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Faculty of Social and Economic Sciences

NATIONAL INSTITUTIONS OF
HUMAN RIGHTS PROTECTION –
NATIONAL AND COMPARATIVE
PERSPECTIVE

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**MINISTERSTVO ZAHRANIČNÝCH VECÍ
A EURÓPSKÝCH ZÁLEŽITOSTÍ
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INTRODUCTION

National Human Rights Institutions (NHRIs) are defined as independent bodies responsible for promoting and monitoring human rights. The system of NHRIs existence is based on the universally defined principles, set by the main international organisations operated in this area – United Nations.

The status, composition, work, effectiveness and involvement of different stakeholders in each state reflect the understanding and observance of human rights and fundamental freedoms. This complicated network of different stakeholders, positive obligation of the state as well as nationally set strategies make the topic very important and still continuously developing.

Papers in the text-book provide different, mainly application reviews how the stakeholders and National Human Rights Institutions are operating, what are the good practices or bad experience and also recommendations based on the particular research. The national, regional and universal perspective in the complex way present the topic of human rights and the optic based on the principle, that every human being is guaranteed human rights and establish the responsibility of the state and its authorities to observe its proper and also efficient implementation.

We strongly hope, that you will find important information and reflects particular research involved.

Editor

ENFORCEMENT OF DECISIONS OF EUROPEAN COURT OF HUMAN RIGHTS AS AN EXAMPLE OF INSTITUTIONAL COOPERATION ON PROTECTION OF HUMAN RIGHTS

Mgr. Nikoleta Bitterová

Abstract: The paper deals with the control mechanism that observes the compliance with obligations arising from judgements stating violation of European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) that is part of system of protection of human rights established by the Council of Europe. Due to the mentioned *ex ante* control of the promotion of human rights commitments is the European legal space with the jurisdiction of European Court of Human Rights considered to be the most developed and most sophisticated system of human rights protection. The aim of the paper is to take a closer look at the system of execution, enforcement and supervision of the decision of European Court of Human Rights with the focus on the functions and methods of institutional ensuing via dialogue between international and domestic institutions on the example of Slovakia.

Key words: European Court of Human Rights, judgement, Council of Ministers, obligation, enforcement

Introduction

Legal proceeding is not an end in itself. Rather, at its end there comes an authoritative decision that entails particular consequences which may be, for the initiator (as well as for participant who is not an initiator) of such proceeding favourable, or quite the contrary, unfavourable. It is then fair to state that the aim of the legal proceeding are the particular consequences, resp. legal effects that are sought by the participant of the trial. The authoritative decision of the court serves in such regards rather as a tool based on which the participant of the

trial is able to reach the aim set during the proceeding. Comparing to the other courts, especially, the domestic courts, the aim of the proceeding before the European Court of Human Rights is very specific: “[a] judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedoms to be made effective.”¹

1. Relevance of the issue

1.1. Current state of art

The paper aims to introduce a process that follows immediately after the European Court of Human Rights (hereinafter ECtHR) delivers decision, usually judgement stating the violation of human rights guaranteed by the European Convention on Human Rights (hereinafter the Convention). This problem is especially important in the context of Slovak and Czech legal academia and practise, since there the emphasis is put rather on the articles dealing with substantive rights and decision-making of the ECtHR - mostly in cases where it serves as an argumentative support referring to quasi-precedent character of the Court’s decisions. Even if there is a professional debate about the procedural questions of the European system of human rights protection, it usually does not cover the proceedings following the moment of delivering judgement.² In other words, considering the

¹ TULKENS, Françoise “Execution and effects of judgments of the European Court of Human Rights: the role of the judiciary”, in Dialogue between judges, Council of Europe, Strasbourg, 2006, p. 12. In: *The Execution of Judgments of the European Court of Human Rights*. 2nd edition. Human rights files, No. 19. Council of Europe Publishing: 2008. ISBN 978-92-871-6373-8. [online].[last accessed on 18.12.2016]. Available from [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2008\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf)

² ECtHR delivers several types of final acts. Except of advisory opinions, it delivers decisions, judgements against particular signatory party to the Convention. The judgements are delivered after the assessment of the case and serves as a legal opinion on violation or non-violation of human rights and

interest in the system of human rights protection guaranteed by the Council of Europe, the interest ends where the judgement of ECtHR is delivered. However, we argue that the attention should be conferred rather on compliance with obligations arising from judgments of ECtHR.

However, as we did already mention, the judgement does not represent the final goal of the legal proceeding. Hence, also the judgement through which the rights guaranteed by the Convention, is only a tool that should ensure, as much as possible, that the situation in which the complainant currently resides is as similar as possible as the situation in which the complainant was before the violations of his/her rights. Of course, this is not fully possible, or in several cases (considering the character of the violation of particular rights) it is almost impossible and impossible at all. The specificity of this problem and some interesting questions related to it inspired us to process some of the judgements of ECtHR.

1.2. International legal and political context

The next reason why procedural questions following the judgment delivery is important and relevant, is their relevance from the broader context of international law and relations between national and supranational legal orders. It is impossible to ignore the development of political moods in last years and months which promote the critical attitude towards the concepts of international organizations with the strong reference to supreme sovereignty of nations states. Their argument is that the represented by persons who do not know the situations in particular country in detail or at all, interfere in intra-state matters from such faraway places such as Brussels or Strasbourg.

fundamental freedoms in particular case. The ECtHR decides on three issues: admissibility of the case, on merits and on just satisfaction.

1.2.1. Great Britain

One of the best examples of such attitudes and their application as a tool of political marketing is the result of Brexit.³ Increasingly, there are voice calling for the withdrawal from the Convention⁴, which would probably also result in exclusion from the Council of Europe.⁵ In this respect, the ECtHR judgement *Hirst against the UK (2)*⁶ is mentioned very often as in this judgement the UK was found guilty of violating the Article 4 of the Protocol no. 1 due to preventing the prisoners their electoral rights via blanket norm (*en bloc*). Despite the judgement is dated back to 2005, up today, the overseeing of its execution was not finished. In other words, the judgement was not executed and enforced at all. The legislative change from the UK side did not come for a simple reason – due to a lack of political will to further specify the condition of the right to vote for prisoners serving a sentence of imprisonment.

³ EU Referendum: Full Results and Analysis. In: The Guardian. [online]. [last accessed on 18. 12. 2016]. available from: <https://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-anal>

Results. In BBC [online]. [last accessed on 18. 12. 2016]. Available from: http://www.bbc.com/news/politics/eu_referendum/results

⁴ WAGNER, Adam. Theresa May Plans UK Withdrawal From European Convention on Human Rights – Report. In *Human Rights, News, Views and Info*. [online]. [last accessed on 20. 12. 2016]. Available from <http://rightsinfo.org/theresa-may-plans-uk-withdrawal-human-rights-convention-reports/>

⁵ Debating Europe: Should European human rights rulings be non-binding on governments? [online]. [last accessed on 26. 12. 2016]. Available from: <http://www.debatingeurope.eu/2014/10/07/should-national-parliaments-be-able-to-veto-european-human-rights-rulings/#.WGO4EFXhD4Y>

⁶ The ECtHR judgement *Hirst against United Kingdom* of 6. October 2005, complain no. 74025/01. [online]. last accessed on 22. 12. 2016]. Available from: [http://hudoc.echr.coe.int/eng#{"fulltext":\["hirst"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER"},"itemid":\["001-70442"\]}](http://hudoc.echr.coe.int/eng#{)

1.2.2. Russian Federation

The UK is not, however, only signatory party to the Convention where there has been a hot debate on this issue. Similar tendencies are observable also on the other side of the continent – in Russia. The amendment to the act on constitutional court that came into force in December 2015 gave the Constitutional Court of Russia Federation the right to declare the judgements of international human rights bodies “unenforceable” reasoned in a way that their interpretation of international conventions and is not in conformity with the Russian constitution.⁷ Such assessment is based on inconsistency of the “basics of Russian constitutional system” and “the human rights system established by the Constitution of Russia Federation”. In the aftermath of such findings of the Russian constitutional court there cannot be exercised any steps whose aim is the implementation of decisions in question.⁸ It is undoubted that the main aim of such amendment were the ECtHR judgements. Russia is still the only member states of the Council of Europe where a domestic bodies possesses such competences. The origins of this legislative amendment is to be seen again in the political unwillingness of the state to adopt national measures following a found violations of the Convention. Surprisingly, also this time the issue of electoral rights of prisoners and violation of

⁷i.e.: CHAEVA, Natalia. *The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in Anchugov and Gladkov*. In: EJIL: Talk! Blog of the European Journal of International Law. [online]. [last accessed on 28. 12. 2016]. Available from <http://www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladko/>

⁸ European Commission for Democracy Through Law (Venice Commission). CDL- AD(2016) 016. Opinion no. 322/2015. Russian Federation. Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court. Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016). [online]. [last accessed on 28. 12. 2016]. Available from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e)

Article 3 of the Protocol no. 1 in case *Anchugov and Gladkov against Russia* showed as questionable.⁹

1.2.3. Turkey

Besides UK and Russia, there is a third “black sheep” when it comes to promotion of obligations arising from the Convention and judgements of the ECtHR. Pioneer in this field are well-known cases against Turkey, i.e. *Loizidou against Turkey*¹⁰ where Turkey published a document on the website of its Ministry of Foreign Affairs in English language declaring Turkey's dismissive attitude towards exercise of judgement. This document provoked an outrage across Europe.¹¹¹¹ Despite the execution of judgement and closure of the cases finally did happen, the stalemate repeated few years after in another case against Turkey – *Mamatkulov against Turkey*.¹²

⁹ The ECtHR judgement *Anchugov and Gladkov against Russia* of 4. July 2013, complaints no. 11157/04 and 15162/05 . [online]. [last accessed on 18. 12. 2016]. Available from : [http://hudoc.echr.coe.int/eng?i=001-122260#{"itemid":\["001-122260"\]}](http://hudoc.echr.coe.int/eng?i=001-122260#{)

¹⁰ The 1996 ECtHR judgement *Loizidou against Turkey* of 18 December, complain no. 15318/89. [online]. [last accessed on 18. 12. 2016]. Available from

:[http://hudoc.echr.coe.int/eng#{"fulltext":\["loizidou"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-58007"\]}](http://hudoc.echr.coe.int/eng#{)

¹¹ MARMO, Marinella. The Execution of Judgments of the European Court of Human Rights – A Political Battle. In: *Maastricht Journal of European and Comparative Law*. volume 2, issue 2008. p. 235 -258. ISSN: 1023-263X. [online]. [last accessed on 20. 12. 2016]. Available from: http://www.maastrichtjournal.eu/table_of_content.aspx?sy=2008&pn=2#

¹² The ECtHR judgement *Mamatkulov and Askarov against Turkey* of 4 February 2005, complaint no. 46827/99 and 46951/99. [online]. [last accessed on 20. 12. 2016]. Available from: [http://hudoc.echr.coe.int/eng#{"fulltext":\["mamatkulov"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-68183"\]}](http://hudoc.echr.coe.int/eng#{)

1.2.4. Black list of states

With the regard of execution of judgement and unwillingness of some state to respect the judgements, there is so called Black list of states that repeatedly have such problems. The black list is compiled by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly and the criterion is a selection of ECtHR judgements that were not implemented by the responsible states in more than five-year period after the delivery of judgement, as well as those where other implementation problems were found. At the moment (based on the report from 2015) black list includes: Bulgaria, Greece, Hungary, Italy, Poland, Romania, Russia, Turkey, Ukraine, UK.¹³ Here it is important to say that the Slovak Republic is does not belong to states with repeatedly problematic approach towards the implementation of judgements and this will be illustrated also in the next part of the paper. One of the reasons why it is so, is it effective cooperation between international element (the Department of execution of judgements) and national element (Office of the government representative of the Slovak Republic before European Court of Human Rights).¹⁴

2. The Function of the execution of judgements of European Court of Human Rights

The meaning of the execution of the ECtHR judgements is based on two bases: firstly, it constitutes a satisfaction of the complainer who

¹³ Doc. 13864 0, 9 September 2015 Implementation of judgments of the European Court of Human Rights Report1 Committee on Legal Affairs and Human Rights Rapporteur: Mr Klaas de VRIES, Netherlands, Socialist Group. [online]. [last accessed on 22. 12. 2016]. Available from: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22005&lang=en>

¹⁴ For more information on the activities of Office of the Representative of Slovak republic before the European Court of Human Rights see: [online]. [last accessed on 20. 12. 2016]. Available from: <https://www.justice.gov.sk/Stranky/Ministerstvo/Zastupovanie-SR/Zastupca-SR-pred-ESLP/Zakladne-informacie.aspx>

won his/her case before the Strasbourg court, which declared the violations of his/her rights; similarly, the execution of judgement is important for the next development of legal order that is being discussed in the proceedings in order to avoid such violation in the future. The judgement itself is limiting as it simply concludes the violation or non-violation of the Convention. It is important to emphasize that judgements the ECtHR are not of constitutive character, do not establish new rights to the complainer; the judgements only declare that the state of art is or is not the result of violation of the Convention by the responsible state.

Unlike national constitutional courts (including the Slovak Constitutional Court) ECtHR does not have rights to cassation and hence, the Court itself refuses the label of 'European constitutional court' or 'court of fourth instance'. ECtHR cannot cancel or change the decisions of national courts hence its decisions have only declaratory character.¹⁵ it is fair to ask how and why does the state execute the judgement, in which it was labelled as a violator of Convention. To respect the judgement of the ECtHR means to execute it on a voluntary basis and in good faith. As the Convention is an international treaty (of regional significance), the general principle of international law apply¹⁶,

¹⁵ BARKHUYSEN, TOM; EMMERIK VAN, L. Michiel. A Comparative View on the Execution of judgments of the European Court of Human Rights. In: CHRISTOU, Theodora; RAYMOND, Juan Pablo (eds.). *European Court of Human Rights: Remedies and Execution of Judgments*. British Institute of International and Comparative Law, 2005. ISBN-10: 0-903067-54-4. [online]. [last accessed on 28. 12. 2016]. Available from: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/12942/A+comparative+view+on+the+execution+of+judgments+of+the+european+court+of+human+rights.pdf?sequence=2>

¹⁶ PIROŠÍKOVÁ, Marica. *Commentary to selected articles of the Convention on Protection of Human Rights and Fundamental Freedoms (original: Komentár k vybraným článkom Dohovoru o ochrane ľudských práv a základných slobôd)*. Euroiuris: Bratislava, 2008. p. 42. ISBN 80-969554-5-9

including the principle *pacta sunt servanda*¹⁷ (treaty has to be fulfilled in good faith).

2.1. The binding effect of the judgments of European Court of Human Rights

The final judgement of the Court is binding and state is obliged to execute it including adoption of general and particular provisions in order to prevent similar violations of the Convention. Article 46, par. 1 of the Convention obliges the states to follow the judgement of the ECtHR in all cases, in which they are part of. In this we can talk about the *inter partes* binding effect. Despite of the fact that the 1960 judgement *Lawless against Ireland*, the ECtHR stated that: “Only those Contracting Parties which are parties to the dispute shall be bound by the judgment of the Court.”¹⁸ It is important to ask what are the effects of the judgements that are delivered in disputes concerning other states. Do the other states have to care about those judgements at all or can we talk about *de facto erga omnes* binding effect of the ECtHR judgements? Such obligation is related especially with Article 1 of the Convention that obliges the states to secure the rights guaranteed by the Convention. The contracting parties should be interested in the judgement concerning other states right because if they are applying the legislature or practise identical or analogical with the legislature or practise of the state that has been convicted, it is possible that without adjustment to the requirements of the Convention and its jurisprudence,

¹⁷ Article 26 of the Vienna Convention on the Law of Treaties: “*Pacta sunt servanda. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”

¹⁸ The ECtHR judgement *Lawless v. Ireland* of 14 November 1960, complain no. 332/57. [online]. [last accessed on 28. 12. 2016]. Available from: [http://hudoc.echr.coe.int/eng#{"fulltext":\["lawless"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-57516"\]}](http://hudoc.echr.coe.int/eng#{)

they can be convicted as well.¹⁹

The decisions of the ECtHR do not have so called self-executing character and in the framework of division of powers of particular bodies of the Council of Europe and independence of particular components of power, the ECtHR is not the body which would be executing the judgements itself. The supervision over the execution of the final judgements of the ECtHR is, according the article 46, par. 2²⁰, held by the Committee of Ministers as the Committee is the highest executive and political body. The proceedings before the Committee of Ministers are very specific comparing it to the proceedings before the

¹⁹ More information on the Convention and its interpretations from the side of the ECtHR see BITTEROVÁ, Nikoleta. Binding force, enforceability and enforcement of judgments of the European Court of Human Rights (original: Závaznosť, vymožitelnosť a výkon rozhodnutí Európskeho súdu pre ľudské práva). In: (eds.) *Cofola 2015: sborník z konferencie*. 1. vyd. Brno : Masarykova univerzita, Právnická fakulta, 2015. 1081 s. Řada teoretická, Ed. Scientia, č. 532. ISBN 978-80-210-7976-2 [eBook]. [last accessed on 28. 12. 2016]. Available from: <http://www.law.muni.cz/content/cs/proceedings/>

²⁰ Article 46: Binding force and execution of judgement „ 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee. 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of 26 27 paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

ECtHR. The proceedings related to the execution of judgements, and mainly to judgements of the ECtHR is not a dispute proceeding in the traditional understanding which means that the parties of the original dispute – the complainer(s) and contracting party to the Convention or responsible state do not have the same space for the participation in the process of the execution. During the meetings where the execution of judgement is being decided, the complainer, neither his/her legal attorney is not present, but the responsible state is present which may raise doubts about the equality of parties in the proceeding before the Committee of Ministers. Warranty that should secure the equality of the parties in the execution of judgements of the ECtHR is to receive the messages of the complainer when it comes to the payment of just satisfaction and individual measures that are directly related to it.²¹ The right to comment on the performance of a particular judgment, in order to obtain a broader context of the situation in a particular country have so called stakeholders (i.e. non-profit organizations). It is however valid that the complainer do not have the possibility to comment on the adopting general measures.²² The Committee of Ministers does not act as an independent arbiter (as it is in the case of ECtHR) as the choice of remedies belongs to state which has only international-legal obligation in order to achieve the set result – the remedy of the breach of human rights guaranteed by the Convention, while this choice then subsequently becomes subject to supervision and approval by the Committee of Ministers.

²¹ HARRIS, David; O'BOYLE, Michael; BUCKLEY, Carla. *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, 2014. s.183. ISBN 978-0199606399.

²² Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights (text approved by the Committee of Ministers on 10 January 2001 at the 736th meeting of the Ministers' Deputies). [online]. [last accessed on 22. 12. 2016]. Committee of Ministers Available from:

<https://wcd.coe.int/ViewDoc.jsp?id=744279&Site=CM>

2.2. Restitutio in integrum

Early and effective execution of judgements of the ECtHR challenges the Council of European and its bodies, in particular from the perspective of credibility of the ECtHR. The Committee of Ministers requires from each government that has been bounded by the judgement to fulfil the commitment the information about the measures which has been adopted by the state regarding the violation of the Convention. The Committee also supervises the process of execution of the judgement up to acquiring the final information from the government of the state concerned about the fulfilment of all obligations according to the judgement and then adopts the final resolution on the execution of judgement. Convention in its article 41 states: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” From the interpretation of this provision it follows that it is upon the Court whether it does or does not admits the just satisfaction and so on the basis of assessment of circumstances of particular case and alleged violation. In general, the just satisfaction admitted by the Court according to the Article 41 of the Convention may have two alternatives; it comes only in the form of declaratory judgement which only states the violation of one or more provisions of the Convention, or such declared violation is accompanied also with the amount of money representing the compensation for the material and / or non-pecuniary damage.²³

Article 46, par. 1 of the Convention implicitly contains the obligation for state to remove or remedy the violation of the Convention, or to provide compensation if the *restitution in integrum* is not possible.

²³ NIFOSI-SUTTON, Ingrid. The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective. In: *Harvard Human Rights Journal*. [online]. [last accessed on 28. 12. 2016]. Available from : <http://harvardhrj.com/wp-content/uploads/2010/10/51-74.pdf>

Restitutio in integrum, or simpler said a restitution, represents the most appropriate way of compensation of the human rights violations. One of the general principles on international law is that in the execution of international decisions, state should aspire for restitutio in integrum every time possible. State is obliged to conduct restitution in serious cases of violation of the Convention. The remedy in the European system of human rights protection should be executed every time at the domestic level. If the is however not possible or it is possible only partially, the ECtHR may admit just satisfaction.²⁴ Except of just satisfaction, the state's remedies are also individual or general measures. The general measures which should prevent the repetition of similar violations of the Convention in the future, includes especially the change of intrastate legislature or legal practise, publishing of the judgements, resp. its translation, forwarding the judgement to responsible bodies in order to get familiar with it. The individual measures include the already mentioned payment of just satisfaction and resitutio in integrum, as well as retrial before national authorities, erasing the record of conviction from the criminal record, residence permit, etc.

In case that the ECtHR noted the violation of the Convention, the accused state has the legal obligation to repay the amount of just satisfaction to the complainer if admitted according to article 41 based on the proposal of the complainer.²⁵ The responsible state has also the obligation to choose general and/or if necessary, individual measure that must be adopted in the national legal order in order to remedy the

²⁴ BUYSE, Antoine. Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law. In: (2008) *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)*, volume 68, issue 2008, pp. 129 – 153 (Article). [online]. [last accessed on 18. 12. 2016]. Available from : <http://dspace.library.uu.nl/handle/1874/32809>

²⁵ Article 41 of the European Convention

violations.²⁶The state has the obligation to create sufficient, reasonable and effective legal measures which enable the execution of judicial decisions and then the subsequent role of the ECtHR is to assess whether they have been used in practise by the national bodies.²⁷

3. The Process of execution of judgements of European Court of Human rights²⁸

The process of the execution of judgements falls under the competence of Committee of Ministers and Department of the Execution of Judgements of the European Court of Human Rights, although in some particular cases also the Parliamentary Assembly of the Council of Europe and the ECtHR itself participate on the execution. The lawyers from the Department conduct all necessary analysis and communication with responsible states on the issue of execution of particular judgements. The Department prepares all the material for the Committee of Ministers which analyses the cases and adopts decision based on the material provided. The decision of the Committee of Ministers has the form of final resolutions (that finishes the supervision of the execution and the judgement is considered executed) or

²⁶ MACEJKOVÁ, Ivetta. *The retrial before the Constitutional Court of the Slovak Republic as a remedy for human rights violations determination of the European Court of Human Rights (original: Obnova konania pred Ústavným súdom Slovenskej republiky ako prostriedok nápravy porušenia ľudského práva konštatovaného Európskym súdom pre ľudské práva)*. [online]. [last accessed on 28. 12. 2016]. Available from https://www.ustavnysud.sk/documents/10182/992164/1_Macejkova_prispevok_final.pdf/8724b0c6-b450-45cd-92cc-1f392cd3212c

²⁷ SVÁK, Ján. *The impact of the ECtHR on a fair trial (original: Vplyv rozhodnutí ESLP na spravodlivý súdny proces)*. [online]. [last accessed on 30. 12. 2016]. Available from: http://www.ja-sr.sk/files/Vplyv_rozhodnuti_ESLP.pdf

²⁸ The analysis of sources is based on the sources that are publicly available containing information on the execution of judgements – recommendations of Council of Europe and reports of the representative of the Slovak republic before the ECtHR.

preliminary executions (which encourages states to take additional measures in order to remedy the violated laws). Both types of resolutions are adopted by the 2/3 majority of the all members of the Committee of Ministers.

3.1. The Council of Ministers of Council of Europe²⁹

The Committee of Ministers of the Council of Europe consists of ministers of foreign affairs of member states, however, at this level the Committee meets usually once a year. The meetings of Committee related to execution of judgements taking place once in three months, are held by the presentation of the permanent missions of the state in Council of Europe. Nevertheless, the composition of the Committee is especially interesting due to the fact that the execution of judgement is

²⁹ Also other bodies of Council of Europe participate on the execution of judgements, such as Parliamentary Assembly through the Committee on Legal Affairs and Human Rights – CLAHR in the form of different resolutions and recommendations to states in the area of measure that could be adopted in order to effectively execute the judgement (mainly in cases of problematic and complex judgements), also European Commissioner for Human Rights and Protocol no. 14 admitted further roles to the ECtHR when he grounded the option of Committee of Ministers in case of a long-term failure of the efforts to execute the judgement to turn to ECtHR with the request for interpretation whether there has been a failure to fulfil the obligation arising from the judgement.

Even though the outcome is that the process of execution of judgement is based on the participatory model, it is still true that the key role is played by the Committee of Ministers and therefore we decided to deal with its roles especially. Regarding the roles and functions of other bodies, see i.e. Open Society Justice Initiative. *From Judgment to Justice Implementing International and Regional Human Rights Decisions*. Open Society Foundations, 2010. ISBN: 978-1-936133-33-8. [online]. [last accessed on 30. 12. 2016]. Available from : <https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf>

not decided by the lawyers, rather by the carrier diplomats.³⁰ In case of Slovak republic (but also other states), not only the diplomats are present during the meetings, but also the representative from the Office of the representative of Slovak republic before the ECtHR, who are directly participating on the development of action plans and action reports through which the institutional cooperation between Department for execution of judgements and Slovak republic in the area of remedies works.

In the first step, the responsible states send the Department for the execution of judgements the *action plans* whose content refers to plans developed by the states including the measures to be adopted in order to remedy the decided breach of laws guaranteed by the Convention. Afterwards, the states send the *action reports* which contain the description of what has been already done in order to remedy the breach of law to the complainer as well as to prevent the similar violation of human rights in the future. Except of already mentioned payment of just satisfaction, plans and reports contain the individual and general measures adopted by the responsible state.

Regarding the process of execution of judgements, we cannot omit the Additional Protocol no. 14 to the Convention, which brought new tools for the Committee that may be used during the execution of judgements. The Protocol no. 14 introduced the system of twin-track procedure system enabling to react on systematic and complex problem at the national level under the so called enhanced procedure.³¹ There are several reasons which lead the Committee to classification of cases under this procedure. It concerns the judgements in cases which require

³⁰ HARRIS, David; O'BOYLE, Michael; BUCKLEY, Carla. *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, 2014. s.183 ISBN 978-0199606399

³¹ ABDELGAWAD LAMBERT, Elisabeth. The Execution of the Judgments of the European Court of Human Rights: Towards a Non- coercive and Participatory Model of Accountability. In: *Heidelberg Journal of International Law*, vol. 69, No. 3 (2009). [online]. [last accessed on 28. 12. 2016]. Available from : http://www.zaoerv.de/69_2009/69_2009_3_a_471_506.pdf

urgent individual measures, then the so called pilot judgements, cases in which the ECtHR or the Committee of Ministers revealed the complex/structural problems and also in cases of international disputes.

3.2. The retrial as remedy

The Committee of Ministers several times recommend the retrial as a remedy at the national level. In the recommendation (2000)2³², the Committee stated that under certain circumstances the retrial, resp. the re-hearing of the case at the national level represent the most effective, as not the only one measure in order to achieve the *restitution in integrum*. The recommendation contains a call addressed to states that relates to possibility for re-hearing of the merit including the retrial in cases in which the ECtHR decided on the breach of provisions of the Convention. The Committee followed the effective remedy in cases in which the complainers suffer from serious negative consequences caused by questionable domestic decision that is not sufficiently repaired by the just satisfaction and cannot be removed otherwise than by the re-hearing, resp. retrial.³³ In Slovakia, the decision of the ECtHR is the legal basis for the retrial at the level of general judiciary exactly stated in the Criminal Procedure Code³⁴, as well as in the new Civil

³² Council of Europe. Committee of Ministers. Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies). [online]. [last accessed on 28. 12. 2016]. Available from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06

³³ PIROŠÍKOVÁ, Marica. *Comentary to the selected articles of the Convention on the protection of human rights and fundamental freedoms. (original: Komentár k vybraným článkom Dohovoru o ochrane ľudských práv a základných slobôd)*. Euroiuris: Bratislava, 2008. s. 45. ISBN 80-969554-5-9.

³⁴ Provision § 394 par. 4 of Criminal code, according to which “*also the Court’s decision according to which the decision of prosecutor or the court of Slovak republic or the preceded proceeding violated fundamental human*

dispute Code³⁵ and in 2014, the possibility of retrial was added to the Constitution of Slovak republic³⁶, which was not possible until then. Comparing to the Czech Republic, there the retrial is possible only and only just before the Constitutional Court of Czech republic, not at the level of general courts.³⁷

3.3. Supervising the execution of judgments of the European Court of Human Rights against the Slovak Republic

Undoubtedly, the most problematic point in the process of execution of judgements is the execution of general measures and selection of appropriate and effective tools of reparations by the responsible state these measures have to be often adopted firstly in order to enable the enforcement of individual measures in concrete cases, i.e. creation of

rights or freedoms of the accused, if negative outcome of such proceeding may not be repaired” is considered a “rather unknown” court’s fact justifying the retrial permission.

³⁵ Provision § 397 letter. d) Civil Dispute Code: “*European Court of Human Rights decided or concluded in its judgement that the court’s decision or the preceded proceeding violated fundamental human rights and freedoms of the dispute’s party and the serious implications were not eliminated by the admitted just satisfaction.*”

³⁶ Article 133 of the Act no. 460/1992 Coll. of the Constitution of the Slovak republic: “*There shall be no appeal against a decision of the Constitutional Court; this however does not apply if due to a decision by a body of an international organization set up to ensure the observance of international agreements binding for the Slovak Republic, the Slovak Republic has the obligation in proceedings before the Constitutional Court to reopen a final decision of the Constitutional Court.*”

³⁷ § 119 (1) Act no. 182/1993 Coll. of Laws on Constitutional Court: “*Should the Constitutional Court have decided in a matter in which an international court found that, as the result of the encroachment of a public authority, a human right or fundamental freedom was infringed in conflict with an international treaty, a petition for rehearing may be submitted against such decision of the Constitutional Court under the conditions set down in this Statute/*”

new judicial remedy at the national level.³⁸ Other examples of general measures are the amendment of law or administrative practise, publishing of judgements of the ECtHR or the education of relevant and concerned authorities.³⁹ Referring to the reports on the activity of representative of Slovak republic before the ECtHR, it is possible to demonstrate the effectiveness of the execution of judgement again the Slovak republic.⁴⁰ In regards with the execution of judgements, the Committee observes whether the general and individual measures necessary for fulfilment of the judgement were adopted, while considering also the possibility of Slovak republic to choose the measures considered the most appropriate. The Office of the representative, through the Permanent Mission of the Slovak republic in the Council of Europe, but also through direct negotiations with the employees of the Secretariat of the Council of Europe, informed the Committee about the fulfilment of commitments arising from the

³⁸ Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights. Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies [online]. [last accessed on 18. 12. 2016]. Available from : <https://wcd.coe.int/ViewDoc.jsp?id=334147>

³⁹ The translation and publication of the judgements may be found on the websites of government agents before the ECtHR. In SR – M. Pirošíková:, <https://www.justice.gov.sk/Stranky/Ministerstvo/Zastupovanie-SR/Zastupca-SR-pred-ESLP/Zakladne-informacie.aspx>;

In ČR - V.A. Schorm:

<http://portal.justice.cz/Justice2/Soud/soud.aspx?h=1&q=Evropsk%FD%20sou d%20pro%20lidsk%E1%20pr%E1va>

⁴⁰ The data are from 2015, since the report from 2016 was not available yet during the time of writing this paper; see 2015 Report on the activity of the representative of the Slovak republic before the European Court of Human Rights (translated from original: Správa o činnosti zástupcu Slovenskej republiky pred Európskym súdom pre ľudské práva za rok 2015), [online]. [last accessed on 30. 12. 2016]. Available from :<https://www.justice.gov.sk/Stranky/Ministerstvo/Zastupovanie-SR/Zastupca-SR-pred-ESLP/Spravy-zastupcu-pred-ESLP.aspx>

judgements in the form of information submitted within the observation of the execution of judgements in the Committee, mainly about:

- The payment of admitted amount of money of just satisfaction
- The further development in cases at the national level
- The distribution of the judgements of ECtHR to bodies concerned and about publishing the Slovak translations of the Court's judgements in the professional legal magazine Justice revue (translations were secured by the Office of Representative)
- The undertaken and preparing legislative changes
- The changes in judiciary of national courts
- The further measures adopted in the framework of execution of judgements

After the Committee is convinced that the Slovak republic adopted all necessary measures in order to comply with the judgement, it adopts the final resolution stating that the duties under the article 46, par. 2 of the Convention were met.⁴¹

⁴¹ In 2015 the Committee of Ministers terminated the supervision of the execution of 14 judgements and decisions against the Slovak republic after publishing the final resolutions referring to this termination. The final resolution are:

- CM/ResDH(2015)12, adopted on 4 February 2015 to the judgement Franek against Slovak republic of 11 February 2014 (no. 14090/10), where the Court confirmed the violation of the right of access to court according to article 6, par. 1 of the Convention due to refusal from the side of the constitutional court to decide on the merit in the constitutional complain;
- CM/ResDH(2015)83, adopted on 27 May 2015 to the decisions Brachová against Slovak republic of 23 September 2014 (no. 60028/09) and Hrbál against Slovak republic of 27 May 2014 (no. 76645/12), that decided to strike out the complaints based on the settlement reached between the Government of the Slovak Republic and the complainants ;
- CM/ResDH(2015)140, adopted on 16 September 2015 to the judgement Viskupová and others against Slovak republic of 11 October 2011 (no.

Conclusion

The aim of the paper is focused on the institutional protection of human rights was to introduce the mechanism of execution of judgements of the European Court of Human Rights declaring the breach of rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The central idea which is being emphasized thorough the whole paper is that the delivery of Court's judgement itself does not enforce the reparation of the breach and thus it is necessary to undertake further steps and proceed with its execution.

Since the core and unifying topic of the conference concerned the institutional elements of human rights protection, the paper aimed at the dialogue between the international and domestic institutions, resp. Slovak institutions in the area of human rights protection and remedy in particular. The author's purpose was to shed light on backstage of the process that follows the delivery of judgement and also on the concrete

43730/06), where the Court declared the violation of the right to access to court according to Art. 6, par. 1 of the Convention due to impossibility to enforce the admitted claim;

- CM/ResDH(2015)141, adopted on 16 September 2015 k rozsudku D. M. F., a. s. against Slovak republic of 5 February 2013 (no. 27082/09), in which the Court declared the violation of the right to hear the case within a reasonable time according to art. 6, par. 1, of the Convention due to unreasonable time of the criminal proceeding;

- CM/ResDH(2015)240, adopted on 9 December 2015 to decisions Ďuračka against Slovak republic of 21 April 2015 (no. 11810/12), Hoferová against Slovak republic of 21 April 2015 (no. 75368/13), Hviždák against Slovak republic of 21 April 2015 (no. 76634/12), Lohnertová against Slovak republic of 21 April 2015 (no. 67527/14), Pašová against Slovak republic of 21 April 2015 (no. 45247/11), Sarkocy against Slovak republic of 21 April 2015 (no. 62656/13), Sarkocy against Slovak republic of 21 April 2015 (no. 65736/13), Vičanová against Slovak republic of 21 April 2015 (no. 63857/14) a Žuffová against Slovak republic of 21 April 2015 (no. 79310/12), that decided the strike out the complaints based on the settlement reached between the Government of the Slovak republic and the complainants;

body that is responsible for the breach of the law. The aim of the paper was thus to present the Slovak republic as an example of good practise, in the general context of challenges and problems of the process of the execution of judgement the Council of Europe and Committee of Ministers face.

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Vienna Convention on the Law of Treaties

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ACTIONS AND FUNCTIONS OF SLOVAK NATIONAL CENTRE FOR HUMAN RIGHTS

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Abstract: The paper is focused on the mandate of Slovak National Centre for Human Rights from the perspective of national institution protecting fundamental human rights and freedoms, as well as from the perspective of anti-discriminatory state body. The authors deal with the theory and practise in context of activities and functions of this institution with the same emphasis. Using broad knowledge gained in practise, they propose improvements of the situation in the area of protection and respect for human rights and fundamental freedoms. The aim of the paper is to notify the reader with the empirical character of the Centre's activities.

Key words: Centre, human rights, fundamental freedoms, discrimination, protection of rights, mandate, practise

Slovak National Centre for Human Rights (hereinafter Centre) was established in the law of National Council of Slovak republic no. 308/1993 of Collection of laws on the establishment of Slovak National Centre for Human Rights as amended by subsequent legislation⁴², with the enforcement effect from 1 January 1994 based on international treaty (Agreement between Slovak republic and the United Nations on governing the Slovak National Centre for Human Rights – the notification of the Ministry of Foreign Affairs no. 29/1995 of Collection of laws). Based on the law, the Centre is an independent legal person that is not registered in the commercial register. At the same time, it is important to add that Centre is a non-profit organization.

⁴² see http://www.snslp.sk/CCMS/files/z%C3%A1kon_o_Stredisku.pdf

In the context of the activities and its status of a national institution for human rights, the primary goal of the Centre is a complex operation in the area of human rights and fundamental freedoms. In order to fulfil its basic tasks, the Centre focuses its activities foremost on the monitoring and assessment of the respect for human rights. In this respect, the employees of the Centre annually publish a Report on the Respect for Human Rights in the Slovak republic for previous calendar year. The report is of mostly assessing and recommending character. The Centre points out to regular mapping of current areas in the context of respecting human rights and freedoms while emphasizing the found shortages, and proposes concrete solutions in order to improve the current and concrete state of art. The report is published annually and the public can reach to the report on the Centre's website.

The Centre collects and, on request, provides information on racism, xenophobia and antisemitism in the Slovak republic. The gathered intel is then used for surveys or research in the area of social inclusion of older persons, in the area of temporary countervailing measures or in the area of protected communication. The results of such researches are then used in the everyday work by the Centre's employees when answering the requests of foreign institutions, which subject of interest is the protection of human rights and freedoms. The collected data are also useful for the providing the legal service, education or rising awareness. The Centre is thus fulfilling its duties in the framework of providing information regarding human rights and fundamental freedoms, collecting and spreading intelligence of these areas while persisting in this activity.

One of the most significant areas of Centre's operations is the provision of librarian services. The Centre's library je accessible to broad public while the persons interested in human rights protection can find rich offer of professional and scientific publications. It is visited mostly by students while writing their seminar or final papers.

The education in the area of human rights protection is another field in which the Centre is active on a regular basis. The lecturers provided the

education to 4000 physical persons only in year 2016. The education is focused mainly on discrimination, bullying in the workplace in the form of mobbing or bossing, protected communication prevention against racism, extremism, xenophobia or antisemitism.

In order to increase the extent of effectivity of its own activities, the Centre may ask the courts, prosecutors, other state bodies, bodies of territorial self-government, bodies of governing associations and other institutions to provide information on respect for human rights in a given period of time. Subsequently, the Centre's employees use this information for their professional activities and effective implementation of legal and sociological mechanisms guaranteeing effective protection of human rights and freedoms.

The Centre is also member of the European Network of National Human Rights Institutions (ENNHRI – the successor institution of non-formalized European Regional Group NHRIs), which consists of 41 national human rights institutions across Europe. National human rights institutions are financed by the state, nonetheless, they are independent from the government and they work under broad legislative or constitutional mandate for the promotion and protection of human rights. In February 2013 ENNHRI established a permanent secretariat in Brussels and in the mid-2013 it also transformed into non-profit organization based on the Belgium law.

The members of the ENNHRI are independent actors between state and civil society. They acquire the knowledge from international and European law in the area of human rights and their role is to control the commitments in this field at the national level. They provide assistance in integration of human rights into intrastate, European and international policies. ENNHRI was several years participating in the process of strengthening tools and approaches of the EU in the area of fundamental human rights, i.e. into the reform of European Court for Human Rights, accession of the EU to the European Convention on Human Rights and enforcement of Charter of Fundamental Rights of the EU.

Since 2004, when the anti-discriminatory law established the Centre as the only anti-discriminatory body that can assess the respect of the principle of equal treatment according to anti-discriminatory law, the Centre's activities is closely connected to enforcement of legal assistance in the area of discrimination, expressions of intolerance and in the cases of violation of equal treatment for all citizens of Slovak republic. It is also enabled, on request, to represent a participant of the legal proceeding in concerning violation of equal treatment. The Centre in particular monitors and assess the respect for equal treatment based on the anti-discriminatory law, prepares the educational activities and participates on information campaigns in order to increase the tolerance in the society, provides legal assistance to victims of discrimination and expression of intolerance, published professional statements concerning respect for equal treatment following the anti-discriminatory law, either on the request of physical or legal persons, as well as from own initiative. The Centre disposes with right of legal representation based on full power in proceeding concerning the violations of equal treatment. Except from competences resulting from the status of national institution for human rights, the Centre has also the competence to protect the equal treatment and so it is a member of the EQUINET network.

EQUINET brings together 46 organizations from 34 European countries what do have a competence as national bodies for equality protection in the area of discrimination in the area of discrimination. The work of this European platform is based on active cooperation of its members and establishing relationships based on trust, mutual support and solidarity. The Centre is active in all five working groups of EQUINET - Equality Law in Practice, Strategy Development, Communication Strategies and Practices, Policy Formation and Gender Related Issues. Each of the working group is dealing with a concrete topic that was chosen in advance. The outcome of the mutual cooperation, information sharing and research of particular problems during the meetings and year-long activity of working group are different publications, common reports and methodological handbook

based on the practise of EQUINET members in particular areas and aspects of their activities.⁴³

Practical examples concerning violations of equal treatment

In the abovementioned context we point out to the current practise of the Centre when provided professional statements concerning the possible violations of valid and enforceable anti-discriminatory legislature. Regarding the monitoring of respect for equal treatment, during the 2016 the Centre found out two cases of possible violation this rights based on medialized information. The information refers to a hostel refusing to prolong the stay for two Roma persons on the grounds of their ethnicity. This decision was reasoned by full capacity of the floor devoted to Roma persons. Despite the free beds on other floors, the hostel did not provide the option for the two persons concerned. The co-owner of the hostel also said that they are segregating Roma people because they are afraid of losing customers of non-Roma ethnicity. These clients refused the accommodation in the past when the hostel was providing the “mixed” floors and rooms (where Roma and non-Roma people were accommodated together).

Considering this the Centre, as the national anti-discriminatory body, was ready to provide legal assistance to discriminated Roma people. The Centre was unable to get the full power through the responsible person for whom the concerned two Roma persons work (hereinafter the mediatrix). Due to lack of full power the Centre was not able to represent the discriminate persons in a matter of direct discrimination based on ethnicity.

Concerning provision of cooperation from the Slovak Business Inspection (hereinafter SBI), the request for contacting the Centre’s representative was addressed to SBI in case the additional inspection of hostel was necessary. The SBI representative stated that the results of primary control after adding written statement from the side of hostel’s co-owners were sufficient for adopting outcomes based on the already

⁴³ see <http://snslp.sk/#menu=2481>

conducted inspection. Hence, based on the insufficient extent of cooperation provided from the concerned persons, resp. control bodies, the Centre was not legitimized on the matter for providing the legal representation, therefore the representation ended with the carrying out the professional statement and its subsequent publishing on the Centre's website.⁴⁴

In another case, the Centre within its monitoring framework found out the possible violation of equal treatment according to valid and enforceable anti-discriminatory legislature. The concrete case dealt with the Turkish students that wanted to reserve an accommodation in a hostel through the portal booking.com. The hostel, however, did not provide the students with reservation due to security reasons as the hostel does not provide accommodation to persons from country experiencing the military conflict and to Kurds. Such refusal approach of the owners was met with negative reaction from the students who argue that it is an expression of racism, which was subsequently refused by the owners themselves, however they emphasized that the accommodation is not provided to Turks and persons from Arab countries due to security reasons.

The owners of the hostel disabled the Turks, Kurds and persons from Arab countries and from countries, when military conflict is currently occurring, from reserving the accommodation. The term 'Turk' refer to physical person with Turkish citizenship, resp. the person of Turkish nationality. From the international law perspective, the term state citizenship and nationality is majority of cases concentrated in the term 'nationality'. This differentiating is especially significant when considering the person having other state citizenship than nationality, i.e. physical person of Turkish nationality with German citizenship. The term 'Kurd' refers to member of an ethnic group whose members are

⁴⁴ see http://www.snslp.sk/CCMS/files/2016_-_anonymizovan%C3%A9_odborn%C3%A9_stanovisko_-_diskrimin%C3%A1cia_z_d%C3%B4vodu_pr%C3%ADslu%C5%A1nosti_k_etickej_skupine1.pdf

characterized by common language, habits and traditions. Except from part of population of eastern and south-eastern Turkey, also the group of citizens from west Iran and South of Iraq and Syria can be considered as Kurd based on geographical perspective.

The term 'persons from Arab states' refers to segregation of group of persons from countries being member of League of Arab States. In that case it concerns the persons with following nationalities, resp. that hold the citizenship of following countries: Egypt, Ira, Yemen, Jordan, Lebanon, Saudi Arabia, Syria, Libya, Sudan, Morocco, Tunisia, Algeria, Kuwait, United Arab Emirates, Bahrain, Qatar, Oman, Mauretania, Somalia, Palestine, Djibouti, Comoros, and Eritrea. Based on the statements of the hostel's owners, it is possible to conclude that the owners would not have provided the accommodation to any persons who come from, or reside or are citizens of abovementioned countries.

Persons coming from countries where the military conflict is currently occurring cannot be exactly distinguished, nonetheless when analysing the long-term conflicts, the citizens of Somalia, Syria, Nigeria, South Sudan and Ukraine do belong here as well.

The statement of hostel's owners is thus according to the Centre's legal opinion considered a violation of equal treatment based on provision of § 2 par. 1 of the Agency of temporary employment. The opinion also referred to these owners as fulfilling the subject matter of direct discrimination on the grounds of ethnicity when segregating the Turkish persons and persons whose nationality may be identified through the list of members of League of Arab States. At the same time, the owners met the subject matter of direct discrimination on the ground of ethnicity in relation to person of Kurdish ethnicity. Discriminatory segregation of persons coming from the so-called Arab states and countries currently experiencing military conflict fulfils the subject matter of prohibition of discrimination on the grounds of other status.

The owners thus fulfilled the subject matter of direct discrimination on the ground of their Turkish nationality. At the same time, they also

committed the crime of direct discrimination of Turks, Kurds, persons from Arab states and persons from countries currently experiencing military conflict on the grounds of nationality, ethnicity and also on the grounds of other status.

In this case, the Centre, as a national anti-discriminatory body, was ready to provide legal assistance to Turkish students. It communicated with the students regarding the rights and remedies they can claim as a victim of discrimination. The representative of the Centre, along with the Slovak Business Inspection met with the owners. During this meeting, they agree on the abandonment of above described proceeding from the side of the owners. The Centre's representatives also agreed with the owners who express interest in developing and apology statement and possible nonmaterial damage which was cause to the Turkish students when violating the prohibition of discrimination. The Centre, however, finished the matter due to no interest of discriminated students in the legal representation in possible anti-discriminatory proceeding. The Turkish embassy was also notified about this step. Dealing with the petition again finished only with publishing the professional statement on the Centre's website.⁴⁵

Thoughts 'pro futuro' and the status of the Centre

Within its activities of fundamental human rights protection for equal treatment, the Centre observes the shortcoming in the context of enforcement of law on case of its violation. At the same time, it is important to emphasize the significant improvement in procedural level when the new civil procedural code – law no. 160/2015 of the Collection of Laws – Civic dispute code contains the provision on protection of the so called weaker sides of disputes in civil legal proceedings. Despite the proposals, mainly from the non-governmental sector, calling for the abolition of court fee payment by the side

⁴⁵ see http://www.snslp.sk/CCMS/files/2016_-_anonymizovan%C3%A9_odborn%C3%A9_stanovisko_-_diskrimin%C3%A1cia_z_d%C3%B4vodu_n%C3%A1rodnosti,_pr%C3%ADslu%C5%A1nosti_k_etnickej_skupine.pdf

claiming the violation of equal treatment, the Centre does not consider such proposal as successful and effective in the context of situational improvement concerning the enforcement of the abovementioned right.

It is important that the professional public leaves the space and time for the effective implementation of new procedural provision. It is also important to realize that measurable improvement of situation cannot be achieved in a short-term run. New provisions of the procedural code do have an undoubted potential for the improvement of the whole situation.

The Centre would welcome also narrower cooperation with media when considering the rise of awareness. On the other side, that would necessarily include only independent media. The Centre favours the promotion also in the context of spreading information through independent as well as impartial media. To increase of success of human rights protection, it would be beneficial for the NGOs and institution established to protect these rights to deepen their cooperation. From the Centre's perspective, such cooperation should be conducted in the form of beneficial information sharing, organizing conferences, workshops or professional seminars. Subsequently, concrete results of this cooperation would be use to improve the holistic state of art of human rights protection.

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PARIS PRINCIPLES – GENESIS, DEVELOPMENT AND GOOD PRACTICES OF THEIR IMPLEMENTATION BY STATES

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Abstract: The United Nations sets the standards of acting and behaving of states. One of important area is the area of protection and promotion of human rights. Specification of human rights is, that standards created at international level need to be applied in to praxis at national level. This application is the responsibility of state. For the purpose of empowerment of the process of promoting and protection of human rights at national level have been create national human rights institutions. These represents transition of international standards in to national level and their existence is also influenced by international standards presented by Paris Principles. This article deals with content and role of these Principles as well as examples of good practices within the application of Paris Principles.

Key words: Paris Principles, human rights, NHRIs, the United Nations, good praxis

Introduction

For everybody is well known a reason, why the United Nations (the UN) has been established and influence of this organization is possible to feel all around the world within its activities or programmes. (United Nations, n.d.) These are part of a work of the United Nations for years. The UN sets practically in all areas of human being and human activity minimal standards of acting of states, or how to behave, and tries to coordinate all member states to achieve these, minimal standards. This position of coordinator is not easy and it is necessary to understand, that the UN has never been created to determine sanctions and punishments to states. The main reason to establish the UN has been to create a

forum and space for states to create common dialogue and to find solutions of problems. The area of human rights protection has been one of the key within the UN since the beginning but also one of the hardest.

Difficulty of this task lies primarily in the fact, that responsibility to respect, protect and fulfil human rights is transfer from international level, which is represented by the UN, to the national one, which is represented by states. It means, that it is responsibility of states to fulfilled their commitments towards the UN and especially fulfil those, which concrete state decided to accept through for example ratification of conventions. (Donnelly, 1986) This responsibility of state is also reason, why it is necessary to create effective, national system, which, among the other things, deals with fulfilment of human rights. One of its parts is government, which accept and takes its responsibilities in the area, and, at the same time, the other part is fully functioning national institution for the protection and promotion of human rights, which is in line with so called Paris principles. United Nations Development Programme, Office of the High Commissioner for Human Rights, 2010)

Within this article, we will deal with Paris principles, how and why they were created, what is their role and content, how they set minimal standards for national human rights institutions, how they have been developed by time and examples of good practices within national human rights institutions of states.

Paris Principles – genesis and the role within national human rights institutions (NHRIs)

Idea to create national human rights institutions is basically older in comparison with Universal Declaration of Human Rights. In the year 1946 Economic and Social Council of the UN was considering an idea to create national institutions, which would be responsible for protection, and promotion of human rights, but mainly these institutions would have the main task to control and supervise a state of human rights in concrete country. (United Nations, 2010) Institutions, themselves, have started to be established earlier than has been set a framework for their operation and creation, and they have represented new mechanism in the area of human rights protection at national level. (International Service for Human Rights, 2013) Within the first, international workshop of national institutions for promotion and protection of human rights, which took place in Paris, France in 1991, have been proposed recommendation for creation and functioning of these institutions. This meeting was organized by the UN and according the venue the *Principles relating to the Status of National Human Rights Institutions* are known as Paris principles. (Pohjolainen, 2006) Two years after this meeting, in 1993, during the World Conference on Human Rights in Vienna, were NHRIs, which are in compliance with the Paris principles, accepted by world community as important actors of protection and promotion of human rights. (United Nations Human Rights Office of the High Commissioner, n.d.) Later that year, in December, the General Assembly of the United Nations adopted resolutions (A/Res/48/134), in which encouraged states to create human rights institutions at national level, which will be in compliance with Paris Principles. They are also part of this resolution and present broad set of recommendations and international standards, which regulate formation, creation and further functioning of NHRIs. (General Assembly, 1993) Thanks to the fact, that these Principles emerged from the work of NHRIs themselves, they have become beginning of cooperation and standardization of all NHRIs, which has been established under the UN. Since this moment, their main task or role is

to cover minimal standards during the creation of new and reform of already existed NHRIs. (International Council on Human Rights Policy, 2005).

Content of Paris principles and control of their fulfilment

Paris Principles are divided in to four parts, where each of them influence different aspect of the NHRIs. The first one consists of competences and responsibilities. Here we can find standards such as competencies of NHRIs in the area of protection and promotion of human rights, mandate of the NHRI set by constitutional law or other legislative text, which regulates creation of institutions and competences. It recommends also several concrete competences such as cooperation with competent bodies such as parliament or government, in the matter of submitting of recommendations, reports in different areas such as in the case of violation of human rights, create an effort to achieve coincidence between national legislation and international standards of human rights, support process of ratification and further implementation of these standards, cooperate during creation of national reports and also cooperate with the UN or other international or regional organizations which dealing with human rights issues, cooperate within educational process or research in the area.

The second part deals with the composition of NHRI and its pluralism and independence. Here we can find important suggestions how to compose NHRI. One of the most important part is to achieve independence of an institution especially through independence of members of it as well as plurality. Paris Principles recommend that NHRI should consist of members of non-governmental organizations, who deals with different areas of human rights or discrimination and other social organizations such as trade unions, then there should be members who are experts in the area of philosophy, representatives of universities and parliament. There is also possibility to include members of departments of government, if it is necessary, but only as members without possibility to vote and with advisory position. The

mandate of these people should be also regulated by legislative act, especially the length of the mandate and possibility of recoverability. These NHRIs should have adequate infrastructure in the area of financial and human resources which will not affect its independence.

Third one focuses on methods of operations of NHRI, as for example possibility to deal with any issue or questions, which are in its competence; have possibility to get access to any documents or information which are necessary to evaluate concrete problem or situation, which is in their competences, including possibility to hear somebody. NHRI should use any form of medialization of their statements or recommendations to inform public; should have possibility to meet whenever they need to; consult or cooperate with other institutions of bodies responsible for human rights as well as create cooperation with non-governmental organizations, especially because of their important role within society.

The last, fourth, one talks about additional principles concerning the status of commissions with quasi-jurisdictional competence. This means, that if NHRI could have possibility to deal with different complaints, which are by different actor such as non-governmental organizations, trade unions or others and in this cases, there should be additional functions which are in compliance with previous principles and also they should behave in accordance to another principles such as to help solve problem or complaint through friendly methods such as conciliation, restricted by the limits of law; should inform concrete party of the problem, which ask for help, about his/her/their rights; should deal with any kind of complaints or help to direct it to more competent institution or body; prepare and suggest recommendation to those, who are competent in concrete area for example in the case of necessity to amend law, different practices etc. “especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.” (United Nations Human Rights Office of the High Commissioner, n.d.) This description of their content is quite broad and usually there are few points, which are consider as the most important of Paris Principles. These are: “a mandate “as broad as

possible”, based on universal human rights standards and including the dual responsibility to both promote and protect human rights, covering all human rights; independence from government; independence guaranteed by constitution or legislation; adequate powers of investigation; pluralism including through membership and/or effective cooperation; and adequate human and financial resources. “(European Union Agency for Fundamental Rights, 2012, p. 15)

The fulfilment of Paris Principles has been controlled since the beginning. In 1993 was established the International Coordinating Committee for National Human Rights Institutions, which represents association of NHRIs from all over the world. The role of this Committee is to help NHRIs over the globe to be in compliance with Paris Principles and to be an actor in promoting and protecting of human rights. (GANHRI, n.d. -A), Its activities consist of “interaction and cooperation with the United Nations system; collaboration and coordination among NHRIs and the regional groups and regional coordinating committees; communication among members and with stakeholders, including, where appropriate, the general public; knowledge development and management; development of guidelines, policies, statements; implementation of initiatives; organization of conferences. “(United Nations, 2010, p. 44) Committee was in 2008 incorporated under Swiss law as an association and sixteen NHRIs (with higher status of accreditation) from different part of world have become voting members and has created Bureau of the Committee. This step was welcomed by the Secretary General of the UN, who also encouraged NHRIs in further and better cooperation with the UN itself and also between NHRIs. (General Assembly, 2009) Within the International Coordinating Committee for National Human Rights Institutions has been created Sub – Committee on Accreditation. It consists of one NHRI from each region with the highest accreditation and its role is to create recommendation to Bureau of Committee about accreditation status of concrete NHRI. For the period of years 2013-2016 consists NHRI from France for Europe, NHRI from Mauritania for Africa, NHRI from Canada for the Americas and NHRI from the

State of Palestine for the Asia and the Pacific region. (ENNHRI, 2016)

The whole process of accreditation starts by submitting of report by concrete NHRI to the International Coordinating Committee for National Human Rights Institutions, these documents are processed by Secretariat (represented by Office of the High Commissioner for Human Rights of the UN), which prepare overview for Sub-Committee. They prepare recommendations for Bureau and Bureau decides, according to recommendation of Sub-Committee, about status of accreditation. If NHRI achieved status A or B has to submit report every five years, if achieved status C, has possibility to submit report anytime. (United Nations, 2010) The system of accreditation has been changed during the years to achieved standards such as transparency or independence. There were several changes as for example: “a system by which NHRIs are reviewed on a periodic basis of 5 years; an appeal process for NHRIs to ensure greater transparency and due process; a more rigorous review of each application; more focused recommendations; and wider distribution and greater knowledge of [Sub- Committee for Accreditation] recommendations by NHRIs and other stakeholders, so that they can follow up in-country and contribute to the accreditation process.” (GANHRI, n.d. – B) As mentioned before, there are three types of accreditation. Status A means that NHRI is in full compliance with Paris Principles. State B could mean that NHRI is not in full compliance with Paris Principles or does not present sufficient evidence to prove its compliance. The last and worst status is status C, which means that NHRI is not in compliance with Paris Principles at all. This status of accreditation does not express the situation with the NHRI but also bring several advantages. NHRIs with A status have possibility to be a part of international and regional cooperation between NHRIs, they have possibility to vote or be members of Bureau of the Committee or are presents during the meeting of Human Rights Council of the UN with possibility to speak. NHRIs with status B have possibility to be present during meetings only as observers. NHRI with C status have no advantages, they can be present during meeting of the International Coordinating Committee for National Human Rights Institutions if they have invitation. (GANHRI,

n.d. – B) Another critics is whether accreditation process is able to judge effectiveness, practice or impact of the NHRIs in reality or it just deals with the law or facts, which are presented in report submitted by NHRI. (Carver, 2016) In 2016 International Coordinating Committee for National Human Rights Institutions changed its name to Global Alliance of National Human Rights Institutions. (Rose, 2016)

However, despite of efforts to make whole process of evaluation of NHRIs better, there are scholars, who see several problems and spaces to make accreditation better. The main problem could be fact, that the International Coordinating Committee for National Human Rights Institutions is not officially established and has not position of intergovernmental organization as for example the UN. Its neutrality could be also questionable, because consists of NHRIs, which should not be necessary independent and without influence of other NHRIs. This problem could be solved by cooperation with international and national non-governmental organizations during the accreditations process There is also question, whether its accreditation process is critical enough, when the most common status is status A. (Rosenblum, 2012)

Even though there is a critic towards the system of accreditation, it is the only way for not, how to control or measure the compliance of NHRIs all over the world with Paris Principles. Issue, how states fulfil criteria of Paris Principles within their NHRIs, we will discuss in last part of this paper.

Fulfilment of Paris Principles in praxis

In previous part was presented content of Paris Principle. For fulfilment of a lot of them is responsible state, especially those, which are connected with the creation of NHRI and content of legislation dealing with it. but for the other is responsible NHRI itself, such as activities in education. For the other aspects of Paris Principles is responsible NHRI itself. These are mainly in the area of its activities and duties in the area of human rights protection and promotion. Above mentioned resolution

of the General Assembly (A/Res/48/134) encourages not only state but also NHRIs to respect and behave in accordance to Paris Principles.

With respect to official information there are 117 NHRIs all around the world. For the purpose of this paper we will look only on situation of European NHRIs. Within the European region, there are 39 NHRIs in 35 countries (United Kingdom, Switzerland and Belgium have more than one institution). All of them are controlled by the accreditation process we mentioned before and there are 25 institutions with status A (for example Armenia, Croatia, Germany, Hungary, Poland, Russian Federation), 11 with status B (including Slovakia, Sweden, Slovenia) and 3 with status C (both in Switzerland and Romania). (GANHRI, 2016) Within the list of NHRIs with A status we can see that at least several NHRIs could achieved their status thanks to facts on paper and not impact in reality (critique of accreditation mentioned before). For example, World Report 2016 from Human Rights Watch claimed several violation of basic human rights in Russian Federation such as freedom of association violated by prohibition of several non-governmental organizations, freedom of expression by prohibition of several web sites or violation of rights of people from LGBTIQ community with strong negative propaganda from the side of state. (Human Rights Watch, 2016)

Even though, we can find a lot of good examples in the functioning and settings of NHRIs in countries, where the violation of human rights is not part of ordinary life and so visible as in, above mentioned, Russian Federation. Gauthier de Beco (2008) clearly in his article *Networks of European National Human Rights Institutions* pointed, that good praxis and its sharing in case of NHRIs and their mutual cooperation could lead toward better compliance with Paris Principles and functioning of NHRIs. (De Beco, 2008),

Within restriction of this paper is not possible to deal with all aspects of Paris Principles and good practices of states in all areas of them. Because of that we will choose only examples of NHRIs which are in compliance with Paris Principles in the area of independence and

plurality (and it means also the way of their composition) and financing. It is not possible to say, that concrete NHRI is the best example fulfil Paris Principles for 100%. These examples of good praxis can be used just as inspiration for further work of other NHRIs, which could have problems in concrete area.

As mentioned before, one possibility how to achieve plurality and independence of human rights institutions is through a process of choosing and nomination of members of board or other governing body of institutions. The first step, how to set correct system of this process is to include all necessary points of it in to legislative act. The Sub-Committee for Accreditation underline with respect to independence and plurality mainly “a) A transparent process b) Broad consultation throughout the selection and appointment process c) Advertising vacancies broadly d) Maximizing the number of potential candidates from a wide range of societal groups e) Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent. “(ICC Sub- Committee on Accreditation, n.d., p. 2)

In Netherlands have decided to achieved independence and plurality through specific procedures of selection of members of NHRI. There are two groups of members. The first one, members of *Advisory Council*, “consists of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from academia.“ (College voor de Rechten van des Mens, 2011, p.7) The other members are choosing and appointed after agreement between Institute, Minister of Justice and Security, Minister of the Interior and Kingdom Relations, Ombudsman, chair of the Council for the Judiciary and the chair of the Data Protection Agency. Other members and alternate members are chosen according to recommendation from Institute towards Minister of Security and Justice and are appointed by Royal Decree. During the selection process there must be taking into account expertise of candidates to achieved plurality of institutions. All

vacancies must be publicly advertised. (College voor de Rechten van des Mens, 2011)

One of the most interesting example within the European region is Danish Institute for Human Rights, which consists of Board and Council of Human Rights. Board consists of 13 members, including six members who are voted by Council, six members are voted by academia (4 of them are voted by rectors of selected Universities in Denmark and 2 of them by Conference of Rectors) and about one position decide employees of Institute. At the same time selected persons have to fulfil concrete criteria of expertise, such as at least two persons nominated by rectors of universities have to have a law degree, at least one person nominated by Council for Human Rights has to have experiences and connection to the area of protection of minority rights, at least one who deals with equal treatment and at least one who deals with protection of rights of person with disabilities. The Human Rights Council itself consists of representatives of civil society. There is possibility of membership of representatives from government or public administration but without right to vote, this have only representatives of civil society. Director is nominated by the Board, after public call for applications and selection process The financing of NHRI according to law, state has an obligation to support Institute from state budget on regular basis. At the same time has institution right to use other forms of financing such as through financial presents or foundations. On regular basis create report about activities and using of finance and there is also possibility to control it but in accordance to standards of public audit in Denmark. (The Danish Institute for Human Rights, n.d. - A)

The financing of the Danish Institute for Human Rights is based much more on other activities such as cooperation with ministry, research activities etc., than on support from state budget. In the year 2015, Danish Institute got 39 million of Danish Krone and around 94 million from other activities. (The Danish Institute for Human Rights, n.d. -B), According to Sub-Committee for Accreditation and its explanation of funding, this could be reason, why Danish Institute should not be in full

compliance with the Paris Principles. The Sub- Committee for Accreditation claimed, that funding from other sources should not present core sources of financing, it is responsibility of state to give the NHRI enough financial support to fulfil its mandate and tasks. (ICC Sub-Committee on Accreditation General Observations, 2013) However, it is questionable, whether we can criticize institution for its independent viability in the area of financing.

Conclusion

“National human rights institutions are independent bodies established to stand up for those in need of protection and to hold governments to account for their human rights obligations.” (Asia Pacific Forum of National Human Rights Institutions, 2016) This definition describes the ideal institution which has been created for the purpose of protection and promotion of human rights. Development of these institution is quite old and even though they are created at national level, standards of their functioning have been defined once again at international level through Paris Principles. Only well-functioning institution have possibility to fulfil tasks for which they were created. Paris Principles are not ideal (Carver, 2016), and there could be discussion about their content and possibility of their fulfilment and effectivity of NHRIs. However, at this moment, there is nothing better, what could influence creation and functioning of NHRIs all around the world, which represent unique institution because of their “focussing only on human rights promotion and protection.” (Lindsnaes, Lindholt, 1998)

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THE STATUS OF COMMITTEE FOR HUMAN RIGHTS AND ETHNIC MINORITIES OF NATIONAL COUNCIL OF SLOVAK REPUBLIC IN THE INSTITUTIONAL SYSTEM OF HUMAN RIGHTS IN SLOVAKIA

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Abstract: The paper deals with the relation between the National Strategy on the Protection and Promotion of Human Rights and Freedoms (hereinafter Strategy) adopted in 2015, foremost three of its priorities, and one of the institution of national human rights protection – the Committee for protection of Human Rights and Ethnic Minorities (hereinafter Committee). The paper investigates the activities and cases that were discussed during the Committee’s session in 2015 and 2016. The aim is to identify the institutional failures and propose their possible correction based on the competencies grounded in current legislative options.

Key words: National Council of the Slovak Republic, National Strategy on the Protection and Promotion of Human Rights and Freedoms, Committee for Human Rights and Ethnic Minorities

Introduction

One of the main ideological grounds applied on the determination of the human rights concept is the perception from the perspective of the status of individual towards public authority. In other words, the legitimate power coming from the people has the “right” to enforce the respect of citizens, if it itself respect the rights and freedoms of citizens (aspect of the sovereignty of nation, legal warranty or enforceability of law). The effective control of the human rights protection in practise through the legislative power is not an issue that has been deeply analysed. As there is diverse competence classification of the realization as well as scrutiny of human rights, it is necessary to have a

closer look at the particular institutions and non/implementation of these competences. Not only in this area, the impact of the institutions on the political processes and subsequent outcomes is as significant as the impact of the political processes on the stability and development of these institutions. This idea may be based on the dualistic understanding of institutions applied by March and Olsen (1989) who consider the institutions as an “arena of mutually competing social powers as well as a set of standard operational rules and structure that define and defend the values, norms, interests and identity of the society.”⁴⁶ The authors then claim that democracy is dependent on economic and social conditions, but also on layout of political institutions.

This paper focuses on one particular institution – Committee for Human Rights and Ethnic Minorities operating within the National Council of the Slovak republic; and on its competences applied on the Strategy’s priorities. Is it necessary to strengthen, create or reformulate the measures in the current institutional system of human rights protection in Slovakia? In detail, is it necessary to strengthen competences of the Committee for Human Rights and Ethnic Minorities in order to effectively scrutinize the human rights protection (based on the Rules of Procedure of NCSR) and its competences in the context of adopted Strategy as a complex framework for human rights protection? The answer is provided by the study of how the Committee treated the selected priorities and aims of the Strategy in 2015 and 2016.

1. National Strategy for the Protection and Promotion of Human Rights and Freedoms

This strategic document was being prepared for almost three years. The reason why the Strategy had to be developed was the necessity of Slovak republic to adopt a more complex and conceptual approach to the agenda of human rights from different perspectives, as well as to

⁴⁶ March, J.& Olsen, J. (1989); *Rediscovering Institutions: The Organizational Basis of Politics*, Free Press New York, p. 17.

reflect the respect for international obligations towards to UN to adopt such document.

The competencies of agenda distribution and institutional provision in the area of human rights were transferred under several responsible bodies in part years. After the adoption of the Strategy under the Ministry of Foreign and European Affairs (hereinafter MFEA) and minister Miroslav Lajčák, the whole human rights agenda was moved under to the Ministry of Justice (the function of Deputy Prime Minister for human rights was terminated in the so called Competence act of 2012⁴⁷). These ‘moves’ confirmed the impossibility to institutionally root the deal with the area of human rights orderly and precisely. The aim of the Strategy is not only to map and identify the deficits and challenges, but also to formulate corrections and more effective measures of protection and promotion of human rights and freedoms. The Strategy itself creates also a space for the identification or competence settings of particular state bodies involved, but mainly t creates the space for the development of action plans for the concrete area of the current agenda implementation (2016-2017).

“Frameworks and priorities are formulated as mutually dependent, holistically and synergistically related and conditioned. In relation to other, only partial documents, the proposed program is an overarching vision that will be concretized and developed on the basis of existing programs as well as newly created. The preparation process of the strategy showed that in the human rights agenda it is necessary to adopt and implement many measures in order to significantly improve the law enforceability. The measures should be also used by the partial steps in favour of concrete civil, social, cultural or economic rights.

⁴⁷ See more in SITA, (27.6.2012). The MPs agreed on the termination of the function of Deputy Prime Minister for Human Rights (translated from: Poslanci odobrili zrušenie funkcie podpredsedu vlady pre ľudske prava) in *Sme*; and in SITA. (6.5.2015). From September human right agenda goes to Justice (translated from: Agenda ľudských práv prejde od septembra na spravodlivosť).

*The aim of the documents is to trigger a higher participation of all stakeholders in the process including the state and public authority, civil society, educational, scientific and cultural institutions.*⁴⁸

Under the responsibility and leadership of the Deputy Prime Minister and the Minister of Foreign and European affairs, Miroslav Lajčák, the Government Council of Slovak republic for Human Rights, Ethnic Minorities and Gender Equality adopted after two years of negotiations in 2014. The Strategy was then definitely adopted in the Government on 18 February 2015.

For the purposes of this paper, we will deal with only three/four priorities of the Strategy⁴⁹ in order to further analyse the human rights issue discussed in the Committee of National Council.

Priority II. – Strengthening of institutions of human rights protection and promotion in SR referring to the Task II, no.1: Strengthening of independent and other mechanisms of human rights protection in SR, IGOs and participation, mainly the role of Ombudswoman.

Priority IV. – Selected systemic measures for the judicial area and other legal protection referring the Task IV, no.1: Ongoing adoption of systemic measures in order to strengthen the rights to judicial and other legal protection and enforceability of human rights, especially the *“necessity to adopt systemic measures complex, mainly legislative changes of procedural legislation of courts focused on the reduction of procedural delays, status and protection of victims in criminal proceeding, status and protection of minors in every (not only criminal) proceeding, procedural conditions for the accelerated proceedings concerning the violation of fundamental human rights and freedoms.”*

⁴⁸ Government Council of Slovak republic for Human Rights, Ethnic Minorities and Gender Equality (2013). *Draft of National Strategy for the Protection and Promotion of Human Rights in the Slovak Republic*, p.2.

⁴⁹ Government Council of Slovak republic for Human Rights, Ethnic Minorities and Gender Equality (2013). *Draft of National Strategy for the Protection and Promotion of Human Rights in the Slovak Republic* p. 23.

Priority V. – Systemic measures of prevention and elimination of barriers of real equality and dignified life for all groups of population in the context of task V, no. 2: Strengthening of effective prevention and elimination of all forms of violence, particularly violence against women and children.

Priority VI. – Adoption of systematic and complex measures against all forms of intolerance in the context of task VI, no. 1: Adoption of systematic and complex measures focused on the prevention and elimination of all forms of intolerance.

2. *Human Rights and Ethnic Minorities Committee of the National Council of the Slovak Republic*

The focus of the Committee of National Council of the Slovak republic is mainly on the bills and documents submitted by relevant entities in regards to human rights, national minorities right's, another vulnerable groups, gender equality etc.

“The Committee draws a particular attention to the laws governing the operation of independent human rights institutions (Ombudsman, Commissioner for Children and the Commissioner for Persons with Disabilities, Slovak National Centre for Human Rights, Office for Personal Data Protection, Nation's Memory Institute)”.⁵⁰

Moreover, the Committee supervises by-law-commanded reports of the above mentioned relevant human rights state actors and cooperates with Government Representative for Roma Communities as well as Commissioner on National Minorities. Besides and state actors, it cooperates with NGOs in this field too. It also monitors the implementation of particular human rights programs.

The Committee monitors the implementation of particular governmental programs, foremost the above mentioned new Strategy

⁵⁰ Constitutional Committee of the National Council of the Slovak republic (1996). *The opinions of the Constitutional Committee of the National Council of the Slovak republic on the procedure according to Act on rules of procedure of National Council of the Slovak republic.*

and others, such as Strategy of the Slovak Republic for the Integration of Roma until 2020, National Action Plan for the Elimination and Prevention of Violence against Women for 2014 - 2019.

The main aim of the research paper is to observe the implementation of the Committee's competence according to § 45 par. 3 letter b) of the Act of NCSR no.350/1996 Coll. Of Laws on the rules of procedure of NCSR as amended by the further regulations which state that the MPs have the rights to observe the respect and exercise of laws and regulations they adopted. Such scrutiny may be conducted also through a parliamentary poll. This can be evoked by a proposal of member of the Committee or even by public appeal to a different topic of human rights infringement, violations and disobedience.

3. Committee's activities in 2015 and conformity with the Strategy

In 2015, the sixth election period, the Committee was led by Rudolf Chmel. During this year, there were 16 meetings called to discuss different topics and problems. These meetings and the topics discussed provide a basis for our analysis.

On 23 April 2015, the Government Representative for Roma Communities introduces an oral **Information on the findings about the police intervention in Vrbnica** conducted on 2 April 2015 during which approximately 15 persons were wounded.⁵¹

“The Representative met with the regional as well as district director of Police shortly after the intervention and was informed that during the intervention nobody was wounded. However, no sound or video record

⁵¹ see more in TASR. (7. 4.2015). MOST-HÍD: Intervention in Vrbnica showed the late system changes. (translated from: MOST-HÍD: Zásah vo Vrbnici ukázal na meškajúce systémové zmeny). In *Teraz.sk* or SITA. (19.12.2016). *Indicted in a case of police intervention in Vrbnica* (translated from: Vzniesli obvinenie v kauze policajného zásahu vo Vrbnici) in *Pravda.sk*

was made. The information from the citizens of the village and from the policemen are different.''⁵²

The Representative does not have a lot of competences, the options are limited, hence the verification of the information depends on other state bodies. Based on the presented information of 4 April 2015, the Representative turned to the inspection of Ministry of Interior of SR and to the General Prosecutor with the request to re-investigate this action. The Committee note this information in resolution no. 172 and asked the Minister of Interior to submit the final inspection report on the investigation of the public order units of the Police in Vrbnica. During the 54th Committee's meeting members of the Committee were informed by the letter of the Minister of Interior (even without considering it) about the ongoing investigation of the police intervention in Vrbnica. This was all the activity of the Committee regarding this case. No other steps or measures were undertaken. The whole case was then investigated by the Ministry of Interior and the by the bodies authorize to act (based the Act on Police and police inspection, the allegation was raised against the policemen who lead the intervention). Other actors do not have the competences to participate on the process of control or corrections.

In this case, the competences of the Committee are very limited and also depended on other human rights actors (i.e. on the information form the Representative for Roma Communities or from the ministries) and in the context of Priority VI it would make a lot of sense to strengthen the competences of the Committee as a legislative constituent or as an information flow of actors involved in the human rights protection (Representative, Ombudswoman and Committee), rather than the executive constituent which in this case control the execution of its own competences.

Another of the issues that have been discussed during the Committee's meeting for a long time is the institutional background of the National

⁵² Committee for Human Rights and Ethnic Minorities. (2015). Memorandum no. 51.

Memory Institute (hereinafter NMI) resulting from the annual duty to handle to the Reports on the NMI. On 10 June 2015, the Committee's session dealt with the motion on the disagreements of the members of governing and supervisory board, as well as employees) due to unclear information from the environment of MI and from addressed MPs There has been a long-term debate on the parliamentary poll proposal, however, the majority of the MPs agreed that *“the conditions, mainly working animosity and incapability to cooperation in this institution will be not solve by this competence”*⁵³.

In the context of the Priority II., the NMI is one of the institutions on which it the Committee as well as parliamentary plenum decides through the nomination/election into councils. In this case it is important to think about the possibility of the greater enforcement and application of the Committee's competences and directly through institutional settings solve similar problems while preserving the symbolic democratic autonomy of this institution.

On the 62nd meeting of the Committee taking place on 9 December 2015, the MPs discussed the point on **Unwarranted placement of children into special schools**. The MP Peter Pollák who strongly initiated the discussion on this issue⁵⁴ informed the Committee about the report of the State School Inspection on the inspection of private special primary school in Rokycany. The report state that the school seriously misconducted the diagnosis of children. Pollák also explained that this agenda is not a new problem of the protection of human rights, but this time, also the European Commission reacted when it sent the formal statement and warning. The Commission also asked for the explaining statement from the side of Slovakia. The MPs discussed also the question how to find out whether similar placement does occur also in other special schools. Pollák proposed a draft resolution asking “the

⁵³ Committee for Human Rights and Ethnic Minorities. (2015). Memorandum no. 54.

⁵⁴ Committee for Human Rights and Ethnic Minorities. (2015). Memorandum no. 62.

Committee to consider that the Committee of the NCSR for education, science, youth and sport in its resolution no. 212 of 18 November 2015 asked the Minister of Education, Science, Research and Sport of the SR to propose set of measures to eliminate the unjustified placement of children from the socially disadvantaged environment to special primary schools and special classes in the ordinary primary school within 30 days; ask the Minister of Education, Science, Research and Sport of the SE to conduct a survey in the special primary schools in order to find out how many children were unjustifiably placed and subsequently to remedy the founded misconduct and to ask the Minister of Education, Science, Research and Sport of the SR to submit the written information on the proposed measures to eliminate unwarranted placement of children from socially disadvantaged background to the special primary schools to the Committee of NCSR for Human Rights and Ethnic Minorities.⁵⁵ Present state secretary of the Ministry of Education, Romana Kanovská confirmed that the case is dealt by the Ministry along with the Office of the Representative for Roma Communities and that the Ministry submitted a claim on the inspection. At the same time, also legislative remedy was conducted as well when the school act no. 245/2008 Coll. Of Laws was amended, despite the fact that the specialized education falls under the Ministry of Interior. The amendment enabled the school inspection to control the special schools from the 1 September 2015 and after the amendment enters into force, the inspection may, based on any motion, investigate the accuracy of the diagnostic test.

In this case, the cooperation of the Committee and Ministry in the context of Priority VI was successful, since the problem started to be corrected even without the real intervention of the MPs. However, if those measures would have been available sooner, the whole situation could have been avoided. It is thus necessary for the information flow between particular institutions of human rights protection to work.

⁵⁵ Committee for Human Rights and Ethnic Minorities. (2015). Resolution no. 212.

4. Committee's activities in 2016 and conformity with the Strategy

In the new, current seventh election period of the NCSR, the Committee is chaired by the MP Erika Juríniová, former vice-chairwoman of the parliament in the recent election period. The Committee has eleven members, six from the coalition and five from the opposition. In 2016, 18 meetings were called.

Right on the second meeting, the new Minister of Justice, Lucia Žitňanská, who is currently responsible for the area of human rights was questioned about the future work with the Strategy. In her reaction, Žitňanská argued: *“as the human rights strategy was not adopted by the consensus because there is no consensus on the question of values in the society, there is no consensus neither in the parliament, nor in the government. However, there is a consensus on the question of human rights education there is also a space to move forward in the area of understanding the human dignity and equality in diversity.”*⁵⁶

The fifth Committee meeting of 24.-25. May 2016 discussed the only item on the agenda: **The discussion of the procedure of state officers during the child withdrawal and options of systemic improvements of these operations.**

The meeting was called due to materials submitted to the Ombudswoman, Jana Dubovcová – the report of ombudswoman on the conditions for the bodies of social protection of children and social custody; and a Report of Ombudswoman on the fulfilment of the state obligation to provide the protection of rights and interests of the child in the case of conflict of laws. These documents were published due to medialized ‘case’ of the 7-year old child withdrawal from the school by

⁵⁶ Committee for Human Rights and Ethnic Minorities. (2016). Memorandum no. 2.

the higher judicial officer based on the judicial decision.⁵⁷ The MPs did not adopt the parliamentary poll proposal on the district courts and the Bureau, Social Affairs and Family. They relinquish any direct involvement.

Only on the tenth Committee meeting on 5 September 2016 the chairwoman submitted the material related to the remedy in the above mentioned case stemming from the conclusions of Committee meeting in May. The materials included the Report on the procedure of state officers during child withdrawal and the option of systemic improvement during these operations (submitted by the Minister of Justice on the grounds of Committee's resolution no. 14); and the Analysis of current state of the child protection during the execution of judicial decisions and custody of minors (submitted by the Minister of Labour, Social Affairs and Family on the ground of Committee's resolution no. 14). After reading and considering the document, the whole work of the Committee was finished again on this case as well as in the context of the Priority IV. The Committee thus contributed to the decrease of media pressure and explain the circumstances of the case from the perspective of all the participants. The remedy in legislative as well as administrative proceeding were, however, kept in the ministries. It would be then fair to think about the possibility of the Committee to exercise its right to propose laws stronger and thus react on the needs of the society more promptly rather than to "keep" the legislative competences only on the lengthy government processes and thus institutionally support more democratic options in the framework of political control and legislative system.

During the 11th Committee meeting of 12 and 14 September 2016, the one and only point of the agenda was to verification of the situation of the social reintegration facility Čistý deň (Clean Day) in Galanta, where according to the motion of Mrs. Furdíková to the Committee, there is a

⁵⁷ see more SITA. (18.5.2016). *ŽITŇANSKÁ: The withdrawal procedure of little Marc was unacceptable (translated from: ŽITŇANSKÁ: Spôsob odobratia malého Marca bol neakceptovateľný).*

suspicion from the sexual abuse and rough treatment of the clients of the facility.⁵⁸

The media cover⁵⁹ of this case trigger the debate among the MPs and the submission of the chairwoman's resolution. The MPs even considered to discuss the topic behind the close doors. They adopted the resolution no. 22 denouncing any forms of sexual abuse of wards in all the facilities of the social protection. The Commissioner for children, Viera Tomanová was asked to submit a report on the respect for rights of children in the social reintegration facility. The meeting continued on 14 September with the non-public session where the MPs unanimously adopted the resolution no. 23 on the "conducting of parliamentary poll in

- a) Head office of labour, social affairs and family (HOLSAF)
- b) Bureau of Labour, Social Affairs and Family (BLSAF)
- c) Social reintegration centre Čistý deň (Clean Day) with the focus on
 - Organizational structure of the facility, professional as well as assistant personal, its competences and activities with client; labour contracts and agreements of employees, trainees and volunteers
 - The contracts with the clients, MLSAF, BLSAF and Higher territorial unit (HTU) and other donors on the financial contributions.
 - Quality of the social services according to current legislation (acts, directives, supranational norms)

⁵⁸ Committee for Human Rights and Ethnic Minorities. (2016). Memorandum no. 11.

⁵⁹ see more in Petková, Z. (22.09.2016). Cover up complaints and non-functional control (translated from: Ututlané sťažnosti a nefunkčná kontrola) in *Trend.sk*

mainly in the area of human rights promotion and protection.⁶⁰

In this case, the Priority V is discussed in all available human rights institution. The Committee emphasized this activity especially due to parliamentary poll in the above-mentioned institutions that was closed when the Report of the parliamentary poll conducted under the resolutions 23 and 24, was adopted. The Chairwoman of the Committee Erika Jurinová informed the Minister of Labour, Social Affairs and Family Ján Richter about the recommendations stated in the final part of the Report of parliamentary poll, mainly the recommendations of legislative character.⁶¹ And again arises the problem to give up the competence to initiate the improvement directly in the parliament and thus create pressure in order to solve the problem faster after exercising the competence for parliamentary poll and identifying the shortcomings.⁶²

During 2015, as it was already mentioned above, the issue of the NMI was discussed, and in 2016, the MPs came back to the item as Personal submission of information by the members of supervisory board of the

⁶⁰ Committee for Human Rights and Ethnic Minorities. (2016). Resolution no. 23.

⁶¹ In the beginning of 2017, the MP Blahová (Freedom and Solidarity) sent to the UN Committee for the rights of child a motion to re-investigate serious and systematic violation of rights declared in the UN Convention on the Rights of Child. According to her statement, the reason of such step is that the Ministry of Labour, Social Affair and Family of the SR does not apply all of its options and tools to protect children, (see more in SITA (05.01.2017). Due to the case of „Clean day“, MP Blahová turned to the UN (translated from: Poslankyňa Blahová sa pre kauzu Čistý deň obrátila na OSN) in *Pravda*. On the other side, the parents of the children staying in the facility are taking about the abuse of the MP's function and no communication from her side.

⁶² Except from the Committee for Human Rights and Ethnic Minorities this problem is dealt also by the Committee for Social Affairs, which is waiting for the conclusions of the investigation of social reintegration facilities and on the results of prosecutor's actions and subsequent legislative system changes.

NMI on the founded shortcomings in the activity and functioning of the NMI. The draft resolution no. 26, in which the Committee should seriously concern the information and should recommend the supervisory board to turn to the Supreme Audit Office and challenge the Management board of NMI to take a standpoint to the information of the supervisory board within 30 days, was adopted by the majority after a contradictory debate. The problem was also discussed during next meeting no. 16 on 28 November 2016 when the statement of the management board of NMI on the situation in NMI concerning the submitted information by the Members of the supervisory board, as well as the statement of chairman of the management board, Ondrej Krajňák on the same issue, was noted. The Committee again terminated its role as a mediator and the problem will be discussed in 2017. In the context of Priority II, there has not been any progress – neither legislative (to approve changes in the law changing powers within institutions) nor institutional in the work of the Committee in the parliament.

Conclusion

It is obvious that in the democratic political system the role of the bodies, in this case bodies of the human rights protection and promotion, is rooted in the rule of law and similarly is related to the principles of separation of powers and check and balances.

Some of these institutions, such as Government Representative for Roma Minorities or the institution of Ombudsman, submit reports concerning the concrete human rights violations that should serve as a basis for conclusions and recommendations addressed to the parliament through the observed Committee. Based on the previous, it should be clear that the problem is not only the limited competences of the Committee grounded in the rules of procedure, but also the exercise of these competences itself within particular institutions.

The parliamentary poll is a legitimate tool of MP to control other state and non-state bodies. The evaluation of such poll and experiences from

the practise are many time not applicable and (similar to Ombudswoman's recommendations) ignored. It should be rather the government and respective ministries which should acquire the recommendations since they have the appropriate apparatus, On the other hand in the context of properly functioning parliamentary democracy (opposition vs coalition) and the good will of the majority advocating observance of the human rights and freedoms in the state and public administration, cooperation with the civil sector as well as professionals or general public also in the context of the approved Strategy, all of these actors shall use their powers in maximum manner.

If we go back to the March and Olsen "arena" defining and protecting the values and norms of institutions, we may agree with Göhler who argues that March and Olsen's definition lacks the symbolic meaning of political institutions. *"Through the use of symbols, the political institutions have to provide required basic orientation for citizens who live together in the society."*⁶³ The Committee according to the observed activities does not interconnect this symbolism with the integrated function of grounded in the parliament's rules of procedure.

Thus the answer to our research question thus refer to the necessity to increase the effectiveness of the control institutional mechanisms of the human rights protection as well as mutual communication and enforcement of the rights by these institutions. It is not necessary to develop new institutional framework, however, it is necessary to reformulate some measures and strengthen the framework of their application in the context of parliamentary democracy and in the context of interpretation of its last resort, such as medialization, public control or formulation of consequences. This all requires active

⁶³ Göhler, G. (1996); *Institutions in political theory: Lessons for European integration*. In: Rometsch, D. - Wessels, W., eds., *The European Union and member states: Towards institutional fusion?* Manchester University Press, p.13

approach and support of the government but also intersectional consideration when adopting legislative amendments or implementing international norms.

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THE COMPARISON OF OMBUDSMAN INSTITUTIONS IN SELECTED EU MEMBER STATES

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Abstract: The paper deals with the comparison of the legislation of ombudsman institutions in Slovak republic and Poland considering also the Council of Europe criteria for such institutions. The author emphasizes the detailed description of mechanism of their functions, especially the correct understanding of the competence of the Ombudsman in Slovak republic as well as the spokesman for civil rights, who together act as an intermediary between citizens and public administration.

Key words: The Ombudsman, ombudsman, public administration, measures to remedy, protection of human rights and freedoms

Introduction

In democratic countries, also other forms of extrajudicial protection of human rights provision before the intervention of public administration bodies are used more often. Currently, almost all democratic countries in Europe, but also from the parts of the world transposed the institution assisting to persons with the constitutionally guaranteed human rights and freedom into their constitutional systems. The institution of public defender, resp. ombudsman can be considered such institution in particular countries. The term “ombudsman” come from Swedish language. Its roots may be traced back to middle-aged word “umbup” (power, authority). How “ombud”, resp. ombudsman was a person who performed as a representation, delegate or spokesman for other persons. Regarding its amendment of constitution, Sweden as a first country in the world developed in 1809 control body titled ombudsman. The founding of this institution was influenced by the Islamic legal system. The king Charles XII. after the Battle of Poltava (1709) again Russians lived few years in exile in Turkey where he became familiarized with

the public administration control system and with the implementation of judicial handling of complaints proceeded by chancellor of justice. This position existed in Islam since the 7th century, 2nd calif Omar's rule. According to this system, Charles XII. established the bureau of Swedish judicial chancellor as a kings' control body. In 1809 the Swedish parliament itself elected the ombudsman. Ever since, the ombudsman and judicial chancellor work in the Sweden as a government body. This example was later followed by Finland in 1919. Such situation maintained until the middle of this century. Afterwards, the ombudsman institution spread across the world. Today this institute is grounded in the legislations of 50 countries across different continents. In particular countries, this institution was established in different time and with different purpose ranging from general application in the area of public administration to specialized application (i.e. in Norway, there is ombudsman for military affairs (1952) and general ombudsman (1963), in Denmark (1955), in Germany there is Commissioner for the control of armed forces 'Wehrbeauftragter' (1959), in New Zealand (1962), Guayana (1966), Tanzania (1966), Great Britain (1967), Hawaii (1969), Nebraska (1969), Mauritius (1970)).

It is interesting to note that the resolution the Council of Europe Parliamentary Assembly no. 1959 (2013) adopted on 4 October 2013 on the strengthening of the ombudsman in Europe⁶⁴ states that there is no standardized model for the institution of ombudsman which bear responsibility of the citizens' protection against maladministration. Some countries established the one-person office of ombudsman, whereas others chose the multi-institutional system including regional and local ombudsmen specialized in areas such as fight against

⁶⁴ Resolution 1959 (2013) Final version Strengthening the institution of ombudsman in Europe. Author(s): Parliamentary Assembly Origin - Assembly debate on 4 October 2013 (36th Sitting) (see Doc. 13236, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Xuclà). Text adopted by the Assembly on 4 October 2013 (36th Sitting). Available on internet: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20232&lang=en> (20.12.2016)

discrimination, minority protection and rights of child. Considering the plurality of legal systems and traditions, the resolution does not consider defending one particular model of ombudsman as appropriate. Despite such attitude, it calls for Council of Europe member states to secure their ombudsman institutions to fulfil the criteria stated in several documents: in the recommendation 1615 (2003) on ombudsman, in recommendation of Committee of Ministers R (80) 2, R (85) 13 and R (97) 14 and the European Commission document for democracy through law (Venice commission) “Compilation on ombudsman institutions” adopted on 1 December 2011. The criteria include:

1. Independence and independent of these institutions whose existence should be grounded in law, and if possible, in constitution.
2. Appointment process: ombudsman should be appointed by the parliament and should report to the parliament
3. Their applicability which should cover the examples of maladministration of all executive bodies as well as human rights protection
4. Access to documents and investigative competences, as well as unlimited access to all detention institutes
5. Their access to constitutional court in order to challenge the constitutionality of faulty legislation
6. Direct access to ombudsman for all persons, including legal persons affected by maladministration regardless their nationality.

At the same the challenge is raised to prevent the multiplication of ombudsman institutions if it is not strictly necessary for the protection of human rights and fundamental freedoms since enlargement of such bodies could confuse the understanding of the means of remedy

available for that particular body.⁶⁵

1. Legislation on the public defender of human rights in the Slovak republic

The Slovak republic established this institution into its legal order with the constitutional law no. 90/2001 Coll. of Laws within the newly created article 151 of the Constitution of the Slovak republic. Public defender is an independent body protecting fundamental rights and freedoms of persons in proceeding before the bodies of public administration and (since entering into force of the amendment 92/2006 Coll. of Laws) before other bodies of public authority if their procedure, decision-making and inactivity was violating the legislation or the principles of democratic state and rule of law under circumstance that the scope and way of protection will be stated by the law (law 564/2001 Coll. of Laws) on the Ombudsman effective since 1.1.2002 which based on § 3 par. 1 states that the performance of the public defender concerns the bodies of public administration, local government authorities and legal and physical persons deciding on or in other way intervening into rights and duties of physical persons, legal persons from the field of public administration. From the legal perspective that limits the status and functions of prosecution and status and function of public defender, it is obvious that:

1. Prosecution of Slovak republic is constituted as a universal protection body of lawfulness and objective law and as a body

⁶⁵ There is a difference between the approach of Parliamentary Assembly and Committee of Ministers in the Council of Europe. The Parliamentary Assembly in its recommendation R (85) 13 on the institution of ombudsman right in the point a) recommends the governments of the member states to consider the possibility the appoint the ombudsman at national, regional or local level or for the specific areas of public administration.

RECOMMENDATION No. R (85) 13 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE INSTITUTION OF OMBUDSMAN (Adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies), available on internet: [http://home.broadpark.no/~wkeim/files/COE-No.R%20\(85\)13.pdf](http://home.broadpark.no/~wkeim/files/COE-No.R%20(85)13.pdf) (20.12.2016)

acting in the public interest

2. Public defender is constituted as a body of subjective rights protection – protection of fundamental human rights and freedoms of physical and legal persons before such proceeding, decision-making and inactivity of public administration bodies which is contrary to the legislation and principles of democratic state and rule of law.

The mission of public defender of right is to provide informal assistance to persons unsatisfied with the case processing which was the subject of the proceeding of public administration bodies or persons, whose discontent is directed against the proceedings or inactivity of the public administration bodies or those which are not satisfied with the behaviour of employees of these bodies. The the Ombudsman provides assistance also to persons who cannot use all the legal option provided by the legal proceeding as these conditions are too complicated to understand. Concerning the focus and competences of public defender, this body may be considered as a supplement of existing judicial control of lawfulness of public administration bodies' procedures. It not only helps the persons calling for help, but is also identifies the possible violation of laws by the public administration bodies. The competence of the Ombudsman is to submit a claim to the respected body to cancel binding legal act adopted by the public administration body violating human rights and freedoms.

The independence of this institution is stated directly in the constitution and is defined by the way of establishment and its relationship with other state bodies. This independence is rather relative and the Ombudsman is in its own establishment and relationships bound to National Council of the Slovak republic, which elects him/her, may remove him/her from the office and is obliged to inform on its activities. The public defender is entirely independent on the executive power, and on the contrary, the public administration bodies bear responsibility to public defender concerning submitting materials, declare statements and providing access to their buildings. The

Ombudsman cannot give order, decide on the merits, resp. in other ways intervene or influence the actions of public administration bodies which fall under his/her observance competence. The institution affects the bodies of court management and administration as well as the reasons assuming the disciplinary guilt of a judge or prosecutor that enable the public defender to submit a proposal for disciplinary proceeding against a judge (§120, par. 2, letter c) of law 385/2000 Coll. of Laws on judges and associates and on the change and supplement of some law) and against prosecutor if the public defender assumes that during the exercise of his/her function in contrary law or principles of democratic state and rule of law, the prosecutor violated fundamental rights and freedoms of the submitter who demanded the legal protection of the Ombudsman (§ 197, par. 2, letter b) of law 254/2001 Coll. of Laws on prosecutors and legal prosecutor candidates). This competence to held the persons acting in the public authority bodies responsible, was supplemented to into the article 151 and the Constitution of the Slovak republic through the amendment of law 92/2006 Coll. of Laws entering into force on 1.4.2006. The amendment grounded also the general constitutional duty of all bodies of public authority to provide necessary cooperation to the public defender as well as the competence of public defender to submit a proposal to start the proceeding on conformity of the general legal acts acc. the art.125 par.1 of the Constitution with the legal norms of higher legal strength if it violates fundamental right or freedom admitted to the physical or legal persons, resp. if further exercise of generally binding legal act may threaten the fundamental rights and freedoms or human rights and fundamental freedoms arising from international treaty that was ratified by the Slovak republic and which was declared in the way stated in law. In this case, it is important to emphasize that the exploratory competence of the Ombudsman concerns the duty to report a subject matter (even without the stimulus) to prosecutor to undertake measures that are entrusted to prosecutor's office if found out that in places for detention of persons deprived of liberty or of persons whose personal liberty is limited, a person is held unlawfully and can forward the impetus to the prosecutor if the impetus concerns the lawful decision of the public

administration body or if the public defender assumes that the decision is in contrary to law or other generally binding legal act. In all of these cases, the motion is considered processed after the transfer of competence to the prosecutor. In other cases, (i.e. delays in judicial proceedings) the processing of motions where the public defender may enter also without previous notice into the objects of public administration bodies and require their necessary cooperation – regarding files, documentation, explanations. The public defender may also ask questions any employee of the public administration body and has rights to personal interview with person detained in some of the places for such purpose. Except from the above mentioned, the the Ombudsman may ask the public administration body to provide information and explanation, to access the file, borrowing the file, to provide written statement on the merits and legal questions and also to collect the evidence proposed. The the Ombudsman may also require the public administration body to undertaken proposed measures which the body is allowed to undertake. The right to be present on the proceedings before the public administration body where the defender may ask the questions the parties as well participants of the proceeding as well as his/her right to require to exercise the evidence proposed and tackle them in the reasoning of his/her decisions. The public administration bodies shall grant the request of the the Ombudsman in every case. If the request was not granted, the public defender could report this procedure to the supervisory body of the public administration body. If the public administration body has no supervisory body, the public defender will report such procedure to the Slovak government which is obliged to announce, within 20 days from the notice delivery of the public defender, measures that were accepted and if the public defender considers such measure insufficient, s/he will report then to the National Council of the Slovak republic. If the result of the processing the motion or of the own initiative of the public defender is refers to the violation of fundamental rights and freedoms, the public defender reports the results to the public administration body against whose procedure, decision-making or inactivity the motion was submitted along with the measures proposed. The public administration

body is obliged to announce its statement and adopted measures within 20 days. In case the Ombudsman considers them again as insufficient, s/he reports to supreme institution, resp. the government and the above mentioned process repeats. The same process repeats also when there are facts assuming that the criminal act, offense, other administrative offense or disciplinary offence or breach of any obligation prescribed by law happened. Moreover, the Ombudsman submits report on activities annually to the National Council of the Slovak republic containing the knowledge about respect for human rights of physical and legal persons by the public administration bodies and its proposals and recommendation to remedy the identified deficiencies, and in case of the serious character of the assumed violations or if the violation concerns larger number of person, the public defender may submit to the National Council also special report. Such special reports have been submitted twice, in 2013 regarding the segregation of Roma children in education by assigning them to special schools with minimal possibility to continue at further levels of education; and in 2016 regarding the possible violations of fundamental rights and freedoms due to the police bodies after the Minister of Interior, as a supreme body to the President of Police corps in 2015 declared that there will be no measures to remedy taken as a response to the measure the the Ombudsman proposed: “To order the police officers the immediate ban to limit the personal freedom of a physical persons by its detention into “designated areas” in a police building that are not a police custody and into any other closed spaces that are not considered a police custody as well as to order immediate physical ban of ‘designated areas’ created in the police buildings in order to limit the personal freedom of a physical person.”⁶⁶

⁶⁶ Special report of the Ombudsman on the facts indicating serious violations of fundamental rights and freedoms due to procedure of police bodies of 18.10.2016: “The president of police force, on 26 January 2015 gave “The order of implementation tasks to ensure the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.” Paradoxically, right because of this intern norm which should secure the increasing level of respect for human rights and freedoms during the

Since 1.9.2015 also the institution of special ombudsmen is working, such as Commissioner of children and Commissioner for persons with disabilities according to the Act No.176 / 2015 Coll. of Laws on commissioner for children and commissioner for persons with disabilities. Their competence corresponds with the protection of children as stated in the UN Convention on the Rights of Child and its optional protocols and protection of the persons with disabilities as stated in the UN Convention on the Rights of Persons with Disabilities.

2. The legislation of the defender of civil rights in Poland

According to the art. 80 of Polish constitution, everyone has the right to turn to spokesman for civil rights with the request when protecting own freedoms or rights that have been violated by the public authority bodies under conditions stated in the law. In art. 72, par. 4 the Polish constitution provides the blanker for the adoption of law that shall stipulate the powers and the way of stipulation of the spokesman for the rights of child.⁶⁷ The spokesman for the civil rights acc. to the art. 191

police procedures is the only norms which regulates the use of illegal designated areas. This order in point 1 letter c) obliges the director of national criminal agency of presidium, director of office of border and foreign police of presidium and directors of regional directories of Police force to ensure the placement of persons deprived of personal liberty into so called “designated areas of the police department for temporary placement of persons deprived of personal liberty”, as well as the handcuffing of persons to appropriate subjects only to necessary required time period; to note in respective administrative assistance and form every such placement and handcuffing along with the time span. Currently, the order of the president of the Police forces not having even the power of a legal act serves as a legal basis for the placement of persons into illegally designated areas. This order is not able to normatively modify the ways of personal security limitations according to art. 17, par. 2 of the Constitution of Slovak republic. Due to this internal legislation, the president of the Police forces created the conditions for an arbitrary proceeding.” Available on internet: <http://www.vop.gov.sk/files/Mimoriadna%20správa%20VOP%202016.pdf> (20.12.2016)

⁶⁷ Act adopted on 6.1.2000 on the defender of rights of child

of the polish constitution may submit proposal to the polish constitutional court on the merit of conformity of the legal acts and the international treaties with constitution; conformity of legal acts with the ratified international treaties, whose ratification was required by the law; conformity of legal acts adopted by the central state bodies with the constitution, ratified international treaties and laws; conformity of purposes or functions of the political parties with the constitution; constitutional suit submitted by anyone whose constitutional freedoms or rights were violated in a merit of conformity of legal acts or other normative act with the constitution if, based on this legal act or other normative act, the court or other public administration body decided in the final decision on the freedoms or rights of the complainer or on the duties grounded in the constitution. According to art. 207 par. 1 of polish constitution, the spokesman for civil rights protects freedoms and rights of man and citizen guaranteed in the constitution as well as other normative act. The scope and way of activities of civil rights spokesman are determined by the law. According to art. 210 of the constitution, the civil rights spokesman is independent body, not subordinated to other state bodies and is responsible only to Sejm (lower house of polish parliament) under the conditions state in the law. According to art. 212 s/he informs Sejm as well as Senate annually on her/his activities as well as on the respect of freedoms and rights of man and citizen.⁶⁸

Dz.U. 2000 nr 6 poz. 69 Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka, available on internet

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU20000060069> c (20.10.2016)

⁶⁸ Dz.U. 1997 nr 78 poz. 483 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r., available on internet:

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970780483> (20.10.2016)

According to the Act no. 123/1987 Coll. of Laws on the civil rights spokesman⁶⁹ regarding the protection of freedoms and rights of man, this defender of civil rights investigates whether there occurred the violations of right and principles of cohabitation or social justice due to the activity or inactivity of the bodies, organizations and institutions obliged to respect and conduct these freedoms and rights. The civil rights spokesman conducts also the function of the visiting body in the merits concerning prevention of torture or other cruel, inhuman or degrading treatment or punishment (state prevention mechanism) in the respect of Optional protocol to the Convention on the prohibition of the use of torture or other cruel, inhuman or degrading treatment or punishment adopted by the UN General Assembly in New York on 18.12.2002 (Dz.U. 192/2007).

The civil rights spokesman exercises its activities state in the law if s/he finds out about the possible violation of freedoms and rights of man and citizen including the principles of equal treatment. S/he controls the way of treatment of persons deprived of liberty regularly. The exercise of function of the public rights spokesman follows the request of citizens or civil organization; of local authorities; defender of rights of child and the request of own initiative. Based on the request, the public rights spokesman may succeed the case; settle it by referring the applicant to the available measures; forward it according to affiliation or not take over the case while referring the applicant to the available measures what can be done also when applying the principle of equal treatment between private persons. After taking over the case, the civil rights spokesman may individually conduct clarifying proceeding, call the responsible bodies, especially the control bodies, prosecutor's office, bodies of state and professional control or control of associations to re-investigate the merit or its parts. S/he may also ask the Sejm to entrust the Supreme control chamber to verify the particular merit or its parts. During the clarification proceedings, the spokesman for civil

⁶⁹ Dz.U. 1987 nr 21 poz. 123 Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich.available on internet:
<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19870210123> (20.10.2016)

rights may verify without notice any issue in the place, require explanations, submission of a file in each case carried out by the highest and central government bodies⁷⁰, government administration bodies⁷¹, bodies of profit-sharing organizations, association and profession organizations, as well as bodies of organizational units with legal personality and bodies of local government units. Moreover, s/he can ask for the information in the merits, provided by courts and prosecution and also other law enforcement bodies as well as for the insight into judicial and prosecutorial files and files of other bodies of prosecution authorities after the termination of the proceeding and issue of decision. While exercising the visiting body function for the elimination of torture, cruel, inhuman or degrading treatments or punishment, the civil rights spokesman may record a sound or picture in places where there are persons deprived of liberty. The recorded sound and picture is stored in the office of the spokesman, in rooms secured against the entrance of unauthorized persons during the necessary period, not longer than 10 years. Furthermore, the spokesman is entitled to provide the record to person recorded, resp.to his/her legal representative as well as to plenipotentiary. In case of investigation, the spokesman may explain to the applicant that the violation of freedoms and rights of a man and citizen was not confirmed or the spokesman may address the submission to the body, organization or institution that violated the freedoms and rights of man and citizens, however, while maintaining the principle of judicial independence. In the submission, the spokesman may formulate the opinion and proposals how to manage the merit and may require the disciplinary proceeding or imposition of service sanctions. Such bodies, organizations and institutions are obliged without delay, within 30 days to inform the spokesman for civil rights about the adopted measures or statement and

⁷⁰ The highest bodies of state administrations are president, government, Prime Minister, the office of the Prime Minister; central government authorities are inspections, regulatory bureaus, standardizing and certifying authorities, supervisory bodies, bodies performing specific public roles – participate on the government policy

⁷¹ All bodies managed by the government

if the spokesman does not share the same opinion, s/he can turn to respective supervisory unit to adopt appropriate measures, while s/he may proceed in another way instead of submitting a claim to a body which violated right or freedom, such as: ask the supervisory body to use means stated in the legal acts; to start a civil proceeding as well as to participate in every already ongoing proceeding with the rights belonging to the prosecutor; furthermore the spokesman may ask for a preparatory proceeding concerning the criminal acts prosecuted ex officio; ask for legal proceeding⁷², bring an action before the administrative court and participate on these proceedings with the rights belonging to the prosecutor etc. Regarding the verification of cases, the defender of civil rights may submit statements and proposals focused on the effective protection of freedoms and rights of man and a citizen and improving the way of merits processing to particular bodies, organizations and institutions. The defender of civil rights may also submit proposals for legislative initiative or to issue a change of other legal acts concerning freedoms and rights of man and citizens, except from proposals to constitutional court according to constitution. If such proposal concerns child, the defender of civil rights has to inform the defender of the rights of child. The scope of activity of the civil rights defender related to exercise of equal treatment contains also analysing, monitoring, and promotion of equal treatment of all persons, execution of unsubordinated verification related to discrimination, developing and publishing unsubordinated reports and issuing recommendations related to discrimination problems.

The protection of freedoms and rights of man and citizens affects also other persons than polish citizens who fall under the jurisdiction of Poland in the scope of the rights belonging to them, including the legal persons and organization units not having the legal personality

⁷² The spokesman of the civil rights has the right to submit a proposal to solve the dispute on the affiliation of administrative bodies to the administrative court. Art.22 par. 3, fifth point of the Code of Administrative procedure. Dz.U. 1960 nr 30 poz. 168 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego., available on internet: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19600300168> (20.10.2016)

acquiring legal responsibility in scope stated in provisions of act of 3.12.2010 on the transposition of some EU legal acts in the area of equal treatment. When informing the Sejm and Senate on his/her activity as well as on the state of art of respect for freedoms and rights of man and citizens, the defender of civil rights provides information also on the undertaken activities in the area of equal treatment in Poland while s/he may submit proposals and recommendation related to activities aimed to secure the principle of equal treatment.

Conclusion

The papers aimed to map the differences between the institution of ombudsman in the EU member states, in Slovakia and Poland in particular, and at the same time observe how the legal acts on the institutions of ombudsman respect common European standards declared by the Council of Europe. It is obvious that the polish ombudsman, due to historical reasons, have the competences very close to the prosecutor with the possibility enter the civil proceedings, challenge the final decision of courts and administrative bodies, whereas the Slovak ombudsman respects the rule of strict separation of ombudsman and courts as independent bodies considering that both institutions' aims are almost identical – protection of human rights and freedoms.

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LEGAL STATE AS PRE-CONDITION FOR WORKING OF HUMAN RIGHTS PROTECTION INSTITUTIONS

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Abstract: Human rights belong to everyone. Not every state is able to guarantee and protect them equally. Precondition of human rights protection's institutions is existence of such form of state, where human rights are not only recognised, but also guaranteed. That form of state is only legal state, where state authorities may act based on law and by way established by law. The paper provide such point of view to theoretical-legal aspects of foundation and operation of legal state and identify correlations between its individual attributes and human rights protection.

Key words: freedom, legal state, rule of law, separation of powers, legal certainty, enforcement of law, human rights

Introduction

Human rights are inalienable, imprescriptible, imprescriptible and unchallengeable. They belong to every human being regardless of his nationality or other status. Human are born and maintain free. Human rights especially protect human, his/her personality against arbitrariness and abuse of power. Except from protective function, civil and political rights enable the individual to influence the behaviour, activity and procedure of power. Both of the functions are feasible only in democratic society that applies the principle of **rule of law**, political plurality, strict separation of powers and judicial independence. The role of state is to embed these human rights in the laws as a rights of human and citizens and the secure their undisturbed enjoyment.

Freedom and public authority

Freedom is part of human, thus a categorical imperative of human rights. It contains human rights and natural equality, as it was formulated by I. Kant: *“Freedom (independence from forced will of others), if it may exist along with the freedom of anybody else based on the universal law, is the only, original law that belongs to every human as a result of his belonging to human kind.”*⁷³

Human being cannot live outside of society. The social need and values of human exclude the consequences of absolute freedom (fight of all against all) and naturally lead people to establishment of public (state) authority, which provides their freedom, security and ownership. The reasons of pooling part of peoples' freedom to the public authority were clarified in John Locke's Two Treatises of Government: *“If a human in natural state is as free as it was already said, if he is unlimited master of his own person and own property, equal to the supreme and subordinated to nobody, why he wants to pool his freedom, why he wants to give up his sovereignty and subordinate to lordship and rule of another authority? The answer is clear: Even if in the natural state he has such rights, its exercise is very unsure and permanently subject of intervention of others, since everyone is king as he is, and every human is equal and the majority from them are not proper in respect for politeness and justice, thus the exercise of property which holds in this state is not very safe and very unsure. This pushes him to give up this state that anyhow free is full of doubts and permanent danger.”*⁷⁴

John Locke continued in the original Plato learning pointing out that it is not possible to build the just society on the principle of the stronger.⁷⁵ The right of the stronger is a part of the natural state the same how as it is part of the sports games. Enforcement of the right of the stronger

⁷³ Kant, I.: Groundwork on the Metaphysics of Morals, Bratislava, Kalligram, 2004.

⁷⁴ Locke, J.: Two Treatises of Government. Praha. 1965, p. 198

⁷⁵ Plato: State (from Greek original translated by Július Špaňár), Bratislava, Kalligram, 2006.

endangers others whilst it does not guarantee security to anybody, not even the dominant member.

In order to provide for their own security, the people voluntarily limit their own natural freedom in favour of public authority – state. The common intention differs then depending on the historical development, period of time, political system, developmental levels of civil society and many other actors. The unifying feature is the **system based on law** that forms and manages necessary relations, accepts the differences of other elements as state ones and acknowledges, provides and protects their rights and freedoms. The law then emerges as a result of in advanced known and recognized process in such environment that was accepted by all system elements and whose results obliges everyone regardless on his/her agreement or disagreement (with in advanced agreed exceptions such as civil disobedience) as the acceptance of the content as well as form is assumed.

The law, its basis, structure and aim of the state and its citizens then justifies its existence by the freedoms of individuals as well as the whole society. Thus the most important role of state is to provide liberty, its further development and protection against its arbitrary restrictions.

The state focused on its long-term successful performance, hence, creates conditions for further development and exercise of freedom. This is universally valid for such type of state, even though, sometimes, the support of individualities and society from the side of the state became dogmatically enforced mantra.

Many times one forgets about the critical assessment of the real options of the state authority when enforcing and protecting freedoms. This brings several risks, not only from the side of freedom protection but also from the side of particular human rights. Inconsistency between plans and reality creates free space into which freedom of some individuals, social groups as well as state authority expands. Exercise of such freedom and state authority then makes is harder or even prevents

the state and its citizens from the further development and from the common satisfaction.⁷⁶

Other example of the misunderstood application of state authority in regards with liberty are countries (most frequently countries of non-European legal culture such as Latin American countries) that do support and provide at least minimum protection of part of the freedom.⁷⁷ However, freedom is unit that cannot be divided and cannot be guaranteed only in limited extend (after all, indivisible fundamental rights and freedoms are part of liberty as well). Such approach then only alleviates, but does not prevent the achievement (or overcome) of the point of maximum state tolerance by the citizens with the mentioned negative consequences for all elements of the system.

At the same let us not forget about the fact that enforcement of liberty that limits the liberty of the other is lawlessness and hence it pushes the state towards the absolute border value and certainty of its own decline.

To summarize, the precondition of maintaining each society in the framework of state entity is a consistent structure of legal norms, respect for them and enforcement of the law by the bodies of state authority. It is thus necessary to establish stable rule of law that will also provide the exercise of human freedom.

Rule of law

- **The term “rule of law”**

This term refers to state based on political system where the whole state authority is subordinated to legal order. The activities of the state are focused not only on ruling and organizing, but also on developing such legislation that provides the legal certainty and hence the clarity and enforcement of law.

⁷⁶ The law, except from its material attributes should use also sympathies – state authority should thus promote it as a positive tool providing proper course of events.

⁷⁷ Prillaman, W. C.: *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport, 2000

First inspirational ideas about the rule of law were offered by John Adams.⁷⁸ He opened the discussion with the conservative British colonial society on the topic of separation of powers as tool of own state's subordination to rules, that it respects and follows. The state of Massachusetts adopted in 1780 the text of fundamental act⁷⁹, most part of which was written by John Adams. This text stated: *"In the government of this society, legislative power shall not exercise neither executive nor judicial power: executive power shall never exercise neither legislative nor judicial power; and the judicial power shall not exercise neither the legislative nor executive power; and finally, the government should be the government of law, not the government of people."*⁸⁰

Although this can be considered a revolutionary approach to the system of state functioning, the doctrine was deeper elaborated only after hundred years.

The basic principles of modern rule of law were formulated at the turn of the 19th and 20th centuries by the constitutional theorist Albert Venn Dicey in still current book Constitutional law: "every official, from the Prime Minister to a police guard or tax collector, is legally responsible, no exceptions, for his actions as any other citizen. The state power has to be exercised exclusively in conformity with the written law adopted in respective procedure."⁸¹

From this text, it is possible to extract two basic principles:

- 1) The rule of law that excludes self-will, any prerogatives and prioritizing of state and its activities

⁷⁸ Second President of the USA, one of the group so called Founding Fathers.

⁷⁹ Constitution of Massachusetts was the first of the constitutions that as created by a special committee of public representatives and first of such documents that was adopted by the people. it contained until then uncommon elements such as two-chamber parliament, veto right that could be overruled by 2/3 majority and independently standing judicial power.

⁸⁰ Constitution of Massachusetts, Part One, Article XXX, 1780.

⁸¹ Dicey, A.V.: Introduction in the Study of the Law of the Constitution. Indianapolis, Liberty Classics, 1982.

2) Equality of all before the law

These two principles were later supplemented by A. Dicey's third one:

- 3) The constitutional law is based on the law of individual that is exercised foremost through courts and parliaments and thus is not (comparing to continental Europe) source of the whole law.⁸²

European version of the idea of rule of law – *rechstaat* – emerged as a response to unlimited power of an absolutist monarch who created law, but was never obliged to respect it.⁸³ The idea of the rule of law became the fighting slogan of enlightenment. The rule of law became the counterpart of absolutism, dictatorship and totalitarianism because it prevents the self-will of state (sovereign) and abuse of his powers against the population (citizens) and their liberty.

The first one who introduced a doctrine on the rule of law at the end of 18th century was Immanuel Kant in his *Groundwork on the Metaphysics of Morals*.⁸⁴ The following century, the rule of law was considered to be an item of political agenda, whose credo was the limitation of state power in order to protect personal liberty. This resulted in a theory that emphasized the commitment of state bodies to the law (***ruling of law, principle of legality***), limitation of state authority by the written constitutions, a basic collection of state legal norms.

Here it is, however, important to point out that the absolutization of positive law is a feature of totalitarian understating of state. State cannot be subordination to itself since positive law is the act of the state's will. Thus the rigorous **separation of powers** into independent and mutually controlled elements is considered as decisive principle of the rule of law which prevents the establishment of legal dictatorship.

⁸² Hattenhauer, H.: European History of Law. C.H. Beck 1998, p.554.

⁸³ Ottová, E.: Civil Society. Comenius University in Bratislava, Faculty of Law, 2008, p. 135.

⁸⁴ Kant, I.: Groundwork on the Metaphysics of Morals, Bratislava, Kalligram, 2004.

- **Some risks of the functioning of rule of law**

The concept of the rule of law is endangered by individual effort to execute the state power without control and limits; by eclectics of legal thought and also very significantly by the exercise of human rights and freedoms with all the limits mentioned in following part.

In the modern legal theory, one can observe the **eclectic relation of modern positivist law, natural law** (referring to the universally valid values based on moral and religion) **and postmodern law** (with its relativisation of state's function, reflection of diverse interests, value and opinions).

The outcome is presented in the theory of state separation from the society based on the model of secularization of religion from the state.⁸⁵ The state control is secured not only by its own bodies, but also by citizens and their associations in the form of conscious civil society, along with the media and international bodies and associations; and that all within a functioning structure since the government is not imaginable without functioning rules that cover the behaviour of all subjects and, if one speak about the democracy, within the structure of developed requirements for the rule of law.⁸⁶

A danger for the further development of the rule of law may be **ahistorianism**. The fact that the interpretation of historical events is dependent on the time period in which the interpretations occurs is one of the basic features of the history itself. This is also applicable for the perception and explanation of theories of rule of law whose newer version are about to succeed its own basis and assumptions in such way they would always be innovatory, contributory and open. Denying own history, or at least its marginalization is clearly visible already in

⁸⁵ Zakaria, F.: *The Future of Freedom: Illiberal Democracy at Home and Abroad*. New York:, W. W. Norton, 2003, p. 95.

⁸⁶ O'Donnel, G.: *Delegative Democracy*, in: *Journal of Democracy*. Vol. 5, No. 1, January 1994, pp. 55-69, p.67.

medieval European legal literature. Rights that expressed the will of a legislator were based on the timeless source *lex divina*, while the rights and freedoms of humans refer to mythical past overcoming history without the basis of legislation in such way that would point out to their insubstantiality, groundlessness even to their uselessness.⁸⁷

Only the honest development of the legal philosophy and the doctrine of natural rights in the works from 17th century eliminated up-to-then common legal as well as philosophical ahistoricism. As perfect and just subject, the nature served as a basis and confirmation of ideas on the universality of rules and their exercise by all people regardless their origin and social status. The object of current concept of the rule of law is the **human being**. The replacement of nature by the human, and many times up to the level of concentration on the metaphysical essence (humanity) is a state which despite complicating the interconnection between human rights theory and norms that should express them, is also some kind of fundamental features of the system of effective state legal activity.

- **The necessary existence of rule of law as a precondition of the human rights protection**

Why it is not possible to provide the protection of human rights by other forms of state? The answer will be based on the analysis of attributes of other forms of government.

State of totality – when searching for the external balance – is appropriate for the factor of persistence. Even though it knows the internal individual and social needs that are in many aspects different from the interests of organizing power, it does not recognize them. In a multiple diverse group (society) it does not apply that the ideal state is what one from the others declares. The outcome then is the increase of state power's exercise, escalation of the society's resistance up to the point when the state cannot regulate it even when exercising the state power in a maximum way.

⁸⁷ Hattenhauer, H.: European History of Law. C.H. Beck 1998, p.7

The dissolution of state occurs since the development of the domestic system oversteps the maximum tolerated degree, it hits the absolute border value which is from the beginning rooted in the structure and this causes the collapse of (state) system.⁸⁸

The state of anarchy – resp. refusal of organized state power's influence on the society and its members is also a form that might emerge, but only as a system with limited durability.

In both cases, one might state that the non-presence of state as a creator and guarantor of law ordered in the legislature, unified for all and exercised by all and on all, is in the end *bellum omnium contra omnes*.⁸⁹

The solution before own decline into the state of totality or anarchy is sought in the establishment and respect of the legal order along with other systemic features and in the finding of balance with the assistance of knowledge and not missing the critical point in order to maintain the whole system under the tolerable border value with the use of fundamental properties of each and every element.

The Marxist doctrine promoting a thesis that law is only an extension of economic relations and a formalization of political power was unsuccessful too.⁹⁰ **Superiority over the law**, the mastery of law and subsequent minimizing did not lead to establishment of classless society that was advocated, but rather it built the strongest totalitarian regimes that did not recognize freedom or diversity.

The mutual recognition of all people and recognition of our particularities, along with the commonly stated fundamental goal(s) is a precondition for a successful cooperation; and establishment of functional relations is a precondition of the achievement of such goal(s).

⁸⁸ Vester, F.: Our World as a system in nets. Deutscher Taschenbuch Verlag, Munich, 1983.

⁸⁹ Hobbes, T.: Selection from Works. Praha, Svoboda, 1988.

⁹⁰ Marx, K. and Engels, F.: Manifest of the Communist Party, Publish House Pravda, Bratislava, 1972.

The existence of rule of law is thus a necessity in the variously structured society. It solves the disputes of partial interests and provides the interests of the development of whole society. The required type of behaviour formalizes the state through the generally binding regulation express in legal norms that might be enforced by the state power.⁹¹

- **Principles of the rule of law**

The content of the term “rule of law” was originally determined by these principles:

- Execution of state (public power) is limited by the law; the principle of limitations and legality of the execution of public power – bodies of public authority – may act only in such way that is permitted by the law⁹²
- The citizen (or a person) is allowed to act in such way the law does not forbid.⁹³

Countries that started their path of transformation triggered also new way of thinking about the theory of the rule of law. The true confrontation with the embedded formulas occurred after finding that the existing learning had to deal with the questions on which it was assumed that the answers were known. The most significant are: *whether there is only one standard of the rule of law, whether it has to be unified regardless of country which exercise it; how one shall proceed with the building of the rule of law in order to achieve the result much more faster and, practically with the artificial incorporation into the system of societies without direct or entirely missing historical experiences of the constitutional system.*

⁹¹ Ottová, E.: Civil Society. Comenius University in Bratislava, Faculty of Law, 2008, p.135

⁹² As it is stated in article 2, par. 2 of the Constitution of the Slovak republic: “State bodies may act only on the grounds of constitution, within its scope and limits and in such way stated in law.”

⁹³ Art. 2, par. 3 Constitution of the Slovak republic: “Everyone may act what is not prohibited by the law and nobody shall be forced to act in such way the law does not state.” „

If one starts from the primordial essence of the definition of the rule of law - the government based on the exercise of power that is exercised exclusively through the rules stated in the law in the system of the separation and control of power that respect the rights and freedoms of people – then the implementation of this idea does not seem to be a hard task. During a more detailed look, one however identifies that the proper exercise of state power, subordinated to the rule of law, must be controlled by an independent judicial authority. Proper exercise and execution of law is probably the oldest condition of the theory of the rule of law. Regularity, consistency – provides legitimacy and durability of the execution of state power. Every state and every society exist due to the number of relations, elements, but also questions and disputes, and hence needs stable and by all respected structure of protection, internal unity and development.

The judicial control of the state power secures the scrutiny of the government based on the norms of supreme legal strength. This is, historically, the newest part, not only in the theory, but also in the structures of new democracies in Europe and Latin America.

The classification on the above mentioned points and the observation whether they are or are not fulfilled is insufficient in order to understand what rule of law is and what it is not. Except from this, it is also necessary to consider also the problems that are related to the implementation of the theory into practice.⁹⁴

⁹⁴ Many times, they are euphemistically identified as “child disease of democracy”. In reality, it is a pathological process that prevents the system to be built on the rule of law.

When using the traditional comparative legal science, **two groups of countries** emerge:

- 1) Those where the rule of law exists⁹⁵
- 2) Without the presence of fundamental elements and without the will to respect the principles of rule of law⁹⁶

J.E. Méndez defines also the **third group** – purported rule of law, where the rule of law is still being built, but it pretends to be working and thus one may observe the slowing down or even stopping of the process of creation of political culture that arises from the rule of law.⁹⁷ The main features of this purported rule of law are:

- weak courts
- Lack of educated independent officers
- high level of instability of political cultures
- existing options of the political influence on the judicial power
- unpunished extra-legal political pressure on the state structures
- bureaucratization of state power

The result is then the legal system that is subject to political pressures with the impact on the economy or economic growth.

Based on the above, it is clear that the concept of the rule of law is also today, a dynamic area of law that is subject to development and changes.

⁹⁵ The rule of law in a Western understanding is considered an entity with a precise and professionally created legal order whilst the law is separated from the politics and other forms of external control (i.e. religion) and thus creates an autonomous system serving and creating the state.

⁹⁶ The rule of law is many times only a caricature which only tries to pretend that it is so and that they are on the way to achieve the goal. In reality, the law – from its creation, realization up to its exercise – is fully subordinated to the needs of politicians, resp. of the interest groups the politicians represent.

⁹⁷ Méndez, J. E. et col.: *The (Un)rule of Law and the Underprivileged in Latin America*. Notre Dame, University of Notre Dame Press, 1999.

Based also on the experience of transition of other Central European and East European Countries, the original principles of the rule of law evolved to current ones:

- justice of law (exclusion of rule of majority, protection of individuals and minorities, principle of sovereignty of peoples/human),
- (legal) equality – all individuals have equal rights regardless their origin, social status, religious affiliation, political affiliation, etc.
- legal certainty, respectively clarity (exactness) of legal norms in legal acts 0 their intention must be stated exactly so the content would not be factually created by the executive acts or by the interpretation of executive or judicial power,
- limitation of legal competences of state to the minimum
- enforcement of law and its guaranty by the state; right to fair judicial trial,⁹⁸
- separation of state power between more independent and mutually controlled elements (especially independent of legislative, executive and judicial power),
- recognition of fundamental human rights and freedoms.

Based on previous it is obvious that the modern (current) rule of law has sufficient tools in order to provide effective protection of all generations of human rights and fundamental freedoms as defined by the international or domestic legal documents.⁹⁹

⁹⁸ The right to fair trial is characterized mainly by the rules: (1) *Nullum crimen, nulla poena sine praevia lege poenali*; (2) presumption of innocence, (3) *ne bis in idem*, (4) *res iudicata*, (5) public issue of judgement, (6) right the legal judge

⁹⁹ i.e. for the EU there are: Universal Declaration of Human Rights, Social Charter, International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on Protection of Human Rights and Fundamental Freedoms; EU Charter of Fundamental Rights.

Rule of law in the Slovak Republic legal environment

The creation of Slovak state within its geographical boundaries is characterised by the historical particularities.¹⁰⁰

The centralised and authoritarian system of **Bach's Absolutism** (Franz-Joseph Neo-absolutism) and later after 1867 the Austro-Hungarian Empire was based on the concept of division of power. Nevertheless, it carried a connotation of the Emperor as a resource with his current exception and his positioning above the law. As such, it brought a certain level of legal certainty unheard of before in the Austro-Hungarian Empire, which also became a cornerstone of the developing judicial power. While a severe control of the exercise of legal power persisted, the access to legal remedies and the trust in the outcomes of this power increased. This was assured by the relocation of some institutions of justice to Vienna and by filling some positions at district and other courts with non-Hungarian judges who at the time of Bach's Absolutism exercised the law based on the Austrian legal framework¹⁰¹.

Considerable progress had been achieved via the **Constitution of the Czechoslovak Republic**, which on the contrary did not adopt the Emperor as a source of power, but the people. As it was stated in the Constitutional Charter of the Czechoslovak Republic, which was adopted by the Temporary National Assembly on 29 February 1920 within the Legal Act no. 121/1920, gaining efficiency on 6 March 1920 in its § 1, section 1: „*The people are the sole source of state power within the CSR*“. This sole sentence, of course, would not suffice in order to build a state characterised by the rule of law. Nevertheless, it was its necessary precondition which was very different from the previous legal framework whereby the persona of the Emperor was perceived as saint, untouchable and accountable to no one.

¹⁰⁰It is sufficient to compare the documents from the beginning of the Hungarian state of the second half of the 19th century with the documents after the creation of the Czechoslovak Republic in 1918.

¹⁰¹ Malý and Sivák. *The History of State and Law*, p. 299.

The legal theoretician Jiří Hoetzel, the author of the draft Czechoslovak constitution, along with his colleagues, contributed substantially to the development and the orientation of the Slovak legal culture in the 20th century. The development witnessed in the (Czecho)Slovak legal science and philosophy at the end of the 19th and beginning of the 20th century was compared to the so-called old democracies of the Western Europe considerably more dynamic¹⁰².

Without the aim to underestimate the importance of the European legal culture, it is possible to claim that the foundations of the Slovak legal theory of the rule of law can be traced back to the tradition of the 1st Czechoslovak Republic and the constitutional good-practices of the Agreement states such as the USA, Great Britain and France¹⁰³, as well as within the English and Swiss constitutional law and theory. Nevertheless, the introduction of the basic institutions of the rule of law into the Slovak legal and philosophical concepts happened within the last decades, rather than the last centuries¹⁰⁴.

The Nuremberg Process belongs to the important incentives of the rule of law and the shift from the past theory of Enlightenment. New perception grounded in international treaties signed after the Second

¹⁰² The modernism of the constitutional doctrine of the 1st CSR was in 1939 replaced with corporatism and paternalism of the Constitutional Act of 21 July 1939 on the Constitution of the Slovak Republic. Hereby the source of the state power was considered the state itself as it was the unifying power of the moral and economic powers of the nation.

¹⁰³ These Constitutions are based on neutral value systems; this seems to be their strength and in the environment of underdeveloped democratic values and traditions also their weakness. This is simply because they do not allow for the use of their institutional and procedural framework in order to eliminate the foundations of the constitutionality and the totalitarian state. This was witnessed through the legally correct accession of the nationalist socialism to power, as well as the legitimate accession of communists after the events of February 1948.

¹⁰⁴ Within the further analysis of history, environment and the understanding of the concept of the rule of law, we also need to take into consideration the lack of understanding within this topic and its practical meaning within the development of the state and its society.

World War submitted the state and its legal system under a strong influence of legal naturalism to the general values - such as justice, the recognition and domination of individual freedom, and the constitutional limitation of the state role within the protection and the development of freedom.

The **fall the communist regimes** in 1989-1991 can be considered as another important cornerstone. Besides the Eastern Europe, countries of the Latin America also made a move towards democratisation and the rule of law.

The development of globalisation, the constitution of a multipolar world and the fight of terrorism tend to naturally influence the current theory of the rule of law. What we are currently witnessing is the redefinition of some elementary notions, such as the perception of human rights, the relation of the state towards its own interest and the inevitable security measures, which in many cases overstep their own necessity and aim, thus considerably influencing the concept of the rule of law.

It was only the **period following the year 1990**, which allowed the development of the rule of law based on the same foundations which were present in other modern democracies. The rule of law, as a question and as a topic, became a part of the critical concept connected to the political conflicts, which were forming the modern constitutional structure. The period of these almost three decades can be compared to the fast-forward development of France, Great Britain of Germany after the Second World War.

Article 1, section 1 of the Constitution of the Slovak Republic¹⁰⁵ states the following: “Slovak Republic is a sovereign, democratic and legal state. It is not bound to any ideology or religion.” This proclamation was based on the shortage of time during its adoption more of a reflection of a wish than the reality. It was confirmed during the

¹⁰⁵ Article 1, section 1 of the Constitution of the Slovak Republic, no. 460/1992: “Slovak Republic is a sovereign, democratic and legal state. It is not bound to any ideology or religion.”

European Union accession deliberations during which every country had to declare and exhibit its ability to fulfil the criteria of a legal state and the rule of law¹⁰⁶.

In the context of the 5th enlargement, the European Council stated during its session in Copenhagen in June 1993 the basic political criteria of accession, which were to be fulfilled by the future EU Member States (including the criteria stated in the treaty):

- Stability of institutions assuring democracy, rule of law, human rights and the respect and protection of minorities,
- Functioning market economy and the ability to stand up to the competitive pressure and the market forces within the Union,
- Ability to fulfil the responsibilities of an EU Member State, including the targets of a political, economic and monetary union, as well as the adoption of common rules, norms and policies of *acquis communautaire*.

Only a state fulfilling the values spelled out in the Article 2 of the Treaty of the European Union (TEU) can request to be a member of the European Union¹⁰⁷: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*¹⁰⁸

The organisation of the values within the article is not based on their importance or any other hierarchy. These values of the Union are the basic preconditions and limits of the inner structure and application of power within the EU Member States and the Union itself. Their alternation or non-fulfilment can result in the application of a procedure

¹⁰⁶ It is a known fact that while Slovakia officially requested EU membership in year 1995, it was after the Luxembourg Summit in 1997 when it was decided that intense deliberations will be launched.

¹⁰⁷ Article 49 TEU. Official Journal of the EU, C115/5, retrieved 09.05.2008

¹⁰⁸ Ibid, Article 2

of the breach of values which is in line with Article 7 of the TEU and thus may result in the suspension of a membership and membership rights.

It was in particular during the EU accession period whereby Slovakia quite clearly proved its shortcomings within the attributes of the rule of law.

Within the Agenda 2000, the European Commission clearly stated that: *„The Commission is concerned that the rule of law and democracy (in Slovakia) is not yet sufficiently deeply rooted. This would require greater openness to opposing views, the proper functioning of State institutions and the respect for their individual roles in the constitutional order. A democracy cannot be considered stable if the respective rights and obligations of institutions such as the presidency, the constitutional court or the central referendum commission can be put into question by the government itself and if the legitimate role of the opposition in parliamentary committees is not accepted.“*¹⁰⁹

Nevertheless, the abovementioned shortcomings were eliminated by the year 1999, whereby Slovakia was officially invited to the deliberations on the accession during the Helsinki Summit.

By acceding to the European Union on 1 May 2004, Slovakia formally and materially (within the international scope) declared that it is a legal state with the rule of law and as such assures the protection of the human rights of its inhabitants. Nevertheless, the internal vantage point of this matter may differ.

The monitoring and evaluation of the fulfilment of human rights and fundamental freedoms in Slovakia is carried out by the **Slovak National Centre for Human Rights**¹¹⁰. The Centre acquired a specific

¹⁰⁹ AGENDA 2000 – for a stronger and wider Union. Bulletin of the European Union, č. 5/97, European Commission, 1997, pp.40-41. Available from: http://ec.europa.eu/agriculture/sites/agriculture/files/cap-history/agenda-2000/com97-2000_en.pdf

¹¹⁰ The Centre was founded with legal act no. 308/1993 on the foundation of the Slovak National centre for Human Rights, gaining efficiency on 1 January

position within the Slovak society. Within the international relations perspective, it functions as a national human rights institution within the United Nations system. Within the perspective of the European Union, the Centre represents the specialised National Equality Body¹¹¹, which is involved in the Europe-wide network EQUINET. Based on this position, the Centre monitors and evaluates the fulfilment of human rights and fundamental freedoms, including the rights of the child, as well as the principle of non-discrimination in the Slovak Republic.

The report of 2013 of the Centre focusing on the fulfilment of human rights, including the principle of non-discrimination and the rights of the child¹¹², it is clear that some shortcoming still prevail in the protection of rights of certain groups of population in Slovakia¹¹³.

The current situation of human rights and fundamental freedoms fulfilment can be observed within the 2015 Report of the Ministry of Justice of Slovakia on the activities of the Permanent Representation of the Slovak Republic at the European Court of Human Rights¹¹⁴. The aforementioned document estimates that within the period of 1993-2015, the European Court of Human Rights (ECHR) notified the

1994 based on the Agreement between the Government of the Slovak Republic and the United Nations on the establishment of the Centre, published by the Ministry of Foreign Affairs of Slovakia no. 29/1995.

¹¹¹ This area was put on the agenda of the Centre via the legal act no. 365/2004 on equal treatment in certain areas and on the protection from discrimination and on the amendment and on amendments to certain laws, as amended (the Antidiscrimination Act).

¹¹² Available from:

http://www.snslp.sk/CCMS/files/Spr%C3%A1va_o_%C4%BDP_za_rok_2013-FINAL_na_publikovanie_1_.pdf

¹¹³ The Roma (building walls, racial segregation, inappropriate use of force by the police force), children (illegal international adoptions, inappropriate physical punishments in re-education centres), persons with disabilities (discrimination, denial of healthcare).

¹¹⁴ Available from:

<https://webcache.googleusercontent.com/search?q=cache:T5hWKIZg7lwJ:https://www.justice.gov.sk/Stranky/SuborStiahnut.aspx%3FUrl%3D%252FSpravyZastupcuPredESLP%252FSpr%25C3%25A1va%2Bza%2B2015%252FSpr%25C3%25A1va%2B2015.pdf+%&cd=4&hl=sk&ct=clnk&gl=sk>

Slovak government with 875 complaints. Within the period of 2014 and 2015, the Slovak government received approximately 30 complaints and by the end of year 2015, 126 of these complaints were unresolved. The report also states that the majority of the complains are related to the breach of the right to a fair trial according to the Article 6/1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, while in most cases the complaints are related to the inappropriate length of the court proceedings.

Despite this, it is clear that by founding particular institutions, i.e. by acceding to certain international treaties, the state did create a sufficient institutional framework which would allow individuals to seek protection of her addressed human rights and fundamental freedoms, whether it is at the national level (Constitutional Court of the Slovak Republic) or at the international level (European Court of Human Rights, Court of Justice of the European Union).

Both of the aforementioned reports lead us to the conclusion that the state does have the interest in fulfilling the attributes of a legal state and the rule of law, thus protecting and fulfilling the human rights of its inhabitants. While some shortcomings are still present, the state is taking measures which aim to identify the shortcomings and make the necessary amends.

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PROTECTION OF THE RIGHTS OF DISABLED PERSONS IN CONTEXT OF THE TASK OF OFFICE OF THE COMMISSIONER FOR PERSONS WITH DISABILITIES

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Abstract: Paper analyses current legal position and the powers of the Office of the Commissioner for Persons with disabilities, which has been established such as the independent body performing its competences separately from other authorities having competencies in the area of human rights of the disabled persons in the Slovak republic. The Office has entered into operations on March 2016 due to application of the Article 33 of the UN Convention on the Rights of Persons with Disabilities in practice and it can be seen as one of the most important and fundamental pillars of legal protection concerning disabled persons.

Key words: protection of human rights and freedoms, disabled persons, the Commissioner for People with Disabilities, UN Convention on the Rights of Persons with Disabilities

Introduction

Persons with Disabilities belong to a specific disadvantaged group of citizens who requires specific care with respect to their medical condition or handicap, but not only from the perspective of medicine, psychology and sociology, but also from the legal point of view. The legal system in any democratic society shall ensure and provide specific system of legal protection linked to disadvantaged group of the population, which is able to take account of the diversity of situations relating to the uniqueness of persons with disabilities, as well.

An important milestone to enhance the protection of the rights of disabled persons in the Slovak Republic was the adoption of the Act no. 176 of 25 June 2015 on the Commissioner for Children and the Commissioner for People with Disabilities and on changes and amendments to certain acts, which entered into force on 1 September 2015 (hereinafter referred to as “the Act”). This Act has constituted a new type of legal institution, which is able to provide considerable social and legal services, in particular, with regard to the application, guaranteeing and respecting of the fundamental human rights and freedoms of persons with disabilities. Adopted Act has reflected, in particular, the requirements and obligations arising under the UN Convention on the Rights of Persons with Disabilities (hereinafter referred to as “the Convention”), which entered into force on 25 June 2010 in the Slovak republic. The essence of the Convention is to emphasize the need to protect the rights and freedoms of persons with disabilities and focus attention to the importance and contribution of such persons to society. The purpose of the Convention is *„to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”*¹¹⁵ In particular, the article 33 (2) of Convention laid down the obligations for states in accordance with their legal and administrative systems to maintain, strengthen, designate or establish within their territory, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the Convention. When designating or establishing such a mechanism, states shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights. Based on above mentioned article was constituted a special institute of ombudsman’s type in the Slovak republic, namely the Office of the Commissioner for

¹¹⁵ UN Convention on the Rights of Persons with Disabilities, available on internet: <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (17.12.2016)

Persons with disabled (hereinafter referred to as “the Office” or “the Commissioner ”).

The legal status and the powers of the Commissioner

The Office has been established such as the public legal entity and independent body performing its competence separately from other authorities having competencies in the area of human rights of people with disabilities, which are defined by a special regulation (for example: Office of the Ombudsman). According to the Act the head of office and its statutory body is the Commissioner for People with Disabilities, which is chosen based on the results of elections held in National Council of the Slovak republic. He/she is elected from among candidates who meet the legal requirements and are nominated by the relevant committee of the National Council. The basic legal requirements necessary for election of the Commissioner to the Office are his/her Slovak nationality, full legal capacity, integrity (without a criminal record), university degree and demonstrable proof of acceptance of such person by the civil society, which shall be proven by the supporting opinion from at least five representative organizations and their representatives. In general, the Commissioner’s term of office is six years, and the position of the Commissioner is incompatible with work in other paid office or in any other public authority. He/she shall be not a member of a political party or political movement, or do any kind of business, as well, except in cases where the Commissioner performs art, literary, teacher or scientist activities. The Commissioner can appoint and recalls the Director of the Office and recruit the employees, who ensure administrative operation of individual agendas and provide legal services, advices and helps to disabled persons in social area, too.

According to the Article 9 of the Act the competence of the Commissioner covers the public administration authorities, in particular, governmental agencies, local government, legal entities and natural persons, which intervene in rights and obligations of natural

persons and legal entities in the area of public administration under a special regulation.¹¹⁶ The primary aim of the Office is to examine compliance with rights of people with disabilities in accordance with own initiative of Commissioner and its employees or upon the request of citizens. According to the Article 21 (1) and (2) of the Act every citizen can contact the Commissioner and file the complaint in writing, verbally on record, or by fax or by electronic means in cases of infringement or threat of human rights and freedoms of disabled persons. In case of the initiation of investigations, the Commissioner is authorized to *„request information and data for examination of respect for rights of people with disabilities and for the purpose of monitoring compliance with rights of people with disabilities, copies of files and records for examination of compliance with rights of people with disabilities including copies of documents, video records, audio records or video and audio records, action by government agencies within the scope of their competence, too.“*¹¹⁷

The Office provides also monitoring services respecting rights of persons with disabilities, in particular by independent investigation on compliance with obligations resulting from international treaties, by which the Slovak Republic is bound and by researches and surveys aimed at monitoring the situation and developments in the area of rights of persons with disabilities, moreover it enforces interests of people with disabilities in the society and cooperates with people with

¹¹⁶ „The competence of the Commissioner for People with Disabilities shall not cover exercise of powers of the National Council and the President of the Slovak Republic, the Government of the Slovak Republic, the Constitutional Court, the public prosecution, courts, the Supreme Audit Office of the Slovak Republic, public guardian of rights, the Commissioner for Children ..., that shall not apply if the aforementioned powers are performed by these authorities in the capacity of public administrative authorities.“(Article 9(2) of the Act)

¹¹⁷ Convention on the Rights of Persons with Disabilities, available on internet: <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (17.12.2016)

disabilities directly or through organizations involved in protection of rights of people with disabilities. The Office encourages improving public awareness concerning the rights of people with disabilities and cooperates with foreign and international entities involved in exercise of rights of disabled persons, as well. The Office is entitled to give official opinions within the disputed situations with aim to ensure the legal status and position of persons with disabilities or recommend remedial measures based on results of the examination or results of the monitoring activities.

Very specific position has the Commissioner in relation to the National Council of the Slovak republic, due to its obligation to submit report on activities of the Office for the preceding calendar year, which shall include, inter alia, the precise scope of activities and received initiatives and recommendations for remedy of the identified deficiencies. This obligation ensure effective control of the activities of the Office by other subject, and in case of any doubts concerning inaction or maladministration of the Office, the Commissioner can be revoked by the National Council of the Slovak republic.

Activities of Office of the Commissioner for Persons with disabled in 2016

The Office has started its activities on March 2016 in accordance with the Act no. 176 of 25 June 2015 on the Commissioner for Children and the Commissioner for People with Disabilities and on changes and amendments to certain acts, which entered into force on 1 September 2015. The registered office of the Commissioner is in the capitol city of the Slovak republic, namely in Bratislava and as the first head of office was appointed JUDr. Zuzana Stavrovská. She was elected on 2 December 2015 by the 72 members of the National Council of the Slovak republic.

Based on the statistics data provided by the Office, it received 433 complaints and initials by the citizens, entered into 24 judicial proceedings, established cooperation with more than 80 non-120

governmental organizations, which are active in protection of the rights of persons with disabilities, state authorities and local government, launched 4 monitoring and contacted more than 438 subjects that can interfere with the rights and obligations of disabled persons and created interactive web page for citizens, as well, and all that within the period of its 10 months existence. Moreover, the Office provides legal advices and consultancy services in various areas, namely, agenda of labor law and compensations provides advices, consultancy services in the context of financial contributions for medical devices, problematic issues concerning parking cards, access to employment and discrimination at the workplace, or in general, negative approach of some employees of Central office of Labor, Family and Social to problem-solving in the field of rights of disabled persons. Employees of the general civil agenda and family law agenda provide consultancy linked to maintenance obligations, alternating childcare, legal capacity and etc. Employees of the agenda of health care and insurance, agenda of social services and education and agenda of barrier-free access provide legal and social services, personal consultancies concerning issues of the state payments, public contributions, various types of insurances, community-based services, reimbursement of healthcare-related services, inclusive education and many others.

Based on above mentioned activities and with reference to fact that the Office can employ in accordance with national financial legislation and state budget, only 10 employees, including Director of the Office and the Commissioner, we dare to positively evaluate the current work of the Commissioner and her associates, who provide legal and social services free of charge, educate civil society and especially persons with disabilities, establish collaboration with various organizations and institutes, carry out the monitoring, more over participating in selected court proceedings and last but not least investigate the received initials within their capabilities and limited human resources.

Conclusion

The creation of the Office of the Commissioner for Persons with Disabilities in Slovakia should be perceived positively. This newly established authority can fill the current gaps in the area of the protection of human rights and freedoms of disabled persons in the Slovak Republic and in general can improve and strengthen the position of such disadvantaged group of citizens from various points of view in society, which is evidenced by the recent activities of the Commissioner. On the other hand, the Office needs to increase its total budget provided by the state and due to it recruits more staff with aim to improve provided services, consultancies and to raise awareness of civil society about the problematic issue.

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HOW TO BALANCE THE FREEDOM OF EXPRESSION WITH THE RIGHT TO BE FREE FROM HATE CRIME?

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Abstract: The article deals on one side with an issue of a traditional tension between the freedom of expression and the right to respect for private and family life, but on the other hand examines these conflicting realities from a quite new perspective of spreading violence and hatred in virtual world.

Key words: incitement to hatred, freedom of media, hate speech, liability of internet provider

Introduction

The Internet has changed the way we communicate, it has many positive values but it has also allowed the hateful to spread offence to a broader audience, without editorial control and often behind a veil of anonymity. The growing reliance on the Internet as the main source of information for many enables the fast spread of often unverified statements that could also incite to hatred.

Statements posted online can go viral almost instantly, making it difficult to challenge them and to remove them completely. One of the greatest threats to contend with is protecting the confidentiality of information when using electronic communication. Safeguards against inadvertent or unintended release of information must receive high priority in any attempt when using the Internet.¹¹⁸

In other word, the continued and unrestrained expression of intolerant rhetoric disseminated through the media and in political discourse could

¹¹⁸ US National Library of Medicine, National Institutes of Health, <https://www.ncbi.nlm.nih.gov/pubmed/10568895>

lead to incitement to discrimination, hatred or violence. This can have a corrosive effect, where such content gets amplified in „echo chambers“, where alternative views are seldom, if ever, expressed.

Incitement to racial hatred occurs when a person uses words or behaviour or displays written material which is threatening, insulting or abusive with the intention of stirring up racial hatred or it is likely that racial hatred will be stirred up. This can include such things as making a racist speech, distributing racist leaflets or displaying a racist poster. The offences for religion and sexual orientation are similar although the behaviour must be threatening only and must be intended to stir up hatred.¹¹⁹

¹¹⁹ **The Council of Europe’s Committee of Ministers Recommendation 97 (20) on hate speech (1997)**, “*hate speech are all forms of expressions which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.*”

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe, General Policy Recommendation No. 15 (2015) on combating hate speech, “*Hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of ‘race’, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status. [H]ate speech may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes.*”

A snapshot of incitement in media content

○ *Facebook's content policy*

Many different groups which have historically faced discrimination in society, including representatives from the Jewish, Muslim, and LGBT communities, have already reached out to the biggest social network providers, such as Facebook, to help them to understand the threatening nature of content of some posted comments.

The representatives of Facebook take this as opportunity to explain their philosophy and policies regarding controversial or harmful content, including hate speech, and to explain some of the steps they intent to take in order to reduce the proliferation of content that could create an unsafe environment for users. To facilitate the goal, to make the world more open and connected, Facebook provider works hard to make the platform a safe and respectful place for sharing and connection. This requires to make difficult decisions and balance concerns about free expression and community respect. According to the Facebook's content policy the content deemed to be directly harmful is prohibited, but content that is offensive or controversial may be allowed.¹²⁰

○ *European Fundamental Rights Agency (FRA)*

The European Fundamental Rights Agency (FRA) contributed to the *second Annual Colloquium on Fundamental Rights* and provides in the actual publication a snapshot of manifestations of incitement in media content and political discourse against different groups in EU Member States.

According to FRA in the period between 1 January 2014 and 1 September 2016, courts, national equality bodies, independent press

¹²⁰ Facebook's content policy, <https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054/>

councils and independent regulatory or supervisory bodies for broadcasting organisations in a number of EU Member States found incitement in a number of instances. FRA is aware of the fact that it is also true that not all incidents of incitement will make it to the attention of courts, equality bodies or (self-) regulatory bodies. For this reason, the information presented in FRA study paper should not and cannot be taken as evidence that any given type of incitement is more or less prevalent in any given Member State.¹²¹

The documented incitements are classed to different groups either according to the targeted group (*incitements against migrants and refugees, incitements against ethnic and national or minorities, against religious or sexual minorities*) or with regard to the position of the decision-making body (*court decisions, various professional councils decisions, opinions of equality bodies etc.*).

- ***European Court of Human Rights (ECHR)***

The European Court of Human Rights (hereinafter referred as, *the Court*) was also called upon to examine a complaint in an evolving field of technological innovation with regard to the liability for user-generated comments on an internet news portal.¹²²

The present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them.

¹²¹ FRA Incitement in media content and political discourse in EU Member States, http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-media-and-incitement-0_en.pdf

¹²² Case *Delfi AS v. Estonia* (Application No. 64569/09) from 16.6.2015, www.hudoc.echr.coe.int/webservices/content/pdf/001-155105?TID

In the Grand Chamber judgment *Delfi AS v. Estonia* (Application No. 64569/09) from 16.6. 2015, the Court recognized the difference between a *portal operator* and a *traditional publisher of printed media*, as audiovisual media have a much more immediate and powerful effect than the printed media.

While the Court acknowledges that important benefits can be derived from the Internet, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.

With the reference to “*duties and responsibilities*” of Internet news portals under par. 2 of Art. 10 of the Convention, the Court tried to find a fair balance between the conflicting rights in question, the freedom of expression (Art. 10) and the right to respect for private and family life (Art.8), as both deserve equal respect.

In the view of the liability the Court has observed „...*that different degrees of anonymity are possible on the Internet. An Internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of verification – ranging from limited verification (for example, through activation of an account via an e-mail address or a social network account) to secure authentication, be it by the use of national electronic identity cards or online banking authentication data allowing rather more secure identification of the user. A service provider may also allow an extensive degree of anonymity for its users, in which case the users are not required to identify themselves at all and they may only be traceable – to a limited extent – through the information retained by Internet access providers. The release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to*

restrictive conditions. It may nevertheless be required in some cases in order to identify and prosecute perpetrators....”.

According to the case-law of the Court „...statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia, are incompatible with the values proclaimed and guaranteed by the Convention, are not protected by Article 10 by virtue of Article 17 of the Convention.”

In the light of the circumstances of the case and with regard to the extreme nature of the comments in question the Court found that the domestic courts’ imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State.

Therefore, the measure did not constitute a disproportionate restriction on the applicant company’s right to freedom of expression.

From that reason the Court decided by fifteen votes to two, that there has been no violation of Article 10 of the Convention.

Conclusion / Résumé

Data collected on the web may not have high reliability and much work needs to be completed to determine the properties of information derived from this source.

Removing hate-inciting material from the Internet is connected with practical difficulties, as once any material is posted on the Internet, it is usually shared on several servers or online repositories, which makes it difficult if not impossible to remove all copies completely.

There are attempts to address this issue by setting up lists of keywords, filters or “blacklists” on a national level. Such filtering systems are in place in several countries, but however, there are doubts regarding their

effectiveness, as well as concerns about the threat that undue limitations could pose to freedom of expression.¹²³

The value of attempting to suppress hate speech on the Internet is being questioned by many stakeholders; as it would not solve the problem of Internet-motivated hate crimes. Even if such hate speech were universally criminalised, the discussions would just move underground, using more obscure and therefore secure ways of communication, making it more difficult for law enforcement agencies to track and monitor such content.

So the question remains, whether there exists any way how to deal this issue?

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THE PROTECTION OF WOMAN IN NATIONAL IN INTERNATIONAL CONTEXT

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Abstract: One of the most common forms of human rights violations is violence against women. On the occasion of the International Day against Violence against Women will be following article focuses on issues related to protection of these rights in national and as well as in international context.

Keywords: fundamental human rights and freedoms, women's rights, the protection of women's rights, violence against women, international institutions protecting the rights of women, the national institutions of protection of women's rights

Introduction

The protection of fundamental human rights and freedoms belongs to elementary principles of international society. The promotion and strengthening of human rights and fundamental freedoms regardless of race, gender, language or religion is one of the aims of the United Nations stated in the Charter of the United Nations.¹²⁴ Despite the effort of international society to protect fundamental human rights and freedoms, they are still being often violated. One of the most often form of the violation of human rights is the violence against women.

There is a need to increase the visibility of this problem not only at the international level, as well as regional or national level. Regarding the effort undertaken at the international level, the General Assembly of the United Nations declared on 17 December 1999, the 25 November as the International Day for Elimination of Violence against Women. The General Assembly also asked the international and non-governmental

¹²⁴ UN Charter, Article 1

organizations, as well as individual governments to increase the awareness about the problem of violence against women on this specific day. 25 November is also the day when the world-wide activities within the campaign 16 days of activism against the violence against women. The aim of the campaign is to point out to fact that despite the long-term effort of international and national institutions, the violence against women is still one of the most often forms of human rights violations and interventions into human dignity. The campaign culminated on 10 December, the International day of Human Rights.¹²⁵

The roots of International Day for the Elimination of Violence against Women can be found in 1960 in Dominican Republic, where three sisters Mirabals were killed for fighting their rights and standing in the opposition of then dictator Rafael Leónidas Trujil. After their murders, the movement of resistance was established which managed to depose the dictator. The sisters became a symbol of elimination of the violence against women.¹²⁶

The issue of violence against women is being dealt also at the national level. In Slovakia, several civic associations, as well as non-governmental organizations, are primarily the organizations that focus on this problem. According to Ministry of Labour, Social affairs and family, around 140-230 thousand women experience violence from the side of her partner or other men. During her life, 23% of Slovak women have experienced violence from her partner, which constitutes almost every fourth woman.¹²⁷ The Ministry also adds that concerned cases can represent only the ‘tip of the iceberg’, while there is still no system of coordinated help for women and other victims of domestic violence as

¹²⁵ see <<http://www.un.org/en/events/endviolenceday/>>

¹²⁶ ROBINSON, N.: Women's Political Participation in the Dominican Republic: The Case of the Mirabal Sisters, Caribbean Quarterly, Vol. 52, No. 2/3, Unravelling Gender, Development and Civil Society in the Caribbean, 2006, pp. 172,173

¹²⁷ see <<https://www.employment.gov.sk/sk/informacie-media/aktuality/medzinarodny-den-proti-nasiliju-pachaneho-zenach.html>>

well as system of prevention. However, there exist effort that aim to solve the above mentioned shortages, such as the points included in the National Action Plan for the elimination and prevention of violence against women 2014-2019 which was adopted on 18 December 2013. The goal of this Action plan is to firstly, establish system of measures for help to women and their children endangered by the violence and secondly, to strengthen the prevention of such violence.¹²⁸

The protection of women in international and regional context

The violence against women became a political problem for the international organizations and institutions as well as regional organizations. In the United Nations (hereinafter UN), the Commission for the status of Women was found in 1946 whose mandate was to help with the execution of women's rights around the world.¹²⁹ An important milestone can be considered the adoption of Convention on the Elimination of All Forms of Discrimination against Women, or CEDAW in 1979 (hereinafter the Convention). The Convention is one of the most crucial tools when defending the equality of women in all aspects of life.¹³⁰ The Convention in the Article 1 defines the term 'discrimination against women' referring to any making of difference, exclusion or limitations based on gender whose consequence or purpose is to impair or nullify the recognition, enjoy or exercise the women's rights, regardless of the family status based on their equality between men and women, human rights and fundamental freedoms in political,

¹²⁸ The Ministry of Labour, Social Affairs and Family, Department of Gender Equality and Equal Opportunities. National action plan to prevent and eliminate violence against women for years 2014 – 2019, available from: <http://www.gender.gov.sk/wp-content/uploads/2012/06/NAP_nasilie_print.pdf>

¹²⁹ EISENBERG, J.: The Status of Women: A Bridge from the League of Nations to the United Nations. The Journal of International Organizations Studies, VOL. 4, Issue 2, 2013, p. 15

¹³⁰ EISENBERG, J.: The Status of Women: A Bridge from the League of Nations to the United Nations. The Journal of International Organizations Studies, VOL. 4, Issue 2, 2013, p. 16

economic, social, cultural, civic or other area. Regarding the adoption of the Convention, the Committee on the Elimination of Discrimination against Women was found in 1982 within the structure of the UN composed of 23 professionals from the whole world, which is monitoring the respect of the Convention in particular countries. The states have obligation to submit report regarding the national activities undertaken in order to improve the status of women every four year.¹³¹ On the meeting in 1989, the Committee was dealing with the high rate of violence against women collecting data about problems from all the countries. In 1992 based on the data provided, the Committee published general recommendations regarding the 'Violence against Women'. This material was especially important for the need of the conference on human rights taking place in Vienna in 1993.

Another important milestone in the fight against violence against women that is closely connected with the 1993 conferences was the adoption of Declaration of the United Nations on the Elimination of Violence against Women.¹³² This document represents a basis for other international documents on the violence against women and domestic violence. It is also titled as the Vienna Declaration right because it was a result of the Vienna conference in 1993. The Declaration states that violence against women is considered to be a breach of rights and freedoms of women because it prevents or totally annuls the possibility of women to enjoy their rights and freedoms. It also states that this violence is gendered biased. Regarding this Vienna conference, it is important to pinpoint to the definition of term 'violence against women' which is the crucial definition that only appears in the international documents on this issue, but also within the European Union or Council of Europe. Article 1 of the Declaration defines the term 'violence against women' as any act of violence based on gender inequality which results in or aims to be physical, sexual or psychological damage of suffering woman, including threats of such acts, coercion or arbitrary

¹³¹ See <<http://www.un.org/womenwatch/daw/cedaw/committee.htm>>

¹³² See <<http://www.un.org/documents/ga/res/48/a48r104.htm>>

deprivation of liberty, whether occurring in public or in private life.¹³³

Moreover, in 1994 the office of Special Rapporteur on Violence against Women by the UN Commission on Human Rights has been established. Her role is to firstly monitor the status of women regarding the violence, gathering necessary data regarding violence against women, its reasons and consequences from particular governments, specialized agencies, other rapporteurs responsible for different human rights questions, to propose measures, tools for elimination of all form of violence against women at local, national, regional and also international level. Last, but not the least, she also submits annual reports to Committee of Human Rights in Geneva. The mandate of Special Rapporteur was restored only recently in 2016 with resolution 32/19. Currently, this office is held by Dr. Dubravka Šimonović from Croatia.

In September 1995, there was 4th World Conference on Women held in Beijing. It resulted in adoption of several documents, such as Beijing Declaration and Action Platform included in the Final report from this conference.¹³⁴ The decision of governments on the prevention of all forms of violence against women and girls and the effort of its elimination is considered a very significant step. The governments also in Article 13 of the Declaration express the conviction that providing full range of women's rights, strengthening the women's rights and their total engagement based on equality in all areas of human society including the participation on decision-making and access to power, are all considered to be conditions for achieving equality, development and peace. It is also emphasized in the Declaration that women's rights are human rights (Article 14). Moreover, it also contains a commitment to prevent and eliminate all forms of violence against women and girls (Article 29) as well as the commitment to secure the respect for

¹³³ see < <http://www.un.org/documents/ga/res/48/a48r104.htm>>

¹³⁴ The United Nations: Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995; no. E.96.IV.13).

international law, including humanitarian law with the aim of protection of women, especially girls (Article 33). The statements are specified later and in more practical way in Action platform.

Regarding the Convention on the Elimination of All Forms of Violence against Women, it is important to mention also the adoption of Optional Protocol on 6 October 1999 in New York.¹³⁵ The Optional Protocol enables the individuals or a group of individuals to give notice that they have become victims of breach of any right stated in the Convention by contacting party to the Committee for Elimination of Discrimination of Women.

Another important document is the first resolution of the UN on the elimination of domestic violence published on 19 February 2004. The resolution refers to the Convention on elimination of all forms of discrimination against women, Vienna and Beijing declarations and the activities of the Committee for status of women and Human Rights Committee.¹³⁶

Except these bodies, there are also others that fight against the violence against women such as UN Commission for Crime Prevention and Drug Control, International Centre for Criminal Law Reform and Criminal Justice Policy. The result of the work was the resolution 52/86 on crime prevention and measure of criminal justice on the elimination of violence against women, whose attachment are also the Model strategies and practical measure on the elimination of violence against women in the area of crime prevention ad criminal justice.¹³⁷

¹³⁵ The National Council endorsed the Optional Protocol through the resolution no.1046 of 22 September 2000 and the President of the Slovak republic ratified the Protocol on 26 October 2000. The Optional Protocol generally, entered into force on 22 December 2000 based on article 16 par. 1 and in Slovak republic entered into force on 17 February 2001 based on the article 16 par. 2. see Statement of the Ministry of Foreign Affairs of the Slovak republic no. 343/2001 Coll. of laws.

¹³⁶ Commission on Human Rights Resolution: 2004/46 - Elimination of violence against women

¹³⁷ See <<http://www.un.org/ga/documents/gares52/res5286.htm>>

The issue of violence against women was reflected also by the UN Secretary General in his report ‘An in-depth study on all forms of violence against women’ which was introduced during the meeting of General Assembly in 2016. The report emphasized the perseverance and inadmissibility of all kinds of violence against women in all countries in the world and calls for strengthening of political commitment and common efforts on prevention and elimination of this form of violence. Report aims also to identify the ways and means for securing permanent and effective fulfilment of commitment from the side of individual states against all form of violence against women and also to raise their responsibility.¹³⁸

Fight against women is one of the priorities of the UN Development Fund for Women (UNIFEM) which supports projects and initiatives in favour of women’s rights and improving of their political, economic and social status mainly in developing countries.

The attention to this area is paid not only at the international, global but also at the regional level. The Council of Europe considered the elimination of violence against women its long-term goal. In this respect, in 2011 the adoption of Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, or Istanbul Convention plays an important role.¹³⁹

The Convention has the biggest scope in this area focused on zero tolerance towards violence against women and domestic violence. It is first complex and precise legally binding tool for prevention and fight against women and domestic violence at the European level. The standards of human rights met in the Convention are considered milestones for further negotiations. The violence against women and domestic violence is in the Convention understood as a violation of

¹³⁸ See <<https://documents-dds-y.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>>

¹³⁹ The Council of Europe Convention on preventing and combating violence against women and domestic violence called also Istanbul Convention was signed also by the Slovak republic on 11.5.2011 in Istanbul, but has not yet ratified it.

human rights and form of discrimination of women. The Conventions foresees establishment of an international group of independent experts (GREVIO) for the purpose of monitoring of implementation at the national level. The core aim of the Istanbul convention is to “create Europe without violence against women and domestic violence” with the emphasis on clear connection between achieving gender equality and elimination of violence against women. Its purpose is also to harmonize legal norms of the member states of Council of Europe and secure the exercise of their rights to women, girls and other groups endangered by the violence to the same level as in the rest of Europe. It is built on four pillars, so called 4Ps: Prevention, protection, prosecution, integrated policies. In the framework of all these areas, it brings concrete measures in order to improve the protection of women in such a way that they can live their lives freely, with dignity and without the threat of violence. At the same time, it also focuses on measures of prevention and then to decrease the alarming number of women and girls which face the different forms of violence.¹⁴⁰

Except the Council of Europe, it is important to mention also the European Union which pays attention to violence against women mainly in the context of promoting gender equality (i.e. Strategy on the equality between women and men 2014-2015, European pact for gender equality 2011-2015, the conclusion of the Council from December 2012: Fights against violence against women and providing support services to victims of domestic violence), as well as in the context of legal protection of victims of violence (the directive of European Parliament and Council 2012/29/EU from 25 October 2012 which sets the minimal norms in the area of rights, support and the protection of victims of criminal act and it also contains the concrete reference to victims of gendered-motivated violence, victims of sexual violence and

¹⁴⁰ See

<<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900-00168046fc88>>

victims of violence committed by close person.¹⁴¹

Despite the seriousness of the effect of violence against women, the politicians and professionals in many EU member states have to face the lack of complex information and data about the scope and character of this problem. Since majority of women do not report on the violence, neither the mechanisms which are still considered to be unhelpful, are not supportive, the official data of criminal justice can include only those cases that have been reported. In other words, political and practical reactions focused on the solution of violence against women are not always based on complex evidence. Although some EU member states and research institutions do conduct surveys and research in the area of violence against women, the lack of complex and comparable data in this area within the EU is persisting comparing to other areas, such as employment, where a lot of member states collect data in regards with gender. In this respect, the survey from the whole Europe conducted by the Fundamental Rights Agency (FRA) on the request of European Parliament which was repeated also by the Council of the EU in its conclusions on the elimination of violence against women.

FRA conducted 42 000 individual interviews with the random sample of women in 28 EU member states. The results of these interviews may be analysed along with the existing data also the missing knowledge at the EU level. It is estimated that 13 million women in the EU experienced physical violence within 12 months before the interviews were conducted. This number equals 7% of women in the age between the age of 18-74 in the EU and it is estimated, that 3,7 millions of women in the EU experienced the sexual violence within 12 months before the interviews. This number refers to 2% of women between the age of 18-74.¹⁴²

¹⁴¹ National action plan to prevent and eliminate violence against women for years 2014 – 2019, p. 3

¹⁴² FRA: Violence against women: a Europe-wide survey. A Brief Overview of Outcomes.

The protection of women in national context

The Article 12 of the Constitution of the Slovak republic guarantees the liberty and equality in dignity and in rights for all people and the gender-based harm, preference or discrimination is prohibited.¹⁴³ The problem of domestic violence, repr. violence against women started to be discussed publicly also due to media campaign ‘Fifth woman’, however, it is still perceived by the public, but also by the professional through many myths and prejudices. Nevertheless, there is a gradual change of the situation due to legislative change and their concrete application by the state bodies, courts and especially due to the more sensitive approach of the representatives of different professions when working with the victims of domestic violence, as well as due to already mentioned campaign of women NGOs.

In the context of Slovak republic, the violence against women is mostly occurring as a domestic violence with high latency. The majority of the violent crimes against women is committed at home behind the closed doors, where except of children, there are no other witnesses. The sensitivity and severity of the problem as well as persisting existence of stereotype ideas about the role of women and men in the family contributed to the long-term taboo of the topic and its absence in the public and political discourse. The following incorrect understanding and attitudes of the society as well as the executive towards violence against women itself resulted in the absence of coordinated and specialized supportive services for victim of such violence. The situation started to change in the beginning 2000s under the pressure from the NGOs. In this respect, it is important to mention again the campaign ‘Fifth woman’ that represents the breakthrough in the

¹⁴³ Constitution of the Slovak Republic, Art. 12, par. 2: *“Fundamental rights shall be guaranteed in the Slovak Republic to every person regardless of sex, race, colour, language, faith, religion, political affiliation or conviction, national or social origin, nationality or ethnic origin, property, birth or any other status, and no person shall be denied their legal rights, discriminated against or favoured on any of these grounds.”*

perception of violence against women in intimate relationships. The campaign developed conditions for the amending the several laws in 2002 which subsequently developed condition for more effective legal sanctioning of the offenders and improved the protection of children. Despite such positive legislative environment, due to impact of continuing prejudices also among the law enforcement bodies, the majority of the cases maintains still unresolved.

National Action Plan for Prevention and Elimination of Violence against Women 2014-2019

The National Action Plan for Prevention and Elimination of Violence against Women for the period 2014 – 2019 (hereinafter NAP) was adopted in December 2013.¹⁴⁴ Its main goal is to develop, implement and coordinate complex nationwide policy for this particular area. NAP contains the definition of terms, overtaken from the Istanbul convention and following operational aims:

- a) The strengthen legal and institutional framework in order to recognize the women's rights and their protection against all forms of violence against women and secure that state bodies, including the judicial bodies acting in the name of states, act in conformity with this commitment
- b) To provide quick, effective and available assistance to all women that face the violence against women or the threat of such violence with the regard of specific needs that arise from their situations
- c) Provide qualitative and effective assistance via standardized approach for the supportive professions and law enforcement bodies
- d) Prevent the emergence of violence and any other situation that contributes to emergence and tolerance of violence.¹⁴⁵

¹⁴⁴ National action plan to prevent and eliminate violence against women for years 2014 – 2019

¹⁴⁵ see http://www.gender.gov.sk/wp-content/uploads/2012/06/NAP_nasilie_print.pdf

The Istanbul Convention, as a basic document for NAP is a regionally and legally binding human rights instrument. It also established complex legal norms for prevention and elimination of violence against women and domestic violence, protection of children the punishment of perpetrators. It also opens the issue elimination of violence against women into broader perspective of equality between women and men which significantly contributes to better recognition of the violence against women as a form of discrimination. The applied holistic approach brings a new impulse to the process of elimination of violence against women and provision of effective protections of women against any kind of violence, mainly due to its sophistication and complexity.¹⁴⁶

The problem of violence against women brings together several policy areas, bodies and departments. Their assistance is, however, rather seldom, without mutual coordination and cooperation at the moment. Providing effective help to all victims of violence against women requires coordinative policy and multi-agency framework that fall under the competence of several ministries of SR (Ministry of labour, social and family affairs; Ministry of Interior; Ministry of Justice and General Prosecutor's Office; Ministry of Foreign and European Affairs; and Ministry of Education, Science and Research and Sport). The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence in its article 7 (Complex and coordinated policy) obliges contracting parties to "take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women."¹⁴⁷

¹⁴⁶ Material intention of a bill on the prevention and elimination of violence against women and domestic violence, available from: <http://www.gender.gov.sk/wp-content/uploads/2015/05/Vecn%C3%BD-z%C3%A1mer.pdf>

¹⁴⁷ The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), article 7,

With the intention to solve this problem at the national level, it is important to solve the problem also at regional and local level. Regarding the improved efforts in this field in several autonomous regions, it is confirmed and recommended to initiate the establishment of individual regional action plans for prevention and elimination of violence against women (hereinafter RAP) following the conception of NAP. RAPs are developed in conformity with the operational aims of NAP taking into consideration areas of criminal and civil framework, area of assistance to women who has experienced violence, area of education and sensitising of helping professions, area of prevention, statistics, research and monitoring and area of work with violent perpetrators. In 2014-2015, the RAPs in Bratislava region focused on prevention. “The activities are set in such way so they include several goals and contain different techniques and methods of their feasibility. Their realization is proposed in a way not to be limited only to women that have been victims of violence against women and perpetrators of such violence, but also for those who work with the target group. As well as for children and youth so they can learn the non-violent way of handling problems in relationships, but also to learn that every violent act has serious social causes and consequences.”¹⁴⁸

National project – The promotion of elimination and prevention of violence against women

National project on the support and elimination of violence against women is focused on the establishment of key strategic and methodological documents with the aim to unify and standardize the social services for women experiencing violence. Project is focused on the study on specific groups of women endangered by violence, i.e.

available from:
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=-0900001680462541>

¹⁴⁸ Regional Action Plan for the Prevention and Elimination of Violence against Women for the Bratislava Region for 2014 – 2016, p. 4, available from:

http://www.bratislava.sk/VismoOnline_ActionScripts/File.ashx?id_org=700000&id_-dokumenty=11050341

Roma women, women living in villages; in order to identify the obstacles and specificities regarding the provision of help. Moreover, the project aims also to education 120 professionals and create working groups of multi-agency cooperation for early and effective solution of cases concerning violence against women.¹⁴⁹

The Institute for labour and family research published a document titles Multi-agency cooperation in Slovakia as a necessary predisposition of effective assistance to women experiencing violence in 2015 that catches the current of art of multi-agency cooperation in Slovakia and the recommendations for the future cooperation. The emphasis is put on the bottom-up approach, participation and development of functional system of cooperation. It prioritizes the definition and correct understanding of common goals and strategies towards gradual systematic elimination of violence against women.¹⁵⁰

Regional multi-agency groups constitute immanent part of protection of women against violence and aggression also regarding the bottom-up cooperation. In Slovakia, eight regional multi-agency centres are currently being built and they are creating and developing long-term and short-term goals and priorities. “Most of the regional groups defined the goals of multi-agency cooperation in several areas which are possible to classify into three basic categories:

- 1) Area of policy-making, strategies and legislature – process of legislative change, resp. the adoption of new legislature is necessary to adjust in a way that assessment of existing legislative measure. At the same time, the need to provide affective use of legislature in practise is included as well.
- 2) The area of primary prevention and rise of awareness – the rise of

¹⁴⁹ see

http://www.ceit.sk/IVPR/index.php?option=com_content&view=article&id=1&Itemid=1&lang=sk

¹⁵⁰ see

http://www.ceit.sk/IVPR/images/IVPR/NP/podpora_prevenencie/dokument_multiiinstitutionalna_spolu-praca_na_slovensku.pdf

awareness of broad public about the problem of violence against women should lead to social change and mainly to assistance to woman experiences violence. This should be achieved through the systematic education and implementation of short-term and long-term prevention programs.

- 3) Area of providing protection, assistance and support to women experiencing violence – the cooperation at regional, national and international level should lead towards stable effective system of protection. The availability of auxiliary centres with qualified professionals as well as sufficient medical care should provide security and minimal standards should be achieved through building specialized auxiliary centres and secured women houses.”¹⁵¹

National action plan for prevention and elimination of violence against women 2014-2019 is almost in its half, and thus it is possible to observe partial results. The assessment report refer to two national projects that were realized by the Institute of labour and family research in the area of prevention and elimination of violence. Norwegian financial mechanism significantly contributed to increase of scope and quality of provided services through doubling the number of beds in secured women houses and tripling the number of counselling centres. At the same time, the national non-stop phone link was set (free of charge)¹⁵² providing counselling to women endangered by violence and Coordination-methodologic centre for gender-biased and domestic violence was found that provides which governs the regional inter-institutional bodies in particular regions.

¹⁵¹ Institute for Labour and Family: Multi-agency cooperation in Slovakia as a prerequisite for effective assistance to women experiencing violence (Current Status and Recommendations). 2015, p. 96

¹⁵² Phone number 0800 212 212

Conclusion

The violence targets women in different periods of their lives, from childhood until adulthood. It happens in the family, in work, school, and peer groups or in the public. It also gets different forms from physical and sexual through psychological and social to economic violence. It is experienced by women of different level of achieved education, social-economic status, ethnicity, religion; women from the city as well as rural areas. The most common form of violence is the domestic violence which is committed behind the closed doors and its scope of severity is underestimated and questioned. Also because of this, the international community was gradually adopting documents for protection of women, such as CEDAW, Istanbul Convention. Such documents were adopted also at the national level – National Action Plan for Prevention and Eliminations of Domestic Violence and Fight against It or National Strategy for Prevention and Elimination of Violence against Women. For past years, the Slovak republic experienced a significant improvement in the area of protection of women against violence. As state is meeting its international and national commitments focused on the prevention and eliminations of violence against women, there is an improvement which is especially seen in particular steps of security provision, gradual change of outdated attitudes and rise of awareness of general and professional public, legislative change, education and professionalism of employees of regional and national institutions, methodology, approaches and directives, strategic materials an action plans as well as data collection in area concerned with the assistance of intergovernmental organizations. The system of interinstitutional cooperation as theoretical developed tool could be really effective and well-functioning tool of prevention and protection against violence against women as the partial results suggest, it is, however, necessary to work on the current state of art and cooperate on the holistic systematic change in a coordinated manner in particular cases.

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INTERNATIONAL COMMUNITY AND NATIONAL INSTITUTIONS _ COOPERATION OF UNIVERSAL AND NATIONAL LEVEL IN AREA OF HUMAN RIGHTS PROTECTION

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Abstract:

Development led to the state, that there is known instead of state system of human rights protection also others (regionals and universal). National institutions of human rights protection have non-subsiary position in the world and its importance is growing. The paper focus on the work of national institutions operation within the context of universal system. The proceeding before the UN Committee for human rights there is illustrated mutual impact and cooperation of universal and national level in area of human rights protection.

Key words: human rights, national institutions, Paris Principles, UN Committee for human rights

Introduction

Interest in the topic of human rights is relevant also in 21st century, especially in case that the international community recognise values stated in the UN Charter, and this should be applied also in the future. The area of human rights was getting through and still in the development, reflecting the development in the society and also in the international community. This fact is visible also in the area of new documents adoption of different importance and the legal power, in the decision-making of relevant authorities and also in the area of the new human rights definition. This confirms, that this is not the closed system, but vice versa.

It is very wide probmatics, which can be count from the different point of view. It may be considered from the point of individual rights and

freedoms content, its historical development, contractual basis, institutional system of the protection, connection with the innovations of the research and technics, considerations *de lege ferenda* etc. It is confirmed also by I. Brownlie, when he stated: „*Human rights are a broad area of concern. Their potencial subject-matter ranges from questions of torture and fair trial to social, cultural and economic rights, for example, the right to housing or to water.*“¹⁵³ Regarding this, the topic of human rights is interest of many institutions, research institutes, universities but also different organisations and individuals.

In the following text we would like to analyse the substance of the national institutions of human rights protection and its position in the system. While the development led to the existence of national (and regional) level of human rights protection and universal level of protection, we mainly focus on the position and acting of national system working in the context of universal system (represented mainly by UN). These systems are not isolated, but mutually connected levels with the aim to support and protect of the most important value we possess.

Hence there was in the last days finished the defence of the fourth periodical report of the Slovak Republic before the UN Committee for human rights,¹⁵⁴ we would like to use this example for explanation of the mutual existence and cooperation of universal and national level of the human rights protection. With the aim to provide complex view to this topic, we also mention the introduction to the character and system of human rights protection.

¹⁵³ CRAWFORD, J.: Brownlie's Principles of Public International Law, 8th Edition, p. 634

¹⁵⁴ Author was the member of the Slovak Republic delegation

The character and system of human rights protection

One of the basic characteristic sign of the human rights system is its objective character, based on the principle of equality. This objective character means, that rights and freedoms are not guaranteed to the individuals not on the basis of specific legal status, but are connected with the existence of individual. Consequence of this is “non-recall“ and also prohibition of the implementation of the principle of reciprocity, which is typical for the international law. It is then used, that state while signing international treaties containing human rights, has also establish the obligation of its guarantee and enforcement and cannot pre-condition its implementation to the principle of reciprocity for other signatory parties. Also European Court for Human Rights in the decision Ireland v. United Kingdom of 1978 stated, that Convention on protection of human rights and fundamental freedoms contrary to classic international treaties is going over the limits of simple interaction between signatory states (high contracting parties). It establishes in relation to the bilateral synalagmatic obligations the objective obligations, which are in according to the preamble of this Convention protected by the collective guarantees.¹⁵⁵

Primarily there were human rights protection considered as internal affairs issue. Development confirmed, that such form of protection is not sufficient and continuously it became of wider and supranational. The output of this was, that the human rights protection was transformed from the exclusive competence of the state to the international level. Adoption of the human rights catalogue by the state was not sufficient and the next rational step was to voluntarily adoption of supranational system of protection of supreme character. We can state, that state sovereignty was broken in favour of human rights protection. The most visible development of human rights and freedoms protection on international level was done after the WWII, when this protection became fundamental principle of international law. Mainly negative experience with human rights and fundamental freedoms

¹⁵⁵ SVÁK, J.: Ochrana ľudských práv v troch zväzkoch, p. 17-18

violations were accelerator for building of universal and also regional system of human rights protection.¹⁵⁶

It became more important topic – human rights- after the WWII, when it became visible in relation to human dignity.¹⁵⁷ The big milestone was the UN foundation, which on one side continue somehow its work on the previous work of League of Nations, on the other side it was the previous experience on international scene, influenced by the world war build on the more stable basis.¹⁵⁸ Architects of the system of United Nations believed, that human rights stated in the constitution of some states and verified by the long development, may become international and universal, in the form of its adoption by collective international legal document. Its intention was confirmed by the fact, that the Nurimberg tribunal after the WWII confirmed existence of holocaust and also establish possibility for calling individual liability of persons for its execution; by this international law confirmed how the collective reaction of international community to the world problems should looks like.¹⁵⁹ Afterwards there follow some exceptional development of human rights legal documents adopted mainly within the United Nations.

It would be mistaken to guess, that only after the WWII there arose interest of international community in this area. In the previous period

¹⁵⁶ see: STRÁŽNICKÁ, V., ŠEBESTA, Š.: Človek a jeho práva. Medzinárodná úprava ochrany ľudských práv, quoted from: SVÁK., J.: Ochrana ľudských práv v troch zväzkoch, p. 33-34

¹⁵⁷ GRANT, J., P., BARKER, J., C.: Parry & Grant Encyclopaedic Dictionary of International Law. Third Edition, p. 266

¹⁵⁸ VALUCH, J., RIŠOVÁ, M., SEMAN, R.: Právo medzinárodných organizácií, p. 92

¹⁵⁹ STACY H., M.: Human Rights for the 21st Century: Sovereignty, Civil Society, Culture, p. 5.

Some authors explicitly stated, that human rights as concept may become “international” only by the way, it become legally binding in relation to international law. See: MÉGRET, F.: International Human Rights Law Theory. In: Research Handbook on the Theory and History of International Law, p. 219

the international law recognise for example concept of diplomatic protection, minorities protection, foreigners regime or protection of armed conflict victims, etc. The important is, that the status of state citizens was considered as the internal jurisdiction of concrete state issue. ¹⁶⁰ According to this we can state, that the international system of human rights protection after the UN foundation had integrated previous ad-hoc reaction of international community to the status of foreigners, human trafficking, slavery or the status of some groups or individuals to the coherent system on global level, which is connected to each individual. ¹⁶¹

The difference in relation to past is also in the position of the state in relation to the citizens, as the fulfilment of the state's role in the area of human rights is not sufficient to protect it and not to interfere to it, as necessary is also active ingerency of the state in the area of human rights protection. Already in the second half of 20th century there were created theories of positive obligation of the state (mainly regarding to case-law of the European Court of the Human Rights), these were based on the fact, that the state may violate human rights not only actively by wrongdoing, but also in the case of omission in area of human rights protection, however such obligation exist. We can then say, that the state has the positive obligation to create conditions for exercising of human rights and all state authorities have such obligation also, as they may violate human rights by non-adoption of acts necessary for its exercising. ¹⁶²

Within the conditions of European Union member states there may exist alongside several individual systems of human rights protection:

¹⁶⁰ Bližšie pozri: HARRIS, D., J.: *Casses and Materials on International Law*, p. 654

¹⁶¹ VRŠANSKÝ, P., VALUCH, J. a kol.: *Medzinárodné právo verejné. Osobitná časť*, p. 200

¹⁶² Bližšie pozri: SVÁK, J.: *Ochrana ľudských práv v troch zväzkoch. I. zväzok*, p. 15 - 16

- national systems (within which the primary position is given to constitutional regulation of rights and freedoms together with constitutional judiciary);
- system of the Council of Europe (within which the importance is given to the Convention on protection of human rights and fundamental freedoms of 1950 as amended by protocols);
- system represented by the EU Fundamental rights charter;
- universal system of human rights protection (based on UN treaties or International Labour Organisation treaties)¹⁶³.

Contrary to above-mentioned, it is valid, that the relevant actor in area of human rights and fundamental freedoms is still the state. The state has the positive obligation to create conditions for human rights exercising, as well as this obligation is valid to all state's authorities. State in the positive way interfere not only to the sphere of social and economic, but also into the sphere of civic and political rights of individual human being, what can be considered as some demonstration of civil society subordination to the state.¹⁶⁴

It has to be underline, that the exercise of the human rights and fundamental freedoms is connected with the rule of law and existence of individual judicial power within the internal state legal system.¹⁶⁵ Due this we can see different level of human rights and fundamental freedoms protectoin not only in the case of concrete states, but also in regions.

As long as it is known the position of individual state to observance and protection of human rights, professor B. Simmons in her work states, that „*governments are quite unlikely to comply with their international treaty obligations with respect to human rights if it is not in their*

¹⁶³ ŠTURMA, P.: Vztah Evropské úmluvy o lidských právech a evropského práva, p.19. K otázke ľudských práv a Európskeho súdu pre ľudské práva. See: VRŠANSKÝ, P.: Ľudské práva a Európsky súd pre ľudské práva - Quo vadis? p. 31-38

¹⁶⁴ SVÁK, J.: Ochrana ľudských práv v troch zväzkoch, p. 16

¹⁶⁵ BROWNLIE, I.: Princípy medzinárodného verejného práva, p. 633

*interest to do so.*¹⁶⁶ Wide scale of studies related to this one identified how (and when) the treaties and international courts have the real influence. It may be derived from the majority of researches, that international human rights system is operating by different ways. One of the possibility to improve it is motivation of the interest groups to use lobbying to government, the others are support of dialogue, forming of elite programmes, national constitution and legislation or support of internal judicial proceedings.¹⁶⁷ The important role is enacted by support and strenghtening of national human rights institutions. Preferably these play quite frequently important role as connecting link between concrete state and international community.

National institutions of human rights protection

Extraordinary importance of the national system of protection and support of human rights have national instituitons for huma rights, which *„can be generally described as permanent and independent bodies, which governments have established for the specific purpose of promoting and protecting human rights.*¹⁶⁸ Formal basis of the concept

¹⁶⁶ SIMMONS, B., A.: Mobilizing for Human Rights: International Law in Domestic Politics, s. 15, s. 122. cit. podľa: HAFNER-BURTON, E., M.: Making Human Rights a Reality, p. 11. available on: <http://iilj.org/courses/documents/Hafner-BurtonMakingHumanRightsaReality2.pdf> (accessed on 05.03.2016)

¹⁶⁷ HAFNER-BURTON, E., M.: Making Human Rights a Reality, p. 11. available on: <http://iilj.org/courses/documents/Hafner-BurtonMakingHumanRightsaReality2.pdf> (accessed on 05.03.2016)

¹⁶⁸ POHJOLAINEN, A-E.: The Evolution of National Human Rights Institutions - The Role of the United Nations, p. 6, available: http://www.nhri.net/pdf/Evolution_of_NHRIs.pdf (accessed on 30.11.2016). Porovnaj: *„National human rights institutions are independent bodies established by domestic law with a mandate to protect and promote human rights in a state“*. National Human Rights Institutions (NHRIs) (2011), para. 21, p. 4., quoted by: European Union Agency for Fundamental Rights: Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union, p. 13; available on: 156

of these institutions are dated to 1946. In that time the newly-founded UN proposed establishment of national institutions as national entities, which would promote human rights standards and to strengthen the communication between UN and its member states. From the point of the development of the national institutions, the most important time were 80s of 20th century, when after the collapse of communists regimes and transition of the “East block” countries there was open the road to human rights institutions establishment.¹⁶⁹

One of the most important milestone in the history of the national institutions was year 1991, when there held place „International Workshop of National Institutions for the Promotion and Protection of Human Rights“. On this occasion there were adopted so-called Paris principles, which became the most important norms, specifying competence, composition and methods of operation of these institutions.¹⁷⁰ In 1993 then UN General Assembly adopted resolution, which confirmed importance of the Paris principles¹⁷¹ as the rules relating to the Status of National Institutions). In relation to Paris Principles we may mention six basic criteria:

http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook_en.pdf
(accessed on 30.11.2016).

¹⁶⁹ see also: Slovenské národné stredisko ako národná inštitúcia pre ľudské práva (NHRI): Národné inštitúcie pre ľudské práva; available: <http://www.snspl.sk/#menu=2480> (stránka navštívená dňa 03.12.2016)

¹⁷⁰ MEUWISSEN K.: The Paris Principles and National Human Rights Institutions: Lost in Translation?, p. 1; available: https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp161-170/wp163-meuwissen-paris-principles-and-nhris.pdf (accessed on 01.12.2016)

¹⁷¹ Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (the Paris Principles) - Adopted by General Assembly resolution 48/134 of 20 December 1993, available: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

- 1) a mandate “as broad as possible”, based on universal human rights standards and including the dual responsibility to both promote and protect human rights, covering all human rights
- 2) independence from government;
- 3) independence guaranteed by constitution or legislation;
- 4) adequate powers of investigation;
- 5) pluralism including through membership and/or effective cooperation;
- 6) adequate human and financial resources.¹⁷²

Establishment of national institutions for human rights in accordance with Paris principles is widely supported by many subjects today. It is supposed, that it has potential for transfer and implementation of international norms on national level and also vice-versa, that those may transfer local knowledge of human rights to the international forum.¹⁷³ In proper working these may be key element in the national system of human rights protection, while filling the gap between international norms of human rights and its implementation on national level.¹⁷⁴

¹⁷² European Union Agency for Fundamental Rights: Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union, p. 15; dostupné na: http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook_en.pdf; (accessed on 30.11.2016). Compare with: Slovenské národné stredisko ako národná inštitúcia pre ľudské práva (NHRI): Národné inštitúcie pre ľudské práva; available: <http://www.snslp.sk/#menu=2480> (accessed on 03.12.2016)

¹⁷³ MEUWISSEN K.: The Paris Principles and National Human Rights Institutions: Lost in Translation? p. 1; available https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp161-170/wp163-meuwissen-paris-principles-and-nhris.pdf. (accessed on 01.12.2016). OHCHR (n 1) 13: „*National human rights institutions - at least those that are in compliance with the Paris Principles - are the cornerstone of national human rights protection systems and, increasingly, serve as relay mechanisms between international human rights norms and the state.*“ Tamtiež.

¹⁷⁴ European Union Agency for Fundamental Rights: Handbook on the establishment and accreditation of National Human Rights Institutions in the

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While in other regions of the world (Asia-Pacific region) we can say, from the point of the mandate and character of individual national institutions of human rights, that there is homogeneity of them, however in the European region there exists visible diversity of mandates, competences and names:

- Public defender of human rights (e.g. Armenia);
- Commission for human rights (e.g. Northern Ireland);
- Human rights institute (e.g. Denmark, Germany);
- Centre for human rights (e.g. Slovakia, Norway);
- Ombudsman (e.g. Sweden, Croatia);
- Parliamentary ombudsman or commissioner for human rights (e.g. Azerbaijan, Poland);
- Public defender of rights (e.g. Spain);
- Parliamentary defender (e.g. Albania).¹⁷⁵

Some institutions monitor mainly human rights and non-discrimination (e.g. New Zealand, Great Britain), some are focused on specific rights as women's rights, or may deal with issues of maladministration, corruption and issues of the environment (e.g. Spain and some Latin American countries).¹⁷⁶

The main characteristics of the national institutions basic types of are used also by Anna-Elina Pohjola in the book „The Evolution of National Human Rights Institutions - The Role of the United Nations“. Part of it is used in the following text:

European Union, p. 13; available: http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook_en.pdf (accessed on 30.11.2016)

¹⁷⁵ Slovenské národné stredisko ako národná inštitúcia pre ľudské práva (NHRI): Národné inštitúcie pre ľudské práva; available: <http://www.snslp.sk/#menu=2480> (accessed on 03.12.2016)

¹⁷⁶ detto

	Human rights commissions	Advisory committees	Human rights ombudsmen	Human rights institutes
Composition	Several commissioners, civil society can sometimes participate in the selection	Pluralist committee representing various sectors of civil society and the government	Single-person body (often assisted by one or several deputies)	Human rights experts and pluralistic advisory board supervising the work
Mandate/principal objective	Promotion and protection of human rights	Advising the government on human rights issues	Protection of civil rights and/or human rights	Promotion of human rights
Monitoring function	Observance of human rights monitored; investigation of complaints; often conciliatory role	Observance of human rights monitored	Observance of human rights monitored; investigation of complaints	Observance of human rights monitored
Advisory function	Advice to the government and other actors in the field of human rights; opinions and statements	Advice to the government, often only on government's request	Advice to the government on the basis of complaints; opinions and statements	Advice to the government and other actors in the field of human rights; opinions and statements

Table No. 1: The main characteristics of the basic types of national institutions¹⁷⁷

¹⁷⁷ POHJOLAINEN, A-E.; The Evolution of National Human Rights Institutions - The Role of the United Nations, p. 20, available: http://www.nhri.net/pdf/Evolution_of_NHRIs.pdf (accessed on 30.11.2016)

In relation to the above-mentioned, we may say, that as the most effective national institutions for human rights may be considered those, which have wide mandate including all human rights. Interesting example is Danish Institute, with the aim to support and protect human rights and principle of equal treatment in Denmark and also abroad. On international level Danish Institute cooperates with government, non-governmental sector, business and technological partners in a way to support its capacity in area of human rights protection and support.¹⁷⁸

In the Slovak republic, this competence of national human rights institution is exercised by the Slovak National Centre for Human Rights, founded by the Act No. 308/1993 Coll. of laws on foundation of the Slovak National Centre for Human Rights. It is the independent legal person, which work is financed from the state budget as according to international treaty obligation and from the donations of national and foreign legal and natural persons.

Cooperation of universal and national level in area of human rights protection

Above-mentioned systems of human rights protection do not present isolated items, but vice versa. Proper implementation and observance of

¹⁷⁸ see: Slovenské národné stredisko ako národná inštitúcia pre ľudské práva (NHRI): Národné inštitúcie pre ľudské práva; available: <http://www.snslp.sk/#menu=2480> (accessed on 03.12.2016), compare with: „Some EU NHRIs, such as the Danish Institute for Human Rights and the Slovak National Centre for Human Rights, have very broad mandates which cover all human rights as recognised in international human rights standards and norms. Other institutions, however, have more limited mandates which cover only certain human rights issues.“ European Union Agency for Fundamental Rights: Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union, p. 22; available: http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook_en.pdf; (accessed on 30.11.2016)

human rights and related norms request the cooperation and communication of all stakeholders within all mentioned levels.

One example of mutual coexistence of universal and national system of human rights protection is e.g. proceeding implemented before the UN Committee for human rights. This Committee was founded in relation to article 28 (1) of the International Covenant on Civil and Political Rights of 16 December 1966 with the purpose to to perform monitoring and enforcement functions under the Covenant and its (First) Optional Protocol 1966).

The Committee contains of 18 members elected for the period of four years. It contains of citizens from the Pact's contracting parties, who are persons of high moral quality and recognised skills in area of human rights, while considering that this position is suitable for persons with legal experience. The Committee receives regular reports from states on how the rights are being implemented and about measures adopted for the exercise of rights guaranteed by the Pact and also about the development in the exercise of these rights.¹⁷⁹ The Committee examines submitted reports and addresses its concerns and recommendations to the contracting party in the form of relevant general comments.¹⁸⁰ One of the contracting party is also the Slovak Republic and we use it as the example how to present the mutual cooperation of national institutions and this universal system.

On 17th and 18th of October 2016 there was presented 4th periodical Report of the Slovak Republic on implementation of the International Covenant on Civil and Political Rights before the UN Human Rights Committee. The presentation held place in Palais Wilson in Geneva (Switzerland), in the Office of UN High Commissioner for Human Rights.

¹⁷⁹ Contracting parties of the Pact has obligation to submit reports as regards to article 40 (1) of the International Covenant on civic and political rights.

¹⁸⁰ GRANT, J. P., BARKER, J. C.: Parry & Grant Encyclopaedic Dictionary of International Law. Third Edition, p. 267

In relation to above-mentioned proceeding, there was submitted report to the Committee (so-called. „State Report“).¹⁸¹ Apart from areas as Increasing awareness of the Covenant among judges, lawyers and prosecutors, Support for gender equality, Combating violence against women, Sterilisation of Roma women, Corporal punishment of children, Investigation of police misconduct, Racially motivated attacks, Asylum and the integration of foreigners, Support for Roma integration, Segregation of Roma children in education, there was specific attention provided to the Slovak National Centre for Human Rights.

It is explicitly stated in the report: *„the Slovak National Centre for Human Rights (hereinafter “the Centre”) as an independent national human rights institution (NHRI) was established pursuant to Act No. 308/1993 Coll., as amended. The Centre is entitled to represent parties to proceedings related to violations of the principle of equal treatment, which follows from its position as the national equality body. The activities of the Centre are financed from the state budget and from donations provided by local and foreign natural persons and legal entities.*

In March 2014 accreditation was renewed for the Centre with B status according to the Paris Principles. Slovak Government prepares amendment of the Act on the Centre with the aim to increase effectiveness of fulfilment of its mandate. The process is guaranteed by the Ministry of Justice.

The objectives of the legislation under preparation include increase of transparency of election of the executive director of the Centre through introduction of public tender, extension of representation of the non-governmental sector in the board of trustees of the Centre and introduction of the commitment to submit annual reports on human rights status to the National Council of the Slovak Republic.“

¹⁸¹ United Nations CCPR/C/SVK/4, 23 July 2015, Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic reports of States parties due in 2015, Slovakia

The Committee reacted to the submitted report by the so-called “List of Issues” – questions and comments.¹⁸² The Slovak Republic received 24 questions in total (including of sub-questions to many of questions), the attention was provided by the Committee mainly to the Slovak National Centre for Human Rights. There was explicitly stated: *„please report on measures taken to ensure the full independence of the Slovak National Centre for Human Rights in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), in particular by addressing the issues of its limited mandate, lack of transparency of its recruitment procedure and lack of diversity of its staff, and by providing the Centre with adequate financial and human resources.“*

The Slovak Republic in written reported to the questions and comments (so-called Written Replies to List of Issues).¹⁸³ In relation to the Slovak National Centre for Human Rights there is stated: *„the government of the SR has adopted by means of its Resolution No. 71 of 18 February 2015 a National Strategy for the Protection and Promotion of Human Rights in the SR (“Strategy”) and has instructed the Minister of Justice to prepare a comprehensive legislation for the Slovak National Centre for Human Rights (the Centre) and to submit it to the government before 30 June 2016. The strategy reflects the fact that the Centre fulfils not only the tasks of an Equality Body in compliance with relevant directives, but also the tasks of a national human rights institution as required by the UN and the Paris Principles. In order to fulfil the requirements of the functions and activity of the Centre, it is therefore important to continue negotiations with the officials of the Centre in order to reach an agreement on the final wording of the act, especially with regard to sensitive questions related to the composition of the*

¹⁸² United Nations, CCPR/C/SVK/Q/4, 22 April 2016, List of issues in relation to the fourth periodic report of Slovakia, Adopted by the Committee at its 116th session (7-31 March 2016)

¹⁸³ United Nations, CCPR/C/SVK/Q/4/Add.1, 15 September 2016, List of issues in relation to the fourth periodic report of Slovakia, Addendum, Replies of Slovakia to the list of issues

management board of this institution, and simultaneously to make use of a new deadline for the submission of new legislation for further negotiation with the Ministry of Finance of the SR on possibilities for increasing subsidies from the state budget for the Centre as a coordinator of the human rights agenda took over by the Ministry of Justice on 1 September 2015.“

In the same time there are involved in the process several institutions (including national institutions) operating in area of human rights, which provide to the Committee its information and knowledge about human rights in the concrete state (so-called NGO Information to List of Issues).¹⁸⁴ Mainly such information provide the complex view¹⁸⁵ to areas of the Committee interest.

Afterwards there held the presentation/defence of the submitted periodical report before the Committee and there are asked following questions and comments. Delegation of the concrete state has to answer questions and add necessary information. Delegation of the Slovak Republic was asked several questions connected with the above-mentioned topics (increasing of awareness on International Covenant in the Slovak Republic, equal representation of women in the society, illegal sterilisation, discrimination, extremism, LGBT community, status of the Slovak National Centre for Human Rights etc.).

We would like to in more detail state questions set by Ms Margo Waterval of Surinam and by Ms Lazhari Bouzid of Algeria. These

¹⁸⁴ In relation to the Slovak Republic except of the Slovak National Centre for Human Rights there are following institutions: Mental Disability Advocacy Centre, Forum for Human Rights, Slovak Disability Council, Association of Help to Persons with Intellectual Disabilities a SOCIA - Social Reform Foundation.

¹⁸⁵ More complex picture is available regarding to shadow reports of other relevant institutions (so-called NGO reports for review). In case of the Slovak Republic there are available reports elaborated by Human Rights League, Forum for Human Rights, Center for Civil and Human Rights, Mental Disability Advocacy Centre, SOCIA - Social Reform Foundation, TransFúzia.

questions focused on the real exercise of fundamental human rights by persons who are detained, i.e. from which moment and how concretely these persons may exercise these rights and how looks the situation in case of juvenile etc. They were especially interested in the way of detention or custody exercise and imprisonment exercise in relation to the Act No. 78/2015 Coll. of laws¹⁸⁶ as well as they focus on the overfull prisons, conditions and implementation of the rest of the penalty and the punishment of the home imprisonment, as well as possibilities and practical implementation and running of visits by non-announced authorities where there are prisoners living, etc. Resulting from the previous information of above-mentioned institutions, they were mainly interested in quantitative information, statistics and other detail information from the report. Especially in relation to authorities, which are not entitled to exercise non-announced visits in places, where prisoners or detained persons are living, the Committee was notified and it was explained the concrete situation, when the public defender of rights¹⁸⁷, commissioner for children, commissioner for people with disabilities¹⁸⁸ or the prosecutor¹⁸⁹ may exercise these visits.

The output of this proceeding before the Committee is the material „Concluding Observations“, in our analysed case „Concluding observations on the fourth report of Slovakia”.¹⁹⁰ This contains several

¹⁸⁶ Act No. 75/2015 Coll. of law on exercise of the control of some decisions by technical tools and on changes and amendments of some acts

¹⁸⁷ for more detail information on public defender of right are in article 151a of the Constitution of the Slovak Republic and in the Act No. 564/2001 Coll. of laws on public defender of rights as amended

¹⁸⁸ for more detail information on commissioner for children, commissioner for people with disabilities, see in Act No. 176/2015 Coll. of laws on commissioner for children, commissioner for people with disabilities and changes and amendments of other acts as amended

¹⁸⁹ for more detail information see Act No. 153/2001 Coll. of laws on prosecutor's office as amended

¹⁹⁰ United Nations CCPR/C/SVK/CO/4, 22 November 2016, Concluding observations on the fourth report of Slovakia, Adopted by the Committee at its 118th session (17 October-4 November 2016)

final statements of the Committee to reviewed human rights. The fact, that the Committee has the real interest on the effective working of national institutions for human rights is confirmed, instead of its participation within the whole process, by stating a special attention in the final material. Concretely in relation to the Slovak Republic it is stated there: *while noting the commitment of the State party to amend the act establishing the National Centre for Human Rights, the Committee is concerned that the Centre has a limited mandate and lacks independence, that there is a lack of transparency surrounding its recruitment procedures and the diversity of its members and staff, and that it has not been provided with adequate resources to carry out its functions (art. 2).*

*The State party should: (a) amend the act establishing the National Centre for Human Rights so as to expand the scope of its mandate and competence to effectively promote and monitor the protection of human rights, including through reporting on national human rights issues to the legislature; and (b) take concrete measures to ensure that the Centre is provided with adequate financial and human resources, in line with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)."*¹⁹¹

Conclusion / Resumé

However the development of human rights system is quite long-lasting, there is still visible following development and reflection in the society. This is also the reason of its interest to many institutions and individuals. Development also led in international community to persuasion, that the human rights protection primarily considered as internal issue, is not sufficient and due this it cannot lie only on states shoulders. Gradually there were formed other systems of human rights protection – regionals and universal, represented mainly by the United Nations (UN). These systems are not working as isolating

¹⁹¹ Concluding observations on the fourth report of Slovakia, p.2 (8, 9).

organisations, but vice-versa. Proper implementation and respect of human rights and related norms request cooperation and communication of all involved on all mentioned levels.

Important element in national system of human rights protection presents national institutions for human rights protection, which are characterised in the European environment by high level of mandate diversification, competences and names. Its establishment is regulated by so-called Paris Principles and supported by the wide range of different subjects. In the Slovak Republic such role is given to the Slovak National Centre of Human Rights.

One example of mutual cooperation of universal and national system of human rights protection is for example proceeding before the UN Committee for human rights. Using it as example should provide detail information of concrete work and inter-connection of both levels. It may be derived from this process, that universal system is interested in proper working of national institutions of human rights and due this there are elaborated recommendations and comments with the aim to improve the status of human rights in different documents on national level.

The effective existence and cooperation of mentioned levels is preconditioned by the proper mandate of national institutions of human rights protection, independence and also by personal and financial capacities. Its working is connected with legislative conditions and the level of rule of law in the concrete country. It should be in the interest of every state to guarantee appropriate conditions for the work of national human rights institutions, which work is focused on support and protection of the most important issue we possess.

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Constitution of the Slovak Republic

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INTERNATIONAL OBLIGATIONS OF STATE AND THE EXECUTION OF JUDGE MISSION

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Abstract: Analysis of a topical problem concerning the influence of the international obligations of a State on professional mission of judges. The conduct of judges that led to violation of the Czechoslovakia's international obligations with respect to human's rights protection in the past. Possibility for a judge to directly take into consideration the international obligations of the Slovak Republic during the judge's mission.

Key words: International obligations of a State, a judge mission, sources of international law, international treaties

Introduction

In September 2016, the Nation's Memory Institute (hereinafter NMI) published a communique what mentioned 228 names of judges that were collaborating on the persecution of currently rehabilitated citizens. According the NMI, "the list of judges, who were judging in such way, may serve for the purposes of National Security Bureau from the perspective of current clearances concerning judges. In order to avoid such judges to be appointed again to high state functions who failed in

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the past.”¹⁹³ The NMI stated in the communique that during 1977 and 1989 the “communist regime in Czechoslovakia violation fundamental human rights despite signing the Helsinki accords which guarantee the respect for those rights. The President of CSSR, Gustáv Husák, also signed the International Covenant on civil and political rights and International Covenant on economic, social and cultural rights. The commitments of state power representatives were not respected in the practise. The political management of the CSSR neither respected the Universal Declaration of Human Rights that in article 13 states: “Everyone has the right to freedom of movement and residence within the borders of each state.”¹⁹⁴

Subsequently, some of the Slovak media brought the information that these judges occupy the position in the Supreme Court of the Slovak Republic. The information raises the question whether such judges should continue in their public service.

This paper aims to contribute to the professional debate on this difficult question by analysing some of the aspects of respect for the international commitments while the judicial service.

In order to achieve the goal stated, it is important to consider following frameworks:

a) Slovak republic took over the international commitments of Czechoslovakia as one of its successor states.

Undoubtedly, the international commitments of states contain also the judge service since the judicial power is part of state power. According the existing rules of international law, the state is responsible for the actions of its bodies regardless of the bodies’ characters (legislative, executive or judicial) as well as regardless of whether it is superior or

¹⁹³ Communique from the NMI press conference in Bratislava, 14.9.2016 – Convicted according to § 109 a holders of judicial persecution between 1977 – 1989

¹⁹⁴ Universal declaration of human rights

subordinate state body.¹⁹⁵ According to international law, the state is responsible also for judge's action '*ultra vires*' – also in cases where the judge oversteps his competence or instructions he got while exercising the judicial duties.¹⁹⁶

The Constitution of the Slovak Republic (the original version of 1992) state in its article 11 that “International Treaties on human rights and fundamental freedoms ratified by the the Slovak Republic and declared according to the law, are superior before its laws if they provide broader scope of fundamental rights and freedoms.”. This article was cancelled by the 90/2001 Coll. of Laws what changes and supplements the Constitution of the Slovak Republic no. 460/1992. According to our opinion, the cancellation of the abovementioned article did not have any legal support; rather it only declared exiting legal state of art resulting from supremacy of international law over national law in cases of all international treaties that the Slovak republic committed to.

The Constitution of the Slovak Republic (in its 1992 original) in article 125 stated that, “Constitutional court decides on the conformity (...) e) of laws of general application with the international treaties declared according to law.” Such provision was later clarified in the law no.

¹⁹⁵ Article 4 of the codified Articles on the responsibility of state of wrongful act (ARSIWA), adopted by the UN Commission for international law in 2001 states:

“Conduct of organs of a State.

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”

¹⁹⁶ Article 7 of the codified Articles on the responsibility of state of wrongful act (ARSIWA), adopted by the UN Commission for international law in 2001 states:

“Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

210/2006 Coll. of Laws so the Constitutional Court decides on a) conformity of laws with the Constitutions, constitutional laws and international treaties that were passed in the National Council of the Slovak Republic, and which were ratified and declared according to law.” We must admit that this formulation which is being repeated in this article as well other place in the paper, has only brief significance when assessing the possible violation of its international commitments by the Slovak republic. Whether there was a breach of international law or not, is not decided according the national laws, rather according to the international law that were valid also during the time of Czechoslovakia and thus has been valid also in the Slovak legal order. Moreover, the shortcoming of such formulation is also the fact that it refers only to one of the several way how Slovak republic can express the consent with the international treaties based on international law. The other ways of such expressions are signature, adoption, approval, accession or exchange of documents comprising the treaty.

The Constitution of the Slovak Republic (in its 1992 original) in its article 144, par. 2 stated that, “(2) If the constitution or law states so, the judges are obliged to respect also the international treaty.” This is a very problematic provision having as aim to confirm the supremacy of international law over the national law, which is not applied if the state is legally bound by an international treaty. In that case, international law is supreme to the national legal order and not vice versa. The article 144 was amended with the constitutional act no. 210/2006 Coll. of Laws in a sense that the par. 1 states that “The judges are independent when performing their function and when deciding they are bound by constitution, constitutional law, international acc. to art. 7, par. 2 a 5 and by the law¹⁹⁷ .

¹⁹⁷ The Constitution of the Slovak republic in article 145 par. (4) states: “*A judge takes this oath before the President of the Slovak Republic: “I swear on my honour and conscience that I shall abide by the Constitution, constitutional laws, international treaties, which were ratified by the Slovak Republic and were promulgated in the manner laid down by a law, and by laws; I shall*

The original text of 1992 did not contain the text of judicial promise. The judicial promise with the reference to international treaties was added to the text of art 145 par. 4 only on the basis on constitutional law no. 210/2006 Coll. of Laws.

The statement of National Council of the Slovak Republic on the membership of the Slovak Republic in the Council of Europe and succeeding the commitments of international treaties approved by the National Council in the resolution of 3 December 1992 no. 85, declared that “National Council of the Slovak Republic feels obliged by the European Convention for Protection of Human Rights and Fundamental Freedoms and all the international treaties and document that amend or supplement the Convention, as well as by the European Convention on the Prevention of Terrorism.”

The statement of the National Council of the Slovak Republic directed at parliaments and national of the world, approved by the National Council in the resolution of 3 December 1992 no. 86 declared that “Slovak republic will follow the rules of international law as well as the aims and principles rooted in the Charter of the United Nations, Helsinki accords, Paris Charter for new Europe and other documents of the CSCE” (predecessor of OECD).

The statement of the National Council of the Slovak Republic on the establishment of Slovak republic approved by the National Council of Slovak republic in the resolution of 1 January 1993 no. 117 declared that “Liabilities assumed from international treaties by the Slovak republic confirm the political decision to live in plural democracy, respect human rights and fundamental civil freedoms. The respecting of above mentioned documents and liabilities establish the fundamental guarantee of freedom, justice and peace.”

In 2001, the Constitution of the Slovak Republic was amended in the constitutional law no. 90/2001 Coll. of Laws what changes and

interpret laws and decide according to my profound convictions, independently and impartially.”

supplements the Constitution of the Slovak Republic no. 460/1992. The original article 1 was supplemented with the par. (2) stating, that “the Slovak Republic respects and follows the general principles of international law, international treaties that it is bound with and its further international obligations.”

B) The succeeded international liabilities of the Slovak Republic do not come from only primary legal norms, but also from the secondary (responsibility) legal relations caused by violation of primary norms of international law by the judge’s approach in former Czechoslovakia

The international commitments of the Slovak Republic overtaken from former Czechoslovakia were grounded not only in primary treaties or customs norms of international law, but also in the secondary norms of international law related to the violation of primary legal norms and rise of international responsibility of Czechoslovakia, in this case of responsibility that was caused by the violation of international commitments related to protection of human rights and fundamental freedoms by the judicial procedure.

C) Political, legal, objective and subjective scope of the problem

The issue of reconciliation process after social evolution or state coup is always diverse, complicated, complex and multi-disciplinary. It is necessary to look at it not only from the perspective of partial aspect, but also from the developmental point of view. It has its political, legal, objective and subjective scope. Therefore, there is a lot of combinations of answers on the question of breach of international obligations of Czechoslovakia due to the judge’s procedure before 1989.

The calculation of answers may start from the categorical argument that the actions of Czechoslovakia and its judges did not violate any international commitments; and the calculation may finish at the point claiming the all the international commitments were violated. In between, there is a spectrum of hypothetical, disjunctive, possible and admissible answers. It is also possible to argue that only political obligations were breached, but not the legal ones. Or, that although the

political and legal obligations were breached, the judges proceeded according to law and thus do not bear any objective, or subjective responsibility for violation of international obligation of Czechoslovakia. It is then possible to observe also whether, during the decision period on the Czechoslovak side or on the side of judges, there existed any international or national legal relevant circumstances dismissing the illegality of the state actions or judge's action. In the case of international law, it concerns the consent of the damaged, self-defence, legal countermeasure, *vis maior*, distress, defending the higher interest at the level of *iuris cogens*, etc. Different answers may arise also from the question whether there existed legal relevant reasons leading to relative or absolute nullity of legal acts of states or judges which violated the international commitments of Czechoslovakia; in particular: whether Czechoslovakia did not refer to provisions of national legal order regarding the consent to be bound by international commitments⁷; whether there was an error during the expression of state's consent to be bound by the treaty¹⁹⁸; whether there was a fraud due to the impact of fraud procedure of other state¹⁹⁹; whether the state representative was forced²⁰⁰; or whether the state was force by the threat of use of force or the use of force itself²⁰¹; and last but not last,

¹⁹⁸ Vienna Convention in article 48 (Error) states that: "*1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.*"

¹⁹⁹ Vienna Convention in article 49 (Fraud) states that: "*If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.*"

²⁰⁰ Vienna Convention in article 51 (Coercion of a representative of a state) states that: "*The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.*"

²⁰¹ Vienna Convention in article 52 (Coercion of a state by the threat or use of force) state that: "*A treaty is void if its conclusion has been procured by the*

from the form of responsibility that is being enforced (objective responsibility for concrete wrongful outcome, or subjective responsibility for culpable conduct). In the case of international responsibility of state for wrongful act it is necessary to prove the imputability of wrongful act to the state as well as prove that this act is objectively not in conformity with the international law and that the norms of international law has been violated. In the case of holding accountable the judges whose action caused the international responsibility of Czechoslovakia and the damage related to this responsibility it is necessary to consider the circumstance whether the judges acted on the basis of direct intention, indirect intention or intentional negligence or unintentional negligence.

Regarding the political scope, the final answer will depend on the real “social order” of the governing power, because law as such, no matter what interpretation are being used today, has always expressed the will of governing power promoted to legal act.²⁰²

Regarding the legal scope, the objective basis for searching for the answer should be the acceptance of supremacy of international law over national law in a scope that the state is legally bound by commitments according to international law. More detailed analysis requires thorough historical, linguistic, systematic, logical and legal view on the problem as well as the comparison of documents according to relevant legal sources. In our opinion, the problem is also the selection of theoretical framework for the study of this issue, either from the perspective of positive law or from the perspective of legal normativism; the consideration of soft law and hard law; the retroactive interpretation of legal norms; limitation period; use of relevant general, additional and linguistic arguments of legal interpretation; extensive or restrictive interpretation of legal norms; glossing and “post-glossing” of legal norms of the former social-economic system in qualitatively

threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

²⁰² And as the internal development in the former Czechoslovakia confirmed when it was necessary from the class perspective, also above the law.

different conditions and the legal life of legal rules, etc.

Regarding the subjective scope, the problem is mainly the own professional and moral integrity while performing the judicial mission by the judges themselves. The term “mission” is used intentionally since it refers to higher values as the usual term “profession” does. The judge’s mission is to contribute to transition of the world to a better place, not the worse place through the performance of the function of the judge.

D) Broader social context of the problem

The broader context of the whole problem creates public disillusionment from the fact that in 1989 all the strategic goals of the Velvet revolution were only partially fulfilled. History confirms, that every successful revolution aims to achieve three strategic change. Firstly, the change of property relationships; secondly, the change of legal order that legalize and legitimize new ownership relationships; and thirdly, exchange of human cadres in the power structures including the legislative, executive as well as judicial power. although the first two changes were realized very quickly, the third change did occur in great or lesser interval. The speed and scope of personal changes depended on eventual secret agreements reached between those who passed on the power and those who accepted it. In case such agreements existed, they had to be confidential since the public influenced by revolutionary ideals demanded the ‘blood’ of former representative more than the new leadership would have accepted. Neither the new power could stand the situation without the help of professional of former regime, including judges and other bureaucrats of state apparatus.

The speed of revolutionary personal changes depended on the intensity of revolutionary mood and number the revolution’s holders (individuals, group of people, nation/folk), type of government that overtook the power (monarchy, tyranny, aristocracy, oligarchy, democracy, anarchy, etc.) and also on the selected means of the revolutionary goals’ realization (guillotine, mass murders, ethnic

cleansing, party clearances, thick line, temporary use or misuse of “old cadres”, realizing of mistakes and the will to serve the new goals, reincarnation of old cadres, biological extinction of old cadres, etc.). The experience of French bourgeois revolution 1789, November revolution in Russia 1917 as well as other bloody revolutionary movements and coups of 20th century confirms that the exchange of cadres did occur very quickly in cases where new power was not bound by any secret and confidential agreements with the representative of former regime. In that cases the new power immediately looked for guillotine, mass murders and other forms of imminent physical liquidation of the representative of former regime as well as of everything that former regime was reminded of. This happened in the ancient Rome Empire when the winners threw the marble statues of executed state representative into the river Tiber. When the personal change became to repeat very often, the winner threw into the river only the retractable heads of the statutes. The original statutes maintained on their places, it was enough to change their head for the heads of new representative of state power. It was more effective and austerity measure.

The development in the Slovak Republic after the Velvet revolution in 1989 underlines, that the quick implementation of the first two changes (there were some exceptions though). If the first change was undertaken quickly because of the wild privatization and other corrective measures lead to change of ownership, then the second change was realized so quickly because of adoption of new legal norms that confirmed the redistribution of ownership rights to former state or public property in favour the privatizers. Despite the efforts, the third strategic change was not achieved. Many of the representatives of former regime kept their functions and jobs, or were transferred to other positions within the new power, maybe due to some confidential agreement between representatives of revolution and representatives of communist party on the peaceful transfer of power after 1989. Although we do not know all the circumstances, the fact is that due to tender character of the revolution and publicly proclaimed slogan “we are not as they are”,

there was not bloody pogrom of the representatives of Communist party of Czechoslovakia, neither the people's militia, nor any mass violence and bloody fights of civil wars and civil unrests. Moreover, without use of old cadres it would not have been possible to effectively provide the functioning of the state apparatus. It comprises tens of state and public employees including teachers, medical staff, bureaucrats, soldiers, police officers, prosecutors, judges, intelligence officials, firemen and other workers paid from state budget who conscientiously served their homeland before 1989 and became firstly qualified and later on prepared for the service also in the conditions of democratic regime.

E) The breach of international obligation – political and legal responsibility of state

The above mentioned NMI communique refers to four international documents that were violated by the procedure of Czechoslovak judicial power – Universal Declaration of Human Rights, Final Act of the Conference on Security and Cooperation in Europe, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

1. Universal Declaration of Human Rights

From the legal point of view, it is firstly necessary to say that Universal Declaration of Human Rights (1948) as well as the Final Act of the Conference on Security and Cooperation in Europe (1975) have the normative quality on the level of soft law, which means that they are not legally binding and that there was no responsibility of Czechoslovakia for their violation.²⁰³

From the perspective of legal analysis, it is also important to note that participating state did not root the requirement of ratification in these two documents. They were therefore never ratified, nor registered by

²⁰³ Vienna Convention on the law of treaties in article 2, par. 2, letter a) defines the international treaty as following: international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

the Secretariat of the United Nations for the purpose of formal registration according to the article 102 Charter of the UN.²⁰⁴ According to this article, par. 2: “Neither party to the treaty or international agreement that was not registered according to provisions of the par. 1 of this article shall not claim the treaties before any of the bodies of the UN.” In this respect, the breach of political obligations of the Declaration and Final Act *in stricto sensu* would not mean the breach of international law by Czechoslovakia. Without breach of primary norms of international law, neither the secondary responsibility of Czechoslovakia could arise. Moreover, the text of the Czechoslovak constitution valid in that period did not deal with the question of primacy of international law or obligations from other international documents over national legal order.

In every case, the abovementioned procedure of judges, the international political responsibility of Czechoslovakia for the violation of international political obligation arising from the international political documents emerged. The judges working in the former Czechoslovakia could consider the international political obligation of state arising from international documents during decision-making process. It depended on their professionalism and moral integrity, of course, only if they had the complete text of the Declaration or Final Act of CSCE. After 1975, the official power did not hurry with the official promotion of this Final Act in the Slovak language. “The third basket” of the document contained the calculation of the political-legal principles, including international commitments in the area of human rights protection, which should govern the state parties. It included also the right of an individual to freely leave and come back to country of his/her nationality. The founding of the Charter 77 in Czechoslovakia was a direct result of the unwillingness of the state power to implement

²⁰⁴ Article 102 of the UN Charter says:

“1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”

the political international obligations of state contained in the Final Act in concrete national practise.

The Universal Declaration of Human Rights²⁰⁵ as well as the Final Act of CSCE²⁰⁶ does have an enormous political impact also today. They express the universal desire of international environment for natural justice expressed in the form of international legal norms. As before 1989, so currently, they represent significant strategic political documents defining the basic directions and value criteria for the state actions at the national level and in the area of international relations. They define the broadest political and moral framework for the state actions in the area of human rights protection. Since 1950, we remember the 10 December as the International Day of Human Rights reminding us also about the significance of Universal Declaration of Human Rights. The declaration of principles in the Final Act, to which Czechoslovakia became part in 1975 by the signature, signified an important breakthrough in the approach of European countries towards the international cooperation in the area of security and cooperation on the European continent in the times of bipolar world.

Even currently if the international political obligations of the Slovak republic arising from the Universal Declaration of Human Rights 1948 or from the Final Act of CSCE 1975 in the area of human rights protection violated due to judicial procedure, the political responsibility would emerge as it did in the case of Czechoslovakia.

- **International covenants on human rights 1966**

The situation is completely different considering the latter two international documents mentioned in the NMI communique. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights whose

²⁰⁵ The Universal Declaration on Human Rights was adopted in the form of UN General Assembly resolution 217 (III) on 10.12.1948.

²⁰⁶ Final Act of the Conference on Security and Cooperation in Europe was signed on 1. 8. 1975 in Helsinki by the highest representatives of 33 European states, USA and Canada.

50th anniversary of adoption was remembered in 2016, are valid multiparty international treaties. The parties have signed the treaties since 1966, Czechoslovakia itself signed the treaties in 1968 and the ratification documents were given to UN Secretary General in 1975. Subsequently, the treaties became effective in 1976.²⁰⁷ Both of them were registered by the UN Secretariat, hence it was possible to invoke them before the UN bodies according to article 102 par. 2 of the UN Charter. On the other side, Czechoslovakia adopted the Optional protocol to the International Covenant on Civil and Political Rights only in 1991 which means that before this date the possibility of more effective mechanism of solution of human rights questions before the international bodies was very hard to implement.²⁰⁸

Based on the previous, if there was a breach of above mentioned provisions of international treaties due to judicial procedure, not only political responsibility was held, but also legal responsibility; and it did matter whether judges' action fell under their competence, or whether it was *ultra vires* procedure (exceeding their competence).

Czechoslovakia, in time of the signature, adoption, accession, approval or ratification did not have any objection or particular provisions of the two international covenants. Thus, when international covenants entered into force, Czechoslovakia could not defend itself with an argument that content of the international obligations according to international treaties is not in conformity with the provision of national law and thus it cannot fulfil the particular international obligations.²⁰⁹

²⁰⁷ International Covenant on Economic, Social and Cultural Rights (NEW YORK 16 December 1966, no. 120/1976 Coll. of Laws); International Covenant on Civil and Political Rights (NEW YORK 16 December 1966, no. 120/1976 Coll. of Laws); Optional Protocol to the International Covenant on Civil and Political Rights (NEW YORK 16 December 1966, no. 169/1991 Coll. of Laws).

²⁰⁸ Czechoslovakia signed the Optional Protocol on 12.3.1991.

²⁰⁹ As it is known, in 1968 when signing the Conventions, Czechoslovakia provided only a statement on the art. 48, par. 1 of the Convention on Civil and Political Rights being in violation of the principle that all states shall have to right to become a party of multiparty treaties governing the matters of general

The reasons are clear. According to customary norms of international law of treaties, the states shall not pardon the non-fulfilment of their international obligations by referring to their national legal order.²¹⁰ The norms also note that state is always responsible for international wrongful act of state bodies regardless of whether it concerns legislative, executive, or judicial bodies as well as regardless of what place this state body has in the state apparatus' structure. Another reason is that according to the current rules of international law, international legal responsibility of state is always assessed according to international law rather than national law of the breaching state.²¹¹

In this respect, the valid international obligations of Czechoslovakia created a space for judges to fulfil their judicial mission in conformity with the requirements of international law.

On the other side, the it is again important to note that before 1989 the national legal order was understood in practise, as well as theory, especially as an expression of a will of ruling class (lead by one political party) promoted to the law, and in case promoted above the law too. In this way the law was defined also in the then national state theory and legal theory textbook used at the Czechoslovak law faculties. The law had to be developed, respected, applied and interpreted only in conformity with the constitutional conception of "socialistic legal consciousness".

Before 1989, the real space for positive judicial activism was limited since at the official state level it was hard to admit that the legislator produced some of the legal norms admitting other or contradictory

interest. The provision of the article 48 par. 1 anticipated the option of participating only for UN member states.

²¹⁰ Article 27 - International Law and observance of treaties: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*"

²¹¹ Article 3 - Characterization of an act of a State as internationally wrongful "*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*"

interpretation which could be interpreted by the judge in conformity with the international obligations of Czechoslovakia or the legislator produced legal norms that were not adopted in the good faith and were intentionally unfair from the perspective of fulfilling the international obligation.

Currently, the valid international obligations of the Slovak republic create more real space for consideration of international obligations according to international conventions on human rights 1966 in the area of judicial procedure. Therefore, if the judges in Slovakia proceed in violation of international obligations, then the international legal responsibility for the violation of treaty obligation was established.

Generally, we might say that judicial activism within the framework of judicial mission requires high extent of personal courage, especially when judge searching for the higher truth and justice based on the international obligations of states, proceeds against the will of ruling power or prevailing public opinion. That is formed not only by the legal, but also by the factual circumstances including the role of media, political oriented campaigns etc. Not every employee including by-the-state-paid judges was or currently is willing to go “to the edge” when it comes to traditional approach of state service execution based on the slogan “*Dulce et Decorum est pro Patria mori.*”²¹² It is thus pleasurable that in the moment the number of judges who consider the international obligations of the Slovak republic in their decision-making process is increasing.

Despite all the complication, the judges have always had the right to creatively interpret and apply the law with the use of traditional arguments of legal interpretation, i.e. argument *a coherentia* or apagogic argument.²¹³ If the first one enables the judge to interpret the law in a way that the interpretation is not contradictory, then the latter one enables the judge to decide in a way the interpretation is declared in

²¹² “It is sweet and noble to die for their country”

²¹³ More on the argument of legal interpretation see Chaim Perelman: *Právna logika. Nová rétorika*. Kalligram, Bratislava, 2014.

good faith and is fair.

Current criticism on the address of judges mentioned in the list is focused rather on their so called inadequate judicial activism in the past which clearly represented amoral overwork, i.e. in a sense that the judge unlawfully sought to comply with the unilateral expectations of ruling power, wish of public opinion, different pressure groups at the district level, etc., beyond the scope of the state's obligations according to international law; beyond the scope of judicial independence and impartiality, judicial ethics, moral and principles of natural justice; and especially at the expense of innocent victims of the decisions of judicial power.

Any judicial overwork within the inadequate judicial activism in the past, but also today, decreases the level of its moral integrity regardless of how professional the judge is to occupy the judicial position. Moral integrity includes the possibility of personal free choice of any judge to maintain or not to maintain in the function if his/her procedure has led to the violation of international obligations of the Slovak Republic.

In this respect, if concrete judge demonstrably solved the problems of own carrier growth through the path of inadequate judicial activism, whose outcome was the violation of international obligations of state in the past, it is up to the judge to consider next steps. Nevertheless, traditional argument that the judge acted "in the conformity with law" will probably not stand, since the perspective of international obligations' violation the consideration of the violation according to national law is irrelevant. The judge had and will have to act not only in conformity with law, but also in conformity with higher principles of universal justice rooted in the valid international obligations of Czechoslovakia, resp. the Slovak Republic. The experiences of Nuremberg and Tokyo international criminal tribunals, but also from practise of European Court for Human Rights show that defence of state representatives is based only on an argument that they acted "in conformity with law" will not stand as far as it concerns the protection of human rights and fundamental freedoms.

As it was already mentioned, before 1989, the law in Czechoslovakia was understood as a will of the ruling class promoted to law. Afterwards, the term “class” was *de facto* replaced with the term “currently ruling power.” Such term includes less workers, peasants or working intelligentsia, and more of what some call “partocracy” or “oligarchy”. What has not changed comparing to the past is conviction of many of those holding the real power, that only the “conformity with the law” is sufficient for the regulation of majority of social relationships. The matter is often considered or interpreted only from one point of view, many time only routinely and without respect for basic interpretative rules of the legal norms, mainly the principle of good faith, traditional meaning of terms used in their context and the necessity to consider the subject and purpose of legislation. The number of laic “self-interpreters” of law who never studied law and do not occupy the position of judge, but because of that they understand the law more and interpret the law, is spreading. Such understanding of law, with all the respect, many times does not cross the scope of interpretation of positive law and intentional pulling of details from general context of legislation, usually the context of used terms, subjects and purpose of legislation, etc. Where does the implementation of natural justice rest in law?

Unfortunately, some judges, even today, do not consider international obligations of Slovak republic, whatever the reasons for their behaviour may be, what violates the Constitution of the Slovak republic and in constitution rooted judicial promise. The outcome then is the increased risk that international legal responsibility of Slovak republic increases.

Of course, critical words cannot be automatically related to the majority of professionally qualified and of high morally knowledgeable judges. They did and still do give maximum of currently objectively complicated material and other conditions, which negatively influence the decision-making process of the judges. It is necessary to than these judges and give them the faith in better conditions in which they are working often at the expense of health, private or family life back.

Comparing to the past, the today's judges do have more adequate legal environment so they can consider not only the letter of the law but also the principle of justice expressed in the international obligations of Slovak republic within their decision-making. Not only the article 144 of the Constitution, but also the judicial promise grounded in the current Constitution in art 145 par. 4.

During the first Czechoslovak republic the judge promised that he will be guided by the constitution and laws. His/her promise had the character of mission oath.²¹⁴

During the CSSR and CSFR the judge promised that he will respect the constitution and law in conformity with the legal consciousness of socialistic society.²¹⁵

It was only after 1989 that the explicit reference to respect for international treaties which the Slovak republic is bound by occurred in the Constitution.²¹⁶ Unfortunately, adding this reference to the judicial promise was brought even later, in 2006 based on amendment of the Constitution, the constitutional law no. 210/2006 Coll. of Laws, which is an amendment adopted 13 years after the establishment of independent Slovakia despite the intention to respect all the international obligations succeeded after the former Czechoslovakia was clearly declared already in December 1992 in particular declarations of Slovak parliament.

In order to effective "manage" the international treaties the judge has to

²¹⁴ According to § 98 par. (1) of Act 121/ 1920 Coll. of Laws which introduces the constitutional bill of Czechoslovak republic: "*All judges shall exercise their authority independently, being bound by the law.*" par. (2) "*Sworn officially, the judges also promise that they would keep the law independently.*"

²¹⁵ According to article 102 of the Constitution of ČSSR of 1960: "*The judges, when performing the function of a judge, are independent and bound only by the legal order of the socialistic state. They are obliged to respect the laws and other legal acts and to interpret them in the conformity with the socialist legal consciousness.*"

²¹⁶ See the note 197

be familiar not only with the national law, but also with the foreign languages, jurisprudence of international courts and the ideas of the most qualified professional in the field of international law as a utility to identify a rule of international law. That is truth not only in case of judges of the Constitutional Court of Slovak republic or the Supreme Court, but also in case of judges at the district or regional courts. We think that the biggest reserves in the applicability of international obligations of the Slovak republic in the area of human rights protection bear the general courts at the level of district courts. In this respect, only routine knowledge of the national law is insufficient for the judge to be professional and to act with high moral level. The judge has to be familiar with the international obligations resulting from the international treaties and other sources of international law. That enables the judge to act in the function even fairer. The Constitution of the SR currently enables the judge to decide “according to his/her best conviction, independently, and impartially,” in other words, without necessarily considering the will of ruling power promoted to law and without considering the principles of socialistic legal consciousness. The current Constitution also states that “the Slovak Republic is a sovereign, democratic state based on the rule of law. It is not bound to any ideology, neither religion.”²¹⁷ On the other side, it is necessary to admit that in current situation of congestion of individual judges, a lot of them are able only to routinely and formally exercise the judicial craft, however, they are not able to fulfil own judicial mission.

Outcomes

- International obligations of the Slovak Republic are currently influencing the exercise of judicial mission.
- The judges are directly responsible for the respect of international obligations of the Slovak republic.

²¹⁷ Constitution of the Slovak republic (1992) in article 1 par. (1) states that: *“The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound by any ideology or religion.”*

- With the respect of developing even better professional environment for professional exercise of independent judicial mission is very important at the level of judicial power:
 - To verify the professionalism as well as the moral integrity of current and future judges. The exception from the principle of non-retroactivity concerning the issues of clearances of current judges does not directly result from the “letter of the law”, it can be however derived from the *bona fide* interpretation of the subject and purpose of the Slovak constitution and other legislation including the international treaties by which the Slovak republic is bound. As it is known the international law, under some circumstances the international law enables the exceptions from the retrospective applicability of the international treaties under the (letter of the) treaty or the context (idea) of the treaty, in other words, if it is sensible and fair from the perspective of the purpose of the international treaty.
 - To shift from the principle of “ruling of the law” to principle “ruling of justice and law.” Law which is applied without justice at the legislative, executive or judicial power is not actual law. the formulation “this proceeding was in conformity with law” currently *de facto* legalize the denigration of justice in cases of evasion of law, simulated legal acts or immoral proceeding that is executed “in conformity with the law”, in other words in the conformity with the will of ruling power promoted to the law. It is, however, insufficient to produce hundreds of new legal acts per annum. The will of ruling power to implement law and justice and considering also the international obligations of Slovak republic is decisive.

- To shift from implementing “blind” justice to implementation of “sighted” justice. The “blind” justice did not hesitate to sacrifice the individual in the interest of protection of the whole legal order the state regime. *A contrario*, the “sighted” justice does not hesitate to sacrifice the whole stability of the legal order and state regime in the interest of human rights protection of an individual. Principally contradictive are in this respect the gradual eliminations of the material truth principle i.e. in civic proceeding in legislation of the Slovak republic. The material truth represented in the past the minimal legal warranty that courts have to search for the real truth in the subject matter and not only to confirm the truth of the stronger side expressed in the number of evidence. If the status of the judge should be gradually decreased to the level of some king of machine not interested in the search for higher truth and justice in matter he/she decides, there will be no need to raise the number of judges in the future. They will be comfortably replaced by the cheaper “blind” machines operating on the basis of “bigger scale takes it all”.
- To shift from the question of how to secure the real access of EU citizens (victims) to justice to the principally opposite approach of how to secure the real access of justice to the EU citizens. Current solution quietly assumes more activity on the side of the citizens and passivity of the waiting justice. It should be quite the contrary – the justice should tailor to meet the citizens, mainly the weak and poor ones who do not have the means to pay the expensive attorneys. This refers to the passive justice built only on the basis of judge’s satisfaction with the formal truth expressed in the number of evidence submitted by the richer and

stronger side, and not to the justice which is sought today. Even though this practise helps to decrease the workload of judges, it did get the Slovak republic further from the higher justice.

- The question of remedy for the victims of the breach of Czechoslovakia's international obligations due to judicial procedure, if it was not satisfactory solved, could be solved not only on the grounds of international legal obligation of the Slovak republic, but also on the grounds of *ex privata industria* approach which means based on own initiative of state and based on the provision of fair remedy on the grounds of *ex gratia*.²¹⁸ everywhere the Slovak republic succeeded the international obligations of Czechoslovakia. The Slovak Republic succeeded not only the actives but also passives from the international obligations of Czechoslovakia up to the date of succession.²¹⁹ Eventual reference to art 2 par. 2 of the Constitution²²⁰ as a reasoning of the impossibility of

²¹⁸ The principle of remedy „*ex gratia*“ from the side of Slovak republic would be possible to consider in case of compensation of the victims of Roma holocaust in Slovakia during the Second World War. Slovak republic would act not on the grounds of legal responsibility, rather on the grounds of universal humanity and in according to the bona fide principle of the international documents on the imprescriptibility of crimes against humanity.

²¹⁹ See the Constitution of the Slovak republic, art. 1, par. 2; Declaration of the National Council of the Slovak Republic on the Slovak Republic's membership in the Council of Europe and the liabilities assumed under international treaties approved by the National Council of the Slovak republic by the resolution of 3 December 1992, no. 85; Declaration of the National Council of the Slovak Republic to the parliaments and nations of the world approved by the National Council of the Slovak Republic by resolution of 3 December 1992 No. 86; Declaration of the National Council of the Slovak Republic to the creation of an independent Slovak Republic approved by the National Council of the Slovak Republic by order of January 1, 1993 No. 117;

²²⁰ The Constitution of the Slovak republic, in article 2 par. (2) states that: “*State bodies may act solely in conformity with the Constitution. Their actions*

the legal procedure in the matter of remedy would be thus incorrect from the perspective of natural justice since it would be out of context of the bona fide interpretation of the Slovak law which should be sought at every level of the state power execution, including the execution of the judicial mission.

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Final Act of the Conference on Security and Cooperation in Europe, signed on 1. 8. 1975 in Helsinki

shall be subject to its limits, within its scope and governed by procedures determined by law."

International Covenant on Economic, Social and Cultural Rights (NEW YORK 16 December 1966, no. 120/1976 Coll. of Laws)

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UN Charter

Universal declaration of human rights

Vienna Convention on the law of treaties

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