



Hungarian Helsinki Committee

**ASSESSMENT OF THE ACTIVITIES AND INDEPENDENCE OF
THE COMMISSIONER FOR FUNDAMENTAL RIGHTS OF
HUNGARY
IN LIGHT OF THE REQUIREMENTS SET FOR NATIONAL
HUMAN RIGHTS INSTITUTIONS**

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The Hungarian Helsinki Committee bears sole responsibility for the contents of this paper.

1. INTRODUCTION

In October 2019, the Commissioner for Fundamental Rights will be subject to a re-accreditation process as the national human rights institution (NHRI) of Hungary by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions. This provides an important momentum for assessing the performance of the acting Commissioner for Fundamental Rights, László Székely, between 2014 and 2019¹ in light of the *Principles relating to the status of national institutions (Paris Principles)*² setting out the most important requirements for a well-functioning NHRI fulfilling its crucial role in protecting fundamental rights and freedoms.

As far as the mandate and powers of the Commissioner for Fundamental Rights (also referred to as Commissioner or Ombudsperson in the present paper) are concerned, its status is in compliance with the Paris Principles. The Commissioner for Fundamental Rights is elected by the Parliament of Hungary³ upon the proposal of the President of the Republic,⁴ and “shall investigate any violations related to fundamental rights that come to his or her knowledge, or have such violations investigated, and shall initiate general or specific measures to remedy them”.⁵ The Commissioner has various means at his disposal to do so, including the investigation of complaints, launching ex officio investigations, issuing reports about his findings, submitting constitutional review requests to the Constitutional Court, commenting on draft laws, etc.⁶ Thus, the legal framework pertaining to the Commissioner for Fundamental Rights can be considered mostly adequate (apart from the lack of rules on how candidates for the position are selected, as detailed in Chapter 2 of the present paper).

However, for the assessment of the performance of an NHRI it is also important to look at “whether the NHRI demonstrates independence in practice and a willingness to address the pressing human rights issues”.⁷ In the present paper, the Hungarian Helsinki Committee (HHC)⁸ wishes to present that even though the Commissioner for Fundamental Rights has the legal means at his disposal to protect and promote fundamental rights efficiently and effectively, and has indeed done so in a number of areas, **he has repeatedly failed to address (or address adequately) pressing human rights issues that are politically sensitive and high-profile.** These included **laws, measures and policies that were considered problematic by various international human rights stakeholders,** but at the same time were pursued eagerly by and were politically important for the government.

While the HHC acknowledges the efforts of the Commissioner in certain areas, it is of the view that his silence or inadequate performance in these human rights areas **casts serious doubts as to his independence from the government in practice and to his willingness to address pressing human rights issues.** This is especially problematic when we take into account the democratic backsliding in Hungary, and that the period since 2010 has been characterized by the governing majority transforming Hungary into an illiberal state. At times when checks and balances have been undermined and human rights have been violated repeatedly in the country, it would have been especially important that the Hungarian NHRI stands up for fundamental rights.

Finally, it shall be highlighted that in 2014, the SCA criticized that the current Commissioner for Fundamental Rights was selected as the candidate for the position by the President of the Republic in

¹ The reason for analysing this time period is firstly that László Székely was elected as Commissioner for Fundamental Rights in 2013 only as of 25 September, and so the activities of the office in 2013 can largely be attributed to his predecessor. Secondly, the Commissioner for Fundamental Rights as an institution was granted the A status as NHRI only in 2014.

² UN General Assembly, Resolution A/RES/48/134 of 20 December 1993

³ Fundamental Law of Hungary, Article 1(2)(e)

⁴ Fundamental Law of Hungary, Article 9(3)(j)

⁵ Fundamental Law of Hungary, Article 30

⁶ For a detailed list of the Commissioner's powers, see Articles 1–2 of Act CXI of 2011 on the Commissioner for Fundamental Rights. (For an English translation of Act CXI of 2011 on the Commissioner for Fundamental Rights, see: <http://www.ajbh.hu/en/web/ajbh-en/act-cxi-of-2011>.)

⁷ Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions, *Practice Note 3 – Assessing the Performance of NHRIs*, 6 March 2017

⁸ www.helsinki.hu

a non-transparent and non-participatory manner, and recommended changing the selection process.⁹ The mandate of the current Ombudsperson expires in September 2019, and so his successor was elected by the Parliament in July 2019. However, the recommendations of the SCA were not complied with, and **the new Commissioner, Ákos Kozma was appointed once again in a non-transparent and non-inclusive manner** (see Chapter 2 of the present paper for more detail).

The performance of the current Commissioner for Fundamental Rights as analysed in detail below, taken together with the deficiencies of the selection process, raises serious doubts as to how independent the newly elected Commissioner for Fundamental Rights will be in practice and calls for close scrutiny of the new Commissioner's activities and independence by both domestic actors and the SCA.

For that reason, **it would be desirable if during the re-accreditation the SCA could look into and formulate clear recommendations regarding the issue of the Commissioner's effective independence and would** – with a view to assessing whether a special review might be needed – **continue to monitor his performance in this regard even after the re-accreditation process is completed. Domestic stakeholders should facilitate such monitoring by providing reliable and balanced information on and assessment of the Commissioner's activities.**

2. SELECTION AND APPOINTMENT OF THE NEW COMMISSIONER FOR FUNDAMENTAL RIGHTS

In its 2014 report and recommendations, the SCA noted with regard to the Hungarian NHRI that, "according to the legislation, vacancies for the **posts of Commissioner and Deputies are neither widely advertised, nor is there broad consultation**".¹⁰ Accordingly, the **SCA encouraged the Ombudsperson "to advocate for the formalization of a transparent and participatory selection process** in relevant legislation, regulations or binding administrative guidelines, and for its subsequent application in practice".¹¹ However, **these recommendations were not complied with, and new Commissioner was appointed in 2019 once again in a non-transparent and non-inclusive manner.**

The mandate of László Székely, the current Commissioner for Fundamental Rights is going to expire on 25 September 2019. Under the applicable Hungarian law, the President of the Republic makes a proposal for the new Commissioner for Fundamental Rights to the Parliament between the ninetieth and the forty-fifth day preceding the expiry of the mandate of the acting Commissioner.¹² On 22 May 2019, two months before the selection period commenced, the HHC wrote an **open letter** to the President of the Republic,¹³ asking him to carry out a transparent selection process, based on predetermined objective criteria, and to involve civil society in the process, in line with the respective provisions of the Paris Principles and Section 1.8 of the General Observations of the SCA. The open letter was **signed by 35 NGOs and two former Hungarian Ombudspersons.** The HHC also initiated an **online petition** to support its request addressed to the President of the Republic, which had over 2,300 signatories.

However, despite the above efforts, the President of the Republic did not comply with the respective international requirements, and **decided on his candidate for the Commissioner's position behind closed doors, without any kind of transparency or consultation.** The President

⁹ *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 27-31 October 2014, <https://nhri.ohchr.org/EN/AboutUs/GANHRIAaccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>, p. 10.

¹⁰ Emphasis to quotations in the present paper has been added by the authors of the paper

¹¹ *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, Geneva, 27-31 October 2014, <https://nhri.ohchr.org/EN/AboutUs/GANHRIAaccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>, p. 10.

¹² Act CXI on the Commissioner for Fundamental Rights, Article 6

¹³ The open letter is available in English here: https://www.helsinki.hu/wp-content/uploads/Letter_to_the_president_on_ombudsman_selection.pdf.

announced his candidate, Ákos Kozma on 28 June 2019,¹⁴ and five days later, on 2 July, the Parliament voted in favour of him.¹⁵

On 12 August 2019, more than one month after the selection process was over, the **HHC received a one-paragraph answer from the Office of the President of the Republic** to the open letter, stating that “the President of the Republic put forward his proposal for the person of the Commissioner for Fundamental Rights on 28 June 2019, in line with the [domestic] legal provisions. In the course of the formation of his proposal, the President considered all viewpoints and circumstances. The Parliament approved and elected Ákos Kozma as Commissioner for Fundamental Rights with a more than two-third majority as of 26 September 2019, for six years.”

According to the official Curriculum Vitae¹⁶ of Ákos Kozma, the new Commissioner obtained his law degree in 1995, and after passing the bar exam in 1997, he continued his legal career as a constitutional law professor. Additionally, Mr. Kozma used to hold certain governmental positions in the first-Orbán government (i.e. the first government led by Hungary’s current Prime Minister and governing party) between 1998 and 2002, namely the position of Head of Cabinet at the Ministry of Justice, and Head of Department at the Ministry of Finance. Since 2010, he has been the Deputy Chairman of the Independent Police Complaints Board. Although the above **governmental positions** do not per se exclude that the future Commissioner will act independently, when **taken together with the non-transparent and non-inclusive selection process** as described above, they **justify a close scrutiny of his activities and degree of independence.**

3. GENERAL ANALYSIS OF THE NHRI’S PERFORMANCE BETWEEN 2014 AND 2019

3.1. ASSESSMENT BY INTERNATIONAL MONITORING BODIES

In the reporting period, at least three international monitoring bodies issued observations or reports that touched upon the status and institutional set-up of the Commissioner for Fundamental Rights:

- In its concluding observation issued in 2018, the **UN Human Rights Committee** stated that following: “While welcoming the A status granted in 2014 to the Commissioner for Fundamental Rights of Hungary by the Global Alliance of National Human Rights Institution, and the commitment of the State party to guarantee the necessary resources for all needs of the Commission, the Committee is concerned about **reports that the Commissioner lacks the human and financial resources necessary to effectively carry out its mandate [...]**.”¹⁷ Therefore, the UN Human Rights Committee concluded that Hungary “should review the financial and other resource needs of the Commissioner for Fundamental Rights of Hungary and ensure it has the financial and other resources necessary to effectively and independently implement its mandate”.¹⁸
- In 2019, the **Committee on the Elimination of Racial Discrimination** (CERD) expressed concerns over the fact that the **Deputy Commissioner for the Rights of National Minorities “is placed under the Commissioner for Fundamental Rights [...]**, which **may impede the Deputy Commissioner from carrying out the work to prohibit racial**

¹⁴ See e.g.: https://index.hu/belfold/2019/06/28/kozma_akos_szekely_laszlo_ombudsman/.

¹⁵ See e.g. in English: <https://dailynewshungary.com/hungarian-parliament-elects-new-fundamental-rights-ombudsman/>.

¹⁷ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Hungary*, CCPR/C/HUN/CO/6, 9 May 2018,

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnm97%2bRfSonZvOyDICMC7to7lkiHViwiffCrjxVJVYr7AYGd1bD3LqpWwx7fjwdowp0XO09j1KeHx2S0%2be4%2fGUZf4WEtz0X6rsDTNt6FAcrQ>, § 13.

¹⁸ *Ibid.*, § 14.

discrimination in a fully independent and impartial manner.¹⁹ (See the remarks in the beginning of Chapter 4 of the present paper about the powers of the Deputy Commissioners.) CERD added that it “**regrets the lack of information on the work of the Office of the Commissioner for Fundamental Rights to prevent racial discrimination and xenophobia against vulnerable ethnic minorities including migrants, refugees and asylum seekers.**”²⁰

- The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) reported after its visit to Hungary in 2017 that it is “particularly concerned at the **lack of functional independence of the [national preventive mechanism] within the Office of the Commissioner for Fundamental Rights**.”²¹ The SPT also criticized some aspects of the National Preventive Mechanism’s work and methods (see in detail Chapter 4.5 of the present paper).

3.2. SUBMISSIONS TO THE CONSTITUTIONAL COURT

In Hungary, the Constitutional Court is entitled to carry out the constitutional review of laws, and if it finds a law or legal provision unconstitutional, it has the power to annul the provision(s) in question. Between 1990 and 2012, there was an unlimited possibility to trigger this procedure: the law allowed for the so-called *actio popularis*, which meant that a request for the constitutional review could be submitted by practically anyone, and so it was not a requirement that the person submitting the request had been affected by that particular law. This tool was widely used by NGOs, scholars, and ordinary citizens. However, the new constitution of Hungary (the Fundamental Law), in force since 1 January 2012, **abolished** this possibility, and restricted the right to submit such requests to the following stakeholders: the Government, one quarter of the Members of Parliament, the President of the Curia (i.e. the Supreme Court of Hungary), the President of the Administrative High Court, the Chief Prosecutor and the Commissioner for Fundamental Rights.²²

As the Commissioner also acknowledged in his 2014 annual report, **abolishing the institution of *actio popularis* “increased the significance of the right of the Ombudsperson to initiate the abstract post facto [constitutional] review”²³ of laws**, even if we consider that at the same time the Fundamental Law introduced a new kind of constitutional complaint for individuals. The above statement was not repeated in any of the subsequent annual reports, which is not surprising if we consider that **the current Commissioner turned to the Constitutional Court only six times between 2014 and 2018** (with one of the petitions being a request to interpret the Fundamental Law, not a constitutional review request), and the HHC is aware of only one constitutional review request and one request to interpret the Fundamental Law this year. These numbers are especially striking if we compare them to the number of constitutional review requests submitted by **the current Commissioner's predecessor, Máté Szabó, who turned to the Constitutional Court more times each year after the institution of *actio popularis* was abolished than László Székely in the past almost six years altogether**: he submitted 24 constitutional review requests in 2012 and 13 constitutional review requests in 2013.²⁴ It is beyond the scope of the present paper to analyze the content of all of these submissions in depth, but the tendencies may be detected already on the basis of the brief summaries below.

¹⁹ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined eighteenth to twenty-fifth periodic reports of Hungary*, CERD/C/HUN/CO/18-25, 6 June 2019, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/HUN/CERD_C_HUN_CO_18-25_34867_E.pdf, § 8.

²⁰ *Ibid.*

²¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism – Report of the Subcommittee*, CAT/OP/HUN/2, https://tbinternet.ohchr.org/Treaties/CAT-OP/Shared%20Documents/HUN/CAT_OP_HUN_2_30577_E.pdf, § 14.

²² Fundamental Law of Hungary, Article 24(2)(e)

²³ *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2014 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2014]*, p. 217.

²⁴ *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2013 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2013]*, p. 226.

In 2014, the Commissioner asked for a constitutional review from the Constitutional Court in two cases:²⁵

- One of the review requests concerned the local municipality decree of Kaposvár that made the storage and placement of personal effects used for habitation on public premises punishable with a fine. However, the Commissioner did not object to the criminalization of homelessness as such, but only claimed that the decree sanctioned habitation on public premises in a wider scope than what was allowed on the basis of the Fundamental Law at the time. (See in more detail in Chapter 4.6 of the present paper.)
- The Commissioner also turned to the Constitutional Court in relation to certain provisions of the law on selling and purchasing land.

The 2014 annual report also contains information on instances when the Commissioner refused requests asking him to turn to the Constitutional Court:²⁶

- The Commissioner refused to ask for a constitutional review in relation to the legal provisions on abortion. (It shall be recalled for example in this regard that the Fundamental Law introduced a provision saying that “the life of the foetus shall be protected from the moment of conception”,²⁷ and this was considered by many stakeholders a step paving the way for stricter abortion rules.²⁸ Thus, the issue of abortion was/is far from neutral politically.)
- The Commissioner received 170 complaints from individuals regarding the last-minute changes in the rules and system of the election of the local government assembly of Budapest. The petitioners claimed, among others, that the way the provisions were changed violated the rule of law.

In 2015, the Commissioner turned to the Constitutional Court three times:²⁹

- In 2013, an amendment to the Code of Criminal Procedure made the **length of pre-trial detention unlimited**, pending a first instance judgment, if the procedure against the defendant was conducted because of a criminal offence punishable by a prison term of up to 15 years or life-long imprisonment. The amendment, which raised serious concerns e.g. in light of the case-law of the European Court of Human Rights, was a political reaction to an individual high-profile case. In 2015, upon the request of the HHC and the Eötvös Károly Policy Institute, the Ombudsperson asked the Constitutional Court to abolish the respective provision, arguing that it violates the right to personal liberty.³⁰ This can be considered the **only instance when the Commissioner turned to the Constitutional Court in a politically high-profile case in a way that he went against the interests of the government.**
- The Commissioner requested the Constitutional Court to abolish a local municipality decree that limited the number of permits to be handed out for using taxi stand slots.
- 2015 marked the first time the Commissioner used its power to ask for an interpretation of the Fundamental Law.³¹ In his submission,³² the Commissioner requested the Constitutional Court to ascertain whether the decision of the Council of the European Union on the relocation of

²⁵ *Ibid.*, pp. 217–220.

²⁶ *Ibid.*, pp. 220–223.

²⁷ Fundamental Law of Hungary, Article 2

²⁸ See e.g.: <https://magyararancs.hu/belpol/az-orban-kormanyok-es-az-abortusz-115099>.

²⁹ *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2015 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2015]*, pp. 173–179.

³⁰ For more detail, see: Tamás Fazekas – András Kristóf Kádár – Nóra Novoszádek: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report – Hungary*. Hungarian Helsinki Committee, October 2015, p. 18. Available at: http://www.helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf.

³¹ This power is granted by Article 2(3) of Act CXI of 2011 on the Commissioner for Fundamental Rights.

³² The text of the submission is available here:

[http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf).

asylum-seekers from Italy and Greece³³ was in breach of the prohibition of collective expulsion enshrined in the Fundamental Law (see Chapter 4.8 of the present paper for more detail). Another question in the submission aimed at ascertaining whether Hungarian authorities were obliged to execute EU decisions if the latter were in violation of the Fundamental Law. It shall be recalled that the government was repeatedly saying that it would not execute the above decision of the Council of the European Union on the relocation of asylum-seekers (referred to as **"relocation quota" decision**), and so the question the Ombudsperson was seen by many as helping the government by enabling the government-leaning Constitutional Court to declare that the government has a right to do so.

In 2016, the Commissioner requested the constitutional review of a local decree of the village of Ásotthalom, that banned and sanctioned "the activities of the muezzin, the wearing of clothes that cover the whole body and head, as well as partially or entirely, the face, and also, the performance of any and all 'propaganda activities' which represent marriage as a relationship other than one established between a man and a woman, furthermore, in which the basis for a family relationship is other than a marriage or a relationship between parents and children".³⁴ In his review request the Commissioner claimed that the ban violated the freedom of conscience and religion, the freedom of expression, the right to human dignity, and the principle of equal treatment.

In 2017 and 2018, the Commissioner did not submit any constitutional review requests to the Constitutional Court.

As far as the year 2019 is concerned, the HHC is aware of two instances when the Commissioner turned to the Constitutional Court:

- The Deputy Commissioner for Future Generations and the Commissioner for Fundamental Rights submitted a joint petition to the Constitutional Court to repeal certain provisions of the amendment of the law on forests that allows deforestation of Natura 2000 territories.³⁵
- Secondly, the Commissioner **initiated the interpretation of the Fundamental Law with regard to the National Judicial Council (NJC) upon the initiative of the President of the National Judicial Office (NJO)**.³⁶ The background of the request is the **conflict between the President of the NJO** (who has extensive powers over the administration of courts and who was elected by the governing majority of the Parliament) **and the NJC**, (a judicial self-governing body comprised of judges elected by their peers and vested with the task of controlling how the President of the NJO exercises her rights). The conflict broke out over the NJC's finding that the NJO President violated the law with the practice of repeatedly annulling – often without any proper justification – calls for applications for judicial leadership positions where the result of the judicial vote on candidates was not in line with her preferences. The conflict involved the unexpected resignation of certain NJC members, in the background of which "unlawful interference was foreshadowed that came from the President of the [NJO] or regional court presidents selected and appointed by her".³⁷ Seats in the NJC remained vacant, and subsequently, the **President of the NJO "declared the [NJC] illegitimate**, and since May [2018] she refuses to cooperate and provide data on request; nevertheless, the President of the Curia (Hungarian Supreme Court) and NJC confirmed that the Council operates in a legitimate way, and that her interpretation of law is simply false."³⁸ In its May 2019 report, the European Association of Judges characterized the situation as a kind of **"constitutional**

³³ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

³⁴ *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2016*, <http://www.ajbh.hu/documents/10180/2613063/AJBH+Besz%C3%A1mol%C3%B3+2016/7233e88b-d26c-a439-6b06-6905a291526e?version=1.0>, pp. 36–37.

³⁵ Case no. AJB-507/2019

³⁶ The related statement of the Commissioner is available here in English: <http://www.ajbh.hu/en/web/ajbh-en/-/commissioner-for-fundamental-rights-turns-to-the-constitutional-court-to-solve-the-constitutional-law-issue-concerning-the-operation-of-the-national-j?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fajbh-en>.

³⁷ European Association of Judges, *Report on the fact-finding mission of the EAJ to Hungary*, May 2019, <https://www.iaj-uum.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>, p. 5.

³⁸ *Ibid.*

crisis”.³⁹ Considering the general passivity the Commissioner for Fundamental Rights has shown in turning to the Constitutional Court, it is quite peculiar that he chose to turn to the Constitutional Court in this matter. This is especially so if we look at the wording of the questions, one of them being the following: “As long as a legitimacy issue emerges because of the composition and membership of [the NJC], is there any such constitutional body in place which may act in order to ensure the lawful operation of this body?” This wording seems to suggest **that the aim of the submission is to allow the Constitutional Court conclude that President of the NJO shall have this power over the NJC.** Furthermore, the questions for interpretation do not actually refer to any fundamental right, although the task of the Commissioner is the protection of these rights. Former Ombudsperson László Majtényi characterized the move as “landing a helping hand” to the President of the NJO in transforming the NJC, the “last still operating institution of judicial autonomy”, in a way favourable to the government.⁴⁰

To sum it up, **the Commissioner for Fundamental Rights has turned to the Constitutional Court in only a handful of cases, and failed to do so with regard to politically sensitive laws** as detailed in Chapter 4 of the present paper. Furthermore, **two of the total of eight submissions can be seen as furthering the goals of the governing majority.**

4. THEMATIC ANALYSIS OF THE NHRI’S PERFORMANCE BETWEEN 2014 AND 2019

The Ombudsperson’s office is a personalized institution, and so the Ombudsperson’s personal approach and preferences may significantly determine the focus and the methods of the office as a whole. However, this does not exempt the Ombudsperson from addressing the most pressing human rights issues in a county. Accordingly, when analyzing the performance of an Ombudsperson, one has to pay special attention to what the Ombudsperson does not address, i.e. what are the issues he/she chooses to remain silent about.

According to Act CXI of 2011 on the Commissioner for Fundamental Rights, in the course of his/her activities the Commissioner shall pay special attention to the protection of – among others – the rights of the most vulnerable social groups. The most vulnerable social groups are often minorities who the majority population looks at with suspicion or – sometimes even – resentment. Therefore, in a populist, majoritarian political system such as Hungary is at present, the rights of such groups are often curbed, and therefore, it can be one of the most important measurements of an NHRI’s political independence and willingness to address pressing human rights issues whether and how it takes action if that happens.

On the basis of these considerations, the paper covers the following thematic issues: the rights of LGBTQI persons, the criminalization of homelessness, the rights of migrants, certain political rights and liberties, and governmental attacks on human rights NGOs (freedom of association and expression).

A section on women’s rights has also been included in order to assess the Commissioner’s performance with regard to a group that he is specifically obliged by the law to focus on.

Furthermore, the Commissioner for Fundamental Rights shall perform the tasks related to the national preventive mechanism (NPM) pursuant to Article 3 of the Optional Protocol of the Convention against Torture and other Inhuman or Degrading Treatment or Punishment (OPCAT). With a view to the fact that it is a relatively new mandate of the Ombudsperson (the Hungarian NPM started its operation in 2015), and so **László Székely is the first Ombudsperson of Hungary who holds the mandate**

³⁹ *Ibid.*

⁴⁰ László Majtényi, Autonómiaküzdelen vagy megalkuvás – avagy az alapjogvédelem és az ombudsman titkos élete [Struggle for autonomy or opportunism – the protection of fundamental rights and the secret life of the Ombudsperson], *Élet és Irodalom*, 21 June 2019, <https://www.es.hu/cikk/2019-06-21/majtényi-laszlo/autonomiakuzdelem-vagy-megalkuvas-.html>

of NPM, the paper also assesses the Commissioner's performance as national preventive mechanism (NPM) under the OPCAT,

In addition, the paper covers the issues of environmental rights and the discrimination of Roma persons, i.e. two **areas the Deputy Commissioners** (the Deputy Commissioner for Future Generations and the Deputy Commissioner for the Rights of National Minorities) **are responsible for**. It shall be highlighted in this regard that before 2012, there were altogether four independent Ombudspersons in Hungary, and both of the human rights areas above had their own independent Ombudspersons (the Parliamentary Commissioner for Future Generations and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities). However, as a result of the changes brought about by the Fundamental Law, as of 1 January 2012, the former four Ombudspersons have been replaced by the sole Commissioner for Fundamental Rights, and the positions of the two Deputy Commissioners were created. (The tasks of the fourth Ombudsperson, the Data Protection Commissioner, were undertaken by the newly established National Authority for Data Protection and Freedom of Information.⁴¹) The Deputy Commissioners are elected by the Parliament upon the proposal of the Commissioner for Fundamental Rights, and the Commissioner exercises the rights of an employer over them.⁴² Furthermore, the Deputy Commissioners have rather limited powers: they **cannot conduct an independent investigation at all** (but shall participate in the investigations of the Commissioner for Fundamental Rights), and may only propose the Commissioner to launch an ex officio investigation or to turn to the Constitutional Court.⁴³ Thus, as put by László Majtényi, former Data Protection Commissioner, the Deputy Commissioners are not, in the practical sense, deputies, but rather **"subordinates"** of the Commissioner.⁴⁴ Many stakeholders voiced **concerns that this new institutional set-up carries the risk that the level of protection in relation to the interests of future generations and the rights of national minorities will decrease**. Therefore, it was also important to assess the Commissioner's performance with regard to these rights.

The order of the thematic parts below reflects the HHC's assessment of the Commissioner's performance:

- his performance can be considered adequate in the areas of the rights of LGBTQI persons and environmental rights;
- mixed in the areas of discrimination of Roma persons, women's rights, and in terms of its activities as NPM;
- and inadequate in relation to the criminalization of homelessness, certain political rights and liberties, the rights of migrants, and the governmental attacks on human rights NGOs.

4.1. RIGHTS OF LGBTQI PERSONS

Even though Act CXI of 2011 on the Commissioner for Fundamental Rights does not mention LGBTQI persons explicitly, civil society organisations reported that the Commissioner **"has become a crucial ally to LGBTI people** in the country",⁴⁵ and **"has become quite active** in recent years on LGBTI

⁴¹ The issue of abolishing the institution of the Data Protection Commissioner and terminating the acting Commissioner's mandate prematurely was brought before the Court of Justice of the European Union, which concluded in April 2014 that "by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfil its obligations under Directive 95/46/EC" (*Commission v. Hungary*, Case C-288/12).

⁴² Act CXI of 2011 on the Commissioner for Fundamental Rights, Article 4

⁴³ Act CXI of 2011 on the Commissioner for Fundamental Rights, Article 3

⁴⁴ László Majtényi: A független ombudsmanintézményeket helyre kell állítani, az alapvető jogok biztosától pedig továbbra is elvárható a jogállami jogvédelem [The independent Ombudsperson institutions shall be restored, and the Commissioner for Fundamental Rights can still be expected to protect rights according to the rule of law], *MTA Law Working Papers*, 2014/47, p. 8. Available at: https://jog.tk.mta.hu/uploads/files/mtalwp/2014_47_Majtenyi.pdf.

⁴⁵ Háttér Society – Hungarian LGBT Alliance – Transvanilla Transgender Association, *Report about the Implementation of the Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5) in Hungary*, 31 July 2018, <http://hatter.hu/kiadvanyaink/report-about-the-implementation-of-the-council-of-europe-recommendation-to-member-0> (hereinafter: *Discrimination on grounds of sexual orientation or gender identity report 2018*), p. 31.

issues".⁴⁶ Háttér Society⁴⁷ reported to the HHC that they consider the current Commissioner's activities in relation to LGBTQI rights particularly positive.

As far as its investigations are concerned, the Ombudsperson **prepared reports on** the following "**crucial questions**".⁴⁸

- *Legal gender recognition*:⁴⁹ "State institutions were for a long time highly reluctant to deal with [the] issues"⁵⁰ of trans people, and so there is no codified procedure in Hungary for legal gender recognition. Instead, "from the early 2000s there was an uncodified practice that allowed for legal gender recognition without medical interventions, neither hormonal treatment nor gender affirmation surgeries were a prerequisite."⁵¹ Upon the complaint of the Transvanilla Transgender Association,⁵² the Commissioner issued a report on the matter in September 2016, calling on the respective ministries to "codify the legal gender recognition procedure" and "to cooperate with civil society organisations in the drafting of the new legislation".⁵³
- *Same-sex adoption*:⁵⁴ In Hungary, same-sex partners are entitled to enter into a registered partnership, but "[s]ame-sex parenting remains an issue where *de jure* discrimination against same-sex couples continues. Even though single individuals are permitted to adopt children, the legislation prescribes authorities to give preference to married couples."⁵⁵ Háttér Society petitioned the Commissioner regarding the matter in the case of a woman living in a lesbian partnership whose application to adopt was rejected. In his 2017 report, the Commissioner "found that [the above] preference rules in various pieces of legislation on adoption are contradictory, and employed in an arbitrary manner",⁵⁶ which in the particular case amounted to the violation of the right of the child to protection and care and the right to fair procedure, and discrimination based on sexual orientation.
- *Rights of registered partners in relation to inheritance tax*:⁵⁷ Háttér Society also petitioned the Ombudsperson in relation to the practice of the National Tax and Customs Administration (NTCA) of ordering same-sex couples "to pay inheritance tax, even though as registered partners they should have been treated as spouses and enjoy full tax-exemption".⁵⁸ In his 2016 report, the Commissioner agreed with Háttér, "declared that the practice of the NTCA runs contrary to existing legislation, disrupts the rule of law and discriminates on the ground of sexual orientation", and "requested the NCTA to revise its policies and pay back any taxes unlawfully levied." As a result, the NCTA "updated their information materials, issued a circular among their staff on the correct interpretation of the law, and paid back any unlawfully levied tax with interests."⁵⁹

The area of the rights of LGBTQI persons is one of those where the Commissioner **exercised his right to request the constitutional review of a law**.⁶⁰ Examples in this regard include **a local decree** of the village of Ásotthalom, "**that banned** – among others – **propagating same-sex marriage** and family as anything other than marriage or parent-child relationship."⁶¹ The Commissioner "turned to the Constitutional Court claiming that the local decree infringed on the rights of freedom of expression, freedom of assembly, freedom of religion and equal treatment", and as a result, in April 2017 the Constitutional Court annulled the decree in question.⁶²

⁴⁶ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 141.

⁴⁷ <http://en.hatter.hu/>

⁴⁸ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 141.

⁴⁹ Case no. AJB-883/2016.

⁵⁰ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 26.

⁵¹ *Ibid.*, p. 26.

⁵² <https://transvanilla.hu/>

⁵³ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 83.

⁵⁴ Case no. AJB-485/2017.

⁵⁵ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 22.

⁵⁶ *Ibid.*

⁵⁷ Case no. AJB-4819/2016.

⁵⁸ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 106.

⁵⁹ *Ibid.*, p. 107.

⁶⁰ *Ibid.*, p. 43.

⁶¹ *Ibid.*, p. 21.

⁶² *Ibid.*, p. 87.

In addition, the Commissioner “organized workshops on the rights of trans[...] and intersex persons;[...] regularly issued press releases on occasion of the International Day Against Homophobia and Transphobia;⁶³ wrote welcome letters to the Budapest Pride;⁶⁴ invited Háttér Society to train staff on the rights of LGBTI persons, and set up an internal network to coordinate LGBTI related work and appointed an LGBTI liaison officer”,⁶⁵ and its annual reports feature a separate chapter on LGBTQI rights. Háttér Society also reported that the Commissioner issued for them declarations of support for calls of applications, and agreed to consult Háttér personally when asked. These actions have significance particularly if we take into account that **besides the Ombudsperson “there have been no public officials taking a public stance promoting tolerance towards LGBTI persons since the conservative Government took power in 2010.”**⁶⁶ At the same time, the Commissioner did not show up for any of the opening ceremonies of the Budapest Pride; failed to comment on a Bill⁶⁷ that aimed at rendering registered partnership meaningless; and **failed to take a stance against the growing number of anti-LGBTQI statements of high-level public officials**, e.g. by the mayor of Budapest⁶⁸ and the Speaker of the Parliament.⁶⁹

4.2. INTERESTS OF THE FUTURE GENERATIONS – ENVIRONMENTAL RIGHTS

As it was mentioned above, one of the deputies of the Commissioner for Fundamental Rights is the Deputy Commissioner for Future Generations. Considering the Deputy Commissioner’s limited competence as described above, and the significance of environmental matters, special attention has to be paid to whether the Commissioner has acted competently and firmly in environmental cases.

In the reporting period, the Commissioner prepared joint reports with the Deputy Commissioner for Future Generations – among others – on the following environmental topics: **noise management**,⁷⁰ **waste management**,⁷¹ **illegal well-drilling**,⁷² **protection of nature reserves**⁷³ and **ecological**

⁶³ Issued every year since 2014, most recently: <http://www.ajbh.hu/-/az-alapveto-jogok-biztosanak-kozlemeny-a-homofobia-es-transzfobia-elleni-vilagnap-alkalmabol>.

⁶⁴ For example: <https://www.ajbh.hu/en/-/az-alapveto-jogok-biztosanak-uzenete-a-budapest-pride-kulturalis-fesztival-megnyitojan>.

⁶⁵ *Discrimination on grounds of sexual orientation or gender identity report 2018*, p. 141.

⁶⁶ *Ibid.*, p. 77.

⁶⁷ Bill T/10536 on Substantiating the Central Budget of Hungary for the Year 2017. The respective amendment was later withdrawn.

⁶⁸ In 2015, István Tarlós, the mayor of Budapest called the Budapest Pride “unnatural and repulsive”, and stated that it should be banned from the downtown street the march used because it is “not worthy for the historic surrounding”. See: https://tv2.hu/mokka/178051_a_homoszexualitasrol_ez_a_szemelyes_velemeny_e_tarlosnak.html.

⁶⁹ In May 2019, László Kövér, the Speaker of the Parliament, member of the governing party Fidesz, stated that “morally there is no difference between the behavior of a pedophile and the behavior of someone who demands” marriage and adoption by same-sex couples. As a follow-up, the Prime Minister’s Chief of Staff, Gergely Gulyás said that they “do not believe it is right if a child has to grow up with two fathers”. See e.g.: https://index.hu/english/2019/05/17/speaker_of_hungarian_parliament_a_normal_homosexual_does_not_regard_himself_as_equal/.

⁷⁰ Cases no. AJB-985/2016 and AJB-184/2018

⁷¹ Cases no. AJB-5702/2014 and AJB-842/2018

⁷² Case no. AJB-5376/2014

⁷³ Case no. AJB-1906/2012

farming territories,⁷⁴ prevention of falling trees and deforestation,⁷⁵ protection against ragweed,⁷⁶ water shortage and sanitation,⁷⁷ and wastewater pollution.⁷⁸

Besides the abovementioned environmental matters, **air pollution** has become a nationwide issue. According to the latest WHO report, **Hungary is among the 15 most polluted countries in the world,⁷⁹** meaning that every 6th person's death can be attributed to the side-effects of air pollution.⁸⁰

An environmental expert of the **Hungarian NGO focusing on air pollution**, the Levegő Munkacsoport (Clean Air Action Group, CAAG),⁸¹ **reported** to the HHC **that the organisation and the Commissioner have been working together on numerous related environmental issues**, but the organisation's environmental experts are not in contact with the Commissioner himself, instead, they have been working with the Deputy Commissioners (since 2014, there have been two acting Deputy Commissioners for Future Generations⁸²). The CAAG reported that they have an ideal relationship with the Ombudsperson's institution, since the environmentalists' views and recommendations were always considered by the Deputy Commissioners, and when they were elected, both of them immediately called for a meeting with CAAG's representatives. Furthermore, the **CAAG and the Deputy Commissioners held conferences together** on household firing, illegal and half-illegal litter incineration, traffic pollution, etc.⁸³ In CAAG's view **the Ombudsperson's institution has never been afraid to take a stand for the sake of a better environment, even when it shed light on deficiencies of state or local institutions.** The Deputy Commissioners also recommended **legislative amendments**, in line with the CAAG's complaint, on litter incineration⁸⁴ or in the context of municipal regulations governing litter incineration.⁸⁵ All in all, the CAAG's environmental expert submitted that **the Ombudsperson's institution has always represented a highly professional stance and this allowed it to be critical even in controversial cases.**

Nevertheless, the case around the **planned investments in the City Park of Budapest** has to be mentioned, which is a **rather politicized issue, and the project is important for the government.**⁸⁶ The CAAG turned to the Commissioner for Fundamental Rights in 2014,⁸⁷ asking him to analyse the newly introduced law on the **City Park** and its compliance with the Fundamental Law.⁸⁸ In its submission, the CAAG asserted that the law violates the right to a healthy environment, and that

⁷⁴ The famous *Kishantos case* happened in 2013, and concerned a 452-acre, state-owned, internationally acclaimed ecological farming land, that had been cultivated for decades by a local non-profit organisation, and which was leased to other various entrepreneurs. In his joint report with the Deputy Commissioner for Future Generations, the Commissioner for Fundamental Rights asserted that ecological farming can reverse the decline of natural assets and is also improves the ecosystem. Therefore, those natural values that have come to existence due to ecological farming are worth of constitutional protection, hence the Ombudsperson called on the Minister for Rural Development to take measures to safeguard those values. See: case no. AJB-4151/2013.

⁷⁵ The Deputy Commissioner made an important proposal to the Parliament in 2016 on a program which aims to plant more trees nationwide. A joint action by the Deputy Commissioner and the Commissioner was a petition to the Constitutional Court in 2019 to repeal certain provisions of the amendment of the law on forests that allow deforestation of Natura 2000 territories (case no. AJB-507/2019).

⁷⁶ Cases no. AJB-4188/2014 and AJB-1324/2019

⁷⁷ Cases no. AJB-858/2017 and AJB-340/2018

⁷⁸ In 2016, the Deputy Commissioner for Future Generations issued a public note in which he expressed his concern about the Tisza wastewater pollution in Vásárosnamény. The Deputy Commissioner called upon the competent authorities as well as the municipalities concerned to disclose the relevant data at their disposal, and also called upon the relevant authorities to inform the public of the measures taken and to be taken, and the timeframe for doing so. See: https://nepszava.hu/1100700_fekalia-a-szoke-tiszaba-mar-az-ombudsman-is-aggodik.

⁷⁹ Ambient air pollution attributable death rate (both sexes) in 2016, see: <http://apps.who.int/gho/data/node.main.BODAMBIENTAIRDTHS?lang=en>.

⁸⁰ <https://bit.ly/2kJHjil>

⁸¹ <https://www.levego.hu/en/>

⁸² Marcell Szabó was Deputy Commissioner for Future Generations until November 2016 (when he became a Constitutional Court judge), while the current Deputy Commissioner is Gyula Bándi.

⁸³ See: https://www.ajbh.hu/en/jogszabalyok/-/document_library_display/2MF8KVIpDr8d/view/2812918, or <https://www.levego.hu/hirek/van-jogi-lehetoseg-fellepni-a-legszennyez-es-ellen/>.

⁸⁴ Case no. AJB 1023/2018

⁸⁵ Case no. AJB 695/2016

⁸⁶ See e.g.: <https://budapestbeacon.com/hungary-to-invest-740-million-renovating-budapests-oldest-and-largest-city-park/>, <http://politicalcritique.org/cee/hungary/2016/budapest-governments-decision-to-destroy-the-citys-largest-public-park-sparks-protests/>.

⁸⁷ See: <https://www.levego.hu/sites/default/files/varosliget-ombudsman-2014apr.pdf>.

⁸⁸ Act CCXLII of 2013 on the City Park

"the investment is likely to reduce the proportion of green areas".⁸⁹ In addition, CAAG voiced concerns over the fact that Members on Parliament had to vote about the law without having access to crucial information, and there was no consultation with civil society and specialized authorities before the law was submitted to the Parliament, even though that would have been mandatory.⁹⁰ The Commissioner for Fundamental Rights himself commented publicly on the City Park project's case, saying that the case **marks the threshold of the Ombudsperson's mandate**, and stated that the Commissioner **"should not voice an opinion about such an issue – instead, it is a matter of policy and urban policy, which should be subject to discussion and decided on by local politicians and professionals, and should not be the subject of fundamental rights inquiries"**.⁹¹ Therefore, the related complaints were transferred to the Ministerial Commissioner responsible for the City Park project.⁹²

4.3. DISCRIMINATION OF ROMA PERSONS

In Hungary, the **discrimination of Roma is widespread in all areas of life**, including employment, health care, services, education, or housing. They face extreme poverty, and many of them "live in segregated neighbourhoods that lack proper infrastructure".⁹³ Furthermore, ethnic profiling of Roma people with regard to ID checks has been demonstrated by research,⁹⁴ while individual cases show the same with regard to petty offences.⁹⁵ Analysing the activities of the Commissioner for Fundamental Rights and the Deputy Commissioner for the Rights of National Minorities with regard to all the spheres where the right to equality of Roma people is violated is beyond the scope of the present paper, and so below, we focus on the issue of school segregation, and two high-profile cases affecting Roma people that received wide media coverage. The latter two cases are examples for the Commissioner taking action, while his activities related to segregation show a lack of willingness to confront the government.

4.3.1. RESTRICTING ACCESS TO WATER IN A DISCRIMINATORY MANNER

In the middle of the summer of 2013, the local government of the city Ózd decided to **restrict the water discharge of 62 public taps and turn off 27 of the altogether 123 water taps**, claiming that the measure is necessary to "encourage the inhabitants to [engage in] more economic water consumption and to discourage illegal use".⁹⁶ In the city where about a thousand households did not have running drinking water and had to rely on public taps for water, the measure resulted that **many people faced severe difficulties in terms of accessing water**, and long queues formed at the remaining taps in the summer heat. Furthermore, the restriction of access to water "principally and particularly negatively affected the inhabitants living in certain settlement-like environment, considered to be in a socially disadvantaged situation, most of whom were of Roma origin."⁹⁷ The Commissioner and the Deputy Commissioner for the Rights of Future Generations (not the Deputy Commissioner for the Rights of National Minorities) issued a joint report in the case,⁹⁸ and concluded that the local

⁸⁹ See: <https://www.levego.hu/kapcsolodo-anyagok/az-ombudsmanhoz-fordult-a-levego-munkacsoport-a-varosligettorveny-miatt/>.

⁹⁰ See: <https://www.levego.hu/sites/default/files/varosliget-ombudsman-2014apr.pdf>.

⁹¹ See: https://mandiner.hu/cikk/20141019_szekely_laszlo_nem_feladata_az_ombudsmannak_politikaval_foglalkozni.

⁹² *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2014 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2014]*, p. 280.

⁹³ See e.g.: Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined eighteenth to twenty-fifth periodic reports of Hungary*, CERD/C/HUN/CO/18-25, 6 June 2019, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fHUN%2fCO%2f18-25&Lang=en, § 20.

⁹⁴ See e.g.: András Kádár – Júlia Körner – Zsófia Moldova – Balázs Tóth, *Control(led) Group – Final Report on the Strategies for Effective Police Stop and Search (STEPSS) Project*. Hungarian Helsinki Committee, 2008. Available at: http://helsinki.hu/wp-content/uploads/MHB_STEPSS_US.pdf.

⁹⁵ For a related Equal Treatment Authority case, see: <http://www.opensocietyfoundations.org/voices/fined-being-roma-while-cycling>.

⁹⁶ *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2013*, <http://www.ajbh.hu/documents/14315/2843265/Report+on+the+Activities+of+the+Commissioner+for+Fundamental+Rights+and+his+Deputies+2013/496edc97-7b9b-de33-14c8-18d3005d28eb?version=1.0>, p. 35.

⁹⁷ *Ibid.*

⁹⁸ Case no. AJB-5527/2013

municipality's measures **violated the right to health and healthy drinking water**. In addition, the joint report concluded that the restriction of access to water affected Roma people in a significantly larger proportion than other groups of the population, and so **amounted to indirect discrimination based on Roma origin**.

4.3.2. DISCRIMINATIVE INSPECTIONS BY AUTHORITIES IN MISKOLC⁹⁹

The Hungarian Civil Liberties Union (HCLU)¹⁰⁰ and the Legal Defense Bureau for National and Ethnic Minorities filed a joint complaint to the Commissioner for Fundamental Rights in March 2014 because of the practice of **"joint inspections"** in Miskolc, the third largest city in Hungary, **conducted by the Miskolc police and other public agencies in the segregated Roma neighbourhoods** of the city. The inspections involved examining the compliance with a variety of regulations, ranging from checking whether documents proving ownership are in order, through public cleanliness inspections, to public guardianship agency inspections, etc. "At some of the locations, authorities returned multiple times to conduct repeated inspections. The various authorities usually sen[t] large inspection teams to the targeted sites. Residents of the inspected neighbourhoods feel threatened and harassed by the repeated, coordinated, raid-like joint inspections by official personnel."¹⁰¹ In a related complaint in May 2014, HCLU asked the Commissioner to turn to the Constitutional Court in relation to the amendment of a local decree "which adversely affected the predominantly Roma residents renting low comfort level municipality-owned dwellings" and "allowed for low-status residents in deep poverty, mostly Roma, to be relocated outside city limits." The HCLU "also pointed out the illegal practices of [the] Miskolc Real Estate Management Plc. [...] related to the ongoing eradication of one of the slums called 'Numbered Streets'."¹⁰²

In their joint report,¹⁰³ **the Commissioner and the Deputy Commissioner for the Rights of National Minorities** agreed with the assessment of the HCLU, and **ascertained that "the coordinated nature of the joint inspections and their planning, organization, and execution violated the principle of equal treatment"**: "the unjustified, repeated inspections which singled out the segregated neighbourhoods of Miskolc **resulted in indirect ethnic, social and economic discrimination**."¹⁰⁴ The report also stated that "the planning and execution of these practices fundamentally violate[d] the right to equal dignity and the right to fair procedure",¹⁰⁵ and **called upon the authorities to stop these joint inspections immediately**. The Commissioner and the Deputy Commissioner concluded that two Miskolc municipal decrees criticized by the HCLU "raised severe constitutional and legal concerns", "warned about the dire living conditions of the inhabitants of segregated settlements", and declared that neither the joint inspections, nor the evictions happening "are suitable measures to eliminate the segregated settlements in Miskolc".¹⁰⁶ HCLU reported that the investigation of the Commissioner and the Deputy Commissioner lasted for a year and a half itself, but they welcomed the report: it was very thorough, contained important conclusions and made firm recommendations.

⁹⁹ This chapter is based on the case summary by the Hungarian Civil Liberties Union available at <https://hclu.hu/en/articles/a-hungarian-city-openly-against-its-roma-1>.

¹⁰⁰ <https://hclu.hu/>

¹⁰¹ <https://hclu.hu/en/articles/a-hungarian-city-openly-against-its-roma-1>

¹⁰² *Ibid.*

¹⁰³ For an English summary of the joint report in case no. AJB-1474/2014, see: https://hclu.hu/files/tasz/imce/2015/summary-miskolc_report_en.pdf.

¹⁰⁴ <https://hclu.hu/en/articles/a-hungarian-city-openly-against-its-roma-1>

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

4.3.3. SCHOOL SEGREGATION OF ROMA CHILDREN

Segregation of Roma children in schools has been a serious issue in Hungary for decades, and there is still a **growing tendency for separating pupils based on ethnicity**.¹⁰⁷ In 2015, approximately 45% of Roma children attended segregated schools or classes in Hungary where all or the majority of their classmates were also Roma.¹⁰⁸ The acuteness of the problem is supported by the fact that the European Commission, on 26 May 2016, launched an **infringement procedure against Hungary over the segregation of Roma children** in schools and in special education. Furthermore, despite the ruling of the European Court of Human Rights in the case *Horváth and Kiss v. Hungary* in 2013¹⁰⁹ that concluded that overrepresentation and segregation of Roma children in Hungarian special schools due to the systematic misdiagnosis of mental disability violated the European Convention on Human Rights, Roma children are continued to be channelled to special schools in Hungary. To date, the Hungarian government has failed to fully implement the European Court of Human Rights' judgment.¹¹⁰

Moreover, **a series of domestic court cases show that the Hungarian state has largely abandoned the problem of segregation**. By way of example, in an April 2018 judgment, a court found that the Ministry responsible for education had violated the requirement of equal treatment in relation to Roma pupils in 28 elementary schools by having failed to take action against school-level segregation starting from the 2003/2004 school year.¹¹¹ Another case that exemplifies the **ambiguous attitude of the Hungarian government** towards the issue is the lawsuit launched by the Chance for Children Foundation (CFCF) against a denomination that reopened a school in the middle of a segregated Roma neighbourhood that had been previously closed down with the purpose of putting an end to the segregation of the Roma children going there. In April 2013, **the Minister responsible for educational matters gave a witness testimony** in the case, **arguing that the court should allow the segregated religious school to continue functioning**. He also submitted that in his view it is possible to assist the children in segregated educational institutions in catching up if they are taught by good teachers with good methods in a loving environment.¹¹²

In a 2018 study, the Educational Motivation Foundation underlined that the **government** has not only abandoned the issue, but strongly **encourages segregation mechanisms** concerning Roma children.¹¹³ The abovementioned case was not the only time that the Minister responsible for education made statements supporting segregation or justifying the government's inaction. For example, in 2010 the **Minister stated that** it cannot be expected – neither professionally nor from a personal point of view – that children from different backgrounds could “grow up” together without any problems, and, therefore, parents' and teachers' **reluctance regarding integrated education is justified**.¹¹⁴ In addition, several **legislative changes contributed indirectly to facilitating segregation**. For example, as of 2015 the age limit for compulsory education was reduced from 18 to 16,¹¹⁵ and so-called “bridge programs” were launched in 2013,¹¹⁶ seemingly with the aim of preventing early school leaving. However, these programs allowed the separation of the pupils with lower academic performance, which

¹⁰⁷ Kriszta Ercse: *Az állam által ösztönzött, egyházasszisztált szegregáció mechanizmusa [The Mechanism of State-Stimulated, Church-Assisted Segregation]*, in: József Balázs Fejes – Norbert Szűcs, (eds), *Én vétkem [My fault – The situation of educational segregation]*, 2018, p. 179 (Table 1). Available at: https://motivaciomuhely.hu/wp-content/uploads/2018/05/%C3%A9tkem_online.pdf.

¹⁰⁸ Bernard Rorke: *Segregation in Hungary: the long road to infringement*. ERRC Blog, 30 May 2016, <http://www.errc.org/blog/segregation-in-hungary-the-long-road-to-infringement/106>.

¹⁰⁹ A brief English summary of the case, as well as the original application, the Government's observations, the judgment, and the Rule 9 communication to the Committee of Ministers of the Council of Europe supervising the execution of the judgment is available here: <http://www.errc.org/cikk.php?cikk=4200>.

¹¹⁰ See: <http://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22004-10905%22%5D%7D>.

¹¹¹ See: <https://www.equalitylaw.eu/downloads/4641-hungary-education-ministry-found-to-be-in-breach-of-its-non-discrimination-obligations-for-failing-to-take-effective-action-against-segregation-in-28-elementary-schools-pdf-164-kb>.

¹¹² See e.g.: https://index.hu/belfold/2013/04/26/balog_a_szeretetteli_szegregacioban_bizik/.

¹¹³ Kriszta Ercse: *Az állam által ösztönzött, egyházasszisztált szegregáció mechanizmusa [The mechanism of state-stimulated, church-assisted segregation]*, in: József Balázs Fejes – Norbert Szűcs, (eds), *Én vétkem [My fault – The situation of educational segregation]*, 2018, p. 177.

¹¹⁴ *Ibid.*, p. 180.

¹¹⁵ Act CV of 2014 on the Amendment of Act LXXIX of 2011 on the National Public Education, Article 28(8)

¹¹⁶ Act LXXIX of 2011 on the National Public Education, Article 14

in practice further enhances segregation mechanisms.¹¹⁷ Moreover, as of 2014, religious schools are exempted from the obligation to accept pupils from their administrative district and, unlike state-run schools, are allowed to establish their own admission criteria. As a result, they can freely decide which children to admit, which further contributes to the segregation of Roma children.¹¹⁸

In spite of the fact that the level of segregation is increasing and **the government clearly does not take appropriate measures, the Commissioner for Fundamental Rights has barely addressed this issue in the past five years.** He looked in a greater depth into this problem only in 2014 when the **Parliament amended the law** on public education, **empowering the government to set out exemptions from the general prohibition of segregation** with regard to schools of national minorities and religious schools in a form of a governmental decree.¹¹⁹ The issue received considerable media coverage as several civil society organisations voiced their opposition.¹²⁰ The Deputy Commissioner for the Rights of National Minorities, also pressured by civil society organisations,¹²¹ issued a report regarding the matter, in which she stated that “integrated education of children of different origins and from different backgrounds is – in addition to being the only form of education which meets the international human rights standards – the only educational solution what leads to real and lasting results”.¹²² The Deputy Commissioner added that any legal amendment which detracts from the general prohibition is clearly unlawful. In spite of the aforementioned statements and that she acknowledged that the law can entail a potential circumvention of the prohibition, the Deputy Commissioner **found no infringement** of any fundamental right in the case.

In 2017, the Commissioner issued a report¹²³ after an ex officio investigation into the issue, in which he made contradictory statements concerning segregation in the field of education. The report focused on the lack of adequate staff and equipment in a school in one of the lagging regions of Hungary, but it also touched upon the subject of segregation. Although the Commissioner established school segregation in the case, it **did not find an infringement** in that respect, arguing that it was “**spontaneous segregation**” and “**occurred without human intervention**”, and added that “the main tool of desegregation policy is providing an infrastructure required for quality education”.

To sum it up: despite the **segregation of Roma children in schools being a pressing human rights issue** in Hungary, the Commissioner for Fundamental Rights **has not shown sufficient sensitivity to the subject and has not taken the risk of countering government policy in the final years of his mandate.**

4.4. WOMEN’S RIGHTS¹²⁴

In 2013 the Commissioner for Fundamental Rights informed the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) that it “has not got any complaints concerning discrimination against women or women’s rights”, but “has examined some women’s rights related [to] issues that raised major public concern”.¹²⁵ Subsequently, in its concluding observations regarding the combined seventh and eighth periodic report of Hungary, the CEDAW Committee expressed concern about the limited mandate of the Commissioner for Fundamental Rights “with regard to addressing

¹¹⁷ József Balázs Fejes – Norbert Szűcs: Hol tart ma az oktatási integráció ügye? [Where does the issue of integrated education stand today?], *Új Pedagógiai Szemle*, 2017/11-12, p. 106. Available at: http://www.staff.u-szeged.hu/~fejesj/pdf/Fejes-Szucs_2018.pdf.

¹¹⁸ Act LXXIX of 2011 on the National Public Education, Article 31(1)-(2). See also: József Balázs Fejes – Norbert Szűcs: Hol tart ma az oktatási integráció ügye? [Where does the issue of integrated education stand today?], *Új Pedagógiai Szemle*, 2017/11-12, p. 105.

¹¹⁹ Bill T/2085 on the amendment of Act LXXIX of 2011 on the National Public Education, Article 27(5)

¹²⁰ See e.g.: https://index.hu/belfold/2014/11/26/az_emmi_szerint_nem_kell_szegregaciotol_tartani/.

¹²¹ See e.g.: <https://tasz.hu/cikkek/mondjon-nemet-az-ombudsman-is-a-szegregaciora>.

¹²² Case no. AJB-6010/2014, p. 20.

¹²³ Case no. AJB-701/2017 (AJB-8033/2016)

¹²⁴ This chapter was compiled by the Hungarian Women’s Lobby (<http://noierdek.hu/2/english/>) and NANE Women’s Rights Association (www.nane.hu/en).

¹²⁵ *Submission of the Commissioner for Fundamental Rights to the UN CEDAW Committee*, 21 January 2013, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/HUN/INT_CEDAW_IFN_HUN_13259_E.pdf, p. 1.

complaints of all forms of discrimination against women, including against women belonging to disadvantaged groups".¹²⁶ The Committee recommended to ensure that the mandate of the Commissioner "clearly covers the duty to promote and protect the rights of all women and protect them from all forms of discrimination including by receiving complaints and providing remedies in cases of violation."¹²⁷ Recalling this point of concern, in its report on the Hungarian country visit from 2016, the UN Working Group on the issue of discrimination against women in law and in practice concluded that "[t]he full potential of the office in the promotion and protection of women's rights seems yet to be realized."¹²⁸

In the reporting period, equality between women and men and **women's human rights have not been a specific, highlighted area in the Commissioner's complaint-based work** either; none of its annual reports has a specific chapter on this issue. At the same time, several complaints and inquiries were related to and relevant for women's and girls' rights and addressed discrimination against them,¹²⁹ even if not being framed, identified or interpreted as such. There have been thematic inquiries where the Commissioner has not approached relevant women's rights NGOs to provide input, although they could have a say – such as the ex officio, comprehensive inquiries on child protection mediation or international child abduction.¹³⁰

For other types of professional work and activities, **women's rights NGOs**, as the Hungarian Women's Lobby and NANE Women's Rights Association, **commended the work of and cooperation with the Commissioner for Fundamental Rights and the Deputy Commissioner for the Rights of National Minorities** as follows:

- It was an important symbolic message that for the initiative of the European Institute for Gender Equality (EIGE) in 2017 the Commissioner joined the White Ribbon campaign against violence against women and became a White Ribbon Ambassador.¹³¹
- At the annual conference of the WAVE (Women Against Violence Europe) Network held in Budapest in 2017 and organized in cooperation with the NANE Association, the Deputy Commissioner for the Rights of National Minorities was a speaker in the opening session, being the only Hungarian state/public actor accepting the invitation to address the international audience.¹³²

¹²⁶ UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013)*, 26 March 2013, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fHUN%2fCO%2f7-8&Lang=en, § 12.

¹²⁷ *Ibid.*, § 13.

¹²⁸ UN Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to Hungary*, A/HRC/35/29/Add.1., 6–23 June 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/097/63/PDF/G1709763.pdf?OpenElement>, § 22.

¹²⁹ To mention but a few: cases addressed the issues of homebirth (AJB-2350/2016), care during pregnancy and after giving birth (AJB-605/2019), preferential treatment of women concerning repayment conditions of student loans (AJB-978/2018), or child prostitution (AJB-1485/2018). Related issues on the situation of women also appeared in some of its investigations carried out as OPCAT NPM.

¹³⁰ See cases no. AJB-75/2018, and AJB-1299/2018.

¹³¹ See: <https://www.ajbh.hu/en/web/ajbh-en/news/-/content/NDht1kk2PisY/laszlo-szekely-becomes-a-white-ribbon-ambassador>.

¹³² See: <http://files.wave-network.org/home/WAVEConference2017.pdf>

- The Commissioner has also been supportive towards Hungary's ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention),¹³³ in a climate when even high-level state stakeholders speak against the Convention¹³⁴ and justify its non-ratification by Hungary with misinformation about its content.¹³⁵
- Furthermore, the Commissioner was open to partnering with women's rights NGOs in international project proposals. Such support has been especially valuable when partnership of or support from a state or public authority is a requirement in the call for proposals, and in a climate when other state institutions (have) refuse(d) cooperation with the NGOs that are blacklisted and considered "problematic" for the government.

4.5. THE OMBUDSPERSON'S PERFORMANCE AS NATIONAL PREVENTIVE MECHANISM & AND THE RIGHTS OF DETAINEES

After the ratification of the OPCAT by Hungary in 2012, the Commissioner for Fundamental Rights was designated to be the National Preventive Mechanism (NPM) in Hungary as of January 2015. Since according to Section 2.8 of the General Observations of the Sub-Committee on Accreditation (hereinafter: General Observations) the SCA assesses NHRIs also as national preventive and monitoring mechanisms, it is necessary to assess the Ombudsperson's performance as the Hungarian NPM.

As far as the structure and independence of the Hungarian NPM is concerned, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) reported after its visit to Hungary in 2017 that it is "particularly concerned at the **lack of functional independence of the mechanism** within the Office of the Commissioner for Fundamental Rights".¹³⁶

The NPM **only conducted altogether 54 monitoring visits to date** in the past almost five years,¹³⁷ meaning an average of 10-11 per year, which is a low number, especially considering that the NPM's mandate covers over 500 facilities, from penitentiaries to psychiatric institutions. **The publication of visit reports is slow**, it usually takes more than six months, and at the time of submitting the present paper, only 33 reports have been published as compared to the 54 visits already conducted. The most extreme examples in this regard include the following:

¹³³ See for example: *Communication of the Commissioner of Fundamental Rights of Hungary in regard to the information provided by Hungary on the follow-up to the concluding observations of Committee on the Elimination of Discrimination against Women on the combined seventh and eighth periodic state report*, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/HUN/INT_CEDAW_NGS_HUN_20266_E.pdf, p. 2.

¹³⁴ For example, the new Minister of Justice at her hearing as a candidate before the Parliament's Committee on European Affairs and Committee on Justice said on 4 July 2019 that "[t]his Istanbul Convention is a political hysteria". See page 22 of the hearing minutes at: <https://www.parlament.hu/irom41/06556/06556.pdf>.

¹³⁵ The fraction leader of the governing Fidesz party (who is currently the Minister of the Prime Minister's Office) stated at a press conference in 2017 that the Istanbul Convention is not only about elimination of violence against women. "He argued that the convention understands that no biological sex but only gender exists, and he thinks it absurd for the party group to support a measure which would replace biological sex with gender in the legislation, so there are parts of the convention which are unacceptable to them." See: Borbála Juhász – dr. Enikő Pap: *Backlash in Gender Equality and Women's and Girls' Rights. Study requested by the FEMM committee*, European Parliament, June 2018, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604955/IPOL_STU\(2018\)604955_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604955/IPOL_STU(2018)604955_EN.pdf), p. 32.

¹³⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism – Report of the Subcommittee*, CAT/OP/HUN/2, https://tbinternet.ohchr.org/Treaties/CAT-OP/Shared%20Documents/HUN/CAT_OP_HUN_2_30577_E.pdf, § 14.

¹³⁷ See: <http://www.ajbh.hu/hu/opcat>.

Place of detention visited	Date of visit	Date of report	Time difference
Szabolcs-Szatmár-Bereg County Penitentiary Institution	28-30 November 2017	No report published yet	21 months (to date)
Metropolitan Penitentiary Institution	28 March 2017	12 December 2018	20 months
Psychiatric Ward of the János Balassa Hospital in Tolna County	31 May – 1 June 2017	25 January 2019	20 months
Debrecen Juvenile Reformatory (facilities in Debrecen and Nagykanizsa)	13-14 and 26-27 September 2016	23 March 2018	18 months
Budapest 14 th District Police Headquarters	6 December 2016	6 March 2018	16 months
Judicial and Observational Psychiatric Institution	16-18 February 2016	22 February 2017	12 months
Budapest Police Headquarters' Central Holding Facility	8 February 2017	1 February 2018	12 months
Somogy County Penitentiary Institution	24-25 June 2015	May 2016	11 months
Integrated elderly care facility in Nagymágocs	12-14 September 2017	13 August 2018	11 months
Police facilities in Siklós, Pécs and Komló	17-18 September 2018	No report published yet	11 months (to date)
Foster families in Vas county	25 October 2018	No report published yet	10 months (to date)

The SPT highlighted in its 2017 report in this regard that “extended delays in drafting and publication of visit reports can have a negative impact on the timely follow-up to the visit report recommendations and, eventually, on the overall conditions of detention of persons deprived of their liberty” (§ 37). Finally, the SPT also observed in its report that the NPM “mainly focuses on detention monitoring activities” and recommended that the NPM “focus[es] also on other preventive activities” (§§ 33–34).

The **insufficient number of visits** and the **lack of preventive activities** relates closely to **the lack of adequate resources and funding of the NPM**. In its 2017 report the SPT expressed its concern that “only nine staff members have been assigned to perform tasks related to the [NPM’s] mandate, a situation that affects the ability of the mechanism to fully carry out its mandate under the Optional Protocol” (§ 21). The SPT was “also concerned that a lack of financial resources presents a major obstacle to the effective and efficient functioning of the national preventive mechanism” and that “the failure to allocate the necessary resources seems to be due to the fact that the Hungarian authorities do not consider that the mechanism requires additional support to carry out its mandate effectively” (§ 22). However, the situation has not improved: in 2018, the NPM employed eight public servants on average, and its budget was 82.7 million HUF (ca. 285,000 USD),¹³⁸ while the total annual budget of the Office of the Commissioner was 1299.8 million HUF (ca. 4,246,000 USD).¹³⁹

Since it started its operation in 2015, the **NPM has demonstrated a development in its methods** of monitoring, recommendations included in recent reports have become more specific and pragmatic, and international standards are duly referred to in its findings. However, the **monitoring methods demand further development** when it comes to the thorough evaluation of facts and follow-up: strict and direct follow-up is lacking even in cases when severe violations of the CAT are revealed by the monitoring visits. In 2016, the NPM conducted one follow-up visit, there were two such visits in 2017, one in 2018, and none so far in 2019.¹⁴⁰ Furthermore, as the SPT noted in its 2017 report, “there is no clear policy concerning a systematic follow-up and dialogue procedure” (§ 38).

¹³⁸ *Annual Report of the Commissioner for Fundamental Rights on the activities of OPCAT NPM in 2018*, https://www.ajbh.hu/documents/10180/2809026/2018.+évi+átfogó+jelentés_végleges.pdf, p. 18.

¹³⁹ Annex I of Act C of 2017 on the Central Budget of Hungary for 2018

¹⁴⁰ See the NPM’s website, <https://www.ajbh.hu/en/web/ajbh-en/opcat>, under “Visits”.

Cooperation with the members of the NPM's **Civil Consultative Body (CCB)**, including the Hungarian Helsinki Committee, has improved. At the same time, more substantive contribution of CCB members would improve the efficiency of the NPM. Also, **the NPM does not include legal experts of the CCB and other civil society organisations with relevant expertise in its monitoring teams**, although the pertaining legislation would clearly allow for this and it could be a solution for the problems deriving from the lack of capacity, and could facilitate the acceleration of the publication of reports and the increase of the number of monitoring visits. This is so in spite of the fact that civil society organisations, such as the Hungarian Helsinki Committee which has decades-long monitoring experience with regard to places of detention, have repeatedly offered their expertise and lawyers to the NPM free of charge. Unfortunately, these offers have been expressly rejected,¹⁴¹ even though the NPM has on occasions employed psychiatrists, physicians and dietitians as external experts.¹⁴² They claim that the basis for the rejection is that the required legal expertise is available within the Ombudsperson's Office. While this might be true in the sense that the NPM staff has members with sound expertise in detention monitoring, the low number of visits and the significant delays in reporting show that they do not have a sufficient number of such internal experts, and therefore the NPM could significantly improve its overall performance by involving NGO expertise. In line with this, in its 2017 report, the SPT also recommended the NPM to "engage more directly and independently with civil society organizations, including, at a minimum, through their increased participation in mechanism visits, internal training, outreach activities, report-writing and dialogue with the domestic authorities" (§ 29), but to no avail.

Furthermore, the NPM **has recently shown a degree of reluctance to investigate detention-related issues brought to his attention by NGOs**. (See also Chapter 4.8 of the present paper on his reluctance to investigate border transit zones.) By way of example, the following two instances may be cited:

- In October 2018, the HHC informed the NPM that it had received complaints from multiple sources (detainees and attorneys) that **detainees are regularly ill-treated** in the Szombathely National Penitentiary Institution. According to the – very similar and consistent – complaints, if a detainee acted in a way that was deemed dangerous or as self-harm, they were cuffed with their hands behind their back to the bars in the corridor, and were left there for hours. The HHC asked the NPM to investigate the issue, but the NPM refused to do so, claiming that since the complaints pertained to alleged criminal and disciplinary offences, **he did not have a mandate to act**, and so forwarded the complaint to the National Penitentiary Headquarters and the prosecutor's office.¹⁴³
- In July 2019, the HHC asked the NPM to investigate the complaint it received regarding the detention conditions of five detainees transferred to the Hajdú-Bihar County Penitentiary Institution in order to work at a nearby construction. However, due to their age and state of health, they were not capable of the required hard physical work. This should have been established by a physician before they could be transferred back to their original place of detention, but the physician of the penitentiary was on holiday at the time. According to the complaint, while waiting for the physician to return, the ill-health detainees were continued to be **held in the so-called "transfer cells", which were dirty and had inadequate ventilation, and where the temperature rose to 40 Celsius**. Furthermore, the complaint said that they had no possibility to wash daily, and could not use the shop inside the penitentiary either. Even though the HHC's letter was clearly submitted to him in his capacity as NPM, the Commissioner replied that he **"does not have the power to influence the placement of detainees"**, and that the general rules¹⁴⁴ of Act CXI of 2011 on the Commissioner for Fundamental Rights on who is entitled to submit a complaint were not complied with, and so

¹⁴¹ See e.g.: *Annual Report of the Commissioner for Fundamental Rights on the activities of OPCAT NPM in 2018*, <https://www.ajbh.hu/documents/10180/2809026/2018.+évi+átfogó+jelentés.+végleges.pdf>, pp. 21–22.

¹⁴² *Visit to Hungary undertaken 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism – Replies of the national preventive mechanism*, § 22.

¹⁴³ Case no. AJB-4576/2018

¹⁴⁴ The Commissioner referred to Article 18(1) of Act CXI of 2011 on the Commissioner for Fundamental Rights, which sets out the following: "Anyone may turn to the Commissioner for Fundamental Rights if, in his/her judgment, the activity or omission of [list of authorities, including "law enforcement organ"] infringes a fundamental right of the person submitting the petition or presents an imminent danger thereto [...], provided that this person has exhausted the available administrative legal remedies, not including the judicial review of an administrative decision, or that no legal remedy is available to him/her."

forwarded the complaint to the National Penitentiary Headquarters instead of investigating the issue.¹⁴⁵

At the same time, the Commissioner for Fundamental Rights **has been open to provide professional input and to professional discourse when it came to NGO-led projects related to defendants' and detainee's rights**. For example, in 2016, the Commissioner agreed to participate in the project "Strengthening the rights of persons suspected or accused of crime through National Human Rights Institutions",¹⁴⁶ coordinated by the Ludwig Boltzmann Institute of Human Rights (Austria) and managed by the HHC as a project partner in Hungary, issued a support letter to the HHC during the call for applications process, and the Ombudsperson's office participated in the project actively.

4.6. CRIMINALIZATION OF HOMELESSNESS

Criminalizing homelessness has been a recurring aim of the incumbent governing party. Living and storing personal property on public premises were declared a petty offence early on after they won the elections in 2010, but these provisions were abolished by the Constitutional Court (upon the request of the former Ombudsperson) by its Decision 38/2012. (XI. 14.), which stated that criminalizing the status of homelessness was unconstitutional, because it violated human dignity.¹⁴⁷ However, the governing majority decided to overrule the Constitutional Court, and in the **Fourth Amendment to the Fundamental Law**, adopted in March 2013, **authorised the Parliament or local governments to criminalize homelessness** by setting out the following: "In order to protect public order, public safety, public health and cultural artefacts, an Act or a local government decree may, with respect to a specific part of public space, prescribe that using a public space as a habitual dwelling shall be illegal."¹⁴⁸ Accordingly, in September 2013, **the Parliament** amended Act II of 2012 on Petty Offences, the Petty Offence Procedure and the Petty Offence Registry System (the Petty Offence Act), and **introduced**, again, the **petty offence of "infringing the rules of residing on public premises for habitation"**, i.e. rough sleeping, criminalizing homelessness as such.¹⁴⁹ The Petty Offence Act authorized – but did not oblige – local municipalities to determine the public premises where rough sleeping was prohibited. Due to the specificities of the sanction system, **the most likely scenario was that homeless persons residing on the streets end up in confinement**.¹⁵⁰ However, **the law "has not [...] been enforced widely**, besides a few cases of fines handed out during the initial few months. After 2015 and up until August 2018 there were practically no recorded cases of police actions in such cases."¹⁵¹

Subsequently, the **Seventh Amendment to the Fundamental Law elevated the complete prohibition of residing on public premises for habitation to a constitutional level** as of 15 October 2018.¹⁵² An amendment of the Petty Offence Act followed, resulting that it is not up to the local municipalities any more to determine the public premises where rough sleeping is punishable: instead, "residing on public premises for habitation" became punishable all over the country, and now may be sanctioned by confinement instantly.¹⁵³ "In the course of the week after the law came into effect, the first **lawsuits against homeless people** already took place in Hungary."¹⁵⁴ Judges having to proceed in such petty offence cases turned to the Constitutional Court regarding the law, but – in spite of the

¹⁴⁵ Case no. AJB-3142/2019

¹⁴⁶ 760308-NHRIs-JUST-AG-2016/JUST-AG-2016-06

¹⁴⁷ For an English summary of the decision, see:

<http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2012-3-006>.

¹⁴⁸ Fundamental Law of Hungary, Article XXII(3)

¹⁴⁹ Further new petty offences introduced included the "construction without the consent of the owner" (aiming to counter illegal settlements, built by homeless persons), and the "unauthorized sale on public premises".

¹⁵⁰ For a legal background material on the Petty Offence Act in English, see: https://helsinki.hu/wp-content/uploads/Criminalization_of_homelessness_in_Hungary_October2013.pdf.

¹⁵¹ András Jámbor, *Criminalization of homeless people in Hungary is taken a step further*, 26 October 2018,

<https://www.boell.de/en/2018/10/26/criminalization-homeless-people-hungary-taken-step-further>

¹⁵² Article XXII(3) of the Fundamental Law now sets out the following: "Residing on public premises for habitation is prohibited."

¹⁵³ For more detail, see: <http://utcajogasz.hu/en/resources/information-materials/the-criminalisation-of-homelessness-in-hungary/>.

¹⁵⁴ András Jámbor, *Criminalization of homeless people in Hungary is taken a step further*, 26 October 2018,

<https://www.boell.de/en/2018/10/26/criminalization-homeless-people-hungary-taken-step-further>

amicus curiae of NGOs, former Constitutional Court justices and the UN Special Rapporteur on housing¹⁵⁵ – the Constitutional Court found in June 2019 that the prohibition was not unconstitutional.¹⁵⁶

Homeless persons are considered by the Commissioner for Fundamental Rights one of the “most vulnerable social groups”, and so under the law the Commissioner “shall pay special attention, especially by conducting proceedings ex officio, to [their] protection”.¹⁵⁷ In the reporting period, the Ombudsperson’s annual reports featured the following activities related to homeless persons:

- The Commissioner conducted ex officio investigations into the services provided to homeless persons in Budapest in the winter crisis period in every year between 2014 and 2019.¹⁵⁸
- In a 2013 report, the previous Commissioner found that the local municipality decree of Kaposvár that made the storage and placement of personal effects used for habitation on public premises punishable with a fine violated the right to human dignity. He called upon the municipality to amend the decree, but to no avail. Therefore, the current Commissioner turned to the Constitutional Court, claiming that the decree sanctioned habitation on public premises in a wider scope than what was allowed on the basis of the Fundamental Law – thus, he did not challenge the criminalization of homelessness as such.¹⁵⁹ (As explained above, the Fundamental Law at the time allowed for the criminalization of homelessness for specific purposes, such as the protection of public order, etc.)¹⁶⁰
- In 2014, the Commissioner asked the Curia (the Supreme Court of Hungary) to review the Budapest decree determining the zones where residing for habitation is prohibited, claiming that it was not in conformity with the Petty Offence Act, e.g. because it designated large, continuous territories a prohibited zone, regardless of the function and nature of the affected public premises.¹⁶¹
- In 2014, the Commissioner also investigated how homeless persons may notify authorities about the mailing address where they can be reached if necessary.¹⁶²
- In 2016, the Commissioner asked the Curia to review the local municipality decree of Zalakaros determining the public premises where residing for habitation is prohibited, claiming e.g. that local municipalities cannot designate all public premises owned by them a prohibited zone.¹⁶³
- In 2017, the Commissioner issued a report on the lack of public toilets in the capital.¹⁶⁴

The above list shows that **even though the Commissioner addressed the situation of homeless persons** in the past years a couple of times, **it failed to address** the most severe violation, namely **their criminalization** by the Fundamental Law and the related Acts of Parliament. Of course, elevating the criminalization of homelessness to the level of the constitution narrowed the Commissioner’s legal possibilities substantially, but that is not an explanation for his **silence on the issue** and why he has not criticized e.g. the Seventh Amendment to the Fundamental Law publicly. (With regard to the earlier legislative steps, the 2015 annual report states that the Commissioner “has emphasised several times recently that state endeavours targeting quick and simple ‘elimination’ of homelessness, ‘getting rid of’ the homeless, and ‘making order’ question the operation of rule of law mechanisms as they announce

¹⁵⁵ See e.g.: <http://utcajogasz.hu/en/resources/misdemeanour-cases/the-constitutional-court-has-made-an-inhumane-decision-on-the-confinement-of-homeless-people/>.

¹⁵⁶ Decision 19/2019. (VI. 18.) of the Constitutional Court. For an English summary of the decision, see: <https://hunconcourt.hu/announcement/the-prohibition-of-staying-habitually-on-public-ground-is-not-against-the-fundamental-law-however-the-state-should-apply-the-sanction-with-encanced-circumspection/>.

¹⁵⁷ Act CXI of 2011 on the Commissioner for Fundamental Rights, Article 1(2)

¹⁵⁸ Cases no. AJB-518/2014, AJB-285/2015 (this report also covered the legal framework pertaining to the criminalization of residing in public premises for habitation), AJB-240/2016, AJB-811/2017, AJB-809/2018, and AJB-295/2019

¹⁵⁹ Case no. AJB-687/2013

¹⁶⁰ *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2014 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2014]*, pp. 218–219.

¹⁶¹ Case no. AJB-0063/2014

¹⁶² Case no. AJB-1612/2014

¹⁶³ *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2016 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2016]*, pp. 220–222.

¹⁶⁴ Case no. AJB-1944/2017

to fight not against the problem but the 'problematic individuals'."¹⁶⁵) It has to be added in this regard that the Commissioner was not consulted on the draft text of the Seventh Amendment, and his office was granted only one working day to comment on the draft of the Bill amending the Petty Offence Act in 2018,¹⁶⁶ which is indeed highly problematic, but does not exempt the Commissioner from the obligation to use other means, e.g. publicity to stand up against rights violations.

It has to be mentioned as well that on 30 October **2018** the Streetlawyer Association¹⁶⁷ submitted a **complaint to the Ombudsperson regarding the new provisions of the Petty Offence Act** criminalizing rough sleeping, asking him to turn to the Constitutional Court regarding the matter. The Commissioner **failed to reply for almost eight months**, and claimed in his response dated 25 June 2019 that since in the meantime, on 19 June, the Constitutional Court delivered its (above-referred) decision on the matter, declaring the provisions constitutional, he does not have any means at his disposal as Ombudsperson to act regarding the problem.¹⁶⁸ Thus, it seems that the Commissioner delayed his response in order to avoid having to make a public stance regarding the constitutionality of the new provisions.

All this shows that while in the beginning the Commissioner did take action to protect the rights of homeless people, more recently, **the Commissioner has failed to take a sufficiently firm stance against the criminalization of homeless persons**. The degree of inaction in this regard by the Commissioner seems to show a strong correlation with the increase of the significance of the issue within the government's agenda, and gives the impression that his willingness to deal with the issue has gradually faded as the issue has become more and more important for the governing majority.

4.7. POLITICAL RIGHTS AND LIBERTIES

The HCLU reported to the HHC that the Commissioner for Fundamental Rights has been **"passive" regarding political rights and liberties in general**. The HCLU highlighted as particularly problematic the instance when they turned to the Commissioner after **journalists were denied entry to open asylum reception facilities** in 2015, at the height of the "refugee crisis" (see also Chapter 4.8 on the government's policy regarding asylum-seekers and the issue's prominent place in their agenda). The Commissioner **failed to reply to the HCLU's inquiry**, submitted in September 2015¹⁶⁹ **for a year and a half**, and when he finally did in December 2017, he informed the HCLU that he **terminated the investigation into the case without issuing a report**. As a reasoning for this step, the Ombudsperson submitted that "in the meantime, certain **open asylum reception** have been closed, and very few people are staying in the remaining ones, and so the **reception facilities are not in the focus of the attention of the media any more**", which renders the Commissioner's investigation **"obsolete"**.¹⁷⁰

In the view of the HHC, it was also problematic that in November 2013 the Commissioner refused to turn to the Constitutional Court upon the request of an opposition Member of the Parliament in relation to a voting rights issue. In the request, the MP claimed that the election rules adopted by the current governing majority after they won the national elections the first time in 2010 include **discriminatory rules: they allow Hungarian citizens living abroad without permanent residence in Hungary to vote also via mail ballot, while Hungarian citizens who live/stay abroad at the time of the elections but have a permanent residence in Hungary have to vote in person at diplomatic missions** (which in some cases requires them to travel large distances). However, the newly elected **Commissioner took the stance that the rules do not amount to**

¹⁶⁵ *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2015*, <http://www.ajbh.hu/documents/14315/2521732/REPORT+ON+THE+ACTIVITIES+OF+THE+COMMISSIONER+FOR+FUNDAMENTAL+RIGHTS+AND+HIS+DEPUTIES+2015/0700c63b-3ff3-46df-b899-142758775f9?version=1.0>, p. 19.

¹⁶⁶ *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2018 [Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2018]*, p. 198.

¹⁶⁷ <http://utcajogasz.hu/en/utcajogasz-en/>

¹⁶⁸ Case no. AJB-1087/2019

¹⁶⁹ See e.g.: <https://abcug.hu/az-ombudsmanhoz-fordult-a-tasz-mert-kizartak-sajtot-a-menekulttaborokbol/>.

¹⁷⁰ Case no. AJB-1954/2017. The response of the Commissioner was made available to the HHC by the HCLU.

discrimination.¹⁷¹ At the same time, **OSCE/ODIHR** concluded in its report on the 2014 national elections in Hungary that the different voting procedures as described above “for the two types of voters abroad was **at odds with the principle of equal suffrage**”, and noted that “[o]pposition and civil society representatives alleged that these differing modalities of voting rights were introduced for partisan reasons”.¹⁷² The latter views were later reaffirmed by the fact that in the 2014 and 2018 national elections, **about 96% of the mail ballots were cast on the governing party Fidesz.**¹⁷³

4.8. RIGHTS OF MIGRANTS

Since the spring of 2015 **the issue of migration has risen to the top of the Hungarian government’s agenda.** The government spent more than 100 million USD on xenophobic public-funded hate campaigns¹⁷⁴ while destroying the Hungarian asylum system step-by-step¹⁷⁵ and attacking and threatening those individuals and organisations that step up for the rights of migrants (see Chapter 4.9 of the present paper). These steps have led to the drastic deterioration of the situation of asylum-seekers and beneficiaries of international protection in Hungary, and migrants face **particularly serious systemic human rights violations.** Over the years of destruction and rampant human rights violations **the Commissioner has mostly remained silent and passive and at least once assisted the policies of the government.** The HHC, as well as other civil society organisations, called on the Commissioner several times to carry out his duties by launching investigations, referring laws to the Constitutional Court, or by conducting monitoring visits, but to no avail.

The most important asylum-related issues where civil society requested the Commissioner’s intervention were the following, in chronological order:

- *Detention of third country nationals at the Hungarian-Serbian border in August-September 2015:* Five members of the NPM’s Civil Consultative Body requested on 8 September 2015 that the Commissioner visits three facilities where third country nationals, including asylum-seekers waiting to be registered were kept in abysmal conditions according to reports of volunteers and medical staff working at these sites. The Commissioner visited one of the facilities and concluded that no formal procedure should be initiated by his office.
- *Fundamental changes to the Hungarian asylum system in September 2015:*¹⁷⁶ Six NGOs requested the Commissioner to conduct unannounced on-site visits at temporary camps where asylum-seekers, including small children and newborn babies were kept in makeshift tents without sanitary facilities in the unusually cold weather without heating and electricity; to address the severe restrictions included in the government’s legislative proposals concerning the asylum system and the introduction of a new state of emergency providing additional rights to law enforcement agencies, by requesting a constitutional review at the Constitutional Court; to tackle growing xenophobia and hate mongering by speaking up publicly and in particular to use his right to address the Parliament on this matter. The Commissioner responded on 14 January 2016 by reiterating Hungary’s international obligations but not addressing any of the concrete requests.¹⁷⁷ No constitutional review procedure was initiated by the Commissioner. The Council of Europe Committee on the Prevention of Torture (CPT) “was struck by” the very

¹⁷¹ The related statement of the Commissioner is available here: <http://www.ajbh.hu/en/kozlemenyek-archiv/-/content/Vs16gMj1ET14/az-ombudsman-a-magyarorszagi-lakohellyel-rendelkezo-valasztopolgarok-levelben-szavazasanak-kerdeserol>.

¹⁷² Hungary, *Parliamentary Elections 6 April 2014 – OSCE/ODIHR Limited Election Observation Mission Final Report*, <http://www.osce.org/odihr/elections/hungary/121098?download=true>, p. 10.

¹⁷³ See e.g.: <http://www.valasztasirendszer.hu/?p=1943608>.

¹⁷⁴ See details of these campaigns in the HHC’s submission to the UN Committee on the Elimination of Racial Discrimination regarding the eighteenth to twenty-fifth periodic reports of Hungary, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fHUN%2f34524&Lang=en.

¹⁷⁵ See details of the destruction in the HHC’s compilation of relevant information notes: <https://www.helsinki.hu/en/all-you-ever-wanted-to-know-about-what-happened-to-refugee-protection-in-hungary-since-2015-in-one-place/>.

¹⁷⁶ See details of these changes in the HHC’s related information notes of 18 September 2015: <https://www.helsinki.hu/en/no-country-for-refugees-information-note/>, and of 16 September 2015: <https://www.helsinki.hu/en/tightening-criminal-rules-targeting-refugees/>.

¹⁷⁷ The Commissioner’s letter to the signatory organisations, case no. AJB-286/2016

same legal changes following their visit to Hungary in October 2015.¹⁷⁸ The European Commission launched an infringement procedure against Hungary as a consequence of the new regulations in December 2015.¹⁷⁹ In July 2018, the Commission decided to refer Hungary to the Court of Justice of the European Union as a final step in the procedure.¹⁸⁰

- *The violent dispersal of the crowd at the border in Röszke on 16 September 2015*¹⁸¹: The HHC requested on 13 October that the Commissioner investigate the conduct of law enforcement in a letter that also contained detailed evidence of human rights violations and police violence committed against – among others – international journalists covering the events.¹⁸² On 23 November 2015, the Commissioner refused to carry out any investigation on the basis that he had no mandate to do so, although earlier very similar violations were investigated by other Ombudspersons. The actions of the Hungarian authorities were condemned by, among others, the UN High Commissioner for Human Rights.¹⁸³
- *Placement of asylum-seekers in temporary tent camps in winter despite adequate free capacities in proper reception facilities*: The HHC requested the Commissioner to intervene with the Immigration and Asylum Office on 9 January 2017.¹⁸⁴ By then the situation was widely reported in the Hungarian media and the local priest hosted asylum-seekers in the parish during the day so that they could warm themselves up in a heated room.¹⁸⁵ The Commissioner responded on 17 May of the same year, stating that although the temporary tent camp did not meet all the legal requirements, there were no reasons to initiate a formal procedure. This was understandable, as by the time of the response, the temporary camp was shut down.¹⁸⁶
- *Another set of fundamental changes to the asylum system entered into force on 28 March 2017 foreseeing, among others, the automatic and indefinite detention of all asylum-seekers with the sole exception of unaccompanied children under the age of 14 for the entire duration of their asylum procedure in so-called transit zones at the Hungarian-Serbian border*.¹⁸⁷ Six NGOs wrote to the Commissioner with detailed legal arguments and requested that he submits a constitutional review request to the Constitutional Court and conducts a monitoring visit to the transit zones.¹⁸⁸ The amendments were heavily criticized by key human rights stakeholders, including the UNHCR,¹⁸⁹ UNICEF,¹⁹⁰ the Council of Europe's Human Rights Commissioner,¹⁹¹

¹⁷⁸ Council of Europe Committee on the Prevention of Torture, *Report on the visit to Hungary from 21 to 27 October 2015*, 3 November 2016, <https://rm.coe.int/16806b5d22>

¹⁷⁹ Press statement of the European Commission of 10 December 2015, *Commission opens infringement procedure against Hungary concerning its asylum law*, https://europa.eu/rapid/press-release_IP-15-6228_en.htm

¹⁸⁰ Press release of the European Commission of 19 July 2018, *Migration and Asylum: Commission takes further steps in infringement procedures against Hungary*, https://europa.eu/rapid/press-release_IP-18-4522_en.htm

¹⁸¹ A summary of events with video recordings is available in English here: <https://budapestbeacon.com/what-really-happened-at-rozke/>.

¹⁸² The letter is available in Hungarian here: https://helsinki.hu/wp-content/uploads/roszke_ombudsman_kerelem_2015_10_13.pdf.

¹⁸³ Excerpts from the statement of the UN High Commissioner for Human Rights are available at: <https://www.reuters.com/article/us-europe-migrants-hungary-zeid/u-n-rights-chief-calls-hungary-callous-xenophobic-anti-muslim-idUSKCNORH1WS20150917>.

¹⁸⁴ The letter to the Commissioner is available here in Hungarian: <https://www.helsinki.hu/kinozzak-a-menekuloket/>. The Council of Europe Commissioner for Human Rights also criticised this in an interview in March 2017: <https://dailynewshungary.com/hungarian-foreign-minister-dismisses-european-criticism-hungary-migrant-policy/>.

¹⁸⁵ See e.g.: <https://www.magyarurir.hu/hirek/menekulteket-fogadott-be-kormendi-plebanos>.

¹⁸⁶ The case is described in detail here:

https://helsinkifigyelo.blog.hu/2017/05/26/majd_ha_fagy_dermeszto_kep_a_kormendi_menekultaborrol.

¹⁸⁷ For a summary of the changes in English, see: <https://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-rule39.pdf>.

¹⁸⁸ The letter is available here in Hungarian: https://www.helsinki.hu/wp-content/uploads/Level_dr_Szekely_Laszlonak_20170324.pdf.

¹⁸⁹ UNHCR press release of 7 March 2017, <http://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html>

¹⁹⁰ UNICEF Regional Director and Special Coordinator for the Refugee and Migrant Crisis in Europe's press release of 9 March 2017, https://www.unicef.org/media/media_95066.html

¹⁹¹ Press release of the Council of Europe Commissioner for Human Rights of 8 March 2017, <https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-hungary-s-new-law-allowing-automatic-detention-of-asylum-seekers>

and the Lanzarote Committee.¹⁹² The Commissioner neither submitted a constitutional review request nor visited the transit zones.

- *Starvation of detainees in the transit zones:* Beginning in August 2018, the Hungarian authorities started denying food from rejected asylum-seekers while detaining them in the transit zones. In each individual case interim measures had to be sought from the European Court of Human Rights in order to ensure that food is provided to those detained. Between 8 August 2018 and 30 August 2019, a total of 27 individuals were starved in detention.¹⁹³ This practice was heavily criticized by a wide range of actors, including the UN High Commissioner for Human Rights,¹⁹⁴ the UN Special Rapporteur on the Rights of Migrants,¹⁹⁵ the Council of Europe Commissioner for Human Rights,¹⁹⁶ and the UN Committee on the Elimination of Racial Discrimination.¹⁹⁷ On 18 September 2018, the HHC requested the Commissioner to conduct a visit to the transit zones and to request the constitutional review of the government decree that by omission provides an excuse to the authorities to deny food from detained foreigners. The Commissioner responded to the request on 14 December 2018: he visited one of the transit zones on a day when no person was deprived of food. The Commissioner also noted that denial of food would be in breach of the Fundamental Law, but concluded that no further steps are needed to be taken. After this statement, another 19 individuals were starved in detention.¹⁹⁸

There is one instance where the Commissioner acted proactively in relation to asylum-seekers: in December 2015, he requested the Constitutional Court to interpret,¹⁹⁹ among others, whether the decision of the Council of the European Union on the relocation of asylum-seekers from Italy and Greece²⁰⁰ is in breach of the prohibition of collective expulsion enshrined in the Fundamental Law.²⁰¹ (See also Chapter 3.3 of the present paper.) The Constitutional Court is yet to deliver a decision. The Commissioner's step is interesting in light of the government's strong opposition to the relocation scheme, a position that it found as crucial as to call a referendum on the subject in the beginning of 2016.²⁰² At the same time, when collective expulsion of unlawfully staying third country nationals was legalized by the governing majority in the summer of 2016, the Commissioner did not act in any way.²⁰³

According to official police statistics, between 5 July 2016 and 28 August 2019 a total of 26,734 collective expulsions took place from Hungary to Serbia. While **collective expulsions** of this scale and the consequent denial of the right to seek asylum they entail are in themselves serious violations of human

¹⁹² Letter from the Chairperson of the Council of Europe Lanzarote Committee to the Prime Minister of Hungary of 22 March 2017, <https://rm.coe.int/168070155a>

¹⁹³ For a list of cases see the continuously updated list here:

https://docs.google.com/spreadsheets/d/10V84xAVREKSScFwz4ME_2kfpBRV_CPqCr7SUKitE2o8/edit#gid=0.

¹⁹⁴ Press briefing notes of the Office of the UN High Commissioner for Human Rights of 3 May 2019,

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24551&LangID=E>

¹⁹⁵ End of visit statement of the UN Special Rapporteur on the human rights of migrants (Hungary, 10-17 July 2019) of 17 July 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E>

¹⁹⁶ Council of Europe Commissioner for Human Rights, *Report Following Her Visit to Hungary from 4 to 8 February*, 21 May 2019, <https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942f0d>

¹⁹⁷ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the combined eighteenth to the twenty-fifth periodic reports of Hungary*, CERD/C/HUN/CO/18-25, 6 June 2019, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fHUN%2fCO%2f18-25&Lang=en

¹⁹⁸ A summary of the cases is available here:

https://docs.google.com/spreadsheets/d/10V84xAVREKSScFwz4ME_2kfpBRV_CPqCr7SUKitE2o8/edit#gid=0.

¹⁹⁹ X/3327/2015, the submission is available in Hungarian on the Constitutional Court's site:

[http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/X_3327_0_2015_inditvany.002.pdf/X_3327_0_2015_inditvany.pdf).

²⁰⁰ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

²⁰¹ Fundamental Law of Hungary, Article XIV(2)

²⁰² See a summary about the referendum here: <https://www.theguardian.com/world/2016/oct/02/hungarian-vote-on-refugees-will-not-take-place-suggest-first-poll-results>.

²⁰³ Amendments to Act XXXIV of 1994 on the Police and to Act LXXX of 2007 on Asylum entered into force on 5 July 2016. The amendments prescribe that law enforcement escort to the external side of the border fence (that is, to Serbia) third country nationals without the right to stay in Hungary. More on this is available here: <https://www.helsinki.hu/en/hungary-latest-amendments-legalise-extrajudicial-push-back-of-asylum-seekers-in-violation-of-eu-and-international-law/>.

rights, many of these measures are reportedly violent. Despite ample reports²⁰⁴ and evidence²⁰⁵ as well as calls from numerous human rights bodies such as the CPT²⁰⁶ or the UN Human Rights Committee²⁰⁷ to put an immediate end to collective expulsions, **the Commissioner never addressed this issue.**

Finally, it shall be mentioned that when the UN Special Rapporteur on the human rights of migrants visited Hungary for an entire week between 10 and 17 July 2019, in an unprecedented move, he was unable to meet with the Commissioner: "I contacted them directly and was told that they were moving office."²⁰⁸

4.9. GOVERNMENTAL ATTACKS ON HUMAN RIGHTS NGOS

The period of 2013–2019 has been largely characterized by a series of **government attacks against human rights NGOs** in Hungary, resulting in **the violation of their freedom of association and freedom of expression.**²⁰⁹ These attacks formed an integral part of the Prime Minister's vision of establishing an "illiberal state", and have been **widely condemned by high-level international human rights stakeholders.** However, the **Commissioner of Fundamental Rights has remained completely silent** regarding the matter, and **has not used any of its powers** to tackle the violation of the rights of civil society organisations.

The series of attacks against Hungarian NGOs started in 2013, with **condemning public statements by high-ranking state officials**, alleging that certain NGOs serve "foreign interests"; an **illegitimate state audit** into the use of the EEA/Norway Grants NGO Fund; the **police raiding an NGO office** unlawfully; and **criminal and tax procedures** launched against NGOs distributing or supported by the EEA/Norway Grants NGO Fund. Although by 2016, the latter procedures were ceased or terminated without any criminal charges brought, the attacks against human rights NGOs continued, and became tied into the government's vigorous hate campaign against migrants, asylum-seekers and refugees, against "Brussels" (as in the European Union), and George Soros. Accordingly, as of 2017, the government has been primarily targeting NGOs providing assistance to asylum-seekers and migrants and/or receiving funding from the Open Society Foundations. The government launched an **all-out propaganda war**: the scope of attacks ranged from **NGOs being bashed by the Prime Minister and various high-ranking government officials**, through the country being flooded with government billboard posters blaring the need to "Stop Soros,"²¹⁰ to a **government-friendly newspaper publishing a list of the names of 200 persons as "Soros mercenaries"** (including NGO staff members, investigative journalists, and faculty members of Central European University).²¹¹

The attacks culminated in the first Hungarian law aimed at silencing NGOs, Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds (hereinafter **Foreign Funded Organisations**

²⁰⁴ See for example the Swedish Aftonbladet's extensive report from 5 March 2017 here:

<https://www.aftonbladet.se/nyheter/a/nolbn/flyktingarna-den-ungerska-polisen-misshandlar-och-torterar-oss>, or an English summary of the piece here: <https://budapestbeacon.com/clear-signs-systemic-violence-asylum-seekers-claims-doctors-without-borders-coordinator/>.

²⁰⁵ See for example the interview with colleagues of the HHC here: <https://atlatzo.hu/2017/03/20/a-laba-kore-tekertek-a-szogesdrotot-gyulnek-a-bizonyitekok-a-menekultek-elleni-rendori-brutalitasrol/>, or a report by Human Rights Watch, *Hungary: Migrants Abused at the Border*, 13 July 2016, <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>.

²⁰⁶ Council of Europe Committee for the Prevention of Torture, *Report on the visit carried out from 20 to 26 October 2017*, 18 September 2018, <https://rm.coe.int/16808d6f12>, pp. 9–19.

²⁰⁷ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Hungary*, CCPR/C/HUN/CO/6, 9 May 2018, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fHUN%2fCO%2f6&Lang=en, §§ 47–48.

²⁰⁸ End of visit statement of the UN Special Rapporteur on the human rights of migrants (Hungary, 10-17 July 2019) of 17 July 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24830&LangID=E>

²⁰⁹ For a detailed timeline of the attacks up until November 2017, see: Eötvös Károly Policy Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee – Transparency International Hungary, *Timeline of Governmental Attacks against Hungarian Civil Society Organisations*, 17 November 2017, http://www.helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_17112017.pdf.

²¹⁰ See e.g.: <https://www.bbc.com/news/world-europe-40554844>.

²¹¹ See e.g.: <https://apnews.com/6fc8ca916bdf4598857f58ec4af198b2>.

Act).²¹² The law prescribes that civil society organisations that receive “foreign” funds in the amount of at least 7.2 million HUF (approx. 25,700 USD) annually have to **register at court** as an “organisation receiving foreign funding”, have to **label themselves** as such on their websites and on all of their publications, and have to **separately report** their foreign funding. Non-compliance results in sanctions, such as fines, and, ultimately, the dissolution of the NGO. By referring to “foreign funding”, the law aims to discredit NGOs by alluding that they serve foreign interests; while the title of the law aims to hint that NGOs were not operating transparently prior to the adoption of the law, which is factually false.²¹³

The Foreign Funded Organisations Act was followed by further laws in the summer of 2018, titled the **“Stop Soros” legislative package**.²¹⁴ These laws created the criminal offence of “facilitating illegal immigration,” i.e. they **criminalized a range of otherwise legal activities aimed at assisting asylum-seekers**, and threatened them with a one-year imprisonment. According to the law, these activities include, but are not restricted to preparing or distributing information materials or organizing border monitoring. In addition, further amendments introduced a **25% “special tax on immigration”**, to be paid by the donors if they provide funds for “immigration-supporting” activities, such as carrying out media campaigns and media seminars, organizing education, building and operating networks, or “propaganda” activities that portray immigration in a positive light.²¹⁵ The latter law’s vague provisions pave the way for politically-targeted tax investigations of NGOs.

The above **laws were severely criticized by a variety of international human rights stakeholders**. Critics of the Foreign Funded Organisations Act included the **UN Special Rapporteur on the situation of human rights defenders** and the **Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**, who urged Hungary to withdraw the Bill before its adoption.²¹⁶ The **UN Human Rights Committee** stated that the “unreasonable, burdensome and restrictive conditions imposed” by the law on certain NGOs “appear to be part of an attempt to discredit [...] NGOs dedicated to the protection of human rights in Hungary.”²¹⁷ Furthermore, the law was severely criticized e.g. by the **Commissioner for Human Rights of the Council of Europe**,²¹⁸ the **Expert Council on NGO Law of the Council of Europe**,²¹⁹ the **Parliamentary Assembly of the Council of Europe**,²²⁰ and the **Venice Commission**.²²¹ The **European Commission** launched an infringement procedure because of the law, and in December 2017 it **referred Hungary to the Court of Justice of the European Union (CJEU)**.²²²

The “Stop Soros” laws and the special immigration tax also triggered strong international reactions: for example, in September 2018, **seven UN Special Rapporteurs** issued a joint statement, “decrying”

²¹² For an English translation of the law, see: <https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>.

²¹³ For a more detailed analysis of the law, see: Hungarian Civil Liberties Union – Hungarian Helsinki Committee, *What Is The Problem With The Hungarian Law On Foreign Funded NGOs?*, <https://www.helsinki.hu/wp-content/uploads/What-is-the-Problem-with-the-Law-on-Foreign-Funded-NGOs.pdf>.

²¹⁴ For an English translation of the laws, see: <https://www.helsinki.hu/wp-content/uploads/Criminalization-and-taxation.pdf>.

²¹⁵ In more detail, see: Hungarian Helsinki Committee, *Criminalisation and Taxation – The summary of legal amendments adopted in the summer of 2018 to intimidate human rights defenders in Hungary. Information Update*, 25 September 2018, <https://www.helsinki.hu/wp-content/uploads/Criminalization-and-taxation.pdf>.

²¹⁶ *UN rights experts urge Hungary to withdraw Bill on foreign funding to NGOs*, 15 May 2017, <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21617&LangID=E>

²¹⁷ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Hungary*, CCPR/C/HUN/CO/6, 9 May 2018,

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnm97%2bRfSonZvOyDICMC7to7lkIHViwiffCrixVJVYr7AYGd1bD3LqPwWx7fjwdowp0XO09j1KeHx2S0%2be4%2fGUZf4WEtz0X6rsDTnt6FAcrQ>, § 53.

²¹⁸ Commissioner for Human Rights of the Council of Europe, *Commissioner calls on Hungary’s National Assembly to reject law on foreign-funded NGOs*, 3 May 2017, <https://www.coe.int/en/web/commissioner/-/commissioner-calls-on-hungary-s-national-assembly-to-reject-law-on-foreign-funded-ngos>

²¹⁹ Expert Council on NGO Law, *Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad*, 24 April 2017, <https://rm.coe.int/168070bfb>

²²⁰ Parliamentary Assembly of the Council of Europe, *Resolution 2162 (2017) – Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University*, 27 April 2017, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>

²²¹ European Commission for Democracy through Law (Venice Commission), *Hungary – Opinion on the Draft Law on the Transparency of Organisations Receiving Support From Abroad*, 20 June 2017,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e)

²²² See: https://europa.eu/rapid/press-release_IP-17-5003_EN.htm.

the new rules,²²³ while **the UN High Commissioner for Human Rights** called the “Stop Soros” laws “shameful and blatantly xenophobic”.²²⁴ The **Venice Commission and the OSCE/ODIHR** issued two related joint opinions. They concluded that the provision establishing criminal liability for assisting migrants “infringes upon the right to freedom of association and expression and should be repealed”.²²⁵ Furthermore, they stated that the special immigration tax is “a disproportionate interference with [the NGO’s] right to freedom of association”, and it also violates their freedom of expression.²²⁶ In July 2019, the **European Commission referred Hungary to the CJEU** once again for the “Stop Soros” laws criminalizing activities in support of asylum and residence applications.²²⁷

As the summary above shows, the attacks against Hungarian human rights and watchdog NGOs clearly **constituted a pressing and politically sensitive human rights issue** in Hungary in the past years. **The complete silence of the Ombudsperson in the face of these rights violations signifies that it, once again, was not willing to confront the government in a high-profile issue important for the governing party.**

5. CONCLUSIONS

The main concerns regarding the independence of the Commissioner for Fundamental Rights in practice as the NHRI of Hungary and regarding its willingness to address pressing human rights issues may be summarised as follows:

- Both the acting and the future Commissioner for Fundamental Rights were **selected as candidates in a non-transparent and non-inclusive process**, in contrast to the recommendations of the SCA.
- The acting Commissioner for Fundamental Rights **has repeatedly failed to address at all or to address in an adequate manner politically sensitive and politically high-profile pressing human rights issues**. These included laws, measures and policies that were considered problematic by various international human rights stakeholders, but at the same time were politically important for the government.
- The performance of the current Commissioner for Fundamental Rights, taken together with the deficiencies of the selection process, raises serious doubts as to how independent the newly elected Commissioner for Fundamental Rights will be in practice.

For these reasons, **it would be desirable if during the Hungarian NHRI’s re-accreditation in October 2019, the SCA could look into and formulate clear recommendations regarding the issue of the Commissioner’s effective independence and would – with a view to assessing whether a special review might be needed – continue to monitor his performance in this regard even after the re-accreditation process is completed. Domestic stakeholders should facilitate such monitoring by providing reliable and balanced information on and assessment of the Commissioner’s activities.**

²²³ *UN experts decry Hungary’s tough new measures against migrants and civil society*, 11 September 2018, <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23533&LangID=E>

²²⁴ See e.g.: <https://www.reuters.com/article/us-hungary-soros-un/hungarian-stop-soros-laws-are-openly-xenophobic-u-n-s-zeid-idUSKBN1JH27S>.

²²⁵ European Commission for Democracy through Law (Venice Commission) – OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), *Hungary – Joint Opinion on the Provisions of the so-called “Stop Soros” Draft Legislative Package which Directly Affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration)*, 25 June 2018, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)013-e), § 104.

²²⁶ European Commission for Democracy through Law (Venice Commission) – OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), *Hungary – Joint Opinion on Section 253 on the Special Immigration Tax of Act XLI of 20 July 2018 Amending Certain Tax Laws and Other Related Laws and on the Immigration Tax*, 17 December 2018, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)035-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)035-e), § 78.

²²⁷ See: https://europa.eu/rapid/press-release_IP-19-4260_EN.htm.