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ETHNIC DISCRIMINATION AND THE WAR AGAINST TERRORISM — THE CASE OF HUNGARY

INTRODUCTION

Ethnic data collection and ethnic discrimination (ethnicity-based selection and ethnic profiling), which are in themselves controversial topics, have brought a new set of challenges in the context of anti-terror law enforcement procedures. This essay aims to survey these challenges as they arise in Hungary, a country that so far has not been directly affected by terrorism.

Part I sets the stage by delineating the general practice of ethnic profiling and ethnicity based selection, and by describing how these arise in the context of the fight against terrorism. Besides the perennial problem with ethnic profiling — that it readily turns into a form of ethnic discrimination — this practice faces an independent problem: lack of effectiveness. With the emerging war on terrorism enhancing the appeal of ethnic profiling, it is appropriate to reflect again on both problems.

Part II moves on to discuss the legal framework within Hungary, a country that has a long history of heated political debate surrounding the legal definition of belonging to an ethnic group. Until now, however, ethnic classification has arisen primarily in connection with positive discrimination within minority law and Diaspora law. Hungary's data protection laws classify personal data concerning national and ethnic membership as special data (protected, among others, by the means of criminal law). That is to say, unless the law specifies otherwise, personal data concerning nationality and ethnicity cannot be processed without written consent from the person in question. The irony of this situation is that the law does not protect potential victims of discrimination; in fact, authorities have used these provisions to make an easy case for dismissing charges of ethnic discrimination. Traditionally, within Hungary, law enforcement methods based on ethnic selection have affected the Roma minority rather than the minute Muslim community. Still, as we shall see, the authorities have virtually unlimited discretion when it comes to stops and searches, and, as a result, the possibility for misuse of power remains unhindered.

In sum, the Hungarian framework does not have any special regulations that have come into effect specifically during the war against terrorism. Still, the authorities — including the police, the border guards and the security services, which have an extraordinarily wide range of competencies that mostly parallel one another — have unlimited discretion in initiating action, leaving wide open the possibility of ethnicity-based subject selection.

ANTI-TERROR EFFORTS AND ETHNICITY — GENERAL OBSERVATIONS

After a brief introduction describing how the counter-terrorism measures that are undertaken by law enforcement agents have entered the scene (Section 1), I discuss ethnicity in the context of police action. I begin with two preliminary discussions: the first distinguishes various ways that the police (and, of course, other service members) might take into account ethnic/racial[1] features (Section 2), and the second examines the discretionary power of the police in initiating action and, in particular, their authorisation to stop and search drivers or pedestrians (Section 3). These sections lead into a discussion of the practice of ethnic profiling and ethnicity-based selection (Section 4), which have long been under attack and scrutiny for their role in ethnic discrimination. These misgivings have been pushed to the background as racial profiling was recently deployed in the anti-terror arsenal. It is important to bring ethnic discrimination back into focus, especially in light of the fact that ethnic profiling has not paid off as an effective weapon (Section 5), in anti-terrorism measures or elsewhere.

A New World with New Standards

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 had otherwise only dreamed of attaining. This time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and the fear that spread 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 organised crime, but thus far had not succeeded in achieving 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 (both professionally and politically) within the Anglo-American world. All the same, the Arab population became a natural target of the war against terrorism. Evidently the horrific notions of weapons of mass destruction and recurring terrorist attacks have overwhelmed the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished.

What is new in the world following 9/11? Traditional policing principles or, for that matter, the law of the Geneva Convention (regulating the interrogation of prisoners of war, for example) have become unsuited to the handling of the peculiar warfare undertaken by suicide bombers and terrorist organisations.

The analysis below concerns ethnic discrimination, which probably constitutes the most widely raised and most serious charge that critics raise against anti-terror regulations and procedures.

Ethnicity and Policing

Before we turn to examining the constitutional standards for police ethnic profiling, two preliminary issues have to be addressed. One concerns racial and ethnic classifications by law enforcement authorities, and the other focuses on constitutional standards relating to the reasons and justifications (standards of suspicion or probable cause) based on which law enforcement action may be initiated. I will discuss these in turn.

American case law and jurisprudence provides a good illustration for the legal framework of police ethnic data processing because dozens of circuit and Supreme Court decisions address the issue. It is well to note at the outset a crucial difference between the continental conception and the Anglo-American one: unlike the continental tradition, the U.S. and the U.K. have a generally accepted practice of processing ethnic (racial) data. Thus, in the latter countries, ethno-racial data processing does not constitute a sensitive issue from a data protection perspective. As spelled out by a set of detailed court decisions, the law distinguishes four ways in which police action may rely upon ethnicity or race, applying different constitutional measures for each of them.

The first relatively unproblematic scenario arises when the victim or witness to a crime provides a description of a specific suspect that includes ethno-racial characteristics. In these situations, courts have invariably found it legal to use such information — in search warrants, for example.

A second, somewhat different scenario presents itself when the description provided by the victim or witness contains very little concrete detail about the suspect beyond her race or ethnicity. In such cases, on several occasions, the courts' stance was that race and ethnicity can be operative in negative descriptions only. For example, if the informant identified the perpetrator as black, then that information can serve as basis for the police not to stop whites and Asians, but it would border on discrimination for them to stop blacks without any further reason for doing so beside their skin colour.[2]

The third case is racial profiling, which will be discussed in detail later on. This practice relies on the tenet that ethnicity in itself makes criminal involvement more likely, and this assumption is not based on any specific or general information about a given individual.

Finally, the fourth case, which features prominently in the war against terror, involves preventive measures that rely on official, written directives about certain racial, ethnic, national or citizenship-based considerations. In these cases, the application of ethno-racial profiles are no longer left to the discretion of the police, border guards and airport security personnel. Instead, ethnic profiling becomes an officially formulated prescription.

Suspicion, Probable Cause and Authorisation to Act

Under what conditions might the police (or other law enforcement organs) initiate action? The standards do, of course, change according to how concretely specified the perpetrator is, what the degree of suspicion is, and in what capacity the law enforcement agent is acting. The procedure can have various types of legal bases: random, voluntary encounter; consensual questioning that does not involve coercion, where, in theory, the citizen may disregard the question; stopping and questioning during an investigation; vehicle control; border control, etc. In discussing the variety of legal bases for police action, we may

well also want to pose several questions. Is it justifiable, for example, to institute a roadblock obstructing everyone's way (and not just that of a specific ethnic group)? What kind of suspicion (if any) is necessary for such a measure? Are random checks acceptable?[3]

All over the world, courts have attempted to clarify these issues, but the task has not been an easy one because it is notoriously difficult to classify scenarios in which a member of a minority group is stopped. Is it a case of ethnic profiling-based crime prevention control? Or is it an investigation with a specific suspect, a stop that is mere pretext (where a minor violation is used as a pretext for stopping), or outright racist harassment?

The decisions have not been entirely consistent, which make matters more complicated. In the 1975 Brignoni-Ponce case, for example, the US Supreme Court did not accept the authorities' claim that on a stretch of road in the vicinity of the U.S.–Mexican border, usually teeming with illegal immigrants, someone should be able to be stopped solely on the grounds that she looks Mexican.[4] Stark contrast is provided by the 2001 decision of the Spanish constitutional court, which stated that skin colour and foreign appearance could serve as significant causes for determining whom the police might stop. A year later, based on a similar pretext (the existence of a large number of Mexicans in a specific area), the American Supreme Court also found it acceptable to order a roadblock...

The situation is tricky because proof of unwarranted ethnic motivation would require that the court (or legislator) state that police action can be initiated exclusively on the basis of *individual* behaviour or suspect description. But no-one has ever said this — besides the roadblock incidents already mentioned, the US Supreme Court has also upheld many other types of *general* controls (albeit ones that were free of ethnic classification). Examples are alcohol tests ordered for railroad workers involved in an accident,[5] sobriety tests around nightclubs,[6] and alcohol tests prior to after-hours extra-curricular school events.[7]

Policing, Discrimination, and Ethnic Profiling

American studies on (mostly) highway patrols have shown that blacks, comprising 12.3 percent of the American population, are significantly over-represented among those stopped and checked by the police.[8] 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.[9]

This phenomenon sheds light on the fact that direct or indirect discrimination against members of a minority group need not be the result of flagrantly illegal, intentional behaviour; discrimination may instead be due to the questionable application of apparently legal measures.

The institution called ethnic profiling was first developed in the U.S. in order to detect drug couriers, and was later implemented in traffic control, and more recently in counter-terrorism 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 behaviour, 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) behaviour 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 Roma (black, etc.), and almost all of the terrorists are Islam fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable.

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

The irony of the situation is that it was right around the time of the World Trade Centre 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.[10]

In connection with anti-terror measures, there was therefore renewed debate over preventive measures

based on ethno-racial profiling. Some commentators emphasise that ethnic profiling is in principle unacceptable. The result, according to these critics, is the harassment of the innocent minority middle class, which is 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 has called 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 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 it also confirmed that the hit rate testifies to the ineffectiveness of ethnic profiling. Racial profiling relies on the assumption that a high rate of criminality is connected to ethnicity, so the hit rate must be higher among, say, African Americans. For a long time, no-one 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.[11] 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.[12] To summarise the results, the previously esteemed 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.

A third argument mentions the risks inherent in alienating crucial minority communities in the context of law enforcement (policing and prevention). Ethnic profiling raises additional severe misgivings apart from the problem of false positives and negatives. The community policing model has demonstrated the now well-known danger of alienating crucial populations. This model maintains 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), in addition to the particular importance of members of the Muslim community, that can detect suspicious behaviour.[13] Indeed, most of the American terrorists identified up until recently were caught based on community reports.

Terrorism and Ethnic Profiling[14]

What is behind the changes in the public and professional sentiment towards racial profiling?[15] With the increases in the dangers and risks of terrorism, we are more and more willing to give up some of our rights, especially if there is a life or death situation at hand. Faced with the possibility of an asymmetric crime in which the death of a single terrorist yields the death of thousands, people's sense of justice is not necessarily offended by an effective procedure that is based on discrimination and prejudice. Moreover, profiling does strike us as more reliable when it comes to terrorism: after all, even though not every Arab or Muslim is a terrorist, still (we tend to assume), every terrorist is an Arab or at the very least a Muslim fanatic.

Even though the above reasons seem plausible, they are not necessarily tenable. Several critics of ethnic profiling have pointed out that its ineffectiveness (illustrated through the example of false positives and false negatives) does not improve in the context of anti-terror measures.[16]

It is well to note that racial profiling can indeed be criticised for its lack of effectiveness. Staying with American examples, not only is it unfeasible for the 11,500 FBI agents to adopt the working assumption that the entire Arab-American population — some 3,5 million people — are potential terrorists, but it is also crucial to avoid alienating that very population — especially when it comes to terrorism. (Consider 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.[17]) Further, false positives raise a special problem with respect to terrorism: it is 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 British citizen 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; Zaccarias Moussaoui from Morocco; not to mention white Americans like John Walker Lindh (the American Talib), Timothy McVeigh, and Charles Bishop.[18]

Having briefly highlighted some general questions relating to the ethnically discriminatory elements of "ordinary" and anti-terrorist policing and law enforcement practices, let us now turn our attention to the case of Hungary.

THE HUNGARIAN LEGAL FRAMEWORK

After providing some data on ethnic, racial and immigrant groups within Hungary (Section 1), I first analyse existing definitional problems under the Minorities Act (Section 2) and then assess the standards for the collection of ethnic data (Section 3). In Section 4, I describe the competencies and procedures of the police, the border guards and the security forces. Before my concluding remarks, I discuss existing anti-terrorist legislation (Section 5) and evidence of racial profiling (Section 6) within Hungary.

Data on Ethnic, Racial and Immigrant groups

There are thirteen recognised ethnic and national minorities in Hungary. The number of immigrants and foreigners with non-European phenotypes has also increased in recent years, producing a new victim group for racial profiling. Recent immigration however, is still of relatively small scale, mainly transitory or coming from neighbouring countries.[19] As a result, ethnic profiling in Hungary is an issue that affects first and foremost the Roma, the only recognisably visible minority.

The size of the Roma population is hard to establish due to the legal ambiguity of registering ethno-national data and the Roma's lack of confidence in the state. Census and academic estimates range between 200,000 and 600,000[20] (2-6% of the Hungarian population). Roma experience widespread discrimination in all walks of life. Stereotypes and prejudices against this group are prevalent in the Hungarian public opinion.

Definitional Problems under the Minorities Act

Data collection aside, ethno-national affiliation in itself is a controversial, ardently debated topic in Hungary. It comes up in two dimensions: defining the group itself and defining membership within the group. As it is closely connected to the questions of ethnic profiling and indirect discrimination, it is essential to provide some brief preliminary highlights of the legal background of the most important elements in the debates.

Group Affiliation

In Hungary, national and ethnic minorities are specifically protected under the Act on the Rights of National and Ethnic Minorities.[21] As Article 68 (1) of the Constitution states: national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State. The Act does not, however, define the term 'ethnic' or 'national minority'. As a result of political negotiations, for example, Jews are not included among national and ethnic minorities for the purposes of the Act, a fact which, however, does not prevent them from being covered by the Race Equality Directive[22] and general domestic anti-discrimination legislation.[23]

The 1993 Act defines national and ethnic minorities as groups that have been present in the territory of Hungary for over 100 years and "(§ 1.) constitute a numerical minority within the population of the country, whose members hold Hungarian citizenship and differ from the rest of the population in terms of their own tongue, cultures and traditions, and who prove to be aware of the cohesion, national or ethnic, which is to aim at preserving all these and at articulating and safeguarding the interests of their respective historically developed communities."

According to the Act, the following groups comprise these minorities: Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Roman, Ruthenian, Serb, Slovak, Slovene, and Ukrainian. In order to register a new minority group, a popular initiative signed by 1000 citizens must be submitted to the Speaker of the Parliament.

Without going into an in-depth analysis of the Hungarian statutory model, two controversies — procedural as well as material — need to be pointed out. Both material requirements (100-year presence and 1000 signatures as a special popular initiative) for qualifying as an ethnic or national minority seem problematic. The Act, besides defining the two group constituting requirements, also contains an enumeration of the thirteen minority groups that are recognised by the Act, which means that the Parliament would need to pass a formal amendment to these provisions if a new group were to qualify. The House (being sovereign), however, is not obliged to vote

affirmatively on the question, which is in sharp contradiction with the otherwise clearly defined requirements. The law therefore uses language that initially appears absolute and seems to set forth the collective right of establishing a minority group (that is, a right to be registered and recognised as such), but in fact it remains politically dependent.

Another set of issues arise around the theoretical and practical questions of who is to verify or whether the 100-year requirement has been fulfilled, and when the clock is supposed to start ticking. When will the Chinese minority (a considerable population since the political transition) be entitled to seek recognition? What about the Palestinians, who may claim some 600 hundred years of presence if "Ismaelite" merchants are considered?[24]

Not only does this model make it difficult for new groups to gain recognition, but it also opens the floor to legally permitted misuse. For example, based on the letter of the law, by seeking registration of the Hungarian Francophone community, a thousand friends of French art and cuisine may easily find tax-paid support for their cultural-leisure activities. Commentators also point out that, besides being inherently arbitrary, the measurement of the 100-year presence is not supported by any legal guide lines, therefore anyone commissioning a historical study showing a century-long presence of any given group can beat the system, and get around the legislator's intent.

As a background note, it is important to stress that post-1989 Hungarian minority-politics cannot be understood outside the context of the ethnic Hungarian Diaspora.[25] We can even say that besides classical commitments, one of the primary reasons behind constitutional motivations for providing and recognising minority rights has been Article 6 (3) of the constitution, which declares that "the Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary". Commentators claim that the creation of the above described homogenous legislation for national and ethnic minorities may help promote the rights of ethnic Hungarians living in neighbouring countries; it cannot, however, provide an effective institutional framework to deal with the specific and robust Roma-problem. Also, this monolithic minority category is inefficient in serving the needs of all thirteen official minority groups in Hungary, which substantially differ in size and consequent claims and aspirations. Also, critics point out that the European accession and subsequent changes in the constitutional and socio-political climate brings challenges that the anachronistic, pre-accession minded Diaspora-targeting law cannot cope with. For example, the appearance of European and other migrant workers and immigrants will bring challenges that the existing legal framework may be ill equipped to confront. Newly arriving groups will easily outnumber small traditional national minorities (such as the Armenian and Ruthenian), and, at the same time, the current legal framework does not have clear guidelines as to how new groups can seek official recognition.

Individual Affiliation

The other, even more controversial element of the Hungarian framework relates to the lack of satisfying legal guarantees regarding individuals' minority affiliation. Hungarian law allows for the handling of data on racial and ethnic origin only with the consent of the person concerned.[26] This gives rise to what is commonly known as "ethno-business" or "ethno-corruption".

In this model, the exercising of minority rights is not dependent on minimal affiliation requirements. Stephen Deets documents, for example how school officials pressure the parents of "Hungarian" students to declare their children German: "according to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German-minority programs, which, by the latest census, is about 8,000 more than the number of ethnic Germans who are even in Hungary".[27] Similarly, in court proceedings, non-Roma employees testify to be Roma in order to rebut claims of ethnic discrimination.[28]

Hungary also established a relatively potent form of autonomous minority institution, a minority self-government structure (bodies that co-exist with local municipal administration), and a decision to vote at minority self-government elections is left solely to the political culture and conscience of the majority. Thus, in Hungary, citizens can vote for minority self-government candidates regardless of their ethnic origin. This enables members of the majority to take advantage of the various remedial measures. For example, the wife of the mayor of Jászladány — a village notorious for segregating Roma primary school children from non-Roma — can hold an elected office in the local Roma minority self-government. Likewise, non-Roma parents can claim that they are Roma in order to conceal racial segregation.[29]

Hungarian minority representatives repeatedly claim that the fact that some candidates ran as Roma in one election and then later as German in the following term (which is permitted by both the law and

the ideal of multiple identity-formation) proves the flourishing of local ethno—business.[30] Similarly, both the President of the National Romanian Minority Self-Government[31] in Hungary, and the (Romanian) Secretary for Romanians Living Outside Romania[32] found it worrisome that the 2002 local elections brought an increasing number of candidates for Romanian minority self governments, while the number of those identifying themselves as Romanian in the national census is decreasing.[33] In their view, the answer lies in the fact that "Gypsies" and Hungarian immigrants who moved from Romania are running as Romanians. The critics are right, for example, in that some Roma politicians decided to run under different labels (in most of the reported 17 cases, Slovakian), expressly for the purpose of exposing the problematic aspects of the legal framework. Also, there are several municipalities where (according to the national census) nobody identified herself as a member of any minority group, yet numerous minority candidates were registered.[34] The examples of loopholes in the legal regime sometimes result in complete absurdity. In order to express their admiration of German football, for example, a small village's entire football-team registered as German minority-candidates for the elections.[35]

It should also be noted that the question of ethno-national identity has been in the centre of other socio-political debates, such as the Hungarian status law,[36] a framework legislation that provides for schemes of rights and preferences available for ethnic Hungarians living outside of Hungary's borders. During the drafting of this law,[37] an ardent domestic political debate[38] arose from the various legislative approaches in identifying who would be considered Hungarian (for the purposes of the law.) In fact, the contradiction between the basic liberal tenet of the free choice of identity and the desire to reduce (the legal) options for both politically and financially undesirable misuse was perhaps the most controversial aspect of the law.

In June 2005 the Parliament passed a comprehensive amendment to the Minorities Act. The legislation made a point of setting forth a plan for institutional reorganisation of the minority-protection mechanisms. At the same time, combating the aforementioned ethno-corruption (that is, the utilisation and misuse of remedial measures for private means that are contrary to the legislators' intentions) will introduce a somewhat controversial registration procedure for those who decide to take advantage of the various privileges and additional rights set forth by the minority law. In order to ensure that only members of the given minority can vote and be elected to minority self-government, the law redefines the meaning of Article 68 par. (4) of the Hungarian Constitution which stipulates that national and ethnic minorities have the right to establish minority self-governments. The Act thus departs from the pre-existing dedication to the free choice of identity, and, by eliminating the explicit provision allowing for the recognition of multiple identity, sets forth legal requirements for minority political participation. According to the new legislation, both the right to vote for and to run as candidates at the minority elections would require the registration.[39] President Ferenc Mádl, vetoed the Act and, at the time of the submission of the manuscript, the Constitutional Court's decision was still pending.

Having described the general issues related to ethno-national identity, let us now turn to the question of ethnic data collection.

Standards for the Collection of Ethnic Data and the Murphy-Law of Prejudice

Data protection laws[40] in Hungary prohibit the collecting and processing of sensitive data, among them data on national or ethnic origin, without the concerned person's explicit consent.[41]

Law enforcement practice in this regard appears to be quite illogical. For example, officials claim that even the recording of racial violence victims would run against statutory provisions, even though the Criminal Code[42] acknowledges certain racially motivated crimes, such as "violence against members of national, ethnic or racial minorities and religious groups" or "incitement against community". All such crimes presuppose a belonging to a given (racially or ethno-nationally defined) community.

This issue provides a wide range of examples for what we may call the "Murphy-law of prejudice". This describes the following phenomenon: no matter how sweet the constitutional and statutory language that deals with equal treatment, the free choice of identity and the protection of sensitive data might sound, it is always the discriminatory practice of the majority that will actually provide a practical definition for ethnic affiliation. Thus, when it comes to the mistreatment of members of various ethnic groups, no serious difficulties with regard to definition or recognition arise for the discriminating party. Such conceptual ambiguities will only worsen the protections provided for the victimised group.

Statistics showing racial crimes and violence to be virtually non-existent should not be taken to suggest that such incidents are in fact absent within Hungary. Such statistics in fact demonstrate that law enforce-

ment agents, as well as prosecutors and courts are very reluctant to recognise racial motivation in violent and non-violent crimes committed against Roma victims.[43] Officers and officials habitually claim that it is because of the lack of clear legislative guidelines for the establishment of racial motivation that the majority of such instances will only qualify as nuisance, assault or mischief, however, some politicians and experts argue that criminal legislation in force could easily allow for a less narrow, more minority-friendly interpretation.

Officially, no police registry contains any ethno-national or racial data per se, and in official use, such as press releases for example, even if the victim or a witness would claim that the offender was, say, Roma, the formal suspect description will not use any ethno-national signifiers. Instead, a (presumed) politically correct meta-language would be used, describing the suspect as "Creole", or a person with a dark complexion.

It should be noted that data protection regulations[44] do not prevent the handling and processing of data on the self-declared or perceived ethnic origin of individuals. Although on the national level, the existence of such statistics is mostly denied, ethnic data is collected by many institutions — for administering minority self government elections, affirmative action quotas, minority scholarships, etc. For some procedures set forth by the Minorities Act (seeking minority self-government elections or minority language education, registering first names that are not included in the official Hungarian register, etc.) one needs to make a formal declaration regarding ethno-national affiliation, in order to be eligible for the measures or preferences.

In practice, several authorities allegedly keep ethnic data based on the perceived ethnicity of persons,[45] and researchers and human rights NGOs also sometimes rely on such estimates.[46] This leads us to the central question within ethno-national data collection (and similarly, within racial profiling and discrimination): should group identity be based on self-identification, or on perception? As Lilla Farkas claims, "Curiously, when penalising violence against a member of an ethnic group, Hungarian criminal law recognises the difference between self-identification and perceived ethnic origin and attaches the same criminal liability to violence committed on either ground.[47] As Hungarian judges seem to understand now, a plaintiff who does not profess himself in court as belonging to the Roma minority, can at the same time claim that he was discriminated on the ground of his perceived ethnic origin."[48]

A Test for Ethnic Profiling: Law Enforcement Competencies and Authorisations

Part I, Section 3 establishes the standards for initiating police actions — above all in stop and search cases — as a crucial aspect of ethnic profiling practices. The present section makes clear just how much is left to the discretion of Hungarian law enforcement authorities — the police, the border guards and the national security agency.

The Police

According to the Hungarian legal framework, the police have an extremely wide, almost indefinite threshold for high-discretion stops; they have full discretion to perform routine control-checks on motorists and pedestrians. The police may stop anyone at any time and ask any questions deemed necessary.[49] The vacuous language of Article 29 of the Act on Police[50] gives full authorisation for the police to stop and request identification of "anyone, whose identity needs to be established". If the need arises, because the individual is not willing to co-operate or because her identity cannot be sufficiently established, she may be searched,[51] arrested[52] and held for eight hours. The chief of the local police unit may prolong the detention period for an additional four hours if the process has not been successful. Should this (maximum 12 hour) arrest not be sufficient, another type of detention[53] („public order detention") may be ordered, which (including the time spent in arrest) may take as long as twenty-four hours. For these stop and search procedures no suspicion whatsoever is needed, no probable cause standards are set forth and, as demonstrated above, unsuccessful identification itself may lead to up to 24 hours of detention. Apart from arrests or detentions, the police are under no obligation to provide an explanation — the only exception being when the individual herself requests such information.[54] The Constitutional Court ruled on several challenges to these provisions[55] and has been consistently dismissing petitioners' claims — disregarding dissents' arguments pointing to a disproportionate length of the detention and a lack of motivation for speedy police procedures with regard to detainees who are being held without having committed anything illegal.

Another form of stop and search competencies comes up in the context of vehicle control. According to Article 44 of the Police Act, the police may at any time check the legality of vehicle operation and possession. The police may therefore randomly stop and check vehicle ownership documents, certificates for

appropriate carbon-dioxide emission, highway stickers (a Hungarian equivalent for motorway tolls), they may check the first-aid kit (a required accessory for all vehicles), the insurance papers of the vehicle, or the condition of the windshield wipers. Critics[56] have argued that it raises constitutional concerns that a significant part of this type of control is actually of an administrative nature and should not be performed by the police forces. For instance, in the case of a company car, checking for the authorisation of the manager is not a policing matter per se; such procedures rather serve social security, tax, and administrative purposes.

Matters of police competencies also raise the problematic issue of reasonable suspicion and probable cause standards. According to the Act on Criminal Procedure,[57] probable cause is needed for the initiation a criminal procedure; still, an arrest or the above mentioned "public order detention" does not qualify as such. As a result, in addition to failure to provide proper identification, a "simple" suspicion (the probability of criminal offence does not exceed 50 percent) also suffices for these coercive measures.[58] Although the legislator never bothered explaining what these standards are supposed to mean, the Constitutional Court upheld the law,[59] precisely on the ground that these measures do not amount to criminal procedure and the detainee (whose co-operation is crucial in these procedures) does not qualify as a defendant under criminal procedures.

Border Guards as Immigration Officers

Border control agencies are another area of law enforcement worth considering. In enumerating competencies and coercive measures, the Act on Border Control Forces[60] gives almost identical authorisation as that of the police forces. What makes this peculiar is that besides classical border guard competencies, Articles 22 and 61 of the Act give a wide authorisation to both the police and the border control agencies to supervise regulations set forth in the Act on Immigration and Alien Control.[61] Among other things, the latter law obliges aliens to carry at all times and upon request present their immigration and identification documents. Should an alien be unable to provide these, she can be arrested and held for 12 hours.[62] In order to check this and other provisions of alien law, police and border guard officers are authorised to enter private premises.[63]

These provisions thus establish a legal environment, which enables, even requires law enforcement agents to stop and control persons with alien accents, appearance, etc.

Security Forces

Act 125 of 1995 regulates the authorities and competencies of the Security Forces. The competence of the Services in most cases runs parallel with that of the police (see below), thus, secret service agents may utilise all coercive measures and procedures that are provided for police officers.

Anti-terrorist Legislation

As everywhere in the Western world, general issues of terrorism have been on the agenda of Hungarian public, academic and media forums. However, the debate over Islam or Muslim communities has not been a dominant issue in the Hungarian political discourse. Altogether, there have been two unrelated incidents where individuals in Hungary, a Muslim religious leader (2004) and a non-nationalised immigrant doctor (2003), were accused of having terrorist connections. The former was arrested and latter was released and then extradited). These events received a considerable amount of media attention but neither triggered particularly long-lasting nor significant public attention.

Motivated by European Union integration process[64] rather than a fear of terrorism, Hungary adopted in 2001 an anti-money laundering and anti-terrorism package[65] containing a host of new measures and regulations intended to aid in the global effort to combat terrorism, especially in the field of financial sanctions and restrictions towards organisations and persons supporting terrorism. In 2002, the Centre for International Co-operation in Criminal Matters was established, followed in 2003 by the Anti-Terrorism Co-ordination Committee.[66] Hungary is involved in Europol and Interpol networks, and is also party to all terrorism-related UN conventions and EU common positions.

As István Szikinger[67] points out, however, that Hungary does not have a special anti-terrorist legislation in force. This can be explained by the fact that authorisation for police action under ordinary procedures and in "regular" cases is so wide that it covers all preventive, investigative and coercive measures[68] that may be used in anti-terrorist operations. Although Article 261 of the Criminal Code[69] specifically criminalises terrorist acts,[70] applicable investigative and coercive measures, including secret information gathering are no different from those that can be used in relation to other serious offences. Most of these measures were introduced in 1999 when a comprehensive legislation combating organised crime was passed.[71]

A judicial or a prosecutorial warrant must often be obtained for secret information collection, though it depends on the nature of the operation. In cases of emergency or pressing need, the police may use unauthorised interim measures. In connection with any criminal offence that can be punished with more than two years imprisonment, upon obtaining a warrant signed by a prosecutor, the police can have access to tax, telecommunications, bank and health care data.[72] Article 69 of the Police Act provides regulations for all secret operations that require judicial warrants. These measures (including searching private premises, wire tapping, controlling mail and email, etc.) may be applied in connection with a variety of serious offences, including "international crime" or "terrorist or terrorist-like crime". As the Constitutional Court[73] noted (in a decision striking down certain elements, but upholding the vast majority of the law), these labels introduce constitutionally questionable, vague and imprecise language.

IN THIS MANNER, POLICE ARE AUTHORISED TO USE ALL MEASURES, WHICH, IN OTHER JURISDICTIONS, MIGHT FALL UNDER THE COMPETENCE OF THE NATIONAL SECURITY SERVICE OR OTHER SPECIALISED BODIES.

In this manner, police are authorised to use all measures, which, in other jurisdictions, might fall under the competence of the national security service or other specialised bodies. In fact, police and national security forces (the secret service) pretty much share competencies and operational means. Whether it is the police or the secret services that will take action actually depends on where a report has been sent, or which agency takes ex officio notice.

Even though there are no anti-terrorist exceptional measures provided for the secret service, as mentioned above, security service officers enjoy the same rights as police officers,[74] and they may apply the same coercive measures and employ the same procedures. In considering the small size of the Muslim community, as well as the fact that no concrete information relating to terrorist activities has ever been identified in Hungary, and, the lack of specific anti-terrorist measures, no significant shift in ethnic profiling is demonstrated by our data. It is nevertheless interesting to note the curious, web-posted[75] yearbook of the Hungarian National Security Office, which in presenting its anti-terrorist activities, for some reason, feels the urge to explicitly refuse ethnic profiling as an operational principle. It says: "...terrorists are to be recognised not so much [sic!] from their origin or religion but their motivation [...] it would be wrong [...] to concentrate on the colour of the skin of the individual instead of his unusual behaviour. [...] It is difficult to sketch concrete traits of character. These people generally hide their intentions thus their behaviour — to reduce the danger of being caught — may be perhaps too law-abiding. Their behaviour may arouse suspicion if they make you feel or voice explicitly their separation from the social-political-religious circumstances of their country..."

Another peculiar example may be brought from the terrain of financial regulations. A recommendation of the President of the Hungarian Financial Supervisory Authority No. 1/2004[76] on the prevention and impeding of terrorist financing and money laundering[77] provides a vivid example for singling out Arab and Muslim countries by the very formulation of its due diligence and reporting requirements:[78] "The procedures aiming at the detection of money laundering intentions need to be used especially when.... Transactions should primarily be examined in terms of whether they are related to individuals, countries[!] or organisations contained in the specific international lists. ... Raised attention needs to be paid to electronically sent and received amounts, which are unusual for certain reasons, including especially the size of the amount, the beneficiary target country[!], the country[!] of the customer placing the order, currency or the method of sending or receipt. .. If an activity does not fit in the registered and reported activities, if the origin of received funds is unclear, if an amount increases from unusual sources, the target country[!] or addressee raises a suspicion, the financial service provider needs to analyse and evaluate them with special care, and the transaction should be reported to the authority even if the smallest suspicion arises."

Evidence and Indications of Racial Profiling by Police Forces

Given the very small size (roughly 0.057 percent of the population) of the Muslim community in Hungary, a fundamentalist terrorist threat is not considered a factor of significance, as the dominantly naturalised Muslim community lives integrated within Hungarian society.[79] There is no measurable public hostility towards the Muslim community, and, even after September 11, or March 11 Islamophobia appears to be a fully marginal, if at all existent phenomenon or sentiment in Hungary. Academic and NGO interest in discrimination and ethnic profiling has therefore been limited to mistreatment of the Roma.

Since the mid 1990's ill-treatment of the Roma in Hungary has been widely documented by human rights NGOs such as the Legal Defense Bureau for National and Ethnic Minorities (NEKI),[80] the Hungarian Helsinki Committee (HHC),[81] the Romani Civil Rights Foundation (RPA),[82] as well as the Parliamentary Commissioner for National and Ethnic Minorities.[83] 2004 saw a remarkable victory of the Hungarian human rights movement engaged in defence of Roma rights before the European Court of Human Rights. In the Balogh judgement, the Court found a violation of Article 3, determining the treatment on behalf of the police against the Roma victim to be inhuman and degrading. The court found no violation of Article 14, prohibition of discrimination, however.[84]

The Hungarian Helsinki Committee conducted a research project in 2002-2003, assessing discrimination against Roma in the criminal justice system. By scrutinising court files, the research of the HHC focused, among other things, on how perpetrators were initially detected by the authorities. The findings of the survey appear to be fully in line with similar Anglo-American studies geared towards analysing discrimination in the criminal justice procedure against visible minorities.[85] The researchers found that Roma offenders and suspects were significantly more likely to have been identified via police stops and searches, whereas in the case of non-minority defendants, the cause of their capturing were other investigative methods, and most of all being caught in the act.

Circumstantial evidence from other stages of the criminal procedure also indicates the likeliness of ethnic profiling. According to the 2001 EUMAP report[86] "research indicates that Roma are more likely than non-Roma to be reprimanded in pre-trial detention or ill-treated by the police,[87] and tend not to have legal representation during investigation".[88] The European Commission against Racism and Intolerance (ECRI) has expressed concern "at evidence that severe problems in the administration of justice exist as regards discrimination against members of the Roma/Gypsy community..."[89]

Closing remarks

Racial and ethnic discrimination — in particular, ethnicity-based selection and ethnic profiling — whether "general" or counter-terrorism specific, is a multi-dimensional issue; Hungary is no exception to this. Scrutiny of ethnic bias should ideally include all of the following: stops and searches, detaining, arrest, criminal procedure, charging, sentencing, disparity in police brutality, access to counsel, law enforcement public employment, ineffective legal remedies, expulsion and immigrant treatment, the designation of terrorist organisations, etc.

The legal framework calls for constitutional scrutiny and law enforcement calls for empirical analysis. Thus far, discussions on ethnic profiling are still rare and considered novel within Hungary. Beside the obvious relevance of observing constitutional rights in the light of anti-terrorist measures, in Hungary the issue also directs public attention to other, more complex implications of constitutionalising ethno-national identity

It emphasises that the remedial, affirmative context (which the Minorities Act encompasses) is not the only place where ethnicity and national identity come up. And even if the Constitutional Court decides to uphold the present amendments to the Act on Minorities, the Murphy-law of prejudice will remain, because the Minority Law applies only to cultural and political rights.

Although there is no spectacular increase in ethnic profiling within the framework of anti-terrorist measures, findings by the Hungarian Helsinki Committee and other sources indicate that ethnic profiling is present within Hungary — this much can be gleaned from raids, prison population, police violence, and the rate of complaint cases filed against the police that were subsequently dropped. In general, as Farkas points out,[90] with Hungarian law allowing for the handling of data on racial and ethnic origin only with the consent of the person concerned, the effect is a severe impediment on the prospect of litigation against indirect discrimination or institutional racism.[91] As ECRI reported in 1999: "...while acknowledging the fact that the collection and utilisation of data on ethnic origin is restricted in Hungary for valid reasons, ECRI is concerned that the lack of reliable information about the situation of various minority groups living in the country makes evaluation of the extent of possible discrimination against them or the effect of the actions intended to fight such discrimination difficult."[92]

Anti-terrorist measures expand the list of related questions: does (Muslim) religion qualify as an ethno-national characteristic? Does the fact that certain crimes actually involve ethnically, racially, nationally homogenous groups (beside terrorist organisations, there are gangs, mafia, etc.), make such profiles effective policing, and if yes, does such group-specific appearance validate preventive profiling measures? After all, we need not forget that just as much as terrorism operates in the battlefields of psychology („kill ten and keep thousands in a state of fear"), so does the war against terrorism. As long as seeing Arabs (or

Roma) being stopped by authorities creates a feeling of safety in the majority, anti-profiling arguments can hardly have a steady impact. There is thus another war, one of ideas, that must be fought with research papers that demonstrate that ethnic profiling is no effective policy and that discrimination is no recipe for security.

NOTES

1. A note about terminology: besides obvious differences, I will treat racial, ethnic and nationality-based terminology as synonymous.
2. This way, if we know only that the perpetrator is black, then the law enforcement syllogism means the following: the perpetrator is black and the suspect is white; from these it follows that the perpetrator cannot be identical with the suspect; but it does not follow from the pair of claims that the perpetrator is black and so is the suspect (or the pedestrian or driver), that then the suspect is the perpetrator. See Sharon DAVIES, "Reflections on the Criminal Justice System after September 11, 2001." *Ohio State Journal of Criminal Law*, Fall, 2003, p. 66.
3. E.g., in the 1979 Delaware v. Prouse case (440 US 648, (1979) the Supreme Court found random stops and checks to be unconstitutional. (See, e.g., Anthony THOMPSON, "Stopping the Usual Suspects: Race and the Fourth Amendment." *New York University Law Review*, October, 1999, pp. 973–974.) In the 2000 City of Indianapolis v. Edmund case (531 US 32 (2000)), the Court still found it unacceptable to have a road check following a roadblock, with the involvement of drug-searching dogs. But the Court upheld a roadblock in the context of a 2004 investigation concerning a hit-and-run accident, when during the time when the crime was committed, the road was blocked and without using further coercive measures the police politely asked motorists about the case, showing them photographs. [Illinois v. Lidster, (000 U.S. 02-1060 (2004)], see also THOMPSON, *Op. cit.*, p. 920. The question is, of course, whether the Court's position would be similar if the roadblock were put in front of a mosque or a Middle-Eastern grocery store...
4. U.S. v. Brignoni-Ponce, 422 US 873 (1975).
5. Skinner v. Railway Labour Executives Assn, 489 U.S. 602, (1989).
6. Police v. Sitz, 496 U.S. 444 (1990).
7. E.g., Veronia Sch. Dist. 47J v. Acton, 515 US 646 (1995), Bd. of Educ. v. Earls 536 US 822 (2002).
8. http://quickfacts.census.gov/qfd/states/00000.html.
9. See, Michael BUERGER – Amy FARRELL, "The evidence of racial profiling: interpreting documented and unofficial sources." *Police Quarterly*, Vol. 5. No 3, September, 2002, p. 290; David A. HARRIS, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters." *Minnesota Law Review*, December, 1999, p. 267.
10. Samuel R GROSS – Debra LIVINGSTON, "Racial Profiling Under Attack." *Columbia Law Review*, June, 2002, p. 1413.
11. See, e.g., Mariano-Florentino CUÉLLAR, "Choosing Anti-Terror Targets by National Origin and Race." *Harvard Latino Law Review*, Spring, 2003; Leonard BAYNES, "Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis." *Virginia Sports and Entertainment Law Journal*, Winter, 2002, pp. 12–13; Deborah RAMIREZ – Jennifer HOOPES – Tara Lai QUINLAN, "Defining Racial Profiling in a Post-September 11 World." *American Criminal Law Review*, Summer, 2003, p. 1213.
12. 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." *Air and Space Lawyer*, Summer, 1998, p. 5.
13. See, e.g., Steven BRANDL, "Back to the future: The implications of September 11, 2001 on law enforcement practice and policy, *Ohio State Journal of Criminal Law*, Fall, 2003; Mark OSLER, "Capone and Bin Laden: The failure of government at the cusp of war and crime." *Baylor Law Review*, Spring, 2003.
14. It should also be noted that there is another somewhat different, though related issue in the context of the war against terrorism: the questions of financial (and related criminal and immigration law) sanctions. These legal measures are intended to obstruct terrorist organizations. A widely held opinion among analysts is that these sanctions have a disproportionate negative impact on the Arab and Muslim community (because of both due process violations in the designation process and an unusual shift in the standards for criminal liability.) The concern is that among the designated organizations and individuals, the ratio of Arabs and Muslims is disproportionately and unjustifiably high. By contrast, comparable strictness about national security is absent with respect to other extremist groups (Irish, Basque or Jewish). Several analysts are of the opinion that the designation of terrorist organizations is profoundly discriminative because it is not based on a uniformly applied set of standards; instead, an organization is designated as terrorist whenever the current government deems it such (mostly based on secret information and unpublicized principles.) See e.g. Paul ROSENZWEIG, "Civil Lib-

erty and the Response to Terrorism." *Duquesne Law Review*, Summer, 2004; David COLE, "The New McCartyism: Repeating History in the War on Terrorism." *Harvard Civil Rights-Civil Liberties Law Review*, Winter, 2003; Sahar AZIZ, "The laws providing material support to terrorist organizations: Erosion of constitutional rights or a legitimate tool for preventing terrorism?" *Texas Journal on Civil Liberties and Civil Rights*, Winter, 2003; Erich FERRARI, "Deep Freeze: Islamic charities and the financial war on terror." *St. Mary's Law Review on Minority Issues*, Spring, 2005; David COLE – James DEMPSEY, *Terrorism and the constitution: Sacrificing civil liberties in the name of national security*. New York: The New Press, 2002; David COLE, *Enemy Aliens: Double Standards and constitutional freedoms in the war on terrorism*. New York: The New Press, 2003; David COLE, "Secrecy, guilt by association, and the terrorist profile." *Journal of Law and Religion*, 2000–2001; Karen ENGLE, "Constructing good aliens and good citizens: Legitimizing the war on terror(ism)." *University of Colorado Law Review*, Winter, 2004; *Review of the Security Council by Member States* (eds. Erika DE WET – Andre NOLLKAEMPER). http://www.intersentia.be/ english/index.asp.

15. In the U.S., in 2002, 30 percent of those asked supported that foreigners from an unfriendly state who were legally residing in the U.S. could be interned. Moreover, 53 percent approved that the borders to Arab countries be closed. Stephen ELLMANN, "Racial Profiling and Terrorism." *New York Law School Journal of Human Rights*, No. 19. 2003, p. 345.
16. William J. STUNTZ, "Local Policing After the Terror." *Yale Law Review*, June, 2002; Samuel R. GROSS – Debra LIVINGSTON, "Racial Profiling Under Attack." *Columbia Law Review*, June, 2002; Mariano-Florentino CUÉLLAR: "Choosing Anti-Terror Targets by National Origin and Race." *Harvard Latino Law Review*, Spring, 2003; David A. HARRIS, "Using Race as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description Yes; Prediction, No." *Mississipi Law Journal*, Special Edition 2003; Richard BANKS, "Beyond racial Profiling: Race, Policing, and the Drug War." *Stanford Law Review*, December, 2003; Richard BANKS, "Racial profiling and antiterrorism efforts." *Cornell Law Review*, July, 2004; David A. HARRIS, "Racial profiling revisited: 'Just common sense' in the fight against terror?" *Criminal Justice*, Summer, 2002; DAVIES: Op. cit.; RAMIREZ–HOOPES–QUINLAN, Op. cit.; Liam BRABER, "Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security." *Villanova Law Review*, 2002.
17. David A. HARRIS: "New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001." *Utah Law Review*, 2004, p. 933.
18. HARRIS, 2004, p. 940; see also, BAYNES, *Op. cit.;* Thomas W. JOO, "Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11." *Columbia Human Rights Law Review*, Fall, 2002.
19. 2003 UNHCR Statistical Yearbook Country Data Sheet — Hungary. http://www.unhcr.ch/cgi-bin/texis/vtx/country?iso=hun.
20. Census data is inaccurate because many Roma are reluctant to identify themselves as such. Some improvement is noticeable: whereas in the 1991 census 142,683 persons declared themselves Roma, in 2001 this number increased to 190,046. Minority organizations put this number somewhere between 400,000 and 500,000. The most reliable number was provided by a survey in 1993/1994 estimating 456,000. See UNDP Avoiding the Dependency Trap. Bratislava 2002.
21. Act No. 77 of 1993.
22. Directive 2000/43 EC, Official Journal of the European Communities 2000, L 180/22.
23. See, e.g., Act CXXV of 2003 on Equal treatment and the Promotion of the Equality of Opportunities (Equal Treatment Act — hereinafter: ETA)
24. Both groups have estimated numbers of 10,000. Meanwhile some doubt that certain recognized minorities (such as the Ruthenian for example) have fulfilled the statutory numerical requirements. (The same doubts were raised on that of the 100-year presence of the Greeks.) The legislator is of course free to recognize any group as a national or ethic minority (even lacking the general conditions), yet the statutory language setting forth the requirements therefore seems absolute and general, and is thus somewhat misleading.
25. Following the Treaty of Trianon in 1920 two-third of Hungary's historic territory (with a corresponding population) had been annexed to the neighbouring state. Since then, but especially after the 1989 political transition, Diaspora politics has been a dominant factor in Hungarian foreign and domestic politics.
26. This of course does not prohibit the anonymous collection of census data. In general, Articles 2(2) and 3(2) of Act No. 63 of 1992 on the protection of personal data and the publicity of public data (Data protection Act).
27. Stephen DEETS, "Reconsidering East European Minority Policy: Liberal Theory and European Norms." East European Politics and Society, 16:1, 2002.
28. For more, see FARKAS Lilla, "The Monkey that does not See." *Roma Rights Quarterly*, 2/2004, http://www.errc.org/cikk.php?cikk=1940 (2003).
29. For a detailed case description see Roma Rights 21–2/003, pp. 107–108. In the summer of 2003 the Roma Press Center's fact finding revealed that at one point non-Romani parents signed a petition in which they too claimed to be Romani.

30. See the minority-ombudsman's annual parliamentary reports or an interview with Antal Heizler, President of the Office for National and Ethnic Minorities, *Népszabadság* (the leading Hungarian daily), 24 July 2002.
31. The President did not predict that more then 7 out of the 17 local self-governments running in the 2002 elections in Budapest (and some 30 out of the 48 registered nationally) would be "authentic Romanian". Out of the 13 local Romanian minority self-governments operating between 1998 and 2002, he estimated that only three have "real Romanian blood" running in their veins. See the summary of an interview with Kreszta TRAJAN, *Népszabadság,* 21 August 2002.
32. See the statement of Doru Vasile IONESCU, *Népszabadság,* 15 August 2002.
33. Only five signatures are needed for the registration of a minority self-government. (For which subsequently everybody, including members of the 'majority', may vote.)
34. See *Népszabadság,* 15 August 2002.
35. Interview with Mr. Heizler, cit.
36. For considerations of the Venice Commission on the issue, see, e.g., http://www.venice.coe.int/ docs/2001/ CDL-INF(2001)019-e.asp.
37. Act 67 of 2001.
38. Two of the three opposition parties in parliament have severely criticized the text, claiming first of all that the government is significantly underestimating the cost of the law. The Socialist party estimated that as many as one million people would be taking advantage of the health care benefit, which alone could cost around 15 billion Forints ($50 million), and the annual price of the proposed legislation would actually add up to around 60 billion Forints. Additional concerns were raised regarding the labour market's capacity to deal with the estimated additional 700,000 legal labourers. Opposition liberals expressed grave misgivings about the overall conception behind the law, claiming that the intricate web of preferences and benefits (most of which would be available in Hungary) does not support staying but in fact encourages immigration.
39. See, e.g., Minelres News, Office for National and Ethnic Minorities, Budapest, Hungary, Selection of news on national and ethnic minorities in Hungary, March 2004, http://lists.delfi.lv/pipermail/minelres/2004-March/date.html.
40. In particular Articles 2(2) and 3(2) of Act No. 63 of 1992 on the Protection of Personal Data and the Access to Public Data.
41. For a detailed discussion of the data protection system in Hungary in relation to ethnic data see Andrea KRIZSAN, "The Case of Hungary." In *Ethnic Monitoring and Data Protection* (ed. Andrea KRIZSAN). Budapest: CEU Press, 2001.
42. Act IV. of 1978. The Criminal Code.
43. Consider for example the case of racially motivated crimes. The Hungarian Criminal Code (Act IV. of 1978) criminalizes four types of behaviour that may fall under the racially motivated category. These are: genocide (Article 155), apartheid (Article 157), violence against members of national, ethnic or racial minorities and religious groups (Article 174/B) and incitement against community (Article 269). Nevertheless, it is safe to say that the while the first two never, the latter two only very rarely occur in official statistics. In 2003, for example, no investigation was initiated in relation of apartheid or genocide, whereas 11 instances of "violence against members of national, ethnic or racial minorities and religious groups" and 14 instances of "incitement against community" were registered. In recent years for example, in the case of "violence against members of national, ethnic or racial minorities and religious groups", the following number of instances had been registered: 1999: 3, 2000: 8, 2001: 12, 2002: 5, 2003: 11. This means that the following number of offenders had been identified and indicted: 1999: 9, 2000: 12, 2001: 9, 2002: 5, and in 2003: 9 identified from which 8 indicted. According to official statistics, in 2003 two people were indicted and two convicted under Article 174/B; in 2004, the numbers were eight and six, respectively. (Source: Unified Police and Prosecution Statistical Database.)
44. It should also be stressed that the Data Protection Act does not explicitly prohibit the processing of anonymous ethnic data of statistical nature, or the anonymous collection for research purposes of data relating to one's perceived ethnic origin. The Data Protection Act defines sensitive data as personal data that relates to racial origin, national and ethnic minority affiliation — not perceived racial origin.
45. See cases encountered by the Minority Ombudsman. For a discussion see KRIZSAN, *Op. cit.,* 168–172.
46. As Lilla Farkas claims, "at present the majority does vindicate the right to say who is a Roma. Despite the lack of official data, when confronted by researchers, heads of prisons provide estimates about the number of Roma inmates. (See FARKAS, *Op. cit.*) The Hungarian Helsinki Committee's research into discrimination against Roma defendants in the criminal justice system was too based on perceived ethnic origin. As researchers explained, they cared little about discrimination based on self identification. Their focus was on discrimination stemming from the perception of policemen, prosecutors and judges of the defendant's ethnicity. See FARKAS Lilla – KÉZDI Gábor – LOSS Sándor – ZÁDORI Zsolt, "A rendőrség etnikai profilalkotásának mai gyakorlata" [The Current Police Practice of Ethnic Profiling]. *Belügyi Szemle,* 2004, p. 33.

47. Article 174/B of Act 4 of 1978 on the criminal code.
48. FARKAS, *Op. cit.*
49. Article 32. of the Police Act.
50. Act 34 of 1994.
51. Article 29.
52. Article 33.
53. Article 38.
54. Articles 29 and 33.
55. Decisions No. 9/2004. and 65/2003.
56. See, e.g., Andras L. PAP, "Street Police Corruption — A Post-communist State of the Art." Kokkalis Program on Southeastern and East-Central Europe, Kennedy School of Government, Harvard University, http://www.ksg.harvard.edu/kokkalis/GSW3/Andras_Laszo.pdf.
57. Act 19 of 1998.
58. Article 33.
59. Decision no. 65/2003.
60. Act 32 of 1997.
61. Act 39 of 2001.
62. Article 61 of the Act on Border Control and Border Guards.
63. Id.
64. It is of particular importance that in June 2001 Hungary was put on its black list of countries non-conforming in money laundering issues by the FATF, OSCE.
65. Act 83 of 2001.
66. Its members are as follows: the National Security Office, the Information Office, the Military Security Office, the Military Information Office, the National Security Special Service, the National Police Headquarters and the Border Guard of the Ministry of the Interior.
67. See his essay in this volume.
68. See e.g. Articles 63, 64, 69 of Police Act.
69. Act 4 of 1978.
70. And the law imposes a duty to report such activities too.
71. Act 75 of 1999. Also see Act 126 of 2000 on the Coordination Centre Against Organised Crime.
72. See Article 63 of Police Act.
73. Decision no. 47/2003.
74. The only difference between the competences of the two agencies is that only the police is authorised to "investigate", thus, whatever this distinction is to mean in practice, national security forces competences stop at "prevention" and "detection" of terrorist activities.
75. www.nbh.hu.
76. http://www.pszaf.hu/english/start.html.
77. Act 15 of 2003 on the prevention and impeding of money laundering states that the objective of the act is to combat the laundering of funds originating from crime, or financing terrorism through the money and capital market system, or making accessible for criminals, through financial service providers. Act 4 of 1978 on the Criminal Code, Section 303 provides for the following definition of money laundering: (1) Any person who uses any item originating from the commitment of a criminal act punishable with imprisonment during his economic activities in order to conceal its origin, or perform any financial or banking transaction in relation to the item shall commit a crime and may be punished with imprisonment up to five years. (2) The punishment is imprisonment up to eight years if the money laundering is committed a) in a businesslike manner, b) involving especially large or even higher amounts, c) by an officer or employee of a financial organisation, investment enterprise, investment fund manager, clearing house, insurance company or an organisation involved in the organisation of gambling, d) by official persons, or e) attorneys at law. (3) Those who make an agreement on committing money laundering shall commit an offence and can be punished with imprisonment up to two years. (4) Those cannot be punished due to money laundering who voluntarily submit a report to the authority, or initiates such a report, providing that the action has not been detected at all, or it has only been detected in part. (5) The item specified in Paragraph (1) also includes documents and dematerialised securities representing a right to assets, which provide the right of disposal over the asset value or entitlement on their own or, in the case of dematerialised securities, for the beneficiary of the securities account. Section 303/A (1) In case of items originating from a punishable action committed by a third party, a) those who use the item while exercising business activities, or b) perform any financial or banking transactions in relation to the item, and are not aware of the origin of the item due to negligence, may be punished with imprisonment up to two years, community work or may be imposed a fine. (2) The punishment for an offence is imprisonment up to three years if the action defined in Paragraph (1) is committed a) involving an especially large, or even higher value, b) by an officer or employee or a financial institution, investment enterprise, investment fund manager, clearing house, insurance company or organisation engaged in the organisation of gambling games, or c) by official persons. Section 303/B (1) Those who do not fulfil the reporting obligation specified in the Act on the prevention and hindering of money laundering shall commit a crime and may be punished with imprisonment up to three years. (2) Those who do not fulfil their reporting obligation specified in Paragraph (1) for negligence shall commit and offence, and may be punished with imprisonment up to two years, community work, or may be imposed a fine. For the legislative background also consider the following: Act 83 of 2001 on combating terrorism, aggravation of regulations on the prevention of money laundering, and ordering certain restrictive mea-

sures, Act 101 of 2000 on the announcement of the Strasbourg convention of November 1990 (on money laundering, and the detection, seizure and confiscation of items originating from crime).

78. Id. See Part 1.4. Blocking the funds financing terrorism.
79. In the 2001 national census 5,777 persons identified themselves as Muslim, which is about 0.057 per cent of the Hungarian population. Taking into account non-citizen migrants and converted Hungarians, media and academic estimates occasionally refer to a larger Muslim population size, sometimes as large as 20,000-50,000. See, e.g., "Mozlimok Magyarországon" [Muslims in Hungary]. *Magyar Narancs*, Vol. 16, No. 19; http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=10117 (11. April 2005).
80. See www.neki.hu.
81. See www.helsinki@helsinki.hu.
82. See www.romapage.hu.
83. See www.obh.hu.
84. ECHR case Balogh v. Hungary 371, 20. July 2004; http://www.echr.coe.int/Eng/Press/2004/July/ChamberJudgmentBalogh200704.htm#_ftn1.
85. See FARKAS–KÉZDI–LOSS–ZÁDORI, *Op. cit.*
86. EUMAP Monitoring the EU Accession Process: Minority Protection. OSI EU Accession Monitoring Program 2001. p. 241.
87. Hungarian Helsinki Committee and OSI-COLPI, Punished Before Sentence, Budapest, 1997. See also, UN Committee Against Torture, Conclusions and recommendations concerning Hungary 's third periodic report, November 1998: "The Committee is also concerned about the persistent reports that [...] a disproportionate number of detainees and/or prisoners serving their sentences are Roma."
88. A kirendelt vedővel rendelkező fogva tartott személyek védelemhez való jogának érvenyesülése a büntetőeljárás nyomozási szakaszában („Realising the right to defence of detained persons with appointed defense counsels in the investigative phase of the criminal procedure"). Office of the Ombudsmen, 1996.
89. ECRI (2000)5, para. 14.
90. See FARKAS, *Op. cit.*
91. Under Article 19(1) b, of Act No. 125 of 2003 on equal treatment and the promotion of equal opportunities the plaintiff must establish his ethnic origin in order for the burden of proof to be reversed. In any case, under Article 8 protection is based on ethnicity, thus she must clear this issue when bringing a case. In cases of indirect discrimination not only the ethnicity of the plaintiff(s) but also of the comparator(s) must be established. The latter may prove an insurmountable task, given data protection provisions. See FARKAS, Op. cit.
92. Second report on Hungary, Adopted on 18 June 1999 made public on 21 March 2000, Para. 26. http://www.coe.int/T/E/human_rights/Ecri/5-Archives/1-ECRI's_work/5-CBC_Second_reports/Hungary_CBC_2.asp.