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REFERENDUM AND REPRESENTATIVE DEMOCRACY*

The introduction of seven referendum questions by the Hungarian opposition parties Fidesz and KDNP on 23rd October 2006 marked the beginning of a new chapter in the relationship between direct and representative democracy in the constitutional history of the post-regime transition era. These initiatives were openly aimed at discrediting the government with extra-parliamentary instruments. All referenda debates in the post-transition period have affirmed the fact—considered a commonplace—that this legal institution of popular sovereignty can be an efficient instrument for attaining political objectives. This was indeed the case several times since the beginning of transition, first with the "four times yes"[1] referendum, the result of which exerted a significant impact on the course of the ongoing transformations. This is the first time, however, when the initiators sought to use referenda to bring down a government. The politicisation of plebiscites was of course helped in no small measure by the circumstance that in the framework of continuously ongoing constitutional legislation the place of referenda in the new constitutional order was never clarified and, moreover, the legal regulation of referenda—starting with the first statutory provision in 1989 all the way to the constitutional amendment adopted in 1997—never ranked among the most successful legislative outputs. The recent political and constitutional law debate, which that lasted over a year, grew acrimonious in the process and challenged the authority of several constitutional institutions, did nevertheless yield two benefits. One is that the National Election Commission (OVB) and the Constitutional Court (AB), which engaged in bitter debates regarding the certification of specific referendum questions, arrived at the joint position that the several deficiencies of the referendum law constitute an unconstitutional omission. In response to the OVB's motions, the Constitutional Court obliged parliament to redress these deficiencies, and due to the political gravity of these issues for all political parties, the requested amendments took place at the end of 2007. Another beneficial outcome of this unfortunate conflict is that an investigation exploring the relation of representative and direct democracy in the domestic political and constitutional system commenced in the columns of several daily and weekly newspapers. The most fruitful of these debates was probably the one which began and concluded with a writing by János Kis in Népszabadság.[2] Before discussing the theoretical questions raised by this debate, it is worth recalling the constitutional provisions on referenda after 1989 and their interpretation by the Constitutional Court.

THE CONSTITUTION, THE PRACTICE OF THE CONSTITUTIONAL COURT AND THEIR INTERPRETATION

The fundamental theoretical question regarding referenda is how they, as manifestations of popular sovereignty, relate to representative democracy, the other form of popular power. The text of the Constitution, which was comprehensively amended in 1989, established that "in the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives." The Constitutional Court first interpreted this passage in its decision 2/1993. (I. 22.) AB, wherein it held: "In the constitutional order of the Republic of Hungary the primary form of exercising popular sovereignty is representation." This approach essentially reflects the liberal position that in a democratic state governed by rule of law the power derived from the people is exercised through constitutional organs, primarily representative bodies. Acknowledging this constitutional interpretation, I believe it is not worthwhile to address those "theoretical" views which argue that the two forms of expressing popular will are equal in rank, since these formulate an approach that is outside the pale of the current constitutional system.[3]

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This was the interpretation from which the Constitutional Court later derived its answer to the often posed question as to whether a constitution adopted by parliament can be amended by way of a popular referendum. The response of the Constitutional Court judges was a ban on referenda seeking to amend the Constitution: "A referendum can decide issues falling under the authority of the National Assembly only within the framework of the Constitution and the laws adopted in compliance with the Constitution. The exercise of rights derived from popular sovereignty either through the National Assembly or through a referendum can only take place in accordance with the provisions of the Constitution. A question put forth in a referendum may not contain a concealed constitutional amendment." Based on the above-cited approach concerning the relationship between representative and direct democracy, it is easy to see that this reasoning is sound. If namely an article of the fundamental laws is modified by the way of a referendum then in the future there is no basis for preventing changes in another passage of the Constitution. And thus within a brief period of time the entire Constitution can be replaced—naturally without regard for whether the individual amendments are consistent with each other. If this can be done then the power to draft a Constitution no longer rests with the National Assembly, but through the referendum it is entrusted directly to the totality of the voting public. Our fundamental laws, however, have entrusted the National Assembly with the power to change the Constitution.

A solution that would allow for amending the Constitution through referenda would—almost imperceptibly—gradually lead to our gliding into a constitutional system that is without precedent in modern constitutional democracies. (The only exception to this is the Swiss constitutional model, which is built on the primacy of direct democracy. But even in Switzerland the Federal Assembly, which is the body entrusted with the authority to amend the federal Constitution, may undertake to draft a counterproposal if it is not in accord with a constitutional amendment foisted upon it by the way of a referendum, and it may submit this proposal for approval by the people and the cantons.) If we scratch the surface of this interpretation of popular sovereignty we will see that it is based on the misconception that the people are not merely the source but at the same time also the subjects of state sovereignty.

At the same time it appears that the constitutional amendment of July 1997 changed the current text of the Constitution in a way that exactly contravened the Constitutional Court's understanding laid down in 1993. Article 28/C (5) lists the constitutional provisions on national referenda and popular initiatives among those issues that may not be subject to a referendum. Plain logic will easily lead to the conclusion that if the constitutional legislator expressly forbids holding a referendum on these provisions, then she sought to allow holding a referendum on all other passages of the Constitution. However, this apparently evident interpretation—which has not been affirmed by any body authorised to interpret the Constitution, though—not only contradicts the aforementioned Constitutional Court decision of 1993, which was handed down before the amendment in question, but also numerous decisions subsequently written by the Court, most crucially Constitutional Court decision 25/1999. (VII. 7.) AB. The antecedent of this decision was the OVB's—which was considerably more referendum friendly at the time than it is today—ruling that certified the referendum question on amending the constitutional provisions regarding the election of the President of the Republic. The OVB grounded its decision in the fact that since July 1997 the passage according to which the only provisions of the Constitution that may not be subject to a referendum are those on referenda and popular initiatives has been part of the Constitution. At the same time the petitioners invoked the 1993 Constitutional Court decision.

The situation was further complicated by the fact that the Constitutional Court's decision 52/1997. (X. 14.) AB—concerning a referendum initiated by the Government on the possibility of land ownership by foreign citizens, which sought to pre-empt a referendum on the same question initiated earlier by voters—contained a somewhat different understanding of the relationship between representative and direct democracy than the abovementioned 1993 decision. From the same constitutional provision from which they had previously deduced the primacy of representative democracy, the Constitutional Court justices arrived at the interpretation that even though "the direct exercise of power is an exceptional form of exercising popular sovereignty, in the exceptional cases when it is actually realised it stands above the exercise of power through representatives."

András Körösényi uses this diversion in the Constitutional Court's practice against Kis's reasoning, arguing as follows: Kis disregards Constitutional Court decisions that do not fit his line of thought, primarily the Court's decision 52/1997. (X. 14.) AB, which states that "with regard to a

given referendum question the National Assembly is relegated into an executive role".[4] Yet Körösényi for his part disregards that the subject matter of this decision—which undoubtedly contains several unfortunate formulations—concerns the relationship between the so-called mandatory referendum, initiated by the populace with 200 000 signatures, and the so-called facultative referendum, set on its path either by the government, the President of the Republic, or 100 000 signatures by citizens eligible to vote. In the decision at hand the Constitutional Court determined the primacy of the former over the latter.

In 1999 the Constitutional Court judges therefore had several potential solutions available to them in formulating their decision. One solution was to choose between contradictory constitutional provisions and to settle the issue. A less activist solution would have been for the Court to avoid a decision and to call on the constitutional legislator to resolve the contradiction in the Constitution instead. And what did Constitutional Court decision 25/1999. (VII. 7.) AB contain instead? First of all the assertion that in its decision of October 1997, the Court had not altered its position regarding the relationship between the exercise of power by means of representation or by the way of referendum. (This is all the more curious since the decision of 1997 explained the shift in the Constitutional Court's position with reference to the amendment in the Constitution that year). In other words in 1999 the Constitutional Court judges reverted back to their 1993 position, not only by treating the 1997 constitutional text as non-existent, but also by ignoring their previous decision based on that text.

A central element of the Court's reasoning in the decision is that generally the Constitution cannot be amended by the way of a referendum—and hence, naturally, the same applies for the rules pertaining to the election of the president of the republic—because the drafting and amendment of the Constitution belongs in the National Assembly's authority. "It follows that the Constitution cannot be amended—on the basis of a voter initiative—through a referendum"—the Constitutional Court's reasoning states. In the final part of its opinion, the Court excludes the procedure whereby the president is elected from the range of questions that may be subject to a referendum because this—as an issue in the National Assembly's exclusive legislative authority—would constitute a change in the constitutional order. A blemish in the Court's otherwise accurate reasoning is that it appears to contradict the Constitution's—undeniably misguided—text, which regrettably failed to list the amendment of the Constitution in general as an issue that may not be subject to a referendum.

Nevertheless, my opinion is that János Kis overstates the conclusions from the Constitutional Court's 1999 decision, which returned to the correct principles of 1993, when he goes as far as to argue that our Constitution does not grant any independent authority to referenda, that its result is never the law and that it only leads to legal consequences in that it places an obligation on the National Assembly. The "jurisdiction" of a referendum—with the exception of the banned topics listed in the Constitution and the constitutional amendment that emerges from the Constitutional Court's practice—happens to coincide with that of parliament, which the Constitution's paragraph 28/B (1) lays out by asserting that " [t]he subject of national referenda or popular initiatives may fall under the jurisdiction of the Parliament." A successful referendum will generally result in an obligation on parliament, and the question of how representatives might be obligated to vote into law a bill reflecting the contents of the referendum's text is a separate issue. This does not remove their obligation, however. Kis's reasoning, which argues that the referendum does not bind the representatives, is therefore incorrect. The provision in the Constitution's paragraph 28/C (3), according to which "[i]f a national referendum is mandatory, the result of the successfully held national referendum shall be binding for the Parliament", cannot be understood otherwise. As I just noted, it is an entirely different matter how this obligation can be enforced. We cannot claim that the representatives are not bound by the Constitution, even though they often violate its provisions and/or principles—on occasion even deliberately.

Nor is Kis's analogy correct in asserting that when the Constitutional Court obliges the legislator to redress an unconstitutional omission, then it does not mandate the substance of the law to be created because it would thereby violate the independence of the representatives. Let us consider the first decision in the history of the Constitutional Court when an unconstitutional omission was made out, decision 32/1990. (XII. 22.) AB, in which the judges obliged the National Assembly to regulate by law the contestability of administrative decisions. Parliament could not have fulfilled its obligation by, say, installing another administrative appeals forum. Only opening up a judicial route satisfied the Constitutional Court's decision—regardless of whether the representatives would have been pleased with the previous solution.

János Kis only allows one instance in which a referendum ordered pursuant to a citizens' initiative—that is a mandatory referendum—obliges representatives: if the objective of the referendum is to stop legislation. He agrees that such a referendum does not violate the independence of representatives. Though he does not provide a reason why this is any less of a violation of the autonomy of those representatives who wish to pass a law, the more important counterargument is that neither the Constitution nor the law on referenda recognises the distinction between a referendum directed at inducing legislation and those aimed at stopping it. Hence drawing a distinction in their respective binding force is hardly justifiable on legal grounds.

One of the main deficiencies in the 1989 legal regulation of referenda was precisely that it made fulfilling the conditions for the mandatory proclamation of a referendum so easy. After all, there is hardly any even moderately popular objective for which a hundred thousand signatures would have been impossible to collect. And as a result, in spite of the principles following from the Constitution, the referendum is inevitably strengthened vis-à-vis representative democracy. In other words the Sword of Damocles hung above nigh all acts adopted by the legislature. Neither the 1997 constitutional amendment nor the subsequent 1998 legal regulation fundamentally changed this, at most it significantly reduced the chances of success for civic initiatives by raising the number of signatures to 200 thousand. But for political parties, which have significant social support, collecting even this number is not much of a challenge. Thereby referenda became almost exclusively party political instruments used by the opposition, they emerged as the most potent right of the parliamentary minority—moreover, they fulfil this purpose on the constitutional level now.

The aforementioned hiatus of the legal regulation as well as the Constitutional Court's shifting practice had the effect that the referendum—which in a constitutional state governed by rule of law is not an omnipotent, but also not an insignificant instrument of popular sovereignty that may be used within the boundaries established by strictly defined legal criteria—may on the one hand become a political tool as a result of the uncertainty inherent in the constitutional provisions and the legal regulations deriving therefrom, and may at the same time emerge as an instrument of political activism by the Constitutional Court because of the lacking theoretical guidelines for its use.

THE DIVERGING ASSESSMENTS OF REFERENDA QUESTIONS AIMED AT "BRINGING DOWN THE GOVERNMENT"

It was amidst this slightly uncertain constitutional and legal regulation and the unsteady Constitutional Court practice that the leader of the opposition announced on 23rd October 2006 the so-called "seven times yes" referendum proposal, designed as a new strategic instrument of the Fidesz–MPSZ and the KDNP to bring down the government, following the failure of the previously tried street politics. The referendum aimed at undermining certain—obviously unpopular—elements of the government's programme, some of which were already encapsulated in the budget bill. In its decisions rendered on the 20th and 21st November 2006, the National Election Commission refused to certify four of the questions and allowed three initiatives to proceed. Objections were submitted to the Constitutional Court in connection with all seven decisions.[5] In its decision published on 9th March 2007, the Court upheld all three OVB decisions approving referenda questions, as well as two of those denying the approval of initiatives, while simultaneously striking down the two other denials and instructing the OVB to undertake a new proceeding regarding those two.

Tuition fees—the first round

One of the annulment rulings, Constitutional Court decision 15/2007. (III. 9.) AB, concerned the question on the financial contribution of students to their education, in other words tuition fees. In its decision 566/2006. (XI. 20.) OVB, the OVB had refused to certify this question citing point f) of the Constitution's Article 28/C. (5), which rules out a referendum on the government's programme. This prohibition does not merely mean that the specific document in its entirety may not be subject to a referendum, but that individual, clearly discernible elements thereof may also not be voted on in referenda. The OVB also noted that on the basis of the constitutional provisions in force regarding referenda, it is impossible to determine how long the result of a referendum would bind the legislature. Hence a successful referendum may potentially result in a concealed constitutional amendment, in as far the regulation of the issue—as an "issue exclusively subject to referenda"—would henceforth be removed from the jurisdiction of the National Assembly.

The initiators of the referendum filed an appeal against the OVB's decision. In their appeal they argued that only the government programme in its entirety is protected by the constitutional ban, but not its individual parts. They further pointed out that the regulatory deficiencies of a legal institution may not be the object of examination in a proceeding directed at certifying a referendum question; therefore a specific referendum may not be halted on the grounds that potential constitutional problems arose with regard to the regulation of the institution of referendum.

The Constitutional Court first of all held that the areas that may not be subject to a referendum based on Article 28/C (5) need to be construed restrictively. The Court argued furthermore that it is necessary to be mindful of the particularities of the form of government. As a result of our parliamentary form of government, a referendum on the government's programme would weaken the constitutional position of the government and the prime minister. The National Assembly adopts the government's programme and simultaneously elects the prime minister in one vote, and thus a referendum on the government's programme inevitably affects the prime minister's person. The inclusion of the government's programme among the prohibited subject areas therefore substantially serves the purpose of ruling out a referendum on the prime minister's person. It follows from the above that even though no referendum can be held on the government programme in its entirety, its individual parts may be subject to referenda initiatives since they do not affect the structural relations between prime minister, government and the National Assembly.

Nor did the Constitutional Court share the OVB's concerns regarding a concealed constitutional amendment, since a successful referendum would not result in the National Assembly facing a legislative obligation that it can only meet by amending the Constitution.

In his concurring opinion Judge András Holló differed from the Court's position and argued that in his view neither the government programme in its entirety, nor its individual elements may be subject to a referendum. At the same time, individual elements of the implementation of the government's programme, which fall into the National Assembly's authority, may be voted on in a referendum. This is why the issue of the tuition fee could be decided by a referendum. Justice András Bragyova, however, believes that the OVB's decision should have been upheld. In his dissenting opinion he expounded on why a referendum on the subject of tuition fees cannot be held for three distinct reasons. In addition to touching upon the government's programme, it does not belong in the National Assembly's authority and also affects the contents of the budget act. His position is that the form of government leads to different conclusions than those laid out by the majority. In a parliamentary democracy, the government's programme expresses the constitutional relationship between the National Assembly and the government, it encompasses the constitutional-political content of "confidence" and the notion that in the realisation of its objectives the majority of the National Assembly—legally this is the National Assembly's decision [Article 24 (2) of the Constitution]—supports the government. And none of the elements of the relationship between the National Assembly and the government belongs among those issues that may be decided by referendum. This follows from a principle established by the Constitutional Court long before, namely the primacy of representative democracy. Moreover, as a consequence of the principle of free mandate a successful referendum is only binding for the National Assembly as an organ of state.

The individual representative is not obligated to vote in a prescribed manner. Thus (in this sense) the result of the referendum creates a political obligation for the National Assembly just as the government programme does (which is also not binding in a legal sense). A successful referendum would compel the majority of representatives to adopt a decision that is exactly the opposite of the one they assumed obligation for by voting for the government's programme. In András Bragyova's view a referendum question seeking to oblige the National Assembly not to do something—that is not to decide—is impermissible, since a referendum question can only limit the National Assembly's authority in individual, specified decisions and not in an unspecified subject matter and indeterminate number of future decisions. A referendum question therefore needs to delimit a specific obligation met in a single instance through one act of the National Assembly. The National Assembly cannot take the referendum result as a grounds for prohibiting either itself or any future National Assembly to restore the tuition fee. This is not part of the legislature's right. On the contrary, it would mark the removal of a legislative authority. In addition, Bragyova argues that the students' financial contribution is an allocation in the budget's revenue plans and hence a referendum on this subject is inadmissible based on paragraph a) of the Constitution's Article 28/C. (5).

Doctor's fees—first round

The second injunction ordering the OVB to undertake a new certification procedure was submitted in Constitutional Court decision 16/2007. (III. 9.) AB regarding the doctor's fee. In its decision 568/2006. (XI. 21.) the OVB had justified its refusal to certify the sample signature sheet in this case on the grounds that the question pertains directly to the budget and is therefore in conflict with the Constitution's Article 28/C. (5) paragraph a), in view of the fact that the budget bill for the year 2007 (T/1145) already planned an intake of 22 billion forints from this levy for the benefit of the Health Insurance Fund. The initiators of the referendum appealed the OVB's decision. In their view a successful referendum would not causally result in modifying the budget act, nor did the question aim to achieve that in the future citizens determine individual expenditures in the budget act. Hence the OVB should have certified the question.

In repealing the OVB's decision, the Constitutional Court argued that it had already explained in its decision 51/2001. (XI. 29.) AB that the subject matters that may not be put to a referendum must be construed narrowly. It follows that the provision in the Constitution's Article 28/C. paragraph (5) point a) removes the contents of the budget act and the act on the implementation of the budget from the purview of referenda. Therefore a question may not be put to a referendum if it contains an amendment of the budget act or if it were to inevitably result in changing a law that falls within the prohibited subject areas. The Court notes in its opinion that it decides on a case-by-case basis whether the given referendum question has a direct and substantive impact on any individual income or expenditure item in the budget act.

The Constitutional Court noted that at the time of the OVB's decision the budget act had not made provisions regarding the doctor's fee, the item only appeared in the appendix to the budget bill. There are no grounds for denying the certification of sample signature sheets with reference to future budgets or to budget proposals. Following the guidelines of the Constitutional Court judges, the OVB needs to examine whether the referendum affects the already enacted budget allocations.

Judge András Bragyova once again disagreed with the annulment of the OVB's decision. In his dissent he argued that regardless of the provisions of the budget act there can be no referendum on the issue of the doctor's fee, since such a referendum would necessarily conflict with the Constitution's Article 28/C. (5) (a). In Bragyova's view assessing whether or not the issue of the doctor's fee may be put to a referendum depends on how we define the terms budget and doctor's fee. His opinion is that if we start from the generally accepted definition that the budget is an itemised list of the state's intakes and expenditures for a specified period of time, then by the content of the budgetary act we mean anything that touches on the budget's revenue or expenditure claims. The budgetary cycle is continuous—this is concomitant to the state's way of operation—and hence it cannot be identified with a law or laws in effect at any given time. The doctor's fee creates a revenue claim and thereby directly influences the budget's balance. It follows therefore that the referendum question by its very nature addresses an issue that affects the content of the budget as it is construed above, regardless of how it pertains to the current statutory legal situation.

As we thus observed above, the annulment in the case of the doctor's fee occurred only on formal grounds. The Constitutional Court's annulment decision argued that the budget act that contained the doctor's fee and therefore served as the basis for refusing to admit the referendum question was only a bill awaiting adoption by the National Assembly at the time of the OVB's decision. The bill was in fact passed before the Constitutional Court submitted its decision. Obviously sensing that following the Constitutional Court's decision the OVB's refusal to certify the question would be a mere formality, the initiators withdrew their question. At the same time, shortly thereafter they replaced it with a slightly reformulated question that only sought to prohibit levying a doctor's fee from the first of January of the year following the referendum, and they also augmented this question with another question proposing a ban on the hospital fee.

The OVB therefore had to argue again the three questions that were most important with regard to the objective of bringing down the government: the issue of the student contribution to higher education (tuition fee), the doctor's fee and the closely related hospital fee. In the latter two it had to decide the same issue with identical reasoning.

Tuition fees—second round

After a repeated proceeding, the OVB issued its decision 105/2007. (III. 29.), wherein it once again refused to certify the sample signature sheet. The Commission based its decision on Article 28/C. paragraph (5) point a), which prohibits a referen-

dum on the budget. Though the tuition fee is an income that accrues directly to the institutes of higher education, its abolition would necessitate funds from the central budget to offset the losses incurred by these institutions in order to preserve the viability of their operation. In the opinion attached to its decision, the OVB reiterated its position that a successful referendum would result in the amendment of the Constitution.

The OVB's negative decision was once again appealed. The appellants explained that the OVB ought not have referred to such grounds for refusal which it had failed to invoke in its first decision. In their view the issue does not directly impact the budget, and as far as the argument regarding the concealed constitutional amendment is concerned, it had already been adjudicated by the Constitutional Court.

In decision 32/2007. (VI. 6.) AB, the Constitutional Court first reviewed its own practice regarding the budget as a prohibited subject matter for referenda. As a result of this exercise it arrived at the conclusion that in this case it must be determined whether the referendum question aimed at abolishing the tuition fee contains an amendment of the current budget act (Act CXXVII of 2006), or whether it inevitably necessitates the amendment of that law. In the Constitutional Court's view the tuition fee was not listed among the intake of universities and colleges, and hence a successful referendum would not require an amendment of the budget act but rather that of Act CXXXIX of 2005 on higher education. The Constitutional Court thus concluded that the certification of the sample signature sheet could not be denied with reference to the question's conflict with the budget. The Constitutional Court did not even engage in a substantial discussion of the OVB's reasoning concerning the constitutional amendment. Instead, it noted that it had deemed this concern groundless in its decision 15/2007. (II. 9.) AB.

As a result of the above, the Constitutional Court granted the appellants' motion and struck down the OVB's decision once again, instructing the Commission to reconsider the issue in the framework of a new proceeding. In addition, in an unusual move it called the OVB's attention to the fact that in a renewed proceeding it would have to certify the sample signature sheet containing a referendum question that complies with the referendum act. The Court pointed out that in a renewed proceeding the OVB is not only bound by the holdings of the Constitutional Court decision, but also by the opinion attached. This unprecedented instruction to a constitutional body was stressed by the President of the Constitutional Court and by the judge who delivered the decision in the framework of an—also unusual—press conference.

In this instance, too, Judge András Bragyova dissented from the annulment of the OVB's decision, and he summarised his reasons in a dissenting opinion. He reiterated his reasoning laid out in his dissenting opinion attached to Constitutional Court decision 16/2007. (III. 9.) AB, according to which by the content of the budgetary act we understand everything that affects the allocations of the budget's revenues or expenditures. And it is indisputable that the tuition fee qualifies as budget revenue. Moreover, the student financial contribution can also be qualified as a levy, which is another reason why it may not be subject to a referendum. By levies we understand all those fees in the case of which the obligation to pay derives from the use of a public service or where one must pay for the readiness of a state-provided service, its being at the public's disposal.

Doctor's fee, second round, and hospital fees, first round

In its opinion denying the certification—with identical reasoning—of the modified and reintroduced questions on doctor's fees and hospital fees, the OVB undergirded its decision with several arguments developed in the opinion section of the decision. Following the Commission's reasoning, the referendum initiative seeks to have citizens precisely determine an item in a future budget act and thus the referendum question falls into a subject area excluded by the Constitution's Article 28/C. paragraph (5) point a). The OVB also called attention to the fact that the question may even impact the budget in effect during the year in which the referendum was to be held. The reason is that it may happen that the period for which the budget act is in effect is extended or that the National Assembly adopts the budget for a period that is longer than a year. The OVB explained further that the stability of the Health Insurance Fund's budget and potential changes in the structure of its revenue and expenditure streams need to be assessed by a different constitutional standard than those revenues collected by the central budget that are not earmarked for specific purposes. In the OVB's view an annual change in these rules would critically jeopardise the stability of the insurance-based healthcare system. The OVB further pointed out that at the mo-

ment it was impossible to determine how long the result of this referendum would oblige the legislature, and thus a successful referendum would simultaneously also result in a hidden amendment of the Constitution.

The initiators turned to the Constitutional Court with a complaint regarding the OVB's decision. They argued that the OVB had denied the certification of the signature sheet with reference to next year's budget, a reasoning that runs afoul of the Constitutional Court's 16/2007. (III. 29.)AB decision.

In adjudicating the complaints in decisions 33/2007. (VI. 6.) AB and 34/2007. (VI. 6.)AB, the Constitutional Court once again reviewed the practice it had developed regarding referendum initiatives affecting the budget. According to guiding decision 51/2001. (XI. 29.) AB, a question may not put to a referendum if it contains an amendment of the budget act or inevitably results in a modification thereof, or if its aim is for the voters to exactly determine individual expenditures in future budget acts. As a new argument, which did not appear in its previous practice, the Constitutional Court noted that the certification of the sample signature sheet may only be denied with reference to future budgets if the referendum question aims to predetermine individual expenditures. The hospital fee and the doctor's fee, in contrast, are not an expenditure but rather an income in the current budget of the Health Insurance Fund. The Constitutional Court's view is that even a successful referendum would not necessarily induce an amendment of the budget act, since the obligation to pay a doctor's fee or a hospital fee does not derive from the budget act but from Act LXXXIII of 1997 on the services of the mandatory health insurance. Nor is there a danger of the referendum affecting the budget in force, the Court believes, since there is no information which would suggest that the period for which the act on the budget of the Republic of Hungary for the year 2007 applies would be extended in time. The Court also did not find persuasive the OVB's argument that the abolition of the hospital fee would critically endanger the stability of the healthcare system. Pursuant to the Constitutional Court's decision, the content of the budget act as a subject matter excluded from the range of topics open to a referendum may not be construed this expansively. Furthermore, the nature of the doctor's fee and the hospital fee does not suggest that their abolition would seriously jeopardise the stability of the healthcare system. Just as in its decision 15/2007. (III. 9.) AB on the referendum initiative concerning the tuition fee, the Constitutional Court once again concluded that a successful referendum would not result in an obligation incumbent on the National Assembly that could only be met by amending the Constitution. It thus found that the reasoning invoking such a scenario is unsubstantiated.

Based on the above, the Constitutional Court granted the complainants' motion and obliged the OVB to undertake a new proceeding. Additionally, in the decisions and the press conferences following their publication, the Court called the OVB's attention to the fact that in a reopened proceeding it would have to certify the sample signature sheet containing the referendum.

Just as he had done in the case of decision 16/2007. (II. 9.) AB on the doctor's fee, András Bragyova again dissented from the majority decision. He pointed out once more that by the content of the budget act one must understand everything that affects the allocations in the budget's revenues and expenditures. And the doctor's fee and the hospital fee are budget allocations, regardless of whether their intake flows into the central budget, the Health Insurance Fund, or if they stay with the given institution where they were collected. Moreover, the hospital fee may also be considered a levy, which would render it additionally ineligible as a subject of a referendum.

This time Judge András Holló also wrote dissenting opinions to the Court's decisions, in which he was joined by Miklós Lévay. The judges emphasised that in interpreting the subject areas excluded from referenda one must start with their designated function. A referendum may not pertain to the budget because that would directly affect the safe realisation of the state's duties, as well as the financial and economic preconditions of the latter, and hence the country's governability. Given this function of the rules excluding certain subject areas from the scope of referenda, the Constitution's provisions extend to both, the budget's expenditures as well as its intake, and applies in the context of both, the current and future budgets, too.

Tuition fee and doctor's fee third round, hospital fee second round

In conducting the new proceedings, the National Election Commission started from the basis that—as the Constitutional Court stressed in Point 5 of its annulment decision—"in a renewed proceeding—in accordance with the provisions of Article 27 (2) of Act XXXII of 1989 on the Constitutional Court—it is not only the holding of the Constitu-

tional Court's decision that binds the OVB in its renewed proceeding, but also the Court's opinion. The OVB is obliged to consider the contents of the opinion in the renewed proceeding and in rendering its decision." Put differently—the OVB's opinion states –, this means that the Constitutional Court's decision in its entirety is binding for the OVB and the Commission cannot ground another decision in reasons that the Constitutional Court has already rejected. Legally, however, the Commission may well deny certifying the initiative once again in a new proceeding if it bases its decision exclusively on new reasons. Not even the Constitutional Court may curtail this right of the OVB. The Court would only have the right of constraining the OVB in this matter if it also had a power of revision In this case, however, a renewed proceeding would not make sense. As long as the legislator ties the annulment unequivocally and inevitably to an obligation to conduct a renewed proceeding, the OVB exercises its jurisdiction autonomously. Following the logic and the text of the relevant regulations, an order to undertake a new proceeding does not imply an obligation to render a specific decision.

In the context of the above case, in the renewed proceeding the OVB examined whether the changes in the legal situation that had taken place in the meanwhile had an influence on the evaluation of the referendum initiative. The majority found that no change had taken place that would have affected the issue touched upon by the referendum initiative. Hence in its decisions 154/2007. (VI. 25.), 155/2007. (VI. 25.) and 156/2007. (VI. 25.) the OVB certified the sample signature sheets.

At the same time the OVB's majority also maintained its professional standpoint that the referenda initiatives—also with regard to the contents of Constitutional Court decisions 51/2001.(XI.29.) AB and 15/2005 (IV.28.) AB—put forth questions that pursuant to point a) of the Constitution's Article 28/C. (5) fall under the subject heading "budget", and as such they belong among the "prohibited subject matters".

According to the OVB's position—outlined in an unusually lengthy and detailed opinion—the potential constitutional-amending result of the proposed referenda questions, which the OVB had pointed to several times in its previous decisions, also appears in a new context since the Constitutional Court laid down in its decision 27/2007. (V.17.) AB that "there is a breach of the Constitution resulting from an omission on the part of the National Assembly, which has failed to regulate how long a decision brought about by a binding referendum is binding for the National Assembly, nor when a law adopted on the basis of a referendum (reinforced by a referendum) may be amended or repealed in accordance with the general rules applicable to the legislature." The Constitutional Court called on the National Assembly to satisfy its regulatory obligation by 31st December 2007.

On the basis of the aforementioned Constitutional Court decision the OVB—the majority opinion says—saw the arguments laid out in both its previous decisions reinforced. To wit, these arguments said that as a result of the lacking legal provisions regarding a specific deadline by which to legislatively settle an issue decided upon affirmatively in a valid referendum, such a referendum decision would effectively impose an indefinite legislative moratorium—pertaining to the issue at hand—on the National Assembly, which can only be constitutionally justified through amending those provisions of the Constitution pertaining to the relationship between the respective institutions of representative and direct democracy. This—given the Constitutional Court's consistent practice laid down in several decisions—would constitute an obstacle to the certification of the question due to its constitutional-amending effect.

The OVB's majority, however—with three dissenting opinions, one of them penned by the author of this article—also acknowledged with regard to this reasoning that in decision 27/2007. (V. 17.) AB the Constitutional Court's ruling had not referred to the certification of the referendum initiative at hand, and that the decision's opinion provided no guideline in the case of this referendum since there was no legislative obligation incumbent on the National Assembly that could only be "satisfied" through a constitutional amendment.

In a departure from standard practice, the majority of the OVB's members found it necessary to issue a press statement to accompany their decision because of the "baseless political attacks and statements by individual party representatives containing open threats" relating to the Commission's work on this issue. In its statement the Commission emphasised that according to the laws in effect, the Constitutional Court cannot prescribe the contents of the OVB's decisions (or its professional viewpoint), nor cannot it deprive the OVB of its certification authority on the basis of rule of law standards. The Commission regarded the slanderous statements by political parties and certain media representatives, in which they cast doubt on the professional expertise, impartiality, and even decency of the OVB's members not only as attacks on their person, but al-

so as undue aggression against a fundamental constitutional institution of an European Union member state. In the arguments laid out in the opinion attached to its decisions, the OVB still rejects the constitutionality of curtailing the latitude of parliamentary governance in the area of budget management through an overly expansive interpretation of the legal institution of referendum. The OVB does not, however—thus the statement –, seek to dispute the Constitutional Court's ultimate discretion and responsibility in this area. At the same time it declares that it acknowledged the Constitutional Court's legal approach not out of professional conviction, but exclusively out of the respect for the supremacy of legality and the constitutional order.

Following the OVB's decisions, which were rendered at the prompting of the Constitutional Court, the Court approved the certifications four months later (!) in its decisions 58/2007. (X. 17.), 59/2007. (X. 17.) and 60/2007. (X. 17.) AB, and thus the collection of signatures was allowed to commence.

UNCONSTITUTIONAL OMISSIONS IN THE REGULATION OF REFERENDA

During the certification proceeding, which did indeed stretch out quite some time, the OVB and private citizens, too, called the Constitutional Court's attention to several unconstitutionalities stemming from omission, in response to which the Court obligated the legislature to redress the impugned deficiencies, which took place at the end of 2007.

The issues of binding force and repeated referenda

As the Constitutional Court—as we saw above—failed to address the constitutional questions repeatedly raised by the OVB in the context of specific cases, on 26th November 2006—thus shortly before the first decisions denying certification—the Commission submitted a motion to the Court to make out an unconstitutional omission, arguing that in the absence of regulation on the binding force of referenda a successful referendum would result in an unconstitutional situation. In its motion the OVB argued that in Act III of 1998 on national referenda and popular initiatives, the legislator did not mandate how long a decision rendered by a successful binding referendum binds the National Assembly. In this way a situation can occur—unless the referendum question itself contains a reasonable deadline—wherein the possibility of immediately passing legislation whose content contravenes the result of the referendum essentially hollows out the direct exercise of power enshrined in the Constitution's Article 2 (2) or, alternatively, another scenario could result in a permanent prohibition on enacting legislation on the given issue, thus unconstitutionally limiting the National Assembly in exercising its legislative authority pursuant to the Constitution's Article 19, including the Article's paragraph 3.

Pursuant to Article 8 (1) of Act III of 1998 on national referenda and popular initiatives, "[a] decision rendered by a successful binding referendum is binding for the National Assembly." At the same time the law does not contain a provision on how long the result of a referendum stops the National Assembly from exercising its constitutionally provided legislative prerogatives, and according to prevailing practice initiators were not required to provide such deadlines when requesting certification. According to Article 19 of the Constitution:

"(1) The Parliament is the supreme body of State power and popular representation in the Republic of Hungary.

(2) Exercising its rights based on the sovereignty of the people, the Parliament shall ensure the constitutional order of society and define the organization, orientation and conditions of government.

(3) Within this sphere of authority, the Parliament shall -

a) adopt the Constitution of the Republic of Hungary;

b) pass legislation […]"

In the absence of a rule regarding a deadline on curtailing the National Assembly's legislative options, we can arrive at several conclusions—all of which are equally unacceptable from a constitutional law perspective. One of these conclusions is that in the absence of a moratorium on amendments or repeals, the legislator can set out to pass a law that contravenes the result of the referendum already the very next day. Such an interpretation would clearly be antithetical to the constitutionally established institution of referenda, and indirectly to the Constitution's Article 2 (2) as well. According to the other unacceptable interpretation the prohibition on legislating in this subject matter is final, unless another referendum obliges the legislature to adopt a law on the previously prohibited subject matter. Limiting the exercise of the National Assembly's legislative and other authorities without any deadline attached to the limitations essentially results in the creation of "issues that are exclusively subject to referenda", since only another successful referendum can en-

force the National Assembly's renewed legislation in these subject areas. This is especially striking in the case of referendum initiatives aimed at prohibiting the adoption of laws of any kind in a given subject matter, but it also applies to positive obligations to adopt specific legislation, which could be tantamount to a permanent prohibition on amending or repealing the resultant laws. The text of the Constitution does not recognise "issues exclusively subject to referenda", these would contradict the National Assembly characterisation as the "supreme body of State power and popular representation" laid down in the Constitution's Article 19 (1).

Indeed, the question even arises whether a subsequent referendum could change the result of a previous successful referendum. After all, if referenda can be held on issues that fall within the authority of the National Assembly, but parliament is no longer entitled to make decisions regarding an issue as a result of a successful referendum, then the question may also no longer be raised in a referendum, thus resulting in a veritable "eternal clause", which would also constitute a concealed constitutional amendment since the Hungarian Constitution—in contrast to the German and French fundamental laws—does not recognise such clauses. Furthermore, indefinitely depriving parliament of its power in certain subject areas does not mesh with the National Assembly's role as specified by Article 19 of the Constitution, and it also violates—based on the explanation provided above—its Article 2 (2).

A curtailment of the National Assembly's constitutional authority as a result of the law's unconstitutional omission is also antithetical to the Constitutional Court's standing practice regarding the relationship between representative and direct democracy, which the Court first formulated in its decision 2/1993. (I. 22.) AB.

Moreover, Article 31 (3) of Act XVII of 1989 on referenda and popular initiatives, which was in force until 26th February 1998, contained provisions—which were lacking later—on limiting the temporal scope of the prohibition on legislation in the context of laws reinforced by a referendum. It states that "[t]he amendment of a law reinforced by a referendum can occur—two years after the law's entry into effect—in accordance with the constitutional provisions on legislation." The law's commentary provided the following constitutional explanation for the provision: "The Proposal seeks to limit the binding force of a referendum and in this sense parliament's legislative authority for a predetermined period—two years. Subsequently parliament should have the right to amend the law or to regulate anew the respective social relations in accordance with the relevant constitutional or legal provisions. The Proposal therefore does not seek to automatically designate the subject matter of an act once enacted on the basis of a referendum as an issue exclusively subject to referenda 'until the end of times'. In the case of an amendment, etc., to the law in question, the Proposal naturally ensures the legal possibility of initiating a referendum."

It emerged that almost simultaneously another petitioner argued that the lack of a rule on how long after an unsuccessful referendum the same question cannot be brought before the people again constituted an unconstitutional omission. In its decision 27/2007. (V. 17.) AB, the Constitutional Court responded to both petitions, stressing again "that an unconstitutionality on the grounds of omission does apply since the National Assembly has failed to regulate in law how long a successful binding national referendum obligates the National Assembly, nor has it regulated when a law adopted on the basis of a referendum (a law reinforced by a referendum) may be amended or repealed following the general rules relating to legislation. The National Assembly has furthermore also failed to regulate how long the same question may not be put to a referendum." On both questions the Constitutional Court gave parliament until 31st December 2007 to redress the legislative deficiencies.

In its opinion the Constitutional Court determined that the moratoria that the petitioners found lacking was indeed absent from Act III of 1998 on national referenda and popular initiatives (Nsztv.), in contrast to the law in effect before 1998. The Constitutional Court emphasised that the principle of the rule of law not only formulates a requirement that the meaning of individual legal norms be unequivocal, but also calls for the predictable functioning of individual legal institutions. The position of the Constitutional Court judges is that the preeminently important institution of the direct exercise of power is not properly constitutionally guaranteed due to the deficiencies raised by the petitioners. The judges also pointed out that the gaps in the regulation cannot be resolved by the legal interpretation of those applying the law, since the interpretive solutions referred to by the petitioners are constitutionally unacceptable. The Court stressed furthermore that the right to a referendum is a fundamental political right, which results in the state's objective institutional protection obligation. It follows that safeguard rules serving the enforcement of the fundamental political right to referendum need to be comprehensively created and adopted. In view of the

above, the Constitutional Court made out a breach of the Constitution manifested in an omission.

The Constitutional Court invoked its own decision 64/1997. (XII. 17.) AB, in which it had undertaken a preliminary review of the bill on national referenda and popular initiatives. Then the Court had taken the position that the two-year moratorium in the bill on calling or initiating a referendum on the same question was unconstitutional. In their reasoning the judges explained that since the adoption of Article 28/C (5) of the Constitution the fundamental laws themselves specify which questions may not be subject to a referendum. Beyond these constitutional limitations, the law may not contain further restrictions, they noted. The Constitutional Court construed the two-year moratorium in the bill as a further restriction. In the decision at hand, however, the Constitutional Court diverged from its previous reasoning and argued that the requirement for a constitutional-level regulation only refers to those subject areas entirely and permanently removed from the range of issues that may be subject to a referendum. Further reasons for exclusion, which do not constitute an absolute limitation on initiating or holding a referendum, may be established by law. These include temporary restrictions on holding a referendum. The operation of the constitutional institution of referenda may thus be limited by law, as long as the restriction does not pertain to its essential substance. The National Assembly is therefore free to choose whether to redress the lacking regulation by amending the Constitution or adopting a law.

As we saw above, however, even after its decision which made out the regulatory deficiency, the Constitutional Court nevertheless rejected the idea of asserting this constitutional consideration in the context of the approval of the referendum questions it had to address—including the three questions that were important to the Fidesz/KDNP. To be sure, the lack of a binding force does not constitute an unconstitutional situation in the case of every question, but most certainly in the case of questions pertaining to the prohibition of the parliament's legislative activity in those areas addressed by the questions put forth by the Fidesz/KDNP. In their decisions 94/2007. (XI. 22.), 95/2007. (XI. 22.) and then 98/2007. (XI. 29.) AB, however, the judges unexpectedly applied their May decision on omission. In these three decisions the Court, instead of certifying the question on dual citizenship or the two referenda questions relating to hospital privatisation, suspended the proceedings until 15th June 2008. The gist of the Court's reasoning is that the National Assembly had not regulated by law how much time must go by before the same question can be put to a popular vote again, and these two questions were already the subject of an unsuccessful referendum in December 2004. Pursuant to the Constitutional Court's argumentation, an unconstitutional "suspended legal situation" existed since an omission had been made out. This situation will persist up until the point at which the legal statute resolving it enters into effect. The opinion in the unanimous decision—while recognising that the suspension of the proceeding temporarily curtails the initiators' right to a referendum—adds as an explanation for the curtailment of the affected fundamental right that "in the case at hand the initiators were aware of the unconstitutional (temporarily 'suspended legal') situation when they handed in their referendum questions, they submitted their initiative with this in mind."

The only problem with this salutary decision is the following: why was its reasoning not applied by the Court's judges a month earlier, when certifying the three questions important to the Fidesz/KDNP? After all the lack of regulation on the binding force had created exactly the same unconstitutional "suspended legal situation" as the unregulated issue of prohibiting repeated referenda, which the Constitutional Court took exception to in its May 2007 decision. The initiators of referenda questions on the doctor's fee, the hospital fee and the tuition fee were aware of the unconstitutional situation, and as they rephrased the question on the doctor's fee—and right from the start only handed in the question on the hospital fee as an addendum to the original question—following the May decision, they could easily have inserted a proviso into the question on how long they sought to limit the National Assembly's legislation. As they failed to do so, an application of the Constitutional Court's reasoning in the November decision should have meant that the questions could not have been certified in October, either, and that the proceeding should have been suspended until the relevant law was enacted.

One can only guess, of course, why the Court used a different constitutional standard in October 2007 from the one applied in November. One assumption is that the October decision was politically motivated, that is the judges chose to overlook the state of unconstitutional omission in the case of the three questions that were crucial to the Fidesz/KDNP, while regarding the question relating to the ban on hospital privatisation—the question already once posed unsuccessfully—they consistently applied the logic of their own 2007 May decision.

Thus, once the certification of the over one million signatures collected—with lightning speed—

in support of three certified questions took place in early December 2007, the National Assembly decided upon holding a referendum, which took place on 9th March 2008 and ended in a valid result and the victory of "yes"-votes on all three questions. At the same time it ordered the referenda, the National Assembly also redressed two omissions through Act CLXXII of 2007. The following provision was adopted to replace Article 8 (1) of the Act on national referenda and popular initiatives: "A decision brought about by a successful referendum is binding on the National Assembly for three years from the date of the referendum—or, if the referendum resulted in a legislative obligation, then three years from the date of the adoption of the corresponding law. The National Assembly is obliged to immediately satisfy the decision of the referendum."[6] The act's Article 11 was amended to say that the OVB can also deny the certification of the signature collection sheet if the same question had been put to a referendum during the previous three years.

Competing referenda initiatives

With regard to the three citizens' initiatives introduced almost at the same time and with identical contents—but contradictory objectives—as the three Fidesz/KDNP questions that had already been certified by the OVB in the first round, the OVB also submitted a motion to the Constitutional Court to make out an unconstitutional omission on the grounds that the Act on national referenda and popular initiatives does not contain adequate provisions for the case that the Commission needs to decide on several referenda questions with the same content. The aforementioned act only provides guidance with regard to the question on the already certified signature sheet: no referendum signature collection sheet with a matching content can be introduced until the already initiated referendum has been concluded. According to Constitutional Court decision 57/2004. (XII. 14.) AB, the signature collection sheet can only be regarded as certified once the OVB's decision on certifying has become effective and the director of the National Election Commission has applied a certification clause to the signature sheet. There is however no guideline in the Act on national referenda and popular initiatives regarding the adjudication of a referendum question handed in again with an identical content after having been already previously submitted. The OVB believes that this legislative omission violates the principle of legal security and the right to a referendum.

Constitutional Court decision 100/2007. (XII. 6.) AB determined that the regulatory deficiency noted by the OVB does in fact apply. The OVB does indeed lack the authority to deny certification to either of two competing referenda initiatives. Thus questions with the same subject matter but antithetical content may be put to a referendum, as a result of which a situation may arise that the National Assembly must implement contradictory decisions. Hence the complained regulatory deficiency jeopardises the predictable and secure operation of the legal institution of referendum to such a degree that it violates the institution of legal security, which is part and parcel of the rule of law. The Constitutional Court also shared the OVB's opinion that the legislative omission violates the right to referendum. According to the opinion attached to the decision, the Constitutional Court's standing practice holds that in addition to formulating an individual claim to protection all fundamental rights also entail the state's objective obligation to ensure the conditions for exercising the given right. With respect to the fundamental right to a referendum, the legislator also violated this objective institutional protection obligation when it failed to create and adopt a comprehensive legal regulation. In light of all the above, the Constitutional Court made out the existence of an unconstitutionality manifested in an omission, and called upon the National Assembly to meet its legislative obligation by 31st March 2008.

This time, however, the Court did not react by suspending certification until the adoption of the requested legislation, but in its decision 101/2007. (XII. 12.) AB it took a position in support of a decision on the merits of certification. With its decision 171/2007. (VII. 18.), the OVB certified the sample signature sheet for the referendum, which contained the following question: "Do you agree that certain medications that do not require a prescription be distributed outside of pharmacies as well?" Simultaneously with the examined initiative, another referendum signature sheet with identical content was submitted for certification. In its decision the OVB held that neither the Constitution nor any laws in force authorise it to reject questions with identical contents as another, already submitted initiative, with reference to some sort of rule concerning which arrived first. The lawfulness of individual referendum initiatives needs to examined one-by-one. Several complaints were brought against the decision to certify. Many complainants took exception because in their view the OVB had failed to apply the principle of prevention and during certification had disregarded the fact it had al-

ready given a green light to a referendum initiative with identical content.

The Constitutional Court found that the complaints lacked foundation. It held that the OVB and the Constitutional Court may only examine whether the specific questions meets the Constitutional and legal conditions. As corresponding legal regulations were lacking, the OVB could not apply the principle of prevention. The Court pointed out that in the case of referenda initiated in an identical subject matter but with antithetical content, it is the responsibility of the initiators to use the campaign period to draw the voters' attention to the potential consequences of their decision. This reasoning is all the more cynical since data from public opinion research shows that voters are willing to give affirmative answers to questions that address the same issue but offer diametrically opposed outcomes for the same answer. This forecasts the case of lacking legislative clarity, in that the National Assembly may face a situation in which it needs to simultaneously pass a law allowing for the possibility of purchasing non-prescription drugs outside pharmacies and another law mandating the exclusive distribution of such drugs by pharmacies. The question is why this time the Constitutional Court did not avail itself of the possibility of suspending the proceeding, as it did on the issues of hospital privatisation and dual citizenship, when it had argued that the questions could not be certified because "the foreseeable, predictable and secure operation of the constitutionally established legal institution of national binding referenda…is not ensured". The question that now remains is whether in light of such an inconsistent practice the Constitutional Court's "foreseeable, predictable and secure operation" as a constitutionally established legal institution "in accordance with the requirements of rule of law" can be ensured?

Again we are left with nothing but guesswork in trying to explain such a rhapsodic application of the law. Might the judges have opted to certify these contradictory questions because one of the initiators, namely the Fidesz/KDNP, did not seek to collect signatures at all (as they had already once demonstrated), and as a plain citizen the other was in any case incapable of acquiring 200 000 signatures in support of the initiative?

The requirement of proper legal practice

In its decision 18/2008. (III. 12.) AB the Constitutional Court did not make out an unconstitutionality manifested in an omission. In basing its refusal to certify a referendum question on the violation of what is originally a fundamental principle applying to elections—the requirement of good faith and proper legal practice—and thus opening up the gates for the rejections of hundreds of initiatives on this basis, it signals that a clear legal regulation in this area would indeed be needed. The specific referendum question that served as the basis for the decision was one of the numerous initiatives by a husband and wife against the health insurance law adopted for the second time by the National Assembly in February 2008. The couple first initiated a national referendum on 27th March 2007 with the following question: "Do you agree that following its conversion into a company the National Health Insurance Fund should not be allowed to be privatised and that it should continue to be owned by the state?" The OVB certified the question in its decision 116/2007. (IV. 18.) OVB.

The Constitutional Court rejected the complaints regarding this decision and upheld the OVB's ruling in its decision 43/2007. (VI. 27.) AB. Subsequently, on 27th June 2007, the director of the National Election Office placed a seal of certification on the signature collection sheet in accordance with Article 118 (1) of the Act on election procedures, which opened the four months period of signature collection. The initiators did not take receipt of the certified signature collection sheet, but declared instead that they withdraw their proposal—which had been decided upon—and then initiated another certification proceeding on the same question. Citing Article 12 (c) of the Act on national referenda and popular initiatives, the OVB refused certification in its decision 166/2007. (VII. 18.) OVB. The cited provision prohibits the submission of new sample signature collection sheets relating to a question whose content is identical with that of an already submitted initiative if the OVB has already certified the question put forth by the latter. The couple filed a complaint with the Constitutional Court against the OVB's decision not to certify, arguing that the law does not prohibit the initiation of a new certification proceeding following the withdrawal of an initiative. They justified the withdrawal of their first question on the grounds that the three questions they submitted for certification achieve their purpose if they can collect signatures for them at the same time, because "separately the intention of the initiative may be circumvented, and the citizens would not understand these questions posed separately."

This complaint was rejected by the Constitutional Court in a unanimous decision that upheld the OVB's decision. A minority composed of five judg-

es, who wrote a concurring opinion, argued that the refusal to certify was correct for the reasons invoked by the OVB or—in the case of Judge András Bragyova—for other constitutional or legal reasons, while the majority believed that the initiators had violated the requirement of proper legal practice.

The majority's reasoning found the basis for refusing certification in the new point e) (previously point d)) of Article 10 of the Act on national referenda and popular initiatives, with the help of which they arrived at the fundamental principles regulated in the Act on election procedures. The cited provision of the Act on national referenda and popular initiatives makes it possible for the OVB (and thus also for the Constitutional Court, which reviews the latter's decision) to reject the question if "the signature collection sheet does not meet the requirements laid down in the Act on election procedure". And—thus the majority—the fundamental principles enshrined in Article 3 of the Act on election procedures—among them the good faith and proper legal practice, which is probably only applicable to referenda—constitute precisely such a requirement.

The decision's opinion section seeks to explain why the Constitutional Court chose this very moment to stress and to begin applying the requirement of proper legal practice from among the fundamental principles applying to elections. The Court's reasoning says that the OVB and the Constitutional Court are nowadays faced with a new situation with regard to national referenda initiatives. One element of the new situation is the unprecedented onslaught of initiatives: the OVB rendered 465 certification decisions between October 2006 and 30th January 2008, 148 of which were appealed before the Constitutional Court. (By comparison: in 2001, 11 OVB decisions were rendered in referenda cases, 18 in 2002, 33 in 2003, 21 in 2004, and 45 in 2005). Nevertheless, only three questions made it all the way to a referendum, which took place on 9th March 2008. (Two of the few voters' initiatives between 2001 and 2005 resulted in a referendum, the questions on hospital privatisation and dual citizenship, which were voted on on 5th December 2004). The other new phenomenon according to the Constitutional Court is that the initiators—because of the absence of a legal prohibition—introduce signature collection sheets for certification on similar or contradictory questions on the same subject matter at the same time or within a brief span of time (see the competitive initiatives of the Fidesz/KDNP and the linguist László Kálmán).

The third novelty is that among the vast mass of initiatives there is a significant number of dubious proposals lacking in seriousness. For a time both the OVB and the Constitutional Court tried to take seriously even those questions obviously not proposed in earnest by their initiators. There is for example the initiative on free beer, which the initiator presumably came up with to prove that on this question, as a budget issue par excellence, it is just as impossible to hold a referendum as it on the tuition fee, the doctor's fee or the hospital fee. After the Constitutional Court waved the latter questions through, though, it was compelled to take the free beer issue seriously as well, naturally not by letting it pass and thereby completely subjecting the institution of referendum and itself to ridicule. This is why the Constitutional Court judges came up with the grounds for refusal—never used before or since—that the initiators had failed to designate from which source they would finance the free beer in the case of a successful referendum. (As we know, the initiators had not designated the source from which the abolished fees might be compensated for, either, as the law does not impose such a requirement on the framers of the referendum question).

A few months ago the OVB became fed up with the stream of "What came first, the chicken or the egg?"-type of ridiculous questions, which were arriving by the dozen, and with a majority decision instituted a preliminary proceeding during which the OVB first decides whether a question can be taken seriously before undertaking an examination on the merits. If the majority responds negatively to this question, then the Commission does not undertake a substantive examination, it does not submit a decision in the case but rather informs the initiator in a letter that with her ludicrous question she has abused the requirement of good faith and proper legal practice. On the face of it, this is the same reasoning as the one contained in the Constitutional Court's decision under discussion here, with the difference that there was no possibility for appealing the OVB's decision, while the Constitutional Court declared the violation of proper legal practice in a perfectly regular decision, from which it follows that in the future that OVB must do the same, thus allowing for the possibility of appealing its decisions to the Constitutional Court.[7]

All signs indicate, therefore, that with its correct decision the Constitutional Court not only prevented an improper legal practice in the case of the married couple's referendum initiative—which in that case was manifested in the withdrawal for tactical reasons of the already certified question and its subsequent resubmission—but also created the possibility of preventing abusive (questions lacking in seri-

ousness, intentionally identical or diametrically opposed) questions in the future. The judges in the minority are of course correct that it would have been more fortunate if it had been the legislator who had created the necessary obstacles to improper legal practice, but we know that the possibility of such a regulation—given that it would take a two-thirds majority—is hardly realistic following the massive opposition success in the March 2008 referenda.

The Constitutional Court's otherwise accurate decision has only one flaw. In fact the same one as the aforementioned and in and of themselves also correct suspending decisions: namely that it is difficult to explain why the Constitutional Court has thus far failed to make out a violation of the requirement of proper legal practice in such cases. We may recall that in the first round on the three questions certified by the OVB, the Fidesz/KDNP had failed to collect signatures just as the married couple had now, because like them it wanted to wait for the other questions whose certifications were still pending. The only difference between the Fidesz/KDNP's actions back then and the couple's actions now is that while the couple almost immediately "withdrew" the original initiative and resubmitted the same question, the Fidesz/KDNP waited out the four months and only then introduced its questions again (this is when the linguist turned up with his questions that addressed the same subject matter with antithetical questions). The legal assessment of "withdrawing" the initiative could hardly differ from letting the deadline pass without collecting signatures, since the law does not recognise the legal possibility of withdrawal. What it does recognise, however, is identical in both cases: "the expiration of the deadline on submitting the signature collection sheets". And as we saw above, this is exactly what the Constitutional Court invoked in rejecting the repeated initiative of the married couple.

The question that now remains is why for instance the Constitutional Court judges certified the question proposed by the Fidesz/KDNP directed at interdicting the sale of non-prescription drugs outside pharmacies, which was also resubmitted with the same content, while later they—correctly—denied the couple the possibility of resubmitting their question. Again we are left with guessing, just as we were with the divergent handling of the abovementioned cases pertaining to the temporal scope of the binding force of referenda. In light of the potential explanations I will leave the guessing to the reader.

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I believe, however, that—at least from a constitutional law perspective—there are more important lesson to be drawn from the whole referenda fuss—which has led to an almost complete paralysis of governmental activity—discussed here than the investigation of potential political motivation in the Constitutional Court's behaviour. This lesson is that the regulation of the relationship between direct and representative democracy, a thought-out approach towards which has been lacking from the very beginning, needs comprehensive rethinking, also on the constitutional level. The situation in which referenda have practically emerged as an instrument of the parliamentary minority, used for the purposes of discrediting the government—in no small measure as a result of the arbitrary constitutional interpretation employed by the Constitutional Court—could be terminated most decisively by a removal from the Constitution of the institution of mandatory referendum organised by the voters.[8] This is the only way to restore the primacy of representative democracy as it operates in the Western European constitutional systems similar to ours. A realisation of this—obviously highly unrealistic—proposal—would not result in an elimination of direct democracy, not even of referenda, from the Hungarian legal system, since the facultative referendum, which may be initiated by parliament, the government, the president of the republic or the voters would persist, as would the institution of popular initiative, the other instrument of civic activity. What would be removed from the set of instruments available in a parliamentary democracy, however, is the possibility of mandatory referenda initiated by the people–which incidentally only constitute a minor percentage of the high number of referenda even in Switzerland, considered as the referendum's land of origin—suitable for discrediting existing or planned measures reflecting the intentions of the legitimate government.

Translated by Gábor Győri

NOTES

1. The most important of the four referendum questions was the one pertaining to the direct election of the president prior to the parliamentary elections, which held out the prospect of certain victory for Imre Pozsgay, a prominent leader of the Hungarian Socialist Workers' Party (MSZMP), the ruling party in the previous single-party regime. The other three questions (the dissolution of the party militia, the prohibition of party organizations at workplaces, and a report

on the party's property) had already been resolved by statutory regulations by the time of the referendum.

2. Kis János, 'A népszavazási versenyfutás' [The referendum race] *Népszabadság* (Budapest 10 November 2007); Kis János, 'A népszavazás-vitáról' [On the referendum debate] Népszabadság (Budapest 15 December 2007).
3. This is the position also taken by Tamás Fricz in the *Népszabadság* debate. Fricz argues that the conjunction "'and' clearly shows that there is no subordinated relationship between the two forms expressing political will, that they are equal in rank." Fricz also expresses his opposition to the current constitutional arrangement—as manifested in the Constitutional Court's interpretation of the Constitution—in noting that he does not accept the limitation on the use of referenda specifically mentioned in the Constitution, according to which they may not be used to compel the National Assembly to dissolve itself. In other words, his view is that "the constitutional amendment of 1989 does not reflect the conditions of 2007". See Fricz Tamás, 'Kis János téved' [János Kis is wrong] *Népszabadság* (Budapest 29 November 2007).
4. Compare Körösényi András, 'Alkotmányos-e a népszavazás?' [Are referenda constitutional?] *Népszabadság* (Budapest 2 December 2007).
5. According to the law anyone—even without any personal stake in the case—is entitled to challenge the decision of the Commission, regardless of whether certification of the question was granted or denied.
6. The government originally sought to place a similar provision—with a two-year binding force—in the Constitution's Article 28/C (Bill T/4408). After this proposal failed to garner the (grand) supermajority of two-thirds of the members of parliament necessary to amend the Constitution, a motion to amend the provision on thee three-year binding force was included among the rules of the Act on national referenda and popular initiatives, whose modification requires a (small) supermajority of two-thirds of members present.
7. The OVB's previous practice, which responded to motions lacking seriousness with a presidential letter rather than a decision, was rejected by two members of the Commission—the author among them—precisely because they were of the opinion that it unacceptably deprives the initiators' right to legal remedy in the case of the Commission's potentially faulty assessment.
8. It is remarkable that this view is shared by the Judge-Rapporteur of the three discussed referenda decisions, Péter Paczolay, who was since elected to head the Constitutional Court. See an interview with him in the weekly HVG: Paczolay Péter, 'Radikális lépésre volna szükség' [Radical measures would be needed] [2008] 5 July HVG 64–65.

Balázs Majtényi

A RIGHT WITHOUT A SUBJECT?

THE RIGHT TO A HEALTHY ENVIRONMENT IN THE HUNGARIAN CONSTITUTION AND THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT*

Though it takes on different forms and its substance is varied, the desire for protecting the environment appears in the constitution of numerous European Union countries.[1] The various methods of regulation differ in terms of whether they formulate a right that all citizens can lay a claim to, as the Spanish, Portuguese and Belgian constitutions do, or a requirement incumbent on the state instead. The latter approach was chosen by the Austrian Constitution and the German Basic Law, for example.[2] There are also instances when it is both an individual right and a state obligation, which is the route taken by the Latvian Constitution. The Hungarian Constitutional Court's decision 28/1994. (V. 20.)—in addition to associating environmental protection with third generation rights—views the Hungarian constitutional provisions, which contain a formulation similar to the one found in the Latvian Constitution, as an 'independent institutional protection'. (According to the Constitutional Court, the latter denotes a state obligation without associated individual rights, whose realisation is thus incumbent upon state institutions.) Occasionally the notion of sustainable development[3] also crops up in constitutions. Pursuant to Article 2 (3) of the Swedish Constitution, for example, public institutions must support sustainable development, which creates a "good" environment for present and future generations. Furthermore, this provision declares the realisation of environmental protection objectives to be a state obligation. Present article will refer to various categories that are uncertain and difficult to define in legal terms; I will return to their analysis below.

According to Article 37 of the European Union's Charter of Fundamental Rights, "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". Consequently, ensuring this is the joint responsibility of those organs in the Union vested with legislative, judicial and executive powers. In the Lisbon Treaty, which has not entered into force yet, the notion of sustainable development is recurrent. Thus Article 2 (3) declares that the European Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment".[4]

An examination of the relevant international regulations shows that the claims to a healthy environment appear as individual rights—in the context of human rights protection—in non-binding documents of international law. Binding international environmental conventions, however, do not adopt the language of human rights, which address the rights holders in terms of individual rights, but mostly declare only state obligations. The often cited *Aarhus Convention* is no exception in this regard. Though it makes provisions concerning the procedural rights of the right to a healthy environment, it specifies *state obligations* meant to protect the right to a healthy environment of all "every person of present and future generations".[5] Human rights documents often formulate these claims as the right to a healthy environment or as associated with sustainable development[6] and hence part of the right to development.[7] (Sustainable development is also specifically designated as a right, since its achievement requires the joint realisation of first and second generation rights.) Yet, there is an obvious difference between the two modes of regulation. The right to a healthy environment may appear in national documents as well, in no small part because some of its elements denote real individual rights as well as specific obligations of the state. The normative substance of the right to development, in contrast, would be more difficult to define unequivocally. The following are

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mentioned among the subjects of the latter right: all humans, all nations, and occasionally current and future generations altogether. They are all entitled to delineate the direction of economic, social, cultural and political development. In these documents we also observe examples of the rights to environment and development both being represented. The Rio Declaration, which in its Principle 3 establishes sustainable development as a right and specifies the procedural rights of the right to a healthy environment in Principle 10, is a case in point. Principle 10 therefore contains the following: the participation of affected citizens in environmental decision-making, the access to environmental information, as well as the possibility to seek effective judicial and administrative proceedings, including the right to legal redress and remedy.

The author believes that in examining the justifiability of a legal regulation, comparative methods and community as well as international legal examples need to be used cautiously, since the mere existence of a legal regulation obviously does not determine whether the particular solution it offers is suitable or not. In any case, the inclusion of environmental protection in constitutions also implies a value judgment on the importance of this issue. It generally does not provide a new individual right, but it does enrich the substance of fundamental rights, including the individual rights. By the latter I mean real rights, which are not construed only as state obligations, but also wholly as individual rights with subjects, in other words as rights that can be enforced.

To sum up: to draft efficient legal solutions, we must draw on the experience of international regulations and strive to use the least possible number of concepts that are difficult to delineate in legal terms. An example of a concept that is difficult to define is sustainable development, which refers to a hitherto unknown development that reconciles environmental needs with economic and social development. At the same time it would be difficult to precisely determine what the term means. There is no unequivocal, exact legal definition and, moreover, there are widely diverging philosophical approaches underpinning it. (Often even ones that proclaim the possibility of leaving behind modern industrial society). The term also alludes to intergenerational equality, but the notion of future generation is itself problematic in terms of legal regulation, since the interests of those not yet born or not conceived are difficult to discern, and hence within the framework of our current legal concepts they cannot be legal subjects in national legal systems. Indeed, it is even uncertain whether sustainable development can be achieved at all. Many believe that it is an oxymoron and cannot be implemented, as economic development as it is conceived today is based on growth, while the sustainable development presumes that our resources will remain fixed and finite. It is true that legal documents often employ terms whose content cannot be exactly defined. The concept of public interest—popular in Hungarian legal documents—springs to mind, for example. In limiting the rights of the owners of forests, the Hungarian Constitutional Court also alluded to public interest in connection with the right to a healthy environment.[8] But an efficient legal regulation ought to scale back the use of such terms to the greatest possible extent.

Let me add that theoretically in the case of international regulation, too, the most fortunate approach would be if it was not only the soft legal declarations but also the international conventions on the subject of environmental protection, which would refer to the connection between human rights and the state of the environment, and if they would moreover specifically enumerate the individual rights derived therefrom, thus truly integrating environmental protection into the framework of international human rights protection. It is obviously not a legal task to define the term environment, but it is nevertheless certain that it already entails a legal object worthy of protection. The following are typically among—often constitutionally—designated objects of protection: the earth's soil, air and water layer, the flora and fauna, as well as their interrelationship; occasionally the reference is specifically to climate. It also happens that constitutional provisions make a distinct declaration about the responsibility towards future generations, as well as the protection of animals[9] or the promotion of sustainable development. The evolution of the state's mandated duty to protect the environment may be substantially influenced by the following environmental principles—whose substance is oftentimes difficult to define in legal terms: prevention, polluter pays, sustainability, the prohibition on adversely altering the state of the environment. The list of these principles was formulated in the past decades, and in the time since it was expanded to include ever new principles. Occasionally the substance of individual principles has changed, too, though the legal regulations have not always been capable of capturing the changes in content. The impact of environmental protection interests on legislation becomes more important, as a result of the development—in no small part thanks to the green movements—that the members of the political community are increasingly committed to

environmental protection. What we can state already at the outset, however, is the following: the constitutionally laid down obligations to protect the environment are primarily incumbent on states rather than people.

THE HUNGARIAN CONSTITUTION

Act XXXI of 1989, adopted at the time of regime transition, was formally only an amendment of the earlier constitution, Act XX of 1949, but in practice it meant the adoption of a new constitution. The specifically enumerated human right rights transposed into the Constitution were—with consideration of international law obligations—mostly those rights that are beyond dispute.[10] In this respect the only exceptions in the list of fundamental rights—which is in any case rather extensive in scope—are Article 68 on the special rights of minorities and the right to a healthy environment, which was excluded from the chapter on fundamental rights. It is true, however, that the contents of the latter are not clearly circumscribed. It is only mentioned in Article 18 of the Constitution's *General Provisions* chapter, which lays down the fundaments of the constitutional order. Certainly, in this chapter the Hungarian Constitution also mentions other fundamental rights, such as for instance the freedom of economic competition or the right to property, enterprise or inheritance. Hence one cannot conclude that a right only entails a state obligation merely from the fact that it appears in the first chapter of the Constitution. In addition to the provisions already mentioned, this chapter also contains the commitment to the ethnic Hungarians who live across the borders, as well as the obligations to respect human rights or to take care of those in need.

Following Article 18, "[t]he Republic of Hungary recognizes and shall implement the individual's right to a healthy environment".[11] An effort to try to seek out the historical antecedents of this provision in the Constitution would be in vain, which is no coincidence given that the history of protecting the environment constitutionally is no more than three decades old. The fact that it appears in the new constitution is on the one hand a response to the environmentally devastating effects of the previous regime's industrialisation policy, and on the other hand to the population's lack of interest—up until the 80s—in this issue. But it may also have been a result of the fact that the environmental movements played a significant role in regime transition.

(An example worth mentioning is for example the Duna Kör [Danube Circle] civic organisation, founded on 1st August 1984, which fought against the construction of the Gabčíkovo—Nagymaros Waterworks, by publishing samizdats and organising protests.)

Apart from its mention in Article 18, the word environment appears only in one other place in the Constitution: in the fundamental rights chapter's Article 70, where the constitutional legislator mentions the protection of the built-in and natural environment in connection with the assertion of the right to health.[12] This is the only place where environmental protection appears explicitly in the fundamental rights chapter of the Hungarian Constitution, as the guarantee of the "highest possible level of physical and mental health"—the drafters of the Constitution regard environmental protection as one of the safeguards of the right to health. The latter article was part of the Constitution already before 1989.[13]

This article adds little to the understanding of the right to a healthy environment, though it allows for the conclusion that the concept of environment extends not only to natural, but also to built-in environment. This is the formulation that necessitated the analysis found in Constitutional Court decision 28/1994. (V. 20.), according to which neither the mention of the state's environmental obligations as instruments for the realisation of the right to health, nor the wording of Article 18, which expressly refers to the right to a healthy environment, can be regarded as limitations on the right to environment.[14] Legal literature does not interpret the wording restrictively (they use the attributes clean or appropriate to provide a clearer specification, or they quite simply refer to it as the right to environment, occasionally as the right to environmental protection.) We should add that the name of a legal institution does not inescapably lead to conclusions regarding its contents. If all we had to go on was the meaning of a term, then for instance the right to environment would be impossible to grasp.[15] Moreover, the wording used by the Hungarian Constitutions does not refer to human health only, but to a healthy environment in general, which is obviously a broader category. And the fact that the Constitution mandates an implementation of the right to health with a consideration of environmental interests cannot in itself provide a basis for the restriction of the right to environment. Overall, all that can be said regarding this article's relation to the environment is that it speaks of an environmentally conscious application of the right to health. Which, given the provi-

sions of Article 18, is in my opinion a legitimate expectation regarding the implementation of any fundamental right.

THE RIGHT TO A HEALTHY ENVIRONMENT

It is the Constitutional Court's task to uncover the various layers of meaning behind Article 18's right to a healthy environment. The Court addressed this issue in several decisions, thereby developing its binding interpretation. To understand the gravity of these decisions, it is necessary to refer to the concept of the "Invisible Constitution", invoked in its early phase by the first Constitutional Court, which acted from 1st January 1990 on—and undoubtedly evinced a greater sensitivity to dogmatic issues than the current Court. In contrast to the official reasoning, at first glance this concept appears to be inspired by natural law. According to the concept, the justices believe to discern an "independent permanence" behind the Invisible Constitution, and in ascertaining it they rely on the methods offered by comparative law and legal literature.[16] The postulation of this doctrine, which was later withdrawn, was necessitated by the particular circumstances of the rule of law transition, as well as the text—originally thought to be transitional—of the 1989 Constitution. The notion suggests that the Constitution has a layer of meaning that we would search for in vain by looking at the text only—it emerges from the Constitutional Court's decision instead. It was in part due to this—subsequently rejected—concept that the Constitutional Court early on began to refer back to its own practice, that is to the "Invisible Constitution" contained therein. By doing so it achieved the following at the very least: it either declared correct one of potentially several competing interpretations of individual articles or redressed regulatory deficiencies. Thereby it also significantly constrained the latitude available to those making, interpreting and applying the law. True enough, apart from redressing regulatory deficiencies all constitutional courts do this even without the concept of an "Invisible Constitution".

According to Article 27 (2) of Act XXXII of 1989 on the Constitutional Court, a decision by the Constitutional Court is binding for everyone. The question is what happens if the interpretation in the given decision is not consistent with the text of the Constitution and who is entitled to make this determination if such an instance were to occur. In construing Article 18, for instance, surprisingly even the text of the visible Constitution did not significantly tie the hands of those shaping the "Invisible Constitution".

Serious theoretical objections can be invoked against the comparative law methods used to reveal the Invisible Constitution. The essence of said objections is aptly illustrated by the interpretation of the right to a healthy environment, in construing which the Constitutional Court quite obviously relied on the interpretation of the German constitution. It did so in spite of the fact that the environmental provisions of the two constitutions differ to no small degree. As opposed to the German Basic Laws, the Hungarian Constitution formulates the right to a healthy environment as an individual right and not merely as a state objective.[17]

Given the position of Article 18 in the Constitution and the dynamic changes in its contents as well as the state policy underlying it, the Constitutional Court was compelled rather early to analyse the right to a healthy environment. Since it does not appear as a human right in the fundamental rights chapter, and hence does not seem to be a right at first glance, the Court had to discern a veritably invisible content, and on occasion create it, too. The interpretation that thus emerged is still making itself felt in legislation. After all if there is a compelling, logical, binding and moreover appealing reasoning, which additionally enjoys the widespread support of civil society, then the legal profession and the public often accept it without hesitation. The Constitutional Court's reasoning also cropped up in public policy proposals and on occasion it provided a point of reference in the creation of new public institutions. As I shall elaborate below, with the help of the Constitutional Court's reasoning the future generations have come to play a role—though only in indirect form—in public policy debates and have given a meaning and a name to the act on a new parliamentary commissioner (ombudsman). The main elements of the analysis were summarised in Constitutional Court decision 28/1994. (V. 20.). A differently constituted Constitutional Court was not able to add anything subsequently, nor did it undertake an attempt at reinterpreting it. Though environmental protection does appear in Constitutional Court decisions adopted later.[18]

THE OBLIGATED PARTY

Article 18 of the Constitution mentions as a right of everyone a right that does not appear in the Constitution's fundamental rights chapters, and whose en-

forcement is designated as a state obligation. According to Constitutional Court decision 28/1994. (V. 20.), it is by no means a coincidence that the right to a healthy environment was included among the general provisions. The decision states that in the area of environment it is the state's duty to protect the natural bases of life and to develop the institutions that manage the finite resources.[19] (The Constitutional Court presumably borrowed the term natural bases of life from the formulation of the German Basic Laws.)[20] That is pursuant to Article 18 it is the responsibility of the Republic of Hungary to enforce this right and to implement it practically.

In extrapolating the responsibilities of the party under obligation, it is essential to determine whom the obligation is incumbent upon: the state or private persons, too. Following Constitutional Court decision 996/G/1990, as a result of relevant constitutional provisions "the state is obliged to create and operate specific institutions serving to realise the right to a healthy environment. […] The state's obligations need to include the protection of the natural bases of life and have to extend to the creation of institutions for the management of finite resources".[21] In terms of the organisational structure of the state, these obligations primarily influence legislation,[22] and only through the latter do they affect the judiciary and the executive.[23]

These obligations, however, may also bind the executive in situations in which there is no distinct provision mandating that the executive organs design their organisational structure and procedures in an environmentally friendly fashion. Such kind of provisions cannot have a direct effect on private persons. If the state fulfils its legislative duty, then environmental obligations reach private persons through the mediation of legal regulations. It is the legislator who can mandate the environmentally friendly behaviour of private persons, that is the state obligation reaches its targets via the legal regulation. The obligation laid down in the Constitution does therefore not directly refer to non-state actors.

THE POSSIBILITY OF RESTRICTING RIGHTS

Constitutional Court decision 28/1994. (V. 20.) states that it is the state's duty to preserve the status quo in the area of environmental protection. The right to a healthy environment laid down in Article 18 "encompasses the duty of the Republic of Hungary to ensure that the state may not lower the level of environmental protection provided through legal regulations, unless it is unavoidable in the interest of asserting another fundamental right or constitutional principle".[24] The Court further argues that even if the latter case applies, the degree of lowering the level of environmental protection may not be disproportional relative to the other right or principle in question.[25] In the case of adverse changes in legislative and organisational safeguard provisions concerning environmental protection, the adequate level of protection needs to be ensured by applying the requirements mandated with regard to the restriction of fundamental rights, so that the possibilities for sustaining life are not affected.

In expounding on the right to a healthy environment, the Constitutional Court placed the emphasis on analysing the aspects relating to the state's obligation, while the individual right aspect was relegated to the background. Though the Court's assertions with regard to these obligations are not in dispute, it does not hurt to add the following: the Constitutions' wording on environmental protection does not refer to state obligations only, but also to *everyone's rights*—that is their entitlements—on the other side of the ledger. Rejecting the existence of a constitutional individual rights aspect of the relevant provisions—based on the reasoning discussed below—cannot be justified on the grounds of the position they occupy in the Constitution. Though it cannot be denied that—as we noted—for a variety of reasons other rights, too, were included in this chapter of the Constitutions, these did not become only state obligations by virtue of this fact. The fact that the right to property is included in the first chapter of the Constitution does not mean that it can be construed merely as a state obligation, and the Constitutional Court does not claim this, either.

INDIVIDUAL RIGHTS?

If we examine the individual rights aspect of the right to healthy environment, then the question arises whether there are any individual rights behind the provisions at all. If there are none, then in a situation in which a state organ fails to respect its obligation vis-à-vis private persons, the individuals become defenceless in the face of the state's failure to discharge its duties. In such cases the substance of the constitutional obligation extends to all three branches of government, but at the same time it does not provide for the possibility—ensured on a constitutional basis—of private persons enforcing their claims. If a constitutionally declared state obligation is not paired with matching individual rights,

then in and of themselves they do not provide legal protection for the individual.

Without procedural rights, any human rights protection system could become inoperable, and the rights contained therein, too, could become victims of state despotism. To comprehend this, let us take an example that may not be entirely comparable with that of domestic regulation, but is nevertheless illustrative. How could there be a means of asserting individual interests before the European Court of Human Rights if the for instance the European Convention on Human Rights were to mention a fundamental right merely as a state obligation, without designating its individual rights aspect?

Moreover, there are fundamental rights associated specifically with environmental protection—formulated in the context of human rights protection—, which are procedural rights. We may add that when talking about the right to environment, then in most cases we discuss rights—due to all who are affected—that the human rights documents contain in any case. Hence the right to a healthy environment must not necessarily be explicitly mentioned. These are mostly formulated as rights derived from procedural rights, thus endowing the derived rights with some kind of surplus content. Generally, this may happen with regard to the following rights: the rights to legal remedy, information and to participate in decision-making processes. The access to environmental information, for example, may have some surplus content, namely that the state not only erect no barriers to stem the free flow of information, but is also obliged to supply its citizens with information concerning the state of the environment.

I do not at all find it necessary that national legislators follow international documents—which mostly formulate this right as a third generation right—in developing the right to environment. The reason is that—and I will return to this below—third generation rights cannot be construed as rights in domestic legal systems. (In my view they can neither be moulded into rights, nor into duties without losing their original meaning.) Hence the characterisation that regards them as an utopia founded on common human values is apt indeed. Keep in mind that the rights to environment and development—linked to environmental interests—, which are often declared in international legal documents and treated as third generation rights, not only lack an unequivocal definition, but moreover also leave unclear who the rights holders are and what their rights consist of. Certainly we must also mention that of these two rights, the right to environment is in a better position, as the international documents formulate certain aspects of it—often almost as an aside—as a procedural right with specific, real substance.

INDEPENDENT AND AUTONOMOUS INSTITUTIONAL PROTECTION

From a jurisprudential perspective, the more problematic aspect of Constitutional Court decision 28/1994. (V. 20.) is that it construes the right to a healthy environment as an "independent and autonomous institutional protection".[26] This suggests that the safeguards concerning the realisation of the state's obligations in the area of environmental protection are elevated to the level of fundamental rights, and hence these must be implemented with statutory and organisational guarantees rather than by the legal protection of individuals on a fundamental rights level. This is problematic even beyond the issue that individuals are left without fundamental rights protection. To grasp this problem, it is helpful to raise the following question: Could there be a separate, "independent and autonomous institutional protection" without direct individual rights support? Does the text of the Constitution support such an interpretation? According to the reasoning provided by the Constitutional Court's decision, the answer is affirmative, but my personal response is: hardly. As an argument to the contrary it may be noted—beyond the fact that it is dubious in terms of jurisprudence—that the text of the Hungarian Constitution speaks of the right to a healthy environment as a right due to *everyone* and hence, as opposed to the German Basic Laws, it does not support such an interpretation. Moreover, in the Constitutional Court's reasoning the right to a healthy environment stands apart from other fundamental rights and only has an institutional protection aspect, which carries the aforementioned risk that an individual cannot lay claim to it before a court. Certainly, Constitutional Court decision 28/1994. (V. 20.) only rules out the individual rights aspect of direct fundamental rights protection. It does not rule out, however, that the right to a healthy environment might have enforceable individual rights elements (below the fundamental right level). In any case, the lack of a subject of the environmental protection obligation is dubious on the grounds that the rights expressly associated with environmental protection, which can be formulated independently as real individual rights as well, are as a matter of fact constitutionally guaranteed procedural rights.

To this group belongs the abovementioned right to participation in environmental decision-making, to access information regarding the environment and the right to legal remedy against environmental decisions.

These naturally need not be individually enumerated, they can be construed as derivative rights of traditional human rights. The right to a healthy environment laid down in the Hungarian Constitution could also be interpreted as saying that the state obligation is countered by an environmentally conscious application of traditional human rights. The freedom of information can obviously not be enriched with a layer of meaning which suggests that it does not merely formulate the need for a transparent state, but of a public power that is obliged to active behaviour directed towards providing its citizens with environmental information. The involvement of the population in making environmental decisions can clearly be seen as a right derived from political rights. And within the right to legal remedy is evidently contained the possibility of filing a complaint against environmental decisions. I emphasise that these rights cannot only be classified as rights derived from the right to environment—the justified social need behind them can also be formulated so as to say that they require the environmentally conscious application of traditional human rights. The essence of such an approach would be that the state obligation laid down in the Constitution's Article 18 can be contrasted with an environmentally sensitive application of the fundamental rights laid down in the Constitution. We could of course consider their environmentally conscious application as self-evident, but then the Constitutional Court's binding interpretation should have pointed this out. Though there are cautious references in the decision pointing in this direction, in its comparison of the nature of social rights and the right to a healthy environment the Court nevertheless rejects the possibility of such an interpretation.

In its decision 28/1994. (V. 20.), the Court also weighed whether to construe the right to environment as a right that curtails the substance of other fundamental rights. In this context it examined the relationship between social rights and the right to environment—as a third generation right—with regard to the question whether the constitutional duties underlying them are comparable. Based on this examination, the Court arrived at the following conclusion: "In addition to actions taken by the relevant institutions, social rights are realised with the use of the individual rights associated with them, which need to be determined by the legislature.

[…]

c) It follows from the above that although 'everybody', or at least every citizen, is entitled to social rights, the specific rights holders of the given individual rights serving the realisation of these social rights can be identified".[27]

Based on the above, the Constitutional Court concluded that the right to environment cannot be compared to social rights, either, since—as opposed to social rights—in the case of the right to environment it is the objective institutional side that is "prevalent and decisive".[28] And it adds the following: due to the particularity of this right, all the duties that the state in other areas fulfils through the protection of individual rights, are in this instance discharged "through the provision of legislative and organisational guarantees".[29]

Let us enumerate some of Constitution's fundamental rights in which the respective entitlement's relation to environmental protection could have been explored. Such is for instance the right to free movement and to freely choose one's location of residence, laid down in the Constitution's Article 58, or the inviolability of one's private home, to be found in Article 59. We may further also refer to the right enshrined in Article 61 (1), according to which "[i]n the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest". (The Constitutional Court made a brief reference to this paragraph.) We could also point to paragraph 5 of Article 57, which states that "in the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. An act passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time". And the list could go on.

Let us recall that there are applications submitted to the most important institution serving the protection of first generation human rights, the European Court of Human Rights, which specifically address environmental protection problems. Moreover, we should note: the breach of convention in cases pertaining to environmental issues was made out with reference to a violation of the respect for private and family life.[30] This was true even in cases in which the establishment of a violation of the right to life would have been conceivable, such as the *Guerra and Others v Italy* case. (Maybe in such cases judges are

prone to avoid making out a violation of the right to life to curb protest by the states in question.)[31]

Obviously the Constitutional Court's approach does not rule out the possibility that the realisation of the state's environmental obligation necessitates the formulation of individual rights. The Constitutional Court's decisions, however, do not provide any guidance as to the potential substance of such rights, save for the assertion that they only indirectly pertain to environmental protection. Instead, the decisions explore the state obligation aspects of the right to a healthy environment, that is the substance of the obligation to provide protection through institutions, which serves the realisation of the right to life. According to the Court, the right to environmental protection is in fact a part of the objective institutional protection aspect of the right to life (Article 54 (1)).[32] This is a misleading reasoning, however. It is of course true that the state's obligations to protect life and to protect the environment are related to each other. Their relationship may be better characterised as having intersecting points, however. I believe that the relationship between fundamental rights and environmental protection cannot be reduced to this aspect.

At the same time it appears based on the Constitutional Court's reasoning that the right to environment is more than a mere constitutional duty or state objective, given that the curtailment of this right is only allowed under the same conditions as that of individual rights. This does raise the following question, however: if the nature of this right is identical to those of individual rights, then can the designation of legal subjects and their rights be avoided? If on the other hand the right to a healthy environment is not an individual right, but rather an "independent protection provided by institutions", then I do not know how a test regarding the restriction of rights might work in practice.

Such doubts appear to be justified by the aforementioned cases, in which the Constitutional Court had to refer to the rather vague concept of public interest in defending the right to a healthy environment by curtailing the rights of forest owners, instead of justifying the restriction of rights by requiring an environmentally sensitive application of the right to property or another human right.[33]

It is no coincidence that the Constitutional Court regards the prevailing definition of the concept of public interest as the parliament's task, and has thus refrained from undertaking such a determination itself. Naturally, the constitutional presence of this concept needs to be construed as narrowly as possible, and under no circumstances is it fortuitous to curtail human rights with reference to public interest. This is true even though such and similar grounds for the curtailment of rights are mentioned in international documents as well.[34] Furthermore, we must also add that no serious theoretical concerns arise if the concept is not used to curtail fundamental rights, but rather to undergird individual rights, for instance in the form of a public interest litigation.[35] The Act on Environmental Protection[36] itself allows for the latter, in that the statute expressly provides for the possibility of associations and civic organisations—established to assert the interest in a healthy environment—turning directly to courts in the form of a public interest litigation. Concerning this possibility, Constitutional Court decision 1146/B/2005. AB also alluded to the Court's earlier reasoning on the lacking legal subject for the right to a healthy environment, and noted that in this case Paragraph 1 of Article 98 of the law on environment provides a procedural-type individual right.[37] The Court argues that this is the case because the aforementioned organisations "are not asserting their own rights, but rather act in a communal interest—the protection of the environment—, which they voluntarily represent".[38] Evidently, regardless of the above, all those who have the legal standing of directly involved parties to the case on the basis of "Article 15 (1) of Act on the General Rules of the Public Administration[39]—that is those who have a personal interest in the case, whose rights, legal interests or legal situation are affected—have the right to seek legal remedy through administrative channels, as well as to turn to a court".[40] In other words, the public interest litigation helps the enforcement of an individual right secured by act.

FUTURE GENERATIONS AND NATURAL OBJECTS

The conclusion that on a constitutional level the right to a healthy environment only has an institutional protection aspect was based on the one hand on the specific placing of Article 18 within the Constitution, and on the other hand on the fact that in the fundamental rights chapter it is not formulated as a real right, either. But more importantly it is due to the fact that in Constitutional Court decision 28/1994. (V. 20.) the desire for the constitutional protection of entities that are difficult to define in legal terms (such as for instance future generations) appears, too.

The Constitutional Court has established: in the context of the right to life, the state's objective obli-

gation to provide protection through institutions extends to human life in general as well; and this includes an obligation to ensure the life conditions of future generations.[41] Let us review the reasoning! Referring back to its decision 64/1991. (XII. 17.), the Constitutional Court laid down concerning the objective, institutional protection of fundamental rights that their "scope may extend beyond the protection that the same fundamental right offers as an individual right. This objective protection is not only broader in scope, but is also qualitatively different than the mere sum of adding individual rights. Regarding the right to life, for instance, the state's objective institutional protection obligation extends to human life in general—to human life as a value; and this encompasses the duty to secure the life conditions of future generations.[42] Furthermore, following the Constitutional Court decision, the objective protection "is not only broader but also qualitatively different, than the mere sum of the protections provided by individual rights". Hence according to the decision it is obviously more than that, and whatever the surplus may be, this is the uncertain area wherein one will find future generations and natural objects.

Thus according to the Court the Constitution expressly designates the state's obligation to sustain the environmental bases for human life as a separate constitutional "right". The Constitutional Court has concluded that as a result of the right to life contained in the Hungarian Constitution, the obligations relating to environmental protection could be deduced even in the absence of Article 18. Indeed, subsequently the Court did not invoke Article 18 in its elaboration on the obligation to protect the environment. Hence the examination, as I noted previously, focused on the state obligation in the context of the right to life, that is on Article 54 (1).[43] At the same time obviously other rights, too, such as a violation of the aforementioned right to health or the inviolability of private residence, can help persons who seek to assert their environmental interests. In the Constitutional Court's understanding, the right to a healthy environment thus secures the physical preconditions of the right to life. At the same time, the question arises how other fundamental rights laid down in the Constitution can be applied in a way that is sensitive towards environmental interests (environmentally conscious), and I believe that this question is left unanswered by this interpretation. It is also a matter of debate why the legislator needs to examine environmental protection in such detail only in the context of the right to life. The reasoning that all fundamental rights can be brought into some kind of relation with the right to life—since this is basis for all other rights, from whence they derive—is not acceptable. (This reasoning, which I find untenable, also appears in the practice of the European Court of Human Rights).[44] Such an argument obviously stands on a weak ground, since if it were to hold then it would be superfluous to specifically mention any other right by name in the Constitution. It would be sufficient to include the right to life in the fundamental rights chapter. And then we would still face the question of what ought to happen to the aforementioned procedural rights of environmental protection, as well as what happens if the state does not ensure access to environmental information, a right that the Hungarian Constitution does not expressly declare. It is especially problematic that through this interpretation, which later became binding, the Constitutional Court practically severed the tie between the right to a healthy environment and the individual rights aspect of the right to life. The Constitutional Court is correct in asserting that the rights specifically associated with environmental protection are primarily of a procedural kind. But from this it may precisely follow that they have an individual rights aspect, too. It is naturally true that for the most part these are rights that are only indirectly connected to the environment. Nevertheless, the Constitutional Court did not deem it necessary to analyse this relationship in the context of other rights. Indeed, it appears that the Constitutional Court could have foregone even Article 18: "In the absence of the Constitution's Article 18, the state's obligations regarding the environment could be deduced with an expansive interpretation from the Constitution's Article 54 (1) as well".

The Court saw the particularity of the right to a healthy environment in the notion that its subject is "humanity" in its entirety, meaning a unity of present and future generations, or "nature", respectively. As the decision argues, "this problem is illustrated by all efforts that seek to endow nature or, as its "representative", animals, plants, etc. with rights", and which speak of the rights of generations yet unborn. The body referred to all this as "figurative speech", adding that it was unnecessary to create such legal constructs to establish legal obligations vis-à-vis "nature" or the "present and future humanity". This leads to the counterargument, formulated by László Sólyom (the former president of the Constitutional Court and current president of the Republic of Hungary) himself, according to which a constitutionally declared state obligation must always face a right and the holder of said right.[45] This is necessary in order to ensure that the obligations

are not without any control, so that they cannot turn against those whose legal protection they are meant to serve, that is natural persons. This means, however, that either future generations or natural objects are the rights holders, or else it does not make sense to speak of a constitutionally enshrined state obligation towards them.

In reality it is not only that future generations or moss or trees have no rights today, but there is also no constitutional obligation towards them, to draw on the "figurative speech" referred to by those who wrote the decision. On the basis of our legal thinking, the real objective of legal protection is to safeguard those alive today. We may add that if we accept the Constitutional Court's train of thought, then it may also be stated that the Court could hardly have gone any further, and its reasoning harbours serious risks. After all, in its decision the Constitutional Court mentioned entities (e.g. future generations and natural objects),[46] the majority of which can neither be endowed with rights on the basis of current legal thinking, nor be designated as the objective of constitutional obligations. We may also add that based on our current legal thinking, we have certainly no legal obligations towards future generations, for the very plain reason that these generations have no clearly discernible interests (they have not even be conceived yet), and they cannot make demands against us, either. Furthermore, apart from vertebrate animals this holds for natural objects, too.[47] I think that the determination of whether future generations or natural objects could be the objectives of obligations requires a complex examination. But we could note already here that this interpretation appears to contradict the Constitution's Article 18, which refers to the right to a healthy environment as a right that everyone is entitled to, that is all individual humans alive today. In a democratic society a great deal can obviously be achieved through a majority decision, maybe even a shift authorising the state to endow future generations or natural objects with legal capacity. But—and this may not be disregarded—as of yet this has not occurred in the Hungarian legal system. Such a decision would be contrary to our current legal thinking, which may change in the future, however.[48]

At the moment—based on the Constitutional Court's decisions—the right to a healthy environment is not an individual right, but it is not a mere state objective, either. According to the Court "the rights of animals and trees" are not mere metaphors: the state veritably has obligations to sustain the natural bases of all life and is obligated to protect all life "starting with the moss all the way to the embryo". But this protection is relative and only the human has an individual right to it.[49] I am not certain, however, that this is necessarily and always true. Of the abovementioned categories, only animals could conceivably be the targeted objectives of a constitutional-level obligation, that is the granting of a limited status as legal subjects is only possible in the context of animals or in the "case of animal rights".[50] And even as far as they are concerned, I do not find the parallel that compares the development wherein they become legal subjects with slave emancipation particularly fortunate. A catalogue of animal rights, whose adoption has been urged for a while now, should diverge from those of human rights in no small measure.

THE PARLIAMENTARY COMMISSIONER (SPECIALIZED OMBUDSMAN) FOR FUTURE GENERATIONS

The Constitutional Court does not regard the right to a healthy environment as an individual right from a fundamental rights perspective.[51] This could have an interesting impact on the future role of the environmental protection ombudsman, whose office was created in 2007. Somewhat surprisingly at first glance, the act establishing the position refers to the Commissioner for Future Generations.[52] The name presumably reflects a desire to draw attention to the future effects of today's policy decisions, a function that the ombudsman's institution is expected to fulfil. If we take seriously the Constitutional Court's interpretation that there is no constitutional level individual rights aspect of the right to environment, however, then it is not entirely clear how a parliamentary commissioner specialising in this area could discharge his duties. Let me add that following Article 2 (2) of Act LXI on the Parliamentary Commissioner for the Rights of Citizens, "the National Assembly may elect with two-thirds of its votes a parliamentary commissioner, whose position is established by law, for the protection of individual fundamental rights". But what could justify the election of a commissioner for the protection of a fundamental right that has no individual rights aspect? After all, in Hungary one turns to parliamentary commissioners with complaints connected to constitutional rights.

At the same time, there are numerous misconceptions in the public perception regarding the authority of the Commissioner for Future Generations, not only due to the rather misleading nature of the po-

sition's name, but also as a result of the original demands of the green organisations and the inflated expectations regarding the office. Prior to the adoption of the law, for instance, 68 green organisations asked the leaders of the parliamentary factions to "establish an efficiently functioning institution for the protection of coming generations and in the interest of sustainable development".[53] Nevertheless, the legislature did not satisfy the original demands of the civic organisations, as it did not create an institution to represent or safeguard the interests of future generations, but rather a new environmental protection commissioner for the protection of the environmental rights of those alive today. Thus the relevant statute does not entitle those who have not been born or not even conceived yet—people without characteristics or faces—to turn to a specialised commissioner with their complaints. The latter task would not require a massive administrative apparatus, by the way, employing one or two fortune-tellers would be sufficient—it is hardly advisable to spend public funds for such purposes, however.

The above naturally do not question the necessity of a specialised commissioner for environmental protection, which is the responsibility for which the Commissioner for Future Generations was created. Specialised ombudsman institutions can be established for the protection of any constitutionally guaranteed right that pertains to a sensitive social issue, if the everyday violation of the given right is a veritable danger to citizens' freedom. The newly created ombudsman institution, however, in fact raises further problems due to the lack of subjects for the rights it protects. Parliament chose to remedy these problems by circumventing them: the Commissioner for Future Generations was created through an amendment of the Act on Parliamentary Commissioners for the Rights of Citizens, and hence the question of how citizens can turn to the commissioner was not addressed separately in this specific context. Let me add that this particular mode of regulation cannot mean anything but the rejection of the notion that the right to a healthy environment has no subject, that is the rejection of the binding interpretation found in the Constitutional Court's decisions.[54]

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A reference in Constitutional Court decision 28/1994. (V. 20.) tied the right to environment to third generation rights. The problem with this approach is that—as we pointed out—third generation rights cannot be regarded as anything but utopias grounded in common human values.[55] And through the Constitutional Court decision uncertain—though appealing—elements of this utopia have seeped into Hungarian law. Certainly, their arrival was not taken seriously by either the Hungarian legislation or law applying organs—though they did cause some uncertainty—, indeed, maybe they could not or would not discern the real substance of the Constitutional Court's decisions.

Translated by Gábor Győri

NOTES

1. Erika Elisabeth Orth, 'Umweltschutz in den Verfassungen der EU-Mitgliedstaaten' [2007] 29 Natur und Recht 229.
2. For more details on the provisions of the German Basic Law see: Dr Dieter Hörnig (ed), *Grundgesetz für die Bundesrepublik Deutschland* (Nomos, Baden-Baden 2007) or Edmund Brandt, Ulrich Smeddinck (eds), *Grundgesetz und Umweltschutz* (Berliner Wissenschafts-Verlag, Berlin 2004) as well as Hans D Jarass, Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* (C. H. Beck, München 2007).
3. The Brundtland Commission's renowned 1987 report has defined the concept as saying that it satisfies the needs of the current generation without endangering the like needs of future generations. Hence the concept entails the desire for intergenerational equality. This "equality" is undoubtedly a creation of international law from whence it found its way into the national legal systems. See Edith Brown Weiss, *Fairness to Future Generations* (Dobbs Ferry, New York 1989).
4. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.
5. Act LXXXI of 2001 on the Proclamation of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 in Aarhus.
6. The concept of sustainable development has played a decisive role in the evolution of international law and environmental policy since the 90s, and after Rio it also began to appear in national legal systems. As far as the concept's international law presence is concerned, it no longer appears only in conventions, but also for instance in the International Court of Justice's decision in the Gabčíkovo—Nagymaros case. It is nevertheless doubtful whether it can be regarded as a legal principle, and the possibility of applying it normatively is even more doubtful. The most common criti-

cism of the right to development is that since in reality it is not a right, it can neither contribute sufficiently to development nor to the promotion of human rights protection. For more details on sustainable development see: Alan Boyle, David Freestone, *International Law and Sustainable Development* (Oxford University Press, New York 1999).

7. Arjun Sengupta, 'On the theory and practice of the right to development' [2002] 24, 4 Human Rights Quarterly 837–889.
8. Constitutional Court decision 1347/B/1996, ABH 1994, 197, 203; as well as Constitutional Court decision 8/2000. (III. 31.), ABH 2000, 58.
9. As far as vertebrate animals are concerned, the reason is that in our national legal systems they are practically on the verge of acquiring rights.
10. Sólyom László, *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginnings of Constitutional Adjudication in Hungary] (Osiris, Budapest 2001) 611.
11. In Hungarian legal literature, László Fodor undertakes a detailed analysis of this article as well as the Constitutional Court's decisions regarding the right to a healthy environment. See further Fodor László, *Környezetvédelem az alkotmányban* [Environmental Protection in the Constitution] (Gondolat—DE Állam- és Jogtudományi Kar, Budapest—Debrecen 2006).
12. Article 70/D (1) People living within the territory of the Republic of Hungary have the right to the highest possible level of physical and mental health.

(2) The Republic of Hungary implements this right through arrangements for labour safety, with health institutions and medical care, through ensuring the possibility for regular physical training, and through the protection of the built-in a natural environment.

13. Previously the Constitution contained the following formulation: Article 57 (1) Citizens of the People's Republic of Hungary have a right to the protection of life, physical safety and health.

(2) The People's Republic of Hungary implements this right through arrangements for labour safety, with health institutions and medical care, and through the protection of the environment.

14. Before regime transition this article probably had an interpretation—due to the lack of the right to a healthy environment laid down in Article 18—which limited environmental needs to the realisation of the right to health.
15. Hungarian legal literature nevertheless has a proclivity to debate this, criticising the Constitutional Court for using both terms, the right to environmental protection and the right to environment, even thoughin their view—based on its literal meaning the right to environmental protection can only designate the individual rights aspect of the fundamental right and cannot refer to the institutional aspect thereof. See for example Fodor (n 11) 61.
16. Sólyom (n 10) 60.
17. For a comparative analysis of Hungarian Constitutional Court decisions and German constitutional provisions see Fodor (n 11) 71–101.
18. In its decision 11/2005. (IV. 5.), for example, the Constitutional Court, proceeding ex officio, determined that an unconstitutional dereliction had occurred when in the context of protecting the lake basin of Lake Balaton, the legislator had failed to formulate safeguard provisions meant to enforce the right to a healthy environment pursuant to Article18 of the Constitution. The statute examined by the body did not establish the legal restrictions—necessary for protecting the water and the aquatic wildlife—on interfering with the lake basin. (Before submitting its decision, the Constitutional Court examined whether in the case of Lake Balaton, which in its kind is a singular natural treasure of Hungary, the existing legal regulations provide sufficient guarantees against interferences that would result in a violation of the right to environment laid down in Article 18. That is whether the legal regulations are sufficient to safeguard the lake's basin, as well as the living resources of the lake basin and the shore. The Court's reasoning contains no new dogmatic elements as compared to decision 28/1994. (V. 20.), ABH 1994, 134.
19. ABH 1993, 533, 535.
20. By this concept the German legal literature refers to the natural environment surrounding man, essentially providing a list of the legal objects that need to be protected in the environment: it refers to the entirety of the natural environment surrounding man, even if it has already undergone significant changes, and furthermore also extends to the elements of the environment, the landscape, as well as to the flora and fauna and micro-organisms. It also includes the relations between these elements but does not extend to built-in environment, such as for instance a housing project. It protects future generations against long-term risks through the principle of precaution and sustainability. See Jarass (n 2) 513.
21. ABH 1993, 533, 535.
22. A particular means of influence is the examination analysis, which is a type of impact assessment investigating the anticipated environmental effects of planned legal regulations. It is provided for by Article 43 of the environmental law (Act LIII of 1995).
23. Halmai Gábor, Tóth Gábor Attila 'Az emberi jogok rendszere' [The System of Human Rights] in Halmai Gábor, Tóth Gábor Attila, *Emberi jogok* [Human Rights] (Osiris, Budapest 2003) see especially 98–107.

24. What preceded this decision was a request to the Constitutional Court to examine the constitutionality of the provisions that had lifted the ban on privatising certain protected environmental areas or using them for the purposes of providing restitution to those whose property had been seized under the previous regime. The Constitutional Court asserted that the state is obliged to preserve the "status quo" in the area of environmental protection. According to the Court, the obligation to maintain the established level of protection also stems from the notion that the natural bases for life are finite and environmental damage is generally irreversible. The Constitutional Court subsequently sought to consistently enforce this principle, and there was an instance when it saved an ecological corridor between two municipalities by striking down a decree ending its protection. Subsequently, in examining the regional development law, the Constitutional Court laid down as a constitutional requirement that the various sectoral strategies do not enjoy primacy over environmental interests.
25. Constitutional Court decision 28/1994. (V. 20.), ABH 1994, 134.
26. Constitutional Court decision (n 25) 138.
27. Constitutional Court decision (n 25) 138.
28. Constitutional Court decision (n 25) 138.
29. Constitutional Court decision (n 25) 138.
30. See for example the cases of *Hatton and Others v the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII and *López Ostra v Spain,* judgment of 9 December 1994, Series A no. 303-C. In the first case, eight citizens residing adjacent to Heathrow Airport in the United Kingdom requested indemnification on the grounds of sleep deprivation. Harry Post, 'Hatton and Others: further clarification of the "indirect" individual right to a healthy environment' [2002] 2, 3, S. Non-State Actors and International Law 259–277.
31. *Guerra and Others v Italy* 116/1996/735/932, judgment of 19th February 1998.
32. Article 54 (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.
33. Constitutional Court decision 1347/B/1996, ABH 1994, 197, 203; as well as Constitutional Court decision 8/2000. (III. 31.), ABH 2000, 58.
34. The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, for example, allows for limiting first generation rights with reference to public order or public morals.
35. Sólyom (n 10) 406.
36. Act LIII of 1995 on the General Rules of Environmental Protection.
37. Pursuant to the environmental law, associations and civic organisations established for the representation of environmental protection interests have the legal status of being parties to the case in proceedings before environmental administrative authorities, if the given proceedings pertain to their area of operation. On the interpretation of this provisions see Constitutional Court decision 1146/B/2005 ABH, 2006. 1849, 1852-1853.
38. Constitutional Court decision (n 37).
39. Act CXL of 2004 on the General Rules of the Public Administration Authority Procedure and Service.
40. Act CXL (n 39).
41. Constitutional Court decision 64/1991. (XII.17.), ABH 1991, 297, 303.
42. Constitutional Court decision (n 25) 137.
43. Article 54 (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.
44. *Guerra and Others v Italy* (n 31).
45. Sólyom László, 'A jövő nemzedékek jogai és ezek képviselete a jelenben' [The Rights of Future Generations and the Representation of these Rights in the Present] in Jávor Benedek (ed), *A jövő nemzedékek jogai* [The Rights of Future Generations] (Védegylet, Budapest 200).
46. See the ethical arguments in favour of protecting these categories. Lányi András (ed), *Természet és szabadság* [Nature and Freedom] (Budapest, Osiris 2000). Molnár László (ed), *Legyenek-e a fáknak jogaik?* [Should Trees Have Rights?] (Budapest, Typotex 1999).
47. The legislator treats vertebrate animals separately from other categories, acknowledging their heightened ability to experience pain and suffering.
48. In international law today, humanity, that is the community of people currently alive and those to be born in the future, can already be a legal subject. On this issue see for example Nagy Boldizsár, 'Az emberiség közös öröksége: A rejtőzködő jogosított' [Humanity's Common Legacy: The Hidden Subject] in Herczegh G, Bokorné Szegő H, Mavi V, Nagy B (eds), *Az államok nemzetközi közösségének változása és a nemzetközi jog* [International Law and Changes in the International Community of States] (Akadémiai, Budapest 1993) 113–143. A comparison of the two legal systems in this respect is not worthwhile due to the fundamentally different legal nature of international public law and domestic law. Even though treating humanity as a legal subject internationally can potentially be justified already today, in domestic law it can nevertheless certainly not be regarded as a legal subject. This can be illustrated with the following example, which on the cause of its historicity illustrates the immutability of legal thinking: the novelist Lev Nikolayevich Tolstoy expressly wished that his literary inheritance be left not to his legal heirs, but rather

to humanity as a whole. His legal advisers cautioned him not to include this wish in his testament, and emphasised that the author could leave his assets only to a clearly defined natural or legal entity. As a result, the writer changed his will and in his testament he left his literary inheritance to his daughter Alexandra.

49. This pronouncement was made in the Constitutional Court decision abolishing the death penalty.
50. Cass R. Sunstein, Martha C. Nussbaum (eds), *Animal Rights. Current Debates and New Directions* (Oxford University Press, Oxford 2004´); Elekes Máté, 'Az állatok jogi státusa' [The Legal Status of Animals] [2006] 11 Rendészeti Szemle 17–29.
51. Though Constitutional Court decision 28/1994. (V. 20.) qualifies this position somewhat, it does maintain the stance excluding the fundamental rights aspect.
52. Védegylet (Protect the Future—a Hungarian civic environmental organisation) drew up the original proposal for the creation of a separate commissioner position seven years ago, and has urged the establishment of the new agency ever since. Jávor (n 45). The National Assembly ultimately decided to adopt the proposal, and in implementing it parliament opted for changing the current system of commissioners through partially cutting back the existing structure—it abolished the post of General Deputy Ombudsman, so that at least in terms of funding it could be replaced by the Commissioner for Future Generations. On 8th October 2008 representatives of the five parties in parliament signed and introduced the bill on the Parliamentary Commissioner for Future Generations. Finally, on 26th November the National Assembly adopted Act CXLV of 2007 amending Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights.
53. '68 zöld szervezet egy új szószólóért' [68 Green organisations for a new ombudsman] <http://www.vedegylet.hu/modules.php?name=News&file=article&sid=618> accessed 4 January 2009.
54. At the same time, the functions of the new commissioner may lead to a surprisingly wide range of fundamental rights restrictions. Pursuant to Article 27/H Paragraph 3, for example, in carrying out his duties the Parliamentary Commissioner for Future Generations may "enter into any such locality or real estate where activities are ongoing that threaten irreversible environmental damage—if acquiring the necessary information or learning about the relevant facts and circumstances is not possible in other ways".
55. On occasion specific utopian ideas were formulated in the context of these rights. Such are for instance the concepts relating to "ecotopia", that is most ideal societies living in harmony with the environment. For the emergence of the designation see: Ernest Callenbach, *Ökotopia* (Berlin, Rotbuch 1984).

Péter Sólyom

THE CONSTITUTIONAL PRINCIPLES OF FREEDOM OF ASSEMBLY IN HUNGARY*

The right to freedom of assembly generally attracts a wider audience if parliamentary majority loses popular support. Frequent demonstrations not only signal the discontent of the public with the ruling majority, but as it happened in Hungary they also represent growing distrust in political parties and the parliamentary institutional structure.

The debate on freedom of assembly concentrates on the limits of exercising fundamental freedoms and rights. In Hungary the past two years produced a turbulent period for the debate on the specific conception of freedom of assembly. A recent decision of the Hungarian Constitutional Court providing a reconsidered interpretation of the right of assembly forcefully influenced the discourse. This paper examines the substance of freedom of assembly as it follows from the Hungarian Constitution in the light of recent decision of the Constitutional Court. On this basis the paper develops an interpretation of freedom of assembly that may enable reinforcing constitutional democracy in Hungary.

TEXTS AND INSTITUTIONS

Freedom of assembly together with the right of association and freedom of expression gained particular importance as a fundamental freedom in the era of the enlightenment. In the US tradition in connection with the right to petition it stood for the right of citizens to discuss public affairs and to present their opinions in this regard in public and to communicate those opinions to their representatives and public authorities. In the French tradition freedom of assembly was granted first in the 1791 Constitution as a democratic means of expressing directly the will of citizens against the state; later, however, as a result of restrictive interpretation for a considerable period it lost its political significance. The 1831 Belgian Constitution included in Article 19 the right of peaceful assembly, however, public assemblies remained to be regulated under public order measures.

In Hungary the right of assembly was left unregulated in the laws of April 1848 and the radical youths leading the revolution of March 1848 failed to address this issue in their demands. The reason for this was that freedom of assembly was an important privilege of municipal nobility practiced regularly in the era of the feudal monarchy.[1] This also explains why the authorities decided not to interfere with the mass demonstration on 15 March 1848 (which remains to provide the example for all subsequent demonstrations).

In the Austro- Hungarian Empire the regulation of freedom of assembly was constantly on the agenda, but the government in fear of from the ethnic minorities and the opponents of the constitutional arrangements with Austria was interested in regulation by public order measures providing ample discretionary powers to the authorities. This, although for different reasons, remained to be the case under the Horthy-regime. The regulatory approach was first altered in regulation *(BM Rendelet)* 5159/1945 (III.24.) on the system of notification of public assemblies which required only a notification to the authorities before citizens wished to exercise their right of peaceful assembly. This regulation forgotten for long decades played a significant role in the demonstrations of the regime-change in the late 80s before the adoption of the Act on the Right of Assembly (ARA 1989).[2]

Freedom of assembly was regarded as a mere declaration of rights by socialist constitutional theory. Article 55(1) of the 1949 Stalinist Constitution included freedom of assembly for the protection of workers' interests and from 1972 freedom of assembly exercised in harmony with the interests of socialism and the people was guaranteed by Article 64.[3] The contemporary foundations of the right of assembly were laid down by Act 1989:I on the amendment of the Constitution and the ARA 1989. Before the adoption of the latter act freedom of assembly had been regulated in regulations of a minister of government or in lower ranking laws, as the obligation to regulate fundamental rights and freedoms on the

* The text was published originally in Hungarian: Jakab András (ed), Az Alkotmány kommentárja [Commentary of the (Hungarian) Constitution] (Századvég, Budapest 2009 forthcoming).

level of acts of Parliament emerged only in the Act on Legislation and Regulation.[4] Regulation in lower ranking laws (ministerial regulations) enabled the highest party leaders to control political activity in public, which was finally lost after the adoption of this act. This made this act an important achievement of the regime-change, an act of symbolic significance. Article 65 of the Constitution modified by Act 1989:I includes now freedom of assembly and association. Article 62(1) of the Constitution was finally determined by Act 1989:XXXI on the amendment of the Constitution. As in case of other constitutions the Hungarian Constitution acknowledges the right of peaceful assembly and regulates the right of assembly as a universal fundamental right.

THE ROLE OF FREEDOM OF ASSEMBLY WITHIN THE DEMOCRATIC INSTITUTIONAL STRUCTURE

Freedom of assembly provides the right of individuals to express freely their opinion in public affairs with others. Freedom of assembly belongs to the category of communicational rights and it is associated with freedom of expression [Decision 30/1992. (V. 26.) of the Constitutional Court, ABH 1992, 167, 171]. The significance of communicational rights rests in their capacity to act in ensuring the self-realisation of human beings. The self-realisation of a person is dependent upon the condition that his communicational rights are observed.

The significance of communicational rights, including freedom of assembly, can only be assessed with reference to their role in the democratic institutional structure. These rights enable the individual to take part with weight in social and political processes. According to the Constitutional Court [Decision 30/1992. (V. 26.)] "the free expression of views, opinions, the free expression of unpopular or peculiar ideas is the basic condition of a living society capable of evolution" (ABH 1992, 167, 171). Without freedom of assembly getting hold of such opinion and information and sharing them with others, the possibility of drawing up views together with others, would be unattainable [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 449]. In a society where direct access to the press is a privilege of few, individuals have no other means but to influence public opinion by means of exercising their right of assembly.[5]

Democracy provides the institutional solutions and procedural conditions of making common decisions under the condition of ensuring equality among individuals. Decision by the majority appears to be the only justifiable exception to the principle of equality in decision-making. The majority principle, however, is capable of infringing the rights of the minority. The Constitutional Court has confirmed that the constitutional limitations of freedom of expression, the most important communicational right, must be defined by taking into consideration the interests lying in shaping and creating public opinion which bears high significance in the democratic process. A manifestation of this is the protection of opinion irrespective of its content. Freedom of assembly is closely associated to the democratic function of freedom of expression. The right of individuals to take part in creating political inputs may not only manifest in the votes cast at general elections but in participation in the processes governing the creation political opinion or in the decision-making process. Between general elections the possibilities of influencing the political majority in government are limited and freedom of assembly provides a very important means for minority opinions to influence the political process. By exercising the right of assembly genuine minority interests may gain access to the political process highlighting that freedom of assembly has a stabilising function: it reveals the gaps in the integrity of the political community enabling the correction government politics.[6] This function of freedom of assembly protecting minority opinion and interest makes it a key fundamental freedom of the democratic process.

THE SCOPE OF FREEDOM OF ASSEMBLY

The Notion of Freedom of Assembly

The notion of freedom of assembly entails a general and a more specific meaning.[7] In general it stands for the freedom of individuals to gather in public or private spaces for the purpose of expressing their opinion collectively. In its more specific meaning not all collective forms of exercising freedom of expression need to be protected under freedom of assembly. The reason for this is that freedom of assembly may only be associated with discussing public affairs. Its most important function is to ensure in a parliamentary democracy based on the majority principle participation in public affairs for those that are excluded from utilising other channels of publicity. In the case law of the German Constitutional Court the conflict between freedom of expres-

sion and the interests of local residents and the users of public roads needed to be resolved with reference to the fact whether exercising the right of assembly concerns participating in a public debate on public affairs. In case the purpose of the event is different, it will attract (a lesser) constitutional protection only under the general freedom of action of individuals.[8] The Hungarian Constitutional Court interprets freedom of assembly as an informational right having particular importance in the democratic institutional structure, which stands closer to the specific meaning of freedom of assembly. On this basis, Article 62 of the Constitution covers those gatherings, events the purpose of which is to facilitate the collective expression of opinion in public affairs.[9] This specific purpose binds the members of the group together. This distinguishes the group from groups consisting of individuals pursuing their own ends (for instance a group formed at the customer service desk of an event) or from random gatherings (for instance the spectators of a road accident).[10] Events the purpose of which is purely commercial or leisure in the absence of a shared aim or objective do not fall under the scope of freedom of assembly. This does not mean, however, that when a common aim can be identified, and for instance artists perform in support of this aim, the event (a charity event) in question cannot be protected under the right of assembly.

In general, freedom of assembly is in close relationship with other fundamental rights including those that are more distant from the objective of discussing public affairs and relate more closely to the realisation of one's personality, thus, to one's private sphere. In this respect religious ceremonies of the church and religious groups (religious processions), or cultural, sport or family events (wedding processions) could be mentioned. The interpretation that freedom of assembly primarily concerns the collective expression of opinions in public affairs is reinforced by the fact that the ARA 1989 in its Article 3 excludes these private events from its scope.[11]

Freedom of assembly manifests typically in organised marches or in demonstrations, gatherings held at a particular place. The Constitution protects *all forms* of assembly; until Decision 75/2008. (V. 29.) of the Constitutional Court constitutional jurisprudence failed to distinguish among the different forms of assembly. Even the legislator remained unconscious of the different expressions used for freedom of assembly as demonstrated by Article 2(1) of the ARA 1989. There was no distinction between a procession or a gathering as the same rules applied to them. The event was only granted constitutional protection when the organisers had discharged their duty of notification to the authorities. However, the approach of the Constitutional Court was changed in the above mentioned decision, as the constitutional protection of freedom of assembly was extended to cover peaceful public gatherings where the nature of the event giving cause to exercising freedom of assembly event necessitates a gathering at short notice (rapid assemblies) or (spontaneously) without any preceding organisation.[12] According to the Constitutional Court such peaceful gatherings reacting to public affairs are covered by freedom of assembly as protected under the Constitution. "The right of collective and public expression of opinion belongs to every individual irrespective whether the assembly was organised and independent of the nature and time of the event in public life to which the individual wishes to react" (ABK 2008, 715, 721).

Freedom of assembly covers occasions of collective expression of opinion having a delimited timeframe. It is difficult to determine what may constitute the shortest or the longest interval of time that is necessary to organise a demonstration. Demonstrations could in principle last for days or weeks where the participants are in constant change. It is important, however, that only events of definite duration may be protected under freedom of assembly. The organiser must define the duration of the event in advance, even if it cannot be predicted when the event that may last for days achieves its objective or becomes unjustified. The organiser may decide to repeat the notification of the event in order to extend its duration. In such circumstance the authorities must examine the objectives of the occupation of public spaces, and whether it remains to relate to exercising the right of free expression in public affairs.[13]

The Personal Scope of Freedom of Assembly

Under the Constitution freedom of assembly is a fundamental freedom of individuals. Its personal scope covers the organiser and the participant. According to the Constitution apart form participating at a public gathering, organising such events also constitutes a fundamental right. On this basis it appears unreasonably restrictive to grant in regulation the right of organising events in public spaces only to those that are more closely connected to the establishment in Hungary.[14] This distinction was confirmed by the Constitutional Court by stating that "only a person familiar with local (Hungarian) circumstances may organise a public event, who by virtue of his physical presence in the country is capable

exercising the rights and fulfilling the obligations—for instance his liability in tort—prescribed by law" [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 457]. These qualifications appear to be irrelevant when one considers that it is of little importance whether the debtor is present in the country.[15] The current status of law is clearly at variance with the Constitution and the law of the European Convention on Human Rights (ECHR). While the ECHR permits restrictions on the political activity of aliens, this must be interpreted restrictively making it applicable only in case of activities with direct relevance to the use of public powers, and organising public events is not such case.[16]

Another important limitation in domestic law on the person of the organiser is that aliens as beneficiaries of temporary protection under the Act on Asylum are excluded from organising public events. In our opinion nothing excludes that refugees and asylum seekers would wish to express their opinion in a public event, for instance against the state from the persecution of which they fled [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 470].

Freedom of assembly is a personal freedom, but that does not exclude that legal persons are prevented from initiating a demonstration in Hungary or abroad. The restriction applicable in this respect is that they must entrust an organiser with the organisation of the event who fulfils the criteria mentioned in the ARA 1989 (ABH 2001, 442, 457). However, in the light of the protective nature of freedom of assembly legal persons under public law are excluded from its personal scope.

The Substantive Scope of Freedom of Assembly

The Constitution provides protection not only to an assembly, but also to the act of organising and participating in an assembly. On this basis, all those acts of individuals are protected that enable them to decide with others where, when, in what way and for what purpose they wish to exercise this fundamental freedom.[17] Consequently, freedom of assembly incorporates the freedom to choose the place, time, form and purpose of an assembly. Within this framework protection is extended to those acts that relate to the preparation of assemblies: the notification and the organisation of the public event and the act of approaching the place of the event.[18] The right to participate at an assembly entails the protection of rights by means of which the collective expression of opinion could materialise: making speeches, holding signs, the distribution of flyers, shouting political slogans, singing songs etc. These are acts that enable the participants to attract attention to their cause. The forms of exercising the right of assembly are multiple. It would include not only acts that relate to the argumentative and debating aspects of collective communication, but also those that are regarded as the non-verbal manifestations of communication (human chains, processions with torches).

The Requirement of a Peaceful Assembly

The right of assembly provided by the Constitution only applies to peaceful events. This requirement is not satisfied when the demonstration is attended by participants armed with weapons or objects capable of causing bodily harm. Similarly, assemblies in the framework of which acts are committed that qualify as criminal offences or where the breach of public order has taken place must be regarded as falling short of the requirement of peacefulness.[19] On this basis, it may appear that the peacefulness of assemblies is simple to determine. However, a low threshold applied to determine the peacefulness of the event could lead to the breach of freedom of assembly.

The restriction of the right of assembly could appear as unnecessary when a demonstration is declared to breach the requirement of peacefulness on grounds that the opinion expressed disturbs others or violates their sentiments.[20] The said requirement cannot be said to be violated even when the demonstration puts forward demands for a radical amendment to the Constitution.[21] Such demonstrations, however, are rendered unlawful when an incitement to violence has taken place.

In the case when certain individuals or a smaller group commit violent acts in a peaceful event, the right of assembly must be ensured to those who assemble peacefully. Banning the complete event is only feasible under strict conditions when the conditions of peaceful assembly can no longer be secured.[22]

RESTRICTIONS ON THE RIGHT OF ASSEMBLY

The General Limits of the Right of Assembly

The Hungarian Constitution only provides for the right of free assembly. The condition 'free' suggests that the Constitution of democratic Hunga-

ry includes among human and political rights the right of every individual to participate freely in assemblies, processions and demonstrations. The limits of this fundamental freedom can be defined according to the general principles applicable to fundamental rights. According to the jurisprudence of the Constitutional Court these could be the protection of the fundamental rights of others,[23] the institutional obligation of the state to observe fundamental rights,[24] or limitations available in international instruments for the protection of fundamental rights such as public order, an important public interest and morality.[25] The objectives justifying an interference with the right of assembly are not of equal weight: interferences implemented in order to secure another fundamental right are treated more favourably than those serving a right more indirectly with the mediation of an institution. Interferences serving an abstract value (morality and public order) require an even stronger justification [Decision 30/1992. (V. 26.) of the Constitutional Court, ABH 1992, 167, 178].

According to the case law of the Constitutional Court the state may only resort to restrictions on fundamental rights when it is necessary, in other words, when securing another fundamental right or freedom or the protection of other constitutional values cannot be achieved by pursuing other means. Moreover, the interference must be proportionate, the legislator must choose the solution appropriate to achieve the given aim that is the least damaging [Decision 879B/1992 of the Constitutional Court, ABH 1996, 397, 401].

A general limit to the right of assembly is the requirement that exercising the right must not entail the breach of the rights of others or it must not result in committing a criminal act or inciting others to commit such an act, moreover, participants—in order to ensure that the event remains peaceful, lawful and orderly—must not carry weapons or objects that can be used as weapons.[26]

Exercising the right of assembly may manifest in a great variety of forms. The free choice of these forms is part of freedom of assembly. Since the Constitution provides protection exclusively to peaceful assemblies, individuals may only opt for peaceful ways of exercising the right of assembly choosing behaviours that do not qualify as criminal offences. Those cases are the most controversial when it is debated whether a given conduct can be regarded as peaceful, for instance when participants cover their faces with masks or wear bullet-proof vests. Similarly, the peaceful nature of the event can be questioned when participants wear uniforms and their behaviour gives the impression that they are part of a military organisation.[27] These must be decided on the facts of the given instance as a general prohibition in an act of parliament would entail an unacceptably broad limitation on the right of assembly. Wearing masks could be prompted by fear of the intelligence services of the state of origin at events organised by political refugees and wearing a bullet-proof vest can be regarded as a symbolic demonstration against the unlawful use of force (weaponry) by the police (for instance when the police uses rubber bullets without having a prior assessment of the damage it may cause and without introducing it to the ordinary weaponry of the police). When these behaviours do not qualify as criminal offences, and when they are peaceful and relate to the purpose of the event, state interference must be avoided.

The Obligation of Notification

The specific limitations of freedom of assembly relate to the choice of place, time and method of the assembly. The free choice of place and time are limited by the obligation of notification of the organiser. This obligation applies to all forms of assembly with the exception of spontaneous gatherings when it is impossible to impose such obligation [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 725]. The purpose of the obligation of notification is to ensure that freedom of assembly is exercised respecting public order and the safety of road traffic. The reason for this is that events with a great number of participants and involving movement due to the number of participants, the disruption to road traffic or the potential counter-demonstrations entails a risk to public order requiring preparations from the police in order to maintain the safety of the event. It follows that the requirement in law that the organiser of a public event at latest three days before the event must notify the appropriate police authority in case of events, processions of such nature is justifiable.[28]

The failure to discharge the obligation of notification could attract negative legal consequences. However, as ruled by the Constitutional Court "the failure of the organiser to fulfil his obligation cannot entail in all circumstances that the police—without setting further conditions—would disband the event the participants of which did not breach the law" [ABK 2008, 715, 724]. Similar rules apply when the event takes place at a time, place, route or following

an aim and timetable that is different from that notified to the police. According to the long-standing case law of the European Court of Human Rights (ECtHR) the obligation of prior notification of public events entails a limitation on the very essence of the right of assembly.[29] However, when the general public had no prior knowledge at an appropriate time of the event giving cause to exercising the right of assembly, individuals have two options: either they refrain from exercising their right of peaceful assembly or they exercise their fundamental rights in breach of relevant domestic law. According to the ECtHR "where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance."[30]

The fact that the failure of organisers cannot attract the most serious legal consequences does not mean that the breach of law would entail no consequences at all. Those who without notification organise a gathering, procession or demonstration that is subject to the obligation of notification or that is not permitted by an act of the police authority[31] can be held responsible like those that use public roads without the assistance of the police. As a result when the obligation of notification was not fulfilled or the event was organised in circumstances different from those stated in the notification, in order to maintain public order and to avoid conducts prohibited by law, both parties, the participants and the police, are burdened by an increased duty of cooperation [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 727]. Cooperation between the organisers and the police is one of the fundamental conditions of exercising the right of assembly. The duty of cooperation is more important in the event of spontaneous or rapid assemblies. In such instances the willingness to cooperate could suffice in order to maintain public order.

In the first decision of the Constitutional Court on freedom of assembly [Decision 55/2001. (XI. 29.) of the Constitutional Court] it found the obligation of notification justified on grounds that besides the right of assembly the use of public space affects another fundamental right, the right to free movement provided under Article 58 of the Constitution. Assemblies impose a restriction on the right to free movement, particularly the right of taking part in road traffic, of those not participating in the event and this provides the reason why public authorities must be notified in due time before the event to be held in public [ABH 2001, 458-459]. In the second relevant decision on freedom of assembly [Decision 75/2008. (V. 29.) of the Constitutional Court] the Court departed from this opinion and ruled that in many instances the right of assembly will conflict with the public interest of ensuring the order of road traffic and not with the fundamental right of "taking part freely in road traffic with or without a vehicle" (ABK 2008, 715, 718).[32] Restrictions of freedom of assembly on grounds of the public interest of ensuring the order of road traffic are justified less readily than those pursuing the protection of another fundamental right.[33] The weight of freedom of assembly and of the public interest of free road traffic must be determined in the light of the facts of the given case.[34]

Other Limitations on Freedom of Assembly

Freedom of assembly incorporates the free choice of the public space where the event will be held. These are usually public spaces that are able to accommodate the purpose of calling public attention to the opinion expressed collectively. In principle, all public spaces can be appropriate for this purpose. However, a distinction must be made between public spaces on the basis whether they are appropriate for the function of public communication, for the purpose that they serve as an adequate public forum. The ability of public spaces to fulfil such a function depends to a great extent on the traditions of using public spaces in a state or on the particular purpose of the event. Moreover, it is not disputed that, generally, taking into account the function of freedom of assembly streets, squares, parks and, in particular, the direct environment of public offices, the Parliament or court buildings are the most appropriate places for public communication. The free choice of holding an event at these places can only be overruled on grounds of imperative reasons. In case of public offices ensuring the personal safety of MPs, judges, civil servants could serve as an appropriate reason. For the protection of this interest the authorities may exclude certain locations form the list of potential public spaces. At the time when the ARA 1989 was constructed opinions were formulated that freedom of assembly should be banned in the direct environment of the Parliament.[35] In response to the unrests of autumn 2006 the need for a similar restriction was advocated again.[36] Under Article 8 of the ARA 1989 "when an event subject to an obligation of notification would jeopardise the undisturbed functioning of democratic institutions and courts" that event can be banned. The lawful-

ness of the restriction depends on how the formula "would jeopardise the undisturbed functioning" is interpreted. In the light of the purpose of freedom of assembly a restrictive interpretation appears acceptable that would allow a ban only when the personal safety of MPs, judges or civil servants were in danger. It would be highly controversial when demonstrations aimed at influencing the work of democratic institutions would be banned on the basis of this provision. This would mean that the psychical pressure exerted on MPs by means of the demonstration is regarded as a grave interference with the functioning of Parliament, while at the same time the system of financing political parties and political lobbying, which are in place to exert pressure on MPs, are not regarded as unlawful. This could damage the relationship between the people and government institutions exercising public powers on the basis of the principle of democratic legitimacy.[37] It follows that a restriction may only be justified when public order was subject to direct danger[38] and this circumstance is supported by facts accessible publicly.

The use of public spaces may not only be restricted on grounds of protecting the functioning of public institutions, but protecting the interests of those not participating in the event are also of importance. The use of public spaces is regulated by the local authorities and in the framework of this they may implement various restrictions as to the time and level of noise of the event taking the characteristics of the given location into account. These conditions, however, must not impose burdens that are heavier than those provided in the ARA 1989 and must not render exercising the right of assembly impossible.[39]

The duty to state reasons and the right of legal redress are jeopardised when the police imposes a restriction on freedom of assembly on grounds of Article 46(1) of the Police Act. This provision to ensure the safety of a person the protection of whom is ordered by government enables the police to secure any public (and private) space to prevent any person entering the location and to order those staying at the location to leave. The potential grounds of the interference are visible, but freedom of assembly will be violated when the police fail to disclose the grounds and extent of the restriction. It is of significance that the Police Act does not clarify who and in what process of law could be entitled to challenge the measures involved.[40]

The interest of public order and defence interests could serve as the justification of the restriction relating to military personnel that at the place of service public events may only be organised after obtaining the leave of the appropriate person in command.[41]

The institution of political campaign moratorium, the period between the day before the general election and the end of the election, can be seen as a general restriction on freedom of assembly provided in an act of Parliament. In this interval it is prohibited to influence the electorate by any possible means[42] including the organisation of public events. Another important question relating to the time of the assembly concerns the duration of the event. A general rule on duration could qualify as unnecessary in the given circumstances, therefore, when determining the permitted duration of an event from the perspective of the general lawfulness of the interference it must be examined whether the aims intended to be achieved by the event can be realised in the given circumstances.[43]

BANNING AND DISBANDING THE ASSEMBLY

The most serious restriction on freedom of assembly is the prior ban of the assembly. It may only take place on grounds of particularly serious reasons. When assessing the implications of a potential ban regard must be had of the significance of freedom of assembly in the democratic institutional structure. The ban of an event as a measure of last resort may only be justified when the police are unable to secure public order with measures imposing a lesser restriction on fundamental rights.[44] This applies to the interpretation of the relevant provisions of the ARA 1989 according to which the police within 48 hours after the notification by the organiser may ban the event at the place and time as indicated in the notification[45] in case an event subject to an obligation of notification would seriously jeopardise the undisturbed functioning of democratic institutions and courts or road traffic could not be redirected onto other routes.[46]

Another serious restriction on freedom of assembly is the *ex post facto* ban of assemblies which necessitates their disbanding. When exercising the right of assembly results in committing a criminal act or inciting others to commit such an act, or it breaches the rights and freedoms of others, or when participants are armed with weapons or objects that can be used as weapons, the disbanding of demonstrations can be proportionate with a view to ensuring the *ultima ratio* protection of the said interests. The second freedom of assembly decision of the Constitution-

al Court found the legal provision disproportionate which required the instant disbanding of demonstrations organised without notification or when they took place in a time and place, and following a route, a purpose and timetable different from that indicated in the notification [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 723-725].

THE POSITIVE OBLIGATIONS OF STATES

With respect to exercising the right of assembly the state is to discharge certain positive obligations. Apart from the duty of cooperation discussed above these include the obligation of the state to protect the participants of events from spectators demonstrating their dislike of the event, from counter-demonstrations and from others breaching public order.[47] The state must protect the event from potential counter-demonstrations even when the event qualifies as breaching the requirement of a peaceful assembly. It follows that authorities must ensure by the use of force, if necessary, the security of lawful public events, and they must prevent others from disturbing such events. This obligation is provided in Article 11(2) of the ARA 1989 and Articles 228/A and 271/A of the Criminal Code. Even Article 1 of the ARA 1989 can be recalled here declaring that the state ensures the undisturbed exercise of freedom of assembly—in other words, the state ensures that exercising the right of assembly is not disturbed by others.

SUMMARY

In examining the substance of freedom of assembly, emphasis was given to defining the aim and function of this fundamental right. The interpretation of freedom of assembly in this paper is constructed on this basis together with the case law of the Constitutional Court that provided an important source of constitutional benchmarks. These benchmarks may serve as guidelines when exercising the right of assembly. Only when the function of freedom of assembly in protecting minority interests is respected, can we expect that this right, which entails many risks, helps reinforcing respect for the Constitution

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NOTES

1. On the history of freedom of assembly see: Rényi József, *A gyülekezeti jog* [Right of Assembly] (Lampel, Budapest 1900); Horváth Attila, 'A gyülekezési jog elméletének és gyakorlatának története Magyarországon 1989-ig' [History of the Theory and Practice of the Right to Assembly until 1989 in Hungary] [2007] 1 Jogtörténeti Szemle 4–15.
2. On this see: Halmai Gábor, 'Egyesüljetek, gyülekezzetek! Egy kodifikáció története' [Associate, Assemble! History of a Codification.] in Kurtán Sándor, Sándor Péter, Vass László (eds), *Magyarország politikai évkönyve 1988* [Political Yearbook of Hungary 1988] (R-Forma Kiadói Kft., Budapest 1989) 239.
3. Act 1972:I on the amendment of Act 1949:XX and on the consolidated version of the Constitution of the Democratic Republic of Hungary.
4. Szikinger István, 'A tüntetések és a rendőrség '88-ban' [Demonstrations and Police in 1988] in Kurtán, Sándor, Vass (n 2) 362–363.
5. Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 720; BVerfGE 69, 315 – „Brokdorf". See on this: Sólyom Péter, 'Demokrácia és gyülekezési szabadság' [Democracy and Freedom of Assembly] [2007] 1 Fundamentum 5–17.
6. "Peaceful demonstrations represent a value from the perspective of securing the political and social order and the legitimacy of democratic institutions. Demonstrations signal to the democratic institutions and society tensions within society enabling the adequate treatment of the causes of those tensions" [Decision 4/2007. (II. 13.) of the Constitutional Court, ABH 2007, 911, 914; Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 720]. "The relationship between freedom of expression and assembly stands for the collective and public expression of opinions. The significance of freedom of assembly as a communications rights is increased by the fact that—contrary to the functioning of the press—it enables direct access without limitations to anyone to participation in political life. Article 61(1 and 2) of the Constitution provides the right to set up a press publication; this requires significant investment. It does not follow from the Constitution, however, that the press should publish the opinion of any particular person. Consequently, among legal institutions enabling participation in public life those are of particular significance that allow equal access. Traditionally, freedom of assembly in public spaces belongs to this category, and nowadays the internet provides similar opportunities" [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 720-721].

7. Drinóczi Tímea, Petrétei József, 'A gyülekezési jog' [Right to Assembly] in Chronowski Nóra e. a., *A magyar alkotmányjog III. Alapvető jogok* [Hungarian Constitutional Law III. - Fundamental Rights] (Dialóg Campus, Pécs 2006) 423–424.
8. BVerfGE 1 BvQ 28/01 – *„Musikparaden"*.
9. The Constitutional Court placed flash mobs under constitutional protection on the basis that they contribute to spontaneous and rapid discourse in public affairs [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 721]. On a similar approach see: Drinóczi, Petrétei (n 7) 426–427. The separate opinion of Judge Bragyova to Decision 75/2008 represents a contrasting opinion: "Freedom of assembly must be interpreted broadly encapsulating any event held in a public space and allowing access for every individual (a public event) (for instance a sport event)" ABK 2008, 715, 726-727.
10. Helmuth Schulze-Fielitz, 'Artikel 8' in: Horst Dreier (ed), *Grundgesetz. Kommentar I.* (Mohr, Tübingen ²2004) 896.
11. Until the second leading decision of the Constitutional Court, Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, an increased protection of electoral campaign events appeared justifiable. It is difficult to reconcile with the function of freedom of assembly in the protection of minority opinions that only in the election campaign period was it allowed to exercise the right of assembly without notification, as a political rally requires similar preparations from the police as any other event. While the increased importance of electoral rallies in a democratic society is unquestionable, the expression of opinions in public affairs between elections demands equal protection. The Constitutional Court by extending protection to spontaneous and rapid assemblies has excluded this difference in regulation. This differentiation proved to be problematic in connection with the demonstrations of September 2006. See on this matter: Szikinger István, „Kordonka" [Little Cordon] *Népszabadság* (Budapest 21 September 2006).
12. The Court, while distinguishing them from spontaneous assemblies, provided equal protection to events of artistic, and more relevantly of political purposes, when participants after a rapid sharing of information gather for a short period of time, and call attention to their presence, or to the message they intend to convey by their extraordinary, startling appearance (flash mob) [Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 721]. As to the notion of assembly see: Kádár András Kristóf, M. Tóth Balázs, 'A gyülekezési jog külföldi és magyar szabályai' [The Hungarian and Foreign Rules of The Right to Assembly] [2007] 1 Fundamentum 63–76.
13. Decision 75/2008. (V. 29.) of the Constitutional Court, ABK 2008, 715, 719.
14. According to Article 5 of the ARA 1989 (01/07/08) the organiser of public events is a) a Hungarian citizen, b) citizen of a Member State of the EU, c) or a third country national lawfully residing in Hungary.
15. See the separate opinion of Judge Kukorelli [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442, 470].
16. Jürgen Bröhmer, 'Kapitel 19: Versammlungs- und Vereinungsfreiheit' in: Rainer Grote, Thilo Marauhn (eds), *EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtschutz* (Mohr Siebeck, Tübingen 2006) 1013–1014.
17. Drinóczi, Petrétei (n 7) 431–432; (n 10).
18. BVerfGE, 69, 315 – „Brokdorf".
19. Article 2(3) ARA 1989. According to Sajó András these limitations do not provide protection against all forms of abuse of the right of assembly requiring corrections that without breaching the right of assembly are able to increase the ability of democratic states to defend themselves. See further: Sajó András, "Önvédő jogállam" [The Self-Protecting Constitutional State] [2002] 3–4 Fundamentum 55–68.
20. BVerfGE 69, 315 – „Brokdorf".
21. *Stankov and the United Macedonian Organisation „Ilinden" v Bulgaria,* no. 29221/95, Article 11 § 39-41, ECHR 2001-IX.
22. BVerfGE 69, 315 – "Brokdorf".
23. Decision 2/1990. (II. 18.) of the Constitutional Court, ABH 1990, 18, 20.
24. Decision 64/1991. (XII. 17.) of the Constitutional Court, ABH 1991, 297, 302-303.
25. On restrictions of fundamental rights see: Halmai Gábor, Tóth Gábor Attila, 'Az emberi jogok korlátozása' [Restrictions on Fundamental Rights] in Halmai Gábor, Tóth Gábor Attila (eds), *Emberi jogok* [Human Rights] (Osiris, Budapest 2003) 109–135.
26. Articles 2(3) and 12(2) of the ARA 1989.
27. Act 2001:XCV on the status of military personnel in the Hungarian Defence Forces. According to Article 23 military personnel in political events may only wear a uniform when representing the Defence Forces with the leave of the appropriate person in command.
28. Under Article 7 of the ARA 1989 notification must be in a written form and must include the following: (1) the duration, place or route of the event, (2) the aims and time-table of the event, (3) the approximate number of participants, the number of organisers responsible for the event, (4) the name and address of the organiser person(s) and the person representing the organiser.
29. *Rassemblement jurassien Unité jurassienne v Switzerland,* no. 8191/78, Commission Decision of 10 October

1979, DR 17. See further: Bán Tamás, 'Nemzetközi emberi jogi testületek gyakorlata gyülekezési ügyekben' [2007] 1 Acta Humana 5–25.

30. *Oya Ataman v Turkey,* no. 74552/01, § 42, ECHR 2006-… See further: *Bukta v Hungary,* no. 25691/04, Judgment of 7 July 2007, and Szikinger István, 'A Bukta-ügy tanulságai' [Lessons of The Case Bukta] [2007] 4 Fundamentum 103–109.
31. Article 152(1) of the Act on Minor Offences.
32. In this respect the Court refers to a decision of the Polish Constitutional Court according to which the right of free movement does not concern free movement on public roads but the freedom to move from one place to another [Decision K 21/05, 18 January 2006].
33. Decision 30/1992. (V. 26.) of the Constitutional Court, ABH 1992, 167, 178; Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 471-473.
34. The use of discretion may not establish an unjustifiable restriction at variance with the purpose of the event, as it happened in case of the 2003 neo-nazi demonstrations and the 2008 gay and lesbian procession. The public interest of free road traffic must be assessed respecting the requirement of neutrality.
35. Halmai (n 2) 239.
36. It was raised by Ombudsman Szabó Máté; see Kapcsándi Dóra, 'Megdöbbentek a jogvédők az ombudsman ötletén' [Idea of the Ombudsman Has Schocked The Defenders of Rights] <www.origo.hu/itthon/20080111-kitiltana-a-tuntetoket-a-kossuth-terrol-az-ombudsman.html> accessed 8 January 2009. On the problems in US jurisprudence see: Mary M. Cheh, 'emonstrations, Security Zones, and First Amendment Protection of Special Places' University of the District of Columbia Law Review 53.
37. See in this respect: Dagmar Richter, "Befriedete Bezirke" und andere demonstrationsfreie Zonen – Kategorienbildung und Problemtypologie anhand in- und ausländischen Versammlungsrechts' in Hans-Joachim Cremer e. a. (ed), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (C. F. Müller, Heidelberg 2002) 899–982.
38. *Christians against Racism and Fascism v United Kingdom,* no. 8440/78, Commision Decision of 16 July 1980, D.R. 21, 138, 150.
39. „When it is obvious that the regulation of uses of public space took place with the intention to restrict the right of assembly, and the conditions of using public spaces were amended only in order to restrict freedom of assembly, legal provisions with no direct connection to fundamental rights may qualify as unconstitutional" [Decision 4/2007. (II. 13.) of the Constitutional Court, ABH 2007, 911, 915].
40. „Az őrzők őrzése. A magyar Helsinki Bizottság értékelése a 2006–2007-es zavargásokról" [Guardian of the Guardians. Report of the Hungarian Helsinki Comitee on Riots in 2006 –2007 in Budapest] [2007] 1 Fundamentum 114.
41. Article 22 of Act 2001:XCV on the status of military personnel in the Hungarian Defence Forces.
42. Articles 40-41 of the Act on the Electoral Process.
43. See in this respect: *Cisse v France,* no 51346/99, § 39, ECHR 2002-III.
44. *Christians against Racism and Fascism v United Kingdom,* no 8440/78, Commision Decision of 16 July 1980, R. 21, 138, 150.
45. Article 8(1) of the ARA 1989 was amended by Article 147(1)(a) of Act 2004:XXIX on Legislative Changes Necessitated by Membership in the European Union. The formula „would entail an unnecessary interference with the order of road traffic" was replaced by the formula „ road traffic could not be redirected onto other routes". The amendment entered into force on 1 May 2004. The previous formula was held constitutional by the Constitutional Court [Decision 55/2001. (XI. 29.) of the Constitutional Court, ABH 2001, 442].
46. Article 8(1) of the ARA 1989.
47. *Plattform „Ärzte für das Leben" v Austria,* judgment of 21 June 1988, Series A no. 139, p. 12, § 32.

Kriszta Kovács

THINK POSITIVE*

PREFERENTIAL TREATMENT IN HUNGARY

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

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

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

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

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

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

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

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

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

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

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

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

CONSTITUTIONAL JURISPRUDENCE

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

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

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

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

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

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

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

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

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

THE PROCESS OF CONSTITUTIONAL REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AFFIRMATIVE MEASURES IN HUNGARY

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

1. Positive actions in admissions

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Gender-Conscious Remedies for Inequality

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

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

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

3. Parity Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Proofread by John Harbord

NOTES

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

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

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

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

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

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

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

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

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

Balázs D. Tóth

THE PERILS OF PRIVATISING PUBLIC POWERS*

One of the central concerns of contemporary constitutional discourse is to what extent the transfer of state sovereignty in the second half of the 20th century has affected the applicability of constitutional concepts rooted in the heritage of the Enlightenment. In Hungary, due to the recent accession to the European Union, the issues whether the division of competences between the European Union and its Member States can be interpreted within the framework of the classical sovereignty-discourse and the European Union could be vested with the characteristics of a state preoccupies constitutional theory[1].

The present paper does not address the issue of transfer of sovereignty as conceived from the perspective of domestic constitutional law and European Community law. Instead, it focuses on another phenomenon that affects sovereignty-discourse: the constitutional implications of privatising certain aspects of sovereignty. Delegation of state powers to private entities, which often seem to be suicidal, [2] may serve as a common denominator of strange coalitions. As the examples below show privatisation—to a different degree—may adversely affect football fans, authors and—somewhat surprisingly—the head of the executive branch. The most important features of the privatisation of public powers are the possible diminution of liberty and, by granting privileges to preferred groups, the impairment of the cohesion of the political community.

The analysis of certain examples of the Hungarian regulation reveals that the different techniques of privatising state powers are based on different considerations. The classic example of privatising public powers aims at empowering privileged interest-groups or factions[3] thereby threatening the fundamental rights of individuals (see Part I and II). In other cases, however, the notion is related to the twisted logic of self-defence or deference of the decision-makers. Privatisation in these cases aims to provide immunity to decision-makers from political accountability. The self-limitation of the executive's power to enact delegated legislation is a good example of this (see Part III). This paper does not intend to provide a general recipe for restoring liberty, nor does it argue that delegation of private powers is unconstitutional *per se*. Nevertheless, mapping the consequences of privatisation schemes is an important step towards finding the principles that justify the constitutionally acceptable ones. The paper builds on the assumption that the integrity of the political community is jeopardised if the interest-groups with public powers are not prevented from realising their constitutionally and socially unacceptable goals and the state does not get rid of its suicidal tendencies.

'FREEDOM FOR ULTRAS!'[4]

Since the dissolution of the 1950's Golden Team or the Magical Magyars it is difficult to conceive Hungarian football from a transcendental perspective. Nowadays, football drives fans into despair instead of awe. However, if one examines the governing body of football, the Hungarian Football Association's (MLSZ) regulation on football matches and contrasts it with the constitutional requirements on freedom of expression, the MLSZ appears to enjoy a privileged, Jovanian position in which different constitutional requirements apply as compared to those applicable to law-makers.

Hungarian law defines the MLSZ as an national sport association. The law applicable to national sport associations is Article 66 of the Civil Code (Act IV of 1957), the Act on Sport (Act I of 2004) and the Act on the Right of Association (Act II of 1989). These provisions typically regulate the private sphere, providing that a sport association is a body with self-government and registered membership established by the organisations functioning in the given sport discipline; individuals are excluded from membership. Under Article 20(1) of the Act on Sport a national sport association pursues tasks provided by law and exercises special powers as regulated in that act. Article 20(3) holds out the prospect that acts of parliament may define tasks that may only be fulfilled by national sport associations.

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At first impression the goal of the MLSZ appears to be enhancing private autonomy in the field of football. In its own definition the MLSZ is an autonomous (self-governing) organisation governing football in the Republic of Hungary that coordinates and supports the activity of bodies and individuals involved in this discipline of sport.[5] Each year the MLSZ enacts a number of regulations on professional football. Under Article 23(1) of the Act on Sport the MLSZ is required to enact three major regulations: the regulation on competition, registration and transfers. Compliance with these regulations is a precondition of participating in the competitions organised by the MLSZ (the professional championship, the national cup etc.). Examining the Act on Sport and the MLSZ regulations, however, questions whether the MLSZ is truly in support of private autonomy and, more importantly, its regulations meet the constitutional requirements of free speech.

The decreasing community of devout football supporters, who decided to follow the fixtures of Hungarian football clubs in person had to get used to the fact that for the purpose of their 'own personal safety' surveillance cameras keep them under observation during the matches and upon entry to the stadium they are subject to clothing and baggage searches.[6] In order to reduce anti-social behaviour in stadiums and to exclude racist expressions from football stadia the MLSZ launched a 'zero tolerance' campaign[7] in the 2007-2008 season. A heavily criticised manifestation of the zero-tolerance policy was the requirement of a prior authorisation on all signs displayed by supporters in MLSZ events.[8] The policy, the effectiveness of which has been questioned recently by many,[9] produced unprecedented unity among football fans' associations, the relationship among which is often characterised by extreme violence and hatred. Being well aware of the new limitation on their freedom of expression they responded in unity[10] to the MLSZ regulation for the 2007-2008 season[11], arguing that it interferes with their free speech rights.[12]

In order to determine whether freedom of expression prevails in football stadia as required by the Constitution, the provisions of the Act on Sport on entry to and expulsion from football stadia and the MLSZ's disciplinary regulation need to be examined. The duty of applying the relevant rules of the Act on Sport on entry and expulsion is placed upon the private party (company) organising the sports event. Apart from obvious cases excluding entry to football grounds such as being under the influence of drugs or alcohol, Article 71(1)d of the Act on Sport denies entry from football supporters in possession of signs or flags capable of inciting hate against others or any totalitarian symbols prohibited by law. When the prohibition is breached in the course of the sports event, the organiser is required by Article 71(3) of the same act to expel the person in question. Under Article 73(1) of the Act on Sport the organiser is entitled to deny the person expelled the sale of entry tickets and to prevent his participation in later events. The act sanctions the mere *possession* of signs or flags capable of inciting hate against others or any totalitarian symbols prohibited by law. It follows that the act incorporates an irrebuttable presumption that the possession of such signs, flags and symbols will entail their use in public, which irrespective of the potential effect of the sign must be prevented upon entry to the football stadia.

Football matches have a specific ambience when compared with political rallies or public cultural events. Weekend games provide one of the most important opportunity of self-expression for many football fans, especially for the so-called ultras who are fanatic, organized supporters. For the ultra, 'as in case of many other subcultures, the expression of own values that are at variance with the general values of society is essential. With the notices (messages on a gigantic piece of textile revealed for a few minutes making it visible in the whole stadia) and the supporters' songs the ultra intends to intimidate the opponents (or to express its devotion to the club or the town). Verbal insults are commonplace, but humour is never neglected. For this reason the chants and the songs are not to be taken seriously in all circumstances: their message is only valid in the specific social environment of the football stadium questioning whether they should be understood as in normal circumstances. The message '*Lazio delenda est*' displayed by the Roma supporters is a good example of supporters' creativity, historical awareness and that the messages need not be taken seriously'.[13]

It appears that the Hungarian legislator and the MLSZ overlooked the classical thesis that 'freedom of expression is the freedom to offend others'.[14] The Act on Sport does not include the condition that the breach of public order by football supporters must entail a direct and genuine threat to or violation of individual rights (e.g. by the possible use of violence).[15] Neither does it require that the totalitarian symbols prohibited by law are distributed, used or displayed in public.[16] The possession of the incriminated items which assumes that the person's clothing and other personal items will be searched[17] provides in itself sufficient grounds for denying entry or expulsion.

This means that different standards apply as regards the limitations of freedom of expression in a sports event and a political rally. Irrespective of the effect induced by the signs capable of incitement to hatred or no matter whether the totalitarian symbols prohibited by law are displayed their possession is sanctioned *per se*. In the light of the Hungarian Constitutional Court's jurisprudence on free speech (see, below) the Act on Sport imposes limits on freedom of expression that are more severe than those regulated in the Criminal Code and the Civil Code. The mere content of symbolic speech or the possession of items with inciting or totalitarian content serves as a basis of restriction. The organizer may not take into consideration the effect of symbolic speech in the expulsion procedure. The act does not address the effect of symbolic speech, and, hence, evidently the civil law requirement that the breach of individual rights must take place is ignored, as well.

It remains unclear why the law-maker incorporates different standards depending upon the place of exercising freedom of expression. Why should more severe sanctions be applicable to those supporting a football team in the evening as compared to participating in a political rally in the afternoon? Parliament might have shared the opinion that freedom of expression is jeopardised less when means less restrictive than criminal law (administrative measures) are applied.[18] This, however, is mere speculation as the act remains silent on this matter. Nevertheless, the Constitutional Court in its decision on the civil law sanctions of hate speech made it clear that the standards of limitation of freedom of expression as determined in 30/1992. (V. 26.) AB decision of the Constitutional Court (prohibition of content-based restriction, only external boundaries may serve as a basis of restriction, the protected interest must be concrete) are applicable to all cases where the constitutionality of measures restricting freedom of expression is at stake. This approach provides an unequivocal response to the question whether the irrebuttable presumption introduced in the Act on Sport limiting freedom of expression. The mere possession of a form of symbolic expression with inciting or totalitarian content or the display of an inciting sign, regardless of the effect of speech, cannot be sanctioned in the light of Article 61 of Constitution which guarantees the right to free speech to everyone.[19]

The cause of the unprecedented unity among football supporters' organisations was, however, not the impugned provision of the Act on Sport. The MLSZ, given its duty under the Act on Sport to enact regulations passed a disciplinary code that presents an even stricter restriction on freedom of expression of football supporters. Under the code denigration in public, discriminatory or defamatory statements and actions on grounds of race, colour, language, religion or ethnicity constitute disciplinary misconducts. The disciplinary committee of the MLSZ is responsible for commencing proceedings against the sport club responsible for such conduct by the spectators.[20]

This provision sanctioning defamatory or discriminatory expression mirrors the provision of the Criminal Code that was declared unconstitutional in 95/2008. (VII. 3.) AB decision by the Constitutional Court.[21] The practice of the Court regarding hate speech is clear on the point that the constitutional protection of speech cannot be denied on the grounds that the content of expression violates the interests, views, sensitivities of others or that it is considered as offensive or degrading by certain individuals. The limitation of freedom of expression may not be based on the content of the extreme viewpoint, only on its direct and foreseeable effect.[22] At the same time, one could argue that spectators should be protected from unwanted communication in a physically confined environment. The captive audience doctrine could hardly be generally applicable in football stadia. Spectators participate at football games open to the general public of their own volition and in exchange of an entry fee. Moreover, spectators are aware that that they will witness forms of communication that would be found disrespectful by 'the general public'.

Furthermore, responsibility for the conduct of spectators is placed only partially on the spectators, as the sports club the supporters of which were involved in the prohibited conduct will pay the pecuniary penalty. It is far from clear what principles justify that the said provision of the disciplinary code imposes an objective liability on sports organisations for the supporters' speech. The penalty is paired with the obligation to organise the following match without the presence of spectators. In case the affiliation of football supporters cannot be determined the responsibility of the organiser sports club will be established.[23]

In the light of the decisions of the Constitutional Court on hate speech it is hard to say on what basis the MLSZ disciplinary code sanctions some forms of expression that are not contrary to the Criminal and Civil Code. Not only the relevant provisions of the Act on Sport limiting freedom of expression appear unconstitutional, but the regulations of the MLSZ also raise constitutional problems. In such

case the public prosecutor—in its supervisory function—may exercise its powers to commence proceedings against the MLSZ before domestic courts for the protection of freedom of expression of football supporters.[24]

Without showing a constitutionally justifiable reason for departing from the general constitutional requirements on free speech, the application of double standard to football matches is unacceptable. This is so even if the supporters express their opinion as regards Hungarian football and its management in non-literary style or, as a result of undesirable mingling of politics and sport, the supporters express such extremist and racist opinion in the stand that cannot be conciliated with the Constitution. The provisions of the Act on Sport restricting freedom of expression and the standards established by the autonomous body of MLSZ which appear to be at variance with the standards established in constitutional law provide an example how freedom of expression can be threatened by the delegation of public powers (duties) to private bodies and by the state failing to exercise its supervisory powers to hold that private body to account.[25]

ASSOCIATIONS AS LAW-MAKERS

Organisations for the collective administration of rights (hereinafter: OCARs) which function as associations have a peculiar relationship with their masters, the authors. The relationship is not marked by the classic problems of freedom of artistic expression e.g., how state regulation via censorship or the cut of funding may silence authors[26]. Hereinafter, I will concentrate on the problems caused by authorising OCARs essentially with law-making power. OCARs exersice their law-making power by regulating the rules of distribution of authors' royalties in the course of the obligatory form of collective administration of authors' rights.

Article 85(1) of the Copyright Act (Act LXXVI of 1999) defines the concept of collective administration of authors' rights[27]. Collective administration is the task of associations established under the Act on the Right of Association (Act II of 1989). Article 86(2) grants monopolistic position to OCARs, as nation-wide only one association may be registered for the collective administration of authors' rights related to one particular type of work and product. A precondition of accepting an association as an OCAR registration by the appropriate state authority is required. Under Article 93(1) of the Copyright Act and under Article 17 of the Act on the Right of Association the activity of OCARs is supervised by the minister of culture and education.[28]

The aim of OCARs is not simply realising the aims determined by its members. The Copyright Act regulates two forms of collective administration of authors' rights, a voluntary and an obligatory form. The consequence of collective of administration of authors' rights in both cases is that when an OCAR authorises the use for or enforces a claim to remuneration against a user the user shall be entitled to the use of the work or the performances of neighbouring rights of the same genre covered by collective administration, provided that the user pays the appropriate remuneration.[29]

The Act enables that right-holders may exclude certain works from the framework of collective administration of authors' rights.[30] In this respect a written declaration must be produced by the right-holder addressed to the OCAR objecting the authorisation of the use of his works or performances of neighbouring rights. In such circumstances authorisation will be provided directly by the author.[31] The possibility of such an objection (withdrawal from the framework of collective administration of rights) is, however, not possible in cases when the Copyright Act provides for obligatory collective administration of authors' rights.[32] In such instances the enforcement of authors' rights protected by Article 13(1) of the Constitution on the protection of private property falls within the exclusive competence of the given OCAR.[33]

Since OCARs must be established in the form of associations, the negative aspect of freedom of association potentially excludes that the Copyright Act would include obligatory membership in the association.[34] At the same time, in cases of compulsory collective administration of authors' rights, OCARs are in a monopolistic position[35], which is justified with the alleged necessity of effective rights enforcement. The use of public powers, affecting the rights of authors' protected under Article 13(1) of the Constitution,[36] is manifest when the OCAR regulates the distribution of royalties in the course of collective administration of rights. The rules of distribution regulate the distribution of royalties among the right-holders collected by the OCAR that remain after the reduction of administration costs. Regulating the distribution of royalties is independent from membership in the OCAR. Under the Act on the Right of Association the rules of distribution are to be determined by the governing body of the OCAR; in some instances other bodies of the OCAR (the management body) may act instead. Under Article 88(1)f(5) the rules of distri-

bution not only cover the members of the OCAR, but non-member right-holders obliged by law to enforce their rights through the OCAR also fall under its scope.[37] On this basis, the rules of distribution cannot be regarded as an internal measure of the association binding only its members based on their voluntary undertaking. Right-holders who are not members of the association have no influence on determining the rules of distribution established by an association that was granted monopoly by law in enforcing authors' rights.

When the collective administration of rights is obligatory the power of OCARs to enact the rules of distribution, substantially, stands for an empowerment to law-making. The association's regulatory nature manifests clearly in the fact that the scope of the rules of distribution covers non-member right-holders. Moreover, it is questionable whether the rights and obligations included in the rules of distribution could be contested before courts. Surprisingly, ordinary courts consider the rules of distribution as part of the internal autonomy of associations.[38] The judicial practice neither addresses the issue how the internal autonomy argument can be applied to those authors' who are not member of the OCRAs, nor raises the problem of normativity. The judicial interpretation of yearly publication of copyright tariffs that is closely related to the rules of distribution also seems to be problematic. The tariffs publications that are subject to approval by the Minister of Culture (in effect these are joint acts of the association and the minister) and published in the Hungarian Official Gazette are regarded as 'facts' or general terms of contract by ordinary courts[39] This interpretation also questions their contestability before courts.

Entrusting associations with the task of obligatory collective administration of authors' rights raises issues as regards the conditions of delegating regulatory competences and enforcing claims relating to proprietary rights. It is doubted that the constitutional requirements of law-makings can be appropriately implemented in case of OCAR regulations (even if subjected to approval by a minister of government). If the legislator entrusts associations to perform public functions, especially lawmaking power, the exclusion of obligatory membership only complies with the requirements that flow from the negative aspect of the right to freedom of association. . When regulatory competences are delegated to associations the results of which bind non-member individuals not only the transparency of enforcing authors' rights must be ensured, the constitutional constraints of delegating law-making activity must be taken into account. . Finally, I will briefly address the issue of what are the constitutional constraints of delegating law-making power to private entities (such as the OCRAs) or organisations comprising of state and private entities.

THE SELF-LIMITATION OF GOVERNMENTAL REGULATORY COMPETENCES

The act on the National Interest Reconciliation Council (NIRC) is a rare example of government deciding to share regulatory powers with a body lacking constitutional legitimacy and political accountability. From the perspective of the doctrine of separation of powers the rationale of delegation can hardly be explained.

The main purpose of the Act on the NIRC and the related Act on the Committees of Sectoral Dialogue and Certain Issues of Middleware Social Dialogue (Social Dialogue Act) was to comply with Decision 40/2005. (X. 19.) of the Constitutional Court[40] that established the breach of Article 2(1) of the Constitution (the rule-of-law provision) on the grounds that Parliament had failed to legislate on the structure and functioning of organisation of national employment interest reconciliation. The acts in question, apart from establishing the NIRC, provide a comprehensive regulation of sectoral social dialogue.

The President of the Republic of Hungary initiated an ex ante constitutional review of the said acts. He questioned the constitutionality of those provisions that regulate the composition and the powers of the NIRC and the powers of national trade unions participating in the NIRC.[41]

The reason for questioning the provisions concerning the powers of the NIRC was that they empowered the participation of the NIRC in law-making activity in relation to which neither the NIRC nor the participating trade unions enjoy democratic legitimacy. The NIRC Act and Social Dialogue Act provided that in the course of regulating certain areas of the terms of employment (such as the amount of minimum wage of or the system of work appraisal)[42] the NIRC's and assent must be obtained in a co-decision procedure. The President argued that according to 16/1998. (V. 8.) AB decision of the Constitutional Court, the constitutional condition of exercising public powers, including law-making, to comply with the requirements of democratic legitimacy flowing from Articles 2(1) and (2) of the Constitution[43]. The provisions on the composition of the NIRC were

suggested to be unconstitutional as the composition of the NIRC fails to ensure that the public powers exercised by the NIRC are based on democratic legitimacy. This conception of democratic legitimacy would require that the national trade unions participating in the NIRC would represent the overall majority of the voters or the addressee of the laws (the employees) that were passed in a co-decision procedure, but said acts do not guarantee this.

In its 124/2008. (X. 14.) AB decision[44] the majority of the Court held that the observance of the requirements of democratic legitimacy per se does not make the transfer of public powers constitutional. The majority opinion pointed out that in the specific case Parliament empowered the NIRC with a right of co-decision in governmental and ministerial law-making. Based on its precedents, the Constitutional Court made it clear that the right of co-decision or consent in the law-making grants the addressee of that right the role of the law-maker. Without the consent of the NIRC the given ministerial or governmental decree would be invalid.

The requirements of democratic legitimacy flowing from Articles 2(1) and (2) of the Constitution has little effect on the transfer of public powers (powers of co-decision) regulated concisely in the Constitution. Sharing law-making powers requires a settlement on the level of the Constitution. Invoking its 2006 precedent on the unconstitutionality of the right of the political state secretary to substitute the minister in promulgating ministerial decrees, the Constitutional Court recalled that law-making powers are 'the most significant powers of state bodies. The Constitution contains an exhaustive list of law-making measures available to state bodies (…) The Constitution has established a comprehensive system as regards law-making powers: it determines the body entitled to regulate, the form of regulation, the hierarchical relationship between different forms of regulation and by virtue of Article 32/A(1) [i.e. constitutional review] the compatibility of that hierarchy with the Constitution is ensured.'[45] As a result, the requirements of democratic legitimacy may only ensure the constitutionality of the transfer of public powers if the transfer does not require constitutional amendment. Otherwise direct empowerment by the overwhelming majority of the electorate or the addressee of the public power in question is sufficient. [46] In absence of a constitutional amendment, the presence of democratic legitimacy appears to fail to ensure the constitutionality of transfer of law-making powers to a body such as the NIRC that is not entrusted with law-making competences by the Constitution.

Since the majority[47] deemed the issue of democratic legitimacy as an irrelevant factor in assessing the right of consent in the law-making process, the judges need not have had to examine whether the non-governmental members of the NIRC (the employers' and employees' national interest groups) represented the overwhelming majority of the addressee of the ministerial and governmental decrees in question. [48]

On this basis, the self-limitation in exercising law-making competences is forbidden. The right of consultation in the course of the law-making process cannot be mingled with ensuring social participation in the formal decision-making process. The relevant constitutional principles seem to enable the head of the executive to resist such neo-corporativist claims advanced in this regard. At the same time, the Constitution not only excludes the open challenges of interest-groups to share law-making powers without sharing political responsibility. Based on the same principles, the anomalies emanating from the law-making powers—that are currently disguised under the slogan of self-governing autonomy of associations—of the OCRAs could also be redressed.

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The examples of privatising certain aspects of sovereignty provide support to the assumption that the transfer of public powers to private bodies could jeopardise fundamental rights to the same extent as in case of the abuse of powers by public authorities. Given the lack of transparency and the absence of constitutional accountability of such private bodies the transfer of sovereignty may entail an increased risk of rights violations. Privatisation may not only reduce the effectiveness of the state, it may easily have an adverse effect on the cohesion of the political community.

The list of potential cases is far from being exhausted by these examples. The potential violation of the fundamental rights of football supporters and authors, and the constitutionally unsound transfer of law-making powers to the NIRC are not the only instances when slices of public powers are on offer to private bodies. Anglers[49] and dog breeders[50] or private undertakings operating speed cameras[51] provide further controversial instances of transfer of public powers. In connection with the aims and functioning of the association labelled Hungarian Guards (Magyar Gárda), causing the most anxiety in this respect today in Hungary, János Kis suggested that

freedom of association provided by the Constitution must not cover attempts to gain parts of the state's monopoly on the use of force.[52]

While classical constitutional theory focuses mainly on the protection of fundamental rights *vis-à-vis* the state, it never turned a blind eye on the perils of private groups acting against what Madison called 'the long-standing and general interests of society'. The system of separation of powers is based in part on the idea that the '*causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its effects'.[53].

Privatising public powers may have numerous rationales. Some instances could be explained by reference to logic of self-defence applied by the decision-makers. In other cases one may speak of privileging certain private interest groups. Nevertheless, not all transfers of public powers to private groups find its reasons in the undue influence of private interest-groups or in the 'suicidal' tendencies of decision-makers. Often the reason is the economic impotence of the state or an argument from efficiency. In Europe air traffic control is performed by private undertakings under thorough state supervision. The USA pays out billions of dollars every year to private undertakings to perform military or related tasks. The number of private employees performing military duties in Iraq these days can only be estimated.[54]

Apart from the potential effects on fundamental rights, considerations of efficiency in the state machinery also influence how the limits of privatising public powers are conceived. The privatisation of certain public functions and certain sections of public powers appears unavoidable. However, it needs to be determined with clarity which principles govern the constitutional choice between public functions that may be transferred to private actors and those that are excluded from privatisation. For this purpose an assessment is needed on the effects of privatisation on fundamental rights and whether state supervision could ensure the constitutionality of the transfer. This is not only a matter for regulation; the prudent use of state resources is needed, as well.

Granting public powers to private actors with conflicting interests so that their conflicts would diminish their ambitions in exercising excessive public powers is not the proper solution. By relying on the classical concepts of constitutionalism and their reinterpretation, the Constitutional Court and ordinary courts are properly empowered to engage in defining the constitutional boundaries of privatising public powers.

Translated by Márton Varju

NOTES

1. For the latest Hungarian literature, see, Chronowski Nóra, *„Integrálódó" alkotmányjog* ['Intergrating' Constitutional Law] (Dialóg Campus, Budapest, Pécs 2005) 47 et seq., Sonnevend Pál, Jeney Petra, Kardos Gábor, Kende Tamás, Lattmann Tamás, Mink Júlia, *A közösségi jogrend* [The Community's Legal Order] Kende Tamás, Szűcs Tamás, Jeney Petra (eds), *Európai közjog és politika* [European Public Law and Politics] (Complex, Budapest 2007) 743 et seq.
2. According to András Sajó, in response to occurrences questioning the rule-of-law state points out that 'the state as opposed to dolphins, whales and human beings is not inclined to commit suicide. On the contrary, the most fundamental characteristic of the state is that it is capable of defending itself: the pack of thieves (magna latrocinium) was raised to be the state on the basis of the purpose of self-defence. Self-defence incorporates the maintenance of public order and on this pretext the conservation of existing power structures. Sajó András, *Önvédő jogállam* [Self-Defending Rule of Law] [2002] 2–3. Fundamentum 55.
3. See James Madison, 'The Federalist Papers, No. 10' in Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (New American Library, New York 1961) 77 et seq.
4. The banner of a Hungarian football club's, Kispest-Honvéd supporters protesting against the restrictions on freedom of speech imposed by the MLSZ <http://www.basildon.hu/img_view.php?imgid=12416).
5. http://www.mlsz.hu/anyagok/szabalyzat/2006-2007/mlszalapszabaly.pdf> accessed 8 January 2009.
6. The present paper does not discuss the issue of surveillance of supporters at sports events. On rejecting the necessity of such measures, see, the dissenting opinion of Judges László Kiss and István Kukorelli in 35/2002. (VII. 19.) AB decision of the Constitutional Court. They saw not only the breach of Article 59(1) of the Constitution on informational rights, but they also held that there is no manifest need in sports events to employ private organisations exercising the state's criminal competences. Article 74(3-6) of the Act on Sport remains to contain the obligation of organisers of sports events to provide public authorities with a copy of the recording. ABH 2002, 199, 221 et seq.
7. <http://www.mlsz.hu/anyagok/szovetseg/zero.pdf> accessed 8 January 2009.
8. Tóth Gábor Attila, 'Szabadláb. Az állam orra' [2006] 27 October Élet és Irodalom <http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0643&article=2006-1029-1825-14VXRT> accessed 8 January 2009.

9. See, e. g., Bernard E. Harcourt, Jens Ludwig, 'Broken Windows: New Evidence from New York City and a Five-City Social Experiment' [2006] 26 University of Chicago Law Review. Available at SSRN: <http://ssrn.com/abstract=743284> accessed 8 January 2009. In the Hungarian literature, see Sárosi Péter, 'Zéró tolerancia. Veszélyes illúziók a rend fenntartásáról' [Zero Tolerance. Dangerous Illusions about Maintaining Public Order] <http://drogriporter.hu/hu/node/941> accessed 8 January 2009.
10. <http://www.urb1991.hu/?aps=artc&f_artcid=110&lng=hu> accessed 8 January 2009.
11. <http://www.mlsz.hu/anyagok/szabalyzat/2007-2008/FEGYELMI_SZABaLYZAT_2007-08.pdf>
12. One of the most severely criticised provision is Article 63(4)c of the 2007-2008 MLSZ Regulation on Competition: '[the football game must be suspended or aborted] when supporters express degrading opinion of the players and the manager of the opponent team and the representatives of the MLSZ.'
13. Balázs Gábor, 'Se szentek, se bűnözők, egyszerűen ultrák' [Neither Saints, Nor Criminals, Simply Ultras] [2008] 15 February Élet és Irodalom. <http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0807&article=2008-0217-1555-02YXQE> accessed 8 January 2009.
14. Sajó András, 'Mit is akarunk védeni?' [What Do We Really Want to Protect?] [2006] March Beszélő <http://beszelo.c3.hu/cikkek/mit-is-akarunk-vedeni> accessed 8 January 2009.
15. 18/2004. (V. 25.) AB decision of the Constitutional Court, ABH 2004, 318.
16. Article 269/B(1) of Act IV of 1978 on the Criminal Code.
17. Article 71(4) of the Act on Sport.
18. In the Hungarian literature it was András Sajó who emphasised that criminal sanctions are not, in all circumstances, the most pervasive limitation on free speech. András Sajó, 'A faji gyűlölet igazolása büntetendő' [The Justification of Racial Hatred is Punishable] [2004] 4 Fundamentum 33, footnote 23.
19. See point III.2 of 96/2008. (VII. 3.) AB decision of the Constitutional Court. ABK 2008. június 916, 918 et seq.
20. Article 8 of the MLSZ Disciplinary Code <http://www.mlsz.hu/anyagok/szabalyzat/2007-2008/FEGYELMI_SZABaLYZAT_2007-08.pdf> accessed 8 January 2009.
21. 'Those who before the general public use or propagate an expression related to the Hungarian nation or certain groups within it, particularly national, ethnic, racial or religious groups, that may curtail the integrity of the members of the group in question or offend their dignity, commit a misdemeanour.'
22. See 95/2008. (VII. 3.) AB decision. ABK 2008. június 900, 903.
23. Article 8(9) of the MLSZ Disciplinary Code.
24. Article 27(1) of the Act on Sport; Article 16 of the Act on the Right of Association.
25. The effectiveness of judicial review—inter alia—depends on how ordinary courts would classify the disciplinary code as a legal measure. See, per analogiam, footnotes 46-47, infra, concerning the rules of distribution and the regulation on royalties of collective administrators of authors' rights.
26. For the contemporary issues of state subsidies of artistic expression in the European context, see, Christoph Germann, 'The "Rougemarine Dilemma": how much Trust does a State Deserve when it Subsidises Cultural Goods or Services?' < http://cadmus.iue.it/dspace/bitstream/1814/9027/3/MWP_2008_22.pdf> accessed 8 January 2009. For the history of literary censorship in the U.S. context, see, Edward de Grazia, *Girls Lean Back Everywhere* (Random House, New York 1992). For the problem of oppressing artistic expression through financial measures see, e.g., *Brooklyn Institute of Arts & Sciences v City of New York* 64 F. Supp. 2d 184 (E.D.N.Y. 1999).
27. "The collective administration of rights shall mean the exercise of authors' rights and neighbouring rights as well as database creators' rights respectively related to authorial works, productions of performers, sound recordings, and programmes broadcasted or transmitted by cable as well as the creating of films and databases which are individually non-exercisable due to the character and circumstances of utilisation and therefore exercised through organisations of right-holders established to this end whether it is legally prescribed or based on the resolution of right-holders."
28. For this purpose the following documents must be made available to the Minister: the internal statute of the association; the organisational and operational rules, the rules of distribution, the list of its members who have consented to publishing their names for such purpose, the list of members participating in its administrative and representative organisations, the annual report, agreements on reciprocal representation concluded with foreign associations performing collective administration of rights (Articles 88 and 93(2) of the Copyright Act). For the role of minister of culture in passing tariffs and other regulations, see, Article 90(2) of the Copyright Act.
29. Article 91(1) of the Copyright Act.
30. This was provided by Article 74 of Act CII of 2003 from 1 May 2004.
31. First sentence of Article 91(2) of the Copyright Act.
32. Articles 19(1), 20(7), 21(7), 23(6), 27(1), 28(3), 70(5), 73(3), 77(3), 78(2) of the Copyright Act.

33. According to the Constitutional Court, the right to property protected by Article 13(1) of the Constitution extend to rights with a pecuniary value [17/1992. (III. 30.) AB decision, ABH 1992, 104, 108.]. This protection also includes copyright as made clear by decision 482/B/2002 of the Constitutional Court. This raises issues of limitation of the right of self-determination or freedom of artistic expression, but these will not be addressed in this paper. The Constitutional Court has not ruled upon this issue directly (see footnote 36).
34. 22/1994. (IV. 16.) AB decision of the Constitutional Court, ABH 1994, 127-128-129. On this, see, Halmai Gábor, 'Az egyesüléshez való jog' [The Right of Association] in Halmai Gábor, Tóth Gábor Attila (eds), *Emberi jogok* [Human Rights] (Osiris, Budapest 2003) 504; Drinóczi Tímea, Petrétei József, 'Az egyesülési jog' in Chronowski Nóra e. a., *Magyar alkotmányjog III. Alapvető jogok* [Hungarian Constitutional Law III. Fundamental Rights] (Dialóg-Campus, Budapest, Pécs) 405.
35. The Ombudsman for Data Protection and Freedom of Information in case 1264/A/2006. held that Article 19(5) of the Act LXIII of 1992 on the Protection of Personal Data and Freedom of Information regarding entities performing state function is applicable to the OCARs. In the ombudsman's view the monopolistic position of OCARs question that OCARs are genuinely private law entities.
36. 482/B/2002 AB decision of the Constitutional Court only per tangentem addresses the issue of collective administration of authors' rights. Under the Copyright Act the contract with the user is concluded by the OCAR. It was questioned whether this is compatible with Article 70/G of the Constitution, as it prevents the author from prohibiting the use of the work when the circumstances of the use would breach the integrity of the work. The exclusion of authors from the process was suggested to violate Article 54(1) of the Constitution on the right of self-determination and the right to property as provided in Article 13 of the Constitution. The Constitutional Court review was based on a test that is applied to chambers of profession. However, an Act of Parliament creates chambers and membership is obligatory. In the Court's opinion, the interference with authors' rights, including the right of self-determination and freedom of artistic expression, is necessary and proportionate as technological developments and the mass use of authorial works demand the particular solution provided in the Copyright Act (ABH 2007, 1448, 1450-51.).The Constitutional Court would probably reach a different conclusion if OCARs qualify as law-making entities.
37. Under the rules of distribution non-members are also entitled to their appropriate share of royalties.
38. As regards the rules of distribution see the judgments 8.Pf.20.304/2007/7. and 8.Pf.21.300/2007/4. of the Regional Appeal Court in Budapest (Fővárosi Ítélőtábla). In the latter case the court rejected a claim on the modification of the rules of distribution on the grounds that courts are not entitled to interfere with the internal functioning of the defendant association as guaranteed in the Act on the Right of Association.
39. The Supreme Court, pursuant to Section 209(5) of Act IV of 1959 on the Civil Code, treats tariffs as general contract conditions determined by law which excludes the possibility of contesting them due to unfairness (see judgement Pf. IV.25 653/1999/6.). On treating the yearly publication of tariffs as a fact, see, judgments Pf.I.20.064/2007/6 of the Debreceni Ítélőtábla (Regional Appeal Court in Debrecen), Pf.I.20.136/2007/4 of the Győri Ítélőtábla (Regional Appeal Court in Győr) and 8.Pf.20.679/2007/5 of the Fővárosi Ítélőtábla (Regional Appeal Court in Budapest). As a result, it still remains to be clarified what is the status of yearly published tariff rules in the Hungarian legal system. It could well be argued that similarly to the rules of distribution, on the basis of their content they may be regarded norms establishing rights and obligations for individuals.
40. ABH 2005, 427 et seq. In case the Court holds that there is an unconstitutional omission, the law-maker is obliged to legislate in the given issue within the time-limit determined by the judgement.
41. For the ex ante presidential motion on the NIRC and the Act on Sectoral Dialogue see: <http://www.keh.hu/admin/data/00000003/_fix/00000000/_fix/00000002/_fix/00000002/_file/20061228Abinditvany_orszagos_erdekegyezteto_tanacs.pdf> accessed 8 January 2009.

The Presidents' view regarding the participation of NIRC in exercising public powers is detailed in Sólyom László, *Pártok és érdekszervezetek az Alkotmányban* [Parties and Interest Groups in the Constitution] (Rejtjel, Budapest 2004) 199–206.

42. Ministerial of governmental decrees regulate these terms of employment.
43. 'Article 2 (1) The Republic of Hungary is an independent, democratic constitutional state. (2) In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives.'
44. ABK 2008. október, 1352 et seq.
45. 37/2006. (IX. 20.) AB decision. ABH, 2006, 480, 485.
46. The typical cases when the requirements of democratic legitimacy constitutionally suffice the transfer of public powers include the establishment of chamber of a certain profession with compulsory membership that pre-

scribe rules of professional conduct for a certain profession and have sanctioning power over their members.

47. Four judges dissented. Judge László Kiss (to whom judge Lévay and Kovács joined) argued that in ex ante review procedures the Court is more confined to the President's motion than in ex post review procedures, therefore the majority should have decided the case on democratic legitimacy grounds. In his dissenting opinion Judge Bragyova not only shared Judge Kiss' interpretation of the ex ante review competence of the Court, but also argued that the President's petition should have been rejected. According to Article 35(1) l of the Constitution the Government shall attend to those responsibilities assigned to its sphere of authority by law. Article 36 of the Constitution stipulates that in the course of fulfilling its responsibilities, the Government shall co-operate with the relevant social organizations. The questioned provisions only specify the constitutional obligations and assign the Government the responsibility to negotiate and come to terms with employment interest-groups. If no consensus is reached in the negotiating procedure Parliament exercises the law-making powers. As opposed to the French constitutional system, Parliament may freely limit the government's decree-making power. Nothing in the challenged provisions point to the direction that the NIRC would have been granted formal law-making power.
48. Strangely enough, the President's ex ante review only addressed the issue of trade union representation, but not the employees' national interest groups'.
49. As regards anglers' associations, see, the critique of obligatory membership by László *Sólyom*. Sólyom László, *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginnings of Constitutional Review in Hungary] (Osiris, Budapest 2001) 513, 518. See, in this respect, 939/B/1997 AB decision of the Constitutional Court. ABK 2008. május 744 et seq.
50. The question was addressed in part by point III.3.47/2008. (IV. 17.) AB decision of the Constitutional Court. ABK 2008. április, 553, 563-564.
51. See 410/2007. (XII. 29.) Governmental Decree on traffic violations attracting administrative sanctions and 18/2008. (IV. 30.) Ministerial Decree of Transport and Economy on speed cameras. The privatisation of the operation of speed cameras was criticised from the perspective of effectiveness and potential corruption. Juhász Ádám 'Gyorshajtás' [Speeding] [2008] 25 April Élet és Irodalom.
52. Kis János, 'A gárda és az állam' [The (Hungarian) Guards and the State] *Népszabadság* (Budapest 15 September 2007) <http://nol.hu/cikk/464123> accessed 8 January 2009.
53. Madison (n 3) 80.
54. These private employers were also responsible for torture in the Abu Ghraib prison. On outsourcing sovereignty in the US context see: Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge University Press, Cambridge 2007).

Eszter Polgári

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN HUNGARIAN JUDICIAL PRACTICE*

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The international system of norms protecting human rights is one of the most important accomplishments of modern international law because it has shaken the foundations of the institutional system based on unconditional respect for state sovereignty. The international human rights treaties motivate—and ultimately compel—states to eliminate deficiencies in their legal systems and to comprehensively ensure the protection and efficient enforcement of the protected rights.[1] The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) serves as the foundation for the most efficient regional legal protection mechanism. The Convention was signed by the members of the Council of Europe on 4th November 1950 and entered into force three years later. Many regard it as a *sui generis* document: it is in part an international agreement, since it creates obligations for the state parties, but at the same time it is also in part national law since the rights enshrined therein are—ideally—enforceable in the courts of member states, too.[2] This is the reason why in addition to the European Court of Human Rights (hereinafter: the Court)—which primarily serves to apply and interpret the Convention—, the national courts—due to the principle of subsidiarity—also play a crucial role in its implementation.

The Convention created a new kind of constitutional order:[3] the substance of the individual rights is continuously expanded and amended by the Court's case-law. This is precisely the feature that makes its application and enforcement in domestic law so difficult: the interpretation employed by the given national court must pay heed not only to the text of the Convention, but also to the case-law that provides its substance. The Strasbourg organs—the former Commission and the existing Court—place a great emphasis on a dynamic and continuously evolving legal interpretation that reflects social changes and thereby seeks a rapprochement of the member states' legal system. It is important to note, however, that the Court is not entitled to undertake an *in abstracto* examination of national laws, it is only authorised to assess whether in a given case the rights laid down in the Convention have been violated by the national authorities.[4] It has no explicit authorisation to annul judgments rendered by national courts or to call on member states to modify their laws.

The Convention's Article 1 obliges member states to secure the rights in the Convention to "everyone within their jurisdiction", and Article 13 expressly declares the right to an effective remedy: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The latter provision raises the question whether the rights laid down in the Convention can be applied to the legal relations between private individuals: it is under dispute in how far—if at all—a right enshrined in the Convention can be horizontally enforced in cases in which the state is not party to the legal dispute.[5] In construing Articles 2, 3, 6, 8 and 11, the Court has recognised the possibility of indirect *Drittwirkung* in several cases.[6] In such cases the state may also be found in violation if it failed to provide for the assertion of the rights laid down in the Convention in the context of legal relations between private individuals (this interpretation also appears to be supported by the obligation contained in Article 1 of the Convention).

* The text was published originally in Hungarian: Fleck Zoltán (ed), *Bíróságok mérlegen II. A szervezettől a jogértelmezési gyakorlatig* [Assessing Courts II: From Organization to Jurisprudence] (Pallas Kiadó, Budapest 2008) 166–184.

THE CONVENTION AND THE COURT'S CASE-LAW IN HUNGARIAN LAW

Pursuant to the Hungarian Constitution's Article 7(1), "[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law." Following the position of the Constitutional Court, the general rules of international law are part of Hungarian law even without a distinct transformation, and in this case the transformation is undertaken by the Constitution itself, whereas in the case of international treaties it is necessary to proclaim them in a law of appropriate rank. Article 7 further mandates the harmonisation of international law obligations and domestic law—including the Constitution.[7]

The Convention was transposed into Hungarian law by Act no. XXXI of 1993, whereby the Convention became a part of Hungarian domestic law. It follows from the Constitutional provisions discussed above, as well as from the Convention's Article 1, that the Hungarian judiciary not only may choose to apply the Convention, but must in fact do so.[8] By making the Convention part of the Hungarian legal system, the legislator made its contents binding for the state's institutions and organs as well. The direct application of the Convention differs from the assertion of other international treaties in domestic courts, in that the practice of the European Court of Human Rights also has to be considered in the process.[9] This obligation is laid down in Article 13 (1) of Act no. L of 2005 on the procedures concerning international treaties: "In construing the international treaty, the prior decisions of the body entrusted with the legal authority to settle disputes in connection with the given treaty must also be considered." Through the integration of this rule, the legislator essentially rendered indefensible the position—which the Hungarian courts had a predilection for—that the domestic judicial organs are only bound by decisions regarding Hungary. Before the adoption of the act on international treaties, there were no clear guidelines for judges as to the degree to which they had to consider Strasbourg case-law in rendering their own decisions, as strictly speaking the case-law cannot be regarded as statutory text or Hungarian precedent. The Hungarian Supreme Court correctly noted in 2003: "[T]he case-law of the European Court of Human Rights is directly applicable—and their application is indeed desirable—in domestic judicial practice."[10]

It is not only the fulfilment of international obligations in good faith which necessitates that the judiciary consider the general conclusions following from the Court's case-law: though the Strasbourg Court is not a precedent court, it does consistently apply the fundamental principles established by its case-law, and if the state seeks to avoid a condemnation in cases whose facts are similar to each other, then it is inevitable to be aware of and apply the case-law, which defines the content of the individual rights. Satisfying the above naturally assumes that the national courts know the case-law and are capable of applying the expectations contained therein in the cases before them.

Ideally, the courts follow Strasbourg practice even in those cases when neither party invokes the Convention but the action refers to some right that is guaranteed—in addition to Hungarian law—by the Convention, too. As all the rights enshrined in the Convention are also part of Hungarian law—most of them are in the Constitution itself—this happens fairly often. Due to limited access to judgments, however, this study will only examine those cases in which either one of the parties or the proceeding courts invoked the Convention or the Court's case-law.

REFERENCES TO STRASBOURG IN HUNGARIAN JUDICIAL PRACTICE

The case-law of the European Court of Human Rights and the Convention do not play a significant role in Hungarian judicial practice. Based on the judgments accessible in public databases and on those received from the Supreme Court,[11] we can group references to them into four categories: 1) cases in which the proceeding court decided the legal dispute by applying the Convention; 2) personality right suits in which the court discusses those cases cited by the relevant Constitutional Court decisions; 3) cases in which either of the parties referred to Strasbourg documents; 4) cases in which the facts of the case contain elements related to the Strasbourg procedure or Court or in which the Convention came up in the context of procedural rights issues. The latter group of cases is not relevant in terms of this study, since in these cases the Convention and the Court's case-law did not influence the outcome, the Hungarian court did not have to decide on an issue connected to the interpretation or application of the Convention.[12] The cases discussed below are suitable for presenting the tendencies observable with regard to the application of Strasbourg

case-law. Due to the limited access to Court judgments the overview provided here is not comprehensive, but it certainly illustrates the difficulties that a party may face if she seeks to base her action on the European Convention of Human Rights or if she wishes to support her arguments with examples derived from case-law.

References with impact on the merits of the case

The cases that belong into this category are those in which the proceeding court—either out of its own volition or in response to a motion by one of the parties—substantially relies on the Convention or the jurisprudence of the European Court of Human Rights in its judgment.

An excellent example for this is a judgment by the Fejér County Court in a suit initiated on the grounds of damages caused by a court in the exercise of its judicial authority.[13] The plaintiff claimed that in espousing the execution of punishment imposed by an Italian court that had sentenced the plaintiff to loss of liberty, the respondent in the case, a Hungarian court, had determined the degree of security of imprisonment unlawfully, and since the plaintiff had served his sentence in a penitentiary rather than a prison, he was released on probation with four months delay, and the conditions of his detention had been more stringent as—among other things—his contact to the outside world had been more restricted. In his submission the plaintiff invoked the violation of Articles 6 and 13 of the Convention: in nine points he summarised the procedural law violations that in his view substantiate a breach of the Convention. The Fejér County Court rejected the plaintiff's action. In its judgment, the County Court touches on the violation of the rights secured by the Convention: "It is the position of the County Court that in adjudging whether in the given criminal proceeding the (…) rights of the petitioner were violated, it should be examined whether the petitioner was able to defend himself in the criminal proceeding, whether he was allowed to put questions and submit motions under the same conditions as the prosecution." Following a review of the proceeding complained of, the County Court concluded that the rights in the Convention had not been violated. Even though the County Court simplifies the guarantees in Article 6 as to encompass only the text of the Convention and fails to consider the further—implicit—rights and fundamental principles developed in the case-law, the judgment must nevertheless be regarded as positive. The County Court did not shy back from interpreting the Convention and it undertook a detailed assessment of the arguments raised in the action.

The second instance judgment in the very same case is surprising, however.[14] The Metropolitan Court of Appeal rejected the plaintiff's action, which referred to a violation of the Convention as one of the grounds for damages, with the following reasoning: "Pursuant to Article 13 and 41 of the Rome Convention, however, a domestic court is authorised and in fact obliged to adjudicate a legal violation on the basis of domestic law. The Convention is therefore not to be applied directly and may not serve as a legal basis for an action. The Court of Appeal further notes that the judgments of the Strasbourg Human Rights Court are not binding for the Hungarian courts, and hence the presentation referring to them is in error. In cases before Strasbourg Human Rights Court, the Hungarian State is the respondent party, judgments are rendered against it: in this form the judgments undeniably shape Hungarian law—as a result of legal harmonisation—, but Hungarian courts are not obliged or authorised to apply them directly."[15] The Court of Appeal's reasoning is problematic from several aspects. For one, what the Convention's Article 13 specifically requires is that member states provide effective legal remedies in case a right guaranteed by the Convention is violated: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority (…)." That is the proceeding court ought to have arrived at exactly the opposite conclusion that it actually came to. Article 41 is an irrelevant provision with regard to domestic laws and national courts. This article namely gives the Strasbourg Court the possibility to award just satisfaction to the applicant if the Convention was violated. What is especially distressing about this case is that the Court of Appeal's decision was crafted after the birth of the 2005 act on the procedures concerning international treaties and hence the Court was already legally obliged to consider all Strasbourg decisions regarding the Convention—and not only judgments pertaining to Hungary.

The judgments of the Supreme Court in which the court decided on the custody of children where the lower courts changed the originally approved arrangement on the basis of the religious views of one of the parents, are also exemplary with respect to the application of the Convention and the case-law. A judgment of 1998 also published in a BH (Collection of Judicial Decisions) deserves a more detailed analysis in this regard. The court of first in-

stance dissolved the parties' marriage in 1992 and also approved the agreement according to which the two underage children stayed in their mother's care. Three months after the legally effective agreement was concluded, the father requested a change to the children's placement, on the grounds that the respondent mother was a regular visitor of the Jehovah's Witnesses, a "baptised member" of the group, which in the father's view exerts a harmful effect on the children's development. The court of first instance placed both children with the plaintiff father. In the judgment, the court took a negative view of the fact that in the so-called blood question the respondent had failed to provide an unequivocal answer as to whether she would consent to her children receiving blood transfusion if necessary. The court of second instance annulled the judgment and instructed the court of first instance to undertake a new proceeding. In the renewed proceeding, the court accepted the parties' claim that certain reasons behind the dissolution of their marriage had been withheld during the divorce trial (drunk driving, disapproval of religious views, infidelity). It examined how the respondent's religious views and the differences of faith between the parents would affect the children, and based on an expert opinion it gave one of the children to the father because the child was closer to the father. The court of second instance upheld the ruling. In the review proceeding, the Supreme Court held that that the binding decision was in contravention of the law. The Supreme Court complained that the conditions laid down in Act IV of 1952 on marriage, family and custody (Csjt), which would make it possible to review the agreement within two years of its conclusion, did not apply. The plaintiff based his application for changing the agreement on one reason alone, the respondent's religious denomination. The Court emphasised that it violates not only the Constitution, but also Articles 8 and 14 of the European Convention on Human Rights if someone is treated differently on account of her worldview. (Though the Supreme Court did refer to the Hungarian Constitution's provision on freedom of religion, it failed to do the same with regard to the Convention). Citing the case-law, it asserted that the differences in worldview between the parents may affect neither parent adversely, they may not be weighed in favour or against either of them. Not even the expert opinion cast doubt on the mother's ability to raise a child and, moreover, the reasoning of the court of first instance, according to which the effects on the children of the differences between the two parents' child-rearing principles ought to be evaluated exclusively to the detriment of the respondent, is erroneous. At this point the Supreme Court referred to Article 5 of the Protocol No. 7 to the Convention, pursuant to which the rights and responsibilities of spouses towards each other and with regard to children born in wedlock are equal in the course of their marriage as well as following its dissolution. It may be expected from the parties, therefore, that they always proceed with the child's best interest in mind. The Supreme Court placed both children with their mother.[16]

The Supreme Court in an excellent decision referred to a judgment delivered against Hungary by the European Court of Human Rights in its decision in which the pre-trial detention of the defendant was altered into a prohibition to leave his place of residence.[17] The defendant was charged with misuse of narcotic drugs in 2006, and he was in detention on remand for half a year. The pre-trial detention was upheld by the county court until the judgment of the first instance court: the reasoning of the decision emphasised that there was risk of absconding (the police could take him into custody only after the arrest warrant against him had been issued) and in the light of the punishment prescribed for the act in question it was justified to deprive him of his liberty. The decision on the pre-trial detention was upheld with the same reasoning by the court of appeal as well. However, the Supreme Court found: "the prolonged detention is only justified if—despite of the presumption of innocence—the measure serves a strong public interest, which weighs more than the protection of individual freedom. But the risk of absconding has to be supported by facts relevant in the particular case." The gravity of the crime and the seriousness of the possible penalty—although are important facts in a given case—can not be solely relied on when extending pre-trial detention. The defendant lived under normal circumstances and the issuance of the warrant was necessary because of the omission of the authorities. When the defendant learnt about the warrant, he was immediately at the disposal of the investigating authority. Furthermore, it was very uncertain when the final decision would be delivered in the case since the date for the hearing was not set. The Supreme Court thus concluded that in the defendant's case the total deprivation of liberty was not justified. The decision of the Supreme Court is perfectly in line with the judgment of the European Court of Human Rights delivered in *Imre v Hungary*.[18]

The rules on disqualification were also examined in accordance with the Convention and Strasbourg case-law by a county court, which observed that the fact that the European Court of Human Rights had

reprimanded the city court that had handled the case on the grounds of the protraction of the proceeding was in itself sufficient to cast doubt on the impartiality of the court in question.[19] In its decision, the county court referred to a tenet derived from Strasbourg case-law, which posits that it is insufficient for a court to be veritably impartial, it must also maintain the appearance of impartiality. All circumstances that may give rise to doubts as to the impartiality of the court serve as grounds for disqualification. The court of appeal ultimately found the county court's decision unlawful on the grounds that it violated jurisdictional rules, but regardless: the case is still a good example illustrating that a Hungarian court, too, can interpret domestic legal regulations in compliance with the Convention.[20]

Personality rights suits: references to Strasbourg case-law by the courts

Even though the practice of the European Court of Human Rights provides clear guidance as to the acceptable limits on the freedom of expression, the case-law has hardly at all made its way into Hungarian judicial practice, though in many cases applying the standard established by Article 10 would make it avoidable that one of the parties ultimately turns to the Strasbourg organ for redress. The domestic courts are stuck in a mode in which they only reference Strasbourg cases that the Constitutional Court itself has cited. None of the examined cases contains a reference to a case that does not appear in the relevant Constitutional Court decision.

In 2007, the Budapest Metropolitan Court (hereinafter: Metropolitan Court) rendered a decision in a suit filed to have a correction published in a newspaper. The suit was initiated by a public figure, a politician and entrepreneur, on the cause of an article entitled "Private billions with state help?", which explored the assets of his companies as well as the circumstances of his enrichment.[21] The writing, which bore the subheading "Organised Overworld", continued in the inner pages of the newspaper. The article claimed that in spite of the fact that following his election the politician had vowed to stay away from the business sphere, through the help of a state enterprise and the relatives of the plaintiff offshore companies in Cyprus raked in billions of forints in profits. Moreover, the journalist observed a connection between the plaintiff's term as a minister in the government and the successful participation in a government subsidy programme of the company he had managed previously. Furthermore, the writing also shed light on numerous economic deals—which were shady according to the author. The plaintiff opined that the article in question presented him in a false light and hence turned to the newspaper with a request for a correction. As the respondent did not meet this request, the plaintiff filed a suit. The Metropolitan Court found that the action lacked foundation. In its opinion, it pointed out that the Constitutional Court decisions no. 30/1992. (V. 26.) and 36/1994. (VI. 24.) delimit the boundaries of the freedom of expression. In addition to alluding to the interpretation of the Convention in Constitutional Court decisions, the Metropolitan Court also touched upon the ECHR's more recent practice, though this reference can hardly be seen as the adoption of case-law: "It also follows from the most recent practice of the European Court of Human Rights that the international body devotes significant attention to the so-called 'watchdog' role of the press." The Metropolitan Court of Appeal upheld the ruling: its opinion only refers to the Constitution's Article 61 and does not even mention the substantial Strasbourg case-law regarding the right to criticise public persons.[22]

The reasoning of the Metropolitan Court in the personality right suit initiated on the cause of an article probing into the private life of a well-known actor is similar.[23] The plaintiff asked the Metropolitan Court to determine that his personality rights as manifested in the rights to reputation and inviolability of private life had been violated. Though the Metropolitan Court does explicitly invoke the Convention's Article 8 (the right to respect for private life), it fails to review the case-law concerning this right. Similarly to the aforementioned decision, it only integrates the contents of Constitutional Court decision no. 36/1994. (VI. 24.) into its opinion and does not lean on the practice of the European Court of Human Rights in interpreting the right to respect for private life. The Metropolitan Court granted the petition, forbade the respondents to engage in further violations of law and also obliged them to pay damages, among other things. The judgment meshes with the Strasbourg decision rendered in a similar case.[24] The Metropolitan Court of Appeal upheld the judgment: here, too, the opinion alluded only to the right enshrined in the Convention's Article 8 but failed to consider its interpretation by the Strasbourg Court.[25]

The decisions above were all submitted by the same judge at the Metropolitan Court (Árpád Pataki), who had also decided the personality right case initiated by a ministry and its minister concerning a statement on police brutality committed during the

riots of fall 2006.[26] The respondent claimed that the police was acting under political pressure as the police leaders had coordinated their actions with their political superiors in advance of the riots. The structure of the opinion in this case is similar to the decisions discussed above: it cites the relevant Constitutional Court decisions as well as the Strasbourg references contained in those opinions.[27]

These rather brief and superficial references might justifiably cause the researcher to turn despondent. If we take a look, however, at some personality right cases decided by other judges, in which the facts of the cases were similar[28] to the ones described above or in which the plaintiff specifically invoked the Convention's Article 8, we need to temper our critical view of Árpád Pataki: in many cases—though the application referred to the Convention—the proceeding court does not address the issue of the potential applicability of Strasbourg case-law beyond acknowledging the right laid down in the Convention.[29] The fact that the Strasbourg practice is part of the judgment—even if only as a passing reference—offers a glimmer of hope that at one point in the future all judges will review the relevant Court of Human Rights judgments before rendering their own decisions.

Consideration of case-law invoked by the parties

Those cases in which the plaintiff relied to a significant degree on the Convention or the Court's case-law in her action constitute a distinct category. This group of cases is worth mentioning because it illustrates that Hungarian lawyers are not nearly as averse to applying Strasbourg case-law as the domestic courts. Several cases are accessible in which one of the parties considered the Convention and the associated case-law relevant to her case and hence referred to it. Strasbourg case-law will naturally not always provide guidance to domestic court decisions, but national courts can nevertheless be expected not to rule out an application of the Convention without substantial examination. This category is distinct from the cases discussed the first group, in that here the domestic courts fail to provide a detailed analysis of the references that might serve to justify their decision to ultimately disregard them.

In one of the cases the plaintiff alleged a violation of his right to expression, as the classifieds newspaper published by the respondent refused[30] to print the following advertisement: "You too can take action against the blundering authorities and judicial decisions that violate your human rights! Send us a description of your case and a return envelope!" The final decision, which rejected the action, referred to the Constitution's Article 61, as well as to the Universal Declaration on Human Rights, but did not invoke the Convention, in spite of the fact that as opposed to the Declaration the Convention is binding. The plaintiff entered a petition for a review of the final decision, in which he sustained his original claim, that is that the publisher's proceeding violated—among other things—Article 10 of the Convention, promulgated by Act no. XXXI of 1993. The Hungarian Supreme Court did not find it necessary to undertake an examination of the proceedings' conformity with the Convention, it based its decision exclusively on the Constitution and the relevant provisions of the act on the freedom of press.

The Supreme Court was more circumspect in a suit involving the review of an administrative order issued in a construction case, in which the plaintiff complained decisions rendered in the framework of a municipal authority's proceeding relating to a request for a permit to build a wind power plant. The respondent's construction permit was approved by the town's mayoral office as well, and as no appeal was pending it became effective. A company that became involved, however, asked the Administrative Office to determine a lack of jurisdiction. Thereafter the Administrative Office instructed the notary public to hand over the case to the Regional Technical Safety Supervisory Authority of the Hungarian Trade Licensing Office. Based on Article 75 (1) (a) of the former Act on administrative proceedings, the Administrative Office—the respondent in the case—struck down the first instance decision. This was the decision that was impugned by the plaintiff who argued that a violation of law had taken place. The county court defeated the plaintiff's cause of action,[31] who in turn introduced a petition for reviewing the decision. The petition referred to a violation of rights acquired and exercised in good faith, specifically to the right to property enshrined in Article 1 of Protocol No. 1 of the Convention, as well as to the requirement of predictability derived therefrom. The Supreme Court did discuss the requirement of proper legal practice—without referring to the Convention—and held that the grounds for nullity laid down in Article 75 (1) (a) of the former Act on administrative proceedings do not recognise rights acquired in good faith and hence the requirement of predictability does not apply, either.[32]

In a suit initiated in response to a condemning decision submitted by the Hungarian Competition Authority (GVH) on the grounds of unfair market practices, the plaintiffs based their action on Articles 8

and 6 of the Convention. In the proceeding undertaken by the GVH, the Authority determined that the plaintiffs had engaged in preliminary consultations regarding the execution of the construction of three highway sections, as a result of which all enterprises involved won tenders. The consortium agreements hence precluded the uncertainties stemming from competition. The GVH's decision was based on direct and indirect evidence, which it had collected with judicial authorisation in the plaintiffs' offices. The documents, memoranda and personal notes seized during the search of the premises indicated that the plaintiffs had coordinated their market behaviour into the most minute detail. Several plaintiffs disputed the admissibility of the seized documents, as they had been obtained by the GVH in contravention of the Convention's Article 8. The Metropolitan Court, which proceeded as the court of first instance, held that a violation of Article 8 was inconceivable since "even the plaintiffs did not claim that the documents—or the process of their acquisition—had brought to light information concerning their private and family life, their residence or their correspondence".[33] Though the Court disputed even that an interference had taken place, it nevertheless examined the issue of curtailing rights in accordance with the Convention: it stated that there was a legal basis for curtailment—the relevant provisions of Act LVII of 1996 on the prohibition of unfair market practices and restriction of competition (hereinafter: Tptv.)—and that restriction had a legitimate aim as it had become necessary in the interest of the country's welfare. Unfortunately, the Court failed to address the third—and most important—test for restricting rights: it did not examine whether the limitation of rights was necessary in a democratic society. Another problem with the Court's reasoning is that it only examines the text of the Convention itself and fails to consider the case-law, which gives substance to the right laid down in Article 8. The European Court of Human Rights declared already back in 1992 that personal notes drafted in the context of work may enjoy the Convention's protection and, moreover, private life cannot be restricted to a private sphere that excludes professional life.[34] The Metropolitan Court of Appeal upheld the first instance decision: with regard to the alleged violation of Article 8, it noted that the Tptv. provides a basis for interfering with the autonomy of enterprises and hence all arguments to the contrary lack foundation.[35] The court failed to provide an explanation, however, it devoted a mere paragraph to the complaints regarding the Convention and it did not use this brief space to decide the merits of all these complaints.

It was also the plaintiff who referred to Strasbourg practice in a personality right case in which an honorary consul delegated to Hungary complained that the Hungarian Ministry of Foreign Affairs (MFA)—the respondent in the case—had violated his personality right in a *note verbale* addressed to the foreign ministry of the consul's country. In the note the MFA explained that a criminal proceeding was pending against the plaintiff and that the ministry had been advised of numerous other violations of law, as a result of which the MFA regarded the plaintiff as unworthy of his appointment, and correspondingly the Hungarian side would no longer recognise him as an honorary consul. The plaintiff argued that the contents of the note violated his personality rights. The Metropolitan Court rejected the claim.[36] In his appeal, the honorary consul invoked the presumption of innocence and emphasised that the presumption "also requires that the representatives of the state and the employees of the organs of public power do not make statements that imply or assert the guilt of an accused before the proceeding court has rendered a decision on the merits of the case." His view was that for an outside observer it would clearly emerge from the *note verbale* that the state presumes his guilt. The Metropolitan Court of Appeal responded in substance to the arguments raised in the appeal. The Court stressed that a presumption of guilt certainly did not apply here, since the note merely conveys the fact that a criminal proceeding is ongoing, and the plaintiff's action cannot even be evaluated from the perspective of an outside observer, since the object of the dispute was a note relayed between two ministries, which is not a public document.[37]

CONCLUSION

The decisions discussed here also show that applying the Convention is not always problematic for Hungarian courts: if either of the parties invokes Strasbourg case-law, the proceeding court may adequately reflect on the cited provisions and cases, though we cannot always speak of a substantial examination in these cases. In most instances the judges exclude Strasbourg case-law in a matter of a few lines, often arguing that it cannot be considered relevant in the given case. It cannot be claimed that the practice of the European Court of Human Rights is applicable in all cases pertaining to human rights, but the fact that the courts often do not even make an effort to seek out potential connecting points is problematic indeed.

At the same time the cases discussed above shed light on the deficiencies of Hungarian judicial practice: even though the courts often refer to rights safeguarded by the Convention or to the practice of the European Court of Human Rights, this generally exerts little influence on the their decision. There may be several reasons behind the disregard of Strasbourg practice. Of course it is true that in a portion of the cases the parties' reasoning is not well-grounded, and in such cases the Hungarian courts cannot be expected to dismiss an application with a lengthy discussion of relevant case-law. We also see numerous cases, however, in which a consideration of the Convention and the resultant legal practice would be necessary. In such cases the position that Hungarian law enjoys primacy is difficult to defend. It appears that a Hungarian judge rarely initiates the inclusion of Strasbourg case-law into her decisions. Since only a fraction of the case-law is available in Hungarian, the hope for change in this area is slim as long as only decisions regarding our home country are translated into Hungarian. Nevertheless, the most important judgments are already available in Hungarian. Thus even though not the entire Strasbourg case-law is available, the decisions that constitute its foundations are already accessible. There are also signs of rejection on the part of the courts: we find several judgments that expressly deny the possibility of applying the Convention. Ultimately, change can only be achieved through a transformation of this attitude.

Translated by Gábor Győri

NOTES

1. Louis Henkin, Gerald L Neuman, Diane F Orentlicher, David W Leebron, *Human Rights* (Foundation Press, New York 1999) 302.
2. See for example: Andrew Z Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study* (Clarendon Press, Oxford 1985) 23.
3. Mireille Delmas-Marty, *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Martinus Nijhoff Publishers, Dordrecht 1992) 288.
4. For a detailed discussion see: Bárd Károly, *Fairness in Criminal Proceedings. Article Six of the European Human Rights Convention in a Comparative Perspective* (Magyar Hivatalos Közlönykiadó, Budapest 2008) 15–16.
5. For a detailed discussion see: P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International, The Hague 1998) 21–23.
6. For a review of the cases see: Andrew Clapham, '*The "Drittwirkung" of the Convention*' in R St J Macdonald, F Matscher, H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993) 163–206.
7. Constitutional Court decision no. 53/1993. (X. 13.).
8. According to Tamás Bán, this is also supported by articles 26 and 27 of the Vienna Convention on the Law of Treaties. For further details see Bán Tamás, *Vigyázó szemünket Strasbourgra vessük* [Let us turn our watchful eyes to Strasbourg] in Halmai Gábor (ed), *Sajtószabadság és személyiségi jogok* [Freedom of the press and personality rights] (INDOK, Budapest 1998) 45–46.
9. Bán (n 8).
10. Judgment no. Bvf.I.2.254/2003/5 of the Supreme Court. A similar statement is contained in the Supreme Court's Decision no. Bvf.I.80/2004/6.: "to follow the jurisprudence of the European Court of Human Rights (Strasbourg) is the obligation of both the first and second instance courts, and the Supreme Court."
11. The research reviewed those judgments which are available—with the names of the parties removed—on the internet portal of the Hungarian judiciary, as well as in the BH form from the CompLex legal database. Furthermore, the 71 judgments were provided by the Supreme Court in response to the questions raised in the research permit.
12. The parties frequently raised for example in motions for reference to the European Court of Justice issues related to the interpretation of the European Convention for Human Rights. See for instance cases published in BH [Judicial Decisions]: EBH 2007.1626 and EBH 2005.1320.
13. Judgment no. 7.P.22.679/2005/36 of the Fejér County Court.
14. Judgment no. 5.Pf.20.961/2007/6 of the Metropolitan Court of Appeal.
15. The Metropolitan Court perceives the role of the Convention in the domestic legal system similarly. Acting as a first instance court in a personality right case the court argued: "the European Convention for Human Rights can be [enforced] only within the constitutional procedural framework of a given country. The international law treaties do not give rise to an interpretation independently from the domestic law." Cited in judgment no. Pfv.V.20.607/2007/9 of the Supreme Court.
16. BH 1998.132. Further relevant judgments: Judgment no. Pfv.II.21.446/2000/3 and no. Pfv.II.23.613/1996 of the Supreme Court.
17. Decision no. Bkf.I.172/2007/2. of the Supreme Court.

18. *Imre v Hungary* (53129/99), judgment of 2 December 2003.
19. BH 2005. 243.
20. Naturally there are instances of the correct application of the Convention and the case-law also outside of the cases discussed here. See for example: BH 2001.230, BH 2001.567, BH 2002.178, or judgment no. P.20.702/2006/15 of the Győr-Moson-Sopron County Court.
21. Judgment no. 19.P.21.536/2007./4 of the Metropolitan Court.
22. Judgment no. 2.Pf.20.844/2007/5 of the Metropolitan Court of Appeal.
23. Judgment no. 19.P.20.306/2006./13 of the Metropolitan Court.
24. See for example: *Von Hannover v Germany* (59320/00), Reports of Judgments and Decisions 2004-VI.
25. Judgment no. 2.Pf.20.755/2007/8 of the Metropolitan Court of Appeal.
26. Judgment no. 19.P.21.294/2007./4 of the Metropolitan Court.
27. The judgment rejecting the petition was upheld by the Metropolitan Court of Appeal, which proceeded in the second instance. The court merely specified the sum of the court costs borne by the state (7.Pf.21.159/2007/2.).
28. See for example: Judgment no. 22.P.633.206/2004/20 of the Metropolitan Court and judgment no. 2.Pf.20.998/2006/3 of the Metropolitan Court of Appeal, which ruled on the appeal.
29. See for example judgment no. 21.P.630.971/2004/16 of the Metropolitan Court or judgment no. 2.Pf.20.998/2006/3 of the Metropolitan Court of Appeal.
30. See: Judgment no. Pfv. IV. 20.838/1997 of the Supreme Court (published: EBH1999.93).
31. Judgment no. K.20.299/2006/5 of the Vas County Court.
32. Judgment no. Kfv.II.39.047/2007/7 of the Supreme Court.
33. See judgment no. 2.K.33.024/2004/46 of the Metropolitan Court.
34. See for example: *Niemietz v Germany* (13710/88), A251-B.
35. Judgment no. 2.Kf.27.360/2006/29 of the Metropolitan Court of Appeal.
36. Judgment no. 19.P.23.110/2006/9. of the Metropolitan Court.
37. Judgment no. 2.Pf.20.791/2007/6 of the Metropolitan Court of Appeal.

Gábor Halmai

THE NEIGHBOURS' FEAR*

ANTI-SEMITISM IN POLAND BEFORE AND AFTER WORLD WAR II

Mid-August a letter arrived via the Internet, in which the Polish member of the Management Board of the European Union's Fundamental Rights Agency turned to the other national delegates of the body, the writer of the present review included. The author of the letter did not write in his capacity as a private person, since the Agency is an international institution of public law, the members of its board are delegated by national governments and the contents of the letter, too, touched upon public affairs. I thus believe that I can divulge the contents of the letter to the reader without violating the secrecy of correspondence. The Polish colleague called attention to an op-ed published in the 26th June edition of *The Times* in London, and asked for the other board members' opinion as to potential countermeasures. The impugned article was penned by Giles Coren, who has been a columnist for the respectable daily for almost a decade, and it noted that the author's émigré Polish Jewish family—who had left their original homeland to save their lives—still do not return there on account of the vibrant anti-Semitism, not even for a visit.[1] Coren describes this personal sentiment, which he is indisputably entitled to, with the following unacceptably general words: "We Corens are here [in emigration—G.H.], now, because the ancestors of these Poles now going home used to amuse themselves at Easter by locking Jews in the synagogue and setting fire to it."

Board members from several countries agreed with the Polish colleague that this manifestation of "verbal aggression" calls for measures by the Agency. In justifying his call for a collective response, the representative from Cyprus went as far as to claim that it is not even certain that what Coren stated with regard to his past had taken place at all. In the unfolding debate, I—while emphasising that the generalisation employed by the journalist was unacceptable[2] but at the same time also protected as an opinion falling under the freedom of expression—sought to convince the colleague from Cyprus, who appeared to have a tendency for relativisation, of the facts of Polish anti-Semitism both during and after World War II, and its role in explaining disillusionment, though not prejudice.

Jan T. Gross, currently a professor of history at Princeton University, is himself an emigrant of Jewish descent. He was an activist in the democratic student movement in Poland in the 1960s, an activity that led to his incarceration for six months. He finally left his country in 1968, when as a result of a grand scale anti-Semitic campaign by the Polish United Workers' Party almost all the 250 thousand Jews who had survived the holocaust—out of 3.5 million before the war—left Poland, thereby realising Hitler's diabolical plan of a Poland completely cleansed of Jews (Judenrein). What happened subsequently is best described with the term used by Paul Lendvai, a political commentator of Hungarian descent: "anti-Semitism without Jews".[3]

Neighbors,[4] the first of the two historical essay published by Gross—first in Polish in 2000 and then in English a year later—, tells the story of how, as the author puts it in the introduction of his book, "one day, in July 1941, half of the population of a small East European town murdered the other half—some 1,600 men, women, and children".[5] A significant portion were murdered—and Coren's harsh words obviously allude to this—after being driven into a shed in which they were burned alive. What makes the incident especially shocking is that even though the Russian occupiers in the north-eastern Polish village had in the meanwhile been replaced by Germans, and the German troops stationed in the area were presumably apprised of the planned operation, the cruel slaughter nevertheless took place without their participation.[6] Thus it was truly neighbours killing neighbours, one Polish citizens murdering another, the Jew. Only a single family sought to help the victims and ultimately it,

* Jan T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton University Press, Princeton 2001) and Jan T. Gross, *Fear. Anti-Semitism in Poland After Auschwitz. An Essay in Historical Interpretation* (Random House Trade Paperbacks, New York 2007).
The text was published originally in Hungarian: Halmai Gábor, 'A szomszédok félelme. Antiszemitizmus Lengyelországban a második világháború alatt és után' [2008] 3 Fundamentum 139–143.

too—similarly to the Coren family—had to flee to the West. They now live in the United States.

The book triggered an intense scientific and political debate in Poland, but the scientific dialogue also moved beyond the country's boundaries. Adam Czarnota, who summarised the scientific debate in Poland, fundamentally distinguishes four different viewpoints.[7] Those who represent an accepting position—interestingly, none of these are historians—verify the assertions in the book and do not consider the crime of Jedwabne an isolated incident but an episode of the Holocaust.

Those voicing cautiously accepting positions acknowledge both, the facts of the mass murder as well as that it was committed by Poles, but criticise certain findings in the book and believe that the author should have undertaken a deeper analysis of Polish-Jewish relations and the entire era of war and occupation. Among them is a thorough analyst of Gross' book, István Deák, a historian of Hungarian descent at Columbia University.[8] Deák shares Gross understanding for the fact that Jews celebrated the Soviets as liberators in September 1939, for instance. Deák also defends Gross from his critics when he notes that Gross does not equate the behaviour of Poles in Jedwabne with those of all Poles. Still, Deák also criticises Gross for his unfortunate choice of words, according to which "*the so-called local population involved in killings of Jews out of its own free will*" [italics in the original].[9] Such a strong formulation of collective responsibility is strongly reminiscent of the approach in Daniel Goldhagen's much disputed 1996 book,[10] in which he labelled the German people "Hitler's willing executioners" and "special sort of murderers".[11] This approach—which Deák rightfully subjects to criticism—is very similar to the impermissible generalisation by *The Times's* columnist mentioned in the introduction. Deák—while he emphatically stresses Gross's credit in awakening Polish public opinion to one of the dark episodes in the country's national history—makes another important critical observation: *Neighbors* does not provide a sufficiently convincing explanation concerning the particular reasons for the killings undertaken by neighbours, which distinguish this massacre from pogroms that occurred elsewhere—Austria, Lithuania, the Ukraine and Romania. In this respect he also notes an interesting distinctive feature in the Hungarian population's behaviour towards the domestic Jewry. This circumstance is that here it was the Hungarian authorities that executed the murders or delivered their compatriots into the hands of a foreign power, and hence there was little room for popular participation. Still, your reviewer ought to add that the voluntarily conscripted Hungarian Arrow Cross members truly proved to be "Hitler willing executioners".

Those who close rank in countering the attack seek to move the emphasis of the debate from the real crimes committed against Jews to such underlying motivations as the moral collapse of society at the time of war, the almost two years of Soviet occupation, the political status of Polish Jews under Soviet and then Nazi occupation, and the alleged Nazi role in the execution of the crime. Those who espouse such a position believe that in his book Jan Gross devotes too little attention to the horrors of Soviet occupation in Eastern Poland, the region that was then attached to the two eastern Soviet republics. This horror had been persuasively portrayed in a previous book by the very same author.[12] Tomasz Strzembosz, a recognised historian of the Polish resistance movement during World War II, argues, for example, that Jews participated in disproportionally high numbers in Communist police actions and crimes.[13] Counter Strzembosz's argument, however, Gross convincingly shows that in the county to which the town of Jedwabne belonged, Soviet repressive measures were negligible, and even in those incidents that did occur the Jews of Jedwabne were perfectly innocent.

Finally, numerous representatives of the Christian-Nationalist right comprehensively rejected Gross' statements, arguing that the crimes were not committed by Poles but by Germans.

Political views were at least as polarised. Alexander Kwasniewski, then the president of the Polish Republic, and Prime Minister Jerzy Buzek took part in a memorial with the mayor of Jedwabne in commemoration of the massacre's 60th anniversary.[14] A group of Jedwabne residents, lead by the local priest, sought to disturb the event with loud music. Among those who rejected the book was Lech Walesa, the leader of Solidarity under the old regime, former president and Nobel Peace Prize laureate, who called Gross a mediocre writer and a Jew who was out to make money,[15] as well as the Jedwabne town council, which dismissed the mayor who had participated in the commemoration.

Already in *Neighbors* Gross had indicated that even Auschwitz had not put an end to the murder of Jews by Poles. *Fear,* originally published in 2006, discuses exactly this violent anti-Semitism after World War II, manifested first in the Krakow pogrom of August 1945 and then in that of Kielce on 4th July 1946, where 43 Jews were killed (80 including those murdered in the surrounding areas), and the potential reasons behind it. According to

some estimates, already between the end of the war and the bloodbath of Kielce several hundred returning Jews were murdered by their Polish compatriots, many of them in the course of the brutal murders spreading on the railways. Gross himself estimates the number of Jewish victims in 1945-46 to be around 1500, which is close to the number murdered in Jedwabne. As a result, over 200 hundred thousand Jews had emigrated by 1947.[16]

The author presumably learned from the criticisms aimed at *Neighbors*—from critics that also included István Deák, as we noted above—and following a description of the events he devotes the major portion of his work to discussing the reactions and the potential reasons. As far as the immediate antecedents of the bloody events in Kielce are concerned, here is what is known: a boy who had strayed from home but was found relatively quickly, made up—presumably in fear of his parents angry reaction—a story according to which he had been held captive in the—non-existing—basement of a house inhabited by Jews who had returned from concentration camps but found that their compatriots had deprived them of their residence. The news that the Jews had been preparing for a ritual murder spread through the town like wildfire. An angry mob stormed the building in question and murdered the majority of its residents, but the massacre also extended to other buildings inhabited by Jews. In addition to several hundred workers from a local factory, the police that was sent to restore order also participated in the killings. In one of the saddest episodes described in the book, three Poles, among them an off duty police officer, gathered a few Jews from the area whom they personally knew, including a young woman with a baby in her arms, and with a lorry they stopped at random, carted their victims off to the woods outside Kielce and murdered them. After executing the mother, they shot her child in the head, too, which the murdering policeman later commented was necessary anyway, since it had been crying for its mother. They had informed the driver of the purpose of their ride, who had assented in return for some compensation.[17]

The contemporary reactions to the pogrom from governmental bodies, parties and the Catholic Church were equivocal to say the least. Especially the reactions—or rather lack thereof—of the communist party and the Catholic Church reflected the fears of these organisations that they might lose their anti-Semitic supporters. Though the Communists planned to issue a statement condemning the events, they refrained from doing so in light of the intense worker protests (in Lodz alone 16 thousand workers went on strike to demand the withdrawal of the planned memorandum). Instead, in searching for the reasons behind the event, the party determined that they are to be found in the insufficiently productive lifestyle pursued by Jews. For quite a while, the Catholic Church maintained a silence regarding the events, and in its later statements it designated the Jews' attraction to communism and Zionism as the reasons for the violence. Indisputably, Gross' otherwise justified criticism of the church once again does not lack for generalisations, and the language employed in his book is even harsher than in *Neighbors*. At one point he speaks outright of the "theological cannibalism of the majority of the Bishops' Conference in Poland" in connection with Kielce. At the same time, he mentions as a positive example the courageous position taken by the bishop of Czestochowa, who condemned all allegations of ritual murder as mendacious.

The often provocative style has obviously provided ample ammunition to rightwing critics to launch even more fervent attacks—if that is possible—against the author following the publication of the book in Poland, naturally fundamentally on account of the contents of the study.[18] It is still more sad that in the spring of 2007 the parties supporting the Kaczynski government, which was in power at the time the book was published in Poland, voted for and adopted a bill—partly with the ulterior motive of punishing Gross—proposed by the extremist League of Polish Families, which threatened with a three years loss of liberty any person who "publicly defames the Polish nation by accusing it of participation in Communist or Nazi crimes, of organising these or being responsible for them". The criminal proceeding initiated on the day of the book's release was terminated on the day after the fall of the Kaczynski government.[19]

The book's penultimate chapter entitled Judeo-Communism ("Zydokomuna" in the original) and the last chapter containing the conclusions search for the reasons why such a substantial proportion of the Polish population turned against Polish Jewry, which had just survived the horrors of the holocaust, and not only sought to drive them out of the country, but even from among the ranks of the living.

The myth of Judeo-Communism seeks to explain and at the same time justify violent anti-Semitism by linking communism to Judaism, and hence regards anti-Jewish pogroms—Kielce among them—as manifestations of justified anti-communism. Gross rebuts with convincing arguments the notion that this xenophobic theory might explain either pre-war or the subsequent anti-Semitism. Data from

1930 suggests that of the over three million Jews in Poland, a mere 7000-7500 declared themselves to be communists, and they made up only a quarter of the small number of communist voters. Not only was the overwhelming majority of Jews non-communist, therefore, but at the same time only a minor proportion of communist voters was Jewish.[20] Moreover, just before the war, in 1938, the Soviet-dominated Komintern dissolved the Polish communist party. The majority of its leaders was sent to the Gulag and during the war Stalin—arguing that "Jews make bad soldiers"—sought to avoid drafting Jews into the army, which meant that even among the occupying Soviet troops there were hardly any Jews. These data make it difficult to accept arguments that want to justify anti-Semitism during and after the war with the communist leanings of Polish Jewry.

It is a different issue, Gross argues—wherein he is supported by István Deák, as we saw—that following the war those Jews who escaped Nazism and the violence of their compatriots became supporters of the new Polish state. In itself this did not turn them into communists, however, and data from the post-war period proves this: membership in the Polish communist party grew from 20 thousand in July 1944 to 235 thousand in December 1945, and it reached over half a million, 555 thousand, by early 1947, but the number of Jews among them were a mere 4 thousand at the end of 1946 and 7 thousand in May 1947.[21] As Gross points out, in certain leading positions the proportion of Jews in the post-war period was higher than that. There are estimates, for example, that among the leaders of the Security Service up to 30 percent were Jews,[22] but this ratio dropped significantly following the recurring anti-Semitic purges, up to the point that by 1968 Jews had disappeared not only from the services, but altogether from the country. Nevertheless—and this strikingly illustrates the phenomenon of "anti-Semitism without Jews"—according to a national public opinion survey in 2004, 40 percent of respondents still believed that the country was run by Jews.[23]

As persuasive as Gross' reasoning is when he argues that Judeo-Communism does not explain anti-Semitic aggression against Jews in the Poland after Auschwitz, as unconvincing is his speculation regarding the real reasons. His explanations are more psychological in nature than social, which in the case of a social historian appears to be a sign of being at a loss. The most important reason according to Gross—which also gave the book its title—is the existential fear of Poles—who felt guilty because of their wartime behaviour—of the return of those Jews who had survived the Holocaust to their social position and their desire to regain their property. To further explain the violence during the war, Gross adds that the serious crimes that individual Poles committed against their own compatriots could not have happened without Nazi occupation. But leaning on Jan Karski he also adds that there was a "genuine agreement" between occupiers and a significant portion of occupied Poles that the killing of Jews was permitted.[24] This also might have contributed to the phenomenon that Gross—borrowing from Jane Goodall[25]—calls "pseudo- or cultural speciation". The distinguishing feature of this behaviour, observed in chimpanzees, is that those exhibiting it regard their opponents as the representatives of another species, as many Poles looked upon their Jewish neighbours.[26] Gross also believes that the inhibitions of the Polish murderers may also have been lowered by the fact that in contrast with the French, Dutch or even the Hungarian population, they knew about the extermination of Jews by the Germans early on, in fact they were often eyewitnesses to it.

Gross is on yet more uncertain ground when he seeks to explain the reasons behind the post-war pogroms. He mentions the telling silence of the Catholic Church—which enjoyed widespread respect in the population—after Kielce as an important reason, as well as the consistent passivity of post-war Polish governments when it came to the restitution of Jewish property that had been expropriated by neighbours during the war. Gross uncertainty as to the real reasons is illustrated by his reference to one of Primo Levi's stories, in which an SS-officer, queried as to the "why" Auschwitz happened, responds "no reason why" ("kein warum"). We Hungarians might recall a classical short story by István Örkény, the *In memoriam dr. K.H.G.*,[27] wherein K.H.G.,[28] who is digging a grave for a horse cadaver, recalls the name of Hölderlin, Heine, Schiller and Rilke to his German guard, who turns red with fury and shoots him.

Translated by Gábor Győri

NOTES

1. Giles Coren, 'Two Waves of Immigration, Poles Apart. My Great-Grandfather Didn't Leave His Home in the Hope of Finding a Better Life—Just a Life' [2008] 6 July Times Online <http://www.timesonline.co.uk/tol/comment/columnists/giles_coren/article4399669.ece> accessed 8 January 2009.
2. In this respect I completely share the criticisms of the *Times* expressed in the editorial of the prestigious

British weekly *The Economist:*'Unacceptable Prejudice' <http://www.economist.com/daily/columns/europeview/displaystory.cfm?story_id=11918619> accessed 8 january 2009.

3. Paul Lendvai, *Anti-Semitism Without Jews; Communist Eastern Europe* (Doubleday, Garden City, NY 1971). Cited in Jan T. Gross, *Fear. Anti-Semitism in Poland After Auschwitz. An Essay in Historical Interpretatio* (New York, Random House Trade Paperbacks 2007) Chapter 4, footnote 24, 284.
4. Jan T. Gross, *Sąsiedzi. Historia zagłady żydowskiego miasteczka* (Fundacja Pogranicze, Sejny 2000) as well as Jan T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton University Press, Princeton 2001)
5. Gross, *Neighbors* (n 4) 7.
6. According to Gross' Hungarian critic, János Tischler, the Polish neighbours engaged in the bloody pogrom at the "behest" of the Germans. See: János Tischler, 'Ki a vámpír? A Félelem a Visztula mentén' [Who is the vampire? Fear along the Vistula] [2008] 8 March Magyar Narancs. The report of the Institute of National Memory on the official investigation of the Jedwabne crime also asserts that the Nazis are responsible for the heinous crime because they "quietly incited" it. Cited in Adam Czarnota, 'Az amnéziás lengyelek. Jan Thomas Gross lengyel fogadtatása' [The Polish community of amnesia. The Polish discussion of Jan Thomas Gross's'] in Jan T. Gross: *Szomszédok. A jedwabnei zsidók kiirtása* [Neighbors: The Destruction of the Jewish Community in Jedwabne] (Új Mandátum Könyvkiadó, Max Weber Alapítvány, Budapest 2004) 191.
7. Adam Czarnota, 'The Polish Community of Amnesia. The Polish Discussion on Jan Thomas Gross' [2002] 1–2 East Central Europe/ECE. Also published as the postscript to the Hungarian edition of *Neighbors*.
8. István Deák, 'Heroes and Victims' [2001] 31 May New York Review of Books.
9. Gross, *Neighbors* (n 4) 133.
10. Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (Knopf, New York 1996).
11. Deák also sees the similarities in approach in that the term "willing executioners" used in the title of Goldhagen's book (n 10) also appears on page 120 of the English edition of Gross's book.
12. Jan T. Gross, *Revolution from Abroad: The Soviet Conquest of Poland's Western Ukraine and Western Belorussia* (Princeton University Press, Princeton 1988).
13. Tomasz Strzembosz, 'Collaboration Passed Over in Silence' *Rzeczpospolita* (27 January 2001) in Antony Polonsky, Joanna B. Michlic, *The Neighbours Respond. The Controversy Over the Jedwabne Massacre in Poland* (Princeton, Oxford, Princeton University Press 2004) 220–236.
14. See Kwaśniewski's speech at the ceremony: Address by President of Poland Aleksander Kwaśniewski at the Ceremonies in Jedwabne Marking the Sixtieth Anniversary of the Jedwabne Tragedy on 10 July 2001, in Polonsky, Michlic (n 13) 130–132. Prime Minister Buzek issued a special statement on the Jedwabne tragedy: 'Living in Truth: Special Statement by Prime Minister Jerzy Buzek regarding the Slaughter of Jews in Jedwabne in 1941, April 2001' in Polonsky, Michlic: (n 13) 125.
15. Tony Judt cites the contents of a radio statement in: 'The House of the Dead: On Modern European Memory [2005] 2 October New York Review of Books.
16. As I noted, the last great emigration wave was a result of the 1968 anti-Semitic campaign by the communists, which was when Gross also chose a new homeland.
17. In some of its elements this tragic case is reminiscent of the scene in the Tibor Cseres' novel *Cold Days,* in which the commander of the gendarmes patrolling the streets in the Voivodina in January 1942 stops a lorry and asks the drivers to take a woman and a boy, who have Serbian names but are presumed to be Jewish, down to the shore of the Danube, where by then the executions are well underway [(Magvető, Budapest 1965) 196–197]. The commander—one of the few characters mentioned by his real name in the novel—was Sándor Képíró, who was first convicted in 1944 and then acquitted. A similar story is described by the historian Enikő Sajti, which she based on a witness testimony from the trial and described in the 1st February 2007 edition of the radio-show called Kontra, in the Hungarian station Klub Rádió. According to this story, Képíró sent some fifty prisoners with an intercepted lorry to the shore that served as an execution ground. (Tibor Cseres presumably read the trial documents and partly used them in writing his novel). Though Képíró was once again convicted in 1946, probably because of his role in the deportations of 1944, he was no longer in Hungary at the time and, moreover, the verdict has disappeared without a trace, too; that is the former gendarmerie office, who presumably committed war crimes for which there is no statute of limitations, never spent a day in prison and lives in Budapest even today.
18. These are discussed in detail in János Tischler's writing (n 6). Among these the harshest criticisms is that of Janusz Kurtyka, the president of the National Remembrance Institute, who in an interview referred to Gross as "unscientific, extremely tendentious, a faux historian and a vampire of historiography".
19. See Tischler (n 6).

20. Compare Gross (n 3) 199–200.
21. Gross (n 3) 221–222.
22. Gross (n 3) 298. The evidence unearthed by Gross shows that members of the national security services—which was thus partially run by Jews—also participated in the Kielce pogrom.
23. See the report published in the 18th January 2004 edition of the popular weekly Wprost. Cited in Gross (n 3) 199.
24. See Jan Karski, 'The Jewish Problem in Poland Under the Occupation' [1992] November Mowia Wiecki 2–9. Discussed in Gross (n 3) 176–178.
25. Jane Goodall (with Philip Berman), *Reason for Hope: A Spiritual Journey* (Warner Books, New York 1999).
26. See Gross (n 3) 254.
27. Örkény István, *Egyperces novellák* [One-minute stories] (Budapest, Magvető 1977) 73.
28. Géza K. Havas was a journalist and critic of Jewish descent.

WHAT IS "CHALLENGE"?

The concept of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously at odds with the profound restructuring of political identities and transnational practices of securitisation that we see today. CHALLENGE ("The Changing Landscape of European Liberty and Security") is a European Commission-founded project (2004-2009) that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged Europe. The project analysis the illiberal practices of liberal regimes and challenges their justification on grounds of emergency and necessity.

The objectives of this project in 6th Framework Programme is:

– to understand the merging between internal and external security and evaluate the changing relationship between liberty and security in Europe;

– to analyse the role of the different institutions in charge of security and their current transformations;

– to facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, sociological, legal and policy implications of new forms of violence and political identity;

– to bring together an integrated analysis on the state of exception (Exceptionalism) as enacted through illiberal practices and forms of resistance to it.

The network comprises 23 universities and research institutes selected from across the EU (King's College London, University of Keele, Copenhagen, Leeds, Genoa, Barcelona, Szeged, Rouen, Athens, Utrecht, Nijmegen, Malta, Cologne, Centre for European Policy Studies, Foundation Nationale des Sciences Politiques, European Association for the Research on Transformation, Groups de sociologie des religions et de la laicite, Stefan Batori Foundation, London School of Economics, Centre d'Etudes sur les Conflicts, International Peace Research Institute). The project is organised around four types of issues:

– Conceptual. An investigation of the ways in which the contemporary re-articulation and disaggregation of borders imply an increase in exceptionalism practices. It covers on changing relationship between new forms of war and defence, new procedures for policing and governance, threats to civil liberties and social cohesion.

– Empirical. Mapping the merging between internal and external security issues and their transnational relation to national life, analysing new vulnerabilities (targeted others, critical infrastructures) and social in-cohesion (such as the perception of other religious groups, etc).

– Governance, polity and legality. An examination of threats to liberty and the use of violence, when the state no longer has the last word on the legitimate use of force.

– Policy. An examination of the implications of the dispersal of Exceptionalism for the changing relationships between government departments concerned with security, justice and home affairs; the securing of state borders and the policing of foreign interventions.

The Challenge project operates a database in order to follow in details the changes that are occurring to the concept of security and the relationship between danger and freedom. This Observatory traces the major transformations of institutions, internal and external security, policy and military functions. The resulting database of thousands of articles, documents, reviews and literature is fully accessible to all actors involved in the area of freedom, security and justice. To keep up to date with the network's activities, you can visit the www.libertysecurity.org homepage.

This volume of Fundamentum supported by the Challenge Project contains some of the recent articles on its Working Package dealing with enlargement, democratic changes and newborn rule of law.

Judit Tóth

András L. Pap

INTRODUCING THE "EFFICIENCY" ELEMENT IN TO THE "LIBERTY VS. SECURITY" DILEMMA

"*Those who would give up Essential Liberty to purchase a little temporary safety, deserve neither liberty nor safety.*" This statement is commonly attributed to Benjamin Franklin,[1] and has been paraphrased in various forms, usually with an additional phrase forecasting the fate of those who are willing to fall into the trap of such a seductive and morally despicable tradeoff: „*People willing to trade their freedom for temporary security deserve neither and will lose both.*" Bearing in mind this 150-year-old warning, this article will investigate the proliferation of various forms of law enforcement activity and authorization in the post 9/11 world. Although I will focus on the academic and policy discussions of one particular law enforcement measure, I hope to provide a more general caveat in the "liberty vs. security" dilemma.

Just about everywhere in the world, the war against terrorism has had the effect of widening the control functions of the national security and immigration services, as well as of other law enforcement authorities. The expanded measures and procedures thus introduced were often ones that legislators and law enforcement officials otherwise only had dreamed of attaining, but this time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and fear spreading in their wake. For example, there are certain regulations with respect to banking (and clients' data) that the authorities have been longing for, to aid them in their fight against drugs and organized crime, but beforehand they were unable to attain them due to constitutional misgivings. Under the auspices of anti-terror action, all of a sudden, the same regulations become acceptable. Likewise, recent decades saw the prospects of police patrolling based on discriminatory racial profiling fail miserably within the Anglo-American world. All the same, the Arab population became a natural target of the war against terrorism. It looks as though the horrific image of weapons of mass destruction and recurring terrorist attacks has overwritten the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished.

As Federico Rahola put it: "As a matter of fact, the current, 'securitarian' dynamics can be summarised in a double tautological process according to which the relentless production of insecurity, through the colonisation of social life by security measures and practices (highly improved in the post-9/11 era), makes in turn proliferate the industry of security. From this point of view, even an undetermined notion such as the one of terrorism has to be seen less as a specific threat than a necessary place-holder in order to legitimise the adoption of security apparatuses and devices."[2]

The uniqueness of this New World is twofold: First, new standards have been set up (required and accepted) for government activism in the sphere of curtailing freedom as an exchange for security. People (the political class, the electorate) appear to be willing to reformulate the traditional balance between liberty and security: a little bit more documents and ID-checks, longer lines and more flexible search-warrants seem an acceptable tax levied in return for more stringent demands for government-provided security. It seems to be the case that there is a broad consensus on the fact that traditional policing principles or, for that matter, the law of the Geneva Conventions (regulating the interrogation of prisoners of war, for example) have become unsuited for handling the peculiar warfare put on by suicide bombers and terrorist organizations. This may be alarming for many, but one can easily say that if this New Security Deal is passed within the habitual pathways of constitutional participatory democracy, there probably is not too much room for complaints against a unanimously empowered protective state. After all, the state is theoretically reconstructed as the outcome of a notional social contract in which individuals agree to trade a quotient of their liberty in exchange for the state's guardianship of security[3] in the broad sense.[4]

The other apparent specialty of this new era, however, is more problematic: the concept of security, which is thus positioned centrally in the political, legal and social discourse does not seem to receive the degree of scrutiny its weight and relevance

would require. In other words, not only is "security" a buzz-word for budgetary and policy demands that can easily overrule long-standing constitutional and human rights limits for government power, but while willingly giving in to these demands, we do not even seem to investigate the actual effectiveness of many of these measures, for example, whether they actually provide us security (in exchange for the liberty value offered).

In other words, at least two separate discussions should be going on in the "security vs. liberty" debate: a theoretical and a practical one. The theoretical needs to be centered around the reformulation of the traditional "security-liberty" balance-recipe. The other line of inquiry should focus on the actual practical effectiveness of certain political and legal measures the government and law enforcement agencies are allowed to have.

In this paper, I will provide some additional arguments to the second debate. By investigating a specific law enforcement action and a potentially structural human rights risk involved—stop and search powers and ethnic profiling—I will highlight the importance of defining and testing the security-content of all new government powers before and during the balancing of how much liberty it is worth. The underlying thesis is that "security" is not an objectively determined social condition, but a socio-psychological construction influenced by a number of irrational features and it is subject to both intentional and circumstantial manipulation. Due to the overrepresentation of crime and violence in media and the entertainment and infotainment-business, the public usually vastly overestimate both the crime problem in general, and the actual probability of one's criminal and especially violent criminal victimization.

While in their reports about crime and security in general, high-end newspapers are trying to be factual and analytical, tabloid media tend to be anything but restrained. As David Green put it: "Broadsheets tend to focus on government, quoting professional experts, elites and interest group representatives. The tabloids tend to focus on crime victims and their relatives, offering dramatic testimonials as counterpoint to the more professionalized discourse of the broadsheet press."[5] Thus, tabloid readers tend to be more fearful of crime than broadsheet readers, particularly about being mugged or physically attacked. For example, a British Crime Survey (BCS) data for example indicated that they were almost twice as likely than broadsheet readers to believe crime had 'increased a lot' over the last several years—43 versus 26 per cent—when it had actually declined.[6] Green points out that "Research focused on the media's 'agenda-setting' function reveals how the press 'may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think *about*'. As the media provide the 'informational building blocks' to structure conceptions of social problems, their causes and possible solutions, the media also contribute to the store of available cognitive tools and materials that also constrain *how* readers and viewers think about the agendas presented. Additionally, people are not only cognitively constrained by encountering the discourses they do, but they are also 'constrained by omissions from the media discourse'… Complex public policy debates are thus mediatized in increasingly constricted and emotive terms, and the lines between news and entertainment values have been blurred in the quest to retain consumers in a crowded marketplace. Even among quality news media, evidence suggests that the ability or willingness of the media adequately to inform the public is further diminishing."[7]

Following Rob Allan's remark[8], David Green[9] calls it something of a "comedy of errors" in which policy and practice are not based on a proper understanding of public opinion, which is, in turn, not based on a proper understanding of policy and practice'.[10]

Take, for example, the widely held belief (depicted in so many movies and novels) that the job of an American police officer is dangerous. But, as Roger Roots[11] points out, police work's billing as a dangerous profession plummets in credibility when viewed from a broader perspective. According to the National Institute for Occupational Safety and Health[12], it is true that homicide is the second leading cause of death on the job for all American workers, however, the taxicab industry suffers homicide rates almost six times higher than the police and detective industry. A police officer's death on the job is almost as likely to be from an accident as from homicide, since approximately 40 percent of police deaths are due to accidents. When overall rates of injury and death on the job are examined, policing barely ranks at all. The highest rates of fatal workplace injuries occur in the mining and construction industries, with transportation, manufacturing and agriculture following close behind. Fully 98 percent of all fatal workplace injuries occur in the civilian labor force.[13]

The above example shows that it lies within the nature of the concept of "security" that due attention needs to be given to the actual verification of security risks and the effectiveness of the offered securi-

ty measures for which we are willing to offer some of our rights and liberties.

For instance, take the case of ID cards: not only can terrorists use a wide range of techniques to forge identities, a recent report by Privacy International showed that two-thirds of all terrorists in history have operated under their true identity,[14] thus, identity cards would have little preventative effect. Nevertheless, one hundred countries around the world currently use national identification cards,[15] and (despite concerns raised by privacy advocates) a number of governments are promoting it as a powerful tool to prevent and fight terrorism.[16]

Amitai Aviram highlights the importance of law's general placebo effect, that is—security issues aside—its impact on social welfare beyond its objective effects by manipulating the public's subjective perception of the law's effectiveness.[17] Aviram argues that "a law is analogous to medical treatment in the sense that for those individuals affected by a risk addressed by the law (the "patients"), the law corrects their biased[18] perceptions of the risk (the "illness") and causes the perceived probability and magnitude of the risk to converge with the objective risk.[19] Thus, like its medical counterpart, the law's effect on expectations (the "placebo effect of the treatment") results in a benefit that is distinct from the objective effect of the law in reducing the objective risk." He also adds that while in the medical sphere, placebo effects are tested on medicine but not on poison: "the expectation of the patient, if she has any expectation, is that the medicine/placebo will make her better. Although the patient may instead believe that the medicine would not improve her condition, it is unlikely that she would believe that the medicine would worsen her condition. In contrast, a law may create an expectation that it would either reduce or exacerbate a risk that it purports to address. In addition, a patient taking medicine usually knows that she is taking medicine, and therefore, the medicine would have both an actual effect (caused by the pharmaceuticals) and a placebo effect (caused by the knowledge of consumption of the medicine). In contrast, many individuals who are subject to a law may be ignorant of its existence. When an individual is subject to the actual effects of a law (caused by the government carrying out the law's dictates) but not to its placebo effect (caused by the changes in expectations due to knowledge of the law's existence), the result is the reverse of the medical placebo effect. The enactment of the law creates a discrepancy between the actual risk, which was reduced by the law, and the perceived risk, which did not change because the individuals are not aware of the law's existence. In other words, expectations are manipulated in a medical placebo effect in only one direction, between having no effect at all at one end, and fully curing the illness at the other end. Legal placebo effects, however, may manipulate expectations in both directions, either mitigating or exacerbating the discrepancy between the objective and perceived risk that the law purports to address. Thus, the manipulation of expectations that occurs in the world of legal placebo effects is more varied and diverse than what occurs with medical placebo effects."[20] In his analysis Aviram distinguishes between four categories of placebo effects: (1) positive placebo effects, which occur when individuals overestimate a risk prior to the implementation of a law and perceive the law as mitigating that risk; (2) negative placebo effects, which occur when individuals underestimate a risk prior to the implementation of a law and perceive the law as mitigating that risk; (3) positive anti-placebo effects, which occur when individuals underestimate a risk and perceive a law as increasing that risk; and (4) negative anti-placebo effects, which occur when individuals overestimate a risk and perceive a law as increasing that risk.[21] Aviram[22] also adds that like "psychic effects, placebo effects are thus caused by a law's manipulation of subjective perception. But, like real effects and unlike psychic effects, placebo effects have an objective impact on the behavior of individuals—an increase or decrease in activity related to the risk that is addressed by the law. It is this objective impact that causes the placebo effect to increase or decrease utility, but unlike the real effects of a law, the placebo effect is triggered by the law's perceived (not actual) effectiveness."

ETHNIC PROFILING AND ASSUMED EFFICIENCY

In what follows, I will delineate the general practice of ethnic[23] profiling and ethnicity-based selection, and how these arise in the context of the fight against terrorism. I will argue that besides the perennial problem with ethnic profiling—that it readily turns into a form of ethnic discrimination—it faces an independent problem: lack of effectiveness.

Ethnic or racial profiling is a practice that relies on the tenet that ethnicity in itself signals a certain type of criminal involvement as more likely, and this assumption serves as a sufficient and therefore legitimate basis for law enforcement (police, secret service etc.) suspicion. The institution was first developed in the U.S. for detecting drug couriers, and

was later implemented in traffic control, and more recently in anti-terror procedures. At the heart of these procedures is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Thus, stops are not induced by suspicious or illegal behavior, or by a piece of information that would concern the defendant specifically. Instead, a prediction provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing acts of terror, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much on the basis of the (suspicious) behavior of the individual, but based on an aggregate reasoning. The goal is to make an efficient allocation (based on rational interconnections) of the limited amount of the available police and security resources. After all, the majority of the prison population is Black (Roma etc.),[24] and almost all of the terrorists are Islam fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable. Such law enforcement-related prejudices against minorities are very widespread. For example, in Hungary, according to a survey in 2006, almost two thirds (62 percent) of the Hungarian adult population agreed fully or to some degree with the claim: "the tendency to commit crime is in the nature of the Roma"[25] A 1997 survey by the Ministry of Interior, showed that 54 per cent of police perceived criminality as a central element of Roma identity[26] and in 2002-2003, the Hungarian Helsinki Committee carried out a research on discrimination against Roma in the criminal justice system, finding deep-running traces of racial profiling by the police within Roma communities.[27]

Originally, the procedure of profiling was about an attempt to create a description profile for suspects, in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behavior and circumstances. In the case of drug couriers, such a characterization might include short stop-overs between significant drug sources and the distribution location, cash paid for the airline ticket, and, based on criminal statistics, also ethnicity, sex and age. The case for ethnic profiling is further strengthened by the fact the gangs that play key roles in organized crime tend to be almost exclusively ethnically homogenous.

The idea to take race into consideration as a helpful tool to screen offenders was widely accepted among law enforcement officers.[28] American studies on highway patrols for example have shown that blacks, comprising 12.3 percent of the American population, are significantly overrepresented among those stopped and checked by the police. [29] In New Jersey, between 1994 and 1999, 53 percent of those stopped by the police were black, 24.1 percent were Hispanic and only 21 percent were white.[30]

As the racially profiling practice proliferated, a fierce academic and political debate erupted over the issue. Criticism of such practices is manifold. Some emphasize that ethnic profiling is in principle unacceptable, because it results in the harassment of the innocent minority middle class, which is thus subjected to a kind of "racial tax" that affects all aspects of people's lives. A further unwanted result is the strengthening of racial/ethnic essentialism, reductionism to black and white (Roma and Hungarian; Arab and non-Arab, etc.).

Another, straightforwardly pragmatic criticism, however, has been calling attention to the practical ineffectiveness of racial profiling: inherent in the prima facie plausible reasoning based on statistics is a profound (and provable) error. Studies conducted in New Jersey and elsewhere have targeted stops based on racial profiling, involving vehicle checks and body searches. The aim was to discern how effective these measures were in detecting drug possession and illegal possession of weapons. The studies have clearly demonstrated that there was no significant, tangible difference between the proportional hit rate within the white population and the non-white population. Not only did the study find that the authorities habitually stopped a disproportionate number of non-white drivers, but they have also confirmed that the hit rate does not justify the utility of ethnic profiling. Racial profiling relies on the assumption that ethnicity and a high rate of criminality are connected, so the hit rate must be higher among, say, African Americans. For a long time, no-one had asked for a proof of this seemingly sensible connection; after all, a sufficient number of criminals were found among the disproportionately high number of minority members stopped. But researchers argue that this does not yield a cost effective method because the number of false negatives and false positives is bound to be much too high.[31] In other words, the measures have a disproportionate negative impact on the black (Roma, Arab) population that is law-abiding, while also reducing the possibility of finding perpetrators that belong to the majority population.[32] Thus, the retrospectively judged effectiveness (which was always assumed, rather than checked and confirmed) turns out to be illusory and does not provide an appropriate policing, prevention and security policy.

Another related argument mentions the risks in-

herent in alienating crucial minority communities in the context of law enforcement (policing and prevention).The model of community policing emphasizes that local policing is most effectively done with active participation from the community. Law enforcement thus should not be an antagonistic, unjust, oppressive power, but a protector of peaceful, law-abiding people, with the criminals pitted as the enemy. With respect to terrorism, we should not overlook the importance of community cooperation. It is no coincidence that the Bush government identifies truck drivers, cab drivers and parking meter attendants as high-priority potential informants (helpful in identifying bombers or suicide bombers), and, above all, the Muslim community, which can detect suspicious behavior.[33] Indeed, most of the American terrorists identified up until recently were caught based on community reports. It is worth considering that one of the very few terrorist arrests where the suspect was eventually charged, in Lackawana, New York, a report from the local Muslim community tipped off the authorities, leading to the arrest.[34]) Further, false positives raise a special problem with respect to terrorism: it seems untenable to assume that only Arabs are involved in terrorist attacks. We need only mention a couple of incidents that happened on American soil: Richard Reid (the "shoe bomber"), a Brit from the West Indies; Jose Padilla (the "dirty bomb" terrorist of Chicago's O'Hare Airport), a Hispanic man who converted to Islam while in jail; not to mention white Americans like John Walker Lindh (the American Talib), Timothy McVeigh, and Charles Bishop.[35]

The irony of the case is that it was right around the time of the World Trade Center attacks that racial profiling suffered decisive rejection within professional as well as political circles. In the fall of 1999, 81 percent of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58 percent approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight.[36]

THE EFFICACY VALUE OF PERCEPTION

In this article two important points were made: one pertaining to the elusive and subjective nature of security, and the other one relating to the lack of objective verification of preventive measures.

It is a well documented in criminology that individual risk predictions are largely based on interpretations far removed from rational considerations of likelihood based on recorded crime rates.[37] Far more people believe that they will become future victims of a nominated offence than, what the number that actually become victims. For example, respondents in three waves of a longitudinal crime survey conducted in Trinidad believed that they are 'likely' or 'very likely' to be murdered in the following 12 months at each of three times at which the sample was questioned. In fact, in 1999, 120 murders were recorded in the population of 1.3 million, that is: 99.8 per cent of those 585,000 expecting to die erred in the question.[38]

It has to be added though that the "it is in no sense individually or collectively irrational for all of a given population to feel that there is some degree of likelihood that they will become victims even though only a tiny proportion will actually do. Until victimization is inflicted on the few to which it eventually is, how can anybody know who should predict it for themselves?"[39] Unlike estimating objective group risk, it is very difficult to objectively pinpoint to an individual's objective risk.[40] Research on the fear of crime suggests that people respond to the 'social facts' of crime in ways which reflect their personal experience and values.[41] In other words, people predict on the basis of information available to them.[42] For example, death by homicide is rarer than death by suicide (even though suicides are underreported, since they are often classified as accidents), but homicide receives more publicity than suicides and so are remembered more easily.[43]

This leads us back to the question of available information. Media theory frequently refers to the concept of cultivation. According to this, television is society's storyteller and if a viewer sees a great deal of violence on television, then she will presume that society is violent; once this presumption takes root, it can penetrate the viewer's attitudinal base and become a decision-making factor. Hence, a viewer who believes that society is violent may be more afraid to walk alone at night, inclined to purchase a home alarm system, or likely to support increasing the police force.[44]

As it had been shown, "security", a core concept in contemporary socio-political developments is a rather peculiar phenomenon. The process of securitization[45] is intertwined with a number of institutional, political and bureaucratic interests, and the entire avalanche is based on perception rather than on objective features.[46] The irony of the case is that no efforts are required from governments to try to assess how certain institutions or law enforcement measures will affect the actual risk of criminal or

terrorist involvement, or even risk-perception. Thus, the state is under no pressure or obligation to prove the correlation between the increase in (the perception of) security—which is in most cases only assumed, presumed and forecasted. Presumably, a lack of a proper methodology to test such dynamics lies behind the fact that the public seems to accept "risk prevention" as a proper price to be paid for extended law enforcement authorizations, and social risks are not weighted against the potential benefits. "Prevention of terrorist attacks" appears to be a blank check, where we are waiving our rights to actually control the effectiveness of the preventive measures. If no terrorist attack happens, the government may argue that is exactly due to these preventive commitments that we could have escaped the threatening disasters. If such incidents do take place in our approximate or remote distance, it is even more a reason to strengthen government efforts and establish further law enforcement measures.

According to Peter Lock "Though once being upgraded to 'war', anti-terrorism becomes an open-ended activity because it is intrinsically impossible to define criteria which would unequivocally permit to declare victory and put an end to this war. The institutions charged with carrying out the 'war against terrorism' emerge as powerful bureaucracies with their own corporate agendas. They are often capable of eclipsing from parliamentary oversight. It plays to their advantage in their drive to achieve dominant positions in the state apparatus that many of their activities are shielded from scrutiny for asserted operational reasons. Their claims of effectiveness cannot be measured as the full dimension of their task is by definition unknown as long as the unbounded concept of terrorism rules political discourses. Their persistent exigency that they must be entitled to carry out covert operations at their own discretion is inherently difficult to monitor. Confronted with imagined terrorism as opposed to defined political challenges in a populist political climate elected bodies are not inclined sufficiently challenge the agendas of the institutional security network. The executive is capable of launching a dynamic of circular causation by imaging a hypothetical terror network, which is delineated as invisible (and hence unknowable). Politicians are not inclined to take risks and do not define how much production of alleged security is enough. As a result, measures adopted in the fight against terrorism acquire features of self-fulfilling prophecies. … In such a context it is virtually impossible to measure progress in the fight against terrorism."[47] Commentators point out that fear also plays a noticeable role in generating identity and feeling of belonging, and collective insecurity can be understood as the purest form of community belonging. The «dangerization process» facilitates an increasing culture of defense. The security discourse serves as an effective means to stimulate community belonging, and is an effective vehicle of post-industrial political power.[48]

The irony of the case is that inspired by the academic discipline of law and economics, in the past years, a considerable body of literature has focused on estimating the social costs of crime and crime prevention—only these findings have not seem to have made the desirable impact on public policy and discourse. For example, Paul Dolan and Tessa Peasgood developed a methodology to provide estimates of the intangible costs arising from the anticipation of possible victimization; that is, estimates of the costs of fear of crime.[49] These costs are categorised according to whether they result in non-health-related losses or health-related losses. When people feel that they may be about to become a victim of crime, they will experience anxiety and stress. The frequency with which people are in this state and the intensity of the anxiety is one measure of the health-related loss from anticipated crime. Non-health losses are associated with changes in behavior (where for example people use their own cars or take taxis rather than walk or use public transport because of their fear of crime)[50] and/or changes in how society is viewed.

For example, a survey of public attitudes to quality of life in the United Kingdom in 2001 found that crime was mentioned by 24 percent of respondents as an important factor affecting quality of life, which made crime the third largest factor after money and health.[51] They claim that the direct costs of security measures, insurance administration expenditure and costs incurred from crime-averting behavior can be interpreted as revealing people's preferences to reduce the risks of victimization and the worry about victimization. Also, a further tangible cost attributable to anticipating crime is any loss in productivity caused by the time and energy spent on actions and emotions linked to anticipating possible victimization. This may include leaving work early to avoid walking home alone, or time spent dealing with a burglar alarm that has been accidentally set off.[52] In addition to these, other behavioral changes also involve additional time costs. Based on survey observations in the United States, on average, an adult spends two minutes locking and unlocking doors each day and just over two minutes a day looking for keys, which is valued at—437 per year.[53] It means that U.S. citizens are estimated to spend

nearly—90 billion worth of time each year simply locking their doors and searching for their keys.[54]

It needs to be added that according to estimates, citizens of the United States spend more on private precautions—"estimates range from —160 billion to —300 billion per year—than on the entire public law enforcement budget. That is, citizens spend more on locks, neighborhood watches, and the like than U.S. governments (state and federal) spend on police, judges, prosecutors, prisons, and prison guards."[55]

CONCLUSION

This article has argued that besides the doctrinal debate between "security" and "liberty", there is another important, and slightly overlooked question to be investigated: the actual efficacy value of policies and law enforcement measures that trigger the entire "liberty vs security" polemics.

What needs to be kept in mind is that "security" itself is a rather social construct, and thus, there is another war, one that needs to be fought in the heads and research papers, in which it needs to be proven that even if we are willing to trade in liberty (or some of our constitutional rights) for security, we still need to be aware of the fact that "security" is an elusive concept.

Instead of pursuing efficient protection mechanisms, we may just be scapegoating and trusting our fates to a tyrannical state that we are creating along the way; a state in which with time, the persecution and ostracization of a minority may well be followed by everybody else's.

Translated by the author

NOTES

1. The proverb was used as a motto on the title page of An Historical Review of the Constitution and Government of Pennsylvania. (1759) which was published by Franklin in 1812. The phrase itself was first used in a letter from the Pennsylvania Assembly dated November 11, 1755 to the Governor of Pennsylvania.
2. Federico Rahola, 'The political impact of security policies' 17 July 2007 <http://www.libertysecurity.org/article1574.html?var_recherche=rahola>. Analysts also mention a 'functional spill-over' as the major propellant of European cooperation in matters of justice and home affairs—wherein law enforcement measures are deemed necessary to fill 'gaps' created by wider integrative processes such as the lifting of border controls. See Ian Loader, 'Policing, Securitization and Democratization in Europe' 18 April 2005 <http://www.libertysecurity.org/article209.html?var_recherche=policing%2C%20securitization>.
3. According to Ian Loader, the politics of resources or the politics of allocation is concerned with trying to ensure that all citizens are provided with a 'fair' share of available policing goods; something that requires attention both to the unwarranted 'over' (or overly invasive) policing of particular individuals or social groups, and to the inability of (disadvantaged) citizens and communities to acquire a proportionate level of such goods. See Loader (n 2).
4. See for example Ian Loader, 'Necessary Virtues: The Legitimate Place of the State in the Production of Security' Tuesday 19 April 2005 <http://www.libertysecurity.org/article232.html?var_recherche=necessary%20virtues>.
5. David A. Green, 'Public opinion versus public judgment about crime. Correcting the 'Comedy of Errors' [2006] January British Journal of Criminology 139.
6. Green (n 5) 138.
7. Green (n 5) 140–141. As Ackerman and Fishkin explain: '[w]e have a public dialogue that is ever more efficiently segmented in its audiences and morselized in its sound bites. We have an increasingly tabloid news agenda that dulls the sensitivities of an increasingly inattentive citizenry. And we have mechanisms of feedback from the public, from viewer call-ins to self-selected Internet polls, that emphasize the intense commitments of narrow constituencies, unrepresentative of the public at large.' B Ackerman, JS Fishkin, *Deliberation Day* (Yale University Press, New Haven 2004) 8–9. This is a decidedly weak foundation upon which to build sensible, defensible and effective penal policy. Green (n 5) 150 concludes by saying: "Only methods embracing deliberation and fostering the conditions to achieve public judgment are sufficient to generate the kind of informed and considered public preferences that could justify the level of political deference public preferences currently receive. Because most typical conceptions of public opinion are not based on deliberation, public opinion is only that–uninformed, unconsidered opinion, tending to lack validity on contentious issues, measuring top-of-the-head reactions to questions about which little is known. Typical assessments of public opinion provide a poor justification for policy, and remain susceptible to exploitation by those of all ideological affiliations with axes to grind. At precisely the time when notions of the will of the public have acquired such political currency, these views are simultaneously being assessed more frequently and in ways that lack both depth and validity."

8. R Allen (2003) "There Must Be Some Way of Dealing with Kids': Young Offenders, Public Attitudes and Policy Change' [2003] 2 Youth Justice 3–13.
9. Green (n 5) 138.
10. It needs to be noted that it may very well fall within the interest of politicians to rely on unsubstantiated public opinion. For example; see Green (n 5) 137; following a high profile murder case, the then Shadow Home Secretary, Tony wrote a piece in *The Sun* asserting, '[w]e can debate the crime rate statistics until the cows come home. The Home Office says crime is falling. Others say it isn't. I say crime, like economic recovery, is something that politicians can't persuade people about one way or another. People know because they experience it. They don't need to be told. And they know crime is rising' „Blair's comments imply that there is no substitute for experience, even secondhand, mass-mediated experience, and his piece lent unqualified credibility to tabloid portrayals. He as much as told the public that their fear of crime, irrational or not, is more important than any unbiased assessment of the problem."
11. Roger Roots, 'Are Cops Constitutional?' [2001] Summer Seton Hall Constitutional Law Journal 686–757.
12. National Institute for Occupational Safety and Health, Violence in the Work Place, June 1997. National Institute for Occupational Safety and Health, Fatal Injuries to Workers in the United States, 1980-1989: A Decade of Surveillance, National Profile, August, 1993 DHHS (NIOSH) Publication No. 93-108.
13. Roots (n 11) 711–712. Also note that about two percent of American soldiers serving in South Vietnam during the Vietnam War died during their service there, yet most Americans would view a one-year tour of duty in South Vietnam during that war as a grave danger. Amitai Aviram, 'The Placebo Effect of Law: Law's Role In Manipulating Perceptions' [2006] November George Washington Law Review, footnote 80.
14. Privacy Int'l, Mistaken Identity; Exploring the Relationship Between National Identity Cards & the Prevention of Terrorism 2 (2004) The report also shows that "[a]t a theoretical level, a national identity card as outlined by the UK government—the proposed legislation in question—could only assist anti-terrorism efforts if it was used by a terrorist who was eligible and willing to register for one, if the person was using their true identity, and if intelligence data could be connected to that identity" See <http://www.privacyinternational.org/issues/idcard/UK/ id-terrorism.pdf>.
15. See Simon Davies, 'Identity Cards: Frequently Asked Questions' Privacy Int'l 24 Augustus 1996 <http://www.privacy.org/pi/activities/idcard/idcard_faq.html>.
16. Jennifer Morris, 'Big Success or "Big Brother?": Great Britain's National Identification Scheme Before The European Court Of Human Rights' [2008] Winter Georgia Journal Of International And Comparative Law 471.
17. Aviram (n 13).
18. The literature mentions three common cognitive biases: availability bias, vividness bias, and social amplification. The availability bias heuristic causes people to "assess the frequency of a class or the probability of an event by the ease with which instances or occurrence can be brought to mind." In other words, events are more "available" (i.e., more easily brought to mind) when we encounter them ourselves or learn about them from others. To demonstrate it, subjects were asked to estimate in relative terms the number of words in which the letter "r" appears as the first letter of the word versus the number of words in which the letter "r" is the third letter of the word. The subjects consistently judged that words containing the letter "r" as the initial letter outnumbered words containing the "r" as the tertiary letter. In fact, words with "r" as the third letter are much more common than words in which "r" is the initial letter. The reason subjects continually made this mistake is that words which began with the letter "r" are much easier to recall than words which have "r" as the third letter. A related pattern of inaccurate heuristics has been called the vividness bias. It causes individuals to place more weight on concrete, emotionally interesting information than on more probative abstract data. Social amplification is a heuristic by which an individual relies on others' beliefs when the individual has little independent knowledge of the matter. This reliance causes people to perceive as more probable those risks that also concern others with whom they interact. As a result, highly visible, dramatic events that capture media attention generate immense public concern that is disproportionate to the actual risk. See Aviram (n 13) 71–75.
19. The author brings the following example: On September 11, 2001, terrorists hijacked four passenger airplanes and flew three of them into the World Trade Center and the Pentagon, murdering at least 2981 people, including all 256 people on the planes. Among the many repercussions of this terrible calamity was a panic regarding aviation security. In the following month, commercial passenger traffic dropped by over 45%. Two months later, on November 19, the Aviation and Transportation Security Act ("ATSA") was signed into law. Its announced goal was "[t]o improve aviation security." By August 2002, the num-

ber of passengers was only 9,2% lower than in August 2001, and by August 2003, it was lower by only 5,7%. Aviram (n 13) 55–56 (Talking about risk-assessment, it needs to be added, as Aviram does, that Cornell University economists Garrick Blalock, Daniel H. Simon, and Vrinda Kadiyali found that "nearly 1,200 more people died in the months subsequent to the [September 11th] attacks when they switched their travel plans from flying to driving." Press Release, 'After Sept. 11 attacks: as traveler plans changed from flying to driving, highway deaths rose in subsequent months' Cornell University News Service (10 March 2005), <http://www.news.cornell.edu/stories/March05/Sept11.PlaneCar.bpf.html>.

20. Aviram (n 13) 57–58.
21. Aviram (n 13) 60–61.
22. Aviram (n 13) 65.
23. A note about terminology: besides obvious differences, I will treat racial, ethnic and nationality-based terminology as synonymous.
24. In Hungary, Research was published in the mid '90s revealing estimates on the ratio of Roma inmates, which showed that based on self-definition of inmates about 40 percent of the prison population is Roma. See Huszár László 'Romák, börtönök, statisztikák' [1997] August Amaro Drom 9–11. With prison directors giving much higher estimates, on average 60 percent. (Women Integration and Prison Project (MIP). Hungarian report 'Data on Crime, Judicial and Prison data' [2004] <http://mip.surt.org> (unpublished).
25. See <http://www.tarki.hu/kozvelemeny/kitekint/20060201.html> (02. 10. 2006).
26. Csepeli György, Örkény Antal, Székelyi Mária, 'Szeretelen módszerek' [Insubstantial methods] in Csányi Klára (ed) *Szöveggyűjtemény a kisebbségi ügyek rendőrségi kezelésének tanulmányozásához* (OSI-COLPI, Budapest 1997) 130–173.
27. See Farkas Lilla, Kézdi Gábor, Loss Sándor, Zádori Zsolt, 'A rendőrség etnikai profilalkotásának mai gyakorlata' [The Current Police Practice of Ethnic Profiling] [2004] 2–3 Belügyi Szemle.
28. For example, in 1994, an estimated 2,714,000 juveniles were arrested in the United States. Of those juveniles, twenty-nine percent were black and sixty-two percent were white. Black juveniles, however, comprised only fifteen percent of the total juvenile population, whereas white juveniles comprised eighty percent of the total juvenile population. Arthur H. Garrison, 'Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together' [1997] Winter New England Journal on Criminal and Civil Confinement 32.
29. <http://quickfacts.census.gov/qfd/states/00000.html>.
30. See Michael Buerger, Amy Farrell, 'The evidence of racial profiling: interpreting documented and unofficial sources' [2002] 5, 3 Police Quarterly 290; David A. Harris, 'The Stories, the Statistics, and the Law: Why „Driving While Black" Matters' [1999] December Minnesota Law Review 267.
31. See for example Mariano-Florentino Cuéllar, 'Choosing Anti-Terror Targets by National Origin and Race' [2003] Spring Harvard Latino Law Review; Leonard Baynes, 'Racial Profiling, September 11th and the Media. A Critical Race Theory Analysis' [2002] Winter Virginia Sports and Entertainment Law Journal 12–13, and Deborah Ramirez, Jennifer Hoopes, Tara Lai Quinlan, 'Defining Racial Profiling in a Post-September 11 World' [2003] Summer American Criminal Law Review 1213.
32. Consider the fact that the name of Yigal Amir, Yizchak Rabin's assassin would not have cropped up based on any kind of assassin profile; nor would the person who first blew up a commercial aircraft—she was a woman who wanted her husband dead in 1949. Gregory Nojeim, 'Aviation Security Profiling and Passengers' Civil Liberties' [1989] Summer Air and Space Lawyer 5.
33. See for example Steven Brandl, 'Back to the future: The implications of September 11, 2001 on law enforcement practice and policy' [2003] Fall Ohio State Journal of Criminal Law; Mark Osler, 'Capone and Bin Laden: The failure of government at the cusp of war and crime' [2003] Spring Baylor Law Review.
34. David A. Harris, 'New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001' [2004] Utah Law Review 933.
35. Harris (n 34) 940, see also Baynes (n 31), and Thomas W. Joo, 'Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11' [2002] Fall Columbia Human Rights Law Review.
36. Samuel R Gross, Debra Livingston, 'Racial Profiling Under Attack' [2002] June Columbia Law Review 1413.
37. See for example Derek Chadee, Liz Austen, Jason Ditton, 'The Relationship Between Likelihood and Fear of Criminal Victimization' [2007] January British Journal of Criminology.
38. Chadee, Austen, Ditton (n 37) 133, 134.
39. Chadee, Austen, Ditton (n 37) 133, 135
40. For example: "It seems that one can have an objective measure of general risk–in this sense, objective risk is group risk rather than individual risk. From the fictitious example given above, this might be a 5 per cent chance of being a victim of that particular crime. This can alternatively be expressed as one chance in

20 of it happening in the next 12 months, or as occurring once every 20 subsequent years. But this does not mean that one can have an objective measure of individual risk. In other words, an individual's average general (or group) risk (the 5 per cent) is not that individual's actual personal risk." Chadee, Austen, Ditton (n 37) 135.

41. A number of research has been done on perceptions on crime and victimization. Besides a widespread confirmation that people typically predict more victimization than they eventually suffer, studies have also shown that while people may base their estimations of their personal risk of victimization on their own experiences and what they perceive to be those of friends and neighbours, they tend not to rely on media accounts, as the latter are typically insufficiently informative, memorable or upsetting. Thus, judgments of personal victimization risk are separate from general concerns about crime, and the latter are demonstrably influenced by media accounts. People also seem to be better at estimating the degree and direction of change in rates of crime as the area in question gets smaller and closer and closer to their own neighbourhood. They can generally believe that crime is rising very fast in the nation as a whole, somewhat less rapidly in their own city than in the rest of the country, but is not rising very rapidly at all in their own neighbourhood. It needs to be added that research shows that people are indeed rather good at specifying the relative frequency of occurrence of crime types, and characteristics of offenders locally, and, given the well known inadequacies of criminal statistics, it is also possible that for certain crimes like vandalism public beliefs are actually more accurate than police recorded rates. See Jason Ditton, Derek Chadee, 'People's Perceptions of their Likely Future Risk of Criminal Victimization' [2006] May British Journal of Criminology 513–514.
42. Chadee, Austen, Ditton (n 37) 137, 138.
43. See Richard Thaler, 'Mental Accounting and Consumer Choice' [1985] Marketing Sci. 199. Of course, one could argue that death by homicide violates a stronger cultural norm than death by suicide and that it is therefore a more threatening and significant event. For these reasons, instances of homicide are more 'available' than instances of suicide, and people overestimate the likelihood that someone will be murdered, relative to the likelihood that he or she will commit suicide. It needs to be added that as opposed to mediated or abstract experiences, lived experience can de-bias or re-bias estimations of likelihood of voluntary and involuntary risks (it has *never* happened to me, therefore it must *not* be frequent.). It is also well established that people overestimate the frequency of rare events and underestimate the frequency of common ones. See Chadee, Austen, Ditton (n 37) 138–139.
44. Kimberlianne Podlas, 'The "CSI Effect" and other Forensic Fictions' [2006–2007] 27 Loyola of Los Angeles Entertainment Law Review 98–99. The author notes that cultivation is rooted more in media theory than psychology and that according to other research, media content merely makes the audience aware of an issue (the agenda-setting effect); at other times, it reinforces pre-existing attitudes; at still others, it seems to have no impact on values or direction of response whatsoever. 101–103
45. According to the constructivist 'Copenhagen School' of security analysis, securitization is constituted by the intersubjective establishment of an existential threat with a saliency sufficient to have substantial political effects. The semiotic structure of securitization differentiates between 'referent objects', 'securitizing actors' and 'functional actors'. A 'referent object' of securitization is something that is considered to be existentially threatened. In the vast majority of cases the security referent is the state, and the 'securitizing actor' is the actor who actually performs the speech act of securitization, by declaring the referent object 'existentially threatened', whereas a 'functional actor' is a participant in carrying out the pragmatic consequences of securitization. Security is never objectively given and there is no implicit, objective or given relation between the subject—the security actor—and the object of securitization as this relation is constructed intersubjectivelythrough social relations and processes. See Peter Burgess, 'The Ethical Subject of Security' Tuesday 10 May 2005 <http://www.libertysecurity.org/article248.html?var_recherche=ethical%20subject>.
46. According to Foucault's concept of „biopolitics" control associated with security should affect the population as a whole, presenting the tendency of depoliticizing security. Michael Foucault, *Naissance de la Biopolitique* (Gallimard, Seuil 2004). Political rationality is indeed suspected of insecurity. Biopolitics therefore individualizes the political discourse, incrementing the responsibility for self protection and security. There is therefore a considerable need for reinstating political rationality of the State, in order to respond to the present uncontrolled situation. See Vivienne Jabri, 'Security and the Return of Politics' Tuesday 6 September 2005 <http://www.libertysecurity.org/article384.html?var_recherche=jabri.> In this theory, Foucault inserts a new conceptual acceleration of the passage to liberalism, through fear and danger. Danger becomes the prerogative of the liberal function, through a culture of stimulating and reproduc-

ing a notion of continuous danger to the actors of economic life. According to Foucault, in this culture of danger, fear lies in the heart of the challenges produced by liberty in governing the subjects. Liberty is organized and reproduced through a new governmental style -liberalism- through a series of economic, legal and social relations that form and divide personalities and thus create a culture. See Nicolas Scandamis, 'Danger in Michel Foucault's Naissance de la Biopolitique' (Lesson of January 24, 1979), Tuesday 26 December 2006 http://www.libertysecurity.org/article1245.html?var_recherche=scandamis

47. Peter Lock, Anti-terrorism and Effects on Freedom of Movement- Assessing the Concept of Progress in the Fight against Terrorism, Wednesday 20 July 2005, <http://www.libertysecurity.org/article318.html?var_recherche=lock%20peter>.
48. See Michalis Lianos, 'Hegemonic Security Discourse: Late Modernity's Grand Narrative' Tuesday 6 September 2005 <http://www.libertysecurity.org/article386.html?var_recherche=michalis>.
49. Paul Dolan, Tessa Peasgood, 'Estimating the Economic and Social Costs of the Fear of Crime' [2007] January British Journal of Criminology.
50. It needs to be added that more expensive forms of transport clearly bring other benefits, such as quicker and more comfortable journeys, and these benefits would need to be controlled for. Dolan, Peasgood (n 49) 123.
51. Dolan, Peasgood (n 49) 123.
52. Dolan, Peasgood (n 49) 124.
53. A study found an average willingness to pay to avoid locking or unlocking assets of —804 (from a sample of 140 respondents). The extra time taken walking home to avoid potentially dangerous shortcuts could, in principle, be valued in a similar way. Dolan, Peasgood (n 49) 124.
54. David A. Anderson, 'The Aggregate Burden of Crime' [1999] 42 J.L. & Econ. 611, 623–624.
55. Robert A. Mikos, '"Eggshell" Victims, Private Precautions, and the Societal benefits of shifting crime' [2006] November Michigan Law Review 308. The author also draws attention to the fact that literature supports the claim that many of the resources spent in the private war on crime are being wasted because many private precautions only shift crime onto other, less guarded citizens, and this redistribution of crime has no net social benefit, as precautions that only shift crime constitute rent-seeking behavior: individuals expend resources to transfer losses, without reducing the size of those losses. A typical example would be vehicle anti-theft devices which will urge thieves to target other cars but not deter them from stealing. A similar discussion centers on the question of gated communities, which are also found only to divert crime to other communities. (As of 2003, there were nearly seven million households located in gated communities in the US, which adds up to seven percent of all households.) It is for this reason that some local governments have simply refused to allow real estate developers to control access to new or existing communities. See 309, 315, 319.

Judit Tóth

WHO IS AFRAID OF ASYLUM SEEKERS AND REFUGEES AFTER ENLARGEMENT?

MAJOR TRENDS IN ACCESSION TO THE PROTECTION

Currently, many of the countries along the eastern EU border are amending their asylum laws in line with EU policy including a Common European Asylum System[1] to harmonise asylum legislation among its member states. International legal standards and best practice should be reflected in those laws. Unfortunately, experience has shown that this is not always the case: instead, the system has often been applied in a selective manner aimed at restricting international refugee protection.[2] Work on transposition of EU Directives into national asylum laws is at different stages in the various countries: Slovakia's new asylum law came into force on 1 January 2007, but more amendments are on the way. The Hungarian Parliament adopted the new asylum law just before its summer break, and it became effective on 1 January 2008. In Slovenia, a Bill was submitted and discussed in Parliament in October 2007. In Poland, preparations to amend the law have been going on for many months and the drat law has been submitted to the Parliament. However, the legislative process might be halted due to the expected decision of the Parliament to hold early elections in autumn of 2007.

Lloyd Dakin, UNHCR's Regional Representative in Budapest, sees contradictory trends relating to refugees - *a strong fear of foreigners coupled with the need for growing economies with ageing populations* to open their labour markets to others, including asylum-seekers. „Through various kinds of restrictions and hurdles many states try to make it as difficult as possible for asylum seekers to obtain refugee status. But we also see in the growing need for a new workforce and an opportunity for asylum-seekers and refugees to get jobs and be productive. We hope that this will increase their acceptance and make their integration easier." The UNHCR encourages governments to consult with its experts during the process of drafting new refugee legislation so that their knowledge may be put to good use from the very beginning.

In Slovakia, the Government consulted closely with UNHCR experts during the drafting process and incorporated some of their comments and recommendations. The introduction of a subsidiary protection status proved a useful tool to positively resolve many cases, such as those of the majority of Iraqi asylum-seekers in Slovakia. Another step forward was the opening of the labour market to persons with subsidiary protection status and for asylum-seekers after one year's stay in Slovakia. Already in 2007, many persons were able to find jobs and move out of government reception centres. However, the UNHCR expressed concern about the fact that these amendments include a number of formal reasons why an asylum claim may be rejected as inadmissibly or „manifestly unfounded". According to the draft law, no full asylum procedures will be carried out if the claim was lodged too late or if asylum-seekers provided „disconnected, contradictory or insufficient data." UNHCR in its comments points out that there are many reasons why someone's story might seem jumbled, such as language difficulties, trauma suffered, cultural and gender barriers or even a general fear of authorities due to past experience at home. Therefore, it is a shared responsibility between the authorities and the asylum-seeker to ascertain all relevant facts and to resolve inconsistencies and misunderstandings. "Even if a refugee story is difficult to understand, it may still be true", said Dakin.

For persons who seek international protection in Hungary, the new law on asylum—the third in this legal field since 1989 - will bring a number of improvements. UNHCR especially welcomed the introduction of a subsidiary protection status for persons who do not qualify for asylum but still cannot be sent back to their country of origin for humanitarian or human rights reasons. Instead of being left in a legal vacuum, such persons will basically enjoy the same rights as recognised refugees when it comes to employment, health-care, social benefits and education. Another welcome change is a restriction on the detention of asylum-seekers.[3] Whilst they could be kept in confinement for up to a year in previous

times, under the new law this period should be limited to a few days at the beginning of the procedure. However, under the new law, the use of false or forged documents by asylum-seekers may be a reason to withdraw protection. UNHCR urged the Government to keep in mind that refugees sometimes have no other choice but to use such documents during their flight. Asylum claims must not be automatically regarded as fraudulent just because an asylum-seeker had no access to genuine travel documents in his/her home country. Another point of concern for UNHCR is the possibility to *deny basic human needs* such as accommodation, food and clothing to asylum-seekers who seriously violate the code of conduct at a reception centre. „Misconduct" may occur for very different reasons which have to be taken into account. Problems should not be tackled by refusing to house and feed asylum-seekers.[4] UNHCR considers such treatment as degrading and dangerous, especially when families with children or persons with special needs are involved.

In Slovenia, the new asylum law is the second major piece of refugee legislation to be proposed by the government in two years. In both cases, UNHCR was not involved in the drafting process. One of the most troubling provisions of the law from UNHCR's point of view is the unrestricted replacement of full-scale asylum procedures with *accelerated procedures*. According to international legal standards such abridged procedures are justified only in clearly abusive and fraudulent cases („manifestly unfounded"). Nonetheless the Slovene draft law foresees accelerated procedures seemingly for all but „manifestly well-founded" claims and asylum applications by separated children or persons with special needs. Hence, only a small minority of asylum-seekers would have the benefit of a complete examination of their cases. Formally, an asylum-seeker has the right to appeal against a negative decision in an accelerated procedure. However, he might already be back in the country of persecution when his appeal is decided, as the authorities are entitled to remove him from the country during that time. UNHCR was specifically concerned about this provision since experience has shown that over the years many asylum-seekers in Slovenia have only been recognized after appeal.

Another point of concern is the widespread use of detention for asylum-seekers. According to the proposal, the movements of all asylum seekers in accelerated procedures may be restricted. In combination, these two provisions may result in the detention of the vast majority of asylum-seekers, a clear breach of international legal standards. Fleeing from persecution is not a crime. Hence asylum seekers should not be subjected to a treatment that societies normally reserve for criminals.

The collaboration between UNHCR and the Polish authorities in the transposition of Directives was good. A number of UNHCR's suggestions were included in the final draft sent to Parliament earlier in 2007 for its approval. Among the improvements is the fact that persons with subsidiary protection would be allowed to fully participate in integration programmes. They would be eligible for rental subsidies and Polish language courses. Another very encouraging point is the fact that the draft law strictly follows UNHCR's recommendations regarding detention of asylum-seekers. One point of concern, however, was the provision that some categories of asylum-seekers would be excluded from personal interviews during the asylum procedure. At the same time, an ordinance recently amended by the Ministry of Labour and Social Policy in Warsaw significantly simplifies access to the labour market for certain groups of foreigners. It would lead to more employment for asylum-seekers and persons with subsidiary protection status.

UNHCR's senior legal expert for the region, Leonard Zulu, warns of an unfortunate trend. „Governments tend to go for the lowest possible asylum standards contained in the EU Directives and justify that by saying that they are meeting EU requirements." This convergent protection and reception at low level is a predominant trend.

There were changes in the Czech asylum law during 2004 to incorporate EU regulations into national law (including several amendments to the Asylum Act). This included above all the harmonisation of the Act with the EU minimum standards (Directive 2003/9/EC Laying down Minimum Standards for the Reception of Asylum seekers) and implementation of Dublin Regulation practice (Directive 2003/343/EC). The amendment sought to improve the social dimension of asylum system. The Asylum Act No. 325/1999 Coll. as amended is compatible with the Council Directive 2003/9/EC. It was transposed into the Czech asylum legislation by the amendment of the Asylum Act of 27 January 2005. This provides, amongst other things, that the Ministry of the Interior must inform[5] asylum seekers of the obligations they must comply with and the benefits to which they are entitled no more than fifteen days after they have lodged their applications. According to the Directive (Article 14), the Amendment of the Act also states that applicants have the right to communicate with their legal advisors. The Organisation for Aid to Refugees welcomes new specific provisions in the Act (in order

to the Directive, Article 15(1)) for persons with special needs (namely unaccompanied minors, minors, pregnant women, disabled persons, victims of torture and violence, traumatized refugees etc.). In accordance with the Directive, unaccompanied minor detainees will be placed with legal guardians or in school accommodation centres suitable for minors. The legal guardians will represent the unaccompanied minors. The Act, as amended according to the Directive (Article 10 and also Article 18), also states that asylum seekers have the same access to education as nationals. These amendments are welcomed by the Organisation for Aid to Refugees, which has been critical of previous practice. However, the freedom of movement of applicants can be restricted to a specific area (referring back to the Directive, Art.7.) The Czech authority may decide to restrict *movement of the applicant* for reasons of public interest or public order.[6]

Beyond the visa and entry restrictions for potential asylum applicants, the absence of family unification premises and procedure would most hinder entry for members of a refugee's family. For instance, the UNHCR passed a set of recommendations to the Hungarian government in 2005 in order to urge transposition of the Directive on the Right to Family Reunification of 22 September 2003 and/or amendments to the existing rules. It contained the following steps:[7]

– the Government should consider waiving the obligation for recognised refugees to meet the qualification criteria contained in Article 14 (1) of the Aliens Act,

– it should consider a broader definition of eligible family members in line with the UNHCR Guidelines on family Reunification of 1983, but at the very least in line with the EU Directive;

– it should consider allowing persons authorised to stay in Hungary under the complementary protection regime immediate access to the right to family reunification upon status determination in the same manner as refugees;

– it should ensure that as a matter of practice in cases where the principal applicant is given refugee status or the status of person authorised to stay in Hungary, the rest of the family should have the right to opt for the same derivative legal status, without prejudice to their right to apply for refugee status or complementary protection individually based on own claim. Family members should also have access to the same socio-economic and other rights as the principal applicant;

– it should consider having a one-stop, single procedure for family reunification, so as to ensure that the application for family reunification is submitted to, processed and approved by a central authority in a single procedure;

– it should consider issuing family members joining recognised refugees with an appropriate visa that denotes their special circumstance (e.g. "Humanitarian Visas" or "Family Reunification Visas");

– it should review current procedures to ensure that fair and efficient procedures for processing family reunification applications in an expeditious manner are in place. The objective of such a review should also include the need to achieve family unity, and not the qualification criteria contained in Article 14 (1) of the modified Aliens Act (2001), the central focus of such procedures;

– it should, as part of the review to make family reunification procedures more fair and efficient, ensure that recognised refugees, at the point that refugee status is granted, are provided with written and oral information on their right to family reunification and the procedures which need to be followed for them to effectively exercise and realise this right, including applicable qualification waivers, details concerning travel documents and visa applications, opportunities for financial assistance for travel costs and integration assistance for the reuniting family. To this end, the authorities may wish to consider introducing an information package on family reunification, including a public place poster and a leaflet which could be given to individual principal applicants at the same time that a positive refugee status determination decision is rendered;

– it should introduce a simple and "user friendly" family reunification procedure that can easily be initiated by the recognised refugee through the completion of a standardised form which, whenever necessary, could be complemented by a personal interview;

– it should consider exploring modalities by which it would be able to assist the applicant refugee to meet the costs of reunification either through a loan or a grant. Initially, these costs could be met under the European Refugee Fund (ERF), which can be administered directly by a government entity or a partner NGO with the requisite family reunification experience;

– it should issue an administrative directive stating that when deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not *per se* be considered as an impediment;

– it should ensure that recognised refugees are aware that a negative decision on an application for family reunification should clearly and fully state the

specific reasons for the rejection of the application and the evidence relied on. It should also provide information on the principal applicant's right of appeal, any time-limits and the provisions of the appeal procedure;

– it should ensure that family reunification takes place within the shortest possible time from the time an application is made. Applications from or regarding separated children should be prioritised, with regard to the principle of the best interest of the child, in view of the potential harm caused by long periods of separation from their parents.

Summing up, the UNHCR commended and encouraged the Government of Hungary to continue applying its flexible and humane interpretation of the current legislation governing the family reunification of recognized refugees, and urged the government to extend the same standards of consideration to persons enjoying complementary protection. In this respect, it was encouraged to introduce legislative amendments that would further facilitate the family reunification of recognized refugees and those with complementary protection.

The other ever-green aspect of entry is non-refoulement.[8] For instance, the Committee Against Torture heard the response of Bulgaria to its questions.[9] Accordingly,

– CAT was directly applicable in domestic jurisprudence by virtue of its incorporation in the internal legal system and recognition by the Constitution;

– the rights and obligations of asylum seekers were laid down in laws on refugee status, and at every stage, protection was provided to asylum seekers until decisions were rendered;

– the State did not expel an asylum seeker to a country where his or her life could be threatened, the delegation said. Bulgaria was fully committed to combating acts of terrorism that should not derogate from the human rights and fundamental freedoms of individuals. Bulgaria believed that the root causes of terrorism should be combated and solutions should be found.

– with regard to article 3 of the Convention on refoulement, the State did not expel an asylum seeker to a country where his or her life could be at risk. However, individuals considered as a threat to national security might be prevented from entering the country, as was the case in many states. If clear evidence of danger against an individual existed in the country of destination, he might be sent to a third country where his life was not in jeopardy;

– refugee status already granted could be withdrawn in certain circumstances including if the individual obtained the nationality of a third country, or if he was granted refugee status by another country.

However, *detaining asylum applicants for illegal entry and omitted registry of asylum application* is not so rare in Bulgaria.[10] Asylum seekers face unfair treatment at the immigration detention centre; they are treated as undocumented immigrants, so they are penalised and deported for violating Art. 31 and 33 of the Geneva Convention. For instance, a 16-year-old unaccompanied boy from Kosovo has been detained at the immigration detention centre in Sofia since May 2007, held under the same regime as adults. A journalist visited him twice (the second time on 14 September), and supported his first and second submission of asylum application, but in vain. There was a deportation order against him, a product of an impossible circumstance in which the boy was kept unaware of appeal deadlines and the content of the order itself. (Potential) applicants from Afghanistan, Iran, and Iraq entering Bulgaria from Turkey face the same treatment. Although the Bulgarian Penal Code exempts refugees from persecution for illegal entry, and Bulgaria has transposed the Directives regarding asylum seekers, under which minors must automatically be released from detention, the practice is far from the regulation. In Bulgaria there is no limit on the time between the submission of an asylum application and its registration, resulting in tremendous hardship for asylum seekers, given the discretionary power given to officials regarding the time taken to register an asylum application. With exception of legally entered persons, all others are detained for months until their applications are registered—if indeed they are at all.

The most dangerous consequence for asylum seekers is the risk of *deportation, and their embassies are requested to co-operate* in facilitating their return. Deportation orders are usually issued with a ruling for their immediate execution, thus appeal has no suspensive effect unless the asylum application is registered. The state agency for refugees may arrive at the detention centre to register and interview an asylum applicant only to find that s/he has already been deported as an illegal immigrant. Others, with exception of vulnerable persons (see the Directive on reception conditions), face unlimited detention. Even tortured asylum seekers are kept in detention. Such was the case of a male from Chechnya, who also submitted two written applications, in October 2006 and in May 2007; following this, he was placed in solitary confinement, in an isolation cell. Thus he was tortured first in Russia and again in Bulgaria.

UNHCR has signed an agreement with the Slovak Aliens and Border Police and the Bratislava-based Human Rights League for *monitoring activities* along Slovakia's land borders and at its airports.[11] The main purpose of the monitoring, which will be carried out through regular missions funded by UNHCR, is to ensure that asylum seekers have *access to EU territory and to asylum procedures.* The agreement, signed on 5 September 2007, formalizes the cooperation, roles and responsibilities as well as the working methodologies of the parties involved.

A similar agreement was signed with Hungary in late 2006 and negotiations are also currently under way with Slovenia and Poland for a similar arrangement. These arrangements represent an important element of UNHCR's activities under the recently announced Ten Point Plan of Action for Eastern and South Eastern borders of EU. The countries which make up the *EU's eastern frontier—Poland, Slovakia, Hungary and Slovenia—face significant irregular migration*, often facilitated by smuggling and trafficking networks. While the region has traditionally served as a area of transit, certain countries are increasingly becoming destinations for both migrants and asylum seekers. Monitoring of the eastern EU border, stretching over 2,610 kilometres, is one of the core activities of UNHCR in the region.

With the mix of migrants and asylum seekers, as well as the criminal elements involved in the profitable human-smuggling racket, law enforcement bodies tend *to focus on stopping illegal migration rather than assisting asylum seekers*. The new agreements, as well as those in preparation, are designed to ensure that asylum seekers receive the help and protection they are entitled to under international law.

The most likely reason for the increase in new asylum-seeking arrivals is Poland's *accession to the Schengen Area on* 21 December 2007, and fears that it will lead to stricter border controls. There have been intentionally spreading rumours among potential asylum seekers that their access to Polish territory would be hampered after the enlargement of Schengen regime, thus encouraging more people to go to Poland before it. In addition, some asylum seekers erroneously hoped that, once in Poland, they would be able to move freely throughout the Schengen Zone. Many asylum seekers are resorting to smuggling networks because of increasing restrictions on borders. According to UNHCR information some of them pay up to €7000 to be smuggled into the EU territory.[12] This increase is leading to an *overcrowding of reception facilities* in Poland. There are currently over 5,300 people staying in 20 separate reception facilities, as compared to 3,550 people in 17 reception facilities a year ago.[13] The current influx has forced the Polish Government to increase the number of reception facilities in order to accommodate all the new arrivals.

The other barrier in obtaining international legal protection is inadequate data bases on countries of origin. A reliable, accurate, transparent and financially sustainable country of origin information (COI) system is critical for the fairness and effectiveness of refugee status determination. Although there is some improvement in refugee status determination in CEE countries, the roundtables organised by the UNHCR have required further development in this region. For instance, in Hungary the immigration authority (OIN) has its own COI unit, and the Metropolitan Court has its own COI expert, while the Hungarian Helsinki Committee as legal representative of the applicants has its own COI expert and trainer. However, the main weakness is the lack of financial support for the establishment of a real COI unit with at least one full-time researcher and a clear profile of activities. This NGO is a leading member of the Europe-wide COI network (headed by ACCORD) and thus is committed to promoting substantive COI quality standards as elaborated by the network (relevance, reliability, balance, accuracy and transparency). For this reason, the following steps were proposed:[14]

– stronger co-operation in training, capacity building and structural, substantial issues is necessary between this network, the Country of Return Information project, and the consultants for UNHCR, ECRE, and others.;

– a unified COI in each country should be available for all stakeholders (including for example Border Guards, Courts, refugee authority), which should be intranet-based and led by an independent professional institute or outside the OIN would be established;

– funds should be allocated for external translation services, thus enabling professional COI researchers to focus more effectively on research and documentation tasks requiring their specific skills, and decreasing the currently very high proportion of work time spent on translation;

– COI researchers should, as a minimum requirement, have high-level English reading and comprehension skills;

– COI research should be independent from political interference and policy considerations. The personal autonomy of researchers is essential;

– users of the COI are free to interpret data and information to suit their needs but this should not influence the content or quality of COI reports and query responses.

CONCERNS IN RECEPTION AND INTEGRATION CONDITIONS

Changing rules on entry and residence for third country nationals are not always translated into efforts in capacity building, including proceedings and accommodation of applicants. For instance, Bulgaria has become much tougher in the past few months in processing the asylum claims of Iraqis, despite no apparent change in the overall profile of the arrivals, the UNHCR warned recently.[15] In 2007, 533 Iraqis sought asylum in Bulgaria and more than 90 percent of them were granted protection, either full refugee status or humanitarian status to almost every Iraqi who asked for asylum after arriving, usually from Turkey. But figures released by an independent human rights organization indicate that between December 2007 and March 2008, Bulgarian immigration officials rejected 41 Iraqi asylum claims and granted refugee status to just two applicants and humanitarian status to 60. Many of the cases were under appeal, although the Government in Sofia had informed the UNHCR that it had simply become more rigorous in assessing claims and making status rulings. "But UNHCR is worried at the apparent change of policy, which the agency believes is not justified by any change of profile of the new arrivals," it said in a news release. "Most Iraqi asylum-seekers continue to be single males, but a growing number of families and single mothers with children are also looking for protection in Bulgaria." Before their first asylum applications were rejected in December 2007, Bulgarian authorities had expressed concern that the Iraqis were placing pressure on the country's limited *accommodation capacity*. Catherine Hamon Sharpe, UNHCR representative in Bulgaria, said the capacity problems have to be resolved in other ways. "The individual's need for protection is the only legitimate reason for granting or denying refugee status." Only 533 Iraqis sought asylum in Bulgaria in 2007, compared to about 5,500 in neighbouring Greece and 3,500 in Turkey. Meanwhile, the UNHCR has issued a position document advising member states' governments to refrain from returning asylum-seekers to Greece until further notice because the country does not have "*essential procedural safeguards*" throughout the refugee status determination process, despite recent efforts by authorities to improve their actions. As a result, asylum-seekers often lack the most basic entitlements, such as interpreters and legal aid to ensure that their claims receive adequate scrutiny from the asylum authorities. Moreover, reception conditions in Greece also continue to fall short of both European and wider international standards, and UNHCR has called on the Greek government to review its procedures and practices.

This change in Bulgaria government policy contributes to blocking land access to Europe for Iraqis fleeing violence. Iraqis held at the temporary detention centre for illegal aliens at Busmantsi, near the capital, Sofia, staged a protest by barricading themselves in one of the corridors of the building and setting a mattress on fire.[16] The six persons in question had been in the detention centre for several weeks. According to the UNHCR representative in Bulgaria, the Iraqis had intended to apply for asylum, but later changed their minds and asked to go back to Iraq, „most likely because they knew there was a greater risk not to be granted status." They were supposed to leave for Iraq on the following day by flying first to Hungary and then Syria. The Bulgarian state said it could not afford to pay for their journey, so the Iraqis paid for the plane tickets themselves. They had valid entry visas for Syria, but the Hungarian government denied them access, which meant that the trip had to be postponed and another route chosen. Until their situation is clarified, the six are stuck in the detention centre.

The condition of the six Iraqis at Busmantsi highlights a change in the attitude of Bulgarian authorities towards Iraqi refugees. Between December 2007 and March 2008, 41 applications from Iraqis were rejected. Since the beginning of December, only 2 Iraqis were given refugee status, 60 others received humanitarian status. In 2008, only 9 Iraqis have so far crossed into Bulgaria and asked for asylum at the border. This seems to be a consequence of the fact that people have learnt about the shift of attitude in Sofia, and are no longer willing to risk coming to this country. Together with Greece—where acceptance rates for asylum seekers are below one percent—Bulgaria is one of the two European Union countries bordering Turkey, making it a natural entry point for Iraqis travelling by land in search for refuge in Europe. In response to the concerns expressed by UNHCR, Bulgarian authorities claim that they have merely become more rigorous in assessing applications and making status determination rulings. „*We are looking more realistically at cases and we have refused a number of asylum claims*," said Todor Zhivkov, director of the Reception Centre for Refugees in Sofia.

According to the UNHCR the most likely reason for the increased *refusal rate* is that there is not enough capacity in Bulgaria to host the asylum seekers. Otherwise, the profile of the applicants has not changed since 2007 in such a way as to justify

the increased rejection rate. Since 1993, 16,602 people have sought refuge in Bulgaria. The largest inflow of asylum seekers came in 2002, when Bulgarian authorities dealt with 2,888 applications, most of them from Afghans. After 2002, application numbers dropped, only to increase slightly again between 2006 and 2007, from 639 to 975—this time on account of the larger number of Iraqis looking for protection. Acceptance rates have usually been good, with around 5,500 people being granted refugee or humanitarian status since 1993. Bulgaria currently has two main reception centres for refugees, one in Sofia with a capacity of 400 and one in the village of Banya which can hold 70 people. The detention centre at Busmantsi can host around 300. Technically, once a person has filed an asylum claim, they should be moved from the detention centre to the reception points, where they have freedom of movement and better conditions. But lately, more and more asylum applicants have been held at Busmantsi. Implementing the Dublin II Regulation, the Bulgarian government passed an ordinance which allows asylum-seekers to be transferred and kept at Busmantsi, although this practice violates asylum law.

The UNHCR Representative said that although the authorities in Sofia have adopted the necessary legislation for the protection of asylum seekers, implementation remains deficient. Bulgarian authorities further argue that the current situation in Iraq permits people from the conflict zones *to seek refuge in the more stable northern regions of Iraq*. But, according to Linda Awanis, Chairperson of the Council for Refugee Women in Bulgaria, in order for Iraqis in the south to move to the Kurdish areas, they need a resident from the north to stand guarantee for them, as well as to specify the length of their stay, conditions difficult to meet. Awanis, an Iraqi refugee herself, acts as an informal link between people in the detention and reception centres and the outside world. Iraqis who arrive in Bulgaria pass to one another her telephone number and call her from the centres when they need medicines, milk for babies, clothes, even sanitary pads. Because the Bulgarian authorities often lack the money to provide basic care, Awanis searches for private donors. Most newly arrived Iraqis say that although there are good jobs in their country, the moment you get out of the house to go to work, your life is in danger. One of the Iraqis granted refugee status in Bulgaria was a young woman who used to be a teacher of Arabic and a layout designer for newspapers. „She came here after she had been kidnapped and beaten by groups—we don't even know which groups—and her family had to pay a ransom for her," Awanis commented. In Bulgaria, refugees who *complete a one-year programme of integration, learning Bulgarian and getting vocational training,* usually end up working in construction (the men) and as sales clerks or hairdressers (the women). But Awanis says Iraqis are happy in Bulgaria because there is peace here, unlike in Iraq.[17]

„It is not the children that give us problems, but rules and regulations," said Jolanta Tyburcy, pedagogical director of a Warsaw primary school where 10 percent of the students are the children of Chechen asylum seekers. Under Polish law, all children aged from six to 18 must attend school. But according to asylum legislation, *children have to pass a Polish language test before they can be admitted to school.* Principals and staff of refugee reception centres are working together to find a compromise solution. Edita Gluchowska, who teaches Polish to new arrivals at the Ciolka Street reception centre in Warsaw, says young asylum seekers and refugees are „*integration champions*" because they mix and pick up languages much faster than their elders. But she believes courses at the reception centres are not enough. „Children should start school as soon as possible to learn the language with Polish children," said Gluchowska, who works with school principals to ensure that courses offered at her centre are in line with the Polish curriculum.

Despite such efforts, a UNHCR survey in 2006 found that up to 50 percent of child asylum seekers in Poland were not attending courses in the reception centres, let alone state schools.[18] Some could not speak any Polish; others were offered places in classes below their age group and given little encouragement to attend, while others again were hampered by lack of transport facilities. Things have improved since the report came out, however. Jan Wegrzyn, head of the Repatriation and Aliens agency, told UNHCR that 90 percent of children in the reception centres would be enrolled in state schools this month.

In Hungary, the problems faced by young asylum seekers and refugees are more financial than linguistic. „*Schoolbooks, stationery, school uniforms and sports kits cost as much as my husband earns in a whole month*", said Yasmen, a mother of three who was otherwise very happy with the quality of education. „The kids are happy in school and they already speak good Hungarian," the refugee said. Refugees and asylum seekers are entitled to a free education, but the state assistance mechanism is not yet in place and so UNHCR has agreed to cover the education expenses of 71 refugees and asylum seekers—including Yasmen's children—during the

current school year. The government is also facing a new problem—stricter application of regulations, aimed at stopping asylum seekers from moving from one member nation of the European Union (EU) to another, mean *there is now more demand for places in secondary schools in countries of first asylum* like Hungary. Again, UNHCR has helped out by paying for 15 teenagers to study at the Dob utca school in Budapest. Under the pilot project, the youngsters will study a curriculum developed for foreign pupils. But Hungary will have to adapt its education system in 2008 to handle more asylum seekers and refugees in the future.

Language is also an education issue in Slovakia, where young asylum seekers and refugees must attend *a six-month course in the Slovak language*. Reception centres provide learning assistance and schools offer additional, EU-funded lectures. But Amra Saracevic, a social worker at the government's migration office, said she knew from personal experience that one of the most difficult things the young foreigners had to deal with in Slovak schools was the curiosity of the local kids. „When I first came to my new class as a refugee child, I felt like an animal in the zoo. Everybody was looking at me, everybody wanted to know about me and my history," recalled Saracevic, a former refugee from Bosnia. She agreed that it was children who played a major role in helping families get settled. „Children pick up language very fast, and they become the first members of the refugee family to be well integrated."

Srđan Šajn, the leader of the Roma Party in Serbia predicted in August 2007 that about 50,000 Roma would be forced to return to Serbia from various European states. Some of them tried to submit asylum application in Romania but in vain. Emil Stan belongs to the first group of Roma applying for refugee recognition in Romania in June 2007. He submitted his application because life was unbearable in Serbia. In fact he was repatriated from Germany, in spite of the fact he had been living and working there for 14 years. His application was refused by the Romanian authorities as was his request to travel to a third country. Stan intended to return to Germany because his family were still there. According to the party leader at least a hundred Roma persons have fled Serbia due to economic hardship. In the early 90s the Roma who had emigrated were sent back from Germany and despite the *agreement on readmission* the government did nothing for their *reintegration*. Želimir Žilnik, the well-known Serbian movie director, shot a documentary film on the tragedy of the returnees in Serbia in 2003 ("Kenedi's Return").[19] Serbian NGOs also have confirmed the forced return from Germany to Kosovo, Serbia and Montenegro and absence of re-integration assistance of returnees nowadays.

Due to new legislation which effectively came into force in 2001, Malta has established and began slowly to implement its own status determination provisions and 'infrastructure', in line with the principles of the 1951 Convention.[20] Immediately afterwards, within the first 12 months, asylum claims from illegal migrant arrivals soared from about 50 to nearly 2000. These migrants, who hailed mainly from sub-Saharan Africa, started arriving in boats, almost invariably via Libya. They landed on Maltese shores for the most part undocumented, having either lost their travel or other identity documents or been dispossessed of themby human traffickers operating mainly from Libya. In an archipelago of 246 sq km with a resident population of 400,000, between 2002 and 2007 there were over 7,000 such arrivals, if one excludes the many other asylum-seekers who typically arrived by air on tourist visas, or were given tourist visas upon arrival at Malta International Airport by the Maltese police, and then filed their applications soon afterwards. In December 2001 the Ministry of Justice and Home Affairs proudly showed an EU delegation and others around a brand new reception centre at Hal Far which would accomodate comfortably some 120 inmates (nearly three times the figure of arrivals in the previous year). Within weeks such accomodation had become grotesquely insufficient. In addition, the government quickly had to resort to former army barracks, schools, private or religious houses, even the Police HQ itself, and somehow transform these into reception and/or detention centres. In 2006 the total capacity of closed centres in which applicants can be kept up 18 months was 1600.[21] The maximum capacity of these centres was for 1,200 persons but in an emergency, Detention Services have managed to accomodate up to 1,600 (for example in 2005, so far the record year of arrivals by boat). The open centres had up to 1,360 available places in 2006.[22]

Taking into account the *EU contributions,[23] some improvement (in detention but not reception centres)* happened in 2007. As of the winter of 2007, the number of asylum-seekers in detention was 1,700—and to prevent further problems asylum-seekers are no longer being kept at the Police HQ in Floriana any more because of inadequate treatment. Lyster, Ta' Kandja and Hal Safi barracks are still in use as 'closed centres'. The original Hal Far centre, which can host 120 persons, has been refurbished with EU funds. A new detention centre has been nearly com-

pleted at Ta' Kandja, which is due to be ready by the end of December 2007, and will house 400-500 inmates. Moreover, according to an official government report, since 2005 a new detention centre for 224 immigrants has been built, while various buildings in detention centres have been improved. Only some €84,000 had been spent on the setting up of a medical service, apart from what was already being provided by the health services free of charge, so that 400 patients could be examined per week. The provision of meals had been outsourced, and 100 casual detention officers were employed to assist soldiers and the police in keeping order at the centres. A preliminary information sheet listing the rights of the immigrants in English, Arabic and French began to be distributed by the Ministry but in future it is to be available in Amharic, Tigrean, Turkish, and Somali as well. EU assistance was also used to upgrade the Marsa open centre. If we include the over 1,700 individuals in detention, this would bring the total of immigrants who have sought asylum in Malta, including those who failed to obtain any kind of status, to over 3,800 in centres alone as of the end of 2007.

Malta set up an Organisation for the Integration and Welfare of Asylum Seekers (OIWAS), under the auspices of the Ministry for the Family and Social Solidarity, which started functioning in February 2007. Its mission statement, which has started to be implemented, refers to staff recruitment, institutional identity, procedures, networking, coordination of the open centre network, standardizing procedures, service agreements, identification of new centres, data collection and trends, customer care, professional teams for vulnerable groups, a project in closed centres, networking with international agencies and NGOs, fullest possible use of EU funds and addressing long-term residence in Malta. Since January 2007, the free provision of foodwas stopped and was replaced by an allowance ranging from Lm 1.25 to Lm 2 per day depending on status. Residents at the smaller centres were obliged to sign in at set times to ensure that those receiving benefits were entitled to them. In September 2007, this new measure was extended to the residents of the larger open centres at Marsa and Hal Far. Those who failed to sign in, presumably because they had a job, would have to pay Lm3.50 a week for a bed at an open centre. In addition, the EU provided to Malta €310,000 to carry out a pilot project aimed at upgrading reception facilities. In October 2007, in response to earlier recommendations, the Ministry for Justice and Home Affairs set up a Detention Centres Board to monitor goings-on, including the occasional accusation of maltreatment.

Summing up, despite EU financial contributions, reception conditions and accession to asylum procedure will not be necessarily improved, even though detention centres and return projects are upgraded. On the other side, all reception and integration efforts and improvements in Malta cannot compensate if the burden sharing system (resettlement, family unification by other member states) and voluntary repatriation remains so limited.

WHAT CAN BE SEEN FROM THE STATISTICS ON ASYLUM SEEKERS AND REFUGEES?

In 2006, a total of 9,900 new asylum seekers were registered in Hungary, Poland, Slovakia and Slovenia, compared with 14,600 in 2005 and 22,100 in 2004. Since July 2007, Poland has seen a sharp increase in the number of asylum seekers, particularly Chechen and Ingush from the Russian Federation. In the first 11 months of 2007, there were 4,931 new applications for asylum in Poland, of which 3,555, or roughly 70 percent, were lodged in the second half of the year. While the monthly average of new applications during the first half of the year was 250, figures increased to 335 in July, reaching 1,148 in November 2007.[24] The figures for 'boat people' is oscillating in Malta (1,686 in 2002, 502 in 2003, 1,388 in 2004, 1,822 in 2005, 1,780 in 2006 and, so far, 1,698 in 2007).[25]

However, these absolute figures are not easily to compare to one another. In July 2007 the new regulation on migration and international protection statistics entered into force in the EU.[26] It requires the member states to provide the European Commission (Eurostat) with a standardized and comparable set of asylum data. This dataset includes all relevant statistics on asylum procedure (on asylum claims, decisions, pending cases, sex and age proportion of applicants). However this regulation has no retroactive effect, thus comparable data for the previous period are not available. In addition, it does not address the issue of repetitive and re-opened cases. According to the Eurodac Central Unit,[27] the verification of asylum claims in 2005 and 2006 proved that in both years, 17 percent of all asylum claims were multiple, i.e. submitted in more than one member state of the EU. For these reasons, since 2004 neither comparable nor clean statistics have been available.

Mainly due to the sharp increase in Iraqi and Russian asylum-seekers, Europe received 13% more claims in 2007 than the previous year. In the 27 member states of the EU, the rate of increase was

Table 1: Asylum applications (1st instance according to UNHCR data)

Country	*2003*	*2004*	*2005*	*2006*	*2007*	*Last change*
EU15	*309 340*	*241 000*	*212 690*	*180 960*	*197 450*	*+9%*
EU12	*39 980*	*40 550*	*28 260*	*20 040*	*25 460*	*+27%*
Bulgaria	1 550	1 130	820	640	980	+53%
Cyprus	4 410	9 860	7 750	4 550	6 790	+49%
Czech Republic	11 400	5 460	4 160	3 020	1 880	–38%
Estonia	10	10	10	10	10	0%
Hungary	2 400	1 600	1 610	2 120	3 420	+61%
Latvia	10	10	20	10	30	+200%
Lithuania	180	170	120	140	120	–14%
Malta	570	1 000	1 170	1 270	1 380	+9%
Poland	6 910	8 080	6 860	4 430	7 120	+61%
Romania	1 080	660	590	460	660	+43%
Slovakia	10 360	11 400	3 550	2 870	2 640	–8%
Slovenia	1 100	1 170	1 600	520	430	–17%

11% in comparison with 2006. The 12 new member states recorded 27% increase in 2007 while the 15 old member states registered a 9% rise.[28] Looking at aggregating statistics, there was a significant increase in Poland (+61%), which means about 3,000 persons, while in 2007Hungary (+61%), Bulgaria (+53%), Cyprus (+49%), Romania (+43%) and Malta (+9%) the rise in absolute figures remained lower than that.

The eastern and southern edges of the EU play a more significant role in receiving applicants but while the general trends of dropping applications in 2005-2007 followed the direction of the EU15, there is a great dispersion in recognition rate among the new member states. There are different reasons and explanations between the new member states for this, however.

The number of immigrants living and working in the Czech Republic is growing, according to a report on migration for last year discussed by the National Security Council in early 2008.[30] More than 392,000 foreigners were staying legally in the Czech Republic by the end of 2007, which is 22 percent more than in 2006. It is the greatest year-on-year increase since the establishment of the Czech Republic in 1993, the report says. Ukrainians make up the largest group of foreigners with residence permits, followed by Slovaks, Vietnamese, Poles and Russians. According to the document, more than 126,000 Ukrainians, almost 68,000 Slovaks and 50,000 Vietnamese were living in the Czech Republic in 2007. More than 204,000 of the total number of foreigners staying in the country were working legally in 2007. More than 85,000 had a valid work permit and some 144,000 foreigners do not need a work permit since they came from EU countries or Switzerland, the report says.

The remaining approximately 10,000 foreigners were a special group that has no obligation to possess a work permit. Traditionally, Slovaks were the largest group on the Czech labour market - more than 101,000 Slovaks were working in the Czech Republic last year. Of the total 68,000 foreign businessmen, Vietnamese made up the largest group (24,000), followed by Ukrainians (some 22,000). More than 85,000 foreigners held business licences last year. Czech embassies abroad also registered a growing number of visa applications last year - more than 700,000. Over 653,000 visas were granted, which is 32,000 more than the previous year. The largest number of visa applications was received

Table 2: Recognition rate including refugees and status for humanitarian grounds, and refugee population[29]

Country	*Recognition rate in 2005*	*2006*	*2007*	*Refugees in 2005-2006*	*2007*
Bulgaria	11,6%	14,8%	34,3%	4 413	4 504
Hungary	12,5%	9,4%	7,3%	8 046	8 075
Poland	31,9%	55,7%	30,0%	4 604	6 790
Romania	11,4%	13,2%	24,2%	2 056	1 658
Slovakia	0,7%	0,3%	3,6%	368	248
Slovenia	1,6%	1,7%	2,1%	251	254

from the citizens of Russia and Ukraine. The number of foreigners staying illegally in the Czech Republic decreased last year compared to the previous year from 7,100 to 4,700. In total, Czech police uncovered 8,000 people who tried to illegally cross the Czech border which is 3,392 fewer than in 2006. Ukrainians traditionally make up the largest group of illegal migrants who violated the foreigner stay regime, though their number has decreased compared to the previous year.

While the number of immigrant workers is on the increase, in 2007, only 1,878 foreigners asked for asylum in the Czech Republic, compared to 3,016 in 2006. This is a 38 percent decrease—while other migrant groups are growing. In 2007 the Interior Ministry granted protection to foreigners in 382 cases, the largest number in the Czech Republic's history. Asylum was granted to 191 people, mainly citizens of Belarus and Russia. Moreover, the total number of applications for asylum lodged in 2004 was 5,459, compared to 11 400 in 2003,[31] a *decrease of* 47%. This marked fall is partly due to changes in the national law after joining the EU, especially with respect to the Dublin Regulation (Directive 343/2003/EC) and partly a reflection of the general drop in the number of applicants in Europe.

Table 3: Asylum seekers by nationality in 2003-2004 in Czech Republic

Country	*In 2003*	*In 2004*	*Change in %*
Ukraine	2 043	1 600	–21.68
Russia	4 852	1 498	–69.13
Vietnam	566	385	–31.98
China	854	324	–62.06
Byelorussia	281	226	–19.57
Georgia	319	201	–36.99
Kyrgyzstan	80	138	+ 42.03
Slovakia	1 055	137	–87.01

Table 4: Applications by stages of procedure in 2003-2004 in Czech Republic

	2003	*2004*
Number applications decided	15 019	7 876
Decisions on merits	9 315	4 775
Asylum granted	208	140
Cases referred back on appeal	207	233
Obstacles to return/ tolerated stay	51	36*

* From Cuba, Republic of Belarus, Kazakhstan, Azerbaijan, Sri Lanka, Vietnam, Ukraine and stateless persons

Asylum seekers whose applications have been rejected after being substantively examined, are not subject to forced deportation. If they do not chose the option of voluntary repatriation, they have to leave the country within the validity of their exit visa, which is granted to them after the end of the asylum procedure for a period of up to 2 months. Some of these persons (it is not possible to estimate what percentage) leave the country and return to their country of origin or try to move to another EU country. The others stay illegally on the territory. If caught by the police, they are put in a detention facility for a period of up to 6 months. A decision is then made to remove them and they are deported to their country of origin. As of 1 May 2004, the Czech Republic began returning asylum seekers, in accordance with the Dublin Regulation, to the first EU country they entered. *Many Chechen asylum seekers have been returned to Poland, their first point of entry* into the EU.[32]

Special attention has been paid by the press to Chechen refugees, although the number of new applications for asylum dropped significantly during 2004. Another significant group of refugees to whom NGOs have been providing assistance are politically persecuted Byelorussians. In the first half of 2005, there was also an increase in the number of refugees from Kyrgyzstan caused by the political instability in that country. The policy in respect of Chechen refugees has become „softer" as refugees from Chechnya generally get more protection in the Czech Republic (asylum granted, tolerated stay) than was the case in previous years. One of the reasons for this could be a marked drop in the number of new applicants arriving from Chechnya. The policy towards Iraqis (as noticed by NGO workers) is to extend the duration of the asylum procedure for as long as possible. This means that they have not been given any decision on their application since the beginning of the Iraq crisis. They usually stay in the Czech Republic for several years and most of them continue with the status of asylum seeker, which is unlikely to change.[33]

Asylum seekers in Hungary have less chance in recent years of recognition and integration. Although the Act on Asylum adopted in 2007 conforms to the procedure in various ways, Act II of 2007 on Third Country Nationals' entry and residence creates numerous limitations on free movement. The number of applicants who are recognised refugees is decreasing, while the rate of illegal entry and non-European applicants is stable.

The case of Malta differs from that of the CEE countries. The vast majority of applicants are not in possession of a passport or an identity document, many claiming to have lost these or had them con-

fiscated *en route*. Of all the appeals received during 2006, 724 out of 732 had been undocumented; only 1% entered Malta legally. This shows a considerable increase on 2005, when 16% arrived legally were. The number of illegal entries would thus seem to be increasing. In 2006 with the exception of one-offs (Kyrgyzstan, Serbia, Senegal, Tunisia), the nationality profile of migrants seeking asylum in Malta has continued to be characterized by sub-Saharan Africans, mainly from East, Central and West Africa, travelling more or less by the same means and via the same land-and-sea routes. What is less clear is the percentage of those arriving by air, who arrange to stay on expired visas or otherwise, most of whom are from the Arab world, the Balkans, the Caucasus, South Asia or the Far East, including China. Most of these do not seem to apply for asylum, preferring other integration alternatives through networking, work permits or intermarriage.[35] In 2006, 93% of all appellants (678) came from Libya, a little more than in the previous year. A small percentage (falling from 12% in 2005 to 2% in 2006) flew in from Europe, North Africa or the Near East. For the rest, those not arriving by boat via Libya came from Turkey (3% in 2005), the Ivory Coast or Tunisia with isolated individual cases from Lebanon or Bulgaria. The majority of arrivals are aged between 18 and 35 years. Moreover, the great majority are males who are relatively young and single, thus Malta is increasingly under the stress of a growingly *disproportionate ratio between male and female residents*. In 2006 some 76% were illiterate or semi-literate compared to 68% the previous year. Some 10% in all had been to secondary school, high school, college or university. At first instance, Malta grants status or at least some kind of protection and assistance (including board and lodging in open centres) to well over 50% of applicants.

CONCLUSIONS

Since enlargement, rather than increasing homogeneity, there has been a growing tendency towards variations in the policy and practice of asylum among the member states of the EU. Two striking processes are at work: the hardening of soft law in the accession process due to the incorporation of non-binding third pillar instruments into the national laws of applicant states; and the sale of an outdated product to candidate states in the East through PHARE programmes to countries receiving far fewer claims and with less developed protection capacities. Exporting procedural tools and concepts of safe third country, safe country of origin, accelerated procedures for manifestly unfounded cases to (candidate and adjacent) states in which there is no properly developed judicial mechanism, civil society and social safety nets was the prelude of enlargement. The control-oriented standpoint of financial and expertise contribution is weakening access to protection, applicants' reception, family unity and integration.[36]

In addition to this, the new member states are on the periphery and therefore the most likely point of entry to EU territory, thus there is much opportunity to send applicants to another state (e.g. 7% of total applicants were multiple in 2004 according to Eurodac data) and therefore a disproportionate burden is detected, causing delays in the processing of asylum claims which in turn works against the equitable distribution of applicants. Due to speeded up harmonisation and transposition of directives, legislation on asylum, and migration, adequate time has not been provided for public debates on asylum policy or setting up data bases on countries of origin. Being forced to fight against illegal migration and terrorism has led to the appearance of another one-sided approach in the form of short-term tactics of law enforcement and public order, instead of

Table 5: Asylum seekers in Hungary 2002-2007[34]

Year	*Applicants*	*Arrival illegally*	*Arrival from Europe*	*Recognised persons*	*Nationality*
2002	6 412	89%	6,8%	104	Iraqi (46), Afghan (10) Serb (9), Iranian (3) Palestine (5)
2003	2 401	76%	27,4%	178	Iraqi (33), Afghan (28) Serb (19), Iranian (9) Palestine (2)
2004	1 600	71%	31,4%	149	Iraqi (13), Afghan (19) Serb (18), Iranian (20) Palestine (12)
2005	1 609	64,6%	36,3%	97	Iraqi (5), Afghan (7) Serb (7), Iranian (10) Palestine (1)
2006	2 117	72,3%	36,2%	99	Iraqi (15), Afghan (5) Serb (0), Iranian (6) Palestine (1)
1st half of 2007	1 205	80,6%	34,1%	54	Iraqi (18), Afghan (1) Serb (0), Iranian (2) Palestine (0)

establishing a comprehensive migration, labour, reception and integration policy. In the absence of effective burden sharing and human rights (asylum) monitoring system, the originally ad hoc solutions, such as subsidiary protection instead of refugee status, spontaneous integration, pilot projects on reception, irregular migration instead of supported family unification, have spread and stabilised. Although the number of applicants is steady, introduction of the minimal standards of the EU law means a tightening of previously existing more favourable legal or social protection rules in new member states. These new rigid asylum and refugee provisions are confirmed by results of public opinion polls (Eurobarometer) showing widespread ethnic discrimination in the form of growth of intolerance and refusal in Hungary (67%) or in Malta (69%), over the average level at the EU (62%).[37]

Translated by the author
Proofread by John Harbord

NOTES

1. Asylum law in the EU after the Amsterdam Treaty includes the following legal norms: Council Regulation 343/2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national; Council Regulation 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention; Council Directive 2003/9/EC laying down minimum standards for the reception of applicants for asylum in Member States; Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise needs international protection and the content of the protection granted; Council Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status; Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between the Member States in receiving such persons and bearing the consequences thereof.
2. New Asylum Laws Bringing Good and Bad News for Refugees, 6 September 2007, *UNHCR Regional Representation in Budapest.*
3. See Article 18 of Dir. 2005/85: (1) Member States shall not hold a person in detention for the sole reason that s/he is an applicant for asylum.
4. Act LXXXIII of 2007 on Asylum.
5. In accordance with the Directive, Article 5.
6. <http://www.migrace.ecn.cz>.
7. Legal and Practical Considerations Concerning Family Reunification and Visa Issues Affecting Refugees and Persons Authorised to Stay in Hungary. UNHCR Regional Representation in Hungary (28 October 2005) 1–19.
8. Judit Tóth, 'Towards a Joint Sweeper of Illegal Migrants' [2005] 19 Central European Political Science Review 89–98.
9. <http://www2.unog.ch/news2/documents/newsen/cat04019e.htm (18 May 2004)>.
10. Valeria Ilarev, 'Bulgaria's treatment of asylum seekers' (Law Faculty of Sofia University – FMR 29) 60–61 LCRI <http://www.lcri.hit.bg>.
11. 18 September 2007, UNHCR Briefing Notes.
12. <http://www.voanews.com/english/archive/2007>.
13. <http://www.un.org/apps/news/story.asp?NewsID=25147&Cr=asylum&Cr1>.
14. Round-table Discussion related to the Hungarian Country of Origin Information system. 12 December 2006. UNHCR Regional Representation for Hungary, Poland, Slovakia and Slovenia „The Way Forward".
15. <http://www.un.org/apps/news/story.asp?NewsID=26410&Cr=unhcr&Cr1=asylum> acessed 21 April 2008.
16. Bulgaria: Two Iraqis did make it. Claudia Ciobanu, Sofia (28 April 2008).
17. <http://ipsnews.net/news.asp?idnews=42149> accessed 22 April 2008.
18. <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4506bf184> accessed 22 April 2008.
19. It depicts fate of the Kenedi family: the German police came for them at night and they had ten minutes to pack and leave for the airport. They were flown to Beograd, leaving their appartment, working place and schooling in Germany. They were received by relatives living in a Roma settlement close to Novi Sad, Sangaj. Social assitance, support for reintegration was non-existent and the children had to face sub-European conditions in a poor settlement lacking electricity, water or sewers. Childern born in Germany had to attend local school without knowledge of the Serbian language. Beyond some civil organisations, nobody was interested in their despair and poverty. (Radio B92, Beograd, 16 December 2007).
20. Henry Frendo, *An updated inquiry into changing reception conditions for asylum seekers in the Maltese Islands* (University of Malta 2007).
21. In Hal Safi, Hal Far, Ta' Kandja and Police HQ in Floriana.

22. The Marsa (former) School. Indicated maximum: 500. Estimated users, including irregulars: 700. Hal Far (Appogg) Centre: Indicated maximum: 174. Registered (single persons and families with children with aseperate room to each family): 150. Estimated users, including squatters: 180. Hal Far (Tents) jointly run by Appogg and the Ministry for Family and Social Solidarity (MFSS), still being constructed and developed. Registered: 148 single males. Hal Far (Police): Registered: 40. Maximum: 115. In the process of being wound down as an 'open centre' to make way for detainees at Police HQ. Dar il-Qawsalla, Birkirkara: Maximum: 36. Registered: 39 families with children, including pregnant women. Hal Far (Peace Laboratory): Maximum: 30. Registered: 25 single males. Dar is-Sliem, Vincenzo Bugeja Foundation, Santa Venera: Maximum: 30. Registered: 14 unaccomapnied minors. Kummissjoni Emigranti, Valletta: Maximum: 320. Registered: 320. Full up. Residents housed in various areas coordinated by this Catholic NGO including religious houses (especially the Bon Pastur Sisters in Hal Balzan), private houses or apartments in Floriana, Gwardamangia, Msida, Valletta.
23. It was about €200,000.
24. Steep rise in number of asylum seekers as Poland joins Schengen Zone (21 December 2007) <http://soderkoping.org.ua/page16666.html>.
25. Frendo (n 20).
26. 862/2007 EC Regulation on migration statistics.
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Gyöngyvér Demény

INTEGRATION OF REFUGEES IN HUNGARY*

INTRODUCTION

The year 1989 saw the beginning of the development of legal norms in Hungary concerning the situation of refugees, including those norms that directly or indirectly can contribute to the integration of refugees, as well as the emergence of initiatives, both on the part of state actors and civil society, that aim to facilitate the integration of refugees. However, there is still no comprehensive governmental policy on the integration of refugees.[1] The paper aims to present the current situation concerning integration of refugees, thus revealing the need for a comprehensive policy that aims their integration. It also provides an account of those aspects that can be relevant in formulating such a policy. All these issues are going to be addressed by providing an overview on questions such as: How did legal norms that concern refugees, especially their integration develop? What is the role that different institutions and the host society play in the integration of refugees? What kinds of factors do influence the possibilities of integration of refugees?

As part of the transposition of the norms of European Union on asylum, the national legislation adopted a new law that came into force on 1 January 2008.[2] The harmonization of national legislation with European Union norms on asylum included adoption of norms conducive to the integration of refugees.[3] This represents an important step in this direction. At the same time, in addition to indispensable legal preconditions, there are other factors that determine the possibilities for the integration of refugees. The implementation of legal norms concerning the situation of refugees, the host society's attitude toward them, the difficulties of learning the host language and the employment possibilities available for refugees all play an important role in the process of integration. As we can see, integration of refugees is a complex process with economic, legal, social, educational and cultural aspects, and these different aspects are interrelated. Successful integration of refugees in one respect, for example on the labour market, can enhance their chances for integration in other respects, such as their economic and social integration. Integration is more difficult when the refugee comes from a culture that differs greatly from that of the host society. In such cases integration entails the refugees' re-socialization in many respects. The successful integration of refugees presumes their adaptation and accommodation to a new social environment, as well as a readiness on the part of the host society to accept them.

This paper explores legal, economic, social, educational and cultural aspects of the integration of refugees in Hungary by referring to various sources, such as statistical data on refugees, legal norms referring to the refugees' situation, studies concerning refugees and their integration, institutional activities and initiatives that aim to facilitate the integration of refugees and the host society's attitudes toward refugees.

REFUGEES IN HUNGARY

Immigration to Hungary started to increase from the late eighties and early nineties with the political changes that took place in Central and Eastern Europe. The first major waves of immigrants came from Romania[4] and from former Yugoslavia when the civil wars started there.

Only some of the refugees who arrived in Hungary and applied for asylum received recognized refugee status. Most entered the country illegally. From 1998 Hungary also started to provide protection to refugees arriving from non-European states, and in recent years more refugees have entered the country from non-European states than from European states.

Asylum seekers arrive in Hungary from various countries; in the last five years refugee status was granted in larger numbers to refugees from Iraq, Iran, Afghanistan, Serbia-Montenegro and Palestine.[8]

As regards the size of the refugee population in Hungary, there are only approximations; there is

* This paper is based on a presentation made at the 4th Training School of Challenge, 2007 Brussels, CEPS.

no exact data. According to UNHCR, at the beginning of 2006 there were 8046 refugees in Hungary and this number increased to 8075 by the end of the year. During that time only 47 refugees were naturalized.[9] Given that only a small proportion of refugees who arrive in Hungary are naturalized and many who receive recognized refugee status leave the country,[10] staying in Hungary is clearly a long term solution for only a fraction of refugees who enter the country. For many, Hungary is a transit country,[11] indeed, many left the country before decision was made on their asylum applications. A change in this situation was brought about by the application of the Dublin mechanism, which specifies that with certain exceptions that Member State of the European Union where the refugee first applied for asylum has to examine the asylum application,[12] thus limiting the possibility of a refugee being recognized in one Member State after having submitted a request for asylum in another Member State which s/he had then left.

THE LEGAL CONTEXT

Before 1989, with the exception of a provision on the right of asylum in the Hungarian Constitution, there were no legal regulations on protection of refugees in Hungary. In 1989 Hungary acceded to the Convention of 28 July 1951 relating to the Status of Refugees, and to the New York Protocol of 31 January 1967 that amended it, but with geographic limitation, assuming the obligation to provide protection only to refugees arriving from European states. UNHCR provided protection for refugees who arrived in Hungary from non-European states. Provisions referring to certain aspects of the protection of refugees gradually began to be included in different legal norms.[13] The adoption of an act on asylum by the Hungarian Parliament took place only in 1997. The Act CXXXIX of 1997 on Asylum came into force on 1 March 1998, lifting the geographical limitation with respect to asylum seekers arriving from non-European countries. Government Decrees[14] that implemented the act on asylum were also adopted. The scope of various legal norms was extended to recognized refugees and other categories of persons in need of international protection.[15] The act on asylum has since been amended several times. Various modifications were made to bring the legislation on asylum into line with the legal norms of the European Union, including the extension of temporary protection to those recognized by the EU Council as entitled to such protection, allowing asylum seekers in whose cases a decision was not taken within a year access to the labour market, and granting recognized refugees the right to vote in local elections and referenda.[16]

Table 1: Refugees in Hungary by year[5]

Year	*Number of registered refugees*	*Number of persons recognized as refugees*
1988	13173	-
1989	17448	35
1990	18283	2561
1991	53359	434
1992	16204	472
1993	5366	361
1994	3375	239
1995	5912	116
1996	1259	66
1997	2109	27
1998	7118	362
1999	11499	313
2000	7801	197
2001	9554	174
2002	6412	104
2003	2401	178
2004	1600	149
2005	1609	97
2006	2117	99
2007	3419	169

Table 2: Number of persons applying for asylum in Hungary by type of entry[6]

Year	*Way of entry in Hungary*	
	Legal	*Illegal*
2003	558	1843
2004	454	1146
2005	569	1040
2006	586	1531
2007	595	2824

Table 3: Number of persons applying for asylum in Hungary by place of origin[7]

Year	*Arriving from*	
	Europe	*Outside Europe*
2003	659	1742
2004	503	1097
2005	548	1025
2006	847	1270
2007	1162	2257

Although provisions on refugees and other persons in need of international protection have been introduced in various legal norms and the law on asylum amended, a coherent, extensive asylum policy is still lacking. On 25 June 2007 the Hungarian Parliament adopted a new law, the Act LXXX of 2007 on Asylum. This act implements the right to asylum set out in the Hungarian Constitution and transposes the EU norms on asylum into Hungarian law. According to this law, the right to asylum includes the right to stay on the territory of Hungary and protection against being returned and against expulsion and extradition.[17] In addition to the status of recognized refugees and temporarily protection, the act introduces a subsidiary protection status (complementary protection), which according to UNHCR "fills the regulatory gap which existed between refugee status under the 1951 Geneva Convention and the Status of Persons Authorised to Stay."[18]

Under the act on asylum that foreigner is recognized as a refugee who "due to persecution or the existence of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a specific social group or political opinion, resides outside of her/his country of origin and is unable or owing to the fear from persecution is unwilling to avail for herself/himself the protection of her/his country of origin."[19] On request, refugee status must be granted to family members of those refugees who were recognized by the refugee authority on the grounds of the above-mentioned specifications in accordance with the Geneva Convention criteria, and to the children born in Hungary of recognized refugees. The Minister responsible for aliens policing and refugee affairs may grant refugee status on the basis of humanitarian consideration and on the basis of UNHCR recognition.[20] Subsidiary protection[21] is granted if a foreigner "does not meet the requirements to be acknowledged as refugee but there is a risk that if s/he would return to his/her country of origin s/he would be exposed to serious harm, and s/he is unable or due to the fear from this danger unwilling to avail for herself/himself the protection of her/his country of origin."[22] On request, under certain conditions, subsidiary protection must be granted also to the family members of those to whom subsidiary protection was granted by the refugee authority on the grounds mentioned before.[23] On request, subsidiary protection must also be granted to children born in Hungary of persons who receive such protection.[24] Temporary protection[25] is granted to those foreigners who arrive to Hungary in mass influx and are recognized by the Council of the European Union or by the Hungarian Parliament as being entitled to temporary protection.[26]

The conditions that form the basis of granting subsidiary protection are reviewed periodically, at least every five years after recognition.[27] The term of temporary protection based on recognition by the Council of the European Union is one year, which may be extended by the Council.[28] The Hungarian Parliament grants temporary protection for a certain term or until a fact is established,[29] and it may extend the protection for a further period.[30] All this indicates that, for beneficiaries of subsidiary protection and of temporary protection as long-term solution, their return to their country of origin is considered if there is a change in the circumstances in their countries of origin such as might permit their return.

From the perspective of integration of refugees it is important what rights they have, and how they can exercise their rights. Recognized refugees are entitled to the same rights as Hungarian citizens with two exceptions: they have suffrage only at local elections, referenda and public initiatives and they may not have such jobs, responsibilities and may not hold such office that by law can only be held by Hungarian citizens. They are entitled to receive an identity card, a bilingual travel document and under certain conditions provisions, benefits and accommodation.[31] Those who receive subsidiary protection enjoy most of the rights that recognized refugees have. They are entitled to a travel document but they have no suffrage.[32] Beneficiaries of temporary protection are entitled to an identity document, travel document for a single exit and return, if they have no travel document from their country of origin; under certain conditions to provisions, benefits and accommodation; and to employment under the rules referring to foreigners.[33]

Without support it is difficult for refugees to start an independent life. For a certain period of time, refugees and beneficiaries of subsidiary protection are entitled to provisions, benefits and accommodation in order to be able to establish basic living conditions.[34] For recognized refugees and beneficiaries of subsidiary or temporary protection, pre-integration provisions and benefits are available that specifically aim to facilitate their social integration.[35]

The protections under the act on asylum are not granted to all those who apply for them. Many of those who do not receive protection under the act on asylum receive a temporary residence permit on humanitarian grounds that ensures them fewer rights comparing with those who receive protection under the act on asylum.

SUPPORTS AND BENEFITS

In Hungary the refugee authority and local governments provide different kinds of support and benefits for refugees and for persons authorized to stay (persons who receive a residence permit on humanitarian grounds). The principal aim of such aid is to support recognized refugees in their efforts to start an independent life and overcome the difficulties of integration. For example in 2006, refugees entitled to support for covering their housing and living expenses could request a one-time settlement allowance, regular living allowance, house rent subsidy and settlement subsidy. Other types of support available for refugees includes school-enrolment benefit for children with refugee status from elementary school until the completion of the secondary school, refunding the costs of health care, travel support and covering the cost of translation of official documents into Hungarian.[36] For recognized refugees other kinds of support were also available and for a longer period than for persons authorized to stay.

Following Hungary's accession to the European Union, grants can be provided from the European Refugee Fund in Hungary as well for projects that aim to facilitate the integration of refugees. The European Refugee Fund aims to support the *social and economic integration of refugees*.[37] In Hungary the Office of Immigration and Nationality has responsibility for and coordinates the implementation of measures and programs funded from the European Refugee Fund.[38]

Starting from 2004 the Office of Immigration and Nationality announced tenders for NGOs, refugee reception centres, community shelters and local governments in the area of integration of persons who receive international protection, addressing both those to whom international protection is granted and the host society. Tenders were announced offering funding for integration purposes,[39] covering various aspects of integration such as housing,[40] employment,[41] acquiring competency in the Hungarian language,[42] and education,[43] as well as social[44] and cultural aspects. The tenders also targeted the different strata of the host society, and both adults and children.[45] Tenders were also invited for projects aiming to inform the host society about the situation of refugees,[46] and facilitate dialogue between the host society and refugees. The organizations that received funding for their projects included NGOs, Refugee Reception Centres and language schools. The applicants had to meet 25% of the budget of the project from their own resources, European Union or state resources.[47]

INSTITUTIONAL ACTORS AND THE HOST SOCIETY'S ATTITUDES TOWARD REFUGEES

The Office of Immigration and Nationality, established in 2000, acts as a refugee authority.[48] It has a Refugee Affairs Directorate with three divisions: the Asylum Affairs Division, the Refugee Welfare and Integration Division and the Dublin Co-ordination Division. Other units of the Office of Immigration and Nationality that deal with refugee affairs are the Regional Directorates, Refugee Reception Centres and Community Shelters.[49] The Office of Immigration and Nationality coordinates the implementation of programs funded by the European Refugee Fund. These programs include initiatives aiming the integration of refugees and other persons who receive international protection. Refugee Reception Centres also have initiatives that facilitate the integration of refugees. The Office of Immigration and Nationality provides various kinds of support for refugees and informs them about the types of support they can request from local governments. Some of these different types of support specifically aim to facilitate the integration of refugees.

The European Union and the UNHCR have a decisive influence on national asylum policy. The immigration policy of the European Union stresses the importance of integration of immigrants, and in particular that of refugees. The European Commission has emphasised the need for a holistic approach to integration including dimensions such as integration to the labour market, education, language competency, housing, health, social and cultural integration, acquiring nationality, and civic citizenship.[50] The transposition of EU norms on asylum in the national legislation has introduced into the national law norms that contribute to the facilitation of integration of refugees. Through the European Refugee Fund, the European Union supports the integration of refugees with financial instruments.

UNHCR set up its office in Hungary in 1989. Until 1998, when Hungary lifted the geographic reservation made to the Geneva Convention, UNHCR had dealt with the protection of refugees arriving from non-European states. Currently the Office of UNHCR in Hungary is the Regional Representation of UNHCR, which works in Hungary, Poland, Slovenia and Slovakia. Refugees arriving in Hungary may already turn to the Hungarian office of UNHCR while their asylum application is in process. The UNHCR emphasises the importance of integrating refugees. According to UNHCR's Executive Committee, "integration into their host societies is

the principal durable solution for refugees in the industrialized world."51 This approach is manifested in various activities of UNHCR, including activities such as support provided to programs that aim to enhance the acceptance of refugees and facilitate their integration, consultations in process of drafting laws that concern refugees, formulation of opinions, and recommendations to states for facilitating integration of refugees. According to UNHCR, in contrast to other migrants, recognized refugees, due to the specific situation they are in, need a specific approach in various fields. These include residence status and naturalization, addressing the consequences of trauma, administrative support, recognition of qualifications, work, and ensuring the unity of the family.[52]

Other institutional actors such as NGOs,[53] international organizations, and churches also have programs and activities to facilitate the integration of refugees. Such activities include among others providing legal aid to asylum seekers and refugees, providing support for their integration to the labour market and their social integration, and conducting studies on the different aspects of integration of refugees.

Whether refugees succeed or not in integrating in the host society depends not only on them, and their adaptation to a new environment but also on the host society, on whether they are accepted or not by its members, on the attitudes of the local community toward refugees. Research results on attitudes toward refugees indicate that a relatively high proportion of the Hungarian population have xenophobic attitudes toward refugees; in February 2007, 27% of the adult population considered that asylum seekers should not be allowed to enter the country.[54] Personal relations between refugees and members of the host society can play an important role in the social integration of refugees. Such relations could facilitate the cultural integration of refugees and help them in learning the norms, values of the host society.

CONCLUSION

The possibilities for integration of refugees into Hungarian society are determined by various factors, such as their legally guaranteed rights, their possibilities to find jobs on the labour market, their educational level and language skills, and the attitudes of the host society's members toward refugees. Starting from 1989, provisions on the rights of refugees have been introduced gradually in the Hungarian legal norms. Acceding to the Geneva Convention, adoption of the law on asylum in 1997 and of the new law on asylum in 2007, as well as harmonization of legislation on asylum with EU norms were all important steps in the development of legal norms on asylum. However, experts in refugee affairs have pointed out the lack of a coherent governmental policy on integration of refugees.

The European Union norms and policy on asylum, the EU policy on integration of immigrants, and UNHCR's policy on asylum play a determinative role in respect of national legal norms on asylum in general, and specifically norms and rights that facilitate the integration of refugees.

The various aspects and dimensions of integration of refugees are interrelated. The existence of legal preconditions for the integration of refugees is indispensable. The development of legal norms in the direction of inclusion of provisions that can lead to the facilitation of integration of refugees can help refugees in their efforts to integrate. However, the successful integration of refugees very much depends on how these legal norms are implemented, on the social environment where refugees try to integrate, on possibilities for refugees to live independently, to find suitable jobs on the labour market, to have appropriate possibility for housing, and on other factors connected to specific circumstances.

Recognized refugees and beneficiaries of subsidiary protection are entitled to the most of the rights enjoyed by Hungarian citizens. However, in order to be able to exercise certain rights they need support, due to the fact that in many respects they are in a disadvantageous situation. For example, they may have economic difficulties, have to adapt to a completely new environment, and to learn a new language.

There are various initiatives and programs that aim to facilitate the integration of refugees both on the part of state institutions and of civil society. They support refugees for example in their efforts to integrate into the labour market, and in their social and cultural integration. Such programs, supports and benefits can constitute substantial help for refugees. However, it seems that these measures alone are often not enough for the successful integration of refugees. There are many reasons for this: benefits and support may be available only for a limited period of time, and successful integration depends on many other factors, such as the social, economic environment where the refugees try to integrate, the attitudes of the host community toward refugees, the very difficult situation in which refugees find themselves, and other reasons.

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Edit Soós – Zsuzsanna Fejes

HUNGARIAN EXPERIENCES OF CROSS-BORDER COOPERATION

INTRODUCTION

Borders are the 'scars of History'.[1] The wide range of problems and opportunities on both sides of borders in wider Europe makes cross-border cooperation indispensable. The border areas of the countries of Western Europe took the first steps towards organised cooperation already in the 1950s where the state borders did not correspond to natural linguistic, ethnic, cultural or economic communities. At first it was done spontaneously, with bottom-up cooperation systems evolving that lacking any formality. Later, principles and legal regulations influenced already functioning practice, mainly supported by the Council of Europe, the European Union and the Association of European Border Regions, then slowly evolving into appropriate institutional structures. This tendency was enhanced by regional policies in the Union, the beginning of the INTERREG program via which cooperation along the internal and external borders of the European Union was aided.

In Central and Eastern Europe, the process happened differently. The countries of the region had exceptionally closed borders with the West which, until the 1990s, were nearly impenetrable, therefore such cooperation was ruled out. With the opening of the borders, not only the chance of cooperation, but also effectively operating EU-schemata, as well as current legal norms and financial support became available. As a result, by the end of the 1990s, with the prospect of joining the EU, more and more systems of cross-border cooperation came about that really lacked any organised form or internal content. Beyond the drafting of noble purposes, they are only superficially similar to spontaneously evolving European structures; in terms of content they are empty, often inoperable, and their only purpose is to obtain financial support from the Union.

Cooperation across borders is a means of cohesion and regional policy of the European Union. The importance of cooperation systems across EU internal and external borders increased after the eastern enlargements in 2004 and 2007. In Europe, more than 40% of regions border other member states, being inhabited by more than one third of the population, which raises the importance of these areas in increasing the economic influence of the Union. The goal of the EU is to improve cooperation between communities across borders throughout Europe. In Hungary, by now cross-border cooperation systems have evolved everywhere, both as institutional and non-institutional forms of cooperation. Apart from the institutional forms (Euroregion, working communities, European Grouping of Territorial Cooperation — EGTC), in the case of cross-border cooperation systems, there are also short-term, temporary cooperation systems leading to the completion of isolated, separate projects. Among the non-institutional forms of cooperation, cultural and town-twinning relations and the cooperation of micro-regions and counties often draw on a common past that predates institutional Euroregional cooperation systems.

The institutionalisation of cross-border cooperation systems is evidently becoming necessary for the sake of more effective representation of interests, common measures and the more effective arrangement of support programs. Among the institutional forms, Euroregions, the most developed are specific spatial structures that attempt to overcome the divisions created by borders through institutional frameworks.

As a result of regional development reforms in Hungary and the neighbouring countries, more and more Euroregional formations have appeared along the border.. Attention is currently centred around Euroregions because they are the most effective forms of cross-border cooperation for areas that are geographically, historically, ecologically, ethnically and economically separated. They make it possible to reunite regions earlier belonging together, create areas of natural attraction, integrate border regions in a peripheral situation, and strengthen development and cooperation contacts in areas inhabited by Hungarian populations in varying ways and to varying extents. Nevertheless, the degree of institutionalisation of the Hungarian Euroregions is very low and they have widely varying forms. Therefore, the primary task of the present research is to identify the roles Euroregions play in the creation of economic, social and regional cohesion of border areas.

From the point of view of cross-border cooperation systems, regarding the territorial structure of Hungary and its neighbours, the basic problem is becoming clear: the cooperating organizations must build their relations within an extremely heterogeneous public administration environment. The different rule of law and public administration system of the cooperating countries, and their attitude towards the EU are the source of many difficulties.

This study will analyze how the *institutionalisation* of Euroregional strategic partnerships has been realised, based on questionnaire surveys and interviews with the leaders of Euroregions operating in Hungary. It aims to identify the roles played by the different economic, socio-cultural and political actors in the forms of cooperation that have evolved in the border regions of Hungary in the last two decades.

In our research,[2] we were looking for the answer to the question whether or not institutional conditions are available for the role of the Euroregions in the formation of Hungarian neighbourhood policy, and which of the levels of the Hungarian public administration is suitable for realising national political purposes within the changed frameworks of borders.

1. THE BASES OF PUBLIC LAW OF CROSS-BORDER COOPERATION SYSTEMS

The creation and development of cross-border cooperation systems started concurrently with the process of European Integration and the evolution of the regions. The successful decentralisation and regionalisation processes were necessarily followed by the growth of related institutions. This process in itself posed no threat to the currently operating system of central state administration, since the aim was not to create a new, independent level of administration, but to connect already existing levels of administration for the sake of social and economic cohesion.[3] At the same time, cross-border cooperation systems have a natural effect on state sovereignty, since certain state spheres of authority are the responsibility of regional levels. This challenge is solved in different ways by the legal and administrative systems of unitary and federal states, offering different chances to sign international contracts and set up and maintain common bodies and institutions.[4]

Hungary is a unitary state in whose administrative system there is no regional level having real power. Up to now no unitary social legal means existed that would be valid and appropriate for the whole of Europe and for defining the organizational structure of cross-border cooperation systems. Therefore, cooperation is influenced by bilateral agreements signed between states during the preparation of certain projects, depending on the political intention of the parties. The contribution of the regional levels in cross-border relations is determined by how much the central government broadens their competence in public law. In addition, it is not enough to base cooperation systems on private law when they concern public institutions and services for which the provision of a public legal entity is necessary.

As regards their legal status, the cooperation systems in which Hungary participates have no legal entity either within or across borders, therefore they do not constitute a separate, independent unit of public administration and cannot sign regional agreements of international public legal content. During their operation, the participating partners act according to the legal system of their own country. Consequently, the building-up and institutionalisation of cooperation systems are largely influenced by the differences of legal and administrative systems, bilateral or multilateral agreements signed by central governments, and the fact that the eastern and southern border areas of Hungary are presently the external borders of the EU.

1.1 International Regulations of Cooperation System

To understand cross-border cooperation it is necessary to be familiar with the *multilateral agreements* that came into force with the participation of several states, under the aegis of international organizations, within the frameworks of regional integration. These agreements drafted general principles that the signing states subsequently built into their legal systems. They contain conditions for interstate contracts and agreements signed between local authorities, but in themselves they do not constitute concrete contracts about cross-border cooperation.

Concrete cooperation demands further bilateral and trilateral agreements. Due to the different laws and degree of centralisation of the different states, and the presence or absence, or the character of framework conventions between them, the legal background of cooperation systems and the circle of competences and right of the participants to sign contracts vary considerably. This variation makes cooperation more difficult, especially for Hungary, which is situated in the centre of the Carpathian basin and borders seven countries (Austria, Slovenia, Croatia, Serbia, Romania, Ukraine, Slovakia).

In the activities of the Council of Europe, intergovernmental work in the field of local democracies and cooperation across borders plays an important role. The Council of Europe has played a significant part in dismantling barriers to regional and international cooperation as well as in strengthening cooperation across borders, with the aim of decentralisation. At European level, there is only one document that makes an attempt to create comprehensive regulation on cross-border cooperation systems, namely the Madrid Convention,[5] passed by the Council of Europe in 1980. The Convention must meet specific expectations, since it can be applied to the local and territorial[6] relations of the ratifying member states. Apart from respecting the sovereignty of member states having variable legal and political systems, it must also create frameworks of bilateral and multilateral agreements. The importance of the Convention is accentuated by the fact that the monetary program and other activities of the international community can be built on it. The Convention plays a compensatory role, in that it defines the concept of cooperation across borders and offers patterns and proposals for the member states to make the cooperation of regions and settlements across borders easier. The concrete forms of cooperation are derived from the internal legal regulation of each member state, therefore it only provides a legal framework that must be filled with specific content by the internal legislations of the ratifying member states.

Firstly, the Convention offers forms of cross-border cooperation that are adjusted to the needs of local and regional communities and are able to create an accessory legal basis for any agreement signed between them. Secondly, means of surveillance and checking that make permanent respect for the principle of state sovereignty possible are provided for the member states. The Convention sets out a range of model agreements to enable both local and regional authorities as well as States[7] to place cross-border cooperation in the context best suited to their needs.

The Convention increases the role of local self-governments and regions in creating relations across borders. Therefore, in the member states of the Convention, it is necessary to draft regulations compatible to the Convention that guarantee political power to regional communities and self-governments and provide suitable financial sources to create cross-border cooperation systems. For this reason, the Committee of Ministers pressures the central governments of the member states to transfer the necessary public legal power not only to local, but also to territorial units in order that they can actively contribute to the definition of political, social and economical units of Europe, to the creation of the 'Europe of border regions'.

Hungary signed the Convention on 6th April 1992, and it was announced together with the Act XXV of 1997. Nevertheless, the actual creation and operation of cooperation systems largely depends on the political attitude and legal system of the neighbouring countries. (see *Chart 1*)

Among the neighbouring countries, Serbia is an exception, where local governments and territorial autonomies are extremely undeveloped, and the absence of European norms can aggravate this situation. This can seriously reduce the chances of cross-border cooperation systems. Usually, there is a chance to sign agreements at local level in countries where the lower levels have a large degree of autonomy. Local and regional treaties make it possible for regional authorities to play a role in the cooperation of nationwide authorities. On the other hand, they authorise regional and local bodies to sign international treaties only under the surveillance of the national level. Consequently, here the state preserves its right of veto, as the exclusive possessor of competence on foreign affairs. There are two ways of overcoming veto: via working protocols, and by means of formal treaties where agreements at nationwide

Chart 1: Madrid Convention in Hungary and in the Neighbouring Countries

Hungary and its Neighbours	*Date of Signature*	*Ratification*	*Coming into Force*
Austria	21/5/1980	18/10/1982	19/1/1983
Croatia	7/5/1999	17/9/2003	18/12/2003
Hungary	6/4/1992	21/3/1994	*22/6/1994*
Romania	27/2/1996	16/7/2003	17/10/2003
Serbia	-	-	-
Slovakia	7/9/1998	1/2/2000	2/5/2000
Slovenia	28/1/1998	17/7/2003	18/10/2003
Ukraine	-	21/9/1993	22/12/1993

Source: Treaty Office on http://conventions.coe.int

level have created the chance for closer cooperation between the regional and local institutes. These cooperation systems are provided via agreements and treaties.[8]

The Convention only encourages the signing countries to aid, facilitate and support the cooperation initiatives of settlements and regions across borders, but does not yet acknowledge the right of self governments to sign agreements. To this end, the Convention has been modified several times, and two Additional Protocols[9] drafted. *The first Additional Protocol (1995),* which came into force in December 1998, deals with the institutions and bodies operating along common borders and acknowledges the right of territorial communities and authorities to establish cross-border cooperation organizations having legal authority, with the stipulation that they must respect the international commitments of the other parties.

„Each Contracting Party shall recognise and respect the right of territorial communities or authorities to conclude transfrontier cooperation agreements with territorial communities or authorities of other States in equivalent fields of responsibility, in accordance with the procedures laid down in their statutes, in conformity with national law" (Art. 2).

The states signing the Protocols undertake to acknowledge agreements at regional level as binding for the cooperating parties. Decisions taken jointly under a cross-border cooperation agreement must be implemented by territorial communities or authorities within their national legal system, in conformity with their national law. Decisions thus implemented will be regarded as having the same legal force and effects as measures taken by those communities or authorities under their national legal system.

From the following summary (see *Chart 2*) it can be seen that this causes problems to several neighbouring countries in meeting their agreements.

The *second Additional Protocol (1998)*[11] assists the interregional cooperation of territorial communities and authorities that have no common borders. Protocol No. 2 will act as a legal text to cover these new arrangements. It recognises the right of the authorities to make such agreements and sets out a legal framework for them to do so. It recognises the right of territorial communities or authorities within its jurisdiction to draw up, within common fields of responsibility, inter-territorial cooperation agreements in accordance with the procedures laid down in their statutes, in conformity with national law. These agreements have to take into account the international commitments of the signing parties.

For the sake of the functioning of local and regional democracy via international relations, the Professional Committee on Cross-border Cooperation of the Convention, at its session in September 2004, drafted a European convention proposal containing unitary regulations on the grouping of territorial cooperation (GTC)[12] across borders. It was to come into force as the third Additional Protocol of the Convention. According to the proposal, cross border grouping between regional self-governments (Euroregion) constitutes a legal entity,[13] and under certain conditions a grouping without a legal entity can also be established.[14] It depends on the resolution of the members whether they establish their grouping on a public or private law basis,[15] an option that may be favourable for Hungary. At the session of the Steering Committee of Local and Regional Democracy of the Council of Europe on 7-8th March 2006, the proposal was modified separately from the Madrid Convention, developing it further, turning it into a European convention proposal containing unitary regulations, with the nomination grouping of territorial cooperation (GTC).

Hungary did not join either of the Additional Protocols; the reason for this may be that there are no economically strong bodies in the country with appropriate public legal authorisation that could establish and maintain cooperation systems having a legal entity. The county as a territorial unit is only

Chart 2: Additional Protocol (1995)[10] in Hungary and Neighbouring Countries

Hungary and its Neighbours	*Date of Signature*	*Ratification*	*Coming into Force*
Austria	28/2/2001	17/3/2004	18/6/2004
Croatia	-	-	-
Hungary	-	-	-
Romania	5/5/1998	-	-
Serbia	-	-	-
Slovakia	7/9/1998	1/2/2000	2/5/2000
Slovenia	28/1/1998	17/9/2003	18/12/2003
Ukraine	1/7/2003	4/11/2004	5/2/2005

Source: Treaty Office on http://conventons.coe.int

Chart 3: European Charter of Self-government[19] in Hungary and Neighbouring Countries

Hungary and its Neighbours	*Date of Signature*	*Ratification*	*Coming into Force*
Austria	15/10/1985	23/9/1987	1/9/1988
Croatia	11/10/1997	11/10/1997	1/2/1998
Hungary	15/10/1989	6/9/1989	1/1/1990
Romania	4/10/1994	28/1/1998	1/5/1998
Serbia	24/6/2005	-	-
Slovakia	23/2/1999	1/2/2000	1/6/2000
Slovenia	11/10/1994	15/11/1996	1/3/1997
Ukraine	06/11/1996	11/9/1997	1/1/1998

Source: Treaty Office on http://conventions.coe.int

the political supporter of cross-border cooperation systems, but the real assignments are usually accomplished by labour organizations of a common legal character, associations and companies of public utility. The Hungarian ratification of the Additional Protocols would require the realisation of a regional reform under which regional self-governments having real political power would be established, self-governments that are capable of establishing cooperation systems functioning according to the necessary legal bases and European rules.

In the interests of cross-border cooperation systems, it is important to create a multi-level government in which local and regional (self-) governance plays a significant part in the arrangement of public affairs. The principle of subsidiarity[16] plays a specific role—due to the decentralisation of central assignments—in the division of power of states at local and regional level. The initiatives of the Council of Europe preceded those of the European Union in the field of regional policy and decentralisation. The Congress of Local and Regional Authorities[17] drafted the basic expectations towards the self-governments in two documents, the self-governmental minimum for the development of local and regional democracies. These two documents are the European Charter of Local Self-government (1985) and the European Charter of Regional Self-government.

The *European Charter of Local Self-government,*[18] connecting to the already existing text of the Madrid Convention, defines the constitutional and legal bases for the principles of government and arrangement of financial affairs that all democratically operating local governments have to abide by. The document defends the right of local communities to self-governance by acknowledging it, thus creating the bases of self-governance and local democracy.

The strengthening of local governments greatly contributes to the realisation of a decentralised Europe. Local authorities are the basic institutions for democratic governance, and the principle of participation is an important contribution to the sub-national government system of a bottom-up-built Europe, based on the principles of democracy and decentralisation of power. From the point of view of cooperation across borders, it is a very important article that defines the right of local governments to unite. Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest within the frameworks of the current legal regulations (Art.10). The right to unite is also extended to the international level. The article announces that „all states acknowledge the fact that the local governments have the right to become the member of international associations for the protection of their common interests. Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States." (Art. 10. (3.)

The process of drafting the European Charter of Regional Self-government, based on the pattern of the European Charter of Local Self-government, began in 1991. It belongs to the democratic principles of integration to acknowledge that regional self-governments having political power have the right to participate in the international activities of the state at any time, in the manner defined by the relevant national legislation, where their own legislating power and interests are concerned. In 1997, the Congress of Local and Regional Authorities passed the proposal of the European Charter of Regional Self-government, which may create a new situation for self-governance at territorial level throughout Europe. It drafts a system of criteria for establishing a regional self-government, and provides constitutional and legal frameworks for the rights of regional self-governments that are necessary to apply in the process of European development.

The Charter proposes basic regulation guaranteeing the political, administrative and financial inde-

pendence of self-governments. It mirrors the decentralisation process taking place in the second half of the 20th century, and it is as part of this decentralisation process that the delegation of political power to local governments, together with the transfer of power to regional self-governments, has been taking place since the 1970s. For the member states, it contains the democratic requirements that are indispensable to establish a legal regulation of sub-national level. It has a significance similar to that of the Charter of Local Self-government. This document also defines a regional minimum standard of self-governance and records it as a requirement for the member state, taking a further step towards the deepening integration of public administration. An article referring to cross-border cooperation appears, connected to the international relations of the regions, according to which the Charter announces that „…within their own areas of competence, the regions are enabled to pursue interregional or borderline cooperation activities, in accordance with the proceedings defined in the national legal regulations. These activities must be pursued with respect to the national rule of law and the international obligations of the state." (Article 8). The international role of the regions supposes that they should be able to sign cross-border agreements and establish common advisory and executive bodies. All of this assumes the demand on the part of the member states that they regulate the cooperation between regional bodies, and that the spheres of authorities necessary for this should be provided by the state.

The proposal announces that all states have the right to establish regional self-governments, and the member states have the right of free choice in the definition of the specific character of their own self-governmental system. Nevertheless, positions differ about the necessity of creating another decentralised level of government in the member states of the Council of Europe. There are countries that object, others draft the establishment of regional self-governments as a long-term aim, while in others again the reforms necessary to establish regional self-governments have already been begun.

The Charter has not yet been passed by the Committee of Ministers. The European Ministers Responsible for Self-governments in the Member States agree that legal means concerning regional self-governments need to be established, and that regional autonomy and decentralisation are important elements of democracy that must be supported by the Charter. Nevertheless, there is wide disagreement regarding decentralisation of central power to regional levels, and how the Charter should guarantee this, whether with a convention, meaning a legal obligation, or with the acceptance of a proposal, meaning a looser obligation. The most recent conference, on 25th February 2005 in Budapest, examined how the factors hindering the acceptance of legal means concerning regional self-governments could be eliminated in the member states.[20] According to the *Declaration on Regional Self-government,* drafted at the conference, 'regions are territorial self-governments between the central government and the local governments'. The acceptance of this principle would undoubtedly constitute an interference in state sovereignty, since certain external rights of the state would be conveyed to the local levels of government. The creation of a second, decentralised level means different challenges for the legal systems of unitary and federal states, therefore it would provide completely different legal means for signing international treaties and establishing common bodies and institutions.

1.2 Internal Regulations

According to internal regulations, the community of local citizens elects the autonomous governing body and mayor at town, municipal level, in the capitol and in the county (territorial level.) There are, however, no governing bodies elected on regional level in Hungary, only statistical-planning regions, based on the NUTS system.

Free association and cooperation with local authorities of other countries is, in the case of Hungary, the constitutional right of local governments. Hungary has embedded the Charter of Local Self-Government into its internal rule of law;[21] consequently, local authorities have the right to cooperate with local authorities of other countries. Permission from the central government is not necessary for local governments to take part in cross-border cooperation treaties and agreements with neighbouring countries.

The legal background of the international relations of local governments—considering the principles of the Charter of Local Self Government—is guaranteed by the Constitution and the Act on Local Governments.[22] Under these terms, the local government can associate with other local governments to represent and advocate its interests and form representative associations and, within its scope of duty and jurisdiction, co-operate with foreign local autonomies. Since local governments are decision-making bodies of political authority, decisions about cooperation with the local governments

of other countries should be made with a qualified majority within the governing body. Although local governments do not have the power to make public legal international treaties, they are entitled to make private contracts.

The European trend also encourages Hungary—and its neighbours—to establish regions with strong political and legal competence as soon as possible, which are to be entitled to make international agreements with the regions of other countries.

As a matter of formal fact, the regional division of Hungary has been established by the Act on local Governments,[23] the Act XXI of 1996 on Regional Development and Land-Use Planning (hereafter referred to as the Regional Development Act) and Resolution No. 35/1998 (III. OGY) on the National Regional Development Concept that shaped territorial partitions fitting and compatible with the NUTS-system[24] in respect of the following:

– country, macroregion (NUTS 1)
– planing/statistical region, based on the counties (NUTS 2)
– county and capitol (NUTS 3)
– micro-region (NUTS 4)
– municipality (NUTS 5)

Starting from regional level, seven statistical-planning regions have been created, after which the amendment of the Regional Development Act set up the EU-compatibility minimum.

With the creation of the statistical-planning regions in Hungary, begining in 1998, a new, institutionalised, multilevel development system has been established. With the approval of the Act XXI of 1998 and Resolution No. 35/1998 (III.OGY) on the National Regional Development Concept, based on the strengthening of the territorial approach to development policies, the reform of administrative system and the development of territorial development strategies have begun. Both Act XXI and Resolution No. 35/1998 (III.OGY) use the micro-regional level as a partition category: Act XXI mentions the micro-region as a partiton category based on the existing functional correlations between its subcommunities, and Resolution No. 35/1998 (III.OGY) defines the smallest partition of territorial development.

One of the significant documents for the adjudication of the Euroregions' integrational role is the National Development Plan (NDP 2004-2006) which is based on on Structural Funds and the Cohesion Fund. The NDP acts upon the European Comission's programming guidelines for 2000-2006. The development of economic competitive power, raising the employment ratio and unfolding the cohesional forces of the nation and economy are an integral part of the National Development strategy approved in 2004. However, cross-border cooperation systems are not mentioned in the NDP, although these could nourish the creation and improvement of regional competitive power, the life standards and the realisation of coordinated development programs for the cessation of the peripheral status, thus providing a foundation for the stable and dynamic development of the regions.

In the National Spatial Development Concept (NSDC), approved in 2005, development does not stop at the country's borders. In order to realise an open territorial policy, the cooperation of border areas is included in the NSDC's main priorities.

Cross-border cooperation systems enable formerly connected regions and counties to create areas of attraction, close the gaps and fortify the different forms and levels of cooperative and development relations with the territories inhabited by Hungarian populations along and across borders.

The NSDC, by facilitating the cooperation of the participant concerned of territorial development, framing the social-economic cohesion of the border region, and developing cross-border communication at local and regional level, contributed to creating the loose-framed institutionalisation of Euroregions. Mapping and integrating the cross-border development models into the national development can be achieved on various levels according multi-level territorial disposition:

– town-twinning (township self-governments, multifunctional micro-regional associations, self-governmental associations of territorial development, etc.)
– territorial conjunctions (between counties and regional development agencies) in the form of Euroregions and partnerships.
– the European Grouping of Territorial Cooperation (a transnational legal character)

1.3 EU-frameworks

Cross-border cooperation systems take different forms in practice. In some cases, territorial contact is not a criterion; multilateral interlocking can be set up between or non-bordering regions. The Associaton of European Border Regions[25] (AEBR) for example, was the first EU-level umbrella organization and pool to support the cooperations formed in border regions and convey their needs to the various forums of the EU. Another type of cooperation can be when the border regions of two or more coun-

tries collaborate. The first such cooperation began in the 1960's along the German-Danish and French-Belgian borders, with the aim of drawing the government's attention to the specific status of these regions. The Association of European Border Regions, which was created especially to promote cross-border cooperation, is now an organization pooling 185 Euroregional cooperation systems. Apart from its strong lobbying activity, the AEBR's goal is to make its voice heard on the European scene, to support cooperation in obtaining the EU funding (INTERREG, Phare CBC, CARDS) and to mediate between cooperation systems and the institutes of the EU. In 1981, the 'Charter of the European Border and Cross-Border Regions' was approved, which was more a statement of political guidelines than a legal document that determined the principles in respect of the existing cooperation practice. Since then other principles and priorities have been integrated, which are now basic requirements of the development program of the EU.[26]

The basic feature of the institutionalisation of cooperation systems, which is applicable in every case, is *time*, by which they can be divided into *short-term* and *long-term strategic* systems. Significant differences in the structures involved in cross-border cooperation systems can cause inconvenience. With this in mind, the European Commission wrote out a practical guide with an elementary classification containing generic viewpoints to help orientation between different types of cooperation. In the process of creating different levels of development, the Commission considered the shaping of partnerships, namely the nature of the organization of cooperation systems, their capacity, functions and competences, as well as correspondence with the INTERREG and Phare CBC (Cross Border Cooperation) program, by which certain organization types can be compiled and classified. On the strategic level, there are two main types of cooperation: Euroregions and working communities.

Euroregions are territories where interregional or cross-border cooperations of social, economic and cultural or different characters between two or more countries and their self-governments already exist.[27] The Euroregion is a formalised structure of cooperation that includes the representatives of local and regional authorities as well as occasional social and economic partners. Euroregions have a specific hierarchy, with an elected council at the top, followed by a commission and thematic working groups and a permanent secretariat.[28] In addition, Euroregions have a collective bank account for external monetary sources, and national, regional and local financing. There are four key features distinguishing them from the other types of cooperation:

– they have the competence for decision making

– they evolve in border regions as a result of a process of many decades

– they entail the coordination and handling of several cross-border projects and initiatives

– they have the specific structures necessary for supra-national programs

Like the Euroregion, the working community is also an organised long-term association of common interest, although with a simplified structure, less integrity and lower levels of competence. Its structure is based on working groups and occasional commissions periodically sitting to make recommendations on solving important problems, making studies, and working as an informational forum.[29]

The harmonious development of the entire Community territory and greater economic, social and territorial cohesion implied the strengthening of cross-border cooperation. In order to overcome the obstacles hindering cross-border cooperation, it was necessary to institute a new legal instrument designed to facilitate and promote cross-border cooperations across the EU. The members of a European Grouping of Territorial Cooperation (EGTC)[30] can be member states, regional and local authorities, as well as certain public legal institutions, or associations with one or more member organizations qualified for EGTC membership, if located on the territory of at least two member countries. (Article 3 (1)-(2)). If it is necessary for community or civil law to choose rights, the association must be dealt with as the subject of the member state in which the seat of the association is found, according to the foundation document. (Article 2 (1)) The function of the association is determined by its constitution, and its structure is the following:

– general assembly with members' representatives

– a director, representative of the association

It should be noted that the constitution could regulate other bodies with a clearly predefined competence (Article 10). The association is responsible for the actions of its associates towards a third person; even if these actions do not fall under the association's competence. Furthermore, the association must compile an annual budget that, most importantly, contains the running costs and, if necessary, the operating costs and the associations debts of any kind, which is to be approved by the general assembly. (Article 11-12)

Cooperative structures at project level are established for the sake of the most effective completion

of certain projects and programs. Nevertheless, it is not necessary to establish a specialised cross-border structure. Many such projects can be supervised through existing institutions on both sides of the border, although connection with at least one strategic level international institution is usually beneficial. If it is essential to establish a project-level structure, relatively few official methods are available that are based on the proper legal form. The solution is often a practical agreement without a legal basis.

Up to now the only generally available legal instrument was the EEIG (European Economic Interest Grouping). This instrument is primarily used for economic-marketing cooperation initiatives, and permits the association of separate corporations or other legal entities on both sides of the border for joint economic activity. Its advantage is that it nurtures the enhancement of competitive power. One of its disadvantages is that it is only available for economic collaboration. The other is that associations using EEIG can only operate within the limits of public law, they cannot rely on the legal functions of local authorities. Experience shows that it is not usable for regional and local institutions.

Other options, such as cross-border structures based on the national legal regulation,[31] eg. Mixed Economy Company (MEC), and Public Interest Grouping (PIG)[32]only exist in a few countries, notably in France. The third option is to find an organizational solution based on specific agreements without a legal basis.

2. INSTITUTIONALIZATION ALONG HUNGARIAN BORDERS

In the Hungarian system, there are three organizational models: *local* (micro-region NUTS 4, municipality NUTS 5) Euroregional cooperations,[33] that have well functioning municipal relations, inter-town and micro-regional cooperation systems; *great-regional,* rather collective-like structures, operating with the participation of a whole country; and *regional* (county NUTS 3, region NUTS 2) *cooperation systems.*

In terms of cross-border cooperation, the structure of territorial levels in Hungary and its neighbouring countries has the basic problem that the cooperating organizations have to establish their proper contacts in a particularly heterogeneous administrative environment. The different legal and administrative systems of the connected countries are the root of many difficulties. It is essential for the development of the institutions' operative relations that all participants have the same jurisdiction and legitimacy. However, due to their construction, competence and possibilities the levels in some neighbouring countries are not compatible with their Hungarian counterparts. Most of Hungary's neighbours have no territorial level, or if there is one, it has few competences and is rather administrative. It is very important to establish a self-governmental system, and many countries have the chance to do so, but this development will probably happen only in those countries that aspire to EU-membership in the near future.

A considerable part of the Euroregional organizations came into being for political purposes. The territorial frames of organizations, the circle of partners, and the tasks to be realized in the scope of the cooperation are decided by agreements of county or town authority politicians. The basic document for the establishment of regional cooperation systems is the foundation charter. The signatories are generally town, county or regional authorities or other territorial, perhaps economic participants, or chambers. The foundation of the cooperation systems typically occurs from below, but their participation is heavily influenced by the possibilities of the given country.[34] The organizational system, the decision-making competence of the members and the authority of the numerous Euroregions created in the last few years are very backward in comparison to West-European Euroregional cooperation systems. In addition, the fact that cross-border regional agreements establish institutions related to NUTS 2 regions, which do not exist in Hungary as a public law administrative territorial unit, impedes the formation of a developed West-European-type Euroregional organization.

Most of the Hungarian cooperation systems are called Euroregions, and establish a more or less organized structure, or working organization to assist its work. Euroregions function as framework institutions to realise common tasks, but they do not signify de facto separated structures with legal character. The individual institutions came into being parallelly in partnering countries, as mirror organizations, with the use and coordination of the institutions or organizations already existing on either side of the border. These working organizations are founded according to the given country's internal legal regulations in a company form; on the Hungarian side they are generally registered public benefit organizations, associations or foundations. Since Euroregional cooperation systems do not have an individual legal personality in order to take full advantage of close relations and EU support possibilities, all par-

ticipating countries in every single cooperation system should have a working organization with acknowledged legal personality.

Euroregions, despite having the same name, are very different in nature: the spatial extent, and the forms and aims of institutions of cooperation systems differ, despite the fact that the treaties determine regional and economic development purposes.[35]

For the purpose of the present research, below we divide Euroregions into different national border areas. For the analysis of organization of cooperation systems, empirical means were used, including questionnaire surveys, in depth interviews and analysis of the foundation charters of the cooperation systems.

2.1 Hungarian-Austrian Borderline Area

The cooperation of the Alps-Adriatic region started on 20th November 1978, with the signing of the Common Declaration in Venice, resulting in the foundation of the *Alps-Adriatic Working Community*. The members of the working community are Bavaria, Slovenia, Croatia, five Hungarian counties (Győr-Moson-Sopron, Vas, Zala, Somogy, Baranya) and Tessine, a canton of Switzerland. The working community does not have a legal personality, and as its expansion is wider than regional, it has been unable to develop a structural and working system as firm as that of the Euroregions. Its organizational construction entails decision-making by the Plenary Session for the premiers of provinces, which is a forum for top administrative experts. The Committee of Executives is the executive and coordinating body of the working community, to which every member province sends one delegate. Professional duties are carried out by five Permanent Committees that, according to demand, create 'workteams' with a permanent range of duties, and temporary 'project teams' to achieve short-term goals The organizing of cross-border relations is the duty of the Alps-Adriatic Management Office, founded in every member province of the working community. The Management Office of the member province responsible for the current chairmanship of the working community coordinates its issues. The Alps-Adriatic Management Office as part of the Bureau of the Carinthian Provincial Government is the working community's General Secretariat, nevertheless, it does not work as a public office in the original sense.

The advantageous feature of this institutionalisation is that real professionals work in the workteams and, at the same time, there is guidance above them: on the one hand, from the Commissions and on the other from the Commission of Leading Executives, who coordinate the implementation. The institution also has a political legislative level called the Plenary Session of Provinces that strategically holds it together and leads it according to the common interest.

However, the requirement of unanimous decision-making often hinders rapid decisions. The search for a compromise is extremely tiring and hard, but it helps the principal of partner relationships and is advantageous in the long run. The harmony of this extensive organization representing numerous different interests has to be furthered; and the purpose of the cooperation adjusts to this, in that it is rather a lobby for enforcing interests, for common, informative and expert discussion and negotiation of questions concerning members' interests. Realizing the principle of subsidiarity, supporting of the integration process, and ensuring efficient cooperation with the European regions' collectives and the European institutes have been registered as the new tasks of the working community.[36]

In spite of the dissimilar organizational structures and mechanisms of legislation of the individual provinces and their heterogeneous administrative construction, the form of the working community proved appropriate for this type of cooperation.

Another important cross-border cooperation in the form of a Euroregion, the *West/Nyugat Pannonia Euroregion,* was founded on 21st June 1999. This Euroregion is, as regards its institutions, the most highly developed among Hungary's border areas, and has the longest traditions of all territorial formations. Its antecedent was the Alps-Adriatic Working Community, and the purpose was to create a body that influences its immediate environment where local and territorial interests across real borders are enforced. The institutionalisation process went through several stages: in 1985, the Hungarian-Austrian Regional Planning and Development Committee was founded to declare the need for cooperation and harmonising regional development arrangements. In 1992, the Hungarian-Austrian Border Regional Council was founded, the members of which, after long preparation, established the West/Nyugat Pannonia Euroregion in order to take the cooperation to a higher stage. Burgenland Province is the Austrian member of the cooperation, joined by Vas and Győr-Moson-Sopron counties, and later Zala county from Hungary.

A cooperation system is not a legal entity, but in view of its subject, a Euroregion is the free-will

community of the interests of cooperating partners. Its organizational construction complies with the classic Euroregional requirements. The Council of the Euroregion is the main strategic legislative body of the cooperation, consisting of 40 participants, where all four members delegate 10 persons. The four members of the Presidency of Euroregion are the presidents of Győr-Moson-Sopron, Vas, and Zala county and the leader of Burgenland Province. The Euroregion's Workteams do the real work, where professional problems are solved in areas with specific function, and proposals and suggestions are elaborated for the Council. The Secretariat of the Euroregion is an administrative organ, consisting of the consultation of four named secretaries, who work in parallel without subordination, coordinating the Euroregion's activity. The residence of Euroregion is the same as the residence of the executive bodies; its coordinating town is Eisenstadt. There is therefore no individual Euroregional institution in this case; this institutional structure functions through organizations already existing on the two sides of the borderline.

2.2 Hungarian—Slovakian Borderline Area

Hungarian-Slovakian institutionalised relations were established later than those mentioned above. The westernmost is the *Triple Danube Area Euroregion* that is a territorial cooperation between Győr-Moson-Sopron county and Rye Island-Matusova zem Regional Association (Dunajská Streda, Galanta, Sal'a districts) founded in March 2001. As regards its structure, this Euroregion is similar to the West/Nyugat Pannonia Euroregion, but in reality, it does not function, hardly shows any practical results, and has not performed any real activities since its foundation.

From the cooperation of the municipalities of the towns Komárom and Komarno in the East, a new territorial cooperation came into being called the *Vág-Danube-Ipel' (VDI) Euroregion*. The members are Nitra county in Slovakia, and Komárom-Esztergom, Pest, Veszprém, and Fejér counties in Hungary. The Euroregion's organizational construction is the following: the Presidency is the main decisive and representative body, it consists of Presidential Teams with 3-3 members delegated from each side, and the decisions are results of a consensus. The President is the external representative of the Euroregion. Each Presidential Team has an Independent Commission with stater and proposer function, and the members are social, economic, and administrative experts. Particularly, for elaboration, development and coordination of projects, ad hoc committees and experts can be employed. The Secretariat of the Euroregion has a permanent working organization that works as a managing secretariat in Komárom-Esztergom county. VDI Euroregion Development Inc, based in Tatabánya, plays this role on the Hungarian side. This cooperation does not have and individual legal character, but the Euroregion's working associations function in both countries in a company form.

Later, two typically micro-regional, local cooperation systems were established in the VDI Euroregion area that have names identifying them as Euroregions: the Danube Euroregion and the Ister-Granum Euroregion.

Danube Euroregion was established on 20th February 2003. Basically, this cooperation is local, built on inter-town relationships, with the aim of raising already existing civil cooperation to a higher level. The centre of the Euroregion is Komárom-Esztergom county, and its members are the municipality of the town of Neszmély, the Micro-regional Association of Tata in Hungary, and the Civil Association from Slovakia.

Its organizational construction follows the classic Euroregional structure. This cooperation is built up from below, and according to its civilian nature, an Independent Committee—similar to the VDI Euroregion—helps the work of the presidency, consisting of invited representatives and experts of social economic and administrative organizations—especially chambers, regional development councils civil organizations, and has a proposing function. The Euroregion's working association is the Danube Euroregion Managing and Development Public Company, which functions as a legal entity, and carries out economic, managing and developmental activities.

The *Ister-Granum Euroregion* was founded on 1st December 2004, basically at micro-regional level. The members are the Association of South Regional Towns of Slovakia, which comprises the self-governments of 53 towns, and the Ister-Granum Euroregion Association from Hungary, which includes 47 self-governments. The organization of Euroregion corresponds to the Danube Euroregion's structure, the only difference is that an Independent Committee does not exist beside the presidency. The working association here also works as a public benefit organization and the long-term aim of the cooperation is to create an institutional form building up from below and independent of the administrative system of the two states, based on social relations.

The local authorities, civil organizations and micro-regional associations which have been cooperating for years now on the two sides of the Hungarian-Slovak border signed a declaration of intent in October 1999 in Putnok to establish the *Sajó-Rimava Euroregion*. The members are Rimavská Sobota, Rőce, and Roznava districts and the associations of the towns and villages of Gemer (279 settlements in the catchment area) on the Slovak side, and the Municipality of Borsod-Abaúj-Zemplén county and the micro-regional associations of Ózd, Kazincbarcika, Miskolc and Tiszaújváros (on the catchment area: 153 settlements) on the Hungarian side. With the signing of this declaration, the Sajó-Rimava Euroregion Cross-border Cooperation was established on the Hungarian side with the members mentioned above and in an associational form, and is registered in Borsod-Abaúj-Zemplén county as a specially prominent public benefit organization as of 7th July 2000. At the same time, on the Slovakian side, the Slané-Rimavské Euroregion was founded, following which the two organizations made a Cooperation Agreement and created the Sajó-Rimava Euroregion on 10th October 2000. The organizational structure of the Euroregion suits the classic organizational construction, with its centre in Rimavská.

The *Ipel' Euroregion* is based on a similar organizational background, its cross-border cooperation contract was signed on 20th September 1999 in Balassagyarmat. In the document, two organizations are mentioned: the Ipoly Euroregion, which was established as an association containing micro-regions in Hungary, and the Ipelsky Euroregion, also based on NUTS 2 territorial units in Slovakia. By this contract, another Euroregional organization, the Ipel' Euroregion, a cross-border alliance of two legal entities was founded on 2nd October 2002. Through this structure, the two member organizations remain operative working organizations with independent legal entities, but, at the same time, due to their cooperation, create a new union, a common Euroregional alliance. Its structure is similar to the traditional Euroregional organization; the only differences are that it has permanent Supervising and Ethical Committees, and a Nominating and Mandate Observer Committee that can be set up occasionally. The members of the Euroregion do not work together directly, but through the founding organizations, which have the headquarters in the Ipolyság area, as well as a branch office in Balassagyarmat.

Similarly, another micro-regional cooperation formation, the *Neogradiensis Euroregion* came into being by the letter of intent signed by Region Neogradiensis registered in the Slovakian Republic and Neogradiensis Region Association in the Republic of Hungary, in respect of the constitution and current legal regulation of the countries, in September, 1999. These two associations, as civil organizations with legal entity, founded the Euroregion on 25th March 2000. The partners of Nógrád county are Vel'ky Krtís, Lucenec, and Poltár districts, thus the Euroregion encompasses the territory of the historical county Nógrád/Novohrad.

The *Kosice-Miskolc Euroregion* was founded by Kosice county (including four districts), the town of Kosice, Borsod-Abaúj-Zemplén county and the town of Miskolc, in May 2000. This cooperation, based on town-twinning relationships contains mostly political and cultural elements. Its organization follows the classic Euroregional construction, with the difference that it has distinct orders on permanent (Financial Supervising Committee) and temporary committees. In order to help efficient operation, in 2001 the Miskolc-Kosice Regional P.C. was established as a working organization with an individual legal character that realises services of public interest.

At the easternmost end of the Hungarian-Slovakian border, the *Zemplén Euroregion* was established on 23rd April 2004, on the territory of the historical Zemplén County. The participants of the cooperation are Slovakian micro-regions and Hungarian micro-regions, towns, regional and economic development organizations in the border area. This Euroregion, like the Ipoly Euroregion, functions in an association form, and created two mirror working organizations to fulfil operative tasks: the Regional Foundation for the Development of Private Enterprise of Zemplén in Hungary, and the Regional Development Agency of Král'ovsky Chlmec in Slovakia. The organizational structure otherwise follows that of other Euroregions.

Lack of common interests greatly influences the development of real institutionalised forms of cooperation that actually function. Those cooperation systems that are based on common historical traditions and long standing inter-town relations are advantageous, and are able to fill the institutional frames with real content. However, the Euroregional frame requires common financial resources. The financial resources of the organizations along the border are small, nowadays; at best they consist of the members' payments, which cannot fund joint developments. Such programs require separate development plans on both sides of the border, often adjusting to the development projects of the partners' own country, using its resources. Thus

the border area cannot take unified steps with common aims and concerns.[37] Joint developments indicate common interests, but the participation of politicians in the cooperation is not enough; the initiation of the economic sphere, the chambers and civil society are also needed. These participants coming from below can be the motivation for future cooperation systems, new characters that can fill the cooperation with real aims and content, and thus further their long-term strategic view.

2.3 Hungarian—Slovakian-Romanian-Ukrainian Borderline Area

One of the oldest Euroregions to include Hungary is the *Carpathian Euroregion*, which was established by the bordering areas of Hungary, Poland, Romania, Slovakia and Ukraine on 14th February 1993, in Debrecen. The cooperation comprises extremely large, country-sized areas therefore it can hardly be called a Euroregion; in view of its purpose and functioning mechanism is more like a working community.

The construction of Carpathian Euroregion, due to the current organizational and operative regulations, is as follows: the Region Council is the highest decisive body, and determines the strategic aims of the Carpathian Euroregion. The Council consists of Councillors representing the National Parties of the region, and the councillors of the given National Parties together compose the delegation of the given National Party. The members of the Hungarian National Party are Borsod-Abaúj-Zemplén, Hajdú-Bihar, Heves, Jász-Nagykun-Szolnok and Szabolcs-Szatmár-Bereg county, together with the cities of county rank: Debrecen, Eger, Miskolc and Nyíregyháza. The head of the regional council is the President. The International Secretariat is the executive and administrative organ of the Alliance, it consists of the Permanent National Contacts, who are set up in all member countries of the Carpathian Euroregion (in Hungary: in Nyíregyháza), assigned by the National Parties. Working Committees are established by decision of the Regional Council; at present the working committee for Regional development is based in Hungary.

The main merit of the Carpathian Euroregion is that it is the first clearly Eastern Central European initiative, however, several foreign and internal political, economic, ethnic and cultural conflicts hinder its development. In the activity of the Carpathian Euroregion the characteristics, duties and purposes of working community and Euroregions are mixed. In the initial stage, the main purpose of cooperation was to create a large territorial area, however, this impedes work in two way: firstly, the members have no shared interest, and secondly, the collective operation of the organization puts unequal burden on the members due to the distances.[38] The interregional relationship between the regions of the five member countries is above the NUTS 2 level. The cooperation is not a phenomenon above countries; it is a structure that may help border regions' development both within narrow and wide bounds.[39] The partition of Euroregions has begun along several border sections, and many particular cooperations and Euroregion-like structure is developing.

As a reaction to the enormous organization of the Carpathian Euroregion, a territorial cooperation called *Interregio* came into being with the participation of Zakarpattia county (Ukraine), Satu Mare county (Romania), and Szabolcs-Szatmár-Bereg county (Hungary). Since Interregio is part of the Carpathian Euroregion, this provides a background for Interregio to develop its cooperation, and contains two- or three-sided cooperation as an umbrella organization. Interregio is based on the principle of partnership, and is only active when necessary; it is not determined by a program from above, but by the problems coming from below.

The establishment of *Bihar–Bihor Euroregion* started in April 2001 with the letter of intent of Hungarian and Romanian government and civil organizations, municipalities and micro-regional associations, and finished in 2002. According to the charter, the organization is open: any municipality, municipality association, civil organization, or other legal person can become a member, but the cooperation does not reach the level of institutionalised Euroregional status. The details of the charter confirm that this micro-regional model based on cooperation across borders supports direct bilateral relations; it communicates the region's territorial connections through a smaller area and more privately. This is, in every respect, a more mobile, operative, reciprocal model that can be an efficient institutional and organizational framework for Hungarian-Romanian relations.[40]

There are more significant historical antecedents of another organization, the *Hajdú–Bihar–Bihor Euroregion,* in that relation between the two counties go back several decades. The Cooperation Agreement was signed between the Hungarian Hajdú-Bihar county (and Debrecen, which joined it later, having founder rights), and the Romanian Bihor county (and Oradea, which joined later and has founder rights), and the Euroregion was established in 2003. As regards its legal status, it is an open, cross-border

organization based on voluntary cooperation, not an individual legal person.

2.4 Hungarian—Romanian—Serbian Triple-border Region

The main organization of the Hungarian-Romanian-Serbian triple borderline area is the *Danube-Kris-Mures-Tisa (DKMT) Euroregion,* founded in November 1997, consisting of three Hungarian and four Romanian counties, and the autonomous Vojvodina province of Serbia. The process of institutionalisation was preceded by cooperational agreements.

The cooperation went through a structural reform in 2003, and a Coordination Committee, which is a body caring for the efficiency of the preparations of the decision and the functioning of DKMT, became part of the organizational system. Furthermore, a working association with a legal entity, the DKMT Euroregion Development Agency P.C. came into being, as an instrument of the preparation and management of common development tasks. The essence of the structure is to separate the economic partnership with legal character from the political organization of the regional cooperation. As a result of the reforms, the Euroregion took on a new two-part structure : one part is an open consultative political forum, the other is an operative working association with a registered legal-economic status. The public benefit organization is a private company, founded by the common-rule organizations that established the Euroregion in 1997; therefore, in the members' assembly, the founders assert their rights and make their decisions on the development plans that the working association deems suitable to execute.

2.5 Hungarian—Croatian—Slovenian Borderline Area

The most politically charged of Hungary's border areas is this triple-border area, and its most extended cross-border cooperation is the *Danube-Drava-Sava Euroregion;* which, according to its legal status, is an international voluntary organization of regional authority units. This Euroregion was established on 28th November 1998, in Pécs, by Hungarian, Croatian and Bosnia-Herzegovinan counties, cantons, districts, self-governments and chamber organizations.

Since 24th January 2005, the organization has a new charter in keeping with the construction of Euroregions, with the exception that this organization does not have a common office. The secretariat is a common administrative, technical and professional bureau that is set up in three national offices: the headquarters are in Eszék, Pécs and Tuzla, and its leader is the secretary of the country in charge of the current chairmanship. The lack of a common office, the large territorial area, and the diversity of the participants all testify to the fact that it is not a real Euroregional organization but rather a great-regional cooperation similar to a working communities of some countries. However, in the scope of the cooperation there is an opportunity for realizing large, cross-border, transnational cooperation systems and also interregional cooperation systems along the borders.[41]

The Hungarian-Croatian-Slovenian triple border area historically operated as an uniform economic area with lively commercial relationship, centred around Nagykanizsa. On the basis of this, in September 2000, a declaration of intent came into force in Nagykanizsa to establish the Drava-Mura Euroregion, and on 14th September 2004, the General Treaty of the Drava-Mura Euroregion was signed, laying down the rules of the cross-border cooperation. Once the cooperation was granted legal status, its working organization, the Drava-Mura Euroregion Public Benefit Organization was established on 2nd May 2002. Nevertheless, the future of this cooperation is insecure, and it is not able to function well at the moment.

The third Euroregion in the region is *Mura-Drava Euroregion*, founded on 2nd October 2002, by Zala and Somogy counties in Hungary, and by Međimurje county of Croatia, on the territory of the historical Zala county. Its legal status is that of a cross-border cooperation of counties and regions in Hungarian and Croatian areas; its fundamental principle is voluntary cooperation. Its organizational construction is less institutionalised; it is a loose formation that does not suit the Euroregional structure. The presidency is the decisive body of the cooperation, each member of the Euroregion delegates one person: this body coordinates the activity of the operative Workteams, and there is a Euroregional Office in every participating country.

Cooperation systems on the Hungarian-Slovenian border area are generally underdeveloped, at an elementary stage, and do not fulfil the criteria of Euroregional cooperation systems. Along this border section, the future prospects are of a great-regional, working community type of cooperation (Alps-Adriatic Working Community, DDSZ Euroregion). The cohesion of the border area is very

weak, since the two Southern Slav states' interests and attitude are closer to Austria than to Hungary (see *Chart 4*).

Chart 4: Percentage of Hungarian borderline area cooperation systems

Borderline area	*%*
Hungarian-Slovakian	47
Hungarian-Slovakian-Ukrainian-Romanian	21
Hungarian-Croatian-Slovenian	16
Hungarian Austrian	11
Hungarian-Serbian-Romanian	5
	100

At the moment, there are basically three organizational models along the Hungarian borders: great-regional, regional and local types of organization:

– great-regional cooperation systems are the Alps-Adriatic Working Community in the west, the Carpathian Euroregion in the east, and the Danube-Drava-Sava Euroregional Cooperation in the south—in spite of their names these are working community-like great-regional cooperation forms;

– relations with regional (county NUTS 3 or region NUTS 2) participation that are the closest to the status and organizational construction of real Euroregions, are the West/Nyugat Pannonia Euroregion, DKMT, Vág-Danube-Ipel' Euroregion, and other especially regional formations like Interregio in the territory of Carpathian Euroregion or Bihar-Bihor Euroregion, which are also based on inter-county cooperation, but do not work in a proper institutionalised way;

– Euroregional cooperation systems at local level (town NUTS 5, micro-region NUTS 4), that have well-functioning municipal and town-twinning relations, supported by inter-town and micro-regional cooperation systems. These are typically found on the Hungarian-Slovakian, Hungarian-Croatian and Hungarian-Ukrainian-Romanian borders.

3. CONCLUSIONS OF THE SURVEY

3.1 On Institutionalisation

The 18 Euroregions along the borders of Hungary vary widely in terms of participants. Euroregions can make cross-border relations closer by bringing together border areas with similar qualities, using the advantages of natural resources and the cross-border situation through the regions' development centres and subcentres. These include Szeged and Pécs on the Serbian-Hungarian and the Croatian-Hungarian border, Debrecen on the Romanian-Hungarian border section, Győr on the Austrian-Hungarian border, Nyíregyháza on the Ukrainian-Hungarian border, and Miskolc along the East-Slovakian border. However, on Slovakian-Hungarian border sections there is a large number of subcentres, with Sátoraljaújhely, Esztergom, Neszmély and Putnok all playing the same role. Subcentres can be micro-regional centers (like Zemplén Euroregion, Bihar-Bihor Euroregion, Neogradiensis Euroregion), municipal regional development associations (like the Danube Euroregion, Sajó-Rimava Euroregion, Drava-Mura Euroregion and the Ister-Granum Euroregion, a municipal association of 53 towns) or a group of city municipalities (e.g. Kosice-Miskolc Euroregion).

One of the possible roles of Euroregions is to contribute to cooperation of self-governments and micro-regions for regional development purposes, and ensure the harmonic development of regions. The organization encourages forms of cooperation and pioneering experiments that support regional development in border regions where, the socially and economically undeveloped settlements include both towns and villages. To preserve partner relations, there both inter-town relations and town associations were established. Among the towns the cities of county rank are the most important, since their sphere of attraction is larger than that of other towns, and this manifests itself in the region-organising role of cities of county rank, such as Szeged (Danube-Kris-Mures-Tisa Euroregion), Debrecen (Hajdú-Bihar-Bihor Euroregion), Pécs (Danube-Drava-Sava Euroregional Cooperation) Miskolc (Kosice-Miskolc Euroregion), Nagykanizsa (Drava-Mura Euroregion) and the town of Sátoraljaújhely, which is 'the capital of the Zemplén region' (Zemplén Euroregion). The cities of county rank, with the parallel reinforcement of the micro-regional level, supported the aims of regional level, in this dimension, contributing to the future of the town and the region.

The coexistence of two or more forms of cooperation also occurs in great-regional cooperation systems, which, as diaphragm organizations, embrace several cooperation systems of local or regional coverage. These include the Hajdú-Bihar-Bihar Euroregion among the regional type operation within the area of the Carpathian Euroregion, and the Interregio and Bihar-Bihor Euroregion among the local type. The Drava-Mura and Mura-Drava Euroregions are similar formations within the area of

the Danube-Drava-Sava Euroregional Cooperation. Furthermore, the area and the participants of these cooperation systems, together with the Euroregion of West/Nyugat Pannonia, also belong to the Alps-Adriatic Working Community. The most complete cooperating structures can be found along the Hungarian-Austrian and the Hungarian-Romanian-Serbian borders, where intensive relations have evolved at all local levels, fostered by common traditions and the large number of ethnic and national majority residing in areas that earlier belonged together. The European integration aims of the Autonomous Province of Vojvodina can fill the cooperation with content, and can reinforce and make it effective. The Hungarian-Slovenian border does not play a serious role in the Hungarian Euroregional development, since it is very short and joins peripheral areas of both countries. In addition, both parties are more interested in cooperation with their Austrian neighbour. Along other borders, mainly the Hungarian-Austrian, Hungarian-Ukrainian and Hungarian-Croatian, relations are incomplete, various partnerships have evolved, and their character is mainly defined by the administrative system of the neighbouring countries.

In terms of organization, according to the European Commission's definition, a Euroregion is a spatial extension which has a specific organizational structure; its highest level is the elected council or assembly, the thematic workteams and the permanent secretariat,[42] and which, in Hungary, takes the legal form of an incorporation or public benefit organization.

To what extent do the Hungarian Euroregions meet the criteria of the European Commission? During the survey, we asked the leaders of the Hungarian Euroregions about the institutionalisation. The answers given to the question 'Does the cooperation have an institutionalised structure?' reveal that virtually all cross-border cooperation systems created along Hungary's borders do have an institutional structure. In fact only one case, the Interregio, which evolved within the former Carpathian Euroregion, does not have an institutionalised decision-making, executive and administrative organization, but only working groups organised for temporary projects. In practice, it only uses the name *Euroregion*, without being an organization, just an agreement at project level. The individual participants create workteams for preparing the common projects and programs, and the parties name their own deputies to coordinate the activities. The projects prepared by the workteams are discussed and passed at meetings of the participant municipalities' leaders.

Great-regional cooperation systems are working community cooperation systems similar to Euroregions that are communities of interest organised for long-term cooperation; however, their constitutional structure is simpler, they are less integrated and their levels of competence are lower. Legislative, executive and administrative organizations with different names and proposed by the European Commission and numerous workteams and commissions are the characteristic features of these cooperation systems. During the specified sessions, they elaborate proposals for the solution of significant problems, make studies and work as an information forum.

Of all Hungarian border regions, perhaps the Danube-Drava-Sava Euroregional Cooperation is the most complicated. Its organization follows that of Euroregions, except that the organization does not have a common office. The lack of a common office, the large territorial coverage, and the varied nature of the participants all suggest that it is also not a real Euroregional organization; it is much more like a great-regional cooperation similar to a working community of some countries. However, in the scope of the cooperation, there is an opportunity for realizing large, cross-border, trans-national cooperation systems and also interregional cooperation across borders.

In the *regional organizations*, except the Interregio mentioned above, most of the cooperation systems (80%) have a common legislative and administrative body, while a unified executive body exists only in 60% of cooperation systems. In these cases, the working groups responsible for the operation, which consists of officials and experts and can be found in every cooperation, has the duty of execution.

The decision-making body, which is usually called

Chart 5: Are there different units inside the structures of cooperation?

Level of structure	*Decision making unit*	*Executive unit*	*Secretariat*	*Working groups*	*Other units*
Great regional	100%	100%	100%	100%	100%
Regional	80%	60%	80%	100%	40%
Local	100%	80%	70%	70%	60%

the presidency or council, is composed of the leaders and principals of the cooperative partners; therefore, its membership contains equal delegates of all participants. In most cases, the common secretariat is a working organization that is founded in a company form, in conformity with the internal legal regulations of the given country; in Hungary these are registered as public benefit organizations, incorporations or foundations. Almost half of the cooperation systems (40%) have other organizational units that help the organizations to be more integrated and work more efficiently and extensively.

Euregio West/Nyugat Pannonia is a good example of a regional cooperation system. It was established in 1999, on the Hungarian-Austrian border, which is the most highly developed of Hungary's border areas in terms of institutions, and has the longest traditions of all territorial formations. The process of institutionalisation has many stages, and its organizational construction complies with the classic Euroregional requirements. Another good example of regional cooperation systems is the main establishment of the Hungarian-Romanian-Serbian border area, the Danube-Kris-Mures-Tisa (DKMT) Euroregion, founded in November 1997, consisting of three Hungarian and four Romanian counties, and the autonomous Vojvodina province of Serbia. The process of institutionalisation also took a long time in this case, and was preceded by bilateral cooperative agreements. The cooperation went through a structural reform in 2003, and a Coordination Committee, which is a body of three caring for the efficiency of the preparations of the decision and the functioning of DKMT, became part of the organizational system. Furthermore, a working association with legal entity, DKMT Euroregion Development Agency P.C. has come into being to help with the preparation and management of common development tasks. The essence of the structure is to divide the economic partnership with legal character and the political organization of the regional cooperation. Due to the reforms and the new structure, the Euroregion took on a new two part structure: one part is an open consultative political forum while the other is operative working association with a registered legal-economic status. The public benefit organization is a private company, founded by the common-rule organizations that established the Euroregion in 1997, therefore, in the member assembly, the founders assert their rights and make their decisions on the development plans that the working association seems suitable to execute.

Institutionalised forms at NUTS 2 and NUTS 3 level are aiming at Euroregional status. The problem is that the cross-border, regional agreements of the West-European Euroregional structures establish institutions referring to NUTS 2 regions, which do not exist in Hungary as a constitutional and administrative territorial unit. Hungarian regional cross-border formations have neither political power nor self-governmental level, and the members at territorial level are just political participants of the cross-border cooperation, while the real operative duties are carried out by private law working organizations, mostly associations, foundations and public benefit organizations. However, the relationships at the level of Euroregion are highly dependent on the level of decentralization in the given country. The level of competence of the cooperating sides differs, in that the partners do not rule the same type of administrative unit on the two sides of the border.

Local cooperation systems are based on micro-regional, inter-town or town-twinning relations on both sides of the border, and civil organizations and chambers also frequently take part in the bilateral relationships. Numerous similar formations appeared in the Hungarian-Slovak border area in the early 2000s. As for the institutionalisation of the Euroregions of the area, they are built up following a well-defined model: mirror organizations functioning separately in the two countries come into being and are registered according to the legal regulation of their own state, but the members also maintain common institutions. Through these common organizations, they create a framework institution and name it Euroregion or interregional alliance similar to the West-European formations.

In spite of their Euroregional name, these organizations do not always suit the criteria of the European Commission. One fifth (20%) lack a common executive body, and there are no common secretariat and organised work teams in almost one third (30%) of local Euroregions. However, 40% have other local organizations, referring to the integrated character of the cooperation.

The most advantageous and efficient model proved to be those cooperation systems where several territorial levels work together, and where, due to the coordination of the county authorities, there is an independent internal organizational unit for managing the international relations, through which they provide a firmer foundation of professionalism and organization for cross-border cooperation than the local authorities could.

In sum, we can claim that today, everywhere along Hungary's borders there are more or less institutionalised and ad hoc cooperation forms. The range is very diverse and mixed: from the occasion-

Table 1: EGTC

Name	*GENERAL European Grouping of Territorial Cooperation*
Legal basis	Regulation (EC) No 1082/2006/EK of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC)
Objective	The objective of an EGTC shall be to facilitate and promote crossborder, transnational and/or interregional cooperation, hereinafter referred to as „territorial cooperation", between its members, with the exclusive aim of strengthening economic and social cohesion. Article 1 (2)
Legal status	– An EGTC shall have legal personality. – An EGTC shall have in each Member State the most extensive legal capacity accorded to legal persons under that Member State's national law. It may, in particular, acquire or dispose of movable and immovable property and employ staff and may be a party to legal proceedings. Article 1. (3)-(4)
Applicable law	In the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office. Article 2 (1)c
Bodies of the grouping	An EGTC shall have at least the following organs: – an assembly, which is made up of representatives of its members; – a director, who represents the EGTC and acts on its behalf. The statutes may provide for additional organs with clearly defined powers. Article 10 (1)-(2)

Source: Own edition, based on Regulation (EC) No. 1082/2006/EK of the European Parliament and of the Council of 5 July 2006 on a European Grouping of Territorial Cooperation (EGTC), Ister-Granum European Grouping for Territorial Cooperation Ltd Statutes, and Convention regarding the establishment of the Ister-Granum European Grouping of Territorial Cooperation Ltd.

HUNGARIAN-SLOVAKIAN BORDERLINES Ister Granum European Grouping for Territorial Cooperation Limited

– Act XCIX of 2007 on the European grouping of territorial cooperation of the Hungarian Parliament of 25 June 2007
– Ister-Granum European Grouping for Territorial Cooperation Ltd Statutes
– Convention regarding the establishment of the Ister-Granum European Grouping of Territorial Cooperation Ltd

– Its general objective is the establishment and maintaining of cooperation extending to the full range of regional development activities between its members, within in boundaries of the delineated area specified in the Annex of the Grouping,
– and with regards to further areas affected by the cooperation, for promoting and strengthening economic and social cohesion.

The Grouping is an independently managed non-profit organisation which shall acquire legal personality on the day of registration, and as such has full legal capability. It may, in particular, have rights and obligations of any kind, acquire or dispose of movable or immovable property, and be a party of legal proceeding.

The law applicable to the interpretation and enforcement of the Convention shall be the law of the Republic of Hungary, where according to the statutes of the Grouping it has its registered office.

The General Assembly
– The highest decision-making authority of the Grouping is the General Assembly.
– The permanent membership of the grouping is made up of the representatives of the members of the Grouping,, the number of which at that time of formation is ……. members. In case of the participation of several legal entities of one single member state, the legal entities shall still appoint their own representatives.
– The General Assembly elects two joint chairs for the period of two years, from which it elects the executive chair and the deputy chair.

Senate
– The Senate is the managing body of the General Assembly, and it represents the General Assembly between two meetings. The chair of the Senate is the current executive chair of the General Assembly.
– The Senate is made up of 8 members: the current joint chair of the General Assembly, three delegated Hungarian and three delegated Slovakian General Assembly representatives who are delegated by the General Assembly. The term of office for the members shall be two years.

Director
– The term of office for the director shall be two years from the day of accepting the Statutes.
– Following the termination of the duties the director may be re-elected for the post.
– The director shall perform their duty in the management of the Grouping with due diligence, with having primary regard to interest of the grouping. The Director shall be held responsible for any damage caused to grouping by their criminal breach of the relevant legislation, of the Statutes or their obligation of management, in accordance with relevant legislation.
– The duty of the Director shall only be performed in person, representation shall not take place.
– The tasks not referred to the competence of the General Assembly, or the Senate shall fall under the competence of the Director.

Permanent Professional Committees:
– External Relations Committee
– Human Resource Policy Committee
– Economic and Asset Management Committee
– Environment Protection Committee
– Industrial and Transport Committee
– Cultural and Tourism Committee
– The professional work of the committees is managed by their chair of committees.
– The professional committees operate to a working plan, the design of which is the duty of the chair of the committees. The working plan contains the schedule for the meetings of the professional committee, its main tasks and the schedule of their implementation. The meetings of the professional committee are convened by the chair based on the working plan at least twice a year and when necessary.
– Between the meetings of the professional committee the chair shall carry out the management of periodical matters, who shall inform the members of the committees regarding their activities.

Work Organisation
– The administrative tasks of the grouping, the preparation and implementation of decisions shall be carried out by a work organisation of its own or by contractual appointment.
– In case of an own working organisation, the Director shall provide tasks for the work organisation, manage the operational functions and exercise the Employer's rights over the employees.
– In case of a contractual working organisation (not from the bodies of the grouping), the Director shall provide tasks for the work organisation, however the Director does not directly influence its operational functioning and does not exercise the employer's rights over the employees of the work organisation either. The details of the cooperation of the grouping and the working organisation are covered by a contract, which approved by the Senate and the Director.

Regional Advisory Body
– The Regional Advisory Body is the consultative and advisory body of the Grouping.
– The Regional Advisory Body is an organisation consisting of 15 members. Its members: the chair of the professional committees, 3 representatives of the Ister-Granum Regional Civilian Parliament, 3 representatives of the largest employers of the region, and a representative of each of the 3 chambers involved.
– The general duties of the Regional Advisory Body attached with right of proposal and reporting rights are; supporting the professional work of the grouping, and assisting the representation of interest of the sides of the employer and of the employee and of professional organisations.

al cooperation systems, cooperation systems with great cultural traditions and with town-twinning relations have the largest importance, and can become more serious, and establish long-lasting cooperation, while institutionalised forms aim at the Euroregional status. All have the same organizational structure (Presidency, Assembly/Council, Secretariat, Working Committees), but their extent and participants are varied. These formations do not have any political power or elected self-government; the local and regional participants are only supporters of the cross-border cooperation, but the operative duties are held by private law working organizations like associations, foundations, or public benefit organizations.

Cross-border cooperation is more intensive in the case of decentralized political systems and multilevel government, and this phenomenon prompts Hungary to accomplish a territorial reform process. Cooperation in the system of regional autonomies is a possible solution, but it involves very hazardous elements, therefore the states can only take steps very cautiously and through many political conflicts.

3.2. On Legal Conditions

Behind partly regional (region NUTS 2, county NUTS 3), partly local (micro-region NUTS 4, municipality NUTS 5) cooperation systems there are effectively functioning self-government relationships, and cooperation between settlements and micro-regions. We have to emphasise here that these structures do not have political power, autonomy and self-government; their activity falls within the competence of the NUTS units that form them, thus for them to function, some preconditions are required:

– signing agreements with other municipalities in the same state has to be the competence of local and regional municipalities,

– a competence for signing agreements beyond the borders, and

– establishing common consultative and executive bodies.

Although a Euroregion as an institution and organization gives the frame of cooperation, due to the large territorial extension, the different interests of the neighbouring countries and the diverse political and administrative levels, it is often impossible to link regions and to hold together the existing and potential interests. According to some opinions, it is also practical to operate smaller organizational systems, micro-regional or inter-town type of relationships or town alliances in order to cultivate partnership. These two or more types of cooperation should and have to be operating next to each other, because they may complement and be built on each other.[43]

Hungary was the first to pass its national act (Act XCIX of 2007) necessary for the establishment of the EGTC. Based on this act, the EGTC seated in Hungary, as a legal entity has limited responsibility (at least one member has limited responsibility), but basically the members have unlimited responsibility. A potential Hungarian EGTC member can only cooperate with a member that operates on a non-profit basis. At the same time, for the establishment of the EGTC, institutions are necessary from at least two EU member states that are members of the cooperation system.

At present, there are two working EGTCs in the area of the EU 27: one from the Belgian-French side, one on the Hungarian-Slovakian border. The EGTC founded between France and Belgium is the Lille-Kortrijk-Tournai Eurometropol.[44] The other is the Ister-Granum EGTC between Hungary and Slovakia. (see *Table 1*).

It is an important question how third countries such as Ukraine or Serbia can be involved in a cooperation system of EGTC-character initiated by EU member states. For third country partners interested in EGTC to be involved, it is essential for their country to pass a national legal regulation that allows such a form of cooperation, that is, the appropriate legal means must be created. It is also important for the third country that is not the member of the Union to sign a cooperation agreement with the EU member state with which the EGTC-cooperation is to be established. Cooperation with third countries within the framework of the EGTC is possible if allowed by the national legal regulation of the given EU member state. The EGTC left the question open, the decision is left to the member states.

In the case of Croatia, the situation is easier, given that during negotiations Croatia has begun to apply the legal material of the community. (This progress is evaluated by the EU every year). In this way it is easier to create a Croatian national regulation necessary for the application of the EGTC. This progress is also encouraged by the fact that Hungary, Slovenia, Austria and Italy, in the field of common cooperation, should have to chance to participate in EU applications as soon as possible.

Examining the practice of member states mainly means examining reactions (or lack thereof) to the border cooperation activities of the local or regional authorities of a given state. In a Hungarian con-

text, we cannot speak about such mature and effective legal practice yet; cooperation systems are very rudimentary. There is no strong regional territorial unit, and the representation of interests of cooperation systems does not always reach the central level.

The authorities of the *central government* earlier were convinced that each type of international relations is the monopoly of the bodies of the central government (mainly of the Ministry of Foreign Affairs), and no cross-border cooperation on the part of local or regional authorities should be allowed. In consequence, some governments took steps against the cooperation initiatives of their own local and regional authorities. The executive bodies of the state could do this directly via the public administration due to the fact that they had written out declarations severely limiting the cooperation possibilities of their own local or regional authorities.

To sum up, for the creation and effective operation of cross-border cooperation systems, it has also been necessary to create the legal frameworks within which these cooperation systems could realise their aims. Counterbalancing the dominance of central government, in cooperation systems along the borders, the local and regional authorities come to the fore. Deriving from the variety of national political systems, cooperation systems across borders can be very variable even within the EU. The unitary, decentralised and federal states provide different forms of institutionalisation for cross-border cooperation systems.

For institutes to develop operative relations, it is indispensable that the parties should have similar authorities and legitimacy. However, the different levels in the neighbouring countries in terms of structure, competence and possibilities are not compatible with their Hungarian counterparts. In most neighbouring countries there is no intermediate level, or if it even exists, it has an administrative rather than a self-government character.

The governments of nation states often do not treat the Euroregional organizations of sub-national level as partners. The lack of Euroregional cooperation, the different authorities and organised feature of the cooperating parties also cause serious problems. Due to the voluntary character of the EGTC, even applying the grouping of territorial cooperation across the internal borders of the unifying Europe, there is no guarantee that the Europe of border regions will evolve. The limits of the EGTC manifest themselves in the fact that it means a form having a legal personality for cooperation systems only along internal borders. At the same time, it is one of the merits of EGTC that it assists the cooperation of decentralised partnerships; that is, regional, local, cross-border cooperation systems evolve. It also adds to the democratic character that the sphere of authority of cross-border cooperation system must be the same as competences of national level, thus providing a way to create 'new forms of government' in border regions.

In Hungary, local self-governments have the authority to initiate international, cross-border cooperation, but regions are not authorised to do so. That is why regional cooperation systems can evolve only under the authority of central governments, since cross-border developments belong to the competence of interstate cooperation.

Similar to the practice of decentralised countries, for successful cooperation, it has also become necessary to build up a regional structure in Hungary compatible with European norms. The Regional Charter proposal provides important assistance in defining the exact accomplishment and authorities of the regions. If the reform of public administration delegated suitable authorities to the regions, it would become possible, within the framework of decentralised partnerships and without interstate agreements, for cooperation programs to be initiated. This in turn entails that local and regional authorities should be granted increasing scope of authority in the internal rule of law.

4. THE ACTORS AND AIMS OF COOPERATION

Through the survey and the interviews made with the leaders of Euroregions (2006) we were searching for the answer to the question what roles the different cooperation-systems play in the creation of Euroregions serving as a basis for the political, economic, social and territorial cohesion of Hungary across borders. *Table 2* summarises the actors of Euroregional formations.

The actors in border cooperation systems are mainly political, having relatively limited political authorisation. Along the border settlements, 14 Hungarian counties are bordered by neighbouring countries. In the multilevel system of regional development, new political and social actors have appeared in regional, county and micro-regional committees of development. In Hungary, regions or counties cannot be considered as having a real political power. The regional level is in the process of transformation at the moment, but not yet completed. By political actors, however, we mean the representatives of county or settlement self-governments

Table 2: The Euroregional cooperation systems in Hungary

Name of the cooperation	*Cooperating partners*		*Character of the cooperation*			*Borderline area*	
	Hungary	*neighbour*	*local*	*regional*	*great-regional*	*external*	*internal*
Alps-Adriatic Working Community	county	province (A) (I) (D); canton (CH); country (SLO); (HR)			X	X	
EUREGIO West/ Nyugat Pannonia	county	province (A)		X			X
Triple Danube Area Euroregion*	county	regional association civil organization, county (SK)		X			X
Vág-Danube-Ipel' Euroregion	county	county** (SK)		X			X
Ipoly Euroregion	civil organization	civil organization (SK)	X				X
Danube Euroregion	municipality, micro-regional association	civil organization (SK)					X
Ister-Granum Euroregion	micro-regional association	Self-governmental association (SK)	X				X
Sajó-Rimava Euroregion	county, micro-regional association	county, associations of towns and municipalities (SK)	X				X
Neogradiensis Euroregion	civil organization	civil organization (SK)					X
Kosice-Miskolc Euroregion	county, town	county,** town (SK)	X				X
Zemplén Euroregion	micro-region, county, regional committee of development, civil organization	micro-region region, county, regional development agency, civil organization (SK)	X				X
Carpathian Euroregion	county, town	county,** county, town, civil organization (SK); county, region, civil organization (PL); county (RO) (UA)			X	X	
Interregio	county	county (RO) (UA)		X		X	
Bihar-Bihor Euroregion	micro-region	micro-region (RO)	X				X
Hajdú Bihar-Bihor Euroregion	county, town	county, province (RO)		X			X
Danube-Kris-Mures-Tisa Euroregion	county	county (RO); province (SB)		X		X	
Danube-Drava-Sava Euroregional Cooperation	county, town, chamber	county, town, chamber (HR); canton, town, chamber (BH)			X	X	
Drava-Mura Euroregion*	county	municipality(SLO); county (HR)					X
Mura-Drava Euroregion	county	county (HR)		X		X	

* This Euroregion is not operating at the moment
** District in the earlier Slovakian public administration
Source: own research

and micro-regional associations who, exploiting the present political and socio-cultural circumstances, for the sake of gaining EU-supports, establish relations first informally, then later in an official, institutionalised form. In town relations, twinning relationships, in which civil organizations are often involved, are dominant. However, they do not operate within Euroregional organizational frameworks: by and large, the cross-border cooperation systems in this field remain at local level, and are usually effective only within one project.

An example of cooperation between towns is the Kosice-Miskolc Euroregion, which was established in 2000 with the participation of Kosice county (including four municipalities), Kosice town, Borsod-Abaúj-Zemplén county and Miskolc town. The cooperation, which is mainly based on a town-twinning relationship, consists of political and cultural elements. In October 1999, in Putnok, those self-governments, civil organizations and micro-regional associations that had cooperated over the years signed a declaration of intention establishing the Sa-

jó-Rimava Euroregion. The Ipoly Euroregion is also based on civil cooperation and similar organizational bases; its cross-border cooperation treaty was signed on 20th September 1990 in Balassagyarmat. The document names two organizations: in Hungary, the Ipoly Euroregion, established as an association covering two micro-regions; in Slovakia, the civil organization named Ipelsky. The Neogradiensis Euroregion is a similar form of cooperation, whose members are the Region Neogradiensis registered in Slovakia, and the Neogradiensis Region Association registered in Hungary. The Bihar-Bihor Euroregion evolved from similar micro-regional cooperation systems in 2002.

Among the great-regional cooperation systems, the Carpathian Euroregion is based on the cooperation of political actors (county, town) and also the Alps-Adriatic Working Community (county, province, canton, country).

In accordance with the principle of subsidiarity, Euroregional relations started building up from below, but after initial enthusiasm, they often could not renew or draft new cooperation aims.

The results of the survey show that along the borders of Hungary, cooperation systems of political purpose come first, and while in the case of internal borders the proportion of cooperation is 30%, in the case of external borders it is only 12.5%. In the case of great-regional cooperation-systems this proportion is 30%, while at local and regional levels it is 20%. This shows the gradual increase in the role of cooperation systems after Hungary joined the EU, the importance of cross-border relations seriously increasing in the establishment of neighbourhood relations. The Euroregional framework contribute the fact that relations between regions, areas of attraction and border areas earlier constituting natural units are becoming closer.

Deriving from the peripheral situation of border areas, common developments presuppose common interests. The participation of political actors is not enough to this; a horizontal partnership is also necessary: e.g., with labour centres, Regional Agencies of Developments that harmonise governmental and regional interests, apart from the assignments of regional economical development, and provide coordination between the regional actors. The Zemplén Euroregion, established in 2004 involving chambers with the aim of development of enterprises, is a cooperation system based on economic and social cooperation. The Danube-Drava-Sava Euroregion (DDSZ) was established in a similar way, by the initiation of chambers (county, town, canton) in 1998.

The economic cooperation of borderline areas and territorial units earlier belonging together, having a similar degree of economic development often makes slower headway—due to financial, custom, social legal regulations and other obstacles—and cooperation systems between certain institutions, self-governments and cultural cooperation systems are often more successful. Furthermore, the present Euroregions offer possibilities of contact for areas with common historical traditions, and peoples cut off from their native country, preserving the language and culture of native minorities.

Economic aims show a much higher value than the other cooperation aims, particularly along external borders (75%) and within the frameworks of regional cooperation systems. (80%). At the same time, along internal borders (40%) and in the local organizational gradation (50%) it is also the economic aims that are primary, pushing political and social aims into second place. This shows the importance of economic developments in which units of NUTS 2 level play a salient role, since these are the basic territorial units of the European development policy. Euroregional cooperation systems can also be the most effective at this level; however, the basic aim of the cooperation, the definitive element of the long-term strategy, can be economic and territorial development, since it would provide stability of cooperation.

In order for regional or local communities to participate in the formation of their own environment and influence the processes that affect local society, it is indispensable for civilian initiatives across borders, civil society actors and civil partners, to be involved. Both member states and sub-national levels should more seriously accentuate the conversation with the civil society. Effective cooperation, with the creation of broad partnerships between settlement self-governments, enterprises and civil organizations, and with closer cooperation with citizens, must include every aspect of everyday life along borders.

The centres of local cooperation systems are usually the cities of county rank: Szeged and Pécs in the Hungarian-Serbian border area, Debrecen on the Hungarian-Romanian border, Győr on the western Hungarian-Slovakian border, Miskolc on the eastern Hungarian-Slovakian border, and Nyíregyháza on the Hungarian-Ukrainian border. On the Hungarian-Slovakian border, there are a large number of sub-centres: including Esztergom, Neszmély and Putnok.

Euroregions can assist cooperation of regional development between self-governments and micro-regions, and the harmonic development of the region.

Characteristically, the proportion of cooperations with the aim of regional development is the lowest. Despite the fact that the founding treaties define general purposes of regional and economic development, according to the interviews the purposes are very different.

Cooperation between small and medium-sized enterprises, as well as economic chambers and enterprise areas and industrial parks connected to them, can be a positive direction from the point of view of development, due to their effect of job creation. The creation of common business interests encourages economic cooperation. The cooperation of border regions is built upon several types of purpose, since the degree of inequality and the necessity of development is the largest in this area, both on the external and internal borders of the European Union. All of this confirms the importance of economic and regional developments. Of the three organizational models—local, regional and great-regional—however, it is not the local model, but cooperation systems involving regional levels that prove most effective, since at this level, due to the coordination activities of the county self-governments, an independent organizational unit is established for the administration of international relations. It is regional cooperation systems that are the most suitable for purposes of regional development. Within the possibilities granted by INTERREG programs, applications for infrastructural and economic developments constitute the majority of applications. Among the purposes of INTERREG III A, the most effective utilisation of community sources within the frameworks of active partnership relations with neighbouring countries, as well as the conveyance and acceptance of experience deriving from the developmental and planning practice of the EU, gained prominent priority in the preparation of countries to later join the Union (Romania, Serbia).

It is not accidental that priorities along all external borders of the EU, are related to the improvement of public transport contacts (e.g. bicycle paths, the extension of border roads), the establishment of border crossings for tourists and commuters, the decrease of waiting time, and the speeding up of traffic, for the sake of the reinforcement of infrastructural integration. Investments connected to the development of common conservationist areas and national parks (buildings and equipment), and the development of technological infrastructure, via obtaining and creating equipment. The applications include rehabilitation and establishment of infrastructural institutions connected to the handling of solid garbage and waste water, the extension of energy networks, and the provision of sustainable protection of nature and the environment in border areas (investments connected to the establishment of common conservation areas and natural parks). Tourism concepts and projects, and the establishment of a conservation centre for the border region (e.g., green community houses or forest schools) contribute to the development of eco-touristic infrastructure. The harmonisation of transport policy, the extension of infrastructural contacts to reduce the isolation of border regions, and the establishment of border crossings on the external borders of the EU are the prerequisites for the stimulation of economic relations. The development of roads, railways, airports and navigable waterways are very important for the surrounding region, since with their assistance, the necessary prerequisites of border cooperation can be created.

The handling of social assignments was mentioned as primary goal by local organizations (10%) and parties along external borders (12.5%), but this value is evanescent. At the same time, the problem cannot be neglected, since of the four freedoms the right to free movement, and labour mobility can be mentioned as the main social goals. The cooperation of border regions also contributes to better understanding. There are border areas that are characterised by a usual identity deriving from historical, cultural and linguistic factors, where the intention of cooperation exceeds the available opportunities. Mainly 'civil-centric' forms of activity may meet these criteria.

The situation is similar as regards cultural purposes, despite the fact that most cooperation is based on cultural-historical traditions. Very few mentioned it as a cooperation form of primary importance, only great-regional (33%) and local (20%) cooperations did so, and only on internal borders. At regional level, neither social nor cultural aspects are primary, this level being basically a means of territorial development. The problem of national minorities must be given special attention, for example, incorporating the language of the neighbouring country in the educational system, in all types of school and forms of education outside schools for the sake of emancipation, since communication is a part of cross-border cooperation. The improvement of language teaching and meetings that facilitate compliance with the conditions of European leisure and service society must be accentuated. Furthering cooperation of the media via shared and repeated news, information services, and cross-border radio and TV programs can play a key role here.

The development of border regions is the result of

a long development process. The peripheral character of border areas is principally defined by how far they are from the centre of the country, and from economically developed centres. The state of the infrastructure is also a defining factor, since the large part of infrastructure in the border regions, in most of the cases, compared to the interior part of countries, was built decades later. Where there is still no appropriate infrastructure, there is often no physical basis of future interregional, cross-border developments. Regional policies concerning economy and infrastructure must aspire to mutual coordination in the border regions, and ultimately to the harmonisation of infrastructural, economic and social-political measures and norms, and the reduction of disparities in development in border areas.

The success of several programs, regional operative programs (ROP) and the Operative Programs of European Territorial Cooperation (2007-2013) make coordination necessary, both on institutional and project levels.[45]

In addition to preserving cultural diversity, border regions contribute to the broadest and most intensive cooperation possible, and to embodying the spirit of European integration. Cross-border cultural cooperation helps to create a sense of affinity among identical minorities, and contributes to the easier understanding of divergent cultural and linguistic groups. This greatly facilitates the spread of a tolerant mentality (usually still lacking) in the area, and understanding between nations. Politicians, public servants, and also print and electronic media have to provide conditions that promote the elimination of prejudices by means of neighbourly relationships.

It is essential to highlight that 75% of the people in external border areas mentioned economic relations as the main goal of cooperation, while this ratio was only 40% in the internal border areas. The difference is equally great in the subject of political cooperation as a major aim: 12.5% in the external, and 30% in the internal areas. Finally, social-cultural purposes as a primarily important aim were articulated mainly in internal border areas.

5. THE IMPORTANCE OF ACQUIRING RESOURCES

The application system leading to financial resources is an important instrument for the advancement of cross-border cooperation. The usual motivation for an application is a shortage of capital, lack of foreign investment interests, and the poverty of those planning to cooperate. As a consequence of the high unemployment rate, in the external peripheries and underdeveloped regions there is a necessity for programs adjusted to the demands of the economy, for the special management of retraining, and for the elaboration of the system of employment and social services. This is why the present research examined whether or not joining to the European Union—besides the existing relations, cooperative programs—can offer a possibility of development in the reinforcement of the resource-acquiring ability of the Euroregions, in elaborating and realizing cross-border developmental projects, and through these, in reinforcing regional economic, social and political cohesion. Apart from this, the research also investigated whether or not the expected developmental extra resources advance the economic-social cohesion of the region, and, as a result, whether the economic, commercial and employment possibilities are broadening along the external borders of the EU.

All of the three organizational models exist along the Hungarian borders: great-regional structure with national participation, those with regional (county NUTS 3 or region NUTS 2), and those with local/micro-regional participation (NUTS 4), and settlement (NUTS 5). Cooperation with the participation of the local levels seem to function most effectively and beneficially of the three levels, where internal organizational units were set up coordinated by local self-governments. These are able to provide a more professional and organically more stable background for international cooperation than the local self-governments of settlements.

The number of Euroregions shows an abrupt increase from the year 2000. Seventy-five percent of the new local Euroregions are local cooperation systems, behind which there is smoothly functioning self-governmental, town-twinning cooperation between settlements and micro-regions. Thus, the local type of Euroregional cooperation can be called 'project-based' Euroregions. The cohesive force of Euroregions is application resources. Fifty-eight percent of those answering the question 'How many times have you submitted an application for an EU project?' were from local cooperation, while this ratio was only twenty four percent in the case of regional cooperation.

During the preparation for the EU membership, one might be expected to know that 2004 INTERREG,[46] which supports cooperation across borders, can be applied not only for the Austrian-Hungarian border section, but also the internal Slovak-Hungarian, Slovenian-Hungarian bor-

der regions, as well as the Romanian-Hungarian, Serbian-Hungarian, and Ukrainian-Hungarian border sections.[47] In fact, 80% answered „yes" to the question 'Have the chances for application increased since the joining the EU?', which shows their confidence in the future. At the same time, it seems that the financial support has not turned out as expected. Some disillusionment can be felt from the answers to the question: 'Has the fact of joining to the EU truly brought about change in the collaboration?'. A decline of 20% (from the original 88.9%) can be seen in the case of local organizations (62,5%), while in case of the regional cooperation this ratio is even higher (40%). Therefore, while more and more applications were submitted at the lower levels, progressively fewer projects could be carried out.

The financial support of the Union has advanced cooperation established in the border regions of Hungary to a great extent. A strategy and developmental program establishing common priorities is an essential requirement if applications submitted for collective financial support are to be accepted. After the establishment of initial cooperation of larger regions, smaller, local and regional types of cooperation came to the fore. Local initiatives supported by INTERREG A, Phare CBC, CARDS CBC and Tacis CBC programs, besides playing a role in international economic, social and institutional connections, did have a great impact on the shaping of Euro regions.

It is essential to utilise the resources of the European Union efficiently—apart from aims of Hungarian developmental policy—within the framework of active partnership with the neighbouring countries, and to adopt and transfer all developmental and territorial planning experience from the EU to the potential membership candidate, Serbia, and to the non-candidate, neighbouring Ukraine.

The cohesion aim, to develop less-developed territories and regions, and increase the significance of cooperation across borders, has gone hand in hand with the augmentation of EU financial support. The cohesion financial resources—the structural funds and the INTERREG—stimulate state and private investments in the favoured regions, thus contributing to the increase of GDP in the underdeveloped regions. During the debate over the financing and priorities of the EU budget between 2007 and 2013, satisfactory arguments were needed to justify how cross-border cooperation contributes to the fulfilment of the cohesion policy. Cross-border cooperation gives added value to the national regulations.

6. NEIGHBOURHOOD POLICY

The structure and institutionalisation of cooperation systems are largely influenced by the differences between national legal and administrative systems, and bilateral and multilateral agreements signed by the central governments, as well as the fact that the north-eastern and southern borders of Hungary are currently external EU borders. The basis for good neighbourhood relations is created through bilateral agreements between central governments, more intensive political conversation, and creating frameworks for closer economic, commercial, interior and judicial cooperation. In its bilateral relations, Hungary has been aspiring to stability and cooperation since the 1990s: basic treaties were signed in the 1990s with the neighbouring countries for this purpose. Hungary made an agreement about the preservation of good neighbourhood relations with Romania, Slovakia, Ukraine, Poland, Croatia and Slovenia. These bilateral treaties deal only tangentially with the issues of cross-border cooperation of local self-governments and administration; however, the reinforcement of global relation system has a good effect on local processes.

In accordance with the Madrid Convention, separate intergovernmental agreements were made with Ukraine (1997) and Slovakia, the text of which is nearly identical to that of the Madrid Convention, except that it contains no accessory regulation[48] comparable to the Convention. It is a region-specific problem that central governments often do not treat sub-national Euroregional organizations as partners.

In most countries, the intention of the central government is indispensable to the creation of legal and public administration conditions necessary to the formation and operation of Euroregions. To allow the creation of cross-border programs without interstate agreements, the neighbouring countries must provide wider and wider jurisdictions to their local and regional authorities. If a member state provides the necessary authority to the regions, it then becomes possible for sub-national cooperation systems to evolve within the framework of decentralised partnerships, without interstate agreements. It is true that real regions (having elected bodies, financial sources and competences) must be also legally based.

Since Romania and Bulgaria joined the EU on 1st January 2007, the European Union now offers the perspective of accession to Hungary's southern neighbours, the countries of the Western Balkans. Croatia is a candidate country, and Serbia[49] also has

the perspective of EU-accession. The prospect of EU-membership is the main framework for the stabilisation and transformation of the Western Balkans. Since May 1999, the Process of Stabilisation and Association provides a framework for creating a safe and prosperous neighbourhood policy with relations based on close and peaceful cooperation.

In the 'Wider Europe' Communication,[50] the Commission only deals with those neighbouring countries that do not enjoy the prospect of membership, namely the western Newly Independent States (NIS) and the Southern Mediterranean. Ukraine is the only neighbour country of Hungary which has no EU membership prospects. But taking into account the size and weight and the impact of enlargement on Ukraine's relations with other NIS and Russia, it is one of the EU's most important neighbours, and the Union aspires to a policy of deeper cooperation with Ukraine, which shares a common border with Hungary.

It is a common interest of the Union and Hungary that the democratisation process should be successfully completed in the countries on their eastern and southern border, and a politically stable, democratic and peaceful area should evolve, an area that does not endanger the stability and the economy of the EU. The 'Wider Europe' makes it necessary to create new frameworks for the relations of Hungary with its eastern and southern neighbours.

As a result of the enlargement on 1st January 2007, 95% of the Hungarian population earlier separated by borderlines now live within the EU. Hence the new task of minority policy to pay exceptional attention to those areas of the Carpathian-Ukrainian (Zakarpattia Oblast) and the Vojvodina regions populated by Hungarian inhabitants. The aim of Hungary is for in the long run the whole Hungarian population within the Carpathian Basin to become part of the Union. To this end, the Hungarian Government has argued for the Euro-Atlantic integration of all neighbouring countries,[51] and the new neighbourhood policy of the Union constitutes a considerable step towards this goal. The regions on the *external EU-borders of Hungary* must play an important role in the integration of undeveloped, peripheral border areas. In the formation of neighbourhood strategy, therefore, they play a serious role in the period after 2007. The eastern extension of the EU also means new challenges and tasks for the Hungarian Euroregional cross-border cooperation systems.

The national political aspects (e.g. the Visegrád Cooperation) are also valid within the frameworks of regional cooperation within the area of the European Union. For example, Hungary played a major role in setting up the Consultative Committee of the Visegrád Countries' Euroregions on 6th May 2004. The Hungarian, Slovakian, Polish and Czech Euroregions constituting the Committee encourage cross-border regional cooperation, with the creation of possibilities of interregional exchange of experience. The initiative starting 21st June 2006, in Sarajevo, the 'West Balkan Visegrád Foundation', offers a forum for the assistance of cross-border cooperation between the two regions, for the building of local democracy, and for the debate on developmental demands arising at non-intergovernmental level.

The Hungarian initiative and policy instrument, the Szeged Process (1999)[52] is a framework that has facilitated the implementation the EU's strategy towards the region, and contributed to the endeavours of the Euro-Atlantic institutions in South Eastern Europe. The Szeged Process supported the priorities of the Stability Pact. Its most valuable contribution has been the promotion of enhanced cross-border cooperation through the support of Euroregions in the Western Balkans. The experience of the Danube-Kris-Mures-Tisa (DKMT) Euroregion serves as a model to place Balkan cooperation in the context best suited to their needs. The Szeged Process towards the Western Balkans like the Nyíregyháza Initiative (2003)[53] towards Ukraine can provide training and know-how transfer, and can establish the dialogue between local (and regional) leaders of new members and their non-EU neighbours about the best possible cooperation in the context of the changing nature of borders. The programme relies on the experience of the international organizations, mainly the Council of Europe and the EU. The Szeged Process and the Nyíregyháza Initiative are the framework for strengthening the EU's New Neighbourhood Policy across the EU's new eastern borders through the cooperation between local and regional authorities and through the partnership of the latter, as well as civil actors. The forms of cross-border cooperation could promote free movement and cooperation among the people of border regions, and the development of relations on the basis of European norms and values.

Cross-border cooperation is therefore the primary tool for all the neighbouring countries to establish mutually fruitful relationship, building on the existing strong points to overcome the negative consequence of separateness and isolation. Opportunities and threats exist which must be addressed in a spirit of cooperation, looking at what has been achieved and what should be done for the region to become a

Table 3: Types of Euroregions along the internal and external borders of Hungary

Internal Border	*Name of Cooperation*	*Establishment*	*Area (km²)*	*Population (people)*
Great-regional	EUREGIO West/Nyugat Pannonia, and. Triple Danube Area Euroregion	1999. 06. 21. (Kismarton), and 2001. 01. 25. (Győr)	15,295 6,162	1,279,585; 696,940
Regional	Vág-Danube-Ipel' Euroregion	1999. 07. 03. (Neszmély)	23,975	2,929,000
	Hajdú-Bihar-Bihor Euroregion	2002. 10. 11. (Oradea)	13,755	1,176,478
	Ipoly Euroregion	2002. 10. 02. (Ipolyság)	60,325	542,727
	Danube Euroregion	2003. 02. 20. (Neszmély)	750	15,000
	Ister-Granum Euroregion	2004. 12. 01. (Esztergom)	2,199	216,261
Local	Sajó-Rimava Euroregion	2000. 07. 07. (Putnok)	6,000	1,000,000
	Neogradiensis Euroregion	2000. 03. 25. (Lucenec)	4,669	364,697
	Kosice-Miskolc Euroregion	2000. 12. 01. (Miskolc)	14,000	1,014,000
	Zemplén Euroregion	2004. 04. 23. (Sátoraljaújhely)	5,330	317,579
	Bihar-Bihor Euroregion	2002. 07. 11. (Biharkeresztes)	176,000	108,698
External border				
	Alps-Adriatic Working Community	1978. 11. 20. (Venezia)	277,402	40,000,000
Great-regional	Danube-Drava-Sava Euroregional Cooperation	1998. 11. 28. (Pécs)	28,284	2,500,000
	Carpathian Euroregion Interregional Association	1993. 02. 14. (Dessian)	161,192	16,051,000
	Interregio	2000. 10. 06. (Nyíregyháza)	23,156	2,185,304
Regional	Danube-Kris-Mures-Tisa Euroregion	1997. 11. 21. (Szeged)	71,636	5,545,000
	Mura-Drava Euroregion	2004. 10. 02. (Caklovac)	10,550	754,826
Local	Drava-Mura Euroregion	2002. 02. 18. (Nagykanizsa)	4,860	340,758

credible partner and for the countries in the region to become stable and reliable democracies.

Differentiated integration is characteristic, as the Euroregions that evolved along the borders of Hungary are in the elementary stage of forming structures. It is not surprising that their institutionalisation shows a variety of forms. *Table 3* contains the main data.

The principles of cross-border cooperation (supported by the European Commission) in the operation of Euroregions, based on the evaluation of the leaders, are different, as shown by *Chart 6*.

Chart 6: How principles on cooperation structure are realized on average (on scale 1-5)

Principle	*Great Regional*	*Regional*	*Local cooperation*
Decentralisation	3,67	3,6	4,0
Subsidiarity	5,0	3,6	4,0
Vertical partnership	3,33	3,8	3,5
Horizontal partnership	5,0	4,0	3,6
Programming	2,67	3,8	3,7
Concentration	3,33	3,6	3,4

The research has enabled us to analyse the meaning and interrelation of the units of Euroregions, i.e. the micro-region, the county and the region, as well as their content from the point of view of how they apply the common principles of the European Union's assistance within the projects and operational programmes. The study lays great emphasis on how the activities of the Euroregions have contributed to the implementation of the common principles of the European Union's assistance.

Programming: Over the years, Euroregions have proved effective instruments for setting objectives, drafting and implementing projects, and building capacities even at local level. Strategic planning and project management capabilities are the main features of successful Euroregions, as regards both internal development and access to funding opportunities established by the EU. Particular mention was made of the desirability, (e.g. in the case of the Drava-Mura Euroregion and the Danube-Drava-Sava Euroregion) of having a secretariat that could harmonize the proposals, reports, projects and programmes formulated and elaborated by the partners from both sides of the border.

Subsidiarity: In general, Euroregional leaders were realistic in their assessments, appreciating the specific added value of cross-border cooperation as a model for 'new governance' which practices subsidiarity in spite of different administrative structures, political competences and national laws on both sides of the border. However, a few respondents

(e.g. the Danube-Kris-Mures-Tisa Euroregion and the Hajdu-Bihar-Bihor Euroregion), believed that the bottom-up approach should bring different communities much closer and should focus on common economic issues, interact and promote their cooperation in the future.

Decentralisation: Border areas face opportunities and problems that national bodies are unable to respond to. Cross-border partnership structures must be put in place at local and regional level. Border regions *need national and European* assistance to fulfil the challenges. Using assistance can be effective in the framework of decentralised partnerships. The fundamental problem of managing cross-border programmes is represented by the often very different administrative levels involved: e.g. the Carpathian Euroregion is the cooperation of NUTS 2 and NUTS 3 levels; in another cases the different legal and administrative rules and traditions of the members create difficulties, e.g. in the case of the Drava-Mura, the Danube-Drava-Sava and the Alps-Adriatic Euroregions.

Vertical partnership: This principle should work between local, regional and national authorities (and at European level). However, the local cooperations, Bihar-Bihor, Drava-Mura, comment upon the lack of the partnership at national, regional and local levels. They are successful in generating projects, but they need strong support to extend their activities. The lack of financial power sometimes frustrates the leaders and much depends on their own experience and ability to make the cooperation work. Not surprisingly, as good politicians, most of them have taken a pragmatic approach, and demanded equivalent contribution from the national government to overcome the Euroregions' financial difficulties.

Concentration: The financing of Euroregions has been solved mainly through EU assistance. The shortage of funding often stems from the lack of general powers of the authorities. This is why they call for the decentralisation of their budgets and their management. Dissatisfaction with the operation of 'concentration' derives from the fact that EU assistance is not matched by national funds. Mostly, the leaders of local cooperations are dissatisfied. Their complaints focus on the inappropriate system of financing and the lack of Public-Private Partnerships (PPP).

Horizontal partnership: Respondents were satisfied with the fruition of this principle. The internal and external partnerships are essential to the elaboration and the implementation of developmental strategies relying on the consultation and the participation of stakeholders, such as local/regional authorities, economic and social partners and representatives of the civil society, including NGOs. Partnership provides a basis for openness and transparency in the preparation and implementation of programmes.

Vertical partnership and decentralisation show a higher average value along the external borderlines in the organizational structure of Euroregional cooperation systems (4); that is, the delegation of power from the higher levels to the lower levels, and the cooperation among these hierarchic levels. Subsidiarity (4.25) and the intention of cooperation between identical levels are a little stronger, as the evaluation of the realisation of horizontal partnerships. This tendency evidently shows the willingness to cooperation and its increase along the external borders of the EU, and the lower levels nearer to the citizens play the leading role in this cooperation. The development strategies and plans mean the evolution of the 'improved conversation' with the neighbouring countries.

Chart 7: How principles of cooperation are realized on average (scale 1–5) by borders

Principles	*External EU border*	*Internal border*
Decentralisation	4,0	3,7
Subsidiarity	4,25	3,9
Vertical partnership	4,0	3,2
Horizontal partnership	4,25	3,7
Programming	3,25	3,8
Concentration	3,35	3,5

The acceptance of decentralisation (4) is a little higher along the external borders than in the internal ones (3.7). However, it shows that the governmental acceptance of Euroregions should be increased, and it explores the acute problem of the lack of competence of Euroregional cooperation systems, and the fact that cross-border developments still belong to the sphere of authority of interstate agreements.

In an optimal case, the regional level should be granted a competence of decision-making, that is, its cross-border competence should be made similar to that of national cases. Local aims are not always identical with those of the central governments.

The realisation of the principles of decentralisation, subsidiarity and partnership is indispensable in the cooperation between European, national, regional and local levels. Authorities below the level of the government and the different groups of the population on both sides of the borders can contribute to peace, security and liberty and serve the defence of human rights, including national and ethnic minority rights. Therefore, border regions play a bridging role for the coexistence of European nations and

minorities, as the elements of the European unification process.

The judgement of cooperation, as for the principles of regional policy, did not fall under the value (3) in the case of any of the principles. Vertical partnership reached the lowest value (3.2), which may be due to the difficulties of cooperation between central government and lower levels. This problem highlights the *obstacles of real regionalisation and decentralisation processes* in Hungary and the neighbouring countries. Strategic programs of Euroregions are not harmonised with the development plans of counties and micro-regions making up the given Euroregion, or with the economic and social programs of regional cooperation systems. Local cooperation systems and enterprise areas and industrial parks connected to them can create a durable foundation for economic cooperation and a social pillar of the organization of the micro-region areas, settlements or settlement associations of Euroregions.

Relations at Euroregional level also greatly depend on the degree of decentralisation in the given country. The competence of cooperating parties is often different, for example, if the Austrian provincial level adjusts itself to its legal status, then state organizations must also be involved in the work on the Hungarian side of the border for complete cooperation. The regulations of competence in the legal system of the neighbouring countries are very different from the Hungarian, but the neighbouring countries' systems are less decentralised.[54]

The removal of borderlines and the reinforcement of their bridge role can induce considerable development along the internal borders of the Union. Cooperation is not only important for people living on both sides of the border, but can create political stability for central governments, and the social and economic development of border regions can accelerate. The external borders, due to the Schengen acquis, are evidently in a more advantageous situation than the internal ones. The strategy towards the cross-border Hungarian population can play a key role in the elaboration of the strategic purposes of Euroregions, and in its realisation, across external borders as well.

7. THE EFFECT OF THE EXTENSION OF THE SCHENGEN ZONE

Since 2008, Hungary has two types of border sections:

– those that count as internal borders; therefore, border control is ceased along the Hungarian-Austrian, Hungarian-Slovakian and Hungarian-Slovenian borderlines,

– those that count as external borders; therefore, the order of border control remains unchanged along the Hungarian-Ukrainian, Hungarian-Romanian, Hungarian-Serbian and Hungarian-Croatian borders, it is modified only a little along the Romanian border. The citizens of the non-Schengen states can enter Hungary with a visa, based on bilateral international treaties; it is possible to travel to Croatia with identity card; and Croatian citizens can still enter Hungary visa-free. From Serbia and Ukraine, it is possible to enter Hungary with different types of visa; a so-called national visa can also be requested.

Euroregions and labour communities evolving along external borders will have the important assignment to actively contribute to the stabilisation of the North-East-European and South-East-European areas, mainly regarding the emancipation of national and ethnic minorities. For this purpose, they must actively support the Euro-Atlantic Integration aims of the countries in the area.

All levels of cooperation of border regions should participate in the activities of regional cooperation forums and organizations, within the framework of vertical and horizontal partnership relations. The principle of building upwards from beneath must be treated with exceptional attention, and civilian and professional organizations can play a key role. This helps these cooperation systems to develop further and be filled with content.

The role and responsibility of Hungary towards the neighbouring countries seriously increased with the introduction of the Schengen acquis, since it must play a dual role: to meet with the Schengen regulations and maintain a strict border control system, and, at the same time, to create solutions that are able to counter-balance the disadvantages deriving from the Schengen system, mainly in border regions inhabited by Hungarian population.

The reduction of fragmentation caused by territorial differences and national borders through cross-border cooperation between regional and local self-governments, gained considerable political and legal acknowledgement in the program period 2007-2013, namely in the legislation package concerning the available cohesion political resources. The European Regional Development Fund, the European Social Fund and the Cohesion Fund support three new objectives: convergence, regional competitiveness and employment, and the European Territorial Cooperation.

The European Territorial Cooperation is based

on the experience of ERDF and INTERREG community initiative, and its aim is to increase co-operation in cross-border programs by creating trans-national areas and an interregional cooperation network in the Union through the exchange of experience. Since 1988, the EU spent 480 billion Euro on disadvantaged regions. In the period 2007-2013, 308 billion Euro are available from the Cohesion Fund.

The character of cross-border programs differs depending on whether the cooperation concerns areas along external or internal borders. Operative programs along the Hungarian-Austrian, Hungarian-Slovenian and Hungarian-Slovakian borders are financed by the ERDF (see *Chart 8*), within the frameworks of the ETC. In the regions along external borders, it contributes to cross-border parts of ENPI and IPA, whose task is to replace Phare, Tacis, Meda, CARDS, ISPA and SAPARD programs. The new financial instrument created for the purposes of European Neighbourhood Policy, the European Neighbourhood Policy Instrument, will be granted to the partner states between 2007-2013. The support can be grouped around four main aims:

– Sustainable development of regions on both sides of a common border

– Fight against organised crime, actions in the field of environment protection and public health service

– Building efficient and safe borders

– Local, cross-border programs bringing people together.

Among the neighbours of Hungary, in the Ukrainian border area the program is four-sided (Hungarian-Slovakian-Romanian-Ukrainian border section), while the program along the Hungarian-Croatian and Hungarian-Serbian borders belong to the competence of IPA.

Overall resources for the European territorial cooperation objective shall amount 2.52% of the resources available for commitment from the Funds for period 2007-2013. From the sum of EUR 308,041,000,000 (at 2004 prices) 73.86% is available for the financing of cross-border cooperation, 20.95% for transnational cooperation and 5.19% for interregional cooperation.[55]

The extension of the Schengen acquis contributes to the completion of an area based on liberty, safety and justice, and to the defence of external borders. The negative effects of the Schengen borders (organised crime, illegal migration, increased traffic) can be offset by the development of cross-border relations, and the creation of a network of Euroregions can be reinforced with the development

Chart 8: Cross border EU-development programs, 2007-2013

Cooperation Support	*Program*	*Source (€)*
European Territorial Cooperation	Hungary-Slovenia	176,496,479
	Hungary-Romania	224,474,935
	Hungary-Austria	82,280,309
	Hungary-Slovenia	29,279,283
Instrument for Pre-accession Assistance (IPA)	Hungary-Serbia	50,111,383
	Hungary-Croatia	52,434,124
European Neighbourhood and Partnership Instrument (ENPI)	Hungary-Ukraine-Slovakia-Romania	68,640,000
Altogether		68,3716,513

Source:http://www.nemzetpolitika.gov.hu/index.php?main_category=2&action=view_item&item=396

of relations of local and territorial self-governments interested in cross-border cooperation. Euroregional development serves the interest of the Hungarian population living beyond the borders.

1. The number of labourers living on side, but working on the other side of the border is quite large, and it often depends on the tempo of economic changes at national level. The number of commuters crossing the border for private purposes is also growing. At the same time, it is also evident that cross-border commuters can cross external and internal borders on different conditions, and irregular movement is also vast, with illegal cross-border commuters are also appearing.

From the point of view of Hungary, this problem has to be given special attention, mainly along the Serbian and Ukrainian borderlines. Regional registers containing the rights of cross-border commuters should be edited, and further friendship treaties should be signed with the South- and East-European countries in order to find a solution to the special problem of cross-border commuting both across the external and internal borders of the EU.

2. The offices of Euroregions should contribute to the improvement of custom and border police authorities to maintain public order and fight cross-border organised crime. The introduction of local border traffic is to be treated as an exceptionally important issue, and its improvement for the inhabitants of border regions, mainly for the sake of the Hungarian population along the borders. The regularisation of local border crossings would decrease

illegal migration, and the border crossings should be open also at night; furthermore, several border crossings could be opened at illegal border crossing points.

CONCLUSIONS

1. In summing up the ongoing processes on the borders of Hungary, it can be stated that despite the need to improve their activities, financial support and information, these cross-border bodies are positive factors in the development of cross-border cooperation. The findings of the research show that a coordinated and integrated developmental strategy for cross-border areas can be achieved through fundamentally institutionalised Euroregions. This is a prerequisite for regular cooperation.

The respondents of the questionnaire agreed that it is essential for local and regional authorities to have the necessary power to play their natural role of promoting and managing competitiveness, innovation and cohesion policies, for the benefit of cross-border cooperation.

All three organizational models exist along Hungary's borders, the regional (county NUTS 3 or region NUTS 2) cooperation system coming closest to organisational construction of real Euroregion.

2. Cross-border cooperation is not possible without decentralisation. It substantially contributes to European integration and to the implementation of cross-border strategies. Furthermore, it brings EU policies closer to the people. CBC cooperation means European, political, institutional and socio-cultural added value.

– CBC initiatives within the region's strategy need a good methodological framework, and resources have to be defined and increased to make those initiatives more effective.

– Successfully strengthened cross-border cooperation needs an appropriate legislative framework in terms of local governance, local administrative reforms and capacity building. To overcome obstacles and barriers created by borders due to national laws and the different administrative structures and competences is the willingness of local and regional authorities. The new European legal instrument, the EGTC is unique because Member States must however agree to the participation of potential members in their respective countries. The EGTC is a legal entity and as such, will enable regional and local authorities and other public bodies from different member states to set up cooperation groupings with a legal personality.

– The EU's commitment and the assistance to international communities need to be matched with the dedication of non-EU governments to implement the necessary political and legal reforms, to establish the required administrative capacity, and to co-operate between themselves.

3. Cross-border cooperation systems operate most efficiently in areas where the process is initiated by local/regional actors. This is the so-called bottom-up organizational structure that guarantees the legitimacy of the decisions and the approach towards the citizens. In order to improve economic competitiveness and solve shared cross-border problems jointly at both the local and regional levels, Euroregional strategies are indispensable.

The systematic cooperation of regional/local actors (governmental, civic and business) across national borders builds bridges between the ethnic and national minorities, and provides the practical underpinning to regional cooperation and to reconciliation in areas which have suffered from severed or dysfunctional cross-border relations.

4. At local level, it is a characteristic of cooperation systems that the actors act within the borders of their own settlements, and are not able to get on within wider frameworks. The organization of micro-region cooperation system has already begun, but the process is slow and is hindered by several factors. These include economic reasons, lack of resources, lack of communication and information exchange, and isolation, as well as problems of ideology and psychical factors. The enlargement of the European Union will have a particularly significant impact on the territorial and social cohesion of these areas. Conversely, stagnation and social crises in the borderlands could threaten the EU's ability to manage its new external border effectively. Border regions need national and European assistance to meet these challenges. To this end, the EU provides the necessary funds which help to stabilise the situation in the border regions (Eastern and South Eastern Europe). Regional economic policy in cross-border regions should promote the border related differences in development and be integrated into basic goals of national development, also European policies (regional and social policy objectives etc.). In this way cross-border cooperation becomes a constituent element of regional development.

5. Cross-border networks at local and regional level can promote not only economic cooperation, but also make an important contribution to tolerance and building mutual trust via socio-cultural cooperation (education, language training). Cross-border cooperation therefore will remain an indis-

pensable factor to facilitate partnerships between neighbouring countries. Partnerships of this kind can built the new multilevel good neighbourly relations on the borders.

Translated by Balázs Kántás
Proofread by John Harbord

NOTES

1. Accociation of European Border Regions. European Charter for border and Cross-border rgions. New version. Gronau, 7th October 2004. Preamble, 3.
2. The results of the paper are part of the research project 'The legal and administrative aspects of cross-border cooperation' supported by the OTKA-project No. T 042892.The information of the Ministry of Foreign Affairs served as the basis for the research supported by OTKA. The survey was completed in March 2006, the analysis of the data started after that.
3. Practical Guide to Cross-border Cooperation Systems, Gronau. 1997, AEBR, 1997: B1, 7
4. Tamás Hardi, *Conditions of forming uniform border regions–the possible border regions in the Carpathian basin* [Ph.D. Dissertation] (Centre for Regional Studies, Győr-Pécs 2001) 76.
5. European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities CETS No.: 106 Opening for signature 21/5/1980, Madrid.
6. According to Article 2 (2) of the Madrid Convention, 'territorial communities or authorities' shall mean communities, authorities or bodies exercising local and regional functions and regarded as such under the domestic law of each State. Based on this, in Hungary, the subjects of agreements regulated by the Madrid Convention can be local (municipal, NUTS 5; micro-regional, NUTS 4) and regional (county, NUTS 3; planning /statistical region, NUTS 2).
7. Interstate agreements are the following:
   – Model inter-state agreement for the promotion of transfrontier cooperation
   – Model inter-state agreement on regional transfrontier consultation
   – Model inter-state agreement on local transfrontier consultation
   – Model inter-state agreement on contractual transfrontier cooperation between local authorities
   Outline agreements, statutes and contracts between local authorities:
   – Outline agreement on the setting up of a consultation group between local authorities
   – Outline agreement on co-ordination in the management of transfrontier local public affairs
   – Outline agreement on the setting up of private law transfrontier associations
   – Outline contract for the provision of supplies or services between local authorities in frontier areas(private-law type)
   – Outline contract for the provision of supplies or services between local authorities in frontier areas (public-law type)
   – Outline agreement on the setting up of organs of transfrontier cooperation between local authorities
8. Practical Guide to Cross-border Cooperation Systems, Gronau. 1997, AEBR, A3. pp. 2-3.
9. Additional Protocol to the European Outline Convention on transfrontier cooperation between territorial communities or authorities. Strasbourg, 9. XI. 1995.; and Protocol No. 2 to the European Outline Convention on transfrontier cooperation between territorial communities or authorities concerning interterritorial cooperation. Strasbourg, 5. V. 1998. CETS No. 159
10. Coming into force: after ratified by 4 states, 1st December 1998.
11. Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation CETS No.: 169 Art. 2.
12. Revised preliminary draft European Convention containing a uniform law on groupings of territorial cooperation (GTC) Council of Europe. CDLR (2006) 17 Strasbourg, 20 April 2006.
13. Revised preliminary draft European Convention containing a uniform law on groupings of territorial (GTC) Council of Europe. CDLR (2006) 17 Strasbourg, 20 April 2006. Article 13 (3), Appendix I Article 2. (2).
14. Revised preliminary draft European Convention containing a uniform law on groupings of territorial (GTC) Council of Europe. CDLR (2006) 17 Strasbourg, 20 April 2006. Appendix I. Article 4. (3).
15. Revised preliminary draft European Convention containing a uniform law on groupings of territorial cooperation (GTC) Council of Europe. CDLR (2006) 17 Strasbourg, 20 April 2006. Preamble 13. and Article 3. (1).
16. Treaty establishing a Constitution for Europe. Brussels, 29th October 2004, CIG 87/2/04 REV Preamble Part I Title III Article 1-11 (3), Official Journal of the European Union, C 310, Volume 47, 16.12.2004.
17. The Congress of Local and Regional Authorities brings together the elected representatives of the local and regional communities. It is a Council of Europe consultative body, being intended to genuinely represent both local and regional authorities, it comprises two chambers: the Chamber of Local Authorities and the Chamber of Regions.

18. European Charter of Local Self-Government. Strasburg, 15. X. 1985. Council of Europe, European Treaty Series No. 122.
19. Coming into force: after ratified by 4 states, 1st September 1988.
20. The conference arranged in Budapest, similar to previous conferences, requested the Congress of Local and Regional Authorities to continue working on the Charter's proposal. The Congress of Local and Regional Authorities was sad to acknowledge that they do not have the necessary majority in the Committee of Ministers to accept the proposal, therefore they proposed that the debates continue.
21. The European Charter on Local Self-government, 15. Oct. 1985. Strasbourg, signed from the side the Republic of Hungary on 6. Aug. 1992 and approved with the Act XV of 1997:
22. The legal background to the international relations of local governments is provided by the Constitution of the Republic of Hungary, (44/A § (1) h) and the Act on Local Governments (Act LXV of 1990. 1. § (6) c.
23. Act on Local Governments (Act LXV of 1990: 1. § (6) c).
24. Considering the need to make individual territories of the member states commensurable the Nomenclature of Territorial Units for Statistics (NUTS) was established by Eurostat in order to provide a single uniform breakdown of territorial units for the production of regional statistics for the European Union.
25. 1970: 10 Euroregions were founded in the castle of Anholt. Two more were in the process of being established: The Regio Rhein-Waal and Euregio Noord (later Regio Ems Dollart). Some time after this, the Regio Bodanica developed into the Euregio Bodensee (Lake Constance). The German Land of Schleswig-Holstein, the Saarland, the Region Nord-Pas de Calais, the Regio Basiliensis and Ostfriesland participated as national border regions.
26. European Charter for Border and Cross-Border Regions, New version, Gronau, 7 Oct. 2004 <www.aebr.net>.
27. István Süli-Zakar, *Ten years of the Carpathian Euroregion interregional association* (University of Debrecen, Kossuth Egyetemi Kiadó, Debrecen 2003) 63.
28. György Éger, *Regionalism, the Euroregion as the specific spatial form of integration* [Pro Minoritate books] (Osiris, Budapest 2000).
29. Association of European Border Regions: Practical guide to cross-border cooperation. 1977 B2, pp. 11-12.
30. Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on the European Grouping of Territorial Cooperation (EGTC). OJ L 210 31.7.2006.
31. János Rehnitzer, *Cross-border cooperations in Europe and in Hungary* (Centre for Regional Studies, Győr, Pécs 1999) 35-36.
32. Organizations only existing in France.
33. See also: Edit Soós, Zsuzsanna Fejes, 'The institutionalisation of cross-border cooperation systems in Hungary' [2007] June Európai Tükör 104–121.
34. Hardi (n 4) 71.
35. Éva Kruppa, *Regions on the border. Cross-border cooperation in the EU and in Central Europe* [Ph.D. Dissertation] (Budapest 2003) 151.
36. Barbara Baller, 'The changing role of Euroregions after Hungary's accession' [2004] 1 Európai Tükör 156–157.
37. 2004): Formation of cross-border regions. Magyar Tudomány (Hungarian Science), 2004/9 pp. 56-59
38. Hardi Tamás, 'Az államhatárokon átnyúló régiók formálódása' [The Formation of Cross-border Regions] [2004] 49 Magyar Tudomány 57.
39. Kruppa (n 35) 145.
40. Baranyi Béla: 'Euroregionális szervezetek és új interregionális szerveződések Magyarország keleti államhatárai mentén' [Euroregional organizations and new interregional formations on the Eastern border of Hungary] [2002] Magyar Tudomány 1510–1512.
41. Kruppa (n 35) 149.
42. Practical Guide to Cross-Border Co-operation. Regional policy and cohesion. Second edition. 1997 p. 3.
43. János Rechnitzer, *Border Regions and National Strategy* (Centre for Regional Studies, Győr, Pécs 2001) 48.
44. Lille-Kortrijk-Tournai Eurometropol <http://www.lillemetropole.fr>.
45. Hungary-Slovakia-Romania-Ukraine ENPI Cross-border Cooperation Programme 2007-2013; Hungary-Romania Cross-border Cooperation Programme 2007 – 2013; Hungary-Slovakia Territorial Cooperation Programme 2007 – 2013, Hungary-Serbia IPA Cross-border Cooperation Programme 2007-2013; Hungary-Croatia IPA Cross-border Cooperation Programme 2007-2013; Hungary-Slovenia Territorial Cooperation Programme 2007 – 2013.
46. INTERREG is a program of action from 1989, which supplements the financial support of the Structural Funds in the area of cross-border coperation, between nations and regions. Its aim is to render the means of development and policies more effective.
47. To understand the results it is worth noting that the Slovakian-Hungarian frontier section became the inner frontier of the EU from 2004, thus it became the beneficiary of INTERREG III.
48. Forgácsné Orosz Valéria, A Madridi Egyezmény végrehajtása Magyarországon [The implementation of

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49. The EU signed the association agreement with Serbia on 29th April 2008.
50. European Commission. Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, Brussels, 11. 3. 2003 COM (2003) 104 final.
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52. See more details at the website of Szeged Centre of Security Policy at <www.scsp.hu>.
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Zsolt Körtvélyesi

COMMON? SECURITY? POLICY?*

MAPPING THE FIELD OF EU INTERNAL SECURITY AGENCIES

Many relevant criticisms have been raised concerning what we call the European Common External and Security Policy. Various articles have addressed how differences among member states make common action impossible, and why the EU cannot act and react in foreign affairs questions. There appears to be little improvement despite the huge number of experts and public servants working on the field.

The same can be said—with different emphasis—of the field of internal security. Interdependency in internal and judicial cooperation, border guard, police and gendarme organizations, in the fight against money laundering and terrorism, and protecting financial interest of the Communities can all result in fruitful cooperation. Still, the complexity of institutional frameworks seemingly does not help to reach the common target of creating a "zone of justice, liberty and security".

This incapacity must obviously have several causes. The book on "The Field of the EU Internal Security Agencies" published in the "Collection Cultures & Conflicts" series seeks to present institutional and interpersonal reasons with sociological means. To be more precise, it represents a stage towards mapping the sociologically perceived, complex field of internal security. The ongoing research is part of the *Challenge Program*—which is an EU Sixth Framework Program on the changing faces of liberty and security in the European Union with the participation of some two dozen European universities.

The research draws on an impressive number of interviews and surveys. The present volume contains three papers based essentially on the data thus collected. The first, longest study was written by four experts from Paris. They start by perceiving the internal security agencies, the inter-institutional and interpersonal network as a sociological *field* in the Bourdieusian sense. They analyze the borders, internal actors, and relations of this field. The result is summarized as a folded map attached to the back cover showing the many actors, relations and the high complexity of the European internal security cooperation. (The illustrative graph can be downloaded from the project's homepage: http://www.libertysecurity.org/article1670.html)

The word 'field', appearing in the title of the book and the paper, is the keyword of the study, the basis for analyzing the collected empirical data. The sociological approach is a genuine novelty for those who have become used to the ordinary formal presentation of the EU institutions. Here the reader can get palpable description, the kind of picture that is evident for those who work in the organization but which is rarely available to outsiders: the interests, tensions and struggles of the individual and institutional actors that can have a great impact on their everyday work. Surveys mapping these connections are common in the private sector, companies use the acquired (confidential) information for improving their decision making. The present case is just the opposite: the results can be accessed publicly and everybody can draw conclusions from them, but their application in practice is far from certain due to lack of political will.

The study does not claim to give a complete overview, rather, it can be considered as a panorama from a smaller mountaintop on the way to a higher peak: it is built on the results of previous papers, and reviews what remains to be done. (It is probably due to this interim nature that there is a confusion in the graphs presented in the first study. The second paper contains repetitive sections, and the annex refers to a diagram that is not included in the book.)

The annex to the first study maps the geographical limits of the field under analysis, with a great emphasis on the transatlantic influence and the lack of stable principles in the cooperation (which is merely a result of the differences between the member states' relation to the US). No doubt the paper is a French work, criticizing these (American, transat-

* Didier Bigo (ed), *The Field of the EU Internal Security Agencies, Collection Cultures & Conflicts* (L'Harmattan—Centre d'Etudes sur les Conflits, Paris 2007). Series ed.: Didier Bigo and Anastassia Tsoukala. The three studies in the volume: Didier Bigo, Laurent Bonelli, Dario Chi, Christian Olsson: *Mapping the Field of the EU Internal Security Agencies;* Antoine Mégie: *Mapping the Actors of European Judicial Cooperation;* Philippe Bonditti: *Biometrics and Surveillance.*

lantic) influences on the internal organization of the EU. In the conclusion, the authors insist on relations being unilateral and question the legal basis for the data flow: as if the basic rights that prevail in other situations were somehow neglected in this case. (Readers may remember the polemic on the EU-US passenger data transfer.) The research clearly confirms the unilateralist nature of the relations: it is reflected in the institutional framework and the appointment policy. Even transatlantists tend to mention a lack of reciprocity in the structure of the organizations specialized in cooperation. According to the authors, this transatlantic influence could not be so serious without the internal division and the rivalry among institutions.

The US insisting on a 'war on terror' and the Europeans mentioning a 'fight against terrorism' show the different principles applied: a military centered aspect in the former case, and a more 'politicized' approach in the latter. Still, the dissent often heard from politicians (like Chirac, Schröder or Zapatero) does not block the seamless cooperation at bureaucratic level, especially if it comes to security. The authors perceive a general trend of security experts 'colonizing' foreign affairs, while this impact is less significant the other way around (external relations logic in security policy).

As for the sociological means, the struggle of institutions for power can be described as a 'social game' in the Bourdieusian field for human and material resources—like pushing one's own classifications on actual security threats through. In this social game, databases are considered as informational capital—which is a disquieting statement, given the spread of illiberal security solutions. Intelligence is becoming more and more important, its logic prevailing in more and more areas, showing a dangerous trend mainly in criminal law.

Drawing this inference, the study clearly states that institutional logic often dominates over professional principles, and the founding circumstances of an institution can be more important than formal relations *per se*. The logics of the pillars and a certain consensus can be more decisive than the targets officially set for an agency. Experts tend to agree on the importance of individual observation of subjects, of technical solutions and of main security challenges, but usually disagree on how to classify threats and what are the desired solutions. One might ask how institutions could agree on a common view, given the individual experts' highly dissenting opinions.

Reviewing inter-institutional and interpersonal relations, the paper studies both everyday connections and formalized cooperation. Several examples support the observation that smooth cooperation cannot be taken for granted even if personal relations are strong. Seeking for a tangible explanation, the authors apply the notions of 'trust' and 'distrust' (as used by Luhmann or Fukuyama for instance). The presence or absence of trust can compensate for the lack of formal relations or can ruin efforts to build formal relations. (This can be seen in the trivial example where Europol and Eurojust could not agree in which office a common meeting should be held.)

Formal relations can on the other hand help informal relations to evolve. As building formal relations in the case of Europol would require the amendment of the founding convention, being a complicated and uncertain process, informal relations become substantial. Apart from inter-institutional relations, personal contacts can also play an important role. Personal impacts are indispensable to understand the cooperation between the Commission, the Parliament and OLAF to establish the post of the European public prosecutor: the actors involved were Germans, and their political relations in Germany became decisive.

We can conclude that informal-interpersonal and formal-legal relations are in constant interaction, the latter having short term effects, the former prevailing in the long run.

Technological development also has a great influence on the analyzed field. The growing preponderance of IT solutions can, from a sociological perspective, diminish the role of institutional and personal relations. The automated access to data—using technological interface in place of a human interface—reduces the role of trust among actors.

The annexes try to 'scan' the activities linked to security experts' field of work, interactions with foreign affairs, with the UN and the US (or, in the latter case, the lack of bilateral interactions), cooperation in criminal law, risk analysis and anti-terrorist diplomacy. (It is also due to counter-terrorist legislation, American influence, and the measures taken against money laundering, that financial institutions, regarding the data provided to intelligence, almost became part of the public sphere, and of the administration.)

The study gives a cross section on what courses, conflicts and relations are the determining factors in the future of European integration. After reviewing the jungle of conflicting interests, a pro-European reader can only conclude that even cumbersome cooperations are better than nothing, ie. the lack of agencies and the ad hoc cooperation of member states' national institutions.

As the authors state, the paper is far from gaining its final form, and at this phase of the ongoing research, it remains to be decided whether the separate 'field of European security agencies' (as advanced in the title) does exist or is just a compilation of national 'fields', without substantive value-added. The area has belonged to the Community pillar since the Amsterdam Treaty but unanimity is required to make decisions, which shows clearly the duality and paradox of the field. Despite the communitarian framework, decision making is rather a diplomatic conciliation of national decisions, implying uncertainty and lack of transparency accordingly.

The study written by an other expert from Paris, *Antoine Mégie*, explores the field of European judicial cooperation with the above mentioned methodology, presenting the institutional and individual actors, without treating institutions as black boxes. Informality plays an important role in this field, too. The author's starting point is that it is everyday practice that forms European integration. That's why one should look at the effect of the social and institutional environment on the individual and also at how personal strategies and institutional role affect the actor in judicial cooperation. The author considers that the conflicts among competent national institutions prevail at European level, and the use of the 'diplomatic toolkit' characterizes the field due to the requirement of unanimity. One can easily go as far as to conclude that a separate European field is still inexistent, but it is important not to underestimate the role of this cooperation, as it has significant impact eg. in criminal law.

The main conflict in the field is that between the national and community interests (between the Council and the Commission), though we can find examples of cooperation as well: ministry staff often refers to papers from the Commission and from a personal perspective the Commission is considered as a possible way to specialization.

According to the study, judges can have two kinds of attitude towards integration. Most consider the Union as a foreign institution far away that simply does not seem relevant to their everyday work. A few, however participate actively in the cooperation, though collective action (through judicial organizations) is more likely than individual. Linguistic and legal knowledge as well as personal experience can all have important impact on judges' attitude; personal relations are far more important in this area than formal connections.

One of the negative effects of informality is the marginalization of the human rights approach: consider the negative message of legal solutions lagging behind the practice of police cooperation. (Though this is not surprising seeing the preponderance of police institutions in the integration. We have to add that at European level in general, the situation is usually better.) National judges are supposed to have an important role in the judicial cooperation, but as we can see they tend to think in national terms, neglecting transborder cooperation as they are used to work autonomously, due to the specificities of their job.

The author concludes that informal and incidental processes are typical, institutional conflicts usually overrule the logic of harmonization, and these conflicts have a substantial impact on the actual outcome. The study mentions the example of Eurojust, the foundation of which was an intergovernmental response to the much more ambitious project of a European public prosecutor from the Commission. The institution thus created is—due to its intergovernmental logic—opposed to an institution based on supranational logic like OLAF. It is usually fallacious to emphasize the cooperation between the two institutions regarding the actual result of the interoperability: despite the often intersecting professional careers, bilateral relations had almost no real achievement. Putting this into numbers it means 11 cases transferred in 2005, and in 7 cases (out of the 11, according to Eurojust where the cases were transferred to) there was no chance for cooperation due to the short deadline. A member of the Europol staff adds that, in spite of the 1994 bilateral agreement on cooperation (which does not make collaboration mandatory), there is no real interaction between the two institutions due to ongoing rivalry.

The situation can be best described with an extract from an interview with a Europol employee: "we rarely cooperate with Eurojust. Last time we invited a judge from Eurojust and he didn't say a word throughout. He took notes, but we didn't get any useful information from him. For us this was not useful at all, but no doubt he collected some information. Everything depends on the judge. If we know and trust each other, the cooperation is much easier." cooperation is also typically more likely to happen between those from the same country. The relations between judges, prosecutors and police also reflect national differences in hierarchical or coordinative relations, which can in turn result in misunderstandings among people with distinct backgrounds.

Apart from the variety of institutional objectives, the struggles for legitimacy can be blamed for conflicts and making cooperation more difficult. Due to the prevailing informality, the institutional frame-

work and thus the working conditions, are in constant flux. As a result of this interaction among dynamic interest fields, the institutions tend to protect their own interests, legitimacy and independence. This intensifies mistrust, which can easily make cooperation impossible. In this context, sharing information, which is the basis of cooperation in criminal affairs, means an important loss of power, weakening positions in the legitimacy struggle. (Here we could add that the principle of data protection can occasionally benefit from this.) Only stable and mandatory regulation, based on common interests can bring solutions, and maybe some non-legal measures, though, as we have seen, good personal relations alone may not help in some cases.

The author gives an insight into the institutional logic of everyday work: the institutional strategies followed in the uncertain environment remind the reader of what Max Weber wrote about the likely degeneration of bureaucracies. In this respect, even collecting information can be seen as a proof of how useful the institution itself is. This underlines the importance of basic rights and of a data protection approach, as its principles could ensure that our data is used only in compliance with original and limited purposes, thus preventing information from being taken hostage in inter-institutional conflicts.

The third study in the book, written by *Philippe Bonditti,* reviews the series of small steps in the interaction between the inner logics of information technology and intelligence, a trend that endangers the predominance of certain basic rights. The appearance of biometric data in the security toolkit strengthens the idea of solving security problems through technological development. This logic prescribes the ongoing building of databases, assuring their compatibility and interoperability, thus connecting all the available data. The author demonstrates the working of this logic with the examples of European databases and the recently introduced ID card in the United Kingdom. The biometric identification that was originally introduced in the field of migration control will affect all the citizens of the state or of the EU, and we remain with less and less guarantee for the separation of databases. The huge amount of data gained from both the population and foreigners can be used for risk analysis, leading to measures being taken on a probability basis. So we can see technological trends that require new answers from both criminal law and data protection perspective.

Helping to find new answers by giving a perspective—thus can be summarized the aim of all three studies. It is important to see *how* the objectives fail to be met even in spite of appropriate legal framework and provided resources. The objectives have to be transmitted to the personal level, to that of everyday work, to a single meeting of two experts with different national and institutional backgrounds. And this is how this book can help: by providing a radically different, non-legal perspective, avoiding the repeated references to political and formal declarations, focusing on what is here and now, giving a faithful picture of the actual situation—and, as Stendhal put it, one cannot blame the mirror for what it shows.

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