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

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **HUNGARY**

IN 2005

submitted to the Network by **Gábor HALMAI** [*]

on 15 December 2005

Reference: CFR-CDF/HU/2005

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union

[*] This report was prepared within the Hungarian Human Rights Information and Documentation Center (INDOK), with the contributions of Ms. Petra Bárd, Mr. Gábor Mészáros, Ms. Eszter Polgári, Mr. Balázs D. Tóth, and Mr. Benedek Varsányi.

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), 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.

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The EU Network of Independent Experts on Fundamental Rights is composed of 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 (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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GENERAL OBSERVATIONS

The development of fundamental rights in Hungary in 2005 was again conflicting. While one can observe *positive developments* during the period under scrutiny concerning some legislative initiatives, national case law and practices of national authorities are *not without concerns*.

1. As reported last year, despite the fact that 1,000,000 women and children are affected by *domestic violence*, the Government was unable to introduce a draft law for the restraint of the violent family member. On 26 January 2005 the Committee on the Elimination of Discrimination against Women adopted its views in a case of a Hungarian woman. The Committee appreciated the state's efforts to support the victims of domestic violence, also drew attention to the fact that although a comprehensive action plan was adopted against domestic violence, these kinds of cases still do not enjoy high priority in court procedures. Hungary failed to introduce specific legislation addressing the issues of sexual harassment and domestic violence. In October 2005 the Government finally submitted a proposal for amending the Code on Criminal Procedures, which contains provisions on ordering restraint.

2. In March 2005 a delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out its third periodic visit to Hungary. During the visit, the CPT's delegation followed up a number of issues examined during previous visits, concerning the conditions of detention in penal institutions. At the end of March 2005 the Government published its *Draft of the Act on the Execution of Penalties and Measures* under consideration by the Government. The Draft is to replace the Law-decree No. 11 of 1979. on the execution of penalties and measures. As an important issue connected to the Draft relates to prison overcrowding, regarding the free space to be provided to the detainees, but here the Draft substantially maintains the regulation in force.

3. In 2003 the minister without portfolio for equal opportunities advocated the legalisation of registered *same-sex partnerships*, so-called civil unions. However the planned legislation (neither the new Civil Code, nor the draft concept on registered partnership) does not intend to recognise homosexual marriage. The most recent draft is even more modest, at the moment the fate of the law is unclear. A deficiency of the draft is certainly the lack of recognition of same-sex partners as heir apparent. Nor is the adoption of children on the agenda.

4. On 4 July 2005, Parliament adopted Act XC of 2005 on the *Electronic Freedom of Information*, the primary goal of which is make the state more transparent by prescribing the list of specific data of public interest that must be published on the Internet. It has to be noted though that it is not clear what justifies that the drafts of legal regulations of a subject matter that cannot be the subject matter of a national referendum, on payment obligations, on pricing, on state subsidies and on the foundation of organizations need not be disclosed. It also has to be noted that the Act provides unqualified discretion for the head of the organ preparing draft regulation not to disclose the draft if publication endangers Hungary's particularly important defence, national security, financial and foreign affairs interest or its environmental protection or inheritance protection interests or when there is an outstanding social interest linked to particularly rapid adoption of the draft regulation.

5. The Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities ordered the establishment of a public administrative body with the overall responsibility of ensuring the compliance with the principle of equal treatment. The *Authority for Equal Treatment* has begun to operate in March 2005. So far 102 decisions have been delivered. Several cases from the practice of the Authority show that the Authority fails to apply the principle of shifting of the burden of proof as required by the relevant European Union Directives. 10 cases ended with finding the violation of the Act on equal treatment, and only in

8 cases requested the parties the judicial review of the decision. However, in a case concerning segregation of Roma pupils and one relating to the dismissal of a homosexual student from a religious university the courts failed to find the breach of the Act, as – in their view – the differentiation had rational basis.

CHAPTER I. DIGNITY

Article 1. Human dignity

Legislative initiatives, national case law and practices of national authorities

1. 2005. évi XXII. törvény az egészségügyi intézmény által működtetett inkubátorban elhelyezett újszülöttek érdekében egyes törvények módosításáról [Act XXII of 2005 on the Modification of Certain Laws in the Interest of Babies Placed in Incubators Maintained by Health Institutions] modified certain acts related to family, marriage and children in order to make it possible for a parent to place his or her new-born baby in an incubator operated in front of health care institutions. The new law adopted by the Hungarian Parliament on April 18, 2005 serves the interest of the child and respects the choice of the parent.

2. The Court of Appeal of Budapest obliged the city of Páand in Pest County to pay HUF 600,000 as non-pecuniary damages to four of its citizens, whose human dignity and right to health have been violated. One of the cases has been initiated in 2002 and involved two women who have been sentenced to labour in the public interest, and had to clean dikes, although they were both been pregnant and therefore should have been exempted from the sentence.

Article 2. Right to life

Domestic violence

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

On 26 January 2005 the Committee on the Elimination of Discrimination against Women adopted its views under Article 7, par. 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in the case Ms. A. T. v. Hungary. The applicant stated that in the previous four years she was subjected to regular severe domestic violence and serious threats by her common law husband, father of her two children, one of whom is severely brain-damaged. Although the husband allegedly possessed a firearm and threatened the applicant and her children with raping them, Ms. A. T. could not go to a shelter because none of them in the country was equipped to take fully disabled child with her mother and sister. She also claimed that there was no legal protection or restraining order offered her in Hungary. In March 1999 the husband moved out and a year later moved together with his new partner taking most of the furniture from the family home. Although the applicant changed the lock, the husband repeatedly broke in the house by using violence. The applicant could demonstrate the regular and severe physical violence by medical certificates.
There were civil proceedings regarding the husband's access to the jointly owned family residence: in its final decision the Metropolitan Court authorized him to return and use the apartment on the following reasons: 1. lack of substantiation of the claim that he regularly battered the applicant; 2. his right to property cannot be restricted. Ms. A. T. claimed that her physical integrity, physical and mental health and life had been at serious risk and she lives in constant fear.

The Committee appreciated the state's efforts to support the victims of domestic violence, also drew attention to the fact that although a comprehensive action plan was adopted against domestic violence, these kind of cases still do not enjoy high priority in court procedures. Hungary failed to introduce specific legislation addressing the issues of sexual harassment and domestic violence. As the state's obligation under Article 2 (a), (b) and (e) extend to the

prevention and protection from violence, in the instant case Hungary violated Ms. A. T.'s right to security of person. Furthermore, the Committee reaffirmed its findings on the periodic report of Hungary in 2002 that the persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family contributes to domestic violence.

The Committee made the following recommendations:

I. concerning the applicant:

a) take immediate and effective measures to guarantee the physical and mental integrity of her and her children;

b) ensure that she is provided with a safe home.

II. in general:

a) respect, protect, promote and fulfil women's human right, including their right to be free from all forms of domestic violence;

b) assure victims of domestic violence the maximum protection of the law by acting due diligence to prevent and respond to such violence against women;

c) take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

d) take all necessary measures to provide regular training on the Convention to lawyers, judges, and law-enforcement officials;

e) implement the Committee's concluding comment of August 2002 on the combined fourth and fifth periodic report of Hungary;

f) investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

g) provide victims of domestic violence with safe and prompt access to justice;

h) provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

Legislative initiatives, national case law and practices of national authorities

In October 2005 the Government submitted a proposal for amending the Code on Criminal Procedures. The proposal contains several provisions on ordering restraint. Restraint – according to the proposal – is a new form of limiting the right to choose one's place of residence and the right to freedom of movement; it is an alternative to pre-trial detention. It can be ordered in cases where the suspected person is charged with an offence punishable with imprisonment and no other measure of coercion, such as pre-trial detention, home detention, or coercive psychological treatment is introduced.

The person against whom the restraint order is issued shall leave the place of residence (flat, house) and cannot return there during the period covered, (s)he has to keep away from the person, his/her place of work, school, etc. The restraint includes the prohibition of communication via any kind of means of communication.

The legislation does not make any difference according to the title of the use a certain premise, it applies both on rents and properties.

As the restraint is an alternative to the pre-trial detention, the procedural rules of the latter duly apply: it can be ordered only by the investigation judge. Many raised the issue of the lack of provisions providing immediate solution for cases of domestic violence. However, according to the general rules the police can detain someone for 3 days without having a court order, which provides a possibility to keep away the alleged perpetrator from the family.

Reasons for concern

2005. évi XCI. törvény [Act XCI of 2005] modified Article 195 of 1978. évi IV. törvény a Büntető Törvénykönyvről [Act IV of 1978 on Criminal Code]. The amendment made it

possible to sentence a single parent to imprisonment, if s/he made it impossible for the other parent to meet or contact their child.
The Habeas Corpus Working Group expressed its worries concerning the modification. The NGO called the attention to the fact that according to 1952. évi IV. törvény a házasságról, családról és gyámságról [Act IV of 1952 on Marriage, Family and Custody] upon dissolution of marriage, in the lack of agreement by the parents, the court decides the issue and places the child with the parent who can best ensure its physical, intellectual and moral development. It means that the new legislation threatens the parent who can better ensure the development of the child with prison sentence, if s/he does not force the child to meet his or her other parent even if the child does not want to do so. The NGO noted that the typical fact pattern in such cases is that the mother prevents the father from the possibility to meet their child, who – in most cases because of the father's previous threatening behaviour or abuse – does not want to meet him. The mother in such cases rationally decides that she will not force her child to meet the father. The NGO pointed out that the previously abused child cannot be protected against the father even in case a third person supervises these meetings, since the supervising expert can only prevent physical abuses, but not the emotional harm and verbal abuse which may occur in the form of a coded language. The child in such situations still has the feeling that the violent parent has power over him or her. As a series of cases examined by the Habeas Corpus Working Group prove, the violent fathers are turning to legal remedies in order to harass their victims again and as courts often sanction mothers with serial fines, they are also financially exploited. The proposed modification should instead clearly refer to cases where the parent having custody rights unduly prevents the other parent from seeing the child. The act however does not leave room for discretion, but chooses to sanction *all* parents who make it impossible for the other parent to meet or contact their child. The NGO also pointed out that the laws do not sanction the opposite case, i.e. when the parent fails to appear at the meetings and neglects the child, although it might be equally harmful, or even more harmful than the case where the mother unduly prevents him or her from meeting the father. At the same time, it has also been stressed that the act seems to be a discrimination against women at the same time, since in 95% of the cases it is the mother who has custody rights and who in most cases reasonably decides not to make her child meet the father. Thereby the law mainly threatens women with imprisonment.[1]

Experts underlined that domestic violence against children and women resulting in the death of the victims is only the top of the iceberg. As to children, most sexual crimes occur within the family. 70 % of children victims are girls. Around 20 % of all sexual crimes are directed against children, although it is difficult to give exact data because of latency.
Many perpetrators are recidivists. A recent sad example illustrating this phenomenon is the case of a criminal sentenced because of having committed rape. The man has been released after 1,5 years before having served his prison sentence. In Szécsény he then brutally assaulted and killed a girl not yet 14 years old in the spring 2005.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

A recent amendment to 2004. évi CV. törvény a honvédelemről és a Magyar Honvédségről [Act CV of 2004 on National Defence and Hungarian Defence Forces, Article 70 (1) a), c) and f).] seems to limit the right to life extensively when it comes to the issue whether civil aircraft can be destroyed if used for terrorist purposes. According to Article 131 (1) "The responsibilities of high readiness allied and national air defence forces participating in the defence of airspace of the Republic of Hungary extend to aircraft violating (unlawfully using) the airspace, lacking identification, flying with unknown intent or performing hostile activities as well as breaching any rule of the air, or being in a state of distress." Article 132

[1] http://hc.netstudio.hu/jogok/btk/lathatas.akadalyozasa.peticio.2005.06.17.htm

(1) states that "Aircraft flying in national airspace may be fired upon with warning or destructive intent with weapons of the high readiness national and allied air defence forces that are participating in the defence of the airspace of the Republic of Hungary, if a) On-board weapons are used, or b) There is a grave act of violence that otherwise (by other weapons or means) endangers lives and property or causes a disaster, or c) It may be definitively concluded that there is an attempt to perform an act under paragraphs a) or b), and the aircraft intentionally fails to obey the instructions of high readiness air defence forces." According to Article (2) "In a case envisaged by Article (1) c), the notice as well as the warning fire may be omitted if, under the circumstances of the case, there is insufficient time thereto, and a delay would result in injury to lives or property."

Despite the fact that the rules of engagement set forth in Article 132 of the Act on National Defence apparently strive to enable the destruction of any civil aircraft used for the execution of a terrorist attack, the provisions of the Constitution on the use of armed forces and on fundamental rights significantly limit the possibility to resort to lethal force. Neither legitimate defence nor extreme necessity, as provided for in Articles 29 and 30 of the Hungarian Criminal Code can be invoked by the state, and as such, neither one can broaden its freedom of action.

The question of shooting down an aircraft that is occupied exclusively by terrorists and contains no passengers or crewmembers unveils an interesting anomaly. In "peacetime" the air force may only open fire on aeroplanes carrying out an external attack in the sense of Article 19/E (1), of the Constitution. In absence of a state of emergency, a state of martial law or a decision of the Parliament under Article 19 (3) j) of the Constitution, the repulsion by armed forces of terrorist attacks launched from within the country lacks constitutional basis. It needs to be emphasised that it is a constitutional authorisation for the domestic use of armed forces in "peacetime" that is missing rather than a legal basis for the killing of terrorists. This problem ceases to exist in the wake of a declaration of a state of emergency, a state of martial law or a relevant decision by the Parliament, but in practice, the arrival at such a declaration or parliamentary decision is most unlikely to occur before the impact of the attacking aircraft. It should be also added that, due to the supreme value of human life, even a plane carrying exclusively terrorists cannot be lawfully destroyed if it is proven beyond reasonable doubt that the perpetrators only seek to cause property damage.

In the case, however, that there are also passengers or crewmembers aboard a rogue aircraft, the air force must refrain from using lethal force. The Republic of Hungary is not entitled to dispose the lives of innocent persons on board. If it nevertheless were to opt for the destruction an aircraft, it would gravely violate both the right to life and human dignity of the sacrificed individuals and the state's existing international obligations.

Article 3. Right to the integrity of the person

Rights of the patients

Reasons for concern

1. The situation of HIV positive individuals is particularly worrisome. Those affected may not exercise many of their self-determination rights: they may not decide whether they take advantage of medical treatment or not, they may not hinder the processing of their medical data together with their personal data, they might not get a residence permit with regard to their health status, and the authorities must reject their application for settlement in Hungary without discretion.[2]

[2] TASZ, Hungarian Civil Liberties Union, May 16, 2005, available at: http://www.tasz.hu/index.php?op=contentlist2&catalog_id=186

2. Another issue related to the self-determination of patients is that of home birth. Here the pregnant woman's rights seem to clash with the interest of the child. The legal situation is not clarified despite of previous promises for a comprehensive legislation. Currently, a mother can give birth at home if two conditions are fulfilled: first, the birth is likely to happen without problems, and a hospital is within 20 minutes reach from the place where the mother is giving birth. In practice however due to the unclear legal situation doctors are unwilling to sign the birth certificates in the fear that they are registering a new-born who has been illegally "bought" by the parents from the natural mother. As a recent case showed those couples, whose baby is born on the way to the hospital or at home because of the brevity of time between calling the doctor and the birth of the baby are much better off, then those who consciously opt for home birth. The latter can easily find themselves in humiliating situations, where doctors criticise them for their irresponsible behaviour.[3]

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

Conditions of detention and external supervision of the places of detention

Penal institutions and institutions for the detention of persons with a mental disability

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

A delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out its third periodic visit to Hungary. The ten-day visit began on 30 March 2005. During the visit, the CPT's delegation followed up a number of issues examined during previous visits, in particular the holding of remand prisoners on police premises, the treatment of foreign nationals held under the aliens legislation, as well as the situation in prisons and social care homes. The delegation also visited for the first time the only high-security psychiatric hospital in Hungary, accommodating patients undergoing compulsory psychiatric treatment by court order. The report about the visit has not been published yet.

Legislative initiatives, national case law and practices of national authorities

There is a Draft of the Act on the Execution of Penalties and Measures under consideration by the Government (henceforward: Draft), which was published on 30 March 2005. The Draft is to replace the 1979. évi 11. törvényerejű rendelet a büntetések és intézkedések végrehajtásáról [Law-decree No. 11 of 1979. on the execution of penalties and measures], and other decrees implementing it, but also incorporates regulations previously under 1995. évi CVII. törvény a büntetés-végrehajtási szervezetről [Act CVII. of 1995 on the Organisation of the Law-enforcement].
As an important issue connected to the Draft relates to prison overcrowding, regarding the free space to be provided to the detainees (6 cc. metres of air and 3 sq. metres of moving area) have a relevant impact on the rights under Article 4 of the Charter. Here the Draft substantially maintains the regulation in force. It is recommended that the definition of the moving area - that is now contained in Article 137.2 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 at the calculation of the moving area prescribes the deduction of the area occupied by the furniture and equipments from the area of the cell - should be also incorporated into the Draft.

[3] Nepszabadsag, September 17, 2005, available at: http://www.nol.hu/cikk/377478/

Positive aspects

As a positive aspect regarding detention, the Hungarian Helsinki Committee, having visited five prisons in Hungary, found that as a rule, the medical service in the prisons is up-to date, and the healthcare personnel – despite the poor material conditions of their job – is performing its work in a professional and decent way.

Reasons for concern

1. The overcrowding of prisons is still a major reason for concern in Hungary. The problem was indicated also by the report of CPT last year (for the second time).[4] The overcrowding showed different rates during the period of scrutiny in the various prisons - Fejér County Remand Prison 143% (8-9 June 2005), Nagyfa National Prison 112% (13-15 April 2005), Vác Strict and Medium Regime Prison 151% (31 January-2 February 2005), with some positive exceptions: Somogy County Remand Prison 96% (19-20 May 2005) and Tököl Juvenile Prison 85% (23-24 November 2004) – but on national level the number of prisoners was still 144% of the overall holding capacity of penal institutes (31 December 2004).[5]
   During its visit to the Fejér County Remand Prison, the Hungarian Helsinki Committee observed that in the smaller cells the overcrowding reached an unbearable level, for sometimes three or four detainees were placed in a cell of less than 7 sq. meters; subtracted the area occupied by the beds, lavatory, toilet, wardrobes, sometimes less than 2 sq. meters of free space were left to three or four remand prisoners to spend 23 hours a day.[6]

2. 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 after each visit of its committee to Hungary to bring their HIV policy into line with relevant international standards.[7] 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] prescribes the segregation of HIV positive convicts from other convicts. Article 43 the 5/1998. (III. 6.) IM rendelet a fogvatartottak egészségügyi ellátásáról [Decree 5/1998. (III. 6.) of the Minister of Justice on the healthcare of the prisoners] orders that HIV positive convicts – respecting their special health protection and the protection of the community – shall be

[4] CPT/Inf (2004) 18, point 32
[5] http://www.helsinki.hu/docs/Szekesfehervar%20jelentes%202005%20junius.PDF ; http://www.helsinki.hu/docs/Nagyfa%20jelentes%202005%20aprilis.PDF ; http://www.helsinki.hu/docs/Magyar%20Helsinki%20Bizotts%E1g%20jelent%E9se%20a%20V%E1ci%20Fegyh%E1z%20%E9s%20B%F6rt%F6nr%F5l.PDF ; http://www.helsinki.hu/docs/Magyar%20Helsinki%20Bizotts%E1g%20jelent%E9se%20a%20kaposv%E1ri%20BV-int%E9zetr%F5l.PDF ; http://www.helsinki.hu/docs/Magyar%20Helsinki%20Bizotts%E1g%20jelent%E9se%20a%20T%F6k%F6li%20Fiatalkor%FAak%20Bv.%20Int%E9zet%E9r%F5l%202004november.PDF ; http://www.bvop.hu/download/chart5.doc/chart5.doc
[6] http://www.helsinki.hu/docs/Szekesfehervar%20jelentes%202005%20junius.PDF
[7] §§ 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; and CPT/Inf (2004) 18, point 47

placed in a separate penal institute. The aforesaid regulations still do not comply with the recommendation of the CPT.

The Hungarian Civil Liberties Union (HCLU) [Társaság a Szabadságjogokért (TASZ)] in its communication on 12 October 2004 called the attention on the still existing practice regarding the segregation of HIV positive detainees. The HIV positive inmates are placed in Tököl Prison (detained separated in Site "K" of the prison), and are not allowed to use common facilities (e.g. library, refectory) or to participate in collective programs. Respective the fact, that the HIV virus is not infecting by the ways of everyday contact, the segregation realizes an unnecessary and disproportionate restriction of the human rights of the concerned detainees. TASZ made a petition to the Constitutional Court in the case.[8]

Fight against the impunity of persons guilty of acts of torture

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

1. In February 2005 the Committee Against Torture published its consideration addendum to the Fourth periodic report of Hungary. The paper mainly considered issues (presented cases, showed figures and reported on developments) that occurred years before the period under scrutiny and partially had been presented in previous reports, thus these findings will not be detailed here. The most important findings of the previous visits of the CPT have been also reiterated in the consideration.

   The consideration contained a significant follow-up of the report related to the fight against the impunity of persons guilty of acts of torture (points 107-129). The Committee had proposed, in its conclusions and recommendations adopted upon examination of the previous report, that a thorough review of Article 123 of 1978. évi IV. törvény a Büntető Törvénykönyvről [Act IV of 1978 on Criminal Code] and the adaptation of the text to the provisions of the Convention to be undertaken. It was the opinion of the Government of Hungary, however, that amendment of Article 123 was not inevitable, for the jurisprudence based on the correct interpretation of this legal provision did not violate Article 2 (3) of the Convention Against Torture, especially when put into the context of the related regulations in force, as well as the relevant practice of Hungarian criminal courts. Article 123 of the Criminal Code provides: "(1) A soldier may not be punishable for his act executed upon order, except for the case if he knew that he commits a crime by the execution of that order. (2) The person giving the order shall be liable for the crime committed upon order as perpetrator." This provision is to be found in the General Part of the Criminal Code in chapter VIII, which relates to soldiers. For the purposes of the Criminal Code current members of the armed forces (army, border guards) and the official members of the police, penitentiary institutions and civil security services are to be regarded as soldiers. Soldiers (within the meaning of the Criminal Code) who do not comply with orders are in violation of Article 354 of the Criminal Code governing disobedience to orders. From the legal provisions specified in (points 110-119) the Consideration of the CAT it follows that within the circle of persons qualifying as soldiers subordinates shall be under the obligation of complying with orders unless they positively know that compliance would constitute a criminal offence. They shall not be punishable if they do not know that by complying with the order they commit a criminal offence since Article 123 of the Criminal Code excludes the punishment of such persons. In that case, the person who has issued the order shall be liable.

[8] Communication to the press of TASZ on 12th October 2004. http://www.tasz.hu/dl.php?type=mm&goto=194. The petition to the Constitutional Court : http://tasz.mool.hu/download/AB%20ind%EDtv%E1ny%20-%202004%20okt%20-%20c%EDmek%20n%E9lk%FCl.pdf?id=13386&time=1132058658&op=cont

Torture within the meaning of the Convention violates Article 226 (ill-treatment in official proceedings) or 227 (forced interrogation) of the Hungarian Criminal Code. If in addition to these offences bodily assault is also committed, the conduct is evaluated as constituting a cumulative crime. In respect of such conduct, or the use of unauthorized bodily force, or orders calling for the commission of bodily assault, it has to be mentioned that official members of the armed forces and the police are supposed to know the legal provisions that govern their operation, rights and obligations. In the case of such offences, a subordinate member of the police or the armed forces shall not successfully allege that he acted upon an order. Knowing about the above-cited legal provisions and regulations and of the relevant provisions of the Criminal Code is a prerequisite for admission into the service for official members. Therefore, in practice – as the legal practice of the court also revealed -, official members of the police or the armed forces shall not use an excuse of non-familiarity with the relevant laws.[9]

2. In its 2005 report, the European Monitoring Centre on Racism and Xenophobia has communicated some new observations about Hungary. The report pointed out that a number of incidents of police mistreatment of and violence against minorities, and in particular Roma, were noted by the Hungarian National Focal Point of the EUMC. As a positive aspect, the report stated that Hungary is among those four new Member States of the European Union that officially collect data (excluding limited references to court cases) on racist crimes and related activities. The data collection is itself a relevant step in the combating against racist crimes, but the low figures in the aspect of Hungary, in comparison with other Member States, are also favourable (in 2004 39 crime cases that may be related to racism, and further 6 accusations under this category).[10]

Legislative initiatives, national case law and practices of national authorities

1. The Hungarian Helsinki Committee carried out a survey among 500 remand prisoners held in police facilities and remand prisons. The results of the survey among others showed that the 17% of the asked detainees stated, that they had been subjected to ill-treatment by the authorities during the criminal process. Most of them stated that the ill-treatment occurred during the arrest, but some detainees had been allegedly ill-treated during their interrogation in order to extract the confession. The major part of the ill-treated does not seek legal remedy, and investigations in ill-treatment cases often take long time or fail to have results.[11]
   Related to its survey on remand prisoners, the Hungarian Helsinki Committee framed proposals regarding the improvement of the fight against the impunity of persons guilty of acts of torture: guaranteeing greater independence to the medical experts examining the detainees, and the video registration of the first interrogation of the suspects or the obligatory presence of their defence counsel could promote this cause.[12]

2. On 7 December 2004, in Szigetvár, police officers took G.S. and his wife, both of Roma origin, to the police station for questioning. They stated that he and his wife were questioned in separate rooms where five officers reportedly beat them in the course of one-and-a-half hours in order to extract their "confessions" to thefts which had occurred on 25

[9] Committee Against Torture. Addendum to the Fourth periodic reports of States parties (Hungary) due in 2000. CAT/C/55/Add.10. 14 February 2005.
http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7b8066b3c69cb91bc1256fe3004f5396/$FILE/G0540381.pdf
[10] EUMC Report 2005. pp. 93, 82-87. http://eumc.eu.int/eumc/material/pub/ar05/AR05_p2_EN.pdf
[11] Press release of the Hungarian Helsinki Committee, 17th February 2005.
http://www.helsinki.hu/docs/sajtokozlemeny%20Vetkesseg%20velelme%202005feb17.pdf
[12] Press release of the Hungarian Helsinki Committee, 17th February 2005.
http://www.helsinki.hu/docs/sajtokozlemeny%20Vetkesseg%20velelme%202005feb17.pdf

November. The ill-treatment stopped when the victims managed to produce train tickets proving that they had not been in town on the particular date. They were released shortly afterwards. G.S. was subsequently admitted to a hospital, where he received treatment for kidney, lung and corrugation injuries. The Baranya County Prosecutor Investigation Bureau initiated an investigation iN the case.
As positive development, on 30 December 2004 eight police officers were charged by the Kaposvár Military Prosecution Office for illegally detaining R.R., a 31-year-old man from Kaposhomok, and beating him on 31 January 2005. R.R. stated to that the police officers beat him in order to force him not to press charges against their colleague, the local deputy, who repeatedly verbally insulted him by calling him Gypsy. Two police officers went into the house and came out dragging R.R. away in handcuffs and forced him into a police car, then took him a remote country road, where, R.R. stated, the police officers pulled him out of the car and beat him for ten minutes. As a result of the beating R.R. suffered a broken nose, and injuries to his eye, his side and right leg.[13]

3. Despite the aggressive treatment of the detainees is not general in the prisons of Hungary, cases of ill-treatment of inmates did not cease to occur and be revealed.
In the Vác Strict and Medium Regime Prison an inmate, K.J.K., had been beaten and kicked by a staff sergeant Cs. on the way to the cell from the doctor's office. In the case a report had been made, and a criminal procedure had been brought against staff sergeant Cs. Another detainee complained that within Site "MZ" of the prison detainees were being treated like animals and often suffered verbal aggression. The captain of the prison stated that to reduce the conflicts between the detainees and the staff, they make efforts to train the staff to communicate properly and take only legal measures in their service. [14]
In the Tököl Juvenile Prison M. F. complained that during an investigation of their cell, the staff ordered out the other inmates, and after a verbal argumentation one of the officers (an ensign) hit him in the chest and than hit his head to the wall. After the event, for his request, M.F. was brought to medical examination. The captain of the prison doubted about the event, but made the denunciation in the case. After three hearings of M.F. by the prosecutors, and the investigation, the Military Prosecution Office on 4 February 2005 ended the procedure without preferring a charge.[15]

Protection of the child against ill-treatments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee on the Rights of the Child in connection with the consideration of the second periodic report of Hungary (CRC/C/70/Add.25) requested Hungary to submit in written form additional and updated information, if possible, before 23 November 2005, among other issues, on the following: the number of reported cases of child abuse; the number and percentage of reports which have resulted in either a court decision or other types of follow-up, and the reported cases of abuse and maltreatment of children occurred during their arrest and detention. The Government has not published its response yet.[16]

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[13] Europe and Central Asia. Summary of Amnesty International's Concerns in the Region. July - December 2004. AI Index: EUR 01/002/2005. 1 September 2005. http://web.amnesty.org/library/Index/ENGEUR010022005?open&of=ENG-HUN

[14] http://www.helsinki.hu/docs/Magyar%20Helsinki%20Bizotts%E1g%20jelent%E9se%20a%20V%E1ci%20Fegyh%E1z%20%E9s%20B%F6rt%F6nr%F5l.PDF

[15] http://www.helsinki.hu/docs/Magyar%20Helsinki%20Bizotts%E1g%20jelent%E9se%20a%20T%F6k%F6li%20Fiatalkor%FAak%20Bv.%20Int%E9zet%E9r%F5l%202004november.PDF

[16] CRC/C/Q/HUN/2 1 November 2005.
http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/de9260af781b9858c12570b3

Article 5. Prohibition of slavery and forced labor

Fight against the prostitution of others

Reasons for concern

Trafficking in women for the purpose of sexual exploitation is a serious problem in Hungary. While Hungary primarily serves as a transit country, it is also a country of origin and destination. Most victims are trafficked from Russia, Romania, Ukraine, Moldova and Bulgaria to and through Hungary to Western European countries and the U.S. Annually still thousands of Hungarian women fall into the trap of job ads promising employment abroad. According to researchers of the National Institute of Criminology and of NANE Women's Rights Association (Nők a Nőkért Együtt az Erőszak Ellen Egyesület) pointed out the exact data are not known, but thousands of women are exploited as slaves. As to men and children there are no data whatsoever.[17]

0033ee6a/$FILE/CRC_C_Q_HUN_2.doc. For the shadow report submitted by the European Roma Rights Centre (ERRC) see Article 24, The rights of the child.

[17] Number 27 Budapest, July 04, 2005, http://www.budapesttimes.hu/index.php?art=883

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention.

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

On 5 July 2005 the European Court of Human Rights delivered its judgment in the case of *Osváth v. Hungary*. The applicant's pre-trial detention was repeatedly prolonged without him having been served in advance with copies of the prosecution's motions to that end, and the Court considered that even if the applicant had been able to appear in person or be represented at the court hearings concerning his detention, this possibility was not sufficient to afford him a proper opportunity to comment on the prosecution's motions. Moreover, the Court noted that the applicant could not appear in person or been represented before the Supreme Court, which had decided *in camera* to prolong the applicant's detention on remand. In the Court's view, the fact that on 18 December 2001 the Supreme Court prolonged the applicant's detention on remand on a ground which had not previously been referred to and was consequently quite unexpected by the applicant merely aggravated the absence of an adversarial procedure. The Court held that there had been a violation of Article 5 § 4 of the Convention, and awarded the applicant ten thousand euros for non-pecuniary damage.

Legislative initiatives, national case law and practices of national authorities

1. Due to a modification of the 1998. évi XIX. törvény a büntetőeljárásról [Act XIX of 1998 on Criminal Procedure] entered into force 1 January 2005, the pre-trial detention is to be implemented, as a general rule, in penitentiary institutions [Article 135 (1)]. It may be implemented in police jail for maximum thirty days, only before the actual charges by the prosecutor are submitted to the court, based on the decision of the court – and can be prolonged by the decision of the prosecutor, for two times, each time for maximum fifteen days, if the investigation makes it necessary [Article 135 (2)].

2. The Draft of the Act on the Execution of Penalties and Measures[18] intended to replace the current rules of execution of penalties contains the following rules relevant for this Article of the Charter: according to Article 284 (2) e) the organ entitled to dispose of the remand prisoner (usually the penitentiary judge) may decide his higher security detention and supervision; however, upon Article 287 (4) the captain of the prison can order the application of stricter rules. With this possibility the captain is able to take over the competence of the organ entitled to dispose of the remand prisoner, and make decisions without notifying them. Theoretically, restrictions in respect of remand prisoners may be ordered only to ensure the success of the criminal process, and in absence of special motives they should not be treated in a less favourable way (e.g. according to the rules of a stricter execution class) than convicts. In the opinion of the Hungarian Helsinki Committee (HHC), the Draft could be modified, enabling the captain to order the application of stricter rules (if the behaviour of the detainee endangers the order in the institute) only for three days –

[18] For further details see the report under Article 4.

and any further prolongation would be subjected to the decision of the organ entitled to dispose. [19]

Reasons for concern

A survey by HHC also focused on the system of official defence counsels who provide free legal assistance for those lacking the sufficient means to pay for defence in the criminal procedure. The survey showed that official defence counsels are less active and are present in smaller percent in the investigation phase of the criminal procedure.
According to the HHC the survey had proved that the legal assistance by the official defence counsels often do not comply with the criteria of the effective right to defence. There may be two reasons for this: first, the remuneration of the official defence counsels is far behind the market price of this service; second, the official defence counsel to proceed in a case is chosen by the investigating authorities – that is disinterested in carrying out the defence well. In the view of the HHC, the assignment of the official defence counsels could be better done by an independent legal assistance service, or their work be controlled by a legal advisory board related to the Bar Association.[20]

Detention following a criminal conviction

Legislative initiatives, national case law and practices of national authorities

The following issues connected to the already mentioned Draft Act on the Execution of Penalties and Measures has a relevant impact on the rights under Article 6 of the Charter: [21]
The so-called "Lighter Execution Regulations" (EVSZ), after completing a part of the punishment, enabled the detainees to leave the penitentiary institute more times a month, and to work at a workplace also out of the institute. From 1999, for changes in the law and in the application of the statutes the EVSZ was practically disabled. Despite the Draft was expected to re-institute the EVSZ (making the needed changes, e.g. deliberate permission procedure), it simply omitted the EVSZ, without reasoning.

The execution of the penalties is to be regulated according to the problems related to the execution classes prescribed by the Penal Code (there are three of them, differing in strictness). The law-enforcement organisation is not entitled to group the detainees in further so-called "regimes" (that is execution classes with somewhat different rights and separated also in area). However, the application of the "regime-system" is not without rational basis, for this way the penitentiary institution is able to remunerate or punish the inmate according to his behaviour. The HHC recommends that: 1. the "regimes" are to be unified and the detainees to be informed precisely of their rights; 2. the "regimes" may not collide with each other that is the strictest "regime" in a lower execution class may not be stricter than the lightest "regime" in a higher execution class. 3. the classing into regime of the detainee had to be communicated in a decision with motivation; 4. the detainee is to be entitled to request the revision of its classing into "regimes" at least once a year from the court. The Draft only partially provides the aforesaid guarantees, and its regulations can be interpreted in favourable and much less favourable ways, that can lead to a further significant restriction on the right to liberty without the decision of a judge.

[19] Opinion of the Hungarian Helsinki Committee on the Draft Act on the Execution of Penalties and Measures. 30 May 2005.
http://www.helsinki.hu/docs/MHB%20velemeny%20BVTV%202_%20tervezet%2020050505.pdf
[20] Press release of the Hungarian Helsinki Committee, 17th February 2005. http://www.helsinki.hu/docs/sajtokozlemeny%20Vetkesseg%20velelme%202005feb17.pdf
[21] Opinion of the Hungarian Helsinki Committee on the Draft Act on the Execution of Penalties and Measures. 30 May 2005.
http://www.helsinki.hu/docs/MHB%20velemeny%20BVTV%202_%20tervezet%2020050505.pdf

Reasons for concern

Under Article 591 (1) of 1998. évi XIX. törvény a büntetőeljárásról [Act XIX of 1998 on Criminal Procedure] the convict has the right to request the deferment (or interruption) of the execution of its imprisonment (not exceeding two years) for a maximum period of three months, based on important motives, especially motives in connection with the personal or family conditions of the convict. J.S. complained that he had not received the 3 months penalty-interruption. He requested the Director General of Hungarian Prison Service to enable to interrupt his imprisonment penalty, because his house had been burnt down and his children had been died in the fire, and his wife was being seriously ill, but his request was refused, despite he had gone to prison voluntarily.[22]

Deprivation of liberty for juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee on The Rights of the Child in connection with the consideration of the second periodic report of Hungary (CRC/C/70/Add.25) requested Hungary to submit in written form additional and updated information, if possible, before 23 November 2005, among other issues, on the following: the number of persons below 18 who have been sentenced and type of punishment or sanctions related to offences including length of deprivation of liberty; the number persons below 18 who have been tried as adults; the number of detention facilities for juvenile delinquents and their capacity; the number of persons below 18 detained in these facilities and minors detained in adult facilities; and the number of persons below 18 kept in pre-trail detention and the average length of their detention. The Government has not published its response yet.[23]

Reasons for concern

G.I., a juvenile Serbian national, who was being detained in the Juvenile Prison of Tököl, waiting his extradition had been hindered for almost a week in making a phone call to his lawyer, and his request to enable him to call the Kőszeg City Public Prosecutor's Office was refused. In the opinion of the captain of the prison the aforesaid restriction was not infringing substantially the rights of the detainee, arguing that for his being in final imprisonment and not in pre-trial detention, the detainee did not need urgent legal aid; furthermore, he had absolutely no right to contact the prosecutor, so that he will not be permitted to do that at all. However, the Director General of Hungarian Prison Service informed the captain of the Juvenile Prison of Tököl that according to a Measure of the Director General, detainees had the right to phone government institutions.[24]

[22] Report of the HHC on its visit to Nagyfa National Prison on 13-15 April 2005. http://www.helsinki.hu/docs/Nagyfa%20jelentes%202005%20aprilis.PDF

[23] CRC/C/Q/HUN/2 1 November 2005. http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/de9260af781b9858c12570b30033ee6a/$FILE/CRC_C_Q_HUN_2.doc. See also under Article 4, Prohibition of torture and inhuman or degrading treatment or punishment. For the shadow report see Article 24, The rights of the child.

[24] Report of The Hungarian Helsinki Committee. http://www.helsinki.hu/docs/Magyar%20Helsinki%20Bizotts%E1g%20jelent%E9se%20a%20T%F6k%F6li%20Fiatalkor%FAak%20Bv.%20Int%E9zet%E9r%F5l%202004november.PDF

Other relevant developments

Positive aspects

On 1 September 2004 the Hungarian Helsinki Committee (HHC) initiated an experimental program for the defence of accused persons. The program was enabled by an agreement between the Budapest Police Headquarters and the HHC, and the HHC provides defence to 120 accused in need until the end of the procedure at the court of first instance. The Police Departments participating in the program accepted to inform the HHC before the first interrogation of the arrested in cases of obligatory legal defence, while the HHC guaranteed to provide a lawyer (paid by HHC and professionally controlled by a special board) within 1,5 hours. The phase of the entry of the cases was closed on 30 January 2005. The evaluation of the experiences is in course, but it can already be noted that the cooperation of the various Police Departments showed different levels. Already an important founding of the program, that many police organs do not consider the short-term arrest (to 8, or in special cases 12 hours; enabled by the Act on the Police) a form of detention, and interrogates the arrested without having ordered a defender. Upon the notice of the HHC, the Chief Prosecutors Office warned the organs of the police of the necessity of the rightful interpretation.[25]

Reasons for concern

It is still a reason for concern that 1999. évi LXIX. törvény a szabálysértésekről [Act 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; – and from 27 January 2005 – breach of peace [Articles 139/A; 142; 143; 151; 156/A; 157 (5); and 142/A]), enables custody as a main sanction. The duration of the custody may be from one to sixty days (in case of cumulative offences, ninety 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[26] in the case when someone is caught in the act during committing a (generally minor) offence [Article 134 (1)]. The spot fine is not paid on the spot, but in thirty 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 one to ten 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.

[25] Press release of the Hungarian Helsinki Committee.
http://www.helsinki.hu/docs/sajtokozlemeny%20BSP%202005feb17.PDF
[26] The sum of the fine may be between 500 and 10000 HUF (approx. from 2 to 40 Euros)

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

Reasons for concern

For the survey based on questionnaire-interviews of the Hungarian Helsinki Committee see Article 4, Prohibition of torture and inhuman or degrading treatment or punishment.

Family life

Protection of family life

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Hungary has promulgated the Convention on the protection of children and co-operation in respect of inter-country adoption concluded on May 29, 1993 in the Hague by the 2005. évi LXXX. törvény [Act LXXX of 2005]. With regard to Hungary, the Convention entered into force on August 1, 2005.

Article 8. Protection of personal data

Protection of personal data

Legislative initiatives, national case law and practices of national authorities

1. The Constitutional Court brought its decision of 36/2005. (X. 5.) AB határozat similarly upon the motion of the President of the Republic. It held certain provisions of the Act on the protection of persons and safeguarding, and on certain activities of private detectives adopted on 2 May 2005 to be unconstitutional. The articles that have been held to be unconstitutional involved rules on electronic monitoring devices.
   According to the reasoning certain elements of the law are contrary to the Constitution's privacy provision, since there is no compelling circumstance that would make the extension of the monitoring to the intimate sphere constitutionally permissible. The Constitutional Court also held the unjustifiably long storage of data and the limitation of the monitored person's determinational rights to be contrary to the Hungarian Constitution.

2. The Data Protection Commissioner of Hungary issued its opinion on the handling of health-related data of adopted children on October 25, 2005.
   Before adoption the child's data concerning its birth and medical treatment are handled together with its name, its natural mother's name and the social security ID number (TAJ szám). In case of adoption the adopting parents submit a request for a new social security ID number. The existence of the adopted child is proven by the birth certificate. After adoption a new birth certificate is issued, so that the adopting parents are indicated in a way as if they would be the natural parents. There is no indication whatsoever to the fact that the child has been adopted. The Commissioner consulted the Ministers of Health, Youth and Equal Opportunities. They agreed that the current legal environment does not make the "transit" between the child's health-related data before and after adoption possible, although this would serve the interest of the child.

The 1952. évi IV. törvény a házasságról, családról és gyámságról [Act IV of 1952 on Marriage, Family and Custody] excludes only that the natural and adopting parents get to know each other, or that the natural parents be informed about the fact of the adoption. According to the Article 24 (2) of 1997. évi CLIV. törvény az egészségügyről [Act CLIV of 1997 on Health Care] however it is the patient that can dispose of his or her health-related data.
In order to clarify the legal situation in the best interest of the child the Commissioner asked the responsible Ministers to co-operate and to find a suitable solution.

3. On 24 August 2005 the Data Protection Ombudsman issued a communication on a subject already addressed by him: the copying of identity cards by mobile phone service providers. The complaint against mobile service providers involved ways the companies abused the clients' personal data to minimise risks, including making copies of IDs. The Commissioner again emphasised that for proving the identification of the customer it is sufficient that s/he shows the identity card and the making of copies is an unnecessary limitation of fundamental rights.

Reasons for concern

1. At the end of November 2004 the Privacy International, the Statewatch and the European Digital Rights together with the Hungarian Civil Liberties Union (HCLU) joined an open letter written to the members of the European Parliament on biometric passports.[27] The petition has also reached the Parliamentary Commissioner for Data Protection and the former Parliamentary Commissioner for Data Protection and some other human rights NGOs as well. The open letter was signed, apart from seven European data protection commissioners, by the commissioner in office and the former one, forty-five human rights organisations (three Hungarians), and many European citizens caring for privacy. The HCLU sought all the Hungarian members of the European Parliament (EP) with a letter of the same content, but unfortunately the EP has passed the draft.[28]
The experts based their concerns partly on the fact that the draft council regulation on biometric passports is contrary to the Hungarian Constitution. However the Hungarian government has voted without any debate for the regulation which was considered by the Hungarian DP Commissioner as the fingerprints have been used for identifying the criminals until the 21st century and „it would not be desirable if all citizens of the union would quasi go on criminal records." The regulation has entered into force on 18 January 2005.[29]
Both the system based on chips and on database has their perils. The RFID chips have the risk of being read by unauthorised or manipulated without having the owner even the chance of getting aware of the data flow. At the database the „function creep" is the real danger which means that the collected huge amount of biometric data will likely be used for purposes which have not much to do with the original aims of the regulation.[30]

2. Another concern expressed by HCLU relates CCTVs. In Budapest there are twenty three districts and in the two third of them CCTV systems are operated by the police which means about five hundred cameras. Although the video surveillance is widely used in Hungary there has no survey ever been made its effects either before installing a system or after its start. The reasons for the CCTV boom are various, the most likely is the following scenario. The fear from criminality is relatively high among the Hungarian population. The

[27] http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-85336&als[theme]=BTS%20Biometric%20Passports
[28] The MEPs has supported the draft with 471 yes votes, against 118 nay, 6 abstention.
[29] Council Regulation 2252/2004/EC
[30] Statewatch analysis – From the Schengen Information System to SIS II and the Visa Information (VIS): the proposals explained.

image of criminality differs much from the official criminal statistics. Since the government does not have any other tools for the fight against criminality in mind they install larger and more effective CCTV systems.

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

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

In its decision 37/2002 (IX. 4.) AB határozat The Hungarian Constitutional Court found the homosexual sodomy provisions of the Hungarian Penal Code unconstitutional, holding that separate and differing provisions applicable to similar heterosexual and homosexual conduct violated the Constitution's dignity provisions. In 2003 the minister without portfolio for equal opportunities advocated the legalisation of registered same-sex partnerships, so-called civil unions. However the planned legislation (neither the new Civil Code, nor the draft concept on registered partnership) does not intend to recognise homosexual marriage.

Reasons for concern

The situation of homosexual couples is still a reason for concern. Although the Government expressed its intention to give equal status for same-sex partners, no amendments have been proposed so far. For these reasons, a law reform is needed to institutionalize same-sex relationships in the form of registered partnership or same-sex marriage and to prevent family and other policy practices discriminating against same-sex couples. The present factual legal relationship of cohabiting partners could be transformed into a more institutionalized form of relationship by the act of official registration. This way it would become unnecessary to make specific arrangements concerning property, financial and personal relationships: encompassing important issues such as providing rights to obtain medical information about the partner's state of health, and rights of disposal over the partner's assets when that partner is in a helpless state; preparation of a will; appointment of guardians (if there are children) etc.

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

As provided by Article 19 (1) of the 1990. évi IV. törvény a lelkiismereti és vallásszabadságról, valamint az egyházakról [Act IV of 1990 on Freedom of Conscience and Religion and on Churches], the state gives – according to the regulations of an other act – equal financial support (allocated in a normative way) to the functioning of educational, social and health care, sport, and child protection institutions of churches, as to the similar state institutions. The current regulation was also upheld by decision 22/1997. (IV. 25.) AB határozat of the Constitutional Court. The rules regarding the financing of these public tasks undertaken by the churches are specified in Articles 5 and 6 of the 1997. évi CXXIV. törvény az egyházak hitéleti és közcélú tevékenységének anyagi feltételeiről [Act CXXIV of 1997 on the Material Conditions of the Religious Activities and Activities of Public Purpose of the Churches], however, the exact figures of the support are detailed each year in the Act on the annual budget of the Republic of Hungary.

Similarly to the previous year, from the beginning of the preparation of the Act on the budget of the year 2006, a serious debate has been going on between the Ministry of Education and some of the churches. The central point of the debate is that the Ministry of Education claims that church schools receive more normative state support than schools maintained by the local self-governments, and for this reason their support have to be decreased; while churches allege that practically students in their schools are what already receive less support, and if it is not increased or if it is decreased, their right to education and equal treatment is infringed by the state. The debate has been extended to the state support of church maintained social institutions.

In March 2005 two petitions were filed with the Constitutional Court on the issue. One of the petitions was made by the Catholic Church, the Reformed Church and the Evangelic Church, stating the unconstitutionality of certain regulations of the 2004. évi CXXXV. törvény a Magyar Köztársaság 2005. évi költségvetéséről [Act CXXXV of 2004 on the 2005 Annual Budget of the Republic of Hungary], that, according to the petitioners, were contrary to Articles 60 (Freedom of religion), Article 67 (2) (Parents' right to choose the form of education given to their children) and Article 70/A (Non-discrimination) of the Constitution. The other petition was made by three MPs, requesting the examination of conflict between international treaty (Agreement between the Holy See and the Republic of Hungary[31]) and the Act on the budget.[32]

Detailed financial data is not available for us regarding the number of students, the special services performed and the exact sum of money received by church-maintained schools; the calculations of the Ministries and the churches show different results, thus it is hard to assess the rightfulness of the financing of the state and church maintained institutions.
On one hand, the problem results from the parallel and not only one level regulation of the issue: the various statutes sometimes contain almost, but not exactly the same norm-texts. On the other hand, problems arise from the fact that in the case of the local self governments, there is a complex regulation of the financial sources, and there are (obligatory and facultative) tasks to be fulfilled, while in the case of the public purpose activities of the churches there is a direct task financing. A normative support is paid either to church and local self-government maintained schools, but the church maintained institutions in addition get a normative supplementary support in theory to cover those expenses, that on the part of the local self-government are financed from their own financial sources (e.g. from local tax income). Nevertheless, it can be concluded that the final solution in the case would be without constitutional doubts if equal treatment and equal support is secured both to the students learning in state schools and church schools (in compliance with Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms).

Reasons for concern

The HIV positive inmates in Tököl Prison (the HIV positive convicts are detained here, in Site "K" of the prison) are still not allowed to use common facilities or to participate in collective programs, thus they are not allowed to be present on masses in the prison chapel. Respective the fact that the HIV virus is not infecting by the ways of everyday contact, the segregation realizes an unnecessary and disproportionate restriction of – among other rights –

[31] Promulgated by 1999. évi LXX. törvény a Magyar Köztársaság és az Apostoli Szentszék között a Katolikus Egyház magyarországi közszolgálati és hitéleti tevékenységének finanszírozásáról, valamint néhány vagyoni természetű kérdésről 1997. június 20-án, Vatikánvárosban aláírt Megállapodás kihirdetéséről [Act No. LXX of 1999 on the promulgation of the Agreement between the Holy See and the Republic of Hungary on the financing of the activities of public purpose and religious activities of the Catholic Church in Hungary and on some questions related to property, signd on 20 June 1997 in Vatican City]
[32] http://hvg.hu/itthon/20050323egyhaz.aspx

the right to freedom of religion of the concerned detainees. The Hungarian Civil Liberties Union (Társaság a Szabadságjogokért – HCLU) filed a petition with the Constitutional Court in the case.[33]

Other relevant developments

Reasons for concern

An islamo-phobic group, called ITT has been founded recently. The group started to spread its views on its website and by posters. According to the opinion of the group, the Koran is a handbook for criminals, the Islam is a criminal religion, and all Muslims are potential terrorists. The Hungarian Islam Community made a denunciation in the case, but the police did not begin an investigation.[34]
Apart from the aforesaid statements of the ITT, no islamo-phobic acts had been reported.

Article 11. Freedom of expression and of information

Freedom of expression and of information

Legislative initiatives, national case law and practices of national authorities

I. In its Decision 12/2004 (IV. 7.) AB határozat the Constitutional Court established an unconstitutional omission, since the legislator failed to provide those rule-of-law-guarantees which ensure access to data of public interest defined in Article 19 (5) of a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról szóló 1992. évi LXIII. törvény [Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest] (hereinafter: PDPI). Parliament was obliged to pass the adequate legislation until December 31, 2004.

1. According to ex Article 19 (5) of the PDPI "unless an Act provides otherwise, data generated for internal use and in connection with the preparation of decisions shall not be public within twenty years following their inception. At request, the head of the organ may permit access to the data even within the above time limit". According to the reasoning of the decision of the Constitutional Court, concepts of data "generated for internal use and in connection to the preparation of decisions" are not defined by the PDPI and the constitutionally legitimate purpose is not provided for either. Moreover, the concept of "data generated for internal use" read separately from the concept of "data in connection with the preparation of decision" grant wide discretionary power for the head of the data handling organ, since the relevant data are not protected according to its substance, but according to the intent of who generated them. Article 61 (1) and Article 8 (2) of the Constitution require the legislator to restrict fundamental rights to the degree necessary and proportionate in relation to the purpose of restriction. Moreover, the legislator also has to guarantee the judicial review with regard to the formal and substantive requirements of restricting public access. The Constitutional Court established omission since these requirements were not met in relation to Article 19 (5) of the PDPI.

2.1. Parliament fulfilled its legislative task by passing the 2005. évi XIX. törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról szóló 1992. évi LXIII. törvény módosításáról [Act XIX of 2005 on the Amendment of Act LXIII of 1992 on the

[33] http://tasz.mool.hu/download/AB%20ind%EDtv%E1ny%20-%202004%20okt%20-%20c%EDmek%20n%E9lk%FCl.pdf?id=13386&time=1132058658&op=cont. For further details see reasons for concern at Article 4.
[34] http://hvg.hu/vilag/20050914koraneroszak.aspx

Protection of Personal Data and the Publicity of Data of Public Interest] on 29 April, 2005. As a main rule, according to Article 19 (1) of the PDPI all state or local authorities and agencies and other bodies attending to the public duties specified by law (hereinafter jointly referred to as 'agency') are to provide the general public with accurate and speedy information concerning the matters under their competence, such as the budgets of the central government and local governments and the implementation thereof, the management of assets controlled by the central government and by local governments, the appropriation of public funds, and special and exclusive rights conferred upon market actors, private organizations or individuals.

2.2. New Article 19/A. of the PDPI makes the exception as to the availability of data of public interest in support of decision-making process. Any data compiled or recorded by an agency as part of and in support of a decision-making process, for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. (Access to these data may be authorized by the head of the agency that controls the data in question.) A claim for disclosure of data underlying a decision may be rejected after the decision is adopted within ten years from the date it was compiled or recorded if disclosure is likely to jeopardize the agency's legal functioning or the discharging of its duties without any undue influence – in particular the freedom to express its position during the preliminary stages of the decision-making process on account of which the data was required in the first place. The ten-year time limit for restriction of access to specific data may be reduced by law.

3.1 Besides fulfilling its legislative task due to the legislative omission established by the Constitutional Court, Parliament refined some of the rules of PDPI as a reaction to the evolving administrative and judicial practice of the PDPI.
By redefining the concept of the data of public interest the legislation laid down squarely that the character of data of public interest is irrespective of the method or format in which it is recorded and whether autonomous or part of a compilation. The amendment also makes it clear that public information subject to disclosure as defined by Article 19 (5) of the PDPI is a distinct concept of data of public interest. The concept of public information subject to disclosure entails any data, other than public information, that are prescribed by law to be published or disclosed for the benefit of the general public.

3.2. Article 3 (2) of the amendment extends the scope of public information subject to disclosure.
First, in relation to any person acting in the name and on behalf of the agencies to the extent that it relates to his duties and the personal data of other persons performing public duties shall be deemed public information subject to disclosure. Access to such data shall be governed by the provisions of the PDPI pertaining to information of public interest (See Article 19 (4) of the PDPI.). Prior to the amendment only the name, the scope of activities, the status and the classification of these natural persons were deemed as public information subject to disclosure.
Secondly, Article 19 (5) of the PDPI provides that – as a main rule – any data, other than personal data that is processed by bodies or persons providing services prescribed mandatory by law or under contract with any governmental agency, central or local, if such services are not available in any other way or form, to the extent necessary for their activities shall be deemed public information subject to disclosure.

3.3. New Article 20 (1) reassures the established practice whereby data of public interest can be requested not only verbally and in writing, but also by electronic means. According to new Article 21/A of the PDPI the agencies may not render access to public information contingent upon the disclosure of personal identification data. Just like in cases of verbal and written requests, the processing of personal data for access to data of public interest that has been published by electronic means is permitted only to the extent required for

technical reasons, after which such personal data must be erased without delay. The processing of personal identification data in connection with any disclosure upon request is permitted only to the extent absolutely necessary.

4. Article 8 of the Amendment also refines the rules of the procedure of Parliamentary Commissioner for Data Protection by stating that the actions and proceedings of the data protection commissioner shall be governed by 1993. évi LIX. törvény az állampolgári jogok országgyűlési biztosáról (Act LIX of 1993 on the Parliamentary Commissioner for Citizen Rights) subject to the exceptions set out in the PDPI (Article 24/A. (1) of the PDPI).

II. On 4 July 2005, Parliament adopted 2005. évi XC. törvény az elektronikus információszabadságról (Act XC of 2005 on the Electronic Freedom of Information (hereinafter: EFOIA). With a view to the assertion of a rule-of law state guaranteed in Article 2 (1) and the fundamental right to have access to and to disseminate data of public interest guaranteed in Article 61 (1) of the Constitution, the primary goal of the EFOIA is make the state more transparent by prescribing the list of specific data of public interest that must be published on the Internet.

1. According to Article 6 (1) of the EFOIA entities performing public tasks defined in Article 3 (1)–(3) have to disclose the data specified in the annex to the EFOIA (general publication scheme). The general publication scheme provides for the most important data of public interest and information subject to disclosure that relate to the personnel, organization, activities, operation and the financial management of these entities. Access to these data has to be provided to anyone without identification and free of charge.
In the application of the EFOIA, the following organs are deemed to be entities performing public function. The Office of the President of the Republic, the Office of the Parliament, the Office of the Constitutional Court, the Office of the Parliamentary Commissioners, the State Audit Office, the Office of the National Judicial Council, the Office of the Prosecutor General, the Office of Economic Competition, the Public Procurement Board, the Hungarian Academy of Sciences, the National Radio and Television Board, an agency of public administration with competence over the entire territory of the country, in particular ministries, the Prime Minister's Office, agencies with nationwide powers, the central office, the office of the ministry, the national chamber and the county (Budapest) office of public administration. Unless the law otherwise provides, these entities disclose the data in their own websites from 1 January 2006. Other entities performing public tasks, but not included in the list above may meet their electronic disclosure obligation by publication in a website in their own or one jointly operated by their associations or maintained by agencies responsible for their supervision, professional direction or co-ordination of their operation or in a central website set up for this purpose. County-level local governments and the local governments with a population of over 50,000 inhabitants must publish their data on the Internet from 1 January 2007. Local governments with a population below 50,000 and other organs performing public duties (e.g. schools, hospitals) are to publish their data in electronic form from 1 July 2008.
According to Article 6 (2), besides the general publication scheme, legal regulation may stipulate other data to be disclosed for individual sectors or the types of entity performing public tasks (special publication scheme). Also, as laid down is Article 6 (3), the head of the entity performing public tasks, after requesting the opinion of the Parliamentary Commissioner of Data Protection, and Parliament may stipulate additional range of information to be disclosed on a mandatory basis for the entity performing public tasks, the agencies or a part thereof subject to their direction or supervision (individual publication scheme).
In compliance with Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the reuse of public sector information Article 7 and 8 establishes the Central Electronic List of Public Information and the Single Public Information

Retrieval System which ensure the simple and rapid access to the data to be disclosed according to the EFOIA.

2. The EFOIA provides for the openness of the law-making procedure by prescribing the publication of draft bills and regulations. The EFOIA also obliges the ministries and municipalities to provide a forum on their websites where users can express their opinion regarding the draft bills, governmental and ministerial decrees published on the Internet, thus allowing citizens to participate in the law-making process. Not only the text of draft legal regulation are to published but also the concept aimed to prepare law-making and the reasoning attached to the draft of the legal regulation as well.

2.1. It has to be noted though that it is not clear what justifies that the drafts of legal regulations of a subject matter that cannot be the subject matter of a national referendum, on payment obligations, on pricing, on state subsidies and on the foundation of organizations need not be disclosed (Article 9 (3)). It also has to be noted that Article 9 (4) provides unqualified discretion for the head of the organ preparing draft regulation not to disclose the draft if publication endangers Hungary's particularly important defense, national security, financial and foreign affairs interest or its environmental protection or inheritance protection interests or when there is an outstanding social interest linked to particularly rapid adoption of the draft regulation.

2.2. As to the legislative procedure, Article 11 obliges the Parliament to disclose all the bills, the documents included in the Parliament's registry of documents related to the bills (in particular amending motions, related amending motions, the recommendations of the committees drawn up for the bill as well as the uniform motion), the minutes drawn up on the first and second reading of a bill at the plenary session, its closing debate, the decision-making on the amending motions and on the final vote, the minutes of the meetings of the committees where the given committee deals with the bill.

2.3. Article 12 of EFOIA also provides that Magyar Közlöny (the Official Gazette of Hungary) will be freely accessible to everyone without charge. Besides this, Article 13 (1) prescribes the creation of Hatályos Jogszabályok Elektronikus Gyűjteménye (the Electronic Collection of Effective Laws), which shall contain the effective text of all central laws in force on a given calendar day. It will be possible to search not only in the title and the number of all effective central laws, but also in their texts.

2.4. As to the decrees of local governments, according to Article 15 of the EFOIA the notary of the local government is obliged the send the decrees to the Minister of Interior who publishes the decrees in the website maintained for this purpose.

3. As to access to judicial decisions, the decisions of Supreme Court and the Courts of Appeal brought on the merit of a case, decisions concerning the uniform application of the law (jogegységi határozat), decisions involving principles of law, the opinions of judicial colleges and judicial college positions on questions of law are to be disclosed in a digital form to anyone without identification, free of restriction and free of charge in Bírósági Határozatok Gyűjteménye (the Collection of Judicial Decisions).

In some civil and criminal cases the EFOIA restricts disclosure. According to Article 17 (7) decisions concerning marriage, fatherhood, establishment of descent, termination of parental supervision and decisions when someone is declared incapable of managing his own affairs shall not be disclosed when either party requests waiver of disclosure. As to criminal cases, according to Article 17 (8) cases involving the abuse of prohibited pornographic recording or decisions regarding criminal acts against sexual morals may be disclosed only if, invited by the court taking action, the injured party gives his consent to the disclosure.

As a main rule, data allowing the identification of persons involved in the disclosed decision have to be deleted so as not to violate the facts of the case. According to Article 18 (2), with a view to the right of informed debate of public affairs guaranteed by Article 61 (1) of the Constitution, the following data need not be deleted in the disclosed decision:

– the name of the entity performing public or municipal tasks or other public tasks stipulated in legal regulation as well as the first name(s) and last name of the person taking action in this capacity (hereinafter jointly the name) as well as his rank – unless an exception is made by law – provided that the given person participates in the procedure in relation to performing his public tasks;
– the name of the natural person defendant who is the defeated party as well as the name and seat of the legal entity or other organization that is not a legal entity provided that the decision was made in a case in which, pursuant to legal regulation, claim enforcement in the public interest is called for;
– the name, seat and the name of the representative of the social organization or foundation;
– public information subject to disclosure.

4. The law on electronic freedom of information will enter into force in several steps. The electronic edition of the Official Gazette and the Electronic Collection of Effective Laws will become effective as of 1 January 2006. On the same day the obligation of electronic publication for major public administrative bodies will enter into force, and draft bills and laws must be also published on the Internet by that time.
County-level local governments and the local governments with a population of over 50,000 inhabitants must publish their data on the Internet from 1 January 2007. By July 2007, the anonymous decisions of the Supreme Court and the Courts of Appeal must published by the administrative office of the supreme judicial self-governing body, the Office of the National Judicial Council. Local governments with a population below 50,000 and of other organs performing public duties have to publish their data in electronic form from 1 July, 2008.

III. 1. On 30 May 2005 Parliament adopted Az elmúlt rendszer titkosszolgálati tevékenységének feltárásáról és az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról szóló 2003. évi III. törvény módosításáról szóló T/14230. számon elfogadott törvényjavaslat [T/14230. on the Amendment of Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security hereinafter: Amendment]. The President of the Republic referred the adopted but not yet promulgated Amendment to Constitutional Court for ex ante review.
The purpose of Article 2 (1) of the Amendment is to make public the personal data processed by the Historical Archives of the Hungarian State Security of professional employees, collaborators and operative contact persons who worked or were in contact with the Secret Services of the communist regime. Publication of these data would have been necessary to identify these people. In the President's view publication would violate the right to protection of personal data guaranteed by Article 59 (1) of the Constitution. The President saw no such constitutional purpose that would have made restriction of this fundamental right necessary and proportional. He also argued that professional employees, collaborators and operative contact persons had considerably different roles in operating the State Secret Services thereby the President initiated a differentiated constitutional review in relation to the groups. The President also argued that amendment does not provide for remedy prior to the publication, which violates the right to remedy guaranteed by Article 57 (5) of the Constitution.

2003. évi III. törvény az Állambiztonsági Szolgálatok Történeti Levéltára létrehozásáról [Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security] defines professional employee as any person, who was in professional service relationship with the organizations having produced the documents coming under the effect of this Act, including both the "secret" and "strictly secret" staff members; collaborator as any person, who provided reports secretly, under coverage and cover-name

to the organizations having produced the documents coming under the effect of this Act, or signed a declaration of being hired to this effect or enjoyed an advantage for this activity; operative contact person as any person, who was kept in records as "voluntary contact" or "occasional contact" by the organizations having produced the documents coming under the effect of this Act.

In its decision 37/2005. (X. 5.) AB határozat the Constitutional Court ruled that the Amendment is unconstitutional, therefore it cannot become effective. In its reasoning the Constitutional Court relied on its precedential decision (Decision 60/1994 (XII. 24.) AB határozat; hereinafter: precedent) which emphasized that unmaking the secrecy of the Secret Services Archives does not mean that all data processed in the archives become data of public interest. The publicity of someone's personal data depends on the fact whether the person in question still participates in the political life. The present rules of the Act III of 2003 correctly strike the balance between the right to protection of personal data and freedom of information by applying the following gradually increasing publicity mechanism:
– documents processed in the Archives that contain no personal data can be get to known and made public by anyone;
– no anonymization shall be required for the documents which are necessary for the identification of the publicly acting professional employee, the publicly acting operative contact person and the publicly acting collaborator and therefore these can be made public;
– a person under observation, a third party, a professional employee, an operative contact person and a collaborator may get to know and may make public the personal data included in a document managed in the Archives, which can be brought into connection exclusively with him;
– a person under observation may get to know but may not make public the data necessary for identification of a collaborator, operative contact person and a professional employee who can be brought into connection with him;
– a person under observation and a third party may get to know, and with the consent of the third party or the person under observation, he may make known the data recording or describing the personal contacts established between the person under observation and the third party (e.g. data gathered on personal meetings, conversations).
The Amendment annuls the gradual approach by securing an unqualified priority to the right of freedom of information. The right to protection of personal data can be limited if restriction serves the informational self-determination of people under observation or the requirement stated in the holding of the precedent that data relating to anti rule-of law-activities of present public figures is considered data of public interest within the meaning of Article 61 of the Constitution. The Constitutional Court found no constitutional purpose that would have mandated the Parliament to ensure total publicity in relation to the personal data of professional employees, collaborators and operative contact persons. According to present regulation no anonymization is required for the documents which are necessary for the identification of the publicly acting professional employee, the publicly acting operative contact person and the publicly acting collaborator and therefore these can be made public and a person under observation may get to know but may not make public the data necessary for identification of a collaborator, operative contact person and a professional employee who can be brought into connection with him. Since the precedent requires no further publicity, the unqualified publicity of the aforementioned personal data violates Article 59 (1) of the Constitution.
As to the right of remedy, the Constitutional Court came to the conclusion the decision concerning the publication of personal data on the website of the Archives counts as official decision within the meaning of Article 57 (5) of the Constitution. Since the legislation failed to provide procedural guarantees that assure the genuine nature of the published personal data Article 8 of the Amendment violates Article 57 (5) of the Constitution.

IV. 2. In its decision 1/2005 (II. 4.) AB határozat the Constitutional Court ruled upon the constitutionality of several provisions of 1996. évi I. törvény a rádiózásról és televíziózásról [Act I of 1996 on Radio and Television Broadcasting; hereinafter: Media Act]. Besides the petitions regarding property rights and the independence of public service broadcasters, a petitioner challenged Article 138 of the Media Act since the provision makes it impossible for citizens to follow the operation of Parliament.
According to Article 138 of the Media Act a closed-circuit television system shall be set up for broadcasting of whole of the sessions of Parliament, the public parliamentary committee hearings dealing with appointments and nominations, and, as required, the meetings of the parliamentary committees. The signal emitted from the closed-circuit system shall be made accessible to all broadcasters. The broadcaster shall cover the costs of joining the system. It is also possible, however, to transmit or record broadcasts on line from the place designated for that purpose in the building of Parliament. The Parliamentary Library shall provide for the accessibility of the recorded material, and, against the payment of costs, shall prepare a copy that may be freely used by anybody.
The Constitutional Court found that the broadcasting rules of the Act in relation to the sessions and committee hearings of Parliament do not contradict Article 61 (1) of the Constitution prescribing the right to access an distribute data of public interest. Citing its decision 32/1992 (V. 29.) AB határozat, the Constitutional Court emphasized again that free access to information of public interest promotes democratic values in elected bodies, the executive power, and public administration, by enabling the people to check the lawfulness and efficiency of their operation. Because of the complexity of civic sphere, the citizens' sway over administrative decisions and the management of public affairs cannot be effective unless the agencies of power are willing to disclose pertinent information. Any rule that secures wide discretion for otherwise publicly operating bodies such as local governments to declare their session closed unnecessarily and disproportionately restricts the right to access to data of public interest. The Constitutional Court reasoned that challenged regulation does not provide for declaring the sessions of Parliament closed. According to Article 138 (7) the chairmen of public service broadcasters are obliged to make the continuous broadcasting of parliamentary sessions possible.

V. A non-governmental organization, the Energy Club filed an action against the National Atomic Energy Office (NAEO) at the Metropolitan Court. In April 2003 radioactive infiltration occurred in Pit 1 of Unit 2 of the Paks Nuclear Power Plant Ltd. (Paksi Atomerőmű Rt,; hereinafter: Plant) that ended in closing down the unit temporarily. The Plant asked for a new regulatory license for the operation of Unit 2 at minimum controllable power, which is a precondition of restarting Unit 2 completely.
The Energy Club asked NAEO to provide them the documentations annexed to the application of the temporal regulatory license since they constitute data of public interest. According to the non-governmental organization access to these data would ensure the public of the safety of restarting procedure. The NAEO refused the petition since ensuring access to the documentations would violate business secrets and intellectual property right.
In April 2005 the Metropolitan Court denied the action of the non-governmental organization, since the documentations were produced in support of a decision-making process and Article 19/A. of the PDPI do not require the NAEO to make them available.
The Energy Club appealed against the judgment to the Court of Appeal of Budapest. In September 2005 the Court of Appeal of Budapest quashed the decision of the first-instance-court by holding that the documentations are information of public interest and do not constitute data in support of a decision-making process and instructed the first-instance-court to consider whether the documentations involve business secrets or intellectual property rights.
In its November ruling the Metropolitan Court denied the petition of the non-governmental organization. The judge argued that according to Article 19 (3) b) of PDPI national security constitutes a legitimate limit to the disclosure of information of public interest. Moreover, the petitioner did not precisely point out the scope of the requested data. The

judge also referred to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters incorporated by Act LXXXI of 2001. According to the Convention a request can be refused by the public authority if formulated in a too general manner or if disclosure would adversely affect the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest (point b) of Article 4 (3) and point d) of Article 4 (4) of the Convention. The Energy Club will appeal the judgment.

VI. In its decision 738/B/1997 (II. 1.) the Constitutional Court ruled on petitions relating the independence of the Hungarian News Agency Corporation (hereinafter: HNA). The petitioners contended that Article 6 (7) and Article 30 (1) of 1996. évi CXXVII. törvény a nemzeti hírügynökségről [Act CXXVII of 1996 on the National News Agency (NNA)] contradicts Article 61 (1)-(2) of the Constitution as interpreted by decision 61/1995 (X. 6.) AB határozat of the Constitutional Court. According to the petitioners, since it is the Prime Minister who is empowered to decide which competitor is proposed to the President of Republic for the presidency of the Hungarian News Agency Corporation (HNA), the Government is capable of influencing the substance of the broadcasting activity. The Government can influence the activity of the HNA for one more reason: Article 30 (1) of NNA does not provide for the exact amount of subsidy guaranteed from the central budget. While Article 61 (1) of the Constitution states that everyone has the right to freely express his opinion and furthermore to access and distribute information of public interest, Article 61 (2) guarantees the freedom of the press. According to Article 61 (4) a majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the supervision of the public news agency, as well as the appointment of the president thereof.
Citing its earlier precedents, the Constitutional Court emphasized that the fundamental rights provisions of the Constitution, such as Article 61, impose the duty on the State to secure the conditions for the creation and maintenance of a democratic public opinion. The objective, institutional aspect of the right to the freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values [See, decision 30/1992 (V. 26.) AB határozat; decision 37/1992 (VI. 19.) AB határozat].
Article 6 of the NNA regulates the preconditions of appointment by the President of the Republic: candidates have to fulfill certain professional requirements; people with significant political activity cannot become candidates. The applications for the presidency of HNA are considered by the HNA's Body of Owners' Council (Council) whose members are elected by the Parliament. The Council makes a proposition for the Prime Minister. According to Article 17 (3) of NNA half of the members of the Council are elected upon the motion of opposition, the other half upon the motion of the governmental fractions.)
The Council's composition corresponds with the presidency of the directing board of the public foundation stipulated by 1996. évi I. törvény a rádiózásról és televíziózásról [Act I of 1996 on radio and television broadcasting]. Decision 22/1999. (VI. 30.) AB határozat judged upon the constitutionality of the presidency of the directing board concluding that the above-mentioned proposition mechanism do not result in securing dominant position for either the opposition or the Government, consequently, the Council's composition is constitutional.
The Court recalled its position in relation to the neutralization of one-sided political influence in nominating judges. Independence can be secured through election by the two-thirds of the members of Parliament or by ensuring that the proposal for appointment from the Government or a member of the Government to the President of the Republic reflects the will of the community of judges (Decision 38/1993. (VI. 11.) AB határozat).
According to Article 6 (1) of NNA the Prime Minister makes a proposal to appoint the President of the HNA but his proposal is based upon the Council's recommendation. The

diversity of the composition of the Council ensures filtering one-sided political influence even in cases when the Council recommends more than one person to the Prime Minister. As a reason for rejecting the petitions the Constitutional Court also noted that the Prime Minister's proposal does not ipso facto result in appointment by the President of the Republic. As the Constitutional Court laid down in its 1991 precedent decision 48/1991. (IX. 26.) AB határozat, the President of the Republic refuses the appointment if the candidate cannot fulfill the necessary statutory requirements, or if the President of the Republic comes to the sound conclusion that the appointment could cause grave disorder in the democratic operation of the state.

Reasons for concern

1. On 13 June 2003 a Member of Parliament, filed a petition at the Constitutional Court to declare some of the drug-related provisions of the Criminal Code unconstitutional. (The Constitutional Court ruled upon the petition in its decision 54/2004. (XII. 14.) AB határozat). The Hungarian Civil Liberties Union (Társaság a Szabadságjogokért; hereinafter: HCLU) requested the Constitutional Court to allow access to the petition according to Article 19 of PDPI. On 12 October 2004 the Constitutional Court informed the HCLU that according to the established practice, it cannot make the petition accessible if the petitioner does not give his consent to it.
   On 10 November 2004 the HCLU filed a lawsuit at the Metropolitan Court against the Constitutional Court for making the petition accessible. The non-governmental organization argued that the Constitutional Court is data processor within the meaning of the PDPI and is obliged to ensure accessibility to data of public interest. Although, parts of the petition can be considered personal data, if the petitioner is a Member of Parliament the petition is data of public interest by all means. Furthermore, the HCLU argued that ensuring access to petitions is related to the informed debate of public affairs as well.
   The first-instance court stated that the Constitutional Court is a data processor within the meaning of point 9 of Article 2 of the PDPI and in certain respect it processes data of public information as well. At the same time, according to the first-instance court, the petition cannot be considered as 'data'. Neither the PDPI, nor the practice of the Constitutional Court or the Supreme Court in relation to freedom of information defines the concept of 'data'. Due to the lack of jurisprudential definition the first-instance court explored the generally accepted meaning of the concept and referred to a prescriptive dictionary, issued in 2003 by the Hungarian Academy of Sciences, the Hungarian Interpretive Dictionary (Magyar Értelmező Kéziszótár). According to the definition, data is 'a (registered) fact that helps to characterize or explore someone or something'. According to the first-instance court there is no such fact in the petition that could be characterized as data, thus the Constitutional Court lawfully refused the request of the HCLU.
   The HCLU appealed the judgment. On 5 June 2005 the Court of Appeal of Budapest as a second-instance court also denied the petition of the HCLU. According to the reasoning of the Court of Appeal, the Metropolitan Court erred when coming to the conclusion that a petition to the Constitutional Court does not amount to data. At the same time the Court of Appeal agreed with the lower court in denying the request of the HCLU. The professional opinion and standpoint expressed in the petition constitutes personal data, since reference can be drawn in relation to an identifiable natural person within the meaning of point 1 of Article 2 of the PDPI.
   Since according to point a) of Article 3 (1) of the PDPI the consent of the data subject is needed for granting access to one's personal data, the Constitutional Court lawfully rejected the request.
   The HCLU requested an extraordinary review of the final decision of the second-instance court at the Supreme Court. On 3 October 2005 the Supreme Court denied the HCLU's request for two reasons. First, a petition for an ex post norm-controll does not become data of public interest just because the Constitutional Court reviews a legal regulation binding

all citizens. Second, contrary to the HCLU's argument, not only the name, address etc. of the petitioners are considered personal data, but all the substantive parts of the petition, thus there isn't any part of the petition that could be considered as data of public interest accessible by anyone.

2. In May 2004 the HCLU launched a project in order to examine the practice of the police and local governments regarding video surveillance (CCTV) of public spaces. The HCLU sent a questionnaire consisting of 36 questions to the local governments and another questionnaire of 80 questions to the district police headquarters of Budapest. The questionnaires were aimed at the legal and economic background of the video surveillance systems, their supervisory mechanisms, the maps regarding the location of the systems and the contracts between local governments and the Police regarding the operation of the systems. The questionnaires were sent as claims for data of public interest within the meaning of Article 19 (1)–(2) of the PDPI.
Almost all the data processors transgressed the statutory time limit of fifteen days for the answers. The questionnaires were first sent to the district police headquarters. The united answer came from the Head of the Office of the Metropolitan Police Headquarters of Budapest who denied informing the HCLU about the internal orders and regulations of the video surveillance systems based on Article 86 (5) of 1994. évi XXXIV. törvény a rendőrségről [Act XXXIV of 1994 on the Police] which provides: '[F]or reasons of criminal law enforcement and prevention, consent to revealing of data of public interest related to a planned police action, to certain internal organizational units and technical equipment of the Police may be refused by the Minister of the Interior, by the National Chief of Police or by the County Chief of Police, and, in connection with a criminal offence, by the head of the investigative organ as well.'
Furthermore, the Head of the Office of the Metropolitan Police Headquarters of Budapest did not provide any statistical data, the maps or other data regarding the location of CCTVs or the contracts between local governments and the Police regarding the operation of the systems.
On 24 November 2004 the HCLU filed an action against the Metropolitan Police Headquarters of Budapest for securing access to those data of public interest that were not disposed. The Central District Court of Pest denied the HCLU's claim without examining its merits since the action included only question, not data and it was not clear from the action which districts of Budapest are concerned.
The HCLU appealed the decision at the Metropolitan Court on 9 May 2005, arguing that in this case answering the questions would have meant providing data of public interest. Although, according to Article 21 (6) of the PDPI the court hears such cases under priority, the appealed was assigned on 23 August 2005 and the date of the first hearing has not been appointed so far.
The HCLU also filed actions against two local governments in Budapest (the Fourth and Sixth districts) since both of them denied claims for providing data of public interest. The legal representative of the local government of the Sixth District of Budapest complied with claim two weeks before the first hearing. As to the local government of the Fourth District, prior to filing the action the mayor informed the HCLU that 'following a consultation with my colleagues, you will not be provided with the requested data'.
At the first hearing, on 7 February 2005, the attorney of the local government of the Fourth District acknowledged that the refusal was unlawful, but at the same time the refusal had 'legal ground' since the data processor is the Police Headquarters of Fourth District, not the local government. As evidence, the attorney submitted the agreement between the Police Headquarters of Fourth District and local government on the operation of the video surveillance system to the court.
With special respect to the agreement, the court came to the conclusion that the local government is considered a data processor in relation to the video surveillance system. As to the questionnaire, the court held that all the questions are related to specific data of public interest and the local government is obliged to provide them. Since there was no

appeal, the decision became final on 7 April 2005. Since the local government failed to comply with court decision, the HCLU initiated an extraordinary procedure to execute the judgment.

Early 2005 the HCLU also sent a claim for providing data of public interest to the Metropolitan Local Government of Budapest regarding the plans of setting a video surveillance system in one of the biggest public park of Budapest (Városliget). In March 2005 the Head of the City Policing Committee of Metropolitan Local Government of Budapest denied to answer some of the questions, since certain data are not public.
After filing an action at the Central District Court of Budapest, the court asked the HCLU to refine its claim in relation to the data and prove its legal capacity, which is a precondition to initiate a proceeding. The representative of the HCLU argued that according to Article 21 (4) of the PDPI, irrespective of the general rules regarding procedural legal capacity, anyone can sue or can be sued in such cases. In compliance with court order, the HCLU submitted more concrete questions: are there any written plans or other documentation regarding the exact deployment of the video surveillance system? What is the role of the Metropolitan Local Government of Budapest in this procedure? Are there any studies regarding the possible effects and costs of the video surveillance system? Was there any decision taken by any organ or official of the Metropolitan Local Government of Budapest in relation to the video surveillance system? What is the current status of the planned united video surveillance system of Budapest?
At the first hearing the attorney of the respondent asked the court to dismiss the plaintiff's claim, since the requested data do not exist since there was no decision taken in relation to the video surveillance system. The attorney further argued the requested data are data generated for internal use and were produced in connection with the preparation of decisions consequently, they are not public for twenty years according to Article 19 (5) of the PDPI. (It has to be noted that respondent's attorney referred the ex Article 19 (5) of PDPI. In decision 12/2004. (IV. 7.) AB határozat the Constitutional Court established an unconstitutional omission, since the legislator failed to provide those rule-of-law-guarantees which ensure access to data of public interest defined in ex Article 19 (5) of PDPI. In compliance with the Constitutional Court's decision ex Article 19 (5) of the PDPI was repealed by Article 4 of Act XIX of 2005 on the amendment of the Act LXIII of 1992 on the protection of personal data and the publicity of data of public interest.)

4. 4. In March 2005, a literary weekly, Élet és Irodalom (hereinafter: ÉS) commenced its series of investigative articles alleging that Viktor Orbán, former prime minister, now leader of the biggest opposition party (Fidesz), attended board meetings (members' meeting) of a company called Szárhegy dülő-Sárazsadány-Tokajhegyalja Kft (hereinafter: company) and gave advice to the directors of the company on how to access state subsidies and on obtaining a stake in state-owned famous winery, Tokaj Kereskedőház Rt. At the time Orbán was the Prime Minister and his wife, Anikó Lévai was one of the stake-holders of the company. ÉS came into the possession of the allegedly recorded minutes of the board meetings of the company and published them. According to the minutes, in relation to state subsidies Orbán said "We shouldn't get as much as we ask for. We shouldn't get the most money." As to the winery, the former Prime Minister told the board that "We can't take anything from them directly."
The company demanded retraction denying that board meetings were held on the dates presented on the published minutes (6 September 2000; 4 June 2001; 2 December 2001). The company's action was not related to any of the statements, which ÉS attributed to Orbán at the board meetings. (In an interview Orbán denied that he took part in 'any kind of board meeting of the company', not denying the content of the statements.)
At the trial before the Metropolitan Court of Budapest the company argued that the members' meetings did not take place because no official report of the meetings was ever filed at the Companies Registry. A witness for ÉS, the ex-wife of the company's lawyer, who took the documents from the lawyer's computer for possible use during divorce

proceedings and sent it to ÉS, said that the directors frequently met for dinner parties at each other's houses. These dinners were invariably followed by company meetings at which one of the joint owners took shorthand notes. According to the witness, Orbán represented his wife at these meetings.
The court of first instance ruled on 19 May 2005 that ÉS did not have to print a retraction relating to claims it made about a company. The ruling emphasized that since nobody had thus far questioned the substance of ÉS's article, the question of whether a company meeting was held on a particular day was of no consequence to the company. According to the reasoning of the ruling irrelevant details were not sufficient grounds for a retraction.
The company appealed the ruling and on 23 June 2005 the Court of Appeal of Budapest overturned the decision and ordered ÉS to publish a retraction stating that the company did not hold board meetings on the above-mentioned dates and no minutes were recorded during these meetings. The Appeal Court interpreted the guideline of the Supreme Court (PK No. 12) relating to 'The Scope of a Retraction's Validity and Guiding Considerations in the Evaluation' differently from the first-instance court. According to point II of the guideline 'A press release must be examined as a whole when evaluating claims for a retraction. The publications and expressions to which there are objection must be taken into consideration according to their real content and not their formal appearance, the related parts of the press release must be evaluated in connection with one another, and the evaluation must also take into consideration the public opinion that has developed in society. The details, inaccuracies, and insignificant mistakes that are neutral in terms of opinion of the person that requested the retraction do not provide the basis for retraction.'
In the Appeal's Court reasoning the first-instance court incorrectly balanced what exactly the company's action aims at. The Appeal Court had to rule upon the question whether the article included false statements in relation to the company. The question whether the company has held board meetings on specific dates cannot be held a detail, inaccuracy or an insignificant mistake that do not provide the basis for retraction, since it closely related to requirement of authentically informing the public.
ÉS requested an extraordinary review of the final decision of the second-instance court at the Supreme Court. On 5 October 2005 the Supreme Court denied the request of ÉS. In the Supreme Court's reasoning Article 150 (1) of 1997. évi CXLIV. törvény a gazdasági társaságokról [Act CXLIV of 1997 on Companies] provides that supreme decision-making bodies of business associations is its members' meeting. It is the primary forum of exercising proprietary rights. Therefore, from the perception of the company's activity it is an essential question whether the members of the company or people representing its members have come with ideas relating to the activity of the company at board (or members') meetings. The second-instance court correctly came to the conclusion that statement aimed to be retracted by the company's action (whether there were board meetings on the dates in question) are regarded essential as to the perception of the company's activity.

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

In decision 1/2005 (II. 4.) AB határozat the Constitutional Court ruled upon the constitutionality of several provisions of 1996. évi I. törvény a rádiózásról és televíziózásról [Act I of 1996 on Radio and Television Broadcasting; hereinafter: Media Act].
A petitioner argued that Article 32 (1), Article 53 (4) and Article 77 (5) requiring the National Radio and Television Board (hereinafter: Board), the Public Foundations, the Broadcasting Fund and public service broadcasters to have their accounts managed by the Hungarian State Treasury contradict Article 61 (2) of the Constitution on the freedom of the press since the Government and Minister of Finance may supervise the economic management of the Board,

the Public Foundations and the Broadcasting Fund thereby they may control the operation of the public service radio and television.[35]

The Constitutional Court recalled decision 37/1992 (VI. 10.) AB határozat pointing out that with respect to the national public service radio and television the legislature is obliged to enact such a law whose financial, procedural and organizational regulations make possible a comprehensive, balanced and accurate reporting by these institutions and ensure their continued operations in such a manner. It must be ensured that neither the organs of the state nor any specific societal interest group be able to influence the content of the programming in such a way as to injure the comprehensiveness, balance in the scope of coverage, accuracy and the non-bias of reporting. The Constitution demands that radio and television be free from the state and individual societal interest groups. They shall not have licenses enabling them to make programming one-sided or exert undue influence on its content. This prohibition extends to indirect influence as well as to its possibility. The demand for freedom from state organs with respect to programming content applies equally against the legislature and the government.
Under Article 61 of the Constitution it is not a constitutional obligation to establish public service broadcasters, but if they are established their independence must be guaranteed. Article 53 of the Media Act established the public foundations in order to ensure the independence of public service broadcasting. These public foundations established public service broadcaster as joint-stock companies. The Media Act not only put an end to the governmental supervision of broadcasters but also reformed their financing. Public service broadcasters are not directly subsidized from the state budget as budgetary organs, but through the Broadcasting Fund and the public foundations, even though majority of the income of the Broadcasting Fund consist of budgetary fees or subsidies.

The Constitutional Court emphasized that within the limits of the petition, it only examined whether the rules of the Media Act requiring the National Radio and Television Board (hereinafter: Board), the Public Foundations, the Broadcasting Fund and public service broadcasters to have their accounts managed by the Hungarian State Treasury contradict the constitutional demand of excluding undue influence by Parliament and Government in relation to the operation of the public service radio and television.
According to Article 18/A (2) of 1992. évi XXXVIII. törvény az államháztartásról [Act XXXVIII of 1992 on Public Finances; hereinafter: PFA] the Hungarian State Treasury (hereinafter: Treasury) is a central budget agency with a separate financial management, performing tasks specified in PFA and other legal regulations in the form of a separate legal entity with a national scope of competence, supervised by the minister of finance concerning both its functions and regulatory aspects.

According to Article 18/B (1) of PFA the Treasury is responsible for – inter alia – the following tasks:
– management of accounts of the organizations and funds belonging to the scope of the Treasury and other current account holders defined by law;
– projection of the aggregate balance of expenses and revenues of accounts of the organizations and funds belonging to the scope of the Treasury and the Treasury itself, in a manner specified by the minister of finance;
– cash supply to the organizations and funds belonging to the scope of the Treasury, other current account holders and customers having a securities account at the Treasury under terms and conditions defined in applicable regulations and its official announcements.
The challenged rules of the Media Act prescribing mandatory account management at the Treasury are not capable of influencing the operation of the Board or the public service providers by Parliament or the Government. Enforcing the effective control of the expenditure of budgetary sources and the requirement of the transparent expenditure of public finance

[35] As to the prorerty-right aspect of the case, see Article 17.

through mandatory account management by the Treasury does not violate Article 61 of the Constitution.

Secrecy of journalistic sources

Legislative initiatives, national case law and practices of national authorities

A journalist, Rita Csík, who works for the political daily, Népszava, was charged on 6 November 2004 with the 'intentional breach of a state secret', under Article 221 of 1978. évi IV. törvény a Büntető Törvénykönyvről [Act IV of 1978 on the Criminal Code]. In a May 2004 article she quoted a police memorandum, which cited criminal evidence collected by the police on a Member of Parliament. The police memorandum proposed lifting the MP's parliamentary immunity. The Chief Prosecutor of Budapest, took the position that the memorandum was 'classified', which resulted in indictment. On the contrary, the Parliamentary Commissioner for Data Protection argued that the classification procedure was not lawful, thus the document cannot be regarded as classified.
On 12 July 2005, during the first day of the trial at the Metropolitan Court, the prosecution maintained that the accused journalist could have guessed from the contents of the memorandum that it was a 'classified' document, since has a law degree, though she was never a practitioner.
The journalist told the first-instance court that it was not her task to check whether the state secret is included in the document, as a journalist she was obliged to check whether accurate and real information is in the document.
In his testimony one of the editors of Népszava, István Horváth said the newspaper published the whole of the memorandum since it did not even occur to the editorial board that they would violate state secret. The reason for publishing the memorandum was that neither the writer nor the addressee, the mayor of Debrecen, Lajos Kósa commented on the existence or the substance of the memorandum. As a response to a judicial question he said that no one warned him that publishing the memorandum would be a crime.
On 18 November 2005 the court of first-instance issued its decision, in which the journalist was acquitted on the charge with the reasoning that the memorandum was not classified accurately.
The Draft Act on State Secrets submitted to the Parliament in December 2005, although reregulate the categories of secrets, did not intent to change the regulation on the crime of breach of state secret.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

1. In October 2004 D.B. was distributing flyers on the street to invite people to a commemoration (to be held on 24 October) to the New Public Cemetery of Budapest. The police arrested her, and later also fined her, stating that the New Public Cemetery is a public domain, so she should have announced previously this assembly to the police. D.B. contested the decision of the Budapest Fifth District Police Headquarters, but the court upheld it. D.B. willing to hold the commemoration in January, announced the time and the place of the assembly at the Budapest Police Headquarters; the Police Superintendent of Budapest refused the case, stating that the New Public Cemetery is not a public domain (for it is not open to the public without restriction), and a permission need to be acquired from the operator of the cemetery. Despite D.B. sought legal aid at the court attaching the decision of the Police Superintendent of Budapest, and on the trial the Police Superintendent of the Fifth District agreed with this standpoint, in March 2005 the Court

qualified the cemetery as public domain, and considered that D.B. had imputably committed an offence.[36]

2. In October 2004, P.F, a Hungarian citizen announced to the police that he was willing to hold a peaceful demonstration in front of the museum called "The House of Terror". (With the demonstration he wanted to point out and demonstrate against the fact, that the current Public Health Program was named after Béla Johan, who had been the secretary of the state during the end of the Second World War, and responsible from removing Jewish employees from the health care system.) The demonstration was banned for two reasons: first, the police qualified the place of the planned demonstration "operational area"; second, they informed P.F. that the area in question was not a public domain at that time, because the Local Self-Government of Budapest has let it to the political party Alliance of Free Democrats (SZDSZ). In the view of The Hungarian Civil Liberties Union the aim of the contract was clearly to impede other citizens practicing their constitutional right to assembly (the place in the case is often used by demonstrators). In February 2005 P.F. sued the Local Self-Government of Budapest and the Alliance of Free Democrats, and requested the court to nullify the aforesaid contract.[37]

3. On 26 April 2005 three peaceful Russian citizens were arrested next to the House of Parliament. The three person, coming from an area heavily affected by nuclear pollution and "representing" the radiation sick people of that area, had wanted to meet the Prime Minister of Hungary to apply for "environmental refugee" status and to ask him to end the negotiations with the Russian Government on the transportation of the Hungarian nuclear waste to Russia. The three Russian citizens were arrested by the police on the ground of "breaching the law on the freedom of assembly". It is uncertain, whether the presence of three persons willing to peacefully express their opinion is a demonstration or not; but their arrest can be considered a too strict reaction to an action having such a low social-danger impact – as a protesting declaration of civil associations observe.[38]

4. In May 2005 on an inauguration ceremony of a statue (of István Bibó), A.B., a participant of the ceremony expressed his protest with a banner against the presence of the Prime Minister, but otherwise not disturbing the event. A.B. was arrested by the police, and a procedure was brought against him on the ground of having committed the offence 'abuse of the right to assembly'. In the opinion of the Police Superintendent of Budapest the action of the police was lawful, because A.B. had failed to abandon his previously not announced "one-person demonstration" after the warnings of the police captain securing the event.[39]

Reasons for concern

The Hungarian Civil Liberties Union (HCLU) pointed out that since 2003 the police have been being used for political purposes in a great number of cases, and the breaches on the freedom of peaceful assembly are continuing.[40]
In the last few years there can be clearly identified a practice of the police, not fully respective of the constitutional right to assembly, sometimes banning and dissolving demonstrations organized by groups of certain political views or demonstrations with an aim not complying with actual political interests of the Government. The aforesaid problem previously appeared in the application of the notorious Article 8 (1) of the 1989. évi III. törvény a gyülekezési jogról [Act III of 1989 on the Right to Assembly; hereinafter: ARA], which provided a

[36] http://www.tasz.hu/index.php?op=contentlist2&catalog_id=1713
[37] http://www.tasz.hu/index.php?op=contentlist2&catalog_id=1667
[38] http://www.tasz.hu/index.php?op=contentlist2&catalog_id=1808
[39] http://www.tasz.hu/index.php?op=contentlist2&catalog_id=1909
[40] http://www.nol.hu/cikk/349001/

condition to the police to ban a demonstration "if it would cause disproportionate disorder to the traffic". After the clause had been replaced with "if the traffic cannot be ensured on any other route" (in force from 1 May 2004), the police still banned a number of demonstrations with referral to the clause no longer in force. Now, the problem – from a legal point of view – appears around the interpretation of the concept "assembly", "public domain" and the term "operational area".

It is not clear, whether the appearance of one person or a few persons on certain scenes willing to express their opinion is subjected to ARA – presumably not – and in particular a press conference held in a public place is an assembly or not. These questions are not detailed in the ARA. ARA contains a definition of the public domain: area, road, street, and square, that can be used by everyone without restriction [Article 15 a)]. From this definition derives, that a public cemetery is not a public domain (in the sense of the ARA), for there is a restriction in the time of usage. The situation about ambiguous places could be cleared, if a not exhaustive taxation of public domain places would be inserted in ARA. As regards the term "operational area", it is not contained neither in the Act on the right to assembly, nor in the Act on the Police; thus it should not be used as a ground to restrict the freedom of peaceful assembly.

Freedom of association

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Committee of Social Rights adopted its Conclusions XVII-2 on Hungary in March 2005 (It concerns the reference period 1 January 2004 to 31 December 2004.). In respect of Article 5 (right to organise) of the European Social Charter, the Committee expressed that it needed further information in order to assess the situation. It asked the Hungarian Government to include the answers to its questions in the next reports to be submitted to the Council of Europe before 30 June 2005.[41]

The Government of the Republic of Hungary submitted its Third Report on the implementation of the European Social Charter in June 2005. The Report included the responses of the Government to comments and questions related to implementation of the articles requested by the Committee. The Government had indicated a change regarding the following issues (in connection with the right to association):[42]

1. As to the trade union membership of nationals of other Contracting Parties, the Government reported that the amended Article 8 of 1989. évi II. törvény az egyesülési jogról [Act II of 1989 on the Right to Association], in force from 1 May 2004 entitles any Hungarian citizen or non-Hungarian with a permanent residence permit, immigration permit, or provisional residence permit may be a member of the administration or management of any interest group if not banned from participation in and exercise of public affairs.

2. Regarding the protection of the right of workers not to join a union in law and in practice, the Government indicated that positive freedom of coalition, which means freedom to organise and voluntary membership, and includes a ban on discrimination in this regard, is no longer a part of Article 5 (1) of the 1992. évi XXII. törvény a Munka Törvénykönyvéről [Act XXII of 1992 on the Labour Code], but is regulated in detail by 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act CXXV of

[41] pp. 27-28.
http://www.coe.int/T/E/Human%5FRights/Esc/3%5FReporting%5Fprocedure/2_Recent_Conclusions/1_By_State/Social_Charter/XVII_2/Hungary.pdf

[42] pp. 48-53 of the report.
http://www.coe.int/T/E/Human%5FRights/Esc/3%5FReporting%5Fprocedure/1%5FState%5FReports/Social_Charter/XVIII_1/Hungary_3rd%20_report.pdf

2003 on and Promotion of Equal Opportunities; hereinafter: AETPEO]. Article 8 s) of the AETPEO qualifies all regulations under which one person or group is treated less favourably than another person or group in a comparable situation for any real or assumed circumstance, such as membership in an interest advocacy group, as discrimination.

3. As to a complete description of any representativeness criteria, the Government noted only (in the field of employment relationship of civil servants) one fact: where civil servants are employed, votes are added up every three years to determine representativeness (this has so far been done three times: in 1993, 1995, 1998, and following elections in the autumn of 2004 the adding up is scheduled for the spring of 2005. Elections originally mandated for 2001 were held in 2004.

4. In respect of the ban of automatic deductions from all workers' salaries including workers who are not union members, the Government reported that according to rules on deducting trade union dues, union dues are paid only by trade union members (who agreed to pay dues when they joined the union). Under Article 161.1 of the Labour Code, deductions from a worker's wages only may be effected by law, executive decision, or with the agreement of the employee, and there are no valid exceptions. Under 1991. évi XXIX. törvény a munkavállalói érdekképviseleti tagdíjfizetés önkéntességéről [Act XXIX of 1991 on the Voluntary Nature of Payment of Dues to Employee Interest Representation Groups], an employer is mandated to deduct union or other interest representation group dues from the worker's salary upon the written request of the worker and to transfer the amount set in the request to the union or interest representation group specified by the employee. This request loses its validity if employment is terminated, if the employee submits a second written statement invalidating the first, for which no reason need be given, or if the interest group given in the statement is terminated.

5. Furthermore, with regard to the activities of labour inspectors, the Committee recalled that, according to the comments of the Hungarian Trade Union Confederations, employers were not effectively deterred from anti-union behaviour because of low fines and ineffective procedures. It stressed that Article 5 of the Social Charter not only required that the law protected workers from any infringement of their right to organize but also required that this protection be effective in practice.

6. Finally, with regard to the right to organize within the police, the Committee considered that the system was in conformity with Article 5 of the Social Charter.

Legislative initiatives, national case law and practices of national authorities

1. Article 68 of the Draft Act on the Execution of Penalties and Measures does not mention the restriction of the freedom of association of the detainees.[43] According to Article 37 of the 1979. évi 11. törvényerejű rendelet a büntetések és intézkedések végrehajtásáról [Law-decree No. 11 of 1979. on the execution of penalties and measures] "the penitentiary institute can rely on the self-motivated associations in carrying out its tasks". The aforesaid regulation is missing from the Draft. Nowadays orchestras, drama groups and sports groups function in many prisons, and these kinds of activities significantly support the re-socialisation and education of the convicts; there was no motivation mentioned to reason the abolition of those.

2. The Metropolitan Court with its judgment of 1 December 2004 dissolved the Blood and Honour Cultural Association, and the Court of Appeal of Budapest as the second instance court with its decision delivered on 27 October 2005 upheld the first-instance judgment. In February 2003 the Metropolitan State Prosecutors Office according to Articles 14 and 16

[43] See also Article 6, Right to liberty and security

of the 1989. évi II. törvény az egyesülési jogról [Act II of 1989 on the Right to Association] sued the Association registered in 2003, and asked the court either to declare the winding-up of the organization because of the lack of the required minimum of 10 members, or alternatively dissolve it because of illegal activity. The reasoning of the judgement pointed out that the declared ideology and activity of the association violates the Treaty of Paris from 1947, in which Hungary undertook to prohibit all fascist organisations in the future.

Article 13. Freedom of the arts and sciences

Freedom of research and academic freedom

Legislative initiatives, national case law and practices of national authorities

On 23 May 2005 Parliament passed a new act on a felsőoktatásról szóló törvény [Act on higher education (hereinafter: NAHE)]. The President of the Republic referred the adopted but not yet promulgated act to the Constitutional Court for ex ante review. In the President's view the new strategic decision-making bodies, the institutional councils of the state-run higher education institutions introduced by NAHE would receive competences that violate the autonomy of higher education institutions, thus Article 70/G (1) of the Constitution which guarantees the freedom of science. Moreover, since Article 70/G (2) prescribes that only scientists are entitled to decide in questions of scientific truth and to determine the scientific value of research, it is also unconstitutional that the Government would be authorized to decide which scientific fields that can launch doctoral programmes. Furthermore, the provision that authorizes the Minister of Education as the maintaining authority to reorganize or dissolve the higher education institution if it does not comply with the requirement of economic and rational management (i.e., if the higher education institution transgresses its budget; its debt overdue for more than sixty days has reached twenty per cent of its budget for more than budgetary year), contradicts with Article 70/G of the Constitution. This authorization also contradicts Article 57 (1) of the Constitution which guarantees the right to remedy and Article 70/K of the Constitution providing that claims arising from infringement on fundamental rights may be brought before a court of law, since no remedy is provided against such decisions. Finally, it violates the requirement of legal certainty that it is not clear when NAHE becomes effective and the old act on higher education loses its effect.
In decision 41/2005 (X. 27.) AB határozat the Constitutional Court agreed with all the presidential objections and ruled that the NAHE is unconstitutional and cannot become effective.

According to the Constitutional Court it clearly violates the legal certainty requirement of the rule-of-law provision of the Constitution (Article 2 (1)) if the NAHE prescribes that the provisions of the old act on higher education can only be applied from the day of the effectiveness of the NAHE, i.e. 1 September 2005 if the introduction of the NAHE has not commenced.

As to the autonomy of state-run higher education institutions, the Constitutional Court based its reasoning on its precedential decisions. Decision 34/1994. (VI. 24.) AB határozat pointed out that freedom of scientific and artistic expression, the freedom to learn and to teach is an aspect of fundamental communication rights. Since the freedom of scientific expression is the manifestation of freedom of expression, the Constitutional Court's conclusions in Decision 30/1992. (V. 26.) AB határozat regarding the eminent role of free communication apply to the freedom of scientific expression as well. Although this right is not illimitable, the state may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Freedom of science means that only scientists are entitled to decide in questions of

scientific truth and to determine the scientific value of research. Deciding what amounts to science can also be decided by the members of the scientific community.
In decision 861/B/1996 the Constitutional Court ruled that the higher institution is subject of this freedom, which ensures for the professors, researchers and students the freedom of teaching, researching, studying and creative artistic activity.

The Constitutional Court emphasized that autonomy and independence do not only extend to the sensu stricto scientific, teaching and studying activities, but also to operational, economic and restructuring activities of the institutions. It is not unconstitutional per se if, in the course of distributing state subsidies, certain efficiency criteria are taken into account provided they are not alien to scientific consideration. These criteria can never be solely based on considerations of market utility or political expedience. It is also not unconstitutional to supervise the scientific or teaching activity of higher education institutions on economic grounds or to prescribe certain structural efficiency requirements.
As to the new strategic decision-making body, more than half of the members of the institutional council are appointed by the Senate of the higher education institution; other members are appointed by the Minister of Education. The president of the institutional council is the rector. Except for the rector, the members of the institutional council cannot be students or employees of the institution. Teaching activity or scientific degree is not a precondition of membership. Specialization in the given field is a precondition only in a few cases. Consequently, the Constitutional Court came to the conclusion that the institutional council cannot be regarded as self-governing body of the higher education institution. However, it has several competences that directly affect the scientific environment of the institution. Consequently, the competences of passing the innovative strategy regarding research and development and the council's right to restructure or dissolve the uneconomically operating unit or activity of the institution contradicts Article 70/G of the Constitution, since the institutional council may subordinate the scientific, teaching and research activity to its self-defined market considerations.

The Constitutional Court also found the Government's competence unconstitutional regarding the decision about those scientific fields that can launch doctoral programs, since NEHA does not guarantee the substantive participation of the subjects of institutional autonomy. This solution endangers the freedom of receiving scientific degree and professionalism of scientific branches.
Finally, the provisions that authorize the minister of education as the maintaining authority to reorganize or dissolve the higher education institution if it does not comply with the requirement of economic and rational management were also found unconstitutional. Dissolving by the minister could take place two ways: (1) if the institution does not comply with the requirement of economic and rational management (i.e., the higher education institution transgressed its budget, its debt overdue for more than sixty days has reached twenty per cent of its budget for more than budgetary year) or if (2) the entrance examinations are unsuccessful in three consecutive years. (The entrance examinations are deemed to be unsuccessful if the actual number of students does not come up to the seventy per cent of the number of students who can theoretically be admitted to the institution.) The reasoning stresses that complying with the requirement of economic and rational management per se does not violate the Constitution. However, the requirement of 'economic and rational management' has to be defined in a normative way that corresponds with scientific considerations.
As a result of precise, normative conditions, the future operation, restructuring and dissolving of higher education institutions would be the authority of the Minister of Education. The centralization of these competences to the management supervisor means the distraction of institutional autonomy and contradicts Article 70/G of the Constitution.
Since the Minister of Education cannot theoretically have such functions the Constitutional Court did not review the regulation of the NEHA regarding the availability of legal remedies against such management supervisory acts.

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

For the Constitutional Court's decision on the new act on higher education see Article 13, freedom of arts and sciences.

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities

1. In decision 35/2005. (IX. 29.) AB határozat the Constitutional Court – ex officio – ruled that there is an unconstitutional omission, since the legislation failed to harmonize 1976. évi 24. törvényerejű rendelet a kisajátításról [Law-Decree No. 24 of 1976 on Expropriation; hereinafter: Expropriation Law-Decree] with the requirements of Article 13 (2) of the Constitution. Parliament is obliged to pass the adequate legislation until 30 June 2007.
   The starting point of the case was a provision of 2000. évi C. törvény a számvitelről [Act C of 2000 on Accounting; hereinafter: ACA]. Article 77 (1) of ACA provides that other income means revenues not forming part of net sales revenues which arise in the course of regular operations (business activity), and which are shown neither under income from financial transactions nor under extraordinary income. According to Article 77 (2) b) of ACA compensation is regarded as 'other income'. The petitioner argued that Article 13 (2) of the Constitution requires full and unconditional compensation in case of expropriation. This requirement is not met because compensation counted as other income is subject to corporate taxation.
   As to Article 77 (2) b) of ACA, the Constitutional Court argued that the rule in question is of accounting and recording nature which serves to help the participants of the market to have objective information on the financial and earnings position of the undertakings. Consequently, it does not effect the constitutional requirement of compensation.
   However, since the regulation of expropriation was passed before the democratic transition the Constitutional Court – ex officio – reviewed the compatibility of the Expropriation Law-Decree with Article 13 (1)-(2) of the Constitution.
   The Constitutional Court pointed out the Expropriation Law-Decree was passed in a different social, economic and legal climate. In the center of its regulatory concept was the state as the sole executor of public-interest tasks. Due to the political transformation in the last fifteen years, most of these functions are now maintained by natural persons or corporations. The scope of assets and proprietors as subjects of expropriation has also changed. Although, the Expropriation Law-Decree was amended several times, its underlying regulatory concept has not been altered.
   The legislation has to guarantee that expropriation is permitted in cases when there is no other way of achieving a purpose that is indeed in the public interest. The fact that the Expropriation Law-Decree permits expropriation if it is related to a generally defined state function maintained either by the central or local government does not secure in itself that expropriation serves the public interest. Furthermore, Article 13 (2) of the Constitution prescribes full, unconditional and immediate compensation, a safeguard-rule of the right to property as a fundamental right. The Constitution provides value-guarantee for the proprietor in case of property distraction. Article 13 (2) of the Constitution read in conjunction with Article 8 (2) of the Constitution obliges the state in the form of objective

institutional protection to pass adequate legislation on a statutory level on the procedural and substantive rules of full, unconditional and immediate compensation. Since the Expropriation Law-Decree does not provide for such procedural and substantive guarantees, the Constitutional Court established an unconstitutional omission; thereby Parliament has to pass the adequate legislation until 30 June 2007.

2. In decision 1/2005 (II. 4.) AB határozat the Constitutional Court ruled upon the constitutionality of several provision of 1996. évi I. törvény a rádiózásról és televíziózásról [Act I of 1996 on Radio and Television Broadcasting; hereinafter: Media Act].
A petitioner argued that Article 32 (1), Article 53 (4) and Article 77 (5) requiring the National Radio and Television Board (hereinafter: Board), the Public Foundations and the Broadcasting Fund to have their accounts managed by the Hungarian State Treasury restricts the right of disposition protected by Article 13 of the Constitution.[44]
As to the right of disposition protected by Article 13 (1) of the Constitution, the Constitutional Court cited its decision 4/2004 (II. 20.) AB határozat declaring the mandatory account management of public foundations at the Hungarian State Treasury unconstitutional. The Constitutional Court applied this precedent analogically to Article 53 (4) of the Media Act and held that this statutory requirement does not differentiate between private and public financial assets, thus in relation to those financial assets that emanate from private sources restricts the right of disposition without public interest. The only purpose of the mandatory account management of public foundations by the Hungarian State Treasury is to increase the interest profit of the central budget which is not a legitimate purpose of restricting the fundamental right to property, therefore Article 53 (4) is unconstitutional.
The Constitutional Court went on differentiating the status of public foundations from the Board and the Broadcasting Fund. The Broadcasting Fund (hereinafter "Fund") is a segregated monetary fund, the responsibility of which is to support public service broadcasting, public broadcasters, non-profit-oriented broadcasters, public service broadcasts and programs, to preserve and further develop culture, to provide for the multicolored nature of broadcasts. The fund is a legal entity and part of the central budget. The manager of the Fund is the Board.
The Board is an independent legal entity under the supervision of Parliament. Its members are elected by Parliament. Its role is protect and promote the freedom of speech by helping broadcasters to appear on the market, by breaking down any information monopolies and preventing the creation of new ones, by protecting the independence of broadcasters; it pays attention to the enforcement of the constitutional principles of the freedom of the press and informs Parliament thereof. The Board is a sui generis state (budgetary) organ.
In decision 50/1998. (XI. 27.) AB határozat the Constitutional Court pointed out the state organs do not have fundamental rights vis-á-vis the state. Since according to the Media Act the Board and the Fund perform their duties as part of the state structure, thus the protection of Article 13 (1) cannot be related to them. Article 32 (1), Article 53 (4) and Article 77 (5) of the Media Act requiring the Board and the Broadcasting Fund to have their accounts managed by the Hungarian State Treasury neither restrict the right of disposition, nor dispose the interest income of the Board and Broadcasting Fund assets in a way that Article 13 (2) of the Constitution requiring full, immediate and just compensation in case of expropriation could be applicable.

[44] For the media pluralism aspect of the case, see Article 11, Freedom of expression and of information.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

1. The Parliament adopted 2005. évi XLVI törvény a magyar állampolgárságról szóló 1993. évi LV. törvény és a külföldiek beutazásáról és tartózkodásáról szóló 2001. évi XXXIX. törvény módosításáról [Act XLVI of 2005 on the Amendment of Act LV of 1993 on Hungarian Citizenship, and Act XXXIX on the Entry and Stay of Foreigners – latter is hereinafter: Aliens Act], in order to incorporate the provisions of the Council Directive 2003/86/EC of 22 September 2003 (Family Reunification Directive). The modification has introduced an affirmative action for refugees in the field of family reunification. The amendment contains the following provisions regarding to refugees:
   - the spouse of the refugee, if the marriage was contracted before arriving in Hungary;
   - their common under-age child, included adopted child;
   - the underage, economically dependent child of the refugee (included adopted child), if the refugee exercises parental supervisory rights;
   - the uder-age, economically dependent child of the spouse (incl. Adopted child), if the spouse exercises parental supervisory rights;
   - the direct line ascendant of first degree or legal guardian, if the refugee is an unaccompanied minor

   may be entitled to a permission to stay with a view to family reunification.
   The family link can be proved through all credible ways; the lack of written documentation cannot be a reason for rejection in case of refugees.
   The otherwise applicable conditions (livelihood, health insurance, accommodation) shall only be observed by the authority if the request for family reunification was submitted later than 3 months after the recognition as refugee.
   The amended text will enter into force on 1 January 2006.
   The amendment seems to resolve the most serious problem of the relevant Hungarian legislation; however some important concerns remain to be resolved.

2. According to the statistics of the UN High Commissioner for Refugees the number of asylum applications lodged in the third quarter of 2004 was 471. In the fourth quarter the Hungarian authorities received 384. In the first part of 2005 the number of the applications lodged was 403, and 362 in the second part. In the second and third quarter of 2005 there has been an increase with 3 per cent comparing to the whole year of 2004. This increase is not relevant if we compare with for example the year 2003 and 2004 (36 per cent decrease in 2004, compared to 2003).
   Until September 2005 the most applications came from Serbia and Montenegro (73). 43 applications lodged from China and 41 from Vietnam. Interestingly, in 2004 the most application (210) came from Georgian citizens, while until September 2005 the Hungarian authorities have received only 21 from Georgians.
   According to the Hungarian Helsinki Committee, the number of asylum seekers in the first half of 2005 (Jan. - Aug.) was 1065.

Positive aspects

1. According to Oltalomkeresők (an NGO assisting asylum-seekers) the practice of the refugee authority of the Office of Immigration and Nationality of the Hungarian Ministry of Interior (Bevándorlási és Állampolgársági Hivatal – hereinafter: OIN) in providing asylum-seekers with information has been improved. The OIN has own information publication, and the language skills of the staff have improved.

2. The Hungarian Helsinki Committee's experience shows that the OIN has recently started a practice of issuing residence permits to "persons authorised to stay (PAS)" for a two-year period, while previously one year was their maximum of validity (or even a shorter period).

Reasons for concern

1. In Hungarian legislation there is no special procedure applicable for refugees, except for the decisions taken at the airports. There is only a general procedure applying for all matters relating to the status of foreigners.[45]

2. In Hungary under certain conditions asylum seekers may still be detained for a maximum period of 12 months.
   It is also problematic that the principle of non-refoulement is sometimes only formally observed by alien policing authorities. Although state authorities must ex officio observe this provision and carry out a due assessment accordingly, sometimes the alien policing authority passes expulsion orders without a real examination, and relevant decisions fail to contain any reference thereto.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

The recognition rate of refugees has significantly increased. The number of asylum applications increased a little in 2005, compared to 2004.
In Hungary there are several civil organizations, which assist refugees. For example the Hungarian Helsinki Committee has a network to give free legal aid. There are Legal Clinics operating in three big Hungarian cities (Budapest, Debrecen, Győr), in which attorneys and law students try to give free legal aid to asylum seekers.

Positive aspects

There are some initiatives to integrate refugees into society and to integrate them into labour market. OIN has a Social and Welfare Department and several civil organisations, like the Oltalom Charity Society, Menedék Hungarian Association for Migrants, Mahatma Gandhi Human Rights Organization provide assistance to refugees in accessing labour market, reunifying families, learn Hungarian, computer skills, etc.

Reasons for concern

The special psychoterapetic aid is still not available for asylum seekers (although the 2003/9 EC Directive ordered it); only in case the asylum-seeker is in critical situation.
The drug supply for asylum seekers is irregular, although the pharmacies of refugee centers have to ensure the access to necessary drugs without delay. Similarly, only civil organizations offer professional help and treatment for tortured asylum-seekers.
Most refugees do not have the necessary background to start a new life and financial support is not sufficient. Unfortunately living conditions in detention facilities fall far below the standards provided for by the Reception Directive and most of the benefits are simply not accessible.
Since the UNHCR stopped giving financial aid, the employment of refugees in refugee camps is not operating anymore.

[45] ECRE country report Hungary 2004

Unaccompanied minors seeking asylum

Positive aspects

In January 2005 Menedék (Hungarian Association for Migrants) and the UNHCR organized a training to employees working at local authority's family help services, in order to point out the defencelessness of refugee families with special regard to minors' social, mental and language troubles.

Reasons for concern

Refugee Children's Home has financial problems because the Oltalom Charity Society cannot conclude an agreement with the OIN. Thus, this special institute may have to be closed.

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

Collective expulsions

Legislative initiatives, national case law and practices of national authorities

1. The amended 2005. évi XXXIX. törvény a külföldiek beutazásáról és tartózkodásáról (Act XXXIX of 2001 on the Entry and Stay of Foreigners – hereinafter: the Aliens Act) contains the following provisions regarding to expulsion:
   - During the expulsion process the client cannot petition the suspense of legal process.
   - The foreigner under the alien policing process of arrest cannot petition the suspense of this process, and there is no chance for equity process.
   - Against the deportation under fulfilment the foreigner cannot petition the suspense of this process and there is no chance for equity process.
   - In the alien policing cases the authority has the obligation to inform the foreigner in his/her mother tongue.

2. In the case of a Serbian Roma from Kosovo the OIN neglected the UNHCR's Position on the Continued International Protection Needs of Individuals from Kosovo and denied the asylum plea. This document, which was issued in March 2005, contains that Kosovo Serb and Roma communities are in a minority situation and these groups should continue to benefit from international protection in countries of asylum under the 1951 Convention or complementary forms of protection depending on the circumstances of claims.
   The petitioner interpreted that he had been discriminated in Kosovo and now he fears of persecution. Despite this fact the OIN Department of Bicske decided that there is no possibility for applying the principle of non-refoulement, because there is no evidence of persecution.

3. In the case of a Kurdish person from Turkey, the OIN also denied the asylum plea. Although in 2003 he substantiated that he was ill-treated and tortured by the police. However, the authority explained that in 2005 the Turkish legislation made a lot of changes in human rights in order to start accession negotiations with EU. On appeal, the Metropolitan Court affirmed the decision.

CHAPTER III. EQUALITY

Article 20. Equality before the law

Equality before the law

Legislative initiatives, national case law and practices of national authorities

On 4 March 1999, a man was robbed and murdered in the village of Újszentmargita in Northeastern Hungary. On the same evening and sometime before the incident, Mr. Ferenc Burka Jr. (28) and his father, Mr. Ferenc Burka Sr. (48), both Romani men, had a few drinks together in a local bar. On the following day, the two men were arrested and an investigation was initiated against them. Two witness testimonies were considered sufficient evidence for an indictment. The first was the bartender's witness statement, according to which the two Romani men had seen a large amount of money in the possession of the victim on that day. The second was the testimony of a villager who reportedly saw the two Romani men walking in the direction of the victim's house, where the murder took place.

The investigation produced solely circumstantial evidence. An officer of the local police department even stated during one of the court hearings, "I immediately thought of Ferenc Burka. It was intuition. I thought he was probably the perpetrator." During proceedings, the prosecutor stated that Ferenc Burka Jr. had burnt and buried the boots of his father, "a common perpetratoral behaviour of Gypsies when they commit a murder and robbery". However, no buried boots – destroyed or otherwise – were actually found. The prosecutor took as evidence that a pair of boots had been burned and buried the fact that only one pair of boots was found in the house. Furthermore, the prosector described as "suspicious" the fact that, at the time of arrest, the Burkas had washed their clothes and hung them out to dry. During the investigation, police disregarded the fact that they discovered a red hair in victim's hand when they found the body and that the Burkas both have black hair.
On 2 April 2002, having been found guilty, the two men were sentenced to 15 and 13 years imprisonment. They began serving the sentences on 16 March 1999.

After lawyers engaged by the ERRC appealed the decision, the case went to the Szeged Judicial Court in September 2003. This tribunal quashed the lower court judgment and ordered a retrial. In March 2005, in the repeated procedure, the two men were ordered released from custody but were placed under house arrest. They had, by that time, already spent exactly 2100 days in a penitentiary. In the meantime, other witnesses came forward who testified to their innocence. Witnesses also fingered another man, Mr. L.T., who reportedly stated that he was the actual perpetrator and had carried out the deed because he thought the victim had stolen some construction tools from him.

On 9 July 2005, on the basis of extensive argumentation indicating that the Burkas had been wrongly convicted, the Hajdú-Bihar County Court acquitted the two men. The prosecutor has appealed the decision and, therefore, the judgment is not yet legally binding. The proceedings confirm that racial animus continues to play a significant role in the Hungarian criminal justice system.[46]

[46] Available at http://www.errc.org/cikk.php?cikk=2355

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

1. The Faculty of Theology of the Károli Gáspár University of the Hungarian Reformed Church educates theologians, ministers of religions and teachers of religious education. On 10 October 2003 the Faculty Council adopted a statement on the religious and moral approach towards homosexuality, claiming that the University cannot support – on the basis of the Bible – the homosexual relationships, marriage of homosexual couples, adoption, or the training of teachers of religion and ministers who are homosexually active. On the same day, a student was expelled from the University, as his openly acknowledged homosexuality made him inadequate for the career of a minister. The Háttér Support Society for LMBT People (plaintiff) submitted an action on 10 February 2004, alleging the breach of the right to equal treatment based on Article 76 of Civil Code. As the factual basis of its action plaintiff pointed to the University's statement adopted on 10 October 2003 and publicized on the Internet on 4 January 2004: the perspectives concerning homosexuality expounded by the respondent serve as principal basis for the practice, which makes the possibility of participating in education dependent upon sexual orientation. By excluding those leading or popularizing a homosexual lifestyle from the education of ministers and theology-teachers, the respondent regards heterosexuality as a precondition for admission to this education.
   The first and second instance court dismissed the petition. The Court of Appeals acting as the second instance forum among other reasons emphasized: in case of religious-based education, the institute is entitled to word its religious views and principles, to express a standpoint fitting into its moral horizon and religious dogmas and to make decisions concerning the suitability criteria for the profession of minister in line with these views. In the respondent's institute, before starting their studies, the minister and religion-teacher candidates note this and take a voluntary oath to respect the dogmas of the Church and the regulations of the Faculty Council. Since the contested statement was based on the religious principles and moral beliefs of the Reformed Church, the respondent did not arbitrarily discriminate and did not exceed the limits of the constitutionally guaranteed freedom to freely express one's opinion.
   The plaintiff submitted a motion for supervision to the Supreme Court. The Supreme Court found that the 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act CXXV of 2003 on Equal Treatment an Promotion of Equal Opportunities; hereinafter: AETPEO], which was entered into force on 27 January 2004 was applicable to the case: the educational and higher education institutes are obliged to respect the requirement of equal treatment in terms of establishing legal relationships, proceeding and making institutional decisions. This regulation also applies to higher education institutes that are founded by Church but operate in accordance with the provisions of the 1993. évi LXXX. törvény a felsőoktatásról [Act LXXX of 1993 on Higher Education] and are accredited by the state.
   In line with the spirit of the statement adopted on 10 October 2003 the respondent passed a decree according to which those participating in the education of ministers or religion-teachers shall be subjected to regular "suitability qualification", where the lifestyle of the particular person will be examined. Furthermore, there was evidence in the lawsuit proving that the respondent did apply against one of its students participating in ministers' education the principles included in the statement. Therefore the respondent's statement provided a principal basis for the practice, in which people wanting to participate in the education of ministers and religion-teachers are differentiated on the basis of sexual orientation and those represented by the plaintiff, namely homosexuals, are excluded from education. The Supreme Court established that the respondent's statement was, according

to subparagraph (1) Article 7 of AETPEO, a disposition that discriminates against those who want to participate in the education of ministers' and religion-teachers' and who publicly display their homosexuality on the basis of sexual orientation.
According to the Act in the lawsuit the University had to prove that
a) he did respect the requirement of equal treatment, or
b) in the given legal relationship he was not obliged to respect the requirement of equal treatment.
Article 7 subparagraph (2) stipulates that dispositions based on attributes enumerated in Article 8 shall not be deemed breach of the requirement of equal treatment if the differentiation had rational basis directly related to the legal relationship when given a detached weighing.
The University (irrespective of the fact that he receives governmental subsidy), displayed the morality of the Reformed Church in the minister's and religion-teacher's education in a legitimate and unsupervisable way. This was exactly what was included in the contested statement: that the respondent wanted to keep away from theology education those publicly displaying their homosexuality. The respondent's statement was concerned with the legal relationship involved in the education of ministers and religion-teachers were consistent with the religious principles of the Church and therefore can be considered rational and justifiable reasons. Consequently, the Respondent was not obliged to respect the requirement of equal treatment.

2. In decision 4/2005 (II. 22.) AB határozat the Constitutional Court declared unconstitutional several provisions of a Budapest 3rd District Local Authority decree regulating social housing. The petitioner ERRC (European Roma Rights Center) challenged the decree on a number of grounds, including the fact that it has a disproportionate negative impact on Roma.
Roma currently face crisis conditions in the field of housing in Hungary. While the international community has strengthened its commitments to the right to adequate housing and to the need to provide housing to the most vulnerable sectors of society, Hungary has dramatically weakened protections available to tenants. In particular, in May 2000, legislation entered into effect allowing the notary – an employee of the municipality – to order evictions absent a court procedure. A notary decision ordering eviction must be implemented within eight days, and appeals are not suspensive.
Local authorities in Hungary have in recent years also sold off significant amounts of the public (including social) housing stocks, creating a situation in which Hungary may not be able to meet in practice the housing needs of the poor and/or extremely poor. Owing to widespread anti-Romani sentiment existing in Hungary, allegations of racial discrimination in the allocation of public housing are often plausible.
In its February 22 decision, the Constitutional Court found illegal provisions of the Budapest 3rd District Local Authority housing decree excluding from eligibility for social housing persons who previously occupied apartments or other premises in violation of the owners' property rights or without legal entitlement. The Court held that this decree was in conflict with the Hungarian Housing Act, as it interferes with the requirement that local governments provide housing to the socially weak. The Court reaffirmed that the criteria for social housing must be social in nature.
The decision is particularly important in developing the right to adequate housing under Hungarian domestic law. Similar complaints brought by the ERRC in November 2004 challenging the local housing regulations of four other Hungarian municipalities are currently pending with the Hungarian Constitutional Court.

3. In decision 28/2005. (VII. 14.) AB határozat the Constitutional Court examined the newly introduced system of the school leaving and university entrance exams. The main change was the introduction of a two-level school-leaving exam. The new system applied to those students who started their high school studies in the ninth grade until 1 September 2001.

With the two-level school leaving exam the entrance exam to universities has been abolished.
The petitioners claimed that the new system violates the prohibition of discrimination (Article 70/A of the Constitution), as those students who finish their studies this year have no opportunity to take part in the state financed higher education with the same chances as those who took their school leaving-exam in the previous years. The differential treatment – in the view of the petitioners – is the result of the fact that the grade received in the school leaving-exam equals fewer points in the entrance procedure. Beside the violation of Article 70/A of the Constitution, the petitioners also alleged the violation of Article 70/F (right to education).
The Court rejected the petitions on the following grounds. The Government in the entrance procedure does not differentiate among students on the basis of the date and mode of the school-leaving exam. The rules of the Government Order are equally applicable to everyone applying to a university. The Constitutional Court examined whether those who took their school leaving exam in the old system and those who did theirs according to the newly introduced rules form a homogenous group, thus the differential treatment could be assessed on the basis of Article 70/A of the Constitution. The Court emphasized: the main characteristic according to which a group might be formed is the fact that the rules of the entrance into higher education is the same for all students no matter when (s)he has taken the school leaving-exam. As the differential treatment does not affect the right to education enshrined in Article 70/H of the Constitution, the Constitutional Court merely examined whether the differential treatment has any reasonable justification, namely it has not been arbitrary. The Court found that the regulation pursued reasonable aimes. However, the Justices underlined that in introducing the new system the legislator failed to observe those requirements – especially, the adequate time necessary for the preparation – that follow from the rule of law. The Constitutional Court – acting ex officio – found an unconstitutional omission. It emphasized that the system lacks the necessary guarantees that would provide the equal treatment under Article 70/A of the Constitution. The Parliament has to amend the Act accordingly by 31 December 2005.

4. The decision 32/2005. (IX. 15.) AB határozat concerned the issue of the salary for the 13th month of the civil servants awarded by the 1993. évi XXII. törvény a Munka Törvénykönyvéről [Act XXII of 1993 on the Labour Code], and other acts concerning the status of civil servants. According to the acts those persons were – with certain exceptions – eligible for this benefit, who had been employed as civil servant on 1 January each year. The petitioners claimed the unconstitutionality of these provisions as being contrary to the prohibition of discrimination (Article 70/A of the Constitution).
The starting point of the Constitutional Court was the following: regulating the benefits that are not considered to be salary, refers to a non-fundamental right, thus it belongs to the discretion of the legislator. The legislator freely decides who receives certain benefits, but the decision taken cannot be arbitrary. According to the provisions at issue, the employee is entitled to receive his 13th month salary "each calendar year", but the condition mentioned above also applies. The Court underlined: on the basis of the relevant provisions the members of the group treated to be homogenous by the legislator can be actually described with distinct features as regards the starting date and the duration of their employment in a certain calendar year. The rules fail to differentiate between employers who were not employed on 1 January, but worked for a longer period during the year and those who had a civil servant status on the first day of the year. The differential treatment does not have any reasonable justification, thus the Constitutional Court found it arbitrary, and for these reasons unconstitutional.

Positive aspects

The 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, hereinafter: AETPEO] ordered the establishment of a public administrative body with the overall responsibility of ensuring the compliance with the principle of equal treatment. The Authority for Equal Treatment has begun to operate in March 2005. Among others, based on an application or in certain cases, ex officio the Authority conducts an investigation to establish whether the principle of equal treatment has been violated and make a decision on the basis of the investigation. It is entitled to bring actions itself – in the interest of the public – for the protection of the rights of persons or groups. The Authority shall review and comment on drafts of legal acts concerning equal treatment; make proposals concerning governmental decisions and legislation pertaining to equal treatment; and regularly inform the public and the Government about the situation concerning the enforcement of equal treatment. In the course of performing its duties, it co-operates with the social and representation organisations and the relevant state bodies, and continually provides information to those concerned and offers help with acting against the violation of equal treatment. The staff of the Authority assists in the preparation of governmental reports to international organisations concerning the principle of equal treatment, including the Commission of the European Union concerning the harmonisation of directives on equal treatment. Each year the Authority prepares an annual report to the Government on its activity and experiences obtained during the year concerned.
For the procedures of the Authority the rules on the general procedures of public administration duly apply.
As of 30 September 570 complaints were registered at the Authority. So far 102 decisions have been delivered. 73 complaints were rejected, since they related to questions not falling under the competences of the Authority, as legal advice, general information inquiry. In 15 cases the petitioner withdrew the complaint. 10 cases (only ten per cent of the decisions) ended with finding the violation of the AETPEO, and only in 8 cases out of the 102 requested the parties the judicial review of the decision. In 3 cases the court already delivered it judgment and upheld the decision taken by the authority.[47]
The Authority shall perform its duties in co-operation with an advisory body whose members have extensive experience in the protection of human rights and in enforcing the principle of equal treatment. The advisory committee has been set up in summer 2005.

Fight against incitement to racial, ethnic, national or religious discrimination

Legislative initiatives, national case law and practices of national authorities

1. Minister of Justice, József Petrétei announced in 5 September, 2005 that the experts of the Ministry of Justice are still looking for the constitutional means of tackling hate speech by criminal law.
   As it was reported last year, on 8 December 2003 Parliament adopted the modification of the Criminal Code, which would have made hate speech criminalization stricter. On 22 December, 2003 the President of the Republic submitted the already adopted but not yet signed Act on amending the hate speech provisions of the Criminal Code to the Constitution Court for ex ante constitutional review since he considered it unconstitutional. In its decision 18/2004. (V. 25.) AB határozat the Constitutional Court ruled that adopted but not yet enacted amendment to the Criminal Code is unconstitutional. The Court, applying its earlier precedents, emphasized again that it would not accept content-based restriction of communication. According to the Constitutional Court communication can only be punished if it directly and foreseeable threatens

[47] See the website of the Authority for Equal Treatment at www.egyenlobanasmod.hu.

individual (constitutional) rights. Since the amendment would have punished certain communications that's effect on the audience fall below this threshold, the amendment would restrict free speech unnecessarily and disproportionately, thus unconstitutionally.
According to the Justice Ministry, besides the criminal law aspect of the issue, it would highly improve the situation if the affected groups would be able to file civil actions against actions that are capable of stirring hostility against minorities. Standing could be granted to groups representing the given minority in cases where there is no individualized victim. Extracriminal sanctions are also capable of retaining people from these acts, for example, considerable amount of damages can be more effective than suspended imprisonment.

2. In February and May 2005 a computer game called 'Oláh Action' appeared on the Internet. The players have to go from county to county in Hungary and liquidate the Roma population of the county in question. A non-governmental organization, the Legal Defense Bureau for National and Ethnic Minority Rights (Nemzeti és Etnikai Kisebbségi Jogvédő Iroda) initiated a criminal procedure at the Metropolitan Police Headquarters of Budapest since the game constitutes incitement to hatred penalized by Article 269 of 1978. évi IV. törvény a Büntető Törvénykönyvről [Act VI of 1978 on the Criminal Code] against the Roma population.
The police ceased the investigation. In its decision the police argued that although the game reflects contempt against the Roma community it does not amount to incitement within the meaning of the Criminal Code.
On 15 July 2005 the Parliamentary Commissioner for Citizen Rights and the Parliamentary Commissioner for Ethnic and Minority Rights issued a joint communiqué in which they characterized the game as an abuse of the freedom of speech, even if it does not constitute an incitement of hatred within the meaning of Criminal Code. In their opinion the game violates the dignity of the Roma community as a whole and the individual members of the Roma community as well and irreconcilable with the fundamental principles and values of the Constitution and the international human rights conventions.

Reasons for concern

On 8 May 2005, according to reports widely circulated in the Hungarian media, József Patai, a fifteen-year-old Romani youth was stabbed in the stomach by one of a group of six persons shortly after he boarded a bus at Budapest's Moszkva tér with two non-Romani friends. The group of six persons in the company of the perpetrator, as well as the perpetrator himself, were reportedly dressed in uniforms, helmets and boots, and some were reportedly equipped with shields. Two of the members of the group were reportedly armed with swords. The attacker reportedly singled out József from among a bus full of persons who had taken notice of the group and stabbed him after shouting "What are you staring at?" When one of József's friends started shouting for help, the bus driver opened the doors of the bus, which was just about to leave, and the assailant as well as the five other persons with him exited the bus. The alleged perpetrator considered himself as member of the Roma community, and until now the investigation has failed to reveal whether the act had any kind of racial motivation.

The European Roma Rights Center (ERRC) noted that the case is not the only occasion on which police authorities have downplayed the role of race in a serious physical assault on Romani persons. To name only one particularly graphic example, on May 28, 1999, a Romani youth named Krisztián Mohácsi was found stabbed to death in the town of Göd, Hungary. A local inhabitant reportedly heard the boy shouting and ran to find him lying near a railroad crossing. The 14-year-old victim reportedly named his attackers before dying at the scene of the attack. Police stated only hours after the attack that they ruled out racial motivation in the attack since the suspects allegedly took 50,000 Hungarian forints (approximately 200 Euros) from the victim at the time of killing. The speed with which investigators discounted the

possibility of racial animus gave rise to complaints by local human rights groups that the Hungarian Police would "deny first and investigate later".

These assaults on Romani persons in Hungary highlight the need for Hungarian police to make public the standards according to which they investigate crimes to determine whether they may be motivated or otherwise animated by racial hostility. It is entirely unclear whether the current criteria applied by police are capable of identifying race as a factor, and thereby pinpointing the particular and significantly aggravating role of race. Absent public debate on the methods and criteria police apply when evaluating crimes to assess whether they are racially motivated, a state of crisis of confidence reigns among significant sectors of the population as to the ability of the police to tackle the socially corrosive fact of racially motivated crime in Hungary. In addition, the public as a whole is denied a full accounting of this disturbing phenomenon afoot in today's Hungary.

Remedies available to the victims of discimination

Legislative initiatives, national case law and practices of national authorities

About the establishment of the Authority for Equal Opportunities see the details under Fight against discrimination.

Reasons for concern

In a case in which the applicant claimed the violation of the AETPEO as she was refused to be considered to be employed in a grocery store. The applicant is of Roma origin and she – having the necessary qualification for it – in the presence of a human rights defender called the shop. The shop posted an advertisement in the local newspaper on that very day, and after the introduction they told the applicant that the job is no longer available. After this, the human rights defender made the call and he got positive reply, and they asked him to come back a few days later. The applicant in the procedure before the Authority claimed that she has been discriminated on the basis of ethnic origin since most of the people in that settlement with the same name as her belong to the Roma minority. As the human rights defender supported her claim, the Authority failed to accept the result of the testing.
Similarly, one of the first cases the Authority for Equal Treatment dealt with raises concerns about the way assessing the evidence presented by the applicant. In a small primary school one Roma student took a German dictionary after the classes. The director of the school officially warned the pupil. The parents of the child claimed that the sanction applied by the director is too serious for the act committed: the director humiliated the student in front of the whole school, and created a hostile environment around him. The Authority found that the sanction applied is more serious than the one prescribed by the Code of Conduct of the school, but failed to find a casual link between the measure and the ethnic origin of the student. Thus, the complaint of the parents was rejected.

Several cases from the practice of the Authority of Equal Treatment (including the above mentioned ones) show that the Authority fails to apply the principle of shifting of the burden of proof as required by the relevant European Union Directives. The representatives of the Authority claim that the requirement of the reverse burden of proof is hardly applicable in their work: as an administrative institutition in its procedures the Authority has to carry out investigation into the relevant facts of the case, ie. not the parties provide evidence. This approach is in compliance with Article 50 (1) of 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól (Act CXL of 2004 on the General Rules of Administrative Authorities and Services), which declares: the acting administrative organ shall collect all the information required to make a decision; and if the information is not available, ex officio or on motion of the parties carries out an evidence collecting procedure. The interpretation of the Authority is supported by the commentary issued to the AETPEO as

well. However, this raises two main concerns. First, this approach is not in compliance with the EU Directives. Second, proving the casual link – as desired by the Authority – in many cases is impossible, thus the procedure does not result in finding a violation. According to Article 19 (1) of the AETPEO the injured party must prove that (a) the injured person or group has suffered a disadvantage, and (b) the injured party or group possesses a characteristic protected by the AETPEO. If these requirements are met, the other party shall prove that (a) it has observed, or (b) in respect of the relevant relationship was not obliged to observe the principle of equal treatment. By trying to establish a casual link between the damage or detriment caused and the allegedly unlawful act, the Authority itself exempts the other party from its procedural duty to provide evidence for observing the principle of equal treatment.

Positive actions aiming at the professional integration of certain groups

Positive aspects

The Authority for Equal Treatment had several cases concerning employment discrimination against Roma. Generally, those cases that were examined on the merits by the Authority ended with friendly settlement, as the former employers in the procedure expressed their will either to set back the previous employment relationship or to offer a new position as soon as they have the opportunity to do so.

Protection of Gypsies/Roma

Legislative initiatives, national case law and practices of national authorities

Case-law concerning the denial of access to bars

1. The Authority for Equal Treatment in its decision delivered on 12 July 2005 fined for 500.000 Forints (approximately 2000 Euros) the limited company the employee of which refused to serve a Roma family in a non-stop bar in Kalocsa. The shopkeeper claimed that the place is “not reserved for Roma”, and the employee threatened the family, including two minors, by using his firearm in case they are unwilling to leave. The Authority for Equal Treatment found that the employee and thus the company violated the requirement of equal treatment. The applicants were represented by the Legal Defense Bureau for National and Ethnic Minorities that expressed its hope the amount of the fine will deter others from unlawful discrimination.

2. In one of the first Roma rights decisions issued under Hungary's comprehensive anti-discrimination law in June 2005, a discotheque in the town of Nagyhalász, in Northeastern Hungary, has been fined the Hungarian forint equivalent of approximately 2400 Euros for discriminating against Roma. On 10 April 2004, Ms. Agnes Rado and three other young people, two of whom were, like Ms. Rado, Romani, were turned away by guards at the door of the Julia Central Discobar in the town of Nagyhalász, for the stated reason that they were not “regular guests”. Non-Roma coming after them managed to enter without any identification or having questions asked of them. In the framework of a joint litigation project with the ERRC, the Budapest-based NGO Legal Defense Bureau for National and Ethnic Minorities (NEKI) conducted a test of the disco on 12 June 2004, to determine whether the actions was racially discriminating or not. The tests ascertained that Roma were banned from entering the bar, while non-Roma were allowed entrance. On the basis of the evidence gathered, a lawsuit was filed in which violations of personal rights, based on the infringement of the right to equal treatment, as regulated by Article 76 of the Hungarian Civil Code, as well as by Articles 8 and 30(1) of Hungary's new anti-discrimination law, were alleged. It was also noted in submissions that under Hungary's anti-discrimination law, adopted to comply with EU rules banning discrimination, where it has been established that discrimination has taken place, the burden of proof shifts to the

respondent. On 13 June 2005, the Szabolcs-Szatmár-Bereg County Court held that the Julia Central Ltd., operating the Julia Central Discobar in Nagyhalász, violated the plaintiff's right to dignity and infringed the requirement of equal treatment. The court awarded 150,000 Hungarian forints each (approximately 600 EUR) in non-pecuniary damages to Ms. Rado and to the other three persons concerned. The Julia Central Ltd. was further ordered to refrain from further violations, and was ordered to post the court's decision at the discotheque for two months.

3. In a case brought by the ERRC together with local counsel, a Budapest court has awarded damages to two Romani men after they were barred from entrance to the discotheque Zöld Pardon, a popular local nightclub. The decision is final and binding.
   The facts of the case are as follows: On 14 September 2002, two Romani men accompanied by two women tried to enter a popular open air club called Zöld Pardon in Budapest. The two women – one of them Romani, both had white skin – entered the club easily, whereas the two men with dark skin were asked to provide identity documents. The two men asked for an explanation as to why they were being refused entrance, because in the meanwhile, they saw many young people entering the place without being asked for identity papers. However, even after one of the men had identified himself, the two plaintiffs were not allowed to enter the club and they ultimately left the premises. On the basis of the witness testimonies and the recorded video evidence, a lawsuit was filed in which violations of personal rights were alleged, based on the infringement of the right to equal treatment, as regulated i.e. by Article 76 of the Hungarian Civil Code, as well as by Articles 2(1) of Convention for Elimination of All Forms Of Racial Discrimination. The case was brought prior to the adoption by the Hungarian legislature, in December 2003 of a comprehensive anti-discrimination law. A first instance court refused the complaint on 16 September 2004. However, on appeal, on 25 August 2005, the Metropolitan Court held that the Zöld Pardon Ltd. and the Doorman-Sec Ltd. operating the Zöld Pardon Club in Budapest, violated the plaintiffs' right to dignity. The court did not find an infringement of the requirement of equal treatment based on racial discrimination, apparently because Hungary's anti-discrimination law had not yet been adopted at the time the incident took place. The judge however stated that security guards are not entitled to check the identity documents of prospective guests, a key finding with implications for future cases.
   The court awarded 100,000 Hungarian Forints (approximately 400 EUR) in non-pecuniary damages to each of the victims. Zöld Pardon Ltd. and Doorman-Sec Ltd. were further ordered to refrain from future violations, and were ordered to send a letter of apology to the two Romani men within 15 days. The decision is legally binding.

4. The Authority for Equal Treatment fined for 400.000 Forints (appr. 1600 Euros) a company running a bar as the security guards prevented young Roma people from entering the bar. The Authority found that the company infringed the requirement of equal treatment as it rejected to provide its service on the basis of belonging to an ethnic minority.

Discrimination in Employment

The Labour Court fined the security company employing security guards for discriminating against Roma people in their employment procedure. A Roma man who has all the necessary certificates applied for a job advertised in a newspaper. He filled the form, but no further communication was made from the company. One and a half years later he saw the advertisement again, but this time the woman in charge of employment did not even let him to fill out the registration form. Shortly after he reapplied, but an employee told him that the company does not employ persons of Roma origin. First he sought remedy from the employment supervisory authority. In the procedure the manager of the company admitted that they do not employ Roma, as their partners requested so. The authority fined the company, but did not award compensation to the Roma man, stating that he had not suffered

any financial damage. The Labour Court – both on first and second instance – found that the company violated the requirements of AETPEO, awarded 500.000 Forints (appr. 2000 Euros) as non-pecuniary damages.

Reasons for concern

The Esély a Hátrányos Helyzetű Gyerekeknek Alapítvány (Chance for Children Foundation; hereinafter: CFCF) brought an action for violation of the principle of equal treatment against the Local Authority of Miskolc. The plaintiff claimed that the local authority acted against the AETPEO when – without redrawing the boundaries of the school districts – closed up several primary schools, and as a result segregated the Roma and disadvantaged children. The plaintiff CFCF also asked the Borsod-Abaúj-Zemplén County Court to declare that the defendant local authority did not fulfil its obligation to integrate Roma and disadvantaged children, as the measures applied resulted in discriminating against these disadvantaged children on the basis of ethnic belonging. The plaintiff claimed that the mere fact of segregation causes harm to children, as it questions their equal dignity.
As concerns the representation, the court emphasized: CFCF was not entitled to file a suit of public interest on behalf of disadvantaged children, since the disadvantaged status is not an essential characteristic of an individual's personality, even if social circumstances might influence one's personality.[48] Thus, the court examined only the motions submitted in relation to Roma children.
The first instance court required CFCF to provide evidence for the casual link between the disadvantage and the protected characteristic. In the view of CFCF, Article 19 (1) of AETPEO requires from the plaintiff only to prove that the injured person or group has suffered of a disadvantage, and this party or group possesses a characteristic listed in Article 8 of the AETPEO listing the protected features. In the court's reasoning the plaintiff ignored Article 8 and 9 of the AETPEO defining discrimination: Article 8 clearly indicates: provisions that result in a person or a group receiving a less favorable treatment relative to another person or group in a comparable situation because of her/his characteristic listed constitute direct discrimination. From this follows – in the court's opinion – that discrimination can occur only if there is a casual link between a provision and the disadvantage. Furthermore, Article 8 also presupposes that the violation of the principle of equal treatment can be only the result of an active behavior. The burden of proof in relation to the disadvantage suffered covers to obligation to prove the existence, on one hand, of an active behavior, on the other hand, the casual link between the active behavior and the disadvantage.
Both parties used expert opinions as evidence. The court found that the opinions submitted by CFCF do not support the plaintiff's claim: the schools educational program and curriculum met the legal requirements and the local authority had no other choice but to approve them. As concerns the facilities related to education there are differences among the schools, but the court failed to find that these would have racial motivation, as the school district boundaries were drawn decades ago. Slumming of schools obviously affects their composition, but it cannot be expected from the local authority to treat these differences by closing existing schools and opening new institutions. These negative effects are independent from the respondent's activities.
The material needs of the schools cannot be covered solely by the state subsidy: with donations and grants the parents provide additional sources. In this sense those schools where well-off children study are in advantage, but this fact cannot be attributed to the respondent local authority. The court emphasized: access to benefits related to education is irrelevant for the case.
In its conclusion the court found: the respondent local authority by financially and administratively integrating primary schools acted lawfully. Professional integration – by adopting educational programs – is the task of the schools, and not of the local authority, thus the latter could not reject the approval of those as being unlawful. The respondent provided

[48] Article 20 (1) of AETEOP

sufficient evidence that in the present case it observed its legal duties, and the plaintiff could not prove the active behavior on behalf of the local authority. The claim of CFCF was rejected. The Foundation appeals against the judgment.[49]

Article 22. Cultural, religious and linguistic diversity

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

1. The Parliament adopted the Act on the modification of the election of representatives to the minority self-governments, and other acts relating to national and ethnic minorities (hereinafter: Act). The Act was adopted by the Parliament on 13 June 2005, and before promulgation, it was sent for preliminary review to the Constitutional Court by the President.
   In the petition the President emphasized: in his view the rules allowing an elected member of a local authority – if there was a certain number of people voting in the course of the election of minority self-governments – to become with a member of the minority self-government simply by making a statement, violate the following provisions of the Constitution:
   Article 2 (1): The Republic of Hungary is an independent, democratic constitutional state.
   Article 44 (1): Eligible voters exercise the right to local government through the representative body that they elect and by way of local referendum.
   Article 70 (1): All adult Hungarian citizens residing in the territory of the Republic of Hungary have the right to be elected and the right to vote in Parliamentary elections, local government elections or minority self-government elections, provided that they are present in the country on the day of the election or referendum, and furthermore to participate in national or local referenda or popular initiatives.
   Article (2): Persons residing in the territory of the Republic of Hungary as immigrants who do not have Hungarian citizenship also have the right to vote in local government elections of representatives and the mayor, as well as the right to participate in local referenda and popular initiatives, in accordance with the regulations of a separate law, provided that they are present in the country on the day of the election or referendum.
   Article 71 (1) Members of Parliament, members of representative bodies of local governments, mayors and the mayor of the Capital are elected by direct, secret ballot by voting citizens, based on their universal and equal right to vote.
   In decision 34/2005. (IX. 29.) AB határozat the Constitutional Court found that Article 68 (3) of the Act is unconstitutional. The Court underlined: the Constitution does not contain rules on how minority self-governments shall be created. However, when assessing the case, one should bear in mind Hungary's international obligations and what kind of international expectations should be fulfilled. The Court found that the state has to secure – in any way – the participation of minorities in the public affairs; this requirement is closely linked to the basic notions of democracy, human rights and rule of law; in designing the electoral framework, besides the administrative and electoral features of the country, the special characteristics of the minorities also have to be reflected; and finally, the existing international obligation do not exclude the limitation of the right to vote, but it cannot result in the discrimination of minorities.
   As regards Article 71 (1) of the Constitution, the equality of the right to vote the Court emphasized: if compared to Article 70/A (general non-discrimination clause) it is a special rule, and it guarantees that every voting citizen has the same number of votes as the others, and his vote is of the same value when it comes counting the votes cast. The examined provision of the Act prescribed a double right to vote in relation to the members of

[49] http://www.cfcf.hu/mutat2.php?site=ugyek&file=20051212.txt

assemblies the local authorities. The constitutional review focused on the issue whether the effective exercise of the constitutional rights of people belonging to ethnic and national minorities can constitutionally result in the breach of the 'one person, one vote' principle.
According to the settled case-law of the Constitutional Court the standard test in similar cases involving institutional protection is not the necessity-proportionality test, but it will depend on the constitutional tasks of the institution at issue. On the basis of the above reasoning the Court found that Article 68 (3) of the Act is not the only possible solution, it is not necessary and is contrary to Article 71 (1) of the Constitution.
The Court also found that the requirements of legitimate exercise of power and the rule of law apply not only to the state institutions, but on the local authorities as well.

2. The Parliament on 17 October 2005 re-adopted the 2005. évi CXIV. törvény a kisebbségi önkormányzati képviselők választásáról, valamint a nemzeti és etnikai kisebbségekre vonatkozó egyes törvények módosításáról [Act CXIV of 2005 on the Election of Members of Minority Self-government, and on the Modification of Certain Laws Relating to National and Ethnic Minorities; hereinafter: Act] – incorporating the guidelines provided by the Constitutional Court. According to Article 2 (1) of the Act everyone has a right to vote (both active and passive) in the election of minority self-governments who
   a) belongs to a national or ethnic minority defined in the Act on the rights of national and ethnic minorities, and expresses his affiliation with that specific minority;
   b) is Hungarian citizen
   c) has the right to vote in the election of local authorities and mayors, and
   d) is listed in the electoral register of minorities.
   A minority self-government election takes place if the number of persons listed in the register is at least thirty in a given settlement. The number of possible minority representatives is five, and each voter can vote for five candidates. In the election of the regional minority self-government the Act introduces an electoral voting system: members of the minority self-governments of the settlements of the region have the right to vote and they could be voted for. A regional self-governmental election is held if at least ten settlements in the region have minority self-governments. At regional level nine representatives are elected. The national minority self-government is elected in a similar system as the regional. A minority may have national self-government, if it has at least minority self-governments in four settlements. The number of representatives varies according to the number of self-governments organized locally.
   The registry of voters entitled to participate in the election of minority self-governments is maintained by the local electoral offices. A voter's name can appear only in one minority registry, otherwise all his/her registrations are invalid. The request for registration shall contain the following: the voter's name, address, identity number, his statement on belonging to a minority, and his/her signature. The head of the local electoral office decides on registration; he is entitled to check the citizen's nationality and right to vote. If the request contains all elements prescribed by law, registration cannot be rejected. Against the rejection a complaint may be filed with the head of the local electoral office (i.e. to the same person taking the decision.)
   The Act modified also the 1993. évi LXXVII. törvény a nemzeti és etnikai kisebbségek jogairól [Act LXXVII on the Rights of National and Ethnic Minorities]: it lays down the detailed rules of the activity of minority self-governments at all levels.

Positive aspects

1. In March 2005 the Ministry for Youth, Family and Social Affairs and for Equal Opportunities adopted a working document to the National Development-Policy Concept. The working document elaborates on the principles of implementing social cohesion and the horizontal consideration that ought to be taken into account. In relation to Roma the document affirms the following horizontal principles: non-discrimination and equal opportunities; the elimination both direct and indirect segregation; complexity; affirmative

actions; preservation of cultural identity; modernization; dividing the social and ethnical dimensions; and European cohesion.

2. In the framework of the "Social and housing integration model-program of the Romani neighborhoods" nine municipalities can initiate integration programs winding up poor Romani neighborhoods.
   The first nine villages are Dencsháza, Galambok, Hencida, Kerecsend, Szentgál, Táska, Tiszabő and Uszka. In these settlements the reconstructions can start already in 2005. This is the first large-scale social housing construction project in Hungary since the transition. The high incidence and spatial concentration of exclusion and deprivation in many municipalities raise the need for co-operation policies and measures that promote inclusion in a complex context.

Article 23. Equality between man and women

Gender discrimination in work and employment

Legislative initiatives, national case law and practices of national authorities

1. The Equal Treatment Authority[50], which was set up in February 2005, has not dealt with cases concerning discrimination based on sex. However, it has decided a case involving discrimination on the bases of motherhood or pregnancy. The authority responsible for labour issues offered two employment opportunities to a woman, who had been unemployed for long. The first place was the local authority seeking for administrator, the second was a primary school. In both cases she was rejected because she was planning to give birth to a child in the near future. When applying for the jobs she admitted that she was taking part in a program for artificial insemination, and for this reason she had to attend regularly consultations, occasionally during working hours. The Authority found the violation of equal treatment in relation with the local authority: although after the submission of the complaint to the Authority the local authority offered a contract to the woman, it discriminated against her on the basis of her (possible) motherhood. The school could successfully excuse itself claiming that she lacked the sufficient qualification and she could not accept a job requiring 8 hours of constant presence.

2. Similarly, the claims based on gender discrimination were rejected in the case, which was initiated by women, all of them more than 50 years old. They were fired from a travel agency, which later applied four new administrators, all of them around 30 years old. The Authority for Equal Treatment fined the company for 450.000 Forints (appr. 1800 Euros) for non-observing the requirement of equal treatment while discriminating among the employers on the basis of their age.

Remedies available to the victim of gender discrimination

Reasons for concern

In the framework of project on the Equal Opportunities for Women and Men: Monitoring law and practices in new member states and accession countries of the European Union the Open Society Network Women's Program issued a fact sheet on the situation of women in Hungary.[51] The statement welcomed the adoption of a comprehensive act on anti-discrimination, including those based on gender. However, it regrets that the act does not

[50] For details see Article 22 Non-discrimination
[51] Available at the following website: http://www.soros.org/initiatives/women/articles_publications/publications/equal_20050502/hungary.pdf

contain any special provisions on gender discrimination, e.g. the notion of harassment does not expressly refer to sexual harassment. Relying on the data of the Hungarian Report prepared by the Foundation for the Women of Hungary (Magyarországi Női Alapítvány - MONA)[52] the report claims that the gross average income of women is 19 percent lower than men's. Women are overrepresented in poorly paid state sector jobs such as healthcare and education, and are underrepresented in national politics. Gender equality concerns are not high on the policy agenda in Hungary, and 'gender mainstreaming' appearing in several strategic document is rather rhetoric than concrete plan of action. For these reasons both the OSI Network Women's Program and MONA recommend the elaboration of national gender equality machinery with an independent and distinctive structure and sufficient human and financial resources, together with a comprehensive strategy or action plan on gender equality.

Article 24. The rights of the child

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

On 13 September 2005 the European Roma Rights Center (a public interest organization based in Budapest, hereinafter: ERRC) submitted its shadow report to the United Nations Committee on the Rights of the Child. The Hungarian government submitted its periodic report in 2003, and the shadow report aims at giving an overview of the relevant changes, concerns since then.[53]
ERRC welcomes the adoption of the comprehensive anti-discrimination act (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról – Act CXXV. of 2003 on equal treatment and promotion of equal opportunities; hereinafter: AETPEO), however expresses its concerns as to the lack of a clear-cut non-discrimination rule applicable both to public and private spheres. Furthermore, the AETPEO does not consider racial discrimination as a particularly serious form of discrimination. In the view of ERRC the AETPEO does not give sufficiently detailed regulation on the acceptable evidence the victim or the representing non-governmental organization can bring to support his/her case. The report also questions the independence of the Equal Treatment Authority, which operates under the supervision of a minister, although it should function without state interference. In relation to non-discrimination, the report regrets that Hungary has not yet ratified Protocol no. 12 to the European Convention on Human Rights and Fundamental Freedoms.

Legislative initiatives, national case law and practices of national authorities

2005. évi XCI. törvény [Act XCI of 2005] modified Article 195 of 1978. évi IV. törvény a Büntető törvénykönyvről [Act IV of 1978 on the Criminal Code]. The Habeas Corpus Working Group expressed its worries about the modification initiated by the Government. The amendment modified the term of prison sentence for perpetrators committing sexual crimes against children under 12 years. Whereas according to the provision previously in force the possible sentence was 5 to 10 years imprisonment, the new law decreased this to 2 to 8 years if physical violence or threat against life or bodily integrity has remained unproven. The Government – without going into the details – emphasised that the provision in question in its previous version led to grave jurisprudential problems. The NGO Habeas Corpus looked through the case law and could not find any instances that would have proved these worries. The NGO recommended determining the definition of sexual abuses in a way that emphasises

[52] www.mona-hungary.org
[53] The report is available in English at www.errc.org

the lack of consent and not the exercise of violence. Violent sexual abuse shall be the constituent elements of aggravated sexual abuse. The NGO also suggested laying down a rule stating that any kind of sexual act with minors shall be prohibited, and that the minimum sentence be 5 years imprisonment. It has also been recommended to abolish the distinction between "assault against decency" (Article 198) and "rape" (Article 197), since the constituent elements are essentially the same; the only differing element is whether the crime involved sodomy or intercourse and the determination and proof of differentiating the two led to numerous difficulties.

Article 25. The rights of the elderly

Participation of the elderly to the public, social and cultural life

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

2005. évi XCVIII. törvény [Act XCVIII of 2005] promulgated the Additional Protocol to the European Social Charter of 1988 Article 4 of which declares the right of elderly persons to social protection. In Hungary the Charter entered into force on June 1, 2005.

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

For details on the Authority for Equal Treatment and its case-law see Article 21, Non-discrimination.

Reasons for concern

The third most important botanic garden in Budapest, the capital of Hungary has been sold. The garden has been kept by students living with physical disabilities, who lived near the garden; and it was also open for the general public, for excursionists and local inhabitants. The sale is not only problematic from the point of view of environmental protection, as private houses will be built on the territory of the large botanic garden, but it invokes ethical and legal concerns, since the former owner of the garden bequeathed the garden for the sole use of children with physical impairment. The director of the garden rejected the legal concerns with the argument that the purchase price will be used in the interest of handicapped children.[54]

Professional integration of persons with disabilities: positive actions and employment quotas

Legislative initiatives, national case law and practices of national authorities

2004. évi CXXIII. törvény [Act CXXIII of 2004] supporting those absent from the job market in the long term came into force on January 1, 2005. 2005. évi LXXIII. törvény [Act LXXIII of 2005] modified the above Act.
Under the category of incapacitated persons are those who, due to a change in their capacity to work following a deterioration in their health, have become permanently unfit to work to

[54] Svábhegyi zöld - Megszüntetik a mozgáskorlátozott gyerekek arborétumát, in Magyar Narancs, July 28, 2005, at: http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=11948

their full capacity in their original job without rehabilitation measures, but are not entitled to an old-age or disability pension, accident disability pension, old-age or disability allowance; or those who, as a result of an industrial accident or occupational disease, are entitled to an accident allowance and have become permanently unfit to work to their full capacity for their employer in their original job. The task of guaranteeing the employment of an incapacitated worker is incumbent upon the employer with whom the worker was employed when his incapacity to work was ascertained and with whom he had concluded a contract of employment. The employer must fulfil this task by guaranteeing suitable employment, providing the necessary training. In the first instance, the employer must employ the incapacitated worker in his original job or profession. If this proves impossible, the employer must find work for the employee within his field of activity – part-time or otherwise – where he can use his skills without any further deterioration in his health. To fulfil this task, the employer employing the incapacitated worker can claim financial assistance. If the reduction in the capacity to work does not exceed 50%, but the employee's income is below that which he earned prior to the reduction in his capacity to work, the State will supplement the employee's income (either in the long term or temporarily). If the employee's incapacity to work has been reduced to such an extent that no solution can be found to keep him in employment, but he is not entitled to claim a disability or accident disability pension, the State will provide him with social welfare in the form of a temporary allowance, regular social allowance or miner's injury allowance.

Reasonable accommodations

Legislative initiatives, national case law and practices of national authorities

The NGO De juRe Alapítvány [De juRe Foundation] is systematically monitoring failures of accommodation and represents clients with disability in court proceedings. Currently two cases are going on: first, because of the failure of reasonable accommodation of automatic teller machines according to the needs of individuals with visual impairments, and second, because of the failure of accommodation of the railway station Népliget Volán in Budapest. Ironically, the NGO called the interested disabled individuals' attention to the fact that in case they wish to be present during the trial procedure they should arrive well in time, because the court building is not accommodated and it takes some time until the guards carry the wheelchair users to the courtroom.[55]

Reasons for concern

Altogether 43 non-governmental organisations protest against the drastic decrease in social normatives planned for 2006. They summarised their concerns concerning the 2006 budget plan in an open letter addressed to the Prime Minister, the Minister of Equal Opportunities, and the Finance Minister.[56]
The relatives of individuals with disability push for a so-called nursing fee, which would correspond to the minimal wages. The National Election Committee authenticated the signature-collection forms and almost 70.000 signatures have been collected. An optional national referendum may be held once the initiative is supported by more than 100.000 signatures.[57]
According to the Ombudsman it is worrying that the Government is still delaying the introduction of an overall preference system for disabled persons in public transportation.

[55] See http://www.drahu.org.hu
[56] See http://www.segelyhely.hu/portal/nagydemonstracio; http://www.foka.hu/alapitvany/hirek/sorstars_hirlevel/20051111.htm. The text of the open letter can be downloaded in Hungarian language from http://www.kezenfogva.hu/doc/Nyilt_level.pdf.
[57] http://www.fogyatekos.hu/main/news-446.html

Whereas individuals with sensory impairments may travel for free, those severely disabled may not.[58]

[58] See http://www.obh.hu/allam/index.htm

CHAPTER IV SOLIDARITY

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

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

In spring 2005 the preparation of the privatization of Budapest Airport Ltd. (hereinafter: BA) commenced. The main activity of BA is the operation of Ferihegy International Airport (Budapest) performed based on the asset management right over assets owned by the Hungarian State. It collects charges from users of the Airport for use (fees related to aircraft and passenger transport, as well as rental related to assets and area use. 100 % of the company is owned by the Hungarian State of which 25 % + 1 vote is in permanent state ownership according to az állam tulajdonában lévő vállalkozói vagyon értékesítéséről szóló 1995. évi XXXIX. törvény [Act XXXIX of 1995 on the Sale of State-owned Enterprenuial Assets; hereinafter: PRIVA]. Owner's rights are exercised by the Hungarian Privatization and State Holding Ltd. (HPSH). In the course of preparation HPSH consulted the trade unions and the representatives of the workers' council several times. On 6 June 2005 Government decided to privatize BA by 2104/2005 (VI. 6.) Governmental Decision through HPSH which publicly invited for tenders and offered for sale shares that constitute 75%+1 of the voting rights in BA on 12 July 2005.
On 3 August 2005 the representative of the worker' council filed a petition at Labor Court of the Metropolitan Court to invalidate the privatization decision and decision of publicly inviting for tenders. The representative argued that the employer failed to comply with a statutory requirement prescribed by 1992. évi XXII. törvény a Munka Törvénykönyvéről [Act XXII of 1992 on the Labor Code; hereinafter: Labor Code]. According to Article 65 (3) a) of the Labor Code employers shall consult the workers' council prior to adopting a decision in connection with plans for actions affecting a large group of employees, in particular those related to proposals for the employer's reorganization, transformation, the conversion, privatization and modernization of a strategic business unit into an independent organization. Furthermore HPSH did not comply of Article 31 of PRIVA which states that HPSH and/or its authorized sales agent inform the employees' interest representation bodies of the business association in writing, at least 30 days prior to the date on which the tender announcement will be published, concerning all of the details (circumstances) in connection with the sale of the asset in question, which, consequently,
- are anticipated to affect the employment, earnings and wages relations, social provision and working conditions of the employees;
- relate to any possible opportunities regarding the acquisition of ownership by the employees.
The representative of the workers' council admitted that there were consultations between the parties, but these were of general nature, there was no precise information given about the privatization.
The representative of BA argued that it was Parliament and the Government that ruled upon privatization by passing PRIVA and the Governmental Decision, HPSH is only responsible for the managing privatization. Therefore, the challenged decisions cannot be regarded as employer's decision within the meaning of Article 65 (3) a) of the Labor Code and the consultation requirement does not apply to these decisions. Moreover, the consultation requirement with workers' council applies only to the privatization of certain units of the employer's organization, not to the privatization of the whole of the employer. In this case Article 31 of PRIVA has to be applied requiring consultation with the trade unions which took place on 5 May 2005, 30 May 2005 and 20 June 2005.
On 29 August 2005 the court of first instance ruled that HPSH's decision on inviting for tenders on the privatization of BA published on 12 July 2005 is invalid. Article 1 (3) of

PRIVA states that in the sphere of its privatization activities, and/or the utilization of the assets HPSH exercises the owner's rights of the state, with the exceptions defined by law. In relation to BA management and proprietary rights are divided between the management of BA and HPSH. According to the reasoning of the first-instance court, in the course of privatization HPSH is a supervisory organ of the management of BA and its decision on inviting for tenders is deemed to be an employer's decision within the meaning of Article 65 (3) a) of the Labor Code. (The Court, obiter, referred to the fact that a contrary conclusion would conflict with Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.) Article 65 (3) a) of the Labor Code does not differentiate between partial and total privatization of the employer. In both cases privatization decisions are actions affecting a large group of employees, consequently, the consultation requirement applies and Article 31 of PRIVA is irrelevant. Although, there were consultations between the parties, but the employer who was represented by HSPH never presented the draft plan of privatization or otherwise provided substantive information on the privatization for the workers' council. Therefore, the employer violated Article 65 (3) a) of the Labor Code and the HSPH's decision on inviting for tender is invalid. BA appealed the ruling. The Metropolitan Court of Budapest in its final ruling dismissed the appeal on 29 September 2005, agreeing with the merits of the first-instance court's reasoning. In October 2005 the Government instructed HSPH to prepare a new privatization procedure. In the course of preparing the new procedure obtained comments from both BA workers' council and the trade unions on the draft wording of the call for proposals.

Article 28. Right of collective bargaining and action

Social dialogue

Legislative initiatives, national case law and practices of national authorities

In Decision 40/2005 (X. 19.) AB határozat the Constitutional Court ruled that there is an unconstitutional omission since Parliament failed to provide statutory rules of the status and operation of the National Interest-conciliation Council (Országos Érdekegyeztető Tanács; hereinafter: NIC) in relation to the competences given by 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról [Act IV of 1991 on Initiating Employment and Unemployment Benefits; hereinafter: IEUB].
The highest forum of interest-conciliation (social dialogue) is NIC where employees, employers and the government are represented. Besides the NIC's general (ex ante) consultative status in economic and social matters, the Act on Employment and the Labor Code stipulate veto power for the NIC in the following matters: (1) regulation of multitudinous dismissal, (2) telework, (3) system of work-qualification, (4) supervision of conditions of employment. The NIC also has veto power in determining the amount of minimum wage annually which is promulgated in ministerial decree. The criteria of (employee and employer) representation in the NIC has been unresolved since 1990. There are no statutory rules for the conditions of the NIC-membership, plus the NIC's self-regulation cannot be accessed by the public, including those who are affected by the co-decisions of the NIC and the Government. Moreover, it is highly problematic how the NIC can exercise public (veto) power without any statutory authorization.
A special forum of national interest-conciliation in the field of employment policy is the Executive Board of the Labor Market Fund (hereinafter: EBL). According to Article 10 of IEUB, EBL is a board consisting of the representatives of employees, employers and the Government for exercising and fulfilling the rights and obligations relative to the Labor Market Fund.
According to Article 10/A of IEUB, NIC has a key role in establishing EBL: the national employer associations represented in the NIC shall nominate representatives of employers as

members of the EBL, and the national employee associations represented in the NIC shall nominate representatives of employees as members of the EBL; and this shall be done in consideration of the ratio of employer and employee contributions paid by those who are represented by such associations unless otherwise agreed. The Minister of Employment Policy and Labor appoints and removes members of the EBL. Members representing the Government shall be appointed and removed on the recommendation of the Minister of Education and the Minister of Finance if such action involves one member; if it involves additional four members, the Minister of Employment Policy and Labor shall make the decision on appointment and dismissal on his own authority. Point c) of Article 9 of IEUB authorizes the NIC to hear the report of the EBL on an annual basis.

The Labor Market Fund (hereinafter: Fund) managed by EBL is a special state fund. Article 39 (2) of IEUB sets out the objectives of the Fund:

a) to provide assistance to the unemployed,

b) to support the unemployed in finding jobs, and facilitate adjustments in the work force,

c) to promote the social security of employees of business organizations under liquidation,

d) to support the improvement of the training system,

e) to increase the job opportunities available to persons with some degree of incapacity to work,

f) to assist in the partial financing of early retirement pension benefits,

g) to provide funding for the costs and expenses related to the provision of subsidies and benefits financed by the basic segments, and

h) to contribute to the financing for the operating costs and improvement expenses of the Government Employment Service,

i) to provide financial assistance for the operating costs and improvement expenses of the European Employment Service.

Article 39/A of IEUB not only divides the supervisory functions of the Fund between the Minister of Employment Policy and Labor and the EBL, but also grants certain independent executive type of competences for the EBL in relation to the Fund. According to point b) of Section (2) the EBL shall pass decisions – inter alia – on restructuring of resources within the individual segments of the Labor Market Fund, other than the funds of the training segment and on the duties of the Government Employment Service relative to the programs initiated by the EBL, and in that context, on the financing of costs which were not planned for in the operative segment of the Labor Market Fund.

Since in the view of the Constitutional Court the EBL does not only perform classic interest-conciliation, but also exercises competences that can be classified as part of the executive power, the delegation competence of Article 10/A and point c) of Article 9 of IEUB that authorizes the NIC to hear the report of the EBL on an annual basis can be characterized as a competence relative to public power. According to earlier precedents, the concept of rule-of law of Article 2 (1) of the Constitution requires the state to enact laws whereby the status, structure, (transparent) operation, competence and legitimacy of organizations exercising public power is granted (Decision 56/1991 (XI. 8.) AB határozat). The Constitutional Court came to the conclusion that almost none of these constitutional requirements are met in relation to NIC, therefore it obliged the Parliament to enact the appropriate legislation until 31 March 2006.

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

2004. évi CXXIII. törvény a pályakezdő fiatalok, az ötven év feletti munkanélküliek, valamint a gyermek gondozását, illetve a családtag ápolását követően munkát keresők foglalkoztatásának elősegítéséről, továbbá az ösztöndíjas foglalkoztatásról [Act CXXIII of 2004 on Promotion of the Employment of Entrants, Unemployed over Fifty Years, and those who after Looking after a Child or Taking Care of a Relative seek Employment, and Fellowship Employment] supporting those absent from the job market in the long term came into force on January 1, 2005. The 2005. évi LXXIII. törvény [Act LXXIII of 2005] modified the above Act. It extends to those young persons entering the job market (those who are under 25 years of age when concluding their contract of employment and who conclude their contract of employment after finishing their studies), the unemployed above 50 and those who wish to reenter the job market after having nursed children or cared for a family member, i.e. those who conclude a contract of employment following suspension of payment of a child care allowance, child care fee, child raising support, or an attendance allowance. Any employer who employs people from this category will receive an incentive if the employee is employed for at least nine months full-time, or at least four hours a day part-time, and the employer agrees to keep the employee in employment for at least another three months (in other words, the employee works for the employer for at least one year). The incentive corresponds to 50% of the social security contribution paid, which can be claimed by the employer from the tax authorities in one lump sum.

Article 34. Social security and social assistance

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

1. 2005. évi V. törvény az Európai Szociális Karta kihirdetéréről szóló 1999. évi C. törvény módosításáról [Act V of 2005 on the Modification of Act C of 1999 Promulgating the European Social Charter] declared that according to Article 20 par. 3 of the European Social Charter allowing for any state party to declare by notification to the Secretary General that it considers itself bound by any articles or any numbered paragraphs of Part II of the Charter which it has not already accepted upon ratification, the following Articles are binding on Hungary: Article 7 par. 1 (to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education); Article 10 (the right to vocational training); Article 12 par. 1 (to establish or maintain a system of social security); and Article 15 (The right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement).

2. The Parliament 27 December 2004 adopted the 2004. évi CXXXVI. törvény egyes szociális tárgyú törvények módosításáról [Act CXXXVI of 2004 on the Modification of Certain Acts Dealing with Social Matters], which made several technical changes in relation to social administration.

Article 35. Health care

Access to health care

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Hungary has promulgated the WHO Framework Convention on Tobacco Control through 2005. évi III. törvény [Act III of 2005]. The Framework Convention entered into force on February 27, 2005.

Legislative initiatives, national case law and practices of national authorities

1. 2005. évi XCV. törvény az emberi alkalmazásra kerülő gyógyszerekről és egyéb, a gyógyszerpiacot szabályozó törvények módosításáról [Act XCV of 2005 on the Modification of Acts on Pharmaceuticals for Human Use and Other Laws Regulating the Pharmaceutical Market] sets the objective to bring Hungarian legislation in line with the laws of the European Communities and other international laws and recommendations that are related to pharmaceuticals, and the rights of those taking pharmaceuticals. As to the problematic provisions of the act, see "Reasons for Concern".

2. The Constitutional Court held in its recent decision 43/2005. (XI. 14.) AB határozat Article 187 (2) of the egészségügyről szóló 1997. évi CLIV törvény [Act CLIV of 1997 on Health Care] to be unconstitutional. The provision declared that those under 35 years or those having less then 3 children cannot undergo voluntary sterilisation. With regard to legal certainty the Constitutional Court declared the provision to be null and void as of June 30, 2006.
   The majority opinion emphasised that human dignity laid down in Article 54 (1) of the Hungarian Constitution involves the right to self-determination and the choice-making capacity based on free and informed consent of the individual over one's own body and fait. Individuals are free to make choices – in line with the limitations laid down in the Constitution – over family life, marriage and child rearing.
   According to the Constitutional Court neither the state's population politics, nor its obligation to protect health renders it constitutionally permissible to make the exercise of self-determinational rights depend on the number of natural children.
   Three justices disagreed and attached dissenting opinions to the judgement.
   The constitutionality of another challenged provision of the Health Act according to which the spouse (irrespectively of whether the partners are living in a marriage or a partnership) also has to be informed and has to agree to voluntary sterilisation has been upheld.

Reasons for concern

1. Hot debate evolved around the planned school canteen regulation that the Ministry of Education intends to issue soon. According to the January 2005 plans certain kinds of foods, such as chips and sugary beverages would have been banned from buffets and canteens. After protests the Ministry opted for a set of guidelines, but the most recent version talks about a detailed set of criteria to be applied. The Ministry of Health and the Ministry of Education jointly developed a system that sets threshold limits for ingredients in foods and beverages. NGOs report the greatest problem to be that there has been neither co-operation nor dialogue with the affected parties before the regulation has been drafted. Moreover, even the Hungarian Dietetic Association found certain parts of the draft legislation problematic. The draft is still pending.

2. 2005. évi XCV. törvény az emberi alkalmazásra kerülő gyógyszerekről és egyéb, a gyógyszerpiacot szabályozó törvények módosításáról [Act XCV of 2005 on the Modification of Acts on Pharmaceuticals for Human Use and Other Laws Regulating the Pharmaceutical Market] abolished state liability for the negative consequences of vaccination whenever liability of other persons cannot be established, as laid down by Article 21 (1) e) of the 1998. évi XXV. törvény [Act XXV of 1998] as of October 30, 2005.
   At the same time the 2005 Act declared Article 58 (7) of the Health Act to be null and void. According to this provision in case the person obliged to undergo vaccination suffered damages or died as a result of vaccination, the state compensated him or her or the relatives.
   The NGOs TASZ (Hungarian Civil Liberties Union) and Védegylet (Protect the Future) objected to ceasing state liability for failed vaccination in their open letter of October 25, 2005. The two organisations emphasised that parents can be criminally sanctioned in case they do not let their children vaccinated. The fact that the state abolished the liability provisions unreasonably reinforces the fears of failed immunisation.
   The Ministry of Health announced that they are searching for a solution that makes it possible to uphold state liability for diseases that result from vaccination.

Drugs

Legislative initiatives, national case law and practices of national authorities

Upon an individual application the Data Protection Commissioner issued his position on drug screening at workplace.
As to the facts of the case, the drug testing device is transported by minibus on the request of the employer to the premises and the screening of drug consumption of employees based on saliva samples is carried out on-the-spot. The test is capable to show from the saliva sample 5 different drugs (derivatives – Cannabis, Amphetamine, Methamphetamine, Cocaine, Opiates) at the same time within minutes. The test is supposed to work at 93% accuracy according to the brochure.

The Commissioner turned to the president of the National Employment Safety and Labour Inspectorate in course of the investigation, who presented in his answer that the 1993. évi XCIII. törvény a munkavédelemről [Act 93 of 1993 on Labour Safety] (hereinafter referred to as LSA) does not entitle either labour safety inspectors, nor regional inspectorates to test employees under probable influence of drugs.
According to the point of view of the NGO TASZ (Hungarian Civil Liberties Union), the "effectiveness of drug screening as means of prevention is not proved scientifically, results of investigations show that the screening is expensive, unfair and not effective at all."
Under Article 2 (2) b) of the 1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű adatokhoz való hozzáférésről [Act LXIII of 1992 on the Protection of Personal Data and Ppublic Access to Data of Public Interest; hereinafter: PDPI] personal data relating to drug addiction, and drug consumption are sensitive data, thus explicit legal provision or voluntary, unambiguous, informed, written authorisation of the data subject is required for data controlling. Under the principle that data processing has to be bound to purpose no personal data shall be processed unless indispensable and suitable for the achievement of the purpose of the data processing, and only to the extent and for the duration necessary to achieve that purpose (Article 5 (2) of PDPI). According to Decision 2/1990. (II. 18.) AB határozat of the Constitutional Court the state may only resort to limitation of basic rights as its last means, if protection or enforcement of another right cannot be achieved in any other way, and limitation may only be extended to the point it is absolutely necessary.
According to Article 2 (2) of LSA realisation of occupational safety and health requirements shall be the duty and obligation of employers, in harmony with the employees' responsibilities in this area. According to Article 60 employees may only perform work in a condition

appropriate for safe performance of the work, and in compliance with occupational safety and health rules.

There is a question of practical importance arising: what consequences may a positive drug screening have either on the side of the employer or the employee? (Since under legal regulations in effect activities connected to drugs are generally treated as criminal offences.)
Keeping the principle of necessity-proportionality in view – that is, by examining the relation between the risk of consequences of drug consumption and invasion of privacy affected by screening – the Commissioner's point of view is that application of drug screening at workplace, and data controlling connected to it are not acceptable generally.
The ombudsman concluded that application of drug screening at workplace may only be possible by explicit legal authorisation – based on constitutional principles – and not by arbitrary choice of the employer, or "authorisation obtained by force" may not give ground for the application or introduction of controlling means that limit rights and privacy of the employee.[59]

Reasons for concern

More than 50 professionals from 26 countries supported the SignOn letter circulated by the Hungarian Civil Liberties Union. The SignOn is part of a recent campaign aiming to pressurise the government to improve the funding system of service providers and reform drug laws in Hungary.
According to recent news, the government started to transfer the money to the service providers - the campaign did its share. Even if it seems improbable that the government will do any attempt to reform the Criminal Code until the next parliamentary elections (May 2006), the petition contributes to raise awareness to the severe barriers of treatment and prevention efforts.

The petition recommends the Prime Minister to promote new criminal legislation and law enforcement practice to avoid the criminalisation of drug users; to improve the funding system of service providers working on the reduction of drug related harms; and to provide appropriate budget to implement the requirements of the National Drug Strategy and ensure access to recently frozen funds.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

On 22 September 2005 the Jász-Nagykun-Szolnok County Court delivered its judgment on the appeal of several doctors working in the County Hospital. The appellants asked the court to declare that the time they served on duty shall be counted as full-time working hours on the basis of 93/1004/EC Directive (hereinafter: Directive). The doctors work as public servants, and their collective contract creates a three-month time-frame: their normal working hours are eight hours a day, and since the accession to the European Union they also fulfill duty in weekdays sixteen hours, in weekends twenty-four hours. Although, the extra duty over the weekly forty-eight hours was not agreed in writing, all the doctors served duty. The defendant hospital takes into account the half of the hours spent on duty as extraordinary working hours, and pays lump sum for the time actually counted.
The first instance court found that the hospital acts unlawfully when took only the half of the actual time spent on duty into account: the legal nature of lump sum and the relevant legal provision require the hospital to pay for every working hour spent on duty. The appellant in their appeal emphasized that the Labor Court acting as a first instance forum ignored the Community law when declared the Directive inapplicable to the case.

[59] http://abiweb.obh.hu/abi/

The County Court emphasized that on the basis of the Directive and the harmonized 2003. évi LXXXIV. törvény az egészségügyi tevékenység végzésének egyes kérdéseiről [Act LXXXIV of 2003 on Certain Rules of Fulfilling Health Care Service] the time spent on duty shall be regarded as full time working hours. In its judgment the Court referred to the jurisprudence of the European Court of Justice, particularly to the Marleasing-case, where the ECJ declared that the domestic courts have to apply and interpret domestic law in accordance with the wording and purpose of the Directive in order to guarantee full compliance with European law.
Interestingly, the Parliamentary Commissioner for Citizen Rights criticized the judgment. He claimed that the domestic judge had no other option but to apply exclusively Hungarian law to the case, even though he has the competence to interpret the domestic law in the light of the Community law. Applying the Directive is the task of the European Court of Justice. In cases of conflicts between the domestic law and the constitution, or between the domestic law and the Community law, the judge has to file a motion for constitutional review with the Constitutional Court, or submit a reference to the European Court of Justice. The Parliamentary Commissioner stressed that the new concept of the Civil Code explicitly excludes the direct application of the Constitution in civil law disputes.

Article 36. Access to services of general economic interest

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

Legislative initiatives, national case law and practices of national authorities

1. The Parliamentary Commissioner for Citizen Rights (Állampolgári Jogok Országgyűlési Biztosa), the General Inspectorate for Consumer Protection (Fogyasztóvédelmi Főfelügyelőség), the Hungarian Energy Office (Magyar Energia Hivatal), and the Hungarian Competition Authority (Gazdasági Versenyhivatal) issued a joint declaration in reply to the large amount of complaints received in relation to gas and electricity services. The above mentioned institutions found that the companies responsible for distribution/provision significantly increased the prices of the services, which cannot be provided by any other company. The increase of price concerned services that are usually requested by the consumer, or is necessary because of the act of the consumer. The invoices issued after the maintance several times contained elements that the consumer could not identify, and the companies failed to give sufficient explanation. Some companies interpret the laws contrary to the interest of the consumer, which constitutes a violation of Article 207 (2) of the Civil Code. As a result of this there is no balance between the servic provided and the price paid for it.
   As the distributor/provider companies enjoy both legal and de facto monopolium, so no competition can naturally evolve, the Offices agreed on exercising stricter scrutiny as regards the activities of the above companies. For this reason, they co-operate, regularly consult, and if it necessary jointly submit amendments to the relevant laws. They also request the companies to end the criticized procedures, and to respect the rights of the consumers. The declaration sets out certain principles that must be observed by all distributor/provider companies. The most important is that the consumers shall be informed as much as possible about their rights and duties in relation to the companies. The consumers must be aware of the fact that no company is entitled to decrease the payment on the basis of social concerns, and the rejection of service for non-payment cannot be considered as ‘abuse of the dominant position’.[60]

[60] The documentum is available at: www.icsszem.hu

2. The Parliamentary Commissioner for Citizen Rights (hereinafter: Ombudsman) issued various recommendation concerning anomalies occurred in supplying services of general economic interest. In case No. OBH 1036/2005 (5 July 2005)[61] the Ombudsman examined the provision of electricity in a remote part of the county capital Tatabánya, where the applicants complained of the lack of sufficient service supply due to the failure of certain customers to pay for the services. The service supply equipment is often damaged and all the maintenance and reparation require huge investments of the supplier. The Ombudsman found that there are serious concerns arising in relation to the right of social security, but underlined: both the local authority and the electricity service provider tries to fulfill its obligation to the extent, which is required by the constitutional right of social security.

3. In case No. OBH 2289/2004 (7 January 2005) the Ombudsman dealt with the issue of dial-up programs. Applicants using Internet received huge telephone bills as a result of a dial-up program initiating international calls. The Parliamentary Commissioner found that both the service supplier and the National Communication Office (Nemzeti Hírközlési Hatóság) provided sufficient information on the modes of protection, the list of phone numbers and the way of blocking them is listed on the website of the National Communication Office and the service provider offered password protection.

Article 37. Environmental protection

Right to a healthy environment

Legislative initiatives, national case law and practices of national authorities

1. Hungary has signed the European Landscape Convention (CETS No.: 176) on September 28, 2005. The Convention entered into force three months after 10 states had ratified it on March 1, 2004. The Hungarian ratification will most probably happen in 2006 and will take the form of an act.

2. 2005. évi XV. törvény az üvegházhatású gázok kibocsátási egységeinek kereskedelméről [Act XV of 2005 on the Trade of Greenhouse Gas Emission Units] aims to reduce the risks of climate change that result from human activity by setting the necessary conditions for the Hungarian Republic to participate in the European Community's emission allowance trade system and in other related international projects.

3. 2005. évi XCI. törvény [Act XCI of 2005] has modified the Hungarian Criminal Code, i.e. Act IV of 1978. According to the new, more precise Article 264 (1) that has also been extended in scope: "The person who unlawfully produces, obtains, keeps, distributes, processes or otherwise uses a radioactive substance or product dangerous to health or the environment, transfers it to a person not entitled to keep it, imports, exports or transfers it through Hungary, commits a felony and shall be punishable with imprisonment of up to five years."

4. The deadline for implementation of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (Water Framework Directive) had been December 22, 2004 for Hungary.

[61] The recommendation is available at: www.obh.hu

Positive aspects

1. After June 30, 2005 there are no more dangerous waste incinetors in operation, which do not comply with the atmospheric pollution limit value set by the Union. As a result the emission of pollution resulting from waste incinetors decreased by 30 %.

2. In order to enhance biowaste recovery, the Hungarian Ministry of Environment and Water prepared an expert opinion, which the Government promised to adopt in 2005.

3. Towards the end of May 2005 a so-called "green commando" started its operation with the objective to prevent accidents that are endangering or polluting the environment. The "green commando" is not a novel institution, but a cooperation of the existing responsible authorities. The following organs are thus participating: disaster recovery, police, immigration police, traffic authority, environmental supervisory authority and experts of the Hungarian Customs and Finance Guard. The merged authorities are also exercising the supervisory functions of national parks and environmental protection agencies.

Reasons for concern

1. In September 1977, the Republic of Hungary and the Czechoslovak Socialist Republic signed a treaty to build the Gabcikovo/Bős-Nagymaros dam system. Hungary abrogated the 1977 treaty with Czechoslovakia concerning the construction of the dam due to environmental concerns. Czechoslovakia, and after its splitting up, Slovakia continued the construction unilaterally, completed the dam, and diverted the Danube into a canal inside the Slovakian Republic. In 1993 the issue has been taken to the International Court of Justice. In 1997 the court handed down an ambiguous decision, according to which the 1977 treaty was still valid, but each side was at fault for acting unilaterally. Hungary and Slovakia were called upon to negotiate in good faith. Between October 1997 and March 1998 negotiations between the delegates of the two countries have been unsuccessful. On December 11, 2003 the Hungarian Government adopted 1122/2003 (XII. 11.) Korm. hat. a bősi üggyel kapcsolatos kormányzati feladatokról [1122/2003 (XII. 11.) Government Resolution on Governmental Tasks Concerning the Issue of Bős]. In April 2004 bilateral negotiations went on. On December 11, 2004 the Hungarian Government adopted 1139/2004 (XII. 11.) Korm. hat. [1139/2004 (XII. 11.) Government Resolution] on the Land Settlement Concept of the Gabcikovo/Bős-Nagymaros Dam System and on the Hungarian Position to be Represented at the Slovak-Hungarian Negotiations]. At the March 3, 2005 negotiations the parties have accepted the three common working groups' suggested mandates and the questions that had been recommended by them for further examination. During April and May 2005 the working groups held their first common meetings and the negotiations at expert level have thereby been started. The negotiations are still going on.

2. Experts call the attention to the dangers of weed-killers used decades ago that are still traceable in the soil. Certain chemicals still affect the human body and have similar effects to female hormones, which leads to cancer in the genitalia in case of teenage boys and problems with the menstruation in case of girls and women. Since these dangerous weed-killers have not been used in the last decades there is little talk about the dangers of the traces that are still there in the earth and in fruits and vegetables.

<u>The right to access to information in environmental matters</u>

Reasons for concern

There is no special law in Hungary on the access to environmental information.

Nor is there a law that would help the adaptation of Directives 2003/4/EC and 2003/35/EC issued to implement the Convention on EU-level, into domestic legislation.

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

In November 2005 the Ministry of Justice submitted T/18200. számú törvényjavaslat a Polgári Törvénykönyről szóló 1959. évi IV. törvény, valamint egyes törvények fogyasztóvédelemmel összefüggő jogharmonizációs célú módosításáról [Draft Law no. T/18200 on the Modification of Act IV of 1959 on the Civil Code, and of Certain Other Laws Relating to Consumer Protection, Required by Legal Harmonization]. The proposed Act aims to bring the Hungarian legislation in line with the following Community laws:
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
- Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions
- Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

CHAPTER V. CITIZENS' RIGHTS

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

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

1. Annex no. 2 of 1989. évi XXXIV. törvény az országgyűlési képviselők választásáról [Act XXXIV of 1989 on the Election of Members of Parliament], and the annex of az országgyűlési egyéni és területi választókerületek megállapításáról szóló 2/1990. (I. 11.) MT rendelet [2/1990. (I. 11.) Government Decree on the designation of the individual and territorial parliamentary electoral districts] had been contested at the Constitutional Court, the petitioner proposed the ex post examination of the unconstitutionality [Decision 22/2005. (VI. 17.) AB határozat of the Constitutional Court]. The basis of the petition was that the contested regulation had failed to provide guarantees to the prevalence of the principle of equal suffrage, for the regular review of the borders of the electoral districts had not been prescribed by law, and the change in the population of the several electoral districts had led to great disproportions regarding the number of votes necessary to win a mandate in Parliament. The Constitutional Court declared that derived from the principle of equal suffrage contained in Article 71 (1) of the Constitution, it is a constitutional requirement that the difference in the number of electors in the individual electoral districts shall be minimized, and that the number of the mandates in each territorial electoral district shall have a strict connection with the number of electors of the district. The Court ex officio proceeded for the elimination of unconstitutionality by omission, and found that the Parliament caused an unconstitutional situation by not providing fully the legal conditions for the prevalence of the equal suffrage principle of Article 71 (1) of the Constitution. The Constitutional Court refused to annul the contested annexes, arguing that not all of their parts are unconstitutional, and the annulment thereof would cause serious functional problems to the whole electoral system; nevertheless instructed the Parliament to fulfil its legislative task by setting the deadline of 30 June 2007 (after the forthcoming Parliamentry elections due in Spring of 2006).

2. The Constitutional Court's decision [23/2005. (VI. 17.) AB határozat] on the time periods open for legal remedies in electoral procedure see Article 47, Right to an effective remedy and to a fair trial.

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

Participation of foreigners in public life at local level

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Commission against Racism and Intolerance in its report on Hungary noted that Hungary has not yet signed and ratified Convention on the Participation of Foreigners in Public Life at Local Level (ETS. No.144) of 5 February 1992 and reiterated its recommendation that Hungary should ratify the aforesaid treaty without delay.[62] During the

[62] Third report on Hungary of the European Commission against Racism and Intolerance. Strasbourg, 8 June 2004. Articles 1-3.

period under scrutiny no initiatives were taken towards the signature and ratification of this instrument by the Republic of Hungary.[63]

Article 45. Freedom of movement and of residence

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In two major cities of Hungary, Kaposvár and Szeged, self-government decrees were enacted on the sanctioning of the so-called "mute" begging, that is begging non offending other people (Articles 24/A and 25 of Kaposvár Megyei Jogú Város Önkormányzatának 7/2000. (II. 29.) önkormányzati rendelete a közterület rendeltetésétől eltérő célú használatának általános szabályairól [Decree 7/2000. (II. 29.) of Kaposvár City Self Government] amended by 69/2004. (XI.24.) önkormányzati rendelet in force from 1 January 2005; and Articles 3k, 5.5 and 21.4 of the Szeged Megyei Jogú Város Közgyűlésének 57/1999. (XII. 23.) Kgy. rendelete a közterület-használat rendjéről [Decree 57/1999. (XII. 23.) of Szeged City Self Government] amended by a decree and in force from 15 March 2005) qualifying it as a minor offence. The aforesaid decrees prohibited the begging on certain parts (important from the aspect of tourism) of the cities, and prescribed the sanctioning of the activity with a fine. The activity to be sanctioned is described in both decrees in a rather broad and imprecise way, thus it may infringe the legal security and, through this, the freedom of movement: in the opinion of the Hungarian Civil Liberties Union (Társaság a Szabadságjogokért – HCLU) the aforementioned regulations aim to effectively ban the beggars, the homeless, and other persons look like them from entering in certain parts of the city. For the restriction of the freedom of movement is without constitutional ground, the HCLU and the Menhely Alapítvány ("Shelter Foundation", an NGO helping homeless people) made a petition to the Constitutional Court and requested the annulment of the regulations at issue.[64] (The case is pending before the Court.)
There had been an initiative of a decree at the Budapest City Council, planning to ban the begging activity in certain parts of the city, in a similar, not precisely defined way, as the Kaposvár and Szeged City Self Governments had done, and enabling the sanctioning of this activity with a fine. After the representative of the HCLU had informed the competent committee and the members of the City Council of its concerns regarding the constitutionality of the initiative, on 30 June 2005 the Council did not pass the decree.[65]

63 http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=144&CM=8&DF=17/11/2005&CL=ENG

64 http://www.tasz.hu/download/AB_inditvany_vegleges.pdf?id=13666&time=1111665993&op=cont

65 http://www.tasz.hu/index.php?op=contentlist2&catalog_id=1992

CHAPTER VI. JUSTICE

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

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

In the decision of 20/2005. (V. 26.) AB határozat the Constitutional Court – on the basis of various constitutional complaints and judge-initiated constitutional review – found that Article 360 (1) of 1998. évi XIX. törvény a büntetőeljárásról [Act XIX of 1998 on Criminal Procedure – hereinafter ACP] is unconstitutional, and declared a constitutional omission as the legislator failed to provide for the necessary guarantees in cases where the appeal shall be decided by a judicial council. Article 360 of the ACP is the following:

(1) The head of the judicial council sets a date for deciding the appeal in a council meeting, public meeting, or hearing within thirty days after receiving the case.
(2) In cases to be decided by a judicial council, the head of the council may set a public meeting or hearing, if (s)he considers it necessary to deliberate on the case in public meeting or hearing.
(3) The appeal court can decide the case, which is for council meeting, in a public meeting or hearing as well, if the reason [for having only a council meeting] is discerned only in a public meeting or hearing.

First, the Constitutional Court summarized its previous jurisprudence on the right to appeal, the relevant case law of the European Court of Human Rights, the historical background and evolution, and the current regulation of this legal institution. As regards its own approach, the Court underlined: the appeal is a legal instrument that enables the representative of the defence and that of the prosecution to challenge the judgment of the first instance court, and the higher judicial forum is obliged to take a decision. However, neither the constitutional right to appeal, nor the procedural guarantees in Article 7 of the ACP provide a right to have the facts of the case assessed only by the first instance court, and in cases where the second instance court modifies the facts on which the judgment is based to have an additional level of revision. The Court emphasized: even the existence of detailed guarantees cannot provide material justice in each case. The ACP in force, gives the second instance court a wide power to revise the decision of the first instance court. The formalities of the decision-making in the appeal procedure are linked to the new forms of procedure – hearing, public meeting and council meeting – and to the type of decision taken by the appeal court. The new ACP allows for a wide range of decisions to be taken in closed council meetings, without regulating in a clear and transparent way the possible cases for holding a council meeting. The form of the hearing and the possible decision are not linked to each other; and the appeal court may modify the decision of the first instance court in a council meeting, and this decision – as the meeting is closed – is not announced publicly, the parties are not notified in advance, and no minutes are taken.

The insufficient clarity of the current regulation in itself constitutes a violation of Article 2 (1) of the Constitution enshrining the principle of rule of law and legal certainty. The possible different approach of each judicial council may result in the violation of the right to a fair trial. Article 46 (1) of the Constitution contains the principle of administration of justice by judicial councils. The administration of justice by councils and the independence of judges are interlinked and both form a part of the right to a fair trial. The individual members of a judicial council shall have the same and equal right in assessing procedural issues: they shall have the same influence through applying additional evidence, which are necessary to consider the judgment of the first instance court. Article 360 (1) of the ACP delegates the

power to decide on the applicable form of procedure to the head of the judicial council, thus this decision can in fact work as a single judge decision influencing the outcome of the case. For the above reasons this provision violates the principle of administering justice in councils and the independence of judges.

The Constitutional Court since the beginning of its operation has made a clear difference between the external and internal aspect of judicial independence: the judge must be independent from everyone, even from fellow judges, and this aspect of independence should be guaranteed. However, the current rules of the ACP might lead to opposite results. Even though the discretionary power of the head of the council seems to refer only procedural decision, in fact it constitutes "an interference with the competences" within the judiciary, as deciding the form of the procedure basically limits the questions examined by the court, and the scope of the appeal. The current regulation, hence, makes it possible for the head of the judicial council exercises the competences of other members of the council the power to make their own decision on the merits of the case. Such a situation not only violates the independence of judges, but also the right to a fair trial.

The exclusion of public from the decision-making procedure and the lack of knowing the motions submitted by the other party clearly constitute a violation of the right to a fair trial, particularly the right to a public hearing, the equality of arms and the right to defence. Moreover, there are no minutes taken at the council meeting: the constitution of the council for example can only be traced back from the signatures of the judges. The parties in the procedure cannot effectively exercise their right to raise objections of partiality against any member of the council. The Constitutional Court in its previous decisions emphasized: every situation shall be avoided that can possibly raise concerns as to the impartiality of the judges.
As regards the right to defence, the Court came to the following conclusion: the right to defence is one of the basic principles of the criminal procedure, and has to be respected during the whole trial. It is manifested by the accused right to know the submissions of the prosecutor, to raise objections against the acting authorities, and to obtain legal assistance. It is not an absolute right, but only necessary and proportionate limitations are constitutionally acceptable. It cannot be deemed as necessary that the parties are not notified of the place and date of the judicial council meeting.
The decisions taken by the council also raise the question of force: usually the judgments enter into force upon their announcement. However, in this case the announcement is impossible. The procedural requirements attached to entering into force are conditions that cannot be neglected, the current regulation is in violation with the above-mentioned principle of rule of law.
As the ACP did not provide the essential procedural guarantees, the Constitutional Court found a constitutional omission in this regard, and called the Parliament to enact the required changes by 31 October 2005.[66]

Reasonable delay in judical proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Before the European Court of Human Rights Hungary has 52 cases pending; out of these in 46 cases do the petitioners allege the violation of Article 6 (1) of the Convention for unreasonable delay in judicial proceeding. One third of the cases involve criminal proceedings, the rest is civil and administrative procedure. According to the Human Rights Department of the Ministry of Justice, approximately the half of the cases brought against Hungary for unreasonable delay of judicial proceedings end with a friendly settlement.

[66]The Parliament failed to amend the ACP until 31 October 2005.

Until 22 November 2005 the European Court of Human Rights found Hungary to be in violation with Article 6 (1) of the Convention in eleven cases. Seven cases raised the violation of Article 6 (1) of the Convention in relation to civil proceedings. Two of the civil cases were initiated for damages: interestingly, the Court found a violation in a case where the judicial proceeding took five years and seven months and the Court awarded 1200 € as compensation (*Szikora v. Hungary*),[67] while in the other case the procedure involving all three levels of jurisdiction lasted for eight years and seven months and the compensation was 400 € (*Szoboszlay v. Hungary*).[68] Two other cases were initiated by requesting an order for payment: in *Kármán v. Hungary*[69] the Social Security Directorate of Budapest requested the order against the applicant for overdue social security contributions; while in *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat v. Hungary*[70]. In the former case the whole proceeding lasted for more than ten years, and for this delay the Court awarded the highest compensation in 2005 (6000 €), while in the latter case it took six years and 3 months to receive a final decision. One application was submitted for the unreasonable length of a procedure on an action for trespass (*Kálnási v. Hungary*),[71] and one case concerned the issue of repossession of property (*Kántor v. Hungary*).[72]
One application complained about the length of proceeding arising from a labour dispute: for the nine and a half year long procedure the Court awarded 3000 € compensation (*Szilágyi v. Hungary*).[73] Two cases related to administrative proceedings: in *Zichy Galéria v. Hungary*[74] the registration of the applicant gallery took more than six years, while in *Mezei v. Hungary*[75] the judicial review of a contested building permit lasted for six and a half years.
Only one case involved criminal proceedings: in *Miklós v. Hungary*[76] a proceeding was initiated against the applicant, a bank manager, on the suspicion of fraud. The whole proceeding took six years and four months on three levels of jurisdiction. The Court awarded 500 € compensation.
In the case *Monory v. Romania and Hungary* the applicant brought a joint application against Hungary and Romania in relation to civil proceedings concerning his divorce and the child custody. Hungary was found to be violation for unreasonable delay.[77]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

1. In decision of 23/2005. (VI. 17.) AB határozat the Constitutional Court examined the provisions of the 1997. évi C. törvény a választási eljárásról [Act C of 1997 on the Election Procedure] regulating the procedures of complaints. The petitioners – whose complaints was dismissed on both instances on the basis of being late – filed a constitutional complaint with the Constitutional Court claiming the unconstitutionality of the second sentence of Article 77 (3) and Article 78 (1) of the Act. They emphasized that the Act fails to clarify whether the complaints shall arrive to the Electoral Committee or to the first instance court within three days, thus the provisions violate Article 2 (1) (rule of law and legal certainty) and Article 57 (5) (right to remedy) of the Constitution.

[67] Judgment of 22 November 2005
[68] Judgment of 22 November 2005
[69] Judgment of 22 November 2005
[70] Judgment of 26 July 2005
[71] Judgment of 27 September 2005. The whole procedure lasted for more than eight years (involving three levels of jurisdiction), and the compensation awarded to the applicant was 3000 €.
[72] Judgment of 22 November 2005. The proceeding lasted for seven years and seven months, the Court awarded 3500 € as compensation.
[73] Judgment of 5 April 2005
[74] Judgment of 5 April 2005
[75] Judgment of 8 November 2005
[76] Judgment of 11 October 2005
[77] Judgment 5 April 2005

The Constitutional Court based on its previous decisions stated: the short deadlines in the electoral procedure are justified by the requirement of rule of law and by the sovereignty of the people. The three day long period available for filing complaints in itself does not violate the requirement of the rule of law. However, the Court found that the conditions of exercising the right to remedy are not exhaustively regulated in either provision. The two provisions against which the petitioners filed their constitutional complaint contradict to each other, and the contradiction cannot be resolved by interpretation. Thus, the Court repealed the alleged provision.
Furthermore, on its own initiative the Constitutional Court examined the relevant provisions of the act regulating the procedures that shall be followed in cases of referenda. Although, it is important that the results of a referendum are announced within a reasonable time, and that the procedures do not last unreasonably long, there is no pressing need to have so short period available for remedies. In case of referendum there is no such constitutional right or goal, which would justify such limitation on the right to remedy. Thus, the Court found the unconstitutionality of those provisions that allow only one day for submitting complaints. The lack of separate regulation of procedure applicable to referenda resulted in constitutional omissions.

2. The Constitutional Court in decision 42/2005. (XI. 14.) AB határozat – for the first time in its jurisprudence – reviewed the constitutionality of a uniformity decision (jogegységi határozat, BJE) of the Supreme Court. The uniformity decision of the Supreme Court aims at reaching a uniform and comprehensive interpretation of certain laws, and according to Article 47 (2) of the Constitution, it is binding for subordinate courts. Besides certain provisions of 1998. évi XIX. törvény a büntetőeljárásról [Act XIX of 1998 on Criminal Procedures – hereinafter: ACP] regulating the position of the affronted party and the accessory private prosecutor (pótmagánvádló) and the relating 3/2004. BJE uniformity decision (hereinafter: UD) of the Supreme Court was challenged on the following grounds: as the state represents the interest of every citizen, and it carries its duties when becomes party to a criminal procedure; and prosecuting crimes is traditionally the task of the public prosecutors. The wording of the ACP does not reflect this notion: the definition of the affronted party and his right to substitute the public prosecutor in certain cases suggest that the institution of accessory private prosecutor is the tool of enforcing solely private interests. In the view of the petitioner, in extreme situations – in case of violation of its property rights – the state itself can act as a private prosecutor. For these reasons, this right shall be limited to natural and legal persons. Based on the above reasoning the petitioner, the Chief Prosecutor of Hungary asked the Constitutional Court to find the unconstitutionality of the Part I of the UD. As concerns Part II of the UD the petitioner argued that the council adopting the uniformity decision did not pay due regard to the difference between the following cases: the state is directly affected by a crime, or only through its organs having an independent legal personality. The UD contains terms that are not defined precisely, thus contradict the principle of rule of law.
The Constitutional Court – in line with its jurisprudence – focused on the constitutional review of meaning attributed to the disputed provision ACP by the UD: the Court examined whether the general authorization of an affronted (taken the procedural categorization) of a crime causing the violation of the property and financial interest of the state is in accordance with the principle of separation of powers, the state's power to prosecute crime and the constitutional status of the public prosecution. The Constitutional Court emphasized that the defence of the society's legal order is primarily the task of the state, and from this it flows that the state has an obligation to prosecute crimes. This state obligation can be derived from the principle of rule of law and the right to a fair trial. As the prosecution necessarily affects individual rights, it must be strictly defined, both substantially and procedurally. The public prosecutor and the accessory private prosecutor obviously have different roles in a criminal procedure: the private prosecutor never takes over the obligations flowing from the constitutional task of the public prosecutor; the private prosecutor does not bear the burden of being objective. Furthermore, the

Constitutional Court examined the issues relating to the right to peaceful enjoyment of property, the prohibition of discriminating between the public and private forms of property without sufficiently serious constitutional reasons providing for example more serious criminal protection of certain forms of public property.
The Constitutional Court found that the provisions of the ACP are not unconstitutional. However, the interpretation given by the uniformity decision is not in compliance with the Constitution, as it provided an authorization for exercising the powers of a prosecutor organs and institutions, which are not entitled by the Constitution to do so. The general authorization given by the UD is in violation with the principle of separation of powers and infringes the constitutional status of public prosecution. Moreover, without offering constitutional reasons or goals, the UD unnecessarily limits the constitutional protection that is offered by the public prosecutor acting in its constitutional mandate. The role of prosecution cannot be vested in any other state organ other than the public prosecution: it is unacceptable that in cases where there is no basis for public prosecution, another state organ takes over the tasks as an accessory private prosecutor.
Furthermore, Article II of the ruling of the UD is unconstitutional as it basically creates a new norm, and goes beyond the boundaries of interpretation.

Article 48. Presumption of innocence and right of defence

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In decision 17/2005 (IV. 28.) AB határozat the Constitutional Court found an unconstitutional omission in relation to regulating revenues arising in criminal procedures. The petitioners claimed that the 1998. évi XIX. törvény a büntetőeljárásról [Act XIX of 1998 on Criminal Procedure – hereinafter: ACP] and the 1990. évi XCIII. az illetékekről [Act no. XCIII of 1990 on Revenues – hereinafter: RA] do not provide necessary safeguards for the right to a fair trial and defence. According to the provisions of the Acts, the revenue of copying the files of the criminal proceeding until the decision on bearing the costs of the whole procedure shall be paid by a) the accused person, if (s)he is not entitled to personal exemption of the costs; b) the authorized defender (so indirectly by the accused) regardless whether defence is mandatory in the procedure or not; c) the statutory representative of the minor accused. The petitioners alleged the violation of the right to defence and the right to a fair trial (Article 57 (1) (3) of the Constitution), the relevant provisions of the International Covenant of Civil and Political Rights and the European Convention of Human Rights.
After reviewing the precedents the Constitutional Court emphasized: revenues for obtaining copies of files in a criminal procedure represent the share of the costs between the state and the accused and the defender. Besides sharing the costs, this type of procedural remedy also aims at rationally limit the exercise of individual rights. However, requiring payment in itself has a detrimental effect on defence, without considering the amount of the payment or due considerations of the financial status of the accused and the defender. It constitutes a financial limit on defence in obtaining and using the necessary files. This limitation might constitute an unbearable burden – depending on the amount of the revenue and financial status of the individual concerned – on the right to defence, making it impossible to use all available resources in trial. The Constitutional Court underlined: Article 70/I on the citizens' general obligation to proportionately contribute to the public revenues cannot be deemed as a pressing need to justify the limitation on the right to defence against the exercise of the state's power to prosecute crimes. The effective exercise of individual rights cannot be dependent on fulfilling the obligations to pay revenues. The costs of criminal investigations, either generally or in concrete cases, and the maintenance of the judiciary shall be borne by the whole society; linking the right to defence and other fair trial rights to revenues cannot be considered as a necessary limitation for the protection of other fundamental rights, or for the obligation to

contribute to state revenues. For these reasons, requiring the payment of revenues when a copy of files is received is an unconstitutional limitation on the right to defence.
Furthermore, the above procedural revenues constitute a violation of the principle of equality of arms, since on one hand the prosecutor – as an agent exercising the state's criminal power – is exempted of paying revenues, thus can obtain all the necessary documents for free, on the other hand, the obligation to pay for the photocopies can result in serious inequality between the public prosecutor and the defendant. Although, under Article 70/I the state enjoys a wide discretion, the provisions on revenues created a situation, which constitutes a violation of individual rights. The legislator has to enact laws conforming to the institutional duty of the state in protecting and providing fundamental rights. For these reasons, the Constitutional Court called on the Hungarian Parliament to amend the ACP and RA according to the ruling by 31 December 2005.