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Accreditation of National Human Rights Institutions
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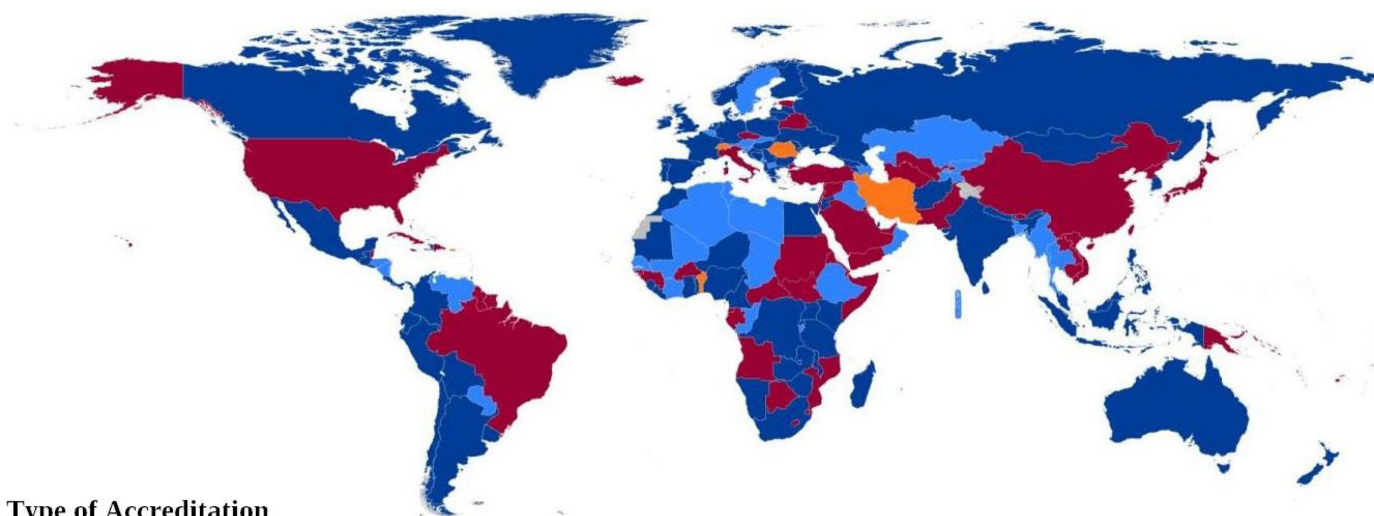

Type of Accreditation

A - Compliant with Paris Principles

B - Not fully compliant with the Paris Principles

C - No Status

No application for accreditation

Dear readers,

We are delivering the summer issue of the online journal V4 Human Rights Review, which provides information on the developments in the areas of human rights and democracy in the Czech Republic, Hungary, Poland and Slovakia.

We start with a contribution by Veronika Haász concerning the role of National Human Rights Institutions (NHRIs) in the V4 countries. The author explains the competences and importance of NHRIs as independent guardians and promoters of human rights. Furthermore, she discusses the current situation in all four countries with regard to the existence, work and impact of these institutions.

In the Czech section, Eliška Hronová focuses on procedural safeguards of children under the age of criminal responsibility. Are the rights of children under 15 years of age sufficiently safeguarded?

In the Hungarian section, Veronika Czina explains the widely discussed measures that the Hungarian government adopted to increase its powers amidst the fight against the coronavirus. To what extent are democratic values and the rule of law endangered?

In the Polish section, Artur Pietruszka reflects on the question of independence of the new Disciplinary Chamber for judges. Based on the ruling of the Court of Justice of the EU, the Polish Supreme Court examined this issue. How did the Constitutional Tribunal respond?

In the Slovak section, Erik Láštic discusses the results of parliamentary elections and how the new government led by an anti-corruption movement had to deal immediately with the pandemic.

We hope you enjoy this issue!

Jan Lhotský
Editor of the V4 Human Rights Review
Head of the Czech Centre for Human Rights and Democracy

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Photo on the front page: Accreditation of National Human Rights Institutions, source: Office of the UN High Commissioner for Human Rights (OHCHR), edits: photo cropped, different font.

CZECH CENTRE FOR HUMAN RIGHTS AND DEMOCRACY

The Czech Centre for Human Rights and Democracy is an independent academic institution monitoring human rights developments both domestically and worldwide, issuing a monthly human rights journal (in Czech), as well as organizing conferences and discussions.

www.humanrightscentre.org

In 2019 the Czech Centre launched a new quarterly V4 Human Rights Review with partnering human rights instutions from Hungary, Poland and Slovakia.

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National Human Rights Institutions in the V4 countries

Veronika Haász

National Human Rights Institutions are emerging actors on both the national and international human rights scene. Within the European Union, only the Czech Republic, Estonia, Italy, and Malta do not have an accredited institution yet. This article gives an overview of the evolution and types of National Human Rights Institutions in the V4 countries.

What are NHRIs?

National Human Rights Institutions (NHRIs) are state-funded but independent national bodies that are established by law and mandated to promote and protect human rights at the national level. In 1993, the UN endorsed minimum standards for the establishment, strengthening, and assessment of the institutions. The Paris Principles describe the mandate, competence and responsibilities, composition, guarantees of independence and pluralism, as well as the methods of operation of NHRIs.

An institution conforming with the Paris Principles has (a) a broad human rights mandate; (b) an inclusive and transparent selection and appointment process for its decision-makers; (c) personal, functional, and financial independence; (d) access to sufficient resources and staff; (e) and effective cooperation activities with national and international stakeholders.

Veronika Haász (right) discussing NHRIs in a conference in Lima, Peru [1]

Universal Declaration of Human Rights [2]

The general competences of NHRIs include (1) the monitoring of human rights and their implementation; (2) political consulting; (3) investigating human rights violations; (4) awareness-raising, including human rights education and training; (5) and cooperation with other institutions with competence in the areas of human rights protection and promotion at the national, regional, and international levels.

Since the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD) refer to the Paris Principles, NHRIs often hold National Preventive Mechanism (NPM) mandate under OPCAT and National Monitoring Mechanism (NMM) mandate under the CRPD.

How can an institution become NHRI?

Compliance with the Paris Principles is examined in an international peer-review procedure upon the request of an institution. The accreditation takes place twice a year. The Global Alliance of NHRIs (GANHRI), through its Sub-Committee on Accreditation (SCA), reviews and

Human Rights Council [3]

assigns the applying institutions one of two statuses: A – fully compliant with the Paris Principles, or B – partially compliant with the Paris Principles. A-status institutions are re-accredited every 5 years.

As of November 2019, 124 NHRIs worldwide were accredited by the GANHRI: 80 with A-status, 34 with B status, and 10 without status [1].

Despite the common standards and formalised assessment procedure, NHRIs show a diverse picture. In some states, a brand new institution is established for the NHRI task; in others, an already existing institution (e.g. ombuds institution) applies for the accredited NHRI status.

Based on their composition and main activity, the following types of NHRIs can be distinguished worldwide: (1) human rights commissions and equality commissions, (2) human rights ombuds institutions, (3) advisory committees and councils, and (4) human rights institutes and centres.

What is the added value of an NHRI?

In comparison to other national human rights bodies, the most significant distinctive characteristic of an NHRI is its bridging role. As an independent body established by the state, an NHRI is well situated to initiate human rights dialogue between citizens and public authorities, as well as national and international stakeholders.

An NHRI with quasi-judicial competence may supplement the work of national courts in as much as it can offer victims an alternative dispute resolution mechanism and human rights dialogue, conduct thematic inquiries, and advance proposals for legal reform. An effective NHRI cooperates with non-governmental organisations (NGOs), for example, by co-organising and co-hosting events or collaborating on projects.

Also, the international community has recognised the significance and potential of NHRIs. For instance, the UN monitoring mechanisms increasingly rely on NHRIs since they can provide them with independent and objective information about human rights situations on the ground. An NHRI may benefit from international engagement, which provides an appropriate legal basis for human rights debates at home, increases domestic accountability, and enables it to learn best practices from other NHRIs.

Furthermore, the EU has put NHRIs high on its human rights agenda. In the Action Plan on Human Rights and Democracy (2015-2019), the first goals are supporting and engaging NHRIs.

NHRI landscape in the V4 countries

The NHRI picture in the V4 countries is an interesting one. The Czech Republic does not have an NHRI at the moment. In Hungary and Poland, the ombuds institutions are accredited as A-status NHRIs. In Slovakia, the Slovak National Centre on Human Rights holds an accredited B-status.

The Czech Republic

The Czech Republic is one of the few European countries that does not have an accredited NHRI, despite the fact that international actors keep encouraging the country to establish one. In 2019, in its concluding observations, the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination urged the Czech Republic to strengthen the powers of the Ombudsperson and consolidate them as an accredited NHRI which would conform to the Paris Principles.

The Office of the Public Defender of Rights (Ombudsperson) was established in 2001. It has the mandate to handle individual complaints against the conduct of public authorities. The Office pursues further activities that are typical for ombuds institutions, such as providing guidance to public officers and advice to the government, issuing legislative recommendations, and publishing reports. The Office also monitors activities relating to forced returns, and acts in its capacity as NPM, NMM, and an Equality Body under the EU's equal treatment legislation.[2]

The Office of the Public Defender of Rights in the Czech Republic [4]

Palais des Nations, Geneva [5]

Hungary

The Hungarian institution was established by the transformation of the ombuds institution into an NHRI. In 2011, upon its first application, the Office of the Parliamentary Commissioner for Civil Rights gained B-status. In 2012, the divided system (four independent ombudspersons) was replaced by one single ombuds institution, the Office of the Commissioner for Fundamental Rights.

This reform brought significant changes in the institutional mandate as well. The new mandate encompasses the supervision of the implementation of the CRPD; NPM tasks; participation in the preparation of national reports based on international treaties relating to his/her tasks and competences; monitoring and evaluation of the enforcement of these treaties under Hungarian jurisdiction; engaging in social awareness raising activities; as well as cooperating with organisations and national institutions promoting the protection of fundamental rights.

The new institution gained an accredited A-status in 2014. The re-accreditation of the Office was to take place in October 2019, but the review has been deferred to the second half of 2020.

The latest observations and recommendations of the SCA indicate the standing of the institution and its Paris Principles (non-)conformity. Beyond raising some specific issues signalled by UN Treaty Bodies and Special Procedures of the UN Human Rights Council, the SCA is concerned by two specific matters: the lack of a sufficiently broad and

transparent selection procedure and the failure of the Office to address some human rights issues. Amongst those are visits to migrant and asylum centres, raising of sensitive issues with the Constitutional Court, and monitoring of national bills on human rights defenders.

Assessing the first nine years of the Hungarian NHRI, we can observe that the written institutional mandate has been broadened in line with the Paris Principles, but the recent practice of the institution raises some doubts about its effective functioning as an NHRI.

Poland

Poland was the first ex-communist European country to establish an ombuds institution in 1987. The Office of the Commissioner for Human Rights fulfils the task of ombudsperson, NPM, NHRI, and Equality Body, and it also monitors the implementation of the CRPD. The Commissioner has broad jurisdiction over state administration, including the armed forces, the security forces, police, prisons, local governments and the court system.

In 2007, the Office was accredited as an NHRI with A-status for the first time. Its full conformity with the Paris Principles was also affirmed in 2012 and in 2017. In all three accreditation procedures, the SCA formulated concerns regarding the lack of human rights promotion, international cooperation, and functional immunity in the Commissioner's legislative mandate. Several budgetary cuts hit the Office and worried the SCA.

When analysing the practice of the institution, the lack of legal ruling is compensated by the ombudsperson's visible activity. The current ombudsperson (2015-) is especially active in promoting and protecting human rights. He has performed exemplary actions in regard to the Polish Government's legal reforms since 2016 that harm human rights, democracy, and the rule of law. In particular, the Commissioner has issued legal opinions and public statements, joined constitutional complaints, intervened in parliamentary instances and cooperated with international organisations defending human rights, democracy and the rule of law.

Plaque at the entrance of the Polish Ombudsman's Office [6]

Veronika Haász interviewing the EU Ombudsperson in Brussels [7]

Slovakia

The Slovak National Centre on Human Rights was established in 1993. Since 2004, it has been the Equality Body of the country. The GANHRI accredited the Centre as an NHRI with B-status in 2014. The B-status enables the institution to be part of the global NHRI community, albeit without voting rights in the GANHRI and the regional networks, in this case, the European Network of NHRIs (ENNHRI). In its capacity as NHRI and Equality Body, the Centre performs a wide range of tasks, with special regard to the monitoring of the principle of equal treatment.

During the accreditation procedure, the SCA's main concern was that the mandate of the institution emphasises areas of equality and discrimination, and thus is not broad enough to fully comply with the Paris Principles. Moreover, the SCA formulated recommendations regarding the selection and appointment process, the pluralistic composition, the elimination of the presence of political representatives in the Administrative Board of the institution, the functional immunity and independence, the tenure of the Administrative Board members, adequate funding, and the Centre's cooperation with other human rights bodies.

GANHRI meeting in Geneva [8]

Since the institution holds a B-status, its re-accreditation does not take place automatically. It is up to the institution to apply for re-accreditation in the hope of being upgraded. Institutions often choose to keep their B-status voluntarily or due to a lack of political will to improve their mandate.

Another choice can be the establishment of a new institution or the designation of the ombuds institution as an NHRI. In such a case, the multiplication of mandates and tasks shall be avoided.

Summary

In the V4 countries, mainly ombuds institutions fulfil the NHRI role, as is the case in Hungary and in Poland. In the Czech Republic, the Office of the Ombudsperson is expected to gain the NHRI mandate in the near future. Slovakia is an exception, with the Slovak National Centre on Human Rights being accredited as an NHRI.

The Hungarian and Polish institutions first functioned as classic ombuds institutions and gained their NHRI mandate at a later stage. The recommendations of the SCA suggest that ombuds institutions accredited as NHRIs often struggle with providing remedy for individual grievances (the traditional ombudsperson's role) and embracing standards of international law, namely approaching human rights broadly and systematically (the new NHRI role) at the same time.

The Hungarian example shows that the institutional framework alone cannot deliver sufficient human rights promotion and protection. Adoption of a human rights-based approach, required by the Paris Principles, largely depends on the mandate holder's perception of the role and their activity.

We can observe the contrary in Poland, where the legislation does not enable the institution to act effectively as an NHRI, although owing to the ombudsperson's attitude and proactivity, human rights-based – as well as preventive and educational – approaches are present in the practice of the institution.

Nota bene, the ombudsperson's personality, philosophy, role perception, and proactivity have elementary effects on the efficient functioning, and thus the NHRI accreditation of the institution.

Therefore, when assessing an NHRI, we must distinguish between the written mandate and the practice of the institution. It is right that the SCA considers both the legal background and the practice of national institutions when measuring their compliance with the Paris Principles.

Veronika obtained her PhD at the University of Vienna (2020). Her research focuses on National Human Rights Institutions with special regard to the transformation of ombuds institutions to NHRIs. She graduated in law in Hungary (2006) and also holds an LL.M. in International Human Rights and Humanitarian Law from the European University Viadrina (2013). She gained her latest working experience at the Global Campus of Human Rights and in the EU Agency for Fundamental Rights.

Notes

[1] Institutions that were accredited with C-status, i.e. non-compliant, before October 2007.

[2] The progress regarding the establishment of the Czech NHRI is planned to be presented in the upcoming issue of the V4 Human Rights Review.

References

UN General Assembly Resolution 48/134. National institutions for the promotion and protection of human rights, 20 December 1993, A/RES/48/134.

Global Alliance of National Human Rights Institutions, 'Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions - Accreditation Status as of 27 November 2019' <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status Accreditation - Chart %28 27 November 2019%29.pdf> accessed 16 March 2020.

Council of the European Union, EU Action Plan on Human Rights and Democracy (Publications Office of the European Union 2015).

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 17-21 March 2014' para 2.2.

Photographs

[1] Conference in Lima, Peru, source: Veronika Haász, edits: photo cropped.

[2] Universal Declaration of Human Rights, author: United Nations Photo, 1 November 1949, source: Flickr, CC BY-NC-ND 2.0, edits: photo cropped.

[3] Human Rights Council - 34th Session, author: UN Geneva/ Elma Okic, 27 February 2017, source: Flickr, CC BY-NC-ND 2.0, edits: photo cropped.

[4] Brno, Údolní 39, kancelář VOP (6733), author: Martin Strachoň, 20 July 2015, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

[5] Palais des Nations, Geneva, author: United Nations Photo/ Jean-Marc Ferré, 7 February 2014, source: Flickr, CC BY-NC-ND 2.0, edits: photo cropped.

[6] Tablica Rzecznik Praw Obywatelskich al. Solidarności 77, author: Adrian Grycuk, 23 August 2014, source: Wikimedia Commons, CC BY-SA 3.0 PL, edits: photo cropped.

[7] Veronika Haász interviewing the EU Ombudsperson in Brussels, source: Veronika Haász, edits: photo cropped.

[8] GANHRI meeting in Geneva, source: Veronika Haasz, edits: photo cropped.

[9] Veronika Haász in a workshop in Turku, Finland, source: Veronika Haász, edits: photo cropped.

Veronika Haász in a workshop in Turku, Finland [9]

Czech Republic

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Children under the age of criminal responsibility and their procedural safeguards in Czech legislation

Eliška Hronová

Children under the age of criminal responsibility cannot be convicted and punished for their delinquent behaviour. However, the acts they commit require a reaction. How is the imposition of an appropriate measure regulated? Are the rights of children under 15 years of age sufficiently safeguarded?

Imagine that two children, Anna (13) and David (16), were suspected of committing a serious crime. They were taken to the police station for questioning. The police did not start the questioning of David until a mandatory legal defence was ensured for him. The defence lawyer informed David about his rights and intervened several times during the questioning. Based on his advice, David decided to remain silent in reaction to most of the questions.

In the case of Anna, the police unsuccessfully tried to contact her parents. She was informed about her right to receive legal assistance from a lawyer of her choice but she was unable to call the lawyer herself and to pay for their services. The questioning was therefore conducted only in the presence of a social worker from the Authority for Social and Legal Protection of Children, who had no legal education. Since Anna was scared and wanted to leave the police station as soon as possible, she signed a confession statement.

Later, during a court trial, the testimony of David could not be used, as the law required a cross-examination of David before the court. Furthermore, David and his defence lawyer had an opportunity to challenge and question all witnesses against him. In contrast to that, Anna's testimony and confession were read before the court during her trial and she did not have any opportunity to confront all the witnesses as it was not her procedural right. The testimonies of witnesses not present at the trial were only read in the courtroom.

Do you wonder why the police and the court treated Anna and David differently? The answer might be both simple and surprising. While David was 16 years old, i.e. a juvenile (between the age of 15 and 18), and therefore already criminally liable, Anna was under the age of criminal responsibility (15). Thus, no conviction, punishment or criminal proceedings were permissible in her case.

Illustration image [1]

Legislation on children under the age of criminal responsibility

Even though children under the age of criminal responsibility cannot be held criminally liable, they are subject to proceedings before a court and subsequently might be subject to an appropriate measure. The proceedings in the case of children under 15 on otherwise criminal acts (*čin jinak trestný*) are regulated primarily by the Juvenile Justice Act.[1] The objective of the proceedings is not to punish the child but to protect society against children's delinquent behaviour while respecting the needs of the child and emphasising his or her rehabilitation, protection and

education. A child is represented by a guardian who is an attorney, and his or her rights and best interests are also guarded by the Authority for Social and Legal Protection of Children and legal guardians – usually parents.

Despite the nature of the court proceedings in the case of children under 15, it should be noted that the a pre-investigation inquiry (*prověřování*) is regulated fully by the Criminal Procedure Code.[2] Thus, the first steps of the law enforcement authorities are the same as in the case of crimes committed by juveniles or adults. However, a child under 15 does not have a right to legal assistance from the very beginning of the proceedings (mandatory legal defence), unlike a juvenile.[3] Later during the trial, the court applying civil procedure is allowed to rely on written statements of the child and witnesses,[4] since the child does not have a right to confront and cross-examine witnesses.

It was already mentioned that a child cannot be punished for delinquent behaviour. Nevertheless, the court can impose one of seven measures; the two most severe ones, namely protective institutional education and protective institutional treatment, constitute a deprivation of liberty.

The standard set by ECtHR and other international human rights instruments

The procedural safeguards regarding children under the age of criminal responsibility were addressed by the European Court of Human Rights ("the Court") in the case *Blokhin v. Russia*. The applicant, a 12-year-old Russian boy, was placed temporarily in a detention centre for the otherwise criminal act of extortion. He complained before the Court that his right to a fair trial enshrined in Article 6 of the European Convention on Human Rights ("the Convention") was violated, namely his right to legal assistance and the right to obtain the attendance and examination of witnesses.

The Court examining the criteria formulated in the case *Engel and Others v. Netherlands* [5] concluded that the prosecution of the applicant must be determined as a *criminal charge* in the sense of the Convention. Therefore, the criminal aspect of Article 6 of the Convention was applicable to the case and the legal safeguards of a criminal trial should have been applied. The Court stressed that a child cannot be deprived of important procedural safeguards solely because such proceedings (that may result in deprivation of his liberty) are deemed to be protective of his interests as a child and juvenile delinquent, rather than penal.

The Court referred to a range of international sources,[6] stressing the particular vulnerability of children, and asserting that a child under the age of criminal responsibility should be guaranteed at least the same legal rights and safeguards as adults. The Court held that there had been a violation of Article 6 of the Convention as the applicant's right to legal assistance and the right to obtain the attendance and examination of witnesses were not fulfilled.

Illustration image [2]

European Court of Human Rights [3]

Conclusion

In the light of the *Blokhin case* and the above-mentioned international instruments, the Czech regulation of the proceedings in the case of children under 15 on otherwise criminal acts does not seem to be very satisfying in terms of conformity with international human rights standards. Children under 15 might be confronted with serious consequences such as deprivation of liberty despite absent legal assistance from the very beginning of the proceedings and an unfulfilled right to confront witnesses before the court. These rights are essential procedural safeguards of a fair trial.[7]

Moreover, if we go back to Anna and David and compare the legal regulation of proceedings in the case of children under 15 and that of juveniles, we can ponder whether the regulation of children under 15 is not discriminatory. Although the measures of protective education and protective treatment can be imposed on both juveniles and children and therefore, these groups are in fact in a comparable situation, only juveniles are provided with the described procedural safeguards.

Besides, the procedural safeguards in the case of adult defendants were not discussed in this article at all. In fact, trial proceedings in their case are hardly imaginable without the right to confront witnesses before the court. Furthermore, mandatory legal defence of an adult is required for all crimes (not offences) in the pre-investigation inquiry and in other cases stipulated by law.

The problematic aspects of the regulation were already discussed in detail by various expert groups.[8] Unfortunately, their criticism and recommendations went unheard. Some shortcomings of the proceedings were addressed in the collective complaint *International Commission of Jurists v. the Czech Republic* submitted to the European Committee of Social Rights in 2017.

Hopefully, the expected decision of the Committee will lead to a desirable amendment of the regulation and that children under 15 will finally be provided with an appropriate standard of procedural protection.

Eliška Hronová graduated from the Faculty of Law at Charles University where she is still engaged in the activities of the Street Law program. She works at the Office of the Czech Government Agent before the European Court of Human Rights. Her areas of interest are ill-treatment and gender equality. She is currently on maternity leave.

Palace of Europe [4]

Notes

[1] These proceedings have the nature of civil proceedings – general civil law regulation is applied subsidiarily.

[2] Criminal proceedings conducted in the case of adults and juveniles have 3 phases: (1) the pre-investigation inquiry called examination, (2) investigation, (3) court proceedings (regulated by Criminal Procedure Code), Proceedings in the case of children under 15 on otherwise criminal acts have only two phases: pre-investigation inquiry – examination, court proceedings (regulated by Civil Procedure Code).

[3] According to § 42a of the Juvenile Justice Act.

[4] According to § 92 (1) of the Juvenile Justice Act.

[5] In the case of *Engel and Others v. the Netherlands (*8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) the Court outlined three criteria for the assessment of applicability of the criminal aspect of Article 6 of the Convention: classification in domestic law, nature of the offence, severity of the penalty that the person concerned risks incurring. The first criterion is of relative weight - if the offence is not regarded as criminal in domestic law, the Court assesses the second and third criteria, which are alternative and not necessarily cumulative.

[6] Among those sources are the Council of Europe Guidelines on child-friendly justice, Article 40 of the Convention on the Rights of the Child, and relevant General Comment No. 10, point 33; and Rule 7.1. of the Beijing Rules.

[7] Furthermore, the right to legal assistance is an essential safeguard against ill-treatment by the police as stressed by the European Committee for the Prevention of Torture and Other Inhuman, Degrading Treatment and Punishment.

[8] The Committee on the Rights of the Child of the Czech Government Council for Human Rights and the Expert Panel on the Enforcement of the Judgments of the Court and the Implementation of the Convention.

References

Act no. 218/2003 Coll. on the Responsibility of Juveniles for Unlawful Acts and on Juvenile Justice (“Juvenile Justice Act”).

Judgment of the European Court of Human Rights, *Blokhin v. Russia*, 23 March 2016, application no. 47152/06.

Collective complaint no. 148/2017 *International Commission of Jurists v. the Czech Republic*, submitted to the European Committee on Social Rights.

Expert Panel on the Enforcement of the Judgments of the European Court of Human Rights and the Implementation of the European Convention on Human Rights, ‘Background documentation of 14 December 2016, 12 June 22017, 28 February 2018, 22 November 2018’ (Justice.cz, 14 December 2016, 12 June 22017, 28 February 2018, 22 November 2018) <https://justice.cz/web/msp/kolegium-expertu-k-vykonu-rozsudku--eslp> accessed 15 February 2020.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ‘Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 2 to 11 October 2018’, point 17 (Council of Europe, 4 July 2019) <https://rm.coe.int/168095aeb4> accessed 15 February 2020.

Photographs

[1] Depressed sad teen girl sits on sill crying at home, author: fizkes - stock.adobe.com, source: Adobe Stock, standard licence, edits: photo cropped.

[2] Crime scene investigation - collecting bullet sleeve of pistol, author: kaninstudio- stock.adobe.com, source: Adobe Stock, standard licence, edits: photo cropped.

[3] European Court of Human Rights - Strasbourg - France, author: mrallen-stock.adobe.com, souce: Adobe Stock, standard licence, edits: photo cropped.

[4] Strasbourg, France - July 3, 2019: Building of Palace of Europe in Strasbourg city, France. The building hosts Parliamentary Assembly of the Council of Europe since 1977, author: doganmesut- stock.adobe.com, source: Adobe Stock, standard licence, edits: photo cropped.

Czech Constitutional Court on conflict of interest: glancing at EU law?

Marek Pivoda

After three years of waiting, the Czech Constitutional Court rejected a petition proposing the annulment of several provisions of the Act on Conflict of Interest. The judgement is worth noting not only for its rich argumentation regarding conflict of interest, the role of the media in a democratic society, and the principle of separation of powers, but also for its use of the EU law perspective for an abstract review of the statute in question.

A state is not an enterprise

In its judgement (Case No. *Pl. ÚS 4/17*), the Czech Constitutional Court (CC) was asked to review several provisions of the Czech Act on Conflict of Interest, which prevent public officials (including MPs and members of the government) from owning, operating or controlling radio and TV broadcasters as well as periodical publishers. Companies in which a public official controls at least 25% of the shares are also limited by the law in regard to public contracts and subsidies.

The challenged provisions were quite controversial especially since they directly affect the current Prime Minister, Andrej Babiš. As a result, Babiš was forced to place most of his business interests, including, inter alia, a media publishing company, in a trust.

Even though the judgment has been described as too lengthy and too late, its message is clear: a state is not an enterprise [1] and activities carried out by public officials should not serve to benefit their private business. Indeed, according to the CC, one of the most crucial responsibilities of a democratic state governed by the rule of law is to preclude public officials from using the power vested in them for their private benefit instead of the public one.

The CC further highlighted that although rules on conflict of interest in general may represent a collision of the democratic principle and the principle of rule of law, they serve numerous legitimate aims, namely protection of the state's economic interests, protection of free political and economic competition, preservation of confidence of the public in the exercise of public authority, and prevention of concentration of power.

Constitutional Court [1]

The CC also pointed out the irreplaceable role of the media in relation to proper functioning of the state, stemming from their ability to form opinions in individuals. In the view of the court, if the media are owned or controlled by public officials, the state's role as a neutral regulator of political competition is necessarily undermined. As a result, the review of rules on conflict of interest may constitute an appropriate measure in a self-preserving democracy.

EU law as a standard for abstract constitutional review?

According to its case law, the CC cannot use the provisions of EU law as separate reference standards when deciding on the constitutionality of Czech statutes and other legal acts. In other words, the court claims that it does not have jurisdiction to review whether domestic law is consistent with the law of the EU.

Nevertheless, the CC generally respects its responsibility to observe international obligations and usually strives to interpret the constitutional order consistently with EU law in cases for which EU law is relevant.

The judgement on conflict of interest is particularly noteworthy as the CC had to consider the challenged act in the light of rules on conflict of interest stipulated in EU law. Even though the CC reiterated that EU law does not serve as a referential criterion for a constitutional review, it emphasised the relevance of rules preventing Member

States' authorities involved in the implementation of the EU budget from taking any action which may bring their own interests into conflict with those of the Union.

According to the CC, the national rules on conflict of interest KL(especially those concerning public contracts and subsidies) should be interpreted as interconnected with the EU law on conflict of interest. On the other hand, the court concluded that the challenged provision prohibiting the control of media by public officials represented a constitutional matter connected to the national identity according to Article 4(2) of the Treaty on European Union.

Although the CC dogmatically claimed that it had not used EU law as a yardstick, it derived one of the underlying arguments of the whole judgement precisely from the EU rules on conflict of interest. In fact, the EU law affected the very understanding of the definition of conflict of interest as the CC used the criterion of '*impartial and objective exercise of the functions*' of public officials (which is stipulated in EU secondary legislation) to assess the provisions in question.

'EU-friendly' interpretation: the ambiguous veil

Considering the detailed analysis of numerous EU acts as well as the degree of importance the CC seems to assign to it, one may logically question the plausibility of the CC's assertion that it merely interprets the Czech constitutional order in an 'EU-friendly' way. The concept of interpretation of constitutional order consistently with EU law may be perceived as rather paradoxical as in order to proceed, the court first needs to apply and interpret EU law itself.

In many cases (apparently including the case at hand), the differences between mere EU-friendly interpretation and the use of EU law as a standard for review may be rather minor. Nevertheless, obstinate proclamations that the EU law is not a yardstick for an abstract constitutional review may have several undesirable effects.

Firstly, since the CC formally uses EU law as a supporting source, the quality of argumentation by EU legal rules may be lower. In other words, the court may explain insufficiently why and how exactly it uses EU law to interpret the challenged provisions. In the case concerning conflict of interest, this phenomenon occurred with regards to the *national identity argument*. The court failed to sufficiently explain why it considered the challenged provision to be a matter of Czech national identity. In my view, such a strong proclamation based on the fundamental principles of EU law deserves a rather thorough explanation, which is unfortunately missing in the judgement.

Secondly, the 'hidden' application of EU law as a mere interpretation tool may serve to justify ignoring, disregarding or rejecting conclusions of the European Court of Justice on matters of EU law. This goes hand in hand with the potential obligation of the CC to engage in a preliminary reference procedure with the Luxembourg court.

The Constitutional Court of the Czech Republic: Main Hall [2]

Illustration image [3]

Conclusion

Even though the Czech Constitutional Court's judgment on conflict of interest raises a number of crucial questions regarding the role of the media in a democratic society, its rather low-quality argumentation based on the EU rules on conflict of interest once again illustrates the questionable manner in which the court deals with issues related to EU law in an abstract constitutional review procedure. It remains to be seen whether the court will clarify its approach in the future and lift the 'ambiguous veil' for the sake of transparency and quality of its reasoning.

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Notes

[1] The phrase 'a state is not an enterprise' is noteworthy as during his political campaign, Czech Prime Minister Andrej Babiš claimed to 'run the state as an enterprise'.

References

Judgment of the Czech Constitutional Court, 8 March 2006, *Sugar Quotas*, No. Pl. ÚS 50/04.

Judgment of the Czech Constitutional Court, 16 January 2007, *Reimbursement of medications*, No. Pl. ÚS 36/05.

Judgment of the Czech Constitutional Court, 10 July 2018, No. Pl. ÚS 3/16

Judgment of the Czech Constitutional Court, 11 February 2019, No. Pl. ÚS 4/17

David Kosař, Filip Křepelka, Ladislav Vyhnánek (eds). *Kompendium evropského ústavního práva* (Masaryk university 2017).

Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014).

Act no. 159/2006 Coll., on Conflicts of Interest.

Photographs

[1] Pohled na Ústavní soud z Joštovy ulice, author: Aleš Ležatka, source: Constitutional Court of the Czech Republic, edits: photo cropped.

[2] Katedra pro plénum Ústavního soudu ve sněmovním sále, author: Aleš Ležatka, source: Constitutional Court of the Czech Republic, edits: photo cropped.

[3] European Union Flags 2. author: Thijs ter Haar, 23 May 2014, source: Flickr, CC BY 2.0, edits: photo cropped.

Mental health of judges: independence and normalization

Vendula Mezeiová

What is the role of the mental health of judges' towards their independence? Is it institutionalization through objective norms, or liberalization through deliberative argumentation which can enhance judicial legitimacy and independence? And may policies preventing judges' mental ill-health help?

When the most experienced and respected representatives of the judicial system in the Czech Republic are calling for a change in attitude towards the mental health of judges but nobody seems to be listening, one would ask why.

Even though the Ministry of Justice of the Czech Republic is currently undertaking a reform of judicial disciplinary proceeding, the mental well-being of judges is not on the list.

This article explores why the mental health of judges is so crucial and why it is important to prevent ill-health.

A judge as a human being

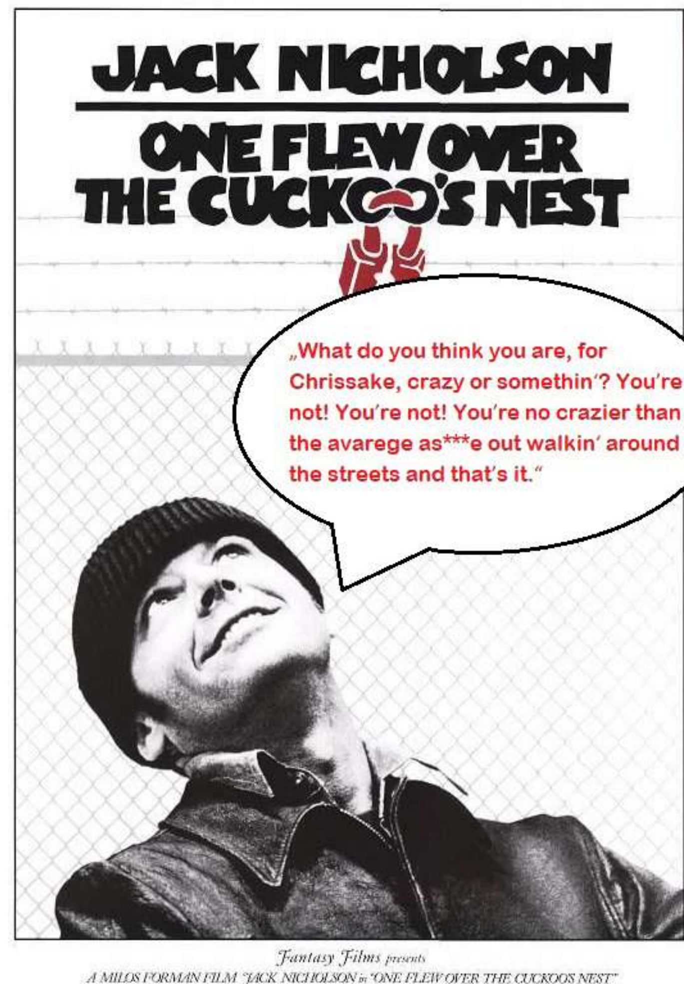
Professor Honzák of Charles University in Prague explains that while enforcing law and justice, judges do not only insert their knowledge, skills and capabilities but also devote a part of their own personality to their work since they decide on real life conflict situations which are often ambiguous.

Therefore, their demanding work, which balances between the pace and quality of decision-making, causes a long-term strain on their mental health.

In spite of that, judges are still only human beings. As threats to the independence of the judicial systems in Poland, Hungary, Slovakia and the Czech Republic indicate, judges as individual human beings and their personalities are the most inestimable fragments of independent and impartial decision-making. Yet they are the most fragile fragments at the same time.

A judge as an institution

The issue arises to what extent a judge's mental health may be summarised into mere objective categories of constitutional function within the system.



Poster of One Flew Over the Cuckoo's Nest with added text [1]

Institutionalization serves the systemic inner adoption of normal characteristics of a judge's mental health. Such a process of internalization is established in order to attain proper functioning of the judicial system and its legitimation.

Judicial function is without a doubt a constitutional institution which requires specific skills. However, a disproportionate emphasis only on the institutional aspects of a judge's personality may create unreasonable expectations of the public as regards the judicial apparatus, which in fact contrasts with the human substance of decision making. Paradoxically, institutionalization of mental health can undermine legitimation of judicial power rather than support it.

Excessive institutionalization of a judge's mental health into objectively normal categories divides madness from the notion of freedom of thoughts, as Foucault suggests. Just think of *One Flew Over the Cuckoo's Nest.* Institutionalization leads towards stigmatization and may enable practices such as court-packing [1], which interfere with judicial independence.

A judge as a human institution

So, is another approach towards the mental health of judges possible?

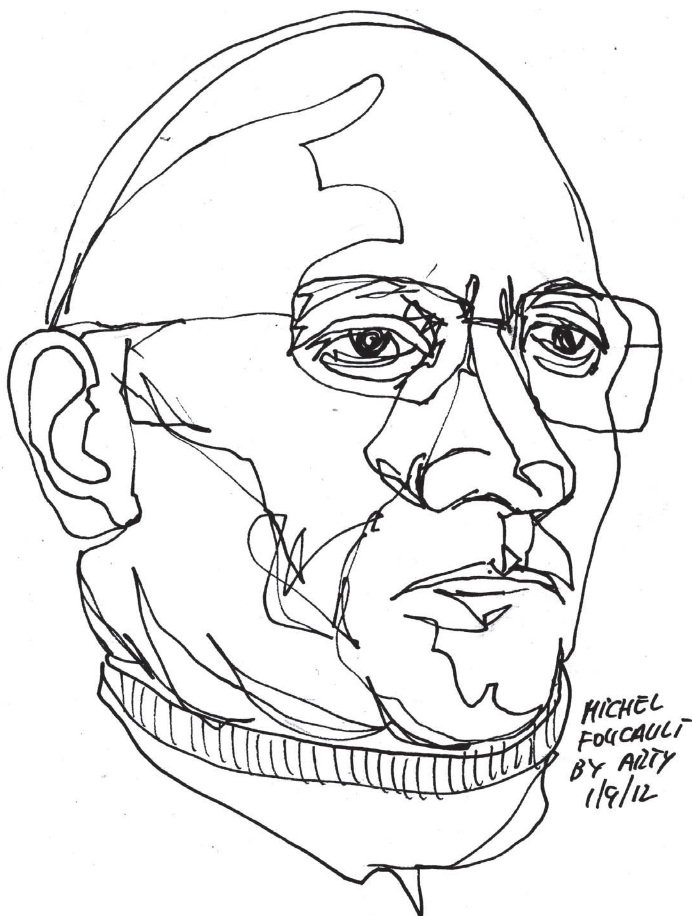
It is claimed that judicial independence does not consist in the *objectivity* of judges' opinions but rather in justified argumentation which properly explains why some claims are not valid whereas some others are. According to the Czech Constitutional Court, the legitimacy of courts cannot be primarily based on their *institutional* power but on the persuasiveness of their *argumentation.*

As a result, issues regarding a judge's mental health should be grasped on the basis of open and deliberative discussion and *understanding of essence* rather than relying on seemingly *objective* presumptions defined by the institution. Proper reasoning based upon arguments is the core of understanding. *Twelve Angry Men*, a film from 1957, may be an illustrative example.

Disciplinary proceedings with a judge [2] conducted by the Supreme Administrative Court and proceedings on the exclusion of a judge due to reasonable doubt about her or his impartiality [3] are platforms where understanding of the essence of a judge's mental health is necessary.

Street art for mental health awareness [3]

Michel Foucault [2]



In January 2019, the Supreme Administrative Court ("the Court") as the disciplinary court for judges decided for the first time that a particular judge was no longer able to perform well nor to carry out the demanding intellectual work within his judicial duties in the long term due to his mental health. Whether the Court managed to create space for deliberative discussion and understanding through proper argumentation is an issue for further analysis.

Liberalization through deliberative discussion on the role of a judge's mental health in judicial function is a way to strengthen judicial independence. Open discussion on a judge's mental health would liberate a judge's position in the sense Bělohradský and Holländer remind us of - that a judge is only someone *from* people not *above* them.

However, first of all, judges have to perceive themselves as biased human beings from (not above) the people, who need to search for solutions in deliberate discussion. It would present the judicial function as a role for a human being who thinks about herself or himself as a subject – not only a tool – of judicial institutions.

Mental ill-health prevention

In February 2020, a law student association named *V jednom kole* organised a panel debate on burnout syndrome in legal professions. Daniela Zemanova, the president of the Judicial Union, mentioned that in relation to judges' mental health it is possible to refer only to the personal experience of each judge because there are no statistics available. She added that there is a tendency to encase and refuse to admit mental health problems. A judge is hereby stigmatized and excluded due to her or his personal mental health issues.

Does this *status quo* indicate that there is an environment of deliberative discussion? How to start liberalization in practice then?

It is argued that deliberative understanding of judges' mental health can be achieved through general prevention of mental ill-health amongst judges. Emphasis on independent and voluntary preventive education and releases which would be organised by judges themselves could raise awareness about the problems.

The release may have different forms from sabbatical leaves and internships, to professional courses and communication. It may advance the understanding amongst judges and in the public that judges are not only tools of the system.

Nevertheless, the stress should be on the notion of judges' self-governance. Since stigmatization also comes from inside the judicial system, the process of mental ill-health prevention has to start from the judges themselves. Only then will it be possible to guarantee that even preventive measures will not be abused to question their independence.

However, this might be the most difficult part. It is not in vain that the best known *memento moris* in the Neapolitan catacombs of San Gaudioso include portrayals of judges with a message from the underworld: *before judging others, judge yourself.*

Conclusion

The mental health of judges and understanding of its role in the judicial system is essential for resistance of judicial independence against threats. Whereas *institutionalization* of judges' mental health serves as a tool of *normalization* of the judicial environment, *liberalization* of the approach

Daniela Zemanová at Panel debate "Burnout syndrome in legal professions" [4]

towards the mental health of judges contributes to understanding its essence through deliberative argumentation. Independent prevention of judges' mental ill-health is suggested as the instrument for balancing institutionalization and liberalization.

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Notes

[1] Court-packing is a strategy (e.g. swapping strategy) used by political leaders to replace sitting judges with loyal ones.

[2] See the Act No. 6/2002 Coll., on Courts and Judges, and the Act No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors.

[3] See section 8 of the Act No. 150/2002 Coll., Code of Administrative Justice.

References

Judgment of the Supreme Administrative Court, 9 January 2019, no. 16 Kss 8/2017 – 249.

Judgment of the Constitutional Court, 18 March 2020, no. II. ÚS 4029/19.

'Panel debate – V jednom kole - Syndrom Vyhoření v Právnických Profesích' (YouTube, 25 February 2020)<https://www.youtube.com/watch?v=99Ltm5N6yVU&t=6s> accessed 1 April 2020.

Pavel Holländer, *Priesečníky umenia a práva* (Aleš Čeněk 2019).

Václav Bělohradský, 'O Umění Soudit. Václav Bělohradský Nad Knihou Pavla Holländera' (Novinky.cz, 22 August 2019) <https://www.novinky.cz/kultura/salon/clanek/o-umeni-soudit-vaclav-belohradsky-nad-knihou-pavla-hollandera-40293967> accessed 10 March 2020.

Radkin Honzák, *Jak žít a vyhnout se syndromu vyhoření* (Albatros Media 2018).

Michael Foucault, *Historie šílenství v době klasicismu* (Herrmann 2019).

Eva Paseková, 'Syndrom vyhoření jako téma sněmu: Soudci potřebují odpočinek, aby mohli dobře vykonávat svoji práci' (*Česká justice*, 11 October 2019) <https://www.ceska-justice.cz/2019/10/syndrom-vyhoreni-jako-tema-snemu-soudci-potrebuji-odpocinek-aby-mohli-dobre-vykonavat-svoji-praci/> accessed 8 March 2020.

Eva Paseková, 'Josef Baxa: Zavírat před vyhořením soudce oči je krátkozraké' (*Česká justice*, 29 October 2019) <https://www.ceska-justice.cz/2019/10/josef-baxa-zavirat-pred-vyhorenim-soudce-oci-kratkozrake/> accessed 8 March 2020.

Karolina Drachovská, 'Rozhovor - Kateřina Šimáčková: Soudce musí být člověk, který pracuje od rána do večera - jak na případech, tak sám na sobě' <https://www.pravniprostor.cz/clanky/ostatni-pravo/rohovor-katerina-simackova-zadna-spolecnost-neni-tak-uspesna-aby-mohla-mrhat-kvalitami-casti-svych-prislusniku> accessed 8 March 2020.

Eva Paseková, 'Vojtěch Šimíček: Soudci by měli mít nárok na tvůrčí volno, aby „nevyhořeli"' (*Česká justice*, 28 October 2016) <https://www.ceska-justice.cz/2016/10/vojtech-simicek-soudci-meli-mit-narok-na-tvurci-volno-aby-nevyhoreli/> accessed 12 March 2020.

Photographs

[1] One Flew Over the Cuckoo's Nest directed by Miloš Forman. One flew over the cuckoo's nest, author: jdxyw, 30 July 2010, source: Flickr, CC BY-SA 2.0, edits: added text.

[2] Michel Foucault. Michel Foucault for PIFAL, author: Arturo Espinosa, 1 September 2012, source: Flickr, CC BY 2.0.

[3] Street art for mental health awareness. Hyuro graffiti, Valencia, author: duncan c, 30 September 2012, source: Flickr, CC BY-NC 2.0.

[4] Daniela Zemanová at Panel debate "Burnout syndrome in legal professions" organized by V jednom kole. Burnout syndrome at legal professions, author: *V jednom kole* - Vendula Mezeiová, 25 February 2020, source: V jednom kole - Vendula Mezeiová, CC BY Vendula Mezeiová.

[5] Disciplinary Court for Judges, author: Lucie Nechvátalová, source: Lucie Nechvátalová.

Disciplinary Court for Judges [5]

Hungary

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Hungarian government takes questionable measures to increase its power amidst the fight against the Coronavirus

Veronika Czina

In their fight against the COVID-19 pandemic, governments are forced to introduce extraordinary measures and adopt new policies. Under the veil of emergency circumstances, some governments may abuse their power and enact changes endangering democratic values and the rule of law.

National state of emergency in Hungary

The Hungarian government announced a national state of emergency (so-called "state of danger") on 11 March, which was followed by the closure of public institutions and a ban on large gatherings. This already allowed the government and different law enforcement bodies (i.e. police, military) to employ extraordinary powers. On 20 March, a bill suggesting the prolongation of the state of danger and potentially giving the government virtually unlimited powers for an undetermined period of time was introduced. The Parliament passed the bill on 30 March despite the opposition's efforts to amend it.

Viktor Orbán [1]

The "Enabling Act"

The law is officially called the Act on Protection against Coronavirus, but critics soon dubbed it the "Enabling Act" as it allows the government to rule by decree. Decrees issued in a state of danger normally need parliamentary approval to stay in force after 15 days. The Enabling Act, however, authorizes the government to extend the effect of decrees without parliamentary approval until the end of the state of danger. Furthermore, the decrees may deviate from laws and regulations in order to fight the virus or its consequences.

Most importantly, the law has no expiration date, and it can only be revoked by the Parliament after the state of danger comes to an end. Although the Minister of Justice Judit Varga argued that the Act can be annulled by the Parliament any time, this possibility is muted as long as the state of danger endures. Since the exact duration of the state of danger is within the exclusive discretion of the government, opposition lawmakers are effectively powerless during this period and the Enabling Act is safe from unwanted parliamentary oversight. The Act thus allows the government to govern by decree practically indefinitely, a legal setup that is in clear violation of the Fundamental Law (Constitution) of Hungary.

The room for potential abuse of executive power is vast. As the Act allows the suspension of certain laws in order to guarantee the stability of the national economy or

the safety of citizens, the government's freedom to apply legal regulations more restrictively or deviate from them entirely is enhanced.

Moreover, the Act also modified the Criminal Code, impacting on criminal procedures. For instance, under the state of danger, criminal procedures can be launched against people who are allegedly obstructing the government's efforts to contain the virus. Journalists who question or undermine the government's narrative can be framed for spreading false or distorted information and may be imprisoned for 1–5 years. Breaking official quarantine orders can also result in an 8-year prison sentence. If these law enforcement decisions are made unnecessarily, they violate fundamental rights. The chances of such an arbitrary crackdown increase if the government extends the state of danger without due justification.

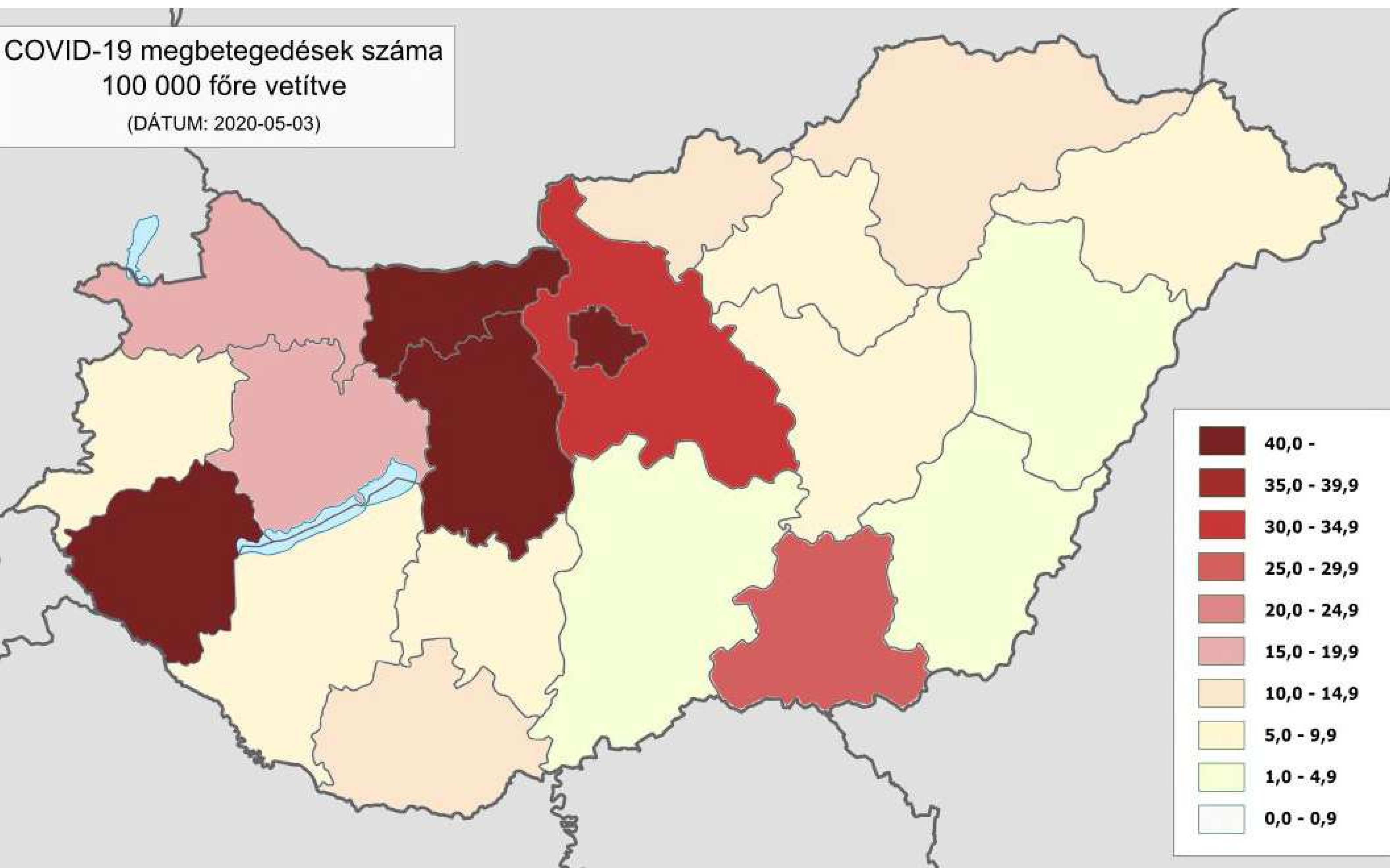
International reactions to the new law

The international reception of the law has been mostly negative. Before its adoption, the Council of Europe Human Rights Chief, Dunja Mijatović, warned that the sweeping new powers the government would acquire through the Act are dangerous enough, but they are especially worrisome without a clear cut-off date and other safeguards. In a similar vein, European Commission President Ursula von der Leyen also expressed concerns over certain governments' extraordinary measures introduced to flatten the curve of COVID-19, surely having the Hungarian example in mind.

Subsequently, 13 EU member states supported a joint statement urging governments to respect the principle of the rule of law, democracy and fundamental rights in their respective efforts to contain the virus.[1] Though the document made no explicit mention of Hungary, it was obvious that Orbán's government was the tacit addressee. Although the country was not among the first signatories, later on, Hungary signed the document, most probably to fight the perception that the statement was aimed against Budapest.

In all likelihood, Viktor Orbán's government will face more backlash due to the Enabling Act. Fidesz's position in the European Parliament is already precarious due to the suspension of its membership in the European People's Party (EPP). The bloc's leader, Donald Tusk, urged EPP to expel Fidesz due to its "morally unacceptable"

COVID-19 in Hungarian regions [2]



Hungarian parliament Building [3]

actions at home. At the same time, Orbán lobbied other leading EPP figures to garner support for his government, with little success to show so far.

In a resolution adopted on 17 April, the European Parliament expressed clear concerns over those governments that seem to abuse the pandemic for their own political needs. This time, the resolution named Hungary and Poland explicitly, and urged the European Commission to assess whether the Hungarian and Polish emergency measures are in line with the Treaties. At the same time, Věra Jurová, Vice-President of the European Commission, said that Hungary had not violated EU law.

The reactions mentioned above clearly show that the EU lacks a unified position against excessive governmental actions in the time of the COVID-19 pandemic. This situation will not be sustainable much longer because democratic values and the rule of law are at stake. If the EU cannot step up against such threatening measures in a coordinated way, this may give a dangerous precedent to other Member States as well.

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Notes

[1] The first signatories of the statement were: Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

References

Act XXII. Of 2020 on the Protection Against Coronavirus (2020. évi XII. Törvény a koronavírus elleni védekezésről) <https://net.jogtar.hu/jogszabaly?docid=A2000012.TV&celpara=&dbnum=1> accessed 7 April 2020

'COVID-19: MEPs call for massive recovery package and Coronavirus Solidarity Fund' (European Parliament website press release, 17 April 2020) <https://www.europarl.europa.eu/news/en/press-room/20200415IPR77109/covid-19-meps-call-for-massive-recovery-package-and-coronavirus-solidarity-fund> accessed 17 April 2020

'Hol kapott indokolatlan túlhatalmat a kormány a felhatalmazási törvénnyel?' (Helsinki Figyelő, 2 Apil 2020) <https://helsinkifigyelo.blog.hu/2020/04/02/hol_kapott_indokolatlan_tulhatalmat_a_kormany_a_felhatalmazasi_torvennyel> accessed 7 April 2020

Vlagyiszlav Makszimov, 'Hungary's state of emergency law is a 'blank cheque' to Orban, critics say' (Euractiv, 23 March 2020) <https://www.euractiv.com/section/justice-home-affairs/news/hungarys-state-of-emergency-law-is-a-blank-cheque-to-orban-critics-say/> accessed 7 April 2020

Photographs

[1] Viktor Orbán. EPP Helsinki Congress in Finland, 7-8 November 2018 (45777983671) cropped, author: European People's Party, 8 November 2018, source: Wikimedia Commons, CC BY 2.0, edits: photo cropped.

[2] COVID-19 in Hungarian regions. COVID-19 Hungary Map, author: DaniFeri, 17 April 2020 (updated on May 2nd), Wikipedia, CC BY-SA 4.0, edits: photo cropped.

[3] Budapest Parliament Building, author: Maurice, 16 July 2008, source: Wikimedia Commons, CC BY 2.0, edits: photo cropped.

Degrading detention conditions, suspending compensation: the "sense of justice of society" in illiberalism

Péter Kállai

Hungarian prisons are overcrowded, but the Hungarian government suspended payment of compensation ordered because of inhuman or degrading treatment of inmates. This article shows how "society's sense of justice" is used as a reason for infringing basic human rights.

Latest attack on the rule of law

In January 2020, Prime Minister Viktor Orbán held an annual press conference. One of his new key phrases is "*society's sense of justice*", which is an expression used in opposition to the legally binding judgements of national and international courts.

In his opinion, the fact that poor, unsatisfactory prison conditions can lead to compensation hurts the Hungarians' sense of justice. Such practices should therefore be forbidden, as Orbán puts it: "*European Court of Justice rules that convicted criminals take away Hungarian taxpayers' money for inadequate detention? What's coming next?*" [1] Orbán also mentioned problematic conditional releases and ordered that the Minister of Justice Judit Varga rectify these issues and submit the appropriate proposals to the government and to the parliament.

The Hungarian government thereby started a new campaign against what it calls the "prison business".[2] Multiple groups are targets of the newest attack on the rule of law, for instance human rights NGOs and lawyers who are being shamed for suing their own country after numerous judges were discredited and the independence of courts undermined (see V4 Human Rights Review Winter 2019, p. 17). Furthermore, as the government connects the issue with the current segregation cases [3] and interlinks them by National Consultations (see V4 Human Rights Review Spring 2020, p. 18), it also targets Roma people.

Prison in Budapest District II [2]

Prison Complex in Budapest District X [1]

The compensation system

Crowdedness of penitentiaries, inadequate conditions and very few square metres per inmate have long been problems in Hungary. After a few cases concerning inhuman or degrading punishment under Article 3 of the European Convention of Human Rights, the European Court of Human Rights issued a judgment in the *Varga and Others v. Hungary* case in 2015. A judgment is considered a pilot judgment when it explicitly goes beyond deciding the individual case, points out structural problems and expects structural steps from the country. In this case the Court expected Hungary

to establish a preventive and compensatory remedy system for the overcrowdedness of the penitentiaries.

In 2017, the Hungarian government set up a mechanism to manage complaints. Measures to improve conditions could be, for instance, transferral or additional open-air time. However, due to the generally poor conditions and crowdedness of all Hungarian prisons, almost every case ended in compensation for the detainees.

Overcrowded prisons

Although Orbán now blames lawyers and NGOs for "making a business" out of public money, the system of compensation was created by his government. What is more, the government introduced measures which even worsened the situation, resulting in an upsurge in claims for compensation.

Firstly, after 2010, the government adopted a stricter criminal policy without evaluating the infrastructural conditions. This led to more frequent imprisonment, long pretrial detentions and long-term confinement of people who were eventually not even convicted.

Secondly, although the government adopted a programme to build more penitentiaries, no new prisons have been established. According to a new plan, the government intends to build new facilities out of shipping containers.

Measures after the press conference

At first, there seemed to be more smoke than fire. The government adopted a resolution to postpone the payments of compensation until the latest possible date, i.e. to their due date. Then, however, the parliament passed an act delaying the payments until the adoption of new legislation on such compensations, meaning the government (and the parliament) effectively suspended the enforcement of final judgments.

According to the act, the government will have to suggest a new regulation of the compensation system by May 15, and by the end of September, it will have to ensure that the prison occupancy rate does not exceed 100 percent. Without substantive changes in criminal policy, these seem to be impossible requirements.

Vác Prison [3]

Minister of Justice Varga Judit [4]

It is worth mentioning that instead of standing up for the human rights of imprisoned people and demanding liveable conditions in prisons, most of the opposition MPs also supported the new act and merely blamed the government for establishing the system of "prison business", thereby actually supporting government rhetoric. They thus advocate criminal policy reform which would reduce overcrowding, but take over the rhetoric of the government by also using the stigmatising expression "prison business".

Conclusion

There are indisputably serious problems facing the prison system in Hungary. The situation regarding the basic rights of prisoners is inappropriate at best, leading to an unsustainable system of compensation measures. Although the situation could be resolved respecting the rule of law and human rights, the government uses the situation to verbally attack the opposition, NGOs, lawyers, courts, and – by creating a rhetorical environment in which the different issues are interconnected – also the Roma minority.

As far as the "sense of justice of the society" goes, it is important to note an important collateral consequence. Abolishing compensation is also detrimental to crime victims, as for them such compensation is often their only chance of receiving reparations from convicts.

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Notes

[1] It is important to note that relevant decisions are of course made by the European Court of Human Rights, not the European Court of Justice. Original quote: *"Az Európai Unió Bíróságának döntése alapján millió forintokat vesznek le elítélt bűnözők a magyar adófizetők pénzéből, mert a fogva tartás nem volt megfelelő? Hát hova jutunk itt?"*

[2] It is one of the newest tags for searching for posts on the government's official international blog published by the International Communications Office, Cabinet Office of the Prime Minister (http://abouthungary.hu/prison-business/).

[3] "*The background and objectives of the two cases are the same: […] destabilizing the country through the prison conditions and the situation of the Roma in Hungary.*" – says government-friendly Origo.hu in an article without author (https://www.origo.hu/itthon/20200220-gyongyospata-es-a-bortonbiznisz-a-soros-halozat-kozos-penzszerzo-akcioja.html).

References

Hungarian Helsinki Committee: Compensation for Inadequate Detention Conditions Threatened by the Hungarian Government – Information Note. January 2020. https://www.helsinki.hu/wp-content/uploads/HHC_info_note_prison_overcrowding_compensations_2020Jan.pdf

Marton Dunai: Hungary to build more prisons to tackle overcrowding, halt inmates' lawsuits. 31 January 2020 https://www.businessinsider.com/hungary-to-build-more-prisons-to-tackle-overcrowding-halt-inmates-lawsuits-2020-1

Ábrahám Vass: Gov't to End 'Prison Business' by Suspending Payment of Compensations for Poor Living Conditions. 16 January 2020. https://hungarytoday.hu/govt-prison-business-suspend-compensation-poor-conditions/

Justin Spike: Hungarian Bar Association: government is damaging confidence in the rule of law. 23 January 2020. https://insighthungary.444.hu/2020/01/23/hungarian-bar-association-government-is-damaging-confidence-in-the-rule-of-law

Photographs

[1] Fővárosi Büntetés-végrehajtási Intézet 10 author: VinceB, 25 March 2012, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.

[2] Fővárosi Büntetés-végrehajtási Intézet 03, author: VinceB, 25 January 2012, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.

[3] S Tower.JPG, author: Globetrotter19, 17 December 2015, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.

[4] Varga Judit author: Elekes Andor, 5 December 2019, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

Discriminatory discourse in Hungary: the aftermath of the Gyöngyöspata case

Alíz Nagy

The Hungarian Prime Minister declined to pay compensation to Roma children in Gyöngyöspata. The aftermath of the Gyöngyöspata case illustrates the salience of anti-Roma sentiments among the Hungarian establishment and the steadily deteriorating status of the rule of law in the country.

Schooling segregation – a short summary of the Gyöngyöspata case

As discussed in the last issue, the segregation of Roma children in Gyöngyöspata takes several forms. Even though the Hungarian law regulates and forbids segregation, de facto, it does occur. In some cases, it is the result of residential segregation.[1] The Chance for Children Foundation (CFCF) was created to address this matter. The organization has been successful in their litigation practices and their activity has shed light on dozens of cases of schooling segregation in Hungary.

Thanks to the CFCF's help, a court ruled that the children of Gyöngyöspata should be compensated. However, the Hungarian Prime Minister Viktor Orbán deemed the judgement unjust and unfair and the Hungarian authorities refused to deliver the compensation by the due date (17 January).

Anti-Roma discourse led by the Prime Minister

The Prime Minister claimed that it was unfair to pay the ruled amount to people who have not done anything to deserve it. Orbán stated that "*Hungarians will not cross some borders, and one of them is paying money for nothing.*" By arguing in this way, the Prime Minister overruled the court's decision and established a discriminatory discourse against the Roma population.

Aladár Horváth, the head of the Roma Parliament Association denounced the Prime Minister for public insult and misuse of office. Horváth argued that the PM's statements "*can release anger in the Hungarian society and might lead to violence against the Roma population.*" He also recalled

Horváth Aladár, the head of the Roma Parliament Association [1]

that Orbán and his government had already previously expressed a prejudiced opinion about the Roma. Recently, Orbán compared the Roma population to the migrants arriving in Hungary; an incident which led to a Roma representative, Béla Lakatos, quitting Fidesz. Lakatos considered it unacceptable that the government should play the migrant card in relation to the Roma.[2]

Both civil society and academia expressed outrage over this portrayal of the Roma in the public discourse. According to Jenő Setét, head of the association "Ide Tartozunk" ("We Belong Here"), the government's rhetoric gives the impression that the Roma cannot be right even if the courts rule in their favour. He called for a protest in support of the rights of the Gyöngyöspata Roma and judicial independence in Hungary. Accordingly, the demonstration was titled "*Free courts! Free Gyöngyöspata!*".

Setét said that "*the government was using the Roma as a tool for 'taking another slice' out of judicial independence. Setét recalled a day 11 years ago, when a Roma man and his son were murdered in the village of Tatárszentgyörgy by right-wing extremists. Then, they were 'murderous militias', whereas today, the government encourages such 'active hatred.'*" Furthermore, Ritók Nóra, a social worker taking part in the demonstration, argued that "*[t]his is a situation which must be dealt with at the system level, from above. […] Instead, I see that problems caused by segregation are breaking out, and the government itself is scapegoating the Roma.*"[3]

National consultation

The government announced in mid-February a new wave of National Consultations. These are often held on matters that the ruling parties consider to be of national importance. In fact, it is a direct mailing campaign through which the government surveys the opinion of citizens, though it is not an official referendum or plebiscite, its results are not binding, there are no procedural safeguards, and the questions are highly manipulative. Nevertheless, the Prime Minister claims such consultations legitimize policy choices in the "surveyed" areas (e.g. migration and the quota system suggested by the EU).

Experts generally consider national consultations to be flawed since the methodology and interpretation of results are non-transparent. Moreover, psychologists and sociologists protested against the current consultation as it addresses matters already decided by the courts, and would reinforce discrimination and hatred against the Roma population.

Deteriorated rule of law

In the above-mentioned cases, the Hungarian government is creating a discourse that seems to be politically motivated and leads to further stigmatization of people in already disadvantaged positions. Refusing execution of these court rulings further erodes the fragile independence of the judiciary in Hungary. Thus, anti-rule of law and anti-Roma discourses simultaneously become a government policy.

On 12 May, the Curia (Supreme Court of Hungary) handed down its final decision in which it upheld the previous decision. The compensation for the 60 children must be paid.

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Notes

[1] For the first introduction of the Gyöngyöspata case, see V4 Human Rights Review Spring 2020, p. 18. For the topic of residential segregation, see the V4 Human Rights Review Winter 2019, p. 23.

[2] Lakatos referred to the fact that the Roma population has been co-living with Hungarians for centuries. It is worth contextualizing here that migration is treated with profound hostility and xenophobia in Hungary.

[3] As reported by Justin Spike (https://insighthungary.444.hu/2020/02/27/we-want-peace-roma-demonstrators-lead-protest-for-judicial-independence).

References

About Us | CFCF' <http://www.cfcf.hu/en/about-us> accessed 14 March 2020

Balázs Cseke, 'Nem először rúgnak bele a romákba Orbánék' (3 February 2020) <https://index.hu/belfold/2020/02/03/fidesz_orban_viktor_nyilatkozatai_romakrol_bevandorloknak_nevezte_a_ciganyokat_ingyenelok_sztereotipia/> accessed 14 March 2020.

Kovács Kriszta, 'Hungary's Struggle: In a Permanent State of Exception' (Verfassungsblog) <https://verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/> accessed 15 March 2020.

'"We Want Peace" - Roma Demonstrators Lead Protest for Judicial Independence' (InsightHungary, 27 February 2020) <https://insighthungary.444.hu/2020/02/27/we-want-peace-roma-demonstrators-lead-protest-for-judicial-independence> accessed 14 March 2020.

Photographs

[1] Horváth Aladár, author: Tibor Végh, 20 September 2008, source: Wikimedia Commons, CC BY 3.0, edits: photo cropped.

[2] Rabszolgatörvény elleni tüntetés 2018.12.16. author: Halász Áron, 16 December 2018, source: flickr, CC BY 2.0, edits: photo cropped.

A banner saying "Independent Judiciary" [2]

Poland

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Flawed procedure of appointment of judges – unlawful proceedings?

Artur Pietruszka

In January, the Polish Supreme Court examined whether the participation in a court composition of a judge appointed by the President of the Republic of Poland upon application of the newly-appointed National Council of Judiciary resulted in an unduly appointed court formation and unlawfulness of criminal or civil proceedings.

CJEU judgment and subsequent Supreme Court rulings

In November 2019, the Court of Justice of the European Union (CJEU) ruled that the Supreme Court should determine whether the Disciplinary Chamber of the Supreme Court (DCSC) can be deemed independent and impartial, considering the objective circumstances (see V4 Human Rights Review Spring 2020, p. 26).

Following the CJEU judgment, the Labour Chamber of the Supreme Court ruled in December that the DCSC is not a court within the meaning of Article 47 of the Charter of Fundamental Rights (CFR), Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and Article 45(1) of the Constitution of the Republic of Poland (henceforth "Constitution") as it does not meet the criteria for an independent and impartial court.

The Supreme Court also stated that national courts should determine whether the mechanism of judicial appointment defined in national law is compatible with the right to a fair trial.

In January 2020, the Chamber of Extraordinary Control and Public Affairs of the Supreme Court passed a resolution, in a court formation consisting exclusively of members appointed in a procedure involving the new National Council of the Judiciary (NCJ).

The resolution stated that the duty to verify whether the NCJ is independent and impartial within the meaning of the CJEU judgment applies exclusively to the Supreme Court. Furthermore, it applies only within the procedure of examining appeals against resolutions of the NCJ regarding the preparation of a list of candidates recommended to the President of the Republic of Poland for appointment to the office of a judge.

President of the Republic of Poland Andrzej Duda [1]

In addition, the resolution concluded that such appointments are a result of the President's constitutional right and cannot be a matter of judicial control.

Petition to resolve divergences in the Supreme Court's case-law

On 15 January, the First President of the Supreme Court filed a petition to resolve divergences in the case-law of the Supreme Court. The discrepancies concerned the following question: upon application of a newly-appointed NCJ in a formation of a court, does participation of the

European Court of Justice [2]

person appointed as a judge by the President, result in such a person not being authorised to adjudicate, or is the court formation with the participation of a person thus appointed unlawful?

Key points of the judgment

On 23 January, the Supreme Court - in a formation of combined Civil, Criminal and Labour chambers - resolved that:

1) A court formation is unduly appointed within the meaning of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Code of Civil Procedures (in addition to other cases) if the court formation:

> a) includes a judge of the Supreme Court appointed upon application of the newly-appointed NCJ;
>
> b) includes judge of a common or military court appointed on application of the newly-appointed NCJ if the defective appointment causes, under specific circumstances, a breach of the standards of independence;

2) The interpretation provided in points 1(a) and 1(b) shall not apply to judgments given by courts before the 23 January 2020 and judgments to be given in proceedings pending at the date hereof under the Code of Criminal Procedure before a given court formation;

3) Point 1(a) of the resolution shall apply to judgments issued with the participation of judges of the DCSC irrespective of the date of such judgments.

Six out of 59 judges issued dissenting opinions to the resolution.

Justification of the resolution

Firstly, the Court explained the omission of judges of the DCSC and the Chamber of Extraordinary Control and Public Affairs. It stated that they would have been acting as “judges in their own case”. These judges had been appointed to the office in a procedure affected by the same flaw, the effect of which was to be examined in the resolution.

The resolution shared the view that the newly-appointed NCJ cannot be perceived as an independent body and should be considered an institution subordinated to political authorities instead.

The Court reasoned that the NCJ passed numerous decisions in absence of the First President of the Supreme Court, who – by virtue of the Constitution – is a member of the NCJ. In addition, the Court observed that the Minister of Justice publicly admitted that the NCJ had been formed this way in order to guarantee that its members were loyal to the political majority.

First Presidents of the Supreme Court [3]

Hence, the Court concluded that the procedure of judicial appointment is flawed. However, the Supreme Court made a distinction between the effect of the erroneous procedure on the Supreme Court judges and the judges of common and military courts. It was argued that the Constitution provides a crucial role for the Supreme Court in the judiciary, as the Court adjudicates upon the validity of elections and thus ensures proper functioning of the state.

As for judges of the common and military courts, the Supreme Court stated that it was necessary to apply different interpretations. The Court listed three main reasons for this approach: practical possibility of a review of the fulfilment of the impartiality and independence criteria, greater variety in the severity of the flaws in appointment procedures, and different constitutional functions of the courts. In spite of the general doubts regarding the impartiality and independence of newly-appointed judges, such doubts may not be substantiated with regard to individual judges.

The Court also explained that the concern for the stability of judgments and the trust of individuals influenced the decision to apply the resolution only to judgments issued after the date of the resolution.

Lastly, the Court invoked a CJEU case-law rule, imposing a duty on the national courts to provide the full effect of the EU law. Applying the rule, the Court observed that the independence and impartiality of courts must be genuine and cannot be assured by the mere appointment of the judge by the President of the Republic of Poland.

Proceedings in the Constitutional Tribunal

On 28 January 2020, the Constitutional Tribunal (CT) issued an interim decision suspending the application of the Supreme Court resolution of 23 January.

The decision was made in proceedings regarding the conflict of powers between the Supreme Court and the lower chamber of the Polish Parliament (Sejm), instituted by a petition of the Speaker of the Sejm, who argued that the Supreme Court resolution interferes with the Sejm competences concerning the organisation of the judiciary.

On 20 April the CT, considering the Prime Minister's application, adjudicated that the Supreme Court resolution is inconsistent with the Constitution, the Treaty on European Union and the Convention. The rapporteur on the case was Stanisław Piotrowicz, a former MP of the ruling party, who voted in favour of adoption of the Act of 8 December 2017 on the NCJ. Three out of fourteen judges issued dissenting opinions to the judgment.

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Notes

[1] The new National Council of the Judiciary was formed in accordance with the Act of 8 December 2017, amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3).

References

Joined Cases C-585/18, C-624/18 and C-625/18, A. K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy, Court of Justice of the European Union, 19 November 2019.

Judgement of the Supreme Court of 5 December 2019, No. III PO 7/18. available in English: <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/III-PO-0007_18_English.pdf>, accessed: 15.03.2020

Resolution of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, available in English: <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/I%20NOZP%203-19-2_English.pdf> , accessed: 18.03.2020

Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Supreme Court, 23 January 2020, case no. BSA I-4110-1/20.available in English: <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf>, accessed: 15.03.2020

Interim decision of the Constitutional Tribunal, 28 January 2020, case no. Kpt 1/20

Judgment of the Constitutional Tribunal, 20 April 2020, case no. U 2/20 available in English: <https://trybunal.gov.pl/en/hearings/judgments/art/11040-uchwala-skladu-polaczonych-izb-cywilnej-karnej-oraz-pracy-i-ubezpieczen-spolecznych-sadu-najwyzszego-z-dnia-23-stycznia-2020-r-sygn-akt-bsa-i-4110-120>, accessed: 28.04.2020

Judgment of the Constitutional Tribunal, 21 April 2020, case no. Kpt 1/20

Photographs

[1] Andrzej Duda podczas kampanii prezydenckiej, author: Radosław Czarnecki, 31 March 2015, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

[2] Sign in front of the Court of Justice of the European Communities (now the Court of Justice of the European Union), November 2006, author: Cédric Puisney, 18 November 2006, source: Wikimedia Commons, CC BY 2.0, edits: photo cropped

[3] Pierwsi Prezesi Sądu Najwyższego 2018, author: Adrian Grycuk, 10 November 2018, source: Wikimedia Commons, CC BY-SA 3.0 PL, edits: photo cropped.

[4] Ulica Rakowiecka 30, author: Adrian Grycuk, 10 December 2017, source: Wikimedia Commons, CC BY-SA 3.0 PL, edits: photo cropped.

The seat of the National Council of Judiciary [4]

Repression towards judges as a means of controlling the judiciary in Poland

Hanna Wiczanowska

In 2017, a disciplinary system was introduced to ensure the subjugation of judges to the will of the ruling majority. The repression particularly concerns judges who demand that the Polish authorities respect the rule of law.

Different categories of repression

The repressive measures levied upon judges primarily all serve the same purpose, i.e. gaining control over judicial power, depriving judges of their independence, and subordinating them to the current political objectives. The repression imposed upon such judges is not of a uniform nature and can be divided into two basic categories:

- "Hard repression" includes mostly cases of preparatory investigations and disciplinary proceedings. Within the analysis of such repression, one must mention the key figure of Judge Paweł Juszczyszyn.
- "Soft repression" refers to such execution of legal entitlements granted to court presidents which bears the hallmarks of chicanery or legal harassment. Examples of such conduct include unjustified transfers to another department of the court or putting all cases of a particular judge under administrative supervision.

Hard repression – the case of judge Juszczyszyn

Hard repression encompasses preparatory investigations and disciplinary proceedings – initiated by the Disciplinary Ombudsman for judges of the common courts, Judge Piotr Schab, and his deputies, Michał Lasota and Przemysław Radzik – in relation to judicial and extrajudicial activities. In this case, the victim of the repressive policy was a judge of the District Court in Olsztyn – Paweł Juszczyszyn.

Upon the decision of the Minister of Justice, Judge Juszczyszyn was delegated to rule in the Circuit Court in Olsztyn, where he would be inter alia examining the means of recourse against judgments of the district courts. While he was hearing an appeal in one of the cases, he decided

Court of Justice of the EU in Luxembourg [1]

to examine the legal status of the judge who had ruled the case in the first instance. He turned to the head of the Chancellery of the Sejm to request documents such as the applications for candidates submitted to the Chancellery of the Sejm as well as lists of citizens and judges supporting candidates for the NCJ, subsequently elected as its members.

The requested documents should have allowed the judge to examine the legal status of the body performing the function of the NCJ with regard to fulfilment of the criteria established within the judgment of the Court of Justice of the EU from 19 November 2019.

Paweł Juszczyszyn was the first Polish judge to undertake liability for execution of the aforesaid CJEU judgment, which provoked an immediate response from the disciplinary system. At first, the Secretary of State at the Ministry of Justice started to publicly threaten Juszczyszyn with initiating disciplinary proceedings against him. At the same time, the Minister of Justice dismissed the judge from his delegation in the Circuit Court in Olsztyn without providing any legal grounds for his decision.

In November 2019, a deputy of the Disciplinary Ombudsman for judges of the common courts initiated disciplinary proceedings against the aforesaid judge, accusing him of abuse of power. Simultaneously, the president of the District Court in Olsztyn as well as the NCJ ruled in favour of an immediate interruption of services for Juszczyszyn. Additionally, the media associated with the current ruling party started a campaign against the judge, presenting him in the worst possible light.

These actions ignored the fact that Judge Juszczyszyn was obliged to examine the legal status of the judge who had been appointed with the participation of the new NCJ. This course of action was set by the judgment of the CJEU from November 2019. These circumstances constitute evidence for the existence of a complex organized disciplinary system targeting judges who do not hold views compatible with those of Poland's ruling Law and Justice party.

Soft repression

Apart from the cases of hard repression, numerous judges are targeted by repressive measures which are described as "soft". Amongst these are unjustified transfer to another department of the court or putting all cases of a particular judge under administrative supervision.

In this context, it is vital to mention the influence of the NCJ in such repression. The Council – which according to the Polish Constitution upholds judicial independence and the autonomy of judges – paradoxically serves as one of the main perpetrators of the harm done under the existing disciplinary system. To illustrate this, it is sufficient to mention two resolutions of this body:

- A resolution ordering judges to use social media with restraint
- A resolution stating that conduct likely to undermine confidence in the independence and impartiality of a judge includes public use by the given judge of infographics, symbols which are or can be unequivocally identified with political parties, trade unions, and social movements formed by trade unions, political parties or other organizations carrying out political activities.

Both resolutions undoubtedly significantly contribute to undermining the fundamental rights and freedoms of Polish

Warsaw, Protest to defend independence of the Polish Supreme Court [2]

Demonstration against the adoption of three judicial acts [3]

judges, such as freedom of expression. It is important to recognize that expressions of support for the rule of law or wearing a T-shirt saying "Constitution" do not give rise to doubts about a judge's independence and impartiality. On the contrary, as it has been purported in the case of Judge Juszczyszyn, certain conduct – such as examination of the legal status of the body performing the role of the NCJ – constitutes a part of a judge's duties.

In order to notice the genuine objective of the repression, it is worth analyzing the case of a judge of the District Court Poznań-Nowe Miasto i Wilda – Monika Frąckowiak. After stating that the Polish Constitutional Court (dominated by judges dependent on the ruling party) is a farce and that the Minister of Justice appoints persons of "rather doubtful reputation as court presidents", the authorities initiated disciplinary proceedings against Judge Frąckowiak and she also became a target of "soft" repression.

In April 2019, Judge Frąckowiak received a proposal from the deputy of the Disciplinary Ombudsman P. Radzik in which she was promised the most lenient penalty (reprimand) if she admits to having committed a disciplinary offence.

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References

J. Kościerzyński (eds.), Wymiar sprawiedliwości pod presją – represje jako metoda walki o przejęcie kontroli nad władzą sądowniczą i Prokuraturą w Polsce. Lata 2015–2019, Iustitia reports, ISBN 978-83-920641-6-9.

Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy* from 19 November 2019.

Resolution ordering judges to use social media with restraint (resolution from 11.01.2017)

Resolution stating that conduct likely to undermine confidence in the independence and impartiality of a judge includes public use by the given judge of infographics, symbols which are or can be unequivocally identified with political parties, trade unions, and social movements formed by trade unions, political parties or other organisations carrying out political activities from 12.12.2018.

Website of the Association of Polish Judges "Iustitia": https://www.iustitia.pl

Photographs

[1] European Court of Justice, author: Gwenael Piaser, 27 February 2010, source: Flickr, CC BY-NC-SA 2.0, edits: photo cropped.

[2] Protest w obronie niezależności Sądu Najwyższego, author: Platforma Obywatelska RP, 4 July 2018, source: Flickr, CC BY-SA 2.0, edits: photo cropped.

[3] Demonstracja przeciwników trzech ustaw sądowniczych pod Sądem Okręgowym w Toruniu, 21 July 2017, author: Runab, source: Wikimedia Commons, CC BY-SA 4.0 PL, edits: photo cropped.

Presidential elections in Poland: Does history like to repeat itself?

Łukasz Szoszkiewicz

The start of the 2020 presidential campaign in Poland feels like *déjà vu* to those who closely followed the previous campaign of 2015. Just like then, we have an incumbent president with the support of the ruling party, a celebrity candidate, and strong social polarization.

In 2015, Bronisław Komorowski ran as an incumbent with the support of the Civic Platform, Poland's largest opposition party. In the first presidential polls conducted in January 2015, Komorowski secured the support of 65% of respondents. In January 2020, the current incumbent Andrzej Duda secured 38% of votes, while only 20% of voters would support the opposition candidate.

The following months, both of the 2015 elections and of those scheduled for 2020, brought a steady decline in support for the incumbent presidents. Media hostile to the ruling party successfully presented the candidates as thoughtless executors of instructions coming from the parliamentary majority and portrayed them as cumbersome in their actions. In 2015, Komorowski's speech in the Japanese parliament became a symbol of awkwardness, whereas now a photo of President Duda signing a bill at a neglected railway station in a small town somewhere in eastern Poland holds a similar meaning.

Further accusations made both in 2015 and 2020 concern the lack of political independence. This is best illustrated by the statistics of vetoed bills. Whilst Bronisław Komorowski vetoed four bills over the term of five years (2010-2015), Andrzej Duda (2015-2020) vetoed nine bills, four of which he refused to sign during the first two months in office, when the Civic Platform, currently in opposition, had a parliamentary majority.

The celebrity candidate

In 2015 the dark horse of the presidential elections was rock musician Paweł Kukiz. He eventually secured over 20% of the votes, appealing mainly to anti-establishment voters reluctant to vote for candidates put forward by the two largest political parties. This time, Szymon Hołownia, a popular TV presenter and social activist, is trying to take on a similar role. He was a member of the Dominican monastic community in the past; an experience which gives him strong legitimacy to speak on religious and social issues.

Celebrity candidate – Szymon Hołownia [1]

It would seem that the combination of a contemporary interpretation of Catholic values and experience in show business should make him an ideal candidate for an electorate tired of rivalry between the two largest political forces. In the January polls, the support for Hołownia was estimated at 10%.

The following weeks of the presidential campaign, however, revealed a lack of concrete programme proposals. In contrast to the anti-establishment candidate of 2015, Szymon Hołownia is a leader with too little political temperament and will certainly not attract voters beyond those satisfied with the choice of the "lesser evil". Furthermore, the members of the so-called "swing groups", i.e. young people and entrepreneurs who bear the burden of growing social benefits, find it difficult to identify a clear message in his speeches.

Social polarization

As in 2015, the upcoming elections are primarily a choice between the candidates of the ruling party (Andrzej Duda) and the opposition party (Rafał Trzaskowski). The incum-

bent president is trying to convince the voters by promising, among other things, a one-time payment of additional pensions, the granting of which is obviously beyond the presidential competences. Such policies depend solely on the will of the parliamentary majority. The same is true for decisions on the largest investment projects in the country, which are to bring tens of thousands of new jobs in the coming years (e.g. New Central Polish Airport with a foreseen capacity of 100 million passengers per year).

As for the opposition candidate, his campaign is based on the need to reduce the power of the parliamentary majority. As president, he would have a decisive influence on the appointment of people to the highest positions in various bodies, for instance in judiciary.

In this sense, the presidential elections in 2020 are not a choice between two strong personalities, but another test of whether the controversial course taken by the ruling party has the necessary social legitimacy. The incumbent's loss would mean the collapse of a political strategy based on the conviction that the massive transfers of social benefits into the pockets of those who earn the least would make it possible to stay in power.

Rafał Trzaskowski, candidate for president supported by the Civic Platform [2]

Robert Biedron, candidate of the Social Democratic Party [3]

What's next?

If the events unfolded as in 2015, the incumbent President Duda would systematically lose public support, which would ultimately lead to his defeat by the opposition candidate. At the beginning of June 2020 support for the incumbent President fell below 50% for the first time in five years. Rather than trying to convince the unconvinced, President Duda is sending his message to the voters who will vote for him anyway.

A much more open attitude and nuanced message is proposed by the opposition candidate, whose electoral slogan refers to the slogan of Lech Kaczyński, President of Poland in the years 2005-2010, whose death in a plane crash caused deep social divisions lasting until today. He praises presidential qualities of Lech Kaczynski, as opposed to the incumbent president. Such strategy might sow a seed of uncertainty in the minds of those voters of Andrzej Duda who motivate their support with the choice of the "lesser evil".

What is most worrying now is the highest daily increase in COVID-19 cases (599 on 8 June). But not at all because some restrictions will have to be reimplemented. If this trend continues, COVID-19 might pose additional challenges for public authorities to run elections in a safe, secure and effective manner.

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References

Alex Szczerbiak, *Can Andrzej Duda lose the Polish presidential election?*, LSE Blog, 11 March 2020, https://blogs.lse.ac.uk/europpblog/2020/03/11/can-andrzej-duda-lose-the-polish-presidential-election/

Jan Cienski & Zofia Wanat, *Poland's coronavirus-crisis election unleashes political warfare*, Politico, 29 March 2020, https://www.politico.com/news/2020/03/29/polands-coronavirus-crisis-election-unleashes-political-warfare-154852

Photographs

[1] 02019 (3) Szymon Hołownia, author: Silar, 28 November 2019, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

[2] EPP Summit, Zagreb, 20 November 2019, author: European People's Party, 20 November 2019, source: Flickr, CC BY 2.0, edits: photo cropped.

[3] Jedynki do sejmu - koalicja Lewica - konferencja, author: Paweł Wiszomirski/Lewica Razem - Partia Razem, 18 August 2019, source: Flickr, CC0 1.0, edits: photo cropped.

[4] Anna Komorowska Bronisław Komorowski Andrzej Duda Agata Kornhauser-Duda Sejm 2015, author: The Chancellery of the Senate of the Republic of Poland/Michał Józefaciuk, 6 August 2015, source: Wikimedia Commons, CC BY-SA 3.0 pl, edits: photo cropped.

Two presidential couples - B. Komorowski (2010-2015) and A. Duda (2015-2020) with the first ladies [4]

Slovakia

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Slovakia in the time of pandemic

Erik Láštic

Slovakia changed its government amid the pandemic after the parliament elections of 29 February brought a dominant victory for the anti-corruption political movement Ordinary People. What are the challenges for the new government that faces an unprecedented epidemic and economic situation, but also promises the restoration of the rule of law?

Slovakia became one of the first European countries to impose "stay at home orders", stopping short of a complete lockdown in the middle of March. Several days before the national government's decision, the governor of the Bratislava region closed all secondary schools in the region. The mayor of Bratislava quickly followed by imposing similar measures on all elementary schools.

Within a few days, a state of emergency was declared, which led to the closing of all schools and non-essential businesses. All this was happening while the results of the 29 February parliamentary elections brought about a complete change of government, with four opposition parties forming a new coalition holding a constitutional majority under the designated Prime Minister Igor Matovič.

The Constitutional Court of Slovakia [1]

It's the executive, stupid!

Already in the first days of the lockdown, it became obvious that the government and especially the Prime Minister would play a crucial part. Although this "rallying around the flag" moment during a crisis is nothing unique, the COVID-19 pandemic is highlighting the complicated design of parliamentary systems, originally built around the idea of a sovereign parliament controlling the executive that serves upon its approval.

Slovakia is one of the new democracies that intentionally moved to parliamentary design after 1989 to counteract decades of omnipotent leaders and their parties. Nevertheless, as everywhere else, modern governance is challenging the parliamentary system. For Slovakia, the early experience with democratic backsliding during the era of Prime Minister Vladimír Mečiar, especially between 1994–1998, showed that parliamentary design without strong checks and balances is unable to constrain an executive that decides to dominate the system.

The majoritarian rule that almost excluded Slovakia from EU accession was weakened after the 1998 elections. The new majority returned to proportional representation in the parliament and more attention was paid to minority rights and overall rule of law. Yet the return to Europe after 1998 highlighted another weakness of the parliamentary design, i.e. the inability of the parliament to effectively control the executive during the accession. This inability only grew after the 2004 enlargement, even though the parliament strengthened its powers vis-à-vis the executive in EU-related matters.

National Council of Slovakia [2]

Use of extraordinary legal procedures

The newly elected Slovak parliament has held several sessions so far, all striving to approve the government's proposals that addressed the current crisis. In all of them, the government pushed for, and parliament approved, a fast-track procedure that allows for three swift readings of the proposals, i.e. allows a bill to be passed in parliament on the same day it was approved by the government. While the procedural rules of the parliament allow for this power to be used only under extraordinary circumstances (e.g. direct threat to human rights or the economy), in the past it was frequently misused by majorities to push legislative agenda serving political aims through the parliament.

The latest example of this was the proposal of the previous government of Prime Minister Peter Pellegrini (SMER) regarding an extra pension payment for all pensioners from 2021 ("13th pension"). This incident took place in the middle of the election campaign, long after the official business of the parliament ended. Although it was clear that the proposal for a fast-track procedure did not fulfill the procedural rules of the parliament, the majority approved it. The President Zuzana Čaputová responded by asking the Constitutional Court to review the law, arguing that none of the conditions for the procedure were fulfilled.

The new government used the fast-track procedure to address the current health and economic crisis. However, just like the previous governments, it was unable to resist its efficiency, and successfully pushed for changes that were not related to the health crisis, e.g. amending legislation regarding the Judicial Council and the Supreme Court and their composition and leadership.

Big brother in the time of the pandemic

One of the measures proposed by the new Slovak government, designed to mitigate the spread of the coronavirus at the end of March, was the use of location and other meta-data produced through electronic communication. In a strong rebuttal to the proposal, the leader of the opposition and former Prime Minister Róbert Fico expressed fear that the law could be used against the political opposition. "*It is a spying law, with the worst impact on human rights,*" said Mr. Fico. Nevertheless, in 2015, the then Prime Minister Fico publicly warned "*that every person – and I do not want to specify whether Muslims, residents or citizens of Slovakia – who needs to be monitored, will be monitored.*"

While only two days passed between publishing the draft of the law and its approval in the parliament, the substantive discussion in the media and the parliament forced the government to soften its proposal and use only anonymized data of Slovak users. Nevertheless, the biggest opposition party, SMER, still asked the Constitutional Court to review the law, arguing that the adopted surveillance measures threatened the constitutional right to privacy.

At this time of crisis, the long-existing accountability mechanisms in Slovakia, e.g. the media and the civil society, still play a vital role in keeping the government accountable. For them, but also all of us, it is necessary to see beyond the horizon of the pandemic. Once the crisis is over, the need for accountability will be even stronger. It will be imperative to prevent "the new normal" in the form of stronger executives, normalization of extraordinary legislative procedures, and the expansion of surveillance.

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References

The Slovak Government Manifesto 2020-2024 (in Slovak), The Office of the Government, Available at: https://www.vlada.gov.sk/data/files/7817_programove_vyhlasenie_2020_2024.pdf

Erik Láštic, Koronavírus robí zo sledovania nový normál (Coronavirus makes surveillance a new normal), SME, 26/03/2020, Available at: https://komentare.sme.sk/c/22369156/koronavirus-robi-zo-sledovania-novy-normal.html

Erik Láštic, Pár nevyžiadaných rád budúcemu premiérovi (Few unsolicited advices for new PM), SME, 07/03/2020, available at: https://komentare.sme.sk/c/22351144/matovic-moze-byt-lepsi-ako-jeho-predchodcovia.html

Photographs

[1] Ustavny sud - hlavné priecelie, author: Kobi92, 15 June 2011, source: Wikipedia Commons, Free Art License, edits: photo cropped.

[2] Slovakian parliament, author: Vityavo, 19 May 2012, source: Wikimedia Commons, CC0 1.0, edits: photo cropped.

[3] National Council of the Slovak Republic, Bratislava, Slovakia, author: Vincent Eisfeld/nordhausen-wiki.de, 20 March 2015, source: Wikimedia Commons, CC-BY-SA-4.0, edits: photo cropped.

National Council of the Slovak Republic, Bratislava [3]

Istanbul Convention: a wolf in sheep's clothing or yet another witch-hunt?

Jana Šikorská

Slovakia is officially stepping down from ratifying the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). What preceded the decision and what are its consequences?

One would expect to rejoice when the protection and rights of victims of domestic violence become part of daily political discourse. Unfortunately, not in Slovakia. The issue of domestic violence as tackled by the Istanbul Convention became a favourite tool for ideological battles.

The painfully long divorce

Slovakia signed the Istanbul Convention (also referred to as "Convention") in 2011 with a view to its later ratification. The Convention was signed by a short-lived government presided by Iveta Radičová. Radičová's government lost the confidence vote in 2011 as well as the subsequent elections of 2012 and since then, Slovakia has been in a populist turmoil, with the Istanbul Convention proving a particularly popular target of fire.

The first voices of rejection appeared already in 2013 from ultra-conservative circles, when a group of NGOs with political backing from the KDH (Christian Democratic Party) and OĽANO (Ordinary People and Independent Personalities) adopted a strongly dismissive position in regards to the content of the Convention. The protests against ratification centred around a few soundbites, such as rejection of "gender ideology" or protection of "traditional family" and values.

Between 2013 and 2018, the Convention was almost exclusively discussed only within Christian or feminist circles, with no serious interest on the side of the political or public mainstream. However, the topic was later elevated to the political mainstream by the governmental Slovak National Party (SNS), which even featured the slogan "We defeated the Istanbul Convention" on its 2020 election billboards. Other parties quickly joined the discourse, and the topic became a political faultline between liberals and conservatives.

The painful divorce with the Convention was finalised in March 2020, when Zuzana Čaputová, the President of the Slovak Republic, addressed the Council of Europe with an official statement pursuant to the decision adopted by the Slovak Parliament not to ratify the Convention. March 2020 marks the end of the difficult political life of the Convention in Slovakia but the scars it left on the discourse on female rights and the rights of LGBT+ people will remain for years to come.

Andrej Danko – leader of the Slovak National Party [1]

Ideology over reasons

Very few scholars or practitioners from the conservative spectrum tried to analyse the Convention from a legal perspective. The space was occupied by those who spoke of the Convention as introducing a "culture of death" to the "pure" Slovak society or as advancing LGBT+ rights. One of the few conservatives who attempted to dissect the legal provisions of the Convention is the prominent Slovak lawyer Daniel Lipšic, yet even his analysis is clouded by his own ideological background.[1]

The Convention and its contents were bent to such an extent that its original plain purpose – to secure harmonisation in laws protecting women and children from domestic abuse and violence – got lost in the shouts of predominantly male politicians and interest groups. In contrast,

this article attempts to highlight and interpret some of the key legal features of the Convention misunderstood by the commentators.

The Convention's purposes, which limit its scope in legal terms, are clearly outlined in its first substantive Article. Five purposes are featured, and none of them mentions the rights of LGBT+ people or forcible change of the national understanding of sex or gender in the respective ratifying countries. Instead, they are all unified in providing effective legal tools to eradicate all forms of violence against women and to provide women with adequate support to secure their equality and dignity.

The issue of gender

The real catalyst of the hateful rhetoric in Slovakia was the definitional Article 3 of the Convention, in particular the word "gender". The Convention defines gender as "socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men," thus opting for a wider definition beyond mere biological distinction. This caused panic among conservative activists.

However, what seems to be overlooked by the critics is the crucial limitation at the beginning of Article 3 – that the definitions are adopted "for the purposes of this Convention." This limitation means that the ratifying state has no obligation to adopt this wider definition in its domestic laws beyond the laws implementing the Convention. The reason why such a definition was included has already been repeated many times: to reflect the complex nature of the root of the violence that stretches beyond biological differences and pertains to socially constructed roles.

A welcome added value of the Convention is the establishment of a Group of Experts (GREVIO) who will monitor the state of harmonisation. The experts are elected by the Committee of Ministers of the Council of Europe after obtaining the unanimous consent of the Parties to the Convention. Some authors criticise GREVIO as an unelected and undemocratic body, but the existence of the transparent appointment procedure rebuts any such claims, as the standard electoral practice for expert bodies adopted by the Convention has been used in many international treaties. [2] GREVIO has already released its first comprehensive report for the years 2015–2019, providing an invaluable source of information about previously inaccessible data.

The Convention is ground-breaking because it is the first binding European document tackling the issue of domestic violence in a harmonised and systematic manner. Some opponents of the Convention voiced the belief that Slovakia already has adequate legislation protecting victims of domestic violence. Nevertheless, the adequacy of the laws is debatable and does not guarantee their future preservation.

The harmonisation and international oversight should, however, also safeguard the "locking-in" of protections from any future unilateral adjustments, similar to those seen in Russia in 2017, when the Duma passed an amendment to its Criminal Code, decriminalising the first offence of domestic battery. Moreover, as mentioned above, the Convention itself contains a number of concrete steps

Members of the European Parliament celebrating the first anniversary of the Convention [2]

Illustration image [3]

to combat both the effects and roots of violence. Therefore, it is not a vague document with no added value for the victims or states, as some sceptics would claim.

Missed opportunity

The discursive space pertaining to the Convention was wasted by inaccuracy and populism. The victims here are not only the existing victims of domestic violence but everyone. Anyone can become a victim of domestic violence in need of protection. As legal protection in the ratifying countries will become more harmonised, the Slovak framework will be left to develop on its own. Slovak citizens will not benefit from the cooperation happening at the international level. Even more damaging are the prejudices caused or deepened by the hateful discourse against minorities that will take a long time to heal.

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Notes

[1] His ideology was evident in the argument that the expert commission established by the Convention would have the ability to criticise religious education at schools, and in particular the ordination of men for priests, because this would be contrary to the "gender ideology". This statement is nothing more than an assumption with no legal backing. The expert committee and their mandate is discussed in the subsequent paragraphs.

[2] This was the case with the expert committee established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

References

Burajová, Barbora. *Mýty, ktoré sa šíria o Istanbulskom dohovore, môžete nahradiť faktami*. Zastavme násilie. 13 February 2020. (https://www.zastavmenasilie.gov.sk/news/myty-a-fakty-o-istanbulskom-dohovore/).

Geherová, Ria. *Od džendžeru u kultúre smrti. Kde sa vzal pojem gender ideológia a kto ním straší.* Denník N. 17 February 2020. (https://dennikn.sk/1757600/od-dzendzeru-ku-kulture-smrti-kde-sa-vzal-pojem-gender-ideologia-a-kto-nim-strasi/?ref=tema.)

GREVIO. *1st GENERAL REPORT ON GREVIO'S ACTIVITIES.*Council of Europe. April 2020. (https://rm.coe.int/1st-general-report-on-grevio-s-activities/16809cd382).

Kiska, Roger. *Za Istanbulským dohovorom je nebezpečná agenda*. Postoj. 25 February 2020. (https://www.postoj.sk/51986/za-istanbulskym-dohovorom-je-nebezpecna-agenda).

Možnosť voľby. *…Lebo na živote žien ZÁLEŽÍ.* Možnosť volby. 2017. (https://moznostvolby.sk/wp-content/themes/moznost/otazky-a-odpovede-o-istanbulskom-dohovore/otazky%20a%20odpovede%20o%20istanbulskom%20dohovore%20na%20stiahnutie.pdf).

Petrík, Simona. *O čo skutočne ide pri spore o Istanbulskom dohovore*. Blog Denník N. 25 February 2018. (https://dennikn.sk/blog/1040474/o-co-ide-pri-spore-o-istanbulskom-dohovore/).

Rábara, Pavol. *Nesvätenie žien môže vadiť rodovej ideológii, tvrdí Lipšic*. Postoj. 19 May 2015. (https://www.postoj.sk/4498/nesvatenie-zien-moze-vadit-rodovej-ideologii-tvrdi-lipsic).

Takáčová, Romana. *Kritikom Istanbulského dohovoru pravda nevyhovuje, hovorí expertka na ženské práva*. Ženy v meste. 15 February 2020. (https://www.zenyvmeste.sk/istanbulsky-dohovor-rozhovor-mesochoritisova-rod-ideologia-gender?fbclid=IwAR2U0Znj3BCTgAu3gIKIEWwytpZpFyPsTtkbhzY6iZfAUJmwMuVHeErQHrQ).

Photographs

[1] Press Conference - Bratislava Informal Parliamentary Summit_2016-10-07, author: EU2016 SK/Rastislav Polak, 7 October 2016. source: Flickr. CC0 1.0, editace: photo cropped.

[2] Photo-OP // the first anniversary of the EU signature to the Council of Europe Convention to prevent and combat gender-based violence and domestic violence, the so-called Istanbul Convention, author: ALDE Group, 13 June 2018. source: Flickr. CC BY-ND 2.0, editace: photo cropped.

[3] Women Rights are Human Rights. Author: Narih Lee, 21 January 2017. source: Flickr. CC BY 2.0, editace: ořez.

Compensation of victims of violent crimes in Slovakia: future challenges and contemporary problem solving

Tomáš Horeháj

How does the state compensate victims of violent crime in Slovakia? After a relatively new law on victims of crime was introduced in 2018, the legal regulation of this phenomenon should be discussed, as well as the problems of its application and prospective changes to the law.

A few years ago, victims were on the periphery of the state's attention and their rights, such as the right to be heard, the right to be informed or the right to be present during the criminal proceeding, were rather overlooked. As time went by – and with the development of victimology – the spectrum of issues of interest to the state has broadened and victims gained important rights not only within the scope of the criminal proceedings but also beyond it. The innovations included the right to protection, the right to be heard, and the right to make claims including the right to compensation from both the offender and the state.

Slutwalk London [1]

Legal regulation of compensation of victims of violent crime

The law on victims of crime (Act No. 274/2017 Coll., hereinafter the "Victim Act") has been effective since January 2018. It allows victims of violent crimes, i.e. Slovak citizens, EU citizens, permanent residents, foreign nationals under the protection of international treaties, or persons that were granted asylum, to apply for state compensation.

Furthermore, there are additional eligibility criteria for claiming compensation from the state. Firstly, the compensation can be claimed only if the crime was committed in Slovakia. Secondly, only victims of intentional violent crimes are eligible. And thirdly, victims have to be active during the criminal proceedings and apply for compensation directly from the offender.

Compensation is paid as a lump sum and cannot exceed the sum equal to 50 times the minimum wage in Slovakia.[1] The victims are eligible to obtain this maximum in cases of death of their relatives.[2] Apart from the compensation for potential physical damage, particularly vulnerable groups of victims – namely the victims of human trafficking, rape, sexual violence and sexual assault – are also eligible for moral compensation for the psychological/emotional harm suffered as a direct consequence of the crime. This sum equals ten times the minimum wage and it is paid automatically.

The Ministry of Justice (MoJ) administers the application process. The application must be sent to the MoJ within one year after the final decision in the criminal proceedings. If the criminal court refers the victim with its claim to the civil proceedings, an application must be sent within one year after the final decision of the civil court.

The MoJ investigates individual applications and assesses them in cooperation with enforcement agencies and courts. It is obliged to make a decision on compensation within six months after receiving the complete application. If the applicant is not satisfied with the MoJ's decision, he or she can appeal it.

Legislative changes de lege ferenda to the Victim Act

There are several legal and administrative burdens that complicate timely and efficient processing of applications. However, there are also numerous possible amendments that could strengthen the victims' right for compensation.

Firstly, the current design, under which a victim who wants to apply for compensation needs to wait for the final decision, may create undue time delay. In various EU countries, it is sufficient that the victim reported the crime; for instance, in the Czech Republic, a victim is able to apply for compensation from the day of reporting the crime to the police. In addition, the relatively short deadline for application in Slovakia (one year) is too strict. This should be extended together with the period over which the victim is to apply for compensation from the offender (which is currently halted at the end of the investigation phase).

Secondly, the contemporary legislation narrows the pool of victims by focusing primarily on the nature of the crime (e.g. domestic violence), not the type of damage the victim suffered. A more open compensation scheme should include not only compensation for health and moral damages, but also for financial and material ones, i.e. covering costs which arise as the indirect consequence of the crime (e.g. loss of earnings, therapy and rehabilitation sessions).

Thirdly, the current interdependence of state and offender compensations weakens the rights of victims. State compensation is currently viewed as a last resort for the victims since they first need to seek compensation from the offender or other sources (e.g. health or other insurance). Ideally, these two institutes should be separated and the victim should have the right to claim compensation from the state (in the form of emergency/social payment), while the state (instead of the victim) would enforce compensation from the offender, thus preventing further traumatisation.

Lastly, although the concept of restorative justice is relatively new for Slovak criminal law and unknown to the legislation, it could have strong potential benefits for both the victims and the offenders. For instance, mediation between the two parties may lead to satisfaction of the victim and a sort of rehabilitation of the offender more likely than lengthy and burdensome criminal justice.

Illustration image [2]

Illustration image [3]

Conclusion

By introducing the Victim Act, Slovakia undoubtedly progressed closer to the EU countries that transposed the Victim Directive into their national legal orders in the past. Even though there have been many positive developments in the realm of victims' rights, there is still much to be done when it comes to victims' compensation since the journey from crime to compensation remains paved with many obstacles and administrative burdens.

The most efficient method to eradicate these barriers would be to introduce legislative changes and new strategies that would be more victim-friendly, fair, appropriate and reparative to all victims. The state has a vital role to play in this process, because, as the European Agency for Fundamental Rights in its report stated, "*the state is no longer in the comfortable and patronising position of a more or less good Samaritan, but a duty bearer indebted to the individuals living under its jurisdiction as right holders.*"

Tomáš is a PhD student at the Academy of Police Force in Slovakia where he focuses on criminology and security sciences. He holds advanced Master's degree in Law from Trnava University. During his university studies he did an internship at the United Nations Office on Drugs and Crime in Vienna and also at the Ministry of Foreign and European Affairs of the Slovak Republic.

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Notes

[1] The calculation is based on the year when the crime occurred; the sum is calculated from the minimum wage valid for that year.

[2] This would generally include crimes such as premeditated murder, murder or manslaughter.

References

European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14 November 2012, [online 04.02.2019]. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF

European Union: Council of the European Union, The future Netherlands, Slovak and Maltese Presidencies. Taking forward the Strategic Agenda, [online 04.02.2019]. Available at: http://data.consilium.europa.eu/doc/document/ST-12396-2015-INIT/en/pdf

Quote taken from p11. Available online via: http://fra.europa.eu/sites/default/files/fra_uploads/Country-study-victim-support-services-uk.pdf.

Act no. 274/2017 Coll. on victims of crime.

Act no. 301/2005 Z. z. Criminal Act Oder.

Photographs

[1] Slutwalk London 2011 - 18, Author: Garry Knight, 11 June 2011, source: Flickr, CC0 1.0, edits: photo cropped.

[2] Police of Slovakia, author: Lasy, 9 August 2008, source: Wikimedia Commons, CC BY 3.0, edits: photo cropped.

[3] Unknown Victim, Author: Center For Jewish History, NYC, 15 September 2009, source: Flickr, CC0 1.0, edits: photo cropped.

[4] Victims Rights, author: Nick Youngson, source: The Blue Diamond Gallery/ Alpha Stock Images, CC BY-SA 3.0, edits: photo cropped.

Illustration image [4]

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