FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN HUNGARY IN 2003

January 2004

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[*] Submitted to the Network by Professor Gábor HALMAI in December 2003. This report was prepared within the Hungarian Human Rights Information and Documentation Center (INDOK), with the contributions of Ms. Petra Bárd, Ms. Krisztina Kovács, Ms. Eszter Polgári and Mr. Benedek Varsányi.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.
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PRELIMINARY REMARKS

Constitutional development in Hungary has taken a different direction from the other former socialist, now accession, countries. This direction can be described as an approach emphasizing continuity, which is evidently attributable to the fact that in Hungary there was no revolution to sweep away the constitution of the ancient regime. The changes in Hungary were not triggered by mass demonstrations like in Romania, in the former GDR, or in Czechoslovakia. Events in Hungary can be described as some sort of "refolution", in which reforms of revolutionary importance interrupted the continuity of the previous regime's legitimacy without any impact on the continuity of legality. The paradoxical situation in this type of political transformation is reflected by the fact that, while in this country, the institutional structures of a constitutional state with the rule of law have been developed and strengthened. The protection of fundamental rights and freedoms are safeguarded, and at the same time the constitutions of Hungary, whatever significant changes and amendments may have been made in them, continue to be titled as if they are all merely amendments to the first written constitution of 1949.

In the past almost one and a half decades, the institutional framework required by the rule of law has been put into place by passing legislation central to the functioning of the parliamentary democracy, fundamentally revising the constitutional framework and establishing and strengthening institutions safeguarding the protection of fundamental rights (Parliamentary Commissioners for Human Rights, Data Protection and Minority Rights[1], an independent judiciary, etc.) The most important protector of fundamental rights is the Constitutional Court, established by the comprehensive amendment to the Constitution in 1989 with an exceptionally wide jurisdiction, which, with its activist interpretation of rights, elaborated the concept of "invisible Constitution", its theory on the nature of the system change, the role of legal continuity, and legal certainty.[2]

The main concerns in 2003 are as follows:
As to Article 4 of the Charter, the likelihood of ill-treatment by the police, mainly targeted against Roma and foreigners, is considerable particularly upon arrest and/or during time spent in detention facilities. Also the substandard living conditions in border guard community shelters for migrants, as well as overcrowding and poor physical conditions in prisons are causes for concern. Furthermore, the practice of segregating HIV-positive convicts and compulsory screening of detainees in Hungarian penitentiaries is a reason for concern.

As to Article 6, the wide-ranging power of the police to apply short-term arrest even against persons not suspected of any crime or misdemeanors is coupled with the lack of any legal remedy against this form of deprivation of liberty. Police may use this measure as a means of

[1] Presently there are four commissioners, the Parliamentary Commissioner and Deputy Commissioner for Civil Rights, the Parliamentary Commissioner for Data Protection and Freedom of Information, and the Parliamentary Commissioner for National and Ethnic Minorities. Anybody, who feels that in consequence of a proceeding, decision or the omission of a certain measure, his or her constitutional rights have been violated or if the threat of a violation is immediate, he or she may apply to the ombudsman. If the ombudsman comes to the conclusion that a constitutional right has been violated, he or she makes a proposal for remedy to the supervisory organ. If the organ violating the given constitutional right is able to terminate the violation within it's own competence, the ombudsman may initiate the remedy of the violation with the head of the organ concerned.

[2] The jurisdiction of the Hungarian Constitutional Court includes *inter alia* preliminary review of enacted but not yet promulgated statutes, constitutional review of enacted norms, review of unconstitutional omission of legislation, examination of conformity of legislation with international treaties and abstract interpretation of the constitution. Retrospective norm control can be initiated by anyone, even if they are not affected by the regulation in question. In such a motion the petitioner can suggest the full or partial nullification of the legal regulation or statute challenged. By such an actio popularis, any statute or even administrative regulations (for example, ministerial degrees) can be challenged. Judges of ordinary courts can initiate retrospective norm control also. Such judges can suspend any case pending before them and initiate proceedings before the Constitutional Court, if they consider the legal provisions to be applied in the case unconstitutional.

arbitrary punishment. The police measure of "bringing before the authority", used frequently in practice by police while the arrested person is still not under the scope of a criminal procedure, allows for the possibility that a detainee could be questioned without being afforded due process rights as suspect. Courts in many instances still seem likely to consider ordering pre-trial detention a mere formality. Until the new Code of Criminal Procedure, which came into affect in 1 July 2003, there was no maximum time limit for the duration of pre-trial detention, and the execution of it in police jails was a serious concern due to the danger of extorting of evidence and physical or psychological pressure. The possible 3-year length of pre-trail detention is still considered unreasonably long, even if it is not extended.
One of the most problematic issues concerning alien policing detention is that according to the Hungarian law, the regional alien policing authority may place a foreigner who is subject to expulsion in detention in order to ensure the implementation of the expulsion. In the case of asylum seekers, however, the expulsion is per se inexecutable until the end of the asylum proceedings. Alien policing detention is ordered by resolution, and the court reviews the legality of ordering alien policing detention, but does not review whether the expulsion is executable.

As to Article 7, a recent phenomenon in the capital, Budapest, is that identity checks are often followed by searches. The target group consists of young persons. The police officers ask them to empty their pockets, purses, and their cigarette boxes, and to take off their shoes and socks. The stated objective of such identity checks and searches is to find drug consumers, which is underpinned by the fact that the police officers often clearly ask the checked persons whether they possess any kind of drugs. However, the police do not have the right to exercise this practice without suspicion.

As to Article 20, the situation of Roma is a serious matter for concern. The unemployment rate is five times higher among the Roma people than the average. Roma have to face prejudice, misconceptions, poverty, poor housing, and exclusions. The number of Roma students passing the school-leaving exam is just a small fraction of the national average, while Roma with a college or university degree are still very much the exception. It is very common in Hungarian primary schools to teach Roma children in separated classes, separated in every common activity of non-Roma children.

As to Article 22, the representation of national and ethnic minorities in the Parliament has not been solved yet, despite the command of the Constitution and the decision of the Constitutional Court on the unconstitutional omission of the legislature. Also the voting system of minority self-governments is under discussion. While the Government and the Parliamentary Commissioners both for Data Protection and National and Ethnic Minorities agree on a registration system by the minority organization themselves. Some of the organizations express data protection concerns.

As to Article 47, during the period under scrutiny the Eur. Ct. H.R. found that Hungary violated Article 6(1) of the European Convantion on Human Rights by reason of the length of the proceedings in nine cases, and five other cases ended with friendly settlement between the applicant and the State. The Ministry of Justice is preparing an act that will provide remedies within the domestic legal system against the unreasonable delays. The concerned persons will be entitled to initiate proceedings in those cases when the courts fail to perform its duties within the terms prescribed by law.

CHAPTER I : DIGNITY

Article 1. Human dignity and Article 2. Right to life

National legislation, regulation and case-Law

The Constitutional Court brought its long awaited judgment on euthanasia in its decision 22/2003. (IV. 28.) AB határozat. The 1997. évi CLIV. törvény az egészségügyről [Act No. CLIV of 1997 on Health Care] contains a wide range of patients' rights, among others the right to human dignity and the right to the refusal of medical treatment. The Act allows terminally ill patients to refuse life-supporting treatment under conditions which ensure that the final decision on ending life be made by the patient alone. However, the Act also lists several restrictions on the practice of this right. The petitioners argued that the legislature, by enacting the above rules in the Act on Health Care, did not resolve the conflicts, which exist between the right to life and human dignity and the right to self-determination. In their view article 54.1 of the Constitution on the right to life and human dignity involves a right to euthanasia. Moreover they urged for the amendment of the Criminal Code distinguishing the criminal liability of assisted suicide from the legal consequences of homicide. The Constitutional Court rejected the applicants' request of declaring both passive and active euthanasia constitutional as well as the amendment of the Criminal Code. The Court reemphasized the principle it has previously laid down on the inseparable unity of the right to life and human dignity. However, it held that subsidiary rights that can be deducted from the right to human dignity, like the right to self-determination, could be limited on the basis of article 8 of the Constitution according to the necessity and proportionality tests. The Court also held that human dignity and the right to life are not only separable, but the enforcement of the one may be to the detriment of the other. Although everyone has the right to decide his or her fate, the right to life always prevails over the right to self-determination, and this rule helps to prevent abuses of terminally ill persons who might be sensitive to improper influence by their doctor or relatives. The Court acknowledged that the Act makes the self-determination of terminally ill patients only to a limited extent possible, however held this restriction of ending their life in accordance with human dignity to be in keeping with the most basic fundamental right, i.e. the right to life. With regard to future development it is important to note that the majority emphasized the narrow line between constitutional and unconstitutional legislation in the fast-developing field of medicine.

Article 3. Right to the integrity of the person

National legislation, regulation and case-law

The Government enacted 148/2003 (IX. 22.) Korm. rendelet a géntechnológiai bírság megállapításáról [148/2003 (IX. 22) Government Decree on the Determination of Biotechnological Fines] on the basis of the empowerment granted by the 1998. évi XXVII. törvény a géntechnológiai tevékenységről [Act No. XXVII of 1998 on Biotechnology Activities]. The supervisory authorities may impose a fine, if the genetic modification of the natural organisms, the contained use, release, commercialization, import and export of genetically modified organisms and products derived there from violate the provisions specified in the Act on Biotechnology Activities, in separate laws or in the permit, especially if the biotechnology activity poses a threat to environment and to human health. The Government Decree specifies special cases and declares that the fine for these breaches of law amount to a sum between 300.000 HUF and one million HUF, and in case of repeated breach of law from 1 million HUF to 20 million HUF. The Government Decree will enter into force on May 1, 2004 and is in line with Art. 17 of the Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms and with Art. 33 of the Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on

the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

111/2003. (XI. 5.) FVM-GKM-EszCsM-KvVM [111/2003. (XI. 5.) Decree of the Minister of Agriculture, Minister of Economic Affairs and Transport, Minister of Health, Social and Family Affairs and Minister of Environment and Water] specifies the procedures to be and not to be regarded as biotechnological modification and lists the authorities entitled to supervise biotechnological activities.

82/2003. (VII. 16.) FVM rendelet a géntechnológiai tevékenységre vonatkozó nyilvántartás és adatszolgáltatás rendjéről, valamint a géntechnológiai tevékenységhez szükséges engedély iránti kérelemhez csatolandó dokumentációról [82/2003. (VII. 16.) Decree of the Minister of Agriculture] specifies the registration and providing of data concerning biotechnological activities and lists the documents to be attached to the request when applying for a permission to pursue biotechnological activities. The Decree is in line with Annex V on "Information required for notifications" of the Council Directive 98/81/EC of 26 October 1998 amending Directive 90/219/EEC on the contained use of genetically modified micro-organisms; with Annexes III/A-B and of the Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC IV on information required in the notification concerning releases of genetically modified higher plants, organisms other than higher plants and additional information; and with Council Decision 2002/812/EC of 3 October 2002 establishing pursuant to Directive 2001/18/EC of the European Parliament and of the Council the summary information format relating to the placing on the market of genetically modified organisms as or in products.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

International case law and concluding observation of international organs

Violation of Article 3 of the ECHR. On 16 December 2003 the European Court of Human Rights has brought a judgment in the case of Kmetty v. Hungary (application no. 57967/00). The Court held unanimously that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights on account of the failure to carry out an effective investigation into the applicant's allegations of ill-treatment.

On 22 December 1998, following a bomb alert, the police ordered everyone inside the market hall to evacuate the building. The applicant and several others refused to comply with the police's instructions. The applicant asserted that the police officers grabbed him in such a way that he fell to the ground, and that he was taken to the basement of the police station, where at least four police officers repeatedly beat him; he was subsequently placed in a cell for about three hours before being released. The Court found it impossible to establish on the evidence before it whether or not the applicant's injuries had been caused by the police's exceeding the force necessary to overcome his resistance to a lawful police measure, either while immobilizing him and taking him to the police station or during his time in custody.

However, the Court reiterated that where an individual raised an arguable claim that he had been seriously ill-treated by the police unlawfully, the authorities were under an obligation to carry out an effective investigation capable of leading to the identification and punishment of those responsible. In the applicant's case, however, the Court found that there was inexplicable shortcoming in the proceedings, which had deprived the applicant of any opportunity to challenge the suspects' version of the events. In the absence of a thorough and

effective investigation, the Court concluded that there had been a violation of Article 3 of the ECHR.

Visit of the CPT. A delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has carried out an ad hoc visit to Hungary (it began on 30 May 2003). The purpose of the visit was to review the treatment of remand prisoners in police and prison establishments in Budapest. Particular attention was paid to the activities provided to remand prisoners, which was a major issue of concern to the Committee following the findings during the two previous visits to Hungary.[3] This year the delegation carried out follow-up visits to the Police Central Holding Facility in Budapest and Budapest Remand Prison, and visited for the first time the 2nd and 4th District Police Stations of the capital. The results of the visit and the recommendations of the Committee have not yet been published yet.

National legislation, regulation and case law

Right to lodge a complaint. The 18/2002. (XI. 30.) IM rendelet [18/2002. (XI. 30.) Decree of the Minister of Justice] amending the 6/1996. (VII. 12.) IM rendelet a szabadságvesztés és az előzetes letartóztatás végrehajtásának szabályairól [6/1996. (VII. 12.) Decree of the Minister of Justice on the execution of imprisonment and pre-trial detention] that altered the process regarding complaints, entered into force on 1 January 2003. According to the decree, the time available for the competent authority to decide on the complaint increased from fifteen to thirty days; this period "for a good cause" can be extended by additional thirty days. (If the nature of the case makes it necessary, the complaint has to be examined and decided out of turn.) It is expected, that not only on paper, but also in practice the average time before the decision will be longer.

A complaint repeatedly made within three months not containing new (additional) facts can be refused without inquiry (with a few exceptions).

Practice of national authorities

Ill-treatment during police manifestations. The research currently being done by the human rights NGO the Hungarian Helsinki Committee will eventually provide detailed data on the ill-treatment of Roma in the hands of the police. At the moment, very little information is available. It can be concluded from a small number of reports that Roma people are more often subjected to an identity check, during which the likelihood of a violent outcome (usage of physical force in an extent not strictly necessary) is increased.

In the case of Mrs. Sándor Z.,[4] the court of first instance on 19 June 2002 found the first and second defendants, among other crimes, guilty of the abuse of official powers and of attempt to cause severe bodily injury. One of the two policemen was sentenced to three years and six months and the other to two years and eight months of imprisonment. The decision was appealed, and on 10 January 2003 the court of second instance (Nógrád County Court) reduced the punishment to two years and four months and two years and two months respectively. [BF. 414/2002.]

[3] CPT conducted two visits to Hungary before 2003: in November 1994 and in December 1999. For the reports see http://www.cpt.coe.int/reports/inf1996-05en.htm and http://www.cpt.coe.int/reports/inf2001-02en.htm. The body's final conclusion in the 1999 report (§ 18) was as follows: „In its 1994 visit report, the CPT concluded that 'persons deprived of their liberty by the police in Budapest run a not inconsiderable risk of ill-treatment'. In the light of all information gathered during the 1999 visit, the Committee must emphasize that it remains concerned about the persons detained by the police in Hungary, and not only in Budapest."

[4] For details, see: White Booklet 2002 The annual report of the Legal Defense Bureau for National and Ethnic Minorities (NEKI). pp. 74-78.

On 19 February, in Hajdúhadház, during an attempt to arrest a police officer shot S.B., a 19-year-old Romani man, in the abdomen. According to the Hajdú-Bihar County Police Department, the officers shot him in self-defense. According to the observation of a neighbor S.B. ran outside the house handcuffed, the two policemen ran after him and beat S.B. in the street, and then shot him in the abdomen. An investigation into the shooting conducted by Hajdú-Bihar County Police Department reportedly found that the use of firearms had been justified. It is unclear whether an investigation had been initiated into the ill-treatment allegations. On 13 June 2003, in Valkó (Pest County) during an attempt to arrest Cs.V., a Romani man, who reportedly had not resisted to the police officers, was pushed face down to the hood of the police car. Two Romani witnesses, one of them a minor, were reportedly dealt with degrading and threatening words, then the minor threatened with a gun, who, as a result, fainted. Leaving the scene of the incident the policemen reportedly said if no complaints were filed against them they would not press any charges against Cs.V. The Pest County Police issued a statement claiming that in the process of arresting Cs.V. the two police officers were threatened by a group of angry Roma, armed with pitchforks and scythes, one of the officers was said to have been even assaulted, and a tyre of their car punctured. The Pest Country Prosecutor's Office has reportedly initiated an investigation into the case.[5]

Material conditions of detention in law enforcement institutions. In March 2003 the 32 law-enforcement institutions still ran on 161% of their total capacity.[6] For the improvement of the conditions implementation of a Government action plan (contained in 2072/1998. (III. 31.) Korm. határozat [2072/1998. (III. 31.) Decision of the Government] and 2147/2002. (V. 10.) Korm. határozat [2147/2002. (V. 10.) Decision of the Government]) for establishing new prison facilities in the term 2003-2008 is in progress. The most important achievements during the period under scrutiny were that as a part of the action plan 500 prison cells in Sopronkőhida were being reconstructed, a new prison in Veszprém, adding 156 places to the current facilities, opened.[7]

Material conditions of detention of short-term arrest. Approximately one-third of the places for short-term arrest at the police stations only partially fit the standards: airing and supplying with natural light often cannot be ensured as demanded in statutes. There were also problems observed concerning the supplying with food and drinking water.[8]

Material detention conditions of foreigners without a legal status to remain in the territory detained in centers. Although the detention centers for immigrants are not overcrowded – on average about 50% of the places are filled – there are some sources of concern in relation to the detention conditions of foreigners without legal status who are required to remain detained in centers. Interpreters generally are not available for medical assistance, which questions the effectiveness of the medical assistance.[9]

In the detention center in Szombathely the detainees do not receive any hot meals on the weekends, thus being forced to deal with worse conditions than persons subjected to imprisonment after a criminal conviction. Detainees applying for refugee status do not go

[5] Amnesty International Report October 2003. AI index: EUR 01/016/2003

[6] The quite constant number of detainees is about 18,000 while there were only 11,234 places. Presentation of the büntetés-végrehajtás országos parancsnoka [National Commander of Law-Enforcement] at the Magyar Országgyűlés Alkotmány- és Igazságügyi Bizottsága [Committee of Justice of the Parliament of Hungary], 4 March 2003. http://www.im.hu/bvop/?ri=464&ei=468

[7] Summary of the Büntetés-végrehajtás Országos Parancsnokság [National Headquarters of Law-enforcement]. http://www.im.hu/bvop/?ri=18

[8] Summary Report (short version) of the Public Prosecutor's Office on the scrutiny on the lawfulness of the restrictions on personal liberty implemented in short-term arrest premises of the investigating authorities. 17 March 2003.

[9] Summary Report (short version) of the Public Prosecutor's Office on the scrutiny on the lawfulness of the special provisions regarding detainees without Hungarian citizenship.

through a medical screening test. When being transported to the hospital or to the dentist, and during the whole medical examination, these detainees have to remain handcuffed.[10]

Right to lodge a complaint. The number of complaints lodged connected to forced interrogation (and unlawful detention) is constant, and remains as in previous years at about 1200-1400 per year.

During the period under detention, a complaint can be lodged to the commandant of the law enforcement institution, to the prosecutor supervising law enforcement, and, in the case of a breach of civil rights occurring during detention, to the Parliamentary Commissioner for Civil Rights. In certain cases detailed in the statute, the detainee can appeal against the decision of the commandant of the law enforcement institution to the law enforcement judge.[11]

The consideration of special circumstances in individual cases are generally not reflected in the decisions of the law enforcement judges. The inquiry of the prosecutor finds the complaints well-founded in only 10% of the cases. After a complaint is lodged to the Parliamentary Commissioner for Civil Rights, the inquiry is generally made and the findings communicated, but it has no further consequence. With such results the right to complaint against ill-treatment cannot be said to be effectively guaranteed.

However, the Hungarian Helsinki Committee reports that the complaints lodged in the Capital City Law-enforcement Institute (Venyige Street) related to the inadequateness of medical assistance were decided generally in favour of the detainees.[12]

Reasons for concern

Segregation of HIV positive convicts. According to the CPT's recommendations, being infected with HIV is not to be used as a justification for separating people. The CPT therefore recommended that Hungarian authorities bring their HIV policy into line with relevant international standards.[13] Article 18 of the 19/1995. (XII. 13.) BM rendelet a rendőrségi fogdák rendjéről [19/1995. (XII. 13.) Decree of the Minister of Interior on the regulation of police detention establishments], Article 39 of 6/1996. (VII. 12.) IM rendelet a szabadságvesztés és az előzetes letartóztatás végrehajtásának szabályairól [6/1996. (VII. 12.) Decree of the Minister of Justice on the execution of imprisonment and pre-trial detention] and Article 38 of 7/2000. (III. 29.) IM-BM együttes rendelet az elzárás, illetőleg a pénzbírságot helyettesítő elzárás végrehajtásának részletes szabályairól [7/2000. (III. 29.) Joint Decree of the Minister of Interior and the Minister of Justice on the detailed rules for detention and detention substituted for a fine] prescribing the segregation of HIV positive convicts still do not comply with the aforesaid recommendation.

[10] Report of the Hungarian Helsinki Committee on its visit to the Szombathelyi Határőr Igazgatóság [Border Guard Directorate at Szombathely] and to the BM Bevándorlási és Állampolgársági Hivatal Nyugat-dunántúli Regionális Igazgatósága szombathelyi kirendeltség [branch agency at Szombathely of the West-Transdanubia Regional Office of the Ministry of the Interiror Bureau of Immigration and Citizenship]. 16 April 2003.

[11] According to 6/1996. (VII. 12.) IM rendelet a szabadságvesztés és az előzetes letartóztatás végrehajtásának szabályairól [6/1996. (VII. 12.) Decree of the Minister of Justice on the execution of imprisonment and pre-trial detention]

[12] A Magyar Helsinki Bizottság jelentése a Fővárosi Büntetés-végrehajtási Intézet III. számú Objektumában tett börtönlátogatásáról [Report of the Hungarian Helsinki Committee on its visit to the Object III of the Capital City Law-enforcement Institute]. 12 August 2003. p. 6-7.

[13] §§ 121-122 of the Report to the Hungarian Government on the visit to Hungary carried out by CPT in 1999. http://www.cpt.coe.int/reports/inf2001-02en.pdf

Article 5. Prohibition of slavery and forced labour

Between 1 December 2002 and 1 December 2003 Hungary has not been found to be in violation of any of the respective provisions, i.e. article 4 of the ECHR, article 8 of the ICCPR, articles 32, 34 or 35 of the Convention on the Rights of the Child or of article 6 of the CEDAW.
There are no pieces of legislation or cases to be reported.

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

National legislation, regulation and case law

Caution money. The 1998. évi XIX. törvény a büntetőeljárásról [Act No. XIX of 1998 on Criminal Procedure], which entered into force on 1 July 2003, introduced the caution money [Article 147-148] into the Hungarian legal system. If the deposit of the caution money – with regard to the criminal act and to the personal circumstances of the accused – renders likely the appearance of the accused in court in the process, the court may omit the ordering of the pre-trial detention. The caution money can be offered by the accused or by any other person. The court decides the sum of the caution money with respect also to the personal circumstances and financial situation of the accused. If the court decides on the acceptance of the caution money, the public prosecutor may appeal. After the accepted caution money is deposited at the court in cash, the accused person is to be released immediately. If the court denies the acceptance of the caution money, a new motion for the acceptance may be put forward only if it refers to new circumstances. If the caution money is accepted and the accused is released, the court may order his/her pre-trial detention, if the accused, despite the summoning, fails to appear in court and does not excuse him/herself with a good reason in advance or in the case when he/she had been hindered, the hindrance ended, does not proof that with a good reason – in these cases the person deposited the caution money loses its right to that sum; the pre-trial detention may be ordered also, if after the acceptance of the caution money a new ground arises for ordering the pre-trial detention. The sum of the caution money is given back to the depositor: if the court orders the pre-trail detention of the accused (with the aforesaid exception); if the public prosecutor stopped the investigation or its time limit had expired without having been extended or if the referral of the charge has been postponed; and if the court ends the process with a final judgement or with a decision on its stopping.

Conditions and implementation of pre-trial detention. The mentioned 1998. évi XIX. törvény a büntetőeljárásról [Act No. XIX of 1998 on Criminal Procedure] provides a more detailed, but not exhaustive listing of the cases in which the possibility of the charged person's impeding or endangering the production of evidence is serious, and thus the pre-trial detention can be ordered [Article 129.2 c) of the Act].

Previously, there was no final time limit for the duration of pre-trial detention. According to the new Act on Criminal Procedure, there is a relative maximum duration of the pre-trial detention: if it reaches 3 years (in case of minors: 2 years [Article 455 of the Act]), the pre-trial detention automatically ends, except if the decision of the court extends it, or in the case of a repeated procedure resulted by the repeal of a statute [Article 132.3 of the Act]. Contrary to the former system, the new Act on Criminal Procedure guarantees the possibility of appeal against all decisions extending the duration of pre-trial detention [Article 131.3 of the Act].
Before the entry into force of the new Act on Criminal Procedure, according to the former law, the pre-trial detention should have been implemented in penitentiary institutions, where generally the material conditions are better. However, until the closing down of the

investigation the detention was also allowed to be carried out in police custody; in practice the latter was rather the main rule than an exception. The new Act on Criminal Procedure reduced the maximum duration of pre-trial detention in police custody to two months [Article 135.1-2 of the Act; these provisions shall enter into force on 1 January 2005].[14]

The new Act on Criminal Procedure extended the means of the judicial review of the lawfulness of the deprivations of liberty while strengthened the right of the detainee to take proceedings. According to the new regulations, if the pre-trial detention ordered or sustained after the charge had been preferred lasts for more than one year, the court at second instance is to review the lawfulness of the pre-trial detention at least once in every six months [Article 132.2 of the Act]. If three months have elapsed since the ordering or sustention of the detention a proceeding taken by the detainee for the review of the lawfulness of the pre-trial detention, even if containing no new (additional) facts, may not be refused without reasoning [Article 133.1-2 of the Act].

As regards the detention of persons suffering from mental insanity or unsound mind, judicial orders reviewing the reasonableness thereof now can be appealed at higher level courts. [Article 142.4 of the Act].

Short-term arrest. According to a recent modification, the personal liberty of foreign persons arrested under a provision of an international convention may not be restricted for a period of time longer than prescribed there [1994. évi XXXIV. törvény a Rendőrségről, Article 33.5 of the Act No. XXXIV of 1994 on the Police; in force since 1 April 2003].

Compensation for unlawful detention. The 41/2003. (VII. 2.) AB határozat [Decision no. 41/2003. (VII. 2.) of the Constitutional Court] quashed Articles 580.2 b) and 581.2 b) of the 1998. évi XIX. törvény a büntetőeljárásról [Act No. XIX of 1998 on Criminal Procedure]. The aforesaid provisions excluded the detainees' right to compensation if the accused person had given cause for his suspicion [Article 580.2 b)] and in the case when he missed to use his right to appeal against the sentence of the court of first instance [Article 581.2 b)]. The Code – in the view of the Court – unreasonably excluded those cases where the suspect tried to mislead the investigating authorities. The Court emphasized: the suspect has the right to silence, or even the right to lie to defend themselves. The latter one is sanctioned in certain cases by the Criminal Code. The Court annulled the provisions at issue.

Restriction of personal freedom by public domain supervisors. Decision no. 13/2003. (IV. 9.) AB határozat of the Constitutional Court. According to the 1999. évi LXIII. törvény a közterület-felügyeletről [Act No. LXIII of 1999 on the Supervision of Public Domain],[15] the supervisors of public domain can impede persons from whom they wish to inquire about something during the time of the inquiry (article 14); and, furthermore, persons whose identities have yet to be ascertained for the purposes of the report (article 15). Petitions challenged that these provisions violate the right to liberty and personal security secured in the Constitution.

The supervisor of public domain can justifiably ask for information from anyone who may be able to provide essential information for the conduct of the proceeding. Therefore, argued the Court, the limitation of the right to personal security is not in this case objectionable.

[14] According to information provided by the Hungarian Helsinki Committee, the average time spent by the detainees in police custody has been reduced to one month from six or eight months since the entry into force of the new Act on Criminal Procedure.

[15] The task of the public domain supervisors is to ensure public safety, public order at a local level, to protect the property of the local self-government, to ensure the legal usage of public places, to control the implementation of public health regulations. [Article 1.4 of the 1999. évi LXIII. törvény a közterület-felügyeletről, Act No. LXIII of 1999 on the Supervision of Public Domain]

The lack of will to co-operate and the refusal to answer, on the other hand, can involve the implementation of the questioned provision limiting personal freedom. In this way the questioned provision, in practice makes answering compulsory, since it makes it possible to limit the personal freedom of those who are not qualified as questioned persons or persons who commit misdemeanour, and to impede them without temporal restraint. The Constitutional Court stated that such a level of restriction is not proportionate to the constitutional aim of securing the exercising of official duty. For this reason the Constitutional Court has judged the provision in question unconstitutional, and repealed it.

However, the Constitutional Court did not find the legal right to impede supervisors of public domain in cases when the ascertaining of identity makes it necessary for the purposes of the report or other legal proceedings. For, in such cases the limitation of personal freedom has a definite duration: it can only last until the ascertaining of identity is completed. Also, the Act gives sufficient regulations for cases of illegality of such proceedings.

Practice of national authorities

Short-term arrest. Concerns have been raised about the methods of documentation of the conditions of short-term arrest, and about the adherence to the right of the arrested persons to be informed. The keeping of police records did not conform to domestic law at a number of police stations. Provisions on the maximum possible length of short-term detention were breached, for the records did not contain the time of the beginning or the end of the arrest or this information had been recorded improperly. In some places the arrested persons were not informed of either the expected or the maximum possible length of the detention.[16]

Relationship between the prosecutor's offices and the judiciary in ordering pre-trial detention or its continuation. Not only the 1973. évi I. törvény a büntetőeljárásról [Act No. I of 1973 on Criminal Procedure] in force until 30 June 2003, but also the new Act on Criminal Procedure provides a wide range of authority to the courts in ordering the pre-trial detention within the frames prescribed by the law [Title VI of Chapter XI of Act No. XIX of 1998 on Criminal Procedure], but in practice the courts do not rely on this possibility: if the prosecutor proposes the pre-trial detention, the court orders it in almost 100% of the cases.

Detention of persons who are subject to expulsion or extradition. One of the most problematic issues concerning alien policing detention is that under article 46.1 of the 2001. évi XXXIX. törvény a külföldiek beutazásáról és tartózkodásáról [Act No. XXXIX of 2001 on the Entry and Stay of Foreigners], the regional alien policing authority may place a foreigner who is subject to expulsion in detention in order to ensure the implementation of the expulsion. In the case of asylum seekers, however, the expulsion is per se inexecutable until the end of the asylum proceedings. Alien policing detention is ordered by resolution, and the court reviews the legality of ordering alien policing detention, but does not review whether the expulsion is executable.[17]

In the absence of interpreters, the asylum seekers arrested are not informed in time of the essential legal and factual grounds of their arrest. Special circumstances and examination of concrete facts are generally not reflected in decisions related to applications for the review of the lawfulness of the detention of illegal foreigners without a legal status to remain detained

[16] Summary Report (short version) of the Public Prosecutor's Office on the scrutiny on the lawfulness of the restrictions on personal liberty implemented in short-term arrest premises of the investigating authorities. 17 March 2003.

[17] Report of the Hungarian Helsinki Committee on the detention of asylum seekers. Report of the Hungarian Helsinki Committee on its visit to the Győri Határőr Igazgatóság [Border Guard Directorate at Győr] and to the BM Bevándorlási és Állampolgársági Hivatal Nyugat-dunántúli Regionális Igazgatóságán [branch agency of the West-Transdanubia Regional Office of the Ministry of the Interiror Bureau of Immigration and Citizenship]. 15 April 2003.

in centers. The aforesaid persons – with a limited number of exceptions – have to spend the maximum possible time (12 months) in the detention centers.[18]

Compensation for being detained innocently. Two brothers from Magyarcsanád accused of having committed homicide were under pre-trial detention for 15 months, until April 2003. They were proved to have been detained innocently, for the charge – in lack of evidence – was withdrawn. The brothers sued the Hungarian state for the compensation of their income that could not have been earned, and for compensation for 2 million HUF immaterial damage. The Szeged City Court awarded them less, 1,2 million HUF per person, saying that the brothers – who are of Romani origin – "did not suffer a psychical detriment to the extent that would serve as a ground for a compensation of 2 million HUF, for they have a more primitive personality than the average". The reasoning of the decision generated a serious public debate. The Csongrád County Court (the court at second instance in the case) found the court at first instance to have mistaken in its reasoning, because the attribute "primitive" is degrading; however, it explained that a court assesses the personality of the detainees when deciding on the compensation for immaterial damages. The court at second instance besides awarding the claimants 220 thousand HUF for their unearned income, approved the 1,2 million HUF sum of the compensation for immaterial damages.

Reasons for concern

Pre-trial detention. The possible 3-year length of pre-trail detention is still considered unreasonably long, even if it is not extended.

Short-term arrest. The application of short-term arrest by the police allows for a certain range of arbitrary practices. In the interest of public security the police may bring before the authority among other cases, who is unable to certify identity; who may be suspected of a criminal offence; of whom in order to have an evidence of a crime it is necessary to take a blood or urine test, furthermore who is quested as missing. [1994. évi XXXIV. törvény a Rendőrségről, articles 33.2 a) b) c) g) of the Act No. XXXIV of 1994 on the Police]. The Police can restrict personal freedom by bringing a person before the authority only for the necessary period of time but not exceeding 8 hours, which can be prolonged once by 4 hours. The problem with these provisions is that there is no need to have a strongly founded suspect to limit someone's personal freedom, and that short term arrest is absolutely unnecessary in the case of someone who is quested as missing. Once she/he was found, there is no reason to keep the found person detained. Therefore, Társaság a Szabadságjogokért (The Hungarian Civil Liberties Union, HCLU), *inter alia* filed a complaint with the Constitutional Court, saying that these provisions of the Police Act were unconstitutional. The Constitutional Court in its decision no 65/2003. (XII. 18.) AB határozat found Article 33.2 g) of the Police Act unconstitutional. Under this provision the police can apprehend and bring before the competent authorities the person who quested as missing, and according to the Court, limiting the fundamental right to personal security in this case was not necessary to achieve the constitutional aim (public security). In addition, the Court found unconstitutional that provision of the Police Act, under which the police might take a person brought before the authority into public security custody for 24 hours if the interest of the person (being in a self-dangerous condition or representing a danger to others due to drunkenness or for other reasons) requires so. The Court rejected the remaining part of the petitions.

Custody as a consequence of an offence. 1999. évi LXIX. törvény a szabálysértésekről [Act No. LXIX of 1999 on minor offences] in case of certain minor offences (arbitrary moving into a flat; disorderly conduct; prostitution under prohibition; serious threatening; driving a vehicle under the duration of its prohibition; steal of minor value committed on agricultural product [Articles 139/A; 142; 143; 151; 156/A; 157.5]), enables custody as a main sanction. The

[18] Summary of the Hungarian Helsinki Committee on the detention of asylum seekers.

duration of the custody may be from one to sixty days, thus as a final result can be longer, than the imprisonment imposed on the perpetrators of some minor crimes; moreover the implementation of the custody may not be suspended.

The Act on offences enables the sanctioning with on the spot fine[19] in the case when someone is caught in the act during committing a (generally minor) offence [Article 134.1]. The on the spot fine is not paid on the spot, but in 30 days by a cheque received from the authority on the spot [Article 135.3]. If the fine is not paid in time, as a final result (if cannot be enforced any other way), it could lead to custody (for 1-10 days, depending on the sum of the fine) [Articles 135.4, 17.5]. The concern regarding this regulation is that if the person subjected to the process accepts the cheque, he (probably without knowing it) waives his right to legal remedy against the imposition of the fine [Article 135.2], and thus an imposition of a fine (of a minor sum) in a process without a formal production of evidence and without a trial before a court can lead to the deprivation of liberty.

Article 7. Respect for private and family life

National legislation, regulation and case-law

45/2003. (IV. 16.) OGY határozat a családon belüli erőszak megelőzésére és hatékony kezelésére irányuló nemzeti stratégia kialakításáról [45/2003 (IV. 16.) Decision of Parliament[20] on the National Strategy Aiming at the Prevention and Efficient Treatment of Domestic Violence] has been issued in order to attract public attention to domestic violence, to eliminate the ignorance of society and, to emphasize that this phenomenon is not a private matter. Furthermore, the national authorities, NGOs, and representatives of the media have been called upon to recognize their responsibility in connection with the fight against domestic violence.

Parliamentary Commissioner (Ombudsman) for Civil Rights. The collection of umbilical cord blood of newborns is not regulated by Hungarian legislation. However in its October 2002 opinion the Scientific Council of Health (hereinafter referred to as "SCH") – an organization that makes proposals, recommendations, gives advice, and prepares decisions for the Ministry of Health; and whose secretariat is a body of the Ministry – issued an opinion on the "Medical, Ethical and Legal Background of Stem Cells Collected From Cord Blood". The Presidency of the SCH held at its 15 January 2003 session the collection of cord blood to be research activity on humans and therefore ordered natural and legal persons wishing to engage in such activity to proceed according to 23/2002. (V. 9.) EüM rendelet az emberen végzett orvostudományi kutatásokról [23/2002 (V. 9.) Decree of the Minister of Health on Medical Research on Humans], which orders the undertakings pursuing research activity on humans to obtain licenses. Since the SCH's status was not clarified and because of the lack of *expressis verbis* legal regulation in the field under scrutiny, hospitals and doctors interpreted the SCH's opinion as binding on them, thereby depriving newborn babies and their parents from the possibility of collecting and storing stem cells, even at the parent's own costs.

In the Ombudsman's view the opinion and its effect are contrary to 1987. évi XI. törvény a jogalkotásról [Act No. XI of 1997 on Legislation], which prohibits informal interpretations of law and the legal regulation of problems created by these. Moreover it contradicts to the right to life and human dignity and the highest possible level of physical and mental health

[19] The sum of the fine may be between 500 and 10000 HUF (approx. from 2 to 40 Euros)

[20] The Hungarian system of norms differs somewhat from the general Western European practice. Beside "statutes" enacted by Parliament, general norms of the Government and the Ministers may also count as pieces of legislation. However, "Decisions of the Parliament" which do not lay down definite legal responsibilities, obligations or entitlements cannot be called legislation but they are so-called "other tools of ruling the state." According to Article 46 of the Act No. XI of 1987 on Legislation the Parliament may determine its own tasks, the tasks of the bodies governed by Parliament and the plans that belong into its scope of competence by "Decisions".

protected by Articles 54.1 and 70/D of the Constitution. In the meantime judicial proceedings have been commenced at the Metropolitan Court as court of first instance. The Court brought its decision on 7 July 2003 in favor of SCH holding that the Council did not ban any activity, but issued its opinion in a scientific question. On 29 July 2003 the President of SCH informed the press that he intends to turn to the President of the Hungarian Academy of Sciences, since in his opinion the Ombudsman endangered scientific freedom. He also pointed out that the SCH – contrary to the Ombudsman's report – is not a body of the Ministry, but only its secretariat is subordinated to it and therefore the Ombudsman went beyond its powers in charging the SCH.

Practice of national authorities

In September 2003 the Central Administration of National Pension Insurance (Országos Nyugdíjbiztosítási Főigazgatóság) altered the decision of the authority acting on first instance and awarded widow-pension to a homosexual man after his deceased partner. After the decision has been made public, got great media attention and became a symbol for acknowledging gay rights, the Pension Administration withdrew its position on the basis that the clerk simply made a mistake. The interpretation of the law is problematic, since until 1996 common law marriage was defined as an economic and emotional relationship between a man and a woman. A 1995 decision of the Constitutional Court dealing with a challenge to the mentioned provision of the Civil Code has been suspended until 1 March 1996 and has later been annulled since Parliament passed a bill changing the wording "man and a women" to "persons". The legislator however failed to clarify the situation before the entry into force of the modification.

In order to receive widower's pension, the couple either has to live together for at least one year and have a child or ten years cohabitation is to be proven. Since the new provision entered into force in 1996, couples not having children cannot claim widower's pension before 2006.

Numerous NGOs and the Minister for Equal Opportunities protested against this interpretation of the Civil Code, claiming that it was contrary to the objective of the modification. Some argue that only obligations cannot be established retrospectively, but benefits can. The appeal of the clients was rejected.

A recent phenomenon in the capital, Budapest, is that identity checks are often followed by searches – as pointed out by the NGO Társaság a Szabadságjogokért (Hungarian Civil Liberties Union, henceforth: HCLU). The target group consists of young persons. The police officers ask them to empty their pockets, purses, and their cigarette boxes, and to take off their shoes and socks. The stated objective of such identity checks and searches is to find drug consumers, which is underpinned by the fact that the police officers often clearly ask the checked persons, whether they possess any kind of drugs. However, the police do not have the right to exercise this practice without suspicion. According to Article 29 of 1994. évi XXXIV. törvény a Rendőrségről [Act No. XXXIV of 1994 on the Police] police officers may check the identity of the person being searched, i.e. ask for ID cards or other documents. However, the Act does not entitle a police officer to conduct searches without any reason. Moreover, this practice is often humiliating – especially the taking off the shoes and socks in public places –, therefore contrary to human dignity declared in Article 2.1 of the Act. The searches are not in harmony with the 96/2000. (XII. 11.) OGY határozat a kábítószer-probléma visszaszorítása érdekében készített nemzeti stratégiai program elfogadásáról [96/2000. (XII. 11.) Decision of Parliament on the Adoption of a National Strategy Program Prepared in Order to Reduce Drug Problems] either, since according to the decision, the police searches are not the primary tools of the reduction of drug consumption.

The Hungarian Helsinki Committee drew the attention to a severe problem that occurs during the course of the alien policing procedure. Article 14 of the 2001. évi XXXIX. törvény a külföldiek beutazásáról és tartózkodásáról [Act No. XXXIX of 2001 on the Entry and Stay of Foreigners] lists the requirements, which are necessary to be fulfilled in order for family members to acquire permission to stay in Hungary. The provision implies that authorities shall be more flexible when the unity of the family is at stake. However, the Office of Immigration and Nationality operating under the supervision of the Ministry of Internal Affairs has not been applying less stringent rules. In many cases the foreign person has to leave Hungary and return to his or her home country in order to obtain a visa. This rule is not only inconvenient, but often the foreign person is often not allowed to return to Hungary and the family gets separated. In another set of cases the foreign person is not granted a refugee status, however is permitted to stay in Hungary and permission is prolonged several times. However, when the person concerned asks for prolongation again the Office of Immigration and Nationality does not grant a new license to stay. In the meantime, the foreign person might have already gotten married and had children; nevertheless the authorities do not regard this fact as a reason for being more permissive. The reasons for expulsion are also narrower if the person concerned is married and has a family in Hungary according to Article 39.1. c). However, since the enforcement of the less strict rules falls into the authorities' discretion, these rules do not apply in practice.

Article 8. Protection of personal data

National legislation, regulation and case-law

2003. évi XLVIII. törvény a személyes adatok védelméről és a közérdekû adatok nyilvántartásáról szóló 1992. évi LXIII. törvény módosításáról [Act No. XLVIII of 2003 on the Amendment of the Act No. LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] modified the Act on Data Protection in order to bring it into line with the Directive 95/46/EC. Among others, the scope of sensitive data has been widened, the meaning of "third country" has been clarified, the notion of "automated individual decision" has been introduced, and the list of reasons for data destruction has also been amended. Another provision of the Act modifies the scope of activity of the Ombudsman for Data Protection. In case of repeated illegal data processing the Ombudsman may order deletion or destruction of the data or may prohibit illegal data proceeding, and furthermore he or she may suspend the data conveyance to foreign countries. Another provision allows for appeal against the Ombudsman's measures. Until the final court decision data may not be deleted or destroyed, however data proceeding is prohibited and the challenged data are to be locked. The modifications will enter into force on 1 January 2004.

Article 88 of the 2003. évi LXI. törvény a közoktatásról szóló 1993. évi LXXIX. törvény módosításáról [Act No. LXI of 2003 on the Modification of the Act No. LXXIX of 1993 on Public Education] amended Annex 2 on the data of children and students. The amendment's structure has been criticized by the NGO Hungarian Civil Liberties Union for mentioning guarantees for the enforcement of basic rights in an annex only. According to the amendment teachers and educators are obliged to keep information in connection with children, students and their family secret. The modification reemphasizes the general rule that data processing has to have a clearly defined objective and it lists possible reasons for its justification. However, the list itself contains vaguely determined objectives, like the "protection of children and youth". Teachers have to inform a competent authority immediately if a child or a minor student is in severe danger. In this case the consent of the child or his or her parents is not necessary. Educational institutions may process personal data of the employees only in connection with employment; determination and fulfillment of allowances, benefits, civil rights obligations, and state security purposes. In the case of voluntary disclosure of data, the student- and in the case of minors, the parents - also have to be informed about the fact that

they are not obliged to disclose data. In the latter case, the parent's permission has to be acquired.

2003. évi III. törvény az elmúlt rendszer titkosszolgálati tevékenységének feltárásáról és az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról [Act No. III of 2003 on the Exploration of the Past Regime's Activities of Secret Agency and on the Establishment of the Historical Archives of State Security Services] intends to compensate the victims of the communist regime by providing information. The Act regulates data issued between 21 December 1944 and 14 February 1990. The previous classification of data ceases to exist, except if law prescribes the maintenance of their secret status.

The new 2003 Act replaced the Historical Office established in 1996 by the Historical Archives of State Security Services. According to the new Act as a general rule persons observed by secret agents, third persons, official employees and the observer may have access to data stored by the Archives and may publish data that are exclusively related to him or her. Researchers may also have access to the data in question and may use them with certain restrictions (e.g. data on sexual life may not be researched within 30 years after the death of the person concerned; data concerning racial, national and ethnic identity shall be processed anonymously within the protected period). Anyone may have access to data processed anonymously within 30 years after the death of the person concerned and after that protected period data may be acquired without anonymity. Anonymity is not required if the data has been recorded at public programs and the statements have been made by public figures; if the data has already been lawfully published; if the data is necessary for the identification of public figures who took part in the secret agent activity; or if the person concerned consented to the publication of the data. If the data requested from the Archives is concerning a public figure, the Archives first must ask him or her whether he or she agrees to being a public figure. If he or she does not, the Archives must reject the request. The Archives' decision may be reviewed by the Metropolitan Court if the petitioner wishes so.

A special law, i.e. 43/2003. (III. 31.) Korm. rendelet [43/2003. (III. 31.) Government Decree] has been drafted on the Enforcement of the Act No. III of 2003.

In its 31/2003. (VI. 4.) AB határozat the Constitutional Court ruled on the constitutionality of several provisions of the Act on Lustration. Petitioners challenged the rule that persons "having influence" on the shaping of public opinion had to be screened because of the vague wording of the Act. Moreover, they contested, it is not only the meaning of the word "influence" that is unclear, but the Act did not indicate the persons responsible for determining those who fall under the Act. This omission makes legal uncertainty even more serious. Some petitioners argued that the notion of "news providers on the Internet" does not exist; they held this wording to be indefinite and therefore inapplicable. According to another argument the list of persons to be screened is arbitrary, since religious leaders, heads of trade unions, etc. are not mentioned. The fact that only the persons mentioned in the Act may ask for a decision declaring that they had not held any important positions in the previous regime has also been challenged. The Constitutional Court rejected all the above claims. The only challenged instance where the Court agreed with the petitioners was the abolition of the words "indirectly or" from several sentences thereby making the screening of persons necessary who were editors-in-chief, deputy editors-in-chief, editors and section editors of broadcasting companies, of nationwide, regional, county and local public papers, and of Internet news providers who have a *direct* influence upon shaping political public opinion. The Constitutional Court held that a distinction between those who shape public opinion directly and those who only have indirect influence is unconstitutional. The Court reemphasized its previous decisions and held that the provision, which includes editors having an indirect influence on public opinion, was unconstitutional.

2002. évi LVIII. törvény [Act No. LVIII of 2002] modified the 1997. évi CLIV. törvény az egészségügyről [Act No. CLIV of 1997 on Health]. The modification that entered into force on 1 January 2003, was needed, since the Constitutional Court in its decision 27/2002. (VI. 28.) AB határozat quashed previous rules laid down in a decree on conducting HIV tests. The Constitutional Court did not go into a substantive analysis of the rules, but quashed the decree on the basis of formal insufficiencies, since it limited fundamental rights in a legal rule lower than an act. Since the judges of the Constitutional Court did not go into the merits the question whether the provisions of the quashed decree violated the Constitution remained open.

The 2002 modification introduces the general rule of voluntary HIV testing in Art. 59 (5) of the Health Act. The voluntary nature of tests and anonymity normally go hand in hand; the amended Act however does not treat anonymity as a general principle, but only allows for tested persons to deny giving any personal data in any stage of the testing. As a practical consequence however testers usually ask for data in the first phase of the testing.

As an exception there are certain groups of people that are required to take an HIV test. These are among others people, who have a profession where they might transmit their own blood or excretion; women who wish to give breast-milk; people giving blood; persons suspected with rape. Some of the elements of this list seem to be arbitrary or constitute an unnecessary intrusion into the private sphere. E.g. HIV falls apart at 56 °C, therefore the testing of women wishing to give breast-milk seems to be unnecessary. A further problem is the vague definition of the first group.

The modification left legal regulations other than the Health Act intact. The Állami Népegészségügyi és Tisztiorvosi Szolgálat [National Public Health and Surgeon General's Service] may request the personal data of those infected with HIV based on public health or epidemic concerns, and it also registers HIV positive persons.

The modified Act is unclear on the nature of the treatment. At some points it talks about obligatory treatment that can be enforced by health authorities, at other instances treatment seems to be of voluntary nature, since the consent of the patient is required.

In sum, the fact that the Constitutional Court quashed previous rules on HIV tests on formal grounds led to the unfortunate consequence that the constitutionality of substantive issues has not been addressed and the legislator was left in the dark as to how to regulate HIV test so that it be compatible with the Constitution.

According to Article 75/B.5 of the 1998. évi XIX. törvény a büntetőeljárásról [Act No. XIX of 1998 on Criminal Procedure] which entered into force on 1 July 2003, representatives of the press may get information from the investigation authority or the public prosecutor, however they may not look into the documents of a criminal case, since the public prosecutor or the judge may only authorize the inspection of the documents if the applicant can prove his or her legal interest in the case. The provision has been strongly criticized by the press. The entry into force of the debated provision did not affect former rules of 1986 on the inspection of documents.

As a reply to the harsh criticisms 26/2003. (VI. 26.) BM-IM együttes rendelet [26/2003. (VI. 26.) Joint Decree of the Minister of Interior and the Minister of Justice] specified information that can be forwarded to representatives of the press by the investigation authorities.

The Constitutional Court held in its decision 38/2003. (VI. 26.) AB határozat Article 7/A.1 of 24/1995. (XI. 22.) PM rendelet [24/1995. (XI. 22.) Decree of the Minister of Finance] on compulsory issuing of invoice for products sold above a certain price (HUF 50,000) to be in violation of the constitutional protection of processing data and therefore declared the

provision, which has been in force since 15 April 2003 void. In April 2003 the Ombudsman for Data Protection pointed out in its information that the challenged article violated basic rules of data protection. According to the law, in order to issue an invoice the collection of personal data is necessary; however, an obligation to disclose personal data can be prescribed only in exceptional circumstances. Even then, the obligation, i.e. the limitation of a basic right has to be prescribed by an act and not by a ministerial decree. The Ombudsman first asked the Minister to amend the Decree. However, since he did not comply with the request, the Ombudsman informed the shopkeepers and vendors that the processing of data without the consent of the person concerned is illegal and may have "severe consequences". Furthermore, he drew consumers' attention to the fact that by disclosing their personal data they waive of their basic rights gratuitously. The Ombudsman then filed a petition with the Constitutional Court. The Court agreed and based its decision on the objections of the Ombudsman. BH 2003.180 [Judicial Decision No. 2003.180] reemphasized 1995. évi CXIX. törvény a kutatás és a közvetlen üzletszerzés célját szolgáló név- és lakcímadatok kezeléséről [Act No. CXIX of 1995 on the processing of data including names and addresses for research and direct profit oriented purposes]. This *lex specialis* overwrites the provisions of the Act on Data Protection when research or public opinion polls are concerned. Unlike the Act on Data Protection, the 1995 Act does not require the consent of persons whose data have been collected if a company making surveys and opinion polls receives data directly from the data operator organ.

In its decision 65/2002. (XII. 3.) AB határozat, the Hungarian Constitutional Court declared the second sentence of article 3. point a) of the 1997. évi XLVII. törvény az egészségügyi és a hozzájuk kapcsolódó személyes adatok kezeléséről és védelméről [Act No. XLVII of 1997 on the Processing and Protection of Medical and Related Data] unconstitutional and therefore void as of 30 April 2003. According to this Article, data on sexual habits are to be regarded as medical data if necessitated by the protection and maintenance of health, the promotion of the patient's effective medical treatment, the tracking of the patient's medical condition, or by sanitary and epidemiological reasons. The Court held the challenged provision to be in violation of Article 59.1 of the Constitution on the right to protection of personal secrets and personal data. Based on its earlier case law the Court had to apply the necessity and proportionality tests when deciding on the constitutionality of the basic right's limitation. The limitation of the right to privacy is necessary if the purpose of data collection is clearly defined. According to Article 5.2 of the 1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekû adatok nyilvánosságáról [Act No. LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] personal data may only be processed if it is unavoidable, and capable of achieving the purpose of the data processing, and only for the period and to the extent necessary to achieve that purpose. Moreover, medical data and data on sexual habits qualify as special data and even more stringent rules apply for their collection and processing: the written consent of the person concerned is to be obtained or the processing has to be prescribed by law. The Court stated that the objectives referred to in the challenged article (i.e. protection and maintenance of health, etc.) cannot be achieved by processing data concerning sexual habits, but rather data on the patient's health condition are necessitated. The objectives are therefore defined too broadly, i.e. not "clearly defined" as proscribed by the Act on Data Protection. Therefore the Court held the challenged provision to be unconstitutional. It is further to be noted that the first sentence of article 3 point a) also allows for the collection of data concerning sexual habits, however only to a limited extent in clearly defined cases.

Parliamentary Commissioner (Ombudsman) for Data Protection and Freedom of Information.

Beginning from the middle of 2002 several authorities made copies of the data processed by them and forwarded them by electronic means to the Ministry of Finance at the instruction of the Minister of Finance. The standing Committee of Human Rights, Minority Issues, and

Religious Affairs of the Hungarian Parliament discussed this data processing at its 19 February 2003 session, where the request was formulated to the Ombudsman for Data Protection to give an opinion. The Ombudsman determined that the data have been unlawfully forwarded to the Ministry of Finance as well as ruling that the Ministry stores them unlawfully. According to the Act on Data Protection, the processing of data is only possible if the person concerned consented or if the law gives authorization. Since the law does not authorize the Ministers to forward or store the data under scrutiny, the request of the Ministry of Finance - just like the compliance with it - were unlawful. Moreover, the data processors disregarded Article 28 of the Act on Data Protection and did not report for registration the forwarding of data to the Ministry of Finance to the Ombudsman for Data Protection. The Ombudsman called upon the Minister to end the unlawful processing of data and conducted disciplinary proceedings against the persons responsible. In line with the Minister's decision, the data have been destroyed between 20 and 25 March 2003. In April the Parliament established a committee examining the above case.

A complainant informed the Ombudsman for Data Protection about the existence of a web site, which allows anybody to send messages from any e-mail address that he or she indicates. The message would appear as if the owner of the e-mail address would have sent it. The Ombudsman issued his recommendation in April 2003 on fake e-mail messages. He stressed that the e-mail address is to be regarded as personal data, provided it can be associated with its natural person owner. According to the Act on Data Protection, personal data can only be processed if the person concerned gives his or her consent to it. Therefore the activity of the web site is clearly in violation of the law.

On 26 June 2003 the Ombudsman for Data Protection issued information on the procedure concerning personal data of persons applying to reality shows. Widespread data have been collected on the applicants, the objective of which has not been or was too vaguely defined. In addition, the persons concerned have not been informed about the purposes of the data collection, which is a basic element of fair data collecting. For these reasons the Ombudsman for Data Protection drew attention to the fact that the consent of the person concerned must not be interpreted extensively; that objectives of data collection have to be indicated clearly; data concerning irrelevant information must not be collected; the person concerned has to be informed on the identity of the data collector, objectives and risks of data collection, and why certain data are required; and that answering questions is voluntary. The Ombudsman for Data Protection asked the producers of reality shows to amend the contracts according to his guidelines and drew the attention of the applicants and participants to the fact that their rights concerning data protection have not vanished by having signing a contract with the producer.

In his communiqué of 25 August 2003 the Ombudsman for Data Protection disapproved the practice of merchants to photocopy ID cards of buyers. It became a common practice that companies require ID cards as a condition to have access to its services or to be able to buy its products. The Ombudsman for Data Protection warned these sellers and companies that he will monitor such practices in the year 2004.

In the framework of a program called "Sulinet Express" the Ministry of Education attempts to create a knowledge-based society. The program provides benefits among others for the purchase of computers, printers and other electronic devices. "Educatio" Kht., the company running the program however processes the tax identification number and other data of the buyers illegally. It requires an unnecessarily broad range of data and uses the tax identification number for the purposes of creating a customer code derived therefrom. The Ombudsman for Data Protection addressed "Educatio" Kht. in a letter of 26 August 2003 and called upon the company not to proceed the tax identification numbers of purchasers and not to use them for the creation of a customer code.

In his communiqué of 2 October 2003 the Ombudsman for Data Protection expressed his worries about a case where the media received information about the fact that a student of a primary school is infected by Hepatitis C. It remained a secret how the teachers, students and parents got to know about the disease of a fellow student. The Ombudsman drew their and the media's attention to the fact that diseases are sensitive data and necessitate an even higher degree of protection than personal data.

The Ombudsman issued his position on the transmission of data among vehicle registering companies on 8 October 2003. The modification to the 1999. évi LXXXIV. törvény a közúti közlekedési nyilvántartásról [Act No. LXXXIV of 1999 on the Registration of Vehicular Traffic] entered into force on 19 April 2003. This amendment enables the acquisition of personal data for parking companies so that they can send out demand notes for fines imposed because of illegal parking. Until 1 January 2000 Hungarian law did not regulate vehicular traffic registration. Therefore the remarkable situation emerged that parking companies, although entitled to collect fines, practically could not enforce this right. The parking companies therefore tried to acquire the necessary data (name and address of the owner of the illegally parked vehicle) through diverse illegal channels. The Ombudsman drew the attention of the parking companies to the fact that the illegally acquired data must be deleted and that the demand notes must not be sent out for the period before 1 January 2000. The entry into force of the 2003 modification must not be interpreted as an authorization to issue demand notes to addresses illegally acquired. The data of vehicle owners have to be requested from the registry according to the new rules.

The Ombudsman issued a communiqué on 12 November 2003 concerning the collection of signatures. The Ombudsman drew the attention of the initiators of such actions to the fact that they always have to notify the ones signing the petitions what the aim, time limit and measure of the data collection is; whether the data will be forwarded or will be accessible to third persons. Furthermore, before the collection of signatures the collector has to notify the Ombudsman about the aim of data collection, the types of data he or she wishes to collect, the source of data and the deadline for deleting the data.

On 15 December 2003 the Ombudsman for Data Protection addressed the issue whether new generation cellular phones with built-in cameras and Multimedia Messenger Service (MMS) violate the Act on Data Protection. According to the Ombudsman the Act covers any creation and proceeding of visual and audio records including the MMS system, which allows for multiplication and processing of records. Furthermore it facilitates the spreading of them, since it enables one to make the pictures public via Internet. A specific case drew the Ombudsman's attention to abuses: a service provider advertised the new data transfer mechanism with the following slogan: "Once you see a pretty woman or a handsome man on the street don't hesitate to share the aesthetic experience with your friends via MMS." The Ombudsman warned the service providers that once a person on the audio or visual records is identifiable his or her consent is to be acquired in order to process the data legally. Otherwise the user is taking and forwarding the records illegally, which might lead to criminal prosecution.

Reasons for Concern

Two representatives of the HCLU asked the Ombudsman for Data Protection in their letter of 21 July 2003 to address a worrying practice. According to the Criminal Code's modification concerning minor cases of drug use, entering into force on 1 March 2003, the convict has the option to participate at a 6-month tapering-off cure. In the HCLU representatives' view the contract to be signed between the clinic and the convict requires unnecessarily and disproportionately broad range of personal data.

Article 9. Right to marry and right to found a family

National legislation, regulation and case-law

The Supreme Court brought two decisions on 25 June 2003 and 2 July 2003 in the case of three mothers who requested a monthly 6700 HUF additional income allowance on the basis of Art. 20 of the 26/1979. (VII. 21.) MT rendelet [26/1979. (VII. 21.) Decree of the Council of Ministers]. According to a 1994 modification of the Decree the amount of the allowance from 1 September 1994 is monthly 6700 HUF, independently of the number of children in the family. The Decree has been declared ineffective as of 7 March 2002 by the 22/2002. (II. 27.) Korm. rendelet [22/2002. (II. 27.) Government Decree]. The authorities refused to transfer the additional income allowance to the families on the ground that is has already been repealed. After several appeals from lower instances the Supreme Court agreed with the plaintiffs and declared that those people who received childcare allowance between 1 January 2000 and 7 March 2002 are eligible for the additional income allowance of 6700 HUF per month. The June and July decisions opened the floodgate of litigation, therefore the Government decided to transfer the additional income allowance without interests to all eligible persons by its 152/2003 (IX. 23.) Korm. rendelet [152/2003. (IX. 23.) Government Decree]. The forgetfulness and the failure of the Government to repeal the Decree of the Council of Ministers will cost 33.6 billion HUF. Those mothers who received childcare allowance before 1 January 2000 and those who wish to receive the interests as well now turn to the Constitutional Court.

Article 10. Freedom of thought, conscience and religion

National legislation, regulation and case law

Reimbursement of certain social tasks undertaken by churches. From 15 February 2003 social institutes maintained by the churches, when they undertake certain state social tasks, do not receive the reimbursements of their costs (i.e. the normative supply) directly from the state budget, but from the local self-governments according to a contract between the local self-governments and the church. [Article 126.3 of the 1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról (Act No. III of 1993 on the social administration and social supplies)]. Before its promulgation the President of the Republic referred the draft act modifying the Social Act to the parliament but the draft act was enacted without changes. The reasoning of the referral was that it infringes the right of those, who would like to take social services in religiously committed institutions.

Tax-reduction after donations to churches. Contrary to the situation before 1 January 2003, now all churches are entitled to issue a certificate on the discount related to donations. [Article 2.3 of the 1997. évi CXXIV. törvény az egyházak hitéleti és közcélú tevékenységének anyagi feltételeiről (Act No. CXXIV of 1997 on the material conditions of the religious activities and activities of public purpose of the churches)]. The basis of the assessment can be reduced with a given percent of the donations given to churches, provided the church issues a certificate on it. Before 1 January 2003 the law limited the number of churches entitled to issue the certificate.

State financing of churches. 2002. évi LXII. törvény a Magyar Köztársaság 2003. évi költségvetéséről [Act. No. LXII. of 2002 on the budget of the year 2003 of the Republic of Hungary] entered into force on 1 January 2003 modified the pre-existing regulations on church financing. Tax payers may offer 1% of their personal income tax to a chosen church. [Articles 1.2 b) and 4/A.1 a) of the 1996. évi CXXVI. törvény a személyi jövedelemadó meghatározott részének az adózó rendelkezése szerinti felhasználásáról (Act. No. CXXVI of 1996 on the usage of a certain percent of the personal income tax according to the taxpayer's

will)]. Previously 0,5% of the total amount of the state income from personal income tax was guaranteed to be given to the churches (if the total amount of the "1% offers" given to the churches fails to reach 0,5% of the total amount of the state income from personal income tax, the state supplements the money to be given to the churches to that extent) [Article 4.2 of the 1997. évi CXXIV. törvény az egyházak hitéleti és közcélú tevékenységének anyagi feltételeiről (Act No. CXXIV of 1997 on the material conditions of the religious activities and activities of public purpose of the churches)]. From 2003 the former 0,5% was altered to 0,8%. The amount of the supplement to the money collected by 1% offers to the churches is to be distributed between the various churches to be proportionate to the sum of money received by each church directly from the "1% offers". There was a provision, enacted in 2001, to the aforesaid Act, which would have entered into force also on 1 January 2003, but the latter before its entry into force modified it. The year 2001 modification would have altered the method of distributing the supplement: the various churches would have received a sum of money proportionate to the data (regarding religious adherence) of the last national census.[21]

Inner cases of churches in court. In the 32/2003. (VI. 4.) AB határozat of the Constitutional Court, the Court reinforced the regulation contained in Article 15.2 of 1990. évi IV. törvény a lelkiismereti és vallásszabadságról, valamint az egyházakról [Act No. IV of 1990 on freedom of conscience and religion and on churches], that inner norms and rules of the churches may not be enforced by the state. The decision was deduced from the principle of the separation of the church and the state [Article 60.3 of the Constitution]. The applicant was a preacher, who was unable to enforce his rights related to an ecclesiastical service relationship based on inner norms of a church by state courts. The constitutional complaint was rejected.

Article 11. Freedom of expression and information

National legislation, regulation and case-law

On 8 December 2003 the Hungarian Parliament voted with a slight majority (184:180) for the modification of the Criminal Code, i.e. 1978. évi IV. törvény [Act No. IV of 1978]. According to the T/5179. számú törvényjavaslat [Bill No. T/5179] hate speech criminalization becomes stricter. In the future anyone who incites to hatred against any nation, national, ethnic, racial or religious minority, or calls for violent acts before the general public shall be punishable for a felony offense with imprisonment up to three years. A person who violates other people's human dignity by disparaging or humiliating them because of their national, ethnic, racial or religious origin shall be punishable for a misdemeanour with imprisonment of up to two years.

Both the previous and the current version prescribe publicity for incitement to hatred. A new element is the word "nation", since before the amendment one could commit this crime against the Hungarian nation, while now it can be any nation. According to the codificator, it is not the speech itself that is to be punished, but the degree of fierceness created by it is the decisive factor.

Eight members of the smaller governing coalition party, Szabad Demokraták Szövetsége [Alliance of Free Democrats] indicated in advance that they would vote against the bill because of free speech concerns. On 22 December 2003 the President of the Republic submitted the already adopted but not yet signed Act on amending the hate speech provisions

[21] It was not communicated before the year 2001 census that the data regarding religious adherence would be used as a basis of church financing. Articles 3.2-3 of the 1999. évi CVIII. törvény a 2001. évi népszámlálásról, valamint a statisztikáról szóló 1993. évi XLVI. törvény módosításáról [Act. No. CVIII of 1999 on amending Act No. XLVI. of 1993 on the year 2001 census and on statistics] stipulated that the information on one's religious adherence is voluntary, and the data of the census would be used only for statistical purposes.

of the Criminal Code to the Constitution Court for comments since he considered it as unconstitutional. The proceeding is pending before the Constitutional Court.

The modification of the hate speech provision was partly a reaction to the decision of the appeal court ruled on 6 November 2003, in which the court reversed the conviction of priest Lóránt Hegedűs Jr., who was convicted of incitement to hatred. He wrote an article in a local newspaper of the right-wing radical Magyar Igazság és Élet Pártja [Hungarian Justice and Life Party] where he called upon the public to exclude "carpet-beggars from Galicia", an expression that is countywide known as the coded anti-Semitic version for Jews.

According to the court's reasoning an element of the crime incitement to hatred is *means rea* aiming at rousing the listeners to commit violent acts. This part of *means rea* was obviously missing, so the Court, since "it is common knowledge that violent acts from the side of the Jewish community do not constitute a threat", as if it were the Jews who were called upon to act violently against the non-Jewish part of society and not those with anti-Semitic feelings against the Jews.

The decision was harshly attacked. Against a philosopher strongly criticizing the judgment proceedings have been initiated. The President of the Supreme Court, who is at the same time the Head of the National Judicial Council defended the judge in this case and the judiciary in general.

Reasons for Concern

On 25 November 2003 in an oral hearing attorney László Grespik, former head of the Fővárosi Közigazgatási Hivatal [Municipal State Administrative Office] and former member of the HJLP asked the judge whether she was Jewish. Mr. Grespik thought this question was necessary to clarify whether the judge was biased, since he represented a neo-Nazi singer singing anti-Semitic and racist songs. The judge replied that neither her, nor anyone in her family was Jewish. This trial – both the attorney's question and the judge's answer – again led to a storm of indignation.

The non-governmental organization HCLU and the Hungarian Helsinki Committee filed a complaint against Mr. Grespik with the Budapest Bar Association.

Article 12. Freedom of assembly and of association

International case law and concluding observation of international organs

Conclusions of the European Committee of Social Rights. European Committee of Social Rights has submitted its Conclusions [XVI-2] on Hungary. In respect of – inter alia – article 5, (Right to organise) of the European Social Charter the Committee asked the Hungarian Government to communicate the answers to its questions before the 31 March, because it needs further information in order to assess the situation.

National legislation, regulation and case law

In the last 14 years of the transition there were no actions initiating the dissolution of parties or associations. The first case was initiated in 2003 against the Blood and Honour Cultural Association (Vér és Becsület Kultúrális Egyesület), after they organized an event, where neo-fascist speeches were held, and planned a Nazi demonstration in Budapest. The procedure is not yet finished.

Practice of national authorities

Freedom of assembly. During the period under scrutiny different types of problems arose related to the practice of the freedom of assembly. A number of demonstrations have been banned. The most common ground of banning a demonstration has been Article 8.1 of the 1989. évi III. törvény a gyülekezési jogról [Act No. III of 1989 on the right to assembly] which enables the Police to ban a demonstration if it "would cause disproportionate disorder to the traffic" [Article 8.1 of the Act]. The most common ground of banning a demonstration has been this. In the case of the Civilians for the Peace [Civilek a Békéért], which finally led to a complaint lodged in to the European Court of Human Rights, the police banned a demonstration (against the military action in Iraq) on an itinerary (Andrássy avenue, Andrássy út) where otherwise programs, assemblies with not smaller number of participants are regularly held.[22] In the case of the Society Helping Tibet [Tibetet Segítők Társasága] the police banned demonstration reasoning the approximately one hundred expected demonstrators would not have enough place in front of the Chinese Embassy. In another case an association was refused to demonstrate on the Heros' Square [Hősök tere] in Budapest on 9 February with reference to the serious disorder it would cause to the traffic, but later the announcement of another association to hold an assembly at the same time, at the same place was not rejected.[23] The Eötvös Károly Közpolitikai Intézet [Eötvös Károly Institute on Public Policy] expressed concerns regarding the series of the breach of the right to peaceful assembly. In its communication the Institute indicated that the recent events prompt that police leaders seek to conform to the political expectations, and the police makes its decisions respective of the participants and aim of a planned demonstration.[24] In connection with the banning (with referral to the order of the traffic) and dissolution of the demonstration of the group Lelkiismeret '88 (demonstrating against a former action of the Prime Minister), the Hungarian Civil Liberties Union (HCLU) [Társaság a Szabadságjogokért (TASZ)], a human rights NGO raised its concerns.[25] In the latter case the General Deputy to the Parliamentary Commissioner for Civil Rights has undertaken a scrutiny.[26]

In the case of a demonstration [Kendermag Egyesület] for the propagation of the legalization of soft drugs, the police failed to take appropriate measures [prescribed for the police in Article 11.2 Act No. III of 1989 on the right to assembly] to try to secure the demonstrators right to peaceful assembly facing counter-demonstrators.

Dissolution of associations. The Capital City Public Prosecutor Office has brought an action against the Vér és Becsület Kulturális Egyesület [Blood and Honour Cultural Association] aiming its dissolution. The causes for the action according the Prosecutor's Office were that contrary what was contained in the basic rules of the association, its members were committed to neo-fascist views, the association did not function in reality since last January and it did not have the required at least 10 members. The case is in court; the proceedings did not have an end yet.

Reasons for concern

Freedom of assembly - recommendations of the Deputy Parliamentary Commissioner for Civil Rights. The Deputy Commissioner for Civil Rights in a report expressed its concerns regarding the practice of the freedom of assembly.[27] The application of the Act No. III of 1989 on the right to assembly can lead to uncertainties related to the recognition of the freedom of

[22] Numbers of the relevant police records: (Budapest Police Headquarters) 122-21/22/2003., 122-21/22/2003., 124-2/36/2003. Decision of the Capital City Court (Fővárosi Bíróság) on the appeal: 20. Kpk. 45061/2003/4.
[23] Hungarian News Agency (Magyar Távirati Iroda) http://hirek.mti.hu/news.asp?newsid=67550
[24] http://www.ekint.org/allasfoglalasok/2003.gyulekezesi_szabadsagrol.html
[25] Hungarian News Agency (Magyar Távirati Iroda) http://hirek.mti.hu/news.asp?newsid=150862
[26] Hungarian News Agency (Magyar Távirati Iroda) http://hirek.mti.hu/news.asp?newsid=151415
[27] OBH 5205/2002. 17 December 2002

assembly, which does not fit the requirement of legal certainty and does not comply with the constitutional scope and conditions of the realization of the relevant basic rights.

A wide range of consideration is provided to the authority, but there is a lack of proper normative elements securing the proportionate realization of the rights and liberties of persons practicing the freedom of assembly and other affected persons.

Under Article 8.1 of the Act, the Police is entitled to ban a demonstration if it "would seriously endanger the functioning of representative organs or of the courts". There are no objective guidelines on which the police could – separately from other constitutional considerations – rely when applying the aforesaid clause.

There is a 48 hours deadline for the police from the announcement of the demonstration to ban it – if there is a cause to do so – , and a 3 days deadline for the organizers of the demonstration to apply for the judicial revision of the decision banning their demonstration [Articles 8.1 and 9.1 of the Act]. The time provided by both deadlines are only sufficient if the police makes an assessment of the formal elements of the announcement of the demonstration; but it is unlikely that an assessment concerning the constitutional elements of the practice of the right to assembly and concerning the securing of the realization of other affected rights could be made.

In the case when the police takes notice of the announcement of a demonstration (does not ban it), and the demonstration held caused infringement on constitutional rights of other persons, there is no legal remedy to these persons.

The Deputy Commissioner for Civil Rights communicated its recommendations toward the competent legislative organs in order to promote the preparation of the modifications.

Article 13. Freedom of the arts and sciences

There has been no relevant issue during the period under scrutiny related to this article.

Article 14. Right to education

National legislation, regulation and case-law

2003. évi LXI. törvény [Act No. LXI of 2003] modifying 1993. évi LXXIX. törvény a közoktatásról [Act No. LXXIX of 1993 on Public Education] introduced major changes. First, it prohibits any discrimination among children, students, primarily because of previous negative experiences. The Act goes into detail about diverse grounds for discrimination, e.g. it is illegal to deny a student a service, or make the exercise of rights granted by law impossible; furthermore illegal segregation or forcing someone attending an educational institution that does not correspond to his or her needs, mental health belong here. Instead of "disabled children", the term "children requiring special nursing" is to be used. Second, the modification introduces a more flexible teaching mechanism within the framework educational plan, e.g. it allows teachers selecting schoolbooks. In order to ensure equality among students, only books that can be acquired by all students are to be used. Third, the new Act lists the rights and obligations of students. As to vocational training the Labor Code is to be applied. For the privacy of children and students, see Art. 24. on the rights of the child.

Reasons for concern

According to a common practice many Roma children irrespectively of whether they are mentally retarded or perfectly healthy go to schools specifically designed for the mentally disabled. Many schools are segregated; in the village of Jászladány the Roma community has not been informed about the matriculation day for a private school. That was one of the concerns that led to the modification of the above mentioned Act on Public Education.

Article 15. Freedom to choose an occupation and right to engage in work

National legislation, regulation and case law

The Act no. XX of 2003 modified the Labor Code: the type of the contract chosen to provide the conditions for the work shall not aim the destruction of the employee's rights set forth in the Labor Code. The contract shall be judged according to its content and not its title. However, the companies trying to hide a labor relation with a contract of agency will not face the sanctions, if they modify these contracts until 30 June 2004. These contracts basically avoid the obligations of the labor law, and provide limited protection under the civil law. The legislator aimed at providing the necessary protection for those who are forced by the employers to engage in such contracts.

Article 16. Freedom to conduct a business

There have been no relevant issues during the period under scrutiny related to this article.

Article 17. Right to property

There have been no relevant issues during the period under scrutiny related to this article.

Article 18. Right to asylum

Practice of national authorities

Detention of asylum seekers. Asylum seekers entered the country illegally are often put in alien policing detention (that is detained as foreigners subject to expulsion or extradition): if they are unable to manage to apply for refugee status at one of the reception stations for refugees before they are found by border guards or by the police, they will have to stay in alien policing detention centers until their application for asylum is decided. See more at the discussion about Article 6.

Integration program for refugees. In December 2002 the Bureau of Immigration and Citizenship [Bevándorlási és Állampolgársági Hivatal] in Debrecen undertook an integration program for refugees. In the first, experimental section of the program it involved fourteen refugees; the participants had the chance to frequent intensive language courses and were helped in their social and cultural integration, as well as in finding a job.

Reasons for concern

It could be recommended to the national authorities that asylum seekers staying illegally in the country not to be treated like other foreigners without the right to remain in the territory. E.g. if an asylum seeker, entered illegally the country, reports himself at the Police or at an

alien policing authority and signs that he is seeking for asylum, shall not be subjected to alien policing detention, but directed to a Refugee Station.

Article 19. Protection in the event of removal, expulsion or extradition

National legislation, regulation and case law

Description: Execution of deportation orders. In case of deportation the territorial alien policing authority organises the transfer of the expulsed foreigners to the border; the transfer is carried out by the Police or by a special vehicle of the Border Guards transporting foreigners. The deportation to neighbouring countries is executed by the Border Guards. The deportation by air is organized and executed by the Bureau of Immigration and Citizenship [Bevándorlási és Állampolgársági Hivatal], if necessary, with the assistance of the Police. [Article 66.1 of the 2001. évi XXXIX. törvény a külföldiek beutazásáról és tartózkodásáról (Act No. XXXIX of 2001 on the Entry and Stay of Foreigners); Article 64 of the 170/2001. (IX. 26.) Korm. rendelet a külföldiek beutazásáról és tartózkodásáról szóló 2001. évi XXXIX. törvény végrehajtásáról (170/2001. (IX. 26.) Government Decree on the implementation of Act No. XXXIX of 2001 on the Entry and Stay of Foreigners)] The alien policing authority may distrain the travel ticket (or a sum of money necessary for the acquisition thereof, or of the documents necessary for travel) to secure the cost of the deportation of the foreigner; to cover these costs, the court may even distrain his valuables or sequestrate his property [Articles 60, 66.3 of the Act]. When executing deportation, police officers and border guards may use the measures of physical constraint as general; the measures may be used only if necessary and only to the extent necessary to break the resistance, and the authorities have to adopt the slightest effective measure available at the situation [Articles 16-19, 47-62 of the 1994. évi XXXIV. törvény a Rendőrségről (Act No. XXXIV of 1994 on the Police); Articles 57-58 of 1997. évi XXXII. törvény a határőrizetről és a Határőrségről (Act No. XXXII of 1997 on border guarding and on the Border Guards)].

CHAPTER III : EQUALITY

Article 20. Equality before the law

Reasons for concern

Public trust in the judiciary diminished as a result of a series of controversial decisions (see the compensation case of the Roma men for being detained innocently under Article 6 and the antisemitic hate speech case under Article 11) The preparedness, knowledge and neutrality of the judges became questionable in the public eye. A 2000 decision also came into light, where the judge in a criminal case concerning deceit stated that the victim should have been much more careful, taking the fact into account that the other party signing the contract (i.e. the suspect) had darkish skin, and had Roma features.

Article 21. Non-discrimination

International case law and concluding observation of international organs

In 2003 Hungary has not been found in violation neither with the relevant provisions of the International Covenant on Civil and Political Rights, nor with Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The European

Roma Rights Center (ERRC) and the Center on Housing Rights and Evictions (COHRE) submitted a complaint to the European Committee of Social Rights on the housing crisis in six different countries in Europe, among them in Hungary.[28]

National legislation, regulation and case law

107/2003 (VII. 18.) Korm. rendelet [107/2003 (VII. 18.) Government Decree] allocates the tasks of the Minister without Portfolio Responsible for Equal Opportunities. Her activities include the fight against the exclusion of people being disadvantaged, and the realization of human dignity and equal treatment.

New Act on equal treatment and the promotion of equal opportunities. The Act was adopted by Parliament in 29 December 2003. The act provides a comprehensive protecting system against direct and indirect negative discrimination, harassment, unlawful segregation and retribution. The scope of the act does not extend to family law relations and relations between relatives.

Negative direct discrimination covers provisions that result in the less favorable treatment of a person or a group comparing to another person or group in a comparable situation because of his/her sex, racial origin, colour, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or ideological conviction, political or other opinion, family status, motherhood (pregnancy) or fatherhood, sexual orientation, sexual identity, age, social origin, financial status, other status, attribute or characteristic. Provisions that are not considered direct negative discrimination and apparently comply with the principle of equal treatment but put any persons or groups having the above mentioned characteristics at a considerably larger disadvantage compared with other persons or groups in a similar situation are considered indirect discrimination. Harassment is a conduct violating human dignity related to the relevant person's characteristic with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around a particular person. Unlawful segregation is a conduct that separates individuals or groups of individuals from others on the basis of their characteristics without a reasonable explanation resulting from objective consideration. Finally, retribution is a conduct that causes infringement, is aimed at infringement, or threatens infringement, against the person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts.

According to the act a public authority shall be set up with overall responsibility of ensuring compliance with the principle of equal treatment. This authority is entitled to carry out investigation ex officio or on a basis of a complaint; initiate lawsuits; review and comment draft legislation; make recommendations, reports. In its procedure it applies the provision Act no. IV of 1957 on the general procedures of public administration, with the differences regulated in the act. If the Authority has established that the provisions ensuring the principle of equal treatment have been violated, it may order that the situation constituting a violation of law be eliminated; prohibit the further continuation of the conduct constituting a violation of law; publish its decision establishing the violation of law; impose a fine; apply a legal consequence determined in a special act. In the administrative procedures the reverse burden of proof applies: the injured party has to prove that he/she suffered an injury and he/she possesses those characteristic(s) that are defined in the act. The other party has to provide evidence that he observed, or that particular relationship he does not have an obligation to observe the principle of equal treatment. The act contains specific rules on employment, social security and health care, education and training, housing, sale of good and providing services.

[28] See: Roma housing crisis: Advocacy groups call on European Committee of Social Rights action on human rights violations. 4 December 2003

Equal treatment in public education. The Act No. LXXIX of 1993 on public education from 1 September 2003 contains stricter rules regarding private students. If the student is socially disadvantaged the decision of the director on this matter is valid only with the consent of the children's welfare service. The present regulation of public education provides a lot of opportunities to segregate disadvantaged children, especially of Roma origin. Declaring them of 'other disabilities' is a perfect tool for keeping them separated from other students. One fifth of Roma students in Hungary study in special schools for slightly mentally handicapped children.[29]

Gays and lesbians in the armed forces. On 8 February 2003 the 4/2003. (I. 31.) HM rendelet a hivatásos és szerződéses katonák egészségi, pszichikai és fizikai alkalmasságának minősítéséről [4/2003 (I. 31.) Decree of the Minister of National Defense on the health, psychical and physical suitability of soldiers for military service] was entered into force. This altered the former regulation that held homosexuality a kind of personality disorder, which resulted inefficiency for military service. Under Article 70.1 of 1993. évi CX. törvény a honvédelemről [Act No. CX of 1993 on National Defense] every Hungarian male citizen between the age of 17 and 50 is obliged to serve in the Hungarian armed forces. Despite of that, the practice is that homosexual men are exempted from the compulsory military service, and officers tend to declare their inability of serving in the army on medical or psychiatric basis. The reasons given for this is that it is the only way to avoid the alleged problems caused by gay people in the community of soldiers. Legal advisers working with issues relating to the military service reported that homosexual people are exposed to humiliating treatment by the officers during the enlistment. However, no legal procedures were started, since everybody – including homosexual people – try to escape military service and for this reason they do not raise the issue of discrimination.

Practice of national authorities

Gays and Lesbians. The Constitutional Court in its decision no. 14/1995. (III. 13.) AB határozat declared that the marriage is traditionally a relation between a man and a woman. The Court emphasized that the provision of the Civil Code defining cohabitation as such relation runs counter the Constitution. However, there are still rules in the Hungarian legal system that exclude homosexual couples from benefits which are available for married couples. For example, the Family Law Act permits couples to adopt children together (adopting a common child) only if they are married. The State provides discounted interest on loans required buying a house or a flat[30] that can be obtained also by married couples only.

Discrimination in Education. In November 2003 a director of a high school did not permit a student, who had been accepted before, to enroll, because he is HIV positive. The Háttér Társaság a Melegekért issued an announcement claiming that this was an unlawful and discriminatory action. They referred to Article 4 of the Act on public education, which prohibits every kind of discrimination between students and his relatives on the basis of sex, age, religion, belief, race, ethnic origin, status, etc. and on any other ground. According to Decree no. 18/1998 of the Minister of Welfare on the necessary measures for the prevention of epidemics getting into contact in the every day life with persons having AIDS does not carry any significant risk.

The Situation of Roma. The situation of Roma is a serious matter for concern. Roma people in Hungary may be divided into three groups based on cultural and language factors. The first and largest group comprises the Hungarian-speaking "Romungros" who constitute 70-75% of the total Roma population. The second group is the Lovari-speaking "Olah" Roma, and the

[29] See the General Reasoning of Act no. LXI of 2003 on the modification of the Act on public education
[30] Regulated by the 12/2001. (I. 21.) Korm. rendelet a lakáscélú támogatásokról [12/2001 (I. 21.) Government Decree on the state support for buying flat].

third comprises "Beash" Roma. According to estimated data, the life expectancy of Roma at birth is about 8-10 years less than the average in Hungary. The unemployment rate is five times higher among the Roma people than the average. Roma have to face prejudice, misconceptions, poverty, poor housing, and exclusions. The number of Roma students passing the school-leaving exam is just a small fraction of the national average, while Roma with a college or university degree are still very much the exception.

It is very common in Hungarian primary schools to teach Roma children in separated classes, separated in every common activity of non-Roma children. The Office of the Parliamentary Commissioner for Ethnic and Minority Rights carried out a thorough investigation in Pátka, a village close to the capital, where Roma children were taught in two separate classes. According to the teachers and the director of the school, the reason for the separation was the language. That is why non-Roma pupils with studying difficulties were taught in normal classes according to a specialized program. In the teachers' opinion the Roma children have fallen so much behind that they cannot catch up with their Hungarian schoolmates. The Parliamentary Commissioner's office carried out an investigation focusing on the teaching methods, the curriculum, and the meals. Approximately 120 pupils study in this primary school, 24 of them study in specialized classes. According to a teacher 5 out of them has linguistic difficulties resulting from the lack of help, and 4 students are mentally disabled. The teachers talked about the various discriminative practices and the colleagues of the office emphasized: it is unexpectable from them to report discrimination as they are not aware the unlawfulness of their actions.

Nearly the same happened in Jászladány, where the local authority of the village agreed on the founding of a new private school. The parents of the Roma children protested against the new foundation based school, claiming that the only purpose of it was to exclude the Roma children from the classes. Last year, after one day of functioning, the Minister of Education withdrew the operational permit from the school after the Administrative Bureau of Jasz-Nagykun-Szolnok County annulled the decision of the local authority permitting them to rent a building for the school without the consent of the Gipsy self-government. This year the court annulled the decision of the Administrative Bureau. In 2003 the foundation-run school has applied for a new operational permit and identification number, and will start operation on the 1st of September.

According to the Office of the Minister's Commissioner for Integration of Roma and Disadvantaged Children (Ministry of Education), in approximately 120 schools Roma children study and eat separately. The Office has adopted several measures recently to remedy the situation. Primary schools can apply for a special integration support if they agree to liquidate the separated classes for Roma children. The amount of money they can get through this program is higher than they would get after each child normally. The Ministry of Education is organizing a network of institutes where the integral education system works. These schools should serve as examples for non-discrimination.

The Ministry gives financial support to establish Roma communal houses, and encourages schools to teach the Roma language. Roma students can apply for a scholarship or a reduction of the tuition fee. The project Magyarországi Cigányokért Közalapítvány (the Public Fund for the Hungarian Gypsies) will provide HUF 1,000,000,000 in the next school year starting in September. Students are supported from the fifth class of the primary school until the university. Furthermore, the Office aims to reduce discrimination by teaching "romology" in the teacher-training colleges to make future teachers familiar with the Roma culture, history, and traditions. In autumn in Pest county romology training has been organized for police officers to enable them to treat the already existing conflicts between Roma people and the police more effectively.

In October the Minister for Education announced a positive discrimination program in high education. The program aims to increase the number of those students in universities and colleges whose parents are undergraduated or who receive regular social assistance or were brought up in state orphanages. Every student – both Roma and non-Roma – who reaches at least 80 % of the points necessary for admission, can enter universities. The program will help one or two thousands students every year from 2004.

The Ministry of Justice in cooperation with the National Gypsy Self-Government and the Office for National and Ethnic Minorities founded a Client Service Network for Anti-Discrimination. The objective of the Network is to set up a *legal aid* service that has explicit competence in cases where the client suffered grievance owing to his Roma descent. With the support of the Nemzeti és Etnikai Kisebbségi Jogvédő Iroda – NEKI (Legal Defense Bureau for National and Ethnic Minorities) also a signaling system is operating.

On 26 September 2003, the European Roma Rights Center together with the Legal Defense Bureau for National and Ethnic Minorities (NEKI) filed a pre-application letter against Hungary with the European Court of Human Rights. The complaint concerns racially-motivated threats and discrimination in access to *housing*, perpetrated by the local government officers and non-Roma residents of Gyure. The applicant, after a flood had destroyed her house, decided to by a new flat from Ukrainian citizens with the financial support of the state in the village of Gyure. After her intent became public both the non-Roma residents and the local government officers resorted to threats and coercion to try to block the signing the contract. Although the contract was signed, under the Hungarian law the transaction requires the approval of the County Office of Public Administration. More than two years later, the Office is formally yet to decide on the matter.[31]

The Roma Sajtóközpont (Romapress) reported that a woman of Roma origin has brought an action against Dél-Pesti Kórház (Hospital of South Pest) for her dismissal. She claims that the reasons behind the termination of her contract were the facts that she is Roma and she is a woman over forty. She is represented by NEKI. The trial is still pending.[32]

Article 22. Cultural, religious and linguistic diversity

National legislation, regulation and case law

Article 68 of the Constitution declares that the national and ethnic minorities in Hungary represent a constituent part of the State. They shall be entitled for protection and use of their native language. The 1993. évi LXXVII. törvény a nemzeti és etnikai kisebbségek jogairól [Act No. LXXVII of 1993 on the Rights of National and Ethnic Minorities][33] guarantees both individual and collective rights for those minorities that are listed in the act. In this regard Hungary formally meets the requirements of Article 27 of the International Covenant on Civil and Political Rights, those of the Council of Europe Framework Convention on National Minorities, and those of the European Charter for Regional or Minority Languages. Every person belonging to a national or ethnic minority can use his/her native language in criminal, civil or administrative proceedings and everyone can maintain and develop his/her culture.

[31] Available on the website of the European Roma Rights Center: http://www.errc.org/publications/letters/2003/hungary_oct_1_2003.shtml

[32] Available at the following website: http://www.romacentrum.hu/aktualis/hirek/2003/04/0409 bbkorhaz.htm

[33] The act defines thirteen ethnic groups as national or ethnic minorities native to Hungary. These are the following: the Bulgarian, Roma, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovak, Slovenian, and Ukrainian.

Practice of national authorities

Among the collective rights the most important is the right to self-government. The minority self-governments are elected bodies that represent the interests of the given national or ethnic minority at settlement or national level. The duties and the authority of these are set forth in view of cultural autonomy. Every person who is entitled to vote may take part in the elections and cast a vote for candidates of a minority. Law governs the number of members of the minority self-governments.[34]

As concerns the biggest minority in Hungary, more than 1,000 local Roma minority self-governments were established during the elections of 2002, and through indirect elections, the National Gipsy Minority Self-Government was elected at the beginning of 2003. Research carried out by the Office of the Parliamentary Commissioner for Ethnic and Minority Rights underlined abuses of this right in the case of every minority.[35] Mainly in the capital and in bigger settlements pseudo minority representatives were elected. These representatives had no personal ties with the given minority and the only reason of their standing as candidates of this community was that it offered them a chance to win a mandate.[36] The local minority self-governments are required to co-operate with the local authorities. In many cases, the local authorities do not provide the minority self-governments with sufficient facilities. In the protection of minority rights, the Parliamentary Commissioner for Ethnic and Minority Rights plays a decisive role. This year nearly all the complaints received by the Office concerned Roma discrimination. As the Parliamentary Commissioner is not entitled to examine complaints claiming discrimination in the private sphere, non-governmental organisations take this task. The Legal Defense Bureau for National and Ethnic Minorities this year dealt with discrimination in employment, education, and distribution of financial aid by the local authorities. The Hungarian Helsinki Committee also provides legal representation in discrimination cases.

The Government proclaimed "new roads" in Roma policy last year. Roma matters were re-allocated to the direct control of the Prime Minister's Office where the political state secretary and related Roma Affairs Agency began to operate. This year the Government Agency for Equal Opportunities has been set up. It is led by the Minister for Equal Opportunities. Hungary is the first country in Central and Eastern Europe where such office has been created. Chaired by the Prime Minister the Council of Roma Affairs, a consultation body, composed of experts of both Roma and non- Roma origin, has been established. The initiatives introduced by the Government primarily focus on the most crucial problems of the Roma, e.g. employment, education, and housing. The above-mentioned institutes have started several programs this year. Beside the mentioned scholarship for Roma students, they also provide HUF 650,000,000 for Roma assistant training. The assistants will be paid for four years by the State and will work in kindergartens and schools where the ratio of the Roma students is higher than 20%. The National Council for Public Works, with the financial support of the PHARE program advertised a tender for the temporary employment of Roma people. The political state secretary has pledged to employ Roma referees in the Labor Center. The agreement with the Labor and Employment Ministry is under preparation.

[34] See: *The system of minority self-governments in Hungary,* www.meh.hu/nekh/Angol/3-4.htm

[35] See the Report of 2002 of the Parliamentary Commissioner for National and Ethnic Minorities. Available in English on the website: www.obh.hu/nekh/en/reports/reports.htm.

[36] Every person who has an active right to vote is entitled to vote for and be elected as minority representative as well, even if he or she does not belong to the given minority. This is why representatives not belonging to the given minority could be elected with the votes of the majority.

Reasons for concern

The representation of national and ethnic minorities in the Parliament has not been solved yet, despite the command of the Constitution and the decision of the Constitutional Court on the unconstitutional omission of the legislature.

Also the voting system of minority self-governments is under discussion. While the Government and the Parliamentary Commissioners both for Data Protection and National and Ethnic Minorities agree on a registration system by the minority organization themselves. Some of the organizations express data protection concerns.

Article 23. Equality between men and women

Practice of national authorities

Although Hungary signed the Convention for the Elimination of Discrimination against Women (CEDAW)[37] human rights activists drew the attention to the fact that the Hungarian Parliament and the Government failed to implement it.[38] They claim that it would be the task of the state to prevent violence against women in the families by enacting the necessary changes in the Criminal Code. Violence against women within the family is a serious concern. Many times the death or serious injury of the woman or child could have been avoided if the authorities had reacted in time. Members of the Parliament raised the necessity of legislative changes, but the bill is still under preparation. The Habeas Corpus Munkacsoport (Habeas Corpus Working Group) and the NANE issued a memorandum in relation to the National Strategy of Social Crime Prevention. The latter document devotes a chapter to violence within family. The non-governmental organizations appreciated that the Government have realized: the violence within the family is a harsh violation of the human rights of women. They also questioned the implementation of the Government Order no. 2174 of 1997 that declared the action plan for the execution of tasks accepted at the IV. World Conference of Women.

Women still have to face discrimination in employment. Especially women above 35 years can hardly find job. In September an international corporation dealing with cosmetics held a conference in Budapest, where they announced to start a research program for female researchers having PhD or participating in PhD training. The age limit was 35 years. Almost the same happened in case of the Hungarian Academy of Sciences where the age limit was 35 years as well, and the application of a woman fulfilling the other conditions was rejected.[39]

The Habeas Corpus Munkacsoport (Habeas Corpus Working Group) on behalf of a woman filed a complaint with the European Court of Human Rights. The woman was convicted of causing serious injury to her husband, while trying to protect her daughter against the violence of the man. During the trial the husband was only summoned up as a victim, however the fact that he tried to throttle his elder daughter had not been questioned. Beside the criminal trial the woman initiated a procedure to divorce, where she was compelled to pay a high amount of money to the husband. In the complaint to the European Court of Human Rights the applicant emphasizes: the Hungarian state violated several articles of the European Convention. The authorities failed to provide effective protection against violence, and in her view it violates Article 5. Hungarian courts also violated Article 6, the right to a fair trial, and she claims that in relation to these rights she suffered from discrimination on the basis of sex, which violates Article 14.[40]

[37] Published in Law-Decree no. 10 of 1982.
[38] For example the opinion of the Habeas Corpus Working Group: www.mancs.hu/0338publ1.htm
[39] For detailed description see: www.mancs.hu/0340tu3.htm
[40] The complaint is available on Internet: hc.netstudio.hu/jogsegely/esetek/strasbourg.osszefogl. 2003.02.06.htm

Article 24. The rights of the child

National legislation, regulation and case-law

2003. évi LXI. törvény [Act No. LXI of 2003] modifying 1993. évi LXXIX. törvény a közoktatásról [Act No. LXXIX of 1993 on Public Education] introduced important changes as to privacy rights of students. Teachers as a general rule are required to keep all information and data about the student secret. This obligation does not apply to secrecy towards parents, if the student empowered the teacher in writing to forward information to his or her parents; and it does not apply towards third persons if both the student and his or her parent agreed in writing to the transfer of information.

The modification is debated and attacked from both conservative politicians because of restricting parental rights and because of the claim that it might lead to a split in the family between children and parents, and the Ombudsman for Education has also criticized it for entirely different concerns.[41] According to the Ombudsman for Education there is good intention behind the law, but the great number of exceptions make the privacy protection provisions inefficient. According to the law the parent can be informed about the child even in the lack of the student's authorization if it is possible without transmitting concrete data or facts. It is more than questionable how this would be possible. A further prerequisite for informing the parent in such cases is that the teacher has to be convinced that letting the parent know about certain matters will not go to the detriment of the child. In practice, such a possibility of not informing the parent if it is disadvantageous to the student existed before the amendment as well.

As to the transmission of information towards authorities, the police, courts, public prosecutors, municipality, national security service, etc. the Act again provides for a great variety of exceptions, i.e. all data that are to be processed and are transferable according to the Act on Public Education may be transferred to the mentioned authorities. Such data include the behavior, diligence, knowledge, development of the student, which basically cover any information.

In practice teachers do use their possibility to report crimes, especially drug use to the authorities. As a survey of the National Institute of Criminology shows half of the denunciations for smoking marihuana are coming from teachers who are perplexed, misled or have prejudices about drug users. For an example as how children's privacy rights are restricted in this relation see the *reasons for concern*.

The Situation of Minor Convicts in Hungary. In Hungary there are three prisons for the detention of minors. The oldest one is operating in Tököl since 1963. The prison can take in 825 convicts. Currently there are 721 convicts, 262 of which are minors. The prisoners participate in primary education from 1st to 10th class,[42] and in specialized studies on a voluntary basis. These latter trainings include courses on decoration, masonry, engine fitting, etc.

The second prison has been built in 1997 in Kecskemét, which can take in 20 prisoners. The prison is currently full. Due to the small number of prisoners, the convicts prepare for the high-school graduation as private students. They also learn computer skills. In the same building there is a special division for convict mothers, who can stay there together with their

[41] The Ombudsman for Education is outside the system of Parliamentary Commissioners; he is operating within the Ministry of Education.
[42] In the Hungarian educational system children go to school with 6, and graduate after a 12-year education with 18.

children until the baby is one year old. Currently 7 women stay in that division with their children. In December 2003 this part of the prison will be extended with 20 more places.

The Szirmabesenyő detention center has been built in 2002 and for a maximum of 115 convicts. Currently 149 persons are accommodated.

In general there is a 147 % overuse of prisons, currently there are 16.676 prisoners, 539 of which are minors (15 women and 524 men); 431 of them are accommodated in the three above mentioned prisons, 102 persons are in county detention centers, close to their residence. The imprisonment of minor women and girls is a major problem; temporarily 6 women stay at the Pánhalma detention center.

Reasons for Concern

In a Kiskunhalas secondary school 3 to 4 students picked randomly from Monday to Wednesday are called upon to undergo urine tests to check whether they used drugs. The time limit is justified by the fact that students usually use drugs at parties during the weekends and the quick test used can show residua in the urine within 3-4 days after drug use. Students are picked randomly so that the shadow of suspicion of guessing why he or she was chosen is avoided. These tests are voluntary as opposed to those conducted on the basis of the school's policy. According to the policy if someone is indeed suspected, i.e. signs of drug use can be traced, he or she is obliged to undergo the test. If the student is unwilling to take the urine test or the parent disagrees with it, the school pays for a clinical testing. If the student and the parents do not accept this possibility either, it amounts to breaking of school rules and as a renunciation of the contract between student and the educational institution.

The Ombudsman of Education expressed his worries about the above described events and stressed that an illegal practice, i.e. drug use is not redressable by another illegal practice, i.e. violation of children's privacy. Even if teachers are driven by a good intention investigations must not be conducted in school, which is itself a hierarchical institution. The student-teacher relationship is based on trust, which ceases to exist as a consequence of the above practice. Even in the case of voluntary tests in a hierarchical institution like a school one cannot talk about truly voluntary choices.

Article 25. The right of the elderly

National legislation, regulation and case-law

78/2003 (VI. 24) OGY határozat a nyugdíjasok helyzetének és életminőségének javításáról az uniós csatlakozás folyamatában [78/2003 (VI. 24.) Decision of Parliament on Improvement of the Situation and the Quality of Life of Pensioners in the Process of Accession to the European Union] intends to ensure a sustainable quality of life for the elderly in line with European welfare norms in the frame of the compulsory pension system. The Parliament wishes to help to sustain the activity of the elderly in the life of the community by extending the possibilities of employment; to provide benefits; to provide sufficient medical care and to improve the conditions in institutions designed for the elderly.

The Parliament asks the Government to develop a plan eliminating the discrepancies between the rise in the nominal value of wages and pensions; to develop a plan to adjust pensions to the degree of inflation; to increase the amount of low pensions; to ensure that pensions do not go under a certain minimum level; to develop a flexible system to go on pension and to adjust its decisions to the annual budget.

In 2003 the introduction of pensions for the 13th month has begun, i.e. at the end of 2003 pensioners receive an additional amount: one fourth of their monthly pension. The amount of the pension for the 13th month will gradually increase until in 2006 pensioners receive basically two monthly pensions in December.

Parliamentary Commissioner (Ombudsman). Because of previous abuses the Parliamentary Commissioner asked elderly people to be more cautious when signing sale contracts thereby selling their real estate in the hope to have the possibility to move into a social institution of the elderly. Often the promised social institutions are basically profit-oriented businesses lacking the necessary authorizations and equipments.

Article 26. Integration of persons with disabilities

National legislation, regulation and case-law

The Constitutional Court in its decision 9/2003. (IV. 3.) AB határozat quashed Art. 2 (1) f) of the 287/1997 (XII. 29.) Korm. rendelet [9/2003. (IV. 3.) Government Decree], because it exceeded the authorization laid down by the 1994. évi XLV. törvény a hadigondozásról [Act No. XLV of 1994 on Military Care] by only providing free tickets for war cripples and their widows and widowers for cabin class. The repeal of the provision must of course not be interpreted as abolishing the possibility for war cripples and their widows, widowers to get tickets out of charge, but on the contrary: they are entitled to free tickets for both first and cabin class journeys.

A mobility impaired person, Mr. Bendegúz Nagy won against a Budapest cafe "Centrál" on January 16, 2003. Mr. Nagy received 200.000 HUF damages and the cafe had to eliminate barriers within 120 days.

As to the facts of the case, Mr. Nagy visited the cafe in March 2000. He could not enter the building without help, inside the building stairs led to the bathroom; these facts led to a series of embarrassing situations. Later on Mr. Nagy visited the cafe again, this time with his girlfriend and they wanted to have diner. The second floor of the restaurant, although very cosy, could not be approached by a person using wheelchair, since there was no elevator. Finally, some people from the staff carried him upstairs. While Mr. Nagy left the table, one of the waiters approached his girlfriend and complained about Mr. Nagy's behavior, who insisted that he should be carried upstairs. The waiter called Mr. Nagy a "hick" and recommended her girlfriend to find another place to dine. Mr. Nagy has visited the cafe for a third time with an American friend of his who was working on barrier-free solutions to show him the place as a bad example.

Mr. Nagy started proceedings in September 2001. against Cafe Centrál. The legal situation was unclear, since one act requires that new and newly renovated buildings shall be barrier-free, while another law allows for a gradual renovation of public buildings and sets a deadline, January 1, 2005 for establishing a barrier-free environment. The court of first instance accepted the arguments of the respondent and rejected the claim of Mr. Nagy. The appeal court, in this case the Municipal Court Budapest, partly agreed with Petitioner and held that his rights to equal opportunity and human dignity have been violated.

Reasons for Concern

Persons with mobility impairment cannot access 80 % of family doctors' consulting rooms. In many cases it is very inconvenient, complicated or even impossible to enter universities, museums, theatres, cinemas, banks or offices of public authorities.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

National legislation, regulation and case law

In 2003 the Parliament modified the provisions of the Labor Code concerning the tasks of the National Conciliation Committee.[43] The Committee is entitled to decide on matters relating to the minimal amount of salaries that is to be ordered by the Government.
The rules on the status of the works council in case of succession in the person of the employer also changed.[44] After the merger or division of the enterprise until the new works council is elected, a temporary council fulfils its tasks. To the temporary works council each of the previous councils delegates one member. To the procedure, work and tasks of the temporary works council the rules of the permanent ones shall apply.

Article 28. Right of collective bargaining and action

National legislation, regulation and case-law

2003. évi XXI. törvény az Európai Üzemi Tanács létrehozásáról, illetve a munkavállalók tájékoztatását és a velük való konzultációt szolgáló eljárás kialakításáról [Act. No. XXI of 2003 on the establishment of the European Works Council and the procedure for the purpose of informing and consulting employees] basically implements Council Directive 94/45/EC of 22 September 1994 regarding the establishment of European Works Councils or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees into the Hungarian legal system. As regards Community-scale undertakings and Community-scale group of undertakings special negotiating bodies are established based on already existing solutions.

Article 29. Right of access to placement services

National legislation, regulation and case-law

2002. évi LIII. törvény [Act No. LIII of 2002], which entered into force on January 1, 2003, introduced major changes to the 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról [Act No. IV of 1991 on the Promotion of Employment and the Care for the Unemployed]. Art. 3. of the 2002 Act modified the Labor Code's provision concerning private employment agencies. The changes are in line with the International Labor Organization's Convention No. 181 on Private Employment Agencies adopted at the ILO's annual session in June 1997.[45] According to Art. 7 (1) of the Convention "[p]rivate employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers." Art. 7 (2) however allows exceptions to the general rule. Using this possibility defined in paragraph (2) the modified Labor Code also makes derogations in favor of chargeability.

[43] Act no. XX of 2003
[44] Act no. XX of 2003
[45] Hungary ratified the Convention with the 6/2002. (II. 7.) OGY határozat [6/2002. (II. 7.) Decision of Parliament].

Article 30. Protection in the event of unjustified dismissal

National legislation, regulation and case law

In 25/2003. (V. 21.) AB határozat, the Constitutional Court declared a constitutional omission in relation to the rules regulating the status of the public servants. The legislator failed to establish the conditions of including the period of military service in the period of the public service. The period could relevant in case of dismissal. The legislator ought to enact the missing provisions until 31 December 2003.

The reasoning of the ordinary dismissal without referring to the facts and circumstances of the situation is appropriate, if it gives the grounds of the dismissal from which it is obvious why the employer does not need the work of the given employee any longer. BH 2003.211 [Judicial Decision 2003.211]

The ordinary dismissal is a written statement that has binding effect from its communication. The employer cannot withdraw it just with the consent of the employee. BH 2003.168 [Judicial Decision 2003.168]

In the case published in BH2003.87 the plaintiff asked the court to declare her dismissal unlawful. The employer it the reasoning of her dismissal referred to reduction of personnel. The number of employees was actually reduced. However, he employed another woman almost for the same task the plaintiff had before her dismissal. The court emphasized that the mere fact of reduction cannot justify the plaintiff's dismissal, since somebody else took her job, who had not been working there before. Although the employer claimed that there was significant difference between the works of the employees, the court did not consider it significant.

Article 31. Fair and just working conditions

National legislation, regulation and case law

The 3/2003 Joint Decree of the Minister of Labor and Employment and the Minister of Health, Social and Family Affairs[46] regulates the minimal work safety requirements of workplaces located in potentially explosive environment. The employer has to create safe working conditions, and if the explosion cannot be excluded completely, he has to take all the necessary measures to reduce its effects. The implementation of the tasks regulated in the decree shall be controlled regularly, especially when significant components of the working environment change. If there is no possibility to create a safe workplace, it should be permanently monitored. The employees should get the necessary training on how to handle these situations.

Article 32. Prohibition of child labour and protection of young people at work

Reasons for concern

2001. évi XVI. törvény [Act No. XVI of 2001] amended 1992. évi XXII. törvény a Munka Törvénykönyvéről [Act No. XXII of 2002 on the Labor Code] in order to harmonize it with the *acquis communautaire*. The modification entered into force on 1 July 2001. According to the modified Art. 72 (1) the employee must be at least 16 years old. Art. 72 further lists some

[46] 3/2003. (III. 11.) FMM-ESzCsM együttes rendelet a potenciális robbanásveszélyes környezetben levő munkahelyek minimális munkavédelmi követelményeiről

exceptions, e.g. children above 15 may work in the summer holiday. The Labor Code however fails to define minor tasks that can be and in practice are completed by children, but do not fall under the notions of work or employment.

Article 33. Family and professional life

National legislation, regulation and case-law

Major changes have been introduced to the Labor Code on certain benefits for parents by the 1999. évi XCVII. törvény a gyermekgondozási díj bevezetésével összefüggő törvénymódosításokról [Act No. XCVII of 1999 on certain amendments in connection with the introduction of childcare fees], which entered into force on January 1, 2000. In 2003 there is only one minor modification to be reported.

The 2002. évi LIII. törvény [Act No. LIII of 2002] entering into force on 1 January 2003 inserted Art. 138/A into the Labor Code according to which fathers of newborn babies get an extra five day off.

Article 34. Social security and social assistance

National legislation, regulation and case law

The Act no. IV of 2003 modified the Act no. III of 1993 on social administration and social services (A szociális igazgatásról és szociális ellátásokról szóló 1993. évi III. törvény). The basic social services defined in the act are to be fulfilled by the local authorities, and on contract by non-state actors and churches. The local authorities gained decisive role in maintaining social institutes and providing social services.

There were changes in the conditions and adjudication of the different social services. In case of regular social aid, the local authorities can organize training for persons applying for work of public purpose. The training should be included in the term of the work. The local authorities shall in an order prescribe the requirements of assistance for flat maintenance. The act lays down the basic guidelines for calculating costs and incomes, on which the assistance depends. The conditions of the nursing fee changed as well: those relatives are excluded who receive one of the different types of financial support after their child or children. The legislator provided a detailed regulation on the debt settlement.

The act established within the framework of the Ministry of Health, Social and Family Affairs the Council of Social Policy. The main tasks of the Council are the following: giving opinion on the concepts, decisions or draft legislation concerning social matters and children protection; and analyzing and evaluating the different forms, types and systems of social services. In the settlements having more than 2000 inhabitants social roundtable should be organized from the representatives of the operators of local social institutes, and other organizations listed in the order of the local authority.

The President of the Republic sent the modifying act back to the Parliament for reconsideration. The President argued that the Act should declare the participation of the churches in social services as a subjective right, and not only in those cases where the local authorities are unable to provide adequate services within their institution. Despite the President's concerns the Parliament reenacted the act, and it was published on 12 February 2003.

Article 35. Health care

International Convention

Hungary adopted the Anti-doping Convention of November 16, 1989 signed in Strasbourg in the framework of the Council of Europe by 2003. évi LXXVIII. törvény [Act No. LXXVIII of 2003].

National legislation, regulation and case-law

The 2003. évi LXXXIV. törvény az egészségügyi tevékenység végzésének egyes kérdéseiről [Act No. LXXXIV of 2003 on Certain Questions Related to Medical Activities], which entered into force on 1 July 2003, aims to lay down unified rules for doctors and other professionals working in the medical field and also to identify special circumstances that necessitate differing types of legislative acts.

The Act allows privatization of public health services – a possibility that led to an endless debate. Because of pressure from the Hungarian Chamber of Physicians' side doctors are also granted the possibility to become owners. The long-term aim of the legislator was to make the system sustainable. Major structural changes are to be expected concerning hospitals and clinics and other medical institutions, like thermal baths.

The President asked the Representatives to reconsider the bill on June 23, 2003, whereupon it has been accepted the same date with the same content. Numerous parties, political and professional organizations turned to the Constitutional Court and challenged the constitutionality of the Act. As a consequence of the circumstances of passing the bill, the President asked the Constitutional Court to interpret his role in the process of legislation.
The Constitutional Court in its decision ruled in 15 December 2003 annulled the law, because of the unconstitutional disregard of the President's concerns.

Reasons for concern

The situation of the Roma community in Szabolcs-Szatmár-Bereg county is worrying as a journalist reported. He took Rozsály as an example where 160 people share 3 showers that can be used between 4 p.m. and 8 p.m. and 2 washing machines and one spin-drier that are operating until noon. Because of the scarcity even families with 6-8 children may only use the washing machine once a week. As the school director put it, it is not enough that children wash themselves each day, if their clothes are dirty. He reported that some children smell unbearably.

According to the mayor the Roma community is a great burden on the village with 800 inhabitants.

The situation of detoxication departments of medical institutions is worrisome. According to the doctors legal, financial and professional conditions are lacking. As to the first condition, it is unclear whether the doctor is allowed to lock up a drunk, maniac patient or not. Three years ago the then Ombudsman argued that a detoxication department is not psychiatry, therefore patients cannot be locked up. Doctors are however disregarding the Ombudsman's recommendation fearing liability if the drunken patient is driven over by a car or perishes by cold.

Moreover, as doctors reported, patients are hard to handle, are usually drunkards, who become violent quickly. At least once a week a toilet is torn out and broken into pieces, patients do damage to each other and to the doctors. The lack of financial means has twofold consequences: there is nothing except mattresses in the hospital rooms and it is hardly

manageable to satisfy the most basic hygienic means and also it is very hard to find professionals willing to work in such an environment.

Article 36. Access to services of general economic interest

National legislation, regulation and case-law

As regards access to services of general economic interest several pieces of legislation have been drafted with the express objective to harmonize Hungarian law with European Community law.

Article 37. Environmental protection

National legislation, regulation and case-law

2003. évi LXXXIX. törvény [Act No. LXXXIX of 2003] introduced the environmental load fee in order to motivate environment protection. The three kinds of fees to be paid in case of emission of materials damaging the environment are air pollution, water pollution and land pollution fees.

2003. évi LII. törvény [Act No. LII of 2003] deals with the state recognition of plants and the production and marketing of propagating materials. The Act has been issued on the basis of the following directives: Council Directive 66/401/EEC of 14 June 1966 on the marketing of fodder plant seed; Council Directive 66/402/EEC of 14 June 1966 on the marketing of cereal seed; Council Directive 68/193/EEC of 9 April 1968 on the marketing of material for the vegetative propagation of the vine; Council Directive 92/34/EEC of 28 April 1992 on the marketing of fruit plant propagating material and fruit plants intended for fruit production; Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species; Council Directive 2002/54/EC of 13 June 2002 on the marketing of beet seed; Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed; Council Directive 2002/56/EC of 13 June 2002 on the marketing of seed potatoes and Council Directive 2002/57/EC of 13 June 2002 on the marketing of seed of oil and fiber plants.

Article 38. Consumer protection

National legislation, regulation and case law

From the 1 July 2003 the provisions of the Civil Code relating to guarantee have been changed. According to the newly enacted rules, if a guarantee is owed under contract or by law for the faultless performance of a contract, the guarantor shall be released during the guarantee period from liability only if he is able to prove that the cause of the defect occurred after the performance.[47] This guarantee does not affect the consumer's warranty rights provided in the Civil Code. According to the Government Decree 151/2003 on the guarantee of certain durable goods defines the maximum term of guarantee in one year. However, the manufacturer is entitled to provide a longer guarantee

There were also changes in the rules concerning deficient performance. From 1 July 2003 any lack of conformity resulting from incorrect installation shall be deemed as lack of conformity of the goods, if the installation forms part of the contract of sale of the goods and the goods were installed by the obligor or a person under his responsibility. This shall apply equally if

[47] Section 248 of the Civil Code

the product, intended to be installed by the obligee, is installed by the obligee and the incorrect installation is due to a shortcoming in the installation instructions.[48]

In case of a lack of conformity
a) the obligee shall be entitled in the first place to choose either repair or replacement, unless this is disproportionate to an alternative remedy,
b) if the obligee is not entitled to neither repair nor replacement or if the obligor refuses to provide repair or replacement, the obligee may require an appropriate reduction of the price or have the contract rescinded.

The repair or replacement shall be carried out within a reasonable time and without any significant inconvenience to the obligee, otherwise he is entitled to repair the goods himself or have them repaired by someone else at the expenses of the obligor.[49] The obligee is entitled to switch from the remedy he has chosen to an alternative remedy.

The obligee can enforce his warranty rights within six months that commences upon delivery of the goods or services. Limitation of this period is accepted only in specified cases determined by the law.[50]

Practice of national authorities

The Fogyasztóvédelmi Főfelügyelőség (General Inspectorate for Consumer Protection) besides examining the complaints of customers relating to the quality of goods, takes active part in formulating a consumer-friendly legislative protection. It pays attention to the respect of consumer protection law with carrying out individual investigations and test concerning a certain kind of product or service. In 2003 the colleagues of the Inspectorate carried out researches and tests in the following fields: services provided by travel agencies (especially the information about the transport provided to the customer); the prospectus attached yogurts; comparable analysis of the fares of taxi companies; camping around the lake Balaton; different types of cheese; the entrance tickets to baths in Budapest. The results are public and available on Internet.[51]

The colleagues of the Inspectorate do test shopping regularly. If they find irregularities, they are entitled to impose fine. The decisions are always appealed. After the Inspectorate decides on the second instance, it can be subjected to judicial review on the grounds of unlawfulness. According to a lawyer working for FVF almost 2% of the decisions become binding without a judicial trial. However, the Inspectorate makes strong efforts to raise the right awareness of the consumers, many of them turns to the Inspectorate with complaints relating to cheap goods usually bought on open-air markets or on the street. In these cases no liability can be established. The number of complaints is permanently high.

The Inspectorate publishes both in its newspaper (Fogyasztóvédelem – Consumer Protection) and on Internet the updated list of prohibited goods. These failed on the safety tests of the authorities.

According to Section 5 of the Law Decree on the interpretation of the Civil Code the associations for the protection of consumer rights are entitled to contest a general contractual conditions if they are contrary to the consumers' rights. No data is available on the number of such actions.

[48] The so-called IKEA rule, Section 305 of the Civil Code
[49] Section 306 of the Civil Code
[50] Section 308 of the Civil Code
[51] www.fvf.hu

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

National legislation, regulation and case law

Participation of non-Hungarian Union Citizens residing in Hungary in the elections to the European Parliament. There has not been any special initiative to improve the participation of Union Citizens residing in Hungary but not being Hungarian nationals in the elections to the European Parliament.

The Constitution of the Republic of Hungary was amended by 2002. évi LXI. törvény a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról [Act No. LXI. of 2002 on amending Act No. XX. of 1949 on the Constitution of the Republic of Hungary]. Article 70.4 of the Constitution, after its entry into force,[52] shall guarantee citizens of a Member State of the European Union residing in Hungary the right to vote and to stand as a candidate in the elections to the European Parliament (if they are of voting age), similarly to Hungarian nationals. The Constitutional basis for the participation of Union Citizens residing in Hungary in the elections to the European Parliament is thus secured.

The Act passed by the Parliament of The Republic of Hungary based on Bill No. T/4146 Az Európai Parlament tagjainak választásáról és jogállásáról [On the Election and Status of the Members of the European Parliament] was referred to the Parliament by the President of the Republic, for it would be inappropriate to fulfill its role. The initiator (Government) repealed the aforesaid Bill, and initiated a new one, Bill No. T/6457 Az Európai Parlament tagjainak választásáról [On the Election of the Members of the European Parliament], which was enacted by the Hungarian Parliament in December 2003.

Article 40. Right to vote and to stand as a candidate at municipal elections

National legislation, regulation and case law

Convention on the Participation of Foreigners in Public Life at Local Level. The Republic of Hungary is not a party to the Convention on the Participation of Foreigners in Public Life at Local Level (ETS. No.144) of 5 February 1992. During the period under scrutiny no initiatives were taken towards the signature and ratification of this instrument.

Implementation of Council Directive 94/80/EC. A Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról szóló 2002. évi LXI. törvény [Act No. LXI of 2002 on amending Act No. XX. of 1949 on the Constitution of The Republic of Hungary] modified the circle of the persons entitled to vote and to stand as a candidate in municipal elections. According to the new Article 70.3 of the Constitution, which will enter into force on the day of entry into force of the Act promulgating the international convention on the accession to the European Union, citizens of a Member State of the European Union residing in Hungary, even if they are not nationals to the Republic of Hungary, if they are of voting age, have the right to vote and to stand as a candidate in municipal elections. So while on Constitutional level the Directive has been implemented, the detailed regulations regarding the practicing the

[52] 70.4 of the Constitution amended by a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról szóló 2002. évi LXI. törvény [Act No. LXI. of 2002 on amending Act No. XX. of 1949 on the Constitution of The Republic of Hungary] shall enter into force on the day of entry into force of the Act promulgating the international convention on the accession to the European Union.

aforesaid right has not been enacted yet (A helyi önkormányzati képviselők és polgármesterek választásáról szóló 1990. évi LXIV. törvény [Act. No. LXIV. of 1990 on the election of the representatives at local self governments and of the majors] has not been modified), neither they are in a draft version.

Practice of national authorities

Participation of third country nationals at municipal elections. During the period under scrutiny, no general municipal elections were held; however, there has been by-election at some places. Information related to the participation of third country nationals in these elections was not provided by the Elections Information Centre [Választási Információs Központ].

Article 41. Right to good administration

Not relevant

Article 42. Right of access to documents

Not relevant

Article 43. Ombudsman

Not relevant

Article 44. Right to petition

Not relevant

Article 45. Freedom of movement and of residence

National legislation, regulation and case law

Compatibility with Council Directives. Well before the period under scrutiny national law has been made compatible with the requirements contained in Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students. Articles 25-30 of the 2001. évi XXXIX. törvény a külföldiek beutazásáról és tartózkodásáról [Act No. XXXIX of 2001 on the Entry and Stay of Foreigners] containing the provisions harmonized with the aforesaid Council Directives will enter into force on the day of entry into force of the Act promulgating the international convention on the accession to the European Union.

Article 46. Diplomatic and consular protection

International case law and concluding observation of international organs

Implementation of Directive 95/553/EC. Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (95/553/EC) is mainly implemented into national law. The provisions of the 2001. évi XLVI. törvény a konzuli védelemről [Act. No. XLVI. of 2001 on consular protection] containing the harmonized regulations [Articles 3.4-5, 5.3] will enter into force on the day of entry into force of the Act promulgating the international convention on the accession to The European Union. Article 5.3 refers to another law to regulate the financial advance or help that may be given to a citizen of the Union, but that law has not been enacted yet.

Implementation Decision of 96/409/CFSP. The second clause of Article 5.1 a) 2001. évi XLVI. törvény a konzuli védelemről [Act. No. XLVI. of 2001 on consular protection], which will enter into force on the day of entry into force of the Act promulgating the international convention on the accession to The European Union, refers to a separate law regarding the establishment of the emergency travel document described in Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document (96/409/CFSP). The referred law has not been enacted yet.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observation of international organs

Right to effective remedy. During the period under scrutiny the Human Rights Committee did not issue final observation finding the violation of Article 2(3) or 4(1) ICCPR. In no cases found the European Court of Human Rights that Hungary was in violation of Article 13 of the Convention in 2003.

Delay in judicial proceedings. During the period under scrutiny the Eur. Ct. H.R. found that the State violated Article 6(1) by reason of the length of the proceedings in nine cases.

Five cases ended with friendly settlement between the applicant and the State.[53] In *Hegedűs v. Hungary*[54] the applicant initiated a civil procedure against a request ordering the applicants to tolerate a sewer, which emanated from the property of the neighbor and crossed a part of their garden. The applicants brought an action in trespass against the neighbor in July 1990. In February 1991 the District Court dismissed the applicants' action. On appeal the Regional Court quashed that decision and remitted the case for a second time. From 2 February 1993 until 23 September 1997, when the final report was submitted, the District Court held several hearings, appointed and replaced experts. On 13 November 1997 the District Court accepted the applicant's claims. On 15 May 1998 the Regional Court dismissed the defendant's appeal. The defendant brought a petition for review before the Supreme Court on 17 June 1998, and the applicants submitted their counter-arguments. On 10 March 1999 the Supreme Court upheld the dismissal of the defendant's counter-action on the servitude claim, but quashed the remainder of the first and second instance judgments.

[53] Two of the cases were not published by the Registrar of the Eur. Ct. H.R.
[54] Eur. Ct. H.R., *Hegedűs v. Hungary* judgment of 25 March 2003, no. 43649/98

In *Theiszler v. Hungary*[55] the applicant brought a civil action against her former husband for a division of their matrimonial property on 16 May 1991. The Court held more than ten hearings between 1991 and 1995. An expert was appointed in November 1997, and further hearings were held. The District Court rendered a judgment on 17 February 1999, which was served on 27 April 1999, and became final on 13 May 1999.

In *Mihály v. Hungary*[56] the applicant initiated a civil procedure against a sport association, operating on the neighboring shooting ground, for compensation of the nuisance caused by the sound of shots being fired. Simultaneously, various administrative proceedings were in progress. The District Court dismissed the applicant's request for an injunction, and on 2 February 2000 his appeal as well. On 22 September 2000 his action was dismissed by the District Court. On 1 July 2001 the Regional Court quashed the decision of the court of first instance and remitted the case. The proceeding is still pending.

In the following cases the European Court of Human Rights examined the case on the merits. In *Tímár v. Hungary*[57] the applicant was sentenced in a criminal proceeding with political connotations for five years of imprisonment. The court also ordered the confiscation of his property in 1965. In 1989 the Attorney General lodged an appeal on legal grounds with the Supreme Court against the judgments of 1965 and 1966, proposing that the applicant's conviction be quashed as being unlawful. In February 1990 the applicant instituted a proceeding before the Budapest Regional Court claiming restitution of his property and compensation for his imprisonment. One year later he was awarded compensation for his damage as a consequence of his imprisonment, but the restitution proceeding continued with hearings and the court took expert evidence as to the value of the property. In February 1992 the Regional Court issued an order awarding compensation. The applicant appealed to the Supreme Court, and after it dismissed his appeal, he lodged a petition for review. This was rejected in October 1995. The applicant turned to the Constitutional Court with a constitutional complaint, and the Court decided that the application of procedural rules assigning restitution cases to the criminal courts amounted to arbitrary discrimination and that the applicant should have been entitled to initiate civil review proceedings before the Supreme Court. Mr. Tímár filed a new petition in April 1995, a few days after the Constitutional Court's decision, and it was rejected again. He filed a new constitutional complaint, and it was referred by the Constitutional Court to the Budapest Regional Court, and the procedure went on to the Supreme Court again. In June 1998 the Constitutional Court declared unconstitutional the procedural situation. Following the change in legislation, in February 2000 the Supreme Court annulled its decision of 1996 and ordered a review, but the petition was dismissed in August 2001. The Eur. Ct. H.R. found that Art. 6(1) was violated and awarded the applicant EUR 8000 as compensation for nonpecuniary damage.

In *Lévai and Nagy v. Hungary*[58] the applicants were dismissed by their employer, a car manufacturer. In March 1993 they brought an action before the Pest Regional County Labor Court for unlawful dismissal. The Labor Court observed that liquidation proceedings were pending against the applicants' former employer and transferred the case to the Economic Collegium of the Pest Regional County Court, which on appeal remitted the case to it. In August 1995 the Labor Court decided that their dismissal was unlawful and transferred the pecuniary claims back to the Regional Court's Economic Collegium. The Regional Court quashed the Labor Court's decision again and remitted the case for the second time. In September 1995 the Labor Court annulled the applicants' dismissal on grounds of unlawfulness, and the Regional Court upheld this decision in March 1996. Subsequently the applicants lodged various pecuniary claims with the Labor Court that transferred them to

[55] Eur. Ct. H.R., *Theiszler v. Hungary* judgment of 30 September 2003, no. 52727/99
[56] Eur. Ct. H.R., *Mihály v. Hungary* judgment of 7 October 2003, no. 57977/00
[57] Eur. Ct. H.R., *Tímár v. Hungary* judgment of 25 February 2003, no. 36186/97.
[58] Eur. Ct. H.R., *Lévai and Nagy v. Hungary* judgment of 8 April 2003, no. 43657/98.

Bankruptcy and Liquidation Section. In October 1996 the Supreme Court quashed the decisions of September 1995 and March 1996 and transferred the case back to the Regional Court. The court further pointed out that pecuniary claims against a business entity under liquidation could only be pursued in the framework of liquidation proceedings. The Regional Court in January 1997 annulled the dismissal and the Supreme Court upheld the decision. Regarding the quantification of the applicants' claims the proceeding was still pending. Since the total length of the proceedings amount to ten years the Eur. Ct. H.R. found that Article 6(1) was violated.

In *Simkó v. Hungary*[59] the applicant brought an action before the Sopron District Court in October 1992 against the Sopron Mayor's Office seeking judicial review and compensation for damages on account of administrative decisions. The District Court rejected the action in March 1993, holding that it had no competence to hear the case. The applicant appealed, and in August 1993 the Győr-Moson-Sopron County Regional Court quashed the District Court's decision, and transferred the case to its competent bench. Meanwhile the applicant brought an official liability action in the context of the same proceedings before the District Court (March 1993). The Regional Court in February 1994 discontinued the proceedings because as the court observed, the defendant authority was notified earlier of the latter action, and for these reasons the applicant's claims were to be pursued in the proceedings relating to the latter action. The applicant appealed, but the Supreme Court upheld the decision in October 1994. The Regional Court came to a decision in July 1996, and awarded the applicant compensation. The applicant appealed and the judgment of the Supreme Court was served on him in April 1998. The Eur. Ct. H.R. found that there were significant periods of inactivity that were attributable to the authorities.

According to the general practice of the Ministry of Justice, the compensation is transferred to the applicants' bank account within two or three months, and it is free of any taxes and charges. The judgment of the Eur. Ct. H.R. does not affect the penalty in criminal proceedings.

In *Vass v. Hungary*[60] the applicant complained about the length of the procedure. The Court found, that, as the applicant's case is still pending before the District Court, her complaint under Article 6 (1) about the alleged unfairness are premature and must be rejected under Article 35 (1).

National legislation, regulation and case law

The Term of the Proceedings. Although the Code of Civil Procedures Article 2 respects the right to a judicial decision within a reasonable time, the civil procedures seem particularly problematic. According to the Code of Civil Procedures in the calculation of the reasonable time, the subject matter of the legal dispute and other circumstances need to be taken into account. No one shall refer to this provision who acted in ill faith during the proceeding at issue. In case the court does not comply with this instruction, the parties are entitled to lodge an action – referring to the violation of their fundamental rights – for compensation, if the remedy cannot provide such. Beside this provision there are several rules that aim to provide the reasonable length of the proceedings, e.g. the term for the examination of the action, or for fixing the day of a hearing.

In the administrative procedures there are strict terms. The authorities shall come to a decision on the merits thirty days after the petition has been submitted. This can be prolonged for another thirty days. If the competent authority fails to proceed, the superior authority either itself acts or designates another authority. If the proceeding has started with a client's petition

[59] Eur. Ct. H.R., *Simkó v. Hungary* judgment of 8 April 2003, no.42961/98.
[60] Eur. Ct. H.R., *Vass v. Hungary* judgment of 25 November 2003, no. 57966/00

and the authority does not reject it within the term prescribed, in the cases defined by statute the legal consequences of the granted petition are to be applied.

The new Code of Criminal Procedures was entered into force on 1 July 2003. The new act brought important changes affecting the length of the criminal procedures. According to the Code the investigation shall be finished within two months. It can be extended for two months by the state attorney, and for another eight months by the district attorney. After that, the Attorney General is entitled to extend the term, but the investigation shall finish two years after the suspect's first interrogation. The terms of the preliminary arrest are set as well.

There are no terms concerning the constitutional proceedings. The Constitutional Court in June rejected the petition of an NGO claiming that the lack of term for the proceedings of the Court is by omission unconstitutional. The Constitutional Court, in its decision,[61] emphasized: the complexity of the cases differs so much that the duration of a proceeding cannot be planned in advance. However, in several cases – for example in the euthanasia case – it took nine years to come to a decision. The lack of the term is very problematic in the case of a constitutional complaint or concrete review, when recognizing the unconstitutionality of a rule the trial judge suspends the case and files a petition to the Constitutional Court.

The Ministry of Justice is preparing an act that will provide remedies within the domestic legal system against the unreasonable delays. The concerned persons will be entitled to initiate proceedings in those cases when the courts fail to perform its duties within the terms prescribed by law.

Legal Aid. Article 47 of the Charter declares the right to legal aid for "those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." The act regulating the legal aid services was accepted in the autumn of 2003.[62] The act provides a comprehensive regulation on the different forms of legal aid available in criminal, civil proceedings and also out of court.

In civil proceedings the following forms of legal help are obtainable: full or partial exemption of charges, advancing the costs of the procedure, and advocate. The act lays down the conditions of receiving legal aid, e.g. the minimum amount of incomes and properties. There are a bunch of cases when a person – otherwise meeting the requirements – is automatically excluded: e.g. when he is acting in bad faith or his claim is manifestly ill-founded, when the procedure relates to the activities of an enterprise, or to the foundation of a civil organization, when he is provided with support within the framework of a different system run by the state. In criminal proceedings the legislator provides financial support in two ways: exemption of the charges for the substitute civil suitor, and advocate representing the accused.

Out of court a person in need could be entitled for receiving legal advice or help in drafting motions or other papers. The act lists those cases in which out of court legal aid is available, for example in some administrative proceedings; when the person has been a victim of a crime; when the legal advice is necessary for his every day life (issues of housing, labor law etc.); when the client asks for advice in relation to extraordinary remedies.

Legal aid can be provided for Hungarian nationals, for persons having a registered Hungarian residence or are parties in a refugee procedure, and by reciprocity for non-Hungarian nationals. The act will be entered into force on 1 April 2004. Until 2004 the relevant provisons of the Code of Civil Procedures and Code of Criminal Procedures apply. These provide all forms of legal aid regulated in the act except for those that are available out of court. [The Code of Civil Procedures makes it possible for people whose income does not

[61] Decision No. 777/E/2002
[62] 2003. évi LXXX. törvény a jogi segítségnyújtásról (Act no. LXXX. of 2003 on legal aid)

reach a certain level to acquire exemption from payment of charges (exemption from paying revenue, or from advancing the cost of the procedure) or to be represented by an advocate at the first and second instance court as well. In criminal proceedings the appropriate authority (the investigation authority, the state attorney or the court) appoints a defense counsel when the accused cannot afford it.]

The Ministry of Justice pays lawyers to give legal advice and legal representation in discrimination cases for Roma people.

The Constitutional Court in its Decision no. 47/2003 (X. 27.)[63] annulled the provisions of the Act no. XXXIV. of 2003 on police concerning crime prevention as it violates the right to remedy and the right to access the court, and it is also in violation of Article 50 (3) guaranteeing the independence of judges. The act failed to lay down the guiding principles for the decision-makers exercising discretionary power. Thus, the judicial procedure is mere formality; the decision is made outside the judiciary. According to the challenged provision the police may under certain circumstances detailed in the Act, for the purposes of crime prevention, monitor a convict released after at least three years imprisonment. Monitoring means *inter alia* collecting of secret data not subject to judicial authorization, and furthermore the police has the right to enter the apartment of such a person without any prior resolution. The Constitutional Court held that the challenged provisions clearly violated fundamental rights of convicts, especially their right to the protection of personal data and the privacy of the home. The Constitutional Court however put more emphasis on the lack of legal security and repealed the provision on that basis.

On the ground of a constitutional complaint the Constitutional Court examined those relations between church and its member that are based on an act of the Parliament. The Court found that it is not contrary to the principle of separation church and state to provide judicial review in legal disputes in connection to these relations.[64]

Article 48. Presumption of innocence and right of defence

There have been no relevant issues during the period under scrutiny related to this article.

Article 49. Principles of legality and proportionality of criminal offences and penalties

National legislation, regulation and case law

The Constitutional Court in its mentioned decision no. 47/2003[65] annulled several provisions of the Act no. XXXIV. of 1994 on the police (A rendőrségről szóló 1994. évi XXXIV. törvény) and of the Law-decree no. 11 of 1979 on the implementation of penalties and measures concerning the means applied for the prevention of crime. The Constitutional Court declared the Order of Minister of Interior no. 28 of 1999 on the control for the purpose of the prevention of crime. This kind of control is a unique institution in the Hungarian legal system; it cannot be compared to none of the existing legal sanctions. From the law it is not obvious who can be subjected to this measure: it creates uncertainty not only for the addressee of the norm, but also for those judges who apply the law. The judges are not provided with proper guidance how to interpret these provisions, which conditions and circumstances should be taken into account. The same judge decides on the probation and on the crime prevention

[63] 47/2003. (X. 27.) AB határozat
[64] Decision no. 32/2003
[65] 47/2003 (X. 27.) AB határozat

control. This violates Article 50 (3) of the Constitution that guarantees the independence of the judicature.
The alleged provisions raise also serious data protection issues.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

There have been no relevant issues during the period under scrutiny related to this article.

ANNEX: FUNDAMENTAL RIGHTS ISSUES OF THE TRANSITION IN HUNGARY

One of the specialties of the Hungarian "constitutional revolution" was that the Constitutional Court had to start its activity with solving three major issues of the transition : the restitution of consfiscated property, the problem of retroactive justice and the lustration of public officials concerning their activity in the previous regime.

Restitution

The Constitution of Hungary did not provide protection against expropriations before 1989. The basic revision of the Constitution, which was promulgated on 23 October 1989. [1989. évi XXXI. törvény az Alkotmány módosításáról, Act No. XXXI of 1989 on amending the Constitution] contains the basic principles of property rights. Article 9.1 declares that Hungary is a market economy where public and private ownership enjoys equal rights and equal protection; article 13.1 ensures the right to property, and article 13.2 states that taking property is possible only exceptionally, in public interest, in cases and in a process regulated by an Act, and under terms of full, unconditional, and immediate compensation. The transition of the political system necessarily meant a complete reshaping of the rules of property ownership.
Creating a new economic order meant for practical purposes the reallocation of national wealth and the formation of a new class of owners. The principal choice was the decision for either reprivatization (returning nationalized property to the original owners) or privatization on a commercial basis. The first compensation case of the Constitutional Court 21/1990. (X. 4.) AB határozat opened the way for commercial privatisation by denying a subjective right of the former owners to compensation. Compensation, the Court argued, was a gratuitous act of the state, based on its sovereign decision. The Constitutional Court also launched here its "legal continuity theory" while recognizing the legal ownership of the State of "legally sound" nationalized property. The "continuity principle", under which expropriatons of property that were legal at the time they occured still had legal effect, later on became decisive for the constitutional evaluation of the "transition". The second compensation case 16/1991. (IV. 20.) AB határozat augments to the first : that social costs and burdens originating from the transformation of the property system might be placed upon those who acquire the former state property for free. This was decisive in later cases in justifying the whole compensation scheme on the grounds of distributive justice. Besides, in its decision, the Court developed a dogmatic formula, the novatio, indicating that the state may preclude reliance on the old legal titles and reduce the old legal duties to a common denominator and merge them with ex gratia compensation.

Retroactive justice

The first elected parliament passed a law concerning the prosecution of criminal offenses committed between December 21, 1944 and May 2, 1990. The law provided that the statute of limitations start over again as of May 2, 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and infliction of bodily harm resulting in death - but only in those cases where the "state's failure to prosecute said offenses was based on political reasons." The President of Hungary, Árpád Göncz, did not sign the bill but instead referred it to the Constitutional Court.

The Constitutional Court in its unanimous decision, 11/1992 (III. 5) AB, struck down the parliament's attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. In addition, the language of the law was vague (because, among other things, "political reasons" had changed so much over the long time frame covered by the law and the crimes themselves

had changed definition during that time as well). The basic principles of criminal law - that there shall be no punishment without a crime and no crime without a law - were clearly violated by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the court said, are those changes that work to the benefit of defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law state and that there can be no punishment without a valid law in effect at the time, the court declared the law to be unconstitutional. In 1993 the Court approved an alternative proposal that only those who had been accused of war crimes could be tried, and then only under conventions of international law.

Lustration

After a long hesitation, the Hungarian parliament passed a law early in 1994, toward the end of the first elected government's term of office, which included a compromise solution to the issue of the secret agents of the previous regime's police. The law set up panels of three judges whose job it would be to go through the secret police files of all of those who currently held a certain set of public offices (including the president, government ministers, members of parliament, constitutional judges, ordinary court judges, some journalists, people who held high posts in state universities or state-owned companies, as well as a specified list of other high government officials). Each of these people would have to undergo background checks in which their files would be scrutinized to see whether they had a lustratable role[66] in the ongoing operation of the previous surveillance state. If so, then the panel would notify the person of the evidence and give him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicize the information. If the person contested the information found in the files, then prior to disclosure, he or she could appeal to a court which would then conduct a review of evidence *in camera* and make a judgment in the specific case. If the person accepted a judgment against him or her and chose to resign, then the information would still remain secret.

After the law had already gone into effect and the review of the first set of members of parliament was already underway, the law was challenged by a petition to the Hungarian Constitutional Court. The Court handed down its decision in December 1994,[67] in which parts of the 1994 law requiring "background checks on individuals who hold key offices" were declared partly unconstitutional. In its reasoning, the Constitutional Court held that the law violated the constitutional right of the citizens to access to information of public interest which is a part of the fundamental right of communication. The Court also ruled that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. Because the Parliament had not yet secured the right to informational self-determination, and first of all the right of people to see into their own files, the Court in its decision declared the Parliament to have created a situation of unconstitutionality by omission.[68] With this decision, the Parliament was given six months to rewrite the Act. The new law, Act No. LXII of 1996, narrowed scope of the lustration process. However, it created a "Historical Office," responsible to take control of all of the secret police files and to make them accessible to citizens who are mentioned in those files. Individuals are eventually able to apply to this office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised.

[66] The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being members of the (fascist) Arrow Cross Party.
[67] 60/1994 (XII.24) AB.
[68] The new law, LXII/1996, was approved by the Parliament on July 3, 1996.