CZECH REPUBLIC – HUNGARY – POLAND – SLOVAKIA

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V4 Human Rights Review

Dear readers,

We are delivering the second issue of the new online journal V4 Human Rights Review, which updates you on recent developments in the areas of human rights and democracy in the Czech Republic, Hungary, Poland and Slovakia. We are proud to organize this project together with our expert partners from all V4 countries.

The introductory contribution was written by Kateřina Šimáčková, a Judge of the Constitutional Court of the Czech Republic, who is also a representative in the Venice Commission of the Council of Europe. In her article, Judge Šimáčková focuses on how the Venice Commission deals with issues regarding judicial independence, illustrating the problem on examples of recent developments in Hungary and Poland.

In the Czech section, Aneta Frodlová starts with the 30 years of freedom anniversary and looks back on the 1989 Velvet Revolution in the former Czechoslovakia, as well as on the events in other V4 countries.

In the Hungarian section, Veronika Czina reflects on whether Hungarian judges can request a preliminary ruling from the Court of Justice of the EU regarding their own independence. Péter Kállai then discusses the current situation with the Hungarian media.

Artur Pietruszka from the Polish section clarifies a smear campaign that was uncovered in August, in which several governmental officials created an informal group with the aim of discrediting some Polish high-level judges.

In the Slovak section, Erik Láštic explains how free access to information in Slovakia serves as an efficient tool to hold the government accountable. Furthermore, Max Steuer focuses on current issues concerning free speech in Slovakia.

We hope you enjoy reading it!

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

Content

Photo on the front page: Kateřina Šimáčková in her office, source: Kateřina Šimáčková

CZECH CENTRE FOR HUMAN RIGHTS AND DEMOCRACY

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

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

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Venice Commission and the Judicial Independence in Hungary and Poland

Kateřina Šimáčková

Judge of the Constitutional Court of the Czech Republic, lecturer at the Faculty of Law of the Masaryk University, substitute member of the Venice Commission of the Council of Europe

Judicial Independence has become a topic of lively discussions in Europe, particularly the Visegrad region, in the last years. The Council of Europe Venice Commission is one of the fora for such discussions as well as one of their participants. During the past decade, it adopted several important documents dealing with this issue in general as well as country-specific opinions.

I addressed these issues in my speech at the VI Conference of the Presidents of the Courts of Appeal of the EU, titled "Judiciary at the Stake in Europe: How to Trust it", held at the end of September in Rome. This contribution is a modified version of my speech, focusing first on the Venice Commission's general documents and then the country-specific opinions responding to situations in Hungary and Poland. Being among the rapporteurs for some of the opinions,[1] I may refer to them also from my personal experience.

Basic documents on the rule of law

There are three fundamental documents of the Venice Commission concerning the rule of law, including judicial independence as one of its main guarantees – the Report on the Rule of Law, the Report on the Independence of the Judicial System and the Rule of Law Checklist.

The Report on the Rule of Law [2] identifies the necessary elements of the modern rule of law and one of them is the access to justice before independent and impartial courts, including judicial review of administrative acts.

The Report on the Independence of the Judicial System consists of two parts, dealing with the independence of judges and the prosecution service.[3] This general document is frequently referred to in the opinions on the Polish and Hungarian judiciary mentioned below. Bearing in mind the Polish context, it is worth noting that this

Judge of the Constitutional Court of the Czech Republic Kateřina Šimáčková [1]

Report was partly prepared by Hana Suchocka, a former Polish member of the Venice Commission. She is a well-known and respected lawyer, former prime minister and minister of justice, but after the Law and Justice Party won the elections, she ceased to represent Poland in the Venice Commission. Nevertheless, she continues to participate in its work and activities as an expert.

Judicial independence in the Rule of law Checklist

The last document to be mentioned is the Rule of Law Checklist,[4] which is a very detailed, thorough and indeed useful document. The following of its conclusions are of particular importance here.

The independence of the judiciary means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of

Courtroom of the Czech Constitutional Court [2]

the fundamental democratic principle of the separation of powers.

The European Court of Human Rights highlights four elements of judicial independence: the manner of appointment, duration of the term of office, the existence of guarantees against outside pressure – including in budgetary matters – and whether the judiciary appears as independent and impartial.[5]

Impartiality of the judiciary must be ensured in practice as well as in the law. The public's perception can assist in assessing whether the judiciary is impartial in practice.

All decisions concerning the appointment and professional career of judges should be based on merit, applying objective criteria within the framework of the law. It is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council has decisive influence on decisions on the appointment and career of judges. In all cases the judicial council should have a pluralistic composition, with a substantial part if not the majority of the members being judges. With the exception of *ex-officio* members these judges should be elected or appointed by their peers.

Bonuses and non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.

There is no common standard on the organisation of the prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

The Venice Commission uses these general criteria also to assess the situation in the individual countries.

New Hungarian Constitution

In Hungary, the unacceptable changes appeared after the current governing party gained a qualified majority in Parliament and started to prepare a new constitution. There is also a difference between the situations in Hungary and in Poland because in the latter country, the governing parties have not gained the qualified majority, so they have not

Kateřina Šimáčková [3]

been able to pursue changes in the system and organisation of the judiciary through constitutional laws as they have in Hungary.

In Hungary, the qualified majority was further used to adopt a new system of appointment of the highest judicial officials. Hungarian presidents of courts and the President of the National Judicial Council have much broader powers than is usual in the standard judicial systems. The President of the Hungarian Supreme Court (*Curia*) is elected by a 2/3 majority in the Parliament and holds his or her office until a new president is elected. That is very important from the point of view of a relevant political minority and its ability to induce a change in that post. The current political majority, even if it loses its qualified majority or becomes a political minority, has an important tool to keep the current president, chosen by this political majority, in office after the end of his term.

Overall, the Venice Commission adopted two opinions criticising the process of adoption as well as particular provisions of the new Hungarian constitution in 2011. Later, mostly in 2012, followed several other opinions – concerning the Act on the Legal Status and Remuneration of Judges and the Act on the Organisation and Administration of Courts, the Act on the Constitutional Court of Hungary, and the Act on the Prosecution Service. Most recently, in March 2019, the Venice Commission paid attention to the new legislation on Administrative Courts.

Moreover, the Venice Commission also criticised some other Hungarian laws and regulations, interfering with fundamental rights, such as an amendment to the new constitution on protection of marriage and family, the freedom of expression and media legislation, the so-called "Stop Soros" legislative package, or the legislation imposing control over NGOs receiving support from abroad and the legislation introducing special immigration tax.

Polish Constitutional Tribunal

As regards Poland, the Venice Commission adopted several opinions in 2016 and 2017, concerning the legislation on the Constitutional Tribunal, the Public Prosecutor's Office, and the draft amendments to the Act on the National Council of the Judiciary and to the Act on the Supreme Court, and the Act on the Organisation of Ordinary Courts.

Given the fact that in Poland the changes have been made by a political power without the qualified majority in the Parliament, they have not concerned first the Constitution, but the Constitutional Tribunal and its judges.

The critical situation arose just after the parliamentary elections in autumn 2015. It resulted from the fact that at that time the mandate of the President of the Constitutional Tribunal and several other judges expired – three judges were outgoing before the end of the term of the previous parliament, and two were outgoing after it. However, all five successors for the outgoing judges had been elected before the parliamentary elections by the previous parliamentary majority. The new Government and parliamentary majority saw the election of the new judges as a breach of the principle of the government for a limited time and did not accept it, electing another five judges to replace those outgoing.

Later in 2016, the Prime Minister even decided not to publish certain decisions of the Constitutional Tribunal, which resulted in a kind of legal dualism because some institutions (such as the Supreme Court) kept respecting all the Tribunal's decisions although they were not published, while other institutions (such as the Parliament and the Government) did not respect them.

Similar steps in both countries

While the first steps concerning the judiciary were different in both countries, both governing majorities then used the same tactics [6] towards the supreme courts – they lowered the retirement age of judges. Considering that the supreme court judges are usually quite elderly, such a regulation results in a part of the court being vacated. And these vacancies then may be filled in by "friendly" judges. In Hungary, the retirement age was lowered to 62 years. A similar attempt was made in Poland, but eventually without success, thanks to, among others, the Court of Justice of the EU.

Nevertheless, Poland later carried out a large-scale reorganization of the Supreme Court so that the original judges were "diluted" by newly selected persons. In addition, the most politically sensitive cases (such as electoral matters) or disciplinary matters were assigned to new panels of the Supreme Court comprising only newly appointed judges. The disciplinary panels, dealing with offences committed by judges and having the power to remove them from office, consist largely of former public prosecutors who, moreover, receive special rewards beyond standard judges' salaries.

That is, in general, another tool introduced in both countries – establishing a special status for some judges who subsequently receive different remuneration than their colleagues in the same court.

In both countries, the legislative changes in the organisation of the judiciary and the public prosecution service were also used to replace presidents of courts as well as heads of prosecution offices without any reason. In Poland, 160 presidents of courts were replaced.

Another criticised measure made in Poland consisted in changing the method of election of members of the National Council of the Judiciary; judicial members of the Council were newly elected by the Parliament. But how can these judges be considered to be representatives of the judiciary when they are chosen not by their peers (the judiciary), but by another state power (the legislature)?

Polish Public Prosecutor General

However, it was not only the political attempts to exert influence over the judiciary that I see as a fundamental problem in Poland, but also an unacceptable infringement of the separation of powers. The most striking infringement of this principle consists in the combination of functions in the person of the Public Prosecutor

Venice, seat of the Venice Commission [4]

Venice [5]

General. Until today, the Polish Public Prosecutor General, Zbigniew Ziobro, holds three other posts at the same time, being the president of one of the governing parties, a member of the parliament, and the Minister of Justice.

In addition, unlike in the past, the Polish Public Prosecutor General has the power to step into ongoing criminal cases and he may also communicate with the media and transmit them information regarding pending preparatory proceedings. In some instances, he has already used these competences to scandalize the political opposition or some "disobedient" judges and prosecutors. As I have already mentioned, often the most problematic aspect in these situations is not the final state introduced by the new legislation but the transitional period during which inconvenient or troublesome persons are removed from their offices, judges and prosecutors are relocated, and fear or desire to serve those powerful and mighty in order to get or hold one's post is generally raised.

How to respond

When I was working on the opinion on the Hungarian administrative justice, I realized that accurate, technically precise and detailed criticism made in a polite manner may be much more effective than implicitly political and generalized criticism or even hysteria; the first one is more likely to result in a more constructive reaction and approach by the criticised state.

Moreover, fierce and extremely political criticism, on the other hand, may easily provoke and boost anti-European rhetoric, and thus have a counterproductive effect towards the public in the affected countries.

Public justification and acceptance of the changes

Speaking about the public, I must add that both in Hungary and in Poland, some of the reforms and changes in the judiciary described above were not easily accepted by the

Launch of a book on discrimination at the Office of the Public Defender of Rights (ombudsperson) [6]

society; there were some demonstrations in both countries and the Polish President vetoed the most controversial draft acts concerning the Supreme Court and the judicial council. Nevertheless, the majority of the people in both countries accepted the changes without explicit reservation.

In both states, similar arguments were used to legitimize the changes. The new Governments pointed to some legal or political missteps made by the previous political majority, alleging that they only remedy those missteps. That was the case for example with the disputed election of new constitutional judges in Poland, criticised for being made too early. They also reproached some mistakes made by courts in the past, and in Poland, the new Government referred to the need to remove communist-era judges. Drastic changes in the public prosecution service were explained by pointing to ineffective prosecution of economic crimes either committed by well-known people from the "elite" or damaging large groups of people; that was the case, for example, with delays in investigation of an investment fraud in Poland, a pyramid scheme.

How to prevent similar situations and changes in other countries?

Considering these causes and the context of such interferences in the judiciary in Poland and Hungary, accepted by large parts of the public, I have reflected on the ways to protect the judiciary from similar attacks by the political power, and I have decided upon the following recommendations:

- In every democratic country there should be factual and constructive discussion containing arguments as to why possible interferences are unacceptable and how they may harm ordinary parties to proceedings.

- Judges and public prosecutors should keep in mind the need to legitimize the judiciary in the eyes of the public and increase public trust in the judiciary, including by being more rather sympathetic and helpful than formalistic or problem-making.

- Effectiveness and comprehensibility of judicial decisions as well as transparency of the judiciary may bolster public trust in the judiciary.

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[3] Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, 16 March 2010, Study No. 494/2008; and Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, 3 January 2011, Study No. 494/2008.

[4] Rule of Law Checklist, CDL-AD(2016)007, 18 March 2016, Study No. 711/2013.

[5] See, in particular, Campbell and Fell v. the United Kingdom, nos. 7819/77 and 7878/77, 28 June 2014, § 78.

[6] On the contrary, different steps were used by the executive power in Romania, but with similar effect of the judiciary and its independence being under threat. Compare 2018 and 2019 Venice Commission's opinions concerning Romania, on draft amendments to the laws on the Statute of Judges and Prosecutors, on Judicial Organisation, and on the Superior Council for Magistracy; on draft amendments to the Criminal Code and the Criminal Procedure Code; and on two emergency ordinances amending the Laws of Justice [CDL-AD(2018)017, CDL-AD(2018)021, CDL-AD(2019)014].

Photographs

[1] Judge of the Constitutional Court of the Czech Republic Kateřina Šimáčková, source: © Ústavní soud

[2] Courtroom of the Czech Constitutional Court, source: © Ústavní soud, edits: photo corpped

[3] Kateřina Šimáčková, source: © Ústavní soud, edits: photo corpped

[4] Venice, seat of the Venice Commission, author: Jan Lhotský, edits: photo corpped

[5] Venice, author: Jan Lhotský, edits: photo corpped

[6] Launch of a book on discrimination at the Office of the Public Defender of Rights (ombudsperson), source: Kateřina Šimáčková, Kancelář VOP, edits: photo corpped

Czech Republic

Section editor: Lucie Nechvátalová
Czech Centre for Human Rights and Democracy

30 years anniversary: The Velvet Revolution and democratic changes in the countries of the Visegrad Group

Aneta Frodlová

On 17 November, the Czech Republic and Slovakia celebrated the 30th anniversary of the Velvet Revolution. In 1989, hundreds of thousands of people gathered in the streets to express their discontent with the ruling regime. What events preceded the +-Velvet Revolution? And how did the democratization process unfold in the other countries of the Visegrad Group?

Reforms in the Soviet Union itself were essential for the gradual transformation of the communist regimes in all countries of the Visegrad Group, and these reforms started with Mikhail Gorbachev. In his 1988 speech, he clearly expressed his disagreement with military interventions and emphasized the importance of the principle of state sovereignty. These sudden changes, combined with a brand new direction of Soviet politics, created an appropriate political environment for democratization in each of the Visegrad countries.

In addition, the failure of the Soviet Union in the arms race against the United States and the significant inefficiencies of the centrally planned economy compared to the market-based system contributed to the dissolution of communist regimes across the Eastern Bloc and in the Soviet Union itself.

Hungarian Transformation

Hungary and Poland were the two countries where the desire for regime change was the most evident. After the suppressed Hungarian revolt of 1956, János Kádár was chosen to stabilize the country. His appointment as the first secretary of the Hungarian Socialist Workers' Party (hereinafter referred to as the "communist party") was critical for the subsequent political developments in the following years.

The year 1988 was important since János Kádár lost his position as the first secretary of the communist party. He was replaced by Károly Grósz, who did not approve of

János Kádár [1]

the discussions on possible changes in the political organization of the country, which had already begun before his appointment. During that period, Imre Pozsgay was considered to be the most popular reformist of the communist party in Hungary.

The Hungarian opposition was not yet strong enough to challenge the "traditional" communists. Although Pozsgay was aware of this fact, he gave a speech on Hungarian radio in January 1989, making several serious statements while Grósz was travelling outside the country. In his speech, he declared that the communist party would have to coexist with other political subjects in the near future.

In February, the Hungarian Parliament passed a bill that allowed the existence of various political parties. A few weeks later, the Central Committee of the Hungarian communist party waived its leading role in the state. Negoti-

Lech Wałęsa [2]

ations between the representatives of the communist party and the democratic opposition began in May 1989. Among the outcomes were the first free elections and an agreement on the direct election of the Hungarian president.

The June reburial and rehabilitation of Imre Nagy, who was the leader of the Hungarian Revolution of 1956, the opening of the Austrian-Hungarian border in August and the success of the so-called four-yes referendum in November further accelerated the whole process. The name of the state was officially changed to the Republic of Hungary in October 1989. From that month onwards, Hungary was not considered to be a communist state.

Process of democratization in Poland

The developments and changes undertaken in Poland were quite different compared to those in Hungary. One of the differences was the fact that the reforms in Hungary were implemented by the communist party itself. The reformists within the Hungarian communist party were the primary force that triggered the downfall of the ruling regime, with their opinions and statements accelerating the process of democratization.

The opposition in Poland formed a movement called Solidarity. The beginning of Solidarity, which was founded by Lech Wałęsa, dates somewhere between the years 1980 and 1981. The movement became so successful that it managed to publish its own newspapers - a task reserved exclusively to the state at the time. In 1981 martial law and an emergency state was declared under the leadership of Wojciech Jaruzelski, who was prime minister of Poland at that time, with the objective of stopping the ever-growing popularity of Solidarity. He then became the chairman of the Military Council of National Salvation. During this period of time, Wojciech Jaruzelski was also First Secretary of the Polish United Workers' Party and Minister of National Defence, among other positions that he held.

Solidarity became more politically prominent in 1988 when it started to incite protests. The government lost a vote of confidence in August and a new government, led by Mieczyslaw Rakowski, was appointed. The leading representatives of the communist party realized that an economic crisis in Poland was developing and public dissatisfaction with the regime grew, creating favourable conditions for the return of Solidarity.

In February 1989, the Polish government began to negotiate with organizations independent of the ruling regime and with Solidarity. One of the outcomes of these negotiations was the legalization of Solidarity. Simultaneously, the first constitutional reforms took place, followed by the first democratic and free elections, with Solidarity being the most successful political party in Poland.

Jaruzelski remained prime minister even after the elections but he later resigned from the position and even stepped down from the post of leader of the Polish United Workers' Party. Subsequently, he was replaced by Tadeusz Mazowiecki and the process of democratization continued under his leadership. At the end of 1989, the communist party definitively lost its leading role and the state was renamed as the Republic of Poland. In the same year following the 1989 amendments to the Constitution, Jaruzelski was elected president. He held the office until the direct presidential elections, during which Lech Wałęsa became the first Polish democratic president at the end of 1990.

Velvet Revolution in Czechoslovakia

The situation in Czechoslovakia was influenced by the military intervention of 1968. The Prague spring, which had later been repressed, was led by a popular Slovak reformist, Alexander Dubček.The subsequent era of "normalization" further deepened the notion that there was no other option but to accept the communist regime.

In 1977, a document called “Charter 77” was written by a civic movement of the same name. The Charter later had a substantial effect on the process of democratization in Czechoslovakia. The civic initiative acted as an illegal organization supporting efforts to restore democracy. Numerous members of the Charter 77 movement who signed the document were later apprehended and incarcerated.

The first indicators of change began appearing in 1988 when more than 400,000 people signed a petition for greater religious freedom. At the end of the year, Russian politician and advisor to Mikhail Gorbachev, Alexander Nikolajevič Jakovlev, advised the Czechoslovakian communist government to cease jamming Radio Free Europe. In the first days of 1989, the communist government stopped interfering and people could listen to the speech of Václav Havel, who was known as one of the most influential members of Charter 77.

On 17 November 1989, students began demonstrating in Prague and their protests were violently suppressed. At that time, Moscow called out the Czechoslovak government not to suppress the protests and opposition. However, the harsh reaction of the Czechoslovak government only hastened the fall of the communist regime. Two days later, the democratic political party called Civic Forum was founded and Václav Havel became its leader, together with other members of Charter 77. The Slovak group "Public against violence" was created as a reaction to the events of November 17 and it had a similar role of democratization as the Civil Forum in the Czech part of Czechoslovakia.

After a meeting at the beginning of December 1989, the top representatives of the Warsaw Pact declared that the Soviet invasion of Czechoslovakia in 1968 was illegal. Swift changes in the Czechoslovak government followed. The power of many members of the government stemmed from their support of the intervention and after the declaration they quickly lost their office. In the same month, a new and mostly non-communist government was formed. Alexander Dubček was appointed Chairman of the Federal Assembly and Václav Havel became the first Czechoslovak president.

The transition from communism to democracy in all these countries took a long time after these events. Even now, the process of democratization in the Visegrad countries is far from complete. We have witnessed certain democratic backsliding as new challenges threatening the democratic rule have arisen. And it still remains an open question how the democratization process will unfold in years to come.

Alexander Dubček and Václav Havel [3]

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Photographs

[1] János Kádár. Kadár János fortepan 66090, author: Fortepan, 1975 (uploaded 17 February 2017), source: Wikimedia Commons, CC-BY-SA 3.0, edits: photo cropped.

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Constitutional protection of crime victims in the Czech Republic

Jiří Novák

Crime victims are one of the most overlooked vulnerable social groups. They are often deprived of constitutional protection of their particular needs. Even though there have been some developments in this field, achievements are mostly limited. If we want to ensure at least some legal certainty for crime victims, there is still a long way to go.

Reforms in the field of criminal law have played a major role in the process of establishing human rights as a phenomenon. The presumption of guilt, use of torture during interrogations or "witch-hunts" necessarily became incompatible with the new idea of law. Sooner or later every country in Europe adopted a broad set of new principles and rights, protecting the accused.

As a result, courtrooms have become metaphorical boxing rings where the defence fights the state prosecution in a supposedly fair match. This "pure" classical view of criminal proceedings, however, seems to forget one other important actor: the person whose rights were possibly violated at the beginning of this whole legal path.

Victimization and law development

Becoming a crime victim is usually not a matter of choice. Researchers show that no social group is protected from victimization. Furthermore, crimes cause all kinds of harm in the life of the victim. The obvious ones are financial and physical. But there is often more tacit and severe harm hidden in the psychological and social aspects of the victim's well-being. They often suffer from trauma, deficiencies in their mental capacities, sleep disorders, etc.

These problems can also be worsened by so-called secondary victimization - a new unnecessary harm in the victim's life. Its source could be a police officer with an insensitive interrogation style, a journalist writing a defamatory article about the case or simply a family member giving ex-post victim-blaming "advice". Beside making the victim's life harder in almost every aspect, all of this has an understandable impact on the sufferer's ability to protect their legal interests.

Illustration image [1]

Due to the fact that most of these problems remain invisible to the general public and politicians, in most countries in Europe legislatures do not respond to them in an ideal way. Succinctly put, victims and their rights were mostly omitted in important human rights instruments of the 20th century.

Fortunately, the 21st century has begun to overturn this historical failure. The Czech Republic adopted a series of statutes for the better protection of victims of domestic violence in 2006, and in 2013, the Victims of Crime Act (Act No 45/2013) came to life.

Similarly to the development in the field of criminal law, there has been a considerable "constitutional gap" in the protection of crime victims' rights. Only ten years ago the Constitutional Court of the Czech Republic (hereafter referred to as Court) enforced a very strict doctrine stating that criminal proceedings constitute a relationship only between the state and the defendant (or convicted), whereas crime victims have basically no constitutional right regarding the process or its outcome.

Recent case law of the Court

However, the situation is slowly changing, mostly due to the influence of the case law of the European Court of Human Rights. Probably the broadest case law of the

Illustration image [2]

Constitutional Court applies to the right to an effective investigation, a specific element of other substantive constitutional rights. According to this case law, individuals have the constitutional right to request an investigation into suspicious deaths as a part of the constitutional protection of human life. This applies to various situations, such as death in a hospital, in a police cell, etc. In one case, the Court found a violation of the right to life when the police investigation of a murder was not swift enough.

Other achievements of crime victims before the Court mostly concern individual cases. On one occasion, the Court had to stand against secondary victimization when a victim of domestic violence was deprived of the possibility to claim damages in criminal proceedings because she was – out of fear of meeting the offender – waiting in a separate room, and therefore unable to raise a claim for those damages.

Probably the most famous case in the Czech Republic is that of Roma singer Radoslav Banga, which was already mentioned in the V4 Human Rights Review (autumn 2019, p. 7). Mr. Banga was not admitted as a party to the criminal proceedings against an offender who in his post on Mr. Banga's Facebook page supported a genocide of ethnic minorities. The Court declared the practice of not admitting him as a party unconstitutional because Mr. Banga was a specific target of the hate crime and therefore had the right to be present at the trial and communicate his views on the matter.

Conclusion

The constitutional protection of crime victims' rights is very limited thus far, without a clear approach or methodology. However, there is a visible trend towards strengthening the protection of this vulnerable social group in the Czech Republic. Many organizations try to help victims and provide them with support in their very difficult and usually unique constitutional cases, attempting to establish a system that would allow better protection. Hopefully, one day the old approach will be overcome and future case law will endow every victim with the real right to a fair criminal trial, with all its aspects.

Jiří works as a judicial assistant at the Constitutional Court of the Czech Republic where he specializes in criminal law cases. He is also PhD student at the Department of Constitutional Law and Political Science, working on a dissertation concerning constitutional protection of crime victims. As a volunteer he works as legal advisor for Bílý kruh bezpečí – non profit organization that provides psychological and legal support to different kinds of victims.

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[2] Illustration image, author: Bill Oxford, 15 June 2019, source: Unsplash, CC0, edits: photo corpped.

[3] Illustration image, author: M.T EIGassier, 19 November 2018, source: Unsplash, CC0.

Illustration image [3]

Legal obstacles for transgender persons in the Czech Republic

Lucie Nechvátalová

Recently, the first case concerning rights of transgender persons appeared before the Czech administrative courts. The lawsuit triggered discussion on the issue of transgenderism in the Czech Republic. Why did the applicant bring a legal action against the Czech administrative bodies and what has the result been so far?

Facts of the case

The applicant was born a male and therefore registered under a male birth number (in the Czech Republic there are different forms of birth numbers for males and females). However, as the applicant identified with a neutral or female gender, she requested a change of her birth number to reflect this issue. According to the Czech legal regulation, an individual is obliged to have gender reassignment surgery (to change her/his genitalia) and to be sterilized if such change is to be allowed.

The applicant refused to undergo such a procedure, inter alia because of the health risks. The administrative bodies therefore rejected her application. Since she perceived this requirement as a violation of her right to physical integrity and to health, she first filed a legal action to a regional administrative court and afterwards a cassation complaint to the Supreme Administrative Court.

Both administrative courts decided that there had not been any violation of the applicant's rights. According to their opinions, an individual has the right to gender identity as a part of the right to respect for private life and physical integrity but the public interest, which lies in the inalienability of civil status, prevailed. This was justified by the aim of maintaining consistency and reliability of civil status records in the state registers and by legal certainty in general.

May the Czech administrative courts depart from the ECtHR case law?

The courts expressly did not follow the case law of the European Court of Human Rights (hereinafter referred to as ECtHR), particularly the case of *A. P., Garçon and Nicot v. France* (hereinafter referred to as the French case). They argued that in the cases regarding sensitive moral and ethical issues in which no pan-European consensus exists, the states should have a wide margin of appreciation and the ECtHR should not set standards in this regard.

The building of the Czech Supreme Administrative Court [1]

Since the Czech Republic is a contracting party to the European Convention on Human Rights (hereinafter referred to as ECHR), its provisions are binding for the country. The ECtHR interprets those provisions and strictly speaking, only decisions in cases concerning a particular state are formally binding for that state. However, the ECtHR case law represents what the real and concrete content of each right is, and, therefore, the case law is *de facto* binding as a whole. This opinion is confirmed not only by the ECtHR but also by the Czech Constitutional Court in its set case law.

In exceptional cases, it might be legitimate to initiate a dialogue with the ECtHR and not to follow its case law – mainly when the ECtHR unreasonably departs from its case law. However, this was not the case.

In the French case, the ECtHR followed its gradually evolving case law concerning the rights of transgender persons with regard to Article 8 of the ECHR. The ECtHR also reviewed the legal changes in Europe, where the supreme courts of the contracting parties of the ECHR decided in favour of allowing a change in gender without the person in question necessarily undergoing the aforementioned surgeries, and where the legislation is changing in this regard.

Furthermore, the ECtHR stressed that the French case concerned "*an essential aspect of individuals' intimate identity, not to say of their existence*" and, therefore, it

Bathroom for everyone [2]

applied a narrow margin of appreciation. The Czech courts with their other arguments debased core issues i.e. forced changes to intimate parts of a certain (sensitive) group of individuals and mandatory sterilisation. However, it should be kept in mind that such practices undoubtedly affected individuals so profoundly that the ECtHR rightly asserted its authority and set standards in this matter for the contracting parties of the ECHR.

The Czech Republic as a member of the European system for the protection of human rights is expected to follow this case law and the Czech government should respond by presenting a solution to make the Czech legal regulation on transgender persons in compliance with it.

The Ministry of Justice prepared a draft amendment revoking the obligation of transgender persons to undergo gender reassignment surgery and mandatory sterilization, but it was rejected during the legislative process by other state bodies, e.g. the Ministry of the Interior.[1] As these state institutions had failed to resolve the situation, it became a task for the courts to provide transgender persons with the protection of their right to gender identity without undergoing the above-mentioned surgeries.

The right of transgender persons to gender identity in the Czech Republic

In the Czech Republic, a change of birth number reflects a change of gender identity. This identity is a fundamental aspect of personality and it is, therefore, protected by the right to respect for private life. Thus, the state's request for sterilization of (transgender) persons and gender reassignment surgery represents an intervention into the physical integrity and also mental integrity of an individual.

Furthermore, although an individual has to give consent to the surgery, this does not fulfil the conditions for free informed consent because when (s)he does not submit to it, (s)he is deprived of the full exercise of their right to gender identity and personal development.[2]

The justification for the above-mentioned intervention presented by the administrative courts was the inalienability of civil status and the requirement of legal certainty which prevailed over the protection of private life and respect for the human body. Concretely, the Supreme Administrative Court decided that in its opinion, an overwhelming majority of the Czech population perceived gender identity as binary (female or male) and objective (depending on the medical recognition). The Court further stated that gender identity perception according to a person's inner conviction is generally considered by the Czech society as an unwelcome anomaly that should not become the norm. Thus, in the Court's opinion, the majority of the Czech population holds the perception of a concord between a person's appearance and their gender identity. This perception is expressed in the Czech law, enabling transgender persons to undergo gender reassignment surgery and sterilization and, consequently, to change their gender identity.

Is forced gender reassignment surgery and mandatory sterilization of transgender persons really necessary?

Undoubtedly, at least some legislators are keen to preserve the above-mentioned view, expressed in the Czech law. And the Czech administrative courts held that they were not in the position to overrule this view and law.

Why is this view incorrect? The Supreme Administrative Court defended itself with the argument that the vast majority of the Czech population relies on the concord between a person's appearance (according to the medical designation) and gender identity in official records. Firstly, the opinion of the vast majority of the Czech population is not ascertainable when there is no evidence proving the court's claim neither did the court request such evidence. The same argument could be that the vast majority of the Czech population do not consider the gender of other persons and their birth numbers an issue important to them.

The Czech Ministry of Justice [3]

Furthermore, according to the Supreme Administrative Court, the opinion of the vast majority of Czechs is reflected by legislators in the law they adopt. However, the will of the legislators is not unchallenged truth. There has been no dispute over the fact that transgender persons have the right to gender identity, and when the rights of individuals are at stake, there is administrative justice to provide them with protection if the legislators (the state) unnecessarily intervene in it through the law.

In this case, the state has conditioned the right of a transgender person to gender identity (as reflected in the birth number) by forced gender reassignment surgery and mandatory sterilization. Therefore, it has profoundly intervened in the very core elements of a human being, in order to make third parties certain about the gender of other persons.

However, is this really necessary? The human being is composed of the physical appearance and the mental element - mind. If these two differ regarding gender, what should be important for the certainty of other people in their (legal) relationships – the appearance of the person's genitalia and the question of fertility, or what the person's inner conviction is and how (s)he presents herself/himself in public?

Importantly, the ECtHR held that a prior diagnosis of gender dysphoria is a legitimate request for gender change, ensuring that persons concerned "*do not embark unadvisedly on the process of legally changing their identity*". The mind is what makes us human beings and should have primacy in our relationships, not physical appearance. Therefore, it is not necessary to force other persons to undergo interventions such as gender reassignment surgery and certainly not sterilization.

Conclusion

In general, the whole concept of human rights is based on the respect and protection of human dignity, including the protection of the human body from unsolicited state interventions. Therefore, the risky surgeries forced upon individuals and the deprivation of their ability to conceive a child have to be perceived as unjustifiable in the case of changing birth numbers, as well as in other instances.

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Notes

[1] The draft is accessible on the websites of the Czech Government database of legislation from: https://apps.odok.cz/veklep-detail?pid=KORNAZWHY3ZN.

[2] The European Committee of Social Rights (established under the European Social Charter) clearly held that such practices in the Czech Republic had violated the right of transgender persons to the protection of health under the European Social Charter (see decision on the merits of 15 May 2018, accessible from: http://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en).

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Hungary

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Can Hungarian judges request preliminary ruling from the Court of Justice of the EU about their own independence?

Veronika Czina

In July 2019, a Hungarian judge requested that the Court of Justice of the European Union examine "his own independence", meaning the compatibility of the Hungarian judicial system and its practices with EU Law. The Hungarian Prosecutor General filed a recourse for the legality of the judge's request, and in its September decision, the Hungarian Supreme Court (Curia) agreed with him.

Background – problems with the Hungarian judiciary and the court system

The current Hungarian judicial system has many flaws that prevent its independent and proper functioning. One such example surrounds Tünde Handó, president of the National Judicial Office (NJO). The NJO is responsible for providing the conditions that are needed for Hungarian courts to be able to fulfill their tasks in jurisdiction at the most professional level possible. The President of the NJO has a significant role in the functioning of the Office. In May 2019 the National Judicial Council (NJC), which is the body that is trusted with balancing the power and controlling the actions of the NJO, proposed initiating Handó's suspension due to several alleged violations of law and standard judicial procedures. These were, for example, the president's practices in appointing officials, her frequent refusal to submit certain proposals or her disregard of constitutional controls.

The Council was firm in its opinion that the non-cooperative president ought to be removed from her post, but the Hungarian Parliament, the competent organ on such matters, rejected the request for suspension. In June, MPs decided (due to the overwhelming majority of Fidesz representatives) that the president of the National Judicial Office was fit to stay in her position. In November 2019,

Justitia [1]

she was elected as a Judge to the Constitutional Court, and thus she left the NJO prematurely. It remains to be seen whether this is meant to pacify the ordinary judiciary or something else.

The National Judicial Council reacted to the rejection by arguing that the decision confirmed the concern of several national and international forums that claim that the Hungarian judicial system lacks functioning checks and means of constitutional control over the power of the NJO's President. These flaws became visible in 2012 when a new system of court administration was introduced in Hungary.

The European Association of Judges also found the behaviour of the NJO President to be worrying, and even illicit. Back in

The Széchenyi Chain Bridge in Budapest [2]

early spring, the President of the Venice Commission of the Council of Europe already considered the case of Handó to be the most vital concern regarding the rule of law in Hungary, mainly due to the fact that she is too independent and not accountable to any institutions. Moreover, the European Commission's recommendation issued in June (before the Parliament's decision) stated that the fact that the NJC can hardly balance the powers of the NCO raises serious concerns about the independence of the judicial system in Hungary.

A Hungarian judge requests that the CJEU examine the independence of the Hungarian judicial system

A Judge from the Pest Central District Court, Csaba Vasvári, suspended a criminal case in order to ask the opinion of the Court of Justice of the EU (CJEU) about the compatibility of the Hungarian judicial system with EU law. A Swedish citizen was charged with misuse of ammunition, and the court did not sentence him to prison, but only ordered that a fine be paid.

The judge's argument was that if he convicted the foreign national (or if other judges do so in future cases), then the person could seek legal remedy in front of international forums and ask for an annulment of the sentence on the grounds of lack of independence in the Hungarian justice system.

Vasvári asked whether it is compatible with the rule of law and judicial independence – as guaranteed by Article 19(1) of the Treaty on the European Union and Article 47 of the Charter of Fundamental Rights – that the president of the National Judicial Office (NJO) selects candidates for leading judicial positions in an intransparent, non-competitive process, and that her appointments are not controlled enough, are temporary and are not fixed-term mandates. As the independence of these judges is questionable, the threat of violation of the right to a fair procedure is real for any citizen whose case might be assigned to such a judge.

The judge also asked whether denying the use of the native language of the accused (not providing an interpreter) is compatible with EU law. Last but not least, he inquired about the remuneration of judges, as prosecutors earn more than judges, unless compensated by judicial leaders' discretionary decisions about bonuses, which again raises the question of judicial independence.

Reaction of the Prosecutor General

One of the first reactions to the case came from the Hungarian Prosecutor General himself (Péter Polt), who initiated a review of the order for the preliminary reference before the Hungarian Supreme Court (Curia, Kúria in Hungarian) in the interest of legality. This step might suggest that he wanted to attempt to prevent other judges from asking similar questions to international bodies in the future. This special appeal, through which Polt tried to acquire a declaration from the Curia that the preliminary reference was unlawful, was only available to the Prosecutor General.

Polt argued that all three questions asked by Vasvári were irrelevant, because they did not raise genuine questions, they were non-issues in the specific case of the Swedish citizen. Moreover, the Prosecutor General claimed that preliminary reference can only be initiated for the purpose of clarifying the interpretation of EU Treaties and for determining the validity of acts and decisions of EU institutions.

Decision of the Curia and its consequences

In September, the Curia delivered its opinion No. Bt.838/2019, which technically cannot halt the preliminary reference procedure. The Curia agreed with the Prosecutor General that the suspension of a criminal case and the request for the preliminary reference is illegal if the request is not strictly related to the interpretation of EU law and it only relates to concerns that are irrelevant for the pending case. The Curia argued that the purpose of preliminary reference procedures is to interpret EU law and not theoretically assess a Member State's constitutional and legal system.

Even though the decision of the Curia does not prevent the reference from reaching the CJEU, it might scale down the activity of Hungarian judges and prevent them from referring similar questions to the CJEU in the future.

Besides the Curia's decision and its future consequences, there is another interesting aspect concerning the relevance of such a case before the CJEU. Some experts argue, for instance, that the preliminary reference should never have been submitted, or at least not in the given form, because the attorney of the Swedish citizen was not motivated by concerns regarding mutual recognition, as he claimed, but he and Judge Vasvári were concerned about the state of human rights and the rule of law in Hungary in general.

Whether submitting the request for preliminary reference was justified or not and whether the concerns mentioned by Vasvári are valid will be clear from the reaction of the CJEU. The Court's reaction to this issue might not only have an effect on the judicial activities of Member State's (more precisely Hungarian) judges, but also on the use and purpose of the preliminary reference procedure as a whole.

Building of the Curia in Budapest [3]

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[3] Building of the Curia in Budapest. Markó utca 16. A Magyar Köztársaság Legfelsőbb Bírósága, uploading author: Fortepan, 1926 (added 3 June 2016), source: Wikimedia Commons, public domain., edits: photo cropped.

Media situation in Hungary

Péter Kállai

Current judgments of the European Court of Human Rights may improve the legal situation of independent journalists in Hungary. However, there are other, deep structural ills in the Hungarian media environment.

Two decisions of the European Court of Human Rights

Two recent decisions improved the legal situation of independent journalists in Hungary. In both of the cases, the European Court of Human Rights (ECtHR or Court) found that the government infringed Article 10 of the European Convention of Human Rights. In *Szurovecz v. Hungary* [1] the applicant, a journalist from the Hungarian portal abcug.hu, was banned from entering a refugee reception centre, where he wanted to conduct interviews. According to the government, he could get information from other sources, and express his opinion without first-hand information, thus the ban was deemed appropriate. The Court concluded that there was a violation of freedom of the press under Article 10 as the government failed to demonstrate that this absolute refusal was necessary.

Another important decision regarding freedom of the press is *Magyar Jeti Zrt. v. Hungary.*[2] The applicant company is the publisher of the Hungarian news portal 444.hu. In an article on football supporters threatening Roma students, the journalist inserted a hyperlink to a Youtube video in which the leader of the Roma minority local government stated among others that "*Jobbik came in*" referring to a political party formerly known for its anti-Roma political platform. Jobbik started defamation proceedings arguing against the statement saying that inserting a hyperlink infringed the party's right to reputation. The Hungarian courts upheld the plaintiff's claim. The Court decided that there was a violation of Article 10 as hyperlinks are only a new form of reporting and they merely attract attention to other contents on the Internet and by using them a news portal is not "*entailing liability for the content itself*".

Structural problems

Although the last two decisions of the ECtHR concerning Hungary and Article 10 of the Convention are important for drawing attention to the failures of the regulations concerning the operation of media workers, there are also deeply embedded structural-institutional problems on the media market which cannot be resolved by decisions on individual cases, and which fundamentally serve the promotion of the government's messages and thus distort the political public discourse, especially during campaign periods.

Headquarters of MTVA [1]

The main elements of the Orbán-regime's propaganda machinery are the centralized ownership of the print (and online) press and full control of the public media, including the National Television. Indicative of the direction and quality of the content is the fact that government-friendly media have lost more than a hundred domestic lawsuits requesting corrections in their different outlets.

Centralization of pro-government media

In the field of privately owned media, Central European Press and Media Foundation (CEPMF or KESMA in Hungarian) was established in 2018. Businesspeople have offered tens of billions of HUF worth of media interests for the Foundation, thus the government-friendly media has been reorganized. More than a hundred media outlets convey only the government's and Fidesz's message around the country, and by now they are almost entirely centrally managed and substantially financed by governmental advertisements.

CEPMF is now responsible for the most influential right-wing daily papers, radios, television, tabloids and some free outlets. However, perhaps most importantly – by acquiring the Company Mediaworks which formerly shut down the largest daily newspaper, Népszabadság – CEPMF owns every county's regional daily newspapers as well.

It could be argued that the creation of such an extensive conglomerate should be investigated by the Hungarian Competition Authority in order to avoid abuse of dominant position and to ensure pluralism. However, prime minister Viktor Orbán issued a government decree declaring strategic importance for CEPMF at the national level. Based on a law adopted back in 2013, the government is entitled to make mergers immune to competition law and to any relevant investigation if the outcome of the transaction is of strategic importance at the national level. The decree should have included reasons and grounding as well, but no further explanation was provided.

National Television serving the government

Another crucial element of the system is the public National Television (MTVA).

MPs have the right to enter public buildings and ask questions to the managers of public institutions. At the end of 2018, several opposition representatives decided to visit the National Television after an anti-government protest against the so-called "slave law" and the planned setup of the new administrative courts. They started a petition against the law and wanted their opinion to be broadcasted but the editors refused. Dániel Papp, director of MTVA, requested a protection of possession process. The proceeding notary ordered the MPs to leave the building, which they later did. Two of them had previously been ejected by the security service. Later, MPs contested the decision. The Budapest District Court for the II. and III. districts recently ruled that as MPs the plaintiffs were entitled to enter the defendant's territory and their presence there did not cause disproportionate harm to the defendant's proper functioning.

The MPs later repeated their action several times, until it resulted in a meeting with the director. They claimed

The seat of government-friendly Mediaworks [2]

Banner reading: "Free MTI News = Trojan Horse of Propaganda" [3]

the state media was one-sided, favouring the Fidesz government and using more than 210 million EUR budget only to back the government's narrative. Papp repudiated accusations about the biased editing and programming of the national channels.

Media Council is responsible for the balance and professional standards of MTVA. The five-person Media Council was elected only by Fidesz in October 2010 for a 9-year term, thus the members' mandate has expired. An ad hoc parliamentary committee should assemble to nominate new members of the Media Council. Opposition parties mutually supported each other's candidates, while Fidesz did not nominate any candidates, thus obstructing the entire nomination process. On December 10, 2019, Hungarian Parliament elected the new members of the Media Council. All new members were nominated by Fidesz.

According to an analysis by 444.hu, M1 is "*not only biased in favour of Fidesz, it is a direct tool of the Fidesz electoral campaign and propaganda.*" Besides the news portal, the Final Report of the Office for Democratic Institutions and Human Rights within the Organization for Security and Cooperation in Europe on the 2018 elections also mentions this situation. According to the Report, 61% of the news coverage on M1 was about the Fidesz-KDNP coalition and the government, and 96% of it was positive in tone. The coverage of the opposition was negative 82% of the time.

Municipal elections

In October 2019, the opposition parties achieved surprising results in the municipal elections. The opposition won the mayoral election in Budapest and it was also declared the winner in some cities across the country, defeating the governing party.[3] However, most of the voters still favour Fidesz, and they won in the vast majority of the smaller towns. This difference in voting patterns might relate to better access to alternative media in bigger cities, while in smaller settlements, public and CEMPF media are overwhelming.

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Notes

[1] Application no. 15428/16, Judgment of the ECtHR of 8 October 2019, Strasbourg.

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[3] See more about the results in Viktor Z. Kazai, János Mécs: Local Elections in Hungary: the Results in Context. Verfassungsblog.de, 14 October 2019.

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Anti-Roma sentiments in Hungary – the case of Miskolc

Alíz Nagy

Members of the Roma minority face systematic discrimination in Hungary. Miskolc, a north-eastern city, demonstrated novel facets of this ill-treatment by the way it deals with its Roma population. With the support of Hungarian NGOs, the largest anti-discrimination lawsuit successfully established that the municipality discriminated against its Roma population.

Background

Hungary recognizes 13 national minorities, out of which the Roma are the most numerous. According to the official figures of the census, a large proportion of the Roma population lives in the region of north-eastern Hungary. Miskolc, the third largest city in Hungary, is one of the administrative centres of this area.

Roma people comprise 13.5% of the city's population and are settled in 13 segregated areas on the outskirts. In recent years, the city took action to evict people living in segregated areas (not only the Roma population, but the Roma constitute 80-90% of settlers in these areas). One specific case was the eviction from the so-called "Numbered Streets" (*Számozott Utcák*) neighborhood, which is one of the segregated areas. Here people were evicted so that the city's football stadium could be reconstructed.

The Hungarian Guard paramilitary group [1]

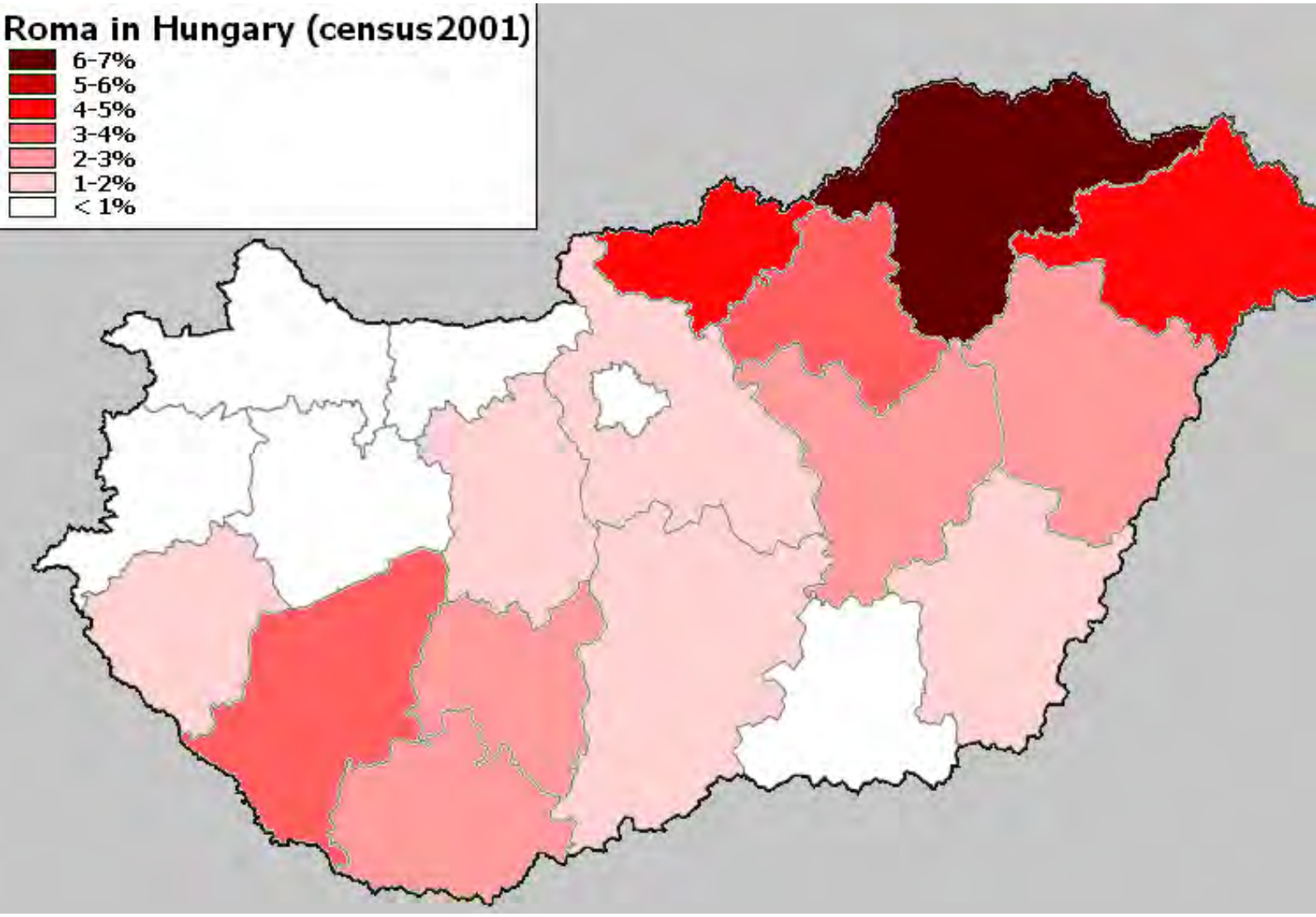
TÁRSASÁG A SZABADSÁGJOGOKÉRT

Logo of TASZ [2]

Anti-Roma sentiments in Hungary

Anti-Roma sentiments have traditionally been strong in Hungary. In the last decade, two issues in particular have come to international notoriety. From 2006 onwards, concerns about the activities of the party "Jobbik", and the marches of the paramilitary group, the Hungarian Guard, loomed large. The ODIHR report published in 2009, for instance, called for "*a far more proactive approach to promoting Roma integration and display the utmost responsibility in dealing with sensitive inter-ethnic and inter-community dialogue issues involving the Roma population.*" Among other things, the report emphasized the role of local authorities and reiterated the necessity of efforts to end schooling and housing segregation.

Hungarian human rights activists have taken part in the fight against the segregation of Roma, although with ambivalent results. Lilla Farkas, a prominent antidiscrimination lawyer turned scholar, considers in retrospect that the almost exclusive focus of the human rights community on school segregation was mistaken under the particular Hungarian circumstances, and that social inclusion ought to be ensured rather by residential desegregation. Segregated housing automatically leads to segregated schooling.



Roma minority in Hungary [3]

However, measures overtly aiming at residential desegregation might in fact result in serious and systematic discrimination at times. This was confirmed in 2019 in relation to a Miskolc city ordinance.

The largest anti-discrimination lawsuit in Hungary so far

Since 2011, new measures have been introduced that target primarily the above-mentioned segregated areas of Miskolc. First, the housing estates and the slums were raided by the so-called "welfare-raids". Authorities – on behalf of the municipality – checked documents (concerning for example guardianship, sanitation, etc.) and permission to reside in these areas. These measures were combined with hostile communication towards and about the Roma population. The head of the appointed authority responsible for the raids explicitly admitted that the aim was to intimidate the population of the neighborhood.

The Ombudsperson concluded that those raids had violated fundamental rights, but the authorities introduced no countermeasures. Meanwhile, prior to the 2014 elections, the mayor expressed that the Roma who left the region would not be welcomed back (from Canada, where they went as asylum-seekers).

As the next step, the municipality amended its ordinance about the housing policy in favour of residential desegregation. However, the legislation violates fundamental rights and is discriminatory against the Roma.

On the one hand, the amounts offered to the tenants were not sufficient to buy houses in a better area, while on the other hand, this measure of Miskolc's municipality led to the exclusion of the Roma population from the city's social welfare system (which is provided on the basis of residence). Furthermore, it started a chain reaction in the region, where other neighbouring cities implemented ordinances to prevent the Roma population from relocating into their neighbourhoods.

The football stadium in Miskolc [4]

The case of the Miskolc Roma settlements demonstrates that local authorities, instead of creating policies to empower the powerless, violate their fundamental human rights. As phrased by the Hungarian Civil Liberties Union (TASZ – Hungarian abbreviation of Társaság a Szabadságjogokért), the Municipal Council of Miskolc, led by Ákos Kriza, "*has been openly against its Roma inhabitants for the past few years*." The NGOs argued that "*together with the communicational method of the municipality, [the measures taken] are violating the right to equal treatment as well as demonstrating prejudice against minorities*."[1]

The events in Miskolc led to the largest anti-discrimination lawsuit in Hungary – as stated by the court itself. TASZ and the Legal Defence Bureau for National and Ethnic Minorities filed the lawsuit in 2016 against not only the municipality, but also the mayor's office and the municipality police.

The Court ruled that the municipality and other authorities of Miskolc violated the principle of equal treatment. It established both direct discrimination and harassment of Roma population. This year in May, the Court of Debrecen upheld the decision in the second instance. This decision is paramount since it exhibits a case of judicial independence, confirming that matters of social inclusion may only be resolved by lawful and non-discriminatory measures.

Is there a chance for a change?

Local elections were held in Hungary on October 13. This time, the mayor, Ákos Kriza, did not run for office and the candidate of the joint opposition won. Weeks before the elections, NGOs dealing with the Miskolc case addressed the mayor-candidates in an open letter. In accordance with the rulings of the courts, they invited the candidates to implement policies that would offer a solution for social inclusion of the powerless in Miskolc. Unfortunately, none of the candidates offered a structural solution for the issues of residential segregation or a plan fighting the discriminatory, prejudiced measures in the area.

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Poland

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All the colours of Poland's parliamentary elections

Patryk Rejs

Probably the most important parliamentary elections after 1989 are over. No wonder the elections were preceded by the most interesting campaign in many years. However, what will follow may be even more intriguing.

The Prologue

The parties entered into elections with the following holdings - the conservative and ruling party Prawo i Sprawiedliwość (Law and Justice, hereinafter referred to as "PiS") had 239 MPs in the 460-seat lower chamber (the Sejm) and a majority (61/100) in the higher chamber (the Senat). The first and the second opposition parties - the Platforma Obywatelska (Civic Platform, "PO") and the Nowoczesna (Modern) - decided to join forces in these elections as the Koalicja Obywatelska (Civic Coalition, "KO"). Thus, they started the campaign with 166 seats in the Sejm and 34 seats in the Senat. The third opposition party, the Polskie Stronnictwo Ludowe (Polish People's Party, "PSL"), ran together with the party of Kukiz 15', with a total of 38 seats.

The remaining 26 deputies represented minor parliamentary groups or were not affiliated. Furthermore, the left-wing parties formed a block to compete in these elections. The arrangement included the SLD (Democratic Left Alliance), returning to the Sejm after four years of not existing in parliament, and two relatively new parties with young, charismatic leaders - Razem (Together) and Wiosna (Spring). Moreover, a new player appeared very far on the right side of the political scene – Konfederacja (Confederation).

To the surprise of many media representatives, President Andrzej Duda announced the elections on 6 August 2019, indicating the earliest possible date. The President stated that the election campaign is always accompanied by political disputes and, therefore, he chose the earliest possible date in order to finish it as soon as possible.

Great hall of the Polish lower chamber – Sejm [1]

Heads flew

The President made no mistake - the campaign was actually very dynamic and rich in interesting events and spectacular "head-shots". The first scandal appeared when the press revealed that the Speaker of the Sejm, Marek Kuchciński (PiS), during his term of office, repeatedly used government aircrafts for private flights, sometimes also inviting his family members and other politicians of the ruling party on board. Under pressure from the public, the Speaker agreed to resign from his office and pay the equivalent of the benefits to charity.

Shortly after this, the press revealed that Marian Banaś, the newly appointed President of the Supreme Audit Office (earlier the Minister of Finance and the head of the fiscal apparatus), was the owner of a tenement in Krakow, which was rented as a hotel and run by people associated with the Krakow criminal underworld. The activity was conducted completely within the bounds of the law and was not taxed. The fact that the Central Anticorruption Bureau

Jarosław Kaczyński – the leader of ruling party – and President Andrzej Duda [2]

(CBA) had been conducting investigations into the former minister's declaration of assets for an unexpectedly long time was brought to light. Banaś claimed that he did not know about the dirty business run in his tenement, but he would go on unpaid leave until the end of the investigation for the sake of the office he held.

The largest opposition party also faced some setbacks. A week before the elections, the head of the parliamentary group of PO Sławomir Neumann was recorded using vulgar language when speaking disrespectfully about the local structures of his party. Furthermore, he promised local politicians protection for their loyalty to the party. Ultimately, he resigned from his office. Lech Wałęsa, known for his uncompromising nature, appeared at a convention of the KO and criticized the recently deceased legendary leader of an anti-communist organisation (and father of the Prime Minister), Kornel Morawiecki, calling him a traitor. The next day, he withdrew his support for the KO and gave his support to the PSL, which, however, distanced itself from this declaration.

The electoral promises concerned mainly social transfers. They included the size of the Family 500+ programme introduced in the previous period (benefits for families with children amounting to about 120 euros per each child) and extra benefits for pensioners (a payment of a 13th and for some of them even 14th pension in a year). The discussion also focused on minimum wages and taxes, in particular for entrepreneurs (reductions in the relatively high costs of social insurance). The tone of the bidding was set by a number of government measures introduced just before the elections (introduction of an income tax reduction, exemption from it for people up to 26 years of age, etc.). Only the Confederation did not take part in this bidding. They called for tax reductions and abolition of the Family 500+ programme. However, the estimates for the Confederation's support oscillated around the electoral threshold of 5%.

To some degree, the campaign also covered moral issues such as the legalisation of same-sex marriage and depriving the Catholic Church of its privileged position. These issues were raised primarily by the left wing parties.

Public opinion polls indicated a great victory for the ruling party. The question was rather whether PiS would continue to rule in a coalition or independently (with at least 231 seats), whether it would be able to reject the presidential veto (276 seats) [1] or even change the Constitution (307 seats).

Who lost and who gained

PiS received 43.59% of the votes, which is the highest score obtained by any formation in the parliamentary elections. However, it was a Pyrrhic victory in view of the expected significant majority – PiS led by Jarosław Kaczyński gained only 235 MPs. This allows him to govern independently without a coalition partner for the next four years, but he has fewer seats than during the previous term.

Five parties exceeded the electoral threshold. The second party, KO, won 27.40% of the votes (134 seats), the block of left-wing parties returned to the Sejm (12.56%, 49 MPs) and the fourth place went to the PSL (8.55% and 30 seats). The Confederation had an interesting result – being a mix of extreme right-wing and nationalist movements – they still managed to get 11 MPs. The German minority party will have one seat.

An interesting matter concerns the Senat. The first polls gave PiS a significant advantage in this chamber. However, the party did not obtain a majority in the Senat, taking only 48 out of 100 seats. For the first time after 1989, the winning party had neither a majority nor a coalition partner. The victory of the opposition means that in the new period, PiS will not have the freedom to carry out rapid legislative changes like they had previously been doing. The loss is troublesome for the ruling party, since a majority in this chamber is necessary for the election of certain state bodies, such as the Head of the Supreme Audit Office, in case Marian Banaś intends to resign from his post.

However, the undisputed winners were the Polish voters as the turnout was 61.74%, the highest since the breakthrough elections of 1989.

The post-election puzzle

Also to the surprise of many, the President set the date for the first parliamentary meeting on 12 November, the latest possible date. The reason for this may be that the winning party had to reorganize itself. After the elections, the balance of power in PiS changed significantly. The fractions gathered around two opposing politicians – Minister of Justice Zbigniew Ziobro and vice prime minister Jarosław Gowin. Each of them introduced eighteen of their own MPs and they are well aware that PiS cannot rule without them. However, Ziobro and Gowin have completely different ideas for Poland.

At the end of the campaign, Jarosław Kaczyński announced that he would not take the post of prime minister,

Sławomir Neuman and Grzegorz Schetyna – officials of the PO parliamentary group [3]

The candidates of left-wing party – Lewica [4]

which will probably be held by Mateusz Morawiecki. As many predicted, PiS will continue its controversial reforms and the social programmes which they have initiated. However, much will depend on the politicians who have grown stronger. The next chapter – the presidential elections – is coming in spring.

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Smear campaign to discredit judges

Artur Pietruszka

In August 2019 a popular Polish news site, Onet.pl, revealed that several officials in the Ministry of Justice had created an informal group which aimed to discredit judges in the public eye by sharing slanderous information about their private lives. The publication prompted the resignation of the Deputy Secretary of Justice and initiated a discussion on judicial independence and a new model of disciplinary proceedings for judges.

Onet article

On 19 August Onet.pl published an article '*Troll farm in the Ministry of Justice*' in which correspondence between the Deputy Minister of Justice, Łukasz Piebiak, and Twitter user @MalaEmi (Little Emi) was disclosed. The latter was an online hater who posted mainly about judges who were critical of the judicial reform in Poland and about the reform itself.

One of the most prominent opponents of the reform was Krystian Markiewicz, a judge, professor of law and president of 'Iustitia' - the biggest association of Polish judges. Little Emi published a number of stories regarding Markiewicz's private life, including his alleged intimate contacts with women. Furthermore, the hater sent out an anonymous letter with the said accusations to all Iustitia's regional offices and to Markiewicz's private address as well.

Onet revealed that Piebiak approved and coordinated the campaign against the judge. Moreover, he revealed Markiewicz's private address to Little Emi. Piebiak also assured the hater that 'they do not put people in jail for doing good deeds' in response to her doubts concerning possible criminal proceedings.

Deputy Secretary of Justice's resignation

On the following day Łukasz Piebiak resigned from his post. In his resignation letter, he said that he was resigning as he felt responsible for the reforms to which he had devoted years of hard work. Moreover, Piebiak stated that he would take Onet to court as it had disseminated slanderous

Krystian Markiewicz, president of 'Iustitia' association of Polish judges [1]

statements about him based on reports from an unreliable person. However, Piebiak has admitted that he knew Little Emi 'from Twitter'.

Following the resignation, Piebiak returned to work as a judge in the Regional Court in Warsaw as he was seconded to work at the Ministry of Justice in 2015 by the current Minister of Justice, Zbigniew Ziobro.

Another Ministry of Justice official involved

On 20 and 21 August, Onet published further articles and revealed that another judge seconded to work in the Ministry of Justice, Jakub Iwaniec, was involved in the smear campaign and had plotted with Little Emi to discredit some of the judges. In particular, Iwaniec provided the hater with documents and information regarding Markiewicz's private life, including his telephone number, and the names of his partner and his child. Iwaniec and

Little Emi were clear in their conversation - the objective of the campaign was to silence the critique of the judicial reform by discrediting Markiewicz.

Iwaniec was dismissed from the Ministry of Justice on 21 August.

'Caste' group on WhatsApp

In addition to Iwaniec's involvement, Onet published screenshots of messages shared in a group on WhatsApp (an online messenger application). The group was named 'Kasta' (Caste) and consisted of around 10 recently nominated or promoted judges, including at least one from the Supreme Court, two Disciplinary Commissioners for the Judges and members of the National Council of the Judiciary. Little Emi was also a member of the group. The participants of the 'Caste' shared insults and jokes about judges critical of judicial reforms.

In July 2018, there was a widespread action of sending postcards in support of the First President of the Supreme Court, Małgorzata Gersdorf, amid the mass protests against amendments to the Law on the Supreme Court. In response to this, a 'Caste' member – current Supreme Court judge Konrad Wytrykowski – initiated the sending of vulgar postcards encouraging Gersdorf to step down from her post. Wytrykowski wrote about the idea in a private message on WhatsApp. Later on, Little Emi urged the Twitter community to send said postcards to the Supreme Court.

Overall, around 20 judges were subject to the smear campaign initiated by the group.

Aftermath of the publications

Regardless of the resignation of the Deputy Minister of Justice and termination of Judge Iwaniec's secondment, the Main Disciplinary Commissioner for the Judges initiated disciplinary proceedings. The Prosecution Office has also opened an investigation based on the Onet publications.

The Main Disciplinary Commissioner announced that not only would the judges who participated in the 'Caste' group be subject to investigation, but that it was also necessary to verify the allegations of Krystian Markiewicz's improper conduct, disseminated by Little Emi.

The proceedings were instituted by *de facto* subordinates of the Minister of Justice, Zbigniew Ziobro, who also serves as the Prosecutor General. Although the government spokesperson announced that Ziobro would not personally take part in the proceedings, questions are being

President of the Supreme Court of Poland, Małgorzata Gersdorf [2]

District Court in Warsaw [3]

asked about the fairness and impartiality of the officials conducting the investigation.

Judges' reactions to the case

Apart from possible criminal and disciplinary charges, the participants of the 'Caste' have already received a response from fellow judges. One of the members of the group, Deputy Disciplinary Commissioner Przemysław Radzik, was to adjudicate in a criminal case in the District Court in Warsaw, sitting in a three-judge panel. Judge Radzik works in the Regional Court in Krosno Odrzańskie, but was delegated to adjudicate in Warsaw by the Ministry of Justice.

However, Judge Anna Bator-Ciesielska refused to sit with him in the same court composition. She invoked the doubts concerning Radzik's alleged unimpeachable character and referred questions to the Court of Justice of the European Union regarding the independence of the judges delegated to adjudicate in higher courts by the Ministry of Justice.

In response, Radzik issued an official statement in which he called the situation 'an abuse of power', a 'serious infringement of the division of power principle' and a 'violation of his personal rights'. The day after the publication of the abovementioned statement, the Main Disciplinary Commissioner initiated proceedings against Bator-Ciesielska.

Conclusion

Media investigation revealed an unprecedented smear campaign aimed at a group critically important for the rule of law and democratic society – judges. It is all the more alarming because of the role of the Ministry of Justice officials who were allegedly coordinating and managing the campaign, intending to win over public opinion in the dispute over judicial reforms.

The case also shows the multiple roles the Minister of Justice finds himself in after the recent changes in the justice system, acting as the Prosecutor General, a member of the National Council of the Judiciary and a supervisor of the

Disciplinary Commissioners and the judges seconded to work in the Ministry of Justice.

Undoubtedly, a thorough investigation into the affair is essential. However, since the case broke out until submission of this article, no one has yet been charged or accused.

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Protests against amendments to the Law on the Supreme Court in 2018 [4]

What could Poland bring into the discussion on Artificial Intelligence and Human Rights?

Łukasz Szoszkiewicz

Artificial Intelligence (AI) strategies are being intensively developed by policy makers worldwide. In 2018 alone, nearly 20 countries, including Poland, put forward new AI frameworks. Less than a year later, after a series of consultations, a new document titled "Policy for the Development of AI in Poland 2019-2027" was published. Does the new strategy have the potential to impact the EU-wide discussion on the legal aspects of AI?

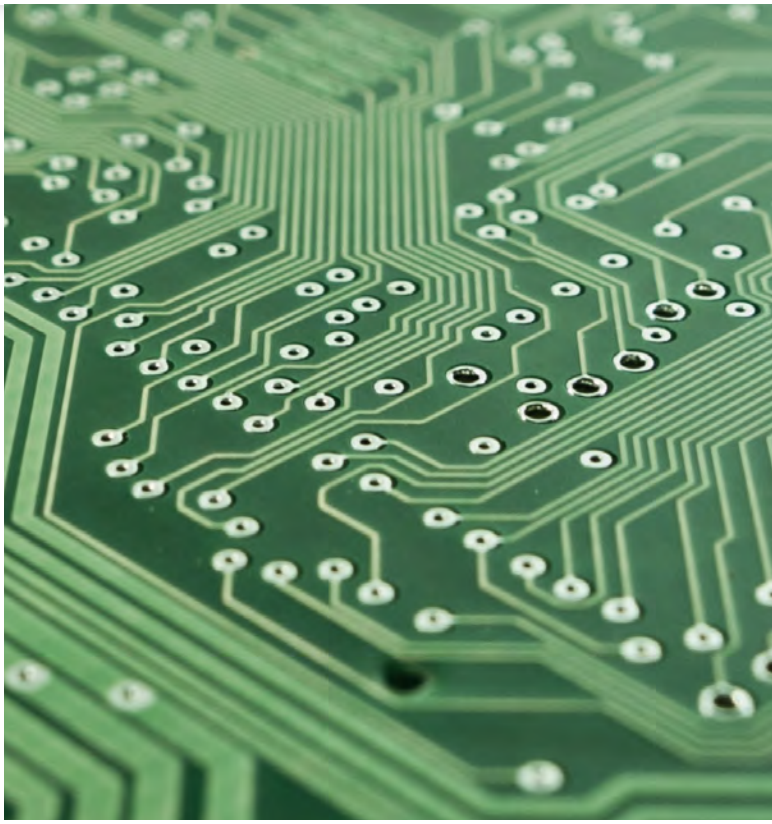

Illustration image [1]

Regulatory initiatives in the field of AI are in their infancy. This comes as no surprise: AI has the potential to transform every domain of human life. The legislative efforts have so far resulted primarily in the adoption of *soft law* instruments as well as numerous political and analytical documents – strategies, reports, white papers, etc. Some of them, such as the French report by C. Villani, have become an important point of reference in discussions on AI.

Balancing AI with human rights

The "Policy for the Development of AI in Poland 2019-2027" identifies nine key challenges related to the development of AI, including the need to design an appropriate legal framework. The following issues are indicated as areas requiring the particular attention of regulatory bodies: legal personality of AI, intellectual property law, liability for damages and public procurement law. In addition, the document elaborates on the need to establish a uniform minimum technical standard in the field of data governance (at least at the European level).

Human rights, in turn, are briefly discussed in a separate section devoted to the "ethical dimension". The section starts with the statement that "[e]thics and law are the foundations for strategic State action in the field of Artificial Intelligence". This suggests that law and ethics are perceived as two separate regimes and human rights are classified as belonging to the latter. What are the consequences of adopting this perspective?

First of all, the ethical framework is based on *soft law* instruments such as guidelines, recommendations and codes of conduct. However, such instruments by no means offer valuable guidance as they are not legally binding and thus remain unenforceable. *Soft law* alone gives rather weak instruments to individuals seeking better protection against both state and non-state actors. Human rights, on the other hand, are well-grounded in international law, with numerous treaties (both at the international and regional levels), monitoring mechanisms (e.g. framework of the UN treaty-based bodies) and international tribunals such as the European Court of Human Rights. Focusing the discussion on ethical issues rather than international human rights law might lead to a situation in which all these well-established mechanisms are contested in the AI era.

The role of business in the context of human rights

Even a brief look at the Polish policy paper indicates that policy-makers give priority to the legal framework for business activity (e.g. legal personality, intellectual property and liability for damages). Unfortunately, the document does not aim to go beyond describing existing initiatives, adopted documents and ongoing discussions in international fora, primarily the European Union (EU) and the Organisation for Economic Co-operation and Development (OECD). Furthermore, the Council of Europe (CoE) is completely overlooked (the CoE is mentioned only once throughout the whole document, whilst the EU appears 46 times and the OECD 45 times), even though the CoE developed the most advanced instruments in the field of automated processing of personal data (Convention No.

108+) and instruments related to the role of business in protecting human rights.

Similarly, there are no references to UN documents (the UN is mentioned only four times) such as the highly relevant *Recommendation on Science and Scientific Researchers* adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the *General Comment on State obligations under the ICESCR in the context of business activities* issued by the Committee on Economic, Social and Cultural Rights (CESCR).

How could Poland contribute to the debate on AI?

At the political level, the lack of references to international human rights law should be perceived as an untapped opportunity for Poland to impact the European discussion on AI regulations. The lack of innovation in the Polish economy [1] prevents it from playing an important role in shaping a business regulatory framework. Therefore, Poland should look for its own niche to become an important voice in the EU-wide debate on AI. Children's rights could be one of such areas; after all, it was Poland that proposed drafting the UN Convention on the Rights of the Child (CRC), and its text was inspired by the thoughts of, among others, Janusz Korczak - a child welfare and children's rights pioneer who called for the convention on child's rights to be drafted as early as 1918.

This choice is not coincidental – the CRC Committee has recently launched a process of drafting a *General Comment on children's rights in relation to the digital environment*. So far, the CRC Committee has received 135 submissions (29 from states), including a response from the Polish government. Again, the document submitted by Poland is very brief and provides no substantial input to any of the six areas of concern identified by the CRC Committee. Fortunately, the process of drafting the General Comment has just been launched and Poland can still play an important role in its course.

The Palace of Nations – United Nations Office at Geneva [2]

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[1] According to the Composite Innovation Index developed by Eurostat, the Polish economy is one of the least innovative in the EU. See: Eurostat, Composite Innovation Index, 2019.

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[2] The Palace of Nations - United Nations Office at Geneva. United Nations building, author: Becks, 19 August 2012, source: Flickr, CC BY 2.0., edits: photo cropped.

Slovakia

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Free access to information in Slovakia as an accountability tool

Erik Láštic

After almost two decades since the Freedom of Information Act was passed, it is possible to argue that the law has become the most influential legal norm on citizens–government relations in Slovakia. With its expansion that led to the obligatory publication of public contracts or judicial decisions, access to information enables public control in a manner previously neither achieved nor attempted by the public institutions.

When a new Slovak government was formed after the 1998 elections, it had to overcome the image of Slovakia as the only country unable to fulfill the Copenhagen political criteria for countries wanting to join the EU. A group of MPs supporting the governing coalition declared in 1999 their willingness to formulate legal conditions that would make freedom of information effective.

With massive support from NGOs, free access to information became the first major policy proposal coming from the civil society that was subsequently transformed into legislation. As sponsors of the law repeatedly emphasized during its readings, "The realization of the constitutional right to information was a key element in the relations between the state and its citizens and in the fight against corruption." The law was both a reaction to the communist state legacy of secrecy, but also to the previous period, which saw democratic backsliding due to the actions of the government led by Prime Minister Vladimír Mečiar.

Origins of free access

The Law on Free Access to Information was approved in May 2000. The right to information was constructed as universal: anyone (a person or a legal entity) can request information from state administration, regional and municipal governments, public organizations (e.g. public TV or radio) and any private entity that has the power to make administrative decisions on rights and freedoms of legal subjects.

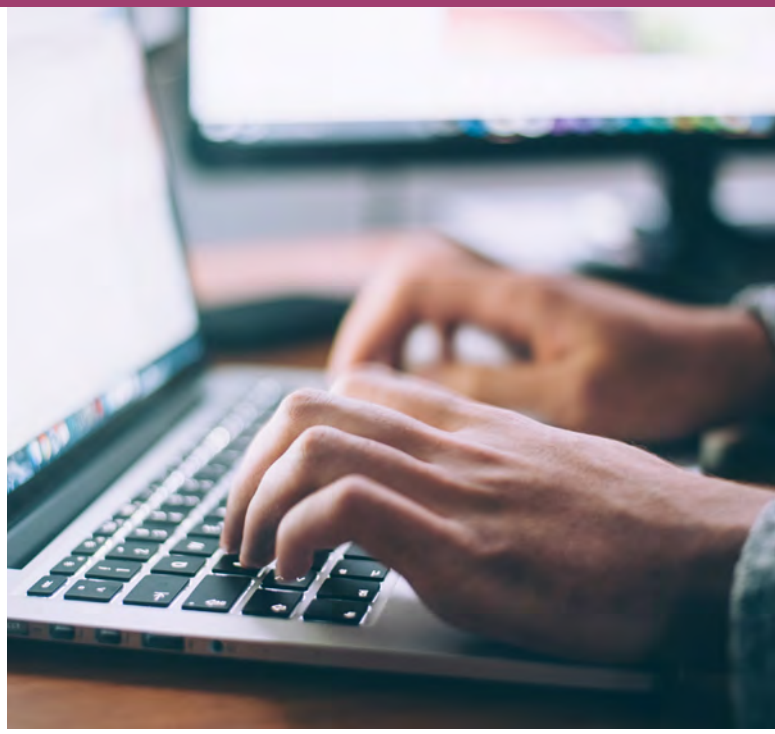

Illustration image [1]

The implementation of the legislation on free access to information benefited from a concentrated effort of three sets of actors. The Office of the General Prosecutor, through its attorneys who are empowered to control the legality of actions of public institutions and local governments, systematically pushed against attempts to limit access to information, pursued particularly by local parliaments. The courts helped to overcome the uncertainty of implementation by repeatedly confirming the basic principles of the law, e.g. its scope and obligations, but also by forcing public institutions to provide explanations when they decided not to grant access to information.

The most important factor contributing to successful implementation of the law was the effort of the civil sector. It already played a crucial role in drafting and adopting the law. The implementation period was characterized by a massive educational campaign oriented towards citizens and bureaucracy. A review process on the implementation followed, taking the form of annual reports on major application problems. Most importantly, NGOs used strategic litigation to create case law to clarify some of the law's provisions and build sustainable legal arguments when faced with the reluctance of public organizations vis-a-vis the law's implementation.

Slovak Parliament (National Council) [2]

Expansion of free access: from experiments to public contracts

The adoption of the Freedom of Information Law and its implementation led to various experiments on how to better use publicly available data. Subsequently, these experiments served as a blueprint for requests to expand the law's principles into areas not covered by the original legislation. Similarly to the discussion about the law in 2000, a crucial role was played by political actors willing to invest their political capital into pushing for the expansion of free access (e.g. Lucia Žitňanská, the Justice Minister in 2010-12 and 2016-2018), and by the media and NGOs. The government in power between 2010-2012 decided to expand the freedom of information principles to mandatory publication of all financial contracts concluded by public authorities and of judicial decisions.

The mandatory publication of contracts expanded the ability to monitor the state and led to another (successful) push for even more "transparency" as a part of the anti-money laundering legislation. Slovakia and Denmark were the first countries in the EU to implement a public register of beneficial ownership. The register started in Slovakia on 1 November 2015, initially mandatory only for private companies participating in public procurement. After the wobbly implementation of the law, which seemed to lack proper political backing, the new Justice Minister, Lucia Žitňanská, championed the law as an important instrument in the fight against letter-box companies. The obligation to register was extended in 2017 to all companies which have contracts with the government amounting to at least €100 000 . The register requires private companies which have contracts with the state to reveal their "real" management and ownership structure. Noncompliance with the law results in fairly high fines, e.g. a general fine is equal to benefits obtained from a contract with the state, or annulation of the registration.

Early implementation of the 2017 amendment shows once again that its success is dependent on the actors, i.e. the court that is responsible for monitoring the register and the public that is willing to challenge the accuracy of the register's records. The importance of strategic litigation was shown in the first cases that reached the court in 2018. In one of them, an investigative journalist from the national newspaper SME, Adam Valček, succeeded in his attempt to reveal the real owners of the 49% share in Infraservices, a.s., a company that provides services worth at least €40 million per annum to the public Bratislava Water Utility.

Illustration image [3]

Officially owned by two attorneys, it was long rumoured to belong to a Slovak oligarch. As the law guarantees anyone can access the records from the public register, it also allows anyone to file a motion asking the court to review the records and their correctness. The burden of proof is on the registered company. In this case, a few days before the deadline set by the judge to correct the records, the ownership of the company suddenly changed from attorneys to the aforementioned oligarch.

Conclusion

Although Slovakia is a parliamentary democracy, its political system is dominated by the government. The formal accountability mechanisms, ranging from the government's control by the majority in the parliament to disciplinary panels in the judiciary, are chronically formalistic and ineffective. With billions of Euros of public resources available annually to be spent by public institutions on the national and local level, often in partnership with powerful economic interests, the Freedom of Information Law and its later expansions created an effective accountability tool used by political opposition, media, civil society, and the public. The opportunity to access the original information sources is crucially important in an era of "alternative facts", where our representatives communicate more and more through tailored messages to selected audiences and where prefabricated political events and facts limit space for civil discussion.

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The twilight of free speech in Slovakia?

Max Steuer

The year 2019 was notable for shaping standards of freedom of speech in Slovakia. Different visions of regulation clashed amidst notable invocations of hostility and discrimination towards minorities.

Slovak courts have provided legal scholars and practitioners with an array of materials to study the scope and limits of freedom of speech. While opportunities to address this question were abundant in the last decade, the topic only became a focal point of public interest after the general elections of 2016. In these, the political party of Marian Kotleba (People's Party Our Slovakia, PPOS), whose representatives consistently pursue anti-minority narratives, crossed the 5% threshold.

Legislative changes in 2017 facilitated enhanced interest when the competence to investigate violations of the Slovak Criminal Code by engaging in extreme speech[1] was transferred to the National Criminal Agency and the Office of Special Prosecution. In turn, the Agency initiated a series of investigations into the speech acts of the representatives of, among others, the PPOS, some of which resulted in indictments and ultimately trials.

How much regulation?

For a while after the legislative changes of 2017, it seemed that the 'barrier against extremism' – as stipulated in the 2016 Slovak government manifesto – was successfully built up, as if it were intellectually inspired by Waldron's account on the inherent 'harm' entailed in 'hate speech', which the state must prosecute. However, three leaks have appeared in the barrier.

Firstly, some instances of extreme speech by political elites were not prosecuted due to a lack of evidence. For instance, one of Kotleba's MPs, who had posted statements denying the Holocaust on Facebook, was not charged due to the alleged impossibility to connect the profile to the person.

Secondly, the PPOS has developed a systematic narrative of the 'twilight of freedom of speech' in Slovakia and related the executive efforts to a fear of the 'one true opposition'.

Marian Kotleba [1]

Thirdly, some of the provisions of the Criminal Code were challenged at the Constitutional Court for being overly broad and allowing regulation of critical political opinions, which cannot be deemed acceptable in a democracy. The Constitutional Court agreed, invalidating some of these arguably overzealous provisions in January 2019.

As this brief overview demonstrates, the question of the extent of regulation became vigorously contested. The actors who had engaged in extreme speech capitalized on the resulting uncertainty, and a legitimate concern arose regarding overextension of criminal law at the expense of other alternatives to address extreme speech.

The courts decide

Coming back to the cases of Marian Kotleba and members of the PPOS, the lack of conclusive judgments sanctioning them for their expressions served as one of the arguments for the Slovak Supreme Court to reject the attorney general's petition to ban the political party as a whole.

When this judgment was delivered in April 2019, an earlier decision of the Specialized Criminal Court (SCC) had already been made, sanctioning one of Kotleba's MPs (Milan Mazurek) for engaging in anti-Roma speech. However, the judgment remained pending until its (substantive) affirmation by the Supreme Court in September 2019, after which Mazurek's mandate was revoked.[2]

This September judgment contains several substantive ideas on content-based regulation of extreme speech. On the surface level, the judgment does not introduce any 'free speech philosophy' as it merely applies the regulation from the Slovak positive law (and the legislative intent behind that law) to the specific case. Later in the judgment, however, the Supreme Court pointed out that '*the basic democratic principles include respect and tactfulness towards the rights of all members of society without regard to their affiliation or religion.*' This can be seen as at least a mild normative endorsement of the content-based regulation.

To the extent that the judiciary acts as 'the mouth of the state', the judgment can be seen as a clear-cut expression of unacceptability of speech undermining human dignity by political elites, and can serve as a reference point in future cases.

But the courts are not the only, nor the most visible, state representatives. Beyond the judgment itself, the limits of the state in expressing a strong principled position came to the fore when Mazurek got the position of another MP's assistant in addition to some severance pay.

Moreover, Robert Fico, former Prime Minister and the leader of the political party Direction – Social Democracy (SMER – sociálna demokracia), implicitly endorsed Mazurek's statement in a video claiming that he had 'only said what the whole nation thinks' and was 'telling the truth'. This was more than just a venture into the Slovak collective consciousness as it signified a sweeping resistance to judicial authority.

Fico did have a point regarding the risk of the judgment leading to a cultivation of Mazurek's image as a 'hero' in certain circles. However, his generalization of these circles to the whole 'nation' is not based on any sound empirical evidence. The election of Zuzana Čaputová, who ran with a message of tolerance and understanding, as Slovak President, provides some empirical refutation of this statement.

In response to the video by Robert Fico, the Office of Special Prosecution, after an investigation by the National Criminal Agency, filed an indictment against him. A conviction for 'hate speech' based on this video would certainly count as a bold move, although further anti-Roma statements could be identified in Fico's appearances, such as that the Roma 'distort the statistics about unemployment' or that 'they abuse the social system.'

Where do we go from here?

Fico's statement, alongside many of the PPOS, imply that freedom of speech in Slovakia was undermined as a result of the vigorous efforts of a few investigators. Fico completely ignores the fact that the more stringent content-based regulation on extreme speech was advocated by his cabinet, and that he did not use the many opportunities he had as Prime Minister to speak up against the regulatory framework which necessitated the conviction in Mazurek's case.

From a comparative perspective, the Slovak legislation and case law are part of a broader tendency towards more regulation, which is observable in contemporary discourse about freedom of speech. Yet concerns stemming from the risk of abuse of the regulation and its silencing effects remain.

The campaign before the 2020 parliamentary elections might well bring more extreme speech acts by Slovak political elites, thereby further undermining the official message of tolerance and dignity present in the ruling in *Mazurek*. At the same time, some anti-minority expressions might be deterred or at least calmed down by the ruling.

In the longer run, as long as extreme speech is not accompanied by credible threats of societal – not only legal – sanctions (such as its consistent and convincing rejections by the pro-democratic political elites), it is unlikely to disappear to the margins of the public sphere.

Illustration image [2]

Illustration image [3]

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Notes

[1] This term is less emotionally driven than that of 'hate speech', although both lack a legal definition. See Hare and Weinstein (2009).

[2] The Supreme Court doubled the financial sanction so that it reached 10,000 EUR but it rejected the obligation for Mazurek to attend a self-funded informative session on the Roma Holocaust, arguing that the status of the accused indicates that his way of thinking and expression would have no prospects of changing as a result of such a session (2T/10/2018, p. 30).

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Religious freedom - new prime international focus for Slovakia?

Viliam Ostatnik

Respect for religious liberty is deteriorating globally. Although the Freedom House Index considers freedom of religion in Slovakia to be generally upheld by the state institutions and the country has increased its calls for international protection of religious freedom, it still has room for improvement – both domestically and internationally.

Religious freedom in the Constitution of the Slovak Republic

The Slovak Republic is a secular state in which religious freedom is guaranteed both by the Constitution and international agreements (such as the International Covenant on Civil and Political Rights or the Vatican Treaty between the Holy See and the Slovak Republic).

Art. 24 of the Slovak Constitution guarantees religious freedom. It defines it as the right of every citizen to (1) change his or her religion, (2) express his or her religion privately as well as publicly, alone or in a group, through religious services and worship, ceremonies and rites, (3) take part in its teachings, as well as (4) be irreligious. No one can be forced to either adopt or reject a certain religion or faith. These rights are to be limited only by the law and only if they pose a threat to public order, health, morals or they directly violate the rights and freedoms of others.

The Slovak Constitution does not explicitly mention the right to think, speak and act in accordance with one's religious teachings, be it at a workplace or place of study, insofar as it does not violate the country's laws. The interpretation of what religious freedom (in connection to the freedom of conscience and conscientious objection) really means can thus be expected to set the stage for ideational conflict between liberals and conservatives.

The measure of religiosity of Slovak citizens is quite significant. According to the statistics of the Slovak Ministry of Culture, 75.5% of Slovak citizens were members of a church or religious organization in 2017. Religious freedom is thus considered a rather sensitive issue for the Slovak population, and consequently for its political representation.

Robert Fico [1]

Slovakia's international position

Slovakia actively participated in the second Ministerial to Advance Religious Freedom in Washington, D.C. in July 2019. The Minister of Foreign and European Affairs, Miroslav Lajčák, gave a speech on the need to protect religious liberty. He claimed that attacks on this human right come from opponents of democracy and emphasized the role of education and the need for interreligious dialogue. Moreover, he used this forum to promote the latest steps the Slovak government has taken in this regard, including the passing of a law against religiously motivated hate speech and extremism. As for the outcomes of the Ministerial, Slovakia supported six formal statements, and abstained from three that addressed the situation in China, Iran and Burma/Myanmar.

Religious freedom is also one of the top priorities for Slovakia while it is a member of the UN Human Rights Coun-

cil for the period 2018-2020. Supporting religious freedom was also priority for Slovakia's recent presidency of the Organization for Security and Cooperation in Europe.

Religious freedom in national politics

In June 2019, the National Council of the Slovak Republic passed a resolution on the protection of religious freedom with an overwhelming majority of 145 out of 150 MPs. The resolution brings attention to the deteriorating situation with regard to respect of religious freedom across many countries in the world. It also presents several suggestions to the Slovak government.

The document urges the government to follow the example of the UN, the EU and several of its member states to increase their efforts in the area of religious freedom protection, and to directly react to the deterioration of religious freedom worldwide. The resolution directly mentions Slovakia's past and the citizens' first-hand experience with religious oppression, particularly during the communist era. The document calls for Slovakia to accept its "special moral obligation to help those persecuted for their faith" worldwide.

However, other actions of the Slovak parliament seemed to go against the tone of the resolution. One such incident, noted also in the 2018 Freedom House report, saw the Slovak Parliament passing – despite an initial Presidential veto – a law that more than doubled the number of adherents required for a religious group to be officially recognized and eligible for public subsidies from 20 to 50 thousand members.

The Freedom House report called it "a worrying development" and suggested that the measure could be interpreted as a preemptive step against registration of Muslim religious societies. Sponsors of the legislation argued, without providing concrete evidence, that the amendment's aim was solely to "eliminate speculative registrations of alleged churches or religious organizations aiming at becoming eligible for state financial subsidies."

Islamophobia and anti-Semitism

There is a noteworthy degree of islamophobia as well as anti-Semitism within the Slovak society and on the political scene. Islam is not an officially recognized religion. Islamophobia is based on a widely shared belief in the

The Church of St. Elizabeth in Bratislava [2]

Illustration image [3]

incompatibility of Islam with European values and especially the rule of law. Regarding anti-Semitic sentiments, The Central Union of Jewish Communities in Slovakia reported that anti-Semitic hate speech increased after the then Prime Minister Fico indirectly accused the US philanthropist George Soros of organizing antigovernment protests.

Several members of the parliament from the People's Party Our Slovakia (ĽSNS) – generally considered a far-right extremist party – faced criminal prosecution for producing materials defaming minority religious beliefs and for Holocaust denial. The new government, elected in 2020, will have to find ways to efficiently and justly counter the increase of anti-Semitism and public expressions of anti-Muslim sentiment, and thus strengthen religious freedom.

Conclusion

Internationally, Slovakia is active in the promotion of religious freedom. Nevertheless, it limits itself politically (e.g. not criticizing China or Iran for religious oppression on political grounds), hence the Slovak foreign policy still has room for improvement. Domestically, rising Anti-Semitism and Islamophobia need to be tackled.

Slovakia has a rather unique experience which can be considered an asset to build upon – it lies in the only region in the world which has direct experience with both fascism and communism.[1] The living memory of state oppression towards one's faith and the desire to live according to one's creed could serve as both a guiding principle and a moral obligation to speak up for religious liberty.

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