CZECH REPUBLIC – HUNGARY – POLAND – SLOVAKIA

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V4 Human Rights Review

Dear readers,

You have the first issue of the V4 Human Rights Review in front of you. How did it happen?

This year we commemorate 30 years since the four 'Visegrad countries', which include the Czech Republic, Hungary, Poland and Slovakia, began their journey to become liberal democracies. Over the years, these central European states established systems based on respect for personal liberties, rule of law and human rights.

Nevertheless, there are numerous threats to the quite new democracies, such as efforts to undermine judicial independence, restrict the rule of law or certain fundamental rights, as well as xenophobia, advance of populism and polarization of the societies. These challenges can only be successfully tackled if people are well-informed about the phenomena.

In our opinion, on the one hand, there are a number of rather superficial articles, both on paper as well as on the internet. On the other hand, there are also well-researched scholarly articles. However, the general public might find those too daunting to read, and thus their insights often go unnoticed outside of academia. Therefore, we decided to launch a joint project in which leading human rights institutes from each V4 country will choose experts to write shorter, easy to read articles on current developments in the areas of human rights and democracy.

We feel that in many ways the V4 countries tend to behave similarly. Thus, we believe that by objectively informing about actual developments, we can contribute to preventing democratic backsliding.

The V4 Human Rights Review will be an online quarterly publication. We wish you enjoyable reading!

Jan Lhotský

Editor

Head of the Czech Centre for Human Rights and Democracy

Content

Photo on the front page: Location of the V4 countries in Europe, author: Aneta Boudová

CZECH CENTRE FOR HUMAN RIGHTS AND DEMOCRACY

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

www.humanrightscentre.org

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

www.v4humanrightsreview.org

Interview with Eva Hubálková from the European Court of Human Rights:

Systemic problems can be fixed

Jan Lhotský

Eva Hubálková is a legal expert and a head of the division at the European Court of Human Rights in Strasbourg responsible for applications coming from the Czech Republic, Poland and Slovakia. Currently covering three of the V4 countries, she has been involved in the work of the Court for approximately 25 years. How are the V4 countries doing in Strasbourg? What are the recent developments at the Court?

Eva Hubálková came to the European Court of Human Rights (ECtHR, Court) for an internship in 1992, shortly before the former Czechoslovakia joined the Court. She was 23 years old and has just graduated from the Faculty of Law at Charles University in Prague.

During the following years, she held different positions within the Council of Europe and the Court, including working for about two years in Chechnya. Apart from this, she mainly dealt with applications coming to the ECtHR. Since 2006, as a head of division, she has been coordinating the work of the Court for instance on the Czech, Polish and Slovak cases.

V4 countries and the European Court of Human Rights

When you look back to the 1990s and your first years at the Court, how were the Czech Republic, Hungary, Poland and Slovakia doing within their first years after joining the ECtHR? Did these states have similar or rather different problems?

In general, all four states that are a part of the V4 group had, at that time, quite similar problems, mainly due to the fact that they shared similar historical developments. Of course, they were not totally the same, as each of the countries had their specificities. In my opinion, Czechs and Slovaks dealt with relatively similar issues, which related to the fact that at the very beginning they were still part of the Czechoslovak Federation, i.e. the same country.

European Court of Human Rights [1]

When we have a look at the countries after circa a quarter of a century, has anything changed? In which areas do the V4 countries currently have major problems?

As 25 years is a long period of time, the situation has naturally changed. What has developed in a positive way is the knowledge of the European Convention on Human Rights and of the Court among the citizens, and the lawyers who started to learn the case-law and developed good knowledge related to it.

The current problems are of course different, because the society has developed. Today, the Czech Republic does not have problems regarding classical restitution of property anymore. In the past, it dealt with similar topics as Poland with regard to rent control. Some of the V4 countries had problems with social security and other specific issues. A notable part of the applications concern the work of the judiciary regarding alleged violations of the right to a fair trial and different aspects of the criminal, civil or administrative procedure, including the length of the proceedings.

Courtroom of the European Court of Human Rights [2]

However, this does not concern only the V4 countries but also the rest of the states parties to the Convention.

What are the most important systemic problems in the V4 countries? In which areas do you currently see the biggest potential for improvement in these four countries?

The first pilot judgement with regard to systemic problems was related to Poland. We can mention two cases which concerned the right to property, *Broniowski v. Poland*, or *Hutten-Czapska v. Poland* which dealt with the rent control that was later quoted, because of similar legal issues, in the judgement regarding the Czech Republic.

The space for improvement lies in legislative changes. As we can see, it worked quite well in Poland where the new laws were adopted. The situation improved and the problem was solved.

A general or even systemic problem which we can see in all V4 countries is the length of the court proceedings.

What proportion of applications from the V4 countries is declared inadmissible within the first assessment?

The majority of applications are declared inadmissible, but this holds true for all member states, not only for the V4 countries.

When we have a look at the numbers of violations at the V4 countries within the last year, is it possible to say by simple comparison who is the "top student" and who is the "troublemaker"? Could the human rights record of the V4 countries at the ECtHR be easily compared?

In order to compare different numbers, it is possible to consult the statistics of the Court, which are publicly accessible online.[1] However, it is difficult to compare the V4 countries by numbers alone, due to the different sizes of their population. Therefore, it is not possible to simply compare for example Slovakia with Poland. Generally speaking, the Court receives a higher number of applications from countries with a higher population.

Furthermore, when a new systemic problem appears in a country, the Court also starts receiving higher numbers of applications concerning similar issues. But this does not mean in itself that the country is a troublemaker.

How well do the V4 countries cooperate with the Committee of Ministers during the implementation of judgments? Does it, for example, sometimes happen that they are not willing to implement the general measures that the Committee recommends in order to prevent future violations?

As far as I know, none of V4 countries had, or has, major problems with the implementation of judgements. The judgements in respect to payment of damages are respected.[2] Some difficulties might appear when the judge-

Eva Hubálková [3]

ment concerns a complicated issue, like, for example, *D.H. v. Czech Republic*, concerning discrimination of Roma children in education. The execution of this judgement is still undergoing and is being supervised by monitoring bodies. As the matter is very complex and involves a number of state institutions, the reform at the national level is still under implementation.

How do the widely discussed problems with the rule of law in Hungary and Poland affect the Court?

If you have a new problem, even a political one, which can affect the rule of law, it is reflected in new incoming applications to the Court.

Do you think that the knowledge about the possibility of submitting an application to the ECtHR among the people and lawyers in the V4 countries is sufficient?

I would say that in comparison with the very beginning, yes, there is a lot of progress. Even though I am not informed about details regarding Hungary, in Poland, the Czech Republic and Slovakia, the overall awareness is good and also the knowledge of the Court's procedure and case-law is, in my opinion, if I use your word, sufficient.

Developments at the European Court of Human Rights

After finalizing the ratification of Protocol 15, the doctrine of *margin of appreciation* will be inserted into the preamble of the Convention and also the time limit for submitting applications to the Court will be reduced from six to four months. Do you consider this a move in the right direction?

Personally, yes I do. The margin of appreciation doctrine is already widely used by the Court in its reasoning of judgements and decisions, so it is not something new and unknown.

In respect of shortening the time period I would say it is also good because in principle it could also shorten the period of rendering a judgement of the Court. Even though it is not a requirement, the trend is that more and more applicants are legally represented by a lawyer. In any case, I think that four months are enough to prepare the application in an acceptable manner.

How does the activation of Protocol 16, which introduces a possibility of the highest national courts to request an advisory opinion from the ECtHR, affect the Court in practice?

Protocol 16 came into effect last year, so it is only the beginning of a future practice. For the time being it does not substantially affect the Court.

How does the ECtHR perceive the very slow advancement of the European Union with regard to the accession of the EU to the European Convention on Human Rights? After the negative ruling of the Court of Justice of the EU in 2014, no progress has been seen. Does the Council of Europe exercise any activities in this regard?

I have not heard about any recent substantial developments in this respect.

How does the Court deal with resistance to ECtHR judgments from countries? Several academics even talk about a "backlash" against international courts.

The aim is that what has been decided by the Court should be, of course, respected. It is also a legal obligation. We have

some countries that do not implement some judgements of the Court. However, the number is very low. I would not speak about a backlash against international courts.

Do you expect any further development of the "Strasbourg mechanism"? Do you see any significant short-term challenges, or a need for further long-term oriented reforms?

During the past few years, after a number of conferences for instance in Brighton and Brussels, the Court has implemented a number of procedural improvements and internal changes in its working methods. This was done in order to deal with a higher number of applications while, at the same time, complying with the requirement of the quality of its decisions and judgements.

The Court also amended its Rule 47, which sets out specific formal conditions for lodging an application. As a result, we can say that the Court has done the maximum to specify in a clear manner, how the application has to be lodged and what documents are required. All information is online in the languages of all member states and it is very instructive and understandable for both the applicants and lawyers.

Notes

[1] The Court statistics can be viewed here: https://www.echr.coe.int/Pages/home.aspx?p=reports&c=.

[2] The statistics with regard to the implementation of judgments can be viewed here: https://www.coe.int/en/web/execution.

Photographs

[1] European Court of Human Rights, author: Jan Lhotský, edits: photo cropped

[2] Courtroom of the European Court of Human Rights, source: © ECHR-CEDH Council of Europe, edits: photo cropped

[3] Eva Hubálková, foto: Libor Fojtík/Economia, edits: photo cropped

[4] Strasbourg court, source: © ECHR-CEDH Council of Europe, edits: photo cropped

Strasbourg court [4]

Czech Republic

Section editor: Lucie Nechvátalová

'Hate crime' in the Czech Republic: before and now

Václav Walach

'Hate crime' is changing. Some contemporary trends include the ongoing decrease in extremist, politically-motivated offences, increasing danger for Muslims and human rights defenders, and the more frequent use of the Internet to spread 'hate'. To address these changes in the 'hate crime' victimization, the practice of criminal justice authorities needs to undergo a reform.

'Hate crime' is a relatively new name for an old phenomenon. Gaining momentum after passing the Hate Crime Statistics Act by the US Congress in 1990, the concept established itself internationally as a, if not *the* category for acts of violence motivated by inter-group prejudices or bias. A motivation of bias, and not hatred as commonly understood, is what sets 'hate crime'[1] apart from the rest of criminal offences.

Offenders do not have to *hate* their victim or group that the victim is a true or alleged member of. It suffices if the victim is *selected* by an offender based on group characteristics such as race, nationality, ethnicity, religion, political convictions, religion, sexual orientation, gender, disability or any other fundamental characteristics.

The 'hate crime' phenomenon has existed long before the emergence of the 'hate crime' concept, and the same is true of its criminalization. In the Czech legal history, the 'hate crime' legislation has its origins in the Act on the Protection of the Republic (No. 50/1923 Coll.), which aimed to protect the multinational state as well as individuals from inter-group violence. The legislation has continuously expanded since then, reaching a climax after 1989.

The fall of political extremism

'Hate crime' became an important topic of public debate during the 1990s, as more and more Romani people, foreigners of non-white skin colour, and the subcultural and far-left youth were assaulted, leaving more than two dozen dead. Since far-right skinheads were identified as the perpetrators of racist murders and arson, the issue was framed as a matter of political extremism and approached as such by criminal justice authorities and the civil society.

Radoslav Banga [1]

However, as statistics revealed, only a minority of 'hate crime' offenders could be considered neo-Nazi skinheads, a fact that corresponds to the situation in other countries where similar studies were conducted. The majority of offenders do not commit 'hate crime' for the sake of their political ideology. And their number even further decreased.

In spite of several incidents, such as the arson attacks on the Roma dwellings in Vítkov (2009), Býchory (2011) and Aš (2012), or the more recent cases of vandalism targeting the enterprises registered as Hate Free Zones (2016) and assault on an African man travelling in a tram of the Prague Public Transport Company (2017), there has been

Demonstration against Islam in Prague in 2015 [2]

a steady decline of violence orchestrated by organized groups affiliated with the right-wing extremism. This, however, does not mean that 'hate crime' has completely disappeared. It has only changed its face.

New targets of 'hatred'

The reality of the refugee crisis was often questioned as very few refugees from Syria and other war-torn countries crossed the Czech border and stayed in the Czech Republic in 2015–2016. For a substantial number of people, though, the refugee crisis was more than a media construction. It had palpable effects on their lives. As the Thomas theorem says, if people define situations as real, they are real in their consequences. In the Czech Republic, the consequences of the refugee crisis were definitely real enough to get over the so-called epithet, often put before the notion, 'refugee crisis'.

According to the analysis of In IUSTITIA, the only organization that comprehensively reports on 'hate crime' in the Czech Republic, the refugee crisis had an important impact on the 'hate crime' statistics. Whereas there were 12 incidents related to the refugee crisis in 2014 in total, a year later, it reached 61 incidents and two years later, 66 incidents. In sum, the number of incidents thus more than quintupled between 2014 and 2016. The following year, In IUSTITIA registered a drop from 66 to 44 incidents. Although the number of incidents decreased by a third between 2016 and 2017, it is still considerably higher than it was in 2014.

The incidents related to the refugee crisis comprise attacks against refugees and migrants, foreigners from Arab countries, Muslims and those who support these groups because of their political beliefs. In all four categories, there was a significant increase in the cases registered by In IUSTITIA from 2014 to 2017. This is the real consequence of the refugee crisis: the Roma continue to be the group most at risk of 'hate crime', but the proportion of such cases is diminishing in favour of other groups, especially Muslims and human rights defenders.

'Cyberhate'

'Hatred' in the streets is progressively accompanied by online 'hate crime'. The In IUSTITIA statistics indicate that the number of incidents perpetrated on the Internet almost doubled between 2014 and 2017. In 2014, In IUSTITIA reported 23 online incidents while three years later it was 44, corresponding to about a third of all incidents registered in 2017. Obviously, the online incidents included represent only a small portion of 'cyberhate', usually the most publicized cases or the cases investigated by the police.

The two criteria also help to explain why online incidents peaked in 2016. That year, the statistics were to a great extent influenced by the case of Radoslav Banga, a Roma singer and front man of the Czech band called Gipsy.cz. The artist left the biggest domestic music award ceremony, the Czech Nightingale, in protest against awarding Ortel, a band whose front man used to perform with a neo-Nazi band. After posting a comment in which he explained his behaviour, Banga received hundreds of hateful comments. The police identified only a handful of offenders, yet it made a difference in the statistics.

Another evidence of how the police underestimate online 'hate crime' can be found in the reaction to the reporting of incidents by In IUSTITIA in the course of the second monitoring exercise of the implementation of the Code of Conduct on Countering Illegal Hate Speech Online. Out of 99 incidents deemed illegal by the organizations' lawyers, only 27 were assessed as potential criminal offenses, and just nine were eventually forwarded to a state prosecutor to date.

Criminal justice authorities: unprepared and lagging behind

Based on the In IUSTITIA's experience in the 'hate crime' victims advocacy, the criminal justice authorities seem to have not fully reflected the above-mentioned changes. Despite a clear recommendation in the governmental National Security Audit to depart from the paradigm of political extremism, the police and other authorities keep focusing primarily on the politically-motivated perpetrators of 'hate crime'. This practice results in the situation when the bias motive of 'hate crime' offenders with no apparent connection to right-wing extremism is often ignored.

Just as the paradigm of political extremism contributes to the limited access to justice for some 'hate crime' victims, so does the lack of information on the specifics of this type of criminality. Primarily, an adequate training is needed, otherwise many 'hate crimes' will remain unprosecuted. This applies even more to 'hate crime' committed on the Internet, including social networks. In particular, the police have to develop an understanding that the online 'hate crime' is no less serious than 'hate crime' containing physical violence, as both forms are criminalized by the Czech law. It should also be stressed that the Internet does not constitute a world where the law does not apply. In fact, the opposite is true, as the use of the Internet presents an aggravating circumstance at verbal 'hate crime'.

Václav Walach is a precarious researcher and post-doc who has undertaken numerous jobs in Prague. In addition to his university-based jobs in the Department of Political Science and the Faculty of Arts at Charles University and the Department of Anthropology and the Faculty of Arts at the University of West Bohemia, he works for In IUSTITIA, the only Czech NGO that focuses on hate crimes in the country. His research interests include critical security theory and practice, crime and crime control and social exclusion.

Notes

[1] Following Iganski, I also prefer to 'surround the words "hate crime" with quotation marks to signify that although "hate" may not often figure in the crimes so labelled, the concept of 'hate crime' is not entirely devoid of utility'. Paul Iganski, 'Hate Crime' in Fiona Brookman, Mike Maguire, Harriet Pierpoint and Trevor Bennett (eds), Handbook on Crime (Willan Publishing, 2010), p. 363.

References

Gwendolyn Albert, 'Hate Crimes and Antigypsyism in the Czech Republic' in Ismael Cortés Goméz and Markus End (eds), *Dimensions of Antigypsyism in Europe* (European Network Against Racism, 2019).

Erik Bleich, 'From Race to Hate: A Historical Perspective' in Thomas Brudholm and Briggite Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018).

European Roma Rights Centre, *Imperfect Justice: Anti-Roma Violence and Impunity* (European Roma Rights Centre, 2011).

Nathan Hall, *Hate Crime* (Willan, 2005).

Paul Iganski, 'Hate Crime' in Fiona Brookman, Mike Maguire, Harriet Pierpoint and Trevor Bennette (eds), *Handbook on Crime* (Willan Publishing, 2010).

In IUSTITIA, *Nenávist na sociálních sítích. Výsledky testingu hlášení nenávistně motivovaných příspěvků na sociálních sítích: Česká republika ve srovnání EU* (In IUSTITIA, 2017).

In IUSTITIA, *Report on Bias Violence in the Czech Republic in 2017* (In IUSTITIA, 2019).

Klára Kalibová, Benjamin Petruželka and Václav Walach, 'Islamofobie a násilí z nenávisti v České republice' in Bronislav Ostřanský (ed), *Islamofobie po česku. Český odpor vůči islámu, jeho východiska, projevy, souvislosti, přesahy i paradoxy* (Vyšehrad, 2017).

Jack McDevitt, Jack Levin and Susan Bennett, 'Hate Crime Offenders: an Expanded Typology' [2002] Journal of Social Issues, 58 (2): 303.

Ministry of the Interior, *National Security Audit* (Ministry of the Interior of the Czech Republic, 2016).

Václav Walach, Klára Kalibová, Vendula Divišová and Petr Kupka, *Lifecycle of a Hate Crime. National Report - Czech Republic* (In IUSTITIA, 2017).

Say No to Hate Crime! [3]

Photographs

[1] Radoslav Banga, original title: Svět knihy 2013 - Radoslav Banga, author: Matěj Baťha, 16 May 2013, source: Wikimedia Commons, CC BY-SA 3.0., edits: photo cropped

[2] Say No to Hate Crime!, author: Mike Gifford, 20 November 2016, source: Flickr, CC BY-NC 2.0., edits: photo cropped

[3] Say No to Hate Crime!, author: Mike Gifford, 20 November 2016, source: Flickr, CC BY-NC 2.0., edits: photo cropped

Being LGBT+ in the Czech Republic: experience with prejudice, discrimination, and violence

Marína Urbániková

Although the Czech society is considered (and considers itself) as largely tolerant of LGBT+ people, a new survey of almost two thousand LGBT+ respondents shows that prejudice, stereotypes, discrimination, harassment, and even violence are still a part of their everyday life. In the survey, the LGBT+ community stated that the most important right they want is the possibility to marry (same-sex marriage), which would allow them to live more comfortably as a lesbian, gay or bisexual person in the Czech Republic.

Both, throughout the EU and in the Czech Republic, equal rights of sexual minorities and their protection from discrimination are guaranteed by law. However, as notoriously known, law in the books often differs from law in practice. How does it feel to be a lesbian, gay, bisexual, or trans* person in the Czech Republic? What are the pressing issues that complicate their everyday life? What stereotypes and prejudices do they have to tackle the most often? What are their experiences of discrimination and violence? What changes and measures would help to make their lives better?

Those were the main questions addressed by the online survey of 1,981 LGBT+ respondents conducted in autumn 2018 by the Public Defender of Rights of the Czech Republic (Ombudsman) in cooperation with the non-governmental organizations, Prague Pride and Queer Geography. [1] The results show that the perceived situation of LGBT+ people is often starker than the Czech society thinks.

Stereotypes and prejudices: do what you want, just do not show it in public

Being LGBT+ in the Czech Republic means a frequent encounter with a whole range of prejudice and stereotypes. According to the LGBT+ respondents, the most widespread stereotype is the opinion that gays and lesbians should not publicly show their sexual orientation, but in private, they can do as they want. This has often or very often been personally encountered by more than two-thirds of respondents. Moreover, it is not just a feeling or a perception. In a representative survey of Czech citizens (not yet published) aged 18+ conducted in 2018 and commissioned by the Public Defender of Rights and Prague Pride, more than 60% of Czech respondents actually agree with this statement. The question, of course, is to what extent we can talk of tolerance when people have to hide their difference to be accepted.

Illustration image [1]

On a more positive note, the most serious forms of homophobia are reported as the least common. For instance, only 14% of the LGBT+ respondents often or very often encounter the opinion that gays and lesbians should undergo treatment to change their sexual orientation (11% of the Czech population agree with this statement). Even less frequently encountered is the opinion that homosexual intercourse should be punishable (5% of LGBT+ respondents has a frequent experience, 7% of the Czech population agree with the statement). Also, in general, the LGBT+ respondents evaluate their situation in the Czech Republic as a rather satisfactory.

Discrimination: frequent and underreported

Being LGBT+ in the Czech Republic also means a considerably higher chance to feel discriminated against. Over the past five years, 38% of LGBT+ respondents felt discriminated against, which is over three times more in

Personal experience with discrimination [2]

comparison to the general Czech population.[2] Trans* people are particularly vulnerable minority within this minority: as many as 57% of them claimed to have experienced discrimination in the past five years, more than five times more than the Czech population.

Most often, LGBT+ people felt discriminated against in the area of education (13%), work and employment (11%), and goods and services (7%). Based on the accounts of discriminatory incidents reported by LGBT+ respondents, the alleged perpetrators often are not only schoolmates or colleagues at work, but also people in the position of power, like teachers or superiors. These worrying results reiterate the need for schools as well as employers to have proper policies and mechanisms in place for addressing discrimination and harassment. It is their legal duty to prevent discrimination and harassment, and deal with them promptly and effectively if they occur.

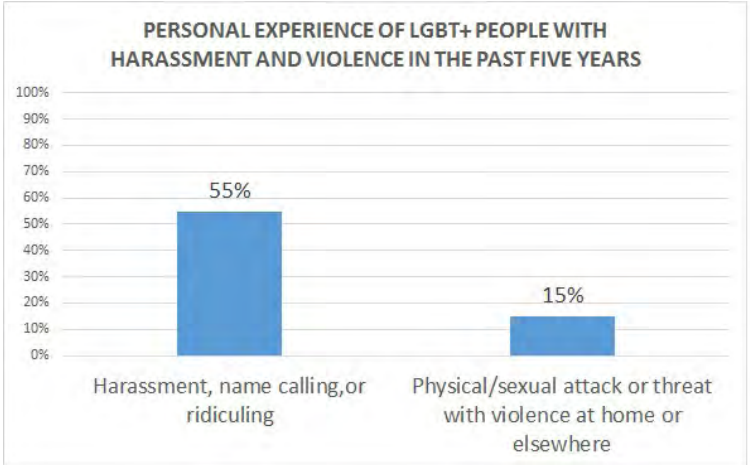
The vast majority of discriminatory incidents, more than 90%, remained unreported, mostly because the respondents considered them to be too trivial and not worth the hassle, and also because they did not believe that reporting would help to improve the situation. Low awareness of where to go with a discrimination complaint, as well as a complex and time-consuming procedure of reporting such an incident are other frequent reasons for not reporting the incidents.

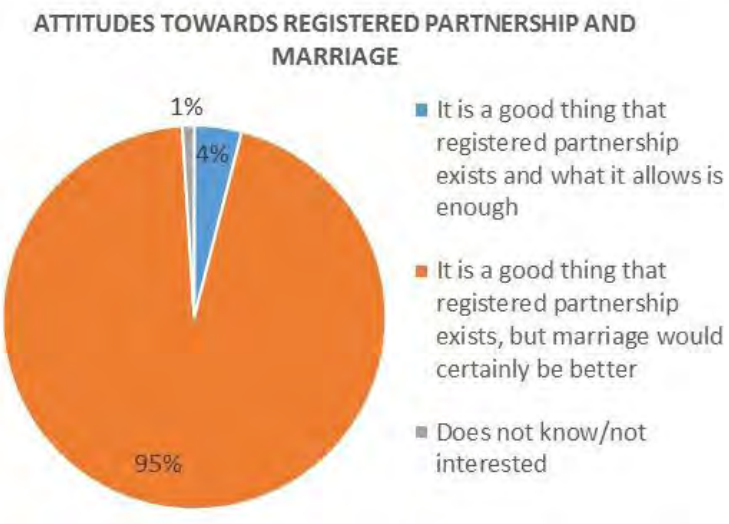
It is a striking fact that the Czech public is often unaware of the everyday problems of LGBT+ people with discrimination and harassment and see their situation in a much brighter light. In total, three-quarters of LGBT+ respondents think that LGBT+ people are still discriminated against in the Czech Republic while only a third of the general public think so.

Harassment and violence: ridicule, humiliation, insults, but also physical attacks

Being LGBT+ in the Czech Republic means a higher risk of experiencing harassment, threats, and violence. The incidents reported by the LGBT+ respondents are more frequent than one would expect in a country largely considered as tolerant. Fortunately, the more serious they are, the less frequently they occur. However, the overall results are far from being satisfactory and acceptable. More than half of the respondents had a personal experience with harassment in the last five years, most often in the form of name-calling and ridicule. In the same time period, roughly every sixth respondent had a personal experience with violence, threats, and physical or sexual attacks, the most serious acts of hate crime. Again, trans* people are targeted more often than the rest of the LGBT+ community.

Personal experience with harassment and violence [3]





Attitudes towards registered partnership and marriage [4]

Based on the incidents reported by the LGBT+ respondents, harassment, threats, and violence are mostly committed by an unknown adult person in public places such as streets or squares. This poses a serious complication for addressing and reporting these cases, as without knowing the identity of the offender, it is all the more difficult to investigate them. Roughly every eighth respondent reported their most serious case of assault/threat in the last five years. As for the reasons for non-reporting, most of the respondents stated that the incident was too minor and not serious enough to call the police. However, particularly alarming is that up to about one fifth of the respondents did not turn to the police because they did not trust the police and were afraid of ridicule and not being taken seriously.

Marriages for all: key improvement for LGBT+ people

The most important measures which, according to the LGBT+ respondents, that would allow them to be more comfortable living as lesbian, gay or bisexual persons in the Czech Republic, are related to family life. Legalization of same sex marriages received the greatest support in this respect (according to 96% of respondents), followed by recognition of same-sex couples across the European Union (95%), and the possibility of child adoption by same-sex couples (93%).

According to the representative survey of the Czech public, most of the Czechs agree with these measures - 65% support marriage for same sex couples and 61% agree with the possibility for same-sex couples to adopt children (e.g. from foster care). As many as 95% of the LGBT+ respondents consider registered partnership, the current legal option for same sex couples in the Czech Republic, to be inadequate. They see this option as an inferior institution aimed for second-rate citizens.

Marína Urbániková is the head of the research unit at the Office of the Public Defender of Rights of the Czech Republic. Here, Marína's research focuses on equality, discrimination, and public administration. She also works as an assistant professor at the Department of Media Studies and Journalism at the Faculty of Social Studies and as a senior researcher at the Judicial Studies Institute at the Faculty of Law at the Masaryk University in Brno, the Czech Republic.

Notes

[1] Report of the Office of the Public Defender of Rights (2019), see below.

[2] Report of the Office of the Public Defender of Rights (2015), see below.

References

Kancelář veřejného ochránce práv [Office of the Public Defender of Rights], *Být LGBT+ v Česku: Zkušenosti LGBT+ lidí s předsudky, diskriminací, obtěžováním a násilím z nenávisti* [Being LGBT+ in the Czech Republic: Experiences of LGBT+ people with prejudices, discrimination, harassment, and hate crime] (2019) <https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum-LGBT.pdf> accessed 4 July 2019. Summary in English: <https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/LGBT_Factsheet_EN.pdf> accessed 22 July 2019.

Kancelář veřejného ochránce práv [Office of the Public Defender of Rights], *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice (2015)* <https://www.ochrance.cz/fileadmin/user_upload/ESO/EN_Discrimination_in_CZ_research_01.pdf> accessed 4 July 2019.

Photographs

[1] Illustration image, author: Tristan Billet, source: Unsplash, edits: photo cropped

[2] Personal experience with discrimination, source: Kancelář veřejného ochránce práv, 2019.

[3] Personal experience with harassment and violence, source: Kancelář veřejného ochránce práv, 2019.

[4] Attitudes towards registered partnership and marriage, source: Kancelář veřejného ochránce práv, 2019.

[5] Illustration image, original title: Let freedom ring, author: Robert Couse-Baker, 27 June 2015, source: Flickr, CC BY 2.0., edits: photo cropped

Illustration image [5]

Children's debts and state policy: developments of debt collection in the Czech Republic

Tereza Dvořáková

Debts are a resonant issue in the Czech Republic because a significant proportion of the population is in debt, including children. Until recently, children's debts were a hidden part of the Czech society. However, in recent months the topic has received a strong media attention and has triggered a wave of critical reactions from both the legal and professional public. The need for a social change was also unanimously agreed upon by the legislators who are preparing legislative changes along the lines of European countries.

Illustration image [1]

The term 'execution' in the Czech legal system

There is no entirely equivalent term in English that would properly translate or interpret execution, a legal action within the Czech legal system. The Czech term does not refer to state sanctioned executions, but to the execution of enforcement proceedings, most often for the purpose of the creditor recovering a sum of money from the debtor. This process is administered by so-called executors. The terms "execution" and "executor" will, therefore, be used to refer to the Czech system of debt collection.

An executor is a private person who is authorized by the state to administer this agenda. Thus, if there is no voluntary fulfilment by the debtor, the creditor, or his lawyer, will contact the selected executor who will ask the court to order the execution and, if legal action is taken, charge the costs and remuneration to the debtor. In addition, the lawyer's fees, court fees, penalties, and interest will be charged. The amount becomes many times higher than the original debt.

There are currently over 870,000 citizens in the Czech Republic 'in execution'. However, this figure does not mean that Czech citizens would be less responsible than other Europeans. In the early 2000s, the former Minister of Justice created an office of private executors which introduced commissions for executors and lawyers set at unreasonably high amounts. This was the origin of a profitable debt business in the Czech Republic.

Children's debts

Children have become part of this system too by falling into debt, sometimes even shortly after their birth. According to the statistics from the Chamber of Executors, it is possible to have an execution from one year of age. For example, let's consider the situation of non-reimbursement of services. If parents do not pay fees for the collection of municipal waste for their children, a debt of the child may emerge; even in situations when a child does not live at home and is placed in institutional care. Public transport operators, companies owned by municipalities, also bear a large share of children's executions. These are public institutions that often sue children for not buying a 25-cent ticket. After processing, one unpaid ticket finally costs about 800 euros. Other public institutions that have sued for "child" claims were, for example, municipal libraries suing for overdue charges, or hospitals charging fees related to hospital stays, which are subsequently enforced from children by health care institutions.

At the very least, however, we get into an interpretative contradiction. By general definition, the goal of publicly established institutions is to provide affordable and good-quality services to all citizens. The general definition further states that such services include, in particular, medical care, education, but also transport infrastructure. Their accessibility, regardless of the socio-economic status of the individual, and good quality should balance market forces.

The role of public services and the scope of children's responsibilities

Strictly market-oriented approaches in institutions that are supposed to provide public services, can, in certain situations, lead to unwanted consequences. Under the given circumstances, it can generate child debt. For a policy based on market principles, a child is difficult to grasp. As a child cannot be a productive individual in the market, common sense says, and the legislation agrees, that financial responsibility is borne by the child's legal representatives. However, it should be added that legally there is no protection against the emergence of child debts.

On the contrary, Article 31 of the Civil Code states: *"Any minor who has not acquired full legal capacity is deemed to be eligible for legal action in a manner appropriate to the intellectual and will component of maturity of the minor's age*". It is this formulation that still allows for the emergence of child debtors. If a child can carry out a contractual act in the form of borrowing a book, he or she must also be able to foresee the consequences of failing to properly fulfil that obligation.

The current situation is that there are over 4,000 children and juveniles registered in the Czech Republic facing so-called executions. Another approximately 50,000 people have carried the same childhood debts into their adult age. The current system is characterized by imposing disproportionate penalties for "breaking the rules" and by an easy recourse to punitiveness. Thousands of children who did not pay for their hospital stay, buy a ticket, or return a book in time, did not do it on purpose. Many child debtors find themselves in a complicated situation, either at the time their debt emerged or in a long term perspective (parent's divorce, institutional care, poverty or other socio-pathological phenomena).

Current situation

Over the years, it became apparent that the execution practice ceased to be beneficial to all parties. On the contrary, the state had to start mitigating their impacts. Executions lead to a preference of illegal work, which means losses for the state budget, or to a significant administrative burden being placed on employers who employ people facing executions.

Furthermore, it results in illegal forms of livelihood that bring about considerable spending on crime prevention. Debts promote reliance on the social security system, which logically increases the cost of social services. Debts are also an important criminogenic factor as they negatively impact mental and physical health. The society is

Public transport [2]

Social worker in household with child in debt [3]

losing not only taxpayers but also full-fledged citizens; and young people with confidence in the rule of law.

The rigid system experienced a certain development this July. The Chamber of Deputies of the Czech Republic passed a vote of advantageous debt relief for all those whose debts originated during their childhood. After three years of insolvency, young adults can be released from their debts. Although the legal reform is welcome in the context of other forms of insolvency in the Czech Republic, it is still not an optimal solution. In order to avoid the current situation in the future, there needs to be legal arrangements that will no longer allow a generation of child debtors to emerge.

The draft amendments to the Civil Code are already on the table in the Chamber of Deputies. According to the motion, the financial responsibility of fulfilling the obligation should be transferred to the legal representative in a larger extent than today. And if there is no such person, responsibility passes to the state.

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References

Ulrich Beck, '*Riziková společnost*' (Praha: SLON, 2004).

Tereza Dvořáková a Jiří Mertl, '*Důstojná existence kontra osobní zodpovědnost: případ dětských dlužníků v Plzni*'[2002] Sociální práce, (3), s. 54–69.

Michael Foucault, '*Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*' (New York: Pantheon Books, 1980).

Ondřej Hejnal, '*Úvod do studia neoliberalismu: Inspirace pro antropologii*' [2014], AntropoWebzin, roč. 10, č. 1, s. 33–47.

Bob Jessop, '*Putting Neoliberalism in its Time and Place: A Response to the Debate*' [2013] Social Anthropology, 21(1), s. 65–74 2013.

Jock Young, '*The Vertigo of Late Modernity*' (Los Angeles; London: Sage, 2007).

Map of "executions". 2017. <http://mapaexekuci.cz/> accessed 10 July 2019.

Collins dictionary. Definition of 'public service'. <https://www.collinsdictionary.com/dictionary/english/public-service?fbclid=IwAR3NjWHU4VkD1hCLfL7-z0db9KVc4OWLuGxKiFIHtzvDEA9i5lR8TYo_2OE> accessed 8 August 2019.

European Parliament. Public undertaking and services in EU. <http://www.europarl.europa.eu/workingpapers/econ/w21/sum-2_en.htm?fbclid=IwAR2LI1GJtDIwYGdBz8_5K6t0q4UwiDtDg1gzUoeKKz2NqNoYGFfdjqz-hVk> accessed 8 August 2019.

The United Nations Convention on the Rights of the Child. 1989. <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 8 August 2019.

Photographs

[1] Illustration image, author: Petra Burzová, Společnost tady a teď, 2014, provided by the author, edits: photo cropped

[2] Public transport, author: Free-Photos, 29 March 2015, source: Pixabay, edits: photo cropped.

[3] Social worker in household with child in debt, author: Petra Burzová, Společnost tady teď, 2014, provided by the author, edits:photo cropped.

Hungary

Section editor: Orsolya Salát

Minority representation in the Hungarian Parliament

Péter Kállai

Nationalities living in Hungary are guaranteed participation in the National Assembly by the Fundamental Law of Hungary. However, the measures in the Electoral Law of 2011 do not lead to effective representation.[1]

Background – Multinationalism?

The granting of special political participation rights is one of the conditions of liberal multiculturalism as defined by Will Kymlicka. Several rights emerged after the regime change in 1989 and these cultural rights and self-government rights created the illusion that Hungary was following the example of a multinational state or multicultural policies. However, the Fundamental Law adopted in 2011 mostly builds on the ethnic, instead of the political concept of the nation, and therefore, Hungary is rejecting a multicultural approach. Nonetheless, some of the measures seemed to aim for real, special political participation of minorities on a national level.

Institutional framework

According to Electoral Law of 2011, Hungary has a mixed electoral system; meaning that voters belonging to the majority have two votes, one for a single candidate and one for a party list. Voters enrolled in the electoral register as national minorities (especially for the parliamentary elections) may cast a vote for a candidate in any single-member constituency, and another for the list of their national minority.

Each minority has one list drawn-up by the national minority self-government body, which is highly influenced by the ruling political power. To win one parliamentary seat, the list must obtain one quarter of the votes, which are required for winning a seat in the proportional part of the system. If the list does not receive a sufficient number of votes to fill this preferential quota to secure a seat for its 'fully-fledged' representative, a spokesperson, a so-called advocate without voting rights, is instituted.

Imre Ritter: German Nationality Advocate [1]

As only a small number of citizens belong to each national minority, and even fewer choose to enroll in the minority register, minority voters risk wasting one of their votes. In the 2014 elections, national minorities could not obtain any seat due to the small number of people who decided to enroll as minority voters. In 2018, the number of registered minority voters increased moderately, however, only the German minority was successfully mobilized and obtained a mandate.

Participation, not representation of nationalities

The Fundamental Law does not guarantee representation for minorities, but only participation in the work of the parliament. A national minority spokesperson is not only deprived of the right to vote but may only be allowed to

Assembly Hall [2]

speak at the end of the daily debates, provided the House Committee considers that the given topic affects individual national minorities. In a real multiculturalist state, it would be difficult to justify the argument that not every issue or question affects members of the national minorities.

More systematic problems can clearly be seen in the example of the German representative.

Several analyses show that the advocates did not have substantial influence over the Parliament's agenda in the period of 2014-2018.[2] While differences persist, the involvement of the advocates in the parliamentary debates is mainly reserved to symbolic topics. The most prominent topics include ethnic and religious holidays, historical figures of their minorities, etc. Furthermore, the statistics reveal that a 'fully-fledged' representative of a national minority has more opportunities to interfere than a spokesperson. Between 2014 to 2018, the German advocate, Imre Ritter, made 55 contributions in total, which made him the most active advocate, whereas as a representative since 2018, he spoke 21 times in one year. He is also a member of the governing party, Fidesz. Before the elections he stated, "*I do not want to play the role of the opposition in parliament*" and except for minority related issues, "*I will vote loyally to the government*". The problematic nature of minority representation was well demonstrated by his contribution to debates about central budgets and taxation bills. He clearly stated he would not express any professional opinion of his own, even though he is a taxation expert, because he does not want to jeopardize the political consensus regarding minority claims by getting involved into real political debates.[3]

Concluding remarks

The problem of low-intense participation of the advocates of national minorities seems to be two-fold. First, the legal system provides only limited possibilities to shape the agenda. Second, the advocates themselves were not proactive to seize the opportunities to do so.

Creating the minority representation system on a national level might have seemed a step towards a real multicul-

tural political community. However, the institution introduced by the Electoral Law of 2011 are suitable neither to maintain the multicultural illusion, nor to create effective representation of nationalities. For most minority communities there is no real chance to obtain a mandate, and the opportunities of minority advocates are very limited. The system is created in an ethnic-national legal and political environment and can easily be misused in order to retain power by the governing party. In the established institutional framework, representing minority interests and being a member of the Parliament in Hungary today, easily becomes contradictory.

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Notes

[1] This text is based on a more detailed analysis of the Hungarian nation concept. See Kállai, Péter and Nagy, Alíz, *Parliamentary Representation of Nationalities and Kin-minorities – Hungary's Biased Electoral System*, EYMI vol.17. (forthcoming)

[2] See (in Hungarian): M. Balázs, Ágnes, *Szólnak a szószólók?: A nemzetiségi szószólók hatása a parlamenti napirendre*, Regio: 25:3, 2017, 231-; Móré, Sándor, A nemzetiségi szószólói intézmény jogi kerete és működésének első két éve, Parlamenti Szemle 2016/2, 30-; Tar, Ferenc, *Képviselők vagy szószólók? – Kisebbségi képviselőválasztás Magyarországon*, Modern Geográfia 2015/II, 25-; Kállai, Péter, *Képviselő-e a szószóló? Nemzetiségi képviselet a magyar Országgyűlésben*, MTA Law Working Papers 2017/12

[3] Speech by Imre Ritter on 18 June 2019, during the general debate on amending certain acts of taxation.

References

Kymlicka, Will, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995.) 174

Majtényi, Balázs and Majtényi, György, *A Contemporary History of Exclusion: The Roma Issue in Hungary from 1945 to 2015* (CEU Press, Budapest, New York, 2016.)

Körtvélyesi, Zsolt, From *"We the People" to "We the Nation"* in Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, edited by Tóth, Gábor Attila (CEU Press, 2012.) 111-40.

Majtényi, Balázs; Nagy, Alíz; Kállai, Péter, *'Only Fidesz' – Minority Electoral Law in Hungary*, Verfassungsblog, 31 March 2018 <https://verfassungsblog.de/only-fidesz-electoral-law-in-hungary/>

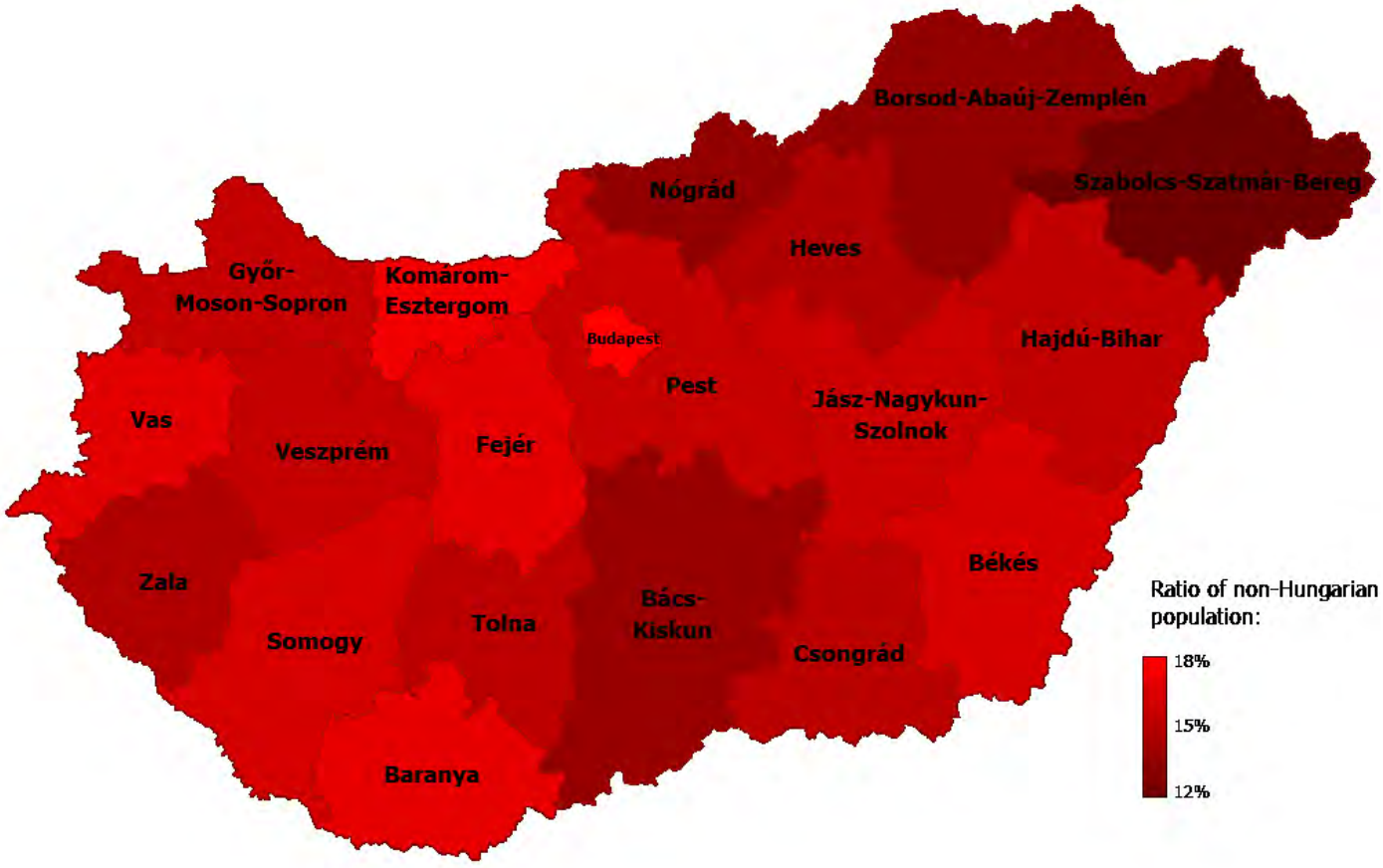
Photographs

[1] Imre Ritter: German Nationality Advocate, original title: Kitelepítési emléktábla avatása a solymári vasútállomáson - Ritter Imre nemzetiségi szószóló, author: Solymári, 23 April 2016, Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped

[2] Assembly Hall, original title: DSCF3491, author: Brian Adamson, 5 April 2017, Flickr, CC BY 2.0., edits: photo cropped

[3] Hungarian counties by proportion of people belonging to minorities based on 2011 census data, author: Bence Damokos, 31 March 2013, Wikimedia Commons, CC BY-SA 3.0.

Hungarian counties by proportion of people belonging to minorities based on 2011 census data [3]



External citizens and the issue of unequal voting rights in Hungary

Alíz Nagy

In 2010, the right-wing Fidesz-led government proclaimed that the Hungarian nation was unified. As a part of this process, voting rights have been extended to citizens without residence in the country. The problematic elements of the Hungarian electoral system concerning external citizens, result in issues with ballot secrecy and inequality.[1]

The unified Hungarian nation

In April 2014, László Kövér, the Speaker of the Hungarian National Assembly, made a public statement in which he praised the establishment of the first Hungarian Parliament that represented the "whole nation". This results from the fact that in 2010, the concept of the Hungarian nation was changed.

As a very first symbolic step in 2010, the Fidesz-led Hungarian government proposed an amendment to the Act on Nationality, abandoning the residency requirement for acquiring Hungarian citizenship. The extension of voting rights to extraterritorial citizens followed in 2011. Until the latest national elections in April 2018, more than one million Hungarians from all around the world obtained their citizenship, relying on this simplified naturalization procedure. Additionally, more than 370, 000 external citizens registered for the parliamentary elections.[2] Both in 2014 and in 2018, more than 95% of the external ballots were casted for Fidesz.[3]

Extraterritorial citizenship and voting rights

The amendment to the Act on Nationality, the Act XLV on the Testimony for National Cohesion and the Hungarian Constitution (called Fundamental Law) was adopted in 2011. This amendment introduced a new ethno-cultural concept of the nation and replaced the political notion of the Hungarian nation, which referred to people living in the territory of Hungary.

The ethno-cultural concept mandates the extension of voting rights to extraterritorial citizens, i.e. citizens of Hungary without a permanent address in the country. Even though the Act CCIII of 2011 on the Elections of Members

Orbán Viktor announcing the victory of the FIDESZ party [1]

of Parliament granted the right of extraterritorial citizens to participate in the elections, they may still cast their vote for only the national party list, resulting in "half votes" of external citizens. Unlike Hungarians living in the territory of the country, they are not equally entitled to exercise their right to vote for their single member constituency candidates.

Further inequalities between Hungarian voters also arise in connection with the methods of voting. Only external citizens have the possibility to cast their ballots via post. Contrarily, this option is not available for those citizens who have a permanent residence in the territory of Hungary but are abroad at the time of the elections. In this situation, they are only allowed to vote at remote embassies. The restriction gave rise to a complaint to the Constitutional Court of Hungary in 2014, however, due to the lack of standing of the applicant who was not an external citizen, the case was eventually dismissed.

A discriminatory voting regime has also been repeatedly addressed in the case law of the European Court of Human Rights (ECtHR), which argues that each state has a wide margin of appreciation in their regulation of the right to vote. As for the situation in Hungary, the ECtHR concluded that the differentiation between voters was reasonable. According to the reasoning, the differentiation

is acceptable as external citizens are less exposed to the consequences of elections results, so it is justified that they only cast their ballots for the national party list. Accordingly, the court argued that it is valid to have more demanding procedural requirements for citizens with permanent residence in the country, who also cast their ballots for the single constituency candidates. In light of this reasoning, the Constitutional Court concluded that the differentiation does not amount to a violation of the constitution.

Secret ballot

The fact that external citizens can cast their ballots via post not only creates unjustified differences between the voting methods used by Hungarian voters, but their administration also casts doubts on the compliance with fundamental democratic norms. In 2014, when external citizens could participate in the Hungarian national elections, it was reported that external Hungarian citizens were casting their ballots with the help of transborder political and civil organizations.

These organizations are meant to support the implementation of external citizenship in Transylvania. This is the region in Romania where most of the people affected by the new legal regulation live. These Transylvanian civil and political organisations are heavily influenced by the Fidesz-led government, being supported both financially and politically, in exchange for which they publicly express their support for the governing party.

At the time of the parliamentary elections (both in 2014 and 2018), the organizations not only helped in implementing the citizenship policy, but also provided administrative assistance during the entire electoral process. The assistance mainly consisted of the voter registration of Hungarian citizens, or the completion of official forms. On the day of the elections in 2014, several forums and websites reported that the elections were held on the street, similar to a public community event in Transylvanian towns. The organizations were also entrusted with the delivery of postal ballots from Transylvania to Hungary. In 2014, the ballots arriving from Romania resulted in one mandate for Fidesz, without which the party would not have secured the two-thirds majority in the Parliament and the power to amend the Hungarian Constitution.

In 2018, violations of the secrecy of voting were reported. The postal ballots are divided into two envelopes: one contains an identification form which the voters must sign while the other contains the ballot itself to ensure anonymity of votes. Any voting packages which are opened before the official counting are invalid. During the elections in 2018, it was reported that several envelopes were suspected to have been opened prior to such counting. Nevertheless, the National Election Office did not dismiss any of these ballots.

The National Election Commission eventually ruled that the ballots in question were invalid. However, after the publication of the election results, Fidesz appealed the decision of the Commission to the Supreme Court (called Curia of Hungary). Since the Curia upheld the finding

Hungarian parliament [2]

The office of the Constitutional Court of Hungary [3]

of the Commission, Fidesz unsuccessfully turned to the Constitutional Court, which did not accept the complaint. In post-election public statements, Fidesz and the newly elected Prime Minister, Viktor Orbán, complained that the Curia had unjustifiably deprived them of one mandate, supposedly preparing the public for a planned restructuring of the judicial system, including judicial oversight of elections.

Parliament quickly (starting in May 2018) adopted the Seventh Amendment to the Fundamental Law, which would enable the establishment of a new wing of the judiciary. According to plans, administrative courts would be overseen by the Ministry of Justice itself, threatening judicial independence and further dismantling of rule of law.[4]

The government postponed the reorganization in the aftermath of the European Parliamentary elections. Nevertheless, the idea of the administrative court reform provoked heavy debates and demonstrated new facets of Hungarian illiberalism.

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Notes

[1] This summary relies on a more detailed analysis of the inequalities of the Hungarian electoral system: Péter Kállai and Nagy Alíz, 'Parliamentary Representation of Nationalities and Kin-Minorities – Hungary's Biased Electoral System' [2019] European Yearbook of Minority Issues forthcoming

[2] For constantly updated data see the website of the National Electoral Office: <https://www.valasztas.hu/kulhoni-magyar-allampolgarok-valasztasi-regisztracioja>

[3] Of the 128,429 valid postal ballots in the 2014 elections, 122 638 arrived for Fidesz. 'A levélben leadott listás szavazatok megszámlálása' <http://www.valasztas.hu/dyn/pv14/szavossz/hu/levjkv.html> accessed 28 April 2014 . Of the 225,025 valid ballots coming via post in the 2018 elections, 216,561 arrived for Fidesz. See 'A levélben leadott listás szavazatok megszámlálása' <http://www.valasztas.hu/dyn/pv18/szavossz/hu/levjkv.html> accessed 13 May 2018

[4] About the problematic issues concerning the new Hungarian administrative judiciary see: Renáta Uitz, 'An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts' (Verfassungsblog, 2 0 2019) <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/> accessed 23 August 2019; and for further details about the debates surrounding this issue: Viktor Kazai, 'Administrative Judicial Reform in Hungary: Who Gives a Fig about Parliamentary Process?' (Verfassungsblog, 1 0 2019) <https://verfassungsblog.de/administrative-judicial-reform-in-hungary-who-gives-a-fig-about-parliamentary-process/> accessed 23 August 2019.

References

András Jakab, 'A külföldön élő magyar állampolgárok választójoga egyenlőségének kérdése a választási törvény koncepciójában'(2011) Pázmány Law Working Papers 38/2011 <http://plwp.eu/evfolyamok/2011/100-2011-38> accessed 8 August 2019

Eszter Bodnár, 'The Right to Vote of Hungarian Citizens Living Abroad' (I•CONnect, 14 July 2015) <http://www.iconnectblog.com/2015/07/the-right-to-vote-of-hungarian-citizens-living-abroad/> accessed 8 August 2019

Decision no. 3048/2014. (III. 13.) (The Constitutional Court of Hungary, 2014)

Decision no. 3086/2016. (IV.26.) (The Constitutional Court of Hungary, 2016)

Decision no. 3156/2018. (V.11.) (The Constitutional Court of Hungary, 2018)

'Dehogy vett el mandátumot a Kúria a Fidesztől' (*Így írnánk mi*, 6 May 2018) <https://igyirnankmi.atlatszo.hu/2018/05/06/dehogy-vett-el-mandatumot-a-kuria-a-fidesztol/> accessed 8 August 2019

'Fotók: A nyílt utcán szavaznak Erdélyben' (*hvg.hu* 4 April 2014) <http://hvg.hu/itthon/20140404_Erdely_szavazas_konzulatus> accessed 8 August 2019

Oran v. Turkey (2014) App no 28881/07, 37920/07 (ECtHR, 15 April 2014)

'Toró: az erdélyi magyarok is részesei a Fidesz-KDNP választási győzelmének' <http://www.neppart.eu/toro-az-erdelyi-magyarok-is-reszesei-a-fidesz-kdnp-valasztasi-gyozelmenek.html> accessed 8 August 2019

Zsófia Vámos v. Hungary and 8 other applications (2015) App.no 48145/14 (ECtHR, 17 February 2015)

Photographs

[1] Orbán Viktor announcing the victory of the FIDESZ party, original title: Election 2018 in Hungary, author: Andor Elekes, 8 April 2018, Wikimedia Commons, CC BY-SA 4.0., edits: photo cropped

[2] Hungarian parliament, original title: Hungarian parliament (1280x800), author: Zsolt Andrási, 24 October 2009, Flickr, CC BY-NC 2.0., edits: photo cropped.

[3] The office of the Constitutional Court of Hungary, original title: The office of the Constitutional Court of Hungary - Budapest, I. Donáti utca. 35-45, author: VinceB, 25 January 2012, Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped. .

Whittling down academic freedom in Hungary

Veronika Czina

Hungary, a member state of the European Union, has been in the spotlight lately, not only because of its critical stance against certain policies of the EU (e.g. migration), but also due to various domestic changes that point towards the erosion of the rule of law and democracy in the country. The government's increasing involvement in controlling the academic and scientific field is a significant part of this process.

Article 7 procedure against Hungary

Hungary has been at the centre of attention in the past few years. This is due to several different actions of the Hungarian government that seemed to pose a threat to liberal democratic values in the country. The EU-wide debate on the "Hungarian question" reached its peak in the autumn of 2018 when the European Parliament (EP) took the first step towards the initiation of the Article 7 procedure against Hungary.

After several unsuccessful attempts of trying to urge the European Commission to act, the EP stepped up in September 2018 by adopting a resolution "*on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*." The document was a follow-up to the Sargentini-report, named after Rapporteur Judith Sargentini from the Committee on Civil Liberties, Justice and Home Affairs. She presented a motion for an EP resolution back in July 2018 and provided a detailed assessment on threats to the fundamental values of the EU in Hungary.

Based on Sargentini's motion, the EP listed in its September resolution, several areas which might endanger the rule of law in Hungary. These areas include the functioning of the constitutional and electoral system, the independence of the judiciary and of other institutions and the rights of judges. Other areas included corruption and conflicts of interest, privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, the rights of persons belonging to minorities, including Roma and Jews, and the protection against hateful statements against such minorities. Additional areas include the fundamental rights of migrants, asylum seekers and refugees as well as economic and social rights.

George Soros [1]

Lex CEU

One of the areas where the erosion of rights and the rule of law can be observed is academic freedom. The Sargentini-report already referred to the opinion of the Venice Commission (the Council of Europe's European Commission for Democracy through Law) on the modification of Hungary's 2011 higher education law. In April 2017, the Hungarian Parliament amended the Act CCIV of 2011 in a way which disproportionately restricted the operation of foreign universities in Hungary. As a result, the Venice Commission concluded that introducing strict rules without sufficient justification, coupled with short and strict deadlines and severe legal consequences for foreign universities which are already established and have been lawfully operating in Hungary for many years, appears highly problematic from the perspective of the rule of law and fundamental rights.

One of the main problems with the law was that it could be seen to be targeting one specific university, the Central Eu-

Viktor Orbán at the EPP EaP Leaders' Meeting [2]

ropean University of Budapest (CEU), which is an American university operating in Hungary. Founded by George Soros, the American philanthropist billionaire of Hungarian descent, CEU has operated in Budapest since 1991 and issues both Hungarian and American degrees. As there are only a few universities in Hungary that fell under the scope of this law, it is widely assumed that "Lex CEU" was part of the nation-wide campaign directed against Soros, who is perceived by the government as the enemy of traditional Christian values. Moreover, he is also portrayed as a person organizing irregular migration to Europe, thus being partly responsible for the refugee crisis of 2015–2016.

The law set certain requirements (such as the obligation to also provide higher education services in the country of origin) which, unless fulfilled, would have made the operation of CEU illegal in Hungary. After more than a year of long negotiations, even though CEU fulfilled the operating conditions set by the law, the Hungarian government refused to sign the deal that would have made it possible for the university to stay in the country. In the autumn of 2018, CEU thus announced that it would move to Vienna and operate there from the next academic year. The Hungarian-accredited programs of CEU can stay in Budapest, but the majority of its programmes, as well as most of its administrative and academic staff, have to move or commute to Vienna.

The infringement procedure that the European Commission launched against Hungary in the matter is pending before the Court of Justice of the European Union (CJEU). The Commission argues that the 2017 higher education law "*disproportionally restricts Union and non-Union universities in their operations and that the Act needs to be brought back in line with Union law.*" The Commission also finds that "*the new legislation runs counter to the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union (the "Charter") and the Union's legal obligations under international trade law.*"[1] The severity of this issue is well-demonstrated by the fact that the European People's Party (EPP) suspended Fidesz, the Hungarian governing party, from the party family, partly due to the lack of resolving the CEU-case before the EP elections of May 2019.

Ban of gender studies

Despite the fact that the CEU-case can be closely linked to the Soros-campaign, it cannot be overlooked that academic freedom in Hungary has lately been challenged on numerous occasions. In August 2018, the Hungarian government's plans to withdraw the master programme of Gender Studies at the public Eötvös Loránd University (ELTE) and to refuse the recognition of the MA in Gender Studies from CEU were revealed.

In its 2018 September report, the EP expressed its discontent with the fact that the misinterpretation of the concept of gender has dominated the public discourse in Hungary.

Building of the Central European University [3]

It condemned the attacks on free teaching and research and called "*for the fundamental democratic principle of educational freedom to be fully restored and safeguarded.*"[2] The government still proceeded with cancelling the gender studies master's programmes.

Government control over research institutes

The most recent issue that provides an example of limiting academic freedom in Hungary concerns the reorganization of the network of research institutes of the Hungarian Academy of Sciences (HAS). The intention of the Hungarian government to fundamentally change the operation of HAS surfaced in the summer of 2018 when the budget proposal for the year 2019 put roughly 2/3 of the HAS's funding under the disposal of the Ministry of Innovation and Technology. After a year of protests, negotiations, alternative suggestions from the HAS that were discarded by the government and open letters from the international scientific community, the law was passed by the Parliament and subsequently signed by the President of Hungary in July 2019.

The law creates a new research network, called Eötvös Loránd Research Network (ELRN) and places all academic research institutes under its control. ELRN has a Secretariat which is responsible for setting out the operational principles and budgetary conditions for the Network. The Secretariat consists of 13 people. Besides its president, six members are delegated by the government and six are delegated by the HAS, and finally, all of them are appointed by the Prime Minister.

The main coordinating body of the ELRN is the National Scientific Policy Council (NSPC), a body belonging to the Ministry of Innovation and Technology. The activities conducted by the HAS will be supervised by the NSPC which will have the authority to set the subjects and directions of research among the scientific community. The NSPC consists of eleven members. It is presided over by the Minister responsible for Scientific Policy Coordination, and has a vice-president as well. The vice-president and the remaining nine members of the committee are nominated by the president of the NSPC and appointed by the Prime Minister. The nine members consist of three prominent representatives from three fields of economy, science and state affairs.

These changes introduced a so far unprecedented government control over the activity of the research institutes. Employees of the HAS thus face the choice of keeping their jobs, but in that case, they might expect strict government control over their activities, or some of them might fear the loss of their jobs as several positions might be deleted due to the upcoming change in the institute structure. In order to avoid this uncertainty, some institute members have already resigned from their positions.

Academic freedom at stake

The attempts of the government to restrict Hungarian academic freedom are not new. It started several years ago with many different acts that all drove the system in the same direction. For example, institutional autonomy was seriously cut due to the appointment of university leaders by the government; certain universities politically closer to the government have been receiving far more funding than others; lists of professors and academic intellectuals who are allegedly anti-government "Soros-agents" were published by pro-government media outlets and the free movement of students was reduced due to the fact that they have to pay back the fees of their education if they move abroad, etc.

The question lying ahead is how far an EU Member State can go in setting back fundamental values in its legal system and what the international community can do to prevent an outright democratic backsliding.

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Notes

[1] Judith Sargentini, 'Report on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)' <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0250+0+DOC+XML+V0//EN&language=en>.

[2] 'European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)' (n 1).

References

'European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)' 7 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN&language=EN#def_1_2>.

Judith Sargentini, 'Report on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)' <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0250+0+DOC+XML+V0//EN&language=en>.

R Kiener, Mr B Vermeulen and Mr D Farrington, 'Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Ducation' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)022-e>.

'2017. Évi XXV. Törvény a Nemzeti Felsőoktatásról Szóló 2011. Évi CCIV. Törvény Módosításáról - Törvények És Országgyűlési Határozatok' <https://mkogy.jogtar.hu/jogszabaly?docid=A1700025.TV> accessed 8 July 2019.

'Commission Refers Hungary to the European Court of Justice of the EU over the Higher Education Law' (*Europa.eu*, 17 December 2017) <http://europa.eu/rapid/press-release_IP-17-5004_en.htm> accessed 27 January 2019.

'Message from President and Rector Michael Ignatieff' (*Central European University website*, 17 December 2018) <https://www.ceu.edu/article/2018-12-03/update-ceus-move-vienna-future-students> accessed 27 January 2019.

'Commission Refers Hungary to the European Court of Justice of the EU over the Higher Education Law' (n 5).

'Decision of the EPP Political Assembly Regarding the EPP Membership of FIDESZ' (*EPP - European People's Party*, 20 March 2019) <https://www.epp.eu/papers/proposal-of-the-epp-presidency-to-the-political-assembly-regarding-the-epp-membership-of-fidesz/> accessed 15 July 2019.

Hungarian Academy of Sciences in Budapest [4]

CEU Vienna Campus Rendering [5]

'European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)' (n 1).

'MTA submitted suggestions for draft law amendment' (*MTA.hu*, 4 June 2019) <https://mta.hu/english/mta-submitted-suggestions-for-draft-law-amendment-109786> accessed 15 July 2019.

'In a letter to the PM, German scientific organizations have distanced themselves from Mr. Palkovics' (MTA.hu, 1 July 2019) <https://mta.hu/english/letter-to-pm-viktor-orban-109871> accessed 15 July 2019.

'Országgyűlési Napló' <https://www.parlament.hu/documents/10181/1569934/ny190702/bd270d69-70cf-71c3-5dec-7463c2e8b858>.

'Törvényjavaslat - A Kutatás, Fejlesztés És Innovációs Rendszer Intézményrendszerének És Finanszírozásának Átalakításához Szükséges Egyes Törvények Módosításáról T/6359.' <https://www.parlament.hu/irom41/06359/06359.pdf>.

Dezső Tamás Ziegler, 'It's Not Just About CEU: Understanding the Systemic Limitation of Academic Freedom in Hungary | Verfassungsblog' (*Verfassungsblog*, 26 March 2019) <https://verfassungsblog.de/its-not-just-about-ceu-understanding-the-systemic-limitation-of-academic-freedom-in-hungary/> accessed 15 July 2019.

Photographs

[1] George Soros, original title: George Soros al Festival dell'Economia di Trento, author: Niccolò Caranti, 3 June 2018, Wikimedia Commons, CC BY-SA 4.0., edits: photo cropped

[2] Viktor Orbán at the EPP EaP Leaders' Meeting, original title: EPP EaP Leaders'Meeting - 23 November 2017, author: European People's Party, 23 November 2017, Flickr, CC BY 2.0., edits: photo cropped

[3] Building of the Central European University, author: Dezidor, 2011, Wikimedia Commons, CC BY 3.0., edits: photo cropped.

[4] Hungarian Academy of Sciences in Budapest, original title: Budapest, Lipótváros, 1054 Hungary, author: Андрей Бобровский, 11 May 2015, Wikimedia Commons, CC BY 3.0

[5] CEU Vienna Campus Rendering, original title: quellenstrasse renderings (4), author: Central European University, 22 March 2019, Flickr, CC BY-NC-ND 2.0., edits: photo cropped

Poland

Section editor: Witold Płowiec

Lowering the retirement age of Supreme Court judges contrary to the European Union law

Hanna Wiczanowska

In June, the Court of Justice of the European Union rendered a judgment in the case, Commission v. Poland, stating that the lowering of the retirement age of judges of the Supreme Court remains contrary to EU law. Such practice infringes the principle of irremovability of judges as well as the principle of mutual trust.

Background of the case

In April 2018, the new Polish Law on the Supreme Court ('Law on the Supreme Court') entered into force, lowering the retirement age for Supreme Court judges to 65. The new age limit is effective from the date of entry into force of the Law, and also applies to judges appointed before that date.

Those judges who wish to continue active judicial service after the age of 65 must submit a declaration, indicating the desire to continue carrying out their duties, and a certificate, stating that their state of health allows them to serve. Such declaration is subject to authorization by the President of the Republic of Poland. Such regulation poses a significant threat of arbitrary decisions, as the domestic law does not provide any criteria of such authorization.

Subsequently, on the 2nd of October 2018, the European Commission initiated proceedings against Poland before the Court of Justice of the European Union (CJEU) for a failure to fulfill its obligations arising from EU law. The Commission considered that by lowering the retirement age and applying the new limitation to judges appointed to the Supreme Court before the respective law entered into force in April 2018, Poland infringed the second subparagraph of Article 19(1) of the Treaty on EU and Article 47 of the Charter of Fundamental Rights of the EU.

In November 2018, amendments to the provisions of the Law on the Supreme Court, repealing the previous regulations, were introduced. Nevertheless, from the perspective of the EU Commission, it was not legally certain whether these amendments eliminated the alleged violations of EU law.

Plaque at the entrance to the Supreme Court of Poland [1]

Poland's judicial crisis

The complaint of the European Commission and the analyzed judgment shall be perceived as an element of the broader democracy crisis, challenging the position of the judicial power within Poland's constitutional system, which affected the National Council of the Judiciary, the Supreme Court and the courts of general jurisdiction. In

European Commission Building - Berlaymont [2]

this context, it is vital to mention the opinion of the Venice Commission (formally the European Commission for Democracy through Law) of December 2017.

In the presented opinion, the Venice Commission recalls the CJEU judgment against Hungary, stating that a sudden lowering of the retirement age for judges violates the principle of equal treatment under EU law. Moreover, the Venice Commission observed that the situation when Polish judges are exposed to early retirement, without any judicial remedy at their disposal, is in contradiction to the right of civil servants' access to a court.

Furthermore, the complaint raised by the European Commission has not been the only matter examined by the CJEU regarding the Polish judiciary. Additionally, the Supreme Court, as well as the Supreme Administrative Court, have made a request for a preliminary ruling regarding the independence and current position of the National Council of the Judiciary. Legal doubts regarding the independence of the NCJ arose from the fact that its judicial members are elected by the Lower Chamber of Polish Parliament) and not by the representatives of the judicial power. The consequences of such a decision are far-reaching, as the National Council of the Judiciary has elected the Disciplinary Chamber of the Polish Supreme Court and the independence of such Chamber can also be questioned.

The ruling of the Court of Justice of the European Union

In the ruling held in June 2019, the CJEU stated that Poland infringed the EU law. Despite the fact that the organization of justice remains within the competences of Member State authorities, the compliance of such regulations with the obligations arising from EU law must be ensured. Under Article 19 of the Treaty on EU, Member States shall provide adequate remedies to ensure effective legal protection in the fields covered by EU law. Such provision is interpreted to require independence of *inter alia* the domestic Supreme Court. The CJEU underlined that freedom of judges from external interference or pressure requires implementation of certain guarantees which should provide appropriate protection to individuals who have the task of adjudicating disputes, including the guarantee against a removal from their office.

The CJEU observed that the application of the measure lowering the retirement age of Supreme Court judges is not justified by a legitimate objective and undermines the

principle of the irremovability of judges, which is essential for their independence.

The CJEU further noted that guarantees of impartiality of the judicial power require that the body concerned exercises its functions autonomously. From this perspective, according to the CJEU, the extraordinary procedure for the extension of the term of office of the Supreme Court judges beyond the prescribed retirement age does not satisfy such requirements. Such extension would be subject to the discretionary decision of the President of the Republic, as its adoption is not governed by any objective and verifiable criteria and may lack reasoning. In addition, the decision cannot be challenged in court proceedings.

By the virtue of the analyzed judgment, no financial sanctions were imposed on Poland as the regulations in question were repealed before the CJEU judgment. However, such change is only partial. The judges who took the position in the Supreme Court after the Law on the Supreme Court entered into force, will also retire at the age of 65, unless the President of the Republic of Poland will approve their declaration. Therefore, the Polish judiciary standards still remain contrary to the independence of judicial power principle. Such independence is also threatened in cases of the Polish National Council of Judiciary and Disciplinary Chamber of the Supreme Court, which is the subject of the case pending before the CJEU. Unfortunately, as the ruling party, Law and Justice, has the majority within the Parliament, major changes can hardly be expected.

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References

Case C-619/18, European Commission v. Poland from 24 June 2019

The Venice Commission Opinion on the Draft Act Amending the Act on the Supreme Court adopted by the Venice Commission at its 113th Plenary Session, 11 December 2017, Opinion No. 904 / 2017, CDL-AD(2017)031.

Case C-286/12, European Commission v. Hungary from 6 November 2012

European Court of Human Rights, Baka v. Hungary from 23 June 2016 [GC], no. 20261/12, ECHR 2016.

Photographs

[1] Plaque at the entrance to the Supreme Court of Poland, original title: Tablice przy wejściu do gmachu Sądu Najwyższego w Warszawie, author: Adrian Gryciuk, 10 November 2018, source: Wikimedia Commons, CC BY-SA 3.0 ., edits: photo cropped

[2] European Commission Building - Berlaymont, original title: Berlaymont building, European Comission, author: Stephane Mignon, derivative work: MagentaGreen, 13 April 2014, source: Wikimedia Commons, CC BY 2.0., edits: photo cropped

[3] The Venice Commission analyzes Poland's judicial reform, source: © Council of Europe, 8 December 2017, edits: photo cropped

The Venice Commission analyzes Poland's judicial reform [3]

Polish Constitutional Tribunal limiting the scope of the prohibition of discrimination

Julia Wojnowska-Radzińska

In June 2019, the Polish Constitutional Tribunal issued a judgment in which it indicated that Art. 138 of the Code of Petty Offences was partially incompatible with the Polish Constitution.

Art. 138 of the Code of Petty Offences states: "*A person who, in professional services, requests and charges for the provision of these services a payment excessive to the regular amount or intentionally, without a reasonable cause, refuses to provide a service that he/she is obliged to perform, is subject to a fine*". A constitutional revision of this regulation was initiated by Zbigniew Ziobro, the Minister of Justice and the Public Prosecutor General.

The decision of the Constitutional Tribunal

In September 2017, the Minister of Justice, Zbigniew Ziobro, made an application to the Constitutional Tribunal indicating *inter alia* that penalizing the refusal to provide services without a reasonable cause under Art. 138 of the Code of Petty Offences violated Art. 2 of the Polish Constitution.[1] The Constitutional Tribunal agreed with the Minister's reasoning. The Tribunal found that penalizing the refusal to provide services without a reasonable cause by a person who is obliged to perform them, does not meet the standards of Art. 138 of the Code of Petty Offences and, therefore, it violates Art. 2 of the Polish Constitution.

Furthermore, the Tribunal stated that the phrase, "without a reasonable cause," cannot be clearly defined as it belongs to the so-called "vague notions". The reporting judge, Mariusz Muszyński, pointed out that the trust of citizens in the state and the rule of law is violated through restricting the freedom of private entities to conclude contracts and imposing penalties for refusal to perform professional services. He also stressed that the freedoms limited by the challenged provision are no less important than protection against discrimination.

How did it start?

To understand the importance of this judgment and its consequences for anti-discrimination law in Poland, the case regarding the LGBT Business Forum Foundation

Minister of Justice Zbigniew Ziobro at press conference [1]

that strived to have its promotional materials printed in a printing shop in Łódź should be mentioned. In May 2015, the LGBT Business Forum Foundation ordered a roll-up banner with the organization's logo and its Facebook page address. However, the shop employee refused to print the poster, sending the LGBT Foundation an email in which he explained: "*I refuse to print a roll-up banner with the graphics I received. We are not contributing to the promotion of the LGBT movement by our work*". The organization notified the Ombudsman about the incident who reported the matter to the Police.

In February 2016, the Police forwarded the case to the District Court. The printer was accused of committing a petty offence contrary to Art. 138 of the Petty Offences Code, which prohibits an act of "*intentionally refusing to perform a service without a reasonable cause*". In July 2016, the District Court for Łódź-Widzew issued a penal order against the employee and imposed a fine of 200 PLN. At that time, the Minister of Justice, Zbigniew Ziobro, got involved in the case by issuing a statement criticizing the judgement. On his request, the District Prosecutor's Office in Łódź joined the proceedings. The case was examined once again by the District Court in Łódź, which confirmed the previous judgement.

However, the employee lodged an appeal to the Regional Court in Łódź, in March 2017. The Regional Court corroborated that the employee's refusal to make a banner was unjustified and hence, he failed to perform a service which formed his obligation under the contract. The Regional Court stated that every person has the right to come to a printing shop, order and be treated equally irrespective of the person's appearance, sexual orientation or affiliation. The judgment of the Regional Court was final.

The decision of the Supreme Court

In September 2017, the Minister of Justice, Z. Ziobro, lodged a cassation complaint to the Supreme Court against the judgment of the Regional Court. In June 2018, the cassation complaint was dismissed when the Supreme Court confirmed that no one should be discriminated against on the grounds of sexual orientation when accessing services. Thereby, the Supreme Court upheld a judgement issued by the Regional Court in Łódź, which ruled that the principle of equality before the law meant that the employee did not have the right to withhold services from the LGBT Business Forum.

It should be stressed that the Supreme Court recognized that the phrase, "reasonable cause," in Art. 138 of the Petty Offences Code, "*Encompasses also religious beliefs which means that when they are inconsistent with features and nature of a particular service, refusal of performing such service is permitted, even if these beliefs are contradictory with other values, including constitutional values, such as prohibition of discrimination*". At the same time, the Supreme Court explicitly recognized that individual characteristics of persons (e.g. religion, sexual orientation, race) could not be the basis for refusal to offer a service. In other words, any such refusal should be considered on a case by case basis. According to the Supreme Court, freedom of conscience and religion may sometimes be a legitimate reason for the refusal to perform a professional service while at other times, they could constitute a manifestation of unauthorised discrimination.

Opening Pandora's box

Without a doubt, the ruling of the Supreme Court can be acknowledged as a landmark case in Polish anti-discrimination law. The Campaign Against Homophobia, Poland's largest LGBT advocacy organization, perceived "*[t]he Supreme Court's sentence as a ground-breaking victory*". Art. 138 of the Petty Offences Code has played a very important anti-discriminatory role in the Polish legal system. According to this provision, a person providing professional services cannot deny access to a service that he/she is obliged to conduct merely due to a cli-

Illustration image [2]

Caryatid at the back of Supreme Court of Poland building [3]

ent's personal features, such as sex, age, race, nationality, disability, sexual orientation, etc.

However, taking into account the latest judgement of the Constitutional Tribunal, it seems that Poland has just moved backwards. Nevertheless, the judgment may lead to the opening of Pandora's box. Let's try to imagine a situation when different persons who perform professional services, for instance in a bakery, restaurant, shop, bank, etc. were refusing service to clients because of the colour of their skin, language, religion.

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Notes

[1] Article 2 of the Polish Constitution states: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

References

A ground-breaking sentence! The Supreme Court of Poland rules against discrimination of LGBT persons in access to service. Available at: https://kph.org.pl/a-ground-breaking-sentence-the-supreme-court-of-poland-rules-against-discrimination-of-lgbt-persons-in-access-to-service/

Judgment of the Supreme Court of 14 June 2017, No. II KK 333/17.

Sprawa drukarza z Łodzi – od drukarni do Trybunału Konstytucyjnego. Available at: https://kph.org.pl/sprawa-drukarza-z-lodzi-od-drukarni-do-trybunalu-konstytucyjnego/.

Photographs

[1] Minister of Justice Zbigniew Ziobro at press conference, original title: Konferencja premier Beaty Szydło i ministra sprawiedliwości, author: P. Tracz/KPRM, 3 March 2006, source: Flickr, Public Domain Mark 1.0., edits: photo cropped.

[2] Illustration image, original title: Rainbow, author: Benson Kua, 5 August 2010, source: Flickr, CC BY-SA 2.0., edits: photo cropped.

[3] Caryatid at the back of Supreme Court of Poland building, author: Wojciech Muła, 3 May 2009, source: Wikipedia, CC BY-SA 4.0., edits: photo cropped.

Polish criminal code amendment: politics v. procedures

Artur Pietruszka

In 2019, the Polish National Police published a report stating that 93% of Poles feel safe in their homes. Moreover, the crime rate has continued to plummet while the level of crime detection rose. In spite of the report, the government considered a major Criminal Code amendment a priority.

Amendment project and proposed changes

In May 2019, a governmental initiative to amend the Criminal Code was submitted to the Parliament. The main purpose of the bill was to extend application of extraordinary aggravation of penalties as well as to change the basic principles of imposition of penalties and penal measures. In a press release, a representative of the Ministry of Justice, which prepared the amendment, declared that the bill is aimed at "effective fight against crime, including pedophilia" and as a result of implementing the amendment "the criminals will finally start to be afraid".[1]

In the explanatory part of the bill, the Ministry of Justice cited three main reasons for the relevance of adopting the amendment: the necessity of enhancing the protection of health and life, current leniency towards the perpetrators and the necessity of adopting harsher penal measures towards sexual offenders.

The most important changes to the Criminal Code proposed in the amendment project were:

- harsher penalties for various types of crimes, including those committed unintentionally;
- implementation of a possibility of sentencing the perpetrator to life in prison without the possibility of conditional release;
- removal of the provision concerning the penalty of deprivation of liberty for 25 years – which has been an autonomous penalty in the Criminal Code – and the introduction of a penalty of deprivation of liberty that lasts no less than a month and no more than 30 years;
- extension of limitation periods, i.e. time limits in which crimes cease to be punishable.

Marcin Warchoł, Deputy Secretary of Justice [1]

Legislative procedures

According to the Standing Orders of the lower chamber of the Polish Parliament (Sejm), the implementation or amendment of the codes shall take place in a special legislative procedure. They specify that the periods between each reading of the project shall be prolonged. The first reading of the amendment of the code can take place no sooner than 30 days from the date of delivery of the bill to the members of Sejm (MPs). The second reading can take place no sooner than 14 days from the date of delivery of the report of the special commission to the MPs.

The discussed bill was submitted to the Sejm on the 14th of May 2019, and the first reading of the bill took place on the same day. The second and third readings were held on the 16th of May. The upper chamber of the Parliament (Senat) submitted its amendments to the bill on the 24th of May. The Senat amendments were accepted by the Sejm and the bill was finally adopted by the Parliament on the 13th of June.

Opinions concerning the bill

During the legislative proceedings various entities, including individual academics, the Supreme Court, the Bar and the Ombudsman have formed opinions concerning the bill. Arguably, the most complex opinion was prepared on the

20th of May by academics from Krakow Criminal Law Institute (KIPK).

Their analysis came to the following conclusions:

- the bill was not adopted in accordance with the Standing Orders of the Sejm and the procedure of amending codes, therefore the bill is unconstitutional;
- the implementation of a penalty of deprivation of liberty for life without the possibility of conditional release infringes the Polish Constitution and the European Convention of Human Rights (ECHR);
- the lack of intertemporal provisions, editorial and legislative errors, as well as the internal incoherence of the bill would actually lead to the mitigation of the criminal responsibility for some crimes, which is against the intentions of the government;
- the policy of harsh criminalization and punishment, which the bill would implement, infringes the principle of democracy and the rule of law;
- the implementation of changes may lead to legal chaos and destabilization of the Polish legal system.

On the 9th of June, after the Senat amendments, KIPK prepared another opinion, stating that in spite of the amendments, it is not possible to restore the legality of the bill, which is unconstitutional.

The opinions invoked an established case law of the Polish Constitutional Tribunal, which on numerous occasions declared that a bill may be unconstitutional solely for the reason that the legislative procedure did not meet the criteria stipulated by the provisions of the Constitution and Standing Orders. Moreover, the Constitutional Tribunal has highlighted the significance of the code implementation and the procedure of adoption of the amendment as well as the codes' importance in the legal system.

Regarding the penalty of deprivation of liberty for life, KIPK as well as JUSTICIA European Rights Network (a coalition of the European leading civil liberties organizations working on the right to a fair trial) called to withdraw the idea. The motion was backed by a consistent case law of the European Court of Human Rights, which ruled several times that such penalty is inhumane and infringes Article 3 of the ECHR.

Government's reaction and the academics' letter to the President of Poland

In response to the KIPK's opinion, the Ministry of Justice alleged that the opinion is "false" as the bill "in reality imposes harsher penalties". Therefore, the state should not tolerate lies that are aimed at impacting the citizens' confidence in the state.

"*We will sue KIPK lawyers as we cannot allow the society to be deceived by fake news*", the deputy Secretary of

Sejm [2]

Andrzej Zoll, Founder of Krakow Criminal Law Institute (KIPK) [3]

Justice, Marcin Warchoł, told the Polish Press Agency (PAP) on the 15th of June. Two days later, the Secretary of Justice, Zbigniew Ziobro, told PAP that there was no need to sue the academics. However, he did not refute the rest of the statement made by his deputy.

In a follow-up to the legislative procedures and the government reactions, 158 academics – lawyers from every major university in Poland specializing in criminal and constitutional law – formed an unprecedented initiative and wrote a joint letter to the President of Poland. The academics shared the views of the KIPK's opinion and stated that the amendment of the Criminal Code is fundamentally unconstitutional. Therefore, the academics urged the President to veto the bill.

On the 28th of June, the President announced that before signing the bill he would refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The Constitutional Tribunal, as of 15th July 2019, has not yet reached a verdict on this case. It should be noted that its ruling will strongly affect the human rights situation in Poland.

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Notes

[1] Ministry of Justice Press Release: <http://centrumprasowe.pap.pl/cp/pl/news/info/140360,25,ms-minister-zbigniew-ziobro-zaostrzamy-kary-za-pedofilie-i-jestesmy-w-tym-konsekwentni!-(komunikat)>, accessed: 14.07.2019.

[2] Marcin Warchoł, Press Release;<https://www.pap.pl/aktualnosci/news%2C469753%2Cwarchol-pozywamy-prawnikow-z-krakowa-bo-nie-mozemy-pozwolic-aby-oszukiwano>, accessed: 14.07.2019.

References

Rządowy projekt ustawy o zmianie ustawy - Kodeks karny oraz niektórych innych ustaw, druk sejmowy nr 3451 [Governmental project of Criminal Code amendment bill, Sejm paper no. 3451] <http://orka.sejm.gov.pl/Druki8ka.nsf/0/996CE307123D03FEC12583FA0069E8F2/%24File/3451.pdf>, accessed: 14.07.2019.

Michał Królikowski, Krzysztof Szczucki, 'Komentarz do art. 40' [Commentary to article 40] in Leszek Bosek, Marek Safjan (eds.) *Konstytucja Rzeczypospolitej Polskiej*. Tom I. Komentarz do art. 1 – 86 [Constitution of the Republic of Poland. Volume I. Commentary to articles 1-86], CH Beck, 2016.

Opinia dotycząca uchwalonej przez Sejm w dniu 13 czerwca 2019 r. ustawy o zmianie ustawy Kodeks karny i niektórych innych ustaw [Opinion regarding Criminal Code amendment bill of 13th June 2019] <https://www.rpo.gov.pl/sites/default/files/Opinia%20%20o%20nowelizacji%20Kk%20158%20prawnik%C3%B3w%20ze%20%20wszystkich%20%20o%C5%9Brodk%C3%B3w%20naukowych%2C%2023%20czerwca%202019.pdf>, accessed: 14.07.2019.

Krakowski Instytut Prawa Karnego [Kraków Criminal Law Institute], Opinia w sprawie uchwalonej przez Sejm Rzeczypospolitej Polskiej na 81. posiedzeniu w dniu 16 maja 2019 r. ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw [Opinion regarding Criminal Code amendment bill adopted by Sejm on its 81st sitting on 16th May 2019] <https://kipk.pl/dokumenty/kipk_opinia_nowelizacjakk_2019.pdf>, accessed: 14.07.2019.

JUSTICIA European Rights Network Statement <http://www.hfhr.pl/wp-content/uploads/2019/06/Justicia-Statement-Jun-14-2019.pdf>, accessed: 14.07.2019.

Photographs

[1] Marcin Warchoł, Deputy Secretary of Justice, original title: 46. posiedzenie Sejmu - pierwszy dzień, author: Sejm RP/Rafał Zambrzycki, 18 July 2017, source: Flickr, CC BY 2.0., edits: photo cropped.

[2] Sejm, original title: 41. posiedzenie Sejmu - drugi dzień, author: Sejm RP/K. Białoskórski, 11 May 2017, source: Flickr, CC BY 2.0., edits: photo cropped.

[3] Andrzej Zoll, Founder of Krakow Criminal Law Institute (KIPK), original title: Professor Andrzej Zoll in the Sejm, author: Adrian Grycuk, 9 September 2015, source: Wikimedia Commons, CC BY-SA 3.0 PL., edits: photo cropped.

[4] Polish Constitutional Tribunal, original title: Entrance to the building of the Polish Constitutional Tribunal, author: Adrian Grycuk, 22 January 2016, source: Wikimedia Commons, CC BY-SA 3.0 PL., edits: photo cropped

Polish Constitutional Tribunal [4]

Slovakia

Section editor: Erik Láštic

Slovak democracy after the 2018 murder of the journalist, Ján Kuciak

Erik Láštic

The murder of the Slovak investigative journalist, Ján Kuciak and his fiancée, reopened the debate about the role of formal transparency mechanisms in Slovakia. The aftermath of the murder saw the largest public protests in Slovakia since 1989 and led to the resignation of Prime Minister Robert Fico, Interior Minister and Police President.

The situation in Central Europe and transparency mechanisms in Slovakia

Slovakia is one of the leaders amongst post-communist countries in formal transparency mechanisms that allow media, NGOs, opposition, and individuals to use IT systems to inform about, criticize, or investigate state affairs. The mechanisms range from wide-reaching legislation on freedom of access to information, imposing an obligation on state authorities to publish all financial contracts online, to a wide array of public databases that offer information on Slovak businesses, such as the most recent registry of public sector partners.[1]

In an era of democratic backsliding across the Central European region, we are witnessing omnipotent executives (e.g. in Hungary and Poland), oligarchs running the country (Czech Republic), slow erosion of free press and repeated attempts to destabilize and weaken the judicial independence. In this context, the formalized mechanisms for political accountability are unable or sometimes unwilling to question those in power.[2] Part of it has to do with parliamentary designs that formally grant the ultimate accountability power to the parliament over the executive but, in reality, are often reduced to rubber-stamping bodies for the executive's agenda.

EU membership deepens these problems. For example, by the lack of formal oversight or, as in the case of Slovakia, by the unwillingness of the parliament to use its

Stickers commemorating the murdered couple - Ján Kuciak and Martina Kušnírová [1]

EU oversight powers in a manner envisaged in the 2004 constitutional law on cooperation between the parliament and the government in EU affairs.

The technological revolution, together with the expansion of transparency laws, fundamentally changed our ability to look at the government. It created a world of "ambient accountability" in which "connections between many different elements are crucial in encouraging greater transparency".[3] It is a complex structure of formal and informal elements combined with the ability to surveil what the state does, either from the national, or international level.

Slovak politics and the 2018 murder of journalist, Ján Kuciak

On the last Tuesday of February 2018, dozens of reporters gathered at the government's headquarters in Bratislava. The Prime Minister of Slovakia, Robert Fico,, the Interior Minister Robert Kaliňák, and the President of the Police Force, Tibor Gašpar, called for an emergency press brief-

A memorial for Ján Kuciak and Martina Kušnírová [2]

ing to address the events that shocked Slovakia. During his speech, Prime Minister Robert Fico placed one million euros in cash on a table in front of the microphones. The sum was meant to be a reward for any information leading to the identification of the murderer of the Slovak investigative journalist, Ján Kuciak and his fiancee Martina Kušnírová, whose bodies had been found the day before in a small village in Southern Slovakia. Robert Fico also suggested that he was informed about the progress of the whole investigation, raising media's suspicion that the top Slovak politician and his allies were directly influencing the investigation.

Ján Kuciak was a rising star in Slovak journalism who used public data and laws guaranteeing free access to information to investigate cases of high-level corruption, influence peddling and parallel power structures in Slovakia, including Slovak oligarchs and organized crime. The initial theory that dominated the debates in Slovak media in the aftermath of the murders pointed to the connection between Ndrangheta, a mafia gang from Calabria, and EU subsidies in Slovak agriculture, a topic that was under investigation by Ján Kuciak

In the following weeks, the media, relying heavily on public databases and legislation on free access to information, published a series of articles that discovered connections between Robert Fico, and individuals close to the Italian organized crime. The first individual, Viliam Jasaň, was the secretary of the Security Council of the Slovak Republic and had a top-secret security clearance. Mária Trošková, a former staffer to Mr. Jasaň while he was a member of parliament, was introduced to Robert Fico by Mr. Jasaň and later served as a personal assistant to the Prime Minister. Both Jasaň and Trošková were forced to resign due to former business relations with Antonio Vadala, an alleged head of the Ndrangheta operation in Slovakia.[4]

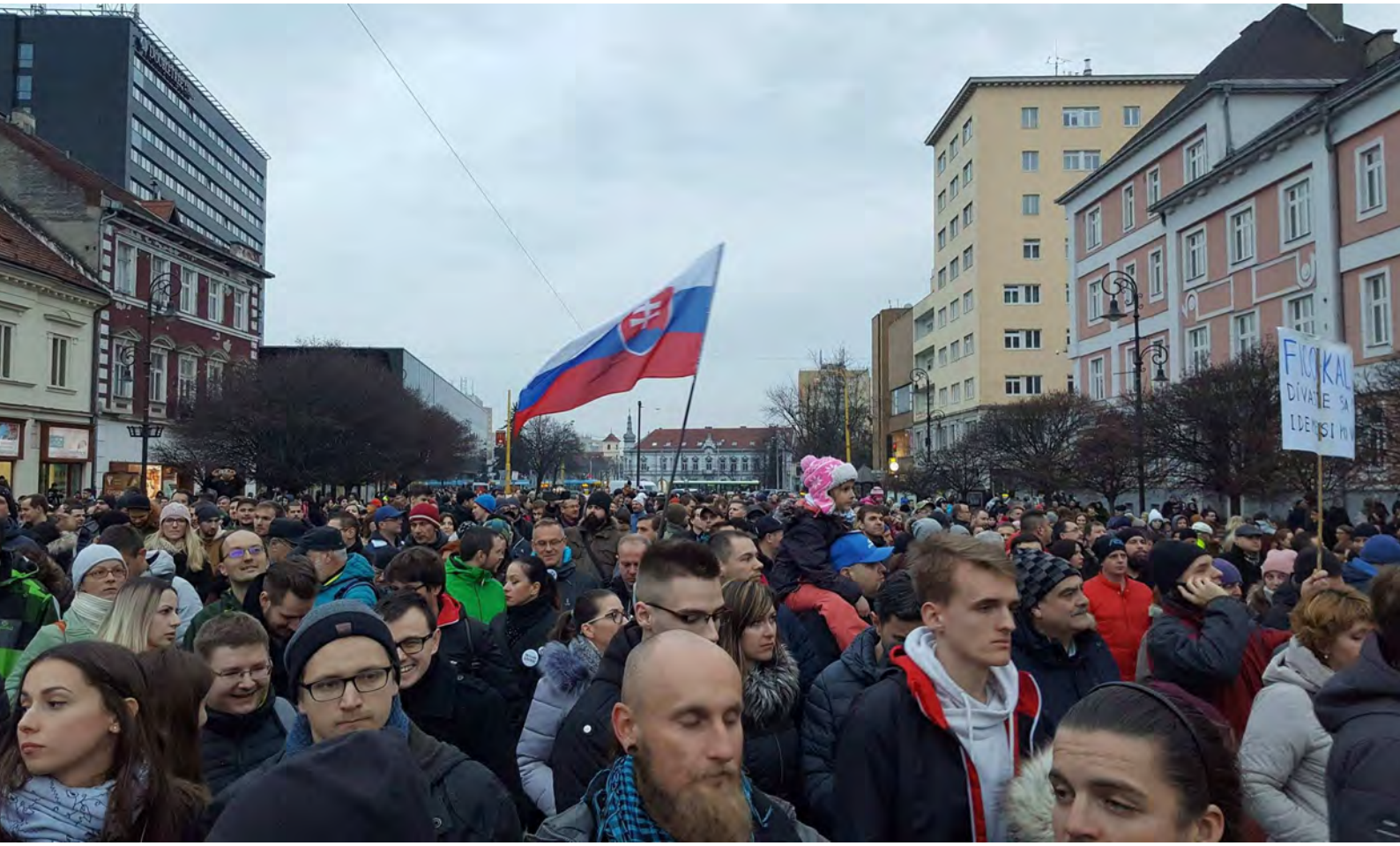
Subsequent reporting, combined with a formal investigation by the Prosecutor General, Jaroslav Čiznár, pointed to the unwillingness of the state authorities in the eastern part of Slovakia to investigate the activities of local and international businessmen in the agricultural business. The authorities included the police, local prosecutors and judges.

Some of the in-depth reporting into the agricultural business and its practices in eastern Slovakia pointed to the weakened internal legitimacy of the state apparatus.[5] Here, the monopoly of the legitimate use of physical force was challenged by local elites that were supposed to represent the state, but instead helped to cover, or in some cases were organizers of, systemic criminal schemes in connection to EU subsidies to farmers. Together with the largest public protests in Slovakia since 1989, the incident led to the resignation of Prime Minister R. Fico (replaced by Mr. P. Pellegrini), the Minister of the Interior and the Police President.

Outcomes of the police investigation and Mr. Kočner

In autumn 2018, four people were officially charged with the murder of the journalist and his fiancée, including a former policeman and an army veteran.[6] Based on a publicly available report by the police, released upon a free access to information request filed by the media,

Protest in response to the murder of the young couple [3]



Protest in response to the murder of Ján Kuciak and Martina Kušnírová [4]

the collected evidence pointed to the alleged organizer of the murder, a well-known Slovak businessman.[7] Marián Kočner personifies an influence peddler whose close political and law enforcement ties saw him run a controversial business based on information access, intimidation, value added tax return schemes and forced acquisitions of targeted businesses.

Despite a long trail of investigative reports, some of them written by Ján Kuciak, Slovak authorities did not take the information seriously for a long time. This raised a reasonable suspicion that Mr. Kočner used his close connections in politics and law enforcement to secure his impunity.

The alleged involvement in the murders is not the first controversy related to Marián Kočner. In 2011, there was a recorded and published a video from his kitchen, where he met the then Chairman of Slovak Parliament, Richard Sulík. What was the topic of the conversation? The upcoming election of the new Prosecutor General in the parliament.

Marián Kočner also published a video online of one of the leading investigative reporters who fell drunk on the streets of Bratislava. The footage was taken by a crew hired by Kočner and was tasked to surveil several Slovak investigative journalists reporting on Kočner's business activities. The surveillance team was led by Peter Tóth, a former star journalist who became an intelligence officer and was later promoted to one of the directors of the Slovak intelligence agency. Since 2005, Peter Tóth was working as a freelancer offering security and PR services. The findings of the team were amplified by alternative media websites and social media.[8]

To add the last piece to the mosaic of the intertwined circles of politics, business, and shady figures, for the last six years, the former Prime Minister Robert Fico rented a luxurious apartment owned by another businessman with questionable relations to politicians. The apartment was directly neighbouring a residence bought by Kočner. through one of his companies.[9]

Legacy of the young journalist's life

Ján Kuciak was one of the leaders in a new type of investigative reporting that uses publicly available databases to uncover stories about abuse of public funds and corruption. Most of the cases that were published by him and other

Slovak media were not followed by police investigations, actions of prosecutors or court decisions.

The murder of Ján Kuciak opened the window of opportunity and allowed for both political and criminal accountability that was not possible before the murder. This ambient accountability involved both domestic actors, including the media, NGOs, political parties, and the Slovak public, and international actors, such as the European Anti-Fraud Office (OLAF) that announced an investigation into the alleged abuse of EU subsidies or a formalized international cooperation with Europol and Eurojust related to the investigation of Kuciak's murder.

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Photographs of the murdered couple - Ján Kuciak and Martina Kušnírová [5]

Notes

[1] See Register partnerov verejného sektora [The registry of public sector partners] https://rpvs.gov.sk/rpvs/

[2] This article defines accountability as a "relationship between the actor and the forum" in which "actor is or feels obliged to inform about his or her conduct" while the forum has the power to interrogate or question the actor and make them face consequences (Bovens, 2010).

[3] Aldrich, Richterová, 2018, see below.

[4] *Slovak Spectator,* With Ján Kuciak, we got to the Mafia through Trošková, 28/02/2018, available at: https://spectator.sme.sk/c/20770913/valcek-interview-with-jan-kuciak-we-got-to-the-mafia-through-troskova.html

[5] See a series of long-form reports by *Dennik* N, e.g. 07/03/2018, Teraz na východe: hľadal som taliansku mafiu, našiel som slovenskú. [Once Upon the Time in the East: I was looking for Italian Mafia, but found a Slovak one.], available at: https://dennikn.sk/1053128/teraz-na-vychode-hladal-som-taliansku-mafiu-nasiel-som-slovensku-reportaz/

[6] *Slovak Spectator,* Kuciak murder: Former soldier and former investigator arrested, 28/09/2018. Available at: https://spectator.sme.sk/c/20925279/kuciak-murder-former-soldier-and-former-investigator-arrested.html

[7] *Slovak Spectator,* Court document: Those accused in Kuciak's murder wanted more money, 09/10/2018. Available at: https://spectator.sme.sk/c/20933724/court-document-those-accused-in-kuciaks-murder-wanted-more-money.html

[8] *Slovak Spectator,* Former journalist-turned-spy spied on journalists for Kočner, 22/10/2018, available at: https://spectator.sme.sk/c/20943776/dennik-n-former-journalist-turned-spy-spied-on-journalists-for-kocner.html

[9] See report from Slovak media, *Plus7Dni*, Nebezpečný sused! Tuší Fico, vedľa koho vlastne býva? 15/04/2016, accessed 29/10/2018, https://plus7dni.pluska.sk/domov/video-nebezpecny-sused-tusi-fico-vedla-koho-vlastne-byva

References

Richard Aldrich a Daniela Richterová, 'Ambient accountability: intelligence services in Europe and the decline of state secrecy' [2018] *West European Politics*, (4), 1003-1024

Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism'[2010], West European Politics, (5), 946-967

Photographs

[1] Stickers commemorating the murdered couple - Ján Kuciak and Martina Kušnírová, original title: #niejenámtojedno, author: Peter Tkac, 23 March 2018, source: Flickr, CC BY-SA 2.0., edits: photo cropped.

[2] A memorial for Ján Kuciak and Martina Kušnírová, original title: A memorial for Ján Kuciak and Martina Kušnírová on SNP Square in Bratislava, Slovakia, author: Matej Grochal, 4 March 2018, source: Wikimedia Commons, CC BY-SA 4.0. , edits: photo cropped.

[3] Protest in response to the murder of the young couple, original title: Protest at the SNP Square on 9th of March 2018 in response to the murder of Ján Kuciak and Martina Kušnírová, author: Slavomír Frešo, 9 March 2018, source: Wikimedia Commons, CC BY-SA 4.0., edits: photo cropped.

[4] Protest in response to the murder of Ján Kuciak and Martina Kušnírová, original title: Protest v Košiciach, 9. marec 2018, author: Bubamara, 9 March 2018, source: Wikimedia Commons, CC BY-SA 4.0., edits: photo cropped.

[5] Photographs of the murdered couple - Ján Kuciak and Martina Kušnírová, original title: Sviečky a kahance pod sochou sv. Jána Pavla II. ako celonárodná pietna spomienka na zavraždených (Ján Kuciak a Martina Kušnírová), author: Ing.Mgr.Jozef Kotulič, 10 March 2018, source: Wikimedia Commons, CC BY-SA 4.0., edits: photo cropped.

To watch and to be watched: activities of far-right groups in Slovakia

Radka Vicenová

Surveillance may occur in rather subtle and non-technological forms. It often occurs outside the realm of official institutions, especially if far-right groups are involved. As a consequence, it can be restrictive towards human rights and liberties, all in the name of public security and safety.

What is surveillance?

Surveillance means to "watch over" and refers to the "*focused and purposive attention to object, data or persons*".[1] The motivation behind surveillance is power control, as the possession of information also means to "have the upper hand". Watching and acquiring information is just one step away from control and inspection and can easily be further (mis)used for intimidation and punishment.

Watching others in various contexts is, of course, an inevitable part of our everyday lives; parents watch over their children, teachers watch over their students, friends watch their other friends on social media. Still, the concept of surveillance as such has been mostly associated with technology, digital media and, most importantly, with security. A rapidly increasing number of CCTV cameras overseeing public space and the continuous implementation of new security measures at airports and borders have been introduced to monitor and identify potential violators of the public order. It is also an example of a security theatre, offering a feeling of safety for the citizens in exchange for some of their rights and liberties.

In response to criminality and terrorism, citizens are becoming subject to increased state surveillance, which they uncritically accept for the sake of their safety. Slovakia, for instance, increased the number of policemen in the streets as a reaction to terrorist attacks in Europe in 2015. Moreover, in 2016, they built a military fence at the Slovak-Hungarian border to protect against refugees. Additionally, they enforced the position of the police and secret service at the expense of certain civil rights as a part of counter-terrorism legislation.

Marian Kotleba [1]

Who can be the watcher?

The above examples all have one thing in common, that the surveillance comes from a position of authority. However, the discussion of security vs. liberty should receive greater

attention. Particularly when concerned and frustrated citizens decide to take justice into their own hands and protect their safety that the state authorities fail to guarantee.

Such groups do not have the same authority and legitimacy that state institutions have, but a part of their goal is to achieve such legitimacy, namely through winning the trust and support of citizens. Across Europe (although not exclusively), this has been a field where far-right parties have started to mobilize their supporters. Based on the narrative of failing security structures, the groups take action in a form that strongly resembles the activities of the police or armed forces. These activities can include patrolling, monitoring and controlling public spaces.

Far-right paramilitary groups in Slovakia, such as Slovak Conscripts (Slovenskí Branci) and Kotleba – People's Party Our Slovakia (Kotleba – Ľudová strana Naše Slovensko), follow similar initiatives. For instance, the Hungarian Guard and the branch of Soldiers of Odin in Canada have tried to place official security forces in the public space instead of the traditional police force. The biggest concern regarding such groups, apart from being far-right, anti-democratic and anti-establishment, is primarily the fact that they (try to) put themselves in the position of protecting public order, even without having the legitimacy and authority to do so. This is in direct contradiction to the rule of law principle, which is about the monopoly of power and legitimate use of force.

Moreover, in the case of Slovak far-right vigilantes (seen patrolling the streets and trains), one can become a target of surveillance at any point in time. Unlike official state security forces, there is no check and balance controlling the system in place. As Michel Foucault emphasised in his theory of automatic functioning of power, visibility may function as a trap, because the knowledge of being permanently watched, can, in the end, substantially alter one's behavior and perceptions.

Good or bad guys?

As indicated, far-right vigilante groups, such as Slovak Conscripts and People's Party Our Slovakia, go against democratic principles and the rule of law in many ways. However, not all vigilantes necessarily do. Vigilantism as a form of informal policing can go against state principles while reinforcing them on other occasions. The concept of taking justice into one's own hands is present in both.

With the digital and social media boom, ordinary citizens acquired more opportunities to watch over one another, now without the necessity of physical presence. The digitalization of vigilantism, i.e. the policing in the online space, means that instead of a physical threat or violence, the main form of punishment is making an individual person visible in an unwanted and often also harmful way (for instance naming and shaming) across social media platforms.

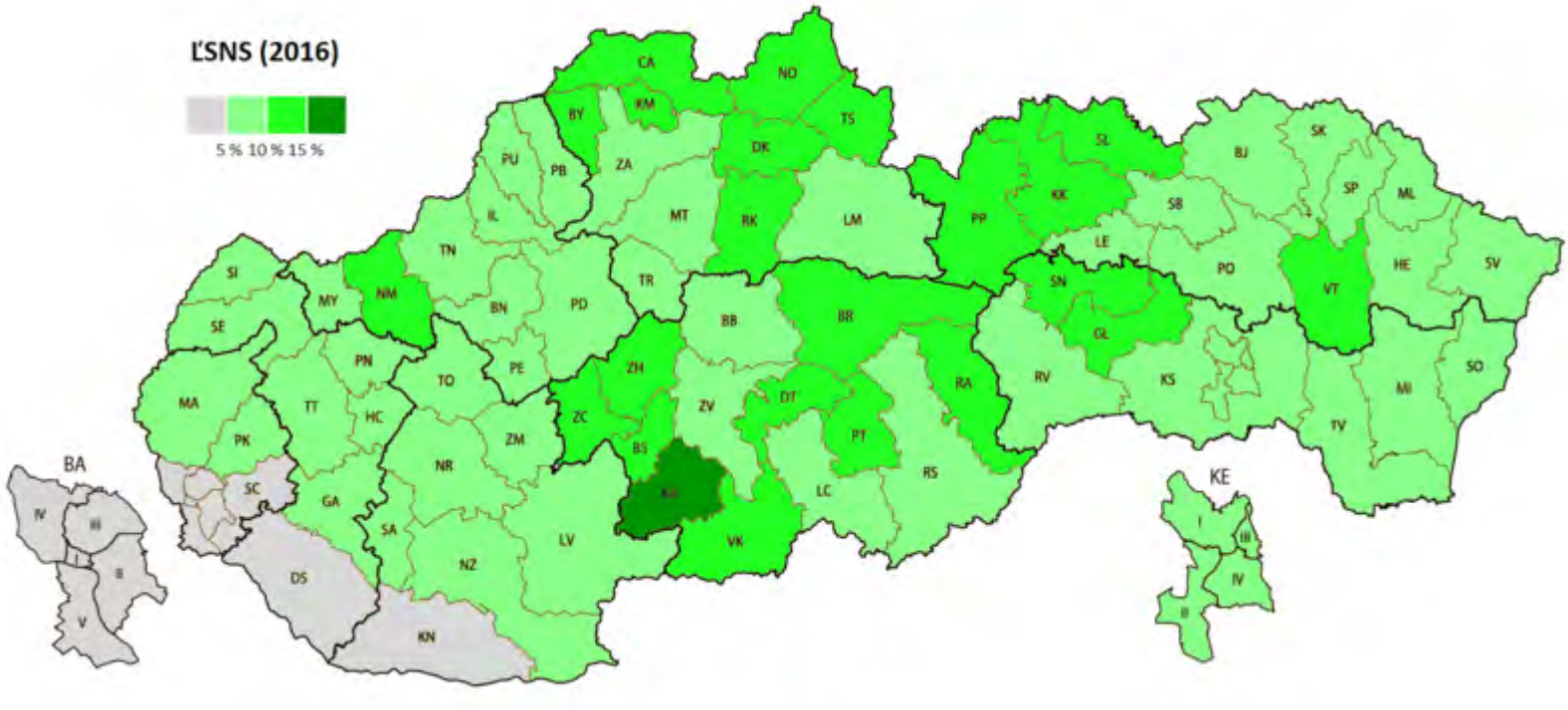
Slovakia has seen a number of emerging initiatives of such kind, mostly in reaction to increasing support for far-right movements in the country and the spread of disinformation and propaganda. This includes social media pages that ridicule and shame members and supporters of far-right movements (Naše Slovensko, Zomri, etc.), or debunk hoaxes and expose their disseminators or trolls (blbec.online, konspiratori.sk, etc.). This refers to an interesting trend of a strong-minded and active civil society that, although not going against the state and its principles or values, is still looking for its own way to protect their community and punish targets.

Beware of self-enforced justice

As many recent civic initiatives show, "to watch over" can refer to various forms and techniques and does not necessarily require technology. Even though the technological boom undeniably offers more accessible and easier ways to surveil one another, there are groups that still rely on conventional vigilante practices and the wider societal and political consequences of this kind of surveillance activity should be given more attention.

On the other hand, it should be noted that not all vigilante practices go against the state and its establishment. For example, certain social media-based vigilante groups may be considered as the manifestation of the

Illustration image [2]



People's Party Our Slovakia's 2016 election results [3]

self-aware, strong-minded and responsible citizen, taking responsibility for the safety and well-being of their community into their own hands. However, the idea of self-enforced justice should always be approached with great caution.

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Illustration image [4]

Notes

[1] Lyon 2010, see below.

References

Daniel Trottier, '*Digital Vigilantism as Weaponization of Visibility*' [2017] Philosophy & Technology, 30(1).

David Lyon, 'Surveillance, Power and Everyday Life' in Phillip Kalantzis-Cope and Karim Gherab-Martin (eds.), *Emerging Digital Spaces in Contemporary Society* (Palgrave Macmillan 2010)

Les Johnston, '*What is vigilantism*?' [1996] The British Journal of Criminology, 36(2).

Michel Foucault, *Discipline and Punish: The Birth of the Prison.* (Pantheon Books 1977)

Photographs

[1] Marian Kotleba, original title: Marian Kotleba na mítingu Ľudová strana Naše Slovensko v Detve, author: Jan.kroslak, 15 May 2010, source: Wikimedia Commons, CC BY-SA 4.0., edits: photo cropped.

[2] Ilustration image, author: PhotoMIX-Company, 3 April 2016, source: Pixabay., edits: photo cropped.

[3] People's Party Our Slovakia's 2016 election results, original title: Mapa podielu platných hlasov pre stranu ĽSNS v percentách v parlamentných voľbách 5. marca 2016 na Slovensku, author: Mikulas1, 28 February 2017, source: Wikipedia, CC BY-SA 4.0

[4] Illustration image, author: Thisabled, 22 May 2018, source: Pixabay., edits: photo cropped.

Digital surveillance and privacy: battle for telecommunications metadata in Slovakia

Martin Kovanič

Telecommunications metadata pose a huge opportunity for digital surveillance of citizens. In the past years, there has been a push for more privacy protection from the European Union. What is the situation of the metadata and the possibility of its use in Slovakia?

The development of information and communication technologies (ICTs) in the past decade has offered huge opportunities to monitor the behavior and movement of citizens. The access of the security apparatus to such data has opened the debate to the extent of its lawfulness, particularly when it interferes with the rights and freedoms of individuals.

Discussions of privacy in modern ICTs draw focus on the content of communications which are put under substantive and procedural legal safeguards. Access to communications, such as wiretapping, has always been more difficult than access to communications metadata. Since metadata encompasses detailed information which enables easier identification of individuals, their abuse poses a risk to our privacy.

Metadata and their interference with the right to privacy

In the digital era, everyone produces and leaves behind an identifiable and reconstructible digital footprint. This footprint is not only our personal data and communications, but also communications metadata. Metadata are information which further specifies the 'real' data. In other words, it is information that makes sorting and analyzing the real data easier.

Telecommunications metadata is the information that illuminates who made a call, to whom as well as where, and when the call was made. At first glance, these details do not seem to be sensitive, especially in comparison with the content of calls or messages. Metadata are often presented as harmless, but their closer analysis provides a wealth of information about the life of individual users.

In 2017, researchers Mayer, Mutchler and Mitchell published their research on privacy properties of telephone

The EU has become an important player in the protection of citizens' digital privacy [1]

metadata, in which they identified several privacy-related concerns, such as the possibility of re-identification. Phone numbers can be identified merely from the possession of metadata and their pairing to publicly or commercially available databases. Even imprecise and sparse metadata can be used to predict home location, relationships and other sensitive information.

The prediction power increases further if the phone has a mobile data plan. The device connects to the Internet constantly to download emails and check for news and updates for a variety of applications. This activity is stored and combined with other information, including time, or phone number. This creates a constant digital footprint of the movement of the phone and provides vast surveillance opportunities.

Telecommunications metadata retention in Slovakia

The responsibility to store metadata in the EU was given to the telecommunication companies with the passing of the Data Retention Directive (Directive 2006/24/EC) in 2006. Its aim was to harmonize regulations in the retention of traffic and location metadata existing in the member states in order to support the fight against serious crime, as a reaction to the Madrid and London terrorist attacks.

In Slovakia, the directive was transposed swiftly into the legal system with the amendment (654/2007 Coll.) to the

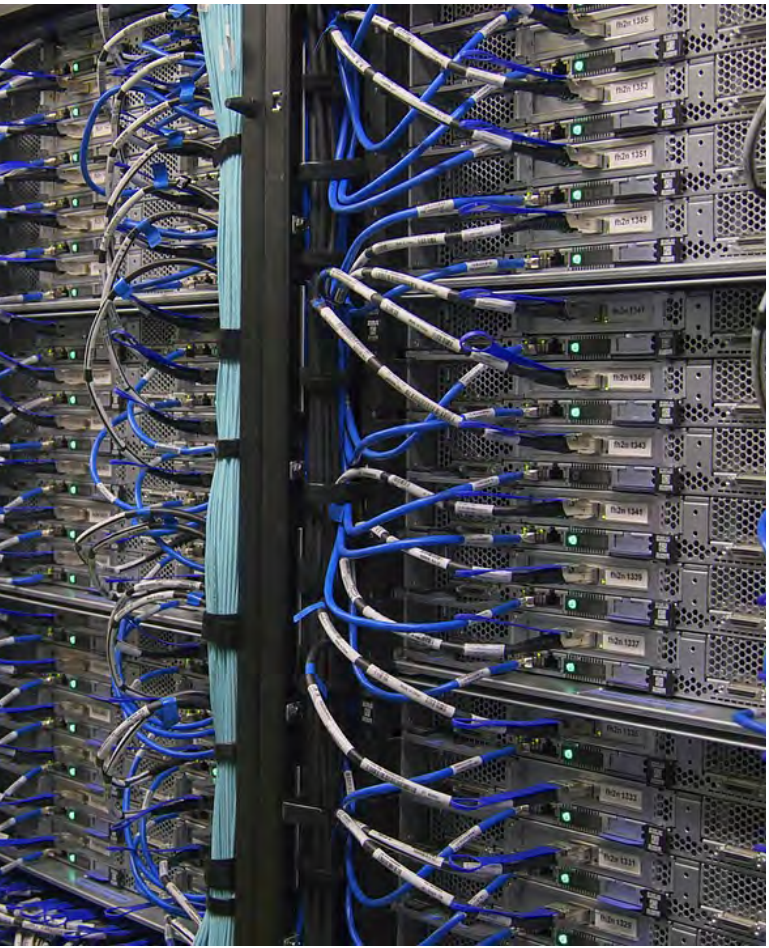
Electronic Communications Act of 2003. At the time, the introduction of the data retention policy did not trigger any reaction from the civil society or the general public. The only criticism was raised by the telecommunication companies that considered it as bringing additional costs for their business.

In Ireland and Austria, the national data retention legislation was petitioned at constitutional courts on the basis of its infringement of fundamental rights shortly following its transposition. Both respective courts decided that lawfulness could not be evaluated until the validity of the Directive itself was examined. Both cases were then brought to the European Court of Justice (ECJ), which combined them into one case, *Digital Rights Ireland and Kärntner Landesregierung and others*, in 2013.

In Slovakia, a similar petition to the constitutional court was prepared and promoted in 2011 by the legal research center, European Information Society Institute. Two years later, it was endorsed by the Freedom and Solidarity party and data retention provisions were petitioned before the Slovak Constitutional Court.

The decision of the ECJ of April 2014 eventually invalidated the Directive. The ECJ argued that despite its legitimate purpose, data retention practice constituted an infringement of fundamental rights. The Directive not only failed to meet the principle of proportionality, but also did not provide safeguards regarding the protection of data as well as the right to privacy.

Illustration image [2]



A provisional measure of the Slovak Constitutional Court followed shortly. It suspended the effectiveness of the data retention provisions of the Electronic Communications Act. The final ruling, invalidating data retention, was decreed in April 2015. Retention practices were found to be invasive of the right to privacy. The main problem was an unprecedented extent of retained data of a large number of citizens using ordinary means of communication, which could have caused a feeling of constant surveillance in the public.

Searching for a new model of data retention in Slovakia

An amendment (No. 247/2015 Coll.) to the Electronic Communications Act was adopted in September 2015. It mostly regulated high-speed electronic communications networks, but it also imposed some limits on the possibility of the data retention. The processing of location metadata was only allowed with the explicit consent of the user or after the metadata had been anonymized.

The main reaction to the ruling of the Constitutional Court was the adoption of the amendment (No. 397/2015 Coll.) to the Criminal Code in December 2015. It stipulates that police force and intelligence services can only access metadata for the investigation of the most serious crimes or terrorism. Their access needs to be approved by a court and specified in its scope and length.

The end of 2015 also brought a passing of the anti-terrorist legislation in a fast-track procedure. It included the amendment to the Criminal Code (No. 444/2015 Coll.), which among other changes, enabled police access to metadata from telecommunication companies' databases in cases of the search for a wanted or missing person. In the former case, a judicial warrant is required.

Additionally, Slovak Information Service (SIS) unsuccessfully tried to gain more unrestricted access to metadata. The first attempt occurred at the beginning of 2015 with the proposal of the new intelligence infrastructure. The second attempt was related to the proposal of the new law on police forces in May 2018. One of the provisions added during the legislative process was the ability of the SIS to access the so-called loose metadata, which are freely

European Court of Justice [3]

transmitted in the air and unencrypted. Both tries failed due to political and civil society resistance.

New regulations but no oversight

The decisions of the ECJ and the Slovak Constitutional Court ended the practices of mass retention of communications metadata. Access by the security apparatus is now allowed on a much smaller scale, has become subject to a judicial warrant and must follow stricter criteria regarding the scope, length of their retention and the obligation of their destruction.

This means that the right to privacy of Slovak citizens is under more safeguards. However, there is still room for improvement. The Electronic Communications Act introduces an obligation of law enforcement agencies to prepare a report on the control of acquisitions of metadata and to have it discussed in the Parliament. Despite these requirements, it has not yet taken place. Therefore, even the minimal parliamentary control of the use of metadata by the police and intelligence is not functional.

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References

247/2015 Z.z. Zákon z 22. septembra 2015, ktorým sa mení a dopĺňa zákon č. 351/2011 Z.z. o elektronických komunikáciách v znení neskorších predpisov a o zmene a doplnení niektorých zákonov.

397/2015 Z.z. Zákon z 13. novembra 2015, ktorým sa na účely Trestného zákona ustanovuje zoznam látok s anabolickým alebo iným hormonálnym účinkom a ktorým sa menia a dopĺňajú niektoré zákony.

444/2015 Z.z. Zákon z 21. decembra 2015, ktorým sa mení a dopĺňa zákon č. 300/2005 Z.z. Trestný zákon v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony.

Judgment of the Court (Grand Chamber) ECLI:EU:C:2014:238, 8. April 2014. Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others.

Mayer, J., Mutchler, P., and Mitchell, J.C. (2016). 'Evaluating the Privacy Properties of Telephone Metadata.' *Proceedings of the National Academy of Sciences*113(*20)*: 5536-5541.

Nález Ústavného súdu Slovenskej republiky PL. ÚS 10/201478, 29. Apríl 2015.

Photographs

[1] The EU has become an important player in the protection of citizens' digital privacy, author: TheDigitalArtist, 12 March 2018, source: Pixabay, edits: photo cropped.

[2] Illustration image, author: dlohner, 24 June 2017, source: Pixabay, edits: photo cropped.

[3] European Court of Justice, original title: European Court of Justice (ECJ) in Luxembourg, author: Cédric Puisney, 18 November 2006, source: Wikimedia Commons, CC BY 2.0., edits: photo cropped.

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