26 Hate Crimes, Underpolicing and Institutional Discrimination

Lessons from Hungary[*]

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This essay has three parts. The first elaborates how in the past year and a half, within 15 months, the European Court of Human Rights (ECHR) adopted three decisions finding Hungary in violation of the European Convention on Human Rights in relation to handling hate crime incidents. Following a brief overview of the three cases, the second part turns to the assessment of adjacent Hungarian case law and practices. A collection of cases demonstrate the underpolicing of hate crimes in general, along the practice of overpolicing Roma suspects charged with hate crimes. The Hungarian case provides examples of how hate crimes can be, arguably: wrongfully used to protect the majority form the minority, and how the proliferation of protected grounds in hate crime legislation may lead to *nullum crimen sine lege* concerns and other undesirable consequences. The third part, cognizant of how the ECHR focused on both article 3 (degrading treatment) and 8 (private life and ethnic identity), we will turn to the assessment of how law can tackle the phenomenon of institutional discrimination. Using Hungarian cases, mostly strategic litigation, we will pay special attention to the concept of "harassment" which carries the potential of being used as a silver bullet.

26.1 Hungarian Hate Crime Practices Found in Breach of the European Convention on Human Rights

Between October 2015 and January 2017, within 15 months, the European Court of Human Rights found Hungary three times to be in violation of the European Convention on Human Rights in relation to handling hate crime incidents. In all of the cases the Roma

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victims' fundamental rights were violated due to the omissions of law-enforcement authorities in hate crime procedures. Let us take a look at the cases![1]

26.1.1 Balázs v. Hungary[2]

On 21 January 2011 around 4 a.m. the applicant, Mr János Krisztián Balázs and his girlfriend were about to leave a club in Szeged, a town in Southern Hungary, when three men in their twenties, unknown to them, started to insult them. They made degrading comments concerning Mr. Balázs' Roma origin and about the physical appearance of his girlfriend. Subsequently a fourth person, Mr E.D. appeared, presenting himself as a police officer (in fact, he was a penitentiary officer) and started a fight with the applicant, which ended due to the intervention of three persons, the applicant's acquaintances. Mr E.D. called the police. Two officers arrived. The applicant, Mr E.D. and his girlfriend were then escorted to the local police station and released the day after. Although both the applicant and Mr E.D. had visible injuries, only Mr E.D. underwent a medical examination. According to the medical findings, he had bruises on his temple and a haematoma around his right eye. On 23 Mr. Balázs was examined by a general practitioner, who found that he had bruises on his chest, back, neck and face.

On 1 February 2011 Mr. Balázs lodged a criminal complaint with the Szeged Public Prosecutor's Office, submitting that the three who insulted him shouted at him "Dirty gypsy, do you need a cigarette? Here is money!" and thrown cigarettes and money at him. He also maintained that his attacker asked the others whether "[they] could not handle a dirty little gypsy" and, turning to him, called him a gypsy. He also gave a description of the injuries he suffered. Furthermore, he explained that the day after the incident he had identified his attacker, Mr E.D. on a social network, he extracted some of his posts where he commented that the night before he "had been kicking in the head a gypsy lying on the ground".On 7 February 2011 the Public Prosecutor's Office opened a criminal investigation against Mr E.D. for the offence of "violence against a member of a group," Section 170 (1) of the Criminal Code. On 17 March 2011 the two police officers who arrived at the scene were questioned, as well as Mr. Balázs' girlfriend, who corroborated the applicant's version of the events. The testimony of the police officers' did not contain any account of the incident, as they arrived at the scene only after the fight.

The applicant's three acquaintances, whose intervention had ended the fight, were not questioned, their identity remaining unknown to the prosecution. The applicant was questioned about their contact details, but the only information he could provide was their nicknames. The Szeged Public Prosecutor's office initiated an ex officio investigation into the same facts on charges of disorderly conduct and on July 20, discontinued the

1 The case summaries are compilations from the original judgments.
2 Appl. No. 15529/12, Judgement, 20 October 2015.

investigation into the offence of "violence against a member of a group", considering that there was no evidence substantiating that Mr E.D. had attacked the applicant out of racial hatred. Upon appeal, this decision was upheld by the Csongrád County Regional Public Prosecutor's Office on September 8., arguing that "although it is likely that the action had racist motives, it cannot be proven sufficiently for establishing criminal responsibility – that is, unequivocally and beyond any doubt – that Mr E.D. ill-treated the applicant precisely because of his Roma origin. The racist motive cannot be established."

Relying on Articles 3 and 14 of the Convention,[3] the applicant complained that the Hungarian authorities failed in their obligation to conduct an effective investigation into the possible racist motive for the assault that was apparent in the racist statements of the perpetrator.

The third-party intervener, the European Roma Rights Centre submitted that the general situation in Hungary showed that there was an institutional racism against Roma within the State bodies, evidenced by the "failure of the authorities to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin".

Referring to the resource guide entitled "Preventing and responding to hate crimes", published by the Organization for Security and Co-operation in Europe (OSCE) (Office for Democratic Institutions and Human Rights), the thematic situation report of the European Union Fundamental Rights Agency ("FRA") entitled "Racism, discrimination, intolerance, and extremism: learning from experiences in Greece and Hungary," the Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Hungary from 1 to 4 July 2014, all citing criticism of the Hungarian authorities for failing to identify and respond effectively to hate crimes, including by not investigating possible racial motivation and underqualifying (prosecuting of a crime motivated by hate as a less severe crime) these incidents, the European Court of Human Rights held that there has been a violation of Article 14 read in conjunction with Article 3 of the Convention.

The Court pointed out that treating racially induced violence and brutality on an equal footing with cases that have no racist overtones turns a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute discrimination, that is, unjustified treatment irreconcilable with Article 14 of the Convention. The vigour and impartiality required for the investigation of attacks with

3 Article 3 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 14 "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Article 14. "The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

potential racial overtones is needed because States have to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Furthermore, when it comes to offences committed to the detriment of members of particularly vulnerable groups, vigorous investigation is required.

The Court held that for the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means; the authorities must have taken all reasonable steps available to them to secure the evidence concerning the incident. When investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. This obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and is not absolute. The authorities, however, must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.

The Court also held that the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence is also an aspect of the procedural obligations flowing from Article 3 of the Convention.

In regards of the specific case, the Court found the Hungarian prosecutors' claims unacceptable, which relied on that the incident could have had other motives than racial, and were satisfied that although there was a likelihood of racist motives, this could not be established "unequivocally and beyond doubt" so as to warrant Mr E.D.'s indictment, as it was impossible to establish how exactly the fight had started.

The Court took the view that not only acts based solely on a victim's characteristic can be classified as hate crimes and perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to. Thus, the prosecuting authorities' insistence on identifying an exclusive racist motive and their failure to identify the racist motive in the face of powerful hate crime indicators such as the posts resulted from a manifestly unreasonable assessment of the circumstances of the case, which impaired the adequacy of the investigation to an extent that is irreconcilable with the State's obligation in this field to conduct vigorous investigations.

26.1.2 R. B. v. Hungary[4]

In this case, the applicant, who is of Roma origin, lives in Gyöngyöspata, a village of 2,800 people, about 450 of whom are Roma.On 6 March 2011 the Movement for a Better Hungary (Jobbik Magyarországért Mozgalom, hereinafter referred to as *Jobbik*), a far-right political party, held a demonstration in Gyöngyöspata. Between 1 and 16 March 2011, in connection with the demonstration, the Civil Guard Association for a Better Future (Szebb Jövőért Polgárőr Egyesület) and two right-wing paramilitary groups (Betyársereg and Véderő) organised marches in the Roma neighbourhood of the village. Despite heavy police presence, the president of the local Roma minority self-government and the mayor informed the police they had been threatened. The mayor reported that some fifty members of the Roma minority confronted approximately twenty members of the Civil Guard Association, one of whom had an axe and another a whip. Four men passed by the applicant's house, yelling "Go inside, you damned dirty gypsies!" One continued threatening her by yelling that he would build a house in the Roma neighbourhood "out of their blood". He stepped towards the fence swinging an axe towards the applicant, but was held back by one of his companions.

Two police officers stopped and searched four individuals. The mayor identified two members of Betyársereg, one of which informed the police that he was the leader of one of the "clans" within the organisation. He said that because some members of his group, about 200 people, intended to come to Gyöngyöspata "to put the Roma situation in order", he was there to "scout" the village. The applicant lodged a criminal complaint against "unknown perpetrators" with the Heves County Regional Police Department, alleging offences of violence against a member of an ethnic group, harassment and attempted grievous bodily assault. The police opened an investigation on charges of violent harassment and the applicant was heard as a witness concerning the events. On 14 July 2011 the Gyöngyös Police Department discontinued these proceedings on the grounds that harassment was punishable only if directed against a well-defined person, and that criminal liability could not be established on the basis of threats uttered "in general". The police also instituted minor offence proceedings on the ground that the impugned conduct was "antisocial". On 14 September 2011 a hearing was held in these proceedings in which six persons appeared before the Gyöngyös District Court on charges of disorderly conduct. A witness maintained that two of them had been wielding an axe and a whip and threatened the inhabitants of the Roma settlement that they would kill them and paint the houses with their blood. The mayor identified one as having been present in Gyöngyöspata on 10 March 2011, but could not confirm that the threats had been directed at the Roma. Another witness identified three persons as having participated in the incident and maintained that it was one of the defendants who threatened the inhabitants

4 Appl. No. 64602/12, Judgement 12 April 2016.

of the Roma settlement. The applicant, who was also heard as a witness, identified two defendants as having been armed and one of them having said that he would "paint the houses with [the applicant's] blood." The applicant attached to the criminal file extracts from comments posted on a right-wing Internet portal in which he had been referred to as the man who had "enforced order among the Roma of Gyöngyöspata with a single whip". The applicant's lawyer requested the Gyöngyös District Prosecutor's Office to open an investigation into "violence against a member of an ethnic group". He maintained that the motive of the threats uttered against the applicant was her Roma origin. His allegation was supported by the fact that at the material time various paramilitary groups were "inspecting" the Roma settlement with the aim of "hindering Gypsy criminality". The prosecutor's office refused the request. Although the identities of the persons who had passed by the applicant's house and that of the alleged perpetrator were established by the investigating authorities, on 2 February 2012 the Gyöngyös Police Department discontinued the investigation into harassment on the grounds that none of the witnesses heard substantiated the applicant's allegation that she had been threatened. The Police Department noted that the perpetrator refused to testify and the witness testimony confirmed only that threats had been made, but not that they had been directed against a certain person. The Gyöngyös District Public Prosecutor's Office upheld the first-instance decision. The Prosecutor's Office found that it could not be established on the basis of the witness testimonies whether the accused had been armed and whether the threats and insults he uttered had been directed at the applicant. Thus neither the criminal offence of harassment, nor "violence against a member of a group" could be established.

On 19 April 2011 the Parliamentary Commissioner for National and Ethnic Minorities issued a report on the events of March 2011 in Gyöngyöspata, taking account of the verbal violence, i.e. statements such as 'You are going to die', 'We are going to cook soap out of you' or 'We will paint the walls with your blood' had been uttered. The report notes that while no actual physical violence had occurred, the organiser of the event announced to the Gyöngyös Police Department the aim of the event as a demonstration "in the interest of the local population of Gyöngyöspata terrorised by the local Roma population earning its living from criminality" According to the ombdusman, the

> "announcement makes it clear that the aim of the event was not to provide a forum for local and national politicians of a political party to address the participants but to 'send a message' to the presumed criminals among the Roma population."

Concerning the conduct of the police, the report made the following observations:

> "According to the police, they could not restrict the movement of the Civil Guard in the settlement, since no one can be hindered in their civil right to freedom of movement…. In my view, the police misinterpret the law, since the threatening presence and marches of a paramilitary group cannot be viewed as 'patrolling', monitoring or prevention of danger. … the police could have been 'firmer' in their behaviour to relieve ethnic tensions."

The applicant submitted that the verbal abuse and threats to which she had been subjected from a member of a right-wing group amounted to inhuman and degrading treatment. (Article 3 of the Convention.) She complained that the authorities failed in their obligation to conduct an effective investigation into the incident. She also complained that the domestic authorities had not taken sufficient action to establish a possible racist motive for the assault, even though her lawyer requested the police to concentrate the investigation on charges of violence against a member of a group, instead of harassment, since the assault against her had been motivated by racial bias. She also argued that the ineffectiveness of investigations into hate crimes committed against members of vulnerable minority groups and the failure to take such crimes seriously was a structural problem in Hungarian law-enforcement practice.

The applicant also maintained that she had been attacked by a member of an extremist group and it had been only by chance that she had not been severely injured, as she and her daughter had been threatened with an axe by a member of an anti-Gypsy organisation, and that she escaped suffering actual physical harm only because of the intervention of a third person. This incident had to be assessed against other circumstances, namely that she had been subjected to continuous harassment due to the presence in Gyöngyöspata over several days of racist, paramilitary groups. As she had not suffered physical injury, the complaint was based on the psychological effect which the conduct of the demonstrators had on her and other members of the Roma minority. She stressed that the purpose of the demonstration had been to spread fear among the Roma in Gyöngyöspata and that when the incident had occurred her young child had been with her. She also complained that the authorities had failed to apply relevant, in particular criminal-law, measures against the participants of the anti-Roma rallies so as to discourage them from the racist harassment that eventually took place.

The third-party intervener, the European Roma Rights Centre viewed the case through the lens of "anti-Gypsyism" and maintained that there had been an increase in anti-Roma rhetoric, racism and physical violence against the Roma in Hungary. It pointed out that the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, Amnesty International and the European Union Fundamental Rights Agency ("the FRA") had all reported pat-

terns of anti-Roma attacks, including harassment, assault and threats, and the growth of paramilitary organisations with racist platforms. The ERRC also reiterated that the general situation in Hungary was one of institutional racism against the Roma minority within State bodies, evidenced by the "failure of the authorities to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin". It relied on the FRA's thematic report entitled "Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary", which showed that the laws on investigating and prosecuting racially motivated crimes were not being implemented effectively. In the case the ERRC also referred to the report on the visit to Hungary of the Council of Europe Commissioner for Human Rights from 1 to 4 July 2014 expressed concerns about the Hungarian authorities' failure to identify and respond effectively to hate crimes. It further argued that vulnerable victims alleging racially motivated violence are unlikely to be able to prove beyond reasonable doubt that they had been subjected to discrimination, especially when they were also victims of a failure on the part of the domestic authorities to carry out an effective investigation. It maintained that the failure to carry out an effective investigation in general had been due to institutional racism. It invited the Court to find that the failures in investigations into hate crimes overall were due to discrimination, depriving the Roma of access to the evidence needed to prove a violation of Article 14 read in conjunction with the procedural limb of Article 3.

The Government submitted that this complaint was incompatible ratione materiae with the provisions of the Convention, since the impugned treatment did not reach the minimum threshold of severity required for Article 3 to come into play. There was no evidence that the applicant was a victim of any physical assault, nor were the verbal threats and insults so serious as to attain the minimum level of severity required.

In regards of claims pertaining to Article 3, the Court pointed out in the outset that the authorities' duty to prevent hatred-motivated violence on the part of private individuals, as well as to investigate the existence of a possible link between a discriminatory motive and the act of violence can fall under the procedural aspect of Article 3 of the Convention, but may also be seen to form part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental value enshrined in Article 3 without discrimination. In order to fall within the scope of Article 3, however, ill-treatment must also attain a minimum level of severity. Although in earlier decisions, the Court has accepted the feelings of fear and helplessness caused by the ill-treatment sufficiently serious to attain the level of severity required to fall within the scope of Article 3 of the Convention, and discriminatory remarks and racist insults must in any event be considered as an aggravating factor when assessing ill-treatment, and that guarantees under Article 3 could not be limited to acts of physical ill-treatment, and could also cover the infliction of psychological suffering by third parties. In the specific case, while the Court held that the behaviour of those participating in the marches was premeditated and

motivated by ethnic bias, and were designed to cause fear among the Roma minority, the minimum level of severity required in order for the issue to fall within the scope of Article 3 of the Convention has not been attained, and rejected respective claims.

In regards of Article 8, however, the Court stated that the notion of "private life" within the Convention is a broad term not susceptible to exhaustive definition. Personal autonomy is an important principle underlying Article 8., which can embrace multiple aspects of a person's physical, social and ethnic identity. In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group and this can be applied to treatment which does not reach a level of severity required for the breach of Article 3., if the effects on the applicant's physical and moral integrity are sufficiently adverse. In the specific case, the Court ruled, the applicant, who is of Roma origin, felt offended and traumatised by the allegedly anti-Roma rallies and, in particular, the racist verbal abuse and attempted assault to which she had been subjected in the presence of her child, and all this was directed against her due to her belonging to an ethnic minority. As to the applicant's contention that the investigation of the alleged racist abuse was ineffective, the Court recalls that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: there may be positive obligations inherent in the effective respect for private life, which may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between, and when investigating violent incidents, State authorities have an additional duty under Article 3 of the Convention to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have also played a role in the events. In regards of Article 8 acts of violence inflicting minor physical injuries and making verbal threats may require the States to adopt similarly adequate positive measures in the sphere of criminal-law protection in cases where alleged bias-motivated treatment do not reach the threshold necessary for Article 3. when a person makes credible assertions that he or she has been subjected to harassment motivated by racism. Thus, the Court held that similar standards to respond to alleged bias-motivated incidents apply for Article 3 as for Article 8 where there is evidence of patterns of violence and intolerance against an ethnic minority.

In sum, the lack of proper investigation of the potential racist motivation of the incident failed to provide adequate protection to the applicant against an attack on her integrity, and showed that the manner in which the criminal-law mechanisms were implemented in the instant case were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention.

26.1.3 Király and Dömötör v. Hungary[5]

Mr Alfréd Király and Mr Norbert Dömötör, both of Roma origin, also alleged that the authorities failed in their obligations to protect them from racist threats during an anti-Roma demonstration and to conduct an effective investigation into the incident, in breach of Article 8 of the Convention.

Mr G.F., a Member of Parliament Jobbik, announced that a demonstration would take place on 5 August 2012 in Devecser under the slogan "Live and let live". The reason for the demonstration was that riots had broken out between Roma and non-Roma families of the municipality. Following the incident, seventeen people were questioned by the police, and an enhanced police presence was ordered, with the constant surveillance of streets inhabited by the Roma community. In the applicants' submission, the police were aware that the presence of a hostile crowd in the municipality could lead to violent acts. The police had been informed through official sources that in addition to the members of *Jobbik*, nine far-right groups, known for their militant behaviour and anti-Roma and racist stance, would also be present at the demonstration. They had also been informed that the demonstrators would seek conflict with the police and the Roma. According to the far-right organisations' websites, the demonstration was aimed "against Roma criminality", "against the Roma of Devecser beating up Hungarians" and "against the Roma criminals unable to respect the rules of living together". Devecser was classified as a special zone of risk, and eight police patrol units were dispatched to ensure an increased presence and carry out checks as of 1 August 2012. About 200 police officers were deployed to secure the demonstration, including members of the Operational Squad. On the day of the demonstration checks were increased throughout the county, including traffic check points. The Veszprém county police department also asked members of the Roma Self-Government of Veszprém county to inform the Roma population about the upcoming demonstration.

About 400 to 500 people were present at the demonstration. Mr G.F. announced that the Roma were not "normal". Mr L.T., leader of the Sixty-four Counties Youth Movement (*Hatvannégy Vármegye Ifjúsági Mozgalom*), said that Roma criminality was omnipresent in the country and wherever this ethnic group appeared, only destruction, devastation and fear came.The Roma, he continued, wanted to exterminate Hungarians, which left the latter with the choice of becoming victims or fighting back. Hungarians, he said, have three options: "To emigrate, to become slaves of the Gypsies, or to fight."[6] Mr A.L., leader of the Civil Guard Association for a Better Future (*Szebb Jövőért Polgárőr Egyesület*) stated that hundreds of Hungarians were killed yearly by the Roma with the approval of the State. He said that there was a destruction of civilians going on in Hungary. He

5 Appl. No. 10851/13, Judgment January 2017.

6 See <www.bbc.com/news/world-europe-19439679>.

called on the demonstrators to sweep out the "rubbish" from the country, to revolt and to chase out the treasonous criminal group suppressing Hungarians. He closed his speech by saying that the Hungarians were entitled to use all means to achieve those goals. Mr Zs.Ty., leader of the Outlaws' Army (*Betyársereg*), spoke about a racial war and an ethnic-based conflict. He said that before such conflict escalated, a message should be sent. He mentioned that the Roma are genetically encoded to behave in a criminal way and declared that the only way to deal with them was by applying force to "stamp out this phenomenon that needs to be purged". Mr I.M., the leader of the New Guard (*Új Gárda*), called on the Government to end Roma criminality and warned that if Hungarians ran out of patience, there would be trouble. Finally, Mr I.O., the vice-president of *Jobbik* in Veszprém county, told participants that there would be no mercy and that every criminal act and every prank would be revenged; if the State authorities did not live up to their obligations to protect civilians from Roma criminality, this would be done by the population itself.

Following the speeches, the demonstrators marched down the Roma neighborhood of Devecser, chanting "Roma criminality", "Roma, you will die", and "We will burn your house down and you will die inside", "We will come back when the police are gone", and obscene insults. They also called on the police not to protect the Roma residents from the demonstrators and to let them out from their houses. Sporadically, there were paramilitary demonstrations, involving military-style uniforms, formations, commands and salutes. Some demonstrators covered their faces, dismantled the cordon and were equipped with sticks and whips. Those leading the demonstration threw pieces of concrete, stones and plastic bottles into the gardens, encouraged by the crowd following them.

The first applicant submitted that he had overheard the police stating on their radio that the demonstrators were armed with sticks, stones, whips and metal pipes. Furthermore, one of his acquaintances had been injured by a stone thrown into his garden, but the police officer to whom the applicant had reported the incident had not taken any steps. In the second applicant's submission, two of the demonstrators leading the march had a list and pointed out to the crowd the houses that were inhabited by Roma. According to the applicants, the police were present during the demonstration but remained passive and did not disperse the demonstration; nor did they take any steps to establish the criminal responsibility of the demonstrators. The report of the police's contact officer noted that the organiser of the demonstrations, Mr G.F. had not been able to keep the events under control and had been unwilling to confront the participants.

On 21 September 2012 the Minister of the Interior, reacting to a letter from civil society organisations, informed the public that the conduct of the police had been adequate and that forty people, including five demonstrators, had been questioned. Following a statement from two victims, the police opened criminal proceedings against unknown perpetrators on charges of "disorderly conduct", which was subsequently amended to "violence against a member of a group."Several months after the incident,

a further criminal investigation was opened into charges of "violence against a member of a group".

In November 2012 the Office of the Commissioner for Fundamental Rights published a report on the events, concluding that the police failed to assess whether the event had infringed the rights and freedoms of others. Such assessment would have led to the conclusion that the people living in the neighbourhood were forced as a "captive audience" to listen to the injurious statements that had been made. According to the report, the demonstration had been used to incite ethnic tensions on the basis of the collective guilt of the Roma community. It went on to state that by not enforcing the limits of freedom of assembly, the police had caused anomalies in respect of the right to peaceful assembly and the Roma population's right to dignity and private life. It also pointed out that certain speeches had been capable of inciting hatred, evidenced by the fact that stones had been thrown at Roma houses. The Commissioner found it regretful that the police failed to identify the perpetrators on the spot, which was inconsistent with their task of preventing and investigating crimes and with the right to dignity, non-discrimination and physical integrity.

The applicants set forth two lines of complaints: one pertaining to the lack of police protection in regards of the demonstration, which, in their view, should have been dispersed or at least contained, and the lack of proper investigation of what they considered as racist hate crimes.

As for the dispersion of the demonstration, both applicants complained to the Veszprém county police department about the failure of the police to take measures against the demonstrators, thereby endangering their life and limb and their human dignity. The complaints were dismissed by the police on the grounds that the conditions for dispersal of the demonstration had not been met, since all illegal or disorderly conduct on the part of the demonstrators had ceased within ten minutes. The police held that the demonstration had remained peaceful, since, apart from throwing stones, no actual conflict had broken out between the police, the demonstrators and members of the Roma minority. It also found that only a small group of demonstrators were armed with sticks and whips. As regards the failure of the police to carry out identity checks on demonstrators and to hold suspects for questioning, the police found that such measures would only have aggravated the situation and strengthened the demonstrators' hostility towards the police. The dismissal was upheld upon appeals by both on the county and the national level, the latter admitting that there could have been grounds to disperse the demonstration, since some participants were armed, and there was a reasonable suspicion that some of them committed the criminal offence of violence against a member of a group, but this would have carried a high risk, since, based on previous experience, those participants would probably have turned against the police. The police acknowledged that the unlawful acts of certain demonstrators infringed the fundamental rights of the applicants, but concluded that seeking to protect those rights would have caused more harm than good.

The Veszprém Administrative and Labour Court also dismissed the judicial review sought by the applicants. It found that although the non-peaceful character of a demonstration could serve as grounds for its dispersal, this was only so if the demonstration as a whole would have ceased to be peaceful. Sporadic acts of violence, could not serve as legitimate grounds for dispersal, and, in any event, the potential infringement of the applicants' fundamental rights had been caused not by the alleged inactivity of the police, but by the conduct of the demonstrators. The high court, the *Kúria* agreed, holding that a dispersal of a demonstration is a possibility rather than an obligation for the police, and restrictions on the fundamental rights of others did not in themselves justify the restriction of the right of assembly. It reiterated that on the whole the demonstration remained peaceful and dispersing the march could have caused more serious prejudice to the Roma community than allowing the demonstration to continue in a controlled manner.

The applicants, together with the Hungarian Helsinki Committee, also lodged a criminal complaint concerning the speeches delivered at the demonstration and the attacks to which the Roma community had been subjected. On 22 November 2012 the Veszprém county police opened an investigation but it was discontinued, although the police admitted that the content of the speeches had been injurious to the Roma minority and was morally reprehensible, it held that it could not be classified as a crime. In particular, the speeches had not been meant to trigger unconsidered, instinctive, harmful and hostile reactions. The prosecution agreed, holding that the speeches contained abusive, demeaning statements concerning the Roma minority and might have contained statements that evoked hatred, but that they had not provoked active hatred and had not called on the audience to take violent action against the local Roma. In regards to the investigation into the offence of violence against a member of a group, the police established that four persons had taken part in violent acts, in particular throwing stones. Three perpetrators could not be identified, and one was found guilty and sentenced to ten months' imprisonment, suspended for two years, which was reduced to one year and three months' imprisonment, suspended for three years on appeals.

In Strasbourg, the applicants complained that the failure of the domestic authorities to adequately protect them from the demonstrators and to properly investigate the incident amounted to a violation of their rights under Article 8 of the Convention, as the threats uttered against the Roma community in an openly racist rally and accompanied by acts of violence caused such a degree of fear and distress, as well as a feeling of menace and inferiority, that it affected their psychological integrity. Referring to the general context of the demonstration and the widespread discrimination suffered by the Roma minority, including repeated instances of hate speech and a series of hate-motivated killings, they claimed to be victims of intentional harassment as members of a captive audience, unable to avoid the message conveyed by the speakers and demonstrators.

The applicants emphasized that the police had been clearly aware that the demonstration constituted a danger to the Roma community, following previous experience of the

behavior of extreme right-wing groups during rallies and the fact that the demonstration had explicitly been planned in the Roma neighbourhood. They argued that police could have used their powers to divert the demonstration to another place or to deny the demonstrators access to the Roma neighbourhood. Moreover, they should have intervened by calling the demonstrators to cease their unlawful conduct. They claimed that the police failed to understand that not only the sporadic acts of violence, but also any threatening behaviour constituted a criminal offence, in particular violence against members of a group. They also submitted that none of the authorities had properly assessed that an anti-Roma demonstration of this kind, by its very nature, infringed the rights and freedoms of others.

The Government submitted that they had taken a wide range of preventive measures prior to the demonstration, including vehicle checks, identity checks and consultations with the representatives of the Roma minority. It also claimed that the case concerned on the one hand, the right of a political group to freedom of expression and assembly, guaranteed by Articles 10 and 11 of the Convention and, on the other, the right of the local residents to their private life, guaranteed by Article 8. The alleged failure of the police to ban or disperse the demonstration corresponded to their obligation to strike a fair balance between those two competing interests. The Government further emphasised that the demonstration, a one-off event, lasted only two hours and the sporadic acts of violence only a couple of minutes. Thus, the event could not be characterised as violent, justifying possible dispersal.

The Court observed that since the police requested the inhabitants not to leave their houses and the demonstrators shouted that they would come back later, threats made during the demonstration could have aroused in the applicants a well-founded fear of violence and humiliation. Furthermore, the reliance of an association on paramilitary demonstrations which expressed racial division and implicitly call for race-based action has an intimidating effect on members of an ethnic minority, especially when they are in their homes and as such constitute a captive audienceThese elements, in the Court's estimation, would be enough to affect the applicants' psychological integrity and ethnic identity, within the meaning of Article 8 of the Convention.

While the Court was satisfied that there was no appearance of arbitrariness or a manifest lack of judgment on the part of the authorities as regards the decision of the police not to disperse the demonstration, nonetheless, the fact remains that the applicants were unable to avert a demonstration advocating racially motivated policies and intimidating them on account of their belonging to an ethnic group. The Court held that domestic authorities should have paid particular attention to the specific context in which the impugned statements were uttered, for example that the event was organised in a period when marches involving large groups and targeting the Roma minority had taken place on a scale that could qualify as "large-scale, coordinated intimidation". Also, the rally, which quite clearly targeted the Roma minority, with the intention of intimidating this

vulnerable group, was attended by members of a right-wing political party and nine far-right groups, known for their militant behaviour and acting as a paramilitary group, dressed in uniforms, marching in formation and obeying commands. This is all the more so that according to the domestic courts' case-law, racist statements together with the context in which they were expressed could constitute a clear and imminent risk of violence and violation of the rights of others. It appeared that the investigating authorities paid no heed to those elements when concluding that the statements had been hateful and abusive but that they had not incited violence. Thus, the domestic authorities inexplicably narrowed down the scope of their investigations.

As regards the criminal investigations into the offence of violence against a member of a group, the Court held that although the police had sufficient time to prepare for the event and should have been able to interrogate numerous persons after the incident, only five demonstrators were questioned; and three of the alleged perpetrators could not be identified. For the lack of any other elements possibly falling within the hypothesis of the offence in question, the police were not in a position to extend the scope of the prosecution to any other protagonists. In these circumstances, the Court finds that this course of action in itself was not "capable of leading to the establishment of the facts of the case" and did not constitute a sufficient response to the true and complex nature of the situation. The Court held that the cumulative effect of shortcomings in the investigations, especially the lack of a comprehensive law enforcement approach into the events: an openly racist demonstration. They could not benefit of the implementation of a legal framework affording effective protection against an openly anti-Roma demonstration, the aim of which was no less than the organised intimidation of the Roma community, including the applicants, by means of a paramilitary parade, verbal threats and speeches advocating a policy of racial segregation. The Court was concerned that the general public might have perceived such practice as legitimisation and/or tolerance of such events by the State. Hence the Court concluded that the State did not comply with its positive obligations under Article 8 of the Convention and there has accordingly been a violation of Article 8.

26.2 Hungarian Case Law and Practices on Hate Crimes

The Working Group Against Hate Crimes,[7] a unique NGO-coalition established in 2012 to join forces for a more effective state response to hate crimes, regularly delivers opinions and reports on the state of affairs. An anonymised overview 24 cases published in 2014,[8] in

7 <http://gyuloletellen.hu/about-us>.

8 For the collection of the cases below, see Tamás Domos-Eszter Jovánovics – Eszter Kirs – Balázs M. Tóth – Márton Undvari: Law enforcement problems in hate crime procedures. Experiences of the Working Group Against Hate Crimes, <www.gyuloletellen.hu/esetek>.

which law enforcement failed to protect victims of hate crimes published by this organisation points to the fact that the aforementioned cases are hardly isolated occurrences, but, rather, highlight the authorities' systemic failure to carry out an effective investigation into hate crimes in general. The systemic failures surface in four dimensions: (i) under-classification of hate crimes, (ii) failures to undertake law-enforcement action, (iii) failures to take investigative measures, and (iv) a failure to apply the crime of "incitement against a community".

As for (i), under-classification refers to the phenomenon that hate/bias motivation is disregarded during the procedure and so, even if due to the well-founded suspicion of a crime, a criminal procedure is initiated, the incorrect, more lenient provisions of the Hungarian Penal Code are used – as in the *R. B. v. and* the *Balázs v. Hungary* cases. As for (ii), as these cases shown, police often fail to take the necessary measures at far-right, extremist assemblies directed against vulnerable groups, even if there is sufficient amount of evidence to suggest that an infringement of law took place. As for (iii), it appears to be a general problem that the investigative authorities fail to question the witnesses, collect the CCTV recordings before their deletion, to conduct searches or background investigations into the motives to learn of the social networks and lifestyle of the offenders (whether they have extremist symbols on their walls, what type of comments they make in public fora) to uncover the motives of the crime and investigate the social networks. As for (iv), for Hungarian courts, "incitement against a community" is committed only if the danger created by an expression is not merely a hypothetical one but involves a direct possibility of a violent act. The police, courts, and the prosecution apply a very restrictive approach relating to this direct threat of danger. As a result, nearly none of the reported expressions fall under the scope of this crime. The authorities Courts and the prosecution always refer to Constitutional Court standards that were actually developed before the adoption of the Fourth Amendment to the Fundamental Law in 2013, which explicitly allows the restriction of free speech to protect human dignity.

26.2.1 Case Law Reported by the Working Group Against Hate Crimes

Let us look at some of the Working Group's cases,[9] most of which, just like those before the ECHR, were highly publicized, but even the media attention of the events left the authorities unaffected:

9 Tamás Dombos – Eszter Jovánovics -Eszter Kirs- Balázs M. Tóth – Márton Udvari: Law enforcement problems in hate crime procedures The experiences of the Working Group Against Hate Crimes in Hungary, <www.gyuloletellen.hu/sites/default/files/ejk_casesummary.pdf>. A detailed Hungarian language description of the cases analyzed can be found at: <www.gyuloletellen.hu/esetek> Working Group Against Hate Crimes, 2014.

In another *Gyöngyöspata* case,[10] that happened at the same time as the R.B-case, (March 4, 2011), the victim, a 35 weeks pregnant Roma women, who was heading home after shopping for groceries, was followed by two men dressed in black, wearing masks and whips around their necks who were members of the anti-Roma far-extremist, Szebb Jövőért Polgárőr Egyesület (Civil Guard Association for a Better Future)[11] that was "patrolling" in the village. Having approached her, they started breathing in her neck and repeatedly spat on her. The police disregarded the racist bias in the incident and classified it as slander. At a later point it reclassified it as a misdemeanor, at the time falling within the jurisdiction of the local notary. After the intervention of the victim's attorney, the prosecution, correctly, reclassified the case as a hate crime, "violence against a member of the community", yet the case was dismissed on the grounds that the actions of the defendants could not have been proven to have been directed against the victim.

Yet again, in the same village, a few weeks later, a Roma couple was heading home for supper in the Roma part of the village. Due to the patrolling of anti-Roma far right vigilantes in the village, they were afraid to bring their children along. Five people dressed in black were standing and cursing at them in front of their door. Later, someone, presumably members of the same group, broke their window with a rock while they were inside, shouting "You will die, filthy gypsies, if you don't move from Pata!" (The abbreviation of the name of the village.) In the police report, the victim's attorney argued that evidence points to racist motivation and that the case should be classified as "violence against a member of the community", but the police opted for vandalism.

At another case in August 2012, during the march of some 20-30 far-right extremists in the district inhabited mostly by Roma of small town of Cegléd,[12] shots were fired from a gas pistol. Despite distress calls from residents, the police did not dissolve the demonstration, did not identify (ID-check) or arrest anyone. At a later point proceedings were initiated both the local Roma people and the extremists, charging the former with vandalism, and the latter with "violence against a member of the community".

In another case, in March 2010, a rabbi and his guests, including children, were celebrating Pesach in an apartment, when stones were thrown into the apartment through the open window. The police qualified the offence as a simple abuse instead of a hate

10 <www.errc.org/cms/upload/file/hungary-gy%C3%B6ngy%C3%B6spata-letter-march-2011.pdf>, <http://tasz.hu/files/tasz/imce/gyongyospata-legal_position.pdf>, <www.cafebabel.co.uk/society/article/roma-and-hungarys-extreme-right-the-hunt-in-gyongyospata.html>.

11 A splinter organisation of the banned far-right Hungarian Guard, see below.

12 The Cegléd-incident lasted several days: The "spontaneous demonstration" of 400 people, among them three Jobbik MPs, against "Gypsy crime" was organized by Jobbik and Új Magyar Gárda, a splinter of the aforementioned banned Magyar Gárda (Hungarian Guard). According to far-right websites, Roma people attacked the "peaceful Gárda members" in the courtyard of a private house, and that is why a "nationwide mobilisation" was ordered. At some point in the conflict, approxiamtely 80 police officers cordoned off houses inhabited by Roma. See <www.politics.hu/20120822/roma-garda-conflict-in-cegled-as-far-right-groups-stage-spontaneous-demo-against-gypsy-crime/>.

crime. Officers advised the men leaving the dinner to remove their yarmulkes, as "it is not safe" to walk around in Budapest wearing them".[13]

In another case, in April 2013, the chairman of the Raoul Wallenberg Association was assaulted and his nose was broken at a football match after raising objections to neo-Nazi statements being shouted. Even though the perpetrators made anti-Semitic statements while beating him up, the police started an investigation on the suspicion of serious bodily harm.[14]

In December 2011, two men wearing bomber jackets assaulted and verbally abused the victim because of his alleged Jewish origin. The victim suffered serious injuries. None of twelve motions to question witnesses, submitted by the victim were sustained, and the decision on suspending the investigation was not sent to the victim, or his attorney. Following a complaint, the investigation was reinitiated by the appellate police division, in the spring of 2013. Since then, several investigative steps have been made, all unsuccessful, mostly due to the time passed, and the inability to retrieve information that was not recorded at the time the crime was committed: the offenders could not have been identified and the investigation was suspended.

In another case in October 27, 2013, the victim, living in the refugee camp at Bicske, was heading to the train station when he was accosted by two men, unknown to him, sitting on a bench in the park. One of them said to him in English: "Black man, go back to Africa, here is Hungary, it's not Africa". One then stood up from the bench and slapped the victim. When the victim raised his arm to defend himself, the attacker began hitting his forearm. The victim fled and picked up a stick, in case the men were to reappear, but never used it. The two attackers later appeared again and as they approached him, the victim noticed that one was carrying a knife, so he started running. Later, a car appeared with several people inside, including the attackers. The men got out of the car, caught the victim and started beating him with a stick-like object. The victim ran towards the train station, but was once again caught by the attackers who continued to beat him with the stick. The attackers then placed him on the train tracks where they continued to punch his head. Later, they laid him onto the platform. Despite the fact that the case clearly shows signs of racist motivation, neither the police nor the prosecutor classified the case as "violence against a member of the community." After months of negotiations, with the involvement of NGOs, ORFK the National Police reclassified the case.

13 See e.g.: "Kövekkel támadtak egy rabbira és a vendégeire" (A rabbi and his guests were attacked by stones) (March 31, 2010), at <http://index.hu/belfold/2010/03/31/kovekkel_tamadtak_egy_rabbira_es_a_vendegeire/>, accessed April 2, 2014.

14 See e.g.: "Orosz Ferencet, a Raoul Wallenberg-egyesület elnökét szidalmazták, megütötték – nyomozás" (Ferenc Orosz, president of the Raul Wallenberg Association insulted, assaulted – investigation) (April 29, 2013) at <www.origo.hu/itthon/20130429-orosz-ferencet-a-raoul-wallenberg-egyesulet-elnoket-szidalmaztak-megutottek-nyomozas.html>, accessed April 2, 2014., "Does Bias Not Count?" at <http://helsinki.hu/en/does-bias-not-count>, accessed April 2, 2014.

26.2.2 Analysis: Underpolicing Hate Crimes

Not much has changed since 2005, when the European Monitoring Centre on Racism and Xenophobia pointed out that,[15] in Hungary there are no instructions on how to determine whether a crime is racially motivated; specialist training programs on dealing with racist crime and violence are not provided; and there are no measures to publicize police initiatives and guidelines for working with victims of racist crime and violence exist.[16] In 2008, in its fourth periodic report on the country,[17] the European Commission against Racism and Intolerance (ECRI) voiced criticism about the implementation of existing provisions of criminal law on racially motivated criminal offenses, including not only the lack of sufficiently vigorous implementation of the existing laws, but also the lack of reliable statistics in this field, and recommended Hungary to introduce a systematic and comprehensive monitoring of all incidents that may constitute racist offences, covering all stages of proceedings. In its report "Field Assessment of Violent Incidents against Roma in Hungary: Key Developments, Findings and Recommendations",[18] the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (OSCE ODIHR) pointed out that

> "current interpretations of Hungarian law render the collection of [relevant] data, or even the identification of ethnic bias as a motivation for a crime, extremely difficult. […] Only the citizenship, gender and the age of victims are recorded on the statistical sheet […], and there are no data on their ethnicity. As a result, there is no statistical information on crimes committed against Roma. Recorded cases of hate crimes are also not disaggregated further by bias motivation, so there are no available data of how many of the cases were based on bias against Roma. There are no records kept on cases where the hate motivation was considered as a base motivation and evaluated as an aggravat-

15 *Policing Racist Crime and Violence: A Comparative Analysis. (*European Monitoring Centre on Racism and Xenophobia, September 2005), 17, 28 and 40. Available at: <http://fra.europa.eu/sites/default/files/fra_uploads/542-PRCV_en.pdf>, accessed April 2, 2014.

16 "A number of possible explanations were advanced … as to why bias motivations are often overlooked by the police. Among these, the latent climate of intolerance and prejudice that also exists within the police force was mentioned. …Another contributing factor could be that proving hate crime is more complex, resource intensive and time consuming than proving other types of crime. Police officers are often focused on closing cases quickly rather than on investing considerable resources in identifying bias motivations. *Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary*, Thematic situation report, (European Union Agency for Fundamental Rights, 2013), 39.

17 *ECRI report on Hungary (fourth monitoring cycle), adopted on 20 June 2008*, ECRI(2009)3., §§ 67. Available at: <www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf>, accessed April 2, 2014.

18 Warsaw, June 15, 2010, 41-42. Available at: <www.osce.org/odihr/68545>, accessed April 2, 2014.

> ing circumstance. As such, there is no statistical information on the extent and pattern of hate crimes."

In this context, ODIHR recommended *inter alia* that the Hungarian authorities ought to reconcile the aim of effectively investigating crimes with a possible hate motivation and the Hungarian regulations on ethnic data collection and processing.

As noted by the European Monitoring Centre on Racism and Xenophobia(EUMC) almost 12 years ago:

> "[i]n Hungary, the low levels of registration under the various specific racially motivated crimes were attributed to law enforcement agents, as well as prosecutors and courts, being very reluctant to recognize racial motivation in violent and non-violent crimes committed against Roma".[19]

26.2.3 Analysis: Overpolicing Hate Crimes by Roma Offenders

The systemic failure to prosecute hate crimes is accentuated by the phenomenon of overpolicing Roma people, the single large ethnic minority in Hungary. Having shown the fallacy of Hungarian authorities to properly respond to hate crimes, when the victims are Roma and other minorities, it is particularly striking to see that in more and more cases involving violence between members of the majority, often members of racist hate groups and members of the Roma community, Roma are charged with racially motivated hate crimes.[20]

One of the cases happened in Miskolc, a city with high a Roma population rate, in March 2009, around the time when a series of targeted murders against Roma was already ongoing. The incident happened only three weeks after an incident in Tatárszentgyörgy which resulted in the death of two Roma, and after members of the extreme right-wing paramilitary group the Hungarian Guard – an association later dissolved by the Supreme Court for carrying out racist activities – were marching around in different Hungarian villages. Shortly before the incidents, text messages were circulated within the Roma community in Miskolc, alleging that skinheads were planning to attack the local Roma. At around 1 a.m. two cars unfamiliar to the local Roma turned up and drove along the homes of the Roma several times. At some point, the car was attacked by 25-40

19 *Policing Racist Crime and Violence: A Comparative Analysis. (*European Monitoring Centre on Racism and Xenophobia, September 2005), 16. <http://fra.europa.eu/sites/default/files/fra_uploads/542-PRCV_en.pdf>, accessed April 2, 2014.

20 See "General Climate of Intolerance in Hungary" (January 7, 2011), at <http://helsinki.hu/wp-content/uploads/General_climate_of_intolerance_in_Hungary_20110107.pdf>, accessed April 2, 2014.

Roma, assuming that the people in the cars were skinheads or members of the Hungarian Guard. The perpetrators had no firearms and they used wooden sticks and stones. The damage caused in the car was 104,000 HUF (approx. 350 EUR). Eleven perpetrators were identified by the police (the rest fled and were never identified) and taken into pre-trial detention by the court. One of the evidences against the Roma defendants included a wooden stick found in the crime scene with the sentence "Death to the Hungarians" written on it, however, it has not been clarified by whom the stick was prepared or used. It was proven that one of the victims had right-wing ties, and the passengers carried several litres of gasoline in a can with them. Furthermore, the only witness (a defendant himself), initially stating that he heard that others made "anti-Hungarian" statements during the attack, claims that he was subject to forced interrogation by the police and made a false statement under duress, in the absence of a lawyer, and that the other defendants made no "anti-Hungarian" statements.[21]

In October 2010 in the first instance decision the court found that all the perpetrators were guilty in 'violence against member of a community', committed in a group and armed. The highest sentence imposed was 6 years imprisonment.[22] On October 8, 2013, the appellate court[23] changed the legal qualification of the case, and convicted the men for antisocial behaviour with a significantly lower penalty. The court noted that the indictment and the first instance decision referred to members of the Hungarian Guard, skinheads and Hungarians as the protected group interchangeably. The court found that members of the Hungarian Guard and skinheads are not protected by the provision on violence against a member of a community. Hungarians as a group are, but there was not enough evidence to prove the motivation, as there was no evidence that the stick was used in the attack, its engraving was known by the attackers, and the witness testimony is questionable.

Another similar case happened in Sajóbábony, a small town close to Miskolc. On 14 November 2009, a public forum was organized by the extreme right-wing Jobbik party. Roma were not allowed to enter and after the forum some were threatened. The next evening three out of the approximately 100 members of the New Hungarian Guard (the "successor" of the dissolved Hungarian Guard) were attacked by Roma locals and one of their cars was seriously damaged by wooden sticks and axes, and passengers suffered light injuries. The victims claimed that their Hungarian ethnicity was the cause of the attack, while defendants argued that they wanted to protect their families from the neo-Nazi (New) Hungarian Guard. Nine Roma suspects were placed in pre-trial deten-

21 See e.g.: "Halál a magyarokra! – Fordulat a verekedo romák tárgyalásán" (Death to Hungarians – a turn in the trial of the violent Roma) (June 4, 2013), at <http://index.hu/belfold/2013/06/04/halal_a_magyarokra_fordulat_a_verekedo_romak_targyalasan/>, accessed April 2, 2014.

22 "Rasszizmusért elítélt miskolci romák – Az önmaga ellen fordult törvény" (Roma sentenced for racism – The law turning against itself) at <http://magyarnarancs.hu/belpol/rasszizmusert_elitelt_miskolci_romak_-_az_onmaga_ellen_fordult_torveny-75090.>, accessed April 2, 2014.

23 Miskolc Regional Court Decision 3.Bf.2023/2012/51.

tion and were accused of violence against member of a community. In May 2013, the first instance court ruled that they indeed committed a hate crime "against members of the Hungarian nation" and the perpetrators were sentenced to imprisonments between 2.5 and 4 years. The decision was appealed against, the second instance court decided to raise the sentences imposed on all defendants in its decision issued on 30 September 2013.[24]

The decisions came under severe criticism from human rights NGO's.[25] According to the Hungarian Civil Liberties Union[26]

> "The harsher sentence for hate crimes is justified as a measure to protect disadvantaged groups of society. The motive behind the actions of the perpetrators, however, was clearly not prejudice but a fear of racism and an attempt to chase the extremists away. … The judgment … fuels our worries about the increase in the number of cases where Roma are accused of racism whereas Roma are the main target of racist violence in Hungary. … the … Court failed to take into account a long history of exclusion, severe discrimination, and inequality that affects the Roma …. The court applied the hate crime law, … against a population that had been traumatized by a series of murders by racist extremists. HCLU believes that these decisions are examples of wide-spread … discrimination in the criminal justice system."

Judicial practice is uneven. In a 2011 case involving a physical assault against persons who belonged to the far-right paramilitary Hungarian Guard, the Supreme Court took the position that

> "criminal law can logically not extend special protections to persons who are members of an organization that was established against certain national, ethnic, racial, religious or other social groups, obviously in violation of the law – especially if this group has already been dissolved by a legally binding court decision."[27]

24 See e.g.: "Sajóbábony, másodfok" (September 30, 2013), at <http://index.hu/belfold/2013/09/30/sajobabony_masodfok/>, accessed April 2, 2014.

25 <http://helsinki.hu/en/general-climate-of-intolerance-in-hungary, <http://gyuloletellen.hu/node/3>.

26 "Those Racist Roma Again" (May 15, 2013, HCLU), at <http://tasz.hu/node/3543>, accessed April 2, 2014. Also see "Romas Sentenced for Hate Crime Against Hungarians", (July 13, 2012), at <http://tasz.hu/node/2785.>, accessed April 2, 2014.

27 Bfv.III.87/2011/5.

There were high court decisions which adopted the position that hate crime provisions are indeed minority-protection mechanisms. In 2015, the high court[28] nevertheless reiterated that members of the majority community can also be victims of hate crimes.

26.2.4 Analysis: Protecting the Majority by Criminal Law

Protecting the majority community over the minorities appears to be an essential element of Hungary's new constitutional order. At least in the field of hate speech, which, of course can be difficult to be distinguished from non-physical criminal harassment.

Article IX (5) of the new constitution, the 2011 Fundamental Law's chapter on Freedom and Responsibility states that "[t]he right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act."

Protection against offensive speech is itself a highly debated issue, with vastly different standards of jurisprudence on the two sides of the Atlantic, but even where curtailing hate speech and the protection of dignity on the basis of identity is allowed, it mostly only comes up in the context of some sort of documented vulnerability in regards of the protected group, or as a threat of potential or actual exclusion or marginalization. When it comes to restricting the right for free expression, the arguments that carry the greatest weight are not those that seek to justify restrictions on hate speech with regard to general notions of dignity, but rather those that would legitimate such measures on the basis of protecting minorities. That is, they would offer additional protections for groups with a reduced ability to assert their interests, or which, as a consequence of for example, some historical trauma, are prevented from participating in the democratic discourse on a level that is commensurate with the majority's involvement. The prohibition of hate speech therefore usually serves as a means to right a historical wrong,[29] or as an instrument for protecting groups that cannot ignore the hate they encounter or lack the wherewithal to take effective action against it. It is unclear how being part of the ethnic/national majority or the Hungarian nation in today's Hungary could have implications that threaten individuals within this majority with a stigma and vulnerability that they should need special legal protections. An unconditional, blank-check protection for communities is not an accepted practice.

28 3/2015 "bünteto elvi döntés" on *Debreceni Ítélotábla Fkhar. II. 248/2014*. See Bfv.II.590/2012/18 and EBD 2015 B.3.).

29 R. Uitz, 'Does the Past Restrain Judicial Review? (Reference to History and Traditions in Constitutional Reasoning)', *Acta Juridica Hungarica* vol. 41, no. 1-2, 2000, p. 47-48.

As seen in the above cases, hate speech is regulated by Article 332 of Act C of 2012 on the Criminal Law. This provision establishes that *incitement against a community* is committed by someone who incites to hatred against "the Hungarian nation; any national, ethnic, racial or religious group; or certain societal groups, in particular on the grounds of disability, gender identity or sexual orientation." Here, the Hungarian nation is specified as a protected legal object, unlike in Article 216 codifying hate crime as "violence against members of the community,"[30] which does not specify the Hungarian nation as a protected group, but provides for an open ended list by including "certain societal groups."

As it has been demonstrated, the question of specifically codified hate crime sanctions for members of a minority (as mentioned above, in Hungary it will mostly concern a single, the only substantive ethnic minority, the Roma) in relation of crimes committed against a member of a majority (especially if this involves members of racist hate groups) will be of paramount importance. The issue concerns the core question of defining hate crimes. Can and should any group be protected as a hate crime victim, or should it only apply to members of discrete and insular, underprivileged, vulnerable communities who lack sufficient numbers or power to seek redress through the political process or may face discrimination because of their inherent (unchangeable, fundamental, immutable) characteristics? The debate concerning hate crimes is generally an intriguing one: should the political message the more severe criminalization of bias motivation and the heightened protection be extended to all kinds of identities, or is it intrinsically a minority protection mechanism? The entire concept of imposing a more severe punishment for bias or hatred has been criticized for introducing "thought policing."[31]

The Hungarian lawmaker explicitly stated in a commentary on the new Penal Code[32] that hate crimes are identity-protecting and not minority protecting provisions, and this position is supported by several international examples.

Why is then the Hungarian framework problematic? First, recalling the ECHR's principle in being context-attentive, while the protection of members of the (national) minority community may be in place in other societies, nothing indicates the necessity (the first step habitually used in constitutional proportionality tests) for a heightened protection for Hungarians in Hungary. No substantiated claims can or have been made for

30 "Any person who displays an apparently anti-social behavior against others for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, of aiming to cause panic or to frighten others, is guilty of a felony punishable by imprisonment not exceeding three years. (2) Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, or compels him by force or by threat of force to do, not to do, or to -endure something, is punishable by imprisonment between one to five years."

31 See for example Larner, J, Hate Crime/Thought Crime, Dissent, Spring 2010, <https://www.dissent-magazine.org/article/hate-crimethought-crime>, accessed April 2, 2014.

32 <www.parlament.hu/irom38/06218/06218.pdf>.

vulnerability, stigma of social inferiority, threat or history of oppression, persecution, or any special form of victimization. Members of the majority community, thus, have no demonstrated need for the symbolic commitment such protections express. ('Ordinary' criminal sanctions suffice.)

Second, there is a threat, and even a well-documented practice of abuse: in Hungary, Roma have been systematically prosecuted with racially motivated hate crimes committed against Hungarians, even when no genuine racist bias or hatred has been proven besides a reference to the victims as "Hungarians", a neutral term used by Roma to signify non-Roma. In several cases Roma have even been charged and sentenced for hate crimes where members of racist hate groups were the victims of the incidents.

26.2.5 *Analysis:* nullum crimen sine lege *Considerations and the Proliferation of Protected Characteristics*

It needs to be added that legislation in the past years by international and national organizations brought a proliferation of protected grounds, and has been extended to basically any socially recognized identity, and often even open ended lists are used, making reference to "any other status." While hate crime legislation has been endorsed, and sometimes implicitly or explicitly required by international organizations such as the OSCE, the UN, the EU, and the Council of Europe,[33] this element has never been clarified. In fact, it appears that the language and concept set forth by the Hungarian legislator, where membership in the majority nation qualifies just as well for the heightened protection as membership in a minority community, seems to be in line with international standards.

The Hungarian case thus shows that even contrary to commitments made by international organizations such as the OSCE and the EU' Fundamental Rights Agency, the concept of hate crimes should be limited to hate incidents committed against members of minority communities. Instances of members of minority communities being systematically charged with racially motivated hate crimes committed against the majority point to a substantive difference from anti-discrimination legislation or grounds for persecution in refugee law, where "the more the better" principle is in place. Here, less is more!

Especially since an undefined (and hence potentially unlimited) scope of protected characteristics, which may be recognized retroactively goes against the basic principles of legal certainty and the sacrosanct principle of *nullum crimen sine lege*.

33 See for example OSCE, Decision No. 9/09 *Combating Hate Crimes, EU Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal*, etc.

26.3 Institutional Discrimination: Harassment and beyond

The more general lesson to be learnt from the ECHR case law on hate crimes (in Hungary) is how law can tackle the concept and phenomenon of institutional discrimination. I will make the point that the systemic failure the above described cases highlighted in criminal proceedings are vivid examples for institutional discrimination. Let us first expand on what institutional discrimination means, then turn to elaborating how harassment can serve as the core legal concept in transposing into legal concepts and terminology.

26.3.1 Structural and Institutional Discrimination

Structural discrimination is not a legal term, it is used in social sciences to describe general, systematic forms of exclusion that goes beyond the actual workings of individual organizations and institutions. It calls attention to the fact that exclusion is based on forms of social communication, constant and recurrent habits and patterns that appear in the shape of attitudes, norms, value systems and choices that result in the exclusion and systematic disfavouring of certain groups. It does not require intentional behaviour or intent, and might not even be apparent in formal rules of social institutions. Examples include segregation in housing, biased media representation, the low number of women in Parliaments or institutions like the national academies of sciences.

Moving to "institutional" and "institutionalized" discrimination, which I use as synonyms, several definitions are available in the literature, but so far there has been no conclusive, generally acceptable theoretical and analytical differentiation between the two terms. Dovidio emphasizes that institutional discrimination is a rule, a convention or practice that systematically represents and reproduces group-based inequality.[34] McCrudden believes the gist of the phenomenon is that exclusion has become so institutionalised that there is no further need for individual decisions and actions to make an institution's operation effectively exclusive. The operational mechanism and rules of an institution structure the results, and the system itself discriminates, there is no need for specific decisions for exclusion, intentions or bias.[35] According to Haney-López who follows what has been termed as new institutionalism, a trend that goes beyond the rational choice theory of institutional sociology, this is a practice that directly or indirectly confirms the social status of disadvantaged groups as it identifies institutional discrimination as an organizational form or structure in which the term defines a problem, not

34 P. J. Henry Dovidio: Institutional Bias. In: John F. Dovidio – Miles Hewstone – Peter Glick – Victoria M. Esses (eds.): The Sage Handbook of Prejudice, Stereotyping and Discrimination. SAGE Publications, 2010, pp. 426-440.

35 Christopher McCrudden: Institutional Discrimination. Oxford Journal of Legal Studies, vol. 2, no. 3, Winter, 1982, pp. 303-367.

the coherent theory of social behaviour and the "institutions" are not necessarily organizations, but can be social practices, as well.[36]

It is important to note that most authors, and even some of the legal experts use the term in a social science, not in the legal sense when discussing structural or institutionalised discrimination, and very often they identify it as (structural or institutionalised) racism.

I argue that the most important aspect of institutionalised discrimination is that it is not necessarily a result of deliberate discriminatory procedures or attitudes, but that of an institutional culture, an operational pattern that in effect disfavours certain social groups.

26.3.2 Institutional Discrimination and Harassment

Anti-discrimination law habitually relies on the distinction between direct and indirect discrimination. Consider for example the EU's Race Directive:[37] "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". Although strictly speaking no actual disparate treatment is taking place, in order to broaden the concept of discrimination, harassment is usually also included within the legal conceptualization. According to the aforementioned EU Directive, "harassment shall be deemed to be discrimination … when … conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."

Thus, harassment is a distinct type of discrimination. Its gist is that the harasser creates or tolerates an intimidating, hostile, degrading, humiliating, offending environment that violates the human dignity of the victim. The phenomena of mobbing (harassment at the work place) and bullying (used in connection to school and educational environments) are also recognized as such.One of the distinctive and most important features of harassment is that it is(also) the employer or a (representative of a) collective entity that can be held responsible for providing a harassment-free environment or procedure, thus it is not (only) individuals, such as police officers or employees, who can

36 Ian F. Haney-López: Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination. Yale Law Journal, vol. 109, 1999, p. 1717.

37 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

engage in this form of discrimination, but the employer, and even an entire organisation as well.

Harassment can be both a one-time occurrence and a pattern of procedures, ora series of continuous, recurring activities. Its corollary feature is that it does not assume an individual intention, guilt or prejudice and does not (or does not only) sanction the behaviour of actual harassers or individuals participating in these procedures, but the organization, the unit or the whole institution that allows for an intimidating, hostile, degrading, humiliating or offensive environment.

Some important technical qualifications are in need here: we need to distinguish between the criminal and the anti-discrimination law concepts and terminology of harassment – most of all because the legal nature of these provisions may be quite different. For example, in many jurisdictions anti-discrimination law is a civil or administrative procedure. Also, some forms of harassment, such as the classic form of sexual harassment by, say, a co-worker, which includes individual action, will not amount to institutional discrimination, unless the corporate culture within the workplace systematically tolerates or encourages it.

26.3.3 Hungarian Case Law Involving Harassment as a Means to Tackle Institutional Discrimination

The following pages provide a collection of Hungarian cases, mostly initiated in the framework of strategic litigation, where harassment has been deployed to tackle institutional discrimination. Arguable, this strategy, exportable throughout the Europe (and maybe even beyond) carries the potential of being used as a silver bullet.

In a September 18, 2014 decision the Budapest Court of Appeal, which declared the practice of the police ban a special case of institutional harassment that violates equal treatment. The court held that the Metropolitan Police committed direct discrimination and harassment based on sexual orientation in April, 2012 when they banned the Pride march claiming it disrupted the traffic in Budapest. In previous years, decrees with the same reasons were repealed by the court and between the two occasions various other events were permitted with roughly the same routes with significantly more participants. (One of these was a QUANGO-march partially financed by the government with more than a hundredfold number of participants.) The Metropolitan Court at first instance found that the police committed harassment, because their decision led to the creation and strengthening of a hostile, degrading and humiliating environment for a group of people with regard to their sexual orientation, as "the decisions of the authorities serve as social patterns for the members of the society and the discriminatory decision of the

police can significantly increase the already existing animosity towards the homosexual minority that is present in the anti-marches".[38]

The extraordinary potential that the provision of harassment has in opening new and unique avenues for law to tackle institutional discrimination can be demonstrated by the strategic litigation cases Hungarian NGO's, mostly the Hungarian Helsinki Committee and the Hungarian Civil Liberties Union, have brought in regards of ethnic profiling and hate speech. Due to spatial limits of this paper, I will only provide a brief overview of the latter developments.

Before 2012, the new constitution, the significance of these strategic lawsuits was that according to the Constitutional Court neither criminal, nor common law provided adequate measures to combat racist hate speech.[39] Even though not all cases led to victory, the Equal Treatment Authority (ETA), Hungary's equality body and the courts had no conceptual problems with considering this approach to interpret harassment.

26.3.3.1 Racist Hate Speech by the Mayor of Edelény

At the public meeting of the city council of Edelény on 24 June, 2009 that was broadcasted on the city television, Mayor Oszkár Molnár made the following statement:

> "It is no secret that in the neighbouring villages where mostly the Roma live, for example in Lak and Szendrőlád, pregnant women deliberately take pills to give birth to loony children so that they can claim double the amount of social benefits and that during the pregnancy – this is new information, but I have checked it, it's true – women beat their stomachs with rubber hammers so that they would have handicapped children…"

The statement was repeated several times in the media, it was made public on the video news website of the television channel RTL Klub and could be viewed on YouTube. The ETA found it to be a harassment of Roma mothers and pregnant women on September, 2009.[40] On repeated appeal, the Supreme Court overruled this decision on the grounds that even if the mayor's statements constitute harassment (which it did not rule out), there is a procedural obstacle as the statements were not made with reference to the residents of the local municipality, and the mayor can only be held responsible for discrimination in relation to them.

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38 <www.hatter.hu/hirek/jogeros-diszkriminalt-a-budapesti-rendor-fokapitanysag-a-budapest-pride-2012-es-betiltasaval>.

39 30/1992. (V. 26.) AB határozat, ABH 1992; 36/1994. (VI. 24.) AB-határozat, ABH 1994; 18/2004. (V. 25.) AB határozat, ABH 2004; 95/2008. (VII. 3.) AB határozat, ABH 2008; 96/2008. (VII. 3.) AB határozat, ABH 2008. Lásd még Polgári Eszter: i. m.

40 1475/2009.

26.3.3.2 Racist Hate Speech by the Mayor of Kiskunlacháza

On 18 October, 2011 the Supreme Court passed a similar review of a decision of the Equal Treatment Authority.[41] The case was the following: After the violent death of the 14-year-old Nóra Horák on 23 November, 2008 there was a strong hostility against the Roma among the locals in Kiskunlacháza. Meanwhile, the city council organized a meeting on 28 November with the title *Demonstration for life against violence* where Mayor József Répás said the following:

> "The rapists, the thieves, the murderers should be frightened! There is no place for violence in Kiskunlacháza, there is no place for criminals, we have had enough of the Roma violence! Kiskunlacháza and Hungary belong to the peaceful and law-abiding citizens. We will no longer let them stealourbelongings, beat up the elders and deflower the children. We are still in majority."

According to the ETA, the statement caused significant fear in the Roma, because the mayor's words increased the already present hostility against the Roma and added to the decline of the peaceful public attitude towards them. The mayor published an article in the local newspaper of the city council with the title *We have had enough*! that was published in one of the national daily newspapers on 11 February, 2009. In the article, he states that

> "Several brutal crimes have been revealed that had been committed by perpetrators with verified Roma origin. Still, the leftist, liberal media and the government talks about racism […] I am sorry to say that today there is an institutionalised racism against Hungarians in Hungary. […] We must stop the terrorizing of the society, the deliberate creation of fear. We cannot let people hide behind the mask of minority and enjoy more rights than the majority. The basis of a normal society is that people feel safe. It should be a world in which if I leave my home in the evening, later I arrive home safely, and not in a body bag."

Based on the petititon of the Hungarian Helsinki Committee the ETA[42] found that the mayor violated the principle of equal treatment with regard to the Roma residents of the town and committed harassment. The Supreme Court, again, refused to recognize the scope of the antidiscrimination law. However, in retrial, the Budapest-Capital Administrative and Labour Court stated that the speech and writings of the mayor do not fall under the freedom of expression and constitute unlawful conduct.[43]

41 Kfv.III.39.302/2010/8.
42 EBH/187/1/2010.
43 <http://helsinki.hu/polgarmester-sem-ciganyozhat>.

26.3.3.3 Racist Hate Speech by the Mayor of a Budapest District

In August, 2015 the Hungarian Helsinki Committee initiated a lawsuit of against Budapest 8th District City Council and Mayor Máté Kocsis because of the harassment of the refugees who came to Hungary. On 4 May 2015, the mayor made a rudely generalizing and inflammatory post public on Facebook with regard to the refugees. Mr Kocsis wrote that

> "Our recently renovated Pope John Paul II Square has been completely destroyed by the migrants. They have built tents and fires in the park, they throw away their litter, run around madly, they knife people and destroy things. Never has there been so much human excrement in a public space. […] We will protect the public property and we will guarantee the safety of our citizens with all legally available means."

According to the plaintiff the majority of the statements were both unfounded and inflammatory, capable of inciting hostile emotions, talking about not individual refugees, but generalizing the statements, stigmatizing all migrants regardless of their individual behaviour and attitude, picturing them as threats to the Hungarian society, thereby detracting their social assessment. The Facebook post clearly violates the obligation of public authorities to provide equal treatment. When assessing whether the behaviour of the defendant led to the creation of an intimidating, hostile and degrading environment one must take into consideration the already extremely hostile public attitude against migrants that was proved by the atrocities against asylum seekers, the people helping them or the people who were believed to be refugees.[44]

On 8 November, 2016, the Municipal Court,[45] not contesting the applicability of harassment, rejected the petition on procedural grounds, arguing the city council's relationship to the asylum-seekers does not fall within the scope of the anti-discrimination act. The case is on retrial and pending.

26.3.3.4 Racist Hate Speech by the Mayor of Mezőkeresztes

On 8 November, 2016 in a lawsuit initiated by the Hungarian Civil Liberties Union (TASZ) the ETA found[46] that János Majoros, the mayor of Mezőkeresztes committed an act of harassment against the Roma with his public letter published in the July 2015 issue of the local newspaper. The article of the title was "Let's stop the decrease of real estate prices" and the mayor named two reasons for the decrease. One was that people with no income managed to acquire real estates in the town and they sub-let these, the

44 <http://helsinki.hu/pert-indit-a-magyar-helsinki-bizottsag-kocsis-mate-uszito-facebook-bejegyzese-miatt>.
45 22.P.22.427/2016/10.
46 EBH/459/5/2016.

other that buyers of the real estates who were paying in instalments did not pay the full amount of the price. Two paragraphs later the mayor suggested a solution to the problem and asked the people of the town that if they could, they should not sell their real estates to persons of Roma origin. The public letter was published on the website of the city council, as well. According to the ETA "the mayor's warning, that people should not sell their real estates to the Roma is in itself degrading and violates their human dignity, but in its context the warning can create a hostile, offending and humiliating environment for the Roma."[47]

26.4 Conclusion and a Triadic Approach

This essay served two purposes, besides providing an overview of the most apparent fallacies and weaknesses of Hungarian authorities' approaches to hate crimes, it pointed to a more general issue: institutional discrimination in the criminal justice system, in particular in the area of hate crimes – and potential legal tools to combat it. The ECHR cases on Hungarian hate crimes practices provide a clear example of how apparently legal practices and procedures that clearly lack manifest bias or discriminatory intent, and even egregious violations of professional standards for investigation can amount to a violation of fundamental rights. Even though the Court did not use the term institutional discrimination, only the third party intervener, the EuropeanRomaRightsCenter, the Court found it important enough to cite this argument in the decision. We believe that the judgments actually pointed to practices of institutional discrimination when finding a lack of proper law enforcement action to be in breach of the Convention – whether they relied on Article 3 (degrading treatment) or 8 (private life and ethnic identity). There seems to be a degree of inconsistency in terms of how harassment is used: as a concept in criminal law, as one in anti-discrimination law, or as a legally unspecified concept to describe the violation of dignity (under the auspices of privacy, in the conceptual vocabulary of the European Convention of Human Rights.)

A conceptual and a case-law based technical clarity would be in need. As a first step, let me offer a triadic approach, as a I believe that there is a tripartite structure to be drawn to differentiate between cases that represent (i) institutional discrimination that is not harassment; (ii) harassment that is not institutional discrimination; and (iii) institutional discrimination that is harassment, as, naturally, institutionalised discrimination and harassment are not synonyms, but intersecting sets and one can debate which belongs where.

Nevertheless, if applied properly, and argued convincingly, a broadened approach to discrimination, whether or not centred around harassment or (due to a limited authorisation to apply discrimination as in the case of the ECHR, and hence,) conceptualized differently can open the road to combat a variety of practices and procedures that amount

47 Ld. <http://tasz.hu/szolasszabadsag/nyilt-levelben-zaklatta-romakat-polgarmester>.

to institutional discrimination. This can include the systematic underqualification of hate crimes, ethnic progiling, residential or educational segregation, "ethno-corruption", hate speech by politicians, but even gerrymandering, the displacement of minority Roma children from their families to state care, forced conscription, or judges sitting in courts treating minority or indigenous defendants or witnesses in a degrading way, or "manels" at academic events. I am convinced the hateful billboard campaign of the Hungarian government in 2015 targeting migrants – who were, in reality, mostly refugees and asylum seekers would meet the criteria, just as street names, monuments, flags, signs and symbols in public areas with a string reminiscence to exclusionism, racism, homophobia, or even sexism. Institutional discrimination can be present in national curricula, or when, as a colleague at the Working Group Against Hate Crimes told me about a case when the Roma plaintiff made a complaint of hate crime and the policeman who recorded the complaint was wearing a T-shirt with the inscription of "Kárpátia", a rock band that can be tied to extreme right organizations.

As the above described cases show, anti-discrimination law is a dynamically developing field and we can hope for the active participation of equality bodies and courts in progress and a more and more inclusive approach in defining discrimination that mainstreams diverse minority viewpoints.