) 106–108.
57. Dworkin calls student diversity and social justice twin goals which justify affirmative actions. See Dworkin (n 2) 404.
58. Romeo Mihajlovic, 'Serbia Helps Roma Students' <http://www.birn.eu.com/en/1/190/7000> accessed 4 January 2009.
59. John E. Morris, 'Boalt Hall's Affirmative Action Dilemma' [November 1997] American Lawyer 4.
60. Nicole Busby, 'Affirmative Action in Women's Employment: Lessons from Canada' in: McHarg, Nicolson (n 31) 52–57.
61. Observatoire de la parité entre les femmes et les hommes <http://www.observatoire-parite.gouv.fr> accessed 4 January 2009.
62. In September, 2000 the Parliamentary Commissioner for the National and Ethnic Minorities Rights started the preparations for a project of a law on fighting against racism and xenophobia and to guarantee equal protection. During the first months of 2001, two more projects of equal protection law were prepared in Hungary. See Andrea Krizsán's country report in Andrea Krizsán (ed), *Ethnic Monitoring and Data Protection. The European Context* (CEU Press—INDOK, Budapest 2001) 185–186.
63. Act CXXXIX of 2005 on Higher Education, Section 2 item h); Section 39 (7); Section 51 (3) item c); Section 66 (7). <http://www.okm.gov.hu/letolt/nemzet/naric/act_cxxxix_2005.pdf> accessed 4 January 2009.
64. Governmental Decree No. 246/2003. (XII. 18.) on amending Governmental Decree No. 269/2000. (XII. 29.) on the general rules of admissions, Section 6.
65. Governmental Decree No. 237/2006. (XI. 27.) on admissions, Section 22.
66. Decision No. 18/1994. (III. 31.); Decision No. 27/2005. (VI. 29.).
67. Decision No. 375/B/2001.
68. Decision No. 28/2005. (VII. 14.). The English summary see in Bulletin on Constitutional Case Law 2005/2, [HUN-2005-2-003].
69. Act XXXI of 2008 gives support for children with multiple disadvantages in kindergarten, without directly mentioning Roma people.
70. Section 66 of Act LXXIX of 1993 says that schools have to admit children in the order of their application. If there is any vacancy left, then they have to prefer disadvantaged applicants. And if there is still any vacancy left, then they have to decide about the candidates by drawing lots. The Act divided school districts again, and the rate of disadvantaged students could differ only up to 25 percent in two neighboring districts. In July 2008 the Act was amended for the

worse. Since the term 2009/2010 only a school with compulsory admission duties cannot deny admission to a student from its district. The regulations concerning the rate of disadvantaged and non-disadvantaged students also changed, giving more room for manoeuvre to local governments.

71. On the greater improvement in the scores of black matriculants see: William G. Bowen, Derek Bok, *The Shape of the River. Long-Term Consequences of Considering Race in College and University Admissions* (Princeton University Press, Princeton, NJ 2000) 30.
72. Act CXXXIX of 2005 on Higher Education, Section 66 (7).
73. The main reason for the lack of confidence of politics may be that the support of society is needed to eliminate the inequality of opportunity of Roma people, and yet the majority of Hungarian society is aware of the weight and frequency of discriminating against Roma people, rejects any redistributing policy trying to amend this situation. Örkény Antal, 'A romák esélyegyenlősége alulnézetből' [Roma People's Equality of Opportunity Seen From Under] [2006] 4 Fundamentum 45.
74. As Sandra Fredman contends, such positive measures are not considered to be human rights duties but rather a matter of social policy. Sandra Fredman, *Human Rights Transformed. Positive Rights Positive Duties* (Oxford University Press, Oxford, NY 2008) 177.
75. See the discussion of this argument in Ronald Dworkin, *The Court and the University* [15 May 15 2003] The New York Review of Books.
76. Jürgen Habermas, 'Intolerance and discrimination' [2003] 1, 1 I.CON 10–11.
77. The fifty leading companies in Hungary employ three times as many men as women. Only very few women work in top leading positions, and the rate of female employment in the middle level of management is only ten percent. Source: Salgó Andrea, 'Munkahelyi diszkrimináció Magyarországon – körkép' [Discrimination at the Hungarian Workplace – A Survey] <http://hvg.hu/kkv/20061003diszkriminacio.aspx> accessed 4 January 2009.
78. Koppelman argues that some obstacles to women's economic opportunities probably cannot be solved by gentler means than outright hiring quotas. Andrew Koppelman, *Antidiscrimination Law and Social Equality* (*Yale* University Press, New Haven/London 1996) 138.
79. Anke J Stock: 'Affirmative Action: A German Perspective on the Promotion of Women's Rights with Regard to Employment' in McHarg, Nicolson (n 31) 59–74. Norway's Corporate Board Quota rule available at <http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-oncompan.html?id=416864> accessed 4 January 2009.
80. The Hungarian legal system does not contain this rule any more. The Act I of 2004 on Sport currently in force does not include this numerical goal.
81. Bill No. T/3066, Section 1. Bill No. T/3060. would have amended Article 33 (5) of the Constitution in such a way that it would require the Prime-Minister to present women and men as at least one-third of the candidates when appointing Ministers. The Bill did not receive the required two-thirds majority vote of the MPs.
82. Only the Hungarian Socialist party has a 20% quota for women, without having such a rule that every third candidate must be of the under-represented sex. Consequently, out of 189 faction members only 26 are woman, and 13 were elected in individual constituencies.
83. 98-407 DC, 14.01.1999. The English summary of the decision see Bulletin on Constitutional Case-Law [FRA-1999-1-001].
84. Loi constitutionnelle nº 99-569 du 8 juillet 1999 relative à l'égalité entre les femmes et les hommes, Journal Officiel de la République Française, 9 juillet 1999, 10175. The text of the Constitution currently in force is available at <http://www.conseil-constitutionnel.fr> accessed 4 January 2009.
85. Loi constitutionnelle nº 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, Journal Officiel de la République Française, 7 juin 2000, 8560.
86. 422/1995, 06.09.1995. The English summary of the decision see Bulletin on Constitutional Case-Law, [ITA-1995-3-012].
87. The Constitution of Italy is available at <http://www.cortecostituzionale.it> (in Italian), <http://www.codices.coe.int> (in English) accessed 4 January 2009.
88. 49/2003, 13.02.2003. <http://www.cortecostituzionale.it/versioni_in_lingua/eng/documenti/attivitacorte/pronunce/abstract/2003/abstract-49-2003-english.pdf> accessed 4 January 2009.
89. Decreto N. o 72/X Lei da Paridade: Estabelece que as listas para a Assembleia da República, para o Parlamento Europeu e para as autarquias locais são compostas de modo a assegurar a representação mínima de 33% de cada um dos sexos.
90. The Hungarian average is almost totally comfortable with having a political leader who is a woman. Eurobarometer survey, Discrimination in the European Union 2008, results for Hungary available at <http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf > accessed 9 January 2009.
91. Kiss Róbert, *Nők a politikában – avagy milyen nemű a közélet Magyarországon?* [Women in Politics—or What Gender Has Public Life in Hungary?], in

Palasik Mária, Sipos Balázs (ed), *Házastárs? Munkatárs? Vetélytárs? A női szerepek változása a 20. századi Magyarországon* [Spouse? Colleague? Rivaless? The Change in Feminine Roles in the 20th Century Hungary] (Napvilág, Budapest 2005) 234–235.

92. Number of women in Parliament in 1990: 7%; in 1994: 11,1%; in 1998: 8,5%; in 2002: 9,8%, in 2006: 10,6%. Data available at <http://www.mkogy.hu> and <http://www.quotaproject.org>.
93. The Constitutional Court of Italy based its Judgment 422/1995. on the right to be elected. That is—among others—what the Swiss Constitutional Court said when rejecting a petition for referendum. 1P.173/1996, 19.03.1997. The English summary of the decision see Bulletin on Constitutional Case-Law [SUI-1997-2-004].
94. Article 70 (1) of the Constitution. It should be noted, however, that under Article 70 (5) the right to vote shall not be granted to persons whose capacity is limited or restricted by being subject to guardianship, or who are subject to the final judgment of a court forbidding them to participate in public affairs, or who are imprisoned on the basis of a final legal judgment or are under compulsory institutional care on the basis of a final judgment rendered in criminal proceedings.
95. Act XXXIV of 1989 on the Election of Members of Parliament, Section 5 (2).
96. Act XXXIV of 1989 on the Election of Members of Parliament, Section 5 (3)-(4), Act C of 1997 on Electoral Procedure, Section 53 (3).
97. Rosenblum reminds us that such a gender equality remedy requires that individuals fit into one side of the male/female binary for calculation. In this way, however, the remedy may serve to limit gender fluidity and maintain gender binary. Darren Rosenblum, 'Loving Gender Balance: Reframing Identity-Based Inequality Remedies' [2008] 76 Fordham Law Review 2886.
98. Sólyom László, *Pártok és érdekszervezetek az alkotmányban* [Parties and Trade Unions in the Constitution] (Rejtjel, Budapest 2004) 55–59.
99. Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities, Section 4 item l), Section 6 (1) item d), (2) item b). The English translation of the Act is available at: <http://www.egyenlobanasmod.hu/data/SZMM094B.pdf> accessed 4 January 2009.
100. Sachs and Biskup argue that in the context of quota arrangements it is necessary to distinguish between election within parties and nomination procedures for election candidates. Elections within parties only have to respect democratic principles, but prohibition of discrimination does not bind parties being private corporations. Therefore it is possible to have quota arrangements within party structures, because with regard to party autonomy the strictness of electoral equality cannot apply. Michael Sachs, Uta Biskup, 'Political Equality Rights' in Albrecht Weber (ed), *Fundamental Rights in Europe and North America* (Martinus Nijhoff, Leiden/Boston 2001) D 32. See also Wolfgang Rüfner, 'Article 3 (2) (3)' in Rudolf Dolzer, Klaus Vogel (eds), *Bonner Kommentar zum Grundgesetz* at 812.
101. See this argument in Tribunal Constitucional de España, JCC 12/2008, 29.01.2008., item 6.
102. Biased decisions are many times the result of unconscious racism. Paul Brest calls racially selective sympathy the unconscious failure to extend the same recognition of humanity to a minority, and hence the same sympathy and care, given as a matter of course to one's own group. Paul Brest, 'Foreword: In Defense of the Antidiscrimination Principle' [1976] 90, 1 Harvard Law Review 8.