

Czech Republic Human Rights Review



Dear Readers,

The Czech Centre for Human Rights and Democracy is proud to present a new issue of the Czech Republic Human Rights Review. The issue sheds light on the principal problems that have occurred for human rights and democracy under the vein of the coronavirus in 2020.

In the opening article, Tereza Kuklová looks ahead and introduces challenges for human rights and democracy that the Czech Republic could face in 2021. Will the Czech Republic establish a National Human Rights Institution or is it going to finally provide compensation to involuntarily sterilized Roma women?

Lucie Nechvátalová continues with an article on a diplomatic event that occurred during the year - a contentious visit of the Czech Senate President Miloš Vystrčil to Taiwan. Her following article summarizes how the Czech Republic coped with COVID-19 during the first and second wave of the pandemic.

Our Review continues with topics that might attract the attention of various international actors. First, Simona Úlehlová looks at Strasbourg and introduces a selection procedure for a new Czech judge of the European Court for Human Rights. Tereza Bártová then discusses the repeated critique of the international human rights bodies towards the use of net cage beds in psychiatric institutions and the reluctance of Czech authorities to abolish this shameful practice. Aneta Frodlová analyses the independence and transparency of justice in the Czech Republic, as examined by the European Commission.

And finally, Pavel Doubek introduces the Annual Report of the National Preventive Mechanism and its importance for the prevention against torture and ill-treatment.

The year 2020 was rich in profound judgements on freedom of expression, freedom of speech and religious freedom. Pavel Doubek introduces a regional court's judgement that strikes a balance between individual religious sentiments and artistic freedom. Simona Úlehlová further explores the Supreme Court decision on the right of a muslim student to wear a hijab during the theoretical lessons at high school. The section is concluded by Klára Košťálová who explores the findings of the Constitutional Court on the freedom of magazine publishers to ridicule leading political figures.

The final part of the review is devoted to the rights of prisoners incarcerated in prison and patients treated in hospitals. To begin, Simona Úlehlová discusses the prisoners' rights to a special diet on the basis of their belief, which is important for the general debate on the prisoners' rights and corresponding duties of prison. Klára Košťálová then draws on the findings of the Constitutional Court with regard to the requirement of timely and effective pain relief of patients in a hospital, which is a challenge for the contemporary understanding of the concept of "lege-artis" treatment.

In the turbulent times of the pandemic, we wish you an enjoyable reading.



Lucie Nechvátalová and Pavel Doubek

Editors of the Czech Republic Human Rights Review

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Front page photo: Almost empty Charles Bridge during the COVID-19 pandemic. Prague: Charles Bridge in the Mist (Explored), author: R Boed, 21 October 2011, source: Flickr, CC BY 2.0. , edits: photo cropped.

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Czech Human Rights Challenges for 2021



Tereza Kuklová

Apart from the challenges which will be presented in more detail below, the Czech Republic has faced several other human rights issues that are likely to influence the course of 2021. The most significant challenges include the debate regarding compensation for the victims of illegal sterilization, the establishment of the Children's Ombudsman, and questions concerning the National Human Rights Institution in the Czech Republic.

Compensation for the Victims of Illegal Sterilization

The bill on Compensation for Illegally Sterilized Persons was presented to the Chamber of Deputies on 27 September 2019. However, the debate did not begin until 19 January 2021 during the 79th meeting of the Chamber of Deputies.

The right to compensation applies to persons who were subjected to illegal sterilization in the period between 1 July 1966 and 31 March 2012. Sterilization is defined as a medical intervention preventing fertility that has been performed on the people in question without their informed consent.

The affected individuals were mostly gypsy women, even though non-gypsy women and also men were included in the final calculation.[1] In the most common cases, the patients were required to sign consent documents during childbirth or anaesthesia, often under the threat of having their baby taken away.

Since the legislative process is taking a long time, the involuntarily sterilized people began to lose hope they might not live to see the promised redress. On 11 September 2020, some of them organised a protest in front of the Hospital in Ostrava [2] to appeal to the deputies for an immediate debate of the bill. The deputies also received an open letter signed by the victims and several experts.

Should the bill pass, the entitled people would have a legal claim to a lump sum of 300,000 CZK



Illustrative image [1]

each. Hopefully, the time has already come and the victims of illegal sterilization will be compensated.

Children's Ombudsman

Another significant bill was presented to the Chamber of Deputies on 16 June 2020 under the name of the Act on the Defender of Children's Rights. The debate of this bill has been taking place since 19 January 2021. Supposing everything goes smoothly, the act could come into force on 1 July 2021.

The Children's Ombudsman is described as an independent and impartial authority seeking to protect and enforce children's rights. His scope of activity applies primarily to administrative authorities. According to the bill, the Children's Ombudsman is mandated to monitor the fulfilment of children's rights, recommend systematic measures, submit petitions and participate in court proceedings.

However, critical voices are pointing out the insufficient definition of the powers of the new human rights authority and its relationship with the current Ombudsman's Office. That is also where the strongest criticism arose from. The current Public Defender of Rights, Stanislav Křeček, sent a disapproving opinion to the government, expressing his disagreement with the proposed form of the bill establishing the Children's Ombudsman. He states that the bill limits the current legal competencies of the Public Defender of Rights.



The victims of illegal sterilization have not been compensated yet [2]

Nevertheless, Křeček claims he is ready to advise the formation of an amendatory draft that would better determine the mutual relations between the two ombudsmen.

National Human Rights Institution in the Czech Republic

As we informed you in V4 Human Rights Review from Autumn 2020 [3], there has been an ongoing debate concerning the non-existence of a National Human Rights Institution (NHRI) in the Czech Republic. According to the United Nations' Paris Principles, a NHRI constitutes an official independent body seeking to protect and promote human rights within its broad mandate guaranteed by the constitution or a legal act.

Since 1993, NHRIs have been founded in more than 120 states. That makes the Czech Republic one of only a few countries that has not yet made any further step.

It may seem that the role of NHRI in the Czech Republic is represented by the Public Defender of Rights (Ombudsman). However, the legal framework of the Ombudsman does not meet all the requirements stated by the Paris Principles as there are still several areas that are excluded from his scope of activity. The Czech Ombudsman was established only to protect persons from the actions of public authorities and other institutions.

On that account, the Czech Human Rights Council has recommended that the government extend the powers of the Public Defender of Rights so he could be accredited as the NHRI in accordance with the Paris Principles. The resolution of the Human Rights Council was presented in October 2019, however, the deadline of 31 December 2020 has not yet been met.

The establishment of the Czech NHRI would mean a great shift in human rights protection, as it would enable the newly-founded institution the control of several issues which are currently beyond the Ombudsman's authority, e.g. the course of the legislative procedure, corruption, freedom of media, or interferences in the system of checks and balances. Nevertheless, based on the current government position, it seems that the formation of NHRI does not constitute a priority at present.

Notes

- [1] Kašpárek, Jan. 'Odškodní stát protiprávně sterilizované ženy? K přípravě zákona se nikdo nemá'. Deník Referendum. 27. 6. 2019.
- [2] The health facility where many of the illegal sterilizations took place.
- [3] Jarabinská, Zuzana. 'National Human Rights Institution in the Czech Republic: an unattainable dream or a potential reality?' V4 Human Rights Review, no. 3, vol. 2, July – September 2020, pages 10 – 12.

References

Aktuality zmocněnkyně vlády pro lidská práva. ‘Rada pro lidská práva doporučila vládě přijmout kroky nutné ke zřízení lidskoprávní instituce.’ Government of the Czech Republic. 30. 10. 2019 (<https://www.vlada.cz/cz/ppov/zmocnenkyne-vlady-pro-lidska-prava/aktuality/rada-pro-lidska-prava-doporucila-vlade-prijeti-kroku-nutnych-ke-zrizeni-lidskopravni-instituce-177366/>).

Doubek, Pavel. ‘Návrh na zřízení dětského ombudsmana: Nový úřad, nebo národní lidskoprávní instituce?’ Bulletin on Human Rights, no. 6, VII. edition, July 2020, pages 34 – 36. (https://www.centrumlidskaprava.cz/sites/default/files/attachment/bulletin/Bulletin_cervenec2020.pdf).

Draft amendment of the Act on the Provision of a Lump Sum to Persons Sterilized in Violation of the Law with explanatory report (available here: <https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=603&CT1=0>).

Draft amendment of the Act on the Defender of Children’s Rights with explanatory report (available here: <https://apps.odok.cz/veklep-detail?pid=ALB-SBQWQQZ6D>).

GANHRI. ‘Paris Principles.’ (<https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>)

Jarabinská, Zuzana. ‘National Human Rights Institution in the Czech Republic: an unattainable dream or a potential reality?’ V4 Human Rights Review, no. 3, vol. 2, July – September 2020, pages 10 – 12. (https://www.humanrightscentre.org/sites/default/files/attachment/bulletin/v4humanrightsreview_autumn2020_0.pdf).

Kašpárek, Jan. ‘Odškodní stát protiprávně sterilizované ženy? K přípravě zákona se nikdo nemá.’ Deník

Referendum. 27. 6. 2019 (<https://denikreferendum.cz/clanek/29796-odskodni-stat-protipravne-sterilizovane-zeny-k-priprave-zakona-se-nikdo-nema>).

Košťálová, Klára. ‘Návrh zákona o odškodnění protiprávně sterilizovaných osob.’ Bulletin on Human Rights, no. 8, XII. edition, October 2020, pages 20 – 22. (https://www.centrumlidskaprava.cz/sites/default/files/attachment/bulletin/Bulletin_rijen2020.pdf).

League of Human Rights. ‘Bezodkladně projednejte návrh zákona o odškodnění protiprávně sterilizovaných osob, vyzývají oběti i řada odborníků.’ 11. 9. 2020 (<https://llp.cz/blog/bezodkladne-projednejte-navrh-zakona-o-odskodneni-protipravne-sterilizovanych-osob-vyzyvaji-obeti-i-rada-odborniku/>).

Public Defender of Rights. ‘Stanovisko ombudsmana k návrhu zákona o dětském ombudsmanovi.’ 2. 7. 2020 (<https://www.ochrance.cz/aktualne/tiskove-zpravy-2020/stanovisko-ombudsmana-k-navrhu-zakona-o-detskem-ombudsmanovi/>).

Photographs

- [1] Illustrative image, author: advogadoaguilar, 19 March 2020, source: Pixabay, CC0, edits: photo cropped.
- [2] The victims of illegal sterilization haven’t been compensated yet, , author: sabinevanerp, 8 September 2018, source: Pixabay, CC0, edits: photo cropped.
- [3] The Office of the Public Defender of Rights. Brno, Údolní 39, kancelář VOP (6733), author: Martin Strachon (Bazi), 20 July 2015, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

The Office of the Public Defender of Rights [3]



The President of the Czech Senate in Taiwan



Lucie Nechvátalová

At the end of August and beginning of September 2020, the President of the Czech Senate, Miloš Vystrčil, made an official trip to Taiwan with a delegation of 90 Czech representatives. What was the aim of this visit? What was the exact agenda? And why did the Chinese authorities overreact to this trip?

Preparation of a trip to Taiwan

At the end of 2019, the former President of the Czech Senate, Jaroslav Kubera, announced that he would make an official visit to Taiwan during the following year. After his sudden death in January 2020, a new president of the Senate, Miloš Vystrčil, was elected.

The new President confirmed that he would follow the plans of his predecessor and arrange an official visit to Taiwan at the end of August and beginning of September 2020 with a 90-member delegation including politicians, entrepreneurs, scientists and journalists.

The reasons for this trip were to establish closer business relations with Taiwan as it is considered one of the most technologically developed countries in Asia and due to the country's tradition of human rights policies and democracy.

Problematic attitude of China

Miloš Vystrčil proclaimed that besides the official goals, there was another reason for the accomplishment of the scheduled trip; concretely, a warning made to his predecessor by the Chinese embassy. After announcing his intention to visit Taiwan, the Chinese authorities warned Jaroslav Kubera that the Czech business companies operating in China would face sanctions.

China considers Taiwan to be its (breakaway) province, without any right to establish independent diplomatic relations with other countries. Any



The President of the Czech Senate delivered a speech in the Parliament of Taiwan [1]

attempt to develop relations with Taiwan is considered by the Chinese authorities as an interference into its “one China policy” and the sovereignty and territorial integrity of the state.

The truth is that there are only fifteen countries in the world which have officially recognized Taiwan as an independent state on an international level.[1] Other states (including the Czech Republic) have more or less established relations with Taiwan at the business level, without developing official diplomatic relations through the most senior state officials in order to appease China.

The new President of the Czech Senate, however, made a clear statement that the Czech Republic is an independent democratic state and would freely develop relations in business, science and culture with other democratic countries of its own choice.

Reaction of Czech politicians

Czech foreign policy senior officials such as the President, the Prime Minister and the Minister of Foreign Affairs criticized Miloš Vystrčil for his decision. The Czech Republic is not one of the coun-

tries which has recognized Taiwan officially and the Czech foreign policy adheres to the “one China policy”. Therefore, these senior officials expressed their concerns over Vystrčil’s trip, as it could break diplomatic relations with China and undermine the future political and business cooperation between the countries.

On the other hand, several Czech (and also foreign) politicians endorsed the official visit. They appreciated that the President of the Czech Senate opposed China’s intervention into the foreign affairs of the Czech Republic and was building new business and scientific opportunities which may help the Czech Republic to become one of the European leaders in these areas.

Meeting Taiwanese leaders

Due to the COVID-19 pandemic, members of the Czech delegation had to undergo tests for COVID-19 before entering Taiwan as well as upon arrival. Taiwanese people observe strict health measures and that is probably the reason why Taiwan is one of the states which has managed to prevent the spread of the COVID-19 pandemic with a minimum number of infected people and casualties as well as with a marginal impact on its economy. The successful combat against the disease was also one of the topics on Vystrčil’s agenda.

During his visit, Miloš Vystrčil met numerous Taiwanese leaders, such as the President, Prime Minister, President of the Taiwanese Senate and several Ministers. He also delivered a speech in the Taiwanese Parliament which ended with the proclamation “I am Taiwanese” (referring to John F. Kennedy’s famous speech in West Berlin). Furthermore, he received a medal for parliamentary diplomacy.

Conclusion

In Miloš Vystrčil’s opinion, his trip was a major success because he managed to establish economic and cultural relations between the two nations and showed that the Czech Republic is an independent democratic state. As a consequence of the trip, the Czech President, Miloš Zeman, announced he would stop inviting Miloš Vystčil to meetings of the state’s top foreign policy officials and Chinese

authorities announced that they would not pursue any cooperation with the companies of those who travelled to Taiwan. Regardless, the impact the visit will have on the Czech Republic remains to be seen.

This article was originally published in V4 Human Rights Review, No. 4, vol. 2, October – December 2020.

Notes

- [1] Here is a list of 15 states which officially recognized Taiwan as an independent state: <https://www.mofa.gov.tw/en/AlliesIndex.aspx?n=D-F6F8F246049F8D6&sms=A76B7230ADF29736>.

References

- ČTK, ‘Cestu předsedy Senátu Vystrčila na Tchaj-wan podpořilo 70 světových politiků’ (Aktuálně.cz, 3 September 2020) <<https://zpravy.aktualne.cz/zahranici/nepotrebujete-souhlas-ciny-cestu-vystrcila-na-tchaj-wan-podp/r~c1382d5ee85f11eab408ac1f6b220ee8/>>.
- ČTK, ‘Detaily Vystrčilovy cesty na Tchaj-wan, Kuberova manželka nakonec nejede’ (Seznam Zprávy, 25 August 2020) <https://www.irozhlas.cz/zpravy-svet/tchaj-wan-cina-asie-osn-mezinarodni-organizace_2009031524_per>.
- Dominika Perlínová, ‘Nezávislý Tchaj-wan? Důvody, proč česká delegace vyvolala tak podrážděnou čínskou reakci’ (iRozhlas, 3 September 2020) <https://www.irozhlas.cz/zpravy-svet/tchaj-wan-cina-asie-osn-mezinarodni-organizace_2009031524_per>.
- Raphael Satter, Nick Carey, ‘China threatened to harm Czech companies over Taiwan visit: letter’ (Reuters, 19 February 2020) <<https://www.reuters.com/article/us-china-czech-taiwan-idUSKBN20D0G3>>.
- Reuters Staff, ‘Czech president tries to tamp down China anger after speaker’s Taiwan trip’ (Reuters, 6 September 2020) <<https://www.reuters.com/article/us-czech-china-taiwan-idUSKBN25X0I2>>.

Photographs

- [1] The President of the Czech Senate delivered a speech in the Parliament of Taiwan. 2020-09-01 Miloš Vystrčil in Taiwan 06, author: Legislative Yuan, 1 September 2020, source: Wikimedia Commons, CC BY 4.0, edits: photo cropped.

The COVID-19 Pandemic in the Czech Republic



Lucie Nechvátalová

Over the last year, the world has faced the COVID-19 pandemic. What is the situation in the Czech Republic and what has the Czech Government done so far to protect the Czech population and prevent the spread of the virus?

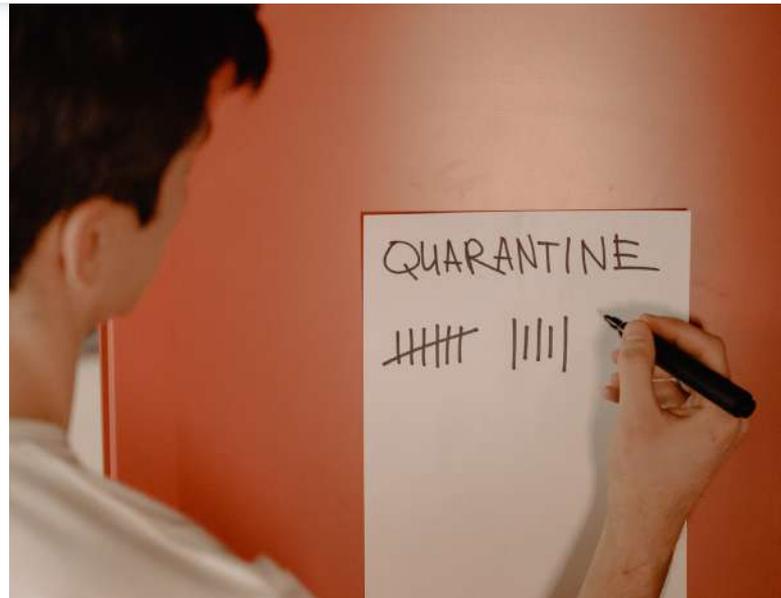
Since the end of 2019, the COVID-19 pandemic has been spreading rapidly around the globe. Each country has been affected by this disease to a different degree and has dealt with this issue in a different way.

The situation concerning COVID-19 has been monitored intensively in the Czech Republic since the beginning of March 2020. As of 23 September 2020, about 1,350,000 people had been tested, 66,700 had been infected, 600 had died and 31,000 patients had recovered.[1] During September, the number of infected people started increasing rapidly. Which measures have been adopted to cope with the COVID-19 pandemic in the Czech Republic so far?

Coping with COVID-19 during the 'first wave'

On 12 March 2020, the Czech Government decided to declare a state of emergency in the entire country. The state of emergency was extended twice with the consent of the Chamber of Deputies and ended on 17 May 2020. During this period, Czech authorities took various crisis measures to prevent COVID-19 from spreading in the population, limiting some (human) rights and freedoms of the (natural and legal) people residing in the Czech territory.

The adopted measures include, among other things, the obligation to wear face masks (or something covering the nose and mouth) outdoors and in the premises of publicly accessible buildings, the prohibition of all types of events involving more than 30 people (e.g. sporting, cultural or religious), both public and private, restrictions on free movement with the exception of travel to and from work and trips necessary to ensure basic human needs, restrictions on leaving the country for almost all Czech citizens, closure of all shops except for foodstores,



Quarantine [1]

drugstores, pharmacies and dispensaries of medical devices, as well as the cancellation of classes in elementary, secondary and tertiary educational facilities.

Criticism of COVID-19 measures

These measures were met with a wave of criticism from both the general public and also legal experts, who raised the following concerns.

First, the critics denounced the process of adoption of the crisis measures and the manner in which the Czech Government communicated them to the public. The decision-making process was chaotic and the government changed and strengthened measures on a daily basis even though the incidence of COVID-19 cases remained relatively stable. The responsible authorities thus failed to adopt a transparent strategy to combat the pandemic.

Moreover, the Czech Government waived its powers to adopt resolutions on crisis measures and delegated the competence to adopt so-called extraordinary measures to the particular ministries. Some experts considered such an altered legal regime as an attempt by the government to avoid legal actions for damages.

Second, critics also pointed to the content of the crisis measures, which they considered disproportional with regard to the governmental goal of ensuring public health.



Face masks DIY [2]

Proportionality of the concrete measures

Some of the adopted measures seem to be disproportional, e. g. closure of all shops and restaurants almost overnight (causing bankruptcy of many companies), a ban on Czech citizens travelling out of the country (as people travelling to high-risk countries and coming back to the Czech Republic could have undergone mandatory quarantine) and a complete ban on the presence of Czech fathers-to-be in delivery rooms.

The obligation to wear face masks or other coverings of the mouth and nose regardless of the material used was also challenged because of the unclear impact of uncertified (typically homemade) face masks on COVID-19 transmission.[2] In this connection the Czech Government was criticized for underestimating the number of face masks available in the Czech market and for not securing an adequate number of certified medical masks and respirators for health workers and caregivers. During the state of emergency, it decided to resolve this shortage by arranging the purchase of medical protective equipment from China. The purchase was not preceded by a public tender, allegedly providing an opportunity for possible corruption.[3]

Challenging measures at the courts

As a response to these measures, several applications to courts have been lodged by affected Czech

citizens mainly to contest the extent of extraordinary measures and the process of their adoption. They were allegedly adopted by concrete ministries unlawfully in the whole territory and even in the areas which were not within their authority.

For instance, one applicant succeeded with his application to the Municipal Court in Prague. The Municipal Court held that the Ministry of Health, in adopting such measures as restricting people in free movement and closing shops and restaurants, overstepped its authority because this power belonged to the Government during the state of emergency.[4] Many proceedings e. g. concerning the obligation to wear face masks or the ban on the presence of fathers-to-be in delivery rooms, are, however, still pending.

The current situation in the Czech Republic

Currently, with the number of COVID-19 infected people increasing in the Czech Republic, the measures are generally being adopted by Czech authorities in a more proportional and rational manner. Strengthened restrictions are imposed predominantly on the concrete high-risk Czech regions based on the local epidemiological situation.

The measures adopted in the whole territory of the Czech Republic include the obligation to wear face masks (in all indoor areas of publicly accessible buildings, in the common areas of schools, in public

transport and at public or private indoor events), and restrictions on running restaurants and similar facilities. As far as travelling to and from the Czech Republic is concerned, individuals must comply with various obligations according to the level of risk of COVID-19 infection in a particular country (from no obligation at all to an obligation to be tested for COVID-19 or to undergo 10-day quarantine).

The situation is evolving and the Czech Government has already expressed its intention of declaring a state of emergency in the case of deterioration.

This article was originally published in V4 Human Rights Review, No. 3, vol. 2, July – September 2020.

Notes

- [1] The Ministry of Health, ‘COVID-19: Přehled aktuální situace v ČR’. Available at: <https://onemocneni-aktualne.mzcr.cz/covid-19>.
- [2] It should be noted that the WHO has warned that wearing so-called non-medical masks (typically homemade face masks made of materials like cotton) should be used as part of a comprehensive strategy of measures to suppress transmission of COVID-19, see ‘Advice on the use of masks in the context of COVID-19’, p. 6 - 8, available <https://apps.who.int/iris/bitstream/handle/10665/332293/WHO-2019-nCov-IPC_Masks-2020.4-eng.pdf?sequence=1&isAllowed=y>.
- [3] Ondřej Golis, Hanuš Hanslík, Aneta Snopová, ‘Čínská nemoc’ (Česká televize, 6 April 2020) <<https://www.ceskatelevize.cz/porady/1142743803-reporteri-ct/220452801240014/0/71925-cinska-nemoc/>>.
- [4] ‘Cancellation of extraordinary measures’ (The Ministry of Health, 23 April 2020) <https://koronavirus.mzcr.cz/wp-content/uploads/2020/04/95_Cancellation-of-EM_free-movement-of-persons_23042020.pdf>.

References

Government of the Czech Republic, ‘Measures adopted by the Czech Government against the coronavirus’ (Government of the Czech Republic, 23 June 2020) <<https://www.vlada.cz/en/media-centrum/aktualne/measures-adopted-by-the-czech-government-against-coronavirus-180545/>>.

Ondřej Golis, Hanuš Hanslík, Aneta Snopová, ‘Čínská nemoc’ (Česká televize, 6 April 2020) <<https://www.ceskatelevize.cz/porady/1142743803-reporteri-ct/220452801240014/0/71925-cinska-nemoc/>>.

The Ministry of Health, ‘COVID-19: Přehled aktuální situace v ČR’. Available at: <https://onemocneni-aktualne.mzcr.cz/covid-19>.

World Health Organization, ‘Advice on the use of masks in the context of COVID-19’ (World Health Organization, 5 June 2020) <https://apps.who.int/iris/bitstream/handle/10665/332293/WHO-2019-nCov-IPC_Masks-2020.4-eng.pdf?sequence=1&isAllowed=y>.

Photographs

- [1] Quarantine, author: cottonbro, 31 March 2020, source: Pexels, CC0, edits: photo cropped.
- [2] Face masks DIY, author: JancickaL, 5 April 2020, source: Pixabay, CC0, edits: photo cropped.
- [3] Prohibiting sign on Kaufland store in Karviná (April 2020) 01, author: Tadeáš Bednarz, 7 April 2020, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

No entry without face mask [3]



Selection Procedure for a new Czech Judge of the ECtHR



Simona Úlehlová

Translated by Lucie Nechvátalová

The term of office of Czech Judge Aleš Pejchal of the European Court of Human Rights, expires this year. Therefore, a selection procedure for this position was carried out last year. Who are the candidates selected?

The European Court of Human Rights (ECtHR) is one of the largest international courts, composed of 47 judges (the number of judges of the Court is the same as that of the High Contracting Parties to the European Convention on Human Rights). It was established in 1959 as a body of the Council of Europe and it has jurisdiction to hear allegations of violation of the European Convention on Human Rights (ECHR) and does so by receiving individual or inter-State applications.

The selection of candidates for judges is a primary responsibility of each High Contracting Party to the ECHR. There are only several requirements set by the Council of Europe: A list of the three best available candidates should be submitted to the Parliamentary Assembly. Each of these candidates shall be of a high moral character and must either possess the qualifications required for appointment to a high judicial office or be jurisconsults of recognized competence.[1] The list of candidates must also be gender-balanced.[2]

The Czech selection procedure is based on the Rules on the selection of candidates for the post of ECtHR judge adopted by the Czech Government (Rules). The nine-member national committee is composed of the Minister of Justice, Minister of Foreign Affairs, the Agent of the Czech Government before the European Court of Human Rights, the Presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court, the Public Defender of Rights, a member appointed by the President of the Czech Bar Association and a member appointed by the deans of the (public) Faculties of Law.[3]

The national committee first selects serious candidates who meet the requirements of the Rules.[4]



Kateřina Šimáčková, a judge of the Czech Constitutional Court [1]

Next, the candidates are interviewed and their knowledge of international human rights law (primarily ECHR case law), language skills (English and/or French) and guarantees of independence and impartiality are assessed. The three best available candidates (and one or two substitute candidates) are selected.

The list of these three candidates is submitted for an assessment to the Advisory Panel of Experts (Panel) set up by the Committee of Ministers of the Council of Europe to provide expert advice to governments on the qualification of selected candidates.[5] If the panel considers that some of the candidates do not meet the requirements the Minister of Justice would suggest another substitute candidate.

If all candidates fulfil these conditions, the list shall be submitted to the Government for approval and thereafter forwarded to the Parliamentary Assembly of the Council of Europe. The candidatures are first examined by the (special) committee, which is mandated by the plenary Assembly to interview candidates, scrutinize their curricula vitae, and make specific recommendations to the Assembly on their qualifications.

Once the list is accepted, the committee votes on its preference among the candidates by secret

ballot and then passes the list on to the Assembly. Having at their disposal the recommendation of the committee, members of the Assembly elect (by secret ballot and majority) a new judge.

The current Czech judge of the ECtHR, Aleš Pejchal, commented on the procedure of the election and said that *“we must understand that a selection of the judge of the ECtHR ended at the Czech level, on the European level an election has taken place. The election fulfilled all the requirements. Each candidate should have convinced the Parliamentary Assembly that they were the best available candidate. This was not a selection or a comparison of the candidates' knowledge.”*[6] Aleš Pejchal previously acted as Vice President of the Czech Bar Association. His predecessor to the position of judge of the ECtHR was Karel Jugviert, who had previously been a judge on the Czech Supreme Court.

The current Czech selection procedure has already been completed. There were seven applicants. The best available candidates were Kateřina Šimáčková (judge of the Constitutional Court), Pavel Simon (judge of the Supreme Court) and Tomáš Langášek (judge of the Supreme Administrative Court).

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 8, vol. 12, October 2020.

Notes

- [1] Article 21 para. 1 ECHR
- [2] Stated by the Resolution of the Parliamentary Assembly of the Council of Europe 1366 (2004) and the Recommendation 1649 (2004)
- [3] Article 4 para. 1 of the Rules
- [4] Article 5 para. 3 of the Rules
- [5] It was set up in 2010, following the wish of the President of the ECtHR Jean-Paul Costa, to assess if the selected candidates are fulfilling requirements and are apolitical.
- [6] Januš, Jan. 2012. „Vyšlo to moc hezky“. Právní rádce, No. 8, p. 42–43.

References

The Czech Bar Association, 2012, Místopředseda ČAK JUDr. Aleš Pejchal zvolen soudcem ESLP. Available on <https://www.cak.cz/scripts/detail.php?id=8683>.

Česká justice. Post soudce Evropského soudu pro lidská práva chce sedm zájemců, 2 October 2020. Available on: <https://www.ceska-justice.cz/2020/10/post-soudce-evropskeho-soudu-lidska-prava-chce-sedm-zajemcu/>.

The Ministry of Justice, 2020, Vyhlášení výběrového řízení na kandidáta na funkci soudce Evropského soudu pro lidská práva. Available on: <https://justice.cz/?clanek=vyhlaseni-vyberoveho-rizeni-na-kandidaty-na-funkci-soudce-evropskeho-soudu-pro-lidska-pra-1>

Appendix to the Resolution of the Government of 15 June 2020, No. 648, on Rules on the selection of candidates for the post of judge at the European Court of Human Rights, available on: <https://apps.odok.cz/attachment/-/down/IHOABQPGW-TE6>.

Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. Available on: https://vm.ee/sites/default/files/content-editors/Res_2010_26_eng.pdf.

Procedure for the election of judges to the European Court of Human Rights, Memorandum prepared by the Secretary General of the Assembly of 4 December 2020, SG-AS (2020) 03 rev 4. Available on: <https://assembly.coe.int/LifeRay/CDH/Pdf/ProcedureElectionJudges-EN.pdf>.

Photographs

- [1] JUDr. Kateřina Šimáčková, Ph.D., author: Vladimír Novotný, source: Constitutional Court of the Czech Republic, edits: photo cropped.
- [2] European Court of Human Rights @ European district @ Strasbourg, author: Guilhem Vellut, 22 September 2018, source: Flickr, CC BY 2.0, edits: photo cropped.

European Court of Human Rights [2]



Abolishment of Net Cage Beds: What is the Czech Republic waiting for?



Tereza Bártová

Numerous international organizations, including the UN Committee Against Torture and the Council of Europe, have called for an immediate and absolute ban on the use of net cage beds. In spite of this, the Czech Republic continues to use them in psychiatric institutions. As the official data shows, there were at least 43 net cage beds in use as of May 2019. Why has the practice not yet been abolished?

In December 2019, with the assistance of the NGO Forum for Human Rights, the Validity Foundation prepared a collective complaint against the ongoing use of net cage beds in the Czech Republic. The complaint was filed with the European Committee of Social Rights as the last step in a series of attempts to draw attention to this practice, which violates the fundamental rights of the residents of psychiatric institutions.

The abolition of net cage beds has been repeatedly requested by numerous international bodies, most recently by the UN Human Rights Committee in its Concluding Observations on the Czech Republic, issued in December 2019. The Human Rights Committee reiterated its concerns expressed in the Concluding Observations from 2013 and called for immediate measures to abolish the use of enclosed restraint beds in psychiatric and similar institutions and the establishment of an independent monitoring system.

However, similar recommendations and condemnations have been made by organizations such as the United Nations and the Council of Europe for almost two decades without any significant impact. In 2002, the Council of Europe Committee for the Prevention of Torture called on the Czech Government to immediately stop using cage beds. Although the practice of using them in social care institutions was abolished in 2006, the cage beds remain in use in psychiatric wards, albeit modified to their net form.



Psychiatric hospital Bohnice. [1]

The use of net cage beds as a legitimate practice or a human rights violation?

While human rights defenders call for the complete abolishment of net cage beds, some mental health professionals point out the lack of alternative solutions to deal with difficult situations as a result of inadequate resources, staff, and training. One of the main reasons stated for the use of net cage beds is management of aggressive or violent behaviour and protection from injury. However, according to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), when using net cage beds, patients tend to be left unattended more often as staff do not perform checks as often as in the case of fixation. Secondly, the length of stay in net cage beds is often longer than needed; patients can spend half or even most of the day in them. Therefore, the CPT standards recommend not using net cage beds any more and instead, that there should be a review of the necessary numbers of staff in psychiatric facilities.



UN Human Rights Committee. [2]

The current collective complaint to the European Committee on Social Rights points out that the ongoing use of net cage beds violates Article 11 of the European Social Charter, according to which the Czech Republic is obliged to provide citizens with the highest possible standard of health. Moreover, the UN Special Rapporteur on Torture clearly stated that there is no therapeutic justification for using net cage beds; their use is in fact degrading and may amount to ill-treatment and even torture, which is prohibited in many international treaties ratified by the Czech Republic. He condemned tying people with disabilities to their beds or chairs, even for a short period of time. He also emphasised the importance of an absolute ban on all coercive and non-consensual measures, including physical restraint of people with psychological or intellectual disabilities.

Furthermore, the violations disproportionately concern elderly patients. In the Validity report from 2013, monitors found that net cage beds were excessively used for elderly patients, particularly those with Alzheimer's or other forms of dementia, ostensibly to prevent them from falling out of bed. The collective complaint points out the obligation of a state party to the European Social Charter to guarantee appropriate support and respect for their privacy to elderly people who live in institutions. Therefore, according to the complaint, the continuous use of net cage beds violates their rights.

Steps towards positive changes?

The UN Human Rights Committee in its latest Concluding Observations noted the efforts to phase out the use of enclosed restraint beds through a draft prepared by the Ministry of Health. The current Minister of Health is also critical of physical restraint. According to him, hospital staff are currently being trained in calming patients without the use of net cage beds or the practice of tying people to beds.

However, the Health Care Act still includes 'placing the patient in a net bed' as one of the possible restraints which can be applied by health care providers in psychiatric settings. Psychiatric hospitals and psychiatric wards of hospitals still use net cage beds. Furthermore, the new Government Action Plan on the Reform of Psychiatric Care 2020-2030 does not include a plan to abolish net cage beds.

Could a positive decision on the collective complaint be a decisive factor in convincing the Czech Government to finally ban the use of net cage beds? If not, what can be done to abandon the practices of ill-treatment? How long can the situation be excused by the argument regarding the lack of staff and financial resources? All these questions need to be asked repeatedly until the practice is abolished.

This article was originally published in V4 Human Rights Review, No. 1, vol. 2, January – March 2020.

References

Aktuálně. cz., Za konec klecových lůžek. Slacklineři mezi ministerstvy připomněli péči o duši, 1 April 2019. Available at: <https://zpravy.aktualne.cz/domaci/provazochodci-mezi-ministerstvy-upozornili-na-potrebu-spolup/r~ad178170546e11e9b6a9ac-1f6b220ee8/>.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Means of restraint in psychiatric establishments for adults (Revised CPT standards). Available at: <https://rm.coe.int/16807001c3>.

Human Rights Committee, Concluding observations on the third periodic report of the Czech Republic, 22 August 2013. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCZE%2fCO%2f3&Lang=en.

Human Rights Committee, Concluding observations on the fourth periodic report of Czechia, 7 November 2019. Available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CZE/CCPR_C_CZE_CO_4_38625_E.pdf.

Czech Ministry of Health [3]

Validity, Cage beds and coercion in Czech psychiatric institutions, 30 June 2014, Available at: <http://www.mdac.org/en/content/cage-beds-and-coercion-czech-psychiatric-institutions>.

Validity v. Czech Republic, Complaint No. 188/2019. Available at: <https://rm.coe.int/cc188casedoc1-en-complaint/1680995240>.

UN General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 28 July 2008. Available at: <https://undocs.org/en/A/63/175>.

Photographs

- [1] Psychiatric hospital Bohnice 010, author: Alena Pokorná, 8 July 2016, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.
- [2] U.S. Periodic Report on the ICCPR, author: U.S. Mission Geneva/ Eric Bridiers, 13 March 2014, source: Flickr, CC BY-ND 2.0, edits: photo cropped.
- [3] Palackého náměstí Praha, author: VitVit, 9 March 2015, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.



Independence and Transparency of Justice in the Czech Republic



Aneta Frodlová

For the first time, the European Commission assessed the rule of law and the fulfilment of democratic principles in the individual Member States of the European Union. How was the Czech judiciary assessed and where did the Commission find shortcomings? What challenges is the Czech judiciary facing in general?

The Commission Assessed Four Areas

For the first time during its work on the topic, the European Commission assessed the rule of law and democratic principles in individual Member States. The evaluation intends to draw the attention of states to possible shortcomings in the fulfillment of European values. Furthermore, this annual evaluation intends to act as a prevention of what is now happening in Hungary and Poland, where judicial reforms have jeopardized the independence and impartiality of the judiciary.

In the evaluation, the Commission addressed four areas. These included justice, freedom of the press, the effectiveness of the anti-corruption policy and the principle of checks and balances between the individual institutions.

Evaluation of the Czech Justice

The Commission stated that it generally perceived the state of the Czech judiciary as satisfactory. It said that judgments in civil and commercial law disputes are issued promptly, thus effectively resolving individual cases.

However, the Commission found certain shortcomings in the administrative judiciary. In this area, it stated that there are often delays in the proceedings, which may be caused by an insufficient staffing of administrative courts.

The Commission has also addressed various reforms, such as the selection process preceding the appointment of judges or disciplinary proceedings



Illustrative image [1]

against judges and prosecutors. The Commission held that these changes could significantly contribute to greater transparency of the judicial system in the Czech Republic. At the same time, it emphasized that they could limit the influence of the executive power on the appointment and removal of judges and prosecutors.

According to the Commission, digitization, such as the introduction of electronic files, would help to improve the quality and efficiency of the judicial system. This change would also have a positive effect on citizens' right to access to justice.

What is Criticized in General in the Czech Judiciary?

The area of insolvency proceedings and related incidental disputes is generally considered as problematic. In general, the judiciary is also accused of excessive formalism and resulting delays, which have an inherent effect on the quality and effectiveness of the decision.

On the side of the expert audience, one can also hear criticism of the legal regulation of the judicial proceedings in the Czech Republic, which, according to some, is too complicated. The procedural norms themselves are described as problematic, which in some cases slows down the court process.

From an international point of view, the Czech judiciary is criticized, for example, for the absence

of a Judges' code of ethics (see Bulletin September 2020, p. 29). At present, the code is already prepared and was sent to the Minister of Justice and the presidents of the regional courts.

Conclusion

In its final conclusion, the Commission stated that the principle of checks and balances is working well in the Czech Republic and is fulfilling its function. It also pointed out that there was no "National Institution for Human Rights" that would co-exist with the Public Defender of Rights.

Concerning the anti-corruption policy, the Commission has stated that legislation is sufficient in this area. However, it drew attention to the fact that, for example, large-scale corruption cases were not investigated systematically enough. It also found deficiencies in the legislation on freedom and plurality of the press. It described the lack of rules that determines who owns which media, as problematic.

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 9, vol. 12, November 2020.

Headquarters of the European Commission [2]

References

- Apm. The European Commission criticizes judicial reforms in Member States. In the Czech Republic, she is bothered by the approach to corruption, ČT24, September 30, 2020. (available at: <https://ct24.ceskatelevize.cz/svet/3195420-evropska-komise-kritizuje-reformy-justice-v-clenskyh-zemich-v-cesku-ji-vadi-pristup-ke>)
- European Commission report on the state of democracy and the rule of law dedicated to the Czech Republic, 30 September 2020. (available at: https://ct24.ceskatelevize.cz/sites/default/files/2499522-cz_rol_country_chapter.pdf)
- Kramer, Jaroslav. What is bothering the Czech judiciary. Právní rádce, March 13, 2018.
- Úlehlová, Simona. Judicial ethics in the light of the case of Judge Alexander Sotolář. Bulletin of Human Rights, Issue 7, September 2020 (available at: https://www.centrumlidskaprava.cz/sites/default/files/attachement/bulletin/Bulletin_zari2020.pdf).

Photographs

- [1] Illustrative image, author: AJEL, January 27, 2006, source: Pixabay, CC0, edits: photo cropped.
- [2] European Commission, author: dimitrisvetsikas1969, 4 August 2018, source: Wikipedia Commons, CC BY-SA 4.0, edits: photo cropped.



Annual Report of the National Preventive Mechanism: Prevention of Ill-Treatment in the Czech Republic



Pavel Doubek

Translated by Barbora Bromová

As a National Preventive Mechanism, the Public Defender of Rights (ombudsman) has been conducting systematic visits for 14 years to places where people are restricted in their personal liberty. Every year, the ombudsman publishes an annual report on its activities and findings and submits it to the Chamber of Deputies and also publishes it on its website. What has occurred in the field of prevention of ill-treatment in 2019 and what are the most fundamental findings?

Let the numbers speak

The tasks of the National Preventive Mechanism (hereinafter referred to as the “NPM”) established under the Optional Protocol to the UN Convention against Torture (hereinafter referred to as the “OPCAT”) are entrusted to the Department of Supervision of Restrictions on Personal Freedom within the Office of the Ombudsman. Out of 15 lawyers in this department, eight of them deal with the NPM agenda. Furthermore, the NPM cooperates with a number of experts from various fields (psychiatrists, general nurses, etc.). In 2019, a total of 15 experts took part in visits to the facility.

In total, the NPM made 25 visits to facilities. The most visited were institutional care facilities (nine times) and psychiatric hospitals (five times). This is followed by prisons (three times) and police cells (three times). Furthermore, the NPM has visited one migrant detention centre, one long-term hospital, one social-care facility providing services without authorization, one elderly home and one home with a special regime.

In addition to monitoring the detention places, the NPM also conducts professional training to raise awareness of the risk of ill-treatment. Last year, the NPM trained 233 employees from long-term and psychiatric care facilities and employees of regional authorities.



NPM Annual Report [1]

Doctor's confidentiality - an obstacle to effective investigation

The NPM brought attention to the unsatisfactory situation regarding the low standard for the prevention of ill-treatment in police cells, prisons and detention facilities for foreigners. The report highlights the irreplaceable role of the doctor in documenting and reporting cases of ill-treatment. The Czech Republic's problem is that the doctor is bound by law to maintain confidentiality and cannot inform the relevant authorities about suspicions of ill-treatment. Therefore, the NPM recommends to the Ministry of Health to prepare an amendment to the Health Services Act so that notifying the authorities of signs of ill-treatment does not constitute a breach of doctor's confidentiality.

Supervision over the deportation of foreigners

The report also discusses the ombudsman's powers to supervise the forced return of aliens (administrative, judicial deportation and surrender). It states

that 43 expulsions were monitored, with the ombudsman's staff overseeing 120 return operations over the last three years. It should be noted that the supervision of forced returns is carried out in accordance with EU regulations [1] and does not constitute "systematic visits" to the NPM under OP-CAT. However, even under this protocol, the NPM has the power to supervise the rights of people during a police escort, because even a police vehicle (as well as a prison bus) constitutes a place where a person is restricted in personal liberty.

Security detention centre visits

At the turn of 2017 and 2018, for the first time, systematic visits were made to institutes for the performance of security detention (i.e. an institute which may be characterised as functionally between a medical facility and a prison). There are two such facilities established in the Czech Republic, at the Brno Remand Prison and at the Opava Prison. The most serious concern is that this institute is overused and imposed even in situations where it is possible to impose less coercive measures (such as protective treatment). Based on these visits, the NPM has elaborated a summary report, which described the findings and addressed a number of recommendations for rectification to the Ministry of Justice and the government. A key recommendation is to amend the Criminal Code [2] so that the security detention is reserved only for the most urgent cases.

Summary report of visits to psychiatric hospitals

The annual report also recounts visits to psychiatric hospitals with a focus on the performance of protective treatment and the use of restraints. Although the visits did not detect ill-treatment, they mapped a number of risk situations that could have reached the threshold of ill-treatment. In particular, there is a long-lasting, very strict regime associated with isolation and lack of activities and the long-term use of restraints. Many of the identified deficiencies have their origin in the systemic shortcomings of protective treatment, or in the absence of any concept and gap-related legislation (insufficient material and personnel capacity, excessively long stay, imposing regime measures beyond the law, etc.).

The result of these visits was included in a summary report which, on more than a hundred pages, de-

scribes the situation very precisely and places it in a broader context. In addition to the constitutional framework, it also applies a number of international human rights standards. It is a report that is unique in the Czech Republic in terms of its content and focus and it could undoubtedly be an inspiring read for a number of foreign NPMs. [3]

Debts in the prevention of ill-treatment

In addition to the findings and recommendations from visits to detention places, the annual report provides "systemic considerations" for the prevention of ill-treatment. It draws particular attention to the absence of supervision of the Public Prosecutor's Office in detention facilities for foreigners, reception centers and psychiatric hospitals, where institutional care as well as protective treatment are performed. Furthermore, the report criticizes the difficulty in punishing the ill-treatment, in particular because the Criminal Code does not explicitly stipulate a provision for the punishment of degrading treatment. It also criticizes the absence of adequate administrative sanctions for ill-treatment in health and social services facilities. In social services facilities, the report also points to the absence of a complaint mechanism and "toothless" powers of the inspection of social-care services.

Annual report of the NPM and the Chamber of Deputies

The NPM Annual Report is an important source of information on the situation in the field of prevention of torture and other ill-treatment. It is also a unique opportunity to raise awareness of the existence and mandate of the National Preventive Mechanism, which is different in nature from the ombudsman's reactive mandate. [4] Therefore, the UN Subcommittee on Torture also recommends that the ombudsman raises awareness of the existence of the NPM as much as possible. This is to be done, for example, by referring to the NPM (and not to the ombudsman) where it carries out the preventive action. [5] Furthermore, the NPM agenda is not aligned with the ombudsman's complaints. It is obvious that the 2019 annual report does not fully fulfill this concept (in many places it speaks of the "ombudsman" and also mentions the complaints it dealt with).

In any case, the annual report is an important document from which direct and unbiased information on the situation in detention facilities can be drawn. The ombudsman submits a report to the Chamber of Deputies every year for approval. It is unfortunate that the Chamber of Deputies has not been paying enough attention to such fundamental material recently and appropriate discussions are taking a long time (for example, the 2018 report was not discussed until 2020). The new ombudsman, Stanislav Křeček, also draws attention to this issue, expressing hope in effective cooperation with the Chamber of Deputies that "the submitted reports will not be discussed with such a time lag and work will be done earlier to solve problems."

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 5, vol. 12, June 2020.

Notes

- [1] Directive 2008/115 / EC of the European Parliament and of the Council (Return Directive).
- [2] Deletion of the third sentence of § 99 para. 5 of the Criminal Code and consideration of the amendment of § 100 para. 1 and 2 of the Criminal Code.
- [3] It is therefore a pity that it has not yet been translated into English.
- [4] Law 21, The ombudsman's dual role can be criticized. Is it able to ensure the effectiveness of the national preventive mechanism? (<https://pravo21.online/pravo/dvojroli-ombudsmana-lze-kritizovat-je-schopen-zajistit-efektivitu-narodniho-preventivniho-mechanismu>)
- [5] For example: UN Subcommittee on Torture, Report on the Visit to Armenia (CAT / OP / ARM / 2), paragraph 61 (https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fARM%2f2&Lang=en)

References

- Chamber of Deputies of the Parliament of the Czech Republic, Resolution on the Summary Report on the Activities of the Public Defender of Rights for 2018, Chamber of Deputies Press 444 (<https://www.psp.cz/sqw/text/tiskt.sqw?o=8&v=US&ct=968>)
- Office of the Public Defender of Rights, the Chamber of Deputies discussed the annual report for 2018 (<https://www.ochrance.cz/aktualne/tiskove-zpra->

[vy-2020/snemovna-projednala-vyrocnizpravuzarok2018/](https://www.ochrance.cz/aktualne/tiskove-zpravy-2020/snemovna-projednala-vyrocnizpravuzarok2018/))

Office of the Public Defender of Rights, Protection against Ill-Treatment 2019 - Report of the Public Defender of Rights as a National Preventive Mechanism (https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/Zpravy-vyrocnivzdet2019_cz.pdf)

Office of the Public Defender of Rights, Protective Treatment, Restrictions and Other Topics - Report from Systematic Visits 2019 (https://ochrance.cz/fileadmin/user_upload/ESO/21-2016-NZ-MLU_SZ-ochranne_leceni.pdf).

Photographs

- [1] NPM Annual Report, source: The Office of the Public Defender of Rights, edits: photo cropped.
- [2] Logo of the Office of Public Defender of Rights, source: The Office of the Public Defender of Rights, edits: photo cropped.

Logo of the Office of Public Defender of Rights [2]



Blasphemy or Freedom of Expression?



Pavel Doubek

Last November, the Regional Court in Brno dismissed an appeal filed by the Archbishop of Prague, Cardinal Dominik Duka, ruling that the religious sentiments of an individual do not prevail over artistic freedom of expression. The judgement not only strikes a balance between the two conflicting freedoms but also places limits on religious freedom in the Czech Republic in the 21st century.

The story begins in May 2018 when a Brno Theatre, *Goose on a String*, introduced, as part of the Theatre World festival, two allegorical plays written by a Croatian-Bosnian director, Oliver Frlić. The plays were entitled “*The Curse*” and “*Our Violence and Your Violence*”.

The plays portrayed, in a very controversial way, the defects of the Roman Catholic Church and reflected the problems of the contemporary world, especially the interference of the West in the Arab world. The most outrageous scenes depicted the rape of a Muslim woman by Jesus Christ, extraction of the Czech flag from an actress’s vagina, and oral sex performed on a statue of Pope John Paul II.

Although the plays were open only to those who bought tickets for the performance in the *Goose on a String Theatre*, their advertisement attracted substantial media attention and provoked a great wave of criticism as well as strong dissenting reactions resulting, inter alia, in criminal actions against the theatre. The play “*Our Violence and Your Violence*” was even obstructed by a physical blockade of far-right activists from a group called *The Decent People*.

In addition, a civil lawsuit was initiated by Cardinal Dominik Duka and his lawyer, who filed a false light action, arguing that these plays grossly offended their religious belief, dignity, and honour, as well as religious belief of all Christians and the Christian faith as such. Since they lost their case at the court of first instance, they filed an appeal to the Regional Court in Brno (hereinafter referred to as the “regional court” or “the court”).[1]



Dominik Duka [1]

The freedom of expression and its limits

The regional court proceeded on the assumption that freedom of expression is one of the most important foundations of a democratic society and one of the basic prerequisites for development and self-fulfillment of every individual. As such, it applies not only to information or ideas that are favourably received or that are considered harmless or uninteresting but also to those that insult, shock or disturb.[2]

At the same time, however, the regional court emphasized that freedom of expression is not unlimited and may be restricted if such restriction is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. The reasons (legitimate aims) for this restriction may be the protection of the rights and freedoms of others, national security, public safety, protection of public health, and morality.[3]



Regional Court in Brno [2]

Freedom of religion: Private or public interest?

The present case is remarkable for the dual nature of. Cardinal Duka's civil action (and present appeal), as he claimed violations of his own religious sentiments and at the same time a violation of the religious feelings of other Christians and the Catholic Church as such.

The court pointed out that Cardinal Duka was not directly affected as he was neither a character depicted in the play, nor a direct witness of the performance. The civil action was, in fact, simply to hide the real objective of protecting the public interests and the interests of the Catholic Church. Therefore, it dismissed the appeal on the grounds that the plaintiff was not legally entitled to file such an appeal.

High degree of tolerance in a liberal society

The regional court further emphasized that the Czech Republic was established on the basis of religious neutrality, which prevents the state from being bound by an exclusive ideology or a particular religious faith.[4] The secular nature of the state implies that the state is separate from any church and must neither discriminate between religious movements, nor unreasonably favour any of them.

The regional court further underlined that the Czech Republic is actually a very liberal country with a high level of atheism and anticlericalism. Given the liberal and secular nature of the state, the court concluded that, in general, even controversial and provocative expressions have to be tolerated.

Artistic expression must carry a humanistic message

The regional court observed that the plays in question did not depict facts about the life and work of Jesus Christ and John Paul II. On the contrary, it should be clear to every average viewer that these are allegorical stories that use a high degree of exaggeration and symbolism to illustrate some of the problems of the contemporary world and that they seek to provoke a public debate.

The court stressed that art cannot only bring joy or laughter. On the contrary, it must also be shocking if such an artistic expression is to contribute to the reflection and discussion of topics of public interest. Nevertheless, the court emphasized that tolerance of such extreme artistic production depends on the requirement that art has the potential to contribute to reflection and discussion on issues of public interest and that it does not intend to incite violence and hatred. Therefore, to be legitimate, it must always

have the ambition of initiating a meaningful social debate and conveying some humanistic ideas.

Conclusion

In order to find a fair balance between (artistic) freedom of expression and religious feelings of believers, the purpose and context of the expression must always be taken into consideration. When art (even extreme allegorical plays) conveys humanistic ideas, it generally deserves protection under freedom of expression. On the other hand, mere insults and mockery, without any effort to provoke serious public debate, certainly do not deserve such protection.

It should be further emphasized that the decision itself cannot be transferred automatically to other countries. Its implementation would be particularly problematic in states that are not based on religious neutrality or that are not as atheistic as the Czech Republic. That is why, as observed by the regional court, some of the decisions of the European Court of Human Rights that favour the protection of religious sentiments over freedom of expression are viewed very critically and controversially in the Czech situation. Ultimately, the level of religious tolerance always depends on the legal, social, historical, and political context of a particular state.

This article was originally published in V4 Human Rights Review, No. 1, vol. 2, January – March 2020.

Theatre play ‘Our Violence and Your Violence’ [3]

Notes

- [1] The article continues to refer only to Cardinal Duka, since he is the main character of the present lawsuit.
- [2] Judgement of the Regional Court in Brno, 20 November 2019, no. 70 Co 170/2019.
- [3] Article 17 par 4 of the Charter of Fundamental Rights and Freedoms of the Czech Republic
- [4] Art. 2 par 1 of the Charter of Fundamental Rights and Freedoms of the Czech Republic

References

- Judgement of the Regional Court in Brno, 20 November 2019, no. 70 Co 170/2019.
- Online debate with Mr Tomáše Halík and Michael Žantovský. In: <https://video.aktualne.cz/>.

Photographs

- [1] Dominik Duka 2014, author: Petr Šále, 18 August 2012, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.
- [2] Brno, Rooseveltova, Justiční palác (01), author: Harold, 30 April 2011, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.
- [3] Theatre play ‘Our Violence and Your Violence’, author: Robert Vystrčil, source: National Theatre Brno, edits: photo cropped.



“The Headscarf Affair”: Tolerance as a Civic Virtue



Simona Úlehlová

Translated by Barbora Bromová

A significant decision was reached by the Czech Supreme Court towards the end of last year: it affirmed the right of a Somali student to wear a hijab during the theoretical lessons at her high school, all within the framework of her right to self-identification. The decision is intended to highlight the Czech Republic's duty to tolerate religious pluralism and to prevent arbitrary preference for certain belief systems, including atheism.

The lawsuit between the Somali student (hereinafter referred to as “plaintiff”) and her Medical High School in Prague began at the Prague District Court (hereinafter referred to as “the district court”). The district court initially refused her claim for compensation: initially, she sought non-pecuniary damages and a formal apology for the school’s refusal to allow her to wear her hijab during the theoretical teaching at school.

The Merits of the Claim

The student had been admitted to the Nursing program at the above-mentioned school. During her negotiations with the headmaster of the school, an agreement was reached that the girl should not wear her hijab during nursing practice. After providing official proof of completion of primary education in the Czech Republic, the student received confirmation of admission to school, conditional on the issuance of a valid residence permit before the beginning of the school year. Due to the fact that the student did not submit the permit before the school year began, the girl was called into the headmaster’s office where the headmaster expressed her dissatisfaction with the student’s choice to wear a hijab.

The lawsuit concerns the fact that the student had been asked to remove her headscarf by the school’s headmaster. This request was substantiated by a provision of the school policy, which stated that “by virtue of voluntary attendance at the local



Girl wearing a hijab [1]

school, a student assumes the responsibility to obey by the rules of proper social behaviour and conduct; to move within school premises without any head-dress – in instances of illness, this provision can be circumvented by a special exemption issued by the school”. Interpretation of this provision has become the merit of the subsequent trial. The concrete question at issue was whether the act of wearing a hijab could be deemed irreconcilable with the standards of appropriate social behaviour.

Hijab as a Religious Symbol

Hijab, which refers to a traditional Muslim scarf that women use to conceal their hair, neck and neckline, seems strange to most of the Czech society, but it cannot be considered to violate the norms of appropriate social behaviour or good morals. Therefore, the Supreme Court has ruled that in cases where the hijab is worn as an expression of religious faith, there is no conflict with rules which forbid the wearing of the headdress indoors. The removal of a hijab is therefore not properly substantiated by the legitimate aim of upholding rules of proper social behaviour or good morals, thus it cannot be mandated on behalf of the school policy, as the provision itself was aimed at protecting proper social conduct and good morals.

Access to Religious Symbols

This decision was based primarily on an extensive interpretation of Czech anti-discrimination legislation, in particular its definition of indirect discrimination. According to the law, indirect discrimination occurs on the basis of neutral provisions which do not include any discriminatory criteria, yet they adversely affect a specific group.

An a priori ban on headaddresses may not seem to be a neutral provision on the basis of which discrimination can occur. However, considering the issue holistically, it is possible to see how this specific restriction affects the plaintiff more specifically, and more adversely, than other students.

In this particular case, where the interpretation of the school policy in question included the plaintiff's hijab, only the plaintiff had been adversely affected. On the contrary, other students who subscribe to another faith, or no faith at all, have been left unaffected by the provision's interpretation. From this point of view, the provision in question is in conflict with Article 2(1) of the Charter of Fundamental Rights of the Czech Republic, which defines the State's responsibility to respect religious pluralism. As a result, the plaintiff had been indirectly discriminated against regarding her right to access education, on the grounds of her religious expression.

The Czech Supreme Court [2]

The Supreme Court has thus affirmed the plaintiff's argument. The Court's reasoning was also supported by the observation that a legal provision forbidding the use of religious symbols by students could not be found anywhere in Europe, perhaps with the exception of France.

In her submission to the court, the plaintiff references the differing approaches to displaying religious symbols across Europe and her research clearly shows that, aside from France, students in Europe are generally allowed to wear a hijab. This approach is supported by the Czech Ministry of Education, Youth and Sports' statement, according to which every person is guaranteed the right to express their religious faith.

Specifically, the statement explained that: "... a school cannot intentionally limit the wearing of religious symbols (e.g. head coverings) with the intention of limiting the religious rights of individuals (e.g. because the display of certain religious symbols is considered improper, unethical or unsuitable for the culture of Central Europe, etc.). This provision of the school's internal policy would conflict with these principles. The right to express religious faith through religious symbols should be maintained, but it cannot result in difficulty identifying the person concerned (e.g. the face cannot be covered in a way that would disable or obstruct identification). However, this does not mean that the school cannot li-



mit, for example, the use of a headdress. Such a policy is acceptable if necessary for theoretical or practical education, especially in terms of safety, health protection, compliance with hygiene rules and similar.”

The Position of the Supreme Court

The Supreme Court is of the view that tolerance belongs to basic civic virtues which are to be expected from members of civil society. The basis of tolerance of each individual is expressed by a lack of interference in the freedom of others, whereas in such cases the state is only supposed to act as the protector of freedoms. Since the State is legally bound by the principles of the Charter of Fundamental Rights, it cannot prefer an individual's right to practice atheism over another's right to freely and publicly express one's religious faith.

The hijab is a symbol of women belonging to the religion of Islam, which remains untraditional in Czech society. Under the conditions defined by our legal system, even these personal and non-threatening manifestations of religious faith must be tolerated by a majority society. This position should be particularly relevant in the field of education, the aim of which is, among other goals, to guide students toward respecting others and their difference in opinions.

The building of the Museum of Art in Olomouc [3]

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 1, vol. 12, January - February 2020.

References

- Judgement of the Supreme Court dated 27. November 2019, No. 25 Cdo 348/2019.
- Statement of Czech Ministry of Education, Youth and Sport dated 6. October 2014, ČŠIG-3601/14-G21.
- ČTK, Česko má tolerovat náboženský pluralismus. Nejvyšší soud se zastal Somálky, která nosila ve škole hidžáb. iROZHLAS. 6.12.2019 (<http://irozhl.as/8iA>).

Photographs

- [1] Iraqi girl smiles, author: Christiaan Briggs, 7 March 2003, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.
- [2] Nejvyšší soud České republiky - hlavní vchod, author: Michal Klajban, 18 April 2010, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.
- [3] Relief hospital, author: Michal Mañas, 22 June 2005, source: Wikimedia Commons, CC BY 4.0, edits: photo cropped.



The Pitomio Affair: Constitutional Court Holds that Freedom of Speech should not allow Arbitrary Ridicule



Klára Košťálová

Translated by Barbora Bromová

Tomio Okamura, the leader of the Freedom and Direct Democracy Party (SPD), sued, in 2013, the then publisher of the Czech weekly magazine, *Reflex*, for its pejorative alteration of his first name into “Pitomio”. The current vice-chairman of the lower chamber of the Czech Parliament has lost his case in all instances so far. Although, his constitutional complaint was granted.

Since 2013, Tomio Okamura has been seeking protection of his privacy rights against the CZECH NEWS CENTRE organisation (hereinafter referred to as “publisher”). His right to human dignity, personal credit and reputation were alleged to have been violated by the legal predecessor of the publisher. In particular, he opposed the publishing of 13 articles, both in the *Reflex* magazine and on the website www.reflex.cz that has occurred in the time-span of 12 months.

The published articles have repeatedly labelled Tomio Okamura as ‘Pitomio’ and also showed photographs depicting him as a clown. A photograph of Okamura’s girlfriend was also included in one of the articles. Furthermore, this particular photo was downloaded from Okamura’s Facebook profile without his consent. Additionally, the complainant had been incorrectly identified as a former advisor to the Minister of Regional Development, Jiří Paroubek. Moreover, he was also alleged to be the co-owner of a bankrupt travel agency, which organised excursions around Prague for toys.

Proceedings before general courts

Okamura requested the publisher to pay 300,000 CZK in non-pecuniary damages as well as to publish a public apology in the *Reflex* magazine. Additionally, he requested a ban on revealing the altered photograph (depicting him with clown make-up and a clown nose). Last but not least, he also insi-



Tomio Okamura [1]

sted on removing the pejorative nickname from all print media owned by the publisher as well as from all associated online servers.

The Prague Municipal Court obliged the publisher to post an apology on the www.reflex.cz website regarding the distortion of Okamura’s name. Concurrently, the court prevented the publisher from using the nickname, “Pitomio”, except in cases which might be considered as “a valid critique”. The rest of his complaint was dismissed. Tomio Okamura was not satisfied with this decision and filed an appeal. The High Court in Prague has upheld the decision as correct on merit.

In the end, Tomio Okamura lost his case before the Supreme Court. The Court justified its judgment by stating that “*the distortion of the complainant’s name and its connection to a pejorative term is to be considered equal to a cartoon caricature which too, exaggerates and mocks.*” A caricature is permissible, as the court made clear, if it is founded on a real basis and does not depart from the principle of proportionality. At the same time, the Court has emphasized that politicians should show a higher degree of tolerance.

According to the Courts' decisions, the publisher was due to apologise only for two published articles and damages were not awarded to the complainant. Additionally, the Courts in general approve to use the nickname "Pitomio". Thus, the complainant turned to the Constitutional Court.

The limits to freedom of expression

The complainant's alleged breach of fundamental rights was seen in the court's failure to prohibit the use of the nickname, "Pitomio", since it is a play on words which combines the complainant's first name (Tomio) with a derogatory expression (*pitomec*, the Czech equivalent of idiot or moron). He argued that such an expression was outside the margin of freedom of expression and that the courts failed to properly safeguard his constitutionally-protected rights.

The Constitutional Court held that courts which dealt with the complaint previously did not consider the case in sufficient detail. The Courts failed to recognise which of the statements were factual, and which were meant to be normative. Not all circumstances were properly considered and, importantly, the critique of the individual himself was not properly distinguished from the critique of his opinions and attitudes. The Constitutional Court has emphasized that it is important for an individual that his or her name is not distorted, especially if it is kind of a pejorative distortion. *"Freedom of expression should not cause anybody, including publicly active figures, to be arbitrarily ridiculed in the eyes of the public."*

In its findings, the Constitutional Court stated: *"media, often proclaimed to be the 'watchdog of democracy', have to respect its principles and foundations on which it stands – in particular, they have to respect fundamental rights of every individual, which include human dignity, personal honour, good reputation and protection of good name, as well as political pluralism and openness of a democratic society. The promotion of an activist attitude or campaign directed at a particular person with the only goal of defaming them, even more so if methods used are outside the widely accepted norms of social decency and aim at disadvantaging the individual in a political contest for public office, should not benefit from judicial protection."*

Therefore, the complainant was successful before the Constitutional Court. The case has been returned to the Municipal Court in Prague, which will be bound by the Constitutional Court's ruling in its decision-making.

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 4, vol. 12, May 2020.

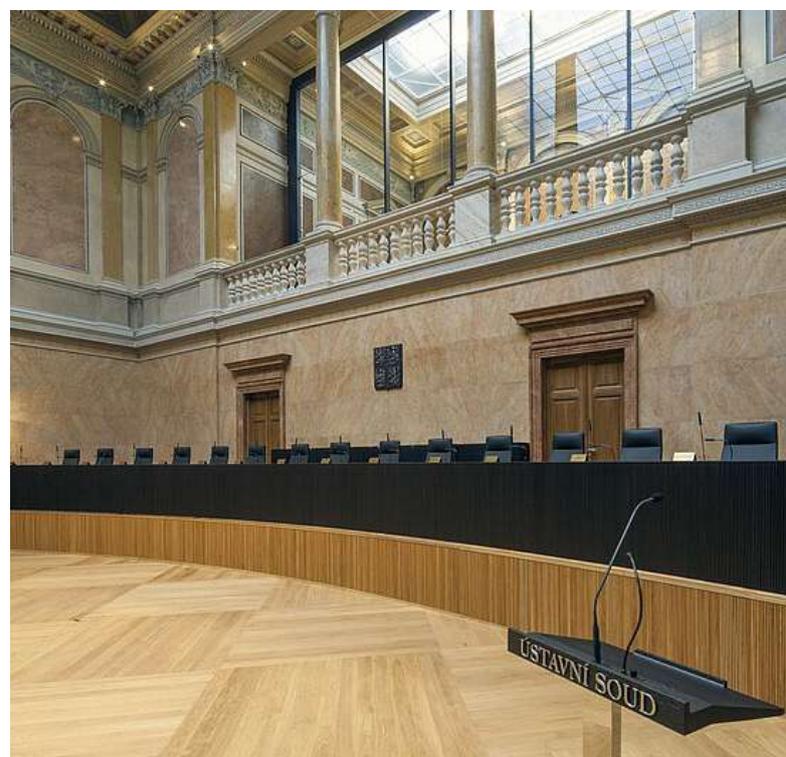
References

- Judgment of the Constitutional Court, 24 March 2020, No. III. ÚS 2300/18.
- Reflex. The Reflex Magazine apologises to Tomio Okamura for their use of the name 'Pitomio', 27. March 2015. Available at: <https://www.reflex.cz/clanek/zpravy/66031/casopis-reflex-se-omlouvava-tomio-okamurovi-za-oznaceni-pitomio.html>.

Photographs

- [1] Tomio Okamura. Tomio Okamura 2015, author: David Sedlecký, 18 July 2015, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.
- [2] Katedra pro plénium Ústavního soudu ve sněmovním sále, author: Aleš Ležatka, source: The Constitutional Court of the Czech Republic, edits: photo cropped.

Hall for the plenary sessions of the Czech Constitutional Court [2]



Prisoners' Rights to a Special Diet



Simona Úteřlová

Many questions arise as to whether prisoners are entitled to special requests in the choice of their diet, to what extent can prisons reject their requests, and under what conditions are prisons obliged to comply with them? In the past, both the Public Defender of Rights and regional courts dealt with these questions. Are the prisons entitled to make decisions about the prisoners' request to choose their food?

Legal Basis

According to the Act on the Execution of Custody and the Act on the Performance of the Punishment of the Deprivation of Liberty, anyone who is accused and convicted has the right to be provided with food while serving his sentence in prison. Accused people and convicts are provided with a regular meal three times a day under conditions which correspond to the maintenance of health and take into account their health condition, age and the difficulty of the work performed. The diet shall also consider the prisoners' needs for observing their own cultural and religious habits, but only if such a diet conforms to the prison's operational needs.

Religious Reasons

A typical example of the provision of a special diet based on religious traditions, i.e. other than a basic diet, is a Muslim diet that does not contain pork. Based on the investigation of the former Public Defender of Rights, Anna Šabatová, this well-established practice is also applied to the specifics of the diet of prisoners of different faiths.

In the past, Anna Šabatová conducted an investigation in Kuřim prison where she addressed the question of whether Christian prisoners are also entitled to a diet without pork. The prison primarily rejected this request as it was not justified by religious belief. In this case, the Ombudsman expressed the opinion that: "the exercise of the right to express one's religion or belief freely, either alone or in association with others, privately or publicly, by



"Former ombudsperson" Anna Šabatová [1]

worship, teaching, religious activity or observance of a ceremony may be restricted by law in a democratic society only for the necessary protection of public security and order, health and morals or the rights and freedoms of others."

According to her conclusion, neither the assessment of faith nor the degree of religious belief of individual prisoners is within the competence of members of prisons. With an extensive interpretation of the conclusions of the survey, it is possible to apply them to the cases of prisoners, for example, vegetarians, since this way of eating is perceived as their worldview. Therefore, no one should judge to what extent they are really convinced of this worldview. According to her results in the case, convicts should be given a vegetarian diet without further assessment.

She concludes her report with a consideration of why a prisoner would generally not be able to request a diet without certain ingredients, such as without pork if that diet is available in the prison even if the request is not based on religious grounds at all. [AN2]

European Case-law

One of the most important rulings of the European Court of Human Rights in this area is the *Jakóbski v. Poland* judgment in which the convict demanded that vegetarian food be prepared for him in the prison's kitchen, which was the only offered meal that was in accordance with his Buddhist religion.

In this case, the Court sought to strike a fair balance between the interests of the convicted person and the interests of the prison for which special requirements in the prisoner's meals may entail increased expenses. The Court held that if the required diet does not require special preparation of food, special products or to be served in the prescribed manner, the prison should at least offer a different diet than the basic type or try to reach an agreement with the convict.

The case of *Jakóbski v. Poland* is also considered by the Czech courts in their decision-making. Prisons should respect the demands of prisoners if they have dispositions and possibilities to do so. This means that if the prison's kitchen does not have the means to provide a specific diet and would still be forced to provide this diet, there would not be a fair balance between these two parties.

The case-law of the European Court of Human Rights has also addressed the issue of the interpretation of Article 9 of the Convention on Human Rights concerning prisoners' demands for non-basic meals. The provisions of the article protect freedom, thought, conscience and religion. By an extensive interpretation, the Court concluded that the enshrined protection does not only concern religious beliefs in the narrower sense but also the worldview, i.e. viewing the world or beliefs as such if they meet certain conditions. These conditions were stated in the judgment of *Leela Forderkres e.V. and others against Germany* according to which beliefs must achieve a certain degree of persuasiveness, importance, seriousness, and coherence.

According to this judgment, vegetarianism, veganism, or other specifics of eating represent a worldview, a comprehensive opinion, and an attitude to life.

Other Options

Given that the aim is to find a fair balance between the responsibilities of prisons and the demands of prisoners, it is necessary to mention that prisoners have another option to procure specific products and to provide special meals.

Primarily, prisoners are not allowed to dispose with cash during their sentence or detention. However, if they earn extra money during the imprisonment or some means are sent to them by a private person from outside the prison facility, the prisoners receive funds in their prison account from which they can draw money to buy personal belongings, including the purchase of specific foods.

Additionally, there exists a form of a certain above-standard thanks to which prisoners can be sent packages through which it is possible to obtain food and necessary products.

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 3, vol. 12, April 2020.

References

- Judgment of the European Court of Human Rights of 6 November 2008, *Leela Forderkreise e.V. and others v. Germany*, complaint. No. 58911/00.
- Judgment of the European Court of Human Rights of 7 December 2010, *Jakóbski v. Poland*, complaint. No. 18429/06.
- Judgment of the Regional Court of 3 September 2019, file no. No. 30 A 9/2019.
- Judgment of the Regional Court of 3 April 2019, file no. No. 57 A 172/2018.

Photographs

- [1] Anna Šabatová, source: archiv KVOP, edits: photo cropped.

Timely and Effective Pain Relief as a Constituent of *Lege Artis* Treatment



Klára Košťálová

Translated by Barbora Bromová

In May, the Constitutional Court assessed the case concerning a woman from Karviná, who in 2005, was admitted to a hospital with health problems. She suffered from great pain, but was not operated on until three days later. She demanded the hospital pay her a compensation. Is leaving a patient suffering from pain a violation of their right to health? What does the term *lege artis* mean?

The applicant's case was based on the fact that during her hospitalization in the Karviná hospital in 2005, she suffered from severe pain which was relieved only after the subsequent operation three days later. Therefore, she demanded compensation from Karviná Hospital for leaving her in such pain for what she claimed was an unnecessarily long amount of time.

However, the lower courts ruled that "pain alone is not and cannot be an injury to health" and that the applicant has not sufficiently demonstrated that the medical facility's conduct was not *lege artis* treatment, i.e. a procedure that follows the best knowledge and rules of medical science.

The applicant did not agree with the findings of the lower courts. She argued, in particular, that the decision of the court of the first instance contradicted the statements of eleven witnesses as well as insufficiently kept incomprehensible medical records. For these reasons, she filed a constitutional complaint.

The Content of the Term *Lege Artis*

The Constitutional Court (hereinafter referred to as the "Constitutional Court") stated that the court of the first instance did not proceed correctly when it "mechanically and uncritically relied mainly on expert opinions conforming to the defendant hospital and significantly suppressed other findings and evidence in the case". The lower court thus ruled on the basis that the successfully performed operation complied with the principles of proper treatment and did not violate the requirement of *lege artis*.



The Czech Constitutional Court [1]

According to the Constitutional Court, the decision of the court of the first instance was erroneous, as the hospital did not dispute whether the operation in itself was performed properly, but whether the operation was timely and the entire medical procedure was adequate. Furthermore, a sufficient amount of evidence showing that the patient had suffered unbearable pain prior to the operation was already provided before the court of the first instance. This was also confirmed by some of the appointed experts.

In its ruling, the Constitutional Court held: "[T]he *lege artis* procedure also includes proper, timely and effective assistance and relief from pain. The fact that the main purpose of the operation is to eliminate the causes of the difficulties cannot change that, which was finally the case (after the complainant was transferred to the gynecological department and the correct diagnosis was made). From the point of view of the right to health and its protection, the secondary purpose of treatment (i.e. the removal or significant alleviation of the patient's suffering as soon as possible) must also be presumed to be constitutionally desirable and relevant to, inter alia, the first sentence of Article 31 of

the Charter of Fundamental Rights and Freedoms (granting everyone's right to health)."

Criticism of the Decision of the Court of Appeal

The Constitutional Court has also criticized the reasoning of the Court of Appeal. The Court of Appeal stated that it was impracticable to review the factual accuracy of the experts' conclusions as the judges do not have the appropriate medical expertise.

The Constitutional Court responded to this statement in its finding as follows: *"The conclusion whether or not the medical facility proceeded according to currently available knowledge of medical science shall be a subject to legal conclusion. Therefore, such a reasoning lies within the competence of an independent court. And an expert opinion can only be a factual basis for a legal conclusion on the '(non) lege artis' procedure. It added: factual and legal correctness of court decisions on experts; such a procedure cannot be accepted from the constitutional point of view of the construction of the judiciary simply because it would eliminate the role of the judiciary. As a result, protection against the state in fulfilling its obligation to protect the health of the individual."*

Reversal of the Burden of Proof

In general, an applicant has to provide all evidence to support their claim over the hospital's liability for damages. However, it is the hospital which has all the information about the patient's health. The Constitutional Court has emphasized that if it is proven that the hospital erred in keeping medical records, the principle of reversal of the burden of proof should apply in this case. No one may benefit from their dishonest or illegal conduct. The general courts did not sufficiently take this into account.

The Supreme Court also erred in failing to give a substantive assessment of the appeal, although the conditions were met. The Constitutional Court stated: *"Therefore, the case-law of the Constitutional Court was applied, according to which the absence of a rational justification of the opinions of general courts in their decisions constitutes a violation of the right to a fair trial, due to arbitrariness and non-reviewability of such conclusions."*

The Right to a Judicial Protection and a Fair Trial

Based on the above, the Constitutional Court concluded that the lower courts violated the complainant's fundamental rights, which are guaranteed in Article 36 para. 1 and Article 38 para. 2 of the Charter of Fundamental Rights and Freedoms of the Czech Republic. The courts' procedure, therefore, infringed upon the right to judicial protection before an independent and impartial court, without undue delay. Therefore, it annulled the decision of the ordinary courts.

This article was originally published in Czech in the Bulletin of Human Rights (Bulletin lidských práv) No. 5, vol. 12, June 2020.

References

The judgment of the Constitutional Court of 6 May 2020, no. I. ÚS 3937/18

Photographs

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

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Czech Centre
for Human Rights
and Democracy

Bulletin is published by Czech Centre for Human Rights and Democracy
E-mail info@humanrightscentre.org | web www.humanrightscentre.org
Authors Pavel Doubek and Lucie Nechvátalová (editors), Tereza Kuklová, Simona Úlehlová, Tereza Bártová, Aneta Frodlová, Klára Košťálová | Proofreader Barbora Bromová and Douglas Radcliff
Graphic editor Nikola Sedláková | ISSN 1804-2392.