

Czech Republic Human Rights Review



Dear readers,

The Czech Centre for Human Rights and Democracy is pleased to present a new issue of the Czech Republic Human Rights Review, which examines the year of 2017.

In 2017 in the Czech Republic, we celebrated a 25-year anniversary of the renewed constitutional judiciary, which gave Adam Blisa and Michal Oščípovský the opportunity to take stock of the elapsed quarter century and possibly look towards the future as well. Adam Blisa then continues with an article focusing on the fact that the constitutional judiciary was a topic in 2017, not only in the Czech Republic, but as a result of the changes in Poland and Hungary, in all of Europe.

Nowadays, it is quite clear that we find ourselves in an era where the most precious object is information. That is reflected in the selection of the following three articles that have to do with the providing of information, or rather with the refusal thereof. Laura Haiselová offers a description of developments on the right to information, Eva Drhlíková

describes a European Court for Human Rights' case concerning the use of classified information and Šárka Dušková discusses the possibility of a state not to reveal such information in specific cases.

Furthermore, Nela Černotová informs that the Czech Republic adopted its own National Action Plan on Business and Human Rights and brings a detailed overview of the document.

Unfortunately, criminal law topics were also relevant in the Czech Republic in 2017. In some areas evidently, we are quite behind the modern world as evidenced by public opinion research on the topic of sexual violence that is analysed by Kamila Abbasi. Criminal law and its reach into constitutional law was then given a new dimension in 2017, thanks to the Prime Minister of the Czech Republic, whose criminal case is discussed in the last article, written by Kateřina Studecká, who also, with this editorial, wishes you an informative reading.



Kateřina Studecká

Content

25th Anniversary of the Restoration of the Constitutional Judiciary in the Czech Republic	3
Michal Oščipovský and Adam Blisa	
Defending the Independence of the Judiciary	6
Adam Blisa	
The Constitutional Court Restricting the Right to Information Piece by Piece	8
Laura Haiselová	
Regner v. Czech Republic	11
Eva Drhlíková	
Refusal to Grant Citizenship on the Grounds of Classified Information	13
Šárka Dušková	
The First Czech National Action Plan on Business and Human Rights	16
Nela Černotová	
The Marginalization of the Rape Phenomenon in the Czech Republic	19
Kamila Abassi	
One Flew over the Stork's Nest	22
Kateřina Studecká	

Front page photo: Constitutional Court of the Czech Republic, author: Stanislav Dušík, CC-BY-SA-4.0, Wikimedia Commons.

NEWS AND COMMENTS ON HUMAN RIGHTS

Follow us on Facebook:

www.facebook.com/humanrightscentre.org

25th Anniversary of the Restoration of the Constitutional Judiciary in the Czech Republic



*Michal Oščipovský
Adam Blisa*

On the 3rd of February 2017 it has been exactly 25 years since the Constitutional Court of the Czech and Slovak Federative Republic commenced its operation. Although this institution had disappeared with the federation just a few months later, the Court managed to handle over 1100 applications. It is therefore appropriate to look back on its functioning and to address its future.

Central Europe is considered to be the cradle of constitutional justice. "The first" Czechoslovak Republic (1918-1938) can take pride in its world primacy in formally establishing the constitutional judiciary in the Constitution of 1920.[1] However, what could have formed a long-standing tradition was interrupted in 1948 (and *de facto* in 1938 when the constitutional judiciary ceased to function).

The Second Beginnings of the Constitutional Judiciary

The constitutional tradition was re-established after the fall of the Iron Curtain. Therefore, we can again talk about the "beginning" of the constitutional judiciary in Central Europe, now not only in the Czechoslovak Federative Republic (or the Czech Republic), but also in other countries of the Visegrád Group that form the core of the Central European countries: Slovakia, Poland and Hungary. Following a regime change after 1989, the belief in the need for constitutional review of laws and for protection of human rights if the complainants objected to their violation by the state has only grown stronger. Hence, the institution of the Constitutional Court was again formally introduced into the Czechoslovak political system by a Constitutional Act No. 91/1991 Coll., on the Constitutional Court of the Czech and Slovak Federative Republic.[2]

The operation of the Federal Constitutional Court commenced on the 3rd of February 1992 and the court consisted of six representatives from the Slovak Republic and six from the Czech Repub-

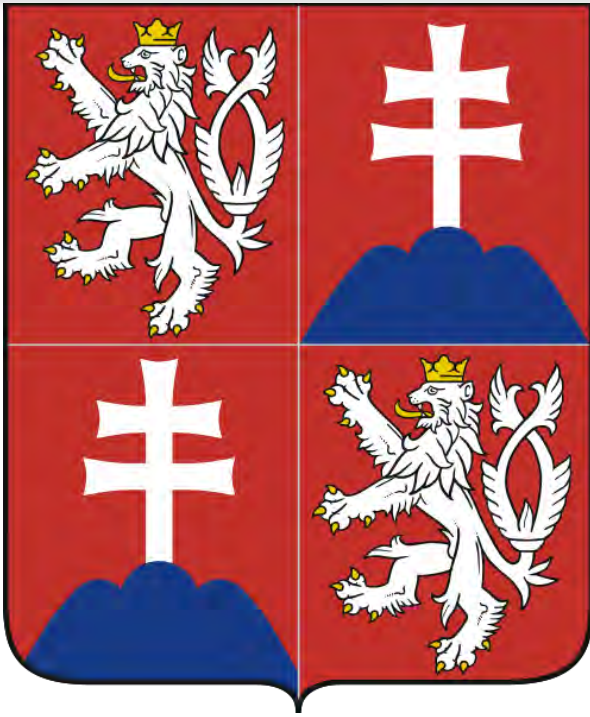


Justice [1]

lic. However, the court's activities did not last for more than one year, due to the disintegration of the federation. Nevertheless, it was an institution that stood at the beginning of the renewal of the discontinued tradition of constitutional justice in Czechoslovakia. Ernest Vaľko was elected president of the newly established court and Vlastimil Ševčík was the vice-president.

The court that avowed to the inspiration of the Federal Constitutional Court of Germany, voiced its opinions in its nine judgments and other decisions on, for example, the conflicts of jurisdiction between the federal and state authorities, the protection of democratic order or the retroactivity of the law. Constitutional judges, who were originally appointed for seven years, had to deal with "key questions" on the transformation of the political regime despite the short life of the institution.[3]

Although the Federal Constitutional Court played an episodic role in the twenty-five years of restored constitutional justice in the Czech political system, it cannot be said that this role was insignificant. Not only because it was an important "first step," but also because the thereafter established Constitutional Court of the Czech Republic built upon the tradition and decision-making of its federal predecessor. This was confirmed by a certain personal continuity as several members of the Federal Constitutional Court served as constitutional judges after the federal break-up, e.g. Zdeněk Kessler (also the first president of the Constitutional Court of the Czech



State Emblem of the Czech and Slovak Federative Republic [2]

Republic), Jiří Malenovský, Antonín Procházka or above mentioned Vlastimil Ševčík.

A Difficult Task

The Federal Constitutional Court together with other Central European constitutional courts did not, however, enter a "constitutional vacuum." The historical context in which the Central European courts were established was essential for their operation and development. This context was represented by the transition phase of these young democracies in which the constitutional courts should have played a crucial role.

The main task of the Central European constitutional courts after the fall of the Iron Curtain was the protection of fundamental rights and freedoms and the prevention of arbitrary interference by public or state power into the sphere of individuals. Efforts to fully control the lives of every citizen and the associated involvement of state power in every aspect, both public (political) and the most private, were one of the main domains of Central European totalitarian regimes. Therefore, introduction of the constitutional complaint resulted, at least in the Czech Republic, in "purifying" the decision-making of lower courts from the relics of communist formalistic legal thinking.

Guarding the human rights catalogs (charters) then represented, and still represents, a substantial part

of Central European constitutional courts' operations. In this challenging activity (consisting of the review of thousands of individual applications) as well as in the less frequent review of legal norms, the constitutional courts are often standing against the executive and the Parliaments, although to a different extent in each country.[4] Therefore, they are inevitably also political players whose position in the constitutional system is still uncertain.

Quo vadis?

However, the political role that the constitutional courts play does not jeopardize their position. It may affect their relations with the executive or the legislature, as shown during Václav Klaus' term of office as President of the Czech Republic who tried to "starve" the unpopular Constitutional Court by not appointing new judges. However, problems may arise because the courts now do the opposite of what they did after their creation. While after the establishment of constitutional courts their activity was aimed at the removal of the old and totalitarian regime, now their crucial role in at least partially established democracies is to prevent the abolition of the current democratic regime.

This is precisely why we are possibly witnessing the beginning of the second end of constitutional courts in Central Europe. Essentially, this is shown on the example of two Central European countries – Hungary and Poland.[5] In Hungary, the Constitutional Court was cut off after the adoption of the new Constitution in 2011, and specifically, its amendments in 2013. This ended a period of strong legalist constitutionalism and the emphasis shifted to the political nature of constitutional rules.[6] In Poland, a similar process is taking place now, yet much faster, after the party Law and Justice (*Prawo i Sprawiedliwość*) came to power.[7]

The constitutional courts, which are supposed to serve as one of the main instruments to insure the preservation of democratic legal systems, are effectively paralyzed and the regimes in both countries have opened a way for a smooth transition to the illiberal democratic establishment, potentially to a fully undemocratic establishment in the future. The irony of fate is that, although constitutional courts should serve as safeguards against such developments, it turns out they cannot effectively prevent it and also have a problem of defending their



Plenary Hall of the Constitutional Court of the Czech Republic [3]

own existence. All despite the considerable support of civil society and the protest of the international community as was the case in Poland.

The constitutional courts in Central Europe appear to be more suitable for peaceful, rather than stormy times, or for the transit period after a fall of undemocratic regimes. It seems that the defense of democracy against the return of such regimes may have to be accomplished by other players. However, the Constitutional Court of the Czech Republic is still strong and its decisions are (with exceptions) respected. Let us wish the Court and the public that it remains the same for at least another 25 years.

Originally published in the Czech Bulletin of the Czech Bulletin of Human Rights no. 2/2017.

Translated by Kateřina Studecká.

Sources

- [1] Langášek, Tomáš. 2011: „Ústavní soud Československé republiky a jeho osudy v letech 1920-1948.“ Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o.
- [2] Constitutional Court. 2017. "Dnes uplynulo 25 let od zahájení činnosti Ústavního soudu ČSFR." Available at: <http://www.usoud.cz/aktualne/dnes-uplynulo-25-let-od-zahajeni-cinnosti-ustavniho-soudu-csfr>.
- [3] Constitutional Court. 1992. "Sbírka usnesení a nálezu ÚSČSFR." Available at: http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/

[prilohy/sbirka_usneseni_a_nalezu.pdf](#).

- [4] Procházka, Radoslav. Mission Accomplished. On Founding Constitutional Adjudication in Central Europe. Budapest, New York: Central University Press, 2002, p. 9.
- [5] The situation may deteriorate for constitutional courts in other countries as evidenced by e.g. the emerging problems with appointment of judges of the Constitutional Court of Spain. CASTÁN, Daniel Toda. What is the Constitution of Constitutional Jurisdiction in Europe? Worrying News from Spain. In: Verfassungsblog [online]. Center for Global Constitutionalism [cited on 2nd of February 2017]. Available at: <http://verfassungsblog.de/what-is-the-situation-of-constitutional-jurisdiction-in-europe-worrying-news-from-spain>.
- [6] Varju, Márton; Chronowski, Nora. Constitutional Backsliding in Hungary. Tijdschrift voor Constitutioneel Recht, 2015, No. 3, pp. 297-298.
- [7] For a comprehensive overview of the events, including a wider context, see the regular commentaries (in English) of Polish academics Anne Śledziński-Simon and Tomasz Tadeusz Konciewicz available at <http://verfassungsblog.de>.

Photographs

- [1] Justice, author: Succo, CC0 Public domain, Pixabay.com.
- [2] State Emblem of the Czech and Slovak Federative Republic, CC0 Public domain, Wikimedia Commons.
- [3] Plenary Hall of the Constitutional Court of the Czech Republic, author: Kirk, CC BY-SA 3.0, Wikimedia Commons.

Defending the Independence of the Judiciary



Adam Blisa

The highest representatives of the Czech judiciary, the Presidents of the Apex Courts Pavel Šámal, Josef Baxa and Pavel Rychetský, the Chief Prosecutor Pavel Zeman and the Public Defender of Rights Anna Šabatová, released a joint statement in July of 2017 named, *“We Cannot Be Silent – Joint Statement about the Situation in Poland,”* in which they stood up for the defence of the independence of the Polish judiciary. This is a brave and just step, yet also foreshadows darker times.

In this relatively short but apt statement,^[1] the representatives clearly name the controversial steps that the Polish governmental majority took and which according to them pose a danger to the independence of Polish judiciary and undermine the foundation of a democratic legal state. Specifically, they point to the paralysis of the Constitutional Tribunal, subordinating public media to party politics, new laws concerning the Supreme Council of the Judiciary as well as general courts and the Supreme Court.

Central-European Trend

The situation in Poland is surprising, mostly because of its strength and extent, however, a similar development has already transpired in Hungary. Temporary abuse of power by the then President of the Supreme Court also took place in Slovakia. Clearly, attacks against the judiciary, whether coming from the inside or outside, are becoming a systematic problem in Central Europe. That is why we wished the Constitutional Court of the Czech Republic at its 25 year anniversary, that it may hold its strong position for at least another 25 years.^[2]

In light of the above, the statement of the highest representatives of the Czech judiciary cannot be considered to be a surprise. Populism is on the rise, basically all around the world, while an independent judiciary is the main guarantee against the abuse of power. That is why authoritarians seek to control and there is no reason to assume that it will be any different with the Czech judiciary. Therefore,



Josef Baxa – one of the authors of „We Cannot Be Silent“ ^[1]

re, it is only right that the highest representatives of the Czech judiciary raise their voices and aptly label the Polish situation as not specific to Poland, as there are others who think that the steps taken by Kaczyński and his party, Law and Justice (*Prawo i Sprawiedliwość*), are perfectly legitimate.

Foreshadowing of the future is not so bright

Moreover, the Czech judiciary is going to face essential changes in 2018 as Josef Baxa's term as the President of the Supreme Administrative Court is about to end. He is undoubtedly one of the leading figures when it comes to relations with the executive and the legislature and his positions are possibly comparable to the President of the Constitutional Court, Pavel Rychetský. It is not yet clear who might become his successor, however, he will be appointed by the winner of the 2018 presidential



Supreme Administrative Court in Brno [2]

election.[3] Even though the appointment of the President of the Supreme court, Pavel Šámal, has avoided controversies, the joint statement suggests that dark thoughts are occupying the minds of the Czech judicial representatives as well.

In any case, the situation in Poland and Hungary serve as evidence that the judiciary cannot protect itself without any help. Although we could subject the judiciary to a “stress test” as some experts suggest,[4] the key power for preserving the independence of the judiciary is the support and trust of the public. And to reach the public, the judiciary must communicate with it. Judging by the joint statement, the Czech judiciary is on the right path in that regard.

Originally published in the Czech Bulletin of Human Rights no. 7/2017

Translated by Michaela Daňková and Kateřina Studecká.

Sources

- [1] „We Cannot Be Silent – Joint Statement about the Situation in Poland” (Nemůžeme mlčet – společné prohlášení k situaci v Polsku), available at: http://www.nssoud.cz/NEMUZEME-MLCET-spolecne-prohlaseni-k-situaci-v-Polsku/art/16453?tre_id=135.
- [2] See the first article in this issue: 25th Anniversary of the Restoration of the Constitutional Judiciary in the Czech Republic.
- [3] The current President of the Supreme Administrative Court is Michal Mazanec, its former vice-President. He was appointed by Miloš Zeman who is now in his second presidential term.
- [4] Eirik Holmøyvik, Anne Sanders. A Stress Test for Europe’s Judiciaries, [verfassungsblog.de](http://verfassungsblog.de/a-stress-test-for-europes-judiciaries/). Available at: <http://verfassungsblog.de/a-stress-test-for-europes-judiciaries/>.

Photographs

- [1] Josef Baxa – one of the authors of „We Cannot Be Silent“, author: Přemysl Otakar, CC BY-SA 4.0.
- [2] Supreme Administrative Court in Brno, author: Dezidor, CC-BY-3.0.

The Constitutional Court Restricting the Right to Information Piece by Piece



Laura Haiselová

The right to information, as guaranteed by the Charter of Fundamental Rights and Freedoms, went through a turbulent development in 2017 in the Czech Republic. The following text provides a brief overview of the most important decisions of both the Constitutional Court and the Supreme Administrative Court.

State controlled private companies not to provide information anymore

In June 2017, the Czech Constitutional Court delivered a surprising judgment on the interpretation of § 2 sec. 1 of Act no. 106/1999 Coll., on free access to Information (hereinafter referred to as “the Act”). This provision prescribes which subjects are obligated by the Act to provide information to the public. The Act provides a list of entities which are subject to that obligation, such as state authorities, territorial self-governing units and their bodies, and last, but not least, “public institutions.” The term, “public institution,” is the major interpretational problem of this provision, since its restrictive or extensive interpretation could fundamentally change the scope of the obligations under the Act.

The crucial question in this case was whether a private energy company, ČEZ, which is effectively controlled by the state, is a “public institution” according to the Act. This question has already been decided in the affirmative, in 2009, by the Supreme Administrative Court, based on the Constitutional Court’s case-law.[1] The Constitutional Court has developed a “test” that determines whether or not an entity (usually a private company) in fact falls within the term “public institution.” According to this test, it is necessary to examine the mode of creation and dissolution of the company, the founder of the company, the person or entity in charge of appointing the bodies of the company, (non-)existence of state control over the company, and the private or public purpose of the company. Therefore, the company, ČEZ, was considered a “public institution” by the Supreme Administrative Court, hence an entity



Administrative files [1]

obligated to provide information to the public. The Constitutional Court has consequently developed a broad base of case-law on this topic, where various private companies (controlled by either state or municipalities) were found to be obligated to provide information according to the Act.

It was, therefore, quite surprising, when the case then appeared in front of the Constitutional Court and its 4th section held [2] that the ČEZ company is not a “public institution” according to the Act, implying that all the companies in a similar position are excluded from the obligation to provide information as well. The reasoning of the Constitutional Court was the following: “*An interference with the fundamental rights defined in this way [i.e. the obligation of private entities to disclose information to the public] might have a reasonable justification and cannot be considered a priori unacceptable. However, its necessary prerequisite is an adequate legal basis, which in relation to private entities, has not been established. This term [i.e. public institution] cannot be extended to subjects of private law. The term is too vague that none of these subjects can determine, from the text of the Act, whether or not they are in the position of an obligated entity. The definition criteria set up in the Constitutional Court’s previous decisions were supposed to prevent the term [public institution] from being applied to other than public entities. However, in relation to private entities, no specifying criteria can be derived. Even courts cannot “create” them beyond the text of the law. In doing so, the courts would declare a private law company to be*



Administrative files [2]

a public institution, which would result in imposing an obligation in contradiction to Art. 4, sec. 1 of the Charter of Human Rights and Fundamental Freedoms [i.e. obligations may be imposed only by law].”

This decision thus excludes a large group of private entities from the obligations under the Act. It is not only the ČEZ company, but other companies as well whose majority owner is the state or a municipality. The Constitutional Court decided that it is not possible to burden a private company with the obligations of a “public institution” in general, unless all the legal consequences of this obligation are factually to the detriment of a public authority. It seems that one of the decisive factors for the Constitutional Court was that the state is “merely” a majority owner of the ČEZ company but there are some private shareholders as well. However, the reasoning left the general courts and the public rather flustered in regard to whether it applies to companies that are owned by the state or municipalities completely, such as public services and transport providers.

It is time to examine whether this decision is a solitary excess or a first of many to start a new trend in the case-law. The Constitutional Court will have another opportunity to decide on a similar matter. Currently, there is a pending constitutional complaint submitted by an anti-corruption NGO, “Oživení,” concerning the company OTE. This company is charged with emission allowances trading and is

owned completely by the state. The Supreme Administrative Court has ruled in accordance with the above described case-law of the Constitutional Court, saying it is not their position to overrule the Constitutional Court’s opinion. We should expect the Constitutional Court’s decision in 2019.

However, in March of 2018, the 1st section of the Constitutional Court decided [3] that Pražská plynárenská Servis distribuce, (a private company completely owned by the city of Prague, providing public services in gas distribution) is a “public institution” according to the Act. The Constitutional Court brought more light into the confusion induced by the aforementioned 2017 decision and ruled that a private company which is completely owned by a municipality can be subject to obligations under the Act. This decision is in line with the former case-law and partially contradicts the 2017 decision as it is at least arguable that all the legal consequences of the obligation to disclose information fall solely unto a public authority. However, it remains to be resolved whether companies owned by the state (both completely, like OTE, and partially, like ČEZ) can be considered a “public institution” as well.

Information on the salaries of public employees

A surprising change of heart has also happened on the topic of providing information of public employees’ salaries. Contrary to a previous decision of the Supreme Administrative Court from 2014, the Constitutional Court has increased restrictions into providing information. The practice of administrative courts has traditionally consisted of providing this type of information and only in exceptional cases, such as if the employee has a marginal and unimportant role in the functioning of the entity and there are no specific doubts about the use of finance, the information on their salary can be restricted.

The Constitutional Court has now ruled [4] that it is possible to provide information according to § 8b of the Act only if the following conditions are met: first, the aim of the request is to contribute to a public interest debate; second, the information itself concerns a public interest; third, the applicant himself is in the role of a “social watchdog;” and finally, the information exists and is available.

This decision has been criticised by the expert public for several reasons [5]. First, it puts an inappropriate burden on the obliged institutions through forcing them to carry out a constitutional test of proportionality. It is unfortunate, as these institutions often do not have a legal department at their service. Second, the test of proportionality introduced in this case is not a traditional test, which we know from the Constitutional Court's well established case-law. Finally, this approach goes against the goal and spirit of the Act. As a result, the decision aims to "screen and sort out" the applicant according to their "public interest."

To sum up, the right to information in the Czech Republic is currently subject to interpretational battles and constant changes in the case-law of administrative courts and the Constitutional Court. The latest case-law seems to be less favourable for the public, however, we can expect further development in the near future. The current legal opinion of the Constitutional Court is subject to criticism from the expert public and certain legislative changes are under discussion. It was, after all, the Constitutional Court that called for legislative amendments in the ČEZ judgement. Even while preparing this text, there are pending cases before the Constitutional Court whose petitioners aim to change the current interpretation of the right to information.

Sources

- [1] Judgment of the Supreme Administrative Court from 6th of October 2009, 2 Ans 4/2009-93.
- [2] Judgment of the Constitutional Court from 20th of June 2017, IV. ÚS 1146/16.
- [3] Judgment of the Constitutional Court from 27th of March 2018, I. ÚS 1262/17.

Constitutional Court of the Czech Republic [4]



ČEZ, a.s. [3]

- [4] Judgment of the Constitutional Court from 17th of October 2017, IV. ÚS 1378/16.
- [5] See: Mazancová, Hana. Výjimka pouze pro ČEZ? Veřejnost přišla o právo ptát se na informace i obecních firem. Available at: https://www.irozhlas.cz/zpravy-domov/pavel-rychetsky-zakon-o-svobodnem-pristupu-k-informacim-oziveni_1803011100_hm. Šikel, Lukáš.
- [6] Miliardy ČEZ, a. s. pod pokličkou aneb nález Ústavního soudu a jeho následky. Available at: <https://pravnihradce.ihned.cz/c1-65809580-miliardy-cez-a-s-pod-poklickou-aneb-nalez-ustavniho-soudu-a-jeho-nasledky>.

Photographs

- [1] Administrative files, author: myrfa, CC0 Creative Commons, pixabay.com.
- [2] Administrative files, author: Dr. Marcus Gossler, CC-BY-SA-3.0-migrated, Wikimedia Commons.
- [3] ČEZ, a.s., author: VitVit, CC0 Creative Commons, Wikimedia Commons.
- [4] Constitutional Court of the Czech Republic in 2011. Author: Millenium187, Wikimedia Commons, CC BY-SA 3.0.

Regner v. Czech Republic



Eva Drhlíková

The Grand Chamber of the European Court of Human Rights found no violation of the right to a fair trial of a Czech senior public official, Mr Václav Regner, whose security clearance had been withdrawn on the basis of confidential information.

Background of the Case on the National Level

The Act no. 412/2005 Coll., on the protection of classified information and security eligibility sets the conditions for issuing security clearances in the Czech Republic. The conditions are identical to those contained in a previous Act, Act no. 148/1998 Coll. pursuant to which the National Security Authority (hereinafter referred to as “NSA”) issued the applicant, Mr Václav Regner, a certificate clearing him for access to classified information at the “secret” level (second highest level). Obtaining such clearance was necessary for his work as a deputy to the First Deputy Minister and Section Director at the Ministry of Defence.

However, based on the intelligence service report provided in a restricted classification regime, reasonable doubts arose about Regner’s security clearance. Specifically, the service found that his behaviour raised doubts about his credibility and ability to keep the classified information confidential. Therefore, in September of 2016, the NSA decided to withdraw Mr Regner’s security clearance. Mr Regner, whose employment contract had been terminated in the meantime by mutual consent due to health reasons, challenged the withdrawal before the Czech administrative courts.

Is Kafka’s Trial a Contemporary Reality?

The core of the dispute was based on the fact that the decision of the NSA did not specify the confidential information on which it was based. During the proceedings, both the applicant and his lawyer were permitted to consult the file except for the confidential documents, which had been sent to the court. These documents were fully disclosed only to the judges.



Kafka’s monument in Prague [1]

Both the Municipal Court in Prague and the Supreme Administrative Court dismissed the application, ruling that the decision to revoke the security clearance was not invalid and that the applicant’s procedural rights had been sufficiently respected, given that the judges had full access to the restricted material. Consequently, the Constitutional Court upheld the decision on the same grounds.

The NSA has repeatedly stated the reasons for its secretive conduct. The case has been nicknamed, Kafka’s Trial, since Václav Regner (simply put) took the position of an accused person who cannot defend himself because he does not know what he is accused of, since it is a secret.

The credibility of Mr Regner was damaged in March of 2011 when the State’s Attorney charged him and 51 other people with influencing the award of public contracts at the Ministry of Defence from 2005 to 2007. In March 2014, the Regional Court in České Budějovice sentenced Mr Regner to three years’ imprisonment. The High Court in Prague upheld that judgment, but suspended execution of his prison sentence for a two-year probationary period.

ECtHR Divided

The application was lodged with the European Court of Human Rights on the 25th of May 2011. Relying on Article 6 § 1 of the Convention, the applicant complained about the unfairness of the administrative proceedings in which he had been unable to access the decisive classified information due to his security clearance being revoked. The Fifth Section on the 26th of November 2015 concluded with a majority ruling that there had been no violation of Article 6 § 1 of the Convention. Subsequently, the case was referred to the Grand Chamber upon the applicant's request. A hearing took place on the 19th of October 2016 and the Government of the Slovak Republic had been given leave to intervene in the written procedure as a third party. The Grand Chamber ruled on the 9th of September 2017, by ten votes to seven, that there had been no violation of Article 6 § 1 of the Convention. [1]

With regards to the merits, the Court explained that the adversarial principle and the principle of equality of arms are fundamental components to a fair trial, however, regarding its previous case law, the Court stressed that the rights derived from those principles, including the entitlement to disclosure of evidence, are not absolute. According to the Court, there may be competing interests such as national security, the need to protect witnesses who are at risk of reprisals or keeping police investigative methods secret, which must be weighed against the rights of the party to the proceedings.

As a result, the Court found that the restrictions to the applicant's rights were counterbalanced by the power of domestic courts to fully examine the documents before them and therefore the very essence

of the protection afforded by the right to a fair trial was not impaired. Nonetheless, the Court expressed that it would have been desirable, to the extent compatible with the preservation of confidentiality and proper conduct of the investigations concerning the applicant, for the national authorities, or at least the Supreme Administrative Court, to have explained, even if only summarizing, the extent of the review they had carried out and the accusations against the applicant.

Given the number of votes and dissenting opinions, the judgment found the Grand Chamber particularly divided. The problem is that the national courts basically played the role of both judges and defence lawyers. If the justification for altering ordinary process is national security, the risk of abuse and arbitrariness is heightened as the Court itself has accepted this before. [2]

Moreover, dealing with the issue of security clearances in the Czech Republic is an on-going process. Rostislav Pilc, ex-chief of the military office of the Czech President Miloš Zeman, has lost his security clearance for the "top secret" level (highest level). However, in May 2018 the Municipal Court in Prague cancelled the decision that withdrew his security clearance. He is also seeking damages from the Czech Republic and the case will be investigated again by the NSA. Vratislav Mynar, the current head of the Presidential Office, has been criticised repeatedly for not having a top security clearance. According to the Czech president, Miloš Zeman, Mr Mynar can occupy the position in his office without the clearance. The law, that would prescribe such obligation, did not pass through the Chamber of Deputies in June 2018.

Ministry of Defence in Prague [2]



Sources

- [1] Regner v. Czech Republic (Application no. 35289/11) no. 141.
- [2] Malone v. United Kingdom (Application no. 8691/79) no. 67.

Photographs

- [1] Kafka's Monument in Prague, author: 706341, CC0 Creative Commons, pixabay.com.
- [2] Ministry of Defence in Prague, author: Mojmir Churavy, CC BY-SA 4.0, Wikimedia Commons.

Refusal to Grant Citizenship on the Grounds of Classified Information



Šárka Dušková

Citizenship is still mostly understood as a privileged relationship of a person with a state, associated with the state's possibility to determine who will be allowed to enter into such a relationship. Today, the citizenship proceedings are usually subject to fundamental principles of a fair trial; an exception being when granting of citizenship is refused on the grounds of classified information. The Constitutional Court has commented on whether such regulation is in compliance with the Constitution.

A Bit of a Context and History

There is no right of the applicant to have citizenship granted and therefore no legally enforceable claim to citizenship exists. This is one of the reasons why it has been asserted for a long time that there is an absolute administrative discretion when deciding upon a citizenship application as an expression of the state's unlimited sovereignty in this area.[1] This legal opinion has been gradually superseded during the last few years by the case law of Czech apex courts and is no longer sustainable today.[2]

In 2005, the Supreme Administrative Court unified the divergent practices with a decision of the Extended Chamber on the 23rd of March 2005, No. 6 A 25/2002 (No. 906/2006 Coll., SAC). The decision stated that granting citizenship does not fall within the sphere of unlimited state sovereignty. Limits are always determined by the constitutional order and its basic principles, inter alia by the prohibition of arbitrariness, the principle of equality and the preservation of human dignity. Thus, fundamental principles of the right to a fair trial are applied here, and also in relation to secondary participant's rights.

These conclusions of the Supreme Administrative Court are highly relevant for a discussion on the provisions of Sections 22 (3) and 26 of Act No. 186/2013 Coll., on Citizenship in the Czech Republic (hereinafter referred to as the "Citizenship Act"). This Act permits, based on information obtained by the Police or intelligence services of the



Czech Secret Service Logo [1]

Czech Republic, to deny citizenship in the case of suspicion that the applicant endangers the state security, sovereignty, territorial integrity, democratic foundations, lives, health or property values.

Given the presence of the classified information in such a case, the justification to deny citizenship rests on the premise that it has been decided so on the grounds of the protection of the security of the Czech Republic. Even despite the fact that administrative discretion is applied in such a case, in accordance with Section 26 of the Citizenship Act, these cases are excluded from judicial review. The only possible defence of a participant therefore, is to appeal to the Minister of Interior without knowing the actual grounds for refusal in the first place, i.e. without the possibility of relevant defence.

Judgement of the Constitutional Court Pl. ÚS 5/16

The above described regulation was under review by the Constitutional Court in its Judgement delivered on the 11th of October 2016, Pl. ÚS 5/16. The Court repeated that the proceedings regarding the granting of citizenship affect participant's rights and certain fundamental rights can certainly be affected as well. Therefore, the Court evaluated whether this legal regulation interferes with individual rights reasonably. In order to do this they chose the test of rationality and the requirement of optimization of contradictory effects of values protected by the Constitution. It concluded that the exclusion of the possibility to become familiar with the grounds of the refusal to grant citizenship, provided that these are based on classified information, is a reasonable measure.



Constitutional Court of the Czech Republic [2]

Having read the reasoning of the judgement however, one cannot shake the feeling that the Constitutional Court has not considered the fact whether the solution selected by the legislator is really necessary or whether a less stringent solution would also lead to a similarly optimal outcome to the conflict of two contradictory interests. Indeed, proposals for other, less stringent measures have already been presented before the Senate [3] and also appear in professional literature.[4]

Constitutionality of the Exclusion of Judicial Review Pursuant to Section 26 of the Citizenship Act

In addition, referring to the binding nature of the prayer for relief and no exhaustion of remedies, the Court unfortunately refused to deal with the compliance of Section 26 of the Citizenship Act with the Constitution, i.e. a provision excluding a judicial review of the citizenship proceedings. All the while, Judges Kateřina Šimáčková and Vojtěch Šimíček convincingly indicate in their dissenting opinion what problems this decision may cause for the Constitutional Court in the future as it can be concluded from the previous case law of the Court that the provision in question is at least on the edge of constitutionality.

For instance, in the Judgement from the 12th of July 2001, Pl. ÚS 11/2000, the Constitutional Court concluded the unconstitutionality of the judicial exemption in the case of acts of the Security Information Service pursuant to Act No. 148/1998 Coll., on the Protection of Classified Information, while referring to the right to free choice of employment pursuant to Art. 26 (1) of the Czech Charter

of Fundamental Rights and Freedoms, i.e. also on the basis of the so-called secondary interference. According to the Constitutional Court, not even the specifics of the protection of classified information can lead to a deliberate abandoning of the constitutional protection of the affected persons' rights.

Some other decisions of apex courts were also quite strict when it came to the exemption from judicial review in cases where classified information was involved. In the Judgement of the Constitutional Court from the 28th of January 2004, Pl. ÚS 41/02 (N 10/32 SbNU 61; 98/2004 Coll.), concerning the security clearance of attorneys, it is impossible to restrict access of an attorney accused in criminal proceedings to classified information due to the right to a fair trial. Accordingly, the Supreme Administrative Court commented on the scope of the judicial review in the case of the refusal to grant security clearance in its Judgement from the 20th of June 2007, 6 Azs 142/2006 – 56. The judgment is as follows: *“the fact that the evidence for the decision is relying upon classified information pursuant to the Act on Classified Information, may not be to the detriment of*

Constitution of the Czech Republic [3]

ÚSTAVA ČESKÉ REPUBLIKY

ze dne 16. prosince 1992



Seat of the Czech Secret Service (BIS) in Prague [4]

the exercise of the fundamental right of a party to the proceedings to present its position to all evidence produced.”

Even in security proceedings, it is necessary to find a balance between interests that are legitimate, yet contradictory. However, pursuant to the Judgement of the Supreme Administrative Court from the 25th of November 2011, 7 As 31/2011 - 101, such balance cannot be achieved, unless effective judicial control over the decision made is ensured. Accordingly, a party to the proceedings cannot effectively object to certain findings being illegal or untrue unless such party is aware of contents thereof.

Even though this time Section 26 of the Citizenship Act avoided its review by the Constitutional Court, it is probably not the last time this provision will go before the Constitutional Court. Hopefully, we will see the day when the constitutionality of absolute discretion in the last administrative proceedings of such types in the Czech Republic is evaluated.

Originally published in the Czech Bulletin of Human Rights no. 3/2017.

Translated by Lukáš Novák.

Sources

- [1] Overview of the development of the legal regulation, e.g., Černý, P., Soudní přezkum správního uvážení nejen v řízení o udělení státního občanství.

Bulletin advokacie č. 7-8/2005. See e.g. Judgement of the Supreme Administrative Court from the 4th of May 2006, file reference 2 As 31/2005, Judgement of the Supreme Administrative Court from the 29th of June 2004, file reference A 11/2003-34. Such approach has also been certified by some constitutional law academics. See, for example, Sládeček, V., Mikule, V., Syllová, J., Ústava České republiky, komentář, C. H. Beck 2007, pp. 117-118.

- [2] Particularly upon publication of the Judgement of the Extended Chamber of the Supreme Administrative Court from the 23rd of March 2005, proced. No. 6 A 25/2002 (No. 906/2006 Coll., SAC).
- [3] See Resolution of the Senate Committee on Legal and Constitutional Affairs from the 4th meeting held on 15th of May 2013.
- [4] Kindlová, Miluše. Ústavnost soudní výuky u neudělené státního občanství z důvodu ohrožení bezpečnosti státu? Administrative Law, vol. 7, year 8, 2015, p. 415.

Photographs

- [1] Czech Secret Service (BIS) Logo, Author: Security Information Service (BIS) - Government of the Czech Republic, Wikimedia Commons, Public Domain.
- [2] Constitutional Court of the Czech Republic, Wikimedia Commons, CC BY 3.0.
- [3] Constitution of the Czech Republic, public domain
- [4] Seat of the Czech Secret Service (BIS) in Prague. Author: Miaow Miaow, Wikimedia Commons, Public Domain.

The First Czech National Action Plan on Business and Human Rights



Nela Černotová

In October of 2017, the Czech Republic adopted its first National Action Plan on Business and Human Rights. The new action plan implements the UN Guiding Principles on Business and Human Rights from 2011 and calls upon companies registered in the Czech Republic to ensure that human rights standards are observed, regardless of where in the world their activities take place.

In reaction to the growing global impact of international corporations there was a need to set out an international framework which would define the responsibility of governments and transnational businesses to protect human rights. Therefore, in 2005, the United Nations Human Rights Council appointed Special Representative of the Secretary-General, John Ruggie, to develop such a document. In June of 2011, the UN Human Rights Council unanimously endorsed Ruggie's framework as the "United Nations Guiding Principles on Business and Human Rights" (hereinafter referred to as "UNGPs").

Three pillars of the UNGPs

The UNGPs encompass three pillars. The first pillar, which establishes the state duty to protect human rights, is comprised of 10 principles. These principles oblige states to prevent human rights abuses within their territories and to pass and enforce laws imposing an obligation on businesses, including those owned or supported by the state, to respect human rights throughout their operations.

The second pillar contains 14 principles which establish the corporate responsibility to respect human rights. It calls upon companies to implement processes which prevent human rights abuses, such as human rights due diligence. Also, it outlines the moral obligation of corporations to address and remedy human rights violations with which they are involved irrespective of where they operate. Companies should, therefore, protect human rights even in countries where human rights standards are lower or not enforced by state bodies.



Office of the Government of the Czech Republic [1]

Furthermore, the second pillar describes the rights protected by the International Bill of Human Rights (consisting of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, as a minimum of rights which should always be respected.

The 7 principles in the third pillar enshrine the 'access to remedy' if human rights are violated. The third pillar obliges states to ensure that victims of business-related human rights abuses can have their complaints investigated and resolved by an effective judicial, administrative, legislative or other appropriate body. Furthermore, states have to facilitate access to non-state-based grievance mechanisms.

National Action Plans on Business and Human Rights

As international law cannot impose obligations directly on businesses, it is up to the states to implement the rules set out in the UNGPs in national law. That is why the European Union, in 2011, the UN Human Rights Council and the Organization of American States in 2014 and the Council of Europe in 2016, called upon their member states to develop national action plans (hereinafter referred to as "NAPs") implementing these principles.



Children mining gold (one of conflict minerals) in the Democratic Republic of Congo [2]

One of the benefits of developing a NAP is that the respective states have the opportunity to assess the current situation of their legislation in respect to business-related human rights protection. They have the chance to identify loopholes in the system and to outline improvements to bring the national laws into compliance with international business and human rights standards.

Another advantage of creating a NAP is that it triggers a national dialogue on business and human rights issues. Apart from different government departments and agencies, many states engage various other stakeholders in the process of developing their NAPs, such as the judiciary, parliament, businesses, civil society organisations, academics, trade unions or the media. However, governments are often criticized for not facilitating participation of disempowered or at-risk stakeholders such as minority groups. Between 2011 and 2017, 21 states have adopted a NAP. Outside of Europe, NAPs have been developed in Colombia, Chile and the United States.

The Czech National Action Plan on Business and Human Rights

In October of 2017, the Czech Republic became the 19th country in the world to adopt a National

Action Plan on Business and Human Rights, for the period of 2017 to 2022. Various stakeholders participated in the development of the Czech NAP, such as government ministries, civil society, academia and trade unions. It was also open to all interested participants. The Czech NAP is very clear and specific with concrete aims, each one with its own deadline and assigned government minister responsible for coordination.

The Czech NAP is divided into three sections following the UNGPs structure. In comparison with, for example, the German action plan which frequently addresses human rights protection from a global perspective, the Czech NAP is more focused on domestic business-related human rights protection.

The first section of the Czech NAP includes state aid, guarantees and subsidies for the private sector and rules for public procurement. It also analyses the current state of protection of migrant workers, evaluating its strengths and weaknesses. Furthermore, it presents relevant case-law examples and plans for future improvements. It gives a detailed description of human rights impact assessments in specific areas, such as the trade in military equipment and conflict minerals, and sets future goals in these areas.

The Czech NAP includes protection of human rights under criminal provisions in its first section, as does, for example, the Swedish one. The German and Polish action plans list criminal liability for human rights violations in the section addressing remedies. In their first sections, covering the 'state duty to protect human rights,' they focus more on implementation of human rights treaties in national law, protection of whistle-blowers, equality between men and women and also on fair trade and protection of human rights globally. The Czech NAP includes information on equality and equal treatment, but the income inequality between men and women is only mentioned in reference to the Government Strategy for Gender Equality in the Czech Republic 2014-2020. The NAP also does not specifically mention protection of human rights defenders.

The second section contains specific guidelines for companies. It implements the second pillar of the UNGPs, addressing corporate responsibility to respect human rights and comes up with recommendations for enterprises to comply with their human rights protection duties. It also refers companies to a government website on corporate responsibility where enterprises can find model documents, guidelines and materials which should help them establish human rights protection mechanisms.

The third part analyses the current state of the 'access to remedy' in the Czech Republic and points out its strengths and weaknesses. In the weak areas, such as representation in court, collective legal actions, accessibility of the courts and alternative and online dispute resolution, it identifies room for improvement and sets specific goals with deadlines. Similar to the German NAP, the Czech NAP also gives information on the jurisdiction of Czech courts in the case of human rights violations by Czech enterprises abroad.

The Czech NAP has set out clear objectives and also established a timeline for checks and reports on compliance with these goals. The Minister for Human Rights has been made responsible for a significant number of these objectives. This office, however, has been abolished by the current Czech government. At the moment, the duties of the Minister for Human Rights are carried out by the Minister of Justice. Hopefully this will not have an adverse effect on the adherence to the NAP and the overall human rights situation in the Czech Republic.

Sources

- Danish Institute for Human Rights. "National Action plans on Human Rights". Danish Institute for Human Rights. 2017-2018. Available at: <https://globalnap.org/about/>.
- Danish Institute for Human Rights. 2017. "National Action plans on Human Rights Toolkit". Copenhagen: Danish Institute for Human Rights. Available at: https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrd_2017/dihr_icar_nap_toolkit_2017_edition.pdf.
- Government of the Czech Republic. 2017. National Action Plan on Business and Human Rights. Prague: Government of the Czech Republic. Available at: <https://www.vlada.cz/cz/ppov/rp/aktuality/vlada-prijala-prvni-narodni-akcni-plan-pro-byznys-a-lidska-prava-161702/>.
- United Nations Office of the High Commissioner for Human Rights. 2011. Guiding Principles on Business and Human Rights. New York and Geneva: United Nations. Available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciples-BusinessHR_EN.pdf.

Photographs

- [1] Office of the Government of the Czech Republic, author: Packa, 2009, Wikimedia Commons, CC BY-SA 3.0.
- [2] Children mining gold (one of conflict minerals) in the Democratic Republic of Congo, author: Enough Project, 2010, Flickr, CC BY-NC-ND 2.0.
- [3] Garment factory in Vietnam, author: ILO in Asia and the Pacific, 2012, Flickr, CC BY-NC-ND 2.0.

Garment Factory in Vietnam [3]



The Marginalization of the Rape Phenomenon in the Czech Republic



Kamila Abbasi

In May of 2017, a film titled “Filthy,” directed by Tereza Nvotová, aired in the cinemas. This movie stirred up public debate about the victimization of victims of violent sexual crimes. This serious issue is not treated systematically despite long-term urgencies by many human rights NGOs operating in the Czech Republic. The psychological movie drama, a result of Czech and Slovak collaboration,[1] inter alia opens the debate on secondary victimization of rape victims who too often face misunderstanding of their surroundings and a widespread opinion that “rape is actually a little bit the victim’s fault.”

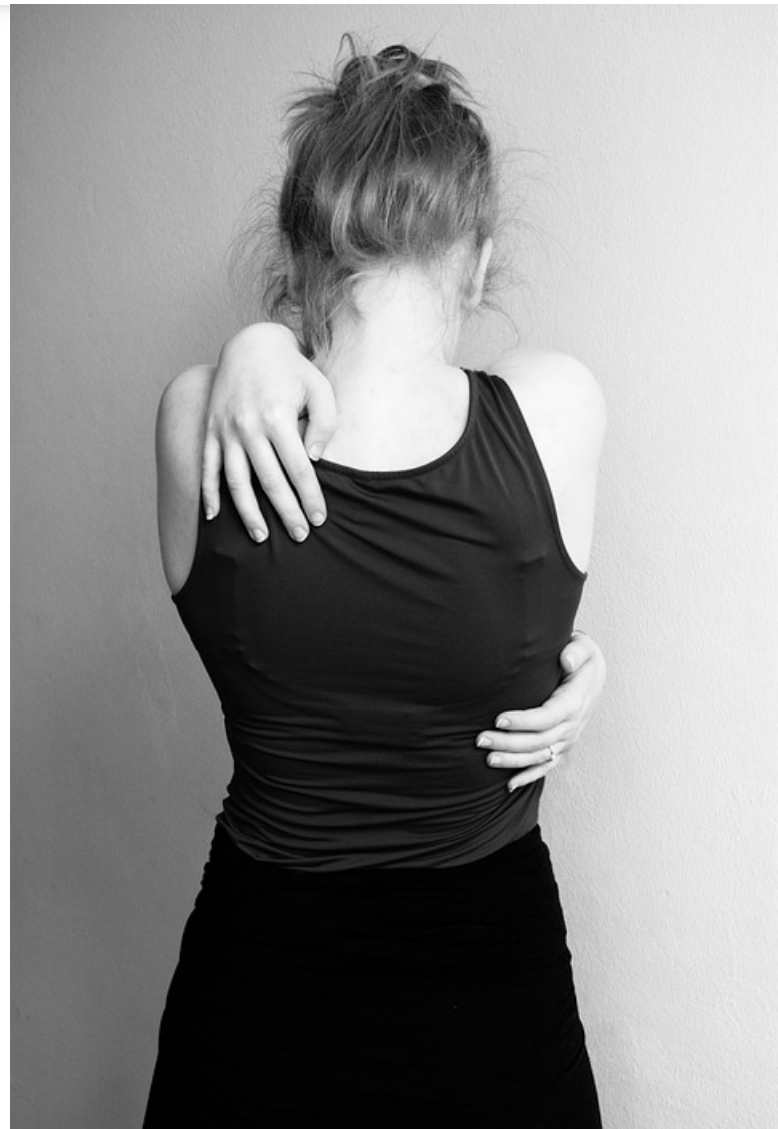
The definition of rape

Generally speaking, sexual violence is considered to be one of the most horrendous and hurtful crimes. In all its forms and expressions, it is a violation of both the psychological and physical integrity of a human being, and furthermore, an attack on or a denial of someone’s freedom. Yet, there is no unified definition of rape and the concept differs within the case law of criminal courts in Western countries.

In the Czech Republic, several NGOs are working with the phenomenon of sexual violence and its victims, namely Persefona, Bílý kruh bezpečí, Amnesty international, In Iustitia and a new initiative, “Když to nechce, tak to nechce” (can be translated as: If she doesn’t want to, she really doesn’t). These entities provide help in the form of personal consultations and other social work as well as long-term alerting to the ignorance of a social stigma that the victims are exposed to for a long time after the attack itself.

Seven myths connected to sexual violence

The If she doesn’t want to, she really doesn’t initiative shares the seven most frequent myths connected to sexual violence on their website.[2] The first myth is the aforementioned assumption that it is somehow



It is the victim’s fault – a widespread myth [1]

the victim’s fault he or she was assaulted. The victims are therefore blamed for being guilty of that crime as they might have dressed provocatively, were drunk and so forth. Another erroneous assumption of society is that rape and sexual violence occur in only third world countries and if it does happen in the Western world, it is only in socially excluded parts of it. Some say that the rapist simply could not have controlled himself and the sexual lust that overcame him, naturally, could not have been stopped. Furthermore, the media often reports on brutal rape attacks committed in remote locations, which supports the wrong impression that rape never happens so to speak, “in front of our eyes” (at home, among partners or friends).

Likewise, false rape accusations reported by alleged victims takes a lot of attention in the media at the expense of the fact that most sexual violent crimes are not reported to the police at all. Moreover, a standard movie depiction of a rape victim



Rape is not only a third world problem [2]

as a weeping and devastated person raises doubts about the credibility of actual victims, both in the eyes of the public and the criminal law enforcement authorities. Last but not least, another myth regarding rape is the assumption that women are only being chaste as a game, but in fact their “NO” means the opposite.

Rape in numbers

Quantitative public opinion research [3] that documented knowledge and opinions of the Czech society on this issue was conducted in August of 2015 at the instigation of the international human rights organisation, Amnesty International. The research took the form of a questionnaire where trained interviewers marked the answers of respondents older than 18 in an electronic form. The research considered the highest education of the respondents, their social status and place of residence.

The results unfolded that sexual violence on women still remains a topic that is polluted with prejudice and ignorance. *“The prevailing opinion within the society is that the perpetrator is most often some unknown,*

third person. An alarming fact then is that a majority of the adult population is of the opinion that in certain cases the woman is partly responsible for her rape. In at least one of the following scenarios, up to 63 % respondents marked the woman to be at least partly responsible. Mainly men aged between 18 and 34 (who are the most frequent offenders of these crimes) attribute this situational co-responsibility to women. The research shows that some social groups of the Czech population believe in stereotypes that lead to a tendency to legitimize these attacks, or at least consider them not to be a major problem and ultimately to partly shift the blame to the victim.”[4]

“It is her fault”

Out of the respondents of the research, up to 24 % of the adult Czech population considers the woman co-responsible for rape while up to 63 % considers her at least partly responsible. Prejudice against raped women is held more often by men (28 %), by people without university education (30 %), people living in towns with a population of 20 to 99 thousand inhabitants (36 %), people aged 18 to 34 or 55 to 64 (44 %) and women aged 65 and more

(32 %). Most respondents hold the woman partly responsible when she was acting flirtatiously (up to 45 %) or she was drunk (up to 43 %). If the woman did not clearly state “NO,” mostly men, hold her as fully, or co-responsible (all male respondents – 43 %; older than 55 years old – 42 %; least educated men – 42 %). Interesting results also brought questions targeted on promiscuity and the number of sexual partners. For example, if a woman is known to have had numerous sexual partners, she is again considered to be fully or co-responsible mostly by men (all male respondents – 32 %; aged 18 to 24 years old – 33 %; older than 65 years old – 39 %; with a primary education – 38 %).

It currently seems impossible to demolish all social stigmas connected with rape. Another alarming fact remains. According to estimates of the Czech adult population, there are “only” two thousand rapes each year. However, this is most likely an underestimation of real numbers. It is all the more necessary to develop a debate on this issue, which according to some research affects every tenth (!) Czech woman.[5]

Originally published in the Czech Bulletin of Human Rights no. 5/2017.

Translated by Michaela Daňková and Kateřina Studecká.

Sources

- [1] Movie Filthy, 2017. Information available at: <https://www.csfd.cz/film/482800-spina/prehled/>.
- [2] Když to nechce, tak to nechce. Seven myths regarding rape. Available at: <https://www.kdyzto-nechce.cz/>.
- [3] Research of the Focus agency undertaken for Amnesty International on the topic of: Sexual Violence on Women through the Eyes of Czech Population. 2015. Available at: <http://www.persefona.cz/source/pdf/amnesty-international-fin.pdf>.
- [4] Sexual Violence on Women through the Eyes of Czech Population. 2015. Available at: <http://www.persefona.cz/source/pdf/amnesty-international-fin.pdf>.
- [5] Sexual Violence on Women through the Eyes of Czech Population. 2015. Available at: <http://www.persefona.cz/source/pdf/amnesty-international-fin.pdf>.

Photographs

- [1] It is the victim's fault - a widespread myth, author: Anemone123, Pixabay, public domain.
- [2] Rape is not only a third world problem, author: Geralt, Pixabay, public domain.
- [3] Sexual violence affects every tenth Czech woman, author: Pexels, Pixabay, public domain.

Sexual violence affects every tenth Czech woman [2]



One Flew over the Stork's Nest



Kateřina Studecká

“The Stork’s Nest” (Čapí hnízdo), a farm-styled conference and recreational facility located about 50 km from Prague, has become a strange phenomenon for Czechs in recent years. Much like in the iconic book and movie where the insanity of the portrayed institution may leave the reader (or viewer) rather baffled, a certain part of the Czech public has been baffled for months trying to understand how it is possible that the central figure of the Stork’s Nest scandal, Prime Minister Andrej Babiš, has seemingly not lost one bit of his political popularity.

The Man

Andrej Babiš is famous for many things. He is the Czech PM, a former Minister of Finance and also one of the wealthiest Czechs (although originally he comes from Slovakia) and an owner of an agricultural holding, AGROFERT (for which he is sometimes compared to Donald Trump). Since 2013, he has owned one of the largest Czech publishing houses, MAFRA (for which he is sometimes compared to Silvio Berlusconi). For all of his accomplishments he has become quite well-known internationally (for a Czech politician anyway) and managed to catch the eye of international organisations as well, such as Transparency International.[1] He, or rather one of the AGROFERT holding’s companies, is the owner of the Stork’s Nest.

Even though he has probably gotten used to dealing with numerous scandals since he entered high level politics in 2011, for example, his involvement with the communist secret service before 1989 which he continually denies, the turmoil surrounding Andrej Babiš deepened even more in 2016 when it became public knowledge that the Stork’s Nest is an object of interest for the Czech Police and the European Anti-Fraud Office (OLAF). Some information was already published in previous years about audits being undertaken on the Stork’s Nest construction funding and its ownership structure, but it was not clear that the discovered problems would be far more serious than some administrative misconducts punishable by fines. In 2016, the public learned that



Prime Minister Andrej Babiš [1]

the PM (then Minister of Finance) was suspected of committing a subsidy fraud.

The Case

The case originates roughly in 2007 and 2008 when the agricultural company owning the facility transformed into a joint stock company, issued anonymous shares and changed its name to “The Stork’s Nest Farm” (Farma Čapí hnízdo; hereinafter referred to as “The Farm”). In 2008, The Farm also started to apply for EU subsidies. During the following months, The Farm was granted a subsidy in the amount surpassing 50 million CZK (2 million EUR). So far so good it would seem, however, the important catch is that the subsidy was strictly intended for small and medium-sized enterprises.

As it would later turn out, The Farm was officially within the definition of a “small or medium-sized enterprise,” however, when the five-year period for the review of compliance with the subsidy conditions had passed, in 2014, The Farm was immediately



Riding hall of the Stork's Nest facility [2]

merged with a company called IMOBA. IMOBA is a part of none other than the AGROFERT holding. These were possibly the first indications that there might have been some wrongdoing on the part of the subsidy applicants. In December of 2015, the Czech Police received an anonymous criminal complaint and started to investigate.[2]

The preliminary investigation took a very long time and the standard six-month period prescribed by the Criminal Code was prolonged, which is not unusual in complicated, white-collar crime cases. However, as this case involved one of the most prominent politicians in the country, the delays were widely criticised. It was only in the fall of 2017 (around the Parliamentary elections, hence the timing was no coincidence according to Babiš) that he was officially charged with subsidy fraud together with 10 other people. The list of the accused included Andrej Babiš's wife, two children, brother-in-law and Jaroslav Faltýnek, his "right hand," Member of Parliament and the vice-president of Babiš's political party, ANO.[3]

Despite Andrej Babiš's public assertions that he did not own and generally had nothing to do with The Farm (and then repeatedly changing his mind), the most important prosecution evidence that was made public includes: a report from the HSBC Bank, according to which The Farm was only granted a loan thanks to the fact that it was part of the AGROFERT holding; expert opinion according to which preparatory works on The Farm were done by the IMOBA company; witness statements testifying

that Andrej Babiš was present at the construction of the facility after 2008; and bank statements proving that Andrej Babiš paid for The Farm's shares "from his own pocket," among many others.[4]

The Immunity

Notwithstanding the intricacy of the case caused by its magnitude and political pressure, the Police had to deal with a rather unusual aspect of the case stemming from constitutional law. According to Article 27 of the Constitution of the Czech Republic, a Member of Parliament cannot be prosecuted for any crime without the consent of their respective chamber, the Chamber of Deputies or the Senate. Such immunity could constitute a serious impediment to many investigations and consequently, to justice. However, not so much in this case.

The Chamber of Deputies received a request for consent to prosecute Andrej Babiš and Jaroslav Faltýnek in August of 2017. As indicated above, both men claimed the timing was not coincidental as the parliamentary elections were approaching and focusing the public's eye on this case was in fact a political conspiracy aimed at discrediting them. Nevertheless, Andrej Babiš asked the deputies to give their consent and in September of 2017, the Chamber voted in favour of his prosecution with 123 votes out of 134 present deputies (and 120 of 133 votes in favour of the prosecution of Jaroslav Faltýnek).[5]

If someone thought there was not enough politics mingled in this criminal case, the subsequent parliamentary elections in October of 2017 showed otherwise. These elections led to the need to renew the consent of the Chamber of Deputies so the prosecution could continue as their immunity was reinstated by the election. Therefore, once again, this case was publicised, analysed, questioned and relativized in the Parliament in January of 2018. Both Babiš and Faltýnek repeated that they were innocent but still would vote in favour of their prosecution. However, they did not voice a specific instruction of this sort to the deputies this time. The final vote was 111 deputies in favour of the prosecution of both accused, out of 180 present deputies.[6] The most controversial moment of this vote was when Babiš proclaimed that it was possible to "buy" a custom made criminal prosecution in the Czech Republic. As the head of the executive, he was fairly criticised for this statement afterwards.[7]

Political consequences? Not so much...

As indicated in the beginning of the article, opponents of Andrej Babiš find it baffling how it is possible that despite all the drama and scandals he has gone through, he is still incredibly politically strong. In fact, the only political consequence for him and the ANO party after the parliamentary elections in October of 2017 was the inability to form a new government for many months as other parties refused to join a coalition. The ANO party, however, was by far the strongest in that election and eventually managed to sway the Czech Social Democrats and form a minority government. The PM's and ANO's preferences have only grown stronger in the last years.

How is this possible when Andrej Babiš finds himself in the middle of a criminal investigation standing accused of mismanagement of public funds? Perhaps it is the strong respect Czechs have toward the presumption of innocence. Perhaps it is the level of distrust they have for the Police and the justice system. Perhaps criminally charged top politicians are the trend nowadays and the comparison with Donald Trump is truly fitting. Or perhaps it is just indifference.

Be it as it may, the question, what does having a criminally prosecuted PM say about the political culture of a country, is on the table. The Czechs are sometimes quick to brag about their justice system not tumbling down in the context of recent events taking place in Hungary or Poland. However, in light of what is happening in the legislative and the executive, having a strong standing judiciary feels rather like a bitter-sweet victory.

Sources

- [1] Transparency International. Andrej Babiš. 2018. Available at: <https://www.transparency.cz/andrej-babis/>.
- [2] Aktuálně.cz. Grafika: Tři roky s Čapím hnízdem. Připomeňte si hlavní aktéry a zásadní okamžiky. 2018. Available at: <https://zpravy.aktualne.cz/do->

maci/capi-hnizdo-hlavni-akteri-casova-osa-shrnuti/r~f647032ced9c11e8bf040cc47ab5f122/?redirected=1551711036.

- [3] Although charges against Faltýnek and three other people were subsequently dropped in May 2018.
- [4] iRozhlas.cz. 10 důkazů policie v kauze Čapí hnízdo: Babišovy e-maily, dohled na staveništi, report banky i platba za akcie. 2018. Available at: https://www.irozhlas.cz/zpravy-domov/capi-hnizdo-duka-zy-andrej-babis-olaf-soud-faltynnek_1811060555_ace.
- [5] Chamber of Deputies of the Parliament of the Czech Republic. Voting results. 2017. Available at: <http://www.psp.cz/sqw/hlasy.sqw?G=66895> and <http://www.psp.cz/sqw/hlasy.sqw?G=66896>.
- [6] Chamber of Deputies of the Parliament of the Czech Republic. Voting results. 2018. Available at: <https://www.psp.cz/sqw/hlasy.sqw?g=67292&l=cz> and <https://www.psp.cz/sqw/hlasy.sqw?g=67293&l=cz>. Since then, the police investigation is still ongoing with the last extension of the investigation period ending in April 2019. The High State's Attorney marked the length of the prosecution as "borderline". Hospodářské noviny. Bradáčová poslala kontrolu na žalobce, který vyšetřuje Čapí hnízdo. Délka vyšetřování je hraniční, řekla už loni. 2018. Available at: <https://domaci.ihned.cz/c1-66378610-bradacova-poslala-kontrolu-na-za-lobce-ktery-vysetruje-capi-hnizdo-delka-vysetrova-ni-je-hranicni-rekla-uz-loni>.
- [7] Česká justice. V Česku je podle premiéra Babiše možné objednat si trestní stíhání. 2018. Available at: <http://www.ceska-justice.cz/2018/01/cesku-podle-premiera-babise-mozne-objednat-si-trestni-stihani/>.

Photographs

- [1] Prime Minister Andrej Babiš, author: David Sedlecký, CC BY-SA 4.0, Wikimedia Commons.
- [2] Riding hall of the Stork's Nest facility, author: Richenza, CC BY-SA 3.0, Wikimedia Commons.
- [3] Chamber of Deputies of the Czech Republic, author: Ervinpospisil, CC BY-SA 2.5, Wikimedia Commons.

www.humanrightscentre.org



Czech Centre
for Human Rights
and Democracy

Bulletin is published by Czech Centre for Human Rights and Democracy
Address Hubert Smekal, Joštova 10, 602 00 Brno, Czech Republic
E-mail info@humanrightscentre.org | **web** www.humanrightscentre.org
Authors Kateřina Studecká (editor), Kamila Abassi, Adam Blisa, Nela Černotová, Eva Drhlíková, Šárka Dušková, Laura Haiselová, Michal Oščipovský | **Proofreader** Douglas Radcliff
Graphic editor Michal Oščipovský | **ISSN** 1804-2392.