

# V4 Human Rights Review



Dear readers,

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

We bring you an interview with Mr Pavol Žilinčík, who is a member of the Judicial Council in Slovakia. His professional focus is on safeguarding judicial independence and strengthening the accountability of the judiciary. How does he evaluate the developments in Slovakia and other V4 countries?

Jana Šikorská then informs us about the new pact of the four capital cities - Budapest, Warsaw, Bratislava and Prague - in which the mayors pledged to stand against illiberal policies in their respective countries.

In the Czech section, Pavel Doubek discusses a dispute between Archbishop Dominik Duka and a theatre, which was characterised by a conflict between religious freedom and freedom of artistic expression.

Alíz Nagy from the Hungarian section focuses on cases of segregation of Roma children in primary schools. What was the courts' reaction and the opinion of the Prime Minister?

In the Polish section, Witold Płowiec explains the ruling by the Court of Justice of the EU, which held that the Supreme Court must ascertain the independence of the new Disciplinary Chamber.

Erik Láštík from the Slovak section reflects on the state of the judiciary. Although it was granted self-regulation, it is confronted with the lowest trust among public institutions. What led to such a situation?

We hope you enjoy this issue!



Jan Lhotský

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

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Bratislavský hrad. The very colorful sunset in Bratislava. autor: Miroslav Petrasko. 10. 03. 2012. zdroj: flickr. CC BY-NC-ND 2.0, edits: photo cropped.

## 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 institutions from Hungary, Poland and Slovakia.

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## Interview with Pavol Žilinčík on judicial independence not only in Slovakia: Well-designed structures are important but high-moral personalities are essential



Jan Lhotský

**Pavol Žilinčík is a member of the Judicial Council of the Slovak Republic and as a member of the selection committee, he takes part in selecting Slovak judges. In the past, he was head lawyer at the Slovak Office of the Public Defender of Rights. Today he works at the Czech Office of the Public Defender of Rights. What are his views on functioning of judicial councils and safeguarding judicial independence?**

After studying Law at Comenius University in Bratislava and Public Policy at Princeton University, Pavol Žilinčík focused mainly on the situation of the judiciary. Apart from that, he co-founded the organisation *Via Juris* focused on strategic litigation and reform of the judiciary. He also helped to develop the organization “Stop corruption” (*Zastavme korupciu*) which aims at the protection of whistleblowers and support of investigative journalists. His academic research at the Department of Political Sciences at the Faculty of Arts of Comenius University focuses on online hate speech and surveillance. In the long-term, he focuses on strengthening the independence and accountability of judiciary.

### Development of the situation of the judiciary in Slovakia

**Given your experience working in the area of judiciary in both Slovakia and the Czech Republic, let’s begin with the differences between the two countries. In what aspects has the organization of the judiciary developed differently since the separation of Czechoslovakia?**

The differences start with the authoritarian-style government of Vladimír Mečiar in Slovakia in the mid-nineties and they then build upon each other. While the transition to a democratic judiciary in the Czech Republic was rather smooth, Mečiar’s government tried to control the judiciary and judges were among his most vocal opponents. After this era, during the EU accession process, Slovakia was quite open to strengthening judicial independence in relation to the executive branch. These efforts also included establishing the Judicial Council.



Pavol Žilinčík [1]

However, soon after this institution was established, it was gradually taken over by the corrupt judicial elites and collaborating politicians. The result was even more corruption, coming from within the judiciary. Furthermore, several prominent judges were sanctioned disciplinarily just for expressing their opinion. About one hundred judges signed a petition complaining about the “atmosphere of fear” in the judiciary. Foreign ambassadors used to visit the disciplinary “show trials”.

Luckily, this era resulted in a legislative action. Extensive reforms were implemented after the change of government in 2010, which tackled the vast internal corruption in the judiciary, mainly using transparency measures. Since then, all judicial procedures in Slovakia have been open to the public, and materials are available on the internet, including transcripts from the sessions of the Judicial Council or the hearings of candidates for judge during the selection procedure.

To summarize the story, the two crucial differences between the Slovak system and the Czech Republic are the imposed judicial transparency and the existence of the Judicial Council.



Bratislava [2]

### **What is the main purpose of the Judicial Council of the Slovak Republic?**

The main role is to manage the careers of judges from the beginning until the end. The Council has a say in the selection and appointment of judges. It decides on their transfers to other courts or their promotion. The Council forms disciplinary panels and may suspend a judge in case of serious doubts about his or her integrity. When judges reach the age of 65, the Council submits a proposal to the president to recall them from office. Furthermore, it elects the President of the Supreme Court and the candidates for international judicial bodies. The Council is also in charge of judicial ethics and represents the judiciary in relations with the other two branches of government in the law-making process.

### **Is the Council then responsible for predominantly organizational matters or is it an actual safety feature preventing possible politicisation of the judiciary?**

The Council should secure both the fair management of judicial careers as well as a proper balance of powers. But there is one more aspect to this. The Council consists of 18 members, nine of which are elected by judges and selected by their peers, while the second half is nominated

by the other branches - three by the President, three by the Parliament, and three by the Government. This composition is supposed to prevent the domination of political players and simultaneously hinder the “encapsulation” of the judiciary – a situation when a majority of judges within the body might try to manage the whole judiciary for their own good.

### **To what extent has the Council succeeded?**

Although the system is almost ideal on paper, the practice is different. In my view, the main problem is that the institutional design did not reflect the real power structure in the justice system and ignored the strength of informal relations among judges. A strong emphasis was put on the institutions, but not enough attention was paid to the actual culture, traditions and professional standards in the justice system.

During the reform, there was almost no discussion about ethical dilemmas judges face in their work, or about the integrity standards a judge should meet. These were perceived just as a formality. Also, not enough attention was paid to the informal powers of the court presidents and it was difficult to react when some of them abused their powers against judges. So the system looked great, but we



Pavol Žilinčík at the Institute of International Relations in Prague [3]

forgot about the people inside. The result was a formally perfect system which was quite unjust inside.

### Comparison and the ideal situation

**Unlike Slovakia, the Czech Republic does not have a judicial council. What is the situation regarding the level of the independence of judges in the two countries? Would it be possible to argue that the implemented model of organisation has a direct impact on the quality of the judiciary and its independence?**

The two countries show that strong institutional independence is not enough. It does not guarantee the independence of individual judges per se. The Czech judiciary lacks a judicial council, it depends more on the executive branch and yet it performs much better in all international rankings measuring public trust or judicial independence. The Slovak example shows that strong institutional independence may do more harm than good if introduced into an environment where corrupt elites know how to “organise”.

**If the Slovak Judicial Council does not function as envisaged, what could be done to improve the design of**

### **judicial councils in general? Can the balance between independence and accountability be better secured?**

The first lesson learned is that in countries with a strong legacy of communism, it is not enough to simply put new institutions in place. This is particularly true in countries where the socialist past was not dealt with significantly and the most influential actors in the judiciary remain the judges who were once members of the communist party. The second lesson is that radical transparency helped a lot. First, it initiated improvements of the situation in the judiciary, but later also served as a learning curve for the whole society; we now understand much better what a good judge should look like, what benefits a fair judiciary brings to society, etc.

### The current situation

**Let’s focus on the current situation. Two years ago, Slovakia was shocked by the murder of young journalist Ján Kuciak and his fiancée Martina Kušnírová. The subsequent investigation and current criminal proceedings against Marián Kočner and others have revealed an intricate web of corrupt connections among Slovak oligarchs, politicians and judges. Despite the undesired attention some judges have received in recent months, the Judicial Council long remained silent and initiated the disciplinary proceedings at a rather slow pace. Why?**

The level of corruption shocked everybody, including the Judicial Council members. It is true that the Council had been contemplating for a long time what course of action to take. Maybe it was partly because – to put it diplomatically – the social circles of the suspected judges overlapped with the social circles of certain members of the Council.

Some other Council members preferred a more cautious approach; they insisted there was no role for the Council to play and only criminal law enforcement agencies should deal with the case. We lost more than two months discussing what we can or cannot do in securing the integrity of the judiciary. Fortunately, I can say that now the actions of the Council are swift and sharp.

**What impact has the Kočner case had on the Slovak judiciary? Has the case helped to release the judiciary from the burden of corruption and clientelism?**

The transcripts of the communication between the judges in question and the alleged perpetrators of the murder show an unprecedented level of corruption. To this day, several judges have resigned from office, and some others face

disciplinary actions. This process itself helps the judiciary and it is a great opportunity for further fundamental improvements.

However, the already low public trust in the judiciary is now collapsing. The anti-establishment, populist movements are using the situation to pursue their own goals and to question the democratic system as such. We have seen in other countries that a hostile takeover of the judiciary can be surprisingly quick. The answer to the question of whether we will be fast enough to fix the system depends on the choices people (especially judges and Council members) make in the following days and months. It can go both ways.

**Is extensive reform necessary? In your opinion, what would help the most in this situation?**

I believe there is great potential in areas which have previously been completely neglected and the importance of which is still heavily underrated: the discussion about ethical dilemmas, the whole area of professional standards and integrity. The numerous reforms have addressed these areas only as a formality, as if it were boring, unnecessary theory. The Judicial Council has published a code of conduct, but judges hardly read it and a discussion about concrete dilemmas has been missing. Now we have a great chance to change this because we see that if there is no dis-

Marián Kočner [4]



Demonstration in memory of murdered journalist and his fiancée [5]

ussion about the limits of ethical behaviour, then judges do not know how to react when faced with a dilemma.

**The situation in the V4 countries**

**Apart from Slovakia, how are the other V4 countries (namely the Czech Republic, Hungary, and Poland) performing in matters of judicial organisation and independence?**

The Czech Republic is doing very well compared to the other V4 countries. It is not only my opinion that the success of the Czech model stems from the fact that major judicial institutions have been led by people with unquestionable moral character from the very beginning. They have set the tone, the standards which others follow.

Looking at Poland nowadays, it reminds me of the “dark age” of the Slovak judiciary between 2008–2011. Disciplining judges for their criticism of the situation in the judiciary is devastating on many levels. One is the individual level, and another one is the atmosphere of fear in the whole profession. If judges are forced to give up their freedom of speech about undemocratic tendencies in the justice system, they may follow other orders in future.

In Hungary, clear signs of weakening judicial independence last since 2011 and there is a combination of several formal and informal tools - lowering the age limit for judges retirement, leading to almost 10% of all judges being forced to retire, political influence over the selection of new judges, or over performance assessment criteria for judges... These are all subtle mechanisms which are dif-



National Council of the Slovak Republic [6]

difficult to read, but may lead to the same result as in Poland - judges who understand what is expected, and who are forced or willing to adjust.

From the Visegrad perspective it is striking that it was Poland and Hungary – two out of four Visegrad countries – that were the first EU countries to face proposals calling for determination of the existence of a clear risk of a serious breach of the values on which the Union is founded, including the rule of law.

**So what does judicial independence mostly depend on? What are the other significant factors, besides its organisation?**

In my view, it is of utmost importance to fill the key positions in the judiciary with people of high moral qualities, who have already shown that they will not bend when faced with an offer or a threat.

The issue of ethics and professional standards should be taken seriously. Czech judge Vojtěch Cepl once said that if legal ethics does not become the very core of legal education, we can read the rest in the book *La Camorra*. I completely agree.

### Photographs

- [1] Pavol Žilinčík, source: Pavol Žilinčík, edits: photo cropped.
- [2] Bratislava, author: Walkerssk, 14 December 2016, source: Pixabay, CC0, edits: photo cropped.
- [3] Pavol Žilinčík at the Institute of International Relations in Prague, source: IIR, author: Ondřej Nečas, edits: photo cropped.
- [4] SF-IMG 0877-MarianKocner 01, author: Slavomír Frešo, 5 April 2016, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.
- [5] #AllForJan, author: Peter Tkac, 2 March 2018, source: Flickr, CC BY-SA 2.0, edits: photo cropped.
- [6] National Council of the Slovak Republic, author: falco, 21 June 2017, source: Pixabay, CC0, edits: photo cropped.

## Could cities stand up to illiberalism?



*Jana Šikorská*

**The mayors of capital cities of V4 states – Bratislava, Prague, Budapest and Warsaw - signed the “Pact of Free Cities” on 16 December 2019. The cities pledged to stand against illiberal policies in their respective countries as well as to honour and fulfil the substantive points of the Pact.**

“Islands in the illiberal storm” – this is the name given to the collective effort of V4 capitals to stand against populist politics spreading within their countries. The Pact signed by the capitals came after the sensational win of Gergely Karácsony in the October mayoral elections in Budapest. Karácsony comes from the liberal end of the political spectrum with a particular focus on green issues and keeping Budapest open to everyone.

His campaign stood in stark contrast to his opponent’s, who was endorsed by the populist right wing headed by Viktor Orbán. Political outlets predict that Karácsony is about to face a long battle against Orbán and his supporters. Therefore, it is not surprising that Karácsony actively seeks allies even beyond Hungary’s borders.

*Gergely Karácsony, Mayor of Budapest [1]*



*Zdeněk Hřib, Mayor of Prague [2]*

Karácsony is, however, not alone in his opposition to the political orientation of his government. The president of Slovakia, Zuzana Čaputová, expressed grave concerns in her recent speech at the Munich Security Conference. She spoke of irresponsible leaders of the V4 countries who pose a danger to the rule of law and democratic values. While it remains to be seen whether capital cities could become liberal safe havens in countries turning to illiberalism, the conclusion of the Pact might be the first step in this direction.

### The content of the Pact

In the words of Zdeněk Hřib, the mayor of Prague, the Pact is divided into three substantive parts – firstly, a declaration of common values, secondly, practical matters, and lastly, allocation of EU funds. The declaration of common values serves as a reminder of the same historic roots and battles the region and the capitals faced. A direct reference is made to a shared history of a totalitarian communist regime, as well as to the birth and subsequent continuation of the democratic path of the region.

Moreover, the commitment to common values and shared history likely signifies more than a formalistic reference. In this context, it can be understood as a reminder of the adolescence of our democracy and the concomitant fragility in the age of the rise of illiberalism and populism.

The practical matters included in the Pact are also of interest. Attention should be paid to the direct appeal to self-governance and subsidiary power of the cities. It is clear that by including such a request regarding the power vested in cities, the mayors are reinforcing the idea that



capitals are able and willing to protect their interests and those of their inhabitants.

The invocation of self-governance and subsidiarity is raised in the context of practical policy solutions to shared issues. Among those mentioned are, for example, climate crisis, inequality, and political tribalism. All of these are undoubtedly among the most pressing contemporary challenges. It is interesting to see that the cities nominate themselves as the platforms for resolving these issues.

Lastly, the cities make a joint appeal regarding the distribution of EU funds. The mayors call for the EU to distribute funds directly to cities in order to avoid dealing with state governments. For example, Mayor Hřib openly speaks of the need for direct distribution in order to avoid mismanagement of funds, indirectly hinting at the recent high-profile case of Prime Minister Babiš and his conflict of interests. Even this section of the pact can be seen as a reiteration of the cities' demand for autonomous governance of their own issues.

### Cities as self-governing entities

It can be plausibly deduced that by concluding such a document, the cities are in fact indirectly challenging the ex-

#### Budapest [3]



isting state-centric distribution of governmental power. The mayors are becoming aware that the capital cities are home to crucial democratic and economic institutions that are in need of protection from shifts towards illiberalism or de facto authoritarian-style governments. While such a development is not unprecedented, the calls for greater autonomy and self-governance go against the usual trend of centralising power which is associated with modern European states.

Furthermore, the alliance of the V4 capitals has another intriguing layer – a sense of transnational identity of the capital city. With an increasing need to address transnational issues and the divergence of interests between cities and rural areas, it will be interesting to see whether the creation of formalised city-networks will become a standard way of stepping up to the challenge.

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- [1] Magyar: Karácsony Gergely Zsivora György szobránák avatásán (Budapest XIV. Zsivora park). Author: Linkoman, 5 September 2019. source: Wikimedia Commons. Public Domain, edits: photo cropped.
- [2] Primátor hlavního města Prahy Zdeněk Hřib. Author: Vojtěch Havlík, 11 January 2019. source: Wikimedia Commons. Public Domain, edits: photo cropped.
- [3] Budapest: Hungarian Parliament. Author: Jorge Franganillo, 28 November 2016. source: Flickr. CC-BY 2.0, edits: photo cropped.

# Czech Republic



Section editor: Lucie Nechvátalová  
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## Blasphemy or freedom of expression?



Pavel Doubek

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

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

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

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

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



Dominik Duka [1]

### The freedom of expression and its limits

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

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



Theatre play 'Our Violence and Your Violence' [2]

### Freedom of religion: Private or public interest?

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

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

### High degree of tolerance in a liberal society

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

The regional court further underlined that the Czech Republic is actually a very liberal country with a high level of

atheism and anticlericalism. Given the liberal and secular nature of the state, the court concluded that, in general, even controversial and provocative expressions have to be tolerated.

### Artistic expression must carry a humanistic message

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

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

## Conclusion

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

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

*Pavel gained a PhD degree in law from the Faculty of Law, Masaryk University. He worked for the Public Defender of Rights and the Office of the Government of the Czech*

*Republic. In 2019 he received postdoctoral research fellowships focused on the implementation of the Convention against Torture and its Optional Protocol in Taiwan.*

## Notes

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

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Judgement of the Regional Court in Brno, 20 November 2019, no. 70 Co 170/2019.

Online debate with Mr Tomáše Halík and Michael Žantovský. In: <https://video.aktualne.cz/>.

## Photographs

- [1] Dominik Duka 2014, author: Petr Šálek/Wikimedia Commons, 18 August 2012, source: Wikimedia Commons, CC BY 4.0.
- [2] Theatre play 'Our Violence and Your Violence', author: Robert Vysrčil, source: National Theatre Brno.
- [3] Physical blockade of the theatre play 'Our Violence and Your Violence' by the group The Decent People, author: Robert Vysrčil, source: National Theatre Brno.

Physical blockade of the theatre play 'Our Violence and Your Violence' by the group The Decent People [3]



## Abolishment of net cage beds: What is the Czech Republic waiting for?



*Tereza Bártová*

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

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

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

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

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

While human rights defenders call for the complete abolishment of net cage beds, some mental health profession-



Psychiatric hospital Bohnice [1]

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

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



Illustration image [2]

physical restraint of people with psychological or intellectual disabilities.

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

### Steps towards positive changes?

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

However, the Health Care Act still includes 'placing the patient in a net bed' as one of the possible restraints

which can be applied by health care providers in psychiatric settings. Psychiatric hospitals and psychiatric wards of hospitals still use net cage beds. And even the new Government Action Plan on the Reform of Psychiatric Care 2020-2030 does not include a plan to abolish net cage beds.

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

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- [2] Checking in with a Patient, author: myfuture.com, 17 August 2011, source: Flickr, CC BY-ND 2.0, edits: photo cropped.

## Czech human rights challenges for 2020



Aneta Frodlová

**The Czech Republic contended with several significant human rights issues in the last year. These included same-sex marriage and the ratification of the Istanbul Convention. What were the developments regarding those issues in the past year? What is the situation now and what can we expect in the future?**

### Equal access to marriage for all?

In 2019, the topic of ‘same-sex marriage’ resonated in the public sphere and stirred many discussions across the country. In March, the Chamber of Deputies discussed two draft amendments concerning this matter. The first draft was an amendment to the Civil Code which would enact same-sex marriage as an equal institute to traditional marriage.

Consequently, the Registered Partnership Act would be repealed and the institute of marriage, nowadays allowed only between a man and a woman, would be opened. The purpose of this draft is to enable same-sex couples to marry and to give them equal rights in the marriage to those held by heterosexual couples.

For example, couples entering a registered partnership currently have no entitlement to joint property of spouses. Furthermore, there is no way for any of those couples to receive a widow/widower’s pension if one of the partners passes away. Moreover, the rights of children living with registered partners are not equal to those of children living in a traditional heterosexual marriage. The draft would erase all these differences.

The Council of the Government of the Czech Republic for Human Rights also expressed support for this change and urged MPs to back the draft in the Parliament in the following stages of the legislative process.

The counter-draft of the opposition concerns an amendment to Article 32 paragraph 1 of the Czech Charter of Fundamental Rights and Freedoms, which governs the protection of the family and parenthood. The proposal would alter this Article and would enact marriage as a permanent union of a man and a woman at the constitutional level.



The seat of the Chamber of Deputies [1]

### These drafts will be discussed by the Chamber of Deputies in the following months

Both drafts are still in the phase of the first reading in the Chamber of Deputies since the discussion in March 2019 was postponed by a resolution of the Chamber. The drafts have recently been included in the discussion and will be dealt with in the following months.

The global trend in equal access to the institute of marriage is positive and the number of states pursuing equalization is growing. Austria, Equador and Taiwan enacted same-sex marriage as an equal institute to traditional heterosexual marriage in the last year, thus joining the group of 29 states supporting equal marriage rights.

There is still no consensus on this issue in the Czech Republic and progress will depend on discussion in Parliament. Ultimately, MPs will have to decide whether the Czech Republic will join the above-mentioned countries or keep the traditional understanding of the institute.

### Ratification of the Istanbul Convention

Another crucial topic in the area of human rights concerns the ratification of the Istanbul Convention (hereafter referred to as the Convention), a human rights treaty adopted by the



Illustration image [2]

Council of Europe. The Czech Republic signed this Convention in 2016 and should have ratified it in the first half of 2018. However, this task has not been accomplished to this day.

The Convention tackles the issue of domestic violence. It imposes an obligation on the signatory states to provide protection to all victims of domestic violence, both men and women equally. The states also have an obligation to prevent this undesirable phenomenon.

There are still ongoing debates on the ratification of the Convention among the public and in the Czech Parliament. One of the lingering arguments against the ratification is that the Convention is not necessary since the Czech criminal law already includes the requested legal regulation and the Czech Republic has, therefore, fulfilled its international obligations.

The area of criminal law, however, constitutes only one part of the Convention. There are other measures in the area of prevention and accessibility to services for victims of such criminal offences. According to recent studies conducted in the Czech Republic, services provided to the victims of domestic violence are currently insufficient

and the Czech Republic falls behind in these key areas regulated by the Convention.

### **The European Union urged the member states to ratify the Istanbul Convention**

In November 2019, the European Parliament urged the Czech Republic and other member states to ratify the Istanbul Convention; however, there has still been no progress. The EU also criticised campaigns against the Convention, which are mainly based on a distorted and false interpretation of the content of the Convention.

As a result of these campaigns, citizens are confused about the exact content of the Convention. Contributing to this confusion are the many myths and fake news stories that have surrounded the topic. Therefore, several discussions have been organized across the Czech Republic to advance the public debate on this issue.[1]

According to the Government Commissioner for Human Rights Helena Válková, a dialogue with the countries that have already ratified the Convention is also crucial. The in-



ternational conference ‘European experience with Istanbul Convention’ took place for this very purpose in October 2019. Representatives of those countries pointed out that the Convention does not pose a threat to the traditional family, which is one of the many pieces of false information concerning the Convention.

It is clear that the ratification itself will not solve this issue. However, the Convention provides the signatory states with a framework and a direction for their future efforts. In particular, it imposes obligations to further improve the law in this area and thus contributes to a higher standard of human rights protection.

### Will the Czech Republic ratify the Convention this year?

The Convention was laid before the Chamber of Deputies in October 2019. The ratification process should begin in the first quarter of this year. As was stated before, the opinions regarding the necessity and usefulness of the Convention still differ and we have yet to see which one will prevail.

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Illustration image [3]

## Notes

- [1] The Czech Centre for Human Rights and Democracy also participated.

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- [2] Illustration image, author: SharonMcCutcheon, 4 November 2018, source: Pixabay, Simplified Pixabay License, edits: photo cropped.
- [3] Illustration image, author: unknown, 4 March 2017, source: PxHere, CC0 Creative Commons.



# Hungary



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## Unfair and unjust: segregation of Roma children in Gyöngyöspata



Alíz Nagy

The previous issue contained an article discussing systemic discrimination of Roma people in Hungary. This article informs about further developments, this time related to the expression of similar sentiments by the Prime Minister. Viktor Orbán called the decisions of the Hungarian courts ordering compensation for the segregation of Roma children unjust.

### Gyöngyöspata and the traditional failure of law-enforcement

The previous article tackled the forced eviction of the Roma from the so-called numbered streets in Miskolc. Gyöngyöspata is located nearby, in the north of Hungary. The town has a history stained by paramilitary groups' marches – or as they called them, *patrols* – which took place in the streets for weeks in 2011. Even though they were openly targeting the Roma population living in a segregated area, the police did not intervene. As the Chance for Children Foundation (CFCF) put it: “Gyöngyöspata became a symbol of anti-Roma movements and a failure of the law-enforcement bodies to protect the citizens from anti-Gypsyism.”

Following these events, TASZ (Társaság a Szabadságjogokért – Hungarian Civil Liberties Union) initiated an *actio popularis* lawsuit based on the Equal Treatment Act (ETA). The Curia (Hungarian Supreme Court) ruled in 2017 that “the failure to protect the Roma from racist harassment amounted to harassment under the ETA,” and found the Heves County Police responsible.

### Chance for Children Foundation and its *actio popularis*

Back in 2011, when the ombudsperson investigated the issue of the paramilitary marches, they received further complaints about systemic discrimination, in particular



Illustration image [1]

regarding Roma children's segregation from non-Roma pupils in the local primary school. Relying on the Ombudsperson's report, the Chance for Children Foundation (CFCF) [1] claimed in court that Roma children were unlawfully excluded from several activities (e.g. swimming classes) and were physically segregated from non-Roma children. A child interviewed said that although she was in the eighth grade, she was only at the level of a fifth grader as a result of the inferior education in their segregated classes.

In 2015, the Curia upheld the decision of the Budapest Court of Appeal, according to which “neither the school, nor the institution responsible for its maintenance fulfilled its duties to integrate the children and by doing so they perpetuated the situation that was initiated by spontaneous segregation in school.”

In December 2019, the Debrecen Regional Court of Appeal ruled that the children were discriminated against and awarded compensation to the affected children. The case is still ongoing because an application for judicial review was launched at the Curia. This application, however, does not have a suspensive effect, i.e. the judgment on compensation is technically executable.

The 99 million forints (approx. 290 thousand EUR) in compensation should be distributed among the pupils (or their families if pupils are underage) in sums ranging between 200 000 and 3 500 000 forints, according to the damage suffered. The amount was supposed to be paid by 17 January 2020.

László Horváth, the elected representative of the constituency (and the head of the government office when the parents and CFCF started to address the issue of segregation) expressed his aversion towards the decision. In a Facebook post, he claimed that “Gyöngyöspata does not want any of the Soros-networks’ money-making actions.”[2] Horváth requested assistance from the Hungarian government.

### Unjust decision of the Hungarian court – Prime Minister’s opinion

On 9 January, the Hungarian Prime Minister, Viktor Orbán, held his annual international press conference. Orbán stated that the case of Gyöngyöspata “harms people’s sense of justice,” because “for some reason members of the ethnically dominant group, who live in the same village [...], are going to receive a significant amount of money without carrying out any work.” Orbán argued that the court’s decision is unfair, as it is not clearly established what segregation is. He claimed that there is a domestic political discourse surrounding the topic and that there also is invalid pressure coming from the European Union (an infringement procedure is going on [3]). Orbán stated that there is confusion between the terms segregation and

Viktor Orbán [2]



catching up. According to him, justice needs to be served to the people of Gyöngyöspata.

### Justice and fairness

Erzsébet Mohácsi, the previous head of the CFCF, highlighted further nuances of this case. Before starting any kind of lawsuit, the CFCF scrutinizes the situation and offers solutions preventing the case from developing into a lawsuit. Mohácsi stated that the organisation warned the municipality about the segregation and called upon the officials to resolve the situation already in 2010. In spite of this, the officials did not make any changes to the school system.

The discrimination against students took several distinct forms, starting with segregated classrooms, but Roma and non-Roma students were also separated for the opening ceremony of the academic year, which Mohácsi experienced first-hand during her fieldwork investigations. Mohácsi stressed that the requested compensation is to be paid by the responsible institutions as this long-lasting segregation had severe, including material, consequences for the students.

### Separation of powers and the Hungarian lesson

The case demonstrates the struggle that a civil society and NGOs face when pursuing actions that contradict the government’s official position. István Hollik, Fidesz’s communication director, and László Böröcz, Fidesz’s deputy-fraction leader, also backed up Horváth, stating that “*the case is nothing more than new political and financial manipulation of the Soros network.*”

Furthermore, the case demonstrates how separation of powers and independence of the judiciary is increasingly disregarded in Hungary. At the abovementioned press conference, Viktor Orbán expressed that although he does not yet know what, something needs to be done, because the court’s decision is unjust towards the people in Gyöngyöspata. Since then, the government has announced that instead of financial compensation, it wished to provide in-kind educational services to the children in Gyöngyöspata.

It has long been established that prejudice against the Roma population is salient both in the region and in Hungary. The fact that the Prime Minister himself expresses a strong disagreement with the court decision recognizing Roma discrimination and segregation could potentially lead to further cleavages and intensify ethnic conflicts in Hungary.



Palace of Justice on the European Heritage Days [3]

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## Notes

- [1] CFCF is an organization that has a history of dealing with cases regarding segregation. Last year, the organisation won the country's most significant lawsuit concerning segregation of Roma children. It was established that the Ministry of Education did not take any action against the segregation of Roma children in 28 primary schools, of which 11 are located in Budapest. This demonstrates that the situation in Gyöngyöspata is not a stand-alone case. For further details, see: 'Legal Action against the Ministry of Education and Culture/National Resources' <<http://www.cfcf.hu/en/legal-action-against-ministry-education-and-culture-national-resources>> accessed 19 January 2020.
- [2] The expression "Soros network" refers to the very persistent idea established and supported and vigorously reiterated by Fidesz's officials that the Hungarian civil society is funded and controlled by György Soros.
- [3] An active infringement case has been going on since 2016 due non-conformity with Directive 2000/43/EC on Racial Equality - Discrimination of Roma children in education. For further details, see: Isabelle Chopin, Catharina Germaine and Judit Tanczos, 'Roma and the Enforcement of Anti-Discrimination Law' (European Commission, Directorate-General for Justice and Consumers 2017).

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- [2] Viktor Orbán. author: EU2017EE Estonian Presidency, 28 September 2017, source: Flickr, CC BY 2.0, edits: photo cropped.
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## Data protection or cover-up of censorship? Dispute over a district journal after an opposition victory in a Budapest district



Veronika Czina

Following the municipal elections of October 2019, a feud emerged between the preceding and the present leadership in the 8th district of the Hungarian capital, Budapest. The new leadership was concerned about the independence of the municipal journal during the election campaign as well as about e-mails sent by public officials regarding the journal's content.

### Background: the aftermath of the 2019 municipal elections

The October municipal elections in Hungary brought a revival of opposition parties in some bigger cities, despite the opposition's previous failures to compete with the Prime Minister Viktor Orbán's right-wing Fidesz party. In the capital, the elections saw the victory of the united leftist opposition rallied behind Gergely Karácsony, who became the mayor of Budapest. Although Fidesz has kept its influence in the countryside, the party has lost major cities as well as the majority of districts in Budapest. In the 8th district, called Józsefváros, the decade-long Fidesz leadership was disrupted by the victory of András Pikó, a candidate supported both by the opposition and a grassroots movement.

After Pikó took office, he claimed he had encountered some difficulties with knowledge transfer, as the previous district leadership had failed to provide him with the necessary passwords and other important administrative data essential to the smooth takeover of office. After a few days in office, Pikó published some emails that contained disturbing details about the way the municipality had been governed in the previous terms.

### Problems with the municipal journal

The new mayor claimed that during the months preceding the October elections, the content of the issues of the municipal journal of Józsefváros was censored by Fidesz politicians, for instance by Máté Kocsis, MP of Fidesz and previous mayor (2009-2018), and by Botond



Illustration image [1]

Sára, preceding mayor of district 8 (2018-2019). Emails posted by Pikó on social media suggested that both of them provided detailed comments to Zoltán Nyerges, editor-in-chief of the journal. The comments were related to certain articles, and were received by Nyerges before being published.

Moreover, Edina Rimán, notary and leader of the Local Elections Office, was also among the "reviewers" of the journal, which was far from being balanced and impartial in its news coverage before the elections. Pikó rightfully pondered how the interference of the notary in this issue was compatible with her oath to ensure clarity and fairness of the elections. The mayor also claimed that the emails demonstrated party control over the printed media, which violated the principle of independence in the case of publicly financed media outlets and raised questions about the fairness of local elections.

Pikó promised that there would be legal consequences (prosecutions, court cases, financial and legal scrutinies) for the actions of the previous administration. Fidesz party members of the Józsefváros municipality reacted by claiming that communication about the content of a local newspaper between the editor and the municipality leadership is understandable, and that politicians only had a say in the content of the interviews held with them.

It is important to note that the Józsefváros journal was also criticized for bias under the new leadership, as almost 2/3 of the first post-election issue contained portraits of the new district mayor. However, the editors tried to compensate for this mistake and made the 2nd issue more balanced in terms of covering news about leadership and opposition.

### Personal data protection or freedom of information?

The district was fined by the supreme court of Hungary (Curia) for the political bias of the journal preceding the 2019 elections. However, as the decision of the Curia only came after the new mayor took office, the new municipality has to pay a fine for the misconduct of the previous district officials. The district now plans to transfer the fine to the editor-in-chief, Nyerges, through a civil lawsuit.

However, at the same time, the National Office for Data Protection and Freedom of Information (NAIH) started an investigation into the 8th district's handling of data, due to the email exchanges between the editor in chief of the Józsefváros journal and the abovementioned municipal officials published by Pikó on social media. According to Attila Péterfalvi, president of NAIH, as the contents of the emails fall under the protection of the GDPR regulation, publishing them violated Hungarian (EU) law, and

Illustration image [2]



went against the practice of the Hungarian Constitutional Court, the Curia, and the European Court of Human Rights (ECtHR).

On the other hand, legal experts claim that in a democracy, such exchanges of information should be published; that in fact, concealing them would be troubling. They suggest that the Freedom of Information Act is applicable, and therefore, the data of people possessing public duties can be published. This applies to the emails in question, as they concerned public duties.

Moreover, the practice of the Constitutional Court also suggests that if the handling of personal data is not arbitrary or humiliating, and if it serves public information purposes (and so falls within the citizens' constitutional right to freedom of information), then their publication does not violate the law. The practice of the ECtHR is similar and suggests that in democratic states, provision of transparent information to citizens in public affairs is more important than the protection of the private sphere.[1] It would be interesting to see the interpretation of the Court of Justice of the EU in this particular case, but whether it will come to that is currently unknown.

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### Notes

[1] See the case of *Flinkkilä and Others v. Finland*.

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## Ilias and Ahmed v. Hungary: “Asylum detention” is not really detention, according to Strasbourg Court



Péter Kállai

In November 2019, the Grand Chamber of the European Court of Human Rights partially changed and partially upheld the former decision of the Chamber in the case of *Ilias and Ahmed v. Hungary*. It is the first decision about the Hungarian transit zone.

### Circumstances of the case

Ilias and Ahmed, two applicants from Bangladesh, entered the European Union in Greece, and after travelling through Serbia, they entered the Röszke transit zone at the border between Serbia and Hungary. Their asylum requests were rejected automatically as inadmissible, as according to the reasoning of the Hungarian authorities, Serbia was declared a safe country by a government decree, meaning no asylum seekers arriving from Serbia are eligible for asylum.

After appealing against the decisions, they spent 23 days in the transit zone. In October 2015, a final decision rejected their application, and they were escorted back to Serbia. Before the European Court of Human Rights (ECtHR) the applicants alleged violation of Articles 3 (prohibition of inhuman and degrading treatment), 5 (right to liberty and security), and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR).

### Decision of the Chamber

Although the Hungarian Government is of the opinion that “asylum detention” does not constitute arbitrary detention as the transit zone is open to Serbia and the applicants could have freely left in that direction, the Chamber decided that both their detention and their expulsion to Serbia were in violation of the ECHR. The government has also tried to establish a legal argument claiming that the transit zone is on “no-man’s land”. If that was the case, legally speaking, the place of the detention would be out of the jurisdiction of the ECtHR. However, the Court stated that the transit zone is in fact on the territory and under the jurisdiction of Hungary.

As collective expulsion is prohibited, asylum procedures must be conducted on an individual basis, considering



Röszke Transit Station, Hungary [1]

the individual circumstances of the applicant. In addition, the Hungarian government systematically ignores civil society reports and, inter alia, the UN Refugee Agency (UNHCR) report on why Serbia is not a safe third country. Despite the reports, Hungary inserted the country into the government decree on safe third countries in July 2015, without any substantive improvement of the guarantees afforded to asylum-seekers in Serbia. If asylum-seekers are sent back to Serbia and then to Greece or home, they are at risk of inhuman and degrading treatment. As the authorities failed to investigate the possibility and consequences of the chain-refoulement based on individual reasons, Hungary violated Art. 3 of the ECHR.

As regards asylum detention, the Chamber ruled that general, automatic decisions were similarly problematic, and that individual decisions were required. Detention could also only be ordered for individualized and detailed reasons. As the “asylum detention” was only de facto – not based on a formal legal decision with detailed reasoning – it was “unlawful” in the sense of Art. 5.

The detention thus violated the applicants’ right to liberty (Art. 5 (1)), and as detention can be lawful only after a conviction by a competent court, the absence of a decision which the applicants could have challenged violated Art. 5 (4) of the ECHR. The return to Serbia violated the principle that no one shall be subjected to inhuman or degrading treatment (Art. 3).

Regarding the question of domestic remedies against the decision on the removal, the Chamber decided that as the expulsion to Serbia constituted a violation of Art. 3, it



Hungarian-Serbian border barrier [2]

was not necessary to give a separate ruling under Art. 13 taken together with Art. 3 of the ECHR.[1] The Hungarian government appealed the decision.

### Decision of the Grand Chamber

Thereupon, in November 2019 the Grand Chamber (GC) issued its decision. Although the Hungarian Helsinki Committee communicated victory in the case (Ilias and Ahmed were their clients), on one major point, the GC did not accept the reasoning of the Chamber and they changed the final decision.

The GC also accepted that the lack of effective remedies against the decision on expulsion does not need to be examined under Art. 13 in conjunction with Art. 3, as the circumstances had been sufficiently examined under Art. 3 alone.

The GC agreed with the Chamber that the Hungarian authorities had violated the applicants' fundamental rights, as the removal of the applicants without assessing the risks of such a measure means that the state failed to fulfill

its procedural obligation under Art. 3 of the ECHR and put them at risk of inhuman or degrading treatment. The authorities should have properly examined the reasons for the complainants' asylum applications and the risks which they would face in case of their expulsion.

The GC observed that the applicants entered the Röszke transit zone of their own will, with the aim of seeking asylum in Hungary. In some previous cases, the Court declared that protection of the ECHR concerning the right to liberty cannot be lost because of the single reason that a person gave himself or herself up to be taken into detention. However, the GC emphasized that its case law concerns a situation "*where the law provided for deprivation of liberty or situations where the applicants had complied with an obligation.*"

In the present case, the applicants had no prior connection to Hungary, but they "*requested admission to that State's territory of their own initiative,*" they "*did not cross the border from Serbia because of a direct and immediate danger to their life or health.*" Thus, as the applicants could leave the detention zone freely to go to Serbia, there was no de facto deprivation of liberty in their case. The only





Volunteers of the UNHCR visiting the Rösztke and Tompa detention zones [3]

consequence of leaving would be the discontinuation of the applicants' asylum proceedings in Hungary, and for that reason one cannot interpret the situation as detention. Therefore, *“the applicants were not deprived of their liberty within the meaning of Article 5.”* The two applicants have been granted EUR 5,000 for non-pecuniary damages.[2]

## Reactions

In 2018, before GC hearings, Deputy Minister of Justice Pál Völner mentioned that the Helsinki Committee is financed by George Soros and the country *“will continue to protect its borders in future and will not allow itself to be made a victim of the migrant business”*. Judit Varga, Minister of Justice welcomed the GC decision, and stated that the *“political and legal attack on Hungarian immigration policy and border protection have failed”*.[3]

The Hungarian Helsinki Committee finds contradictory that criteria for Art. 5 detention were not fulfilled because of the lack of risk in Serbia, while the violations of Art. 3 and 13 were based on the lack of individual, *“rigorous assessment of the real risk the applicants were facing as a result of their expulsion to Serbia”*.[4] A commentator on the Strasbourg Observers blog considers that the judgment *“further eroded”*[5] the already weak Convention protection of asylum-seekers against unnecessary detention.

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# Poland



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## Judicial independence in Poland before the Court of Justice of the EU



Witold Płowiec

**In November 2019, the Court of Justice of the European Union held that Poland’s Supreme Court must ascertain the independence of the new Disciplinary Chamber and decide whether it can rule on cases concerning the retirement of Supreme Court judges or whether such cases must be examined by another court which meets the requirement of independence.**

### The requests for a preliminary ruling

Three Polish judges (one from the Supreme Administrative Court and two from the Supreme Court) brought an action before the Chamber of Labour Law and Social Insurance of the Supreme Court (‘the Labour Chamber’), claiming that their earlier retirement enforced by the new national legislation infringed the second subparagraph of Article 19(1) of the Treaty on European Union (TEU), Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), Article 2(1) and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Directive 2000/78’).

The Labour Chamber of the Supreme Court asserted that serious doubts arose as to whether the newly established Disciplinary Chamber – responsible for reviewing employment relationships of judges as well as ethical complaints against judges – would provide sufficient guarantees of independence and impartiality. All the judges sitting in this chamber were appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary (NCJ). The appointment of NCJ judges themselves was changed pursuant to the Law of 8 December 2017: 15 out of the 25 members of the NCJ must be elected by the Lower Chamber of the Polish Parliament – not by the general assembly of judges as before.

The Labour Chamber of the Supreme Court asked the Court of Justice of the European Union (CJEU) by means of the preliminary ruling procedure to decide whether the



European Court of Justice [1]

newly established Disciplinary Chamber of the Supreme Court satisfies the requirements of independence and impartiality required by EU law.

### Key points of the judgment

In the judgement, the CJEU stated that Article 47 of the Charter and Article 9(1) of Directive 2000/78 must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not independent and impartial. A court is not deemed to be independent and impartial when the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts regarding the imperviousness of that court to external factors, in particular to the direct or indirect influence of the legislature and the executive, and its neutrality.



Supreme Court of Poland [2]

The Labour Chamber of the Supreme Court must determine whether that applies to a court such as the Disciplinary Chamber. The principle of the primacy of EU law must be interpreted as requiring the Labour Chamber to disregard such provision of national law which reserves jurisdiction to hear and rule on cases to a court which is not independent and impartial.

The CJEU observed that independence of the court, which is inherent in the task of adjudication, forms a part of the essence of the right to effective judicial protection and the fundamental right to a fair trial. These rights are of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States – set out in Article 2 TEU, in particular the value of the rule of law – will be safeguarded.

The CJEU noted that the mere fact that judges were appointed by the President did not result in the absence of judicial independence, provided that the legal rules on the appointment of judges did not give rise to reasonable doubts about their independence.

Referring to the NCJ, the CJEU noted the premature termination of the mandates of 15 judges who sat on the former NCJ, an increased number of NCJ members elected by a political authority, the potential for irregularities which could adversely affect the process for the appointment of new NCJ members, the manner in which the NCJ exercises its constitutional responsibilities of ensuring the independence of the courts and judges, as well as the existence of an effective judicial review of NCJ decisions.

The CJEU also indicated other factors relevant to the assessment of independence of the Disciplinary Chamber. The Court recalled, among other things, that the Disciplinary Chamber had been granted exclusive competence to hear employment matters involving Supreme Court judges and issues related to the retirement of judges. This competence was challenged already in an earlier judgment of the CJEU (C-619/18). The CJEU also highlighted that the Disciplinary Chamber was comprised solely of newly appointed judges, thereby excluding judges already serving in the Supreme Court, and noted that the chamber enjoyed a particularly high degree of autonomy within the Supreme Court.



Illustration image [3]

### After the judgment

Following the CJEU judgment, the Labour Chamber of the Supreme Court stated on 5 December 2019 that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial court. Furthermore, the Labour Chamber of the Supreme Court noted that the incumbent NCJ was not impartial and independent from the influence of the legislature and the executive. Despite this judgment, the Disciplinary Chamber and the NCJ continue their activities.

In their reaction in form of the Common Position, a number of law associations dealing with the defence of the rule of law in Poland emphasise that all authorities of the Republic of Poland are obliged to fully execute the judgment of the CJEU. Unfortunately, this seems unrealistic for the time being.

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## Judicial reforms in Poland: another brick in the wall



Lukasz Szoszkiewicz

Thirty years ago, Poland was the first country to tear down the wall separating it from democratic Europe. Unfortunately, today, Poland is among the countries that are rebuilding it the fastest. Another brick, added by the government at the end of December 2019, is the so-called ‘Muzzle Act’, unanimously criticized by the European Union, the Venice Commission, and the OSCE Office for Democratic Institutions and Human Rights.

### Populists or cynics?

Populism is indicated as the main culprit for the “democratic recession” in countries such as Hungary, Turkey, the United Kingdom, the United States, and Poland. However, appealing to the “will of the people” should not be confused with pushing social polarization to the extreme in order to justify changes whose main beneficiaries are, in fact, members of the ruling party. This is exactly the case in Poland, where the campaign against the judiciary (ongoing since 2015) does not aim at achieving the goals expected by society, but seeks to satisfy the ambitions of a narrow group of politicians.

For this reason, the ruling party tries to avoid or limit the role of social control mechanisms at all costs, by adopting laws at night, bypassing meaningful public consultations and parliamentary debate, and by appointing judges of the Constitutional Tribunal at night, without the presence of the media. Adding to this, the new package of amendments to Poland’s judiciary laws, tabled in December 2019, seeks above all to make judges subordinate to executive power. The most controversial changes include limiting the independence of judges by:

- precluding them from deciding on the validity of judicial appointments,
- limiting freedom of expression by prohibiting judges from engaging in public debate on the functioning of the justice system,
- granting new powers to the Minister of Justice, including arbitrary dismissals of presidents of the courts of appeal.



Polish Sejm [1]

### Limiting independence in adjudication

The proposed amendments explicitly preclude courts from questioning the legal legitimacy of state bodies, including the review of the validity of judicial appointments. This remains in clear collision with the international standards set up by the European Court of Human Rights, which explicitly indicated that courts – when deciding upon the right to a fair trial – are obliged to consider the independence of the decisive body by examining *inter alia* “the manner of appointment of its members and (...) whether the body presents an appearance of independence”.[1]

Similarly, the Court of Justice of the European Union (the CJEU) indicated that when examining independence, the court shall take into consideration “the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed”.[2]

Precluding courts from questioning the validity of judicial appointments should be interpreted in the context of the newly introduced legal definition of a judge. According

to the proposed amendments, a judge “*is a person appointed to this position by the President of the Republic of Poland who has made an oath [...]*” ( Article 55 para. 1 of the amended Act on the Organisation of the Common Courts). Therefore, the power of judicial appointment has been de facto transferred from the National Council of the Judiciary (judicial branch) to the executive branch. This proposal clearly contravenes the recommendations of the Council of Europe according to which “*the authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers*”.[3]

### Limiting freedom of expression

The proposed amendments define new misconduct as a result of which a judge can be brought to disciplinary liability. The imprecise language of legal provisions makes it possible to qualify *de facto* any statement concerning judiciary (in particular opinions that are unfavourable to the changes pursued since 2015) as “action that may impede functioning of the justice system.”

For this reason, the Venice Commission indicated in its opinion that “*it is clear that [the provisions] are aimed essentially at suppressing criticism of the manner in which the ‘new’ NCJ [National Council of the Judiciary] was formed, and of the composition and powers of the newly created chambers*”.[4] Opinions concerning the justice system, in turn, are subject to strengthened protection under freedom of expression as they fall within the public interest.[5]

“Constitution” displayed on screens in protest to the judicial changes [2]



### New powers for the Minister of Justice

When examining previous legislative changes already in 2017, the Venice Commission concluded that they “*enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice*”.[6] Recent amendments further jeopardize the independence of the Polish judiciary by granting additional powers to the Minister of Justice. Among other changes, presidents of the courts of appeal are required to submit annual reports on the functioning of the courts to the Minister. The latter can reject the report and if the NCJ supports the Minister’s position (the Council could veto the Minister’s rejection by adopting a resolution with the majority of two-thirds of its members), the court president is found to have committed a “serious failure to comply with the official duties,” which allows the Minister to dismiss the court president.

Taking into account the fact that members of the Council are elected by the Parliament (since 2017), the whole mechanism remains under the exclusive control of legislative and executive powers. Therefore, the Venice Commission concluded in its recent opinion that “*in practice it means that the Minister has virtually unrestrained power to dismiss court presidents*”.[7]

### Looking for allies

As a justification for disciplinary measures, government officials have repeatedly referred to various provisions taken from French legislation. Indeed, French law provides for disciplinary liability of judges in certain cases although judicial activity itself remains under absolute protection. Moreover, the National Judicial Council of France explicitly stated that “*judges cannot be prosecuted or disciplined by reason of their judicial decisions*”.[8]

It is also worth noting that according to French law, the status of judges is regulated by an organic statute, which is preceded by obligatory constitutional review (by the Constitutional Council) before entering into force. French legal academics and experts in French Law have already criticized the instrumentalisation of French Law by the Polish Government and dealt with major misrepresentations of French law.[9]

The referenced opinion of the Venice Commission refers only to the latest package of amendments presented in December 2019. If the overall initiatives of the Polish government since 2015 were taken into account, this list would be much longer and would contain a number of



Mr. Zbigniew Ziobro, Minister of Justice [3]

highly controversial legal and institutional arrangements. Although the Senate (upper house of the Parliament) rejected the much-criticized bill, the Sejm (lower house) overruled the Senate's resolution and the bill was sent to the President for his signature. The Bill was signed by the President, promulgated and entered into force on 14 February 2020, with the exception of two provisions.

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Ms. Małgorzata Gersdorf, First President of the Supreme Court [4]



## LGBTI free zones in Poland



Julia Wojnowska-Radzińska

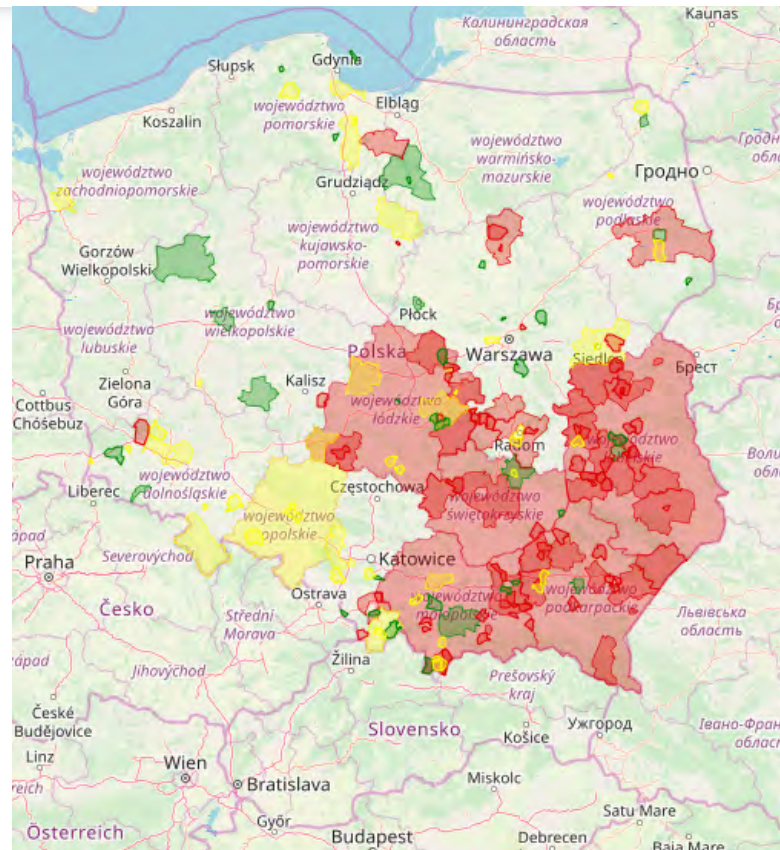
In November 2019, a debate dedicated to “public discrimination and hate speech against LGBTI people, including LGBTI free zones,” took place in the European Parliament. The debate was initiated by the Parliament’s LGBTI Intergroup, which expressed strong concern about the current situation of the LGBTI community particularly in Poland.

### Using hate speech by public authorities

Since the beginning of 2019, the LGBTI community in Poland has been under attack. More frequent hate speech against LGBTI people has been coming not only from members of civil society but also from public authorities and officials. Furthermore, public authorities do not refrain from statements which may be reasonably understood as legitimising hatred or discrimination against LGBTI people. Homophobic or transphobic statements by representatives of public institutions are particularly worrying as they negatively influence public opinion and fuel intolerance in Poland.

Before the parliamentary elections in October 2019, several Polish regional and local authorities adopted binding resolutions, pledging to be “free of LGBT ideology”. So far, 51 resolutions against LGBT ideology have been adopted by the local government units in the south-eastern part of Poland. Accurate data regarding these resolutions have been collected in a so-called “Atlas of hate”, which is a map of Poland showing voivodeships, counties and communities where anti-LGBT laws were enacted (i.e. red means enacted, green means rejected, and yellow means lobbying). This map was created by a young activist, Jakub Gawron, and it is systematically modified and updated.

However, five of these resolutions have been challenged by the Commissioner for Human Rights, Adam Bodnar, at the Voivodeship Administrative Court. The Commissioner for Human Rights as an independent equality body is obliged to safeguard the equal treatment principle. In the Commissioner’s view, these resolutions violate provisions of the Polish Constitution, as they discriminate against homosexual and transsexual persons by excluding them from their local communities. According to the Commissioner’s statement, local government units are also



“Atlas of hate” in Poland [1]

violating the principle of legality, as they are not entitled to adopt such resolutions interfering with fundamental human rights.

The Commissioner for Human Rights points out that the most worrying issue regarding these resolutions is the scale of this phenomenon stemming from the public authorities’ belief that their activities are in accordance with law. Simultaneously, Adam Bodnar resists action taken by the public authorities to promote negative stereotypes, stir up prejudice and harass LGBT people.

Resolutions against LGBT ideology imply that this particular social group does not deserve recognition, respect, and equality, and they legitimise attacks on the members of this group. Public expressions of homophobia and transphobia, whether articulated by individuals in public office or members of the civil society, are dangerous since hate speech can escalate if not addressed, potentially leading to acts of violence.

### What’s law got to do with it?

Non-discrimination and dignity are the fundamental principles contained in the Constitution of the Republic of Poland. The Polish Constitution recognises that “*the inherent and inalienable dignity of the person shall constitute*



*a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities” (art. 30). Article 32 of the Constitution provides that “all persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever.”*

The Polish Criminal Code contains several provisions directly restricting certain forms of hate speech. However, none of these provisions specifically mentions sexual orientation or gender identity among the prohibited grounds. The list of protected grounds is extensive, extending to nationality, ethnicity, race, religion, and belief. The European Commission against Racism and Intolerance (ECRI) recommended that sexual orientation and gender identity should be explicitly added to the prohibited grounds in Articles 256 and 257 of the Polish Criminal Code. Nevertheless, there is currently no political will to amend these regulations.

### EU response to public discrimination, hate speech and LGBTI free zones

In December 2019, Members of the European Parliament voted in favour of the Resolution on public discrimination and hate speech against LGBTI people, including LGBTI free zones. This resolution is a result of the debate which was held in November 2019.

#### Katowice Pride-Parade [2]



In the resolution, the European Parliament expresses “*deep concern at the growing number of attacks against the LGBTI community that can be observed in the EU, coming from states, state officials, governments at national, regional and local levels, and politicians.*” The document “*strongly condemns any discrimination against LGBTI people and their fundamental rights by public authorities, including hate speech by public authorities and elected officials, in the context of elections, as well as the recent declarations of zones in Poland free from so-called ‘LGBT ideology’, and calls on the Commission to strongly condemn these public discriminations.*”

The European Parliament urged Poland to “*revoke resolutions attacking LGBTI rights, including local bills against ‘LGBT ideology’ in accordance with its national law; as well as its obligations under EU and international law.*” Despite the fact that this resolution is a non-binding legal act, it has a landmark significance as it highlights that all Member States of the EU, including Poland, are obliged to take action to combat discrimination against LGBTI people and to advance their equality.

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# Slovakia



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## What now? The failure of the independent judiciary in Slovakia



Erik Láštík

**Almost two decades after the 2001 amendment to the constitution was passed, the Slovak judiciary remains one of the most discussed topics in the local political discourse. Although the judiciary was granted full independence and self-regulation by the amendment, it is confronted with the lowest trust among public institutions, a poor clearance rate and repeated allegations of misuse of power, nepotism, and corruption.**

The judiciary was the only constitutional power that did not undergo a substantial transformation in personnel after the change of political regime in 1989. The 2001 amendment to the constitution was a reaction to the tumultuous period of 1994–1998, in which the ruling coalition led by the Prime Minister V. Mečiar repeatedly overstepped the boundaries of separation of powers and directly influenced the selection of judges. The amendment aimed to strengthen the independence of the judiciary by allowing judges to serve for life and entrusting the judiciary with governance of its own affairs by establishing the Judicial Council.

### From judiciary to politics and back

However, the 2010 Human Rights Report by The U.S. State Department described the Slovak judicial system as only formally independent, pointing out that in reality corruption, official intimidation of judges, inefficiency, and a lack of integrity and accountability undermined judicial independence. The report's evaluation was based on systematic evidence of leadership by the former Justice Minister Štefan Harabin (2006–2009), who left the Ministry only to be elected (for the second time) as the Chief Justice of the Supreme Court in June 2009.

Mr. Harabin, a former Chief Justice of the Supreme Court in 1998–2003 and first Chair of the Judicial Council (2001–2003), became the Minister of Justice after the 2006 parliamentary election by a direct transfer from the posi-



Štefan Harabin [1]

tion of Supreme Court judge. In this period, the Judicial Council and its disciplinary senates appeared to decide disciplinary cases initiated by Mr. Harabin in a highly inconsistent manner. These practices resulted in allegations by the media, NGOs and international observers that the disciplinary proceedings only targeted critics of Mr. Harabin. Several of these cases resulted in the suspension of judges. Other reported malpractices of the Justice Minister Harabin involved appointments, transfers, promotions, and demotions of judges, all conducted without clear rules.

### The 2010 elections: a push for transparency

The elections and the replacement of the government in June 2010 brought a series of changes. The new leadership of the Ministry of Justice, critical of Mr. Harabin's role, strengthened its position in relation to the Judicial Council and disciplinary hearings. For the first time, public access to the audio recordings of the Council's sessions, transcripts of the sessions, voting records, and resolutions approved by the Council was allowed. In addition, a large judicial reform aiming to increase the transparency of the



Photo of the murdered couple - Ján Kuciak and Martina Kušnírová [2]

judiciary came into effect in 2012. The reform mandated all the court decisions to be published online (including performance statistics of judges), selection procedures for judges to be open to public oversight, and judges to annually declare their family ties within the judiciary.

In the last push against Štefan Harabin, the parliament amended the constitution in 2014, prohibiting the dual role of the Supreme Court Chief Justice and the President of the Judicial Council. In September 2014, Daniela Švecová was elected the new President of the Supreme Court and Jana Bajánková was appointed to run the Council, thus dividing the once dual presidency and symbolically ending the ‘reign’ of Mr. Harabin, who returned to the Supreme Court as a regular judge.

### New era, old problems

Although the situation in the judiciary had stabilized, several observers argued that problems in the Slovak judiciary were far from over. In 2017, a book written by a group of Comenius University researchers argued that while the high level of independence of the judiciary led to the empowerment of judicial elites, it drastically reduced the democratic accountability of the judiciary by isolating it from society and by enabling the promotion of the elite’s own interests.

By using available data on selection procedures, the scholars showed that the judicial ranks were often filled with candidates socialized within the system, either through familial ties or through positions of judicial clerks. The authors implied the existence of multiple centres of power – concentrated around district courts’ and regional courts’ presidents – where loyalty to the system was tested through accountability mechanisms such as promotions, disciplinary procedures or remuneration schemes. Allies of those in power were rewarded, critics punished. The 2018 report of Transparency International argued that it was not clear to what extent more public accountability improved the quality and integrity of the Slovak judiciary.

### After the Kuciak murder: corrupt minority, silent majority

The aftermath of the 2018 murder of the investigative journalist Ján Kuciak and his fiancée Martina Kušnírová uncovered repeated and systematic failings of the Slovak state and its law enforcement. Five people were charged with murder and have been standing trial since January 2020, including Marián Kočner, a businessman and influence peddler with high political contacts.

Evidence collected during the investigation included thousands of messages from instant message application



The seat of the Slovak parliament (National Council) [3]

Threema, showing that Mr. Kočner had engaged in interfering with justice, as well as corruption in courts, for years. His network of judges penetrated all levels of the judiciary; it included courts' presidents, ordinary judges, and also regional court judge and recent junior Minister of Justice Monika Jankovská.

In several high-profile cases, judges received and followed detailed instructions on pending cases in return for cash incentives and other benefits. While most of these judges are currently subject to disciplinary proceedings initiated by the Minister of Justice and the Judicial Council, the public confidence in the judiciary is at its lowest in decades. Even after the above-mentioned revelations, only a minority of judges have publicly denounced their colleagues, demonstrating a rather limited potential for self-correction within the judiciary. What remains is a significant breach of the public trust committed by the judiciary.

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- [3] The slovakian parliament, author: Vityavo, 19 May 2012, source: Wikimedia Commons, CC0 1.0., edits: photo cropped.

## Truth revelation and the secret police archives: the case of Andrej Babiš



*Martin Kovanič*

**Discussion about secret police collaboration during the communist regime still remains in the public discourse 30 years after the Velvet Revolution in both the Czech and the Slovak Republics. The case of the current Czech Prime Minister of Slovak origin, Andrej Babiš, has been the most visible instance of the truth-revelation procedures carried out by the post-communist societies and their institutions.**

### Truth revelation as a form of transitional justice

Removal of any non-democratic regime brings up the question of how to deal with the crimes of the past. The pursuit of transitional justice presents a challenge for any new political regime committed to the ideas of democracy. Truth-revelation regarding past injustices and identification of victims and perpetrators of such crimes are key mechanisms in transitional justice. Human rights lawyer Juan Méndez considers the right to know the truth one of the fundamental rights of the former regime's victims.

In the Central European post-communist context, truth-revelation procedures were carried out in various ways. In Czechoslovakia, the process of truth-seeking started with the lustration law of 1991, which identified several categories of perpetrators of injustices, who were excluded from the most visible public offices in the new democratic state.

Another major initiative brought access to the secret police (ŠtB - State Security) archives. In the Czech Republic, personal files became accessible to victims already in 1996. The extent of the files and the number of individuals entitled to access them expanded in 2002 and again in 2004, making the files of ŠtB officers, collaborators, and victims available to the public.

In Slovakia, the files of ŠtB officers and collaborators were open to the public only in 2002, with the establishment of the Nation's Memory Institute (NMI), an important institution responsible for revelation of truth. A similar institution was created in the Czech Republic in 2007, with a rather controversial name, the Institute for the Study of Totalitarian Regimes.



Andrej Babiš [1]

The question of the names of the secret police officers and collaborators being published by these institutes reinvigorated the discussions about responsibility, guilt, and the issue of allowing such controversial individuals to hold public offices in consolidated democratic regimes. The case of Slovak-born Czech PM Andrej Babiš has become the most visible one.

### The case of Andrej Babiš and its implications

The Babiš case started in December 2011, when the website Euro.cz published ŠtB documents confirming that Babiš was a secret police collaborator. From 1980, he was registered as a confidant, which is considered an unconscious form of collaboration. In 1982, he became a conscious collaborator, an agent with the codename "Bureš."

The available file describes the binding act – i.e. the start of the collaboration – in detail but it remains unclear how the cooperation continued, since the majority of his file was destroyed in December 1989 during a massive file-

shredding. These documents surfaced at a time when Babiš was launching his political party ANO 2011 and he refused to admit any form of conscious collaboration with the ŠtB. Babiš decided to take legal action against the NMI – the institution in charge of the secret police files and their publication in Slovakia.

This initiated a lengthy legal battle, which has not been resolved to this day. Furthermore, the public revelation of the Bureš file had significant political effects. In October 2013, Babiš was elected a member of the Czech Parliament. At the time, the lustration law was still in effect, requiring negative lustration from every candidate for an executive position in the government. In the new government formed in 2014, Babiš was appointed the Minister of Finance, despite the absence of a negative lustration certificate. Because the court proceedings in Bratislava were still in progress, the Czech parliament amended the lustration law in September 2014, removing the position of Minister from the list of public offices under the lustration law.

Between 2011 and 2017, the legal case went through all types of Slovak general courts (District, Regional and the Supreme Court) and Babiš won at all three levels. The reasoning of every general court was in line with the previous court's decision on the authenticity of evidence in the ŠtB files. The courts noted the absence of a plaintiff's signature in the files and the discrepancies between individual files. Moreover, the courts relied on the testimonies of former ŠtB officers, which were mostly in favour of the plaintiff. According to the rulings of general courts, Babiš did not collaborate with the secret police. However, due to the public visibility of the case, the NMI decided to present a constitutional complaint to the Constitutional Court in March 2017.

### Decision of the Constitutional Court and its aftermath

In June 2017, the Slovak Constitutional Court issued a significant decision in the case, which has implications for the NMI's future truth-revealing activities. Apart from the pronouncement of several malpractices committed by the general courts, the Constitutional Court made two important decisions.

Firstly, it ruled that the NMI – being an institution that has not produced the files and that is not responsible for the evaluation of their accuracy – does not have passive legitimacy in cases of unlawful evidence. The institute had been claiming this right for years, without much success in the courtrooms.

Secondly, the Constitutional Court challenged testimonies by the former ŠtB officers, ruling that these individuals “actively participated in the enforcement of the communist regime,” their working methods included “lies, immoral and condemnable practices” and, therefore, the general courts needed to argue “fully and comprehensively” why they considered them to be reliable witnesses giving “truthful and trustworthy testimonies.” In other words, rulings on the lawfulness of evidence against an ŠtB collaborator should not be based on the testimonies of its former managing officers.

The case was returned to the general courts. In January 2018 the Regional Court in Bratislava ruled in accordance with the judgment of the Constitutional Court and dismissed Andrej Babiš's action against the Nation's Memory Institute.

In June, Babiš presented an appeal to the European Court of Human Rights, claiming violation of his rights before the Slovak courts. The complaint was, however, rejected as inadmissible in November 2018. Babiš then presented a complaint to the Constitutional Court, which ruled in his favour in November 2019, claiming that the courts did not deal with the question of who should be the defendant in the case, and thus bringing the case back to the Regional Court. Therefore, the final ruling on the lawfulness of evidence against Andrej Babiš is yet to come.

Nevertheless, these legal proceedings showed major limits of the truth-revelation procedures. Firstly, the majority of the files were destroyed in the 1989 shredding. Another constraint of truth revelation is that these processes take place in a courtroom, focusing solely on the facts of evidence, not going deeper into the discussion of the extent of collaboration and responsibility for the crimes committed by individual collaborators. Full understanding of the

Iron Curtain Memorial in Slovakia [2]





Protests against Andrej Babiš [3]

communist repressions requires a much broader investigation of the micro-histories of individual collaborations in their particular context.

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## Informal judicial networks and judicial independence in the aftermath of Ján Kuciak's murder



Samuel Spáč

Slovakia has been considered a ‘good student’ of EU integration as regards the reform of the judiciary. Judicial independence should be secured primarily through institutional insulation of the judiciary from other branches of power, making judges the most prominent actors in the judicial governance. However, information published after the murder of investigative journalist Ján Kuciak and his fiancée in February 2018 uncovered the existence of informal networks posing a threat to judicial independence in Slovakia.

### Slovak judiciary in the context of Ján Kuciak's murder

As of early 2020, the trial of the alleged murderers of Ján Kuciak and his fiancée Martina Kušnírová is still before the first-instance Specialized Criminal Court. Marián Kočner, indicted for ordering the murder, has been in custody since June 2018, although for a different case.

The case concerns alleged falsification of four bills of exchange in the value of €69 million which were supposedly issued by Pavol Rusko, former director and owner of TV Markíza, the largest private TV channel in Slovakia. Rusko supposedly issued the bills for Kočner as a private person, while also acting as the director of TV Markíza, which was to guarantee the bills.

In 2015, Kočner filed a lawsuit against TV Markíza, now owned by the US-based CME Group, demanding payment of the bills. In April 2018, the District Court in Bratislava ruled in favour of Mr. Kočner, ordering TV Markíza to pay the amount. However, as was later revealed in published text messages exchanged between Kočner and several judges, the decision in the case may have been rigged. The central figure in the alleged misconduct was Monika Jankovská, at that time Deputy Minister of Justice, who served as a judge prior to her political engagement, and who could eventually return to the judiciary.

### Informal networks and judicial independence

Messages between Jankovská and Kočner showed that Jankovská orchestrated the decision of the court on behalf



Protests against the Slovak government [1]

of Kočner, with the help of judges of the appellate court in Bratislava.[1] In addition, the messages revealed how such schemes operated in the Slovak judiciary. For instance, Jankovská wrote about the judge deciding the case: “*She promised it. Several times. I made her who she is, and now it is time to pay the debt!!!!*”

This by itself indicates that Jankovská was somehow involved in the selection of judge Maruniaková for the judicial position. In fact, a closer look at the selection procedure supports such allegations. Maruniaková won only due to her outstanding performance in the interview part of the selection procedure, where she received 112 out of 120 points. Since the best of the unsuccessful competitors received only 94 points, Maruniaková got ahead of her in the final results. Interestingly, another judge who communicated intensively with Kočner, Vladimír Sklenka, vice-president of the largest District Court in Bratislava, became a judge due to a similar coincidence. Indeed, this does not prove interference in the selection process, but it certainly raises serious concerns.

As regards judicial reforms, Slovakia has been considered a ‘good student’ of EU integration. Most of the powers regarding the professional careers of judges were transferred from political branches to the judiciary itself. Bodies dominated by judges are responsible for the selection and promotion of judges as well as for disciplinary measures. Furthermore, most of these decisions are overruled



by the Judicial Council. These reforms were supposed to ensure the independence of the judiciary by protecting it from political interference, assuming that judges would make merit-based decisions and rely on objective criteria.

The assumptions behind these recommendations focused only on formal institutions and ignored the fact that judges can have their own interests and that they can create informal networks or perhaps expand already existing ones. Many of the post-communist judiciaries (including Romania, Bulgaria, Ukraine or Slovakia) have suffered from serious problems, despite the transfers of considerable powers in judicial governance to judges themselves.

It seems that judicial independence is less a consequence of institutional design and, as Ferejohn puts it, more “a consequence of self-restraint by powerful groups”. In other words, it does not matter who the powerful groups are, whether political branches or judges, there will always be a certain capacity to influence the judiciary and its composition. However, as Popova argues, whether this capacity is utilized in any shape or form is determined by powerful groups’ *willingness* to do so.

### (New) lessons from Slovakia

As the example of Kočner demonstrates, a judge in a political position may have used her influence to secure the

selection of a preferred judge, who subsequently delivered a desired decision in a particular case. If this really happened, as Jankovská’s messages suggest, the former Deputy Minister could not have achieved it by herself. The Ministry of Justice does have some control over the judges’ selection as two out of five members of the selection committees are nominated by the Ministry. However, that would not have been sufficient to secure the desired outcome. Therefore, if it was really Jankovská who “made [judge Maruniaková] who she is”, some help must have come from within the judiciary.

In addition, allegations that political influence has helped powerful judges secure particular decisions are not new in Slovakia. In 2010, former Minister of Justice Štefan Harabin (2006–2009) was awarded €150 thousand compensation in a defamation lawsuit against the General Prosecutor.

The case was decided by a junior judge, who had been nominated for the position by the Judicial Council led by Harabin just a few months earlier. Furthermore, the judge decided the case under peculiar circumstances as the court president changed the work schedule so that the case could have only been assigned to one out of three young judges. Moreover, the court president was appointed to her position by Harabin’s substitute in the ministerial position, and observers considered her Harabin’s “right-hand woman” in the Judicial Council.

Protest in response to the murder of Ján Kuciak and Martina Kušnírová [2]





Monika Jankovská [3]

The Slovak experience hence shows that the transfer of powers regarding the professional careers of judges from politicians to judges themselves is not a guarantee of judicial independence. Judges, just as any other actor in power, may be willing to use this competence to influence the outcomes of judicial proceedings. There are several remedies that may render the utilization of such powers more costly, and hopefully, less successful.

First, increased transparency can help to identify instances when such powers are misused. Not necessarily prior to such misconduct, but perhaps at least after. It would not be possible to verify Jankovská's claims using her communication with Kočner without the unique level of transparency the Slovak judiciary has enjoyed since its 2012 reform.

Second, to ensure judges will be able to resist undue influence, they need to have strong and trustworthy partners in

the media, NGOs, academia and international institutions, who will defend them when needed.

And third, judges need to be confident about their skills and abilities if they are not to rely on personal connections and networks. This can happen only in a fair system, where the professional careers of judges are dependent on objective criteria and a fair, merit-based evaluation.

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## Notes

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