CZECH REPUBLIC – HUNGARY – POLAND – SLOVAKIA

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V4 Human Rights Review

Dear Readers,

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

We start with a contribution by Hanna Suchocka from the University of Poznań, who was also a long-term member of the Venice Commission of the Council of Europe. Her article focuses on the independence of the judiciary and the role of High Judicial Councils not only in Poland.

Jana Šikorská then informs us about the decision of the Court of Justice of the EU, which found that the Czech Republic, Hungary, and Poland violated EU law by refusing to take in refugees.

In the Czech section, Zuzana Jarabinská discusses the failure of the Czech Republic to establish a national human rights institution (NHRI) and makes several proposals regarding how this could be done.

In the Hungarian section, Alíz Nagy explains why the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) has still not been ratified by the Hungarian parliament.

In the Polish section, Krzysztof Dwiecki provides an insight into the recent presidential elections, which were affected by several controversies. How did the elections organized during the pandemic period unfold?

In the Slovak section, Erik Láštic reflects on the means of direct democracy, in particular the use of referenda for different political purposes in Slovakia.

We hope you enjoy this issue!

Jan Lhotský

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

Content

Photo on the front page: European Court of Justice, author: Gwenael Piaser, 27 February 2010, source: Flickr, CC BY-NC-SA 2.0, edits: photo cropped

CZECH CENTRE FOR HUMAN RIGHTS AND DEMOCRACY

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

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

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A growing or diminishing role of High Judicial Councils?

Hanna Suchocka

Following liberation from the domination of the Soviet system in 1989, one of the most important challenges that Poland and other countries have been facing is, in a very vaguely defined manner, a "reform of the judiciary". Is the existence of High Judicial Councils a necessary part of it? What role do they play?

Searching for appropriate solutions, countries referred to their own democratic traditions to the extent that they were rooted in the European legal culture. When undertaking the process of reform of the judiciary, it was recognized, and also recommended by the Venice Commission (European Commission for Democracy through Law), that the basic principles concerning the place of courts and the role of judges should be regulated by the constitution.[1] Although the method of constitutional regulation concerning the judiciary varies from country to country, there is a common tendency in post-communist states to adopt a more detailed constitutional regulation than can be observed in so-called stabilized democracies.

Hanna Suchocka [1]

Searching for the best model of judicial appointments

One of the crucial problems of new regulations to guarantee the independence of the judicial power was the adoption of an appropriate system for the appointment of judges. It was therefore no coincidence that, after the issuance of many individual country-specific opinions on judicial reforms, the Venice Commission devoted substantial attention to this issue in its first comprehensive report.[2] An important premise of the Commission's work was the search for a system that would allow for an effective de-politicization of the appointment process.

In the report, the Venice Commission recognized the importance of preserving the diversity of individual systems, pointing out that there is no single "non-political" model for appointing judges which could be regarded as ideal for implementing the principle of separation of powers in each country. Specific solutions will largely depend on the internal situation of a given state and its democratic legal tradition.

In this respect, post-communist countries bear the burden of their "undemocratic history" which shaped the relations between the judiciary and other authorities for more than 40 years. While some methods of judicial appointments, for example by the Minister of Justice, do not pose a threat of politicization in countries with a stable democracy and a strong legal culture, they cannot be applied in post-communist countries. Here, different instruments and thus different systems of judicial appointments were needed to free judges from the long-term influence of executive power.

Venice Commission's approach to the High Judicial Council

The discussion concerning the position and role of the High Judicial Council (HJC) has become one of the key issues in many countries.[3] Similar debates also took place in the Venice Commission.

Initially, the Commission did not adopt a firm stance towards the need for the creation of HJCs. For instance, in its opinion on the 1998 constitutional amendments in Albania, notwithstanding its generally positive attitude to the establishment of HJCs, the Venice Commission made clear

110th Plenary Session of the Venice Commission [2]

that "*it cannot be considered as a principle that a democratic state has to create a Superior Council of the Magistracy*". The Commission repeated the view that as long as an independent judiciary could be otherwise ensured in a given state, there was no need to set up this body.

The Commission's position has evolved substantially following the assessment of the judicial reforms undertaken in several countries in Central and Eastern Europe. In its successive opinions, it expressed its strong support for the creation of HJCs as autonomous and independent bodies. This position was reiterated in the Commission's 2010 report on judicial independence, which recommends countries that have not yet done so to consider establishing an independent judicial council or a similar body. It can be seen as a time of a growing role of HJCs.

The creation of the High Judicial Council: a European standard?

Poland was the first country in Central and Eastern Europe to make fundamental changes in the judiciary, introducing the National Council of Judiciary to its judicial system. After the adoption of the constitutional amendment in April 1989 (before the June 4th election), Article 60 of the Polish Constitution provided that judges were to be appointed by the President at the request of the National Council of the Judiciary.

Following Poland's example, the establishment of HJCs in most post-communist countries became a "sign of the times". There was a widespread belief that HJCs could better guarantee the apolitical nature of judicial appointments. In this context, it is debatable whether the creation of HJCs should be regarded as a European standard which has to be respected by all Member States. I believe so especially in the light of the widespread recognition of this institution. Yet the mere establishment of HJCs is not sufficient. To de-politicise national judicial systems, these institutions must also guarantee the principles of judicial autonomy and independence effectively.

As the evolution in some countries in Central and Eastern Europe in the last few years has shown, many of the existing HJCs are not free from political influence. In this regard, when designing these institutions, legislators should adopt necessary safeguards to protect the independence of the judicial system. These safeguards should include, namely, the composition of the HJC, the election of its members, the decision-making procedure, and the legal nature of its decisions. Their importance was emphasised in recent opinions of the Venice Commission in relation to changes in the Polish judiciary as well as in recent opinions concerning Serbia and Romania.

The composition of the High Judicial Council and the election of its members

One of the main problems with regard to HJCs is the composition and election of their members, which is crucial for ensuring institutional autonomy. The essence of these bodies implies that they should be pluralistic in nature.

In other words, they should not consist only of judges, especially due to the risk of judicial corporatism, which is dangerous for judges' impartiality, but should maintain a balance between the representatives of the judiciary and other institutions.

Taking this position into account, one can undoubtedly agree that the construction of the National Judicial Council, as set out in Article 187 of the Polish Constitution of 1997, is the optimal solution, corresponding to the European standards.

This is because the National Judicial Council consists of three categories of persons, who are: 1) persons performing functions *ex officio, i.e.* President of the Supreme Court, Minister of Justice, President of the Supreme Administrative Court and a person appointed by the President of the Republic of Poland, 2) judges (15 members), 3) persons elected by the Parliament (4 members elected by the Sejm and 2 members elected by the Senate). Therefore, the Council's structure regulated in the Polish Constitution logically corresponds to the essence of this body, ensuring its autonomy, apolitical nature, and pluralism.

From the content and wording of Article 187, it is clear that only one category of the Council's members (parliamentarians: MPs and senators) is elected by parliament. The listing of three separate categories of the Council's members in three separate points of Article 187 means that they derive their mandate from different sources. This system ensures institutional balance and creates conditions for apolitical appointments.

110th Plenary Session of the Venice Commission [3]

Lower house of the parliament of Poland (Sejm) [4]

Hence, the view that the Parliament can also elect all judges as members of the National Council of Judiciary, as it was set out in the amendments to the Law on the National Council of Judiciary, is in contradiction to the interpretation based on a system of constitutional values.[4]

Not completely excluding the possibility of the election of some HJC members by national parliaments, the Venice Commission rather advocates the opinion that they should not be directly involved in politics. An advisable solution would be that HJC members do not hold positions as active parliamentarians, *i.e.* deputies or senators, but remain only legal practitioners who are elected by the national parliament.

Is the role of High Judicial Councils diminishing?

It can therefore be concluded that the pluralistic nature of HJCs is a European standard, with at least half, or even better, a majority of judges elected by the judicial community, not excluding the possible participation of the Minister of Justice in the Council, but subject to the conditions set out in the opinion of the Venice Commission.

All countries undergoing transformation were, and some still are, in a very difficult situation concerning the efficiency of their judicial systems. To combat this deficiency, there is a very dangerous temptation to "loosen"

the standards set out for the judicial branch at the expense of its independence. Despite membership in the Council of Europe and the European Union, there is a tendency, unfortunately not an isolated one, in many European countries to adopt short-sighted solutions undermining the efforts to de-politicize domestic courts in their national legal systems. Yet giving in to such pressure is dangerous both for the European community and for individual states.

In the light of the recent developments, we return to the main question: are we in a situation where the role of HJCs, despite their existence in so many countries for the last 30 years, is diminishing? The answer is not simple. In the past few years, we have been witnessing a widespread trend of countries implementing HJCs which formally comply with the European standards in their legal systems while, on the other hand, adopting sophisticated rules concerning their composition and decision-making methods. As a result, the autonomous nature of HJCs and thus the objective for which they were established, i.e. guaranteeing the independence of the judiciary, is in fact being undermined or even directly suppressed. It is therefore difficult to consider these policies as meeting the European standards.

If HJCs are transformed into "mock institutions" which formally exist but are under a strong political influence, it will be plausible to say that the role of HJCs is indeed diminishing. In Poland, the bitter reality was aptly captured in the title of a recent paper by a lawyer from the young generation which reads: "*The rise and fall of judicial self-government in Poland*".[5] It remains to be seen whether it will be a common trend in many countries or only an incidental case in the path towards building an independent and efficient judiciary.

Demonstration ("This is our court") [5]

Associate Professor at Adam Mickiewicz University in Poznań, former Prime Minister of Poland, former ambassador of the Republic of Poland to the Holy See, long-term member of the Venice Commission of the Council of Europe, Honorary President of the Venice Commission.

Notes

[1] The form of the constitutional regulation was also indicated in the Recommendation of the Committee of Ministers of the Council of Europe, Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges. (Principle I.2.a). See also Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards of Independence of the Judiciary and the Irremovability of Judges.

[2] Judicial appointments (CDL-AD (2007)028). This report was the Venice Commission's contribution to the Opinion No. 10 of the Consultative Council of European Judges (CCJE) on the Structure and Role of Judicial Councils.

[3] The names of such councils vary from country to country, e.g. High Council of Justice, Supreme Judicial Council, High Council of the Judiciary, Superior Council of Magistrates, National Council of the Judiciary. For the sake of simplicity, this article uses the general title "the High Judicial Council" (HJC).

[4] A critical assessment of such a solution was found in the opinion of the Venice Commission on Polish acts CDL-AD(2017)031: "The election of the 15 judicial members of the National Council of the Judiciary (the NCJ) by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far-reaching politicization of this body." The Venice Commission recommends that, instead, judicial members of the NCJ are elected by their peers, as in the current Act.

[5] A. Śledzińska-Simon, *The rise and Fall of judicial self-government in Poland: On judicial reform reversing democratic tradition*, German Law Journal, Vol. 19, No. 7, December 2018.

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Photographs

[1] Hanna Suchocka, author: Pelz, 13 June 2015, source: Wikimedia Commons, CC BY-SA 3.0, edits: photo cropped.

[2] 110th Plenary Session of the Venice Commission, 10 March 2017, source: Flickr, CC BY-ND 2.0, edits: photo cropped.

[3] 110th Plenary Session of the Venice Commission, 10 March 2017, source: Flickr, CC BY-ND 2.0, edits: photo cropped.

[4] 23.posiedzenie Sejmu, author: Paweł Kula, 22 July 2016, source: Flickr, CC BY 2.0, edits: photo cropped.

[5] This is our court, author: Grzegorz Żukowski, 17 July 2017, source: Flickr, CC BY-NC 2.0, edits: photo cropped.

Czech Republic, Hungary, and Poland violated EU law by refusing to take in refugees

Jana Šulcová

In its ruling of April 2020, the Court of Justice of the European Union found that the Czech Republic, Poland and Hungary breached EU law by not implementing the decision of the Council of the European Union on the mandatory relocation of 120 000 applicants for international protection from Greece and Italy to other EU Member States. In the judges' view, Poland and the Czech Republic furthermore failed to comply with an earlier decision of the Council concerning the voluntary relocation of 40 000 refugees.

Introduction of relocation quotas in the EU

In 2015, the European Union faced a massive and sudden influx of third country nationals, with over one million people seeking international protection in its territory. The EU's asylum system, where the first countries of arrival are responsible for processing applications for international protection, soon collapsed. In the decision of the Council of 22 September 2015, EU home affairs ministers established a mandatory relocation system, assigning quotas to other EU Member States, in order to alleviate pressure on Italy and Greece. While Poland, under the liberal-conservative Civic Platform government, supported the decision, the Czech Republic, Hungary, Romania and Slovakia did not, but were eventually outvoted by other Member States.

As an expression of their discontent, Hungary and Slovakia, supported by Poland under the national-conservative Law and Justice government, tried to annul the Council's decision, claiming that the mandatory relocation system was illegal. The Court of Justice of the European Union (CJEU), however, did not share their view and in its judgment of September 2017 pointed out that the relocation system was based on the principle of solidarity and fair sharing of responsibilities.

Although Slovakia originally opposed the relocation quotas, between 2015 and 2017 it eventually offered temporary shelter to more than 1 200 people who applied for asylum in Austria. It is probable that this step helped Slovakia to avoid being sued by the European Commission.

Following Slovakia's example, in December 2015 Poland indicated that 100 people could be relocated to its territory. In reality, though, the relocation was never completed and Poland made no further pledges in this regard. The scenario was similar in the case of the Czech Republic. In 2016, the Czech government indicated that it would accept 50 asylum seekers in its territory, but only twelve of them were in fact relocated. The national authorities have not given any undertakings since then. The same holds true for Hungary, which has been reluctant to comply with the quotas from the very beginning.

The buildings of the Court of Justice of the European Union [1]

Unsuccessful objections of Central European countries

In December 2017, the European Commission referred the countries to the CJEU, claiming that they had failed to fulfil their obligations to communicate, at least every three months, the number of asylum seekers they were willing to take and to proceed with the actual relocation of asylum seekers.

In the proceedings, the three Central European countries firstly argued that the case was inadmissible because the period of application of the relocation scheme had expired

By the expiration of the Council's Decisions, only some 30,000 people had been relocated [2]

in 2017, and therefore it was no longer possible for them to remedy the alleged infringements. The CJEU was not sympathetic to this argument, noting that a declaratory decision as to their failure to fulfil their obligations under EU law was still of substantive interest.

On the merits of the case, Poland and Hungary explained that they had refrained from implementation of the relocation decisions to maintain public safety, law and order. On this point, the judges held that the protection of public interests could justify non-compliance with the quotas only in relation to a specific applicant, following a case-by-case investigation which would, based on consistent, objective and specific evidence, give rise to a suspicion that the applicant represents an actual or potential threat. However, the argument could not provide legal grounds for the suspension of the implementation of the Council's decision as such.

The CJEU also rejected the argument raised by the Czech Republic which pointed to the malfunctioning of the relocation mechanism as another reason for not complying with the Council's decisions. According to the judges, the unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning of the relocation mechanism, would undermine the objective of solidarity inherent to the relocation decisions and the binding nature of those acts. The Czech Republic could not circumvent its obligation to implement the relocation scheme by providing other types of aid to Greece and Italy as the most affected EU countries.

Legacy of the CJEU's judgment

Even though the CJEU's judgment is merely a declaratory decision as the effect of the Council's decisions has already elapsed, it affirms that the EU has created an independent legal order based on the rule of law. It is also a reminder to the EU Member States that the Council's decisions are binding for them even if they conflict with their domestic political agenda.

The migration crisis proved that the existing EU legislation was insufficient to confront such a regional emergency, leading to a complete collapse of the system. Neverthe-

less, the relocation scheme left divisions between Central European and Western EU member states that continue to thwart a reform of the EU asylum policy.

The CJEU's judgment is also an indication that consensus in the EU should be formed on the political level, especially when deciding on sensitive issues such as the asylum policy. Otherwise, controversial decisions may face substantial difficulties in their implementation by individual Member States.

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Photographs

[1] Kirchberg - Cour de Justice (Court of Justice of the European Union) Tower I, II and III, author: Robert GLOD, source: Flickr, CC BY-NC-ND 2.0, edits: photo cropped.

[2] Refugee crisis in the Western Balkans: Scenes of despair and hope, author: European Union/ECHO/Mathias Eick, 15 November 2015, source: Flickr, CC BY-NC-ND 2.0, edits: photo cropped.

[3] P1060297, author: Brainbitch, 20 October 2016, source: Flickr, CC BY-NC 2.0, edits: photo cropped.

Refugees rescued in the Mediterranean sea [3]

Czech Republic

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National Human Rights Institution in the Czech Republic: an unattainable dream or a potential reality?

Zuzana Jarabinská

The Czech Republic is one of the very few states in Europe which has not yet established a National Human Rights Institution in accordance with the Paris Principles. Some of the international partners therefore treat the Czech Ombudsman's Office as an institution of this kind even though it does not possess the adequate mandate to fully perform the relevant functions.

First, it is fair to mention that the title of this article is overdramatized: having a National Human Rights Institution (NHRI) [1] in the Czech Republic in the future is surely not unattainable and for the vast majority of the Czech society it is definitely not a dream. The main reason for this is that most people (politicians included) do not know what an NHRI is and how such an institution could improve their lives (or political preferences). Therefore, I would like to start this article with a short comparison between an NHRI and an Ombudsman's Office in the traditional sense.

The NHRI and the "traditional" Ombudsman Institution: human rights bodies with different perspectives

NHRIs were internationally recognized as an important instrument for protection and promotion of human rights in the 1980s and early 1990s.[2] The principles relating to the status of national human rights institutions (the "Paris Principles") were adopted by the UN General Assembly in December 1993 and set basic criteria, requirements, and fundamental guiding principles all NHRIs over the world should fulfil.[3] According to the Paris Principles, NHRIs are non-judicial, fully independent bodies established by law and adequately funded by the state, whose task is to promote and protect human rights in the state's jurisdiction.

The main distinctions between an NHRI and a "traditional" Ombudsman Institution rest in their different methods of work and the extent of their mandate. The Ombudsman

UN General Assembly [1]

Institution is an independent institution designed to protect people against unlawful actions or inactivity of public authorities. In this capacity, it focuses on the investigation of individual complaints based on which it proceeds to the publication of general conclusions and recommendations.

Contrary to this, the NHRI monitors the overall human rights situation in the state and tackles the attendant challenges in more general terms. In this regard, NHRIs also devote more resources to promoting and raising awareness of human rights issues, providing human rights education, etc.

In terms of their mandate, the activities of NHRIs are designed to be as broad as possible, covering all human rights aspects. On the other hand, the Ombudsman's Office does not deal with all human rights problems but only those related to the conduct of public authorities.

The Czech Ombudsman's Office as an NHRI: *status quo* and potential future developments

The Czech Ombudsman Institution does not fulfil its role merely in a traditional understanding. It combines the authority over individual complaints with several specialized

agendas entrusted by the Czech Parliament, such as the National Preventive Mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (further referred as "NPM"), the equality body, the monitoring body under the Convention on the Rights of Persons with Disabilities, the body monitoring forced returns of foreigners, and the institution watching over the rights of EU citizens and their family members. The Czech Ombudsman Institution is therefore not purely a "traditional" Ombudsman's Office dealing only with cases concerning public authorities but it also - in several specific fields - works as a "quasi-NHRI".

The Ombudsman's Office is also the only state-funded, fully independent human rights institution in the Czech Republic which can, to a limited extent, be a partner to international organizations and their bodies monitoring compliance with international human rights obligations in the Czech Republic. Therefore, many international bodies started proactively contacting the Ombudsman's Office with various requests concerning the human rights situation in the Czech Republic (mostly in the form of questionnaires, personal meetings, shadow reports, etc.). The number of these requests has been increasing in the last decade as the Czech Ombudsperson started being more active and visible on the international level.

However, there are human rights areas and issues not falling within the Ombudsman Institution's competence. For example, the institution cannot deal with rule of law deficiencies, such as inappropriate use of special or accelerated legislative procedures, limited consultation in the process of drafting new legislation, deficiencies in the judicial system, corruption, freedom of media and the general media environment, and infringements of checks and balances, or with some human rights areas which are not covered by its mandate because they are not subject to decisions made by public authorities (for example some aspects of criminal law, civil rights and liberties, children's rights, etc.).

The Ombudsman's Office is also not equipped with the power, working methods, and staff which could satisfy the needs of a properly functioning NHRI. These deficiencies are most apparent with respect to the absence of proper human rights education, insufficient financial, personal and other resources and lack of competence to conduct widespread research and analytical activities in relevant areas.

Despite these shortcomings, the Ombudsman's Office in fact fulfils most of the Paris Principles criteria for an NHRI except for the breadth of its mandate, lack of certain methodological competence, and the plurality requirement. These deficiencies could be resolved by a legislative amendment to the Act on the Public Defender of Rights. However, the Czech Parliament has not yet done so. Why?

Why does the Czech Republic still not have an NHRI?

One of the main problems connected with the "NHRI issue" in the Czech Republic is that most political representatives do not consider it an issue at all. The lack of understanding and awareness of what an NHRI is and the insufficient interest in changing the existing system are combined with prejudices with regard to anything bearing the label "human rights". The overall political climate

Human Rights Council [2]

The Office of the Ombudsman of the Czech Republic [3]

in the Czech Republic has not been especially favorable towards strengthening human rights institutions in the last decade or two. As a result of this, establishing an NHRI has obviously not been a political priority.

Another aspect contributing to the lack of interest in establishing an NHRI in the Czech Republic is that there is no internationally binding obligation for states to create such a body. This fact explains (to some extent) why it was feasible to establish an NPM, a CRPD body, an equality body etc. and why the same does not seem to be possible in the case of an NHRI: all the above mentioned bodies were created in order to fulfil internationally binding legal commitments of the Czech Republic. While the non-existence of an NHRI may have a negative impact on the international reputation of the state concerned, no one can blame it for violating international law.

The Ombudsman Institution as a potential NHRI in the Czech Republic?

If the political environment and priorities started to be positive about the establishment of an NHRI, its tasks would be most probably entrusted to the Ombudsman's Office instead of constituting a new, separate institution.

First, it would be the most efficient and conceivable way as the Ombudsman already has a fully equipped office with a functioning administrative background and extensive experience in many human rights fields. Second, the Ombudsman's Office has already "gathered" several specialized mandates throughout the years of its existence. In this regard, a logical step would be to entrust the NHRI's agenda to the Ombudsman Institution as well. Third, explicit recommendations to strengthen the mandate of the Ombudsperson allowing it/him or her to fully assume the NHRI's functions have already been made by various states during the Universal Periodic Review several times in the past.[4] Moreover, having analyzed these recommendations, the Czech Government itself promised to make efforts to expand the Ombudsman's mandate so it can lawfully assume the NHRI's role.[5]

As the current institutional framework suggests, the promises of the Czech Government do not match its political priorities. Fully relying on the Ombudsman's work in partially performing the NHRI's tasks is, however, not the best way of tackling the situation.

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Notes

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[2] Jan Wouters, Katrien Meuwissen (eds.), National Human Rights Institutions in Europe. Comparative, European and International Perspectives (Intersentia 2013) 14

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[1] UN General Assembly, author: Patrick Gruban, 17 December 2006, source: Flickr, CC BY-SA 2.0, edits: photo cropped.

[2] Human Rights Council – 15th Session, author:UN Photo/Jean-Marc Ferre, 13 September 2010, source: Flickr, CC BY-NC-ND 2.0, edits: photo cropped.

[3] Brno, Údolní 39, kancelář VOP (6733), author: Martin Strachoň, 20 July 2015, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

Home births: return to the middle ages or a path to human dignity?

Zuzana Andreska

When expecting a baby in the Czech Republic, parents face a very rigid system. If they wish to make use of expert help from doctors and midwives, their only legal option is to deliver in a maternity ward. What is the reasoning behind the system and the potential alternatives to it?

The Czech system of obstetrics is generally considered to be very advanced, with a low death rate of both mothers and babies. The costs of birth-related health services are covered by public health insurance.

Nevertheless, not all parents are satisfied with the services provided by Czech hospitals and seek an alternative, usually in the form of home births. However, there is currently no other legal alternative to giving birth in a medical facility. What is the reason for denying mothers this choice? Should there be a choice? And if so, what kind?

Legal framework of giving birth in the Czech Republic

Home births are not explicitly legally regulated in the Czech Republic. Health services of any kind can be provided only by certified doctors[1] with a degree in medicine, and other certified medical staff, including midwives, i.e. health professionals providing services related to pregnancy and birth, from whom the Health Services Act (hereinafter the "HSA") also requires specific education, although of a lower level.[2]

A healthy baby is the common goal [1]

Parents complain of a hostile environment in hospitals [2]

However, midwives (and doctors) are legally forbidden from assisting in childbirth at home, as they can only offer birth-related assistance in a “health establishment”. [3] A health establishment has to fulfil certain minimum legal requirements which cannot possibly be met anywhere else than in hospitals. These requirements include, *inter alia*, the presence of a gynaecologist who would be able to arrive within five minutes, or the possibility to conduct a caesarean-section in another facility which can be reached in no more than a 15-minute drive.

Sanctions imposed on midwives

The relatively rigid system of obstetrics and gynaecology is further strengthened by prosecution of those who try to work around it. Apart from administrative fines, midwives in the Czech Republic also occasionally face criminal prosecution.

In January 2020, one of the midwives who assisted women with home births was given an administrative fine of 4,000 euros for overstepping the competences established for her by the HSA. Ten years before that, another midwife, Ivana Königsmarková, a former president of the NGO *Union of Midwives*, who assisted in the birth of a boy in 2009 who then died due to complications during the birth, was accused of causing serious bodily harm by negligent act and faced a sentence of six months to four years of imprisonment. In 2014, the courts acquitted her because the

prosecutor failed to prove the causal nexus between her actions, or lack thereof, during the birth and the boy's death. Königsmarková later sued the state for harm caused by the criminal proceedings and received approximately 30,000 euros for loss of profits.

Clash of rights

The focal point of the debate on home births evolves around the clash between the right of women to choose a place to give birth and the right of the unborn child (and the mother) to have their life and health protected.

This conflict has been debated not only on the national level but also internationally. The European Court of Human Rights (hereinafter the "ECtHR") did not find the Czech law regulating home births to be in violation of the European Convention on Human Rights. However, it invited Czech authorities to make further progress by keeping the relevant legal provisions under constant review, so as to ensure they reflect medical and scientific developments whilst fully respecting women's rights in the field of reproductive health. Notably, the ECtHR also urged Czech officials to ensure adequate conditions for both patients and medical staff in maternity hospitals across the country.

What are the future prospects?

Birth-giving remains a highly controversial topic in public debates in the Czech Republic. In order to bring together various stakeholders, the Government's Council for Gender Equality established the Working Group for Childbirth in 2015. It focuses on the question of place, method and context of birth (and the pre-birth and after-birth period), taking into account the role of midwives in the process.

Records from the Working Group show that the Ministry of Health neither supports home births nor plans to change the system in such a way as to incorporate the establishment of "birthing houses" as a middle way between hospitals and homes, which would allow for a less "hospital" and more domestic environment and where midwives rather than doctors would assist.

Instead, the Ministry opted for the introduction of so-called "centres of birthing assistance" which would form special departments within existing maternity wards. So far, there has only been one centre of this kind established, located in the capital city. Such centres should differ from traditional hospitals in that births of women whose pregnancy is considered to be without complications will be accompanied merely by midwives, not doctors. However, doctors would be available immediately, if necessary.

Despite being presented as an evolution to the existing system, many members of the Working Group consider the centres to be an insufficient solution. One of the reasons is that the centres will cooperate only with midwives who are employed by the particular hospital while completely leaving out community midwives. Unlike midwives employed by hospitals, community midwives take care of expectant mothers continuously during their pregnancy in order to establish a closer relationship of trust between them. However, their services are not covered by public health insurance and many hospitals (including the only established centre) do not allow them to assist in maternity wards.

Second, requiring extra payments on top of the costs covered by public insurance is a general trend accompanying health care (not only obstetrics) in the Czech Republic. The new centres will charge expectant mothers around 400 euros (which equals the regular cost of services provided by community midwives during the whole pregnancy including accompanying the woman to the hospital to give birth there) for a guarantee that one particular midwife will be present during the entire process of the birth. Having to pay a further 180 euros per night for a private room with a private bathroom can be financially unfeasible for many women.

Home births as another alternative?

In order to fully implement the right of parents to choose the place of giving birth, the Working Group adopted a rec-

A midwife was fined for assisting with home birth [3]

Maternity wards – symbol of safety or anonymity and loneliness? [4]

ommendation to the Government's Council for Gender Equality to support the establishment of birthing houses, which the Council itself approved later in 2018. Unfortunately, the Czech Government has not yet discussed the issue. In this regard, the Ministry of Health in particular has been continuously criticized for ignoring the wishes of expectant parents. Its lack of communication with the Working Group has also been explicitly reproached by the Panel of Experts regarding the implementation of ECtHR decisions.

The current system, with its rigidity and one-sided focus on the survival of the child, leads some parents to exit the official system and opt for an unassisted birth at home, with all the associated risks. Expectant parents who want to give birth at home can either choose an unassisted home birth or they can seek a midwife who is willing to undergo the risk of fines of up to 40,000 euros and criminal prosecution. A unified system of care for pregnant women in the Czech Republic before, during and after birth, outside of hospitals, is thus yet to come.

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Notes

[1] Act No. 95/2004 Coll., on the conditions for acquiring and recognizing professional competence and specialized competence for the exercise of the medical profession of doctor, dentist and pharmacist.

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Photos

[1] A healthy baby is the common goal, author: Tom Adriaenssen, 11 March 2006, source: Wikimedia commons, CC BY-SA 2.0, edits: photo cropped.

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[3] Ambulance, author: Albert Lugosi, 7 June 2015, source: Flickr, CC BY 2.0, edits: photo cropped.

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The COVID-19 pandemic in the Czech Republic

Lucie Nechvátalová

In the last few months, many countries around the world have faced the COVID-19 pandemic, and the Czech Republic is one of them. What is the situation in the Czech Republic and what has the Czech Government done so far to protect the Czech population and prevent the spread of the virus?

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

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

Coping with COVID-19 during the 'first wave'

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

The adopted measures concerned, besides other things, the obligation to wear face masks (or something covering the nose and mouth) outdoors and in the premises of publicly accessible buildings except for private homes, the prohibition of all types of events (e.g. sporting, cultural or religious), both public and private, involving more than 30 people, restrictions on free movement with the exception of travel to and from work and trips necessary to ensure basic human needs, restrictions on leaving the country for almost all Czech citizens, closure of all shops except for foodstores, drugstores, pharmacies and dispensaries of medical devices, as well as the cancellation of classes in elementary, secondary and tertiary educational facilities.

Illustration image [1]

Criticism of COVID-19 measures

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

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

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

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

Proportionality of the concrete measures

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

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

Challenging measures at the courts

As a response to these measures, several applications to courts have been lodged by affected Czech citizens mainly to contest the extent of extraordinary measures and the process of their adoption. They were allegedly adopted by concrete ministries unlawfully in the whole territory and even in the areas which were not within their authority.

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

The current situation in the Czech Republic

Nowadays, when the number of COVID-19 infected persons is increasing in the Czech Republic, the measures are generally being adopted by Czech authorities in a more

Face masks DIY [2]

proportional and rational manner. Strengthened restrictions are imposed predominantly on the concrete high-risk Czech regions based on the local epidemiological situation.

The measures adopted in the whole territory of the Czech Republic include the obligation to wear face masks (in all indoor areas of publicly accessible buildings, in the common areas of schools, in public transport and at public or private indoor events), and restrictions on running restaurants and similar facilities. As far as travelling from and to the Czech Republic is concerned, individuals must comply with various obligations according to the level of risk of COVID-19 infection in a particular country (from no obligation at all to an obligation to be tested for COVID-19 or to undergo 10-day quarantine).

No entry without face mask [3]

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

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[1] Face masks DIY. Author: JancickaL, 5 April 2020, source: Pixabay, CC0, edits: photo cropped.

[2] Illustration image, author: Alexandra_Koch, 9 March 2020, source: Pixabay, CC0, edits: photo cropped.

[3] Prohibiting sign on Kaufland store in Karviná (April 2020) 01, author: Tadeáš Bednarz, 7 April 2020, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

Hungary

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The Non-Ratification of the Istanbul Convention – Gender Inequality in Hungary

Alíz Nagy

The Council of Europe's Istanbul Convention was signed by Hungary in 2014. Since then, it has not been ratified. In May 2020, the Hungarian National Assembly voted against its ratification following a political statement by the Christian-Democratic Party. The party argues that the Convention is incompatible with Hungarian national values on gender and migration.

Istanbul Convention and Hungary

The Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention, is the first European document that sets out the framework for protection of women against violence. The agenda of the Convention is specific, addressing violence against women as "*a form of gender-based violence that is committed against women because they are women*." It establishes that states are obliged to "*fully address it in all its forms and to take measures to prevent violence against women, protect its victims and prosecute the perpetrators*."

Although the ratification was subject to intense political debate, minor steps towards the implementation of the Convention seemed to have been taken. In 2015, a proposal for a strategy against partnership violence was made public, to the discontent of many women's organizations, which pointed out that the draft ignored the Convention's explicit aims. The Istanbul Convention recognizes the structural nature of violence against women as the consequence of "*unequal power relations between men and women*". As a result, it strives for the protection of women within a broader framework: gender equality.

Gender equality in Hungary

According to the Gender Equality Index of the European Institute for Gender Equality, Hungary scores among the

Council of Europe [1]

worst of the EU countries in all domains reviewed. Despite the Hungarian press reporting continuously about cases of sexual harassment and partnership violence, there have been no signs of countermeasures being taken by policy makers in the last few years. A research published in 2018 titled "*Women's Affair*" demonstrates the "*difficulties and obstacles confronting women in everyday life.*" Overall, the research shows that women face social disadvantages mainly because they bear the responsibilities of care, which impacts their general position, among others, in financial domains as well.[1]

Violence against women in Hungary

Tóth shows in a review of the last two decades of research that partnership violence in Hungary is subject to stereotypical thinking. Although the numbers indicate a signifi-

cant decrease in victim-blaming, the practice is still widely prevalent as well as the idealization of the traditional family life and division of roles.[2]

In 2019, the National Assembly adopted a legislative amendment regulating access and visitation of children following family separation. Several NGOs have criticized the new legal framework for making institutionally forced visitations more difficult to supervise. Research shows that "*custody and visitation rights may be used as a form of custodial violence and a continuation of IPV*" (intimate partner violence).[3]

In 2020, due to the COVID-19 lockdown, the National Crisis Management and Information Telephone Service reported that the complaints of IPV incidents doubled.

Non-ratification of the Istanbul Convention in Hungary

The debate on the Istanbul Convention has been summarised recently in a report assessing how EU rules are reflected in Hungarian national laws concerning gender equality. According to its author Lídia Balogh, the issue has been labelled a "feminist topic", with the government's agenda concerning women focusing purely on their reproductive potential. On this point, Balogh quoted the Hungarian Prime Minister Viktor Orbán who stated: "*I would like to reach a comprehensive agreement with Hungarian women, because the success or failure of our demographics depends on them.*"

Hungarian politicians claim that the national legal system already provides sufficient legal guarantees of women's protection, and therefore, ratification of the Istanbul Convention would be redundant. This argument was recently reiterated by the Minister of Justice Judit Varga after several cases of domestic violence were reported and the question of the Convention's ratification was repeatedly raised.

KDNP's political statement against women's rights

In May 2020, the Christian-Democratic Party (KDNP) issued a political statement calling for rejection of the ratification of the Istanbul Convention. Its reasoning is twofold. One, it dismisses the term "gender" within the meaning presented by the Convention as "*socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for women and men*" and rejects the "gender-ideology" allegedly demonstrated by it. Second, the KDNP argues that the Convention contradicts the government's position on migration as it enables gender-based migration claims.[4]

The political statement was adopted the day after it was issued. Several organizations expressed their disagreement. Among others, the Patent Association, an NGO dealing with gender based violence and women's rights, states that these arguments show "*a clear denial of the situation in Hungary.*" The Hungarian Helsinki Committee labels the political statement political cynicism.

Several female members of Parliament condemned the decision. One of the opposition parties (Demokratikus Koalíció) even stated that the government "*is launching a fight against women*". Further politicians of the opposition (from the party Párbeszéd and Lehet Más a Politika) expressed similar views.

Ironically, the Hungarian government declared the year 2020 as "the year of victim assistance". The rejection of the Istanbul Convention makes mockery of this announcement and can hardly be understood as combatting gender inequality.

Christian-Democratic Party [2]

Illustration Image [3]

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Notes

[1] The context of this research and the title of it is a reference to the Hungarian Prime Minister's words. In 2017, Viktor Orbán said as a response to a journalist's question concerning the recall of Réka Szemerkényi, the Hungarian ambassador to the US, that *he does not deal with women's affairs*.

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Hungary's newest trans-discriminatory measure

Péter Kállai

The Hungarian parliament has banned change of personal data known as sex at birth. Several international and national LGBTI organisations have protested, stating that this measure leads to discrimination of transgender and intersex people.

One of the main reasons cited for the unlimited scope of the so-called Act on Protection against the Coronavirus, which allowed the government to rule by decree until the end of the state of emergency, was the alleged inability of the Hungarian Parliament to meet. In fact, there was no interruption in the Parliament's operation and its members have adopted several bills concerning people's rights.

"Sex at birth" – unchangeable personal data

On 31 March 2020, on the International Transgender Day of Visibility, the Deputy Prime Minister Zsolt Semjén submitted a series of legislative changes which were combined in a so-called "salad bill". Among others, the amendments included an increase in the governmental influence on the operation of theatres and transfer of some real estate to government-friendly organisations and social institutions of churches. Additionally, the bill declared documents connected to the Budapest-Belgrade railway project and the related Chinese loan a state secret for 10 years, subordinated six more public universities to the managerial control of foundations and overturned the decision of Budapest's mayor (from the opposition) to refrain from building museums in the largest public park.

Apart from these policies, the new legislation also introduced the concept of "sex at birth" which is defined as "*the biological sex determined by primary sexual characteristics and chromosomes*" and implemented it into the Civil Registry Act, setting out that these personal data "*cannot be changed*." On this point, the explanatory note further provides: "*Rights or obligations may arise on the basis of the sex declared by the birth registry; accordingly it is necessary to define the concept of sex at birth. Given that it is not possible to completely change the biological sex, it is necessary to stipulate in legislation that it is not possible to change it in the registry.*"

Budapest Pride 2015 [1]

The bill was adopted on 19 May 2020 and signed by the President eight days later. As of this date, official documents such as ID cards, driving licenses, and passports will compulsorily refer to sex at birth, denying trans people the ability to legally reassign their gender.

Anti-gender politics in Hungary

This development is not without a prelude. Official gender and name change permissions have not been issued to applicants for almost four years. In November 2016, the procedures were suspended on the pretext of developing a more uniform and transparent regulation. While the process of legal recognition of gender was initially slow and non-transparent, since late 2016, it has become largely inaccessible, with the new law reinforcing this trend.

The Fidesz-KDNP majority rejects the term "gender" as an ideological concept. In their view, there is no such thing as gender (only as an ideology) and sex is not a social construct, with social roles or identity playing a role, but it is purely biologically defined. This reasoning stands not only

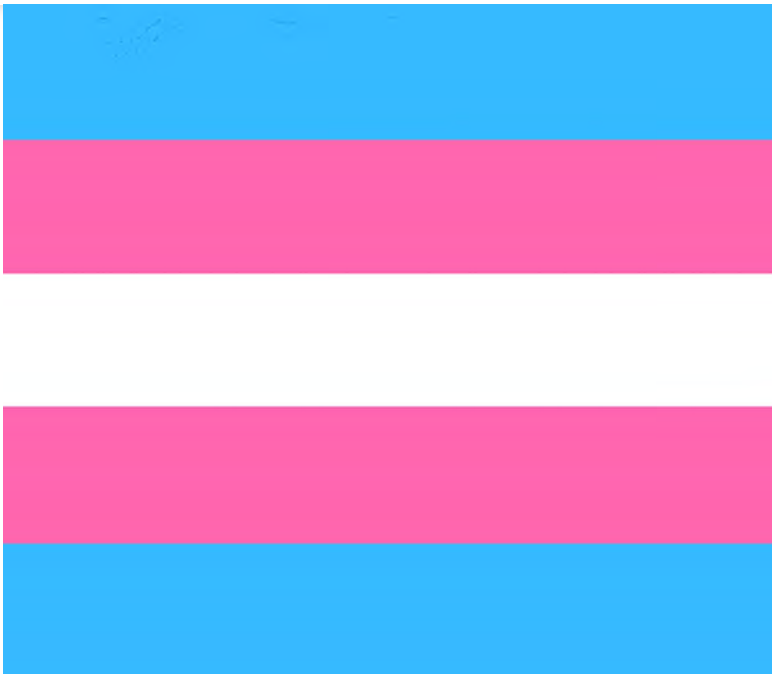
behind the refusal to ratify the Istanbul Convention,[2] but it was also cited in connection with the ban on gender studies programmes at universities.

NGOs' protests

Several national and international LGBTI organisations and transgender rights activists condemn and protest against the new law. The #Drop33 movement [3] and the Háttér Society recall that 40% of transgender people are fired from their jobs because they are transgender. In their opinion, this law can lead to increasing discrimination, especially in relation to employment and health care.

The ban on legal recognition and the inability to change gender identity on legal documents makes the tension between documentation and gender presentation even more apparent, forcing transgender and intersex people to verbalise their identity in different situations - to "come out" as transgender for complete strangers. As a result, they may face verbal or physical harassment even more frequently , limiting their right to respect of their dignity and personal security.

Logo of Háttér Society [2]



Transgender Pride Flag [3]

As the Transvanilla Transgender Association points out, in 2018 the Office of the Commissioner for Fundamental Rights stated that "*the lack of a quick, transparent and accessible legal gender recognition procedure undermines trans people's right to human dignity and self-determination.*" Indeed, under Article XV of the Hungarian Fundamental Law, Hungary is obliged to guarantee fundamental rights to everyone without discrimination. In this regard, the Hátter Society points out that the law also contradicts previous decisions of the Constitutional Court according to which gender and name change was recognized as a fundamental human right for transgender people.

Dunja Mijatović, the Council of Europe's Commissioner for Human Rights and the European Parliament's LGBTI Intergroup, has also condemned the bill, stating that "*trans rights are human rights*".

Recent ECtHR judgement

A recent judgement of the European Court of Human Rights makes the situation even more peculiar. On 16 July 2020 the ECtHR ruled that Hungary is obliged to legally recognize people's gender. In 2015, Hungarian authorities granted refugee status to a transgender man due to his being persecuted in his home country, Iran, for being transgender. However, Hungary, stating lack of jurisdiction, denied his request to amend his documents, which still referred to him as a woman. The ECtHR now found that the refusal to grant him legal gender recognition violates Article 8 of the European Convention on Human Rights.[4]

Trans Rights are Human Rights [4]

Relief from the Constitutional Court?

After the enactment of the bill, protesters sought to find remedy at the Constitutional Court. They submitted a petition to the Commissioner for Fundamental Rights asking him to send the law to the Court so that it could review its constitutionality. However, the history of the Constitutional Court, packed with government-friendly judges in the last decade, does not suggest that there will be any major confrontations with the government.[5] It is even questionable whether the matter will be brought before the Court and, if so, when it will appear on the judges' agenda. Until then, trans people remain deprived of their right to self-determination.

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[1] *See* Veronika Czina, Hungarian government takes questionable measures to increase its power amidst the fight against the Coronavirus. *V4 Human Rights Review*, No. 2, Vol. 2, April – June 2020, p. 20-23.

[2] *See* the contribution of Alíz Nagy to this issue of *V4 Human Rights Review:* The Non-Ratification of the Istanbul Convention – Gender Inequality in Hungary.

[3] 33 was the number of the relevant paragraph in the so-called salad bill. *See* International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Organisations Call on Hungarian Parliament to Reject Attempts to Ban Legal Gender Recognition*. 4 June 2020, available at: <https://ilga.org/hungary-drop33-legal-gender-recognition-ILGA-Europe-TGEU>.

[4] Case of Rana v. Hungary, application no. 40888/17, judgment of the ECtHR of 16 July 2020. <http://hudoc.echr.coe.int/eng?i=001-203563> .

[5] On how the Constitutional Court became a "judicial rubber stamp for government interests", *see* Hungarian Helsinki Committee, *Hungary's Government Has Taken Control of the Constitutional Court*. 25 March 2015, available at: <https://www.helsinki.hu/en/hungarys-government-has-taken-control-of-the-constitutional-court/>. For more examples, see the relevant articles on Verfassungsblog: <https://verfassungsblog.de/tag/hungarian-constitutional-court/>.

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[3] Transgender Pride Flag, author: Mfhelms, 7 March 2017, source: Wikimedia Commons, CC BY-SA 4.0, edits: photo cropped.

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Hungary's new national curriculum faces criticism from several angles

Veronika Czina

A new national curriculum in education will be in place from the academic year of 2020/21 in Hungary. The modified curriculum faces backlash not only due to its content, but also the fact that it has allegedly been crafted behind closed doors.

Background: modification of the national curriculum

Although the new national curriculum of Hungary (NAT, *Nemzeti Alaptanterv)* had been in the making since 2017, its content was made public only on 31 January 2020. Despite its late publication, Hungarian authorities have confirmed that it will be effective from autumn 2020. The new national curriculum introduces changes in elementary and secondary education, and moreover it also has effects on kindergarten education.

The NAT promised a paradigm shift in national education: a bigger focus on preparation of preschoolers for school, a decrease in the number of classes, more advanced language education and an evaluation system aiming at developing student competences. The process of acquiring books that follow the curriculum has changed, as well as the structure of classes and the content of textbooks.

Circumstances of the NAT's development

Soon after its publication, the NAT attracted criticism from several sides. First of all, the method of its creation was criticised for being entirely developed behind closed doors, without consulting any professional or public fora. No nation-wide organizations or teachers' boards were consulted during the creation of such an overarching, paradigm-changing document.

Second, the introduction of the curriculum within such a short time frame has also raised eyebrows. The President of the Hungarian Teacher Society argued that such profound changes as those introduced by the NAT should have been implemented over several years of transition. He also claimed that no other national curriculum in the history of modern democratic Hungary had been introduced so secretively and in such haste. As an example, he

Student in a Hungarian elementary school [1]

mentioned that the idea of the first ever NAT was raised back in 1989, with public materials being released in 1992 and finalised only in 1995.

The adoption of the first NAT, as well as its modifications in the 1990s and 2000s, were thus long and open processes that gave schools several years to implement the changes of the NAT in their curricula, which stands in sharp contrast with the current rushed process. In the case of the new curriculum, the idea arose in 2017 but its foundations were not laid down until autumn of 2018. After this phase, a 300-page plan was published and made accessible to the public, with professional organizations and experts providing their comments as well. To what extent these recommendations were taken into account remains contested as the following, most important phase of the work, when the curriculum itself was drafted, was conducted behind closed doors and the stakeholders were left out of the process.

Focus on the spirit of national pride

Besides the method of its preparation and introduction, the NAT's content has also been found to be problematic. Some critics highlight – unsurprisingly – that it is po-

litically and ideologically motivated while others point to its Christian-conservative bias. Several new authors displaying a particular understanding of the national culture (mainly authors from historically Hungarian territories outside the current borders) and conservative ideologies have been added to the textbooks and their works are listed as compulsory reading, while other important authors are left out (such as Nobel Prize laureate Imre Kertész). Some of these newly introduced authors even publicly express antisemitic or far-right views.

As of now, however, one disclaimer has to be made concerning the materials students will follow: the syllabus (*kerettanterv*) of individual lessons has not been published yet (despite the NAT's anticipated entry into force in September 2020) and the Minister responsible for the NAT promised that those authors who seem to have disappeared from the literature curriculum might in fact be discussed in classes.

Substantial changes are expected also in history classes, which will mainly focus on those events that serve the purpose of creating national unity, emphasize connections with the former Hungarian territories or commemorate the once great state of Hungary as a country. Contrarily, other aspects of the history of Hungary and important international actors, such as the EU or the UN, will only be taught marginally, as it seems from the curriculum available so far.

In sum, the amendments to the curriculum of literature and history suggest that these subjects are seen as tools for the formation of national identity. The Association of History Teachers argues that the knowledge-centered and material-oriented approach of the new curriculum means a step back from the source- and analysis-oriented, competence-based system of teaching that has been gradually developing in the Hungarian education system in the past two decades.

Concerns of professional organizations

Several professional organizations have expressed their concerns about the NAT, including prestigious secondary schools, even religious ones, university professors, the

Children during class [2]

Illustration image [3]

Association of Literature Teachers and the Association of History Teachers.

These organisations generally claim that the NAT does not serve the interest of children because even though it lowers the number of classes, it does not lower the amount of content they have to cover. It puts an emphasis on encyclopedic knowledge instead of developing skills and does not provide for alternative teaching methods for students with different abilities or learning difficulties. Moreover, the NAT does not prepare students for the reality of the labour market and supports a conformist attitude instead of encouraging critical thinking and free expression of thoughts.

Yet, what is worse, the new curriculum does not serve the interest of teachers either. According to professional organisations, the curriculum deprives them of the freedom of choice and independence when it comes to the selection of teaching methods.

Incoherence and dubious feasibility

A further problem is the NAT's incoherence. The NAT mentions several modern teaching methods, such as active learning, group work, differentiation between students based on their abilities and goals as well as the use of digital technology. The question remains to what extent these methods will be compatible with the increased amount of knowledge students will have to acquire, the educational background of teachers, or the available school facilities. The lack of flexibility regarding different levels of institutional preparedness is also striking: the NAT might be fairly feasible in an elite Budapest school, but it will not be so in schools of poorer or more remote regions of Hungary.

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Poland

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Elections that were not held: dispute over the organisation of the presidential elections in Poland

Krzysztof Dwiecki

In May 2020, Poland experienced one of the most serious political crises - during the ongoing presidential elections no candidate was elected. The disgraceful precedent caused by the constitutional dispute over the holding and conduct of the presidential elections in Poland during the COVID-19 pandemic was unequivocally recognised by lawyers as dangerous legal chaos, the effects of which continue to this day.

Political organisation of the presidential elections

The source of turmoil that arose in connection with the organisation of the presidential elections in Poland on 10 May 2020 was the World Health Organization's announcement of a state of pandemic due to the spread of COVID-19 disease. As a result, there were doubts among the Polish public opinion as to whether the organization of the presidential elections on time and in the traditional form, i.e. at polling stations, was possible from the point of view of conditions threatening the proper electoral process. The Polish government, despite the announcement of the state of the epidemic in Poland, did not decide to introduce a state of natural disaster.

The introduction of a state of natural disaster would have made it possible to legally postpone the presidential election until the cause of its introduction had ceased. Despite this, the ruling coalition (*Zjednoczona Prawica*), which is dominant in the Sejm of the Republic of Poland, decided for the option of holding the elections on the original date, adopting a special law as the legal basis for their organisation one month before the elections.[1] Its content excluded the application of certain provisions of the Polish Electoral Code - the basic source of electoral law - and transferred the power to organise the elections from apolitical electoral bodies to political authorities. The law contained several controversial solutions, such as:

Illustration image [1]

- the possibility of electing the President only by universal postal voting, taking place in Poland and abroad,
- the obligation to attach a statement on personal and secret voting on the voting card as its attachment, containing the personal data of the voter,
- depriving the National Electoral Commission of the right to determine the template of voting cards and their printing in favour of the Minister of State Assets.

Doubts and controversies regarding the electoral process

The special act adopted by the Sejm, creating legal and technical foundations for the organisation of the presidential elections, became the object of strong criticism from

the parliamentary opposition, as well as in legal circles and international organisations. Opposition politicians pointed to the political motives for its adoption, related to the desire of the ruling parliamentary coalition to provide re-election to its own candidate - the current President Andrzej Duda. The lawyers, on the other hand, pointed out that the content of the act distorts the democratic electoral process and leads to violations of the electoral rules laid down in the Polish Constitution.

The Supreme Court presented key arguments in its legal opinion. It pointed out that the adoption of the special law led to a violation of the Constitutional Tribunal Directive according to which any amendments to the electoral law should be adopted no later than six months before the election date. In addition, violations of the procedures laid down in the Sejm Regulations were pointed out, as the entire legislative process in the Sejm lasted for several hours, and the bill itself did not contain all the elements required by law, among others an assessment on its compliance with constitutional requirements. The possibility of delivering and receiving electoral packages from employees of the designated postal operator, i.e. *Poczta Polska*, was also criticized because in this way they were granted the status of public officials and the essence of elections was transformed into a postal service.

A separate charge was related to the limitation of the competence of the National Electoral Commission - the apolitical and most important body of electoral administration - in connection with the organisation of presidential elections. Its key powers regarding the determination of the model of voting cards and their printing as well as the method of delivery of electoral packages was entrusted to the ministers competent for state assets and foreign affairs - representatives of the executive body, devoid of the attribute of impartiality.

The conclusion of the opinion of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE) also pointed out that the special act needed to be improved to bring it into line with international standards for democratic elections.

Looking for a solution

The prerequisite for the special act was to be adopted within 30 days by the Senate, where the parliamentary opposition has the majority, and signed by the President. However, due to the lengthiness of the legislative process in the Senate, the Minister of State Assets Jacek Sasin - the main person responsible for the organisation of the elections - began without a legal basis to act in their organisation, specifying a new template for voting cards. In addition, based on the decision of the head of the Polish government - also issued without a legal basis - printing of voting cards and other elements of the electoral package was ordered, as well as the preparation by *Poczta Polska* for distribution of packages for correspondence voting.

It soon turned out that it was impossible to hold the presidential elections on time for organisational reasons, related to the detention of the law in the Senate and internal disputes that occurred among the ruling coalition. In addition, there were controversies related to the leakage of printed and secured voting cards and the fact that the Polish Post Office received the list of voters from the Ministry of Digitalisation without a legal basis, containing their personal data.[2]

The result was that the ruling parliamentary coalition reached a political agreement that the presidential elections would take place on 10th May, but there would be no possibility to vote. This was legally sanctioned by a resolution of the State Electoral Commission, stating that the inability to vote on the day of the presidential elections is tantamount to a situation where there are no candidates in the presidential elections.

The above described solution was not unanimously accepted, as in the face of the legal chaos that had arisen, it was indicated that each subsequent date of the elections

Mr. Andrzej Duda, President of Poland [2]

The Presidential Palace in Warsaw [3]

was unconstitutional. Despite the adoption of another special act to organize the presidential election, which finally took place on 28th June and 14 July and ended with the re-election of the current President Andrzej Duda, the legal validity of these elections is questioned. This is a clear example of the legal chaos caused by the actions of politicians who did not use the legal instruments provided for in the Constitution of the Republic of Poland in order to organize presidential elections during COVID-19 pandemic.

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Notes

[1] Act of 6 April 2020 on special rules for holding general elections for the President of the Republic of Poland ordered in 2020.

[2] Currently, this case is the subject of a complaint lodged by Adam Bodnar, the Polish Ombudsman, to the Provincial Administrative Court in Warsaw.

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Pandemic and freedom of assembly in Poland

Patryk Rejs

Special circumstances, such as the outbreak of a disease, may constitute grounds for restricting citizens' rights and freedoms if such limitations constitute effective means of preventing the spread of the disease. Any limitations should, however, be introduced with respect for the law, and in particular, for the provisions of the Constitution.

First days of pandemic in Poland and ban on mass events

The first case of the coronavirus causing COVID-19 was reported in Poland on 4th March. Knowing that one of the most effective preventive means is social distancing, the authorities quickly took quite radical measures to stop the spread of the epidemic.

On 8th March (the number of confirmed cases: 13), the Chief of the General Sanitary Inspection (GIS) recommended that Prime Minister Mateusz Morawiecki call off all mass events with more than 1000 people taking place indoors. On 10th March (the number of cases: 22), the Prime Minister prohibited all mass events, not only those with over 1000 attendees, thereby going significantly beyond the recommendation of the GIS.

From the very beginning of the epidemic, it was clear that restrictions on freedom of assembly would be introduced. It was, however, less clear in what legal form and to what extent these restrictions would be imposed.

Further days and further restrictions

On 13th March (the number of confirmed cases: 68), the Minister of Health Łukasz Szumowski issued a regulation on the declaration of an epidemic emergency in Poland, limiting many freedoms. According to paragraph 9 (1) of this regulation, the organisation of assemblies was prohibited for the period of the emergency, i.e. from 14th March until further notice. While the ban excluded assemblies with less than 50 participants, its effects were far-reaching, also covering religious assemblies, like holy masses in churches, or funerals. It was, therefore, the first, significant restriction on the freedom of assembly.

Paweł Tanajno – arrested presidential candidate [1]

A week later, on 20th March (the number of confirmed cases: 425), Minister Szumowski issued a new regulation which escalated the state of epidemic emergency to the state of epidemic. Paragraph 11 of this regulation left the prohibition of assemblies untouched. The regulation was amended only four days later, on 24th March, when the Minister cancelled the exception allowing the organisation of assemblies for less than 50 people for the period from 25th March to 11th April. As a result, even smaller meetings of people became illegal.

The effect of those Regulations was extended for an indefinite period of time, with minor amendments. Almost two months later, on 29th May, the Prime Minister reduced the restrictions on the freedom of assembly, reinstating the regular regime for gatherings of up to 150 people.

It is worth mentioning that despite the governmental policies, several assemblies were organised across Poland, including a protest of entrepreneurs dissatisfied with the forced closure of their businesses. During one of such protests, the police even arrested Paweł Tanajno – the presidential candidate and also an entrepreneur who led the biggest manifestation.

Legal grounds for restrictions on the freedom of assembly in Poland

One of the fundamental freedoms guaranteed to everyone by the Polish Constitution is the freedom of assembly. The legal act that regulates this freedom in more detail is the Law on Assembly which was adopted in 2015. The Law does not define an assembly with respect to a minimum number of people taking part in it. This is a result of one of the judgments of the Polish Constitutional Court which questioned the requirement of at least 15 persons attending set out in the previously applicable laws, leaving smaller gatherings out of its scope.

According to Article 57 of the Polish Constitution, the freedom of assembly may be, however, limited. First of all, there are so-called material restrictions that shape the freedom of assembly, regardless of other circumstances, within the framework set out in Article 57. Such restrictions include, for example, the prohibition of the participation of armed persons in assemblies.

Further restrictions on this freedom may be established under Article 31 (3) of the Constitution, which provides: *"Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."*

Minister of Health – Ł. Szumowski (l) and Prime Minister M. Morawiecki (r) [2]

These restrictions are not unconditional. To become legal, they must fulfil the prerequisites of the aforementioned provision, namely to have the form of a statutory act, pursue one of the enumerated public interests and comply with the principle of necessity (or, as the case law of the Constitutional Court provides, the principle of proportionality). Moreover, such restrictions may only limit, but not completely nullify the right or freedom.

Everything is legal, isn't it?

In the case of the ban on assemblies, there is little doubt that it was introduced to protect public health. It can even be assumed that the governmental restrictions are necessary in a democratic state and remain proportionate to the dangers of the coronavirus epidemic, especially given the speed at which it spreads, its infectiousness, and the degree of mortality, predominantly among the elderly and sick.

But the problem still exists. First of all, these restrictions were not adopted in the form of a statute but as ministerial regulations. The fact that the regulations were issued based on the provisions of the Law on preventing and combating human infections and infectious diseases (including those articles added to it just before the declaration of an epidemic emergency) does not justify its lack of compliance with the Constitutional Law.

The complete abolition of the freedom of assembly is also highly questionable. Even if we assumed that by passing the regulations, the Minister of Health and the Council of Ministers acted on the basis of the statute, and therefore had the competence to establish such a ban in an ordinance (which is already doubtful in itself), according to Article 31(3) of the Polish Constitution, no restriction may violate the essence of the law and thus, in practice, prevent its implementation entirely.

Both of these considerations alone, and especially in combination, imply that the restrictions violated the Constitution.

Conclusions

Of course, special circumstances, as the epidemic undoubtedly is, justify limiting the rights of individuals to protect important public interests. However, any attempts

Demonstration – one of the forms of assemblies in Poland [3]

by the authorities to take away citizens' freedom under the convenient justification of fighting against the virus, even worse when they are accompanied by violations of the Constitution, must be criticized.

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Poland must suspend the new Chamber of the Supreme Court created to handle disciplinary cases against judges

Martin Pracný

The Court of Justice of the European Union, in its order of 8 April 2020, ordered Poland to suspend the application of the national provisions on the powers of the new Disciplinary Chamber of the Supreme Court with regard to cases concerning judges. The European Union's highest court thus complied with the European Commission's request to issue an interim measure.

Illustration image [1]

The history of this conflict dates back to 2017, when Poland's ruling Law and Justice party adopted a new disciplinary regime for judges of the Supreme Court of Poland and the ordinary courts. These changes included the creation of the new Disciplinary Chamber of the Supreme Court, which should conduct disciplinary proceedings regarding judges of the Supreme Court, as well as decide appeals against decisions of lower disciplinary instances.

The Disciplinary Chamber has become part of a wider dispute over the reform of Poland's justice system, which, according to the European Commission, is undermining the independence of the Polish judiciary. The government party explains the reform as an effort to make the work of the courts more efficient and at the same time to get rid of judges associated with the pre-1989 communist regime. However, these efforts have produced many controversial decisions which are criticized not only by the Commission, but also by the Polish opposition and the professional legal community.

Poland failed to fulfil its obligations under EU law

In this particular case of the new disciplinary regime, the Commission stated that Poland breached its obligations under EU law, namely the second subparagraph of Article 19(1) of the Treaty on the European Union [1] together with the second and third subparagraphs of Article 267 of the Treaty on the Functioning of the European Union [2].

The result of these infringements was an action which the Commission brought to the Court of Justice of the European Union (CJEU) in October 2019.[3] The Commission argued that the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber. The main reason for this questioning is that judges of the Chamber are appointed by the National Council of the Judiciary, which also consists of 15 members who are elected by the lower chamber of the Polish Parliament. The members elected by the legislature raise doubts about their political independence, which may subsequently be reflected in their decision on the appointment of judges.

By its judgment of 19 November 2019 [4], the CJEU, on the basis of a request for a preliminary ruling from the Supreme Court of Poland – Labour and Social Insurance Chamber, stated that EU law precluded cases concerning its application from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. In the opinion of the CJEU, the Labour Chamber of the Supreme Court itself must assess whether the Disciplinary Chamber meets the requirements of EU law for an independent and impartial tribunal (for more on the judgment, see V4 Human Rights Review Spring 2020, p. 26).

Is the Disciplinary Chamber a court?

The Labour Chamber subsequently stated in its judgments of 5 December 2019 and 15 January 2020 that the circumstances in which the Disciplinary Chamber was established, the extent of its powers, its composition and the involvement of the National Council of the Judiciary in its constitution, all indicate that the Disciplinary Chamber cannot be considered as a court in the light of

EU law and not even Polish law. Furthermore, the Labour Chamber noted that the incumbent National Council of the Judiciary was not impartial and independent from the influence of the legislature and the executive. Even after these judgments, the Disciplinary Chamber continued to perform its judicial functions.

In light of these facts, on 23 January 2020, the Commission requested the CJEU, in proceedings seeking interim relief, to order Poland to adopt the following interim measures: (1) to suspend, pending the judgment of the CJEU on the action for Poland's failure to fulfil, the application of the provisions constituting the basis of the jurisdiction of the Disciplinary Chamber to rule, both at the first instance and on appeal, in disciplinary cases concerning judges; (2) to refrain from referring the cases pending before the Disciplinary Chamber before a panel whose composition does not meet the requirements of independence; and (3) to communicate to the Commission, at the latest one month after notification of the order of the CJEU imposing the requested interim measures, all the measures that it has adopted in order to comply in full with that order.

Do the interim measures interfere with state sovereignty?

The Polish government argued that the interim measures proposed by the Commission are inadmissible and reduce Polish sovereignty because the composition of the constitutional bodies of the member states does not fall within the competence of the EU. As regards the possibility of ordering the interim measures, the CJEU has held that, although the organisation of justice falls within the competence of the Member States, the fact remains that the Member States are required to comply with their obligations under EU law.

It is therefore up to each Member State to ensure that the disciplinary regime applicable to judges of the national courts complies with the principle of judicial independence, *inter alia* by ensuring that the judgments given in disciplinary proceedings against judges of those courts are reviewed by a body which itself fulfills the guarantees associated with effective judicial protection, including the protection of independence. In those circumstances, the CJEU has jurisdiction to order interim measures to suspend the application of the provisions relating to the powers of the Disciplinary Chamber in respect of disciplinary proceedings against judges.

Conclusion

The purpose of the interim measures is to guarantee the full effectiveness of the future final judgment in order to avoid the loophole in the legal protection afforded by the CJEU. Following the order of the CJEU, the First Presi-

Court of Justice of the EU in Luxembourg [2]

Supreme Court of Poland in Warsaw [3]

dent of the Supreme Court suspended the Disciplinary Chamber. The Polish government also complied with its obligations and sent the Commission information on the implementation of interim measures by the deadline. Also due to the coronavirus epidemic, which negatively affects the activities of the CJEU, we will probably see a final judgment in this case in the second half of 2020.

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Notes

[1] Article 19(1) of the Treaty on EU: *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*

[2] Article 267 of the Treaty on the Functioning of the EU: *"Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."*
"Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

[3] Case C-791/19 Commission v Poland.

[4] Joined cases C-585/18, C-624/18 and C-625/18, A. K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy.

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Slovakia

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The perils of direct democracy in Slovakia

Erik Lastic

Last week of July 2020 saw a familiar event in Slovak politics. A former parliamentary party, the Slovak National Party, announced the launch of a petition calling for a national referendum on early parliamentary elections. Calling the current government that took office only in March 2020 incompetent, the party plans to start collecting the 350,000 signatures needed to call a referendum in the upcoming weeks.

Check against legislature

The 1995 Slovak Constitutional Court decision on the role of direct democracy described the referendum as "*the people's check against the legislature,* [allowing them] *to take the responsibility which the legislature does not want, cannot, does not know how to, or is unable to bear.*" Over almost three decades, Slovakia saw dozens of attempts to transfer the decision-making power directly to the people only to see this instrument subjected to a bitter political competition, clashing interpretations of the constitutional text, and the polarization of society.

Why is the referendum, initially intended by the 1992 Constitution as a counter-balance to representative democracy, an everlasting source of problems? In 1992, the Constitution's drafters explained that in a referendum, "the people will decide directly upon the most important questions of the life of society." Yet referendum experience between 1992 and 2020 proved the opposite: the referendum itself and its use became one of the most critical questions.

The referendum on direct presidential elections

The complexity of Slovak experience with direct democracy is best summed up in the case of the 1997 referendum. In December 1996, fearing a political crisis would arise if the President could not be elected in 1998 by the polarized Parliament, opposition political parties initiated a petition calling for a referendum proposing direct presidential elections.

Slovak referendum 2015 [1]

The coalition parties opposed the referendum initiative and argued that the Constitution did not explicitly provide for the possibility to amend the Constitution by a referendum. They countered the opposition's initiative with a parliamentary resolution that requested that the President call a referendum on NATO membership, nuclear weapons, and military bases. The opposition initiative for direct presidential elections collected more than 521,000 signatures. President Kováč decided to join both initiatives and called for a joint referendum to be held in May 1997 with four questions on the ballot.

The merger of both polls increased the political tension between President Kováč and Prime Minister Mečiar. Both sides appealed to the Constitutional Court to interpret the constitutional articles on the referendum.

Illustration image [2]

The marred referendum of 1997

In May 1997, just a few days before the referendum vote was to occur, the Court ruled that the referendum on direct presidential elections was legal and that an amendment to the Constitution could be the subject of a referendum. However, the Court added that it was not possible to amend the Constitution directly merely based on the outcome of the vote.

Both coalition and opposition parties described the Court's decision as their victory. The government seized the opportunity provided by the Court's unclear decision and dropped, despite lacking the authority, the question on direct presidential elections from the ballot, distributing a ballot with only three questions proposed by coalition parliamentary party groups. The majority of voters refused to vote when presented with a ballot with only three questions. On 26 May 1997, the Central Referendum Commission announced that the referendum was marred, and the vote was invalid. According to the Commission, the referendum did not comply with the rules because four questions should have been included on the ballots.

Referenda under control

With the exception of the 2015 referendum on the protection of traditional marriage, initiated by the social movement Alliance For the Family (*Aliancia za Rodinu*) with the Catholic Church's support, the remaining referenda were organized by political parties, either based on a parliamentary resolution or by a petition. Apart from the vague constitutional provisions for referenda, there are also other unresolved questions about direct democracy in Slovakia.

In fact, there is no consensus on the role that should be played by direct democracy in the Slovak constitutional order. What is the relation between citizens and their representatives? When and in what situations is it appropriate to use direct democracy?

Referenda remain under the control of the political parties. Every referendum was accompanied by heightened polarization fuelled by political parties that call for a referendum, but also those who urge their voters to boycott the plebiscite to make the vote invalid. In the end, the existence of the 50% voter quorum for referenda to be valid distorts political competition and allows political actors to depress turnout by inviting voters to abstain from freely expressing their vote.

Referenda in an age of populism

The rise of populist political movements across the globe, aiming to serve the silent majority and to fight against the elite, also revitalized the debate on the relationship between representative democracy and the direct involvement of the people. The new ruling coalition in Slovakia, led by Prime Minister Matovič, the leader of the Ordinary People and Independent Personalities (OLANO) movement, frequently pays lip service to direct democracy and the will of the people.

In the last year only, the OLANO announced its aim to call for an all-encompassing referendum with 17 questions, ranging from an extra vacation day for voters to a fee-free appointments system in healthcare. With no efforts to initiate the actual referendum, 11 of these questions were transformed into an internet poll "rozhodni.to (decide.

it)" in the middle of the 2020 election campaign. The survey allowed internet users to choose policy priorities for the movement and the future government. After winning the election, Mr. Matovič used the internet poll results as a bargaining tool when discussing the next government manifesto, repeatedly referencing the survey results as an expression of the people's will.

OLANO's recent efforts together with the latest attempt of the Slovak National Party to use the referendum to call early parliamentary elections serve as additional evidence that the referendum in Slovakia remains under the control of the political class. It allows for parliamentary confines and traditional parliamentary procedures to be skipped by placing policy and political conflicts in front of voters as in the referenda in 1997, 2000, and 2004 [1].

As Dahl observed, the weakness of citizens exercising ultimate control over the agenda of collective decision-making is already a problem of the utmost seriousness in all democratic countries. In Slovakia and everywhere in the world, the challenge remains to strike a balance between the complexities of modern representative government and governing with the people's consent.

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Notes

[1] Two of the referenda , of 2000 and 2004, were both initiated by the largest opposition parties seeking dissolution of the Parliament and early parliamentary elections. Both referenda were invalid due to a low turnout.

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Slovak prime minister Igor Matovič [3]

Embarking on the "Polish way"? Amendments to abortion laws in Slovakia

Jana Šikorská

The newly elected Slovak Parliament has already discussed and voted on four highly controversial amendments seeking to limit women's access to legal abortion. As a result, Slovakia is closer than ever to passing a law which would impose practical barriers for women seeking termination of pregnancy in the territory of the Slovak Republic.

Since the parliamentary elections which took place in March 2020, the newly elected Slovak administration has had a full legislative agenda. To the surprise of many observers, an unexpected item on it was the immediate preoccupation of the ruling coalition with the abortion laws currently in place. Between March 2020 and August 2020, the Slovak Parliament already voted on four amendments to the abortion legislation. These amendments ranged from the most conservative ones, proposing the so-called "Polish model", to less harsh ones, with all of them being more stringent than the current text.

Current abortion legislation and its challenges in a nutshell

The current legislation in Slovakia allows women to undergo abortion upon a formal written request and without providing any reasons until the 12th week of pregnancy. After this period, an abortion is legal in circumstances prescribed by law, namely when the pregnancy negatively affects the health of the woman. Whether this is indeed the case is decided by an expert medical assessment.

Although the four amendments recently proposed by the newly formed governmental majority are based on a uniform presumption that the current abortion legislation is too liberal, there are already formal restrictions in place for women wishing to terminate their pregnancy. In particular, the doctor is required to provide guidance on the possible health consequences of the procedure, which cannot be undertaken more than once every six months.

The radical approach: Following the Polish path

The most radical legislative proposal came from Kotlebovci-Ľudová strana Naše Slovensko (Kotlebovci - People's Party Our Slovakia), an openly far-right party. The ĽSNS has been consistently advocating for the so-called "Polish model", which essentially means a complete ban on abortions with a few limited exceptions, such as if the pregnancy is a result of a criminal activity (e. g. rape, incest), if the pregnancy poses a threat to a woman's life, or if the fetus shows genetical defects.

Leader of OĽANO's conservative wing [1]

According to a legal analysis published by an NGO *Možnosť voľby (Option to choose)*, the amendment would in reality ban all abortions unless there are some serious underlying reasons. In its view, the new legislation would not only seriously undermine the fundamental human rights of pregnant women but could also put their health and lives in danger due to the expected increase in illegal abortions. The NGO further suggests that the amendment would be incompatible with the Slovak constitution as per a 2007 decision of the Constitutional Court, in which the Court ruled that in the first 12 weeks, the fetus does not enjoy any legal protection and the right to privacy of a pregnant woman must be upheld and protected. Therefore, the 12-week window to undergo abortion was held to be compatible with the Slovak Constitution.

Although the Slovak Parliament rejected the ĽSNS's proposal in the most recent vote, it is likely that identical or similar legislation will be put to the vote again in the future.

The key legislation

The seemingly least radical amendment out of the four came from the conservative wing of the ruling party Obyčajní ľudia a nezávislé osobnosti (Ordinary people and independent personalities). Interestingly, its proposal does not aim for a total ban on abortions. Instead, the OĽANO has adopted a more subtle approach, putting forward a series of more "digestible" amendments which could, in the end, practically limit access to abortions for many women in Slovakia; with all of the amendments being underpinned by a clear political aim. The conservative ideology shifts focus from protecting women to protecting fetuses. The proposed legislation has passed the first reading in the Parliament and it is awaiting its second reading.

The OĽANO's amendment introduces a number of smaller changes to the current legislation. One of them is the prolongation of the waiting period before women can undergo an abortion, which would increase from the current 48 hours to 96 hours. Both the current and the proposed period are in conflict with international human rights law, namely the right of a pregnant woman to privacy and health standards. Moreover, the research shows that women are unlikely to change their opinion during the waiting period, which merely reinforces an unwanted psychological burden. Arguably, the only logical rationale behind the additional 48 hours is thus to shrink the 12-week window.

Another seemingly harmless amendment is an increased governmental oversight over the information about the risks associated with abortions which the doctor is legally obliged to pass on the patient before the procedure. Here, the OĽANO proposes including details about postnatal financial and material help and to allow NGOs and/or churches to produce information leaflets. Unsurprisingly, women's rights activists fear that the amendment could be misused by anti-abortionists and that the information presented on the leaflets could be manipulative and factually misleading.

The final point of the OĽANO's proposal worth mentioning is the introduction of a new requirement of two independent opinions from two different medical facilities should a woman decide to undergo abortion after the end of the initial 12-week period. This condition is problematic for two reasons. First, experts agree that medical opinions are unlikely to differ due to the precision of contemporary medicine. Second, many also fear that women from rural areas could have great difficulties obtaining the second opinion from a different medical facility due to the distance and costs associated with the journey. In sum, these factors may effectively discourage some women from getting an abortion even if they would otherwise consider it.

Beyond the practical harm

Both proposals have contributed to hateful and divisive rhetoric against the rights of women and gender equality.

Protester [2]

Illustration image [3]

The discussions surrounding the amendments, as well as the texts themselves, portray women as passive objects in need of guidance and/or prolonged explanations and convincing.

In the more radical format, the decision is made for women by the state without any representation of their voice, essentially, the narrative being that the life of a pregnant woman is in the hands of a state which bars them from making a free and informed choice about their health and bodily integrity. In the less radical format advocated by the OĽANO, the control is diffused to a number of other actors, such as doctors, NGOs or churches. As a result, the pregnant woman gradually loses control over her own health and body while an increased degree of control is exercised by different actors, who interact with the woman in a direct or less direct way. The overall result is similar, namely the portrayal of women as unable to make informed choices.

It is likely that Slovakia has embarked on a journey which may bring further limitations on reproductive rights and which could, in the future, copy the Polish model. Yet, as of now, the current social climate does not allow for such a radical leap to go unnoticed.

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Office for Personal Data Protection and its politicization in Slovakia

Martin Kovanič

The Office for Personal Data Protection is a public authority responsible for the protection of personal data in Slovakia. Even though mass surveillance is becoming a much-debated media topic, public discourse has so far paid only limited attention to the institution. The Office gained extensive media coverage when it requested information from the Czech Center for Investigative Journalism about the source of a leaked recording related to corruption at the General Prosecutor's Office under threat of a large fine.

Institutional protection of personal data

The Office for Personal Data Protection (OPDP) was established in 2002 as part of the accession process to the European Union. As a supervisory body, its main function is to apply the Act on Personal Data Protection, provide consultancy services, create guidelines for data processors and supervise data processing in public institutions and private enterprises. Apart from that, the OPDP is also tasked with raising public awareness of the risks associated with data processing and educating data subjects on their rights. In order to achieve this, it is supposed to engage in public debates and present a data protection voice in the public sphere.

In its latest annual report, the OPDP claims that public awareness of the issues of data protection is on the rise. The number of consultations via e-mail rose to 1500 in the period from May 2018 to May 2019. In the same time period, the Office provided 67 press statements. Especially in 2018, the majority of the questions were related to the introduction of the new data protection legislation, namely the General Data Protection Directive (GDPR) and the new Act on Personal Data Protection and their application. During 2019, the media interest decreased and the OPDP focused more on specific cases.

The controversial request for disclosure of a journalistic source

The OPDP entered the public debate more prominently following its request addressed to the Czech Center for Investigative Journalism (CCIJ) in relation to a recording

GDPR [1]

of a discussion between the controversial entrepreneur Marián Kočner with the former general prosecutor Dobroslav Trnka. The request dates back to December 2019, i.e. the start of the trial with Marián Kočner, who has been accused of ordering the murder of the journalist Ján Kuciak and his fiancée Martina Kušnírová.

The recording of the debate between Kočner and Trnka, full of vulgarisms, was published in October 2019. It was recorded in Trnka's office in the summer of 2014 and it contains information about the corruption of Members of Parliament during the election of the general prosecutor, information about the existence of the recording of the so-called Gorilla case, which was the large corruption case connecting top politicians and entrepreneurs in corrupt practices, publicized in 2011, and blackmail of another controversial entrepreneur Jaroslav Haščák. The leak of the recording shed light on a highly problematic relationship between members of the private sector with the prosecutor's office.

In its request, the OPDP asked the CCIJ for detailed information on the source of the recording and any other recordings taken in the prosecutor's office under threat of a large fine amounting up to 10 million euros. The CCIJ

refused to comply with the request, invoking its right to protect its journalistic sources. The threats sparked a mass media outcry and the OPDP had to publish a press statement in which it tried to explain that it only asked the CCIJ for cooperation in identifying the camera operator who was responsible for the recording. The CCIJ, however, published the entire letter and proved that the request asked for the disclosure of the source of the recording. The OPDP did not take any further steps towards sanctioning the CCIJ.

Aftermath of the case and the role of the OPDP's President

The request to the CCIJ was interpreted in the light of personal connections of the OPDP's President Soňa Pötheová with Marián Kočner. She worked as the head of PR during his election campaign for the mayor of Bratislava in 2006. Moreover, the investigation of Kuciak's murder uncovered that she had been communicating with Kočner over Threema and WhatsApp from 2014 until at least 2017. Pötheová did not make a press statement personally after the connection had been revealed in January 2020, taking a two-month holiday instead.

After the February elections and the establishment of the new government, Pötheová was summoned before the Committee on Human Rights and National Minorities of the Slovak Parliament to explain the threats towards the CCIJ. She excused herself due to her incapacity to work. At the meeting, the Committee passed a motion to remove Pötheová from office based on the persisting suspicion that due to Pötheová's close contacts with Kočner, the OPDP *"did not act independently and was subject to external influences."* In April 2020, she was dismissed from her position as President by the National Council of the Slovak Republic, just a few weeks before her five-year term was about to run out.

Politicization of data protection and its effects

The problem of the politicization of state administration is not exclusive to the OPDP, but this particular case illustrates that it leads to suboptimal performance. Soňa

Whatsapp & Threema [2]

Demonstration in memory of murdered journalist Ján Kuciak and his fiancée Martina Kušnírová [3]

Pötheová was already criticized in 2015 when she was elected President of the OPDP. Before that, she was a close collaborator and head of the communicating office of the former Speaker of the National Council of the Slovak Republic for the SMER-SD party. She did not have any previous experience with the protection of personal data in a professional capacity.

During her term, the OPDP was not able to establish itself as an authority in the field of data protection and its activities remained rather invisible to the general public. The legacy of this period will be tainted with controversies over the request to disclose journalistic sources and the close relationship of Marián Kočner with the OPDP's former President, as one of his many contacts in the state administration. When it came to political struggles, personal data protection was just a means to an end.

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Photographs

[1] GDPR - General Data Protection Regulation, Author: Descrier (descrier.co.uk), June 27, 2017, source: Flickr, CC BY 2.0, edits: photo cropped.

[2] Whatsapp & Threema, Author: Tim Reckmann, December 11 2014, source: Flickr, CC BY 2.0, edits: photo cropped.

[3] #AllForJan, Author: Peter Tkáč, March 2nd 2018, source: Flickr, CC BY 2.0, edits: photo cropped.

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