CZECH CENTRE FOR HUMAN RIGHTS AND DEMOCRACY

Czech Republic Human Rights Review

Dear readers,

The Czech Centre for Human Rights and Democracy is proud to present a new issue of the Czech Republic Human Rights Review.

Searching for proportionality was the red thread of the major events that occurred in the Czech law in the "pandemic year" 2021. It is apposite that the Czech Charter of Fundamental Rights and Freedoms celebrated its 30th anniversary as highlighted by Tereza Kuklová in her opening essay.

Tereza further examines a parliamentary (in)competence to stop the government from declaring a state of emergency due to the Covid-19 pandemic and debates the major shortcomings of anti-pandemic measures. To get a glimpse at some particular violations, Nikola Sedláková examines the Constitutional Court's judgment concerning a general ban on retail sales. Daniela Matyášová then probes into the decision of the Supreme Administrative Court which annulled the mandate to wear a respirator.

The next part of our review could be described by the notion of "security." First, Tereza Kuklová introduces a controversial constitutional amendment regarding a right to defend one's life with the use of a weapon. Nikola Sedláková examines various issues of national security emerging from the annual report of the Security Information Service. Daniela Matyášová then moves to discuss whether a recognition of same-sex adoption may be viewed as a threat to the Czech sovereignty. In the last place, Kateřina Ochodková discusses the constitutional procedure of removing presidential powers relating to the unfavourable health condition of the Czech President.

Regarding the security of a person, Jana Koblasová examines the right to be provided with a placenta after childbirth and Nikola Sedláková sheds light on the judgment of the European Court of Human Rights concerning mandatory child vaccination.

Our review concludes with remarks written by Kateřina Ochodková regarding an interesting effect of the new electoral system on elections to the (Czech) Chamber of Deputies in October 2021.

Notwithstanding the difficult times, we wish you an enjoyable reading.

Pavel Doubek

Editor of the Czech Republic
Human Rights Review

Content

Front page photo: Pohled na Ústavní soud z Joštovy ulice, author: David Bernard

The Czech Charter of Fundamental Rights and Freedoms Has Celebrated 30 Years

Tereza Kuklová

"All people are free and equal in their dignity and rights. Their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable." This is the first article of the Charter of Fundamental Rights and Freedoms. In January 2021, the Charter celebrated the 30th anniversary of its adoption by the Federal Assembly. What gave rise to this document, and what is its significance today?

Unlike in some other countries such as Germany or Poland, human rights are not listed directly in the text of the Constitution in the Czech Republic. They are contained in a separate catalogue of human rights known as the Charter of Fundamental Rights and Freedoms (hereinafter referred to as "the Charter") which is the first comprehensive human rights document in the Czech territory. Although human rights were already enshrined in previous Czechoslovak constitutions, during the totalitarian regime the protection only existed "in books" and was not successfully invoked in practice.

The Defender of Human Rights

Although the Charter constitutes a part of the constitutional order of the Czech Republic, the legislature has never officially approved it as a constitutional act. The Charter was adopted on 9 January 1991 only as a resolution of the Federal Assembly (federal parliament of Czechoslovakia). Therefore, it was regarded as a mere decision to publish the text of the Charter in the Collection of Laws. The legal force was granted to the Charter consequently by an explicit reference in the text of the Constitution (Article 3). The Charter´s constitutional legal force is today subject to no controversy as apparent, for example, from the expert commentary to the Charter: *"The constitutional force of the Charter is nevertheless fully accepted in legal practice and clearly acknowledged by the Constitutional Court since the beginning of its operation."*

The bust of Alexander Dubček from Ľudmila Cvengrošová [1]

The Charter became a part of the Constitution of the Czech Republic on 28 December 1992, after being approved by the Czech National Council. The Charter was incorporated into the legal system of the Czech Republic without any change, so federal terminology still appears in certain provisions.

The Charter consists of 44 articles divided into six chapters. Each article regulates the relationship between an individual and a state power. Besides fundamental rights and freedoms, the articles also attend to the protection of the rights of national and ethnic minorities, economic and social rights, and the right to judicial and other legal protection.

The content of the Charter draws inspiration from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the European Social Charter, and also from the Czechoslovak Constitution of 1920.

The Crucial Session of the Federal Assembly

The bill of the Charter was put before the Federal Assembly on 8 January 1991. It was composed of two drafts created by the Slovak National Council and the Czech National Council, which were adapted to a united form by the constitutional committee of the Federal Assembly. However, the drafts of the two National Councils differed slightly on some points, so members of the Federal Assembly also discussed the final version of the Charter.

At the beginning of the meeting, Alexander Dubček, the chairman of the Federal Assembly, uttered: *"I consider the Charter of Human Rights to be a kind of moral code that shall work against despotism and arbitrariness in our society and enforce and strengthen the principles of morality and humanity, which have always been some of the most important elements for those who have fought for human rights in our lives."*

Dubček further stated that the Charter would serve as a guarantee of democratic values and would enable overcoming the deficiencies of the totalitarian regime in the field of human rights. He mentioned the most significant human rights declarations and emphasized the need to enshrine fundamental rights and freedoms at the constitutional level. He also added that the adoption of the Charter could lead to the acceptance of Czech application for a membership in the Council of Europe as the prerequisite for its admission was the acceptance of international principles and standards of human rights and freedoms.

Afterwards, the chairman of the Slovak National Council, František Mikloška, gave a speech and pointed out that the Charter was based on the inviolability and universal character of human rights. The next speaker, the chairman of the Czech National Council, Dagmar Burešová, declared: *"One of the basic features of the presented document is an effort to ensure that all regulated rights and freedoms are real. That means applicable and enforceable."*

After opening speeches, a debate was launched on the individual articles of the Charter and on the amendatory bills raised by particular legislators. When voting on the final draft of the Charter, almost all present legislators voted in favour. However, some Czech and Slovak legislators abstained from voting and several representatives of the Hun-

The seat of the former Federal Assembly [2]

garian minority even left the assembly hall as they believed the Charter did not take sufficient account of the rights of national minorities.

Significance of the Charter

By its adoption 30 years ago, Czechoslovakia committed to respecting international human rights standards, which enabled its gradual inclusion in the community of democratic nations. In addition, on 21 January 1991, Czechoslovakia was admitted to the Council of Europe, just like members of the Federal Assembly had hoped.[1]

However, the Charter has not only a symbolic value, but plays a crucial role in the protection of human rights and freedoms in the Czech Republic. The enshrinement of fundamental rights at the constitutional level transforms them into "public subjective rights" meaning that individuals can invoke the Charter´s provisions against the state through practical legal remedies. State, on the other hand, is obliged to ensure their effective protection and enforcement.

According to Article 4 of the Constitution of the Czech Republic, the fundamental rights and basic freedoms shall enjoy the protection of judicial bodies. Once the constitutionally guaranteed rights and freedoms are infringed upon by a public authority, the aggrieved individual may seek protection at general courts and consequently at the Constitutional Court through a constitutional complaint. [2] The Constitutional Court stands outside of the structure of general courts, as its principal role is to protect the Constitution and fundamental rights and freedoms.

Moreover, the jurisprudence of the Constitutional Court has reiterated that constitutionally enshrined rights and freedoms "illuminate" the entire legal system. That means that the entire process of creation, interpretation and application of law must be in accordance with constitutionally guaranteed rights and principles.

Three Decades with the Charter

In December 2020, a new commentary of the Charter was published. A group of authors consists of Faisal Husseini, Michal Bartoň, Marian Kokeš, et al.[3] The new commentary from the C. H. Beck publishing house is thus a certain successor to the one from 2012, which came from the Wolters Klu-

The Constitutional Court of the Czech Republic [3]

wer publishing house. The previous commentary was written by Eliška Wagnerová, Tomáš Langášek, Vojtěch Šimíček, et al.[4] In order to keep the content up to date, the Charter is repeatedly interpreted not only by the Constitutional Court but also by numerous legal experts.

The anniversary of the Charter reminds us that 30 years ago, the Czech Republic joined the universal human rights system. Alexander Dubček introduced the meeting of the Federal Assembly on 8 January 1991 with lofty words: *"We are on the threshold of revolutionary changes in our lives."*

The promulgation of the Charter as part of the constitutional order facilitated the formation of a system that protects anyone who feels deprived of their rights. Particularly in times of emergency, when the entire spectrum of fundamental rights is limited, it is essential not to forget the need to protect human rights and freedoms.

Notes

[1] However, on 31 December 1992, Czechoslovakia left the Council of Europe due to its disintegration. The Czech Republic and Slovakia subsequently became members of the Council of Europe on 30 June 1993.

[2] Article 87 (1) d) of the Constitution of the Czech Republic.

[3] Husseini, F., Bartoň, M., Kokeš, M., Kopa, M. a kol. 'Listina základních práv a svobod. Komentář. 1. vydání.' Praha: C. H. Beck, 2021, 1451 s.

[4] Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I. a kol. 'Listina základních práv a svobod. Komentář.' Praha: Wolters Kluwer, 2012, 931 s.

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Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I. a kol. 'Listina základních práv a svobod. Komentář.' Praha: Wolters Kluwer, 2012, 931 s.

Photographs

[1] The bust of Alexander Dubček from Ľudmila Cvengrošová. Teodor Banik busta Alexandra Dubceka, author: Peter Zelizňák, 21 April 2008, source: Wikimedia Commons, CC0.

[2] The seat of the former Federal Assembly. Národní muzeum – FS, author: VitVit, 20 October 2014, source: Wikimedia Commons, CC BY-SA 4.0.

[3] The Constitutional Court of the Czech Republic. Pohled na Ústavní soud z Joštovy ulice, author: Aleš Ležatka, source: Ústavní soud.

[4] The assembly hall of the Constitutional Court. Pohled do sněmovního sálu z předsálí, author: Aleš Ležatka, source: Ústavní soud.

The assembly hall of the Constitutional Court [4]

The Constitutional Court as Jekyll and Hyde: Was the Declaration of a State of Emergency in February 2021 Truly Unconstitutional?

Tereza Kuklová

The Constitutional Court of the Czech Republic has repeatedly ruled that the declaration of a state of emergency represents "an act of governance" that cannot be subject to judicial review. This view was reiterated in a resolution adopted by the Constitutional Court in March 2021. Notwithstanding that, the resolution also contained a thesis by which the Court actually negated its previous conclusion. What was the content of the controversial obiter dictum, and how did dissenting Justices comment on it?

The Constitutional Court adopted a controversial resolution [1]

In February 2021, the Chamber of Deputies refused to prolong the state of emergency due to the ongoing COVID-19 pandemic, however, the government subsequently declared a "new" state of emergency which began after the one ending. The government justified its decision by a request from regional governors who turned to the government under the Crisis Act.[1] According to the government, new circumstances arose, so it was possible to declare a state of emergency again.

Afterwards, a group of 35 senators (hereinafter referred to as "the petitioner") turned to the Constitutional Court (hereinafter referred to as "the Court") proposing the annulment of both the government's resolution by which a state of emergency was declared and all consequent governmental resolutions regarding crisis measures.

New State of Emergency or Actual Extension of the Previous One?

The petitioner was aware that the Court had refused to examine resolutions declaring a state of emergency due to its lack of jurisdiction in the past. He believed, however, that in the present case the principles of a democratic state and the system of checks and balances had been violated, which made the contested act open for constitutional review by the Court.

The petitioner stated that the government circumvented the decision of the Chamber of Deputies as well as the very purpose of the Constitutional Act on the Security of the Czech Republic. The newly declared state of emergency immediately followed the one that the Chamber of Deputies refused to extend. Moreover, the state of emergency was declared for the same reason as the previous one, and the request of the regional governors had no effect on that. The petitioner concluded that the previous state of emergency was actually extended, contrary to the will of the Chamber of Deputies.

Should the state of emergency already be terminated at the time of the decision of the Constitutional Court, the petitioner requested that at least an academic statement be issued declaring a violation of the principle of a democratic state.

An Unreviewable "Act of Governance"

The Constitutional Court referred to its earlier resolutions in which it repeatedly concluded that the decision to declare a state of emergency which does not contain specific crisis measures could not be reviewed by it. Such decision is in fact an act of political governance bearing no rights or obligations, hence remaining beyond the scope of the Court's judicial review.[2]

The review of the declaration of a state of emergency falls within the competence of the Chamber of Deputies, which is entitled to annul the declaration.[3] The Court pointed out that the Chamber of Deputies had done so in this case and annulled the declared state of emergency due to the entry into force of a new Pandemic Act.[4]

The Court held that it was entitled to review the decision declaring a state of emergency if it also contained some crisis measures prescribing generally binding normative rules of conduct. The very resolution declaring a state of emergency could be annulled by the Constitutional Court if and only if it contravened the fundamental principles of the rule of law and if it led to change the essential requirements for a democratic state governed by the rule of law.[5]

As the case under assessment did not meet the aforementioned reviewability criteria, the Constitutional Court rejected the motion due to lack of its jurisdiction.

On the other hand, that particular crisis measures adopted within the state of emergency might be subject to Court's judicial review. At that time, however, the measures in question were no longer in effect, hence making the judicial review inadmissible ratione temporis. For this reason the review of these measures had to be discontinued by the Court.

Obiter dictum

Surprisingly and quite contrary to this conclusion, the Constitutional Court stated in paragraph 22 a short *obiter dictum*, [6] describing how the provisions concerning the state of emergency should be interpreted. If the grounds on which the state of emergency was declared have not changed, the government cannot bypass the Chamber of Deputies and follow the ending state of emergency with a new one.

The Court further explained that the provision of the Crisis Act allowing regional governors to request the government to declare a state of emergency does not constitute an exception from the possibility of prolonging the state of emergency by the Chamber of Deputies. The regional governors may turn to the government only if the state of danger which they declared at their territories does not suffice to manage the crisis. The Court thus concluded that the requests of the regional governors must be necessarily preceded by the declaration of a state of danger. Furthermore, the central government is not bound by the requests of regional governors.

The Constitutional Court as a "Restrained Arbitrator"

Although the Justices of the Constitutional Court generally agreed with the majority decision, some of them delivered their dissenting opinions highlighting the controversies of the said *obiter dictum*.

Justices Jaroslav Fenyk, Josef Fiala, and Radovan Suchánek stated that the *obiter dictum* institute had been misused in a given case. The institute should not serve to communicate arbitrary statements, but it is supposed to complement the conclusion of the decision. In this case, however, the exact opposite was done: *"Here, the Constitutional Court is suddenly, unexpectedly and in an activist manner dealing with the merit of the case, which it claims to have no decision-making competence."* The three Justices found this part of the decision not only redundant but even inappropriate because the Court de facto concluded that the contested declaration of a state of emergency was unconstitutional.

The dissenting opinion of Justice Jan Filip further develops this view. He explained that in the continental legal system the *obiter dictum* was understood under the terms "even if". On that account, its use in the present case was incorrect as it did not

JUDr. Milada Tomková [5]

respond to the conclusion reached, but instead tried to answer the merit of the case. The wording used and the terse content of the statement only made many other questions arise. The effect on the government's future decision-making ability on a state of emergency is not yet clear.

The last dissenting opinion came from Justice Milada Tomková who joined the arguments in other dissenting views and underlined the necessity for predictability and indisputability of the Constitutional Court's decision-making.

Justice Tomková added with an exaggeration: *"As a result, the adopted resolution seems like a work by Robert Louis Stevenson, in which the Constitutional Court performs the 'dual role' of Jekyll and Hyde."* She concluded that if the majority of the plenary session had wished to comment on this pressing issue, it should have admitted the Court's competence to decide on the matter and deal with the merits.

The Main Message?

The Constitutional Court adhered to its previous opinions and stated that the review of the decision declaring a state of emergency fell within the framework of the constitutional-political review by the Chamber of Deputies. Although the Court refused to rule on the merits, it commented in a non-binding *obiter dictum* on the question of the constitutionality of the contested declaration of a state of emergency and even indicated that it was indeed unconstitutional.

In any case, one must agree with the conclusion of the dissenting Justices, Fenyk, Fiala, and Suchánek, who stated: *"This obiter dictum, which appears to be a kind of 'non-binding declaration' of the unconstitutionality of the decision declaring a state of emergency, will, of course, immediately become the 'main message' of today's resolution."*

The chairman of the Senate [3]

Notes

[1] According to Section 3 (5) of the Crisis Act, the regional governor shall immediately request the government to declare a state of emergency in case incurred danger cannot be effectively averted within a state of danger.

[2] In paragraph 13, the Constitutional Court explicitly refers to the resolution of file no. Pl. ÚS 8/20, Pl. ÚS. 11/20, Pl. ÚS 105/20, and Pl. ÚS 111/20.

[3] Article 5 (4) of the Constitutional Act on the Security of the Czech Republic.

[4] Act No. 94/2021 Coll., On Emergency Measures In the Event of an Epidemic of COVID-19 and On the Amendment of Some Related Acts.

[5] Article 9 (2) of the Constitution of the Czech Republic.

[6] *Obiter dictum* is an institute from the Anglo-American environment. It constitutes a legally non-binding note of a judge without the character of a precedent. It thus supplements the binding part of the decision that is *ratio decidendi*.

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Photographs

[1] The Constitutional Court adopted a controversial resolution. Ústavní soud České republiky, author: Janusz Jakubowski, 29 August 2018, source: Flickr, CC BY 2.0.

[2] JUDr. Milada Tomková, author: Vladimír Novotný, source: Constitutional Court.

[3] The chairman of the Senate, Miloš Vystrčil. MilosVystrcil, author: Občanská demokratická strana, source: Wikimedia Commons, CC BY 2.0.

What Are the Shortcomings of Anti--Pandemic Measures According to the Supreme Administrative Court?

Tereza Kuklová

The Pandemic Act authorises the Ministry of Health to issue emergency measures to eliminate the COVID-19 pandemic in the Czech Republic. Judicial review of these measures is entrusted to the Supreme Administrative Court which has already subjected many of them to severe criticism. Why were several anti-coronavirus measures either annulled and retroactively declared as unlawful by the Court?

The Ministry of Health (hereinafter referred to as "the Ministry") remains entitled to issue emergency measures under the Public Health Protection Act,[1] but only for a specified area and only for persons suspected of being infected. On the other hand, emergency measures under the Pandemic Act represent a special temporary authority for "the period of the pandemic emergency". Both categories of emergency measures must be rigorously justified.

Who is to Blame?

During the parliamentary interpellations held on 17 June 2021, the then Minister of Health, Adam Vojtěch, stated that until that day, the ministry had lost 17 legal disputes concerning emergency measures. By contrast, 65 cases resulted in a victory of the ministry and 35 proceedings were discontinued by the courts.

Due to the rising number of annulled and unlawful emergency measures, Minister Vojtěch launched an internal audit at the Ministry to investigate the process of how the emergency measures were adopted. The outcomes of the audit would be followed by potential further steps. It is worth noting that the said annulment decisions open the door to possible lawsuits for damages from those who have been affected by the unlawful measures.

Emergency measures are issued under the Pandemic Act [1]

In Violation of the Law

Although in the course of the proceedings before the Supreme Administrative Court (hereinafter referred to as "the Court") some measures have already been annulled by the Ministry, the Pandemic Act enabled the proceedings to continue. The Court could no longer annul the measures, but it was still entitled to declare them unlawful.[2]

Until 1 July 2021, a total of 23 emergency measures issued by the Ministry under the Pandemic Act failed to pass the review before the Court. However, only five of them were annulled (in full or in part), as the remaining 18 had already lost legal force by the time the decision was issued. The Court, therefore, only declared their unlawfulness.

The defective measures in question concern almost all areas of life that were restricted by the Ministry on the grounds of the COVID-19 pandemic. These namely included the testing of employees and self--employed persons, mandatory use of respirators and face masks, the restriction on the access to museums, galleries, social clubs, bars, closure of restaurants, casinos, schools, accommodation facilities, sports grounds, swimming pools, wellness, ski lifts, and also shops and services (see more regarding the decision in the Bulletin of June 2021, p. 27).

Serious Deficiencies in Reasoning

According to the Court, emergency measures were mostly declared unlawful due to their insufficient justification. The Ministry often failed to explain the necessity of the chosen regulation. Judge Jitka Zavřelová has stated in judgement concerning restrictions imposed on the operation of ski lifts and cable cars: *"The Ministry of Health also did not provide any arguments to justify the need for the chosen regulation. The Supreme Administrative Court does not claim that such arguments do not exist. However, it is not its job to seek or surmise these arguments instead of the opponent."*[3]

Furthermore, judgment from June 2021 dealing with emergency measures restricting access to the indoor premises revealed that the petitioner had fallen victim to illegal discrimination. The Ministry failed to include a condition of a positive laboratory test for the presence of antibodies against the COVID-19 disease among the requirements for entering indoor premises. Judge Tomáš Langášek emphasised that the Court was not authorised to determine the adequate level of antibodies, as this was the task of the Ministry. The Ministry was obliged to take that step since failure to regulate the area without giving sufficient reasons is unlawful.[4]

Judge Josef Baxa explained in the judgment from July 2021 that the Court *"puts emphasis on the proper justification of emergency measures so that they could be understood, not only by those who create them or by legal professionals, but above all else, by all individuals."* This was the case of a deficient justification of the emergency measures restricting catering and accommodation services. These measures were justified by the need to reduce the reproduction number (R) and to compare the effect of the measures with the interference with fundamental rights. Evidently, such a reasoning is incomprehensible for an ordinary individual.[5]

Repeated Overstepping of Authority

Furthermore, the flaws of emergency measures often related to the fact that they regulated areas which were beyond the scope of the Pandemic Act.

This was also the case of emergency measures prohibiting the presence of the public in the premises of catering services and casinos. According to the

According to the Court, the closure of schools was against the law [2]

Court, these services could not be restricted under the Pandemic Act simply because they did not fall within a list of situations covered by the Act. Judge Langášek further stated that *"it is not the task and mission of the judiciary to complete the law according to the opponents' wishes which results in harm of individuals and artificial persons. Their rights and freedoms, on the contrary, are meant to be protected by the Court."*[6] As a consequence, the Court has annulled the contested emergency measures.

Is Quality on the Decline?

The Pandemic Act entered into force on 27 February 2021. At that time, Jan Blatný was the Minister of Health. In total, six emergency measures adopted by Blatný's administration failed (at least partially) the subsequent judicial review conducted by the Court. Three of them were annulled, others were declared unlawful.

Nonetheless, the worst "score" was reached by his successor, Petr Arenberger (in office from 7 April to 25 May 2021). A substantial number of emergency measures adopted by Arenberger were subjected to a massive judicial criticism. At that time, the Court annulled two emergency measures and 15 were declared unlawful.

On 26 May 2021, Adam Vojtěch was re-appointed as Minister of Health and returned to his office. However, the wave of judgments dealing with the emergency measures in early summer 2021 did not yet concern the ones adopted under Minister Vojtěch, but instead it referred to emergency measures issued during his predecessors.

Future Outlook

It is beyond doubt that the legal quality of the emergency measures had a declining tendency and significant deficiencies were identified in measures adopted by ministers Vojtěch, Blatný and Arenberger. Currently, the Czech Republic has a new government based on the parliamentary elections in October 2021 and a new Minister of Health Vlatimil Válek took office.

At present, one can hope that the Ministry has changed its approach towards the constantly growing number of judgments and that it would adapt its next measures to their content. With respect to the efficiency of emergency measures and the legal certainty of citizens, it is certainly not appropriate for the measures to be immediately annulled by the courts.

In conclusion, let us quote from one of the above-mentioned judgments, where Judge Baxa commented on emergency measures as follows: *"As they (the emergency measures) (with some exaggeration) recall the time of oppression (previous totalitarian Communist regime) during which orders, prohibitions or restrictions were a common practice, they must not become 'the new state of normality'."*[7]

Some measures restricting catering services were also unlawful [3]

Notes

[1] Based on Section 80 (1) g) of Act No. 258/2000 Coll., on the Protection of Public Health, the Ministry of Health may issue emergency measures in the event of a pandemic according to Section 69 (1).

[2] Section 13 (4) of Act No. 94/2021 Coll., On Emergency Measures in the Event of an Epidemic of COVID-19 and On the Amendment of Some Related Acts.

[3] Judgment of the Supreme Administrative Court of 28 May 2021, file no. No. 8 Ao 14/2021.

[4] Judgment of the Supreme Administrative Court of 30 June 2021, file no. No. 6 Ao 21/2021.

[5] Judgment of the Supreme Administrative Court of 1 July 2021, file no. No. 1 Ao 5/2021.

[6] Judgment of the Supreme Administrative Court of 21 May 2021, file no. No. 6 Ao 22/2021.

[7] Judgment of the Supreme Administrative Court of 1 July 2021, file no. No. 1 Ao 5/2021.

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Photographs

[1] Emergency measures are issued under the Pandemic Act, author: fernandozhiminaicela, 18 April 2020, source: Pixabay, CC0.

[2] According to the Court, the closure of schools was against the law, author: klimkin, 12 December 2015, source: Pixabay, CC0.

[3] Some measures restricting catering services were also unlawful , author: Tama66, 19 July 2018, source: Pixabay, CC0.

A general ban on retail sales - a violation of human rights?

Nikola Sedláková

In February 2021, the Constitutional Court annulled part of a resolution of the Government of the Czech Republic which banned retail sales and providing of services - a measure against the spread of the COVID-19. Applicants claimed the violation of a right to engage in enterprise and other economic activity under Article 26 of the Charter of Fundamental Rights and Freedoms on the grounds of discrimination among entrepreneurs according to the assortment of goods.

According to a government resolution, a crisis measure was adopted, promulgated under No. 23/2021 Coll., concerning the ban on retail sales and provision of services with effect from 23 January 2021 to 14 February 2021. A group of 63 senators (hereinafter referred to as the "petitioner") challenged the legislation because the restrictions on retail trade and services imposed appeared to be disproportionate, discriminatory, and even infringed the rights guaranteed by the Charter of Fundamental Rights and Freedoms. [1] The appellant also alleged breach of the principle of legality, as there was a clear vagueness of the ban. Thus, individual entrepreneurs were not sure whether they were subject to the ban or not.

A major problem with these government measures is the fact that they are relatively short-lived, as new regulations are constantly being issued at short intervals to change or repeal the original crisis measures. The Constitutional Court (hereinafter referred to as the "Constitutional Court") emphasized that it did not question the existence of the legitimate aim of the measure, which is to prevent or at least mitigate the spread of COVID-19 and related health system failure and extensive damage to citizens' health and lives. However, even in such circumstances, it is still necessary to comply with the requirement of proportionality and clear justification, which is the core of the SC's finding.

Violation of fundamental rights

In its finding, the Constitutional Court primarily assessed whether there was a violation of the essence

A general ban on retail sales [1]

and meaning of fundamental rights, specifically economic, social, and cultural rights guaranteed by the Charter of Fundamental Rights and Freedoms. ÚS concluded that the challenged provision interferes with the right to do business. ÚS also applied a discrimination test, based on which different treatment was found - some entrepreneurs were banned and others were allowed. Based on these findings, the CC then applied a proportionality test.

According to the CC, the main question is whether the issued measure is sufficiently justified and whether different treatment with individual groups of entrepreneurs is adequate. It is debatable whether the objective pursued could not have been achieved in other ways, for example by means which would not infringe the fundamental rights of the entities concerned. The Constitutional Court found that the ban on retail sales and services with the exceptions presented in the contested measure can be considered discriminatory to some extent if someone can sell their goods and someone, for example offering a similar range, must have their premises closed. However, the government does not comment on

this key issue of the assessment of the established total ban on the sale of retail and the provision of services with certain exceptions. It is also unclear whether the government took into account the use of less restrictive means at all.

In its finding, the Constitutional Court stated that it was aware of the fact that the government was in a difficult situation. Due to the ongoing pandemic, the government is facing problems that are very difficult to solve in most cases. There is a clear lack of previous experience in dealing with similar problems of this magnitude. Moreover, even among experts, there is no consensus on how to regulate an extremely difficult situation. However, it must be emphasized that the government should be able to justify any such regulations and, above all, the reasons for such regulations should be comprehensible to the population. In a different case, the regulations lose their legitimacy. "We were not strict with the government. We understand that when the pandemic began in March 2020, it was a surprise to everyone. But now it is February 2021, "says Constitutional Judge Vojtěch Šimíček. [2]

The government in the role of a dictator?

The general ban on all retail sales and the provision of services in establishments, with so many exceptions that, according to the Constitutional Court, can be compared to a "telephone directory", lacks a clear reason why the government has chosen this solution. The government's decision must be made based on expert recommendations, which are based on available information not only about the disease but also about its spread. Although this is an extremely complex situation, it still does not give the government the power to do almost "anything". In an interview with Deník N, Constitutional Judge Vojtěch Šimíček informally commented: “We are not fifteen fools who do not perceive reality. But even in a crisis, power cannot be given to a dictator. "[3]

The SC also criticized how bans and restrictive measures were defined. Even at the time of the declared state of emergency, it is not possible first to ban more or less everything through legislation, without a more detailed explanation, and then, except for certain areas, to release the area affected by the ban. Although it is clear from the essence of the matter

Constitutional Court of the Czech Republic [2]

that some of the exceptions are necessary, such as the sale of drugs or many of them would need to be further justified to make it clear that there is no unacceptable arbitrariness on the part of the government, such as open florists or gun shops submitted by senators.

However, there was no consensus among the judges of the CC, on the contrary, the three judges presented their different opinions. The most serious can probably be considered the criticism of the vice-president of ÚS Jaroslav Fenyek, who talks about the deviation of ÚS from the principle of judicial self-restraint (restraint, self-restraint). The CC has accepted this principle in its decision-making for many years, as it stems from respect for the division of power in the state.

In conclusion

The Constitutional Court is fully aware of the seriousness of the current situation and the fact that the same demands cannot be placed on legal regulations as under normal circumstances. However, at the same time, this situation should not be used to the other extreme, i.e. to introduce invasive measures without any justification. It is unacceptable in a state governed by the rule of law that any act of a public authority, all the more so as it infringes fundamental rights, should not be clearly and convincingly justified.

Notes

[1] Articles 3, 4, 11 and 26 of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

[2] Mazancová, Hana a Tvrdoň, Jan. Nejsme patnáct bláznů, kteří nevnímají realitu. Ale ani v krizi nejde dát moct diktátorovi, říká ústavní soudce Vojtěch Šimíček. Deník N. 24 February 2021 (https://denikn.cz/569435/hodina-soudu-teprve-prijde-ani-v-krizi-tu-nemuze-vladnout-diktator-rika-ustavni-soudce-simicek/?fbclid=IwAR3jbZvJ5hJImO50ahADXeVnDMZQE-GiBUyxp7DcyMRiht-DVmdAVZoCp-2U).

[3] Ibid.

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The Constitutional Court annulled part of the resolution of the Government of the Czech Republic [3]

Mazancová, Hana a Tvrdoň, Jan. Nejsme patnáct bláznů, kteří nevnímají realitu. Ale ani v krizi nejde dát moct diktátorovi, říká ústavní soudce Vojtěch Šimíček. Deník N. 24 February 2021 (https://denikn.cz/569435/hodina-soudu-teprve-prijde-ani-v-krizi-tu-nemuze-vladnout-diktator-rika-ustavni-soudce-simicek/?fbclid=IwAR3jbZvJ5hJImO50ahADXeVnDMZQE-GiBUyxp7DcyMRiht-DVmdAVZoCp-2U).

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Photographs

[1] A general ban on retail sales. Obchodní dům Baťa Brno Česká vstup, author: Martin Strachoň (Bazi), 19 May 2010, source: Wikimedia Commons, CC BY-SA 3.0.

[2] Constitutional Court of the Czech Republic. Ústavní soud České republiky, author: David Bernard

[3] The Constitutional Court annulled part of the resolution of the Government of the Czech Republic. Andrej Babiš, premiér ČR, author: vjkombajn, 16 October 2018, source: Pixabay, CC0.

The Supreme Administrative Court Annulled the Emergency Measure Concerning Respirators for the Third Time

Daniela Matyášová

In its judgment, the Supreme Administrative Court again annulled the Ministry of Health´s extraordinary measure banning the movement and stay of persons in certain places without respirators. According to the Supreme Administrative Court, the ministry has ignored the court's previous decisions, and if it continues to do so, the court will next time annul a similar measure with an immediate or even retroactive effect.

The Ministry of Health (hereinafter referred to as "the Ministry") issued the annulled extraordinary measure on 29 June 2021 based on Article 69/1 (i) and Article 69/2 of the Public Health Protection Act. The measure prohibited all persons from moving and staying in certain places without respiratory protective equipment (typically a respirator or nano mask). The measure granted some exceptions to certain groups of people, such as children.

A petitioner, who sought the annulment of the emergency measure, argued that the measure was disproportionate. He emphasized that he suffers from respiratory diseases and has serious respiratory problems. He, therefore, insisted that the obligation to wear a respirator had an adverse effect on his health since the measure did not allow any exemption for people with a serious lung disease.

The measure was again non-reviewable

Despite the fact that the petitioner expressly requested the Supreme Administrative Court (hereinafter referred to as "the Court") to assess the measure in terms of its violation of the law and in terms of proportionality, the Court did not make this factual assessment and annulled the contested measure for non-reviewability [1]. Court stated that it was not possible to examine the case on merit since the measure in question lacked adequate reasoning.

There was a mandate to use airway protection in the Czech Republic [1]

The Court referred to the provisions of section 3 para 2 of the Pandemic Act, which also applies to measures issued by the Ministry on the basis of the Public Health Protection Act. Pursuant to Section 3 para 2, the Ministry must in the accompanying reasoning to the emergency measure take into account, first, the current analysis of the epidemiological situation of COVID-19, second, the specific level of risk associated with the defined activities, areas or other characteristics and third, the adequacy of the interference with the rights and legitimate interests of legal and natural persons.

The reasoning needs to assess the impact on different groups of people

According to the Court, the justification of the said emergency measure contained an up-to-date analysis of the epidemiological situation, but there was no consideration of the specific level of risk

associated with the defined activities (movement and stay of persons in certain places without respirators). Moreover, the Ministry did not assess the adequacy of interference to the rights of certain groups of people.

The Court thus called the contested measure non-reviewable on the grounds of the absence of reasoning. It was not clear whether and to what extent the Ministry has considered the risks associated with wearing of protective equipment for various groups of people. In particular those suffering from a serious illness whose wearing of respirators can cause health issues.

The Court has held that the Ministry must always weigh the risks and benefits of wearing a respirator. It goes, in particular, for persons who have been vaccinated or have already been infected with the COVID-19. If the Ministry continues to insist that it is not possible to grant an exemption for such people, it must duly justify this in an accompanying reasoning to the emergency measure.

The Ministry mechanically copied the reasoning from those used in previous measures

On top of that, the Court has underscored that it was *"surprising that the respondent, despite repeated court´s reproaches, did not proceed with a new reasoning (…), and, conversely, continues to recycle the reasoning, which the court repeatedly described as insufficient and contrary to law."*[2] The Court noted that the Ministry mechanically copies reasonings from already repealed measures and puts them into the new ones.

The Court also found a partial contradiction in terms of the words of the measure and its reasoning. Despite the fact that, according to the contested measure, nano masks were considered to be sufficient respiratory protection, the reasoning precluded such interpretation. In addition to the non-reviewability, the Court thus described the measure as incomprehensible.

At the end of the judgement, the Court admonished the Ministry that if the reasonings to the new me-

The Supreme Administrative Court repeatedly annulled the Ministry´s restriction [2]

asures continue to be "recycled", it would repeal a similar measure the next time with an immediate and retroactive effect. Until now, the Court has always left the Ministry with a period of several days to respond to the Court´s reproaches and to correct the errors by issuing a new measure.

The Ministry heard the warning

Soon after the judgment, the Ministry issued a new emergency measure, which already enshrined an exemption from wearing respirators for persons who *"cannot wear a respiratory protective device (...) for serious health reasons and are able to prove this by a medical certificate (...)."*[3] The new measure also contained an extended reasoning in which the Ministry dealt with the degree of risk stemming from wearing of respirators for individual groups of persons and the adequacy of the interference with their rights and freedoms. The question arises, however, whether the new reasoning will be sufficient for the Court.

Enforcement of imposed fines based on illegal measures

The repeated abolishment of extraordinary measures by the Court leads, due to the nature of the matter, to legal uncertainty for the citizens. At the same time, confidence in the enforcement of individual anti-epidemic measures is being undermined. According to constitutional lawyer Jan Winter, the courts will, in the future, revoke fines that were imposed on people for not wearing masks if an extraordinary measure imposing such an obligation had been subsequently revoked for its illegality by the Court.

Respirator [3]

The Ministry of Health´s residence at Palacky square in Prague [4]

Notes

[1] A court decision is generally considered to be non-reviewable when it is from the reasoning of the judgment not clear what reasons led the court to the decision.

[2] The Supreme Administrative Court´s judgement, 27 July 2021, No 8 Ao 17/2021-68, para 29.

[3] Emergency measure of the Ministry of Health, 30 July 2021, reference number MZDR 15757/2020-56/MIN/KAN.

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[1] There was a mandate to use airway protection in the Czech Republic. Man and mask COVID19 pandemic, author: Shanluan, 14 May 2020, source: Wikimedia Commons,CC BY-SA 4.0.

[2] The Supreme Administrative Court repeatedly annulled the Ministry´s restriction. Nejvyšší správní soud ČR I.jpg, author: Millenium187, 17 July 2011, source: Wikimedia Commons, CC BY-SA 3.0

[3] Respirator. 3M N95 Particulate Respirator.JPG, author: Banej, 23 June 2013, source: Wikimedia Commons, CC BY-SA 3.0.

[4] The Ministry of Health´s residence at Palacky square in Prague. Praha, Palackého náměstí, Ministerstvo zdravotnictví, banner.jpg, author: Aktron, 4 June 2020, source: Wikimedia Commons, CC BY-SA 4.0.

The Right to Use a Weapon: A Symbol, a Shot in the Dark, or a Possible Danger?

Tereza Kuklová

A controversial amendment to the Charter of Fundamental Rights and Freedoms entered into force on 1 October 2021. The right to defend one's own life or the life of another person with the use of a weapon is now constitutionally guaranteed under the conditions set by law. What is the significance of the "right to a weapon" which is now enshrined in the constitutional order of the Czech Republic?

The Senate-proposed amendment to the Czech Charter of Fundamental Rights and Freedoms was accompanied by contradictory reactions from the very beginning. As for the cause, the Charter was amended once in the past, when in 1998 the period of detention without the consent of the court was prolonged from 24 to 48 hours.

Symbolic Promotion of the Right to a Self-defence

The explanatory memorandum to the said amendment has explained that up to the present the right to a self-defence has only been protected by statutory regulation. According to one of the proposers of the bill, Senator Martin Červíček, the meaning of the amendment is primarily symbolic. It emphasises the importance of the right to life as the most fundamental right, without which other human rights cannot be fulfilled.

The proposers admit that the territory of the Czech Republic could be considered relatively safe in the long-term view. Nevertheless, some violence still occurs. The constitutional enshrinement of the right to use a weapon thus strengthens the awareness of the fact that everyone has the right to fight for their lives, even with an arm in hand.

However, the explanatory memorandum states that the main purpose of the amendment is entirely the constitutional enshrinement of the right to a self-defence, and not "arms regulation". Self-defence with

The constitutional order of the Czech Republic now includes a right to use a weapon [1]

a weapon is supposed to be just one of the possible responses to an attack. Anything that can be used in defence against an attack may be called a weapon. According to the proposers of the bill, the self-defence could be realised through cold weapons (e.g. a knife) which may be possessed without any legal restrictions or firearms that can only be owned and carried under the conditions stipulated by law.

Despite the European Union

The present amendment has been initiated by a petition raised particularly by huntsmen and other gun owners. The petition was signed by 102,000 people, including several constitutional officials. Its objective was to respond to the recently amended directive of the European Union [1] which aims to reduce arms ownership, including legally held weapons.

The Czech Republic unsuccessfully resisted the directive before the Court of Justice of the European Union (Court of Justice). Subsequently, however, the EU directive had to be implemented within the amendment to the Czech Weapon Act.

Martin Červíček held that the amendment to the Charter of Fundamental Rights and Freedoms shall serve primarily as a safeguard so that the right of self-defence will not be restricted in the future by EU law. He believed that the regulation of firearms possession by the EU will not increase the security of the European population, since criminals and terrorists obtain weapons from illegal sources.

However, it should be noted that the EU law has precedence over the law of EU member states as confirmed by the Court of Justice. This applies equally to both statutory and constitutional legislation. Hence, the current constitutional enshrinement of the right to use a weapon does not in itself ensure that everyone will always be able to invoke it as it may be contrary to the superior EU law.

The Question of Classification

The right to use a weapon has been included in an article of the Charter of Fundamental Rights and Freedoms protecting the right to life.[2] However, during the legislative process, an amendatory bill was submitted to the Chamber of Deputies recommending to insert the text of the amendment into the final provisions of the Charter.[3]

The amendment was propounded by the Senators [2]

The petitioner of the amendatory bill, legislator Vojtěch Pikal, explained that assigning the right to use a weapon exclusively to the protection of life may seem superior to other legitimate cases of use of the weapon. On those grounds, Pikal proposed to add the right to use a weapon to an article containing a general interpretation of the provisions of the Charter, so that this "newly established right" would apply to all fundamental human rights. Nonetheless, the amendatory bill was not accepted by the Chamber, hence the right to use a weapon now only concerns the defence of the right to life.

What Experts Say?

Although a part of the public welcomes the constitutional protection of the right to use a weapon, most experts remain sceptical and concerned. Constitutional lawyer Jan Kysela pointed out the ambiguity, uselessness and possible perils of the adopted amendment: *"The outcome could be even worse if it gives the impression that now any defence is possible simply because I do have a fundamental right enshrined in the Charter."*[4]

Advocate Jaroslav Ortman has labelled the amendment as a simple shot in the dark. He reminded that the Czech Criminal Code contained institutes of extreme necessity and necessary defence. Provided that the legal conditions are met, these institutes allow the use of a weapon in self-defence against an attack on health or property, not only against an attack on life. *"If this leads to an increase in the number of weapons, it is the wrong step. And if it results in a reduction, it is contrary to what they established as a fundamental right,"*[5] Ortman added, saying that the right to use a weapon should have never been stipulated by constitutional order at all.

The same opinion was shared by constitutional lawyer Jan Kudrna, who also criticised the assignment of the right to use a weapon to an article guaranteeing the right to life, as it meant possible killing. According to Kudrna, passing a new amendment of the Constitutional Act on the Security of the Czech Republic would be a much better arrangement than interfering with the Charter.

In addition, he is worried that the uncertainty regarding the position of the right to use a weapon in the Czech legal system (especially in connection with the extreme necessity and the necessary defence) could bring the amendment before the Constitutional Court of the Czech Republic within a year or two to.

Notes

[1] Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 On Control of the Acquisition and Possession of Weapons.

[2] The right to use a weapon now constitutes the second sentence of Article 6 (4) of the Charter of Fundamental Rights and Freedoms.

[3] The proposer of the amendatory bill suggested inserting the right to use a weapon in Article 41 as a new paragraph 3.

[4] Vaculík, Radim, Právo. 'Právníci: Právo na zbraň? Zbytečné a nebezpečné.' Novinky.cz. 22. 7. 2021.

[5] Ibidem.

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Photographs

[1] The constitutional order of the Czech Republic now includes a right to use a weapon, author: gmsjs90, 3 September 2020, source: Pixabay, CC0.

[2] The amendment was propounded by the Senators. Senat 2833, author: Krokodyl, 4 October 2011, source: Wikimedia Commons, CC BY-SA 3.0.

[3] The European Union endeavours to reduce possession of weapons, author: dimitrisvetsikas1969, 4 August 2018, source: Pixabay, CC0.

The European Union endeavours to reduce possession of weapons [3]

Security Information Service Annual Report 2019: What are the new threats the Czech Republic has to face?

Nikola Sedláková

The Security Information Service of the Czech Republic has issued an annual report in November 2021 examining several security threats that the Czech Republic faced. The activities of spies from Russia and China are at the forefront, but there are several other warnings. What security issues does the Czech Republic have to take into account? And is the work of the security service appreciated by the Czech politicians?

The Security Information Service (SIS) is one of the three intelligence services operating in the Czech Republic.[1] The areas covered by the SIS are determined by law [2] and the government is responsible for its activities. The findings of the SIS are forwarded to the government and the president of the Czech Republic. With governmental approval, the president can also assign tasks to the SIS.

One of the main tasks of the SIS is to obtain and evaluate information about foreign intelligence services which could endanger the Czech security or significant economic interests of the State. It also provides information on subversive activities that go against the democratic foundations and sovereignty of the Czech Republic as well as information relating to terrorism and organized crime.

Privileged information are submitted to relevant authorities (President of the Czech Republic, the Government, police, etc.) in the form of a classified report. The public can learn about the activities of the SIS through an annual report, which is publicly available. Compared to previous annual reports, the present annual report is written rather in a moderate language, providing less details on the SIS activities.

Russia and China: an ever-increasing threat

The new SIS annual report confirmed all the threats that have been anticipated in previous years. In the part dealing with the operation of the Russian secret services on Czech territory, the SIS does not bring any surprising new findings but rather confirms the long-term threats the Czech Republic is facing.

Logo SIS [1]

The report shows that all three key Russian secret services operate in the Czech Republic. These are the Russia's external intelligence agency (SVR), the Main Intelligence Directorate of the General Staff of the Armed Forces of the Russian Federation (GRU) and the Federal Security Service (FSB). Many of these agents operate under diplomatic coverage from the staff of the Russian Embassy in Prague. As in previous years, the number of Russian intelligence diplomats was very high.

The SIS considers the new trend to be risky as some pro-Russian propaganda and disinformation spreaders are not directly controlled or assigned by the Russian state yet still work for them. Moreover, these "activists" do not necessarily come from the Russian-speaking community but could include Czech citizens, which is even more alarming.

As for the Chinese spy networks, they have a slightly different strategy than the Russian Federation. According to the SIS, China is focusing more on

academic areas through various student exchange projects or the opening of joint research centers. For example, Czech academics were offered participation in training and conferences, while the expenses were covered by the Chinese side.

Although the intelligence of the two countries have different strategies, they have one in common: the Czech Republic belongs strongly to their area of interest.

Czech institutions under attacks of "state hackers"

Perhaps the most crucial part of the annual report is information on the penetration of Russian and Chinese "state hackers" (working for the local secret services) into the cyberinfrastructure of state institutions in the Czech Republic. There have been repeated attacks on the infrastructure and diplomatic networks of the Foreign Ministry, most likely carried out by Russia.

The seat of SIS [2]

An intrusion into the infrastructure of the Avast antivirus company, possibly by Chinese actors, was also registered. Thanks to the SIS warning of a possible attack, Avast company, in cooperation with counterintelligence, was able to take appropriate measures to ensure the protection of users' data.

Possible future threats - democracy at risk?

Recently, there has been a discussion about awarding a state contract for the completion of the Dukovany nuclear power plant. Although this is an important security issue, it is analyzed very cautiously by the SIS annual report. See, for example, the excerpt of the SIS report in this regard: *"The SIS has increasingly focused, inter alia, on risky activities related to strategic energy projects."* One can only speculate why the SIS does not address this issue in more detail.

According to the SIS, both China and Russia should be excluded from the tender for the completion of the Dukovany nuclear power plant. However, it is alarming that the president of the Czech Republic is strongly against this opinion and, on the contrary, claims that this contract should be won by one of these countries. [3]

The SIS also monitored possible efforts to illegally influence the results of the European Parliament elections in May 2019. It dealt with this due to the growing disinformation scene, which seeks to spread pro-Russian narratives and conspiracy theories.

A security threat is also the identified attempt to export tank engines from the Czech Republic to North Korea - a country with a totalitarian regime. Overall, the SIS report deals with arms exports to embargoed countries much more than usual.

The SIS Criticism

Most politicians consider the work done by the SIS to be very positive and beneficial, except for the president of the Czech Republic. Miloš Zeman has criticized the activities of the information service for a long time (describing the SIS as "incompetent"), especially its current director, Michal Koudelka..

I believe that the criticism of the SIS should be based on objective facts and done in a constructive way. For example, it is possible to request outcomes from the SIS or to entrust it with specific tasks, as provided by law. The president's criticism does not seem to be reasonable and driven by intentions to make its work more effective. Particularly alarming is the president's recent request to the SIS to provide the names of Russian intelligence officers in the Czech Republic. Although the president has the right to ask the secret service to provide some information, revealing information of such nature could endanger many people and jeopardize a number of operations. It is also a question whether such a request meets the requirements stipulated by the Czech law.

As mentioned above, the 2019 SIS Annual Report is more cautious than the previous ones. One possible explanation would be to avoid a public criticism of the president. This would also explain why the SIS is less specific in its report on some topics.

Notes

[1] The second intelligence service is the Office for Foreign Relations and Information (Civil Intelligence Service), which deals with information from abroad. The third intelligence service is Military Intelligence, which combines counterintelligence and intelligence activities and focuses primarily on defense-related information.

[2] Act No 153/1994 Coll. on Intelligence Services of the Czech Republic as amended

[3] Kabrhelová Lenka. Rusko a Čínu raději nezvat, radí experti. Praha: Podcast Českého rozhlasu Vinohradská 12. 23 November 2020.

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[2] The seat of SIS. Nárožní, BIS a XXXLutz, author: ŠJů, 27. September 2011, source: Wikimedia Commons, CC BY-SA 3.0.

[3] Miloš Zeman. Milos Zeman 2019-02336, author: Pelz, 13 June 2019, source: Wikimedia Commons, CC BY-SA 3.0.

Miloš Zeman [3]

Sovereignty of the Czech Republic regarding the recognition of adoption of a child by homosexuals abroad

Daniela Petržilková

In December 2020, the Constitutional Court rejected a proposal to repeal part of a provision of the Act Governing Private International Law. This provision prevents courts from recognizing adoption decisions issued by foreign courts when a child is adopted by a homosexual couple. What considerations led the Constitutional Court to this conclusion?

Pursuant to the provisions of Section 63 para 1 of the Act Governing Private International Law (hereinafter refer to as "the Act") [1], a court may not recognize an adoption decision issued by a foreign court if (i)it would be contrary to public order, (ii) the exclusive jurisdiction of Czech courts would impede it, or (iii) adoption would not be permissible under the Czech law.

Czech Republic has no obligation to recognize foreign court's decision on adoption [2]

Dissenting Justices believe that the child best interests shall prevail over the legislator´s discretion [1]

The story began at the Municipal Court in Prague which dealt with a recognition of a US court´s decision regarding adoption of two children by a homosexual couple – a Czech citizen and a citizen of Trinidad and Tobago. The court concluded that part of the provision of Section 63 para 1 of the Act is unconstitutional (requirement that the adoption must be permissible under the Czech law). It therefore turned to the Constitutional Court and proposed an annulment of the said requirement.

The merit of the case concerns the provisions of the Czech law which only allows spouses to adopt a child together. As a result, adoption of a child by a homosexual couple is not legally permissible, hence a foreign court decision on adoption of a child by homesexual couple could not be recognized by the Czech courts. According to the Municipal Court, this provision thus fails to provide protection of the constitutional right to a family life of the adoptive homosexual parents.

Sovereignty of the Czech Republic as a basic argument

In the analysed judgment, the Constitutional Court emphasized that the Czech Republic is a sovereign

state pursuant to Article 1 para 1 of the Constitution. The basic manifestation of state sovereignty is, among others, the exercise of jurisdiction in relation to events and persons in its sovereign territory. It is therefore up to each sovereign state whether to recognize a certain judgment issued by a foreign court and under what conditions.

Therefore, according to the Constitutional Court, if the Czech legal system does not allow the recognition of a foreign judgement regarding adoption of a child by a homosexual couple, it should be regarded as a manifestation of the Czech jurisdiction over its territory.

There is no human right to adopt a child

The Constitutional Court also referred in its reasoning to its previous ruling according to which it is in accordance with the Constitution, if the Czech law gives a preference to the institution of marriage, even in the context of adoption.[2] The Constitutional Court emphasized on another occasion that there exist no fundamental human right to adopt a child.[3]

The Constitutional Court, therefore, concluded that a negative decision on adoption *"cannot violate a right to a family life."* According to the Constitutional Court, the Section 63 para 1 of the Act only means that the *"factual reality"* of life in a foreign state does not acquire *"any special significance"* compared to the same reality in the Czech Republic.

At the end of its ruling, the Constitutional Court emphasized that the best interests of a child may not always be the only consideration and a decisive viewpoint in every situation. It is thus up to the legislator to lay down generally binding rules for adoptions, including the rules for recognition of adoption decisions issued by foreign courts.

Dissent: Abstract principles must not prevail over the best interests of a child

Justices Pavel Šámal, Kateřina Šimáčková and Vojtěch Šimíček expressed a common dissenting position to the present ruling. In their view, the Constitutional Court should have annulled the contested provision for the violation of right to a family life under Article 10 para 2 of the Czech Charter of Fundamental Rights and Freedoms and Article 8

Protest march for homosexuals' rights [3]

of the European Convention on Human Rights. The dissenting justices criticized the fact that the majority of the plenum disregarded these articles in its ruling.

It stems from the case law of the European Court of Human Rights ("ECtHR") that stable same-sex couples meet the characteristics of family life under certain conditions. The existence of a family is therefore a factual question. According to the dissenting justices, the case under consideration is nothing more than an acceptance of the already existing legal status by the Czech legal order. It is, therefore, not credible that the Czech courts would award higher value to the factual reality of life abroad, as most of the plenum claims.

In the dissent, the justices examined in detail the relevant case-law of the ECtHR. They concluded that the ECtHR has repeatedly emphasized the importance of legal recognition of family life. Legal recognition of a family is crucial, for example, in the case of hospitalization of a child, because only under the condition of family recognition will its adoptive parents have the right to information about the child´s health, etc.

The dissenting justices also criticized the majority plenary´s view that the best interests of a child in this case must give way to another value, which is the legislator´s political discretion. They insisted that non-recognition of a foreign decision on adoption of a child by a homosexual couple is contrary to the best interests of the child, which is protected by Article 3 of the Convention on the Rights of the Child.

Constitutional Court [3]

Conclusion

Child adoption by homosexual couples is a controversial issue in the Czech Republic. The legislation itself prioritizes a formal institute of marriage in the context of child adoption, hence make adoption by same-sex couples impossible. The analysed Constitutional Court judgment makes a step further by deriving the current policy from the principle of state sovereignty. Put it in a nutshell, the non-recognition decision of foreign decision on adoption by same-sex couples demonstrates the execrcise of national soverignty and thus is not in conflict with the constitutional order ofthe Czech Republic.

The Constitutional Court ruling is rather controversial and it is likely that parties of the proceeding will seek for a justice before the ECtHR.

Notes

[1] Act No. 91/2012 Coll., Act Governing Private International Law

[2] Ruling of the Constitutional Court of 19 November 2015, no. Pl. ÚS 10/15

[3] Ruling of the Constitutional Court of 14 June 2016, no. Pl. ÚS 7/15, para 35

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[1] Dissenting Justices believe that the child best interests shall prevail over the legislator´s discretion. Family Portrait, author: Eric Ward, 11 October 2007, source: Wikimedia Commons, CC BY 2.0.

[2] Czech Republic has no obligation to recognize foreign court's decision on adoption. Joy on the swing, author: VanessaQ, 16 October 2011, source: Wikimedia Commons, CC BY-SA 3.0.

[3] Protest march for homosexuals´ rights. Prague Pride 2014 Václavské náměstí (01), author: Lukáš Bíba pro Prague Pride, 16 August 2014, source: Wikimedia Commons, CC BY-SA 4.0.

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Article 66 of the Czech Constitution: A Tool to Protect a President, or a Means of Removing a Political Opponent?

Kateřina Ochodková

In connection with the unfavorable health condition of President Miloš Zeman, Article 66 of the Constitution became the focus of attention. It was not activated, but the debates in the fall outlined what a removal of presidential powers could look like.

Miloš Zeman was hospitalized immediately after the parliamentary elections. This was his second stay in Prague's Central Military Hospital (CMH). In mid-September he had only been there for about a week, but he spent almost a month in the intensive care unit there after the elections.

Due to insufficient information about Zeman's health condition, a Senate President, Miloš Vystrči, requested information from CMH on his ability to exercise a presidential mandate. Subsequently, the Senate Commission for the Constitution stated that the requirements for activating Article 66 of the Constitution were met.

Activation of Article 66 of the Constitution: Prerequisites and Consequences

Article 66 regulates a substitute exercise of the powers of the head of state by other constitutional authorities if the president is unable to exercise his official duties for serious reasons. As a procedural prerequisite for application of the said provision, both chambers of the Parliament of the Czech Republic, the Chamber of Deputies, and the Senate, must agree on this by adopting a resolution.

However, the Constitution does not specify the notion of serious reasons and the article has never been used for this reason. The term "serious reasons" has been so far interpreted only in doctrine. These are, for example, serious illness or surgery, capture of a head of state by foreign army, being a missing person, a long stay abroad, etc.

Miloš Zeman [1]

The aim of article 66 is to protect the performance of the office of the President by ensuring the continuous performance of certain state functions. Serious reasons leading to the inability to exercise the presidential powers must therefore be objective in nature. At the same time, they must relate to the performance of the office of the President as a whole, not only to partial functions.

The President can Defend Himself against Parliament's Action

The President's procedural defense lies in his power to propose to the Constitutional Court that the resolution in question be annulled. He may submit this proposal that he is no longer able to exercise his powers within 10 days of the adoption of the resolution by the chambers of the Parliament. The Constitutional Court would then have to order an oral hearing within five days of receiving the motion and make a decision within 15 days of receiving it. Such a procedure is thus limited by relatively short terms.

The Constitutional Court will then assess whether at the time of the adoption of the resolution of the chambers of the Parliament the constitutional guarantees were met. In other words, were there truly serious reasons preventing a President from exercising his office. Noteworthy, if the president succeeds, he retakes his office, however the presidential acts adopted meantime by substitute mechanism remain in place.

The Senators have Previously Dealt with the Application of Article 66

The Senate Commission for the Constitution has already addressed the application of Article 66 at its meetings in June and July of 2021 in connection with alleged violation of presidential duties by President Zeman. [1] This mostly concerns the Vrbětice case (subversive activities of the Russian Federation on the Czech territory). The Senate Security Committee was tasked to prepare an analysis of Zeman's controversial activities during his presidency..

On the basis of the analysis, the Senate Security Committee recommended to the Senate to adopt a resolution under Article 66 stating Zeman's inability to hold the office of President. [2] However, the members of the Senate Commission for the Constitution as well as the members of the Committee on Legal and Constitutional Affairs did not consider the conclusions of the analysis to provide sufficient grounds for application of Article 66.

With the exception of Senator Pavel Fischer, the rapporteur for the analysis, the senators highlighted the need to regard Article 66 as a tool to protect the presidency, not as a means for bringing Zeman to political accountability. According to the senators, the latter should be addressed by the constitutional charge for high treason or gross violation of the Constitution under Article 65, not Article 66.

Senator Miroslava Němcová stated the following: *"At the moment when I have to assess whether the institute of the president should be affected by the decision to remove those powers, I must not think that Miloš Zeman is sitting there, that I do not agree with his steps, I do not agree with his views. I must consider whether the requirement of Article 66 of the Constitution, which states that the President is unable, even temporarily, to perform his powers, is met. It is not said here whether he performs it well, badly, miserably, or on the edge of the Constitution. What is said here is that he is unable to perform his powers."* [3]

Ministry of the Interior of the Czech Republic [2]

The End of the Debate on Article 66?

Fortunately, Zeman's conditions improved in November and he was transferred to the standard hospital unit. Therefore, according to the Senate Commission, it would not be necessary to deal with the situation further if Zeman was able to exercise his presidential mandate, at least his significant powers. [4] At the end of November, Zeman was transferred from the CMH to his seat in Lány, where he appointed a new prime minister (Petr Fial)and began discussions with ministerial candidates. In mid-December, he appointed Fiala's government.

In light of recent developments, the debate on Article 66 seems to be over for now. However, it cannot be ruled out that Zeman's state of health will deteriorate in the future and therefore there might be a future need to consider application of Article 66. The fall debate on the article was thus at least useful for reminding that there is a difference between the situation when a President cannot exercise his powers and the situation when a President simply does not want to exercise them.

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Prague Castle, a seat of the Czech President [3]

Notes

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[2] 66. usnesení Výboru pro zahraniční věci, obranu a bezpečnost. Senát. 2. 6. 2021. (https://www.senat.cz/xqw/webdav/pssenat/original/99622/83635)

[3] Rozsypal, Michael. Němcová: Zbavení pravomocí prezidenta? Musíme být ve střehu. Zeman rozvrátil stát. Aktuálně.cz. 10. 11. 2021 (https://video.aktualne.cz/dvtv/nemcova-zbaveni-pravomoci-prezidenta-musime-byt-ve-strehu-ze/r~4a6d177641a411ec98380cc47ab5f122/

[4] 11. usnesení Stálé komise Senátu pro Ústavu ČR a parlamentní procedury. Senát. 9. 11. 2021. (https://www.senat.cz/xqw/webdav/pssenat/original/101562/85228)

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[1] Miloš Zeman. Zeman M 1, author: David Sedlecký, 5 May 2013, source: Wikimedia Commons, CC BY-SA 4.0.

[2] Art. 66 was discussed by the Senate Commission for the Constitution. Senat 2833, author: Krokodyl, 4 October 2011, zdroj: Wikimedia Commons, CC BY-SA 3.0.

[3] Prague Castle, a seat of the Czech President. Prague Castle and the Mala Strana district of Prague.JPG, author: Janmad, 21 July 2009, source: Wikimedia Commons, CC BY 3.0.

The Constitutional Court has emphasized the autonomy of the mother's will and ruled in the dispute over the releasing of the placenta

Jana Koblasová

The Constitutional Court´s ruling from March 2021 dealt with the right to release a placenta to the mother and other related rights. Although the applicant lost the case, the court expressed its view regarding the possibility to refuse a release of the placenta to the patient. The Court's arguments may be a welcome guidance for healthcare professionals on how to administer similar cases in the future.

The applicant sought damages of 500,000 CZK before the district court as compensation for non-pecuniary damage. This non-material loss has arisen while providing health-care services by the company ALMEDA corp(defendant before the district court). The complainant alleged, inter alia, that her birth wish was not respected, hospital failed to ensure a valid informed consent to the performed medical procedures, delivery was accelerated, she was forced to push out placenta)[1] and that placenta was not released to her.

The district court did not award damages because, according to the judge, the acts performed were in accordance with requirements of medical science and pursued the goal of protecting the health of the child, and even the mother. The court also referred to Section 91 of the Health Services Act, according to which body parts removed in connection with the provision of health services are cremated and therefore the defendant cannot be blamed for complying with the statutory obligation.

The regional court (acting as a court of appeal) upheld the district court's decision. It noted that, since the placenta was infected with the herpes virus and the tissue was already rotting, it was unsuitable for the purpose for which the complainant had requested it (for consumption). The regulation in the Act on Protection of Public Health, which was applicable at the time of childbirth, should be applied to the case.

Illustration image [1]

The applicant subsequently appealed to the Supreme Court, which rejected it as unfounded. According to the Supreme Court, the legal provisions concerning cremation provide a health-care institution no other options regarding administration of parts of the human body than to cremate them or use for some medical purposes. [2] When the applicant exhausted all remedies before the general courts, she turned to the Constitutional Court where she reiterated the same arguments as those expressed before the general courts.

Assessment of the course of childbirth

As for preformation of medical interventions (accelerating childbirth, administering antibiotics, etc.) without informed consent, the Constitutional Court (the Court) notes that the right to inviolability of a person under Article 7 para. 1 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") is not an absolute right. This right may be infringed upon in order to protect another fundamental right or constitutional value. In the present case, it was necessary to consider and protect the life and health of the child.

The Court has already specified in previous case law [3] the need to protect the rights of the unborn child. However, even in a situation where the fundamental rights of the mother are restricted in order to protect the life and health of the child, it is necessary, according to the Court, to insist that such an intervention is proportionate.

The Court relied on a factual conclusion, which follows from the medical records and an expert opinion and concluded that the general courts had correctly assessed the nature and adequacy of medical interventions and found a fair balance between constitutional values. The Court has further pointed out that it was the complainant herself who refused to be acquainted with the content of the informed consent, hence she cannot claim that the defendant failed to provide her with the informed consent.

For the above reasons, the Constitutional Court did not find this part of the complainant's arguments to be justified.

Assessment of the rejection to release a placenta

The Constitutional Court did not agree with the reasoning of the Supreme Court's decision regarding the non-issuance of the placenta. According to the Court, the constitutional conformity of the interpretation of the Act on Protection of Public Health must be examined. However, such examination must be preceded by addressing the key question of whether there exists a right to release a placenta which stems from fundamental rights and freedoms.

The Court underscored that the basic value on which the constitutional order is based is respect for the freedom of individuals contained in Article 1 of the Charter.Freedom is an essential part of a democratic state governed by the rule of law and includes the ability of individuals to make their own choices about the way they live. The State can intervene in these decisions only minimally. In previous case law [5] the Court emphasized that the institution of free and informed consent to any medical procedure is based on the recognition of the legal personality of each individual and their freedom to make decisions on their body.

The case law of the European Court of Human Rights represents a similar view, in particular the

Illustration image [2]

judgment of Jehovah's Witnesses of Moscow and others v. Russia. In this case as well, respect for human dignity and human freedom are emphasized, together with the principle of self-determination and personal autonomy. Provisions protecting human dignity and freedom can also be found in the Civil Code (§ 3 para. 1, § 81 para. 1).

The fundamental rights of respect for the freedom of individuals anchored in Article 7 para 1 and Article 10 para 2 of the Charter were of the utmost importance for the Constitutional Court in this matter. As these fundamental constitutional postulates spread through the entire legal system including statutes such as the Act on Protection of Public Health, they must be taken into account whenever the statutory provisions are applied and interpreted.

As a consequence, although the Act on Protection of Public Health does not allow the release of body parts (such as placenta) at the request of an individual and stipulates the obligation for the health-care institution to cremate them , it is not appropriate to entirely disregard the individual's wishes and fundamental rights.

In the opinion of the Constitutional Court, the statutory order to incinerate the placenta must be interpreted in a way that the placenta may be cremated if and only if the mother does not request for it and if there are no serious reasons justifying the rejection of the request. To sum up, the Court held that the legal ways on how to deal with the placenta are listed demonstratively in the law, hence permitting other ways (such as the release to the mother as noted above).

According to the Constitutional Court, the requirement to release a placenta to the mother is a manifestation of her personal autonomy and has constitutional protection.

The Constitutional Court has determined that placenta must be perceived as the most internal bond between mother and her child. It is not up to the general courts, not even the Constitutional Court, to assess the personal motivation of mothers to get the placenta. Thus, the Constitutional Court does not share the thesis of an a priori refusal to release the placenta justified by a flat-rate interest in the protection of public health.

However, when granting protection for the right to obtain a placenta, it is at the same time necessary to protect other constitutional values and rights of other persons. Put it differently, it is necessary to examine the proportionality of the restrictions imposed upon the fundamental right to obtain a placenta. Of course, there are reasons why placenta release is unacceptable, such as the case when it shows signs of pathology.

Ilustration image [3]

Conclusion

The CIn view of the above, the court held that it is not possible to accept the interpretation of the general courts, which deny mothers the right to release a placenta. It is true, however, for the present case that the applicant did not have the right to be provided with a placenta, as it was in a pathological condition. The Court concluded that rejection to release the placenta did not constitute an interference with the applicant´s fundamental rights. The Constitutional Court thus dismissed the complaint.

Notes

[1] Placenta is a temporary organ arising in the mother's uterus. It serves, among other things, to nourish the fetus and is usually expelled from the uterus after delivery.

[2] At the time the complainant gave birth, Section 26 para 12 of the Act on Protection of Public Health was in effect.

[3] For example, the judgment of the Constitutional Court of 2 March 2015, file no. No. I. ÚS 1565/14.

[4] This test has long been used to determine whether an interference with a fundamental right is proportionate. See the case-law of the Constitutional Court (eg the Constitutional Court's judgment of 10 July 2014, file no. Pl. ÚS 31/13).

[5] Judgment of the Constitutional Court of 2 January 2017, file no. No. I. ÚS 2078/16.

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[3] Child´s grasp. A Daughters‘ Grip, author: bluebyers, 2 August 2008, source: Flickr, CC BY-NC 2.0.

Vavřička and Others v. The Czech Republic: What follows from the ECtHR decision?

Nikola Sedláková

The European Court of Human Rights in Strasbourg has rejected complaints from six Czech parents who have turned to it with the complaint against the compulsory child vaccination.This article sheds more light on this interesting decision and puts it in the Czech context.

The summary of the ECtHR´s judgment

The Czech system of compulsory vaccination of children has long been a controversial topic, as there is a conflict between the right of the individual and the interest of the state in the protection of public health. [1] The complainants based their complaints in particular on disproportionate interference with their rights by the State, namely violations of the right to private and family life (Article 8 of the Convention), the right to freedom of conscience, thought, and faith (Article 9) and the right to education (Article. 2 of the first protocol). The ECtHR argued against these objections, noting that the imposition of compulsory vaccination is a tool to ensure the collective immunity of the population against infectious diseases [2], hence to fulfill the legitimate aim of protecting public health. The ECtHR endorsed the overall system of compulsory vaccination in the Czech Republic as it did not deviate from the margin of appreciation provided by the Convention.

Constitutionality of the legal regulation of compulsory vaccination

Article 7 of the Charter of Fundamental Rights and Freedoms states: *"The inviolability of the person and his privacy is guaranteed. It can be limited only in cases stipulated by law."* Although the obligation to undergo vaccination is not prescribed in a legislative text (statute), it is defined by a secondary legal regulation (decree).[3] Act on Protection of Public Health does not define specific diseases or criteria based on which mandatory vaccinations are determined,

Mandatory vaccination is a controversial issue [1]

it only regulates the group of persons to whom the vaccination obligation applies. As a result, the statutory regulation contains only abstract provisions on compulsory vaccination, while the true content of the vaccination duty could be found only in the secondary legal regulation. The Constitutional Court has not yet determined whether the present legal basis for mandatory vaccination meets the requirement that the legal duties must be prescribed by statutes and not the secondary legislation (reservation of the law). Likewise, it has not made a decision yet whether or not the said regulation as such is compliant with the Czech constitutional order.

When assessing conflicting rights (or rights and the public interest), the proportionality test must be applied. This test is based on the principle that a fundamental right can be infringed if, and only if, it is appropriate, necessary, and proportionate (these three steps of the proportionality test are commonly applied by the Czech Constitutional Court). It goes beyond doubt that protecting the health of a society is a legitimate goal and compulsory vaccination is an appropriate tool to achieve it. It is important, however, how (by which concrete

measures) the goal is achieved. Therefore, it is necessary to ask further, whether the objective pursued (public health) could not be achieved by other (less invasive) means. However, it is debatable whether the current legal framework meets this requirement. There is no explanation in law, for example, why some diseases are subjected to mandatory vaccination while others are not.It is worth pointing to the dissenting opinion of former Constitutional Court JusticeKateřina Šimáčková concerning the entry ban of unvaccinated children to kindergarten. If a child does not undergo compulsory vaccinations, he or she must not be admitted to kindergarten (with some exceptions such as a religious objection). Šimáčková held that the non-admission of an unvaccinated child to pre-school facilities does not aim at protecting the society, but rather sanctions parents who refused the compulsory vaccination. [4]

Exemptions from the vaccination obligation

The issue of the compliance of compulsory vaccination with human rights in Europe is a problem that arises quite often before the Constitutional Court (hereinafter referred to as the “Court”). Although the applicants are rather unsuccessful with their claims before the Court, an example worth mentioning is the judgment no. I. ÚS 1253/14 where the Court decided in favor of the complainants. The Court stated that, under certain conditions, parents' negative opinion on compulsory vaccination is protected by freedom of conscience (the so-called secular reservation of conscience). In such a case, a State must not enforce compulsory vaccination and subject the objectors to legal sanctions.

According to the Court, to exercise the secular reservation of conscience successfully, there must be "the consistency and persuasiveness of the person's claims and the social implications that an accepted secular conscience reservation may have in a particular case." However, the parent´ s statements must be credibly and consistently maintained. They must be expressed at the first contact with the doctor with whom the child is to be vaccinated. The credibility of the conscientious objection can then be supported by reference to a specific scientific study that vaccination may have a negative effect on a child's health. However, the secular reservation of conscience is not enshrined in law, so it is very difficult to invoke it in practice. Moreover, the result will be uncertain as it only applies to very specific situations.

In conclusion

It is obvious that in some cases individual interests may outweigh the public interest in the context of health protection. On the other hand, the courts have emphasized that to prevent a collapse of the compulsory vaccination system, the exceptions could only be associated with extremely serious

European Court of Human Rights building in Strasbourg [2]

and obvious arguments. The decision of the ECtHR raises the question of what effect this will have on the attitude of Czech courts and administrative authorities in assessing whether the public interest or a fundamental right or freedom of an individual should prevail. However, I believe that nothing will change in the current practice since administrative authorities and courts have to continue with their assessment of the persuasiveness and quality of the applicant's conscientious objection on one side and consideration of the legitimate aim of public health on the other. It is true, however, that such an assessment is rather subjective and could not be subjected to any uniform approach. As the objections to vaccination differ case by case, it is necessary to approach them on an individual basis.

Notes

[1] Provisions of § 45 (et seq.) Of Act No. 258/2000 Coll. on the protection of public health and amending certain related laws.

[2] In the context of compulsory vaccination of children, these are standard vaccination against tetanus, polio, viral hepatitis B, diphtheria, pertussis, diseases caused by Haemophilus influenzae b., Measles, rubella, and mumps.

[3] Decree on Vaccination against Infectious Diseases, No. 439/2000 Coll.

[4] Judgment of Czech Constitutional Court No PI. ÚS 19/14 of 27 January 2015, Dissenting opinion of Judge Kateřina Šimáčková on the statement and reasoning of the judgment in file No. PI. ÚS 19/14.

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Photographs

[1] Mandatory vaccination is a controversial issue, author: kfuhlert, 10 September 2014, source: Pixabay, CC0.

[2] European Court of Human Rights building in Strasbourg, author: Endzeiter, 21 June 2019, source: Pixabay, CC0.

[3] Mandatory vaccination as a tool ensuring a herd immunity, author: MasterTux, 29 April 2018, source: Pixabay, CC0.

Mandatory vaccination as a tool ensuring a herd immunity [3]

Elections 2021: The First Test of the New Model

Kateřina Ochodková

At the beginning of October 2021, elections to the Chamber of Deputies took place. Voters decided on its composition on the basis of a new electoral system. How did it work in the October elections?

The new electoral system had to be adopted after the Constitutional Court declared the previous one unconstitutional at the beginning of February 2021 and annulled some of its basic elements, the method for allocating seats in the Chamber of Deputies and the electoral thresholds for coalitions.[1] The situation was complicated for legislators due to the fact that both chambers of Parliament had to agree on the same wording of the amendment[2] and that it had to be agreed in a very short period of eight months.

The Design of the New Electoral System

Of several proposals, a model which can be described as a political compromise was adopted. [3] It maintains 14 constituencies but changes the method of allocating votes into seats. To increase its proportionality, seats are also distributed in the second tier. The new system also maintains a 5% electoral threshold for a political party which candidates alone. What changes, however, is the electoral threshold for coalitions (8 % for coalition of two a 11 % for coalition of three or more political parties).

If the political party alone or in coalition with others crosses these electoral thresholds, it will participate in the process of allocation of the mandates. First, the number of mandates distributed in the constituencies is determined through the Hare quota[4] and the largest remainder method. In these constituencies mandates are allocated to the parties through the Imperiali quota.[5] The mandates that are not allocated by it are, together with the remaining votes of the parties, transferred to the national tier. Through the Hagenbach-Bischoff quota[6] and the largest remainder method, these residual votes are used in it to allocate the remaining mandates.

In October, elections to the Chamber of Deputies were held in the Czech Republic [1]

Election Wins and Losses

The elections were surprising for both the results and the functioning of the new system. They even encountered several records. Electoral turnout was the highest since 1998, with over 65 % of voters casting their ballot. However, because some parties did not pass the 5% electoral threshold, more than a million votes were lost, the most in the history of the Czech Republic. One-fifth of voters are thus not represented in the Chamber. Moreover, for the first time in the history of the Czech Republic, a social-democratic party (ČSSD) and a communist party (KSČM) did not gain representation in the Chamber.

On top of that, women have gained the highest representation (51 out of 200 seats) in the history of the Czech Republic so far. 16 of them gained their mandate with the help of preferential voting. However, use of preferential votes were ill-fated for the Pirate Party (Pirátská strana). Given the combination of low 5% limit for the preferential allocation of seats and the formation of a coalition with the

political movement STAN which were composed of many popular local politicians, the voters prefered STAN over Pirate Party. Hence, notwithstanding some success of coalition Pirate Party - STAN as whole, the candidates of the former were largely unsuccessful in the end.

New Electoral System and Electoral Paradoxes

Although the coalition of three political parties "SPOLU" won the elections with a total of 27,79 % votes, it received less seats than their rival "ANO", which was supported by 27,12 % of voters. Besides the question who is the true winner of the elections, another question was raised: Is the new system indeedmore proportional?

According to the political scientists Daniel Kereš[7] and Tomáš Lebeda[8] the cause of the paradox lies in the geographical distribution of seats. The ANO movement had better results in constituencies where fewer votes were needed to win the seat. The former explains that the coalition SPOLU was damaged by its own voters: *„If the coalition SPOLU could give up 3857 to 6003 votes in southern Bohemia, the whole constituency would lose one seat and Prague would gain it. ANO would lose the lost South Bohemian mandate and the one gained in Prague would belong to SPOLU."*

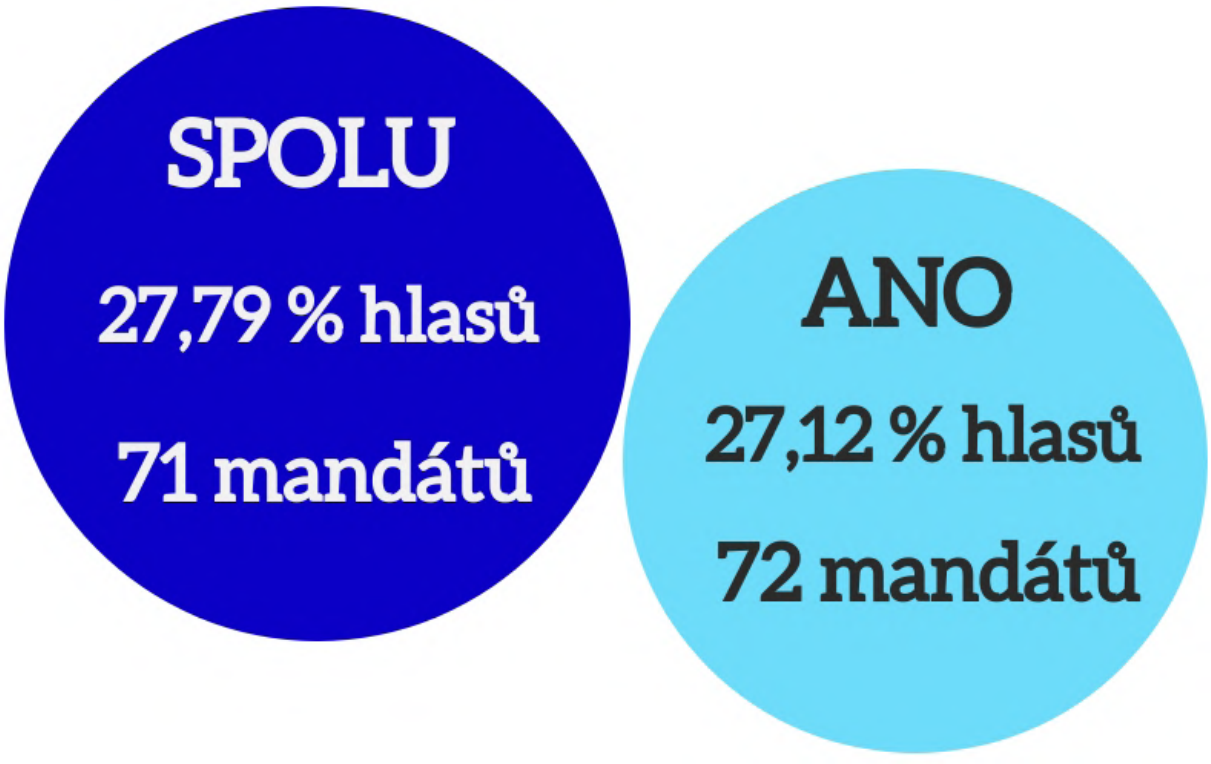
Not only this paradox, but also the overall election results raised doubts about the success of the reform. Tomáš Lebeda pointed out that if the elections were held according to the old system, the results would be more proportional by one third. Imperiali quota redistributed 199 seats in the first tier. The second tier, with only one remaining mandate, was not able to correct the inequalities caused by the constituencies of different size.

Courts and Elections

The elections were also historic for the Supreme Administrative Court (SAC). The SAC received an unprecedented number of complaints on elections, a total of 210 (another 22 were dismissed for being submitted after the deadline). Although most of them were only faulty copies of the same model, often unfit to deal with, some complaints were directed against the new system.

The main case was a complaint by the Pirates and STAN challenging Section 48 and 50 of the Electoral Act, which regulates the method of allocation votes into seats according to the Imperiali quota. The problem was seen in their misinterpretation, leading to the allocation of a single seat in the second tier. Instead, seven seats were to be distributed in the second tier.

Electoral paradox: The winner of the elections did not gain the most seats [2]



The SAC did not uphold their claim. It did not agree with the complainant's interpretation because it did not correspond to the structure of the Electoral Law or to the very purposes of the contested provisions. Complainant's interpretation would lead to the need to return from the third step of the recalculation to the first step and to the fact that in some constituencies it would be more difficult to obtain a mandate in the first tier than in other constituencies.

Consequently, Pirates and STAN filed a constitutional complaint against the decision of the SAC, but the Constitutional Court, one of the actors of an electoral reform, rejected it on procedural grounds.[9] It held that since that submission was not in fact a constitutional complaint but rather constituted "another remedy"[10] was not submitted on time.

Final Evaluation: Was the „Legislators' Stellar Moment" truly "Stellar"?

On the basis of the Constitutional Court's judgment relating the unconstitutionality of the previous electoral model, the legislator received a clear instruction from the Constitutional Courts: Adopt a system that meets the constitutional requirement of proportional representation! However, there is no consensus on how proportionate the system should be to meet the constitutionality requirement as required by the Constitutional Court. Regrettably, it is unlikely that there will be some consensus in the future.

For example, constitutional scholar Jan Wintr has noted that the new system would succeed in the test of constitutionality.[11] The President of the Constitutional Court Pavel Rychetský pointed out that it would be inappropriate to assess the constitutionality of the system after a single election, as it is necessary to expose it to various situations through multiple elections.[12]

However, if, even based on a single election, it turns out that the new electoral system is at least problematic, why should it not be criticized? Through model calculations, which represent an imperfect, but still the best possible tool for its evaluation, various situations can be simulated without having to wait for future elections. Therefore, the new system should be analyzed and, in my opinion, evaluated in terms of its constitutionality. After all, in 2001, the electoral system under which no elections were even held was reviewed and subsequently annulled for its unconstitutionality.[13]

The principles of proportional representation establish for the political parties the constitutional right to proportional representation in the Chamber of Deputies. It is a requirement that the seats be distributed among the parties represented in the Chamber in proportion to the votes received in the elections, so that no party is under-represented or over-represented. The question of the constitutionality of the new system would therefore be resolved by the proportionality test. Since several proposals were made during the "legislator's stellar moment" itself, which could have interfered less with this right,[14] I cannot assess it as stellar.

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Notes

[1] Decision of the Constitutional Court of 3 February 2021, ref. No Pl. ÚS 44/17

[2] Article 40 of the Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic, as amended

[3] New electoral system was introduced by Act No. 189/2021 Coll., amending Act No. 247/1995 Coll., on Election to the Parliament of the Czech Republic and on the Amendments to certain Other Acts, as amended

[4] Hare quota expresses the ratio of the number of all valid votes (numerator) and all distributed seats (denominator)

[5] Imperiali quota is a modification of Hares quota. It assumes that it is divided by two more seats.

It was now enough for electoral coalitions to pass electoral threshold of 8% and 11% [3]

[6] Hagenbach-Bischoffova quota is a modification of Hares quota. It assumes that it is divided by one more seat.

[7] Kerekes, Daniel. October 11, 2021. Volební paradox. Kdyby koalice Spolu dostala v jižních Čechách méně hlasů, získala by poslance navíc. Deník N https://denikn.cz/724278/volebni--paradox-kdyby-koalice-spolu-dostala-v-jiznich-cechach-mene--hlasu-ziskala-by-poslance-navic/

[8] Guryčová, Kristýna. October 15, 2021. „Vyšší spravedlnosti" se podle Lebedy ve volbách nedosáhlo. „Jedna zkušenost nestačí" říká Rychetský. iRozhlas https://www.irozhlas.cz/zpravy-domov/volby-prepocet-hlasu-na-mandaty-hnuti-ano--spolu-lebeda-rychetsky-novy-system_2110150500_kno

[9] Decision of the Constitutional Court of 25 January 2022, ref. No Pl. ÚS 41/21.

[10] An appeal under Article 87 (1) e) of the Constitution, i.e. an appeal against a decision concerning the verification of the election of a deputy or senator.

[11] Ibid.

[12] Ibid.

[13] Decision of the Constitutional Court of 24. January 2001, ref. No Pl. ÚS 42/2000.

[14] As an example two expert proposals formulated at a conference in the Senate can be presented. The essence of the first of them, formulated by Marek Antoš, lies in ordering the percentage of seats to the parties in a ratio corresponding to the percentage of votes received, and their subsequent distribution among the electoral constituencies. The essence of the second of them, recommended by Tomáš Lebeda, lies in the introduction of a second „compensatory" tier, i.e., one in which the number of seats are prescribed by law, ideally 20-40. It would also be more favorable for the proportionality of the electoral system to use the Hare quota instead of the Imperiali quota, as this is a basic quota and, in essence, the „fairest" quota.

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Photographs

[1] In October, elections to the Chamber of Deputies were held in the Czech Republic. Volební místnost, author: Ondřej Žváček, October 18, 2008, source: Wikimedia Commons, CC BY-SA 3.0.

[2] Electoral paradox: The winner of the elections did not gain the most seats, author: Kateřina Ochodková, source: own work.

[3] It was now enough for electoral coalitions to pass electoral threshold of 8% and 11%. Kampaň SPOLU Praha 2021, author: Alois2018, September 23, 2021, source: Wikimedia Commons, CC BY-SA 4.0.

[4] Ballot box. Volební urna při komunálních volbách v Brně 2014.jpg, author: Martin Strachoň, 11 October 2014, source: Wikimedia Commons, CC BY-SA 4.0.

Ballot box [4]

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